



Environmental
Defenders Office

Proposed changes to conservation planning decisions

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About EDO

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Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

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Introduction

Environmental Defenders Office (EDO) welcomes the opportunity to provide feedback on the proposed changes to conservation planning decisions.¹ We note this first tranche of consultations includes 185 entities (157 threatened species and 28 threatened ecological communities) proposed to not need or no longer require a Recovery Plan, and that this proposal is based on the Threatened Species Scientific Committee (TSSC) guidance, as outlined in their plan *Ongoing modernisation of conservation planning under the EPBC Act*.² We understand there will be further tranches of consultation on a total of around 600 entities.

Our overarching concern with the proposed changes centres on the different legal status and regulatory effect of Conservation Advices and Recovery Plans, and the implications this has for decision-making. Given the current biodiversity extinction crisis, Australia needs to invest in the development and implementation of stronger tools to recover threatened species and communities. Accepting weaker standards will not reverse the trajectories of biodiversity decline.

This submission does not respond to each decision for all 185 entities, but focuses on the legal implications of the proposed changes in the current context, and refers to specific examples. We address:

- **The difference between Recovery Plans and Conservation Advices**
- **The decision-making process for the proposed list – transparency, principles, reasons**
- **The need for strengthened threatened species listing and recovery mechanisms**

Our **overarching recommendations** are that:

- DAWE should be fully resourced to effectively implement Recovery Plans as the primary tool for species recovery.
- Any decision to not require or no longer require a Recovery Plan should be based on scientific evidence and not for reasons of administrative efficiency, and be accompanied by published reasons for consultation.
- Broader reform of threatened species provisions in the EPBC Act is needed to address the extinction crisis.

1. The difference between Recovery Plans and Conservation Advices

The TSSC guidance, as outlined in their plan *Ongoing modernisation of conservation planning under the EPBC Act*, notes the advantages of Conservation Advices, including that they can be prepared quickly, updated easily and approved under law from the time an entity is listed as threatened. However, the guidance does not list advantages of Recovery Plans, particularly in terms of consultation, review, and legal weight in decision-making.

¹ See: [Proposed changes to conservation planning decisions | Have Your Say - Agriculture, Water and the Environment \(awe.gov.au\)](#)

² See: [Ongoing modernisation of conservation planning under the EPBC Act \(awe.gov.au\)](#)

Recovery Plans are an internationally recognised tool for conservation of threatened species and communities and, when invested in and implemented, have demonstrably resulted in the recovery of species.³

From a legal point of view, the critical difference is the **legal weight of Recovery Plans** in decision making processes, compared with Conservation Advices. In deciding whether or not to approve the taking of an action under the EPBC Act, and deciding whether to attach any conditions to the approval, the Minister “must not act inconsistently” with any Recovery Plan. In contrast, the Minister need only “have regard to” a Conservation Advice in approval decisions (s139). This different threshold of consideration also applies to decisions made regarding entering into bilateral agreements – ie, the Minister must be satisfied a proposed bilateral agreement (management arrangement or authorisation process) is not inconsistent with any Recovery Plan, but need only have regard to Conservation Advices (s53). The different threshold also applies to decisions for approving plans, policies or programs for the purpose of strategic assessments (s146K(2) and (3)). In practice, this means that Recovery Plans have more weight in decision-making and cannot be disregarded.

Other key differences include:

- The recovery planning process is the main mechanism for identifying and registering critical habitat under the EPBC Act. A recovery plan must identify habitat ‘critical to the survival of the species or ecological community’ (s270(2)(d)), and the Minister must, in turn, consider whether to list habitat that is identified in the recovery plan as being critical to the survival of the species or ecological community on the Critical Habitat Register (*Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(2));
- Recovery plans are a statutory instrument meaning there is increased parliamentary scrutiny;
- Recovery plans must be reviewed at least every 5 years, whereas there is no requirement to review Conservation Advices (s279);
- There is a clear role for the TSSC in terms of matters to take into account in advising on the making of a Recovery plan (s274);
- There is public consultation on Recovery Plans (s275, 276), but no requirement for consultation for Conservation Advices. Public consultation is also required on amendment or revocation of Recovery Plans (s269AA(5));
- In making a Recovery Plan regard must be had to the role and interests of Indigenous people in the conservation of biodiversity (s270(3)(e)). There is no equivalent consideration for Conservation Advices;
- The precautionary principle must be considered in decisions about Recovery Plans (s391), but there is no equivalent explicit requirement for Conservation Advices;

³ Funding of Recovery Plans is mandatory in the United States, and this has resulted in 85% of listed birds in the United States achieving a documented stabilisation or recovery following listing. See: [A Wild Success: A Systematic Review of Bird Recovery Under the Endangered Species Act \(esasuccess.org\)](https://www.esasuccess.org/)

- There is an explicit requirement that the Commonwealth must implement a Recovery Plan that applies to Commonwealth areas (s269(1)), but no similar provision for Conservation Advices;
- There is a clear requirement that Commonwealth agencies must not take any action that contravenes a recovery plan (s268), but not equivalent obligation for Conservation Advices; and,
- There are requirements for annual reporting on making and adoption of Recovery Plans (s284), but no equivalent requirement for Conservation Advices.

It is clear that the requirements for making and applying Recovery Plans are more rigorous and comprehensive than for Conservation Advices. While Conservation Advices may be administratively quicker and easier, we remain concerned about the reduction in rigour, transparency, accountability, and legal weight in decision-making about impacts on threatened species and communities. There is a clear difference in regulatory effect.

2. The decision-making process for the proposed list – transparency, principles, reasons

While EDO is not providing comment on every species and community listed as potentially not needing or no longer needing a Recovery Plan, we have overarching concerns as to how the list was decided upon. The TSSC has provided general guidance as noted, but there are no reasons provided for each species and community to justify the proposed change to their respective conservation plans.

It would assist the public consultation process to provide reasons for the decisions. We note that there are some species where a Conservation Advice may be appropriate and effective – for example, species that are entirely on Commonwealth land, or have populations on well-protected islands (for example, the Herald petrel *Pterodroma heraldica*). However, the rationale to propose changes for species that are geographically spread or are subject to multiple threats and pressures is less clear.

There is a disconnect between the principles identified by the TSSC and some of the entities on the list. For example, the TSSC guidance principles for considering when a Recovery Plan may be required in addition to a Conservation Advice includes an “entity being subject to high development pressure.” Several species on the list are subject to high development pressure in Western Sydney and yet are listed as no longer needing a Recovery Plan. These include:

- **Cumberland Plain Shale Woodlands and Shale-Gravel Transition Forest**
- **Shale Sandstone Transition Forest of the Sydney Basin Bioregion**
- **Western Sydney Dry Rainforest and Moist Woodland on Shale**
- **Turpentine-Ironbark Forest of the Sydney Basin Bioregion**

Similarly in Northern suburbs of Sydney, there is high development pressure on:

- **Blue Gum High Forest of the Sydney Basin Bioregion.**

Another consideration for retaining the need for a Recovery plan is where “there is an established Recovery Team coordinating the implementation of a Recovery Plan, who are willing to contribute to any reviews and updating of that Recovery Plan.” EDO is actively involved with the Recovery Team and plan development for the **Spectacled flying fox** (*Pteropus conspicillatus*), and yet Spectacled flying fox is on the list of species for which a Recovery Plan will no longer be required. Including this species on the list is inconsistent with the TSSC principles, and also inconsistent with the recent recognition of the species on the Top 100 Priority Species List.⁴

The examples given here warrant increased recovery actions, and **we do not support abandoning Recovery Plans for these species**. We provide further detail in the following resources:

- In relation to the Spectacled Flying Fox see: [First Nations Lore key to Flying-fox recovery in the Wet Tropics - Environmental Defenders Office \(edo.org.au\)](#)
- In relation to Cumberland Plain woodland see: [EDO Submission on the Draft Cumberland Plain Conservation Plan - Environmental Defenders Office](#)

It is also of concern that some species that are proposed to no longer need a Recovery Plan are species that have been subject to EPBC Act referrals and legal challenges in the past. This is an indication that they are species potentially subject to repeated development pressures. These species include:

- Green and gold bell frog (*Litoria aurea*)
- Giant burrowing frog (*Heleioporus australiacus*)
- Southern brown bandicoot (*Isoodon obesulus obesulus*)
- Tasmanian devil (*Sarcophilus harrisii*)
- Golden sun moth (*Synemon plana*)
- Silver perch (*Bidyanus bidyanus*)
- Glossy Black cockatoos (*Calyptorhynchus lathami halimaturinus*)
- Whale shark (*Rhincodon typus*)
- Masked owls (*Tyto novaehollandiae Kimberli*)
- Broad-headed snake (*Hoplocephalus bungaroides*)

As noted above, a Conservation Advice is a weaker instrument in terms of how it influences decision-making, so the proposal to weaken considerations in relation to species that might regularly or increasingly trigger the EPBC Act is of concern. In the absence of a Recovery Plan, decision-makers would not be constrained to making decisions that are ‘not inconsistent with’ the recovery plans, and could in fact, have regard to – and then disregard – a Conservation Advice for these impacted species.

EDO therefore recommends that there needs to be greater transparency on how decisions are made to list certain species as not requiring or no longer requiring a Recovery Plan. Lowering the threshold for consideration by decision-makers in high development areas must not be a rationale for down-grading a Recovery Plan to a Conservation Advice. The overarching consideration must

⁴ See: [100 Priority Species - DAWE](#)

be the recovery of the species or community, not administrative efficiency in assessment and approval processes.

3. The need for strengthened threatened species listing and recovery mechanisms

EDO is concerned that the proposed changes to conservation planning would result in a weakening of recovery tools and standards at a time when we need to be strengthening national environmental standards for species recovery. These proposed changes must be considered in the context of the current biodiversity extinction crisis and the recognition of the need for broader reform of the EPBC Act.

In relation to biodiversity, the 2016 State of Environment report concluded:

Australia's biodiversity is under increased threat and has, overall, continued to decline. All levels of Australian government have enacted legislation to protect biodiversity... However, many species and communities suffer from the cumulative impacts of multiple pressures. Most jurisdictions consider the status of threatened species to be poor and the trend to be declining. Invasive species, particularly feral animals, are unequivocally increasing the pressure they exert on Australia's biodiversity, and habitat fragmentation and degradation continue in many areas. The impacts of climate change are increasing...

The outlook for Australian biodiversity is generally poor, given the current overall poor status, deteriorating trends and increasing pressures. Our current investments in biodiversity management are not keeping pace with the scale and magnitude of current pressures. Resources for managing biodiversity and for limiting the impact of key pressures mostly appear inadequate to arrest the declining status of many species.

The biodiversity extinction crisis has been examined by a Senate Inquiry⁵ and by the Independent review of the EPBC Act.⁶

The EPBC Act is now 20 years old and is in need of extensive reform. It is complex, inefficient, and most importantly, it is not meeting its aim of protecting the environment and conserving biodiversity. It fails to address some of the most significant environmental challenges facing Australia, including climate change, land clearing and cumulative impacts. Its implementation has been undermined by resourcing issues. EDO recommends a new, clear Act be drafted to effectively address the major environmental challenges we face, and to reverse the declining environmental trends.

EDO was deeply engaged in the Independent statutory review of the EPBC Act conducted by Prof Graeme Samuel. In the process of that review we recommended specific reforms to strengthen threatened species protection, conservation and recovery, including the following:⁷

⁵ See: EDO Submission to the Faunal Extinction Inquiry available at: [Cth Planning Submission \(edo.org.au\)](https://www.edo.org.au/Cth-Planning-Submission)

⁶ See: [EPBC Act Review | Independent review of the EPBC Act \(environment.gov.au\)](https://www.environment.gov.au/epbc-act-review) and [EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf \(edo.org.au\)](https://www.edo.org.au/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf)

⁷ The full submission is available at: [EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf \(edo.org.au\)](https://www.edo.org.au/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf)

- Independent Scientific Committee to assess and directly list threatened species, ecosystems for national protection.
- Simpler and faster nomination and listing processes, and strong, non- regressive common standards for assessment across the Commonwealth, states and territories.
- All valid nominations to be assessed within statutory timeframes.
- Stronger protections for threatened species, important populations, ecological communities and critical habitat across Australia.
- Vulnerable ecological communities be a ‘trigger’ for impact assessment and approval (via existing matters of national environmental significance).
- Emergency listing provisions for threatened species and ecological communities and critical habitats.
- Permitting nomination and listing of important populations of a species.
- Applying the precautionary principle to listing decisions.
- Requiring decisions affecting species and ecological communities are consistent with approved conservation advices, recovery plans, threat abatement plans and international agreements.
- Impacts on critical habitat must be refused and conservation agreements sought with landowners. The Act should include a conservation covenanting mechanism.
- Critical habitat must be identified, mapped and included on the Critical Habitat Register at the time a species or ecological community is listed.
- Extending critical habitat protections beyond Commonwealth areas.
- New threat categories to reflect international (IUCN) standards, including for near threatened and data-deficient species and ecological communities.
- Mandatory requirements for recovery plans and threat abatement to be developed and implemented in a coordinated manner across Australia.
- Mandatory goals to be addressed in recovery plans.

EDO recommends that broader reform of the EPBC Act is pursued to address the extinction crisis, and that any changes to conservation planning are considered in this context.