



Environmental
Defenders Office

**Submission to the review of the Nature Conservation Act
2014 (ACT)**

December 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

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.

www.edo.org.au

Submitted to:

Environment, Planning and Sustainable Development Directorate
Email: EPSDDcomms@act.gov.au

For further information on this submission, please contact:

Rachael Chick
Senior Solicitor
T: (02) 9262 6989
E: rachael.chick@edo.org.au

Isobel Brinin
Senior Solicitor
T: (02) 9262 6989
E: isobel.brinin@edo.org.au

Acknowledgement

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations peoples. We acknowledge that not all First Nations peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

Role of EDO

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

EDO has and continues to work with First Nations clients who have interacted with western laws, including litigation and engaging in western law reform processes.

Out of respect for First Nations self-determination, EDO has provided high-level key recommendations for western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

EXECUTIVE SUMMARY

EDO welcomes the opportunity to make a submission to the review of the *Nature Conservation Act 2014* (ACT) (**NC Act**).

The review presents an opportunity for the ACT to modernise and strengthen the laws aimed at conserving the unique natural environment of the ACT, reverse current trends of decline and restore species populations and ecosystems. To maintain the ACT's role as a leader in sustainability, climate change mitigation and environmental policy, its nature conservation laws should be brought into line with important international and domestic commitments to halt extinctions and restore ecosystems, and set clear, whole-of government objectives for the conservation and restoration of biodiversity.

In the 10 years since the NC Act commenced, the natural environment in the ACT has declined markedly. Australia is experiencing a biodiversity crisis, and the ACT is not immune from this. Since the 2019 State of the Environment Report, six new species have been added to the ACT Threatened Native Species List.¹

The ACT government declared a climate emergency in May 2019, and has been experiencing worsening climate change impacts, including the devastating bushfires of summer 2019-2020, which burned nearly 40% of the ACT's land area, including 80% of Namadgi National Park.²

Matters affecting the conservation of nature in the ACT do not only fall within the purview of the NC Act. The greatest drivers of biodiversity loss, such as habitat loss for development and infrastructure, are regulated under a range of other statutes, and in particular the *Planning Act 2023* (ACT) (**Planning Act**). As such, considering the NC Act in isolation is unlikely to provide a useful framework for assessing and improving the NC Act's efficacy.

In undertaking its review of the NC Act, the ACT Government should be aiming to take the lead in modelling a robust framework for biodiversity conservation that will lead to improved outcomes and reverse trends in biodiversity decline, in line with international goals.

Summary of Recommendations

Recommendation 1: Strengthen the objects of the NC Act in line with national and international policy commitments.

Recommendation 2: Ensure the goals of the NC Act are operationalised within the Act, through specific provisions.

Recommendation 3: Review the responsibilities of the Act to incorporate and support the right to a healthy environment.

¹ ACT Commissioner for Sustainability and the Environment, 2023. *State of the Environment Report*, p 31. Available at <https://www.actsoe2023.com.au/OCSE/ACT-State-of-the-Environment-Summary-Report-2023.pdf> (**SoE 2023**)

² SoE 2023, p 25.

Recommendation 4: Remove provisions of the Planning Act allowing for decisions to be made inconsistently with the Conservator's advice.

Recommendation 5: Amend the Planning Act to require the Territory Plan to be consistent with the objects of the NC Act and with the Nature Conservation Plan. In the event of inconsistency between the two, the Nature Conservation Plan should prevail.

Recommendation 6: Legislate a set of science-based, best-practice, principles that govern the operation of the offsets policy.

Recommendation 7: Set clear thresholds for where impacts cannot occur and offsets cannot be used. This should include:

- mandating the refusal of applications with 'serious and irreversible' or 'unacceptable' impacts for all development and activities; and
- adopting 'no-go' zones where offsets are not available and impacts cannot be allowed to occur.

Recommendation 8: Require action plans for listed species and communities to contain critical habitat (including climate refugia). Ensure that critical habitat is covered by "upfront no" mechanisms in **Recommendation 6**.

Recommendation 9: Reflect international and domestic commitments through:

- Updating the objects of the NC Act as at **Recommendation 1**;
- Requiring the Nature Conservation Strategy to be consistent with relevant commitments;
- Defining Nature Positive in accordance with its internationally understood definition
- Requiring plans made under the NC Act to be consistent with Nature Positive; and
- Listing climate change as a Key Threatening Process under the NC Act.

Recommendation 10: the NC Act and other relevant legislation such as the Planning Act, should be amended to give the protection of biodiversity primacy over other considerations in nature reserves.

Recommendation 11: The power to establish and manage nature reserves should be removed from the Planning Act. These powers could sit under the NC Act or standalone legislation could be introduced for the creation and management of nature reserves, as is the case in other jurisdictions.

INTRODUCTION

EDO welcomes the opportunity to make a submission to the review of the *Nature Conservation Act 2014* (ACT) (**NC Act**).

In the 10 years since the NC Act commenced, the natural environment in the ACT has deteriorated.³

Australia is experiencing a biodiversity crisis, and the ACT is not immune from this. Since the 2019 State of the Environment Report, six new species have been added to the ACT Threatened Native Species List.⁴

The 2023 State of the Environment Report sets out the following statistics with respect to threatened species and ecological communities (as at the date of the report):

- there are 8 critically endangered, 21 endangered, 28 vulnerable and one regionally conservation dependent species listed in the ACT;
- since 2019, 6 additional species have been listed as threatened, 3 species given a higher threat status, and one species given a lower threat status;
- there are 3 listed threatened ecological communities; and
- there are 2 listed key threatening processes.

It concluded that “[w]hile changes in listings do not necessarily represent a decline, it is clear that the future of some species and communities in the ACT are threatened without management intervention.”⁵

Crucially, the quality of data around threatened species and ecological communities in the ACT is low, and “[c]onsequently, data on conservation status is limited and the current number of threatened species is likely to be vastly under-reported.”⁶ Data gaps also prevent the identification and management of pressures, particularly incremental pressures, on species and ecosystems.⁷

The ACT government declared a climate emergency in May 2019, and has been experiencing worsening climate change impacts, including the devastating bushfires of summer 2019-2020, which burned 40% of the ACT’s land area, including 80% of Namadgi National Park. 75,000 hectares which had previously burnt in 2003 were re-burnt in 2020, which according to the State of the Environment Report, “has resulted in severe, lasting impacts on native vegetation, biodiversity, and ecosystem health.”⁸

Other significant drivers of nature loss and biodiversity decline in the ACT include the expansion of urban areas, and particularly greenfield developments, and attendant habitat loss, fragmentation, and the introduction of invasive species. The 2023 State of the Environment Report found that

³ SOE 2023, p 3.

⁴ SoE 2023, p 31.

⁵ SoE 2023, p 167.

⁶ SoE 2023, p 174.

⁷ SoE 2023, p 175.

⁸ SoE 2023, p 25.

areas of high conservation value outside of reserves continue to be lost or fragmented through ongoing urban expansion despite the NC Act's ostensible protections.⁹

It is clear that, on the current policy settings and legislative framework, and in the context of a changing climate, degradation of nature in the ACT will continue.

This is not an ACT specific issue. Laws across Australia that are intended to protect biodiversity and conserve nature are failing. The 2021 Australian State of the Environment Report found the number of federally listed threatened species had risen 8% since 2016 and that more extinctions are expected in the next decades. At least 19 Australian ecosystems are now showing signs of collapse or near collapse.¹⁰

Recent reviews of other jurisdictions' laws have been critical of the regulatory 'status-quo', and have recommended key shifts in mindset and attitude, including substantial reform to current frameworks. For example:

- The *Independent Review of the EPBC Act – Final Report* found that the Federal *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is outdated and requires fundamental reform.¹¹
- In NSW, the *Independent Review of the Biodiversity Conservation Act 2016 – Final Report* found that operative provisions of the *Biodiversity Conservation Act 2016* (NSW) (**BC Act NSW**) “are incapable of supporting its objectives”, which it found are in any event already obsolete after only five years. The report recommended a substantial “re-crafting of the Act”, including giving primacy to biodiversity considerations in the framework governing land use in NSW.¹²

This review presents an opportunity for the ACT to modernise and strengthen the laws aimed at conserving the unique natural environment of the ACT, reverse current trends of decline and restore species, populations and ecosystems. To maintain the ACT's role as a leader in sustainability, climate change mitigation and environmental policy, its nature conservation laws should be brought into line with important international and domestic commitments to halt extinctions and restore ecosystems, and set clear, whole-of government objectives for the conservation and restoration of biodiversity.

Matters affecting the conservation of nature in the ACT do not only fall within the purview of the NC Act. The greatest drivers of biodiversity loss are regulated under a range of other statutes, and in particular the Planning Act. Further to this, in August this year, The ACT Government passed the *Human Rights (Healthy Environment) Amendment Bill 2023*, enshrining the right to a healthy environment in the *Human Rights Act 2004*. As such, considering the NC Act in isolation is unlikely to provide a useful framework for assessing and improving the NC Act's efficacy.

⁹ SoE 2023, p 88.

¹⁰ Australian Government, 2021. Australia State of the Environment Report 2021

¹¹ Professor Graeme Samuel AC, 2020. *Independent Review of the EPBC Act – Final Report*. Available at <https://epbcactreview.environment.gov.au/resources/final-report>

¹² Dr Ken Henry AC et. al, 2023. *Independent Review of the Biodiversity Conservation Act 2016– Final Report*. Available at <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

In undertaking its review of the NC Act, the ACT Government should be aiming to take the lead in modelling a robust framework for biodiversity conservation that will lead to improved outcomes and reverse trends in biodiversity decline, in line with international goals.

The objects of the NC Act should be modernised and operationalised

The Act is expressed as having a “main object”, which is “to protect, conserve and enhance the biodiversity of the ACT.”¹³ This is then specified as to “be achieved particularly” by a number of matters.¹⁴

While the object itself, being to “protect, conserve and enhance the biodiversity of the ACT” remains relevant, there are a number of threats and concepts which should be introduced to the Act for it to remain fit for purpose in light of the worsening climate and biodiversity crises.

These include:

- enhancing the capacity of species and ecosystems to adapt in the context of a changing climate;
- preventing further extinctions of threatened species and ecological communities;
- identifying and protecting threatened and culturally important species and their habitat and ecological communities;
- ensuring recovery of threatened species and ecological communities so their conservation status improves;
- net positive biodiversity outcomes;
- that the ACT be nature positive;
- supporting the right to a healthy environment (as enshrined in the *Human Rights Act* by the *Human Rights (Healthy Environment) Amendment Bill 2023*) through the protection, conservation and enhancement of the ACT’s natural environment; and
- halt and reverse deforestation and land degradation by 2030 in line with the Glasgow Declaration.

However, to be effective and not merely aspirational, objects of a statute must be integrated into and operationalised by the substantive provisions of that statute (and other statutes as relevant). This is the case for the NC Act and the broader planning and environment framework in the ACT.

Although the NC Act goes some way to incorporating the objects into some decisions, for example at s 6(3), the Minister, in exercising a function under the Act, “must have regard to the objects of this Act”, the NC Act’s objects must be applied to all decisions affecting biodiversity (and in particular, decisions made under the Planning Act).

For example, this could be achieved by:

- Amending legislative requirements for decisions, plans, strategies, advices, and other instruments with impacts on nature in the ACT (including under the Planning Act) to be consistent with the objects of the NC Act, or other standard such as Nature Positive.

¹³ NC Act, s 6(1).

¹⁴ Set out at NC Act, s 6(2)(a)-(h).

- Including specific mechanisms in the NC Act to support biodiversity conservation in the context of a changing climate. This could include, for example: requiring action plans made under the NC Act to identify and protect areas of critical habitat including climate refugia; and ensuring climate change is listed as a key threatening process, requiring a threat abatement plan to be prepared within a certain time limit, and requiring and resourcing implementation of the plan.
- Embedding binding, specific, measurable, and time-bound standards and goals in the NC Act or subordinate legislation. For example, the United Kingdom has set biodiversity targets in its *Environmental Targets (Biodiversity) (England) Regulations 2023* (UK). These include that:
 - The long-term biodiversity target for species' extinction risk is to reduce the risk of species' extinction by 2042, when compared to the risk of species' extinction in 2022.¹⁵
 - The long-term biodiversity target for the restoration or creation of wildlife-rich habitat is that on or after the day these Regulations come into force, in excess of 500,000 hectares of a range of wildlife-rich habitats are to be restored or created by 31st December 2042.¹⁶
 - The long-term biodiversity target to reverse the decline of species abundance is that the overall relative species abundance index by 31st December 2042 is:
 - a) higher than the overall relative species abundance index for 31st December 2022; and
 - b) at least 10% higher than the overall relative species abundance index for 31st December 2030 (the specified date for the 2030 species abundance target).¹⁷

Alternatively, the NC Act could require that binding, specific, measurable, and time-bound standards and targets be set and in the Nature Conservation Strategy.

Recommendation 1: Strengthen the object of the NC Act in line with national and international policy commitments.

Recommendation 2: Ensure the goals of the NC Act are operationalised within the Act, through specific provisions.

Recommendation 3: Review the responsibilities of the Act to incorporate and support the right to a healthy environment.

¹⁵ *Environmental Targets (Biodiversity) (England) Regulations 2023* (UK) Regulation 4.

¹⁶ *Environmental Targets (Biodiversity) (England) Regulations 2023* (UK) Regulation 7.

¹⁷ *Environmental Targets (Biodiversity) (England) Regulations 2023* (UK) Regulation 14.

Protecting, conserving and enhancing the biodiversity of the ACT

It is clear from the 2023 State of the Environment Report that the NC Act, and the broader land management framework in the ACT, is not achieving that NC Act's object of protecting, conserving, and enhancing the biodiversity of the ACT. It states that its reporting period (2019-2023) saw "the continued, relentless degradation of our natural environment."¹⁸ A major reason for this was the unprecedented climate-change related bushfires of 2019-2020, however other drivers include other climate change impacts, invasive plants and animals, vegetation loss, habitat fragmentation, other changes to the frequency and intensity of fire, and land use change (particularly greenfield development).¹⁹

In EDO's experience, biodiversity conservation laws are unable to achieve their important objectives if, as is very often the case, they are undermined or overridden by land use laws (e.g. through excessive discretionary decision making, exemptions or lower than best practice policy settings).

A significant change in approach is needed to halt and reverse species decline. This is exemplified in the analysis and recommendations made to the NSW Government by Prof Ken Henry in the context of the 5-year statutory review of the BC Act NSW. The *Independent Review of the Biodiversity Conservation Act 2016 – Final Report* noted challenges with balancing competing interests (e.g. economic, social and environmental) and suggested that biodiversity considerations needed to be given primacy in order to achieve the needed outcomes for biodiversity and future generations.²⁰

Similarly, the 2023 State of the Environment Report found that "[w]ithin the policy hierarchy, environmental considerations continue to be secondary to other priorities such as urban growth and European heritage,"²¹ and recommended that the NC Act be strengthened to give it primacy over other legislation within nature reserves, and include the power to establish nature reserves.²²

Within the ACT's planning and environment framework, the territory planning authority is required to refer a development application to the Conservator of Flora and Fauna (**Conservator**) (a statutory office holder created by the NC Act) for advice if the application is likely to have a significant adverse environmental impact on a protected matter.²³ The decision-maker is required to consider the Conservator's advice,²⁴ the decision itself does not have to be consistent with the Conservator's advice in certain circumstances.²⁵ Further, the Chief Planner of the Minister may approve a development application that is inconsistent with the Conservator's advice for a significant development that is likely to have a significant adverse environmental impact on a declared protected matter if the Chief Planner or Minister is satisfied that the proposal is

¹⁸ SoE 2023, p 3.

¹⁹ SoE 2023, p 169.

²⁰ Dr Ken Henry AC et. al, 2023. *Independent Review of the Biodiversity Conservation Act 2016– Final Report*. Available at <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

²¹ SoE 2023, p 15.

²² SoE 2023, pp 18, 177.

²³ Planning Act, s 170; NC Act, Ch 13.

²⁴ Planning Act, ss 186(i), 189 and 190.

²⁵ Planning Act, s 190.

consistent with the offsets policy and would provide a substantial public benefit.²⁶ In this manner, the NC Act and its objectives are, even where a proposal is likely to have a significant impact on a protected matter, able to be overridden on the subjective opinion of the Chief Planner or Planning Minister as to compliance with offsets and the nebulous concept of public benefit. As noted above, in EDO's experience, and as borne out in recent reviews of the EPBC Act and NSW BC Act, such provisions invariably undermine the objects and effectiveness of biodiversity conservation laws.

In order for the NC Act to meet its object, planning decisions and instruments such as the Territory Plan must be consistent with NC Act and associated plans such as the Nature Conservation Plan and instruments.

Recommendation 4: Remove provisions of the Planning Act allowing for decisions to be made inconsistently with the Conservator's advice.

Recommendation 5: Amend the Planning Act to require the Territory Plan to be consistent with the objects of the Nature Conservation Act and the Nature Conservation Plan. In the event of inconsistency between the two, the Nature Conservation Plan should prevail.

Offsets policy

Environmental offsetting is ostensibly provided for under Ch 13 of the Planning Act, however the substantive framework for offsetting is provided for in policy.

The *ACT Environmental Offsets Policy (Offsets Policy)* provides for the use of offsets for both matters of national environmental significance under the EPBC Act and for ACT protected matters.

The stated aim of offsetting under the Offsets Policy is 'to maintain or improve the likelihood of matters of national environmental significance and ACT protected matters.'²⁷ As well as providing for the consideration of offsets for matters of national environmental significance (under the EPBC Act), the Offsets Policy also provides a framework for the delivery of offsets for ACT protected matters. The Offsets Policy states that ACT listed threatened species are required to be assessed for an offset, however, to avoid overlap with the EPBC Act Offsets Policy, additional environmental offsets are not required.

The Planning Act outlines procedural rather than substantive offset provisions, such as including details about making the offsets policy and guidelines, the form of offsets and how they are to be calculated.²⁸ The Planning Act provides that the Minister 'may determine how the value of an offset is to be calculated' as long as it is consistent with the offsets policy.²⁹ This grants discretion to the Minister in calculating an offset value. This, along with the focus on procedural rather than substantive offset provisions, is of concern given the difficulties raised by critics of biodiversity offsetting, including in quantifying biodiversity values for market purposes, time lags in restoring

²⁶ Planning Act, s 190(2).

²⁷ ACT Environmental Offsets Policy, p 2.

²⁸ Planning Act, Ch 9.

²⁹ Planning Act, s 240.

areas, failure to account for declining base lines, failure to effectively manage offset sites, protect offset sites in perpetuity and perverse outcomes.³⁰

The Office of the Commissioner for Sustainability and the Environment found that since 2009, the total offset area in the ACT has increased 100-fold.³¹ It also reported on opportunities to improve environmental offsets in the ACT. These include:

- incorporating the environmental offsets policy into plans and actions for a changing climate and sustainable future;
- when preparing for future developments in the ACT, offset areas should be identified early;
- increased integration of Act-specific requirements with the national offsets policy;
- accurate recording of the initial health of an offset area;
- ongoing monitoring to assess management effectiveness and long term conditions;
- early onset of management actions for approved offset sites to ensure maintenance of condition;
- an enforcement regime for compliance with offset policies;
- appropriate agreements with leaseholders to be updated for approved offsets and management funding is provided to the leaseholder;
- the offsets register to be comprehensive and updated regularly.³²

We have not found any other material reviewing the outcomes of the ACT offsets scheme and whether the scheme has delivered a net gain or not. While the scheme's aim to 'maintain or improve' is better than some jurisdictions, it does not require a net gain.

The State of the Environment Report 2023 observes that in the ACT, because of the paucity of data available, "it is unclear whether offsets are truly compensating for the loss of biodiversity permitted under federal and Territory environmental laws and policy."³³

However, there is substantial evidence available in other jurisdictions that offsets schemes for biodiversity are failing.³⁴

³⁰ Environmental Defenders Office, *Submission on the Planning Bill 2022* (17 June 2022) 25 available at: <https://www.edo.org.au/wp-content/uploads/2022/06/220617-EDO-Submission-on-the-ACTs-Planning-Bill-2022-1.pdf>.

³¹ Office of the Commissioner for Sustainability and the Environment, *Environmental offsets in the ACT* available at: <https://envcomm.act.gov.au/latest-from-us/environmental-offsets-in-the-act/>.

³² Office of the Commissioner for Sustainability and the Environment, *Environmental offsets in the ACT* available at: <https://envcomm.act.gov.au/latest-from-us/environmental-offsets-in-the-act/>.

³³ SOE 2023, p 10.

³⁴ Annika Reynolds, *Conservation after the fact: The prevalence of post-approval condition-setting in environmental impact assessment processes in Australia and its implications for achieving ecologically sustainable development outcomes*, Environmental Impact Assessment Review, Volume 99, 2023 <https://www.sciencedirect.com/science/article/abs/pii/S0195925522002980>; Audit Office of New South Wales, Effectiveness of the Biodiversity Offsets Scheme, 31 August 2022, available at <https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>; Independent Review of the Biodiversity Conservation Act 2016 – Final report, August 2023, <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>.

EDO has written extensively on offsets frameworks in Australia.³⁵ We have identified best-practice principles that must underpin biodiversity offsetting:³⁶

1. Offsets must be designed to improve biodiversity outcomes
2. Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts
3. Offsets must be based on genuine 'like for like' principles
4. Legislation and policy must set clear limits on the use of offsets
5. Time lags in securing offsets and gains should be minimised
6. Indirect offsets must be strictly limited
7. Discounting and exemptions should not be permitted
8. Offsetting must achieve benefits in perpetuity
9. Offsets must be additional
10. Offset arrangements must be transparent and legally enforceable
11. Offset frameworks must include monitoring and reporting requirements to track whether gains and improvements are being delivered, and mechanisms to respond if outcomes are not being delivered.
12. Offset frameworks should build in mechanisms to respond to climate change and stochastic events

Neither the NC Act nor other relevant legislation such as the Planning Act explicitly set out the mitigation hierarchy of "avoid, mitigate, offset". In EDO's experience, the mitigation hierarchy is poorly implemented in Australia, and there is too much reliance on offsetting schemes.

The mitigation hierarchy should be clearly set out in the NC Act and must be required as a mandatory pre-condition for development before any offsetting option is considered. It must be properly implemented and enforced. Appropriate guidance should be provided to proponents on how they can demonstrate their endeavours to genuinely 'avoid' and 'mitigate' aspects of proposed development.

There needs to be a robust, legislatively enshrined, framework for offsetting, in line with best practice principles.

Given the key aim of an offsets framework should be improved environmental outcomes, the offsets framework would be best placed in the NC Act, under the environment portfolio, rather than the Planning Act.

Recommendation 6: Legislate a set of science-based, best-practice, principles that govern the operation of the offsets policy.

³⁵ See, for example: Environmental Defenders Office (2022) 'Defending the Unburnt: Offsetting our way to extinction' <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>; Environmental Defenders Office (2021) 'Submission to the inquiry into the integrity of the NSW Biodiversity Offsets Scheme' <https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/>; Environmental Defenders Office (2022) 'Submission on the Northern Territory draft Biodiversity Offsets Policy and the draft Biodiversity Offsets Technical Guidelines', <https://www.edo.org.au/publication/edo-submission-on-the-draft-northern-territory-biodiversity-offsets-policy/>.

³⁶ Environmental Defenders Office (2022) 'Defending the Unburnt: Offsetting our way to extinction' <<https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>>.

Ensuring protection of areas of high biodiversity value

‘Serious and irreversible’ or ‘unacceptable’ impacts

In the face of the extinction crisis, safeguards must be built into the NC Act and relevant legislation such as the Planning Act that act as ‘red flags’ in circumstances where impacts on biodiversity are serious and irreversible, or unacceptable – in line with clear, scientifically based definitions. These ‘red flags’ should signal an ‘upfront no’ (i.e., mandatory refusal) to such impacts.

In NSW, for example, the *Biodiversity Conservation Act 2016* (NSW) mandates the refusal of certain projects that would have ‘serious and irreversible’ impacts.³⁷ At the Federal level, the Government plans to introduce mechanisms to safeguard against ‘unacceptable’ impacts (e.g. no-go zones, and mandatory refusal requirements).

Recommendation 7: Set clear thresholds for where impacts cannot occur and offsets cannot be used. This should include:

- mandating the refusal of applications with ‘serious and irreversible’ or ‘unacceptable’ impacts for all development and activities; and
- adopting ‘no-go’ zones where offsets are not available and impacts cannot be allowed to occur.

Protection of critical habitat

The NC Act ostensibly provides for the protection of critical habitat of listed species and ecological communities through action plans. For the purposes of the NC Act, **critical habitat**, for a species or ecological community, means a habitat that is critical to the survival of the species or ecological community.³⁸

Critical habitat is generally understood to mean habitat that is critical for the survival and recovery of a species or ecological community. The concept was first introduced in the US *Endangered Species Act* (1973),³⁹ also been adopted in Canada and Australia, although with slightly differing definitions and legal requirements. In Australia, all jurisdictions, with the exception of the South Australia and the Northern Territory, have introduced critical habitat provisions into law.

Critical habitat mechanisms, where appropriately implemented, can ensure that impacts are avoided in those areas where protection of habitat is critical. If these areas are degraded or lost then species or ecological communities are likely to go extinct or will not be able to recover. If the ACT government wants to arrest biodiversity decline then properly identifying, protecting and managing critical habitat is key.

As noted above, most Australian jurisdictions have introduced critical habitat provisions into law. While this suggests an intention to protect the habitat of species at risk of extinction, the effective

³⁷ *Biodiversity Conservation Act 2016* (NSW), s 7.16(2).

³⁸ NC Act, Dictionary.

³⁹ <https://www.fws.gov/law/endangered-species-act>

implementation and use of the provisions has been problematic. The provisions are rarely used, and protections are limited.

Concerns about the poor implementation of critical habitat provisions in Australia are well recognised.⁴⁰ In general, concerns do not relate to the concept of or intent to protect critical habitat, but rather with the failure to effectively implement and utilise the mechanism as a key conservation tool.

EDO has identified key principles that should underpin the reform of critical habitat provisions:⁴¹

- *Clearly define critical habitat:* A clear, common definition of critical habitat should be adopted across all Australian jurisdictions, based on the best available science. The definition should be descriptive, drawing on key elements set out in the *Matters of National Environmental Significance - Significant impact guidelines 1.136*.
- *Make critical habitat identification mandatory:* Critical habitat must be identified at the time a species or ecological community is listed or within a specified timeframe via a clear, mandatory statutory process triggered by listing (e.g. in a mandatory conservation planning document).
- *Protect and manage critical habitat:* Critical habitat must be protected and managed, irrespective of land tenure.
- *Support landholders:* Areas of critical habitat must be prioritised for conservation and recovery, including funding for landholders where relevant (e.g. in government-led conservation programs).

Recommendation 8: Require action plans for listed species and communities to contain critical habitat (including climate refugia). Ensure that critical habitat is covered by “upfront no” mechanisms in **Recommendation 7**.

⁴⁰ See, for example: Fitzsimons, J. (2020) ‘Urgent need to use and reform critical habitat listing in Australian legislation in response to the extensive 2019-2020 bushfires’ 37 EPLJ 143; Australian Conservation Foundation (2018), ‘Australia’s Extinction Crisis Protecting critical habitat’

https://www.acf.org.au/new_research_reveals_australia_s_critical_habitat_laws_are_broken; Various submissions to the Independent Review of the EPBC Act, including: Environmental Defenders Office (2020), ‘Submission to the 10 year review of the EPBC Act’, <<https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf>>; WWF-Australia (2020), ‘Submission to the EPBC Act Review’, <https://epbcactreview.environment.gov.au/sites/default/files/2020-05/ANON-K57V-XOKR-K%20-%20WWF-Australia.pdf>; Humane Society International (2020), ‘Submission to the Independent review of the EPBC Act’, <<https://epbcactreview.environment.gov.au/submissions/anon-k57v-xfqb-x>>

⁴¹ EDO and WWF-Australia (2024), ‘Bushfires, Bureaucracy and Barriers How poorly implemented critical habitat frameworks risk failing the survival and recovery of threatened species and ecological communities’, < <https://www.edo.org.au/wp-content/uploads/2024/05/240508-WWF-EDO-Critical-habitat-report-FINAL.pdf>>

How could the NC Act best support national and international commitments, including in achieving climate change and nature positive goals?

As the Discussion Paper notes, there have been significant increases in domestic and international agreements on biodiversity conservation and climate change mitigation since the commencement of the NC Act. For example, with respect to biodiversity:

- *Kunming-Montreal Global biodiversity framework*: The Kunming-Montreal Global Biodiversity Framework (GBF) was adopted during the 15th Biodiversity Conference of the Parties (COP 15) in December 2022.⁴² The GBF sets out 4 goals (Section G) including that “the integrity, connectivity and resilience of all ecosystems are maintained, enhanced, or restored, substantially increasing the area of natural ecosystems by 2050” and “human induced extinction of known threatened species is halted” (Goal A). It also sets out 23 targets (Section H) including targets of conserving 30 per cent of terrestrial and inland water areas, and of marine and coastal areas, by 2030 (Target 3).
- *Glasgow Leaders’ Declaration on Forests and Land Use*: During the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow from 31 October – 12 November 2021 over 100 countries, including Australia, pledged to halt and reverse deforestation and land degradation by 2030 through the Glasgow Leaders’ Declaration on Forests and Land Use (Glasgow Declaration).⁴³ The Glasgow Declaration includes six key commitments, including to conserve forests and accelerate their restoration; and to reverse forest loss and degradation while ensuring robust policies and systems are in place to accelerate the transition to an economy that is resilient and advances forest, sustainable land use, biodiversity and climate goals.
- *Leaders’ Pledge for Nature*: In September 2022, Prime Minister Albanese, announced that Australia would sign on to the Leaders’ Pledge for Nature to reverse biodiversity loss by 2030.⁴⁴ Under the pledge, political leaders have committed to undertake urgent action, as part of the UN Decade of Action to achieve Sustainable Development, to put nature and biodiversity on a path to recovery by 2030. This includes commitments to “address the direct and indirect drivers of biodiversity loss and halt human induced extinction of the planet’s land and oceans through representative, well-connected and effectively managed systems of Protected Areas and Other Effective Area-Based Conservation Measures, and to restore a significant share of degraded ecosystems.”⁴⁵

⁴² Convention on Biological Diversity (2023) ‘Kunming-Montreal Global Biodiversity Framework’ <<https://www.cbd.int/gbf/>>

⁴³ UK Government (2021) ‘Glasgow Leaders’ Declaration on Forests and Land Use’ <<https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>>

⁴⁴ The Guardian (2022) ‘Australia signs global nature pledge committing to reverse biodiversity loss by 2030’ <<https://www.theguardian.com/australia-news/2022/sep/21/australia-signs-global-nature-pledge-committing-to-reverse-biodiversity-loss-by-2030>>

⁴⁵ See Leaders Pledge For Nature (2024) ‘United to Reverse Biodiversity Loss by 2030 for Sustainable Development’ <<https://www.leaderspledgefornature.org/>>. ‘Other effective area-based conservation measures’ (OECMs) are areas that achieve long term and effective in-situ conservation of biodiversity, outside of protected areas, and can include areas on private land, such as areas protected under a formal, long-term or in-perpetuity conservation agreement. The International Union for the Conservation of Nature (IUCN) has published guidance on defining and identifying OECMs, see IUCN (2019) ‘Recognising and reporting other effective area-based conservation measures’ <<https://portals.iucn.org/library/sites/library/files/documents/PATRS-003-En.pdf>>.

- *Threatened Species Action Plan: Towards Zero Extinctions*: In October 2022, the Federal government released its Threatened Species Action Plan: Towards Zero Extinctions. The Action Plan includes objectives of preventing new extinctions of plants and animals (Objective 3) and ensuring at least 30 per cent of Australia’s land mass is protected and conserved (Objective 4).

The NC Act and other legislation having an impact on biodiversity in the ACT should be updated to reflect and operationalise these commitments. For instance, through:

- Updating the objects of the NC ACT – see above.
- Requiring the Nature Conservation Strategy to be updated to reflect international and domestic commitments.
- Defining Nature Positive in accordance with its internationally understood definition.
- Requiring plans made under the NC Act to be consistent with Nature Positive.
- Listing climate change as a Key Threatening Process under the NC Act- alarmingly only two Key Threatening Processes are listed under the NC Act, when it is clear that there are a number more that are relevant to ACT’s threatened species and communities.

Recommendation 9: Reflect international and domestic commitments through:

- Updating the objects of the NC Act as at **Recommendation 1**;
- Requiring the Nature Conservation Strategy to be consistent with relevant commitments;
- Defining Nature Positive in accordance with its internationally understood definition;
- Requiring plans made under the NC Act to be consistent with Nature Positive; and
- Listing climate change as a Key Threatening Process under the NC Act.

How can provisions and processes for reserve declaration and management be improved?

As noted in the 2023 State of the Environment Report:

“the ACT differs from other jurisdictions in Australia in that the *Planning Act 2023* is the instrument which provides for reservation of land – including wilderness areas, national parks, and nature reserves – and the management objectives for those areas.”⁴⁶

The Planning Act also provides the mechanism by which reserve management plans are prepared. This is inconsistent with most other jurisdictions in Australia where there is dedicated legislation for the declaration, management and revocation of reserves with clear objectives that align with that purpose.

In our view, there are inherent conflicts with a single Act, i.e. the Planning Act, being tasked with both managing land use and development and conservation of our most high value natural areas. In our view, the provisions and processes for reserve declaration and management must sit outside of the Planning Act.

⁴⁶ SoE 2023, p 177.

The declaration and revocation of reserves could be integrated into the NC Act, as it is the key piece of legislation for nature conservation in the ACT, or into a standalone piece of legislation as is the case in, for example, NSW (the *National Parks and Wildlife Act 1974* (NSW)). In any case, the relevant powers would be better placed under the responsibility of the environment minister than the planning minister.

As noted in the 2023 State of the Environment Report, the NC Act does not have primacy over other legislation in nature reserves.⁴⁷ Consequently, Parks and Conservation service staff do not have powers in relation to matters such as fire management, littering and dumping, erection of structures, and domestic animal management in reserves.⁴⁸

Recommendation 10: The Nature Conservation Act and other relevant legislation such as the Planning Act, should be amended to give the protection of biodiversity primacy over other considerations in nature reserves.

Recommendation 11: The power to establish and manage nature reserves should be removed from the Planning Act. These powers could sit under the Nature Conservation Act or standalone legislation could be introduced for the creation and management of nature reserves, as is the case in other jurisdictions.

⁴⁷ SoE 2023, p 177.

⁴⁸ SoE 2023, p 177.