



5 November 2021

Conservation Planning
Department of Agriculture, Water and Environment
GPO Box 858
Canberra ACT 2601
By email: conservationplanning@environment.gov.au

Re: Proposed changes to conservation planning decisions

The National Environmental Law Association Ltd ACN 008 657 761 (**NELA**) welcomes the opportunity to comment on the Department of Agriculture, Water and Environment's (**DAWE**)'s Proposed Changes to Conservation Planning Decisions.

NELA is a peak body for advancing environmental law in Australia. We are Australia's only national, multidisciplinary, member-based association focused on environmental law and sustainability. NELA serves the needs of practitioners in law, planning, natural resources and environmental science and management. One of NELA's objectives is to provide a forum for and otherwise assist in the discussion, consideration, and advancement of environmental law among the legal profession and the wider community.

Several NELA Directors provided input to this submission that the NELA Board approved.¹

Introductory comments

This consultation concerns a proposal that has been informed by advice from the Threatened Species Scientific Committee (**TSSC**) about the "ongoing modernisation of conservation planning" under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the Act**). Comments have been invited on a proposal not to develop a Recovery Plan for 185 threatened species and ecological communities listed on the schedules to the Act, and to inform planning decisions concerning those matters of national environmental significance, instead, through Conservation Advices.

NELA understands these 185 decisions to be the first tranche of what will be a total of approximately 600 similar decisions for threatened species and ecological communities.

NELA confines our brief comments to the overall legal and policy implications of the proposed decisions, rather than comment on the merits of each decision.

EPBC Act reforms need to be in place before this proposal proceeds

NELA is concerned to see a retreat from using Recovery Plans as the standard instrument for the conservation and recovery of threatened species and ecological communities before the 38 recommendations made in the most recent review of the EPBC Act are implemented. Professor Graeme Samuel AC, the chair of the most recent 10-year EPBC Act review, urged in his foreword to the review

¹ For a profile of NELA Directors see <<https://www.nela.org.au/about/board-members/>>

report (**Samuel review report**) that Governments refrain from ‘the temptation to cherry pick from a highly interconnected suite of recommendations’ in his report.²

NELA supported the Samuel review recommendations, including that better planning is required to protect and restore the environment, including:

- strategic national-level planning
- adaptive regional planning
- regional recovery plans
- ecologically sustainable development plans, and
- strategic assessments.³

Following the Samuel Review Report, in June 2021 a pathway document for ‘reforming national environmental law’ and a document containing a ‘proposed timeline for EPBC Act reforms’ were released,⁴ but EPBC Act amendments in response to the many meritorious recommendations made in the Samuel Review Report have not yet been drafted for consultation. Neither of the pathway documents flagged this current consultation.

NELA is concerned that DAWE’s significant under-resourcing,⁵ coupled with a policy approach prioritising the streamlining of the EPBC Act that was expected to be recommended in the Samuel review, led to a significant backlog in the development of Recovery Plans has resulted in this proposal, such that the drivers of the decision are not consistent with the principles of ecologically sustainable development, or the conservation of Australia’s biodiversity.⁶

NELA is also concerned that this proposal is inconsistent with the Australian Government’s signing of the Kunming Declaration⁷ at the Convention on Biological Diversity (CBD)’s 15th Conference of the Parties (COP-15) in October 2021. That Declaration recognised, with grave concern, the “*unprecedented and interrelated crises of biodiversity loss, climate change, land degradation and desertification, ocean degradation, and pollution ... [that] pose an existential threat to our society, our culture, our prosperity and our planet*”. Amongst other commitments, signatories to the Declaration undertake to “7. ... strengthen environmental law at national level, and its enforcement, to protect biodiversity ...”.

NELA’s view is that this proposal is aimed at administrative streamlining, cost-saving and enhancing flexibility in conservation planning. It is not aimed at strengthening our national environmental law to ensure that conservation planning represents best practice for the conservation and recovery of threatened species and ecological communities, including through appropriate accountability mechanisms.

² Prof G Samuel AC, ‘Foreword’, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra, October 2020, iii.

³ Ibid Ch 8.

⁴ See <<https://www.environment.gov.au/system/files/resources/02baf838-1d1c-492d-8014-ae9fc356f845/files/pathway-reforming-national-environmental-law.pdf>> and <<https://www.environment.gov.au/epbc/publications/proposed-timeline-for-epbc-act-reforms>>.

⁵ Australian Government, “Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999”, *Auditor-General Report No.47 2019–20*, 52–53 <https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2019-2020_47.pdf>.

⁶ L Cox, ‘Australian threatened species at risk with no recovery plans finalised in past 18 months’, *The Guardian*, 19 October 2020 <<https://www.theguardian.com/environment/2020/oct/19/australian-threatened-species-at-risk-due-to-government-inaction-over-backlog-of-recovery-plans>>; L Cox, ‘Fantasy documents’: recovery plans failing Australia’s endangered species’, *The Guardian*, 20 February 2018 <<https://www.theguardian.com/environment/2018/feb/20/fantasy-documents-recovery-plans-failing-australias-endangered-species>>.

⁷ Convention on Biological Diversity, 15th Conference of the Parties, 10th meeting of the Conference of the Parties serving as the meeting of the Cartagena Protocol on Biosafety, and the 4th meeting of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization 12-13 October 2021, “Kunming Declaration”, Declaration from the High-Level Segment of the UN Biodiversity Conference 2020 (Part 1) under the theme: “Ecological Civilization: Building a Shared Future for All Life on Earth” <www.cbd.int/doc/c/99c8/9426/1537e277fa5f846e9245a706/kunmingdeclaration-en.pdf>.

NELA's view is that the Minister should not agree to these premature reforms at this time.

Conservation Advice is not a substitute for Recovery Plans

NELA appreciates that there may be certain circumstances where a Recovery Plan would not provide additional benefit to the conservation of a particular species, such as when a species occurs wholly within a well-managed national park, but we would expect this to be the exemption to the rule, rather than for Recovery Plans to start becoming exceptional.

We understand that under [s266B\(2\)](#) of the Act, Conservation Advice must always be in place for listed threatened species and ecological communities (unless the species is extinct or is a conservation dependent species) and that DAWE is now proposing greater reliance on Conservation Advice in the absence of Recovery Plans. NELA understands the advantages of Conservation Advice published at the time of listing to include that such an Advice provides immediate guidance to decisions makers, and that it is a flexible tool. However, NELA is concerned that the statutory framework for Conservation Advice is weaker than that for Recovery Plans. It concerns us that limiting the use of Recovery Plans may be to the detriment of threatened species and ecological communities in need of stronger protection.

Recovery Plans are a legislative instrument and subject to disallowance whereas a Conservation Advice is not.

Recovery Plans must be reviewed by the Minister at least every five years whereas there is no statutory requirement to review a Conservation Advice.

While Conservation Advice may be more flexible to update, there are no formal requirements to update the Advices.

Under [s270](#) of the Act there are a series of important requirements for the content of Recovery Plans such as the identification of habitat that is critical to the survival of the species or community and the actions needed to protect those habitats, and the identification of populations that are under particular pressure for survival and the actions needed to protect those populations. Another example is the requirement to have regard to the role and interests of indigenous people in the conservation of biodiversity in the making of a Recovery Plan. Whereas, [s266B\(2\)](#) of the Act does not require these important details for the content of Conservation Advice.

Further, under [s274](#) of the Act the TSSC is required to provide very specific advice on the content of a Recovery Plans which is not required in the same way for a Conservation Advice. In the case of Recovery Plans, the TSSC is required to provide advice on the following considerations

- (a) the degree of threat to the survival in nature of the species or ecological community in question;
- (b) the potential for the species or community to recover;
- (c) the genetic distinctiveness of the species or community;
- (d) the importance of the species or community to the ecosystem;
- (e) the value to humanity of the species or community;
- (f) the efficient and effective use of the resources allocated to the conservation of species and ecological communities.

There are no equivalent detailed requirements for the TSSC to advise on the content of a Conservation Advice.

Of particular concern to NELA is the proposal to integrate the framework for Recovery Plans with other decision making under the Act, as those frameworks are not as strong as for Conservation Advice. This happens in the following ways:

- A Commonwealth agency must not take any action that contravenes a Recovery Plan or a threat abatement Plan [s268](#). There is no equivalent provision for Conservation Advice.

- In deciding whether or not to approve the taking of an action *and any conditions to attach to the approval*, the Minister must not act inconsistently with any Recovery Plan [s139](#). Whereas by comparison the Minister only “must have regard to” any approved Conservation Advice in deciding whether or not to approve the taking of an action [s139](#). This requirement to “have regard to” has been interpreted to mean “that genuine consideration must be given to the document.” If a Minister fails to have regard to a Conservation Advice that can be fatal to the validity of a decision. But once genuine consideration has been given the Conservation Advice, approval of a development can be given, with or without conditions.⁸
- The Minister must be satisfied that any bilateral agreement containing a provision relating to listed entities is not inconsistent with any Recovery Plan [s53\(1\)\(c\)](#). Whereas the requirement is for the Minister to merely have “had regard to any approved Conservation Advice for the species or community” containing a provision relating to any approved Conservation Advice [s53\(1\)\(ca\)](#).
- The Minister must be satisfied that any management arrangement or authorisation process proposed for accreditation is not inconsistent with any Recovery Plan – [s53\(2\)\(c\)](#). Again the requirement here is only to have regard to Conservation Advice [s53\(2\)\(d\)](#)

NELA is aware that a Recovery Plan will no longer be required for a number of the ecological communities that are facing significant development pressures and regularly trigger referrals for approvals under Part 9 of the Act. We are concerned that the only way in which listed threatened species and ecological communities can receive actual protection that is not dependent on the favourable exercise of broad discretionary powers by the Minister in making approval decisions with or without conditions attached, is through the inclusion of limits, constraints or protections in some form in a Recovery Plan. If such provisions are included in a Recovery Plan, the Minister must not act inconsistently with them.

Whilst it is clear that the Minister must have regard to a Conservation Advice and a decision will be invalid if they do not do so, once regard has been accorded to the Advice, the Minister is free to make a decision contrary to that Conservation Advice. Therefore, it is especially important to have Recovery Plans in place for the species and ecological communities that regularly trigger approval processes under the Act and that includes many of the threatened ecological communities on this list such as those in the Sydney basin.

This importance only increases if the Commonwealth proceeds with approval bilateral agreements with states and territories.

Process for consultation

Finally, NELA would like to express concern over shortcomings of the consultation process in this proposal. The requirements for consultation on decisions whether or not to require a Recovery Plan is set out in [s269AA\(5\)](#). This consultation process is intended to give effect to those consultation requirements for 185 species and ecological communities. NELA is concerned that no specific “reasons

⁸ [Project Blue Sky Inc v Australian Broadcasting Authority \(1998\) 194 CLR 335](#) at [92] and [93] per McHugh, Gummow, Kirby and Hayne JJ; [Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities](#) [2013] FCA 694; [Tarkine National Coalition Inc v Minister for the Environment](#) [2015] FCAFC 89; 233 FCR 254; See also: Federal Court of Australia, ‘Statement re NSD33/2015 Mackay Conservation Group v Minister for Environment’, Federal Court website, 19 August 2015, discussed in S Power & J Tomaras, “Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015”, *Bills Digest no. 37 2015–16*, 3 November 2015 where the parties agreed to the Federal Court issuing a consent order to set aside the Minister’s decision to grant approval under the *EPBC Act* for the Carmichael coal mine in Queensland (proposed by Adani Mining Pty Ltd) on the basis that the Minister had failed to consider the Approved Conservation Advices for two vulnerable species (the Yakka Skink and the Ornamental Snake). The Minister subsequently re-approved the Adani Carmichael mine on 14 October 2015.

for decision” have been provided for the decision in relation to each of the threatened species and ecological communities.

We do not think it is sufficient to provide a general discussion and generic criteria without the particular context for each species and ecological community under consideration. Considering the potential consequences of the decisions we believe a statement of reasons is warranted for the public to be able to properly consider each case.

NELA thanks DAWE for considering our views on this important matter.

A handwritten signature in black ink, appearing to read 'H. Jaireth'.

Dr Hanna Jaireth
NELA President, for the NELA Board