Submission to the Review of the Environment Protection & Biodiversity Conservation Act

Submission from:
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Executive Summary

- **Ecological crisis is a human crisis and a top priority:** The EPBC review must recognise that our society and economy are entirely dependent on a healthy natural world, and that the ecological collapse that human activities have already begun threatens our very survival. Following the last year's bushfires, fish kills, extinctions, coral bleaching, coastal erosion, and pandemic, it is clear that our environment is at breaking point and can ill afford any further damage. The protection and rehabilitation of ecosystems must, therefore, be treated as a top priority for government, rather than being traded away in favour of short-term development or economic growth.

- **Failure of the EPBC:** The EPBC review should acknowledge that, judged against its objects, the Act has been an appalling failure. The acceleration of the destruction of Australia's environment, natural resources and biodiversity over the last 20 years, triggering devastating impacts not just on the natural world but on human lives and livelihoods which depend on it, should indeed mark the EPBC as among the most stark failures in recent Australian legislative history, overseeing a process of managed destruction. In the context of the ecological crisis, it is of paramount importance that new laws be developed based on the following six principles:

    1. **Rights of Nature:** Around the globe, there is growing recognition that the natural world should not be seen purely in terms of its value to humanity, but that it has intrinsic worth. Animals, plants, habitats and ecosystems have a right to exist, and human society will be far better off for respecting those rights and learning to live balancing our own rights and desires with those of nature. Australia's national environment laws should acknowledge Rights of Nature at least as a normative principle.

    2. **Presumption of protection:** Given the scale of the ecological crisis, and the concomitant threat to human society and economy, Australia's national environment laws must institute a firm presumption of protection ensuring that, in the absence of overwhelming countervailing

factors, proposals which will cause or risk substantial damage to Australia's remaining healthy ecosystems, or which, taken cumulatively with other projects will together cause or risk such damage, are not approved. Offset schemes have failed and been abused and should not be considered alternatives to this presumption of protection. Development should be actively encouraged and supported which contributes to ecological remediation.

3. **Accountability for protection:** Both governments and developers must be held to account for deliberate or reckless damage to Earth's life support systems. Regulators must be appropriately resourced and given sufficient investigative and enforcement powers, and penalties for breach must be sufficient to act as a real deterrent. Additionally, government reporting on key environmental indicators should be required, with prominence in Parliament beyond the simple tabling of reports. The Green Institute supports the call for a national Environmental Protection Agency and National Sustainability Commission to take institutional responsibility in this space.

4. **Community role in decision-making in the context of scientific advice:** Those who know and care the most about environmental practice – scientific experts and local residents – are those who current practice pays least attention to. This must be reversed, through practices of deliberative democracy in localities where developments are proposed, bringing experts to the table, as well as concerned voices from elsewhere, to genuinely and respectfully discuss options. Free, prior and informed consent of Indigenous communities is particularly vital. Appeals processes and enforcement should institute open standing, acknowledging that we all have a stake in a healthy environment.

5. **Climate transition:** The absence of a climate trigger in the EPBC is perhaps its starkest failure. However, given the urgency of the transition that is now needed, heading towards zero emissions as swiftly as possible, simply inserting a trigger for consideration of climate impacts is insufficient. New national environment laws should include a ban on any new fossil fuel infrastructure, and require that every proposal of national significance be at least carbon neutral.

6. **Remediation and resilience:** With ecosystems already collapsing, it is vital that national environment laws do more than protect the natural world – they should provide for remediation of damaged environments and build resilience in ecologies. Cumulative impacts of projects must be accounted for in assessment and monitoring. Proactive remediation plans, for threatened species, for ecological communities, and for bioregions, should be developed and appropriately funded. Indigenous knowledge and practices should be respected, harnessed, and funded.

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Introductory remarks

The Green Institute welcomes the opportunity to make a submission to this vital and timely review of the EPBC Act. While the timing is coincidental, the fact that the period for submissions was extended due to Australia's worst ever bushfire season, encompassed the third mass bleaching event in five years on the Great Barrier Reef,[1] followed swiftly after a series of mass fish kills in the Murray Darling Basin, and is concluding in the midst of a pandemic widely attributed to biodiversity destruction,[2] casts the task of the review panel into stark relief.

Too often, government review panels tell governments what they believe they want to hear. This second guessing does an immense disservice to governments, to citizens, to the institutions panel members are drawn from, and to our democracy as a whole. Our system depends on expert advisers giving governments accurate, frank and fearless advice. Given the consequences of policy failure in this case, it is a particularly solemn responsibility of the EPBC review panel to tell government the whole, unvarnished truth about the ecological crisis we are in, the increasing impacts of that crisis on human life, society and economy, and the role the EPBC Act has played in facilitating this crisis, and to set the agenda for reform which places protection and rehabilitation of the natural world in its rightful position of priority.

It is clear that Australia's ecological systems are at breaking point. The *Australia's Environment 2019* report from the Australian National University[3] is just one of numerous highly credible scientific reports in recent years detailing an appalling downward trajectory for Australia's environmental indicators, including soil quality, rainfall, biodiversity, temperatures, plant growth, tree cover and river flows. These measures show ecologies in crisis, with very real impacts on human health, mental health, and quality of life. The CSIRO's *Australian National Outlook 2019*[4] similarly sets out a grim downward trend in ecological health, with substantial existing impacts on agriculture and the capacity to sustain our population.

The environmental catastrophes we have seen in recent months highlight the fact that "the environment" is not something separate from humanity. A healthy environment is not an optional extra we can negotiate away in favour of more development or swifter economic growth. The bushfire smoke smothering Australia's major cities; the drought and collapsing soil quality endangering our

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[1] Terry Hughes and Morgan Pratchett, "We just spent two weeks surveying the Great Barrier Reef. What we saw was an utter tragedy", *The Conversation*, April 7, 2020, https://theconversation.com/we-just-spent-two-weeks-surveying-the-great-barrier-reef-what-we-saw-was-an-utter-tragedy-135197

[2] John Vidal, "Human impact on wildlife to blame for spread of viruses, says study", *The Guardian*, April 8, 2020, https://www.theguardian.com/environment/2020/apr/08/human-impact-on-wildlife-to-blame-for-spread-of-viruses-says-study-aoe

[3] *Australia's Environment 2019*, Australian National University, https://www.wenfo.org/aer/

[4] CSIRO, *Australian National Outlook 2019*, https://www.csiro.au/en/Showcase/ANO

capacity to grow food; the coral bleaching damaging human livelihoods, well-being, and seafood stocks; the novel Coronavirus triggering the worst economic collapse since the Great Depression; all these demonstrate that we cannot continue to pretend that we are disconnected from the natural world or in any way immune to the effects of its ill-health. The environment is the air we breathe, the water we drink, and the soil in which we grow our food. It is our only home.

We can ill afford to damage it any more than we already have.

How, then, should we judge a national Act whose objects (s 3(1)(a), (b) and (c)) include "to provide for the protection of the environment", " to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources", and "to promote the conservation of biodiversity"?

Judged against these objects, and in the context of the ongoing environmental monitoring and research noted above, the EPBC Act must stand as among the most extraordinary legislative failures in Australian history. Far from protecting the environment, it has established and presided over a culture of managed ecological destruction which must not be allowed to continue.

This, of course, is not entirely the fault of the legislation, nor of those with the unenviable and poorly resourced task of implementing it. It is primarily the result of the broader set of legislative, institutional and economic structures the EPBC Act operates within. Nevertheless, it is the duty of the EPBC review panel to acknowledge the utter failure of the Act to even come close to meeting its objectives, the devastating consequences of this failure for all of us, and the need for new legislation that will ensure the protection and rehabilitation of the natural world which is our only home.

1. Rights of Nature

The concept of legally instituted Rights of Nature was first introduced into modern legal thought through a 1972 article by Professor Christopher Stone called "Should Trees Have Standing?".[5] The paper challenged the idea that the natural world, that trees, should be treated as objects only in the eyes of the law – as property. The environment, in this view, consists not just of "natural resources" or "ecosystem services" for human use, but of living entities which themselves have a right to exist and to be respected by our legal systems.

Policy, theory and jurisprudence around Rights of Nature have grown dramatically in the intervening half century, often drawing on and based around Indigenous worldviews and political movements. In Australia, Dr Peter Burdon at the University of Adelaide and Dr Michelle Maloney at the Australian Earth

[5] Christopher Stone, "Should Trees Have Standing? Towards Legal Rights For Natural Objects", (1972) 45 *Southern California Law Review* 450.

Laws Alliance have championed the idea and detailed both its legal basis and how it could be implemented.[6]

While the most famous examples of existing legal rights for nature include New Zealand's allocation of rights to the Whanganui River, and Bolivia and Ecuador's constitutional "Rights of Mother Earth", there are numerous local examples, including event across the United States of America, of legal recognition that the natural world, specific natural phenomena, and certain ecosystems, have inherent legal rights.[7]

Western Australian Greens MLC, Diane Evers, has introduced a Bill, *The Rights of Nature and Future Generations Bill 2019*, into the Western Australian parliament which would enshrine the legal right for the natural world and its constituent ecosystems to exist, require government to act to protect it, and introduce stiff penalties for breach.[8] Just this week, the Blue Mountains City Council announced plans to integrate Rights of Nature into their planning and operations.[9]

While a detailed examination of the possibility of a full regime of Rights of Nature is beyond the scope of this submission and of the review, not least since the Commonwealth lacks a Bill of Rights, the concept is legally mature enough to be introduced in normative terms. The Green Institute contends that national environment laws should include, as an object of the Act, acknowledgement that the natural world has its own inherent right to exist, and that it is not simply resources or services for the benefit of human society and economy.

2. Presumption of protection

As outlined, the scale of the ecological crisis, and the concomitant threat to human society and economy, are such that we can ill afford to further damage already weakened ecosystems. Ecosystem collapse is non-linear, and extremely difficult to rewind. Within this context, the EPBC Act establishes what is effectively a system of managed ecological destruction. This can no longer be the case if we wish our society and economy to have a future.

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[6] P Burdon (Ed), *Exploring Wild Law: The Philosophy Of Earth Jurisprudence*, Wakefield Press, 2011; Peter Burdon, Wild Law And The Project Of Earth Democracy, in M Maloney And P Burdon (Eds), *Wild Law In Practice*, Law, Justice And Ecology, Routledge Press, 2014.

[7] See M Maloney, "Rights of Nature, Earth democracy and the future of environmental governance", in T Hollo (ed), *Rebalancing Rights: Communities, Corporations, and Nature*, The Green Institute, 2019, https://www.greeninstitute.org.au/wp-content/uploads/2019/03/Green-Institute-Publication-Rebalancing-Rights.pdf

[8] D Evers, *Protecting Nature for Future Generations is Only Right*, media release, November 13, 2019, https://www.dianeevers.com.au/protecting-nature-for-future-generations-is-only-right/

[9] No author given, "Blue Mountains council resolves to integrate Rights of Nature into operations and planning", *Blue Mountains Gazette*, April 15 2020, https://www.bluemountainsgazette.com.au/story/6721668/blue-mountains-council-resolves-to-integrate-rights-of-nature-into-operations-and-planning/

Australia's national environment laws must, therefore, institute a firm presumption of protection ensuring that, in the absence of overwhelming countervailing factors, proposals which will cause or risk substantial damage to Australia's remaining healthy ecosystems, or which, taken cumulatively with other projects will together cause or risk such damage, should not be approved.

S3A of the Act sets out principles of ecologically sustainable development which seek to (s3A(a)) "effectively integrate both long-term and short-term economic, environmental, social and equitable considerations", as well as the precautionary principle, the principle of inter-generational equity and that (s3A(d)) "the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making". It should be noted that economic, social and equity-focussed legislation does not include objects which call for them to be balanced with ecological considerations. Applying such balance only to environmental laws effectively devalues ecological health when in reality all other measures are entirely dependent on a healthy environment.

S3A(a) should be tightened to clarify that short-term and long-term economic, social and equitable considerations cannot be achieved in the absence of a healthy environment. S3A(d) should be reframed to state that the conservation of biodiversity and ecological integrity are fundamental to human survival and thus will underpin every decision made under the Act. Taken together, these Principles should make it clear that the only proposals which will be approved will be those which integrate short-term and long-term economic, social and equitable considerations within the context of positive environmental outcomes. Chapter 4, in particular s66 which sets out the outline of the assessment and approvals process, should also be reframed to institutionalise a presumption of protection of the environment, rather than a presumption of approval of environmentally destructive actions with certain conditions attached.

In this context, it is worth noting that the Green Institute endorses the guiding principle in the terms of reference of this review of "making decisions simpler", however the Institute rejects the frame that this should be achieved through "reducing unnecessary regulatory burdens". Regulation to protect the natural world which sustains all life should never be cast as an unnecessary burden, although it can be simplified. Much of the burden of the system derives from the establishment of the complex system of managed destruction. The institution of a clear presumption of protection could drive innovative development proposals which would diversify and clean up Australia's economy, instead of facilitating the continuation of a narrow and ecologically destructive economic base.

The Green Institute also notes that offset schemes, always a questionable model for biodiversity where one ecological community can never be said to replace another, have failed and been abused. Offsets rely on a hard baseline to determine additionality, and this is effectively impossible to prove. They should therefore not be considered as alternatives to this presumption of protection.

3. Accountability for protection

Not only does the current assessment and approvals process constitute a system of managed destruction rather than a prioritisation of protection, but there is currently little in the way of serious accountability for ongoing destruction. Both governments and developers must be held to account for deliberate or reckless damage to Earth's life support systems.

It is vitally important that regulators be appropriately resourced to conduct monitoring and given sufficient investigative and enforcement powers. In the absence of such monitoring and enforcement, it must be expected that breaches will continue. The Green Institute supports the call from the Environmental Defenders Office and the Places You Love Alliance for a national Environmental Protection Agency to be instituted, with responsibility for monitoring and enforcement.

To support enforcement, penalties for breach of environmental conditions must be sufficient to act as a real deterrent. In circumstances where breaches may enable substantially increased profits for multi-billion dollar corporations, penalties in the order of 5,000 penalty units, up to a rarely applied maximum of 50,000 penalty units, constitute little more than another cost of doing business. Financial penalties should be increased, with consideration given to adjusting penalties based on capacity to pay, or recouping any profits made due to the breach (treating these as proceeds of crime). In addition, for egregious breaches by corporations, the option of deregistration should be on the table.

Government must also be held to account for its role in managing the health of Australia's environment. The Green Institute also supports the call for a National Sustainability Commission to take institutional responsibility in this space. Such a Commission, or similar independent scientific body, should be tasked with managing comprehensive environmental accounts which government should report on to Parliament on an annual basis and which should form a key plank, alongside human wellbeing measures, of new national accounts to replace GDP.

The legislation establishing the Commission should institute a set of key environmental indicators against which government will be judged, with legislated targets to reverse the decline in biodiversity, soil quality, climate conditions, water quality, etc.

4. Community role in decision-making in the context of scientific advice

Those who know and care the most about positive environmental practice – scientific experts and affected communities – are those whom current practice pays least attention to. The existing assessment and approvals process is run effectively by and for the benefit of developers, with little capacity for independent scientific assessment and limited opportunities for democratic participation.

This must be reversed, through practices of deliberative democracy in localities where developments are proposed, bringing experts to the table, as well as concerned voices from elsewhere, to genuinely discuss options. Deliberative democratic practices have been demonstrated around the world to lead to positive social, environmental and economic outcomes. Instead of adversarial "consultative" approaches where a proposal is presented effectively as a fait accompli and those seeking alternatives are cast in a purely oppositional role, deliberative democratic processes enable constructive, creative solutions to be found by engaging all parties in genuine, respectful discussion, informed by independent scientific advice.

Existing consultation requirements should be replaced by a requirement for early stage deliberative discussion. Proposals must then detail how the views of all those involved in the deliberative processes have been taken into account in informing and changing the proposed action.

While democratic participation is important for all affected communities, the free, prior and informed consent of all Indigenous communities is particularly vital. The common practice of deliberately dividing Indigenous communities in order to secure favourable Indigenous Land Use Agreements must be ended

While deliberative democratic processes should reduce the likelihood of disputes, democratic principles and good environmental practice also require open standing for all appeals processes, judicial review, and civil enforcement. Open standing acknowledges that we all have a stake in a healthy environment.

Principle 6 below extends this role for the community into participatory development of proactive remediation plans.

5. Climate transition

The absence of a climate trigger in the EPBC is perhaps its most obvious and extraordinary failure. The climate crisis is an overwhelming driver of ecological damage and the political decision not to include a proposal's impact on the climate in triggers for assessment cannot be allowed to continue.

However, given the urgency of the transition that is now needed, heading towards zero emissions as swiftly as possible, simply inserting a trigger for consideration of climate impacts is a necessary but insufficient reform. The remaining carbon budget for staying below 2C, let alone 1.5C, is such that we cannot afford any new fossil fuel developments, and must ensure that all new major developments of all kinds are at least carbon neutral, if not carbon positive. Instead of creating new levels of complexity, our regulatory system should make this as clear and simple as possible.

To this end, our national environment laws should follow the existing precedent on stringent controls on nuclear actions by introducing a ban on any new fossil fuel infrastructure, and requiring that every proposal of national significance be at least carbon neutral.

6. Remediation and resilience

With ecosystems already collapsing, it is vital that national environment laws do more than protect the natural world from specific destructive proposals – they should also provide for the remediation of damaged environments and proactively build resilience in ecosystems and bioregions.

Resilience in ecosystems refers to both "their ability to absorb change and persist while maintaining core structural and functional attributes" as well as "speed at which… [they can return] to an equilibrium state following a temporary disturbance".[10] Managing for resilience requires ensuring diversity and redundancy in ecosystems, fostering connectivity, increasing understanding about how complex adaptive systems work, broadening participation, and establishing more polycentric systems of governance rather than centralised, top-down management.

In this context, it is imperative that cumulative impacts of projects be accounted for in assessment. The absence of such cumulative impact assessment enables a death by a thousand cuts for ecosystems, wearing away at diversity, redundancy and connectivity. It makes a mockery of the approvals system and demonstrates either a complete misunderstanding of how ecologies work or a deliberate attempt to avoid scrutiny. It should not be allowed to continue.

The concept of recovery plans for listed threatened species and ecological communities in the EPBC is one of its better aspects, but the failure to appropriately resource their development and implementation reflects the stark difference between principle and practice. The Green Institute recommends that the concept be broadened into proactive remediation plans not just for listed threatened species and ecosystems, but for whole bioregions. These plans should be developed through deliberative democratic processes as described in principle 4 above, involving genuine, respectful discussion amongst citizens and stakeholders, informed by independent scientific advice. Vitally, both the development and implementation of these plans must be fully funded.

Finally, in this process as elsewhere, Indigenous knowledge and practices should be respected, harnessed, and funded, led by Indigenous people and communities.

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[10] Quentin Grafton et al, "Realizing resilience for decision-making", *Nature Sustainability*, vol2, October 2019, 907-913, pp 907-908.

Summary of recommendations

The Green Institute submits that, for the above reasons, the EPBC review panel should acknowledge:

1. the scale of the ecological crisis, the fact that this crisis is also a human crisis, and recommend that ecological protection and remediation be placed in a position of top priority for government; and

2. the utter failure of the EPBC Act when measured against its key objects of environmental protection, and recommend the development of a new set of national environment laws which will truly enable protection and remediation of the environment;

and recommend:

3. the inclusion of legal rights for the natural world, at least as a normative goal, in the objects of national environment laws;

4. that a clear presumption of protection be legislated to end the process of managed ecological destruction under the EPBC Act;

5. an end to the use of highly questionable biodiversity offsets;

6. the establishment of a Commonwealth Environmental Protection Agency, with appropriate resources and powers, to lead monitoring and enforcement of environmental conditions;

7. an increase in penalties for breaches of conditions to a level and type that can act as a real deterrent, including recoupment of profits and potential deregistration of corporations;

8. the establishment of legislated key environmental targets to reverse the decline in ecological health, to be accounted for by a National Sustainability Commission and reported on to Parliament annually;

9. the implementation of required deliberative democratic fora prior to submission of a proposal, to develop an agreed form of proposal with all relevant stakeholders, informed by independent scientific advice;

10. the requirement of free, prior and informed consent of all Indigenous communities before the submission of a proposal, and end the practice of divisive negotiation of ILUAs;

11. open standing in all appeals processes, judicial review, and civil enforcement proceedings;

12. the introduction of a climate trigger to ensure that any development with a substantial climate impact is assessed, and the creation of certainty by banning all new fossil fuel infrastructure;

13. that cumulative impacts of projects and proposals on ecosystems are accounted for and assessed;

14. the introduction of properly funded, democratically developed and scientifically based remediation plans, not only for listed threatened species and ecological communities but also for bioregions; and

15. that Indigenous knowledge and practices be respected, harnessed, and properly funded.