



Law Council  
OF AUSTRALIA

*Legal Practice Section*

11 November 2021

Committee Secretary  
Senate Standing Committees on Environment and Communications  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [ec.sen@aph.gov.au](mailto:ec.sen@aph.gov.au)

Dear Secretary

### **Inquiry into Australia's faunal extinction crisis**

This submission has been prepared by the Australian Environment and Planning Law Group (**AEPLG**) on behalf of the Law Council of Australia's Legal Practice Section (**the Section**). The Section welcomes the opportunity to make a submission to the Senate Standing Committees on Environment and Communications in relation to the Inquiry into Australia's faunal extinction crisis.

The Section notes that the issues raised in the Inquiry's Terms of Reference, issues which have been further considered by the Statutory Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) chaired by Professor Graeme Samuel AC and the Royal Commission into National Natural Disasters Arrangements, remain relevant and must be addressed by all levels of government.

The Section further notes the submission dated 1 November 2021 made by the Law Institute of Victoria (**LIV**) to the Inquiry (**Attachment**). The Section supports the comments made in the LIV's submission.

The Section would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Chair of the AEPLG, Robyn Glindemann on [robyn.glindemann@lantegy.com.au](mailto:robyn.glindemann@lantegy.com.au).

Yours sincerely

**Michael Tidball**  
**Chief Executive Officer**



**LAW  
INSTITUTE  
VICTORIA**

T 03 9607 9311

F 03 9602 5270

[lawinst@liv.asn.au](mailto:lawinst@liv.asn.au)

### **Committee Secretary**

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PO Box 6100  
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**By e-mail only:** [ec.sen@aph.gov.au](mailto:ec.sen@aph.gov.au)

Dear Committee Secretary

### **RE: Inquiry into Australia's Faunal Extinction Crisis**

The Law Institute of Victoria ('LIV') is grateful for the opportunity to provide a submission to the Senate Standing Committees on Environment and Communications' Inquiry into Australia's Faunal Extinction Crisis ('the Inquiry'). This submission is informed by input from members of the LIV's Environmental Issues Committee.

The LIV represents more than 19,000 lawyers and people working in the law in Victoria, interstate and overseas. As the peak body for the Victorian legal profession, the LIV initiates programs to support the needs of a changing profession, promotes an active law reform advocacy agenda, responds publicly to issues affecting the community, delivers continuing legal education programs, and continues to provide expert services and resources.

The LIV would like to make general comments and then address the Terms of Reference to offer insights into the Victorian perspective.

### **General Comments**

The LIV recognises that the protection and conservation of Australia's ecosystems, and laws that achieve this, are of great importance to current and future generations.

The Australian continent has seen an ongoing decline in the population and conservation status of approximately 500 threatened species contrary to international laws enshrined to protect biodiversity to which Australia is a signatory. The LIV is concerned by the ongoing decline in the population and conservation status of Australia's threatened fauna species.

The LIV has previously contributed to calls for policy submissions at the state government level in relation to biodiversity matters. These include the Victorian Legislative Assembly's Environment and Planning Committee's 2019 *Inquiry into Tackling Climate Change* and the Environment and Planning Committee's 2020 *Inquiry Into Ecosystem Decline in Victoria*.

The LIV urges stronger and more effective enforcement of laws to protect threatened species, including the *Environment Protection and Biodiversity Conservation Act 1999* as well as recommending greater coherence between laws that regulate activities that can impact upon biodiversity protection



In light of the many reviews undertaken by Senate Standing Committees previously on this and related subject matter, the LIV urges the Senate Inquiry to recommend that an action plan with clear timeframes should be developed to review relevant policy and legislation.

## **Responses to the Terms of Reference**

### (1) *The ongoing decline in the population and conservation status of Australia's nearly 500 threatened fauna species:*

The 2017 Biodiversity 2037 report published by the State of Victoria's Department of Environment, Land, Water and Planning, highlighted that by 2037, eighteen species of mammal, two bird species, one snake species, three freshwater fish species, six invertebrate species and fifty-one plant species will be extinct by 2037.<sup>1</sup>

The Commissioner for Environmental Sustainability commented in their 2018 State of the Environment report that 21 of the 35 biodiversity indicators assessed within the report were reported as 'poor'.<sup>2</sup> According to the *Review of the Flora and Fauna Guarantee Act 1988* Consultation Paper published by the State of Victoria's Department of Environmental, Land, Water and Planning, ecosystem decline endangering native flora and fauna is attributable to the ongoing loss and fragmentation of habitats as well as an increase in harmful weeds, pests, and diseases.<sup>3</sup>

The WWF's *Impacts of the Unprecedented 2019-2020 Bushfires on Australian Animals* report estimated that '3 billion animals – including mammals, birds, reptiles and frogs – were impacted by Australia's bushfire disaster'.<sup>4</sup> As a result of limited data on animal densities and the variable impacts of fire and of different species' ability to survive fire, the LIV supports the WWF's recommendations that the Federal Government should adequately fund and implement appropriate long-term monitoring of all bioregions that are likely prone to risk of future bushfires.<sup>5</sup>

The LIV submits that recent bushfire events will likely exacerbate the faunal extinction crisis. The LIV therefore advocates for the funding and implementing of long-term ecosystem monitoring measures, particularly in bushfire prone areas.

### (2) *The wider ecological impact of faunal extinction:*

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<sup>1</sup> State of Victoria Department of Environment, Land, Water and Planning (2017), *Biodiversity 2037 Report*, 10

<sup>2</sup> Commissioner for Environmental Sustainability (2018), *State of the Environment 2018*, p. 25

<sup>3</sup> State of Victoria Department of Environment, Land, Water and Planning (2017), *Review of the Flora and Fauna Guarantee Act 1988 Consultation Paper*, p. 8

<sup>4</sup> World Wide Fund for Nature, *Impacts of the Unprecedented 2019-2020 Bushfires on Australian Animals* (Report, 2020), 6-7

<sup>5</sup> World Wide Fund for Nature, *Impacts of the Unprecedented 2019-2020 Bushfires on Australian Animals* (Report, 2020), 9



As noted above, faunal extinction is caused by many factors and activities regulated by a number of laws. The faunal extinction crisis requires laws that appropriately take faunal protection into account. Legislation must align with and support such initiatives as Victoria's *Protecting Victoria's Environment – Biodiversity 2037* policy. For example, improving town planning and building laws and policies is necessary to limit further faunal extinction, by way of protecting ecosystems in urban, suburban, and peri-urban developments, intelligent transport infrastructure design, and landscaping.<sup>6</sup>

It is also essential that the connection between healthy biomes and the continued viability of essential resources, including clean air and water is promoted in policy and legislation design.<sup>7</sup> As emphasised in the LIV's September 2020 Submission to the Legislative Council's Environment and Planning Committee's 'Inquiry into Ecosystem Decline', maintaining healthy populations of flora and fauna is contingent on intelligent waste management strategies and regulations being implemented and enforced.

The LIV has previously submitted to the Senate and its Standing Committees on Environment and Communications that the LIV endorses and calls for the Commonwealth Government to create and maintain climate policy that is consistent, and adequately and equitably distributes responsibility.<sup>8</sup> The LIV has expressed in prior submissions its favour for giving extra weight to international climate obligations in Australian biodiversity laws.<sup>9</sup> The LIV urges greater action with respect to climate targets for the protection of Australia's native flora and fauna, particularly following the devastating 2019-20 summer bushfires, recognising the impacts of climate change on local biodiversity, in its 2020 Submission to the Law Council of Australia's *Independent Review of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999*.<sup>10</sup>

(3) *The international and domestic obligations of the Commonwealth Government in conserving threatened fauna:*

It is noted that Australia holds obligations under the *Convention on Biological Diversity*,<sup>11</sup> in its capacity as a signatory. The LIV asserts that, with the observable trends in faunal extinction, it is not apparent that the Commonwealth Government is sufficiently acting on these obligations. The Law Council of

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<sup>6</sup> Law Institute of Victoria, Submission No 134 to the Legislative Assembly Environment and Planning Committee, *'Inquiry into Tackling Climate Change in Victorian Communities'* (11 September 2020), 2[7]-[9]

<sup>7</sup> Law Institute of Victoria, Submission No 930 to the Legislative Council Environment and Planning Committee *'Inquiry Into Ecosystem Decline in Victoria'* 30 September 2020, 3[4]

<sup>8</sup> Law Institute of Victoria, Submission No 134 to the Legislative Assembly Environmental and Planning Committee, *'Inquiry Into Tackling Climate Change in Victoria Communities'*, (11 September 2020), 1; See also the LIV's submissions to the Senate Standing Committees on Environment and Communications' inquiry into the Coal-Fired Prohibition Funding Power Bill 2017 (2019); the Senate Standing Committees on Environment and Communications' inquiry into Current and Future Impacts of Climate Change on Housing, Buildings and Infrastructure.

<sup>9</sup> Law Institute of Victoria, Submission to the Law Council of Australia, *Independent Review of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999* 17 January 2020, 3

<sup>10</sup> Ibid.

<sup>11</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).



Australia outlined in its submission to the *Inquiry into the Faunal Extinction Crisis* that Australia is obliged to:<sup>12</sup>

- i. Art 8(1): Establish and maintain a system of special measures and/or protected areas for the purpose of conserving biological diversity.
- ii. Art 8(d): Promote ecosystem protection and the viability of species populations.
- iii. Art 8(f): Promote threatened species' recovery through ecosystem management plans.
- iv. Art 8(k): Develop and maintain legislation and regulation that advocate for the protection of threatened species.

The Intergovernmental Agreement on the Environment<sup>13</sup> asserts that States, Territories, and Federal government are obliged to strive for uniform environmental protection legislation and regulations. Notably, under Schedule 9, parties agree that each level of government is obliged to uphold their responsibilities with practices that protect flora and fauna conjointly.

The Federal Government is obliged to give effect to the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*.<sup>14</sup> Under the Convention, governments, both State and Federal are responsible for implementing measures to regulate the commercial use of wildlife in such a way that promotes population viability and animal wellbeing. The LIV urges government to uphold its obligations under the Convention.

- (4) *The adequacy of Commonwealth environment laws, including but not limited to the Environment Protection and Biodiversity Conservation Act 1999 ('EPBC Act'), are insufficient to protect threatened fauna against key threatening processes;*

The *Australia State of the Environment 2016 ('SoE 2016')* report highlighted that there is an increased threat to Australia's biodiversity, which has worsened in recent years due to inadequate enforcement of environmental protection regulations.<sup>15</sup> The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) exists as a legal framework to balance the national protection of Australia's environment with current societal and economic agendas.<sup>16</sup> The LIV reiterates suggestions made by the Law Council of Australia that the Federal government prioritises environmental protection objectives when considering the impacts of new developments and changes in land use, specifically

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<sup>12</sup> Law Council of Australia, Submission No 121 to Parliamentary Senate Standing Committees on Environment and Communications, *Australia's Faunal Extinction Crisis* (10 September 2018), 5-6

<sup>13</sup> Intergovernmental Agreement on the Environment, May 1992, available at [Intergovernmental Agreement on the Environment \(IGAE\)](#)

<sup>14</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature in 1973 (entered into force on 1 July 1975)

<sup>15</sup> Ian Cresswell and Helen Murphy, *Australia State of the Environment 2016: Biodiversity* (Independent report to the Australian Government Minister for the Environment and Energy, 2017); Law Council of Australia, *Australia's Faunal Extinction Crisis* (10 September 2018), 5

<sup>16</sup> Law Council of Australia, *Australia's Faunal Extinction Crisis* (10 September 2018), p. 5; *The Environment Protection and Biodiversity Conservation Act 1999* (Cth).





the destroying of habitats for agricultural development, urban expansion, and mining.<sup>17</sup> The LIV further recommends that the Federal Government prioritises species protection, ecosystem restoration and recovery, and aligning climate change legislation and policy in achieving these outcomes.

The LIV recommends that the Federal Government considers implementing a more robust legislative strategy and stronger policy commitment to biodiversity and habitat preservation. The LIV, supporting the position of the Law Council of Australia, proposes that the Federal Government should review the environmental impact of native vegetation clearing regulations and greater management of threats that give rise to habitat destruction or faunal extinction when considering amendments to the EPBC Act.<sup>18</sup>

*(5) The adequacy and effectiveness of protections for critical habitat for threatened fauna under the Environment Protection and Biodiversity Conservation Act 1999 ('EPBC Act'):*

The LIV supports the position of the Law Council of Australia in its 2020 Submission to the EPBC Act Review<sup>19</sup> Particularly with regard to the potential for conflict between private property rights and the EPBC Act and State and Territory legislation that ought to protect Australian fauna and biota. It is therefore suggested that engagement be had with private landowners about means of ensuring ecological protection while honouring private property rights. This may take the form of:

- i. Community consultation;
- ii. Compensatory mechanisms; and/or
- iii. Legislative reform.

The LIV is concerned that the Minister has discretion under the EPBC Act regarding whether Critical Habitat is included on the s 207A register. The LIV supports the recommendation of the Law Council of Australia that Critical Habitats identified under recovery plans are protected under s 207B of the Act.<sup>20</sup>

Referring to Terms of Reference 4 and 5 regarding the insufficiency of Commonwealth environmental protection and conservation laws, the LIV supports and reiterates the relevant recommendations held within previous LIV and LCA submissions regarding the EPBC Act,<sup>21</sup> and in the Samuel Report.<sup>22</sup>

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<sup>17</sup> Ibid 7[16]

<sup>18</sup> Law Council of Australia, Submission in Response to Discussion Paper, *Independent Review of the EPBC Act* (20 April 2020), 45[168]

<sup>19</sup> Ibid 46

<sup>20</sup> Law Council of Australia, Submission No 121 to Parliamentary Senate Standing Committees on Environment and Communications, *Australia's Faunal Extinction Crisis* (10 September 2018), 8[18]-[20]

<sup>21</sup> Law Institute of Victoria, Submission to Law Council of Australia, *Independent Review of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999* (17 January 2020); Law Council of Australia, Submission in Response to Discussion Paper, *Independent Review of the EPBC Act* (20 April 2020).

<sup>22</sup> Graeme Samuel, Final Report to Department of Agriculture, Water and the Environment, *Independent Review of the EPBC Act* (October 2020).



(6) *The adequacy of the management and extent of the National Reserve System, stewardship arrangements, covenants and connectivity through wildlife corridors in conserving threatened fauna:*

The LIV notes that Australia is a signatory to the *International Convention on Biological Diversity*,<sup>23</sup> under which at least 17 per cent of terrestrial land be conserved by regulated systems of protected areas by 2020. The CSIRO reported in 2016 that Australia has eighty-six distinct bioregions, which are less than 17 per cent protected by Australia's National Reserve System.<sup>24</sup> The current National Reserve system does not maintain adequate protections for the variety of distinct bioregions across the Australian continent.<sup>25</sup> The LIV recommends consideration of a means of expanding the National Reserve System to better account for and protect bioregion diversity in both marine and terrestrial environments.

The Law Council of Australia recommends implementing a successor to the *National Wildlife Corridors Plan*.<sup>26</sup> Endorsing this, the LIV further recommends that the above considerations are taken into account in reviewing the National Wildlife Corridors Plan.

(7) *The use of traditional knowledge and management for threatened species recovery and other outcomes as well as opportunities to expand the use of traditional knowledge and management for conservation:*

The LIV recommends that the Government actively seeks the input of First Nations peoples in designing means and methods of combatting the faunal extinction crisis when engaging in infrastructure and land development projects. The LIV submits that consultations be held with First Nations elders and community leaders. The LIV posits that there is an opportunity to realise environmental objectives while undertaking infrastructure and development projects. The LIV recommends that the Standing Committee ought to link economic recovery programs to these environmental objectives, and seek responsible land management advice and consultation from talks with First Nations peoples.

(8) *The adequacy of existing funding streams for implementing threatened species recovery plans and preventing threatened fauna loss in general:*

It was noted by the Department of Environment, Land, Water and Planning in its January 2017 *Review of the Flora and Fauna Guarantee Act 1988* that sufficient government funding and similar resources are necessary to ensure communities are actively capable of conserving biodiversity. These must also

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<sup>23</sup> *International Convention on Biological Diversity*, opened for signature 5 June 1992 (entered into force 29 December 1993)

<sup>24</sup> Kristen Williams, Tom Harwood, Simon Ferrier, *Assessing The Ecological Representativeness Of Australia's Terrestrial National Reserve System: A Community-Level Modelling Approach*, (Final Report, 30 June 2016), CSIRO Land and Water. Available at: <https://doi.org/10.4225/08/585ac3382ff4b>

<sup>25</sup> *Ibid.*

<sup>26</sup> Law Council of Australia, Submission No 121 to Parliamentary Senate Standing Committees on Environment and Communications, *Australia's Faunal Extinction Crisis* (10 September 2018), 9



be complementary to State and Federal Government management schemes. The Review found that this was not the case as late as January 2017.<sup>27</sup>

The LIV emphasises that investment strategies need to be designed to support and enable clear, measurable biodiversity conservation targets. It is recommended that this is designed with consideration of measures outlined in the 2016 SoE Report.<sup>28</sup>

(9) *The adequacy of existing monitoring practices in relation to the threatened fauna assessment and adaptive management responses:*

Since the 2019-2020 bushfire events that affected large swathes of Australian native fauna habitats, the LIV strongly emphasises that fauna monitoring schemes and practices need to be increased to ensure population recovery.<sup>29</sup> Dickman and McDonald report that estimates of the species lost during these bushfire events are highly conservative and do not account for such populations as frogs and bats.<sup>30</sup>

The LIV supports the Law Council of Australia's recommendation that more rigorous monitoring practices be implemented.<sup>31</sup> The LIV also recommends that the Federal Government reports on faunal population recovery outcomes on a regular basis as recommended by the World Wide Fund For Nature's November 2020 report and per the Law Council of Australia's recommendations.<sup>32</sup> The LIV urges that such programs receive the necessary budget allocation to function adequately.

(10) *The adequacy of existing assessment processes for identifying threatened fauna conservation status:*

The LIV supports the Law Council of Australia's recommendations that assessment processes should align with the recommendations of the Threatened Species Scientific Committee.<sup>33</sup> This entails reviewing current practices of Federal Government entities of regularly deferring listing habitats and species, which noted as being threatened by informed, impartial experts.<sup>34</sup>

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<sup>27</sup> Department of Environment, Land, Water and Planning, *Review of the Flora and Fauna Guarantee Act 1988*, (Final Report, January 2017), 21

<sup>28</sup> Ian Cresswell and Helen Murphy, *Australia State of the Environment 2016: Biodiversity* (Independent report to the Australian Government Minister for the Environment and Energy, 2017)

<sup>29</sup> World Wide Fund for Nature, *Impacts of the Unprecedented 2019-2020 Bushfires on Australian Animals* (Report, 2020), 9

<sup>30</sup> Chris Dickman and Tein McDonald, 'Some Personal Reflections On The Present And Future Of Australia's Fauna In An Increasingly Fire-Prone Continent' (2020) 21(2) *Ecological Management & Restoration* 86, 86-96

<sup>31</sup> Law Council of Australia, Submission No 121 to the Parliamentary Senate Standing Committees on Environment and Communications, *Australia's Faunal Extinction Crisis* (10 September 2018), 8[16].

<sup>32</sup> World Wide Fund for Nature, *Impacts of the Unprecedented 2019-2020 Bushfires on Australian Animals* (Report, 2020), 9

<sup>33</sup> Law Council of Australia, Submission No 121 to the Parliamentary Senate Standing Committees on Environment and Communications, *Australia's Faunal Extinction Crisis* (10 September 2018), 10[30].

<sup>34</sup> World Wide Fund for Nature, *Impacts of the Unprecedented 2019-2020 Bushfires on Australian Animals* (Report, 2020), 10





(11) The adequacy of existing compliance mechanisms for enforcing Commonwealth environment law:

The effective administration and enforcement of laws must be of paramount importance in preventing further faunal extinction and reversing habitat loss. Enforcement that upholds the rule of law is vital. The LIV notes that prior audits of the Department of Environment's compliance monitoring practices have exhibited "...limited progress in relation to the implementation of broader initiatives to strengthen the Department's regulatory compliance".<sup>35</sup> This has been remarked as prevalent at a state level too, notably under the *Flora and Fauna Guarantee Act 1988* (Vic), under which penalties for breaches are incongruent with related state legislation and are considered insufficiently deterrent according to reviews by the Department of Environment, Land, Water, and Planning.<sup>36</sup>

The LIV supports the Law Council of Australia's 2020 recommendations, that Government perform a review of the resources available to regulatory bodies to better empower effective enforcement of the EPBC Act and associated legislation.<sup>37</sup> The LIV urges immediate action on this critical matter.

If you would like to discuss any of the matters raised in this letter, please contact Kara Nathan, Paralegal for the LIV Property and Environmental Law Section, at [knathan@liv.asn.au](mailto:knathan@liv.asn.au) or on (03) 9607 9432.

Alternatively, please contact Dr Rebekah Farrell, Head of Legal Policy at [rfarrell@liv.asn.au](mailto:rfarrell@liv.asn.au).

Yours sincerely,

**Tania Wolff**  
President  
Law Institute of Victoria

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<sup>35</sup> Australian National Audit Office, *Monitoring Compliance with Environment Protection and Biodiversity Conservation Act 1999: Conditions of Approval: Follow-on Audit*, (Auditor General Report No 36, 2016-2017), [5]

<sup>36</sup> State of Victoria Department of Environment, Land, Water and Planning, *Review of the Flora and Fauna Guarantee Act 1988 Consultation Paper*, (Report, 2017), 62

<sup>37</sup> Law Council of Australia, Submission to the Department of Agriculture, Water and the Environment, *Statutory Review of the Environment Protection and Biodiversity Conservation Act*, (20 April 2020), 57-58