



## **Submission on proposed changes to conservation planning decision**

2 November 2021

Thank you for the opportunity to provide a submission on the Environment Minister's proposed decision to not have a recovery plan for 28 ecological communities and 157 species.

Lawyers for Forests Inc. (LFF) is an incorporated association of legal professionals advocating for 20 years for the protection of Australia's native forests, including the species that inhabit them.

LFF strongly objects to the Government's proposal to no longer have recovery plans for those threatened ecological communities and species.

Creating and implementing recovery plans is essential to protect threatened species and ecological communities.

Recovery plans are different from conservation advice in both function and effect. Recovery plans cannot be replaced by conservation advice.

### *The importance of recovery plans*

A recovery plan is a powerful measure for the protection of listed threatened species and threatened ecological communities under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act), if produced and implemented.

Recovery plans include what steps are required to protect, conserve and manage listed threatened species or ecological communities.<sup>1</sup> Once the Minister decides to adopt a recovery plan for the threatened species and ecological communities, the Minister "must not act inconsistently with it".<sup>2</sup>

There has been a significant increase of habitat loss in Australia in recent years. It is essential to identify threats to the habitat of species and communities,<sup>3</sup> because habitat protection is an essential factor in their survival and recovery.<sup>4</sup>

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<sup>1</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 269A(2), 270.

<sup>2</sup> *Ibid* s 139(1)(b).

<sup>3</sup> *Ibid* ss 270(2)(ca)-(d).

<sup>4</sup> Bruce Lindsay and James Trezise, 'The Drafting and Content of Threatened Species Recovery Plans: Contributing to their Effectiveness' (2016) 33 *Environmental and Planning Law Journal* (2016) 237, 245 ('The Drafting and Content of Threatened Species Recovery Plans').



Recovery plans must contain objectives to be achieved, criteria against which achievement of the objectives is to be measured, the necessary actions to achieve the objectives, threats to the species and communities, and habitats that are critical to the survival of the species or community.<sup>5</sup>

#### *Comparison between conservation advice and recovery plan*

Recovery plans are preferable to conservation advice. While conservation advice is also a protection measure for threatened species and ecological communities, the important distinction relates to its legal effect compared to recovery plans.

Recovery plans are legally binding on the Minister. The Minister must not act inconsistently with a recovery plan,<sup>6</sup> however conservation advice is just one relevant consideration that the Minister takes into account in deciding whether or not to approve the taking of an action.<sup>7</sup> This means the Minister is not required to act consistently with conservation advice.

Moreover, the scope of required content of conservation advice is not as stringent as recovery plans. Conservation advice may contain either “information about what could appropriately be done to stop the decline of, or support the recovery of, the species or community” or “a statement to the effect that there is nothing that could appropriately be done to stop the decline of, or support the recovery of, the species or community”.<sup>8</sup> Recovery plans, on the other hand, set out the steps that must be taken to help a species recover and avoid extinction.

#### *Utility of recovery plans in judicial proceedings*

Recovery plans have been utilised by the Courts.

For example, in *Environment East Gippsland Inc v VicForests* [2010] VSC 335, the Draft National Recovery Plan for the Spotted-tailed Quoll (Long, K & J. Nelson, (2010)) was taken into consideration by the Supreme Court of Victoria in deciding “there is a real threat of serious and irreversible damage to the environment by reason of destruction of habitat for the Spotted-tailed Quoll”, and one of the reasons is “because the Draft National Recovery Plan confirms the vulnerability of the Spotted-tailed Quoll to habitat change.”<sup>9</sup> In this case, the Court ordered an injunction to stop logging to protect the habitat of threatened species.

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<sup>5</sup> EPBC Act (n 1) s 270(2).

<sup>6</sup> Ibid s 139(1)(b).

<sup>7</sup> Ibid s 139(2).

<sup>8</sup> Ibid s 266B(2).

<sup>9</sup> *Environment East Gippsland Inc v VicForests* [2010] VSC 335, [633].



Evidently, recovery plans have played a significant role in the protection of species through their consideration by the Judiciary. It is concerning that the Government is seeking to remove this important legislative tool for 28 ecological communities and 157 species when recovery plans have been used to challenge ecologically destructive Government decisions.

The Government may be seeking to remove recovery plans so they cannot be used to set aside Government decisions in future judicial review proceedings.

#### *Insufficiency of current recovery plans and implementation*

One criticism of recovery plans is the delay in producing them. The reason for the Government's proposal of removing recovery plans and only producing conservation advice may be to resolve the backlog of recovery plans.<sup>10</sup>

Several recovery plans have expired under the EPBC Act and only three recovery plans on the list the subject of the Government's proposal have been adopted.

The Government has not explained why it has not caused more recovery plans to be produced and adopted. It suggests the Government is not concerned to invest in the protection of Australia's threatened species and communities. The Government should be investing in recovery plans instead of this process the subject of the proposal. The Government must realise the importance of recovery plans and the duty we have to protect our species and the habitats they rely upon.

#### *Conclusion*

The Government should not substitute recovery plans with conservation advice.

LFF strongly objects to the Government's proposal. LFF highly recommends the Government maintain recovery plans for the listed species and communities, complete and further develop recovery plans to effectively protect the habitat of the listed species and communities and adequately fund the full implementation of all recovery plans.

Yours sincerely

Executive Committee for Lawyers for Forests Inc.

Contact: Dan Cash, President, [dcash@vicbar.com.au](mailto:dcash@vicbar.com.au)

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<sup>10</sup> Rachel L. Miller et al, 'Protecting Migratory Species in the Australian Marine Environment: A Cross-Jurisdictional Analysis of Policy and Management Plans' (2018) 5 (229) *frontiers in Marine Science*: 1-13, 10.