

How environmental protection can go amiss:

A. Responsibility for species protection can be shifted from the federal government to the states without sufficient oversight.

This grasslands case study illustrates how a regulatory system allows the federal government to avoid its responsibilities and a state government to fail to do its job to protect endangered species.



Victoria's grasslands

Grasslands are significant areas for providing habitat and a source of food for several endangered species, such as the striped legless lizard. But their capacity to survive has been reduced due to urban development and weed and feral animal invasion. Less than five percent of Victoria's grasslands still remain - in our 'Volcanic Plain' area. Examples include Craigieburn Reserve, Laverton North Grassland Reserve and Mortlake Common Flora Reserve.

How are they being protected?

These grasslands were listed¹ as '**critically endangered**' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the *EPBC Act*) in 2008/2009 by the federal government, which then endorsed the Melbourne Strategic Assessment (MSA) program.

¹ Listing under the *EPBC Act* aims to help protect and recover critically endangered ecological communities and preserve their value as vital habitat for threatened species.

Strategic Assessments are a tool to achieve *EPBC Act* objectives, using **state government** systems of assessment and species protection in place of federal environment impact assessment.²

The MSA program is designed to manage the environmental impact of **urban development** in Melbourne's growth areas. The state government can then **streamline environmental approvals** to enable urban expansion. Using the MSA, the Victorian Government made commitments to acquire land for the establishment of a 15,000 hectare Western Grassland Reserve and a 1,200 hectare Grassy Eucalypt Woodlands Reserve by 2020 to offset the habitat destruction caused by urban expansion.

But things have gone wrong

The MSA has failed to deliver the promised reserves. The decline in the extent and quality of the grasslands that the MSA was meant to stop, has continued. The Victorian Auditor General³ found that by December 2019 the Victorian Government had only acquired around 10 per cent of land in the Western Grassland Reserve and none for the Grassy Eucalypt Reserve. And the small reserves that have been created are difficult and expensive to manage effectively.

An environment impact assessment at the federal level would normally be done by the developer who is standing to gain from federal government development approval. However, due to the use of the MSA, the Victorian government has undertaken the impact assessment and faced the financial and legal challenges the program has thrown up – all leading to cost blowouts and inadequate management.

What does this indicate?

Power is handed to a state without the state being sufficiently accountable for the exercise of those powers. The *EPBC Act*'s capacity to delegate environment impact assessment to a state should not allow for this failure in monitoring and reporting.

This illustrates the failure of the strategic assessment mechanism in the *EPBC Act*. Other examples exist too, where a strategic assessment was accredited under the *EPBC Act* and, rather than environmental outcomes being achieved, there have been net losses in ecological communities.⁴

And how could it be done better?

- The federal government must not allow streamlining or delegation to state governments without stronger, clearer, binding, national environmental Standards and stronger Federal oversight.
- National environment protection regulation must be more holistic so that a decision at a project scale does not prevent national environmental Standards being met at a system scale.
- National Standards should consider a broad range of environmental impacts; include Indigenous and broader community engagement and look to direct and indirect impacts to biodiversity.

² The *EPBC Act* offers two pathways for assessing and potentially approving an action that is likely to have significant impact on nationally significant native vegetation - Environmental Assessment process or a Strategic Assessment process

³ Victorian Auditor General Report, *Protecting Critically Endangered Grasslands*, June 2020

⁴ The Victorian government's *Bushfire Fuel Management Program* is an example of a failure to protect environmentally significant habitat through the strategic assessment mechanism. Lack of federal oversight enabled the Victorian government to clear endangered South-Eastern Red-Tailed Black Cockatoo habitat trees as part of fire management activities.

- All government activities, federal, state and local must be consistent with the national Standards. Such Standards can also support greater integration of federal, state and territory environmental responsibilities.⁵
- A well-resourced Federal independent Environment Protection Authority for oversight and enforcement should be created.
- The *EPBC Act* amended to provide a legislative basis for these proposals.

Do the major party platforms address these issues?

ALP – action to “arrest species loss, protect habitats, control invasive species, ... protect biodiversity ...”; reform environment protection laws including an independent Environment Protection Agency; bring about “efficient, streamlined and effective environment assessment ... ; creation of strong, legally enforceable national Environmental Standards supported by robust data that act to maintain or improve the environment”.

Liberals – will “restore waterways”, “protect native animals”, “act to reduce litter”; “upgrade facilities” in national parks.

The Liberal Party position, evidenced by Bills currently before the Senate, will devolve more power to state governments without adequate Standards or oversight.

Greens – will “stop the extinction crisis” through “setting a goal of zero extinction by 2030” and investing in “greening and restoration programs” and will “back new, stronger environmental laws” with an “independent watchdog”.

⁵ Samuel, G, *Independent Review of the EPBC Act – Final Report*, Oct 2020.

How environmental protection can go amiss:

B) The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) allows the states to administer bad law through intergovernmental Regional Forestry Agreements.



The Leadbeater's Possum and logging Mountain Ash forests⁶

This case study explains how a federally listed threatened species has become more endangered due to a poorly managed intergovernmental agreement process.

Background information

- The Leadbeater's possum, the Victorian state faunal emblem, has been up listed from endangered to 'critically endangered' under the federal *EPBC Act*. Leadbeaters live almost exclusively in the Mountain Ash forests of Victoria's Central Highlands.⁷ Only 1% of these forests are now old growth. These forests are some of the most carbon-dense on earth and provide essential drinking water for Melbourne and regional Victoria.
- These forests are being logged.
- Severe bushfires also cause habitat loss. (There were less than 2,000 individuals remaining and 45% habitat loss after the 2009 fires).
- Logging increases the severity of fire in the possum's Mountain Ash habitat.
- The cessation of logging in these forests would give Leadbeater's Possum its best chance of recovery and long-term survival, as recommended by the TSSC (*Threatened Species Scientific Committee*), but their habitat has not been listed on the federal Register of Critical Habitats, nor has a National Recovery Plan (under the *EPBC Act*) been implemented for the possum or its habitat.⁸

How has logging been allowed in such critical habitats?

⁶ We acknowledge the use of *Devolving Extinction* (Oct. 2020), an Environment Defender's Office publication, and the Australian Conservation Foundation report, *Australia's Extinction Crisis*, 2018, in preparing this case study.

⁷ The Mountain Ash is eucalypt of the year!! (These are the beautiful trees we see as we drive through the Black Spur).

⁸ More than 80 per cent of Australia's mammals and 90 per cent of our trees, ferns and shrubs occur nowhere else on earth. A number of these species, such as Leadbeater's possum, are unique to Victoria (VAGO 2021).

The *Central Highlands Regional Forests Agreement (RFA)* is an intergovernmental agreement that devolves the federal government's responsibilities for environmental matters to the Victorian government.⁹ RFAs establish forest management and intergovernmental arrangements through a strategic planning process via which federal and state governments are meant to balance a range of values (environmental, social, economic, heritage etc).

RFAs are another example of the failure of devolution of national responsibilities for the protection of threatened species to state and territory governments. The possum is a forest-dependent species that has not been protected by the RFA and there has been no suggestion of suspension of the RFA's accreditation. The federal review and oversight measures available under RFAs to protect federally listed threatened species such as the Leadbeater's Possum, have not been used.

Victoria's complicated and inadequate laws have led to poor implementation and enforcement. And **VicForests**, the state-owned logging agency, has been said to be "practically operating under a system of self-regulation".¹⁰

NGOs to the rescue!

It should not come to this, but it frequently does!! Frustrated by the continuing failure of the Commonwealth and Victorian governments, The **Friends of Leadbeater's Possum** commenced Federal Court proceedings against VicForests in 2017. They argued that the exemption from *EPBC Act* protections did not apply, given VicForests logging operations were non-compliant with Victorian timber harvesting regulations. The Friends won the case. The Judge found that VicForests was in breach of Victorian and *EPBC Act laws* and that past logging and planned logging were illegal. This judgement was overturned on appeal¹¹ and now the Friends have filed an appeal in the High Court.

What can we conclude?

This case demonstrates a **failure of state and federal regulatory systems to protect forests and threatened species**. Current requirements are buried within hundreds of pages of legislation, statutory documents, unenforceable guidelines and policies. Ministerial discretionary powers add to the problems of accountability and reduce trust in the system.¹²

What is the link to water and bushfires?

Around 60% of Melbourne's water supply is stored here (Thompson Catchment). And these forests have recently suffered from severe bushfires.

Water quality and supply are affected by bushfires and logging.

The amount of water yielded from mountain ash forests is related to [forest age](#). Catchments covered with old-growth ash forests yield almost [twice the amount of water each year](#) as those covered with young forests.¹³

Bushfires reduce the trees available for logging operations and place more pressure on fire-affected forests to recover.

Further, **emergency bushfire works** are exempted from consideration of threatened species and then also the protection of the *EPBC Act* leading to a further driver of biodiversity loss.

⁹ Regional Forests Agreements (RFAs) form the basis for an **exemption** from the usual federal threatened species protections. These protections are replaced by a weaker, alternative mechanism, where assessment is conducted in accordance with a RFA.

¹⁰ *Independent Review of Timber Harvesting EPBC Act Regulation in Victoria, 2018.*

¹¹ Appeal succeeded on a technical legal basis regarding the "statutory construction" of the RFA's requirements and the exemption to *EPBC Act*.

¹² Samuel Review of *EPBC Act*, Oct 2020.

¹³ The logging is primarily for paper manufacturing and to supply the Maryvale mills (owned by the Nippon Paper Group) with native forest logs.¹³

What can be done better?

- More robust oversight of RFAs by the federal government is required so that the assurance and reporting and mechanisms in the regulations are met and native forest logging leading to biodiversity loss is not enabled.
- Establish a National Sustainability Commission to set standards for threatened species recovery that aims for net gain in biodiversity rather than no net loss. This could resolve the failures in the current system to prevent incremental biodiversity loss.
- Establish a new critical habitat register and a new approach to critical habitat listing that accounts for **climate change** adaptation and impacts.¹⁴
- Establish an independent and well-resourced national EPA and a threatened species fund.
- Integrate First Nations' strategies to inform biodiversity actions and recognise the rights and interests of Traditional Owners through increased negotiation and agreement making.

Do the major party platforms address these issues?

ALP – recognises the “environmental crisis and decline” and is “committed to addressing” it; will “ensure the Commonwealth has institutional capacity to provide effective and transparent environmental management systems .. including an Environment Protection Agency (a strong cop on the beat) .. genuinely independent of government ..”; will “reform national environment protection laws to ensure they are fit for purpose to arrest environmental decline and restore environmental health” and provide a “central voice for First Nations people”.

Liberals – their threatened species strategy is “putting vulnerable plants and animals on a better path”; commit to expenditure on bushfire recovery, will “restore waterways, protect native animals, reduce litter .. protect national parks by “upgrading facilities ..”; protect the Great Barrier Reef and expand Indigenous Ranger program.

Greens – Will end land clearing and native forest logging; support sustainable plantation forestry; fund Indigenous ranger programs, will “back new, stronger, environmental laws” and an “independent watchdog to enforce” them; “recognise First Nations people as custodians of the land” and “work hand in hand”; “zero species extinction by 2030”; invest in greening and restoration programs; “restore wildlife habitat” and “plant two billion trees”; and save the Great Barrier Reef.

¹⁴ This and the following two points are based on recommendations in the 2020 Samuel Review of the *EPBC Act*.

How environmental protection can go amiss:

B. Insufficient regulation of greenhouse gas emissions



Greenhouse gas emissions and climate change regulation

This explanation of emissions regulation reveals not only how law and policy is failing in this area, but also how obfuscated the requirements of the regulatory system are, making it difficult to identify who or what is responsible or how to improve things.

Is there any regulation of greenhouse gas emissions In Australia?

The answer, sadly, is an unclear.

This lack of clarity is frustrating for all parties and breeds distrust.

An environmental law text tells us:

“Emissions of greenhouse gases in Australia are not prohibited and only minimally restricted, with the limited exception of the **Emissions Reduction Fund (ERF) safeguard mechanisms**.”¹⁵

The **ERF** is a scheme whereby the government buys emission abatements from polluters. It is designed to incentivise, rather than penalise, a range of organisations and individuals to reduce their greenhouse gas emissions.¹⁶

Safeguard mechanisms (SM) were introduced to address problems with the **ERF** – where the government’s purchase of emissions abatements from a business through the ERF were found to be displaced or offset by emissions increases elsewhere. SMs are not ambitious, however, and only encourage businesses to keep emissions within historic levels. In other

¹⁵ Bates G, *Environmental Law in Australia*, 2019. The system is further weakened by recent changes which allows facilities to sell their carbon credits on the open market.

¹⁶ An example is the Crown trigeneration replacement project aimed to improve energy efficiency by reducing energy consumed from an electricity grid. Facilities gain Australian Carbon Credit Units (ACCU) for their abatement measures.

words, a fossil fuel industry can gain carbon credits while continuing to expand and emitting carbon at business-as-usual levels.

SMs apply to facilities that emit more than 100,000 tonnes of carbon dioxide annually. *The National Greenhouse and Energy Reduction Scheme* encourages polluters that meet specified thresholds to register and report annually.¹⁷ This mechanism, however, is allowing emissions to continue to rise and the sector most responsible for greenhouse gas emissions (electricity generation) to be “largely unregulated”¹⁸. The system has been further weakened by recent ERF changes, leading to a significant drop in the value of carbon offset prices and raising questions regarding the system’s integrity.

Potential progress is made more difficult because state governments have jurisdiction over land use planning and development. The recent challenges to wind farms in Victoria, based on noise complaints, are an example of state-level planning legal challenges and merits appeals, which can frustrate emissions reduction projects.

We also have **National Environment Protection Measures (NEPs)**¹⁹ but these do not provide any **direct regulatory control** over industry or individuals and state and territory governments are largely left to set appropriate standards. For example, decisions by the Victorian Environment Authority regarding NEPs, are informed by broad reference standards rather than compliance standards for **individual** businesses.

A 2021 WA Case is illustrative of the lack of regulation over carbon emissions

The WA government approved two major projects (in the Pilbara and mid-west) which are expected to add millions of tonnes of carbon into the atmosphere. Academics, lawyers, farmers and the Conservation Council of WA appealed the state EPA’s recommendation for Ministerial approval of these projects.²⁰

The Appeals Convenor stated that “If approved, the ... proposal will result in residual emissions that will need to be met with reductions or offsets elsewhere ...”.

Ultimately the Minister has the final say on project approval and project opponents could not get around the case-by-case approach by which project proposals are assessed. That is, getting past the assertion that the Pilbara and mid-west projects’ emissions cannot be linked to the environmental impacts of climate change in WA. In other words, the cumulative impacts, cumulative damage and worsening climate change of projects are not considered.²¹

The proponent is reported to have said, there was no precedent in Australian law that a proponent or government had a **duty of care** to avoid increasing greenhouse gas emissions. Although this is not the same as saying there is no regulation of greenhouse gases, it is concerning. And it reminds us of the recent Federal Court loss on appeal, when brave, secondary school students took the federal Environment Minister to court. The Minister has now proven that she owes no duty of care to Australia’s children!

Should the EPBC Act include a climate trigger?

¹⁷ Bluescope Steel in Westernport is one such facility with “reported covered emissions” of 111,372 tonnes.

¹⁸ Bates p 695

¹⁹ See *National Environment Protection Council Act 1994*

²⁰ Note that the EPA does not set specific emissions targets but may require proponents to outline how they will avoid carbon pollution and contribute to the state goal of net-zero pollution by 2050.

²¹ See Sydney Morning Herald, article by Emma Young, 11/2/21

In the current *EPBC Act* there is no climate or greenhouse ‘trigger’.²² A 2009 review of the Act (Hawke) and the 2020 Samuel review discussed the inclusion of a greenhouse or climate trigger. Samuel recommended that a range of climate change scenarios be considered when development proposals are assessed, and Hawke recommended the Act be amended to insert a requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments and bioregional planning processes. These recommendations could help *EPBC* mechanisms to be more proactive, broadly focused and a ‘normal’ part of planning rather than its current reactive approach which is mostly triggered by one-off events, threats or developments and overlooks cumulative impacts.

What could strengthen regulatory systems to limit greenhouse gases and mitigate climate change?

- Setting stronger emission reduction targets.
- Ceasing financial support for the fossil fuel industry and investing more in renewables industry.
- Redesigning the carbon market. eg. Introduce stronger safeguard mechanism requirements to enforce progressively greater annual emissions reductions; emissions to be reduced or paid for in full, rather than only above a baseline (Bowyer, *Renew Economy*, March 2022).
- Including a mechanism in the *EPBC Act* to assess the **cumulative climate impact** of any project or proposal.

Do the major party platforms address these issues?

ALP – speaks of “restoring integrity and independence to the environment and climate change portfolios and relevant science agencies”, “accepts the science of climate change” and “will take strong action to reduce the impact of climate change on Australia’s environment”. Climate change is listed as a threat to Australian security.

Liberal Party – no clear reference to climate change or carbon abatement.

Greens – New coal, oil and gas infrastructure to be banned; “mining, burning and export of thermal coal phased out by 2030”; “stop subsidies to big coal, oil and gas corporation”; more support for renewable energy industry.

²² *The EPBC Act’s* protections are ‘triggered’ when one of nine matters of environmental significance is involved, such as threatened species, nuclear actions, and world or national heritage places.

Some suggested questions for candidates arising from these case studies:

If you are in government would you work with your parliamentary colleagues to:

1. Implement the recommendations of the *Samuel* review with binding and enforceable National Environmental Standards as the centrepiece?
2. Commit to establishing a truly independent federal environment regulator?
3. Include assessments of cumulative climate change impacts and incremental biodiversity loss in environmental law?
4. Ensure the environment portfolio is a senior cabinet position?
5. Incorporate Indigenous knowledge, innovations and practices into environmental management?
6. Set stronger emission reduction targets?
7. Cease financial support for the fossil fuel industry?
8. Introduce an efficient, effective emissions reduction system that prioritises long term environmental integrity over short term cost impact?