



BUSHFIRES, BUREAUCRACY AND BARRIERS

How poorly implemented critical habitat frameworks risk failing the survival and recovery of threatened species and ecological communities
March 2024

About Environmental Defenders Office (EDO)

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law.

Environmental Defenders Office

Email: info@edo.org.au

Phone: (02) 9262 6989 (Sydney office), (07) 3211 4466 (Brisbane office) or (toll-free) 1800 626 239.

www.edo.org.au

About WWF-Australia

WWF is one of the world's largest and most experienced independent conservation organisations, with more than 30 million supporters and a global network active in more than 100 countries. WWF's mission is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature, by conserving the world's biological diversity, ensuring that the use of renewable natural resources is sustainable, and promoting the reduction of pollution and wasteful consumption.

WWF-Australia is one of Australia's most trusted conservation organisations. For 45 years, WWF-Australia has worked to protect threatened species and habitats, meet the challenge of climate change, and build a world where people live in harmony with nature.

WWF-Australia National Office

Suite 3.01, Level 3, 45 Clarence Street
Sydney NSW 2000

Tel: +1800 032 551

enquiries@wwf.org.au

WWF® and World Wide Fund for Nature® trademarks and ©1986 Panda Symbol are owned by WWF-World Wide Fund For Nature (formerly World Wildlife Fund). All rights reserved.

For contact details and further information, please visit our website at **wwf.org.au**.

EDO and WWF acknowledge the assistance of experts Steve Douglas, Mark Lintermans, Tarmo Raadik and Nick Whiterod.

CONTENTS

EXECUTIVE SUMMARY

1. INTRODUCTION

2. BACKGROUND

- 2.1 The state of biodiversity in Australia
- 2.2 What is critical habitat?
- 2.3 Why is the protection of critical habitat important?
- 2.4 The (under)use of critical habitat in Australia

3. DEFENDING THE UNBURNT USING CRITICAL HABITAT

3.1 Overview

3.2 Case studies

Case study 1: New South Wales – *Biodiversity Conservation Act 2016*

Case study 2: New South Wales – *Fisheries Management Act 1994*

Case study 3: Queensland – *Nature Conservation Act 1992*

Case study 4: Victoria – *Flora and Fauna Guarantee Act 1988*

Case study 5: Federal – *Environment Protection and Biodiversity Conservation Act 1999*

4. KEY ISSUES

- 4.1 Identification of critical habitat is not mandatory
- 4.2 Critical habitat is not clearly defined
- 4.3. Procedural requirements and processes create barriers
- 4.4 Protections for critical habitat are limited
- 4.5 There is no consistent application of critical habitat provisions across Australian jurisdictions
- 4.6 Failure to incentivise protection of critical habitat on private land has contributed to underuse of the mechanisms

5. KEY PRINCIPLES FOR REFORM

APPENDICES

EXECUTIVE SUMMARY

The protection of unburnt habitat has become an urgent priority in the wake of Australia's 2019-2020 bushfires. Areas of remaining, unburnt land are a vital refuge for biodiversity, particularly threatened species. WWF-Australia identified six priority landscapes across Queensland, NSW and Victoria as requiring immediate protection. These areas will be key to securing the future of many threatened species and sustaining important ecosystem services while impacted landscapes recover.

Environmental Defenders Office (EDO), in collaboration with WWF-Australia, has sought to use existing legal mechanisms to protect these priority, unburnt areas. One legal mechanism considered was the identification and protection of critical habitat. We set out to identify and seek protection for areas of critical habitat using NSW, Queensland, Victorian and federal laws. We found that existing legal provisions were woefully underused and ineffective in delivering responsive, robust protection for habitat that will be critical to species survival.

In particular, we concluded that:

- Identification of critical habitat is not mandatory, and mechanisms for identifying and/or declaring critical habitat are rarely used;
- Critical habitat is not clearly defined;
- Procedural requirements and processes create barriers;
- Protections for critical habitat are limited;
- There is no consistent application of critical habitat provisions across Australian jurisdictions; and
- Failure to incentivise or resource protection of critical habitat on private land has contributed to underuse of the mechanisms.

Unless these key issues are addressed through urgent reform, important critical habitat provisions in Australian laws will fail to achieve the outcome intended – the essential identification and protection of critical habitat.

Following examination of these issues, and reflecting on our recent experience of seeking protection for areas of critical habitat, we have identified five key principles that must underpin reform of critical habitat provisions.

Key principles for reform

1. Clearly define critical habitat

- a) A clear, common definition of critical habitat should be adopted across all Australian jurisdictions, based on the best available science.
- b) The definition should be descriptive, drawing on key elements set out in the *Matters of National Environmental Significance – Significant impact guidelines 1.1*,¹ incorporating

¹ https://www.dcceew.gov.au/sites/default/files/documents/nes-guidelines_1.pdf

other key criteria (such as in clause 7.09 of the EPBC Regulation) and responding to current challenges, such as climate change.

2. Make critical habitat identification mandatory

- a) Critical habitat must be identified at the time a species or ecological community is listed or within a specified timeframe via a clear, mandatory statutory process triggered by listing (e.g. in a mandatory conservation planning document).
- b) Mapping can assist in identifying critical habitat, but critical habitat must also be described textually.
- c) Identification of what constitutes critical habitat must allow for newly identified areas of critical habitat to also be recognised (i.e. areas of critical habitat may be identified iteratively (e.g. in response to episodic events such as bushfires)).
- d) A process must be put in place to identify the critical habitat for all species already listed, within a clear timeframe.

3. Protect and manage critical habitat

- a) Critical habitat must be protected and managed, irrespective of land tenure.
- b) Protection could be achieved via two mechanisms:
 - i. Strategic planning processes should identify areas of critical habitat as ‘no-go’ areas that are off-limits to development.
 - ii. Where there are no legal mechanisms for identifying ‘no-go zones’ (e.g. a regional plan or spatial tool), provisions must mandate refusal of activities that will negatively impact critical habitat.
- c) Protections must be equivalent across all land tenures.

4. Support landholders

- a) Areas of critical habitat must be prioritised for conservation and recovery, including funding for landholders where relevant (e.g. in government-led conservation programs).

5. Ensure consistency between jurisdictions

- a) There should be alignment between federal and state and territory laws relating to critical habitat.

1. INTRODUCTION

This report looks at one specific legal mechanism for biodiversity conservation – critical habitat provisions in Australian law. It examines why these legal provisions are not working and what is needed to ensure that the protection and management of critical habitat becomes a key element of biodiversity conservation efforts in Australia.

We reflect on our own efforts to seek protection for priority unburnt areas using existing critical habitat provisions following the devastating 2019-2020 bushfires.

Box 1: Defending the Unburnt

In the wake of Australia’s 2019-2020 bushfires, the protection of unburnt habitat has become an urgent priority.

Areas of remaining, unburnt land are now a vital refuge for biodiversity, particularly threatened species. WWF-Australia has identified six priority landscapes in Queensland, NSW and Victoria as requiring immediate protection.² Unburnt and lightly burnt³ areas will be key to securing the future of many threatened species and ensuring important ecosystem services are sustained while impacted landscapes recover. In considering the impacts of the 2019-2020 bushfires on wildlife, it has been suggested that the time required for recovery of threatened and fire-sensitive species ranges from 10–120 years, depending on the severity of the fire and extent of impacts on individual populations.⁴ Recovery will require long-term or permanent protection of unburnt fire refuges in large patches linked by corridors.⁵

In collaboration with WWF-Australia, EDO is working to ensure that our laws are used to adequately protect these priority areas from further impacts, including inappropriate development, land clearing and logging.⁶

² WWF Australia, *Defending the Unburnt*, 2021, available at <https://www.wwf.org.au/what-we-do/2-billion-trees/protecting-the-unburnt-six#gs.ud2uij>

³ The importance of protecting lightly burnt and some moderately burnt areas from forestry operations post-bushfires was highlighted in the following report: Smith, Dr A., *Review of CFIQA Mitigation Conditions for Timber Harvesting in Burnt Landscapes – A Report to the NSW Environment Protection Authority*, 2020, available at <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/forestry/review-of-cifoa-mitigation-conditions-for-timber-harvesting-in-burnt-landscapes.pdf?la=en&hash=6360E080DB80E7BEF935A1A4A6BDDAB46BBFD0A7>

⁴ Smith, Dr A., *Review of CFIQA Mitigation Conditions for Timber Harvesting in Burnt Landscapes – A Report to the NSW Environment Protection Authority*, 2020, p.14, available at <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/forestry/review-of-cifoa-mitigation-conditions-for-timber-harvesting-in-burnt-landscapes.pdf?la=en&hash=6360E080DB80E7BEF935A1A4A6BDDAB46BBFD0A7>

⁵ Smith, Dr A., *Review of CFIQA Mitigation Conditions for Timber Harvesting in Burnt Landscapes – A Report to the NSW Environment Protection Authority*, 2020, p.6, available at <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/forestry/review-of-cifoa-mitigation-conditions-for-timber-harvesting-in-burnt-landscapes.pdf?la=en&hash=6360E080DB80E7BEF935A1A4A6BDDAB46BBFD0A7>

⁶ See <https://www.edo.org.au/unburntsix-mainpage/> and <https://www.wwf.org.au/defending-the-unburnt-six/>

2. BACKGROUND

2.1 The state of biodiversity in Australia

Australia is facing an extinction crisis.

The *Australia state of the environment 2021: biodiversity report* (SoE 2021) states:

- *“In June 2021, 533 animal and 1,385 plant species were listed under the (Environment Protection and Biodiversity Conservation Act 1999) EPBC Act ... The list includes 105 species that are Extinct or Extinct in the Wild”;*
- *“The number of threatened species listed under the EPBC Act has risen for almost all taxa over the past 5 years”;*
- *“We can expect further extinctions of Australian species over the next two decades unless current management effort and investment are substantially increased. Conservation actions are linked to reduced rates of decline for threatened Australian plants, mammals and birds, but they have not been sufficient to reverse declines overall”;* and
- *“Many of the pressures on biodiversity in Australia have increased in intensity in the past 5 years. Habitat loss and degradation and invasive species result in persistent and sometimes irreversible impacts on biodiversity across almost all areas of Australia. Many Australian ecosystems are experiencing cumulative and compounding pressures, leading to ecosystem collapse characterised by loss of key defining features and functions”.*⁷

Examples:

- *587 animals listed as threatened under federal environmental laws*⁸
- *1,416 plant species listed as threatened under federal environmental laws*⁹
- *396 of these plants and animals are ‘critically endangered’ – meaning they are at extremely high risk of extinction in the wild*
- *Over 100 endangered ecological communities listed under federal environmental laws*
- *104 species are Extinct or Extinct in the Wild*¹⁰

(Note – The total number of threatened species and endangered ecological communities will be greater than this, as some species and ecological communities are listed under state laws only at this stage.)

⁷ Murphy, H. and van Leeuwen, S., *Australia state of the environment 2021: biodiversity*, independent report to the Australian Government Minister for the Environment, Commonwealth of Australia, Canberra, see specifically pp.7, 8 and 18, available at <https://soe.dcccew.gov.au/sites/default/files/2022-07/soe2021-biodiversity.pdf>

⁸ As at February 2024, and not including those listed as Extinct.

⁹ As at February 2024, and not including those listed as Extinct.

¹⁰ As at February 2024.

There are a range of mechanisms aimed at seeking to protect and conserve biodiversity across Australia. These include biodiversity conservation laws, threatened species listing processes, private land conservation initiatives, species recovery plans and government-led conservation programs. Yet, with ongoing biodiversity decline, as reported by *Australia state of the environment 2021: biodiversity*, efforts to reverse biodiversity decline are not working.

Positively, Australia has made some key commitments in response to the extinction crisis, notably:

- **Kunming-Montreal Global Biodiversity Framework (GBF):** This was adopted during the 15th Biodiversity Conference of the Parties (COP 15) in December 2022.¹¹ The GBF sets out four goals (Section G) including that “*the integrity, connectivity and resilience of all ecosystems are maintained, enhanced, or restored, substantially increasing the area of natural ecosystems by 2050*” and “*human induced extinction of known threatened species is halted and, by 2050, extinction rate and risk of all species are reduced tenfold and the abundance of native wild species is increased to healthy and resilient levels*” (Goal A). It also sets out 23 targets (Section H), including conserving 30 per cent of terrestrial and inland water areas, and of marine and coastal areas, by 2030 (Target 3).
- **Glasgow Leaders’ Declaration on Forests and Land Use:** During the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow from 31 October–12 November 2021 over 100 countries, including Australia, pledged to halt and reverse deforestation and land degradation by 2030 through the Glasgow Leaders’ Declaration on Forests and Land Use (Glasgow Declaration).¹² The declaration includes six key commitments, including to conserve forests and accelerate their restoration; and to reverse forest loss and degradation while ensuring robust policies and systems are in place to accelerate the transition to an economy that is resilient and advances forest, sustainable land use, biodiversity and climate goals.
- **Leaders’ Pledge for Nature:** In September 2022, Australian Prime Minister Anthony Albanese announced that Australia would sign the Leaders’ Pledge for Nature to reverse biodiversity loss by 2030.¹³ Under the pledge, political leaders have committed to undertake urgent action, as part of the UN Decade of Action to achieve Sustainable Development, to put nature and biodiversity on a path to recovery by 2030. This includes commitments to “*address the direct and indirect drivers of biodiversity loss and halt human induced extinction of species, to ensure species populations recover, and to significantly increase the protection of the planet’s land and oceans through representative, well-connected and effectively managed systems of Protected Areas and Other Effective Area-Based Conservation Measures, and to restore a significant share of degraded ecosystems*”.¹⁴

¹¹ <https://www.cbd.int/gbf/>

¹² See <https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>

¹³ See The Guardian, *Australia signs global nature pledge committing to reverse biodiversity loss by 2030*, 21 September 2022, available at <https://www.theguardian.com/australia-news/2022/sep/21/australia-signs-global-nature-pledge-committing-to-reverse-biodiversity-loss-by-2030>

¹⁴ See <https://www.leaderspledgefornature.org/>. ‘Other Effective Area-Based Conservation Measures’ (OECMs) are areas that achieve long-term and effective in-situ conservation of biodiversity, outside of protected areas, and can include areas on private land, such as areas protected under a formal, long-term or in-perpetuity conservation agreement. The

- **Threatened Species Action Plan: Towards Zero Extinctions:** In October 2022, the Federal Government released its *Threatened Species Action Plan: Towards Zero Extinctions*.¹⁵ It includes objectives to put all priority species on track for an improved trajectory (Objective 1), prevent new extinctions of plants and animals (Objective 3), and ensure at least 30 per cent of Australia’s landmass is protected and conserved (Objective 4).

To meet these new, more ambitious commitments, governments must strengthen their environmental laws, policies and programs. Legislative objects should be brought in line with national and international policy ambitions. This should include objects to enhance biodiversity and ecosystem functions and services, ecological integrity and connectivity; halt extinctions and recover species. The protection of critical habitat, including strengthening and making better use of critical habitat mechanisms, would be a key part of meeting these objectives.

2.2 What is critical habitat?

While legal and scientific definitions (and terminology) may differ slightly, the term ‘critical habitat’ is generally understood to mean habitat that is critical for the survival and recovery of a species or ecological community. For the purposes of this report, we use the term critical habitat in this broad sense, irrespective of a jurisdiction’s exact definition or terminology. The term ‘species’ (unless used in a specific context) refers to listed threatened and listed migratory species.

The term ‘critical habitat’ is generally understood to mean habitat that is critical for the survival and recovery of a species or ecological community.

The concept was first introduced in the US *Endangered Species Act* (1973),¹⁶ which defined critical habitat as:

“(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

*(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species”.*¹⁷

In summary, the US *Endangered Species Act* places non-discretionary duties on the Secretary and federal agencies, such as requiring that critical habitat is designated at the time a species is listed, and consulting with the Fish and Wildlife Service in relation to actions that may destroy or adversely modify critical habitat. The public can bring court proceedings for failure to fulfil those duties.

The concept of critical habitat has also been adopted in Canada and Australia, although with slightly differing definitions and legal requirements.

International Union for the Conservation of Nature (IUCN) has published guidance on defining and identifying OECMs, see <https://portals.iucn.org/library/sites/library/files/documents/PATRS-003-En.pdf>

¹⁵ Department of Climate Change, Energy, the Environment and Water, *Threatened Species Action Plan: Towards Zero Extinctions*, 2022, <https://www.dcceew.gov.au/environment/biodiversity/threatened/publications/action-plan-2022-2032>

¹⁶ <https://www.fws.gov/law/endangered-species-act>

¹⁷ US *Endangered Species Act* (1973), s 3(5)(A).

In Canada, the *Species at Risk Act* (S.C. 2002, c. 29) (SARA) establishes a framework for the protection of critical habitat.¹⁸ In SARA, critical habitat refers to “*the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species (habitat essential)*”.¹⁹ In summary, SARA requires that a species’ recovery strategy or action plan identifies critical habitat, to the extent possible.²⁰ SARA prevents the destruction of critical habitat in some instances and may impose restrictions on development and construction, primarily on federal land.²¹ The Government of Canada is obliged to track and report on actions taken and measures put in place to protect the identified critical habitat of species at risk.²²

In Australia, all jurisdictions, except South Australia and the Northern Territory, have introduced critical habitat provisions into law – see Table 1.

Table 1: Outline of Australian legislation with critical habitat provisions

Jurisdiction	Key legislation	Key terminology
Commonwealth	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (EPBC Act)	Habitat critical to the survival
		Critical habitat
Victoria	<i>Flora and Fauna Guarantee Act 1988</i> (FFG Act)	Critical habitat
New South Wales	<i>Biodiversity Conservation Act 2016</i> (NSW) (BC Act (NSW)). Note: The NSW BC Act applies to terrestrial species only, and not fish and marine vegetation.	Areas of Outstanding Biodiversity Value (AOBV)
	<i>Fisheries Management Act 1994</i> (NSW) (FM Act) Note: The FM Act applies to fish – defined in s 5.	Critical habitat
Queensland	<i>Nature Conservation Act 1992</i> (NC Act (Qld))	Critical habitat
Australian Capital Territory	<i>Nature Conservation Act 2014</i> (NC Act (ACT))	Critical habitat
Western Australia	<i>Biodiversity Conservation Act 2016</i> (BC Act (WA))	Critical habitat
Tasmania	<i>Threatened Species Protection Act 1995</i> (TSP Act)	Critical habitat
South Australia	South Australia does not have specific critical habitat provisions, but the significance of native vegetation as a habitat for wildlife is one of the principles that is considered when exercising certain functions under the <i>Native Vegetation Act 1991</i> (SA). The development of a new biodiversity act in South Australia (underway) provides an opportunity to include specific critical habitat provisions in South Australian laws.	Not applicable
Northern Territory	The Northern Territory does not have legal provisions for critical habitat.	Not applicable

¹⁸ <https://laws-lois.justice.gc.ca/eng/acts/S-15.3/FullText.html>

¹⁹ *Species at Risk Act* (S.C. 2002, c. 29), s 2(1).

²⁰ *Species at Risk Act* (S.C. 2002, c. 29), s 41, s 49.

²¹ *Species at Risk Act* (S.C. 2002, c. 29), ss 56–61.

²² *Species at Risk Act* (S.C. 2002, c. 29), s 63.

The way critical habitat is defined varies across Australian jurisdictions. For example:

- Queensland provides a clear, standalone definition of critical habitat, which is similar to that in the US *Endangered Species Act*. Section 13 of the NC Act (Qld) provides:
 - Critical habitat is habitat that is essential for the conservation of a viable population of protected wildlife or community of native wildlife, whether or not special management considerations and protection are required.
 - A critical habitat may include an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife.
- The NC Act (ACT) simply defines critical habitat as “*habitat that is critical to the survival of the species or ecological community*”. We are not aware of any additional guidance or criteria for applying that definition.
- In other jurisdictions, critical habitat is ‘defined’ with reference to its declaration or identification as critical habitat. In most cases, specified criteria must be considered in declaring or identifying habitat as critical. For example:
 - Under the Commonwealth EPBC Act:
 - The definition of critical habitat reads: “*critical habitat for a listed threatened species or a listed threatened ecological community has the meaning given by subsection 207A(4)*”. Subsection 207A(4)(1) provides “*habitat listed in the register in relation to a species or ecological community is critical habitat for the species or ecological community*”. Clause 7.09 of the *Environment Protection and Biodiversity Conservation Regulation 2000* (Cth) (EPBC Regulation) sets out matters to be taken into account by the Minister in identifying habitat under subsection 207A(1).
 - Separately, habitat ‘critical to the survival’ of species must be identified in a recovery plan.²³ The term ‘critical to the survival’ is undefined in the EPBC Act, however the same criteria set out in clause 7.09 of the EPBC Regulation should be considered in identifying habitat that is critical to the survival of the species or community concerned.²⁴
 - Additionally, the *Matters of National Environmental Significance – Significant impact guidelines 1.1*²⁵ (Significant Impact Guidelines) provide that an action is likely to have a significant impact on a critically endangered or endangered species if there is a real chance or possibility that it will adversely affect habitat critical to the survival of a species. It provides further guidance on what is habitat critical to the survival of a species or ecological community in the context of determining whether an action will have a significant impact on that habitat:
 - ‘Habitat critical to the survival of a species or ecological community’ refers to areas that are necessary:
 - for activities such as foraging, breeding, roosting, or dispersal;

²³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 270(2)(d).

²⁴ *Environment Protection and Biodiversity Conservation Regulation 2000* (Cth), cl 7.11(3).

²⁵ https://www.dcceew.gov.au/sites/default/files/documents/nes-guidelines_1.pdf

- for the long-term maintenance of the species or ecological community (including the maintenance of species essential to the survival of the species or ecological community, such as pollinators);
- to maintain genetic diversity and long-term evolutionary development; or
- for the reintroduction of populations or recovery of the species or ecological community.

Such habitat may be, but is not limited to: habitat identified in a recovery plan for the species or ecological community as habitat critical for that species or ecological community; and/or habitat listed on the Register of Critical Habitat maintained by the Minister under the EPBC Act.

The Federal Court has found the definition of ‘habitat critical to the survival of a species or ecological community’ in the Significant Impact Guidelines to be of relevance for understanding the term ‘critical habitat’.²⁶

- Under the Victorian FFG Act, the definition of critical habitat is “*an area of Victoria in respect of which a critical habitat determination is made*”. Section 20F of the FFG sets out the criteria that must be considered by the Secretary in making a determination.
- Under the Tasmanian TSP Act, critical habitat is defined as “*an area of land defined on a map under section 23 which the Secretary determines as a critical habitat of a listed taxon of flora or fauna*”.²⁷ In order to make a declaration, the Secretary must be satisfied, after consultation with the Scientific Advisory Committee (SAC), that the whole or any part of the habitat of any listed taxon of native flora or fauna is critical to the survival of that taxon.²⁸
- Under the BC Act (WA), the definition of critical habitat is “*habitat that is listed as critical habitat under section 54(1)*”.²⁹ Section 55 of the BC Act (WA) provides that habitat is eligible for listing as critical habitat if:
 - it is critical to the survival of a threatened species or a threatened ecological community; and
 - its listing is otherwise in accordance with ministerial guidelines.
- NSW provisions differ slightly again:
 - For fish species under the FM Act, critical habitat is defined as “*habitat declared to be critical habitat under Division 3*”.³⁰ Section 220P in Division 3 provides that “*the whole or any part of the habitat of an endangered species, population or ecological community or critically endangered species or ecological community that is critical to the survival of the species, population or ecological community is eligible to be declared to be the critical habitat*”. There is no additional criteria guiding the identification of critical habitat, however the Minister must consult with the Fisheries Scientific Committee about the identification of any such critical habitat (s 220Q(2), FM Act). Additionally,

²⁶ *Friends of Leadbeater’s Possum Inc v VicForests (No 4)* [2020] FCA 704 [590] – [600].

²⁷ *Threatened Species Protection Act 1995* (Tas), s 3.

²⁸ *Threatened Species Protection Act 1995* (Tas), s 23(1).

²⁹ *Biodiversity Conservation Act 2016* (WA), s 5.

³⁰ *Fisheries Management Act 1994* (NSW), s 220B(1).

the Minister must consider other criteria before deciding whether an area should be declared critical habitat, per s 220S of the FM Act.

- For terrestrial species under the BC Act, critical habitat has been replaced with the concept of an Area of Outstanding Biodiversity Value. The term 'declared area of outstanding biodiversity value' means "*an area declared under Part 3*". Criteria to be considered in making a declaration are set out in section 3.2 of the BC Act and clause 3.1 of the *Biodiversity Conservation Regulation 2017* (BC Regulation, NSW).

The definition of critical habitat is incredibly important as it provides clarity on what must legally be protected. Circular definitions that refer to a register or plan are unhelpful, as is the failure to adequately define key terms (e.g. 'important populations' and 'recovery'). Along with a clear definition, mechanisms to quickly and accurately establish what is declared or identified critical habitat (e.g. a register, maps or detailed description) are also important.

More detailed information, including key processes and criteria for identifying and declaring critical habitat in each Australian jurisdiction, is set out in Appendix 1.

2.3 Why is the protection of critical habitat important?

Loss of habitat and habitat fragmentation and degradation are among the primary drivers of biodiversity decline.³¹ Protecting, restoring and managing habitat is essential for abating the biodiversity crisis.

However, not all habitat is equal. Critical habitat, by definition, refers to land that is critical for the survival and recovery of a species or ecological community. If these areas are degraded or lost, then species or ecological communities are likely to go extinct or be rendered unable to recover.

If the Australian Government wants to achieve its commitment to no new extinctions,³² and ensure “the abundance of native wild species is increased to healthy and resilient levels”,³³ then properly identifying, protecting and managing critical habitat is key.

2.4 The (under)use of critical habitat in Australia

As noted above, most Australian jurisdictions have introduced critical habitat provisions into law. While this suggests an intention to protect the habitat of species at risk of extinction, the effective implementation and use of the provisions has been problematic. The provisions are rarely used, and protections are limited. For example:

- Only five areas of critical habitat have been listed on the Register of Critical Habitat under the EPBC Act since its commencement in 2000, all prior to 2005.³⁴
- Only four areas are listed as an Area of Outstanding Biodiversity Value (AOBV) in NSW. These areas were originally listed as critical habitat under the now repealed *Threatened Species Conservation Act 1995*. No new areas have been added under new AOBV provisions introduced in 2017.³⁵ One area of critical habitat (for the grey nurse shark (*Carcharias taurus*)) has been declared under the FM Act in NSW.
- Historically, there has been only one critical habitat determination made under the FFG Act in Victoria, in 1996, which was subsequently withdrawn (see Case study 4 below). Recent amendments to the FFG Act included revisions to the critical habitat provisions that expand the concept of critical habitat, provide an inclusive list of factors that may contribute to an area being critical habitat and create a greater role for the Scientific

³¹ See, for example, Pimm, S. and Raven, P., *Extinction by numbers*, Nature 403, 2000, pp.843–845, <https://doi.org/10.1038/35002708>; Keil, P., Storch, D. and Jetz, W., On the decline of biodiversity due to area loss, *Nat Commun* 6, 2015, p.8837. <https://doi.org/10.1038/ncomms9837>; Kearney, S., Cawardine, J., Reside, A., Fisher, D., Maron, M., Doherty, T., Legge, S., Silcock, J., Woinarski, J., Garnett, S., Wintle, B., and Watson, J., The threats to Australia’s imperilled species and implications for a national conservation response. *Pacific Conservation Biology*, 2018, p.25. 10.1071/PC18024, <https://doi.org/10.1016/j.biocon.2023.110201>

³² Key objectives of the Australian Government’s 2022-2032 *Threatened Species Action Plan – Towards Zero Extinctions*, include:

- the risk of extinction is reduced for all priority species (Objective 1); and
- new extinctions of plants and animals are prevented (Objective 3).

³³ *Kunming-Montreal Global Biodiversity Framework*, Goal A, available at <https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>

³⁴ <https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl>

³⁵ Part 3 of the *Biodiversity Conservation Act 2016* (NSW) establishes a process for the Minister to declare AOBVs. It replaces former critical habitat provisions. See further <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value>

Advisory Committee (SAC), however no areas have been declared under these expanded provisions.³⁶

- To the best of our knowledge, no areas have been identified as critical habitat or an area of major interest under the NC Act in Queensland or as critical habitat under the BC Act in Western Australia.³⁷

Even once declared or listed on a register, critical habitat protection is not always absolute. In some instances, decision-maker discretion may permit activities that impact critical habitat. For example:

- In NSW, an AOBV is not automatically off-limits to development. In the case of Part 4 development, AOBVs are identified on the Biodiversity Values Map,³⁸ and development in an AOBV is deemed “*likely to significantly affect threatened species*”.³⁹ This will trigger the Biodiversity Offsets Scheme and impacts of the proposal must be assessed using the Biodiversity Assessment Method. The decision-maker must consider the outcomes of that assessment in determining whether to grant approval.
- In Queensland, land identified as critical habitat is not automatically off-limits to development. Instead, a regulation or conservation plan may include provisions for the use or development of land, and activities, in an area identified as, or including, a critical habitat or an area of major interest.⁴⁰

The call for more effective use of critical habitat provisions is not new. For years scientists and conservation advocates have been urging governments to use existing provisions to protect critical habitat and save species from likely extinction. For example:

- In the past, Humane Society International (HSI) – Australia has provided the Commonwealth with the data to allow it to list critical habitats for well over 60 species on the Register of Critical Habitat but no additions were made.⁴¹ HSI Australia further argued that even if EPBC protections for critical habitat were primarily limited to Commonwealth land, the register would play a key role as a central repository for all identified critical habitat.⁴²
- In 2018, a report co-authored by the Australian Conservation Foundation, WWF-Australia, the Wilderness Society and The University of Queensland examined the failure of national environmental laws to protect critical habitat and made recommendations for reform.⁴³

³⁶ See Victoria Department of Environment, Land, Water and Planning, *Critical habitats and HCO factsheet*, available at https://www.environment.vic.gov.au/_data/assets/pdf_file/0032/466682/Critical-habitat-and-HCO-factsheet.pdf

³⁷ We have not analysed how many action plans in the Australian Capital Territory identify critical habitat.

³⁸ *Biodiversity Conservation Regulation 2017* (NSW), cl 7.3.

³⁹ *Biodiversity Conservation Act 2016* (NSW), s 7.2.

⁴⁰ *Nature Conservation Act 1992 (Qld)* s 120H and s 175(2)(j).

⁴¹ Beynon, N., Kennedy, M., and Graham, A., (Humane Society International), *Grumpy Old Greenies – lament waiting lists, wasted opportunities and wayward pork barrelling in Australia’s biodiversity programs*, 2005, cited in Australian Conservation Foundation, *Australia’s Extinction Crisis Protecting critical habitat*, 2018, available at https://www.acf.org.au/new_research_reveals_australia_s_critical_habitat_laws_are_broken

⁴² Beynon, N., personal communication, 19 October, 2023.

⁴³ Australian Conservation Foundation, *Australia’s Extinction Crisis: Protecting critical habitat*, 2018, available at https://www.acf.org.au/new_research_reveals_australia_s_critical_habitat_laws_are_broken

- In 2021, following reforms to the Victorian FFG Act, Environmental Justice Australia put forward a case for using the reformed laws and policy to protect critical habitat for Victoria's threatened species.⁴⁴
- Scientists continue to advocate for the identification and protection of critical habitat as a key conservation tool in Australia.⁴⁵

The idea of using critical habitat mechanisms to protect at-risk species came to the forefront again following the 2019-2020 bushfire season. The case was made for the urgent use and reform of critical habitat listing in Australian legislation.⁴⁶

EDO and WWF-Australia's work has continued to explore opportunities to use existing critical habitat provisions to protect priority unburnt areas that are critical to the survival of species in the wake of the bushfires. Case studies from our work are provided below.

⁴⁴ Environmental Justice Australia, *Using law and policy to protect the critical habitat of Victoria's threatened species*, 2021, available at <https://envirojustice.org.au/blog/publications/critical-habitat-of-victoria/>

⁴⁵ See, for example, Ward, M., Simmonds, J., Reside, A., Watson, J., Rhodes, J., Possingham, H., Trezise, J., Fletcher, R., File, L., and Taylor, M., Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia, *Conservation Science and Practice*, 2019, 1. 10.1111/csp2.117.

⁴⁶ Fitzsimons, J., Urgent need to use and reform critical habitat listing in Australian legislation in response to the extensive 2019-2020 bushfires, *Environmental and Planning Law Journal*, 2020, 37, pp.143-152.

3. DEFENDING THE UNBURNT USING CRITICAL HABITAT

3.1 Overview

Following Australia's 2019-2020 bushfires, the protection of crucial unburnt habitat emerged as a priority for securing the future of many threatened species, sustaining important ecosystem services, and helping impacted ecosystems and landscapes to recover.

To secure these crucial areas, EDO, working in partnership with WWF-Australia, sought to utilise existing legal mechanisms to enhance protection for species and their habitats in priority landscapes – see Box 1.

One of the legal mechanisms considered was the identification and declaration of critical habitat – being areas critical to the survival of, in this case, bushfire-impacted species.

Our science and legal experts analysed species data and legislative criteria and processes with the intention of identifying areas eligible for protection under critical habitat mechanisms and then seeking to have them protected. However, 18 months since the project began, we are no closer to having secured protection for critical habitat. While our efforts continue, key obstacles have prevented these legal mechanisms from doing their intended job. With ongoing opportunities for reform, including a Federal Government commitment to overhaul national environmental laws, protecting critical habitat remains an urgent priority. This report aims to reflect on efforts to date and to push for reform while we work towards achieving increased protection for critical habitat, particularly in crucial unburnt areas.

3.2 Case studies

Case study 1: New South Wales – *Biodiversity Conservation Act 2016*

Overview

Historically, critical habitat provisions for terrestrial species were contained in the now repealed *Threatened Species Conservation Act 1995* (TS Act). In 2017, the *Biodiversity Conservation Act 2016* (BC Act) introduced new provisions relating to Areas of Outstanding Biodiversity Value (AOBVs). These replaced the former critical habitat provisions. Four areas declared as critical habitat under the TS Act became AOBVs under transitional provisions.⁴⁷ No AOBVs have been declared in NSW since the BC Act commenced in 2017. Appendix 2 provides an outline of the relevant provisions of the BC Act.

Using the BC Act to Defend the Unburnt

WWF and EDO have identified a number of bushfire-impacted species whose habitat may be eligible for listing as an AOBV under the relevant provisions of the BC Act. These include various

⁴⁷ These four habitats are habitats for the Gould's petrel, little penguin population in Sydney's North Harbour, Mitchell's rainforest snail in Stotts Island Nature Reserve, and the Wollemi pine. See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value/area-of-outstanding-biodiversity-value-register>

plant species, such as several callistemon species in the NSW Megalong Valley, and the Mongarlowe mallee (*Eucalyptus recurva*) in the NSW Southern Tablelands.

While NSW is the only jurisdiction that has a clear process by which third parties can nominate an area for consideration as an AOBV, making a nomination is challenging. For example, it requires applicants to:

- Consider the relevant legislative criteria and provide justification for the proposed area being declared an AOBV.

This may require scientific input from relevant experts, which can be costly and time consuming. Not all third parties can access scientific support.

- Demonstrate landholder support.

This presented a key barrier to WWF and EDO pursuing nominations on private land as we did not necessarily have existing relationships with landholders in areas identified most suitable for AOBV nomination.

Preliminary discussions with the Department of Planning and Environment advised that existing landholders were likely already engaged in existing conservation work (e.g. under the NSW Saving our Species (SoS) program). It was unclear how a third party might approach landholders or how an AOBV nomination might impact existing relationships and programs. It was also unclear why the onus to negotiate with landholders regarding AOBV nominations rested with third parties like WWF and EDO rather than department staff who already had existing relationships, particularly as recovery strategies for some species included actions for the department to negotiate land management agreement/s.⁴⁸ Notably, in NSW, landholders can access priority funding for areas declared an AOBV.

While we recognise that landholder support for the nomination of AOBVs would make the process easier, this is not a legal requirement. Putting the onus on the nominee to demonstrate landholder support as part of the application process places an undue obligation on the nominator. It may create an obstacle for nominations, particularly when nominators have no existing relationship with landholders or appropriate avenues to commence discussions. The department has oversight of relationships with landholders on other conservation land management matters, including through the SoS program, and the Environment Agency Head engages with landholders later in the process.⁴⁹

The requirement to demonstrate landholder support introduces an additional, non-legislative, non-scientific criteria for nominations and may be a key factor in preventing an AOBV declaration when all other legislative criteria is met. We do not believe this was the legislative intention.

⁴⁸ For example, the recovery strategy for *Callistemon purpurascens* in NSW includes as an action item: “Negotiate with landholders to conserve and protect *Callistemon purpurascens*. Investigate land protection in perpetuity”. <https://www.environment.nsw.gov.au/savingourspeciesapp/project.aspx?ProfileID=20319>

⁴⁹ For example, section 3.3 of the BC Act (NSW) provides that it is the role of the Environment Agency Head to notify landholders whose land is within the proposed area and give landholders a reasonable opportunity to make submissions.

Understandably, if an AOBV is declared on private land, support for the landholder will be essential for future management and protection. We have consistently advocated that declarations should trigger an assessment of private stewardship funding needs to support the affected landholders in managing the areas for conservation.

WWF and EDO are continuing to consider options for using AOBV mechanisms to protect important critical habitat of bushfire-impacted species.

Case study 2: New South Wales – Fisheries Management Act 1994

Overview

Part 7A, Division 3 of the *Fisheries Management Act 1994* (NSW) (FM Act) establishes a process for declaring critical habitat of endangered species, populations and ecological communities, and critically endangered species and ecological communities. The FM Act applies to fish, defined as “marine, estuarine or freshwater fish or other aquatic animal life at any stage of their life history (whether alive or dead)”, and includes oysters and other aquatic molluscs, crustaceans, echinoderms, and beach worms and other aquatic polychaetes.

Currently, only specified habitat of the grey nurse shark is listed on the Register of Critical Habitat under the FM Act.

Using the *Fisheries Management Act* to Defend the Unburnt

WWF and EDO identified a number of bushfire-impacted species whose habitat may be eligible for listing as critical habitat under the FM Act, including the Fitzroy Falls spiny crayfish (*Euastacus dharawalus*).

Box 2: Fitzroy Falls spiny crayfish⁵⁰

The Fitzroy Falls spiny crayfish (*Euastacus dharawalus*) is facing imminent extinction. It is currently listed as critically endangered under the FM Act (NSW) and EPBC Act.

Although potentially once more widespread, the Fitzroy Falls spiny crayfish now occurs in a strictly limited area. It is found only in part of the Wildes Meadow Creek catchment, part of the Shoalhaven River catchment on the South Coast of NSW, above Fitzroy Falls. Its habitat is restricted to approximately 12km of waterway, of which less than 1km is high-quality habitat protected within the Morton National Park.

⁵⁰ Information sourced from:

- Threatened Species Scientific Committee, ‘Conservation Advice, *Euastacus dharawalus*, Fitzroy Falls spiny crayfish’, 2016 <<https://www.environment.gov.au/biodiversity/threatened/species/pubs/83143-conservation-advice-07122016.pdf>>
- NSW Department of Primary Industries, ‘Fitzroy Falls spiny crayfish’, <<https://www.dpi.nsw.gov.au/fishing/threatened-species/what-current/critically-endangered-species/fitzroy-falls-spiny-crayfish>>
- NSW Department of Primary Industries, ‘Fact Sheet – Fitzroy Falls Spiny Crayfish *Euastacus dharawalus*’ <https://www.dpi.nsw.gov.au/_data/assets/pdf_file/0006/635163/Fitzroy-falls-spiny-crayfish-euastacus-dharawalus.pdf>

The construction of Fitzroy Falls Reservoir, in 1974, inundated 25 per cent of the species' known habitat. It led to a split in the crayfish population, with one site previously present below the wall and four known sites above the wall.

Threats to the Fitzroy Falls spiny crayfish, include:

- Habitat degradation and fragmentation, and barriers to movement, from construction of the Fitzroy Falls Reservoir;
- Damage to, or removal of, riparian vegetation;
- Competition and predation from other species of crayfish, such as the common yabby (*Cherax destructor*), which has been introduced to Fitzroy Falls Reservoir from the Murray-Darling Basin;
- Predation by alien fish species and exotic terrestrial species that have been found to impact freshwater spiny crayfish, such as the European red fox and feral cats;
- Illegal fishing, including through misidentification; and
- Vulnerability to extreme weather events and altered river flows.

Protecting and appropriately managing the few remaining habitat sites and addressing other threats is key to the survival of this species.



Fitzroy Falls spiny crayfish in captive setting. (Photo: Rob McCormack)

The Fitzroy Falls spiny crayfish is commonly olive-brown on its head and back, and paler orangey-cream on its underside. It grows to at least 86mm occipital carapace length (OCL)⁵¹ and 300g in weight.

There is no process for third parties to nominate an area to be declared critical habitat, although it would be open to any person to write to the Minister requesting they exercise powers under the FM Act to make such a declaration, including consulting with the Fisheries Scientific Committee and on a preliminary identification of critical habitat.

⁵¹ Occipital carapace length (OCL) is a standard measurement unit for crayfish, which is the length from between the eyes to the end of the main body segment.

There is no process for third parties to nominate an area to be declared critical habitat, although it would be open to any person to write to the Minister requesting they exercise powers under the FM Act to make such a declaration, including consulting with the Fisheries Scientific Committee and on a preliminary identification of critical habitat.

Preliminary discussions with the NSW Department of Primary Industries suggest the government had no immediate plans to further use the critical habitat mechanisms in the FM Act, including as a post-bushfire conservation mechanism. WWF and EDO have sought to engage with the Minister for Agriculture, who has carriage of the FM Act, regarding opportunities to strengthen protections for threatened species, populations and ecological communities of freshwater and marine species, as part of a whole-of-government response to a related review of terrestrial biodiversity laws.⁵²

Case study 3: Queensland – Nature Conservation Act 1992

Overview

The *Nature Conservation Act 1992* (Qld) (NC Act) includes provisions for identifying and protecting both critical habitat and an area of major interest. These can be identified in either a regulation or conservation plan made under the NC Act. Additionally, the Minister may declare a nature refuge over critical habitat or an area of major interest; or make an interim conservation order for the conservation, protection or management of critical habitat or an area of major interest that is subject to a threatening process.

Appendix 4 provides an outline of the relevant provisions of the NC Act.

We are not aware of any areas that have been identified as critical habitat or an area of major interest under the NC Act.

Using the *Nature Conservation Act* to Defend the Unburnt

WWF and EDO have identified a number of bushfire-impacted species whose habitat may be eligible for declaration as critical habitat under the NC Act, including the Jagara hairy crayfish (*Euastacus jagara*) and Dalveen blue box (*Eucalyptus dalveenica*).

⁵² *Independent Review of the Biodiversity Conservation Act 2016 – Final Report*, August 2023, available at <https://www.parliament.nsw.gov.au/lc/taledpapers/Pages/taled-paper-details.aspx?pk=186428&houseCode=lc> The five-year statutory review of the BC Act considered the interaction between the BC Act and FM Act, as well as the *Marine Estate Management Act 2014* (MEM Act). The independent panel undertaking the review reported that:

“The management of marine ecosystems is impacted by multiple acts, including the Marine Estate Management Act 2014, Fisheries Management Act 1994 and BC Act. The Review Panel heard that the interaction of the acts creates some regulatory uncertainty for identifying and managing threats, particularly for marine mammals. The Review Panel notes that the responsibility for assessing the conservation status of species and ecological communities in NSW is split between two scientific entities – the TSSC established under the BC Act and the Scientific Committee under the Fisheries Management Act 1994. By bringing these experts together, a more comprehensive and holistic understanding of extinction risk could be achieved”.

Moreover, the independent panel noted that *“(a)s has been recognised in many global forums over the past few years, the natural environment is now so damaged that we must commit to ‘nature positive’ if we are to have any confidence that future generations will have the opportunity to be as well off as we are”*. This observation is equally applicable to the FM Act as it is to the BC Act, with the independent panel recommending *“legislative reform to align relevant Acts with a nature positive outcome”*. The independent panel also recognised the importance of aligning laws with and contributing to national and global frameworks that have come into effect over the past five years, particularly the Kunming-Montreal Global Biodiversity Framework.

There is no process for third parties to nominate an area for declaration, although it would be open to any person to write to the Minister and request they use existing powers under the NC Act to declare an area as critical habitat. Because the provisions have not been used before, there is no clear internal process or precedent for the Minister to rely on when considering such a request. The Minister would also need to consider that a landowner may be entitled to compensation from the state if land was declared critical habitat.⁵³

In response to inquiries by EDO and WWF regarding the use of relevant provisions in the NC Act, the Queensland Department of Environment, Science and Innovation (**DESI**) has advised that:

- Under its Threatened Species Program 2020-2040, planning for threatened species recovery includes the identification of areas that are important to a species' long-term persistence, along with associated actions that may be required to protect these areas;
- DESI has a policy of only entering into voluntary agreements with landholders to establish private protections (rather than compulsory declarations); and
- Through its 2022-2023 State Budget, the Queensland Government has committed \$262.5m over four years to expand and manage the public protected area estate, which has helped secure a range of critical habitat, including that used by the northern hairy-nosed wombat.

WWF and EDO are continuing to consider options for advocating for increased protection of critical habitat under Queensland laws. At this stage, it is unclear how reforms at the federal level may affect the future protection of critical habitat in Queensland.



Northern hairy nosed wombat. (Photo: © Karenfoleyphotography / Dreamstime.com)

⁵³ *Nature Conservation Act 1992 (Qld) s 137A.*

Case study 4: Victoria – Flora and Fauna Guarantee Act

Overview

The *Flora and Fauna Guarantee Act 1988* (Vic) (FFG Act) provides that the Secretary⁵⁴ may determine an area in Victoria is critical habitat.⁵⁵ Once an area has been determined to be critical habitat, the Minister may make a Habitat Conservation Order to stop, prevent or repair damage to the critical habitat, manage the critical habitat or ensure its conservation or protection.⁵⁶

Appendix 5 outlines the relevant provisions of the FFG Act.

We understand there has only been one or two critical habitat determinations made under the FFG Act, in 1996, which were subsequently withdrawn.⁵⁷ A stakeholder submission to the Inquiry into Ecosystem Decline in Victoria, noted:

*“In Victoria there has only ever been one declaration of Critical Habitat for an animal, and one for a plant – the latter was for the Small Golden Moths Orchid (Diuris aff. lanceolata), located on the Sloane Estate in Altona, then the only known site of occurrence of the species, almost 20 years ago. An area of approximately 1 hectare was declared as Critical Habitat, but with no protection. However, the Critical Habitat Determination was not Gazetted, as required by the FFG Act, and trucks were allowed to drive across the site. The Critical Habitat Determination (CHD) was subsequently lifted about a month later, with no accompanying evidence, and the withdrawal of the CHD was Gazetted”.*⁵⁸

Recent amendments to the FFG Act included revisions to critical habitat provisions that expand the concept of critical habitat, provide an inclusive list of factors that may contribute to an area being critical habitat and create a greater role for the Scientific Advisory Committee (SAC).⁵⁹ Despite these amendments, no critical habitat determinations have been made.

⁵⁴ See *Flora and Fauna Guarantee Act 1998* (Vic), section 3 – definitions. Secretary means the body corporate established by Part 2 of the *Conservation, Forests and Lands Act 1987*. Section 6 of the *Conservation, Forests and Lands Act 1987* (Vic) establishes the body corporate as “The person who is for the time being the Department Head (within the meaning of the Public Administration Act 2004) of the Department and the successors in office of that person are a body corporate under the name “Secretary to the Department of Environment, Land, Water and Planning”. It is noted that the Department of Environment, Land, Water and Planning was renamed the Department of Energy, Environment and Climate Action on 1 January 2023 <http://www.gazette.vic.gov.au/gazette/Gazettes2022/GG2022S673.pdf>

⁵⁵ *Flora and Fauna Guarantee Act 1998* (Vic) s 20.

⁵⁶ *Flora and Fauna Guarantee Act 1998* (Vic) s 26(3).

⁵⁷ See Fitzsimons, J., *Urgent need to use and reform critical habitat listing in Australian legislation in response to the extensive 2019-2020 bushfires*, 2020, 37 EPLJ, p. 143.

⁵⁸ Dr Colin Hocking, Submission No. 830, Inquiry into Ecosystem Decline in Victoria, 31 August 2020 (https://new.parliament.vic.gov.au/4a4ba5/contentassets/049d2a54d75e4378b65ee6dbbba61ac/submission-documents/s830---dr-colin-hocking_redacted.pdf).

⁵⁹ See Victoria Department of Environment, Land, Water and Planning, *Critical habitats and habitat conservation orders fact sheet*, available at https://www.environment.vic.gov.au/_data/assets/pdf_file/0032/466682/Critical-habitat-and-HCO-factsheet.pdf



Small Golden Moths Orchid (*Diuris aff. lanceolata*).
(Photo: © ala.org.au / French, Garry)

Using the *Flora and Fauna Guarantee Act to Defend the Unburnt*

WWF and EDO identified a number of bushfire-impacted species whose habitat may be eligible for determination as critical habitat under the FFG Act, including the East Gippsland galaxias (*Galaxias aequipinnis*).

There is no process for third parties to nominate an area for determination, although it would be open to any person to write to the Minister or the SAC seeking to have an area considered for critical habitat determination.

It is unclear whether the Victorian Government or the SAC intends to make use of revised critical habitat

provisions to increase protection for bushfire-impacted species. The Victorian Department of Energy, Environment and Climate Action has advised that, following amendments to the critical habitat provisions of the FFG Act, work is being undertaken to support the effective use of critical habitat determinations, including the preparation of statutory guidelines. WWF and EDO are continuing to consider options for advocating for increased protection of critical habitat under Victorian laws.

Case study 5: Federal – *Environment Protection and Biodiversity Conservation Act 1999*

Overview

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) includes provisions for the Federal Environment Minister to identify and list critical habitat on a Commonwealth Register of Critical Habitat. To date, habitat for only five species (and no ecological communities) has been listed on the register.⁶⁰

Separately, a recovery plan must identify habitat ‘critical to the survival of the species or ecological community’.⁶¹ Habitat identified in this way is not critical habitat for the purposes of the register and does not receive the same legal protections as registered critical habitat.

⁶⁰ These species are the wandering albatross (*Diomedea exulans*) – Macquarie Island; Ginninderra peppercress (*Lepidium ginninderrense*) – north-west corner Belconnen Naval Transmission Station, ACT; black-eared miner (*Manorina melanotis*) – Gluepot Reserve, Taylorville Station and Calperum Station, excluding the area of Calperum Station south and east of Main Wentworth Road; shy albatross (*Thalassarche cauta*) – Albatross Island, The Mewstone, Pedra Branca; and the grey-headed albatross (*Thalassarche chrysostoma*) – Macquarie Island. The Register of Critical Habitat is available here: <https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl>

⁶¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 270(2)(d) and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.11.

However:

- Under s 139(1)(b) of the EPBC Act, the Minister cannot, in making certain decisions, act inconsistently with a recovery plan; and
- When making a recovery plan, the Minister must consider whether to list habitat that is identified in the recovery plan as being critical on the Register of Critical Habitat.⁶²

Appendix 6 outlines the relevant provisions of the EPBC Act.

Using the *Environment Protection and Biodiversity Conservation Act* to Defend the Unburnt

WWF and EDO have identified several bushfire-impacted species whose habitat may be eligible for determination as critical habitat under the EPBC Act, including the Border Ranges lined fern (*Antrophyum austroqueenslandicum*) (see Box 3), Cudgegong giant spiny crayfish (*Euastacus vesper*) and short-tail galaxias (*Galaxias brevissimus*).



Short-tail galaxias (*Galaxias brevissimus*). (Photo: © Fishes of Australia / Tarmo A. Raadik)

Box 3: Border Ranges lined fern⁶³

The Border Ranges lined fern (*Antrophyum austroqueenslandicum*), previously known as the Lamington ox tongue fern, has dodged extinction once, but may very well be facing extinction again.

The fern was first discovered in 1983, when about five individuals were found in Woonoongoora, Lamington National Park, in Queensland. After those species were removed or perished, it was listed as extinct under the Queensland NC Act. It was subsequently rediscovered in 2015 at two sites in NSW – one near Tyalgum, in the Border Ranges, and the other in Mount Jerusalem

⁶² *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(2).

⁶³ Information sourced from: Threatened Species Scientific Committee, 'Conservation Advice *Antrophyum austroqueenslandicum* Lamington Ox Tongue Fern', 2020
<<http://www.environment.gov.au/biodiversity/threatened/species/pubs/74525-conservation-advice-04112020.pdf>>

National Park. It was also then found at another site in the Huonbrook Valley, in 2020. Surveys conducted in 2022 across the three known sites found a total of 275 individuals.

The species is currently listed as critically endangered under the EPBC Act and has been identified as one of the Federal Government's 110 priority species in its *Threatened Species Action Plan: Towards Zero Extinctions*.⁶⁴ A Recovery Action Plan for the species is currently being developed.

Three known sites currently have varied protection and management:

- The subpopulation within Mount Jerusalem National Park is protected and managed under the national parks' framework;
- The subpopulation near Tyalgum is on private land, where landholders undertake land management and weed control; and
- The subpopulation at Upper Huonbrook is on a private property subject to an in-perpetuity conservation covenant with the Nature Conservation Trust of New South Wales.



The Border Ranges lined fern (*Antrophyum austroqueenslandicum*). (Photo: © DCCEEW)

Identification of the known sites as critical habitat of this species, under strengthened critical habitat provisions, could shore up ongoing protection and management of the species.

There is no process for third parties to nominate an area for inclusion on the Register of Critical Habitat. The usual way in which the public can provide input on critical habitat under the EPBC Act is through the recovery planning process. The Minister is required to consult on a recovery plan before making it,⁶⁵ (however recovery plans are not mandatory (although the Minister must decide for each listed species whether to have a recovery plan)).⁶⁶

⁶⁴ Department Climate Change, Energy, the Environment and Water, *Threatened Species Action Plan: Towards Zero Extinctions*, 2022, <https://www.dcceew.gov.au/environment/biodiversity/threatened/publications/action-plan-2022-2032>

⁶⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 275.

⁶⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 269AA.

Once critical habitat is identified in the recovery plan, the Minister must consider whether to list the identified habitat on the register.⁶⁷ While it is mandatory for the Minister to consider listing critical habitat on the register at this point, there is nothing preventing the Minister from listing critical habitat on the register at any other time. It would therefore be open to any person to write to the Minister requesting they use their powers under the EPBC Act to list critical habitat on the register.

In 2022, the former Environment Minister, Sussan Ley, determined that 176 species and communities would no longer require a recovery plan, further limiting the identification and protection of critical habitat.⁶⁸ In opposing the decision, EDO highlighted the legal implications of removing requirements for recovery plans, including that the recovery planning process is the main mechanism for identifying and registering critical habitat under the EPBC Act and, more generally, that requirements for making and applying recovery plans are more rigorous and comprehensive than for Conservation Advices (which were intended to become the primary conservation planning document for those species no longer requiring a recovery plan).⁶⁹

The current Federal Government has proposed further changes to conservation planning in its *Nature Positive Plan*,⁷⁰ including new conservation planning documents. At this stage, it is unclear exactly how critical habitat will be identified in conservation planning documents and whether the Register of Critical Habitat will be retained.

WWF and EDO are currently engaged in the reform of national environmental laws, including discussions on how critical habitat provisions may operate under reformed national environment laws. Given the reform process is underway, we have not requested the Minister add specific species to the register at present. However, our strong view is that critical habitat for *all* current and newly listed threatened species, including those suggested above, must be identified managed, and protected under the reformed laws – see Key Principles for Reform below.

⁶⁷ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(2).

⁶⁸ See <https://www.dcceew.gov.au/environment/biodiversity/threatened/recovery-plans/proposed-changes-conservation-planning-decisions>

⁶⁹ EDO, *Proposed changes to conservation planning decisions*, 2021, available at <https://www.edo.org.au/wp-content/uploads/2021/11/211107-Conservation-plan-changes-EDO-submission.pdf>

⁷⁰ Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: better for the environment, better for business*, 2022, p 19, available at <https://www.dcceew.gov.au/environment/epbc/publications/nature-positive-plan>

4. KEY ISSUES

Concerns about critical habitat provisions in Australia are well recognised.⁷¹ These have been reinforced by our own efforts to seek the use of critical habitat mechanisms in the wake of the bushfires. In general, concerns do not relate to the concept of or intent to protect critical habitat, but rather the failure to effectively implement and utilise the mechanism as a key conservation tool. Key issues are reiterated below.

4.1 Identification of critical habitat is not mandatory

One of the key concerns regarding critical habitat provisions in Australia is that, in most instances, the identification and declaration of areas of critical habitat is not mandatory. This is in clear contrast to the US *Endangered Species Act*, which mandatorily requires critical habitat to be identified at the time a species is listed and imposes subsequent obligations on decision-makers, such as consulting with the Fish and Wildlife Service in relation to actions that may destroy or adversely modify critical habitat. Similarly, in Canada, SARA requires that a species' recovery strategy or action plan identifies critical habitat, to the extent possible.

In Australia, no jurisdiction mandates the identification or declaration of critical habitat. For example:

- While the Commonwealth EPBC Act requires habitat critical to the survival of a species to be identified in recovery plans, these areas are not automatically added to the Register of Critical Habitat. This means there is no central repository of critical habitat and any additional protections for areas listed on the register do not apply. Further, recovery plans are not required for all species or ecological communities. For those without recovery plans, habitat critical to their survival is not identified at all. And while all species have Conservation Advices, these documents are not required to identify habitat critical to the survival of a species or community and must only be considered by the Minister when making decisions about further destruction of habitat.
- Under the NSW BC Act, the Minister can, but is not required to, declare an Area of Outstanding Biodiversity Value (which includes critical habitat). While NSW is the only jurisdiction that has established a process for third parties to nominate areas for declaration, no additional areas have been declared since the new provisions came into

⁷¹ See, for example:

- Fitzsimons, J., *Urgent need to use and reform critical habitat listing in Australian legislation in response to the extensive 2019-2020 bushfires*, 2020, 37 EPLI, p. 143.
- Australian Conservation Foundation, *Australia's Extinction Crisis Protecting critical habitat*, 2018, available at https://www.acf.org.au/new_research_reveals_australia_s_critical_habitat_laws_are_broken
- Various submissions to the Independent Review of the EPBC Act, including:
 - EDO, Submission to the 10 year review of the EPBC Act, April 2020, available at <https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf>
 - WWF-Australia, Submission to the EPBC Act Review, April 2020, available at <https://epbactreview.environment.gov.au/sites/default/files/2020-05/ANON-K57V-XQKR-K%20-%20WWF-Australia.pdf>
 - Humane Society International, Submission to the Independent review of the EPBC Act, March 2020, available at <https://epbactreview.environment.gov.au/submissions/anon-k57v-xfqb-x>

effect more than six years ago. Similarly, under the NSW FM Act, the Minister has the discretion to declare critical habitat for fish and aquatic species and communities.

- Under the FFG Act in Victoria, SAC *may* make a recommendation to the Secretary to make a critical habitat determination. Similarly, in Western Australia the BC Act (WA) provides that the Minister *may* list habitat as critical habitat.

For critical habitat provisions to be effective, it must be mandatory for critical habitat to be identified either at the time a species or community is listed, where possible, or otherwise within a specified timeframe via a clear, mandatory statutory process triggered by listing (e.g. in a mandatory conservation planning document). The requirement to identify critical habitat should not perversely delay or hinder listing, but rather the framework should facilitate the timely identification of critical habitat to support the conservation and recovery of threatened species. There must also be a process established for identifying critical habitat for species and communities already listed. Identification should be by both description and map (where possible and appropriate) and identification must allow for newly identified areas of critical habitat to also be recognised (i.e. areas of critical habitat are not fixed; identification can be fluid if new areas become known). Where critical habitat has not been mapped, the description should be used to identify critical habitat on a case-by-case basis.

4.2 Critical habitat is not clearly defined

As outlined above, critical habitat definitions vary across jurisdictions. In many cases the term ‘critical habitat’ is not clearly defined, with circular definitions pointing to declarations or plans to define the term, and criteria for considering its identification or declaration. In the case of the EPBC Act, there is additional confusion as both the terms ‘critical habitat’ and ‘habitat critical to the survival’ are used. We understand that alternative terms, such as ‘critical protected area’, are being considered as part of federal reforms.

For clarity and consistency, we recommend a clear, common definition of critical habitat be adopted across all Australian jurisdictions, based on the best available science. We suggest the definition should be descriptive, drawing on key elements set out in the Significant Impact Guidelines,⁷² other key criteria (such as clause 7.09 of the EPBC Regulation) and respond to current challenges, such as climate change.

Table 2 highlights the key elements that should be incorporated into a clear, uniform definition of critical habitat.

⁷²https://www.dcceew.gov.au/sites/default/files/documents/nes-guidelines_1.pdf

Table 2: Key elements of critical habitat

Proposed key elements	Examples and comments
<p>Critical habitat, for a listed threatened or migratory species or ecological community, means a habitat that is critical to the survival and recovery of a species or ecological community, and can include:</p>	<p>See, for example, BC Act (WA) and NC Act (ACT).</p> <p>Note the inclusion of ‘recovery’, reflecting the definition in the <i>Matters of National Environmental Significance – Significant impact guidelines 1.1</i>; criterion (f) of clause 7.09 of the EPBC Regulation; and the need to halt and reverse ongoing biodiversity decline.</p> <p>Further guidance on what is meant by recovery will be needed. For example, it could mean ‘delisted and no longer declining’.</p>
<ul style="list-style-type: none"> - habitat used during periods of stress, like flood, drought or fire. 	<p>See:</p> <ul style="list-style-type: none"> ● clause 7.09 of the EPBC Regulation; and ● BC Regulation (NSW).
<ul style="list-style-type: none"> - habitat used to meet essential life cycle requirements, including foraging, breeding, nesting, roosting, social behaviour patterns or seed dispersal processes. 	<p>See:</p> <ul style="list-style-type: none"> ● clause 7.09 of the EPBC Regulation; and ● <i>Matters of National Environmental Significance – Significant impact guidelines 1.1</i>.
<ul style="list-style-type: none"> - habitat necessary for the long-term maintenance of the species or ecological community (including the maintenance of species essential to the survival of the species or ecological community, such as pollinators). 	<p>See Appendix B1 of the <i>Independent Review of the EPBC Act – Final Report, October 2020</i> (Samuel report).</p>
<ul style="list-style-type: none"> - habitat necessary to maintain genetic diversity and long-term evolutionary development. 	<p>See:</p> <ul style="list-style-type: none"> ● clause 7.09 of the EPBC Regulation; and ● BC Regulation (NSW).

<p>- habitat necessary for use as corridors to allow the species to move freely between sites used to meet essential life cycle requirements.</p>	<p>See:</p> <ul style="list-style-type: none"> ● clause 7.09 of the EPBC Regulation; and ● <i>Matters of National Environmental Significance – Significant impact guidelines 1.1.</i>
<p>- habitat necessary to ensure the long-term future of the species or ecological community through reintroduction or re-colonisation or recovery; or habitat needed as climate refugia.</p>	<p>See:</p> <ul style="list-style-type: none"> ● clause 7.09 of the EPBC Regulation; and ● <i>Matters of National Environmental Significance – Significant impact guidelines 1.1.</i>
<p>- an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife.</p>	<p>See:</p> <ul style="list-style-type: none"> ● US <i>Endangered Species Act (1973)</i>; and ● NC Act (Qld).
<p>- any other habitat that may be critical to the survival of a listed threatened species, listed migratory species or a listed threatened ecological community, including but not limited to climate and fire refugia and Biologically Important Areas for marine species⁷³.</p>	<p>See:</p> <ul style="list-style-type: none"> ● clause 7.09 of the EPBC Regulation; and ● BC Regulation (NSW). <p>Note explicit recognition of the importance of climate and fire refugia and Biologically Important Areas.</p>
<p>Such habitat may be, but is not limited to: habitat identified in a conservation planning document (or however defined) for the species or ecological community as critical habitat for that species or ecological community; and/or identified as critical habitat during planning and assessment processes.</p>	

These key elements are considered essential for critical habitat protection to enable species recovery now and into the future. Any definition should be deliberately non-exhaustive, meaning

⁷³ For more information on Biologically Important Areas for marine species, see <https://www.dcceew.gov.au/environment/marine/marine-species/bias>

critical habitat is not confined to these elements but can evolve to accommodate other types of critical habitat, should it be desirable to do so. Key terms within the definition, such as ‘recovery’ also need to be clearly defined.

The application and definition of critical habitat must allow for population expansion and changes in distribution or life history traits caused by climate change or other impacts. This means that while specific areas of critical habitat for an entity may be identified and mapped at any point in time, each entity must also have a description of what constitutes critical habitat for that entity so that, if new areas of critical habitat are identified, they are protected immediately.

4.3. Procedural requirements and processes create barriers

Current procedural requirements and processes create barriers to identifying and declaring critical habitat. For example:

- As outlined in Case study 1, in NSW, the department has set up a process for third parties to nominate areas for consideration as AOBVs. As outlined in our case study above, this presents a number of challenges, including that third parties must obtain landowner consent.
- Under the EPBC Act, poorly aligned processes for identifying habitat critical to survival in recovery plans and listing habitat on the register create confusion.

These impediments would be overcome by overhauling critical habitat frameworks, and by, most importantly, making the identification and declaration of critical habitat mandatory. Procedural barriers and lack of political will should not inhibit the identification and declaration of critical habitat.

4.4 Protections for critical habitat are limited

Once critical habitat is identified and declared, laws can provide for protection and management of these areas. Currently, in jurisdictions where critical habitat is identified, actual, genuine protection for those areas is limited. For example:

- Under the EPBC Act, protections for critical habitat listed on the register is restricted to areas of Commonwealth land. This limits the extent to which protections under the act apply and fails to provide adequate protection for the habitat of federally-listed species. We note that while Commonwealth land (and the related term, Commonwealth areas) is defined in the EPBC Act,⁷⁴ land that falls within the definition is not readily identifiable. We have been unable to locate a central repository identifying land that falls within the relevant definitions.⁷⁵

⁷⁴ See section 27 of the EPBC Act for a definition of Commonwealth land, and s 525 of the EPBC Act for a definition of Commonwealth areas. These areas can include: land owned or leased by the Commonwealth or a Commonwealth agency (including land owned or leased by the Commonwealth on Norfolk Island); land in the Jervis Bay Territory; land in the following external territories: Christmas Island, Ashmore and Cartier Islands, Coral Sea Islands, Cocos (Keeling) Islands, Australian Antarctic Territory, and Heard and McDonald islands; and any other area of land that is included in a Commonwealth reserve. In the ACT, territory land is not Commonwealth land, unless it is leased by the Commonwealth or a Commonwealth agency (territory land is all land in the ACT other than National Land).

⁷⁵ The Federal Government’s *Actions on, or impacting upon, Commonwealth land, and actions by Commonwealth agencies - Significant impact guidelines 1.2 - Environment Protection and Biodiversity Conservation Act 1999* does provide some further guidance, including links to further information on Commonwealth national parks and reserves, Commonwealth Marine Protected Areas, the Great Barrier Reef Marine Park and Biosphere Reserves.

- In NSW, AOBVs are not necessarily off-limits to development or infrastructure. While some rules restrict certain activities in AOBVs (for example, rural landclearing rules do not apply in AOBVs),⁷⁶ many activities, including clearing in rural areas assessed under the *Environmental Planning and Assessment Act 1979*, can still be approved, although more stringent environmental assessment requirements will apply. For example, any development proposal located in an AOBV will trigger the Biodiversity Offsets Scheme, with the proposal still, in most cases, able to be assessed and determined under planning laws.
- In Queensland and Victoria, the Minister is required to negotiate conservation agreements with landholders and can issue certain conservation orders to protect critical habitat, but outcomes are ultimately at the discretion of the Minister – see appendices 4 and 5.

Laws must provide real protection for areas of critical habitat. There are a number of ways this could be achieved, for example:

- Critical habitat identified as ‘no-go areas’ that are off-limits to development;
- Mandatory refusal of projects that impact critical habitat; and
- Equivalent protections across all land tenures.

4.5 There is no consistent application of critical habitat provisions across Australian jurisdictions

As outlined in Appendix 1, critical habitat provisions vary across jurisdictions. Consistent with efforts to align the listing of species across jurisdictions through the Common Assessment Method, the identification and protection of critical habitat should also be aligned.

4.6 Failure to incentivise protection of critical habitat on private land has contributed to underuse of the mechanisms

While critical habitat is tenure blind (i.e. critical habitat can occur on Crown land, private land, leasehold land, etc) our experience is that governments have been hesitant to consider or assess recommendations for critical habitat, let alone declare critical habitat on private land. In some jurisdictions, declarations of critical habitat may give rise to landholder compensation.

The protection of critical habitat is integral to government commitments to conserve and restore biodiversity and halt extinctions. We strongly support government investment in supporting landholders to protect and restore critical habitat on their land.

In NSW, for example, the government has prioritised AOBVs for government funding under its *Biodiversity Investment Conservation Strategy 2018* when landholders enter into a conservation agreement.⁷⁷ Similar incentives could be introduced in other jurisdictions, although our experience to date in NSW is that access to funding has not led to an increase in nominations for AOBV declarations. However, this may change with increased outreach and landholder engagement.

⁷⁶ *Local Land Services Act 2013*, s 60A(b)(v).

⁷⁷ <https://www.bct.nsw.gov.au/news-stories/biodiversity-conservation-investment-strategy>

5. KEY PRINCIPLES FOR REFORM

Identifying, protecting, and managing critical habitat is a key component of species conservation and recovery and will be essential to meeting international and domestic commitments such as the Kunming-Montreal Global Biodiversity Framework and the Glasgow Leaders' Declaration on Forests and Land Use. However, current frameworks are not up to the task.

Right now, there are key opportunities to overhaul our laws. This would help ensure that critical habitat provisions are a key tool in responding to the biodiversity extinction crisis and deliver genuine and comprehensive protection for critical habitat. For example:

- The Federal Government is currently pursuing reforms to the EPBC Act that will implement its *Nature Positive Plan*. This plan commits to introducing regional plans to guide sustainable development and ecological restoration. The *Nature Positive Plan* says that regional plans will identify 'Areas of High Environmental Value', where development will largely be prohibited. These are areas of high environmental sensitivity intended to include critical habitat for threatened species.⁷⁸ The *Nature Positive Plan* is otherwise silent on how critical habitat would be identified and declared.
- A five-year statutory review of the NSW BC Act has found that the AOBV mechanism in NSW is under-utilised. The review panel concluded that the intent of AOBVs will be achieved, with relevant criteria continuing to be utilised, through the single spatial tool and identification of 'no-go areas' – rendering the current process of declaring an AOBV redundant. That is, the review panel has not found the need for critical habitat redundant, but has suggested critical habitat be identified through the adoption of 'no-go zones' relying on the current legislative criteria. This is similar to what is proposed under regional plans through Areas of High Environmental Value in the federal *Nature Positive Plan*.
- South Australia has committed to developing a new Biodiversity Act.⁷⁹ Given that South Australia's laws don't currently include provisions for critical habitat protection, this is a key opportunity to bring them in line with other jurisdictions and implement this important conservation tool.
- Victoria has updated critical habitat provisions in the FFG Act and is developing statutory guidelines to support their implementation. This provides an opportunity to enhance the use of this important legal mechanism and deliver improved outcomes for biodiversity (although further improvements to the Victorian provisions could be made, including making the identification and protection of critical habitat mandatory).

It is imperative that reforms address the key concerns with critical habitat provisions outlined above, deliver a framework that will provide real protection, and halt and reverse extinctions.

The effectiveness of improved frameworks will be dependent on the definition of critical habitat, as well as the process for identifying and mapping critical habitat. The scope of critical habitat

⁷⁸ Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: better for the environment, better for business*, 2022, p.19, available at <https://www.dcceew.gov.au/environment/epbc/publications/nature-positive-plan>

⁷⁹ <https://www.environment.sa.gov.au/topics/biodiversity/biodiversity-act>

must meet conservation needs, and identification or description of critical habitat must be mandatory and timely for all listed species. Critical habitat protections must be strengthened, for example, through strategic planning that identifies critical habitat as ‘no-go zones’ or through mandated refusals where critical habitat is impacted. If provisions remain similar to current processes (i.e. discretionary and under-utilised), then the effectiveness of critical habitat protections will remain limited.

We have identified five key principles that must underpin reform of critical habitat provisions. We will be considering proposals for reform against these key principles.

Key principles for reform

1. Clearly define critical habitat

- a) A clear, common definition of critical habitat should be adopted across all Australian jurisdictions, based on the best available science.
- b) The definition should be descriptive, drawing on key elements set out in the *Matters of National Environmental Significance – Significant impact guidelines 1.1*,⁸⁰ incorporating other key criteria (such as in clause 7.09 of the EPBC Regulation) and respond to current challenges, such as climate change.

For example:

Critical habitat, for a listed threatened or migratory species or ecological community, means a habitat that is critical to the survival and recovery of a species or ecological community, and can include:

- Habitat used during periods of stress (including floods, drought or fire);
- Habitat used to meet essential life cycle requirements (including foraging, breeding, nesting, roosting, social behaviour patterns or seed dispersal processes);
- Habitat necessary for the long-term maintenance of the species or ecological community (including the maintenance of species essential to the survival of the species or ecological community, such as pollinators);
- Habitat necessary to maintain genetic diversity and long-term evolutionary development;
- Habitat necessary for use as corridors to allow the species to move freely between sites used to meet essential life cycle requirements;
- Habitat necessary to ensure the long-term future of the species or ecological community through reintroduction, re-colonisation or recovery;
- An area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife; and

⁸⁰ https://www.dcceew.gov.au/sites/default/files/documents/nes-guidelines_1.pdf

- Any other habitat that may be critical to the survival of a listed threatened species, listed migratory species or a listed threatened ecological community, including but not limited to climate and fire refugia and Biologically Important Areas.

Such habitat may be, but is not limited to habitat identified in a conservation planning document (or however defined) for the species or ecological community as critical habitat for that species or ecological community, and/or identified as critical habitat during planning and assessment processes.

2. Make critical habitat identification mandatory

- a) Critical habitat must be identified at the time a species or ecological community is listed or within a specified timeframe via a clear, mandatory statutory process triggered by listing (e.g. in a mandatory conservation planning document).
- b) Mapping can assist in identifying critical habitat, but critical habitat must also be described textually.
- c) Identification of what constitutes critical habitat must allow for newly identified areas of critical habitat to also be recognised (i.e. areas of critical habitat may be identified iteratively (e.g. in response to episodic events such as bushfires)).
- d) A process must be put in place to identify and declare (or similar) the critical habitat for all species already listed, within a clear timeframe.

3. Protect and manage critical habitat

- a) Critical habitat must be protected and managed, irrespective of land tenure.
- b) Protection could be achieved via two mechanisms:
 - i. Strategic planning processes that identify areas of critical habitat as ‘no-go areas’ off-limits to development.
 - ii. Where there are no legal mechanisms for identifying ‘no go zones’ (e.g. regional plan or spatial tool), provisions must mandate refusal of activities that will negatively impact critical habitat.
- c) Protections must apply equally across all land tenures.

4. Support landholders

- a) Areas of critical habitat must be prioritised for conservation and recovery, and landholders funded where relevant (e.g. through government-led conservation programs).

5. Ensure consistency between jurisdictions

- a) There should be alignment between federal and state/territory laws relating to critical habitat.

Appendix 1: Key critical habitat mechanisms and criteria in Australian legislation

Jurisdiction	Key legislation	Key terminology and criteria	Key legal provisions for identifying critical habitat
Commonwealth	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (EPBC Act)	Habitat critical to the survival	<p><u>Key mechanism:</u> A recovery plan must identify ‘habitat critical to the survival of the species or ecological community’, to the extent to which it is practicable to do so (ss 270(2)(d) and 270(2A), EPBC Act).</p> <p><u>Key criteria:</u> Criteria in clause 7.09 of the <i>Environment Protection and Biodiversity Conservation Regulations 2000</i> (EPBC Regulations) must be considered in identifying habitat that is critical to the survival of the species or community concerned (per cl 7.11(3) of the EPBC Regulations).</p>
		Critical habitat	<p><u>Key mechanisms:</u></p> <ul style="list-style-type: none"> • The Minister must keep a register that lists habitat identified by the Minister as being critical to the survival of a listed threatened species or listed threatened ecological community (s 207A, EPBC Act). • When making a recovery plan, the Minister is to consider whether to list habitat identified in the recovery plan as being critical to the survival of the species or ecological community on the register (cl 7.09(2) EPBC Regulations). <p><u>Key criteria:</u> See Clause 7.09 of the EPBC Regulations.⁸¹</p>

⁸¹ Clause 7.09 of the EPBC Regulation provides:

The Minister may, in identifying habitat, take into account the following matters:

- whether the habitat is used during periods of stress;
Examples of periods of stress: Flood, drought or fire.
- whether the habitat is used to meet essential life cycle requirements;
Examples: Foraging, breeding, nesting, roosting, social behaviour patterns or seed dispersal processes.
- the extent to which the habitat is used by important populations;
- whether the habitat is necessary to maintain genetic diversity and longterm evolutionary development;
- whether the habitat is necessary for use as corridors to allow the species to move freely between sites used to meet essential life cycle requirements;
- whether the habitat is necessary to ensure the longterm future of the species or ecological community through reintroduction or recolonisation; and
- any other way in which habitat may be critical to the survival of a listed threatened species or a listed threatened ecological community.

Victoria	<i>Flora and Fauna Guarantee Act 1988</i> (FFG Act)	Critical habitat	<p><u>Key mechanism:</u> The Secretary* may determine any area in Victoria as a critical habitat. (*Secretary means the body corporate established by Part 2 of the <i>Conservation, Forests and Lands Act 1987</i>) (s 20 FFG Act).</p> <p><u>Key criteria:</u> See section 20 FFG Act.⁸² The Secretary may also make guidelines in relation to areas that may be eligible for critical habitat determinations (s 20E), FFG Act).</p>
New South Wales	<i>Biodiversity Conservation Act 2016</i> (BC Act (NSW)) Note: the NSW BC Act applies to terrestrial species only, and not fish and marine vegetation.	Areas of Outstanding Biodiversity Value (AOBV)	<p><u>Key mechanism:</u> The Minister can declare an area as an AOBV (s 3.1 BC Act (NSW)). Declared AOBVs must be listed on a public register (s 9.7(1)(b), BC Act (NSW)).</p> <p><u>Key criteria:</u> See section 3.2 of the BC Act (NSW).⁸³ The declaration of an area may relate to, but is not limited to, protecting threatened species or ecological communities, connectivity, climate refugia and migratory species. Additional criteria are set out in</p>

⁸² Section 20 of the FFG Act provides:

- 1) The Secretary may determine any area of Victoria to be a critical habitat.
- 2) A determination under subsection (1) must not be made unless the Secretary considers that:
 - a) the area significantly contributes to the conservation in Victoria of a listed taxon or community of flora or fauna; or
 - b) the area significantly contributes to the conservation in Victoria of a taxon or community of flora or fauna that is not listed, but in respect of which –
 - i. a recommendation has been made by the Committee under section 16D; and
 - ii. the Minister has not made a decision under section 16G or has made a decision under that section to make a recommendation; or
 - c) the area supports ecological processes or ecological integrity that significantly contributes to the conservation of a taxon or community that is listed.
- 3) Without limiting subsection (2), a determination of a critical habitat may be made if –
 - a) the area is critical to the persistence of a taxon or community of flora or fauna;
 - b) flora or fauna aggregate in the area for reproduction or other important life stages;
 - c) the area is used by flora or fauna to move between populations, migrate or disperse, or as refugia during environmental stress;
 - d) the taxon or community of flora or fauna is occasionally present in the area;
 - e) the taxon or community of flora or fauna is not present in the area but was previously present in the area and there is potential to reintroduce it; or
 - f) the area is likely to be needed by a taxon.

⁸³ Section 3.2 of the BC Act (NSW) provides:

The Environment Minister can declare an area as an AOBV, if

- a) the area is important at a state, national or global scale, and
- b) the area makes a significant contribution to the persistence of at least one of the following –
 - i. multiple species or at least one threatened species or ecological community;
 - ii. irreplaceable biological distinctiveness;
 - iii. ecological processes or ecological integrity; or
 - iv. outstanding ecological value for education or scientific research.

			clause 3.1 of the <i>Biodiversity Conservation Regulation 2017</i> (BC Regulation, NSW). ⁸⁴
New South Wales	<i>Fisheries Management Act 1994</i> (NSW) (FM Act) Note: The FM Act applies to fish – defined in s5.	Critical habitat	<u>Key mechanism:</u> The whole or any part of the habitat of an endangered species, population or ecological community or critically endangered species or ecological community that is critical to the survival of the species, population or ecological community is eligible to be declared critical habitat of the species, population or ecological community (s 220P, FM Act). <u>Key criteria:</u> Unlike other jurisdictions, there is no criteria guiding the identification of critical habitat, however the Minister must consult with the Fisheries Scientific Committee about the identification of any such critical habitat (s 220Q(2), FM Act). Additionally, the Minister must consider other criteria before deciding

⁸⁴ Clause 3.1 provides, relevantly:

- (2) An area makes a significant contribution to the persistence of multiple species or at least one threatened species or ecological community if –
- a) it provides resilience during periods of environmental stress that is important for their continued existence, or
 - b) it sustains adaptive capacity or evolutionary potential because it contains high levels of unique components of genetic or phenotypic diversity that will enable species to adapt to changing environments, or it functions as an important ecological or evolutionary refuge able to sustain viable populations of species at risk due to climate change or other environmental stresses, or
 - c) it supports migration or dispersal of animals and plants, currently or in the future, that will contribute significantly to the persistence of species at risk, or
 - d) it is habitat critical for the survival of a threatened species.
- (3) An area makes a significant contribution to the persistence of irreplaceable biological distinctiveness if –
- a) it has a very high structural, functional or compositional diversity, or
 - b) it is an essential site for the persistence of evolutionary or ecological distinctive species, endemic species or ecological communities, or
 - c) it is an essential site for the persistence of 2 or more threatened species or ecological communities in combination.
- (4) An area makes a significant contribution to the persistence of ecological processes or ecological integrity if –
- a) it has ecological integrity, being an area that is –
 - i. an outstanding, relatively intact example of a functioning ecosystem type, or if a fully intact ecosystem does not remain, then the best remaining example of that ecosystem type that contributes to maintaining the persistence of biodiversity and ecological integrity, or
 - ii. the most intact remaining site of a species occurrence that provides habitat requirements vital to the conservation of a species, or
 - iii. the last known remaining site of a species occurrence, or
 - b) it is a primary contributor to the continuation of essential ecological processes, or
 - c) it is an essential site for a significant proportion of the population of a species during one or more key life history stages or processes.
- (5) An area makes a significant contribution to the persistence of outstanding ecological value for education or scientific research if it contains established infrastructure or data related to long-term ecological research monitoring programs that establish an irreplaceable historic baseline, being the best site anywhere in NSW for long-term research on particular species, ecological communities or ecological processes.

			<p>whether an area should be declared critical habitat, per s 220S of the FM Act.⁸⁵</p> <p>In so doing, the Minister must also consider whether, consistent with the principles of ecologically sustainable development, the area identified might be amended to avoid or lessen any adverse consequences of its declaration as critical habitat.</p>
Queensland	<i>Nature Conservation Act 1992</i> (NC Act, (Qld))	Critical habitat	<p><u>Key mechanisms:</u> Critical habitat (or an area of major interest) can be identified in either a regulation or conservation plan made under the NC Act (s 120H, s 175(2)(j), NC Act (Qld)). The Chief Executive is required to keep a register of any critical habitat or area of major interest identified in a regulation or conservation plan (s 133, s 134, NC Act (Qld)).</p> <p><u>Key criteria:</u> Section 13, NC Act (Qld) provides: Meaning of critical habitat:</p> <ol style="list-style-type: none"> 1) Critical habitat is habitat that is essential for the conservation of a viable population of protected wildlife or community of native wildlife, whether or not special management considerations and protection are required. 2) A critical habitat may include an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife. <p>The <i>Schedule Dictionary</i> of the NC Act (Qld) defines 'area of major interest' as an area that contains natural resources of significant nature conservation value.</p>

⁸⁵ Section 220S of the FM Act provides:

- (1) Before deciding whether an area identified by the Minister should be declared critical habitat, the Minister must have regard to the following –
 - (a) the likely social and economic consequences of a declaration of the area as critical habitat,
 - (b) without limiting paragraph (a), the likely consequences of a declaration of the area as critical habitat for landholders of, or other persons having an interest in, or in lawful uses of, the land concerned,
 - (c) the advice of the Fisheries Scientific Committee on the matter,
 - (d) any written submissions received by the Minister on or before the date specified for the receipt of public submissions about the preliminary identification of the area and, in particular, any submissions received from public authorities exercising relevant functions in relation to the area.
- (2) In so doing, the Minister must also consider whether, consistent with the principles of ecologically sustainable development, the area identified might be amended to avoid or lessen any adverse consequences of its declaration as critical habitat.

Australian Capital Territory	<i>Nature Conservation Act 2014</i> (NC Act (ACT))	Critical habitat	<p><u>Key mechanism:</u> Critical habitat is to be identified in an action plan (s 100, s 101, NC Act (ACT)).</p> <p><u>Key criteria:</u> Critical habitat, for a species or ecological community, means a habitat that is critical to the survival of the species or ecological community (Dictionary, NC Act (ACT)).</p>
Western Australia	<i>Biodiversity Conservation Act 2016</i> (BC Act (WA))	Critical habitat	<p><u>Key mechanisms:</u> The Minister may list habitat as critical habitat (s 54 BC Act (WA)). A register of critical habitat must be maintained (s 57 BC Act (WA)).</p> <p><u>Key criteria:</u> Section 55, BC Act (WA): Habitat is eligible for listing as critical habitat if –</p> <ul style="list-style-type: none"> a) it is critical to the survival of a threatened species or a threatened ecological community; and b) its listing is otherwise in accordance with the ministerial guidelines.
Tasmania	<i>Threatened Species Protection Act 1995</i> (TSP Act)	Critical habitat	<p><u>Key mechanism:</u> The Secretary can determine habitat to be a critical habitat (s 23, TSP Act).</p> <p><u>Key criteria:</u> The Secretary must be satisfied, after consultation with the Scientific Advisory Committee (SAC), that the whole or any part of the habitat of any listed taxon of native flora or fauna is critical to the survival of that taxon (s 23, TSP Act).</p>
South Australia	Not applicable	Not applicable	<p>South Australia does not have specific provisions for the protection of critical habitat akin to other jurisdictions. (Note that the significance of native vegetation as a habitat for wildlife is one of the principles considered when exercising certain functions under the <i>Native Vegetation Act 1991</i> (SA)).</p> <p>The development of a new Biodiversity Act in South Australia (underway) provides an opportunity to include specific critical habitat provisions in South Australian laws.</p>
Northern Territory	Not applicable	Not applicable	The Northern Territory does not have legal provisions for critical habitat.

Appendix 2: New South Wales - Areas of Outstanding Biodiversity Value (AOBVs) under the *Biodiversity Conservation Act 2016*

Introduction

The *Biodiversity Conservation Act 2016* (BC Act) introduced new provisions relating to Areas of Outstanding Biodiversity Value (AOBVs). These replaced critical habitat provisions under the repealed *Threatened Species Conservation 1995* (TS Act).

Four areas declared as critical habitat under the TS Act became AOBVs under transitional provisions.⁸⁶ No AOBVs have been declared in NSW since the BC Act commenced in 2017.

Key criteria

The Minister for Environment and Energy can declare an area an AOBV if the Minister is of the opinion that:

- (a) the area is important at a state, national or global scale; and
- (b) the area makes a significant contribution to the persistence of at least one of the following –
 - (i) multiple species or at least one threatened species or ecological community;
 - (ii) irreplaceable biological distinctiveness;
 - (iii) ecological processes or ecological integrity; or
 - (iv) outstanding ecological value for education or scientific research.⁸⁷

The declaration of an area may relate to, but is not limited to, protecting threatened species or ecological communities, connectivity, climate refugia and migratory species.

The *Biodiversity Conservation Regulation 2017* (NSW) sets out more detailed criteria to be applied by the Minister in forming the opinion that an area can be declared an AOBV.⁸⁸

Procedural Requirements

Nominations

Anyone can nominate an area for consideration as an AOBV. A proposal form is available on the Department of Planning and Environment's website.⁸⁹ Proposals must address the relevant legal criteria, and can include evidence to support the nomination, such as a scientific expert report.

⁸⁶ These four habitats are habitats for the Gould's petrel, little penguin population in Sydney's North Harbour, Mitchell's rainforest snail in Stotts Island Nature Reserve and the Wollemi pine. See

<https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value/area-of-outstanding-biodiversity-value-register>

⁸⁷ *Biodiversity Conservation Act 2016* (NSW) s 3.1(1).

⁸⁸ *Biodiversity Conservation Regulation 2017* (NSW) cl 3.1

⁸⁹ <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value/proposals-for-areas-of-outstanding-biodiversity-value/making-a-proposal/area-of-outstanding-biodiversity-value-proposal-form>

The Department has also published *Guidelines for interpreting listing criteria for Areas of Outstanding Biodiversity Value*.⁹⁰

Recommendation and public consultation

The BC Act sets out the procedural requirements to be followed before an area is declared an AOBV, and includes:⁹¹

- **Recommendation:** The head of the environment agency must recommend the declaration of the area.
- **Consultation with interest-affected parties:** The head of the environment agency must notify landholders, and any relevant public authorities, of the recommendation to declare the area. These parties must be provided a reasonable opportunity to make submissions.
- **Public consultation:** The proposed declaration of an Area of Outstanding Biodiversity Value must undergo public consultation as required by part 9. The proposed declaration document must be publicly exhibited for at least four weeks.⁹² During this public consultation period, any person may make a written submission to the Minister.⁹³ Before the Minister makes a declaration, they are to consider any submissions made on the proposed document and any recommendations made by the environment agency head in relation to submissions.⁹⁴ The public consultation process under part 9 also applies to any amendment of the proposed declaration, except if the Minister considers that the amendment is of a minor nature or the matter is urgent.⁹⁵ However, a failure to comply with public consultation requirements does not prevent the declaration from being made or amended, or invalidate the declaration once it is made or amended.⁹⁶
- **Expert consultation:** The head of the environment agency must seek and consider the advice of the Threatened Species Scientific Committee (NSW TSSC), the Biodiversity Conservation Trust (BCT) and the Biodiversity Conservation Advisory Panel (BCAP).

Although these procedures must be undertaken, a declaration will not be invalid because of a failure to fully comply with these requirements.⁹⁷

Making a declaration

An AOBV is declared by publication of a notice of the declaration on the NSW legislation website.⁹⁸

⁹⁰ <https://www.environment.nsw.gov.au/research-and-publications/publications-search/guidelines-for-interpreting-listing-criteria-for-areas-of-outstanding-biodiversity-value>

⁹¹ *Biodiversity Conservation Act 2016* (NSW) s 3.3.

⁹² *Biodiversity Conservation Act 2016* (NSW) s 9.2.

⁹³ *Biodiversity Conservation Act 2016* (NSW) s 9.3(1).

⁹⁴ *Biodiversity Conservation Act 2016* (NSW) sub-s 9.3(3)-(4).

⁹⁵ *Biodiversity Conservation Act 2016* (NSW) s 9.4.

⁹⁶ *Biodiversity Conservation Act 2016* (NSW) s 9.5.

⁹⁷ *Biodiversity Conservation Act 2016* (NSW) s 3.3(3).

⁹⁸ *Biodiversity Conservation Act 2016* (NSW) s 3.1(2).

Amending a declaration

The Minister may amend a declaration of an Area of Outstanding Biodiversity Value, including by revoking it, by publishing a notice on the NSW legislation website.⁹⁹ To amend or revoke a declaration, the same procedure that applies to the making of a declaration must be followed, except where the amendment is to correct a minor error or omission.¹⁰⁰ A declaration cannot be revoked or amended to remove any part of the area unless the Minister considers the area is not eligible to be declared or that the procedural requirements for making the declaration were not complied with.¹⁰¹

Notification to interest-affected parties

The head of the environment agency is to notify any landholder of land in the proposed area and any public authorities that exercise functions in relation to land that is covered by the declaration.¹⁰² The agency head is also to notify these parties if the declaration is amended or revoked.¹⁰³

Subsequent legal protections/requirements/outcomes

Offences

It is an offence to damage the biodiversity values of a declared Area of Outstanding Biodiversity Value.¹⁰⁴ The maximum penalty is \$1.65m in the case of a corporation or \$330,000 in the case of an individual, or imprisonment for two years, or both.

The regulations also include specific offences for declared areas. For example, it is an offence to fish in the little penguin declared area at North Harbour between sunset and sunrise during the little penguin breeding season.¹⁰⁵

Other protections

An area that has been recommended as an AOBV must be mapped as category 2 sensitive-regulated land under part 5A of the *Local Land Services Act 2013* (LLS Act).¹⁰⁶ Rural landclearing that is not exempt in that area will require approval (self-assessable codes will not apply).¹⁰⁷ Once an area is declared an AOBV, any proposed clearing will require assessment and consent under the *Environmental Planning and Assessment Act 1979* and/or *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*.

⁹⁹ *Biodiversity Conservation Act 2016* (NSW) s 3.5(1).

¹⁰⁰ *Biodiversity Conservation Act 2016* (NSW) s 3.5(3).

¹⁰¹ *Biodiversity Conservation Act 2016* (NSW) s 3.5(2).

¹⁰² *Biodiversity Conservation Act 2016* (NSW) s 3.4(1)(a).

¹⁰³ *Biodiversity Conservation Act 2016* (NSW) s 3.4(2).

¹⁰⁴ *Biodiversity Conservation Act 2016* (NSW) s 2.3.

¹⁰⁵ *Biodiversity Conservation Regulation 2017* (NSW) cl 3.6.

¹⁰⁶ *Local Land Services Regulation 2014*, cl 108(g).

¹⁰⁷ *Local Land Services Regulation 2014*, cl 124.

The Minister must take reasonable steps to enter into a private land conservation agreement with any landholder whose land is within the proposed area.¹⁰⁸

AOBVs are an automatic priority for private land conservation funding and support under the NSW Government's *Biodiversity Conservation Investment Strategy*.¹⁰⁹ The BC Act requires the Minister for the Environment (or delegate) to direct the BCT to take reasonable steps to enter into a private land conservation agreement with any landholder whose land is within an AOBV.¹¹⁰

¹⁰⁸ *Biodiversity Conservation Act 2016* (NSW) s 3.4(1)(b).

¹⁰⁹ See <https://www.environment.nsw.gov.au/research-and-publications/publications-search/biodiversity-conservation-investment-strategy-2018>

¹¹⁰ *Biodiversity Conservation Act 2016* (NSW) s 3.4.

Appendix 3: New South Wales – Critical habitat under the *Fisheries Management Act*

Introduction

Part 7A, Division 3 of the *Fisheries Management Act 1994* (NSW) (FM Act) establishes a process for declaring critical habitat of endangered species, populations and ecological communities and critically endangered species and ecological communities. The FM Act applies to ‘fish’, defined as “*marine, estuarine or freshwater fish or other aquatic animal life at any stage of their life history (whether alive or dead)*”, and includes oysters and other aquatic molluscs, crustaceans, echinoderms, and beach worms and other aquatic polychaetes.

Key criteria

The FM Act defines critical habitat as “*habitat declared to be critical habitat under Division 3*”.¹¹¹

Section 220P in Division 3 provides that “*the whole or any part of the habitat of an endangered species, population or ecological community or critically endangered species or ecological community that is critical to the survival of the species, population or ecological community is eligible to be declared to be the critical habitat*”. There is no additional criteria guiding the identification of critical habitat, however the Minister must consult with the Fisheries Scientific Committee about the identification of any such critical habitat (s 220Q(2), FM Act). The regulations may (but do not currently) provide that a specified habitat, or habitat of a specified kind, may, or may not, be declared critical habitat for the purposes of this division.

Additionally, under s 220S of the FM Act, the Minister must, before deciding whether an area should be declared critical habitat, have regard to:

- (a) the likely social and economic consequences of a declaration of the area as critical habitat,
- (b) without limiting paragraph (a), the likely consequences of a declaration of the area as critical habitat for landholders of, or other persons having an interest in, or in lawful uses of, the land concerned,
- (c) the advice of the Fisheries Scientific Committee on the matter,
- (d) any written submissions received by the Minister on or before the date specified for the receipt of public submissions about the preliminary identification of the area and, in particular, any submissions received from public authorities exercising relevant functions in relation to the area.

The Minister must also consider whether, consistent with the principles of ecologically sustainable development, the area identified might be amended to avoid or lessen any adverse consequences of its declaration as critical habitat.¹¹²

¹¹¹ *Fisheries Management Act 1994* (NSW), s 220B(1).

¹¹² *Fisheries Management Act 1994* (NSW), s 220S(2).

Procedural requirements

Identification of critical habitat by the Minister

Section 220Q(1) of the FM Act provides that the Minister is to identify (where this is possible) the critical habitat of each endangered species, population and ecological community and each critically endangered species and ecological community.

The Minister must consult the Fisheries Scientific Committee about the identification of any such critical habitat and must not make a preliminary identification until the Minister has considered the advice of the committee on the matter (220Q(2)).

There is no formal process for third parties (i.e. members of the public) to recommend or nominate an area for consideration as critical habitat.

Consultation on preliminary identification

Section 220R of the FM Act provides that after making a preliminary identification of critical habitat, the Minister must:

- give details of the preliminary identification to the Fisheries Scientific Committee; and
- give a copy of the notice of the preliminary identification to all affected persons;¹¹³ and
- give the public an opportunity to make submissions about the preliminary identification.

Section 284 regulates the public consultation procedure. It requires copies of the preliminary identification to be publicly exhibited and at least 30 days allowed for public comment.

Declaration of critical habitat by Minister and register

An area is declared critical habitat by a notification published in the NSW Government Gazette.¹¹⁴

A map that shows the location of the critical habitat is to be published in the Gazette, and the description of critical habitat in a declaration is to be provided by or by reference to that map.¹¹⁵ However, the Minister may decline to disclose the precise location of critical habitat (or proposed critical habitat) if satisfied that the disclosure would be likely to expose the habitat and the endangered species, population or ecological community or critically endangered species or ecological community that occupies it to a significant threat; each landholder of land concerned agrees that the precise location should not be disclosed; and it is in the public interest that the precise location should not be disclosed.¹¹⁶

¹¹³ Under section 220R(3), affected persons include landholders (including public authorities who are landholders) of the land concerned; other public authorities known to the Minister to exercise relevant functions in relation to the land concerned; if the land concerned is subject to a mortgage, charge or positive covenant – the mortgagee, chargee or person entitled to the benefit of the covenant; and holders of leases and other interests granted by the Crown over the land concerned.

¹¹⁴ *Fisheries Management Act 1994* (NSW), s 220T.

¹¹⁵ *Fisheries Management Act 1994* (NSW), s 220W.

¹¹⁶ *Fisheries Management Act 1994* (NSW), s 220Y.

The Minister must also keep a register containing copies of declarations of critical habitat as in force from time to time, and maps of the critical habitat that are published in the Gazette.¹¹⁷

Subsequent legal protections/requirements/outcomes

Duty to have regard to the existence of critical habitat

Section 220V of the FM Act provides that a public authority must have regard to the existence of declared critical habitat in relation to the use of any land for which it is a landholder, or in exercising its functions in relation to any land.

Recovery plans and habitat protection plan

The Secretary may prepare a recovery plan for listed species.¹¹⁸ If a recovery plan is prepared, it must identify any critical habitat declared in relation to the threatened species, population or ecological community, and state what must be done to protect the critical habitat.¹¹⁹

The Minister may establish a habitat protection plan for the protection of declared critical habitat.¹²⁰

Stop work order

Under Part 7A, Division 7 of the FM Act, the Secretary may make a stop work order if any action being, or about to be, carried out is likely to result in damage to critical habitat (among other things).

Offences

A person must not, by an act or omission, do anything that causes damage to any critical habitat.¹²¹

¹¹⁷ *Fisheries Management Act 1994* (NSW), s 220X.

¹¹⁸ *Fisheries Management Act 1994* (NSW), s 220ZI.

¹¹⁹ *Fisheries Management Act 1994* (NSW), s 220ZN.

¹²⁰ *Fisheries Management Act 1994* (NSW), s 192.

¹²¹ *Fisheries Management Act 1994* (NSW), s 220ZC.

Appendix 4: Queensland – Critical habitat and areas of major interest under the *Nature Conservation Act 1992*

Introduction

The *Nature Conservation Act 1992* (Qld) (NC Act) includes provisions for identifying and protecting both critical habitat and an area of major interest. Additionally, the Minister may declare a nature refuge over critical habitat or an area of major interest; or may make an interim conservation order for the conservation, protection or management of critical habitat or an area of major interest that is subject to a threatening process.

Key criteria

The NC Act defines critical habitat as follows:¹²²

- (1) **Critical habitat** is habitat that is essential for the conservation of a viable population of protected wildlife or community of native wildlife, whether or not special management considerations and protection are required.
- (2) A **critical habitat** may include an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife.

Area of major interest is defined as follows:¹²³

area of major interest means an area that contains natural resources of significant nature conservation value.

Procedural requirements

Identification of critical habitat or area of major interest in regulation or conservation plan

The NC Act allows for critical habitat or an area of major interest to be identified in either a regulation or conservation plan made under the NC Act. The Chief Executive is required to keep a register of any critical habitat or area of major interest identified in a regulation or conservation plan.¹²⁴

We are not aware of any areas that have been identified as critical habitat or an area of major interest under the NC Act.

A regulation or conservation plan may include provisions for the use or development of land, and activities, in an area identified as, or including, a critical habitat or an area of major interest.¹²⁵ A

¹²² *Nature Conservation Act 1992* (Qld) s 13.

¹²³ *Nature Conservation Act 1992* (Qld) Schedule Dictionary.

¹²⁴ *Nature Conservation Act 1992* (Qld) s 133 and s 134.

¹²⁵ *Nature Conservation Act 1992* (Qld) s 120H and s 175(2)(j).

local government must not issue or give any approval, consent, permit or other authority for a use of, or a development on, land that is inconsistent with the regulation.¹²⁶

There is no formal process for third persons (i.e. members of the public) to recommend or nominate an area for consideration as critical habitat or an area of major interest.

Compulsorily declared nature refuges

The Environment Minister may compulsorily declare a nature refuge if the Minister is of the opinion that the area is, or includes (i) an area of major interest; or (ii) a critical habitat; and should be declared a nature refuge.¹²⁷ However, the NC Act first requires the Minister to prepare a nature refuge proposal and negotiate a conservation agreement with the landholder.¹²⁸ We are not aware of a nature refuge having been compulsorily declared under these provisions.

Where the landholder and the Minister are unable to agree that an area should be a nature refuge, and the management intent for that area, the Minister can make a recommendation to the Governor in Council¹²⁹ for the area to be compulsorily declared a nature refuge under the NC Act.¹³⁰

The Minister must provide written notice to the landholders and any other people with an interest in the related land.¹³¹ This notice must include the proposed management intent, the Minister's reasons for their opinion, and a deadline for the interest-affected parties to submit objections to the Minister.

After considering any objections received, the Governor in Council may, by regulation, declare the area a nature refuge.¹³² This regulation must describe the area over which the declaration is made, specify the declared management intent, specify the covenant applying to the declaration, and include any other prescribed information.

A nature refuge declaration does not automatically override any extractive industry interests on the land, such as mining or extractive forestry.¹³³

¹²⁶ *Nature Conservation Act 1992* (Qld) s 123 and s 126A.

¹²⁷ *Nature Conservation Act 1992* (Qld) s 49.

¹²⁸ *Nature Conservation Act 1992* (Qld) ss 44, 45.

¹²⁹ https://documents.parliament.qld.gov.au/explore/education/factsheets/Factsheet_4.2_ExecutiveCouncil.pdf

¹³⁰ *Nature Conservation Act 1992* (Qld) s 49.

¹³¹ *Nature Conservation Act 1992* (Qld) s 49.

¹³² *Nature Conservation Act 1992* (Qld) s 49(3).

¹³³ For landholders who wish to voluntarily protect land from mining interests, Queensland recently introduced a new category of voluntary protected area – special wildlife reserves. Land declared as a special wildlife reserve receives statutory protection from incompatible land uses such as mining, commercial grazing and native timber harvesting. See <https://www.qld.gov.au/environment/parks/protected-areas/private/special-wildlife-reserves>

Interim conservation order

If protected wildlife habitat that is a critical habitat, or an area of major interest, is subject to a threatening process that is likely to have significant detrimental effect, the Minister may make an interim conservation order for the conservation, protection or management of that area.¹³⁴

The NC Act defines a threatening process as follows:¹³⁵

A threatening process is any process that is capable of:

- a) *threatening the survival of any protected area, area of major interest, protected wildlife, community of native wildlife or native wildlife habitat; or*
- b) *affecting the capacity of any protected area, area of major interest, protected wildlife, community of native wildlife or native wildlife habitat to sustain natural processes.*

Additionally, an interim conservation order:

- may provide for the prohibition or control of a specified threatening process; or such other matters as are prescribed;¹³⁶
- may be made in relation to land even though the wildlife or habitat is not within the land; or the land is not within an area of major interest or protected area;¹³⁷
- can be in place for 60 days, and extended by not more than 90 days;¹³⁸ and
- allows the Minister to suspend any licence, permit or other authority granted under any act that would permit the holder to do anything that would contravene an interim conservation order.¹³⁹

There are no express provisions saying that critical habitat or area of major interest needs to be identified in a regulation or conservation plan before the powers for declaring a nature refuge or issuing an interim protection order can be used. The provisions simply require the Minister to form an opinion as to an area being critical habitat or an area of major interest.

Subsequent legal protections/requirements/outcomes

Offences

It is an offence for a person to take or interfere with native wildlife in identified critical habitat or in an area of major interest, unless a licence, permit or other authority permits the person to do so.¹⁴⁰

¹³⁴ *Nature Conservation Act 1992 (Qld) s 102(c).*

¹³⁵ *Nature Conservation Act 1992 (Qld) s 12.*

¹³⁶ *Nature Conservation Act 1992 (Qld) s 103.*

¹³⁷ *Nature Conservation Act 1992 (Qld) s 103.*

¹³⁸ *Nature Conservation Act 1992 (Qld) s 105.*

¹³⁹ *Nature Conservation Act 1992 (Qld) s 107.*

¹⁴⁰ *Nature Conservation Act 1992 (Qld) s 97.*

Compensation for the landholder

A landowner may be entitled to compensation from the state in the following circumstances:

- where land is identified in regulation or a conservation plan as including critical habitat or an area of major interest;¹⁴¹
- where the Minister declares that the area is a nature refuge without the agreement of the landowner;¹⁴² or
- the land is subject to an interim conservation order.¹⁴³

¹⁴¹ *Nature Conservation Act 1992* (Qld) s 137A.

¹⁴² *Nature Conservation Act 1992* (Qld) s 67.

¹⁴³ *Nature Conservation Act 1992* (Qld) s 108.

Appendix 5: Victoria – Critical Habitat under the *Flora and Fauna Guarantee Act 1988*

Introduction

The *Flora and Fauna Guarantee Act 1988* (Vic) (FFG Act) provides that the Secretary (the Department Head of the Victorian Department of Environment, Land, Water and Planning)¹⁴⁴ may determine an area in Victoria as critical habitat.¹⁴⁵ Once an area has been determined to be critical habitat, the Minister may make a Habitat Conservation Order to stop, prevent or repair damage to the critical habitat, manage the critical habitat or ensure its conservation or protection.¹⁴⁶

Historically, there has been only one critical habitat determination made under the FFG Act, in 1996, which was subsequently withdrawn.¹⁴⁷ Recent amendments to the FFG Act included revisions to the critical habitat provisions that expand the concept of critical habitat, provide an inclusive list of factors that may contribute to an area being critical habitat and create a greater role for the Scientific Advisory Committee (SAC).¹⁴⁸

Key criteria

A determination that an area is critical habitat must not be made unless:¹⁴⁹

- the area significantly contributes to the conservation in Victoria of a listed taxon or community of flora or fauna; or
- the area significantly contributes to the conservation in Victoria of a taxon or community of flora or fauna that is not listed, but in respect of which –
 - a recommendation has been made by the Committee under section 16D; and
 - the Minister has not made a decision under section 16G or has made a decision under that section to make a recommendation; or
- the area supports ecological processes or ecological integrity that significantly contributes to the conservation of a taxon or community that is listed.

Further, a determination of a critical habitat may be made if:

- the area is critical to the persistence of a taxon or community of flora or fauna;
- flora or fauna aggregate in the area for reproduction or other important life stages;
- the area is used by flora or fauna to move between populations, migrate or disperse, or as refugia during environmental stress;
- the taxon or community of flora or fauna is occasionally present in the area;

¹⁴⁴ See *Flora and Fauna Guarantee Act 1998* (Vic), section 3 – definitions. Secretary means the body corporate established by part 2 of the *Conservation, Forests and Lands Act 1987*. Section 6 of the *Conservation, Forests and Lands Act 1987* (Vic) establishes the body corporate as “The person who is for the time being the Department Head (within the meaning of the *Public Administration Act 2004*) of the Department, and the successors in office of that person are a body corporate under the name “Secretary to the Department of Environment, Land, Water and Planning””.

¹⁴⁵ *Flora and Fauna Guarantee Act 1998* (Vic) s 20.

¹⁴⁶ *Flora and Fauna Guarantee Act 1998* (Vic) s 26(3).

¹⁴⁷ Fitzsimons, J., *Urgent need to use and reform critical habitat listing in Australian legislation in response to the extensive 2019-2020 bushfires*, 2020, 37 EPLJ, p. 143.

¹⁴⁸ See Victoria Department of Environment, Land, Water and Planning, *Critical habitats and HCO factsheet*, available at https://www.environment.vic.gov.au/_data/assets/pdf_file/0032/466682/Critical-habitat-and-HCO-factsheet.pdf

¹⁴⁹ *Flora and Fauna Guarantee Act 1988* (Vic) s 20.

- the taxon or community of flora or fauna is not present in the area but was previously present in the area and there is potential to reintroduce it; or
- the area is likely to be needed by a taxon or community of flora or fauna in the future.

The Secretary, in consultation with the SAC, may make and publish guidelines in relation to areas that may be eligible for critical habitat determinations.¹⁵⁰ There are currently no guidelines published.

Procedural requirements

Recommendations by the Scientific Advisory Committee (SAC)¹⁵¹

The SAC may make a recommendation to the Secretary to make a critical habitat determination.¹⁵² The Secretary is required to consider any recommendations by the SAC to make a critical habitat determination.¹⁵³ The Secretary must also give reasons to the committee for its decision to propose or not propose to make a critical habitat determination,¹⁵⁴ and publish its decision.¹⁵⁵

Nominations

There is no formal process for third persons (i.e. members of the public) to recommend or nominate an area for consideration as critical habitat or an area of major interest.

Public consultation

- *Consultation with interest-affected parties:* The Secretary must provide written notice to any landholders of land within the area of the proposed critical habitat determination and any public authorities that perform a function or exercise a power in that area.¹⁵⁶ The Secretary must also provide written notice to any person whose “*interests ... are likely to be adversely affected by the proposed determination*”.¹⁵⁷ The notice must notify the recipient of their right to make submissions on the proposed determination and the submission deadline.¹⁵⁸ The deadline must be at least 30 days after the notice is provided.¹⁵⁹
- *General public consultation:* The Secretary must publish on the internet a copy of the proposed determination, a general description of the effect of the proposed determination, and must specify that there is an option to make a submission by the deadline.¹⁶⁰ Any person may make

¹⁵⁰ *Flora and Fauna Guarantee Act 1998* (Vic) s 20E.

¹⁵¹ *Flora and Fauna Guarantee Act 1998* (Vic) s 8(2). The Scientific Advisory Committee (SAC) is a committee consisting of 7-9 expert scientists in a diverse range of flora and fauna, or potentially threatening processes. It advises the Minister on the listing of taxa or communities of flora and fauna and potentially threatening processes, and on any other flora and fauna conservation matters.

¹⁵² *Flora and Fauna Guarantee Act 1998* (Vic) s 20A(1).

¹⁵³ *Flora and Fauna Guarantee Act 1998* (Vic) s 20A(2).

¹⁵⁴ *Flora and Fauna Guarantee Act 1998* (Vic) s 20A(3).

¹⁵⁵ *Flora and Fauna Guarantee Act 1998* (Vic) s 20A(4).

¹⁵⁶ *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(1)(a)-(b).

¹⁵⁷ *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(1)(c).

¹⁵⁸ *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(2).

¹⁵⁹ *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(2).

¹⁶⁰ *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(3).

submissions to the Secretary on the proposed determination,¹⁶¹ and the deadline must be at least 30 days after the notice is provided.¹⁶²

The Secretary is not required to provide written notice or to publish the proposed determination if such action is “*likely to result in damage being done to the habitat within the area*” of the proposed determination.¹⁶³ The Secretary is also not required to publish the proposed determination if the landholder so requests and it is approved by the Minister. Once the submission deadline has passed, the Secretary must consider the submissions, and further consult with the SAC in preparing a critical habitat determination.

Making a critical habitat determination

The Secretary must determine whether a critical habitat determination will be made within 12 months of the proposed determination being published.¹⁶⁴ The Secretary must publish notice of the making of a critical habitat determination in the *Government Gazette*.¹⁶⁵ The Secretary must ensure that a register of critical habitat determinations and habitat conservation orders is kept and maintained.¹⁶⁶

Amending a critical habitat determination

If the Secretary amends a critical habitat determination, the amendment operates as if it were a proposed critical habitat determination and the steps listed above must again be repeated,¹⁶⁷ except where the proposed amendment is declaratory, machinery or administrative in nature.

Subsequent legal protections/requirements/outcomes

Management agreements

Once an area is subject to a critical habitat determination, the Secretary is required to take “all reasonable steps” to enter into a public authority management agreement or section 69 agreement in respect of that area.¹⁶⁸ The agreement must outline the measures to provide for the long-term conservation and protection of the critical habitat.¹⁶⁹

Habitat Conservation Orders

The Minister may make a Habitat Conservation Order if it is necessary to stop, prevent or repair damage to the critical habitat, manage the critical habitat or ensure its conservation or protection.¹⁷⁰

¹⁶¹ *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(3); ‘Flora and Fauna Guarantee Act 1998: Critical habitat and habitat conservation orders’, Department of Environment, Land, Water and Planning (Vic) (web page, 2020).

<https://www.environment.vic.gov.au/__data/assets/pdf_file/0032/466682/Critical-habitat-and-HCO-factsheet.pdf>

¹⁶² *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(3).

¹⁶³ *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(4).

¹⁶⁴ *Flora and Fauna Guarantee Act 1998* (Vic) s 20C(2).

¹⁶⁵ *Flora and Fauna Guarantee Act 1998* (Vic) s 20C(3).

¹⁶⁶ *Flora and Fauna Guarantee Act 1998* (Vic) s 42.

¹⁶⁷ *Flora and Fauna Guarantee Act 1998* (Vic) s 20D.

¹⁶⁸ *Flora and Fauna Guarantee Act 1998* (Vic) s 20F; s 69 agreement refers to agreements made under s 69 of the *Conservation, Forests and Lands Act 1987* (Vic).

¹⁶⁹ *Flora and Fauna Guarantee Act 1998* (Vic) s 20F(3).

¹⁷⁰ *Flora and Fauna Guarantee Act 1998* (Vic) s 26(3).

The order may apply for up to 10 years.¹⁷¹ A Habitat Conservation Order requires or prohibits actions or activities within a critical habitat or outside the critical habitat if the proposed activity is likely to adversely affect the critical habitat.¹⁷² It is an offence to contravene a Habitat Conservation Order.¹⁷³

The Minister may also make a Habitat Conservation Order in relation to an area proposed as a critical habitat by the Secretary of the Department of Energy, Environment and Climate Action.¹⁷⁴ However, these are limited in duration to 12 months.¹⁷⁵

Before a Habitat Conservation Order or requirement imposed by a Habitat Conservation Order expires, the Minister and the Secretary must take all reasonable steps to ensure the long-term conservation of the taxon, community or critical habitat in respect of which the order was made.¹⁷⁶

In certain circumstances, the landowner is entitled to compensation for financial loss suffered as a consequence of the making of a Habitat Conservation Order.¹⁷⁷

Management plans

A flora and fauna management plan¹⁷⁸ may provide for the conservation, management or restoration of a critical habitat.¹⁷⁹

Implications for Ministers and public authorities

Ministers and public authorities, so far as is consistent with the proper exercising of their functions, must give proper consideration to critical habitat determinations.¹⁸⁰

If the Secretary is of the opinion that action taken, or to be taken, by a public authority is likely to threaten the persistence of a listed taxon or community of flora or fauna, or a critical habitat, the Secretary may require the public authority to consult with the Secretary either before the action starts, or if the action has already started, within 15 days of the request being made.¹⁸¹

Appendix 6: Commonwealth – Critical Habitat under the *Environment Protection and Biodiversity Conservation Act 1999*

Introduction

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) includes provisions for the Federal Environment Minister to identify and list critical habitat on a Commonwealth Register of Critical Habitat.

¹⁷¹ *Flora and Fauna Guarantee Act 1998* (Vic) s 27(4).

¹⁷² *Flora and Fauna Guarantee Act 1998* (Vic) s 27.

¹⁷³ *Flora and Fauna Guarantee Act 1998* (Vic) s 32.

¹⁷⁴ *Flora and Fauna Guarantee Act 1998* (Vic) s 26(1)(b).

¹⁷⁵ *Flora and Fauna Guarantee Act 1998* (Vic) s 26(4).

¹⁷⁶ *Flora and Fauna Guarantee Act 1998* (Vic) s 40.

¹⁷⁷ *Flora and Fauna Guarantee Act 1998* (Vic) s 39.

¹⁷⁸ Flora and Fauna Management Plans are prepared under Part 4 Division 3 of the *Flora and Fauna Guarantee Act 1988* (Vic).

¹⁷⁹ *Flora and Fauna Guarantee Act 1998* (Vic) s 23(2)(e).

¹⁸⁰ *Flora and Fauna Guarantee Act 1988* (Vic), s 4B.

¹⁸¹ *Flora and Fauna Guarantee Act 1998* (Vic) s 7.

To date, habitat for only five species has been listed on this register.¹⁸²

Separately, a recovery plan must identify habitat “critical to the survival of the species or ecological community”.¹⁸³ Habitat identified in this way is not critical habitat for the purposes of the register and does not receive the same legal protections as registered critical habitat. However, when making a recovery plan the Minister must consider whether to list habitat that is identified in the recovery plan as being critical to the survival of the species or ecological community on the register.¹⁸⁴

Key criteria

Clause 7.09 of the *Environment Protection and Biodiversity Conservation Regulation 2000* provides that the Minister may, in identifying habitat, take into account the following matters:¹⁸⁵

- (a) whether the habitat is used during periods of stress;
Examples of periods of stress: Flood, drought or fire.
- (b) whether the habitat is used to meet essential life cycle requirements;
Examples: Foraging, breeding, nesting, roosting, social behaviour patterns or seed dispersal processes.
- (c) the extent to which the habitat is used by important populations;
- (d) whether the habitat is necessary to maintain genetic diversity and long-term evolutionary development;
- (e) whether the habitat is necessary for use as corridors to allow the species to move freely between sites used to meet essential life cycle requirements;
- (f) whether the habitat is necessary to ensure the long-term future of the species or ecological community through reintroduction or re-colonisation; and
- (g) any other way in which habitat may be critical to the survival of a listed threatened species or listed threatened ecological community.

In determining whether to list a habitat, the Minister must also consider the potential conservation benefit of listing the habitat.¹⁸⁶

Procedural requirements

Identifying and adding critical habitat to the register

The usual way in which the public can provide input into critical habitat under the EPBC Act is through the recovery planning process.¹⁸⁷ A recovery plan is required to describe areas of habitat that

¹⁸² These species are *Diomedea exulans* (wandering albatross) – Macquarie Island; *Lepidium ginninderrense* (Ginninderra peppercress) – north-west corner Belconnen Naval Transmission Station, ACT; *Manorina melanotis* (black-eared miner) – Gluepot Reserve, Taylorville Station and Calperum Station, excluding the area of Calperum Station south and east of Main Wentworth Road; *Thalassarche cauta* (shy albatross) – Albatross Island, The Mewstone, Pedra Branca; and *Thalassarche chrysostoma* (grey-headed albatross) – Macquarie Island. The Register of Critical Habitat is available here: <https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl>

¹⁸³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 270(2)(d).

¹⁸⁴ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(2).

¹⁸⁵ *Environment Protection and Biodiversity Conservation Regulation 2000* (Cth), cl 7.09.

¹⁸⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207A(1A).

¹⁸⁷ Information on how to get involved in the recovery planning process can be found on the Department of Agriculture, Water and Environment website, <https://www.environment.gov.au/biodiversity/threatened/recovery-plans/comment>

are critical to the survival of the species or ecological communities.¹⁸⁸ The Minister is required to consult on a recovery plan before making it.¹⁸⁹ Once critical habitat is identified in the recovery plan, the Minister must consider whether to list that habitat on the register.¹⁹⁰

Outside this process, any questions or concerns regarding critical habitat should be discussed with the Department of Agriculture, Water and Environment. Comments or concerns can also be put in writing to the Environment Minister.

Register

The Minister must keep a register, and may list (on the register) habitat as being critical to the survival of a listed threatened species or listed threatened ecological community.¹⁹¹ The register must include sufficient information to identify the habitat, including its location and extent.¹⁹² It should also outline the reasons why a listing is considered a critical habitat.¹⁹³ The Register of Critical Habitat must be made publicly accessible at the office of the Department of Agriculture, Water and the Environment and online.¹⁹⁴ However, information may be kept confidential where it is necessary to protect the species or ecological community or the habitat, or the interests of relevant landholders.¹⁹⁵

Expert consultation

Before listing habitat on the register, the Minister must consider any advice from the Scientific Committee about whether the habitat is critical to the survival of a listed threatened species or listed threatened community.¹⁹⁶

Landholder consultation

If the habitat is outside a Commonwealth area, the Minister must take reasonable steps to consult with the landowner of the area where the habitat is located.¹⁹⁷

Subsequent legal protections/requirements/outcomes

Offences

It is an offence to knowingly damage critical habitat in or on a Commonwealth area.¹⁹⁸ That is, while critical habitat in any jurisdiction may be identified on the register, the offence under the EPBC Act has limited application as it only relates to damaging critical habitat in or on a Commonwealth area.

¹⁸⁸ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.11.

¹⁸⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 275.

¹⁹⁰ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(2).

¹⁹¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 207A.

¹⁹² *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.10(1)(a).

¹⁹³ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.10(1)(b).

¹⁹⁴ See <https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl>

¹⁹⁵ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.10; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207A(3A).

¹⁹⁶ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(3)(a).

¹⁹⁷ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(3)(b).

¹⁹⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207B.

Sale or lease of the land

Where a Commonwealth agency completes a contract to sell or lease Commonwealth land that includes critical habitat, the agency must ensure that the contract includes a covenant that, in effect, protects the critical habitat.¹⁹⁹ The agency must take reasonable steps to ensure that the covenant binds subsequent buyers or lessees.²⁰⁰



Regent honeyeater (*Anthochaera phrygia*). (© Shutterstock / Ken Griffiths / WWF)

¹⁹⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207C(2).

²⁰⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207C(3).



**THE CRITICAL DECISIONS
WE MAKE TODAY WILL
HELP SHAPE AUSTRALIA'S
TOMORROW.**

© WWF-Aus / Madeleine Smitham



Working to sustain the natural world for the benefit of people and wildlife.

together possible. wwf.org.au

WWF-Australia National Office

Suite 3.01, Level 3,
45 Clarence Street,
Sydney NSW 2000
Australia

Tel: +1800 032 551
enquiries@wwf.org.au
[@WWF_Australia](https://www.facebook.com/WWF_Australia)
wwf.org.au