

Could the EPBC Act be fit for purpose and prevent biodiversity decline?

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Australia's premier environmental legislation—the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act from hereon) is due for its 20-year review in October. The main questions conservation scientists want the review to ask are: 1) is the Act achieving what we want it to achieve? 2) If no, what would a legislation need to meet our objectives?

What do we want it to achieve?

One of the main objects of the EPBC Act is to “provide for the protection of the environment, especially ... matters of national environmental significance.” This includes species and ecological communities listed under the Act as ‘threatened’ (meeting the strict criteria for Vulnerable, Endangered or Critically Endangered), and migratory species. Another main purpose of the Act is the “conservation of biodiversity”.

But are these the best objectives for this Act? The likelihood of achieving your goals is increased when your goals are clearly outlined, and measurable. Therefore, should the objectives of our premier environmental legislation explicitly state that we want to prevent the decline of biodiversity (specifically species and ecological communities), and recover those that have declined? Subtle nuances can result in substantial real-world impact when it comes to the law.

Is it achieving what we want it to achieve?

Watching development within the habitat of the endangered species I work on, the Black-throated finch (*Poephila cincta cincta*), be approved under the EPBC Act; I see an abundance of evidence that the **Act is failing to prevent the decline of threatened species**. Important breeding habitat for the Black-throated finch is continually being cleared both with approval under the EPBC Act, and through ongoing habitat loss that does not go through the EPBC Act's formal process. We also have a study in the final stages of preparation showing that more than 1,300 terrestrial threatened species have lost habitat since the EPBC Act has been in operation. With the **extinction of three Australian vertebrates in the last decade**, and **general decline in environmental indicators**, I argue that the Act is not achieving the desired objectives.



In practice the EPBC Act has failed to protect the endangered Black-throated finch by approving multiple developments that remove or degrade their habitat. Credit: Eric Vanderbuys.

What would a legislation need to meet our objectives?

The Australian Panel of Experts in Environmental Law have produced a [wide-ranging Blueprint for the next generation of environmental laws for Australia](#). Continuing this work, the National Environmental Law Association and ANU College of Law ran a symposium on this topic in March. Much of the law reform discussion has focused on the way actions are assessed under the Act. These ‘actions’ are usually developments, but anything that could impact a Matter on National Environmental Significance (MNES: species and ecological communities listed under the Act as ‘threatened’, migratory species, and other important matters) counts. The current process only applies if the action is likely to have a significant impact on an MNES. Each speaker at the March symposium presented their top recommendations, and a rough summary (in haphazard order) of these includes:

- 1. Clarify the scope of governmental authorisation.** Compliance under the law is greater when there is an absence of ambiguity for where the law actually applies. Defining a ‘significant impact’ of an action is unclear, and as a result, many projects do not get referred under the Act for assessment.
- 2. Greater independence.** This includes a) establish an independent regulator, such as an independent national Environmental Protection Agency that administers a national assessment and compliance regime, b) appoint independent and accredited consultants to do the environmental assessments, c) give responsible third parties a seat at the compliance and enforcement table, and d) lessen the discretionary decision-making powers of the relevant ministers. In short, remove the politics and vested interests from the decision-making process.
- 3. Greater emphasis on compliance and enforcement.** It was said during the symposium that “A law without enforcement is not worth the paper it’s written on.” Holding people to account for their actions is key to compliance with the law. This can be improved through ‘spot check’ type auditing, similar to the tax system.
- 4. Greater transparency.** This includes a) establish a public register of approvals with justifications, b) enforce data sharing, and c) Establish accountability for decisions. Currently, the case in many States is that data collected by consultants on behalf of development proponents are classified as ‘commercial in confidence’ and are not

available to the public or scientists working on the threatened species. In a resource-limited environment, data collected by consultants often constitutes the bulk of data on some threatened species and sharing these data substantially increases the knowledge base. Furthermore, data sharing can provide transparency in decision making, which tends to lead to better decisions. Also, better decisions can result from making people accountable for decisions—if a species goes extinct, who were responsible? Can they prove they took reasonable action to prevent the extinction?

5. Cumulative impact assessments. Currently, most projects are assessed for the likelihood of significant impacts in isolation of every other project. This leads to the underestimation of the broad scale impact development can have on species. I found that **there were over 700 projects that intersected with Black-throated finch habitat within the duration of the Act (2000-2018)**. Each one of these projects were assessed for their impact individually, leading to the ‘death by a thousand cuts’ for Black-throated finch and many other threatened species.

6. Increase resourcing for the environment and establish a secure funding model. This includes funding national and regional monitoring programs. Industry levies could be used to fund related or beneficial environmental monitoring and research.

7. Genuinely use the mitigation hierarchy: avoid, mitigate, offset. Currently approvals for developments appear to go straight past the first two steps of the mitigation hierarchy, to offsetting. Better environmental gains could be made with a genuine effort to avoid and mitigate impacts. Where offsets are deemed necessary, they must be better employed to avoid ongoing declines. For example, an offset has to actually counterbalance the impact if ‘no net loss’ is truly achieved—**and most of the time they don’t**. Projects should not be approved that will have a significant impact until a suitable offset has been identified, and secured.

The recommendations are too numerous to list exhaustively here, but there is some great thinking on how we can write better laws to protect our biodiversity. With the results of the recent federal election, the hope that these recommendations will surface in the official EPBC Act review—and receive timely implementation—has dimmed somewhat. But as conservation scientists we can lend expertise to these discussions. Let’s not leave it solely to the environmental lawyers (and bureaucrats) who may not know a finch from a fairy wren, or a functional ecosystem from a degraded one. It is important that new laws have a strong ecological underpinning, which will be crucial to their success.

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Jeremy Simmonds and Michelle Ward also gave helpful feedback on this article.