

RESTORING THE BALANCE

THE CASE FOR A NEW
GENERATION OF AUSTRALIAN
ENVIRONMENTAL LAWS



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BirdLife Australia acknowledges the traditional owners of Country throughout Australia, and their continuing connection to land, sea and community. We pay respect to them and their cultures, and to their Elders both past and present.

Report by Jenny Lau and Margaret Quixley
February 2018

Above
Mallee Emu-wren. Photo by Dean Ingwersen



Australia is a land of stunning landscapes and unique wildlife. It supports a rich and diverse avifauna, including a high proportion of the world's parrots and honeyeaters. It is the origin of the world's songbirds. Our flora and fauna are the envy of the world, particularly for countries that have lost much of theirs through human-induced landscape change and resource exploitation.

But we appear to have learnt little from past mistakes, both at home and overseas. Australia continues to have some of the highest rates of land clearing in the world, we oversee growing lists of threatened species, and a broad range of threats such as fire, weeds and pest animals continue to increase.

Even where there is strong scientific evidence of actions that will cause harm, Australia's poor record of environmental monitoring coupled with the ambiguity of key terms in legislation such as 'significant impact' means that science can effectively be ignored. Worse still, in some cases our Federal Minister has the power to use his or her discretion to override scientific evidence. Under exemptions such as Regional Forest Agreements, actions that will impact on threatened species don't even require Federal approval.

Our current national environment laws are not strong enough to protect critical habitats or recover threatened species. At best, they are a band-aid solution, a handbrake to decline, capable of stopping only the worst impacts. By and large they are simply managing a trajectory towards extinction—rather than arresting and reversing declines as they should.

Many Australians continue to take our extraordinary plants and animals for granted and are yet to fully grasp the concept that extinction is forever and that it's happening before our very eyes. Unless we all work together to bring about real change, future generations will be left with an Australia where once-common species such as Carnaby's Black-Cockatoos, Regent Honeyeaters and Swift Parrots are extinct.

But it doesn't have to be this way. BirdLife Australia, together with the Places You Love Alliance and guided by the Australian Panel of Experts on Environmental Law, has developed a blueprint for new environmental laws and institutions that can begin the work of providing effective protection for threatened species and restoring ecosystems. It is a challenge that Australia must take on. Right now, we all have an opportunity to make real, lasting change that will provide a strong foundation for future generations and protect the unique plants, animals and places we love.

Laureate Professor Peter Doherty
Immunologist, Nobel Laureate, author

INTRODUCTION

Above right

Regent Honeyeater. Photo by Dean Ingwersen

Below right

Remote Australia. Photo by Erin Baker (Unsplash)

Australia's national environmental laws are failing to protect and conserve Australia's biodiversity—our plants, animals and the environments they rely on. With thousands of species now threatened with extinction, and successive national State of the Environment reports indicating that threats from land clearing, altered fire regimes, invasive species and changing land use continue to worsen, it's time for real change.

The Federal *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) was drafted with good intent and some strong provisions. But it allows for high levels of ministerial discretion in decision making (pages 6, 8 & 16) and contains loopholes and exemptions such as Regional Forest Agreements (page 12) that undermine the objectives of the Act. Many key concepts, such as significant or cumulative impacts, are poorly defined, leaving them vulnerable to subjective interpretation and exploitation (page 8), an issue that is exacerbated by the absence of a strong national environmental monitoring and reporting program, and insufficient resources to ensure compliance.

These weaknesses are compounded by administrative and legislative processes that lack transparency, contain significant barriers to community participation (pages 6 & 15) and are heavily skewed towards the protection of business and economic interests. Recent reversals of land clearing controls in Queensland and NSW clearly show that some protections are all too easily unwound by vested interests influencing the government of the day.

In practice, current legislation focuses on discrete and reactive issues, typically development proposals that may impact on Matters of National Environmental Significance. Our current national laws are not designed to address the big drivers of biodiversity decline: the loss and degradation of habitat (and the associated problem of loss of habitat connectivity); altered fire regimes; invasive species; and climate change.

The scale and pervasiveness of these systemic and intractable issues requires strategic landscape-scale planning and a long-term commitment of resources. Yet one of the main instruments within the legislation that could support long-term action—species' Recovery Plans—has been systematically undermined, leaving it vulnerable to lobbying by business interests and governments seeking to avoid perceived barriers to economic activity (page 18).

What does this mean for people working to protect and conserve the environment?

For advocates and scientists, it means that time and again we see science ignored, with developments allowed in areas that are known to provide important habitat for listed threatened species or ecological communities, or logging occurring in areas that support high biological diversity.

For community groups working to restore habitat, it's knowing that for every seedling that will take decades to provide nesting or feeding habitat, elsewhere mature trees are being felled for short-term economic gain, often with marginal returns and little thought for the irreplaceable nature of the values being lost.

For future generations, it means an Australian landscape degraded by the excesses and short-sightedness of previous generations. This report illustrates just how quickly species can go from being common to facing extinction, simply because early warning signs were ignored and successive governments continued to approve the destruction of habitat.



The way forward—a new generation of environmental laws and institutions

BirdLife Australia and our Places You Love Alliance partners convened the Australian Panel of Experts on Environmental Law. These experts have developed a blueprint to guide the development of new, stronger laws to prevent further environmental damage and facilitate recovery, and new institutions to provide the governance and planning frameworks to address the big environmental challenges facing current and future generations.

From this blueprint, the Places You Love Alliance has derived the following policy recommendations to underpin the Next Generation of Environmental Laws.

1. Create national environment laws that genuinely protect Australia's natural and cultural heritage. The Federal Government must retain responsibility for Matters of National Environmental Significance and protect them effectively. National oversight must be expanded to land clearing, biodiversity and ecosystems, water resources, climate change, air pollution and protected areas.
2. Establish an independent National Sustainability Commission to set national environmental standards, undertake strategic regional planning and report on national environmental performance. The Commission would also develop enforceable national, regional, threat-abatement and species-level conservation plans.

The proposed Commission would provide the national leadership required to develop and implement plans to tackle complex and cumulative pressures such as habitat loss and degradation, invasive species, altered fire regimes and climate change.

The National Sustainability Commission will have authority to work with all jurisdictions to implement those plans, including:

- bioregional planning;
 - the coordination of regulation and policy across jurisdictions to minimise regulatory conflict and overlap;
 - developing national environmental standards that are binding on states and territories;
 - gathering nationally consistent data adequate to inform policy and regulation at all levels; and
 - public reporting on environmental indicators, decision making and outcomes of planning so politicians, business and the public can participate in an informed manner.
3. Establish an independent National Environmental Protection Authority that operates at arm's length from government to conduct transparent environmental assessments and inquiries, as well as undertake monitoring, compliance and enforcement actions.
 4. Guarantee community rights and participation in environmental decision making, including open standing provisions, open access to information about decision making and environmental trends, review of decisions based on their merits, third-party enforcement provisions and protections for costs in the public interest.

While these reforms will be costly, and may encounter opposition, more effective environmental law is the only way to ensure the long-term viability of ecological systems, agricultural production, community amenity and wellbeing. Real reform will require the Commonwealth to work with the States and the private sector to develop an effective funding model for environmental governance, ensuring that the costs of environmental stewardship are borne equitably across the community and across generations.



CARNABY'S BLACK-COCKATOO

Carnaby's Black-Cockatoo

Federally listed as Endangered, the Perth-Peel subpopulation of Carnaby's Black-Cockatoos has declined by 5-11 per cent per annum since 2010, due to the ongoing clearing of foraging and roosting habitat on the Swan Coastal Plain. With more than 70 per cent of banksia woodland now cleared, the species has become increasingly reliant upon pine plantations north of Perth to survive.

Compliance and enforcement

The importance of pines as a food source for Carnaby's is well understood (and recognised in the species' Recovery Plan). Indeed, in 2017, three quarters of Perth-Peel Carnaby's were recorded roosting within one kilometre of Perth's pine plantations, underscoring the importance of the plantations to sustain this population.

Despite the known importance of this habitat, these plantations have been harvested—without replacement—at a rate of around 1,000 hectares each year since 2004. At its greatest, this plantation spanned 23,000 hectares; today, less than 7,000 hectares remains.

Harvesting pines without adequately compensating for the loss of habitat has demonstrable consequences for this Endangered species. Since 2010, BirdLife Australia has undertaken regular monitoring of Perth's Carnaby's Black-Cockatoo population via its Great Cocky Count and has recorded sharp declines linked to the cumulative removal of mature pine trees.

Ministerial discretion

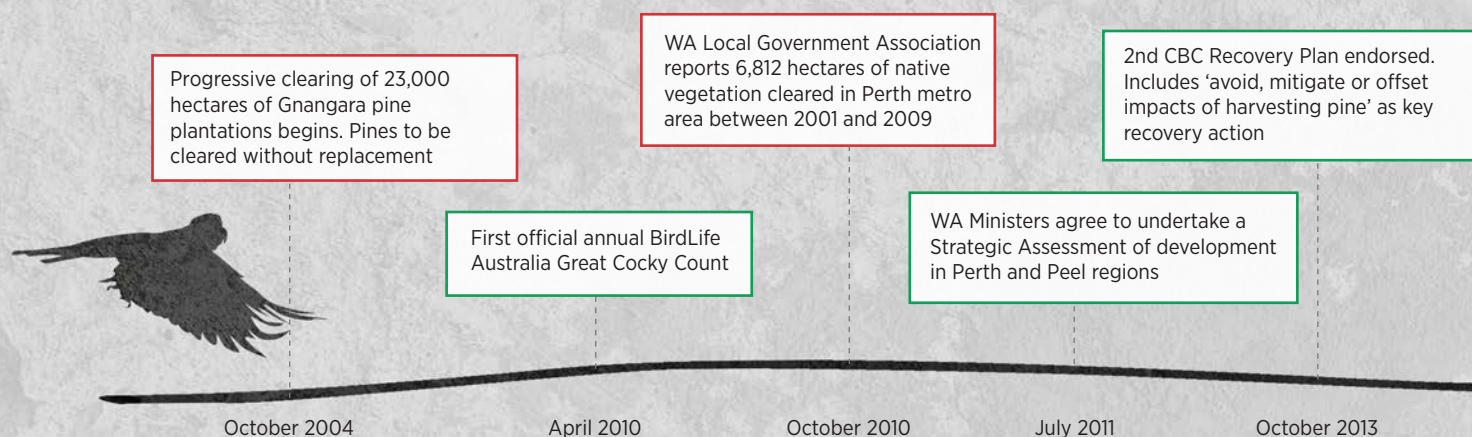
In 2014, BirdLife Australia wrote to the Federal Environment Minister and his State counterpart with the results of the 2014 Great Cocky Count, indicating that legal advice received suggested 'harvesting without replacement' did not constitute a lawful continuation of a use of land under section 43B of the EPBC Act, and met the criteria for 'significant impact' on a Matter of National Environmental Significance.

BirdLife Australia requested this be referred to the Federal Department of Environment to determine if it constituted a 'controlled action' (requiring further assessment of environmental impacts) and sought assurances from both the State and Federal Ministers that any further harvesting without replacement would be subject to referral under Part 7 of the EPBC Act, pointing to powers of the Federal Minister under section 70 to request a referral of the proposal.

To date, the Government of Western Australia has failed to refer this action to the Commonwealth for assessment, despite repeated requests by BirdLife Australia, and the ongoing and significant decline of Carnaby's Black-Cockatoo populations. By failing to refer the action for assessment under Commonwealth laws, the WA Government's action raises serious issues of transparency and accountability—legal responsibility is avoided and compliance seems optional. This points to an inherent weakness in legislation that relies in a large part on self-referral, opaque definitions of what constitutes a 'significant impact' and insufficient resourcing to ensure enforcement and compliance.

In response to repeated referral requests, successive Federal Ministers have cited the removal of pine plantations, and any potential impact

CARNABY'S BLACK-COCKATOO (CBC)





on the Carnaby's Black-Cockatoo, as being considered within the Strategic Assessment of the Perth and Peel Regions—a process that commenced in 2011 and is yet to be finalised.

During this time, at least 5,000 hectares of pine forest has been cleared without replacement, consideration or recourse for its impact on a nationally-listed threatened species. The discretionary powers available to the Minister to call an action in, which in this case were not exercised, also point to a legal system vulnerable to politicisation—even when the case for referral is clear, the Minister is not compelled to act.

Transparency and community rights

The information provided by the WA State Government through the Strategic Assessment consultation process was grossly inadequate. Endeavours by BirdLife Australia and other groups to provide constructive feedback were thwarted by a lack of disclosure of key information, including granular mapping and modelling projections, ultimately requiring requests under Freedom of Information laws. This highlights the inherent challenges the community faces when seeking to effectively participate in or scrutinise assessment processes.

While the data produced by organisations like BirdLife Australia fills critical knowledge gaps and is relied upon to inform environmental decision making, the burden of holding governments to account for poor decisions, non-referral and the outright dismissal of scientific evidence effectively outsources regulatory and compliance responsibility to non-state actors. Prohibitive legal costs also represent a significant barrier to individuals and non-government organisations, acting as a further deterrent to ensuring robust environmental checks and balances, and undermining the effectiveness of the legal system tasked with the protection of federally listed species.

Above

Carnaby's Black-Cockatoo. Photo by Georgina Steytler
Bottlebrush *Callistemon*. Photo by Georgina Steytler



SOUTHERN BLACK-THROATED FINCH

Southern Black-throated Finch

The Southern Black-throated Finch is listed as Extinct in NSW and Endangered under Federal and Queensland laws. Its overall occurrence has contracted by 80 per cent over the last 30 years. Known strongholds include the Townsville area and Queensland's Galilee Basin, a region where numerous coal mines are proposed—including the controversial Carmichael coal mine.

Ministerial discretion

The significance of Black-throated Finch habitat at the site of the Carmichael coal mine was not known when the mine was initially assessed as a 'controlled action' in 2011. Subsequent surveys of the site in April 2013 revealed a new, significant population—much larger than other known occurrences and separate from the Townsville population which had been regarded as the species' largest remaining stronghold.

As this discovery was made after the terms of reference for the environmental assessment process had been set, the proponents did not need to consider how the project would impact on it and the project was approved by the Queensland and Federal Governments in 2014.

In July 2015, BirdLife Australia wrote to the Federal Minister, advising of this significant, new information about the population, including that the mine site supports habitat critical for the species' survival.

When a legal challenge overturned Federal approval for the mine in August 2015, the Minister had the discretion to consider this information in a new approval process. But despite acknowledging the new evidence in the second Statement of Reasons, the Minister did not adequately consider its significance and approved the mine for a second time, in October 2015.

Cumulative impacts

The Black-throated Finch's plight is exacerbated by the fact that decisions to approve developments across its range are being made in isolation from one another, with little consideration of cumulative or compounding impacts on the Finch. Research suggests that since the EPBC Act came into effect, there have been 722 referrals for projects that overlap with remnant Black-throated Finch habitat; 405 of these were determined to be 'Not a Controlled Action', meaning they did not require Federal assessment or approval.

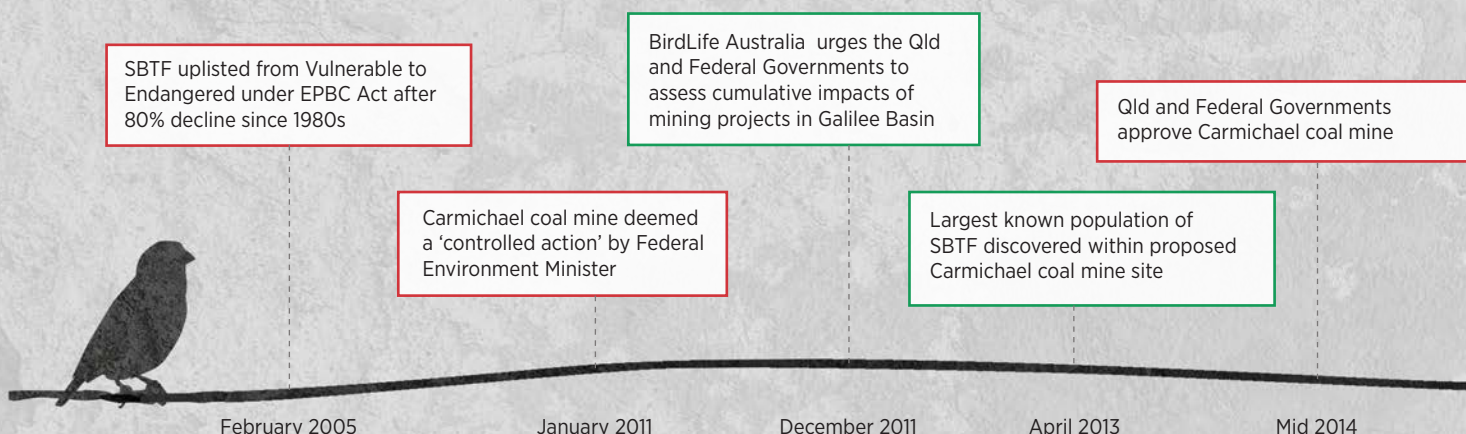
The cascading effect of these impacts is evident in the proposed China Stone mine, adjacent to the Carmichael mine, that contains the only other known area of similar-quality habitat. Housing, infrastructure and agricultural developments are also regularly approved around Townsville, home to the only other stronghold of the subspecies.

Inappropriate offsets

Proponents of the numerous projects in the Galilee Basin argue that they can effectively offset the impacts of the individual developments on the Black-throated Finch. However, almost 170,000 hectares of prime Black-throated Finch habitat will need to be created to compensate for current development approvals and it has never been demonstrated that their habitat can be restored or re-established or that birds can be relocated to new locations with suitable habitat (should it exist).

Mines that will destroy some of the best Black-throated Finch habitat will be allowed to proceed, without any evidence that proposed offsets will be successful. Existing Black-throated Finch offsets around Townsville have been found neglected and full of weeds, undermining arguments for their effectiveness and eroding community confidence in the delivery of positive conservation outcomes from offset measures.

SOUTHERN BLACK-THROATED FINCH (SBTF)





Even more alarming are instances of approved offset areas on land earmarked for other mining developments; a large proportion of the Carmichael mine Stage One offsets lie within the boundaries of the proposed China Stone mine which is currently undergoing environmental assessment.

Transparency and community rights

Lack of transparency or appropriate community consultation saw the Black-throated Finch Recovery Team forced to use Freedom of Information laws to access Offset Strategies and Species' Management Plans. These revealed the use of inadequate survey methodologies and the gross miscalculation of compensatory actions associated with offset proposals. Furthermore, the proponent of the Carmichael mine continues to withhold important data arising from surveys conducted at the site over the last five years.

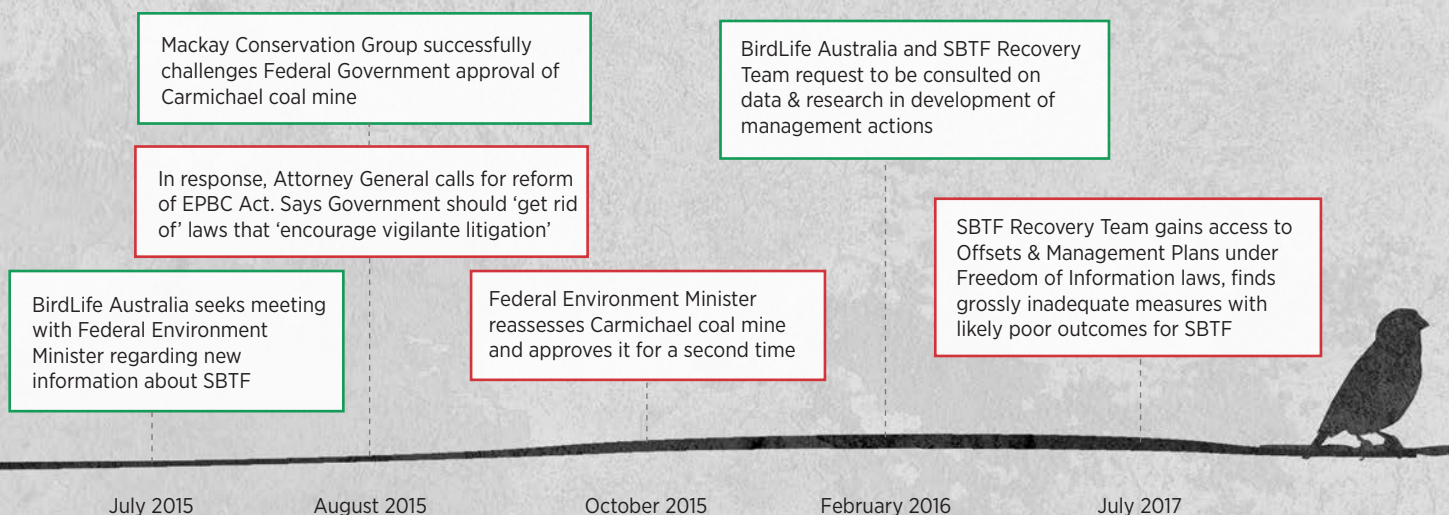
Compliance and enforcement

Serious doubts remain as to whether environmental conditions and offsets placed on projects would be properly enforced by Queensland and Commonwealth Governments. A 2013 Queensland Auditor General's Environmental Regulation report estimated that 97 per cent of resource projects were never checked to see if they were compliant with their environmental conditions.

Furthermore, a 2014 report by the Australian National Audit Office (ANAO) found serious deficiencies in the Federal Department of Environment's monitoring of major projects, undermining confidence that governments have the capacity to ensure developers comply with conditions placed on approvals.

Despite the known significance of the Galilee Basin for the Black-throated Finch, legislation is systematically failing to protect the species' habitat and approval of developments across the region will likely lead to its extinction.

Above
Southern Black-throated Finch. Photo
by L. Stanley Tang



Extinction by neglect

The failure of the EPBC Act to protect and conserve threatened species is most evident for listed species that have had little or no attention or resources. The plight of these species demonstrates that our current laws make it easy for governments to ignore and neglect threatened species, leaving them to slide towards extinction because governments are not legally required to act to prevent extinction.

The examples of neglected species highlighted are far from isolated—and they clearly demonstrate that extinction is a choice. When governments choose to do nothing to protect and conserve threatened species, enabled by weak national environment laws, they make a de facto choice to facilitate species' extinction.

Recent research has found that, globally, the strongest factor in reducing biodiversity loss is a robust set of conservation laws that are consistently enforced. Simply setting aside conservation reserves and compiling threatened species lists is not enough. Communities and organisations must ensure that existing legislation is enforced, and work to make laws stronger.

New national environment laws would have a dual focus on protecting and recovering what is threatened, independent of species' popularity or profile. Bioregional plans, developed by the National Sustainability Commission, would give effect to recovery and threat abatement plans to protect Australia's precious birdlife.

Above right

Abbott's Booby. Photo by Sarah Summers

Below left

Christmas Island rainforest. Photo by Sarah Summers

Below right

Green Rosella. Photo by Andrew Silcocks





King Island endemics

King Island's isolation from the Australian mainland and Tasmania has led to the evolution of six endemic subspecies, including the Critically Endangered King Island Scrubtit and the Endangered King Island Brown Thornbill.

Despite the Scrubtit having been recognised as Critically Endangered for more than two decades, and the Thornbill having been rarely sighted over the same period, very little quantitative information is available for these subspecies. There has been limited systematic evaluation of threats to these birds and almost no on-ground conservation action.

The 2012 King Island Biodiversity Management Plan, which acts in place of detailed, individual species' Recovery Plans, set performance criteria to be achieved by 2017. For the King Island Brown Thornbill, and King Island Scrubtit this included "information to be able to assess population health at all listed sites, have conducted surveys to detect any other subpopulations present on the island, and assess and implement time-critical actions required to ensure survival of specific subpopulations and of the two species, including translocations and captive breeding programs".

Almost none of this work has been done. While an academic paper published in 2016 improved our understanding of the distribution and status of the Scrubtit and made recommendations for action, this work was initiated by researchers concerned that nothing was being done for the bird rather than any imperative arising from the EPBC Act. Their recommendations are yet to be implemented.

There have been no systematic surveys for the Thornbill, which experts agree is Australia's most endangered bird. It's closer to extinction than the Orange-bellied Parrot. Yet in sharp contrast to the Orange-bellied Parrot, the subspecies has received little dedicated funding and few in the community would even know that it exists.

Christmas Island endemics

Christmas Island is internationally recognised for its high level of biological endemism. It supports 11 endemic birds (seven bushbirds and four seabirds), seven of which are globally threatened. It is home to the world's last remaining breeding colony of Abbott's Boobies as well as the Christmas Island Frigatebird, the world's rarest frigatebird.

None of Christmas Island's endangered birds has an up-to-date Recovery Plan. Three, including Abbott's Booby, don't have Recovery Plans in place despite this being required under the EPBC Act. Three, including the Christmas Island Frigatebird, have out-of-date Recovery Plans from 2004, despite the EPBC Act requiring Recovery Plan updates every five years.

Most of these species are dependent on the Island's rainforest ecosystem which is highly vulnerable to the irreversible impacts of clearing and to threats from established invasive species including Giant Centipedes, Wolf Snakes, cats, rats and Yellow Crazy Ants.

While invasive species can be difficult and costly to manage, the Federal Government has the power to stop clearing of the rainforest. Currently, the greatest source of clearing is from phosphate mining. Under the EPBC Act, the Government can reject a recent proposal to expand phosphate mining activity and has the power to ban any further mining activity. In doing so, they can also act to protect the Island's long-term prospects for a sustainable, ecotourism-based economy. Yet it has so far failed to do so.

It's not only island endemics that are being neglected. The Grey Range Thick-billed Grasswren, Mount Lofty Ranges Chestnut-rumped Heathwren, Gawler Ranges Short-tailed Grasswren, Alligator Rivers Yellow Chat and a host of other species are in urgent need of more research to inform recovery planning and resources to support recovery actions.



SWIFT PARROT

Swift Parrot

The Swift Parrot is Critically Endangered. With fewer than 1,000 pairs left in the wild, it is predicted to go extinct in the next 14 years. Loss of breeding habitat in Tasmania through logging and clearing is one of the greatest threats to the Parrot's survival, along with predation by introduced Sugar Gliders.

Exemptions and loopholes

Regional Forest Agreements (RFAs) are 20-year plans negotiated between Federal and State governments that allow for timber harvesting in defined areas of native forest. Unlike other industries whose activities may have a significant impact on nationally listed threatened species, logging "in accordance with a Regional Forest Agreement" is exempted from national environment protection laws, removing Commonwealth oversight for threatened species protection.

This legal exemption has been detrimental for many threatened species, including the Swift Parrot, whose habitat has been routinely felled over the last 20 years despite its status as a 'Priority Species' under the Tasmanian RFA, and despite having been declared Critically Endangered in 2015.

The implications of RFAs for threatened species management became evident during the 2006 Wielangta Forest court case. The Federal Court ruled that it was enough that the Tasmanian and Commonwealth Governments agreed that adequate protection was in place for threatened species under the RFA, not that actual protection had been achieved. Under this ruling, a species could go extinct but still be viewed as effectively "protected".

Lack of national oversight

The lack of Commonwealth oversight is particularly pronounced for the Swift Parrot, which breeds in Tasmania but whose range stretches as far north as Queensland and crosses six jurisdictions. In the absence of strong national leadership, recovery actions taken in one jurisdiction may be undermined by destructive practices in another.

This is clearly evident in RFAs where industry priorities can override the conservation imperative of threatened species. A 2015 report by Environment Tasmania revealed that the Tasmanian Government approved logging in areas that its own scientists identified as important Swift Parrot habitat. As recently as 2017, the Tasmanian Government continued to allow felling of known Swift Parrot nesting habitat.

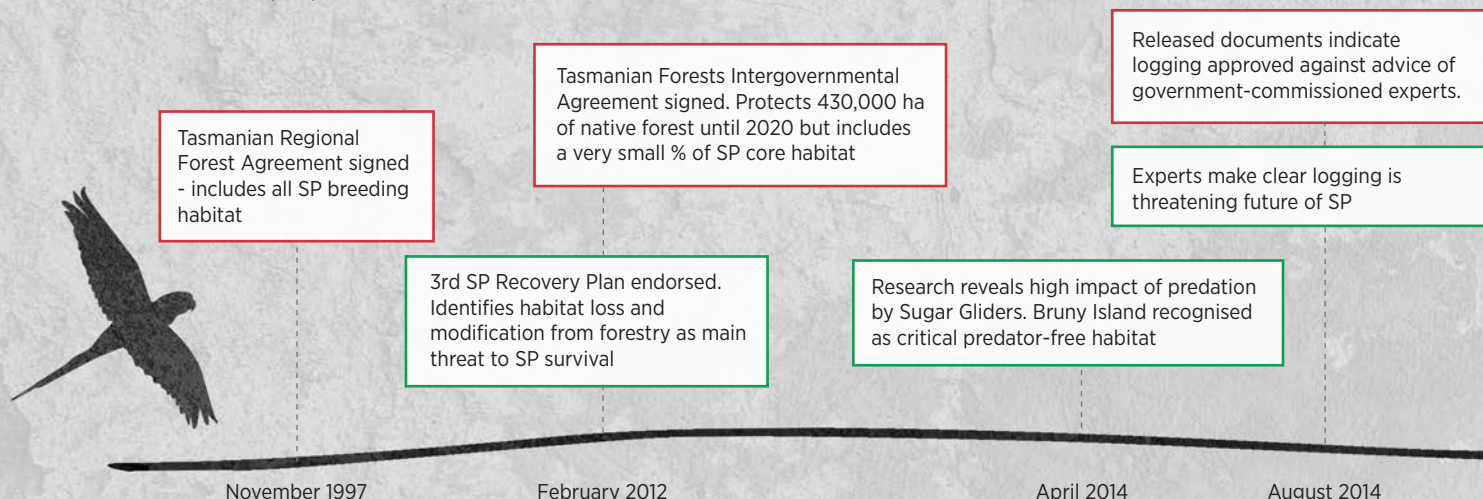
Compliance and enforcement

In the two decades since the RFAs were first signed, our understanding of the ecology and adaptive management of threatened species has improved vastly, and we have gained important new insights into climate change, forest ecology, forest management and threats. However, there is no imperative for RFAs to incorporate new knowledge during the five-yearly review processes and in 2017 Tasmania was the first state to "rollover" its RFA with the Federal Government, endorsing another 20 years of Swift Parrot habitat destruction.

Transparency and community rights

Lack of enforcement to ensure mandated five-yearly reviews, inadequate monitoring and evaluation, and lack of avenues for third-party review all represent systemic failures of RFAs. Their long-term tenure has often put them out of reach of widespread public scrutiny, despite mounting evidence of adverse outcomes.

SWIFT PARROT (SP)





RFAs illustrate the inherent risk of the Commonwealth handing responsibility for Matters of National Environmental Significance to the states with the Tasmanian RFA representing a direct threat to the Swift Parrot and other nationally threatened species. The proposed new Environment Act will cover all industries without exception. Logging of native forests will be treated the same as any other activity which impacts on environmental values, for which the Federal Government is responsible.

Above
Swift Parrot. Photo by Chris Tzaros

Regent Honeyeater

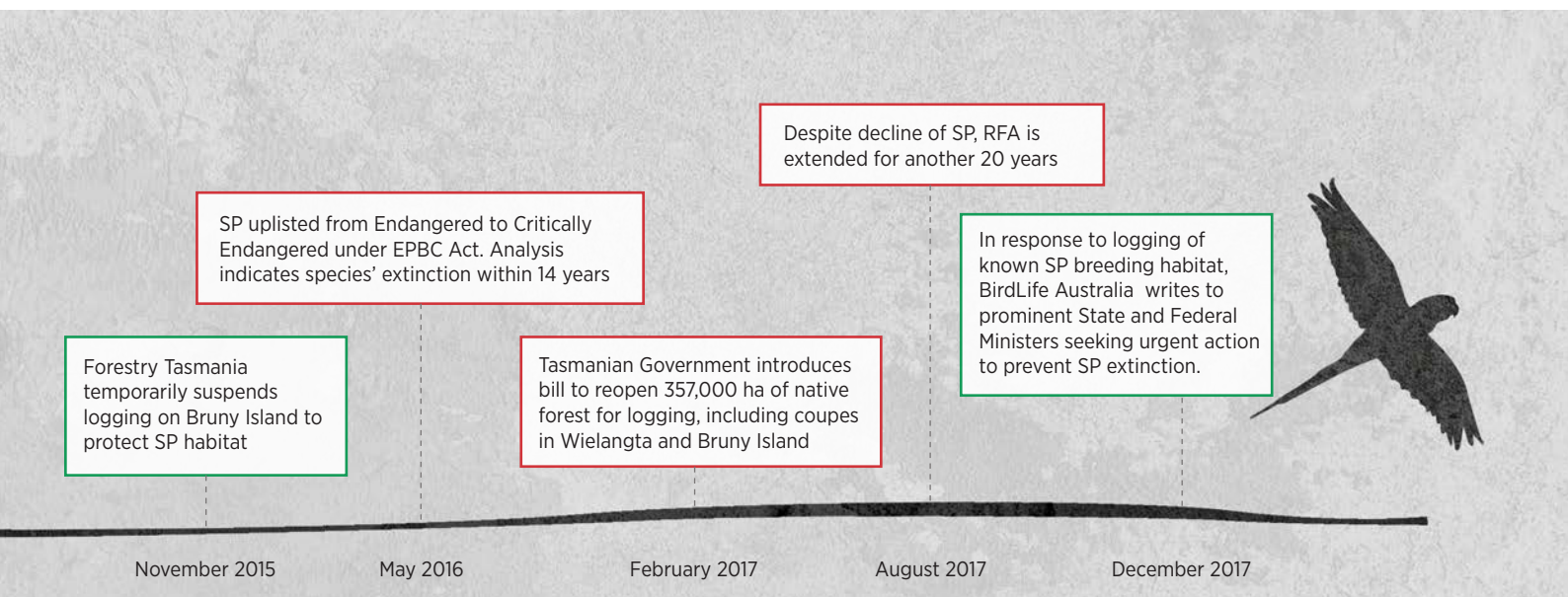
The Regent Honeyeater is nationally Critically Endangered, having declined by more than 80 per cent over the last three generations. Like the Swift Parrot, its decline is linked to clearance and degradation of its woodland habitat. The species' 2016 Recovery Plan states that habitat critical to the survival of the Regent Honeyeater includes any breeding or foraging areas where the species is likely to occur and any newly discovered breeding or foraging locations; "It is essential that the highest level of protection is provided to these areas".

The Lower Hunter Valley is known to be important for Regent Honeyeaters and is predicted to become even more important as climate change intensifies. Unfortunately, the woodlands and forests of the Lower Hunter are under significant threat from mining, industrial and urban developments. In 2002, the NSW Government rezoned an area of the Tomalpin Woodlands in the Lower Hunter for industrial purposes—the Hunter Economic Zone (HEZ)—and in 2007 the Federal Government approved development of the HEZ within the Tomalpin Woodlands. To date, the development has not progressed beyond planning approval.

Mounting evidence indicates that the Tomalpin Woodlands, the largest woodland remnant on the floor of the Hunter Valley, provides vitally important wintering and breeding habitat for Regent Honeyeaters and is one of the most important mainland refuges for Swift Parrots.

BirdLife Australia's attempts to use this new information to protect the woodlands have been unsuccessful because provisions to use new information to revoke decisions or alter conditions under the EPBC Act are limited in their application. Under the current Act the Minister is not compelled to consider or act upon new evidence despite having powers to do so under Section 145. Even when conditions of approval are not being met, the political will to revoke approval or amend approval conditions is lacking.

Despite this species being on the brink of extinction, the Act continues to allow destruction of habitat critical to its survival. The Federal Environment Minister has the discretion to choose whether to use the Act to protect species and even where provisions exist, they are unlikely to be used unless it is politically palatable to do so.



SOUTH-EASTERN RED-TAILED BLACK-COCKATOO

South-eastern Red-tailed Black-Cockatoo

The South-eastern Red-tailed Black-Cockatoo is listed as Endangered in Victoria, South Australia and nationally. It is one of the most clear-cut examples of a bird endangered by altered fire regimes, particularly in association with planned burning. There are only around 1,500 South-eastern Red-tailed Black-Cockatoos left, and after two decades of recovery efforts the birds' population is still in decline.

Exemptions and loopholes

Altered fire regimes, particularly increased fire frequency and intensity, are well recognised as one of the greatest threats to Australia's birds. A range of factors can contribute to altered fire regimes, including one of our most effective tools in reducing fire risk to communities, planned burning. However, sensitivities around fire risk management means governments can be reluctant to place limits on planned burning, even for areas where evidence suggests its value in protecting life and property is marginal while risks to threatened species such as the South-eastern Red-tailed Black-Cockatoo are high.

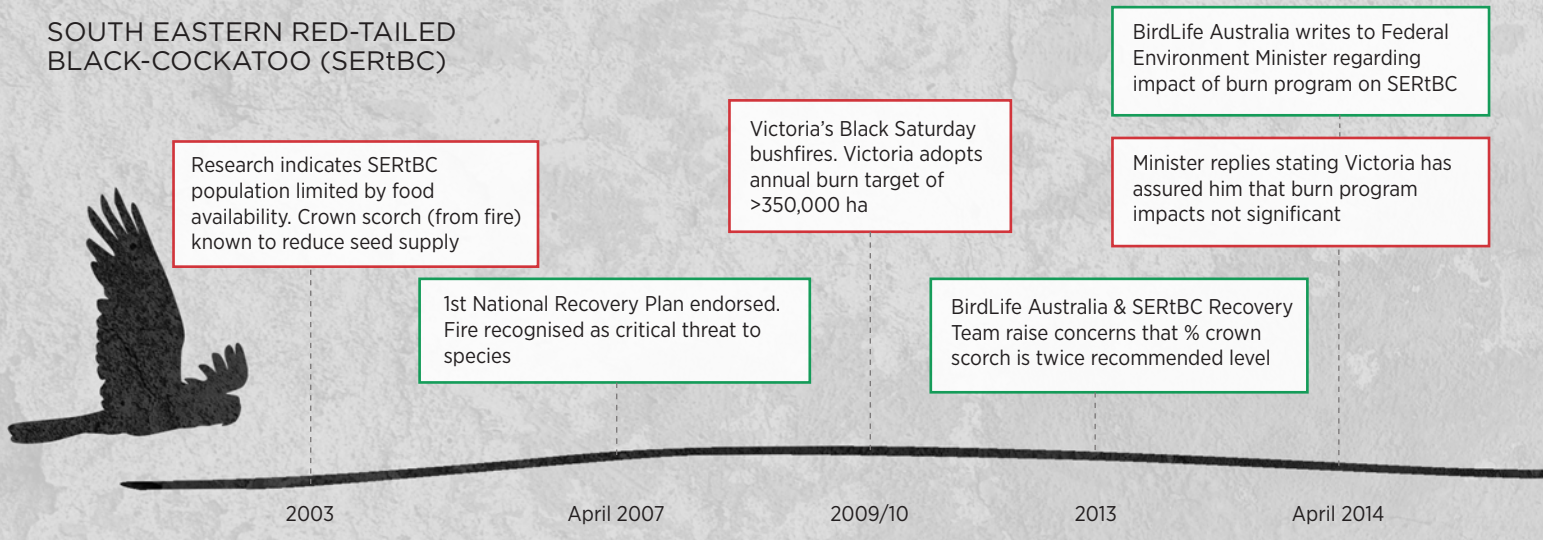
In 2008, "Fire Regimes that cause biodiversity decline" was nominated as a Key Threatening Process (KTP) under the EPBC Act. A decade later it hasn't been listed (or rejected) as a KTP, so no Threat Abatement Plan can be developed and efforts to recover species threatened by inappropriate fire regimes are stymied.

Government policy purports to include broad and ambiguous exemptions under the EPBC Act for "routine controlled burns of the type that have occurred in the past". While this interpretation of exemptions from legal controls operating under the Act are arguable, they make it difficult for scientists and advocates to use the Act to stop ecologically damaging burns from going ahead—even where there is strong evidence that burns will not contribute to the protection of life and property but may threaten endangered species.

Ministerial discretion

One of the greatest threats to the South-eastern Red-tailed Black-Cockatoo today is management of the Cockatoos' habitat on public land by Victorian Government agencies, and the reluctance of the Victorian Government to commit to better habitat management within an updated National Recovery Plan.

SOUTH EASTERN RED-TAILED BLACK-COCKATOO (SERTBC)



Research indicates SERTBC population limited by food availability. Crown scorch (from fire) known to reduce seed supply

1st National Recovery Plan endorsed. Fire recognised as critical threat to species

Victoria's Black Saturday bushfires. Victoria adopts annual burn target of >350,000 ha

BirdLife Australia & SERTBC Recovery Team raise concerns that % crown scorch is twice recommended level

BirdLife Australia writes to Federal Environment Minister regarding impact of burn program on SERTBC

Minister replies stating Victoria has assured him that burn program impacts not significant

2003

April 2007

2009/10

2013

April 2014



Research indicates that no more than 15 per cent of the Cockatoos' habitat should be scorched by fire in any ten-year period. Beyond 15 per cent, the Cockatoos will have difficulty finding enough food to eat and there is an increased risk that the population will decline.

In recent years, the level of scorch in Cockatoo habitat has reached 26 per cent, largely driven by planned burning, and flock count data indicates the species has suffered an unprecedented decline in the proportion of female/young birds over recent years. Put simply, fewer females means fewer eggs laid and fewer young birds to produce the next generation of Cockatoos.

While it is difficult to control the amount of habitat scorched by bushfires, the Victorian Government can control the amount of Cockatoo habitat scorched in planned burning. Importantly, the Victorian Government can do this without putting the community at risk of bushfire by placing a moratorium on planned burning in important Cockatoo habitat away from human life and property.

However, the Victorian Government has so far refused to do this and has stalled on endorsement of a draft revised National Recovery Plan that specifies that a minimum of 85 per cent of stringybark habitat on public land within the subspecies' range must not experience crown-scorch by bushfire or planned burning in the previous ten-year period.

The Federal Government, which can approve a National Recovery Plan without endorsement from the states, has done nothing to fix this.

Transparency and community rights

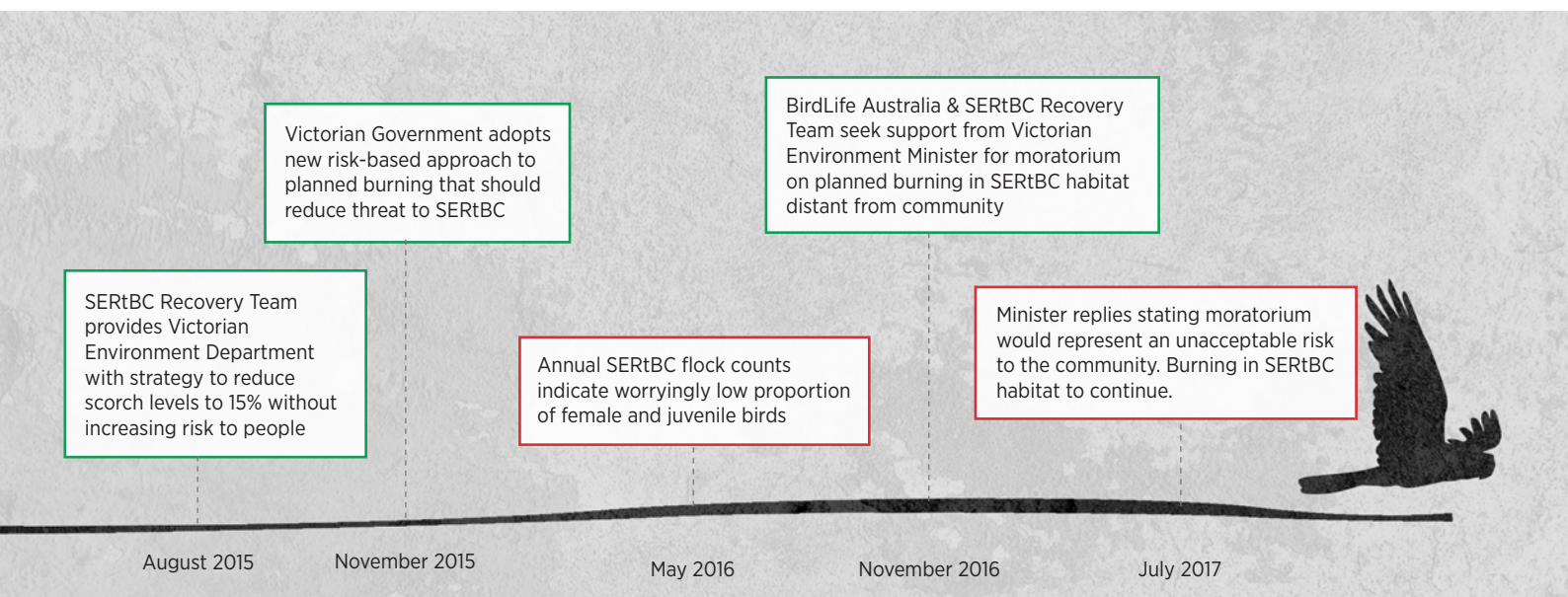
While third parties, including organisations or individuals with an established interest in a species, have the right to challenge apparent breaches of the EPBC Act, the potential cost of doing so represents a significant barrier. For the South-eastern Red-tailed Black-Cockatoo, this means the legality of planned burns of marginal value to the community that represent a significant risk to the species remains in question.

New national environment laws must include a strengthened role for the community. The system must include strong democratic legal frameworks that empower and engage the community, including merits review of key decisions and protections for costs associated with legal proceedings commenced in the public interest.

The National Sustainability Commission would also be responsible for the development of threat abatement plans, and as an independent body, would be able to adopt a more objective, evidence-based approach to strategic bushfire risk management.

Above

Red-tailed Black-Cockatoos. Photo by Rick Dawson



EASTERN CURLEW

Eastern Curlew

The (Far) Eastern Curlew is nationally listed as Critically Endangered. Its population has declined by over 80 per cent in the last 30 years. Endemic to the East Asian-Australasian Flyway (EAAF), the Eastern Curlew feeds and roosts exclusively in coastal environments.

Ministerial discretion

Moreton Bay Ramsar site in Queensland is recognised as one of the world’s most important sites for the Eastern Curlew. National legislation and international agreements should protect Ramsar sites from negative environmental impacts, particularly against destructive developments within their boundaries (something that has never occurred under Australian law). So when the Walker Group proposed a development for Toondah Harbour that sought to encroach on over 40 hectares of the Moreton Bay Ramsar site, including the destruction of Eastern Curlew feeding habitat, it was expected that the Federal Minister would declare the proposal as ‘clearly unacceptable’ under the EPBC Act.

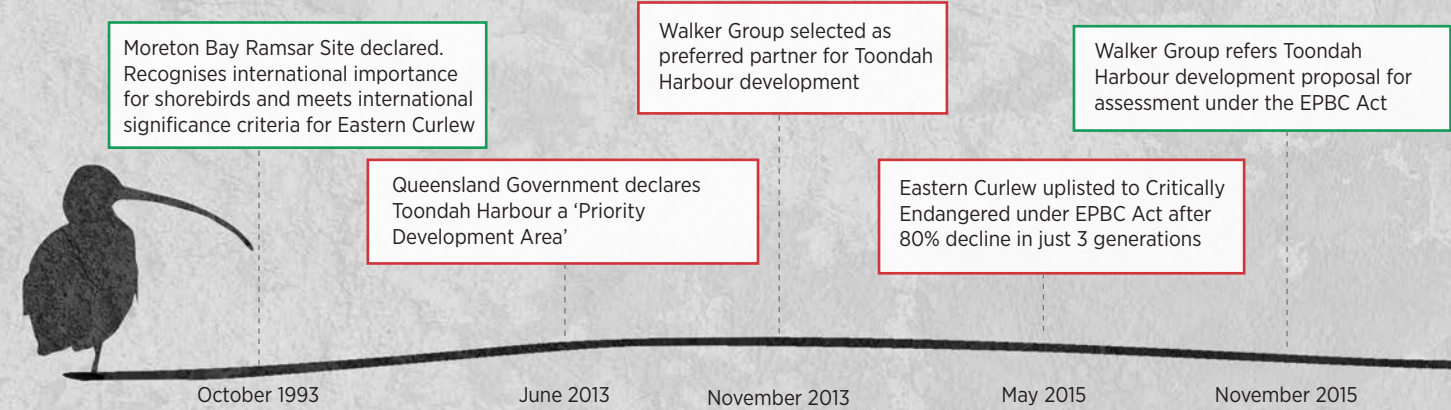
Outright rejection of this development proposal also seemed likely given that the Walker Group had not considered alternative proposals (as required under the Act) that would avoid significant impacts on migratory shorebirds and the Ramsar site. While such consideration may have been complicated by the fact that the Queensland Government had explicitly identified Toondah Harbour as a Priority Development Area (PDA), there was scope for Walker Group to put forward a proposal within the PDA that would not encroach into the Ramsar site and migratory shorebird habitat.

Inexplicably, a decision on this seemingly straightforward case was delayed an unprecedented six times over a 12-month period from late 2015 to late 2016. Then, in May 2017, the proposal was suddenly withdrawn. Days later Walker Group submitted a new proposal, almost identical to the original. The new proposal was quickly assessed and declared a ‘controlled action’ under the EPBC Act, progressing it to the next stage in the assessment process.

The significant similarities between the two proposals and the speed with which the second proposal was progressed raises questions as to why the initial proposal had been withdrawn and why contents of

Above
Eastern Curlew. Photo by Duade Paton

EASTERN CURLEW





the advice received by the relevant Federal Environment Department (in particular, the wetlands section) were heavily redacted when obtained under the Freedom of Information Act.

The Toondah Harbour development appears to have been subject to extraordinary, discretionary ministerial and departmental decision-making processes that went against significant domestic and international concern about the precedent being set by the Federal Government in failing to reject outright a development within the boundaries of a Ramsar site.

Inappropriate offsets

The list of possible offsets suggested for the Toondah Harbour development included increased habitat protection in the Yellow Sea. Despite the obvious jurisdictional questions about how such an offset could be enforced, it is also inappropriate given that habitat in the Yellow Sea serves a different purpose in the Eastern Curlew's life cycle. Unlike Moreton Bay, which functions as a 'terminal site' on southward migration, the Yellow Sea functions as a staging or 'refuelling site' during northward and southward migration and, while this habitat is critically important to the species' long-term survival, it does not fit the 'like-for-like' intention of offsets.

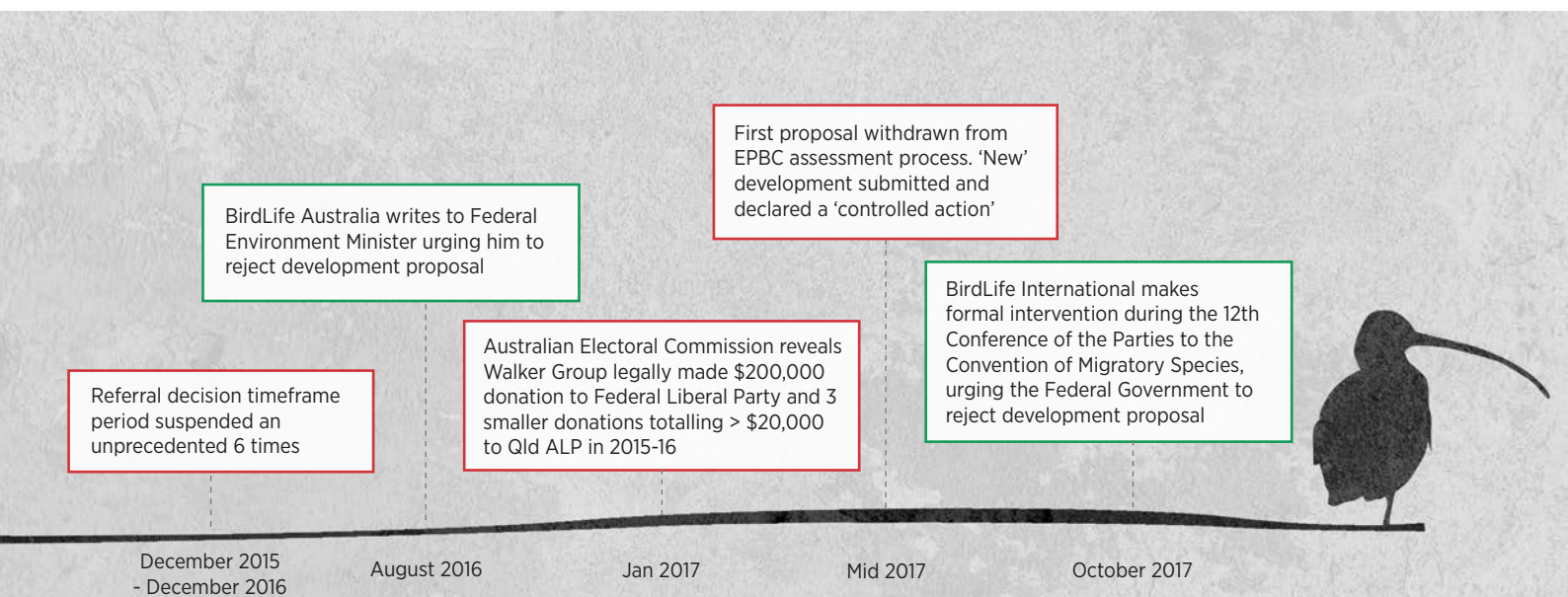
The proposed development at Toondah Harbour will permanently destroy feeding habitat used by Eastern Curlews and other migratory shorebirds. At present, there is no evidence that feeding habitat can be recreated for the species, and the proposed remediation and rehabilitation offset projects within

Moreton Bay will therefore not provide sufficient replacement for the loss of feeding habitat caused by the development. In short, the proposal will result in a permanent loss of feeding habitat for Eastern Curlews in an internationally important site for the species.

Transparency and community rights

The Toondah Harbour case demonstrates a clear lack of transparency in the environmental assessment process. The reasons behind the repeated deferral of the decision on the original proposal were never made public, and there has been no explanation as to why the second proposal progressed through the decision-making process so quickly given the delays for the first referral and the clear similarities in the proposals. When requested under the Freedom of Information Act, the departmental advice on the original referral was heavily redacted, making it impossible to ascertain whether the advice provided on the first referral differed to the advice on the second referral.

Despite significant domestic and international pressure, our national laws have failed to offer swift protection for Eastern Curlews in one of the species' most important sites in Australia. While a final decision on the proposal has not been made, the fact that a proposed development within a Ramsar site was not simply declared a 'clearly unacceptable' action calls into question the Government's commitment to upholding its obligations under domestic legislation and international agreements.



THREATENED SPECIES RECOVERY PLANS— PLANNED TO FAIL



When the EPBC Act was first passed into law, the listing of a species as nationally threatened triggered a legal requirement for the development of a National Recovery Plan; a document that captures current understanding of how present and past threats contributed to the species' decline and the key actions needed to recover the species. While such plans are not directly enforceable, a strong plan can impose measures to help protect a species, for example by identifying areas of critical habitat that must be protected, specifying limits to loss or specifying clear, time-bound management objectives for a species and its habitat. Importantly, the Environment Minister cannot approve an action that is inconsistent with a Recovery Plan.

In the five years or so following the introduction of the Act, a number of Recovery Plans showed clear intent to use the full powers and provisions of the Act to protect and recover species by clearly specifying areas of critical habitat (e.g. Black-eared Miner) or by placing limitations on activities that could be undertaken within important areas within a species' range (e.g. Golden-shouldered Parrot, Hastings River Mouse).

But over time, Recovery Plans have become increasingly insipid as governments have sought to avoid strong prescriptions that might limit activities within a species' range or require resources for the implementation of priority actions.

In 2007, the EPBC Act was amended to allow the Minister to decide that a Recovery Plan is not required for individual listed species. In these cases, the only information required to be produced is a 'Conservation Advice' produced at the time of listing; typically, a much shorter document that provides a high-level perspective on why a species has

declined and the "simple" actions that are required for recovery. Most Conservation Advices lack the detail required to implement recovery actions. Worse still, these documents are not binding on decision makers.

As the lists of threatened species have grown, funding for the development and implementation of Plans has declined. Today, most listed species don't have Recovery Plans. For those that do, Recovery Plans were mostly drafted long ago and have not been updated within the required five-year time frame.

Our analysis shows that of the 67 nationally listed Endangered and Critically Endangered birds, only ten are covered by up-to-date Recovery (five) or Regional (five) Plans; 29 species have out-of-date Recovery or Regional Plans and ten species that require an individual Recovery Plan do not have one (including Abbott's Booby, Australian Painted Snipe and Australasian Bittern). A further 18 species only require a Conservation Advice, because it has been determined that they require "simple" recovery actions.

Governments are not compelled or obliged to implement Recovery Plans and Conservation Advices. They can pick and choose between species to support and species to ignore.

Under our proposal, new national environment laws would have a dual focus on protecting and recovering what is threatened. Bioregional plans would give effect to recovery and threat abatement plans to achieve recovery goals and indicators, and protect Australia's birds and wildlife.



It's clear our national environment laws are failing. They allow clear-felling of Critically Endangered Swift Parrot breeding habitat, burning of Endangered South-eastern Red-tailed Black-Cockatoo food trees and mining of irreplaceable Endangered Southern Black-throated Finch habitat. They allow a property developer to propose a resort within the boundaries of a Ramsar site that provides internationally important habitat for Critically Endangered Eastern Curlews and woodlands likely to be crucial to the recovery of the Critically Endangered Regent Honeyeater to be destroyed for an industrial estate that could easily be located elsewhere.

Despite clear scientific evidence that these actions will push species closer to extinction, they are legally being allowed to proceed.

The *Environment Protection & Biodiversity Conservation Act 1999* is neither protecting the environment nor conserving biodiversity. The inherent weaknesses in the Act, including its exemptions, allowance for ministerial discretion and ambiguous definition of 'significant impact', allows strong scientific evidence to be ignored and protects decisions from being scrutinised or challenged. Recovery Plans can be left to gather dust because there is no legal imperative for their implementation, meaning many neglected threatened species are simply being left to their own devices.

None of this is acceptable or inevitable. It's time for real change.

BirdLife Australia is at the forefront of the push for a new generation of environment laws and independent institutions that can form the bedrock of change to guide the work of repairing environmental damage, improving species' population trajectories and ensuring economic development is sustainable.

Together with our Places You Love Alliance partners and guided by the work of the Australian Panel of Experts on Environmental Law, BirdLife

Australia is calling for a new national environmental framework with four key elements:

1. national environment laws that genuinely protect Australia's natural and cultural heritage
2. an independent National Sustainability Commission
3. an independent National Environmental Protection Authority
4. guaranteed community rights and participation in environmental decision making

It is essential that the new framework and nature laws are underpinned by five key principles—national leadership; a central role for community; trusted institutions; strong environmental outcomes; and resilience in the face of climate change. See: <http://www.placesyoulove.org/australiawelove/naturelaws/>.

BirdLife Australia has long been a champion of citizen science and an advocate for science-based decision making. Thanks to the efforts of thousands of volunteers, we hold one of Australia's largest biological databases—the basis of good environmental planning.

Our experience in contesting developments that contribute to the death by a thousand cuts of Australia's birdlife fuels our determination to fight for these new laws and institutions. We seek to protect the birds and places we love from political expediency and to ensure that the community is empowered to play a role in protecting and conserving nature.

Changing our laws and the way society views and values both nature and science is critical to ensuring that future generations have clean food, water and air, and can enjoy and be inspired by a continent with rich and biodiverse ecosystems that continues to support our beautiful and unique birdlife.

Above

Alligator Rivers Yellow Chat. Photo by Laurie Ross

Below left

Australasian Bittern. Photo by Andrew Silcocks

Act for birds. Act for nature.

Australia's national environmental laws are failing to protect and conserve Australia's biodiversity—our plants, animals and the environments they rely on.

With thousands of species now threatened with extinction, and successive national State of the Environment reports indicating that habitat clearing, altered fire regimes, invasive species and changing land use continue largely unchecked, it's time for real change.

Together with our Places You Love Alliance partners and guided by the work of the Australian Panel of Experts on Environmental Law, BirdLife Australia is calling for a new national environmental framework, including a new generation of national environment laws that genuinely protect Australia's natural and cultural heritage, the establishment of an independent National Sustainability Commission, an independent National Environmental Protection Authority, and guaranteed community rights and participation in environmental decision making

This report describes how we can fix Australia's broken environment laws and describes the multitudinous ways our national nature laws are failing to protect and conserve our most endangered species—leaving them teetering on the brink of extinction.

Cover photo:

Red-tailed Black-Cockatoos. Photo by Rick Dawson

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Australia's voice for birds since 1901

BirdLife Australia is dedicated to achieving outstanding conservation results for our native birds and their habitats.

With our specialised knowledge and the commitment of an Australia-wide network of volunteers and supporters, we are creating a bright future for Australia's birds.

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