

Submission to the independent review of the EPBC Act

April 2020



**AUSTRALIAN
CONSERVATION
FOUNDATION**

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About ACF

ACF is Australia's national environmental organisation. We represent a community of more than 700,000 people who are committed to achieving a healthy environment for all Australians. For more than 50 years ACF has been a strong advocate for Australia's forests, rivers, people and wildlife. ACF is proudly independent, non-partisan and funded by donations from our community.

Executive Summary

Australia, like the world, is in the grips of a climate and extinction crisis. Key environmental indicators continually demonstrate that the condition of Australia's environment is poor and continues to worsen.

Species are disappearing at 1,000-10,000 times the natural rate.¹ As one of the few mega-biodiverse developed nations in the world, our title as a global leader on extinction and biodiversity loss is shameful. Since 2000 Australia's list of nationally threatened species and ecological communities has increased by more than 30%, from 1,483 to 1,974. Australia now ranks second globally for overall biodiversity loss.

Australia has been identified as a global deforestation hotspot, the only developed nation to make the list. Since the EPBC Act came into force, it has been estimated that 7.7 million hectares of threatened species habitat has been destroyed, the vast majority of that unregulated. We have seen three Australian animals declared extinct since 2009. When the Act was established in 2000, the koala was thought to be common. However habitat loss meant the species was listed in 2012 and since then rates of loss have only increased. Biodiversity offsets for the species have fundamentally failed to stem its decline.

The key drivers of species loss are well known including: habitat clearing and fragmentation, invasive species and inappropriate fire regimes as well as disease, pollution and over-exploitation. Climate change represents one of the most pervasive threats to biodiversity. Creating longer, hotter fire seasons, causing ocean warming and acidification and triggering heat waves that can potentially wipe out entire populations of species.

The 2019/20 bushfires across Australia highlighted the devastating dual impacts of climate change and biodiversity loss. The fires focussed Australia's attention on our environment. Alongside the loss of property, life, wildlife and ecosystems, the fires brought to the front of mind the need to protect the air we breathe and conserve the places we love.

Australia is now a global laggard when it comes to tackling climate change. Our emissions continue to rise despite our commitments to take action and the volumes of scientific and economic evidence which says acting early will be cheaper and more effective in the long run.

It is within this context, of vanishing wildlife and increasing emissions, that our central piece of national environmental law must be evaluated and reformed. As a large developed nation with no shared borders and sole jurisdiction across its territory, the Australian Government is in a unique position to create a new framework that builds on its capacity to set direction and bring its significant resources to the challenges ahead. The federal government's response to the COVID-19 is testament to this capacity.

¹ De Vos, J. M., Joppa, L. N., Gittleman, J. L., Stephens, P. R. and Pimm, S. L. (2015), Estimating the normal background rate of species extinction. *Conservation Biology*, 29: 452-462. doi:[10.1111/cobi.12380](https://doi.org/10.1111/cobi.12380)

The EPBC Act must be replaced, not tinkered with. Significant national reform is required if the legislation is to deliver on community expectations that species like the koala do not disappear forever. To do this will take a bold government with a positive vision for the future of Australia's environment.

Lack of political will coupled with high levels of discretion and lack of environmental standards or outcomes within the EPBC Act effectively make protecting the environment seem optional for decision makers.

Effective environmental planning and approval decisions rely on robust, apolitical and independent advice. Political interference in Australia's environmental institutions has diminished their effectiveness over the years, as is demonstrated throughout this submission.

There is a clear opportunity through this review to drive leadership on the environment whilst seeking to create a more open, accessible and simplified environmental law system.

A new national environmental law framework must be built on national leadership and a focus on delivering strong environmental outcomes. It must ensure there is broad scope and reach of Commonwealth interests. That decisions are made based on the best available evidence and that impacts are assessed by an independent regulator free from the political interference of vested interests.

It must contain clear duties on decision-makers, put a greater focus on bioregional planning, and contain clear and measurable outcomes that the Commonwealth and the states must achieve. In some cases it should also include prescriptions or processes for how to achieve those outcomes, where doing so would provide certainty for outcome delivery.

It must focus on the institutional and governance arrangements, to not only independently assess information, but also coordinate across jurisdictions and develop robust information and data systems so that we can better understand trends in our environment.

It must also put community interests at the centre of decision making and ensure that there is a high level of transparency and accountability for how decisions are made. This will need to be accompanied by adequate safeguards that empower communities to hold decision makers to account.

This submission is divided into two key parts. The first looks at the broader questions on the operation and administration of the EPBC Act. The second seeks to address the specific questions outlined in the Discussion Paper, grouped into thematic areas to reduce duplication.

Recommendations

Below is a summary of the key recommendations reforms we propose for a new generation of national environmental laws. Further discussion of each of these is in Part II of this submission.

<p>Priorities for reform</p> <p>Q4, Q6, Q26</p>	<p>The review should focus on</p> <ul style="list-style-type: none"> ● the reasons the EPBC Act has not been an effective piece of legislation in protecting Australia's environment and whether the legislation is meeting its objectives; and ● the key legislative and policy measures needed to protect, connect and restore Australia's environment in a socially just way. <p>The key areas that should be a key focus for reform of the legislation include:</p> <ul style="list-style-type: none"> ● Enshrining Australian Government leadership in environmental protection through new National Environmental Measures ● Providing targets and legal mechanisms for clear environmental outcomes that will slow, stop then improve the outlook for Australia's biodiversity, this should include: <ul style="list-style-type: none"> ○ Retaining existing MNES ○ Establishing new and expanded triggers ○ Setting strong and clear national environmental standards ○ Ensuring greater use of planning instruments ○ Protecting critical habitats and nationally important ecosystems ● Ensuring that a new generation of environmental law is equipped to deal with pressing environmental challenges, such as climate change and the rapid decline of biodiversity ● Ensuring accountability via duties on decision makers to exercise their powers to achieve the Act's aims ● Improving environmental governance, including establishing independent institutional arrangements that improve integrity and trust in environmental decision making ● Improving environmental democracy, including access to information, improved transparency and ensuring that regulators are able to be held to account through open and transparent judicial processes ● Providing all sectors, including business, with greater certainty as to impact assessment processes, improving their efficiency and the manner in which decisions are made ● Improving data and information management; and enshrining long term environmental accounting and reporting into law.
<p>National Leadership</p> <p>Q1, Q9</p>	<p>The Australian Government must take a greater role in environmental protection, including by setting national environmental standards,</p>

	<p>focussing on bioregional planning and providing broader national oversight over key National Environmental Matters.</p> <p>Due to the systemic issues in the administration of the EPBC Act the Australian Government should include new national institutions;</p> <p>A National Environment Commission - to develop standards, undertake strategic bioregional planning, drive coordination across jurisdictions and manage and report on environmental data and trends</p> <p>A National Environment Protection Agency - to independently assess environmental impacts and ensure compliance with relevant approvals , plans and standards.</p> <p>National leadership under a new environmental framework should deliver:</p> <ul style="list-style-type: none"> ● Accountability for decision makers for the improvement of environmental indicators ● Development of national goals, standards and reporting ● Protection for specific National Environmental Matters ● Coordination of multiple jurisdictions and regulatory regimes
<p>Legislative objectives</p> <p>Q3</p>	<p>The objects of the EPBC Act are generally sound, but could be more specific, with an overarching object and supporting secondary objects.</p> <p>A new primary objective of the new legislation should be:</p> <p style="padding-left: 40px;">To conserve, protect and recover Australia’s environment, its natural and related cultural heritage and biological diversity, including genes, species and ecosystems, its land and waters, and the life-supporting functions and the multitude of benefits to Australian society that they provide.</p> <p>The Act should also include a number of secondary objects, including:</p> <ol style="list-style-type: none"> a. To provide national leadership and partnership on the environment and sustainability, and to achieve ecologically sustainable development; b. To recover, prevent the extinction or further endangerment of Australian plants, animals and their habitats, and to increase the resilience of native species and ecosystems to key threatening processes; c. To ensure fair and efficient decision-making; government accountability; early and ongoing community participation in decisions that affect the environment and

	<p>future generations; and improved public transparency, understanding and oversight of such decisions and their outcomes;</p> <p>d. To recognise Aboriginal and Torres Strait Islander peoples' knowledge of Country, and stewardship of its landscapes, ecosystems, plants and animals; to foster the involvement of these First Australians in land management; and expand the ongoing and consensual use of traditional ecological knowledge across Australia's landscapes;</p> <p>e. To fulfil Australia's international environmental obligations and responsibilities, in particular to take all steps necessary and appropriate to achieve the purposes of the relevant international treaties</p> <ul style="list-style-type: none"> i. the World Heritage Convention; ii. the Convention on Biological Diversity; iii. the Ramsar Convention on Wetlands of International Importance; iv. the Bonn Convention on the Conservation of Migratory Species of Wild Animals; v. the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); vi. the United Nations Declaration on the Rights of Indigenous Peoples; the United Nations Framework Convention on Climate Change (as applicable to emissions reduction and carbon management under the Act); vii. United Nations Convention to Combat Desertification; viii. special bilateral or multilateral conservation agreements (including agreements with Japan, China and the Republic of Korea to protect migratory birds in danger of extinction) and ix. any other international agreement relevant to the objects of this Act <p>f. To recognise and promote the intrinsic importance of the environment and the value of ecosystem services to human society, individual health and wellbeing.</p> <p>g. Ensure the Minister and all agencies and persons involved in the administration of the Act must act consistent with, and seek to further, the primary object of the Act.</p>
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<p>Ecologically Sustainable Development</p> <p>Q2</p>	<p>Key to effectively implementing ESD will be the establishment of clear decision criteria, standards and environmental outcomes that national environmental law must achieve.</p> <p>In relation to the principles of ESD, it is recommended that new environmental law retain the existing text in part 3A and also include:</p> <ul style="list-style-type: none"> ● Prevention of harm principle; ● Non regression principle; ● Biodiversity principle; and ● Polluter pays principle <p>New environmental legislation should also establish environmental duties and rights, including:</p> <ul style="list-style-type: none"> ● a substantive right to a safe, clean and healthy environment; and ● procedural environmental rights (including the right to information, to public participation and to access to justice in environmental matters). <p>and</p> <ul style="list-style-type: none"> ● Duties of care to avoid causing environmental harm; and ● Duties on responsible parties to repair environmental damage and restore impaired ecosystems and landscapes to the greatest extent practicable. ● Duties on decision makers to exercise their powers to achieve the Act's aims
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<p>New National Environmental Matters</p> <p>Q4, Q1</p>	<p>Establish new triggers as National Environmental Matters, including:</p> <ul style="list-style-type: none"> ● Ecosystems of National Importance, which aim to conserve: <ul style="list-style-type: none"> ○ Areas that meet criteria as a Key Biodiversity Area ○ Areas that are of High Conservation Value ○ Climate refuge habitat ○ Critical habitat areas ○ Wildlife corridor areas ○ Unregulated rivers ○ Ecosystems that provide critical ecosystem services (e.g. critical water catchments) ● National Parks and Reserves Trigger <ul style="list-style-type: none"> ○ For impacts on public areas with the National Reserve System ○ Consideration should be given to additional legislative protections for Indigenous protected areas; in close consultation with First Nations communities ● Greenhouse Gas Trigger, covering <ul style="list-style-type: none"> ○ any development that produces over 100,000 tonnes of CO2 equivalent per year (including downstream emissions); and ○ designated development in regulations to trigger assessment ● Land clearing trigger, covering clearing proposals that are: <ul style="list-style-type: none"> ○ Greater than 100 ha over any two consecutive years ○ habitat for nationally listed threatened species ○ An area designated in regulations
<p>Retain and expand existing federal triggers</p> <p>Q4, Q1</p>	<p>Retain or expand existing triggers including:</p> <ul style="list-style-type: none"> ● Expand the water trigger to: <ul style="list-style-type: none"> ○ a wider set of resource industries, including shale and tight gas. ○ cover major infrastructure projects that impact on freshwater resources ● Retain the existing nuclear actions trigger for uranium activities and; ● Expand threatened ecological community MNES to incorporate vulnerable species

<p>Environmental Outcomes</p> <p>Q8</p>	<p>New national environmental laws should prioritise and ensure the delivery of the following environmental outcomes:</p> <ul style="list-style-type: none"> ● Ensure the Federal Government assumes responsibility and leadership for reversing the decline in Australia’s environment; ● End the destruction of primary, remnant, old-growth or high-conservation value forests and bushland; ● Prevent the extinction of native fauna and flora; ● Protect and recover key biodiversity areas, threatened ecological communities and threatened species including strict protection for their critical habitats; ● Substantially reduce Australia's greenhouse gas pollution and increase carbon sequestration in biodiverse landscapes; ● Safeguard freshwater ecosystems, including from extractive and industrial processes; ● Reduce, to as close to zero as possible, air pollution, plastic pollution and chemical pollution across Australia; ● Maintain and strengthen the prohibition on domestic nuclear power, enrichment and reprocessing whilst advancing responsible domestic radioactive waste management. ● Safeguard the natural and Indigenous cultural values of Australia’s protected areas, heritage places, and other conservation tenures; ● Prevent the introduction of, and reduce the current extent, spread and population size of invasive species that are threatening biodiversity; and ● Effectively protect Australia’s wildlife from commercial exploitation including illegal wildlife trade and unsustainable fishing <p>In addition to environmental outcomes there are a number of procedural outcomes that should form the focus of the structure of the legislation, including:</p> <ul style="list-style-type: none"> ● Ensure environmental impact assessment and approval decisions are made in line with national standards and plans using clearly defined and objective criteria;
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	<ul style="list-style-type: none">● Ensure environmental impact assessments are conducted by independent accredited assessors and the results made public in a timely fashion;● Require the Australian Government to make five yearly national plans that set national goals for the improvement of environmental indicators, monitor impacts using outcome based reporting, and to report annually to Parliament against results;● Mandate opportunities for meaningful community engagement within decision making, planning and assessment processes;● Enable community access to merits review;● Enable community rights to ensure the enforcement and implementation of the Act;● Ensure the Act applies equally to all industries and sectors; and● Mandate the implementation of statutory plans and instruments.
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<p>National standards</p> <p>Q9, Q10, Q17, Q18</p>	<p>The Australian Government should develop a national standards regime that operates in conjunction with an improved focus on bio-regional planning. These approaches should build on (and not displace) an approval and oversight role for the Australian Government.</p> <p>National standards should be developed by the National Environment Commission based on the best available scientific evidence and accounting for a variety of interests and viewpoints.</p> <p>National Standards should:</p> <ul style="list-style-type: none"> ● be codified in law, with a clear statutory development process; ● be consulted with communities, jurisdictions, scientists and the regulated; sector within strict statutory timeframes; ● have capacity to be updated based on new scientific information; ● be actively enforced by a new National Environmental Protection Agency; and ● have third-party enforcement provisions. <p>Assessment bilateral agreements must be strengthened and ensure consistency and alignment with an agreed set of national standards.</p> <p>The Australian Government must maintain an approval and oversight role for all National Environmental Matters</p>
<p>Prohibition on Nuclear energy</p> <p>Q9</p>	<p>The federal government retain the long standing and prudent national prohibition on nuclear power</p>

<p>Critical Habitat</p> <p>Q9, Q11, Q16</p>	<p>Retain and reform the critical habitat register to:</p> <ul style="list-style-type: none"> ● Better account for climate refugia habitat; ● Ensure penalty provisions apply across all land tenures; ● Require mandatory mapping and identification of critical habitat for all newly nominated threatened species; ● Require the registering of critical habitat occurs within 12 months of a species being added to the national threatened species list; ● Require mandatory community consultation and education programs associated with all threatened species and ecological community listings and critical habitat designations; and ● Ensure that critical habitat mapping and data are publicly available <p>Commence an audit of mapping critical habitat knowledge and needs for all existing nationally threatened species</p>
<p>Recovery Planning</p> <p>Q9, Q11, Q16</p>	<p>Require mandatory development of recovery planning instruments at the time of species or ecological community listing in the vulnerable, endangered, critically endangered and extinct in the wild categories.</p> <p>Establish a searchable database reporting on the status and implementation of all recovery actions and make such a database publicly available. The database should be collated, managed and published by the Australian Government.</p> <p>Establish a statutory obligation (duty) to:</p> <ul style="list-style-type: none"> ● Implement endorsed recovery plans, including provision of adequate funding to recovery teams; ● Identify and incorporate critical habitat information in the recovery planning process; and ● Report annually on recovery plan implementation
<p>Threat Abatement Planning</p> <p>Q9, Q11, Q16</p>	<p>Require a National Environment Commission to undertake 3 yearly audits to provide a comprehensive list of existing and new key threats, to inform nominations and key areas of work. This process must only be directed by the best available scientific information.</p> <p>Ensure all TAP nominations are considered within 3 years of nomination</p> <p>Develop two new instruments:</p> <ul style="list-style-type: none"> ● Develop Threat Response Statement as an instrument which is developed at time of listing. ● Include provision for Threat Abatement Advice as an urgent

	<p>interim instrument, that can be deployed prior to the full development of a Threat Abatement Plan.</p> <p>New legislation should automatically trigger the development of Threat Abatement Plans for all key threatening processes.</p> <p>Establish a searchable database reporting on the status and implementation of all actions and make such a database publicly available. The database should be collated, managed and published by the Australian Government.</p> <p>Establish a statutory obligation (duty) to:</p> <ul style="list-style-type: none"> ● Implement endorsed plans, including provision of adequate funding; and ● Report annually on plan implementation
<p>Species Listing</p> <p>Q9, Q11, Q16</p>	<p>Reform species listing to provide for the emergency listing of species and their habitats that apply for upto 12 months</p> <p>Introduce emergency protection orders, that would take precedence over other decision instruments, to provide the Minister and/or NEC and NEPA with the powers protect key ecological values</p> <p>Introduce provision for automatic inquiries into extinction events as well as major ecosystem destruction/ collapse events.</p>
<p>Conservation Agreements</p> <p>Q9, Q11, Q16</p>	<p>Retain and expand the provisions for federal conservation agreements to enable them to be explicitly attached to a place (registered on title)</p>

<p>Bioregional Planning</p> <p>Q9, Q11, Q16</p>	<p>Reform bio-regional planning provisions of a new environment Act to:</p> <ul style="list-style-type: none"> ● Ensure they have a legislated purpose to achieving the objects of the Act ● Are coordinated with state and territory planning instruments ● Meet the improved principles of ESD (e.g. biodiversity principle) ● Require plans are built on scientific evidence, including and ecosystem assessment ● Have significant community engagement and consultation provisions ● Define key outcomes plans should achieve; including <ul style="list-style-type: none"> ○ Have SMART objectives ○ Are compliant with national standards ○ Protect national environmental matters, including the identification of Ecosystems of National Importance and critical habitats ● requiring the EPA, Ministers and all levels of government to make decisions consistent with protections established in a bioregional plan; ● Ensure there is suitable review and accountability processes for plan implementation; ● Identify classes of actions and appropriate regulatory pathways contingent on location, potential impact and relevant environmental and heritage values; and ● Replace outdated Regional Forest Agreements
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Regulatory tools

Q13, Q14

A new Act should provide for a suite of tools for the Australian Government to achieve the objects of the Act, as noted through these recommendations. These tools should include:

National Environment Plan to set national priorities, goals and metrics to protect and restore the environment in key areas.

National Environmental Standards for key environmental values and issues, such as air pollution, mine rehabilitation and plastic pollution. Standards should also specify key decision criteria and thresholds, such as limits to the loss of habitat.

Protection of National Environment Matters which the Australian Government has regulatory responsibility and is required to issue federal approval and/or provide national oversight for

Bioregional and Environmental Plans

The Act should have a strong focus on reformed bioregional planning process (see above) as well as other plans that must be monitored and implemented, including:

- *Threat abatement plans*
- *Recovery plans*
- *Pollution plans*
- *Management Plans*

It is recommended that bioregional planning form the basis of the Australian Government strategic landscape scale interventions, if Strategic Assessment are to be utilised then the following improvements should include:

- strong legislated standards, decision-making criteria and science-based methods, including a ‘maintain or improve’ environmental outcomes test;
- cumulative impact assessment requirements, taking account of past, present and likely (approved) future activities at the relevant scale;
- comprehensive and accurate mapping and baseline environmental data;
- mandating transparency and public participation at all phases of the process, including post-approval compliance;
- requiring alternative scenarios to be considered and accounting for climate change impacts;
- adaptive management and review once a program is accredited, to respond to new discoveries, correct unsuccessful trajectories or implement best available technology; and

	<ul style="list-style-type: none"> robust oversight, including via legislated, independent performance audit requirements, transparent verification of compliance, and ‘call-in’ powers for higher-risk actions and clear penalty provisions for non-compliance.
<p>Indigenous cultural heritage and participation</p> <p>Q19</p>	<p>Any changes relating to the role of Indigenous peoples under the EPBC Act must be subject to effective and extensive consultation with Indigenous peoples, communities and organisations.</p> <p>‘Free, prior and informed’ consent of Indigenous communities should become a mandatory operational principle, and consideration in decision making, particularly for any decision that will impact Indigenous heritage values Indigenous Protected Areas, Indigenous owned land or land that is subject to a Native Title claim.</p> <p>The review seeks the views and reflect the will of Indigenous stakeholders on the ratification of the Nagoya Protocol on access and benefit sharing under the Convention on Biological Diversity and reflection in national law.</p> <p>New environmental law should value and take into account Indigenous knowledge in culturally appropriate ways, in close, effective and extensive consultation with Indigenous peoples, communities and organisations.</p>

<p>Governance and institutional arrangements</p> <p>Q21</p>	<p>A new generation of environmental laws would establish new independent institutions,</p> <p>National Environment Commission</p> <p>A National Environment Commission would be established as an independent authority reporting annually to parliament on the state of the environment. It would:</p> <ul style="list-style-type: none"> ● Develop and oversee national environmental goals, strategies, plans and standards; ● Require at least one full time Commissioner and independent public sector staff appointed from commencement of Act; ● Have the mandate to negotiate with all levels of government regarding plans, standards and environmental information. ● Gather and publicly disseminate evidence on environmental conditions and trends to inform decisions and improve outcomes over time; ● Ensure recovery plans, threat abatement plans, conservation advices and threat mitigation directives are up to date and integrated into bioregional plans. <p>National Environment Protection Authority</p> <p>A National Environment Protection Authority would be the new Commonwealth assessment, approval and enforcement body for environment issues that are nationally important. The establishment and adequate resourcing of an independent national environment protection authority that operates at arm's-length from government is key. It would:</p> <ul style="list-style-type: none"> ● Be governed by an independent board and headed by a chief regulator; ● Have statutory duties to use powers and functions to achieve the Act's aims; ● Undertake assessment, approval and enforcement of activities that affect environmental issues of national importance; ● Undertake impact assessment and approval of actions on land and waters; ● Undertake independent compliance, audit and enforcement roles; ● Include a separate unit responsible for post-approval project and plan compliance, audits, monitoring and reporting; ● Ensure approvals comply with statutory plans under the Act (e.g. recovery plans, threat abatement plans, bioregional plans); ● Review, advise and report openly to the Minister on specific development projects.
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	<p>There should be mandatory accreditation of consultants who work on projects covered by new national legislation, to ensure industry best practices and ethical conduct. There should be a statutory process for complaints handling and safeguards for industry whistleblowers.</p>
<p>Compliance and enforcement</p> <p>Q21</p>	<p>New environment legislation should:</p> <ul style="list-style-type: none"> ● Establish a Special Account for the collection of payments from environmental infringement notices; ● Substantially increase the penalty units attached to a breach of approval conditions to provide adequate disincentive for non-compliance; ● Trigger the <i>Regulatory Powers (Standard Provisions) Act 2014</i> with exceptions made for environmentally-specific coercive and enforcement actions; ● Contain provision of warning and infringement notices to be issued for Part 3 offences; ● Include strong enforcement and penalty provisions for Part 10 (strategic assessment) approvals that encourage approval holders to prioritise their commitments made under Strategic Assessments; and ● Ensure adequate resourcing for compliance and enforcement activities, including earmarking components of cost-recovery revenue.
<p>Transparency</p> <p>Q20</p>	<ul style="list-style-type: none"> ● Mandatory and inclusive community consultation on all key components of new legislation, including the development of statutory plans, standards and approval decisions. <ul style="list-style-type: none"> ○ Community panels should be pursued where feasible, however such panels must be chaired and convened by the EPA or NEC, not by proponents. ● Open standing for any person to seek review of government decisions or to enforce a breach or anticipated breach through third party enforcement. ● Extending legal standing to merits review of approval and permitting decisions. This has been shown to improve the rigour of decision making. ● A statutory right for citizens to ask the court to require performance of mandatory duties by the Minister or other decision-makers under the Act. ● Protection for costs for public interest legal proceedings, for example limiting upfront cost orders that deter the community from exercising legal rights. ● Automatic disclosure of all statutory decision making material at the time of decision

Data and information

Q15

New environmental law should be underpinned by robust scientific information and strong data management systems, including

- a centralised database or hub for biodiversity and ecosystem health data
- data standards to be set via subordinate instrument (such as via regulation)
- long term funding of the hub and duties on decision makers for maintenance of the data and relevant data-sharing agreements.
- that environmental information required as part of assessment and planning processes is consistent with relevant standards and entered into the database.
- that there is reasonable and open access to data, noting the need to safeguard some species location information.

For assessment and approval information, legislation should ensure:

- There is a publicly available national database detailing environmental impact assessment and compliance information as well as the details and locations of environmental offsets.
- All decision material, such as assessment reports or recommendation reports that relate to federal environmental legislation should be released at the time a decision is made.
- Provide a single point of entry and public oversight for referrals and assessments across jurisdictions, preferably managed through the NEPA.

There should continue to be 5 yearly State of the Environment reporting, with a renewed effort in building and maintaining a system of National Environmental Accounts, which should release full accounts and key indicators against the SoE annually (at a minimum).

There should be improved remote sensing data capabilities and disclosure, to track status, trends and monitor compliance with relevant regulations.

<p>Financing and environmental markets</p> <p>Q22, Q23, Q25</p>	<p>That a \$4.5 billion fund be established to provide incentives for private landowners and purchase ecosystem service from willing sellers. This should:</p> <ul style="list-style-type: none"> ● deliver funding through a mixture of investment vehicles, such as grants, impact bonds, ecosystem service investment; ● be established to achieve the objectives of the the legislation and goals outlined in national plans; ● Leverage its size to deliver private sector co-investment in sustainable agriculture, water management and forestry; and ● provide funds to deliver investments in productive landscapes which are not tied or contingent on biodiversity offsets. <p>The fund should be independently administered through the National Environment Commission or other independent statutory authority, and include</p> <ul style="list-style-type: none"> ● Independent governance and decision making ● High levels of transparency and accountability; and ● Expert advisory and community consultative bodies.
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**Biodiversity
Offsets**

Q24

The Department invest in collecting and evaluating the data on the delivery of the existing EPBC Act offsets policy and performance of the EPBC Act offsets assessment guide.

As an urgent priority the Government must develop a register that can outline the:

- Status
- Location
- Values protected
- Compliance record

For all existing and potentially new biodiversity offsets. This should be done in a manner that can integrate with future data reforms (as outlined above)

Simpler and more transparent metrics for offset calculation should be developed.

Offset principles should be strengthened and build on existing EPBC offset principles including those relating to:

- Improve or maintain test for MNES
- Like for like offsets
- Additionality
- Timeliness
- Accounting for risk: and
- Transparency

Additional principles should be developed including

- Ensuring there are limits to the application of biodiversity offset (eg offsets are not utilised for matters that cannot be restored or replaced, such as endangered or critically endangered species and ecological communities or critical habitat areas);
- Genuinely requiring that offsets are a last resort, after all efforts are made to avoid and minimise impacts;
- Providing clear guidance as to what impacts must be 'avoided', for example where they trigger a level of impact over a certain threshold on endangered MNES;
- Enabling third party enforcement;
- Ensuring existing obligations are not utilised for offsets, such as mine rehabilitation; and
- any offsetting must be consistent with recovery goals in recovery plans.

Biodiversity offset policy should be driven by capacity for offsets to compensate for the loss of environmental values (and not enable

offsets to be utilised where this is not possible) and not be driven by market size or liquidity.

Trust models for offsets can enable more strategic delivery of offsets, but come with risks to environmental outcomes, especially in the absence of robust governance frameworks. Any establishment of trust models for offset delivery must be accompanied by

- robust rules for offset calculation and delivery
- Independent governance at arms length from ministerial intervention
- High levels of transparency and accountability

Target based approaches to biodiversity offsets, consistent with latest scientific thinking, should be evaluated and openly modelled in the context of new statutory objectives, outcomes, targets, standards and plans under environmental law.

PART 1

General operation and administration of the EPBC Act

Focuses on process not outcomes

One of significant critiques of the the EPBC Act is that, whilst having apparently strong objectives, it provides limited guidance on the outcomes it seeks to achieve. Instead of outlining decision criteria to reach specified environmental outcomes the Act focuses on process, outlining a variety of mechanisms that are available to assess development projects and the manner in which these must be conducted. This focus on process makes the legislation overly complex.

Where there is capacity for some sort of decision criteria (for examples s136 - 140 which state a Minister must not act inconsistently with relevant documents) instruments are rarely utilised in such a fashion. For example recovery plans, in theory, could be used to specify critical habitat areas and outline key areas for habitat protection.

As has been noted there has been a significant decline in key environmental indicators across Australia under the EPBC Act. Since 2009, three species of animal, the bramble cay melomys, the Christmas Island pipistrelle and Christmas Island skink have gone extinct. In response to these disappearances, leading researchers undertook a forensic approach to understand what led to each extinction. They note a number of key issues in terms of policy and management including:

“a lack within national environmental legislation and policy of explicit commitment to the prevention of avoidable extinctions, lack of explicit accountability, inadequate resources for conservation (particularly for species not considered charismatic or not of high taxonomic distinctiveness), inadequate biosecurity, a slow and inadequate process for listing species as threatened, recovery planning that failed to consider the need for emergency response, inability of researchers to identify major threatening factors, lack of public engagement and involvement in conservation decisions, and limited advocacy.”²

As noted by the Australian Senate in its interim report into Australia’s Faunal Extinction Crisis:

Evidence received by the committee has raised serious questions about whether the EPBC Act is still fit for purpose and is in fact achieving the objectives set out in the

² Woinarski, J. C., Garnett, S. T., Legge, S. M. and Lindenmayer, D. B. (2017), The contribution of policy, law, management, research, and advocacy failings to the recent extinctions of three Australian vertebrate species. *Conservation Biology*, 31: 13-23. doi:[10.1111/cobi.12852](https://doi.org/10.1111/cobi.12852)

Act. It is also clear that the EPBC Act is struggling to meet the scale of the challenge our environment faces, including the threats to our faunal species. Evidence considered in chapter 2 of this report overwhelmingly showed that Australia's rate of faunal extinction has continued to increase since the introduction of the EPBC Act.³

Lack of independent decision making

The EPBC contains very few constraints on decision maker discretion. This significantly hinders its effectiveness and opens its processes to influence by vested interests. The current administration of the EPBC Act is housed solely within the Department of Agriculture, Water and Environment. Within this structure, Senior Executive Service officers, who operate under the direction of the Secretary and the Minister, are also those charged with overseeing the assessment and approval of projects under the EPBC Act as delegates of the Minister. This creates the potential for conflicts of interest in relation to the independent assessment of projects and avenues of direct political interference in regulatory decisions.

There are numerous examples of highly questionable approval decision making processes that have occurred under the EPBC Act. Contemporary examples include the approval of the groundwater management plan (GWMP) for the Adani coal mine and the approval of Yeelirrie uranium mine just prior to the 2019 election. Both approvals were heavily politicised and did not follow the usual process for approval under the EPBC Act. The approval of the GWMP was particularly dubious, noting political threats made against the then environment minister⁴, the proximity of the decision to the writs being issued for the federal election and the approval of the plan following a brief phone link up between senior executives in the Department, CSIRO and Geoscience Australia.⁵ Others, such as Toondah Harbour (see case study below) highlight how the EPBC Act is open to influence and lacks the transparency and accountability that we see in other jurisdictions.

Case Study 1: Toondah Harbour

- The Toondah harbour is a controversial development referred under the EPBC Act to build 3600 units inside a Ramsar listed wetland and on critical habitat for critically endangered waterbirds in Moreton Bay, Queensland. If approved it will involve the active destruction of a wetland of international significance.

³ Environment and Communications References Committee Australia's faunal extinction crisis Interim report https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalexinction/Interim_report

⁴ SMH 18 April 2019 Environment Minister ordered Adani meeting the day colleagues lobbied for approval <https://www.smh.com.au/politics/federal/environment-minister-ordered-adani-meeting-the-day-colleagues-lobbied-for-approval-20190418-p51fdx.html>

⁵ ABC News 14 May 2019 Adani water plan ticked off within hours despite lack of detail, internal CSIRO emails reveal <https://www.abc.net.au/news/2019-05-14/adani-csiro-emails-foi-melissa-price/11107276>

- The project has been referred three times under the EPBC Act (2015/7612, 2017/7939, 2018/8225) and is currently undergoing an Environmental Impact Assessment for its third referral.
- For the first two referrals the Department recommended the project be determined clearly unacceptable twice due to unacceptable impacts on the Moreton Bay Ramsar Wetland - the then Environment Minister rejected this advice for 2017/7939
- In making the recommendation for 2017/7939 the department produced two briefs for the exact same action and provided them to the minister on the same day:
 - MS17-000773 - Recommending the project be determined clearly unacceptable (this was rejected)
 - MS17-000774 - Recommending the project be determined a controlled action.
- This is a highly unusual approach, to split the same project/decision across two separate, but consecutive briefing instruments.
- Both decisions had to be uncovered through Freedom of Information. MS17-000774 came to light in a matter of months. The release of MS17-000773 was fought by the Department for over a year - but was eventually released in part due to increasing parliamentary and media scrutiny.
- No statement of reasons has been provided for MS17-000773 - the reasons for the Minister rejecting the Department's advice that the project was clearly unacceptable are unknown.
- The proponent is known as a well-connected businessman and a significant political donor. In 2016, while the project was actively being considered by the Coalition Government, the developer donated \$200,000 to the federal Liberal Party.
- Developer donations are banned in a number of jurisdictions due to their ability to impact on planning and approval decisions. However, no such ban exists under the EPBC Act.
- The ABC revealed the department received advice that any development inside the wetland would contravene Australia's international obligations.
- Due to the legislations poor disclosure and antiquated systems, there was a significant delay in unpacking the Department's and Ministers decision making processes for Toondah Harbour. Most transparency evolved through the FoI regime, rather than the EPBC Act process. And there remain important unanswered questions as to the reasons for the then Minister rejecting the Department's clearly unacceptable recommendation.

It is clear that stronger integrity safeguards are needed for our national environmental approval system. Noting that a significant number of environmental planning and consent issues have been a matter of investigation through state anti-corruption bodies, no such equivalent oversight body exists at the federal level.

Poor regulation of habitat destruction

Land clearing and habitat destruction remains one of the primary drivers of biodiversity decline in Australia as identified by the CSIRO and the independent State of the Environment Report.^{6 7} A 2019 national study published in *Conservation Science and Practice* evaluated threatened species habitat loss since the operation of the EPBC Act from 2000 to 2017. Its findings were damning in relation to the effective regulation of threatened species habitat destruction under the EPBC Act. It highlighted that since the EPBC has been in operation an area of 7.7 million hectares of threatened species habitat has been destroyed. This is an area 20% larger than the entire state of Tasmania.⁸ The total extent of this loss is highlighted in Figure 1 below.

This research masked known fire events, so notwithstanding smaller burns, the majority of the destruction mapped in Figure 1 is primarily anthropogenic clearing. Alarmingly, when overlaid with the EPBC referrals spatial layer, which is a very generous assessment of project footprints, 93% of national threatened species habitat destruction has occurred outside of any known federal referral (marked red below). The vast majority of this habitat destruction has occurred due to poor regulation of agriculture and lack of incentives for private land stewardship, which should be coupled together.

Much has been made of the perceived regulatory burden of the EPBC Act on agriculture, sparking the non-statutory review of the intersection of the EPBC Act and the agriculture sector in 2018 headed by Dr Wendy Craik (Craik Review). There have been very few agriculture referrals under the EPBC Act. This fact was also noted by the Productivity Commission in its draft report on the regulation of agriculture:

“In the period 1999– 2014, there were 54 agriculture-related projects referred for assessment, of which eight projects were subject to conditions (Australian Government 2014a)”⁹

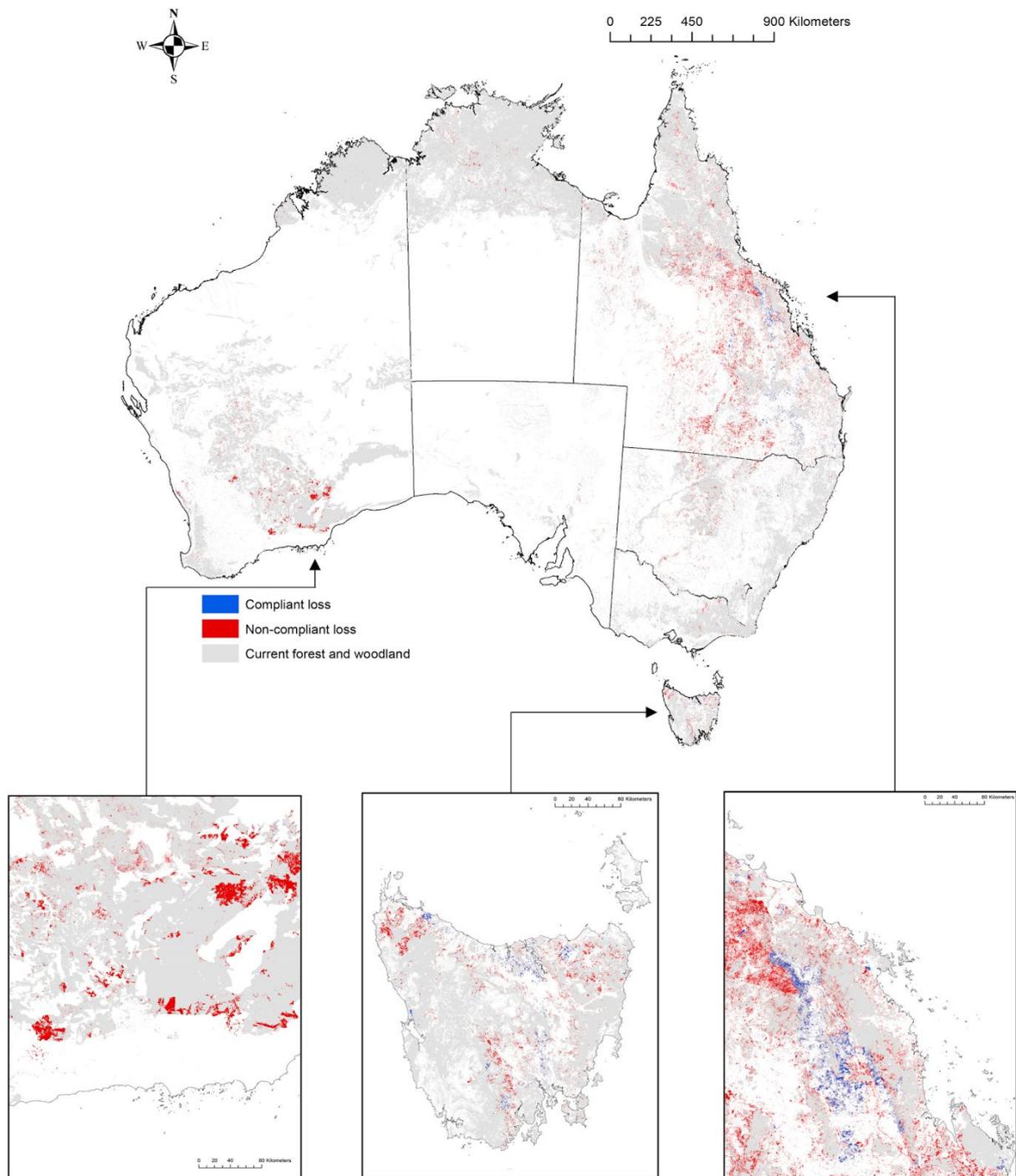
⁶ Biodiversity: science and solutions for Australia <http://www.publish.csiro.au/Books/download.cfm?ID=6967>

⁷ Jackson WJ, Argent RM, Bax NJ, Clark GF, Coleman S, Cresswell ID, Emmerson KM, Evans K, Hibberd MF, Johnston EL, Keywood MD, Klekociuk A, Mackay R, Metcalfe D, Murphy H, Rankin A, Smith DC & Wienecke B (2017). Australia state of the environment 2016: overview, independent report to the Australian Government Minister for the Environment and Energy, Australian Government Department of the Environment and Energy, Canberra. p 16 <https://soe.environment.gov.au/sites/default/files/soe2016-overview-launch-version328feb17.pdf?v=1488792535>

⁸ Ward, MS, Simmonds, JS, Reside, AE, et al. Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia. *Conservation Science and Practice*. 2019; 1:e117. <https://doi.org/10.1111/csp2.117>

⁹ Productivity Commission Regulation of Agriculture Draft report <https://www.pc.gov.au/inquiries/completed/agriculture/draft>

Figure 1 - Map of threatened species habitat loss 2000 - 2017



Source: Ward, MS, Simmonds, JS, Reside, AE, et al. Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia. *Conservation Science and Practice*. 2019; 1:e117. <https://doi.org/10.1111/csp2.117>

Even when adopting a broader definition of “agricultural development” as taken by the Craik Review, which factored in infrastructure projects that facilitated agriculture, this number still only amounted to 165 over almost 20 years and out of more than 6,400 referrals.¹⁰ In fact in a Department briefing cleared through the Deputy Secretary of Environmental Protection Group it acknowledged that:

“Despite some perceptions, farmers are not highly regulated by the EPBC Act. However, there is a need to make it easier for farmers to understand and comply with the Act”¹¹

This is reinforced by evidence provided to the Senate in 2018 in relation to offsets for agricultural referrals, in which the Department stated:

Since commencement of the EPBC Act, a total of 15 projects that either have a direct agricultural component, or that involve the development of infrastructure that will facilitate agricultural development in the future, such as dams and pipelines, have required an offset as a condition of approval. Delivery of these offsets is governed by each project’s conditions of approval.¹²

There remains a perception, partly due to historically poor outreach and communication, that there is an undue regulatory burden on the sector. The inverse is true, that the sector is under-regulated under the EPBC Act, as demonstrated by the low numbers of referrals along with the significant rates of land clearing and threatened species habitat loss observed. Additionally, there have been overt instances of political interventions in a number of agricultural compliance cases¹³ and referrals¹⁴ and attacks on the EPBC in general. These have resulted in the department, as the regulator, taking a diminutive approach to regulating the agricultural sector, which is likely the aim of such political interventions.

The data continues to show that agricultural expansion into MNES habitat areas have been responsible for a significant proportion of threatened species habitat loss since 2000 and the decline of significant areas of biodiversity.

There is important work to be done as part of this review to grapple with the mix of policy tools, both regulations and incentives, to better conserve biodiversity across agricultural landscapes.

¹⁰ Review of interactions between the EPBC Act and the agriculture Final Report - Page 17 sector <https://www.environment.gov.au/system/files/resources/0bb50a4d-b273-4a31-8fdb-dcde90edef3e/files/review-interaction-s-epbc-act-agriculture-final-report.pdf>

¹¹ FOI 190723 Document 4A Minister for the Environment and Energy (For Information): MB17-000520 <http://www.environment.gov.au/system/files/190723.pdf>

¹² 2018-19 Budget Estimates Environment and Communications Committee, Environment and Energy Portfolio QoN 149

¹³ Guardian 5 March 2018 Lobbying by MPs forced government to back off on land-clearing enforcement <https://www.theguardian.com/environment/2018/mar/02/deeply-regret-australias-apology-to-landholders-suspected-of-planning-unlawful-clearing>

¹⁴ SMH 1 June 2019 Coalition's reef advocate backs massive tree-clearing plan <https://www.smh.com.au/politics/federal/coalition-s-reef-advocate-backs-massive-tree-clearing-plan-20190601-p51thy.html>

Poor transparency of regulated decision making

Under the EPBC Act the Department is one of the few environmental regulators that do not disclose the basis of decision making when a decision is made. Additionally, there is limited information made available through a single point of entry about the assessment process or related documentation. As outlined in the Toondah Harbour case study above, failure to disclose decision making information in a timely fashion can significantly hinder public scrutiny of decisions. Poor transparency and lack of disclosure measures create environments where undue influence and corruption can thrive and erode trust in the regulator. Table 1 (below) contrasts in approach between the Department and other environmental regulators such as the NSW Independent Planning Commission or WA EPA.

Table 1 - Comparison of information disclosure practices across selected jurisdictions

	<i>Administration of EPBC Act</i>	<i>NSW IPC</i>	<i>WA OEPA</i>
<i>All information available in one single website</i>	No	Yes	Yes
<i>Disclosure of public comments received on proposal</i>	No	Yes	Yes
<i>Release of assessment / recommendation report at time of decision</i>	No	Yes	Yes

There are provisions under the EPBC Act to access recommendation reports through a request to the Secretary under Section 135A. ACF has lodged numerous requests under this provision in a genuine effort to reduce Freedom of Information request burden, which is another viable alternative - yet responses from the regulator have been exceptionally slow. This in turn makes Fol a more attractive, but more resource intensive alternative.

There is a strong argument for disclosing decision making information and criteria when decisions are made: it is in the public interest to disclose such matters, especially when regulating the protection of the environment; it will reduce the burden on the regulator in processing other types of information requests, such as Fol requests; and it will drive improved internal culture and scrutiny of decision making.

Exempted industries and lack of regulatory oversight

A major flaw in the EPBC Act is the exemption from assessment and approval provisions for logging activities which take place under a Regional Forest Agreement. The RFA were originally negotiated through the 1990's to seek a balance between conservation and resource production. They effectively involved the establishment of reserves in compensation for the removal of federal oversight and accreditation of state forestry

regime's for the purpose of the EPBC Act. Conceptually the RFA's operated as a form of strategic assessment. The key issue with the RFA's is they are now built on out-dated information and the federal government has largely adopted a set and forget approach to the agreements.

Despite logging having serious impacts on threatened species and their habitat in a number of these regions this exemption continues. The cumulative impacts of habitat loss, degradation and fragmentation from logging, fire, invasives and climate change are pushing forest dependent threatened species to the brink. As noted by researchers:

No threatened forest vertebrate has moved to a lower threat category since RFAs began. Twelve forest-dependent vertebrates impacted by logging have had their threat status increased to 'Endangered' or 'Critically Endangered' under the EPBC Act since the RFAs came into force, for example the Regent Honeyeater, Western Ringtail Possum, Swift Parrot and Koala (NSW and Queensland populations).¹⁵

The NSW, WA, Tasmanian and Victorian RFA's have recently been renewed or rolled over in questionable circumstances. Specifically, there was no renewal of the regional assessments on which the agreements were originally constructed.¹⁶ They have locked in another 20 years of exemptions for one of the most significant risks to forest biodiversity in Australia.

The failure of the RFA's to stem biodiversity loss include:

- inadequacy of State threatened species protections accredited by RFAs;
- insufficient provision for adaptive management;
- inadequate reviews;
- deficient monitoring, compliance and enforcement; and
- limited third-party participation rights.

Regional Forest Agreements have been an abject failure when it comes to protecting threatened species habitat. The RFA's are also a cautionary tale for the accreditation of state and territory regimes, particularly in the absence of adequate standards, safeguards and monitoring regimes.

Inadequate monitoring and measurement of implementation and outcomes

There is a distinct lack of systems level analysis of environmental outcomes delivered through the existing EPBC Act assessments and approvals regulatory regime. The regulatory functions of the Department are entirely focussed on protecting matters of national environmental significance and commonwealth land and waters under the EPBC Act. Despite this there remains no effective mechanisms developed by the government to measure the environmental outcomes delivered through its regulatory activities.

¹⁵ Blakers M., Sydes B. 2020 No longer Tenable Bushfires and Regional Forest Agreements <https://www.envirojustice.org.au/wp-content/uploads/2020/03/EJA-report-No-longer-tenable-1.pdf>

¹⁶ Ibid

Specifically the federal government:

- does not hold aggregated data concerning the extent of clearing of habitat for nationally listed threatened species.¹⁷
- does not have a register or database outlining the total quantum, effectiveness or location of offsets required under EPBC Act conditions of approval.¹⁸
- does not track the implementation of threatened species recovery planning instruments.¹⁹

It is a systemic failure of governance and information management that after 20 years of operation that a regulator is unable to answer the fundamental questions of how its operations are working to meet the objectives of its legislation.

The Department does not have a clear grasp of the trends that are occurring in the environment, and especially in relation to threatened species, and therefore cannot adapt its regulatory approach to keep up with trends and threats.

Case study 2: Biodiversity Offset Data

When the EPBC Biodiversity Offsets Policy was released in 2012 it committed to the establishment of a public register. Despite 8 years to develop this essential piece of regulatory infrastructure no progress has ever been made on creating a data system that tracked and reported on biodiversity offset delivery.

Despite this lack of infrastructure, the Department set a specific performance measure in the 2015/16 Portfolio Budget Statement to measure its regulatory performance based on the amount of habitat protected by offsets. To stakeholders this indicated that such a system was in development to create an adequate dataset to enable robust evaluation of regulatory outcomes and performance.

To the contrary, the Department had to issue a very public rebuke of its own data systems, acknowledging that it did not have the data or information to measure against the performance criteria the government had set it. Rather than develop such systems the department has looked to other measures of its regulatory performance, despite the prolific use, and poor monitoring, of biodiversity offsets.

¹⁷Senate Standing Committee on Environment and Communications Legislation 2018-19 Budget estimates Question no.147 Portfolio question number: 147

¹⁸ Senate Standing Committee on Environment and Communications Legislation Committee Answers to questions on notice Environment and Energy portfolio Hearing: Supplementary Budget Estimates November 2019 Question No: 66

¹⁹ Senate Standing Committee on Environment and Communications Legislation Committee Answers to questions on notice Additional Estimates, March 2019 Environment and Energy portfolio Question No: 67

Objective: Ensure sustainable development outcomes by regulating impacts on matters of national environmental significance

Criterion	The number of hectares of habitat protected by offsets ⁶ compared with the area impacted ⁷ for approved projects ⁸
Result	Data/information not available or incomplete

There are serious failings in relation to the systems and capabilities of the department in measuring and tracking environmental change and their regulatory approaches. This includes tracking and managing environmental impacts and biodiversity offsets. Critically the use and availability of EPBC Act data is constrained by antiquated systems and lack of investment. It is worth reflecting that the EPBC Act was enacted in the early evolution of the internet and it entirely predates modern mobile technology. Simple databases, such as on the timing of decision making and condition sets, (information that is already publicly available but not searchable) are not disclosed. Recommendation reports for projects are not automatically disclosed or data within digitised. This seriously inhibits analytical evaluation of the legislations performance.

Administrative performance

Department annual reports demonstrate that the administration of EPBC Act assessments and approvals has deteriorated in relation to on-time performance in recent years. Only sixty per cent of decisions required by the Minister under the EPBC Act were on time in 2018-19, a decline from 76 per cent in 2013-14 (See Figure 2). The time taken from the initial referral stage to the final approval stage of assessing a proposed action has also increased from an average of 799 days in 2013-14 to 984 days in 2018-19 (See Figure 3). This increase in time taken to complete the requirements of the EPBC Act is despite a decrease in the administrative workload. The number of referrals made declined from 412 in 2011-12 to 220 in 2018-19.

Figure 2

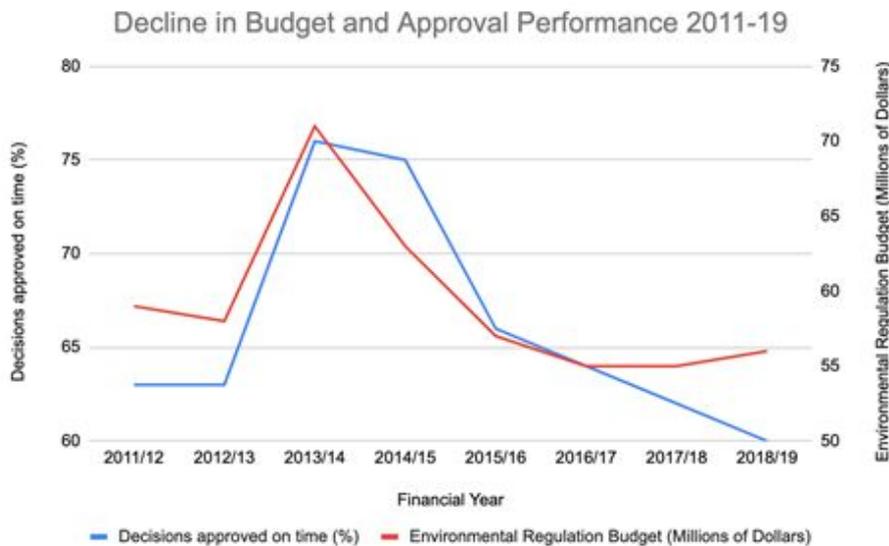
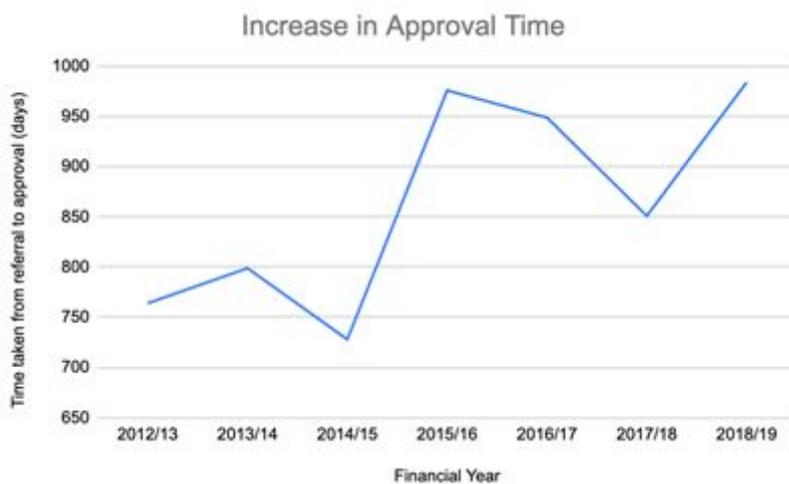
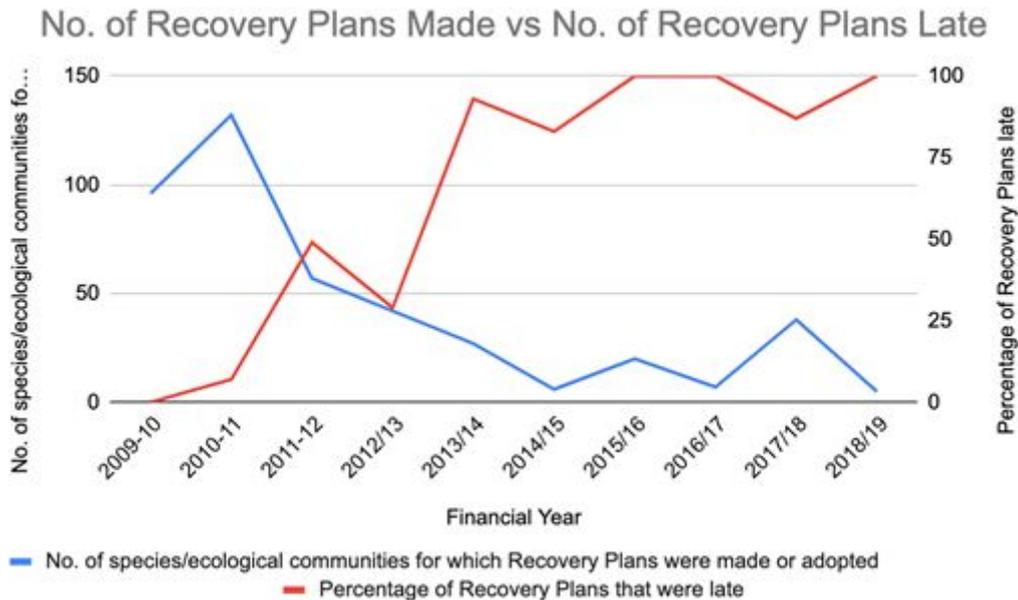


Figure 3



The statistics are also damning when it comes to the development of proactive conservation documents, such as threatened species recovery plans. Analysis of timeframes for recovery plan development have shown that since 2013 it has taken an average 7.39 years for a plan to be developed. Section 273 of the EPBC Act outlines there is a maximum of 6 years for recovery plan development (3 year initial period and provision for one 3 year extension). The recovery plans for the plains wanderer and for the regent honeyeater took 15 years to be developed. Over that timeframe the regent honeyeater was uplisted to critically endangered.

Figure 4



Poorly resourced regulator

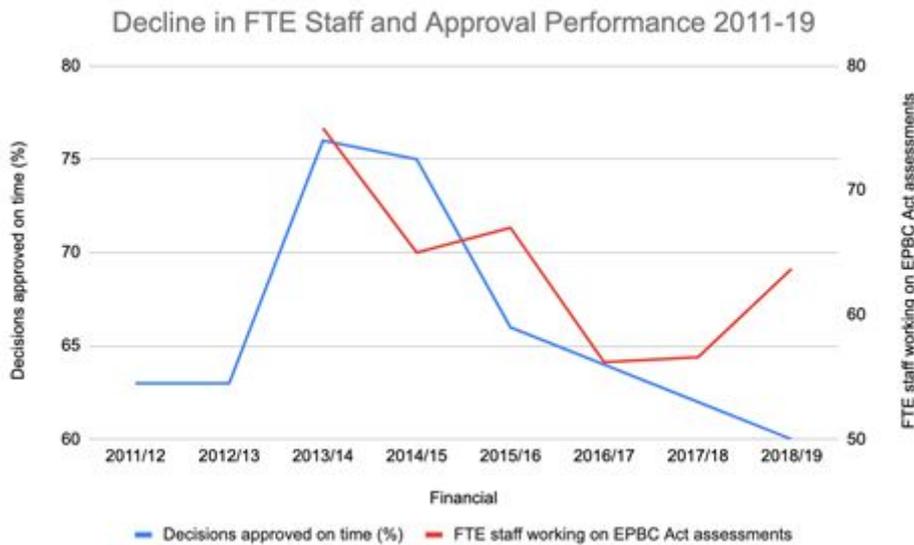
Department annual reports also show a declining trend in both the budget and staffing allocated to Environmental Regulation between 2013-14 and 2018-19. The Environmental Regulation budget decreased from a peak of \$71 million in 2013-14 to \$56 million in 2018-19.²⁰ Full-time equivalent (FTE) staff dedicated to EPBC Act assessments declined from 75 in December 2014 to 56.6 in December 2018.²¹

The decline in Environmental Regulation budget and staffing seen between 2013-14 and 2018-19 is correlated with the deteriorating quality of administrative performance over the same time period (figure 2). The large increase in the budget between 2012-13 and 2013-14 coincides with a substantial improvement in the timeliness of approvals. In contrast, the sharp decline in the budget from 2013-14 onwards appears to have had a very negative effect on the capacity to carry out approvals on time. Figure 5 shows a similar relationship between the number of FTE staff working on EPBC Act assessments and the timeliness of approvals.

²⁰ Environment portfolio Annual Reports (2012/13 - 2018/19)

²¹ Senate Standing Committee on Environment and Communications Legislation Committee - Answers to questions on notice (Environment and Energy portfolio) Question no. 99 'EPBC Act - Staff working on Assessments'

Figure 5



Approval condition setting - backloading of assessments and approvals

As noted above there is no publicly available database that enables the systemic analysis of condition setting, however there are key examples that highlight significant problems with the condition setting practices.

Likely due to serious workload issues and pressure to approve projects, since 2012 the Department has increasingly adopted a practice of ‘backloading approvals’, through which complex problems and decision making are deferred to post-approval provisions via conditions of approval. This generally occurs through the development of management plans. A good example of backloading is the approval of the Adani Coal mine (EPBC 2010/5736) which required a multitude of additional management plans to be approved following the actual approval decision. Many of these, such as the offsets plan or groundwater management plan, dealt with complex technical issues that should normally be dealt with within an assessment process. In essence forming a subordinate approval process.

Backloading shifts the liability and responsibility for the assessment decision making to the Department’s post-approval, monitoring and compliance areas. It also fundamentally shifts the nature of assessments. There are no mandatory community consultation requirements or public disclosure mechanisms for post-approval management plans or subordinate approvals required as conditions.

The use of post-approval backloading applies to offsets also. As an example, for the Red Hill Mining Project (2013/6865) the proponent was simply required to deliver an offset that

complied with the EPBC Act Environmental Offsets Policy”.²² This is despite the policy explicitly indicating that offsets should be in place prior to impacts occurring and that best practice would see offsets being identified through the assessment process.

Figure 6 - Condition 7 2013/6865

Offsets

7. The **approval holder** must provide environmental offsets for authorised unavoidable **impacts** on **EPBC Act threatened species and communities** and their habitat for individual **project stages** of mine development as detailed in Table 1 including, but not limited to, impacts from clearing and **subsidence**. The **approval holder** must ensure that environmental offsets comply with the **EPBC Act Environmental Offsets Policy**.

There is no way for a proponent to meaningfully interpret this condition and know the quantum of the offset they should be providing. There is also no guarantee of any environmental outcome given the lax nature in the application of the existing EPBC Act offsets policy (see case study 10). Lastly there is no way that this condition is enforceable, with the outcomes of the application of the offsets policy being so malleable.

The backloading of conditions has been conflated with outcomes based conditioning. The latter is only possible where you have the systems in place to measure and track outcomes, the Department has no such systems.

Limited review and accountability frameworks

There have been numerous critiques of the EPBC Act, including by Godden and Peel, who noted:

*“deficiencies of the EPBC Act include a variable record of government application of its environmental impact assessment provisions, coupled with the substantial costs to environmental groups of litigating cases under the legislation in an attempt to ensure government and proponent accountability. Further, recent amendments to the EPBC Act, rushed through the federal Parliament in late 2006, seem designed to reduce the breadth and transparency of environmental decision-making under the legislation in order to enhance the ‘efficiency’ of the assessment process for development proponents.”*²³

Currently the only provision to take legal action against a decision under the EPBC Act is through judicial review, rather than a merit based approach looking at the substantive environmental, social and economic outcomes of decisions.

²² Approval Decision notice 2013/6865

http://epbcnotices.environment.gov.au/_entity/annotation/b045fa4e-3768-e511-9099-005056ba00a8/a71d58ad-4cba-48b6-8da-b-f3091fc31cd5?t=1576200433897

²³ "Godden, Lee; Peel, Jacqueline --- "The Environment ... - AustLII."

<http://www5.austlii.edu.au/au/journals/MelbULawRw/2007/5.html>. Accessed 7 Aug. 2018.

The government has lost or conceded a number of cases in recent years due to significant errors in the manner in which assessments and approvals have been made.²⁴ Despite these increasing statistics of lost cases, there remains no evidence of vexatious litigation under the EPBC Act.

In the 2018/19 financial year there were 2161 referral, assessment or approval decisions made under the EPBC Act, 861 of these decisions were late (i.e. exceeded their statutory deadline).²⁵ In that same year only six of these decisions were challenged in the Federal Court (two of which were related to the same development).²⁶

Both the Federal Court and Administrative Appeals Tribunal Act 1975 (s42B) protects against frivolous and vexatious claims. Both jurisdictions can also reject an application that does not have reasonable prospects of success or if it is an abuse of the tribunal process.

Appeals to review the merits of decisions are not taken lightly and are costly in time and money for the applicants. NSW ICAC's report *Anti-Corruption Safeguards and the NSW Planning System* proposed 'six key corruption safeguards' in terms of its planning system:²⁷

These are:

1. providing certainty;
2. balancing competing public interests;
3. ensuring transparency;
4. reducing complexity;
5. meaningful community participation and consultation; and
6. expanding the scope of third party merits appeals.

When these principles are applied to the operations of the EPBC Act, the legislation itself or the regulatory culture of the Department, it is clear they are severely lacking in some areas (certainty, transparency, community participation) and entirely absent in others (merits appeals).

²⁴ Australian Conservation Foundation v Minister for the Environment (NSD2268/2018), Environment Council of Central Queensland Inc. v Minister for the Environment (Commonwealth) and Harris (NSD1788/2018), Polaris Coomera Pty Ltd v Minister for the Environment (QUD627/2018)

²⁵ DEE Annual Report 18-19 p41

²⁶ DEE Annual Report 18-19 p118

²⁷ ICAC, Anti-Corruption Safeguards and the NSW Planning System, ICAC Report (2012)

PART 2

Addressing questions in the discussion paper

Priorities, focus and principles for reform

Relates to discussion paper Question 4 Question 6, Question 26

Focus of the review

The review must primarily focus on:

- the reasons the EPBC Act has not been an effective piece of legislation in protecting Australia's environment and whether the legislation is meeting its objectives; and
- the key legislative and policy measures needed to protect, connect and restore Australia's environment.

As outlined through this submission there are significant flaws in the legislation as it stands, and there are important lessons to be learnt from the operation of the Act of the past 20 years, as well as experiences from other jurisdictions.

The discussion paper identifies a number of key themes which appropriately set out where the review should focus its attention in addressing the capacity of the legislation in delivering environmental outcomes:

- effectiveness;
- efficiency;
- certainty;
- inclusion; and
- trust and transparency

Effectiveness

The review must deal with the key issue of effectiveness of the EPBC Act and apply these lessons to its successor. That is, how does a new set of national environmental laws effectively protect and restore biodiversity and reduce pollution in a federation like Australia?

Whilst the discussion paper notes: *“it is very difficult (and often impossible) to determine the exact impact of the EPBC on Australia's environment over two decades.”* This is precisely what researchers and NGOs have done. In a 2019 study titled “Lots of loss with little

scrutiny” researchers used a range of data sets to model the effectiveness of the EPBC on protected threatened species habitat from 2000 - 2017. As noted by the researchers:

By coupling remotely sensed forest and woodland data with the distributions of 1,638 terrestrial threatened species, terrestrial migratory species, and threatened ecological communities, we quantified the loss of potential habitat and communities since the EPBC Act came into force in 2000. We found that over 7.7 million ha of potential habitat and communities were cleared in the period 2000–2017. Of this clearing, over 93% was not referred to the Federal Government for assessment, meaning the loss was not scrutinized under the EPBC Act.²⁸

The study was the first to try and unpick the effectiveness of the EPBC Act in the context of broader environmental regulations. By focussing on known and likely habitat for nationally threatened species, migratory and ecologically communities, it provides a useful indicator for the reach of the legislation. There are some limitations to the study that are worth noting. The study doesn't pick up the conversion of grasslands, so underestimates the impacts on these landscapes, especially in NSW, Vic and ACT. The study also tried to mask out fire scars using known fire layers, however fire mapping is inconsistent across Australia. Lastly there is a time lag between habitat loss and a species being added to the threatened species list. Noting these limitations, the above figure is still highly significant. The reality that in over a 17 year period, there was a huge loss of potential habitat for threatened species (7.7 million ha) and the vast majority wasn't regulated under the country's national environmental law (approximately 93%).

Efficiency

It is also worth contrasting the view expressed in the discussion paper that it is difficult to calculate the contribution of the EPBC Act to environmental decline or otherwise, with the government's determination to calculate the economic “costs” of the legislation. These costs have been calculated on some pretty rubbery assumptions. For example, the most recent cost analysis developed by the Department (which only had its methods released through FoI - see section on transparency below) was based only on projects assessed through EIS, PER or Accredited assessment approaches. This ignores that the majority of projects under the EPBC Act (average of around 60% in recent years) are completed through simple assessment methods, such as referral information or preliminary documentation. By excluding these projects, the timeframe for assessment is artificially inflated which then translates to longer average cost assessment based on the Department's net present value calculations. However, as noted by McGrath when the Department first released its methodology in 2015, these assessments ignore delays that are triggered at state and territory levels.²⁹

Notwithstanding the above, it is important to evaluate the efficiency of processes under the EPBC Act. From how information is handled, to timeliness of decision and how to improve

²⁸ Ward, MS, Simmonds, JS, Reside, AE, et al. Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia. *Conservation Science and Practice*. 2019; 1:e117. <https://doi.org/10.1111/csp2.117>

²⁹ McGrath, C 2014 One stop shop for environmental approvals a messy backward step for Australia - *Environmental and Planning Law Journal*

regulator efficiency. As noted in Part I above, there is a close correlation between resourcing of the regulator and their on-time performance. And these factors must feature in any assessment of regulator efficiency.

Priorities for reform

As noted in this submission Australia's environment is in significant decline in terms of its condition and health. There are very few indicators that tell a positive story. As noted by the Independent Reviewer's discussion paper "*the EPBC Act is the Australian Government's central piece of environmental law.*"³⁰ Yet during its operation there have been significant declines in biodiversity, increases in emissions and dramatic impacts on ecosystems across Australia. The legislation is also out-of-date and not fit for purpose in a modern digitally connected world.

The principles for future reform (question 26) could be strengthened by acknowledging the important and unique role of the Australian government in delivering national leadership. We propose additional principles including:

- Ensuring National Leadership
- A central role for communities in decision making
- Trusted and independent institutions

Recommendation

The review should focus on

- *the reasons the EPBC Act has not been an effective piece of legislation in protecting Australia's environment and whether the legislation is meeting its objectives; and*
- *the key legislative and policy measures needed to protect, connect and restore Australia's environment in a socially just way.*

The key areas that should be a key focus for reform of the legislation include:

- *Enshrining Australian Government leadership in environmental protection through new National Environmental Measures*
- *Providing targets and legal mechanisms for clear environmental outcomes that will slow, stop then improve the outlook for Australia's biodiversity, this should include:*
 - *Retaining existing MNES*
 - *Establishing new and expanded triggers*
 - *Setting strong and clear national environmental standards*
 - *Ensuring greater use of planning instruments*
 - *Protecting critical habitats and nationally important ecosystems*
- *Ensuring that a new generation of environmental law is equipped to deal with pressing environmental challenges, such as climate change and the rapid decline of biodiversity*

³⁰ EPBC Review discussion paper p6

- *Ensuring accountability via duties on decision makers to exercise their powers to achieve the Act's aims*
- *Improving environmental governance, including establishing independent institutional arrangements that improve integrity and trust in environmental decision making*
- *Improving environmental democracy, including access to information, improved transparency and ensuring that regulators are able to be held to account through open and transparent judicial processes*
- *Providing all sectors, including business, with greater certainty as to impact assessment processes, improving their efficiency and the manner in which decisions are made*
- *Improving data and information management; and enshrining long term environmental accounting and reporting into law.*

National leadership

Relates to discussion paper Question 1, Question 9

The Australian Government's constitutional authority on the environment

Whilst the Australian Constitution is silent on the issue of the environment, it is widely accepted that the Federal Government has broad reaching power to legislate on environmental matters. As noted by Australian Panel of Experts in Environmental Law (APEEL):

“The vast majority of expert legal opinion supports the view that the Commonwealth has a substantial, almost plenary, capacity to make laws concerning the environment. This conclusion is based primarily upon the effect of High Court decisions handed down since the 1970s that have given an expansive interpretation to several heads of power contained in section 51 of the Constitution – in particular, the external affairs power (s.51 (xxix)) and the corporations power (s.51 (xx)).”³¹

There is limited contention of the Australian Government's heads of power to legislate, regulate and provide funding for environment protection in modern times.

What prevents the Australian Government asserting a stronger leadership role in the environmental space is primarily a lack of political will. This coupled with high levels of discretion and lack of environmental standards or outcomes within the EPBC Act can effectively make protecting the environment seem optional for decision makers.

Evolution of the EPBC Act and MNES

One of the limitations of the EPBC Act is the narrow way it frames and focuses on component elements of the environment, rather than looking at a broader or more comprehensive set of environmental values. The Act focuses on nine Matters of National Environmental Significance (MNES) that predominantly stem from the 1997 Heads of Agreement (HoA) for the environment (with some notable additions that have occurred during the operation of the legislation, such as the 'water trigger').

The HoA, along with the 1992 Inter-Governmental Agreement on the Environment (IGAE) form a key foundational basis of the EPBC Act. The HoA actually stipulates a broader set of MNES than those reflected in the EPBC Act, noting 30 matters of national environmental significance. Whilst much focus has been on those MNES enshrined in the EPBC Act, there are numerous others that have been neglected in the context of the implementation of national environmental law and policy. These include:

10. Conservation of biological diversity (recognising that nationally endangered or vulnerable species and communities are covered under item 4 of this Attachment)

³¹ Australian Panel of Experts on Environmental Law, Environmental Governance (Technical Paper 2, 2017)

The Commonwealth has a responsibility and an interest in relation to meeting obligations contained in the Convention on Biological Diversity in co-operation with the States, including under the National Strategy for the Conservation of Australia's Biological Diversity and through relevant programmes.

25. Implementation of the National Strategy for Ecologically Sustainable Development

The Commonwealth has an interest in relation to implementation of the National Strategy for Ecologically Sustainable Development.

26. Nationally significant feral animals and weeds

The Commonwealth has an interest in relation to the development and implementation of measures and agreed programmes to control feral animals and weeds identified in national strategies, agreements, policies and control plans.

27. Conservation of native vegetation and fauna

The Commonwealth interest involves taking programme and co-operative measures with the States and other interested parties to conserve and manage native vegetation and fauna.

28. Prevention of land and water degradation

Commonwealth interest is in the development of agreed strategies and programmes to prevent and ameliorate land and water degradation particularly in relation to transboundary problems.³²

As noted in Part I above, many of these MNES and Australian Government responsibilities and interests have been poorly implemented to the extent that key environmental indicators are trending downwards. To reiterate, Australia is a global deforestation hotspot, is a world leader on species loss and extinction, has poorly resourced and managed invasive species and has seen significant declines in funding for biodiversity recovery. Australia has failed in meeting our obligations under relevant international treaties, largely through a lack of national leadership and coordination (see Case Study 2 below).

The EPBC Act has been built on a series of agreements that formed policy norms through the 1990's, and these norms have progressively shifted and/or have been forgotten or ignored due to a variety of drivers, for example through institutional culture or political ideology.

Despite high aspirations in key foundational documents that underpin the EPBC Act, there are clear examples of the Federal Government stepping back from its identified "interests and responsibilities" as identified under the HoA. These include looking to relinquish

³² Heads of Agreement 1997 Council of Australian Governments
<https://www.environment.gov.au/resource/heads-agreement-commonwealth-and-state-roles-and-responsibilities-environment>

environmental approval responsibilities through the “One Stop Shop” policy, particularly without any clear environmental outcome safeguards.³³

The Australian Government’s decision to abolish the formal COAG body tasked with dealing with these issues - the Standing Council on Environment and Water (SCEW) - in 2014 is a key example. This forum has been replaced by the Meeting of Environment Ministers (MEM), which has no formal standing under COAG, has an ad-hoc meeting schedule and is subject to significantly less secretariat and resourcing support. We now face a situation where environmental and water policy issues find no meaningful forum within the COAG context.

We also see the narratives delivered by politicians and officials alike, that impacts such as land clearing and habitat destruction, are issues that are primarily responsibilities of the states and territories. This is despite the clear inclusion of such matters as both responsibilities and interests of the Federal Government in the HoA (MNES 9,10,11,27,28)³⁴.

Case Study 3: Australia’s international obligations under the CBD

The Convention on Biological Diversity (CBD) is the pre-eminent global convention which covers the protection and restoration of the environment under the United Nations. It is one of the most widely ratified UN global agreements, with 196 parties. Australia signed the convention in June 1992 and subsequently ratified the convention in June 1993.

In 2010 the convention endorsed the *Strategic Plan for Biodiversity 2010-2020*, which included the Aichi Biodiversity Targets. The Aichi Targets are a set of 20 global targets for nation states to work towards to address the global biodiversity crisis and implement the CBD’s strategic plan. Whilst all Aichi targets relate to the protection of biodiversity, there are a number that of significant relevance to the operation of the EPBC Act, including:

- *the extinction of known threatened species has been prevented and their conservation status, particularly of those most in decline, has been improved and sustained.*
- *pollution, including from excess nutrients, has been brought to levels that are not detrimental to ecosystem function and biodiversity.*
- *invasive alien species and pathways are identified and prioritized, priority species are controlled or eradicated, and measures are in place to manage pathways to prevent their introduction and establishment.*
- *the rate of loss of all natural habitats, including forests, is at least halved and where feasible brought close to zero, and degradation and fragmentation is significantly reduced.*
- *ecosystem resilience and the contribution of biodiversity to carbon stocks has been enhanced, through conservation and restoration, including restoration of at least 15 per cent of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combating desertification.*
- *the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is in force and operational, consistent with national legislation.*

³³ ANEDO 2014 Assessment of the adequacy of threatened species & planning laws

³⁴ Heads of Agreement 1997 Council of Australian Governments

<https://www.environment.gov.au/resource/heads-agreement-commonwealth-and-state-roles-and-responsibilities-environment>

It is clear that Australia has not met the above Aichi targets that expire this year.³⁵

The CBD targets are an important mechanism that provide direction to states as to the policy settings, funding and legal frameworks that should be implemented to address biodiversity loss. Whilst the targets have provided a guide for driving conservation ambition, their potential has not been fully realised, largely because of a failure to effectively reflect them in domestic policy and law.

A new framework for the Convention will be finalised in 2021, including new targets for conservation and restoration of biodiversity. Australia generally plays a constructive and vocal role in the CBD.

Whilst the post-2020 Global Biodiversity Framework is still being negotiated, it is critical that the review of the EPBC account for the global conventions that Australia has ratified, and the targets to which Australia is obligated to implement.

Public expectations of Australian Government leadership in the environment space

There are a number of studies that show there is a clear public expectation of federal government leadership on the environment. The Griffith University Constitutional Values Survey in 2014, which was a nationally representative poll, highlighted that Australians strongly favoured federal leadership, with 44% favouring sole federal oversight, the highest ranking after health care comparatively, with 72% thinking the federal government should have some role.³⁶

Figure 7 - Extract from Griffith University Constitutional Values Survey (2014)

³⁵ Australia's Biodiversity Conservation Strategy 2010-2030: An Independent Review of Progress

<http://www.environment.gov.au/submissions/bio-cons-strategy/submissions/humane-society-international.pdf>

³⁶ Australian Constitutional Values October 2014 Survey 2014 Results Release 1 Prepared for and by Professor A J Brown Centre for Governance & Public Policy Griffith University Nathan QLD 4111

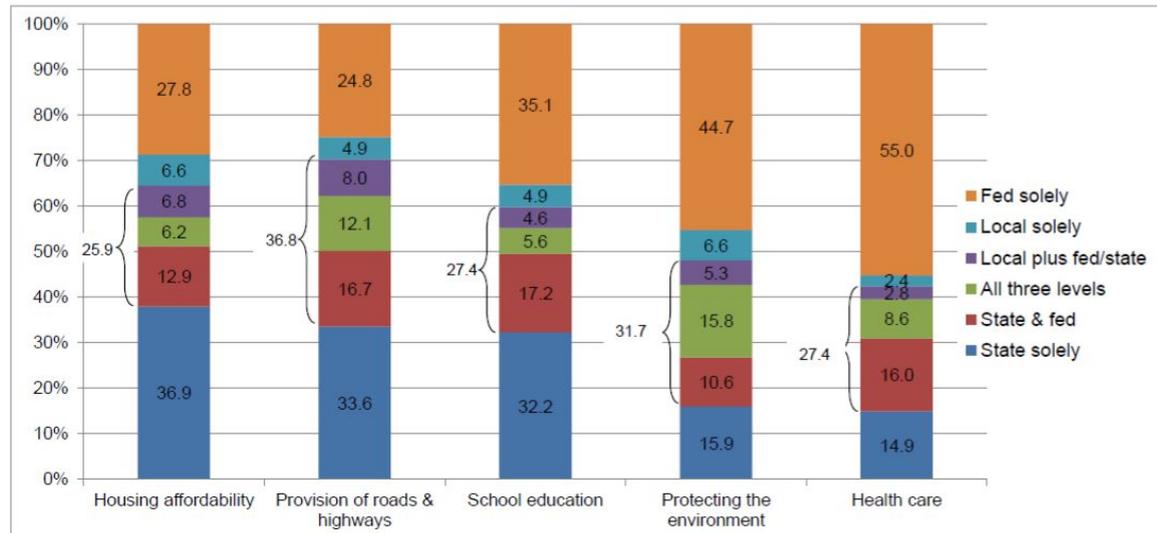
Roles and responsibilities – who should do what?

Which **level, or levels** of government do you think should be responsible for [each of the following policy areas] – should it be federal, state or local government, or some combination of them?

	Who should be responsible?											Don't know	Total	
	State governments		Federal government		Local government		How many levels?							
	At least in part	Solely	At least in part	Solely	At least in part	Solely	1	2 or 3	Fed & State	All three	State & Local			Fed & Local
Provision of roads & highways	68.2	33.6	55.6	24.8	24.9	4.9	63.3	36.8	16.7	12.1	5.9	2.1	0.1	100.2
Housing affordability	61.7	36.9	48.1	27.8	19.6	6.6	71.3	25.9	12.9	6.2	5.7	1.1	2.7	99.9
School education	58.7	32.2	58.8	35.1	15.1	4.9	72.2	27.4	17.2	5.6	3.7	0.9	0.4	100.0
Protecting the environment	45.8	15.9	72.9	44.7	27.7	6.6	67.2	31.7	10.6	15.8	3.5	1.8	1.1	100.0
Health care	41.8	14.9	80.1	55.0	13.8	2.4	72.3	27.4	16.0	8.6	2.3	0.5	0.3	100.0
<i>Average</i>	56	27	64	38	21	5	70	30	15	10	4	1	1	101.0

Roles and responsibilities – who should do what? (2)

Which **level, or levels** of government do you think should be responsible for [each of the following policy areas] – should it be federal, state or local government, or some combination of them?



Not including 'don't knows'

The retreat of the Australian Government from leadership in the environmental space needs contextualised in the federal political circumstances. For the past decade federal environmental policy has primarily been viewed through the lense of an impost or burden on economic development, such as the initial pursuit of approval bilateral agreements through the Gillard Government or the “One Stop Shop” policy of the current government. The failure of these policy approaches and the environmental policy paralysis that followed (for example see discussion below on lack of action on reform of biodiversity offsets) can in part be attributed to a lack of political will to look at holistic reform. There is a clear opportunity

through this review to drive leadership on the environment whilst seeking to create a more open, accessible and simplified environmental law system.

A new direction

There is a clear and essential role for the Australian Government to lead the development of a national framework for environmental protection and restoration. The current system distributes responsibility across the federation, but no one jurisdiction is charged with coordinating efforts to protect our environment.

The Australian Panel of Experts in Environmental Law undertook a two year study into the system of Australia's environmental law. In it they concluded that the "*case for the re-design of the current environmental federalism system in Australia is overwhelming*".³⁷

In its recommendation APEEL highlights that there is a key role the Australian Government can play in setting strategic direction, whilst maintaining a level of responsibility for National Environmental Matters. It contemplates two approaches for this, the Australian Government acting independently or negotiating such processes with the states and territories.

A truly national approach to environmental protection would build on Australia's international responsibilities and the federal government's capacity to bring authority and resources to environmental governance.

A lack of nationally consistent monitoring and reporting makes evidence-based decision making difficult for governments and increases costs for businesses attempting to comply with eight different, often-changing regulatory regimes.

For the Australian Government to hold an effective leadership role in managing Australia's environment it requires a suite of regulatory tools that are fit for purpose. These include both mechanisms to avoid, control and mitigate impacts on the environment, and proactive provisions that enable protection of key environmental values. We do not think this can be achieved by amendments to the EPBC Act. Rather a new federal environmental law is required which is simpler, contains clear duties on decision-makers, puts a greater focus on bioregional planning, and contains clear and measurable outcomes that the Commonwealth and the states must achieve. In some cases it should also include prescriptions or processes for how to achieve those outcomes, where doing so would provide certainty, efficiency and better environmental outcomes.

Recommendation

³⁷ Australian Panel of Experts on Environmental Law, Environmental Governance (Technical Paper 2, 2017)

The Australian Government should take a greater role in environmental protection, including by setting national environmental standards that all states must comply with and providing broader national oversight over key national environmental matters

A new national environmental framework must be built on five key principles:

- *National leadership*
- *A central role for communities in decision making*
- *Trusted and independent institutions*
- *Delivering strong environmental outcomes*
- *Ensuring resilience in the face of climate change*

National leadership under a new environmental framework should deliver:

- *Accountability for the improvement of environmental indicators*
- *Development of national goals, standards and reporting*
- *Protection for specific National Environmental Matters*
- *Coordination of multiple jurisdictions and regulatory regimes*

To enshrine leadership, the Australian Government should develop a series of new National Environmental Matters increasing the oversight of key environmental assets and establish new environmental institutions to provide oversight, accountability and guidance on key environmental matters, trends and data.

Objects, principles and ESD

Relates to discussion paper Question 2, Question 3

Objectives

The EPBC Act has relatively sound objectives. The failure in reaching them has been a function of other parts of the legislation, including lack of defined outcomes and environmental standards, high levels of discretion, lack of independent decision making, poor data integration and a lack of transparency and accountability for decision makers.

Noting the above, it is possible to simplify the objectives of the legislation to a primary objective:

“to conserve, protect and recover Australia’s environment, its natural and related cultural; heritage and biological diversity including genes, species and ecosystems, its land and waters, and the life-supporting functions and the multitude of benefits to Australian society that they provide.”

This primary objective should be followed by secondary objectives including those that focus on:

- The leadership and coordinating role of the Australian Government on environmental protection
- recovery and preventing the extinction of species and ecosystems, particularly through protecting habitats and dealing with key threats.
- enshrining transparent decision making, community participation and access to justice in legislation
- Strengthening the rights and aspirations of Aboriginal and Torres Strait Islander peoples’

Principles of Ecologically Sustainable Development

The principle of ESD is articulated by the National Strategy for Ecologically Sustainable Development:

*‘using, conserving and enhancing the community’s resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased’.*³⁸

The principles have been codified into the EPBC Act in the form of Part 3A:

The following principles are principles of ecologically sustainable development:

³⁸ Australian Government, *National Strategy for ESD*, ‘What is Ecologically Sustainable Development?’ at <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1#WIESD>.

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;*
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;*
- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;*
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;*
- (e) improved valuation, pricing and incentive mechanisms should be promoted.*

Whilst the promotion of ESD as a guiding principle in the legislation is noteworthy and should remain, it is difficult to argue that this principle has been effectively applied or given thorough thought in decision making under the legislation. The effective abandonment of the NSESD in the 1990's laid the foundation for poor implementation of ESD in principle.

The failure of the application of the ESD principle under the EPBC Act is not because the principle is flawed. Rather, the failure under EPBC stems from the fact that the Act provides so little guidance as to environmental outcomes it seeks to achieve. As noted in an expert paper on ESD

*“Legal definitions of ESD are problematic because they tend to treat ESD as a process for, rather than an outcome of, decision-making”.*³⁹

In effect, the EPBC allows significant discretion to the Minister as to the application of ESD. Detailed analysis of recommendation reports completed by the Australian National University found that in recommending approvals for almost all projects only cursory attention is paid to the principle of ESD. In fact the same sets of words are used across clusters of projects, indicating a cultural practice of simply copying and pasting from previous reports, rather than assessing how ESD is applied in each decision.⁴⁰

Thus under the EPBC Act ESD becomes subjugated to a discretionary element in decision making, rather than being the focussed outcome of the planning, assessment and approval process. This is clearly articulated by Macintosh in relation to the EPBC Act:

“Decision makers are given broad discretionary powers with few restrictions and minimal formal legislative guidance on how they are supposed to pursue the objects of the legislation. The adoption of this structure in legislation has muted ESD's

³⁹ Gerry Bates 2014 - An expert paper on ESD
http://www.environmentcommissioner.act.gov.au/__data/assets/pdf_file/0004/661720/An-Expert-Paper-on-ESD-by-Gerry-Bates-for-Commissioner-May-2014.pdf

⁴⁰ EPBC Act data project 2020, (paper forthcoming)

*impact. Rather than relying on formal rules and procedures, the pursuit of ESD has been left to the discretion and goodwill of statutory decision makers.*⁴¹

The EPBC Act has provided so little guidance as to how to strike the balance between development and conservation, that it has almost entirely failed to chart a path toward decoupling environmental degradation from economic growth.

Improving the application of ESD can be driven through a range of mechanisms, including ensuring whole government approaches, improving planning instruments to better account for multiple uses, and ensuring there is clear development criteria in the form of standards, decision criteria or benchmarks against which projects and activities may be assessed.⁴²

Additional principles should include:

- prevention of harm principle - taking preventative actions against likely harm to the environment and human health
- non-regression principle - the principle of non-regression of environmental goals and protections, and continuous improvement in environmental standards and management over time.
- biodiversity principle - Ensuring that biodiversity and ecological integrity are a fundamental consideration in decision-making, including by preventing, avoiding and minimising actions that contribute to the risk of extinction
- principle of free, prior and informed consent - the principle of free, prior and informed consent of indigenous groups for relevant actions

In addition to the establishment of the above principles, APEEL also highlighted the potential for establishment of environmental rights and duties under a new generation of environmental law. Specifically:

Environmental Rights

- a substantive right to a safe, clean and healthy environment; and
- procedural environmental rights (including the right to information, to public participation and to access to justice in environmental matters).

Environmental Duties, to apply to the private sector, governments and individuals to, including

- a duty of care to avoid causing environmental harm;
- a duty on responsible parties to repair environmental damage and restore impaired ecosystems and landscapes to the greatest extent practicable.
- duties on decision makers to exercise their powers to achieve the Act's aims

These are in addition to existing principles outlined in the legislation in 3A which must be maintained, including the precautionary principle, intergenerational equity principle

⁴¹ Andrew Macintosh - 2015 The Impact of ESD on Australia's environmental institutions, *Australasian Journal of Environmental Management*, 22:1, 33-45

⁴² *Ibid*

Cost-benefit analysis

The Australian Government has pursued a cost-benefit approach to resource use and environmental policy historically through the Resources Assessment Commission, which was discontinued in 1993.

This was primarily as a procedural step, rather than an outcomes focussed approach. As noted above, a failure to apply standards and define the environmental outcomes being sought has afforded decision makers a huge range of discretion within the EPBC Act. There are numerous case studies highlighting this, including the case of grazing cattle in the Victorian Alps, a case that was determined clearly unacceptable by one Minister, only to be approved by another, following a change of government. This is irrespective of the damage such activities do to sensitive alpine ecosystems or the fact the region was a national listed heritage place. The Alps cases highlight that there is so much latitude in the legislation that the Department is able to reconstruct a decision brief to recommend something almost entirely contradictory to an earlier decision, depending on political preference. A more contemporary example is evident in the case study of Toondah Harbour (see Part I above), where the department constructed two variations of a brief for a minister, one said the project was clearly unacceptable, the other said it should proceed to EIS. Both were given to the minister at the same time.

For ESD to be more effectively applied, it needs to be assessed how it plays into whole-of-government processes. For example, ensuring Austrade assistance does not support projects that will destroy critical habitats or government investments do not subsidise developments that are unacceptable harmful to the environment. Whilst a whole-of-government reform is beyond the scope of this review, a key to progressing the ESD objective is in setting clear standards and environmental outcomes that legislative decision making must work toward. It is worth noting this was in part the intent of s516A of the EPBC Act and the defunct NSESD. Neither of which were sufficiently robust to compel decision makers to act. The inclusion of environmental rights and duties are essential in this regard, and will play a stronger role in compelling action.

The benefits of setting clear environmental outcomes and standards is clear: they send a signal to both government and business decision makers as to the rules that must be followed. They remove ambiguity and will facilitate whole government processes in the broader application of ESD principles.

In the absence of clear, binding and unambiguous environmental performance or outcomes standards or criteria, any cost-benefit analysis will simply fall into the same trap the EPBC Act has been in for the past 20 years: significant political discretion and potential for manipulation.

Recommendation

The objects of the EPBC Act are generally sound, but could be more specific, with an overarching object and supporting secondary objects.

Primary objects:

1. *“to conserve, protect and recover Australia’s environment, its natural and related cultural; heritage and biological diversity including genes, species and ecosystems, its land and waters, and the life-supporting functions and the multitude of benefits to Australian society that they provide.”*

Secondary objects:

The Act should also include a number of secondary objects, including with regard to protecting biodiversity and ecological integrity. Including:

- h. To provide national leadership and partnership on the environment and sustainability, and to achieve ecologically sustainable development;*
- i. To recover, prevent the extinction or further endangerment of Australian plants, animals and their habitats, and to increase the resilience of native species and ecosystems to key threatening processes;*
- j. To ensure fair and efficient decision-making; government accountability; early and ongoing community participation in decisions that affect the environment and future generations; and improved public transparency, understanding and oversight of such decisions and their outcomes;*
- k. To recognise Aboriginal and Torres Strait Islander peoples’ knowledge of Country, and stewardship of its landscapes, ecosystems, plants and animals; to foster the involvement of these First Australians in land management; and expand the ongoing and consensual use of traditional ecological knowledge across Australia’s landscapes;*
- l. To fulfil Australia’s international environmental obligations and responsibilities, in particular to take all steps necessary and appropriate to achieve the purposes of the relevant international treaties*
 - i. the World Heritage Convention;*
 - ii. the Convention on Biological Diversity;*
 - iii. the Ramsar Convention on Wetlands of International Importance;*
 - iv. the Bonn Convention on the Conservation of Migratory Species of Wild Animals;*
 - v. the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);*
 - vi. the United Nations Declaration on the Rights of Indigenous Peoples; the United Nations Framework Convention on Climate Change (as applicable to emissions reduction and carbon management under the Act);*
 - vii. United Nations Convention to Combat Desertification;*

- viii. *special bilateral or multilateral conservation agreements (including agreements with Japan, China and the Republic of Korea to protect migratory birds in danger of extinction) and*
- ix. *any other international agreement relevant to the objects of this Act*
- m. *To recognise and promote the intrinsic importance of the environment and the value of ecosystem services to human society, individual health and wellbeing.*
- n. *Ensure the Minister and all agencies and persons involved in the administration of the Act must act consistent with, and seek to further, the primary object of the Act.*

Ecologically Sustainable Development

Key to effectively implementing ESD will be the establishment of clear decision criteria, standards and environmental outcomes that national environmental law must achieve

In relation to the principles of ESD, it is recommended that new environmental law retain the existing text in part 3A and also include:

- *Prevention of harm principle*
- *Non regression principle;*
- *Biodiversity principle; and*
- *Polluter pays principle*

New environmental legislation should also establish environmental duties and rights, including:

- *a substantive right to a safe, clean and healthy environment; and*
- *procedural environmental rights (including the right to information, to public participation and to access to justice in environmental matters).*

and

- *Duties of care to avoid causing environmental harm; and*
- *Duties on responsible parties to repair environmental damage and restore impaired ecosystems and landscapes to the greatest extent practicable.*
- *Duties on decision makers to exercise their powers to achieve the Act's aims*

New National Environmental Matters

Relates to discussion paper Question 4, Question 1

The current matters of national environmental significance should be retained and expanded to a broader list of National Environment Matters. These should provide greater clarity and oversight in relation to the Federal Government's responsibilities, and also provide a suitable foundation for the Australian Government to implement proactive measures to protect and restore Australia's environment.

Ecosystems of National Importance

There were many proposals that were left on the table following the Hawke review. One that continues to have merit is a new national trigger that can better account for ecosystem health and function.

As noted by the Hawke review:

Shifting the focus to include an ecosystem level would enhance the ability of the Commonwealth to engage more strategically in biodiversity conservation. This shift would also be consistent with Australia's international obligations under the Biodiversity Convention, which calls for protection of ecosystems, as well as individual species.

The Review recommends establishing a new matter of NES for 'ecosystems of national significance' so that the Commonwealth will be better placed to proactively manage and protect ecosystems that are at risk.

Expanding on the work of the Hawke review, an improved national Act would enable identification and listing of a new protected matter: Ecosystems of National Importance (ENI).

A definition of ENI would enable non-threatened ecosystems to be nominated through a public process against key listing criteria through consideration by an Independent Scientific Committee.

Criteria for ENI should include:

- Areas that meet criteria as a Key Biodiversity Area (see case study below)
- Areas that are of High Conservation Value
- Climate refuge habitat
- Critical habitat areas
- Wildlife corridor areas
- Unregulated rivers
- Ecosystems that provide critical ecosystem services (e.g. critical water catchments)

The premise behind such a National Environmental Matter proposal would be to provide the federal government greater ability to be proactive in its involvement in environmental matters, particularly through bio-regional planning (see further discussion below). ENI could also shape investments in environmental matters.

ENI would be tied directly to the Australian Government's obligations under the CBD for the protection of biodiversity.

Case study 4: Key Biodiversity Areas

Key Biodiversity Areas (KBA) are 'sites contributing significantly to the global persistence of biodiversity', in terrestrial, freshwater and marine ecosystems.

The Global Standard for the Identification of Key Biodiversity Areas (IUCN 2016) sets out globally agreed criteria for the identification of KBAs worldwide. The KBA Standard establishes a consultative, science-based process for KBA identification, founded on the consistent application of global criteria with quantitative thresholds that have been developed through an extensive consultation exercise spanning several years.

Sites qualify as global KBAs if they meet one or more of 11 criteria, clustered into five categories: threatened biodiversity; geographically restricted biodiversity; ecological integrity; biological processes; and, irreplaceability. The KBA criteria can be applied to species and ecosystems in terrestrial, inland water and marine environments. Although not all KBA criteria may be relevant to all elements of biodiversity, the thresholds associated with each of the criteria may be applied across all taxonomic groups (other than micro-organisms) and ecosystems.

The KBA identification process is a highly inclusive, consultative and bottom-up exercise.

Over 300 KBAs have already been declared in Australia mainly based on their importance for birds. These places also support over 2/3 of all threatened species in the Country. Australia has a KBA National Coordination Group.

Key Biodiversity Areas currently make up a key indicator for Australia's progress against the UN Sustainable Development Goals.

National parks and reserves (National Reserve System) trigger

Australia's National Reserve System is the cornerstone of our conservation efforts. The national reserve system is a policy framework that brings coherence to the public, private and Indigenous reserves across Australia. The vast majority of public reserves in the NRS are managed by the states and territories.

Despite their protected area status, national parks and reserves have come under threat from inappropriate development and poor management decisions. High profile cases include moves to degazette Murray River National Park for logging, graze cattle in the Victorian Alps, and the decision to not effectively control feral horses in the NSW Alps.

A new Act should include a requirement for the regulation of harmful activities within areas of Australia's national reserve system, including active decisions to not control key threats.

Such a trigger could operate to regulate impacts based on a class of actions that trigger federal environmental assessment, such as commercial development, logging or timber harvest or commercial grazing as well decisions to maintain or increase invasive species within protected areas. .

Where such a trigger would extend to Indigenous Protected Areas, there must be a requirement for free, prior and informed consent in relation to any impacts on these areas and should be subject to close engagement and discussion First Nations communities.

Greenhouse gas trigger

There is a clear need for regulatory intervention at the federal level to strengthen the assessment of fossil fuel projects, specifically regarding the contribution of those projects to climate change.

At a federal level, assessment of proposed projects under the EPBC Act does not explicitly require greenhouse gas (GHG) emissions to be considered. This is because environmental assessment under the EPBC Act is limited to evaluating a proposal's impact on Matters of National Environmental Significance (MNES). The GHG emissions of a project may still be indirectly relevant to assessment because human produced GHG emissions are the leading cause of climate change, which is seriously impacting many MNES.

The clearest example of the connection between GHG emissions and MNES is the potentially catastrophic impact of climate change on the Great Barrier Reef Marine Park. A global analysis of 100 coral reefs has shown that climate change has created a fivefold increase in the frequency of severe coral bleaching events over the past 40 years.⁴³ And last year, the Intergovernmental Panel on Climate Change (IPCC) warned that coral reefs are predicted to decline by a further 70-90% at 1.5°C or >99% at 2°C.⁴⁴

Case study 5: Climate change and the Carmichael Coal Mine

Climate change impacts on the Great Barrier Reef were a central feature of the Federal Court case concerning the Environment Minister's approval of the Carmichael coal mine.⁴⁵

⁴³ <https://science.sciencemag.org/content/359/6371/80>

⁴⁴ https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf, 10.

⁴⁵ ACF Inc v Minister for the Environment [2016] FCA 1042.

Relevantly, the Minister decided that although the mine would generate a combined 4,729,988.241 tCO₂-e, the overseas component of these emissions (i.e. the ‘scope three’ emissions) was not a ‘direct consequence’ of the project. The Minister reasoned that the actual net increase in global emissions (and therefore impacts attributable to the mine) depended on a range of variables, including:

- Whether the coal replaces coal currently provided by other suppliers;
- Whether the coal is used as a substitute for other energy sources, and;
- The efficiency of the coal burning power plants.

While the Federal Court held in favour of the Minister, it explicitly did not reject the relevance of scope three emissions. Rather, the Court considered that the Minister was entitled to consider whether the mine would contribute to a net increase in GHG emissions. Since he concluded that this was “speculative”, it was not unlawful for the Minister to conclude the mine would not have a direct impact on the Great Barrier Reef. Relevantly the Court highlighted that its role was not to adjudicate on the merits of the Minister’s reasoning, but rather, whether it was lawful under the EPBC Act:

*On a judicial review application, the Court cannot step into the shoes of the Minister and decide for itself whether Adani’s action should be approved and, if so, what conditions should apply. The Parliament has conferred that task and responsibility on the Minister and the Minister alone. This Court’s function on a judicial review is significantly more limited, confined as it is to a review of the legality, and not the merits, of the Minister’s decision. Ultimately, it is the Minister who must accept responsibility and be accountable for the merits of his decision.*⁴⁶

Climate change now poses an existential threat to human society. The international community has recognised, through the Paris Agreement, that reducing GHG emissions is a pressing responsibility of governments across the world. The scale and urgency of this problem highlights the need for both supply and demand-side interventions in fossil fuel markets. In the absence of a domestic or international carbon pricing framework, the federal government must consider national environmental law as a key tool to regulate the contribution of Australian fossil fuels to climate change.

The Hawke review explored the implementation of a greenhouse gas trigger, and recommended an interim trigger be implemented, until the expected implementation of an economy wide mechanism to address emissions through the CPRS.

Following the repeal of the carbon price there has been no effective mechanisms to drive down emissions nationally. The Government’s climate solutions fund, in which taxpayers

⁴⁶ Ibid

purchase abatements does little to drive down emissions. Analysis has highlighted the systemic flaws in the CSF and the lack of adequate enforcement of baselines.⁴⁷

New legislation should include a greenhouse gas emission trigger that ensures any development that produces over 100,000 tonnes of CO₂ equivalent per year (including downstream emissions) as a matter of national environmental significance.

There should also be provision for a designated development list to trigger assessment under a new GHG trigger.

Land clearing trigger

As noted in Part I above, the EPBC Act has failed to effectively regulate habitat destruction of threatened species. This has been due to poor policy guidance, limited monitoring, insufficient data availability and generally poor outreach. There has also been contention in relation to the Australian government's responsibility to protect habitats and ecosystems. Not all land clearing impacts threatened species, but it does destroy habitats for native wildlife and contribute to the loss of biodiversity.

Australia has experienced a significant spike in native habitat loss as a result of windbacks in state legislation in 2013 (Qld - now reversed)⁴⁸ and 2016 (NSW)⁴⁹. Both legislative changes have contributed to significant declines in biodiversity in these states. These moves have also triggered the need for stronger federal oversight due to impacts on MNES. However attempts to regulate increasing impacts from land clearing have effectively been suppressed due to political factors.⁵⁰ The regulatory solution to the challenge of land clearing will involve a mix of policy and legislative responses to drive behavioural change. These include incentives, policy guidance, outreach and regulatory safeguards. The Craik review focussed heavily on the need for incentives, guidance and outreach (discussed in relevant sections of this submission), but was relatively silent on the regulatory safeguards component. Incentive approaches alone are insufficient to drive necessary changes in behaviour.

New environmental legislation should have a land clearing trigger to supplement stewardship arrangements for undertaking conservation action.

The operation of such a trigger should specify a threshold limit of:

- 100 ha (or greater) over any two consecutive years
- habitat for nationally listed threatened species
- An area designated in regulations

⁴⁷ Coalition's climate policy has allowed heavy industry to increase emissions by nearly a third May 2019
<https://www.theguardian.com/environment/2019/may/16/coalition-climate-policy-heavy-industry-increase-emissions-nearly-third>

⁴⁸ Queensland Labor reintroduces land-clearing laws to parliament March 2018

<https://www.theguardian.com/australia-news/2018/mar/08/queensland-labor-reintroduces-land-clearing-laws-to-parliament>

⁴⁹ NSW land-clearing approvals increased 13-fold since laws relaxed in 2016, Mar 2020

<https://www.theguardian.com/environment/2020/mar/27/nsw-land-clearing-approvals-increased-13-fold-since-laws-relaxed-in-2016>

⁵⁰ Lobbying by MPs forced government to back off on land-clearing enforcement 5 March 2018)

<https://www.theguardian.com/environment/2018/mar/02/deeply-regret-australias-apology-to-landholders-suspected-of-planning-unlawful-clearing>

Recommendation

Establish new triggers as National Environmental Matters, including:

- *Ecosystems of National Importance, which aim to conserve:*
 - *Areas that meet criteria as a Key Biodiversity Area*
 - *Areas that are of High Conservation Value*
 - *Climate refuge habitat*
 - *Critical habitat areas*
 - *Wildlife corridor areas*
 - *Unregulated rivers*
 - *Ecosystems that provide critical ecosystem services (e.g. critical water catchments)*
- *National Parks and Reserves Trigger*
 - *For impacts on public areas with the National Reserve System*
 - *Consideration should be given to additional legislative protections for Indigenous protected areas*
- *Greenhouse Gas Trigger, covering*
 - *any development that produces over 100,000 tonnes of CO₂ equivalent per year (including downstream emissions); and*
 - *designated development in regulations to trigger assessment*
- *Land clearing trigger, covering clearing proposals that are:*
 - *Greater than 100 ha over any two consecutive years*
 - *habitat for nationally listed threatened species*
 - *An area designated in regulations*

Retention and expansion of existing MNES

Expanded water trigger

Australia is the driest inhabited continent on earth, our water is precious. The current drought highlights how vulnerable our water resources are, and the impacts of poor management.

The current water trigger operates to protect water resources from coal mining and coal seam gas developments. The independent review of the water trigger found that the trigger should remain and that its enactment addresses clear community concerns in relation to the impact of these industries.

However there is a clear inconsistency in its approach. The trigger does not apply to equally (or potentially more) damaging activities, such as shale gas fracturing, tight gas or underground coal gasification. More broadly there are other harmful activities, including the imposition of new regulatory structures (dams) on private and public lands that will impact the environment and downstream users.

Since the abolition of the National Water Commission there has been a lack of impetus for the implementation of the National Water Initiative and water reform. Parts of Australia, such as the Kimberley, seem to be set on a path to recreate the mistakes of the past in relation to the over allocation of scarce water resources.⁵¹

Retention of the existing nuclear actions trigger

It is essential that uranium exploration and mining remain within the definition of 'nuclear actions' and that nuclear actions remain listed as a MNES and that full environmental assessments under the EPBC Act are retained. While this process still falls short of effectively regulating the industry and has not and cannot be assured to deliver positive environmental outcomes, its removal would profoundly weaken an already deficient regulatory framework for the sector which has both high risks and high rates of incidents. Australia's uranium sector is contested, flat-lining and characterised by under-performance and non-compliance – this is not the time for the Commonwealth to be walking away from dedicated scrutiny or reducing environmental protections.

In subdivision E, section 22(1)(d) of the EPBC Act the "mining and milling of uranium ore" is listed as a 'nuclear action' which is a MNES. Within the EPBC Review discussion paper there is a suggestion that MNES have changed over time and there is a specific suggestion that 'nuclear actions' be removed from the list of MNES.⁵² This view is being prosecuted by some stakeholders, most notably the Mineral Council of Australia, despite no change or reduction in the risk of nuclear actions. Uranium, and the radioactive wastes and by products remain a significant human health and environmental risk. There is still no example of a

⁵¹ Fitzroy River plan can avoid Murray-Darling mistakes, traditional owners say
<https://www.theguardian.com/australia-news/2018/jun/20/fitzroy-river-plan-can-avoid-murray-darling-mistakes-traditional-owners-say>

⁵² EPBC Review Discussion paper pg 15

successfully rehabilitated uranium mine site and ongoing pollution issues continue at operating mine sites.

There is a misconception that over time regulations and standards have improved and the risk from uranium mines has somehow diminished. This is simply not the case and there is evidence that existing regulations fall short of addressing the risks of uranium mining. Further, there are continuing concerns that the lack of scrutiny, studies and scientific evidence means that a significant knowledge gap remains in the management of uranium mine sites. The section “Regulating Uranium – Inquiries” gives greater detail about the outcome of inquiries and recommendations for improved regulations which identifies significant issues and risks associated with uranium mining and its regulation.

Within the EPBC Review discussion paper there is the suggestion that the whole of project assessment required for uranium mines is a duplication of process given that states also have whole of project assessments⁵³. Under existing assessment bilateral agreements, the Commonwealth has deferred the assessment of ‘controlled actions’ to the states and territories. The federal government, however, is still required to ‘approve’ controlled actions. Within this process there is an important mechanism for the federal government to apply conditions as part of an ‘approval’ to ensure consistency with the objects and principles of the EPBC Act 1999. This ability should not be compromised or reduced.

The bilateral agreements, which were designed to stop a perceived duplication of process, have not delivered good environmental assessment practice in relation to Australia’s uranium sector.

Vulnerable Ecological Communities

Threatened ecological communities are protected, however only endangered and critically endangered TEC trigger the Act. There is no clear policy rationale for this approach, and it is recommended that all threatened TEC, including those in the vulnerable category become triggers under the legislation.

Recommendation

Retain or expand existing triggers including:

- *Expand the water trigger to:*
 - *a wider set of resource industries, including shale and tight gas.*
 - *cover major infrastructure projects that impact on freshwater resources*
- *Retain the existing nuclear actions trigger for uranium activities, and;*
- *Expand threatened ecological community listing to incorporate vulnerable species*

⁵³ EPBC Review Discussion paper pg 19

Environmental outcomes and standards

Relates to discussion paper Question 8, Question 9, Questions 10, Question 17, Question 18

Discussion paper question 8 contemplates an outcomes versus process approach. As noted above, the EPBC Act is primarily procedural legislation, without clearly articulating the outcomes it seeks to achieve.

A new generation of national environmental law should focus on the delivery of specific environmental outcomes under national environmental law. These should include:

- Ensuring the Federal Government assumes responsibility and leadership for reversing the decline in Australia's environment;
- Ending destruction of primary, remnant, old-growth or high-conservation value forests and bushland;
- Preventing the extinction of native fauna and flora;
- Protecting and recovering key biodiversity areas, threatened ecological communities and threatened species including strict protection for their critical habitats;
- Substantially reducing Australia's greenhouse gas pollution and increasing carbon sequestration in biodiverse landscapes;
- Safeguarding freshwater ecosystems, including from extractive and industrial processes;
- Reducing, to as close to zero as possible, air pollution, plastic pollution and chemical pollution across Australia;
- Maintaining and strengthening the prohibition on domestic nuclear power, enrichment and reprocessing whilst advancing responsible domestic radioactive waste management.
- Safeguarding the natural and Indigenous cultural values of Australia's protected areas, heritage places, and other conservation tenures;
- Preventing the introduction of, and reduce the current extent, spread and population size of invasive species that are threatening biodiversity;
- Effectively protecting Australia's wildlife from commercial exploitation including illegal wildlife trade and unsustainable fishing.

Noting there need to be a greater focus on outcomes, there is still a need to describe processes of how outcomes will be delivered. These can be simpler than the current provisions in the legislation (for example some processes such as Public Environment Reports are effectively identical to Environmental Impact Assessments).

Specific process objectives in the design of the legislation should include:

- Ensure environmental impact assessment and approval decisions are made in line with national standards and plans using clearly defined and objective criteria;
- Ensure environmental impact assessments are conducted by independent accredited assessors and the results made public within a timely fashion;
- Require the Australian Government to make five yearly national plans that set national goals for the improvement of environmental indicators, monitor impacts using outcome based reporting, and to report annually to Parliament against results;
- Mandate opportunities for meaningful community engagement within decision making, planning and assessment processes;
- Enable community access to merits review;
- Enable community rights to ensure the enforcement and implementation of the Act;
- Ensure the Act applies to all industries and sectors;
- Mandated implementation of statutory plans and instruments.

Additionally there will need to be investment in sufficient environmental data and monitoring systems (see discussion in *Incentives* below).

For project level assessments, there is also provision to look at state and territory assessment processes and ensure these are suitable to provide for the assessment of National Environmental Matters, whilst maintaining a Federal Government approval and oversight role. Assessment bilateral agreements are supported, as is a single regulatory gateway for projects, however stronger standards and safeguards are needed. For example the recent NSW Assessment Bilateral has set a dangerous precedent in accrediting the NSW offsets approach which has key elements that are inconsistent with the EPBC Act offsets policy (see case study below)

Case study 6: NSW Assessment Bilateral Agreement and NSW biodiversity offsets

Whilst there are some positives to the NSW offsets model, including the Biodiversity Conservation Trust, the rules are generally weak and have questionable additional elements.

For example, mine site rehabilitation decades into the future can count as an offset under NSW law; offset requirements may be discounted in favour of other socio-economic factors;

and supplementary measures - such as research projects or paying money into a fund - are a readily accessible alternative to finding a direct offset.

A recent report by the NSW Resources Assessment Commission found that under NSW laws more than 37,000 ha was cleared in the 18/19 financial years. A rate 13 times higher than the annual average. Approvals also increased by 70% following land clearing rule changes in 2019.⁵⁴

Concerningly, is also found significant underperformance in terms of the areas of offsets that had been delivered. The NSW government failed to set aside between two and four times the areas of land approved for clearing as had been prescribed. In nine of the 11 regions, the set-asides ranged from 6 to 69 per cent of the approved hectares, the audit found.

Approval bilateral agreements should not be pursued. These measures have previously been pursued largely to abdicate Commonwealth responsibility in environmental protection. Additionally they create separate regulatory regimes that are subject to significant issues of scale, scope and change and encourage forum shopping.

Key to improving the operation of national environmental law will be the development and inclusion of a robust national standards regime, that accompanies planning and approvals approaches of the Commonwealth. However recent experience with assessment bilateral agreement, particularly in NSW, indicate a worrying trend to forget about any environmental standards (see case study 6 and 7)

It should be noted that national standards should not be used to vacate or minimise Australian Government responsibilities. An adequate set of regulatory tools is required for the Commonwealth to directly engage and address key issues (see discussion below). The National Environment Protection Measures are an example of a relatively poor standards regime. They are extraordinarily slow to be implemented, and lead to inconsistent application by the states and territories.

New legislation should outline the manner in which the federal government will develop national standards and how they will apply. Standards should be codified in law or regulation, not policy instruments.

It is important to consider the constitutional implications of a standards regime. Whilst the Australian Government has broad remit to establish environmental laws through a variety of heads of power (eg external affairs, corporations and taxation powers), it is generally limited in compelling the states to take action. Thus a national standards regime must ensure there remains an authorising role and skill set within the the federal government as potential

⁵⁴ SMH Devastating biodiversity loss' made worse by rise in land clearing, March 2020
<https://www.smh.com.au/environment/conservation/devastating-biodiversity-loss-made-worse-by-rise-in-land-clearing-20200327-p54em2.html>

resolution to jurisdictional conflict in such matters will sit with Australian Government taking unilateral action (potentially under s109 of the constitution).

Recommendation

New national environmental laws should prioritise and ensure the delivery of the following environmental outcomes:

- *Ensure the Federal Government assumes responsibility and leadership for reversing the decline in Australia's environment;*
- *End destruction of primary, remnant, old-growth or high-conservation value forests and bushland;*
- *Prevent the extinction of native fauna and flora;*
- *Protect and recover key biodiversity areas, threatened ecological communities and threatened species including strict protection for their critical habitats;*
- *Substantially reduce Australia's greenhouse gas pollution and increase carbon sequestration in biodiverse landscapes;*
- *Safeguard freshwater ecosystems, including from extractive and industrial processes;*
- *Reduce, to as close to zero as possible, air pollution, plastic pollution and chemical pollution across Australia;*
- *Maintain and strengthen the prohibition on domestic nuclear power, enrichment and reprocessing whilst advancing responsible domestic radioactive waste management.*
- *Safeguard the natural and Indigenous cultural values of Australia's protected areas, heritage places, and other conservation tenures;*
- *Prevent the introduction of, and reduce the current extent, spread and population size of invasive species that are threatening biodiversity;*
- *Effectively protect Australia's wildlife from commercial exploitation including illegal wildlife trade and unsustainable fishing*

In addition to environmental outcomes there are a number of procedural outcomes that should form the focus of the structure of the legislation, including:

- *Ensure environmental impact assessment and approval decisions are made in line with national standards and plans using clearly defined and objective criteria;*
- *Ensure environmental impact assessments are conducted by independent accredited assessors and the results made public within a timely fashion;*
- *Require the Australian Government to make five yearly national plans that set national goals for the improvement of environmental indicators, monitor impacts using outcome based reporting, and to report annually to Parliament against results;*

- *Mandate opportunities for meaningful community engagement within decision making, planning and assessment processes;*
- *Enable community access to merits review;*
- *Enable community rights to ensure the enforcement and implementation of the Act;*
- *Ensure the Act applies to all industries and sectors;*
- *Mandated implementation of statutory plans and instruments.*

The Australian Government should develop a national standards regime that operates in conjunction with an improved focus on bio-regional planning. These approaches should build on (and not displace) an approval and oversight role for the Australian Government.

National standards should be developed by the National Environment Commission based on the best available scientific evidence and accounting for a variety of interests and viewpoints.

National Standards should:

- *be codified in law, with a clear statutory development process;*
- *be consulted with communities, jurisdictions, scientists and the regulated; sector within strict statutory timeframes;*
- *have capacity to be updated based on new scientific information;*
- *be actively enforced by a new National Environmental Protection Agency; and*
- *have third-party enforcement provisions.*

Assessment bilateral agreements must be strengthened and ensure consistency and alignment with an agreed set of national standards.

The Australian Government must maintain an approval and oversight role for all National Environmental Matters

Mine-site rehabilitation

Mining leaves long-term legacies and associated environmental impacts as discussed throughout this submission. This is especially the case where large open pits are left in the wake of mining operations, which can easily exceed more than 100 metres in depth. In NSW alone it has been estimated that there are at least 45 voids with a total of 6,050ha of voids either planned or approved, covering an area greater than all of Sydney Harbour.⁵⁵

The case of McArthur River zinc, lead and silver mine in the Northern Territory could arguably be one of the most significant mining regulatory failures in Australia's recent history. Despite a series of approvals from both the Commonwealth and the Northern

⁵⁵ EPBC Approval 2014/7210

http://epbcnotices.environment.gov.au/_entity/annotation/2fe7e800-c390-e911-8f1d-00505684324c/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1586923282714

Territory Government the project has been littered with ongoing environmental and health impacts, including significant waste dump seepage and drainage issues, pollutants entering the McArthur river system and most notably the spontaneous combustion of the waste dump that burned for years. This coupled with lack of adequate financial assurance has been a recipe for regulatory failure and environmental disaster.

The most recent EPBC approval for McArthur mine, highlights this risk, with a condition requiring a post-approval plan (see assessment backloading discussion in Part I) to assess the stability and performance of the pit levee for 1000 years.

“within 5 years of this approval, a study to determine the long-term (1000 years) stability and performance of the mine pit levee. This study must assess and confirm the stability of the structure in terms of resistance to erosion and must consider the effectiveness of the structure in isolating the mine pit from a 0.1% Annual Exceedance Probability (AEP) event.”

The Minerals Policy Institute took a different view, noting the long term risks of the open pit and inadequate surety held by the regulator, viewed the onus on repairing the landscape should be borne by the proponent:

“The McArthur River site, given the major and ongoing AMD risks it is managing, also presents a strong example for the use of complete pit backfill. The principal technical arguments include:

Sulfidic waste is below ground level and erosion of engineered soil covers is avoided; Sulfidic waste is below the water table, and given the low solubility of oxygen in water and the time it takes for oxygen to diffuse through the thick cover of mine wastes, this almost eliminates the availability of oxygen to drive the biogeochemical process of sulphide oxidation and AMD;

Deep-rooted trees cannot penetrate through and compromise any engineered soil covers, since thick roots provide open pathways for the infiltration of water;

Sulfidic waste is well below the zone where interaction with the above ecosystem would be important, such as tree roots and burrowing animals

In terms of mine-site rehabilitation the United States' Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires that surface coal mine operations “backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated”.⁵⁶ The current approach in Australia does not see standardised requirements for backfilling of voids. This can lead to suboptimal landform, environmental and social outcomes. In particular final voids present a significant hazard in terms of ongoing water quality management and community safety.

⁵⁶ U.S. Code (1977) Surface Mining Control and Reclamation Act of 1977, U.S. Code (Title 30, Chapter 25), Available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title30/pdf/USCODE-2011-title30-chap25.pdf>

National standards for mine-rehabilitation and final void management and backfilling are required and should be pursued at the earliest potential opportunity, particularly in relation to impacts on water resources.

Case study 7: Mine-rehabilitation and biodiversity offsets

The use of mine site rehabilitation to offset residual impacts from a mining development is generally precluded under sections 7.6 and 7.7 of the EPBC Act offsets policy, which relate to 'additionality' and 'timeliness' respectively.⁵⁷

In NSW mine site rehabilitation is a standard lease requirement under the NSW Mining Act 1992, meaning it fails additionality requirements, contingent on the level of rehabilitation required. Under the EPBC Act offsets policy, offsets must be delivered in a timely fashion, this is defined within the policy as being at or before the time of impact. Once rehabilitation commences the time until any native vegetation represents suitable habitat for EPBC Act listed species or communities can again take decades, let alone time until species occupancy.

The NSW Biodiversity Assessment Methodology does not deliver equivalent or better outcomes to the EPBC Act Offsets Assessment Guide for mine site rehabilitation (notwithstanding the likely breaches of Sections 7.6 and 7.7 of the EPBC Act offsets policy noted above). Generally, the NSW BAM generates more value of offset through its credit calculation for mine site rehabilitation, as it does not account for the significant time lag between the impact occurring and the offset deliverable. This factor is explicitly accounted for under the EPBC Act offsets assessment guide and has a very significant bearing on outcomes generated through the guide. This is due to the time until ecological benefit and threatened species status functions that drive much more stringent requirements under the EPBC Act process.

The Department has acknowledged this through numerous questions on notice and responses to mine rehabilitation strategies. For example, evidence provided by the Department to the Senate Environment and Communications committee noted that:

*“Mine rehabilitation can contribute in a limited way to conservation outcomes in large coal mines. While open coal mine pits have limited capacity for rehabilitation, land cleared for other infrastructure associated with large coal mines can be rehabilitated, particularly at mine decommissioning. Under the EPBC Act Environmental Offsets Policy and Offsets Assessment Guide, the conservation gain of proposed mine rehabilitation is limited by: the uncertainty of rehabilitation success, particularly on land that is highly degraded; and the time to ecological benefit, given the time lapse between land clearing and rehabilitation.”*⁵⁸

⁵⁷ EPBC Act Environmental Offsets Policy 2012

<https://www.environment.gov.au/epbc/publications/epbc-act-environmental-offsets-policy>

⁵⁸ Question on Notice No 127 Additional Estimates 29 October 2014

http://www.aph.gov.au/~media/Committees/ec_ctte/estimates/supp_1415/environment/answers/q126.pdf

The Department has been less equivocal when providing specific advice to proponents, noting in its comments on the Shenhua Watermark Coal Project that:

“rehabilitation of disturbance footprints does not qualify as an offset and should be referred to as a component of the project’s ongoing operations rather than an ‘offset’”.⁵⁹

Despite this the NSW assessment bilateral agreement has just been endorsed which enables the expanded use of mine rehabilitation as an EPBC Act offset.

Air pollution

At present, the EPBC Act does not regulate pollution such as air pollution or plastic pollution. A federal government standard setting role could limit and control harmful pollution that pose risks to environmental and human health. Standards could be established through regulation or via planning instruments, such as pollution abatement plans. This would replace the system of National Environment Protection Measures which have failed to effectively and consistently reduce pollution due to extraordinary delays in negotiating pollution standards and a lowest common denominator approach. It would also expand out to pollution sources where it is clear that a national approach is needed, such as for plastic pollution.

Recommendation:

- *Specific National Standards should be developed for:*
 - *Mine rehabilitation, including a requirement for final void back-filling for open cut mines*
 - *Air -pollution*
 - *Biodiversity offsets*
 - *Plastic pollution*

Retention of the prohibition on nuclear power

Section 140A of the EPBC Act 1999 states that:

The Minister must not approve an action consisting of or involving the construction or operation of any of the following nuclear installations: (a) a nuclear fuel fabrication plant; (b) a nuclear power plant; (c) an enrichment plant; (d) a reprocessing facility.

⁵⁹ Watermark Coal Project (SSD-4975 and EPBC 2011/6201) Shenhua Watermark Coal Pty Ltd Merit Review Comments – Department of Sustainability, Environment, Water, Population and Communities
<https://majorprojects.affinitylive.com/public/d20bc3aa4ce96af431feb844312a798a/Watermark%20Coal%20Project%20-%20SEWPaC%20Submission.pdf>

The s140A prohibition in the EPBC Act is consistent with other prohibitions in the Australian Radiation Protection and Nuclear Safety (ARPANS) Act 1998 and similar prohibitions in state legislation in New South Wales, Victoria and Queensland. Legislation in Western Australia and South Australia prohibits the establishment of a nuclear waste storage facility, which would be a necessary requirement if nuclear power reactors were developed. These legislative prohibitions demonstrate the broad community concern over and rejection of nuclear power and nuclear waste storage in Australia.

Since these prohibitions were introduced under the Howard government, nuclear power costs have increased dramatically while renewable energy costs have plunged considerably. The problems that prompted these prohibitions remain unresolved. Contemporary safety issues have been exposed including the multiple reactor meltdowns, fires and explosions at the Fukushima Daiichi nuclear power site. There is still no permanent nuclear waste disposal facility operating anywhere in the world for the high-level nuclear waste generated by nuclear power reactors. There are still dangerous links between the civilian nuclear fuel cycle and weapons proliferation, and the safeguards system remains limited and underfunded. The risk of reactors becoming military targets (as has been the case with research reactors in the Middle East on multiple occasions) remains a serious concern. Disturbingly, patterns of inadequate regulation persist in numerous countries. This continues despite the fact that inadequate regulation is widely accepted as a root cause of the Fukushima disaster.

Recommendation

- *The federal government retain a national prohibition on nuclear power (s140A)*

Environmental protection, species and landscape scale provisions

Relates to discussion paper Question 9, Question 11, Question 16

The Australian Government has obligations to protect biodiversity at multiple scales. Directly addressing question 9 in the discussion paper, protecting and recovering species and improving landscape scale habitat management activities are not mutually exclusive, in fact they are mutually reinforcing. The short answer is if the Government is serious about protecting biodiversity, it will need to implement both species level and landscape scale regulations, policies, plans and programs. There are specific opportunities for improving both as discussed throughout this submission. For example Ecosystems of National Importance could be established to improve landscape scale outcomes alongside protecting important habitats for species along with critical habitat reforms.

It is also worth reflecting on the lack of implementation of key strategies aimed at dealing with landscape scale challenges, such as the National Wildlife Corridors Plan (NWCP). The NWCP was the first meaningful attempt of the federal government delivering large landscape scale outcomes in a targeted and strategic way, without relying on legislation (such as strategic assessments). It has all but officially been disbanded.

Critical habitat reforms

Alongside the regulation of development, the EPBC Act gives the Australian Government powers to protect threatened species. This includes overseeing the development of recovery plans for threatened species and ecological communities and the provision to list habitat that is critical to the survival of a species on a national, critical habitat register.

The EPBC Act defines critical habitat as ‘habitat critical to the survival of a listed threatened species or ecological community.’⁶⁰ The law establishes a wide variety of matters that may be taken into account when identifying critical habitat. This includes whether the habitat is used during times of stress (for example; fire, flood, drought), is essential during any part of a species life cycle, is used by important populations, is necessary to maintain genetic diversity and evolutionary potential, provides a corridor, or any other way habitat may be critical.⁶¹

The designation of critical habitat in Australia primarily occurs through the national critical habitat register. It is important to note that critical habitat designation does not create parks or reserves. Instead it places restrictions on actions which would result in the destruction of critical habitat, including fines and even imprisonment for persons who knowingly damage critical habitat.

Improving Australia’s approach to the management and protection of critical habitat will have important benefits for the recovery of threatened species and the awareness of species

⁶⁰ EPBC Act s 207A (4)

⁶¹ The EPBC *Regulations 2000* sub-section 7.09

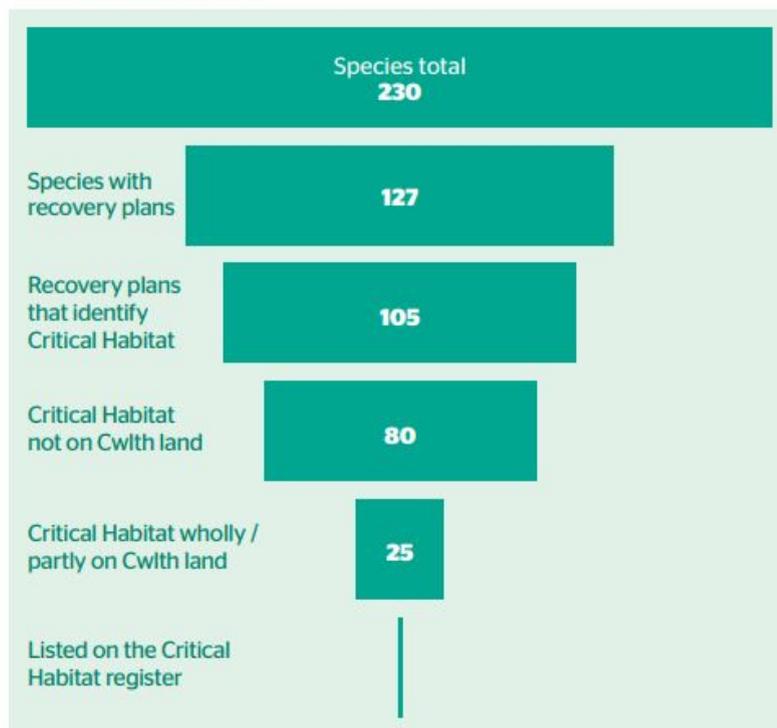
conservation in the broader Australian public. Paired with an improvement in recovery planning processes and threatened species list management, stronger critical habitat laws will greatly improve transparency and accountability in threatened species conservation. Similarly, such measures will also provide important signals to governments and developers regarding the location of critically important environmental values that must be avoided when planning development projects.

Despite having over 1900 nationally listed threatened species and ecological communities, Australia’s national critical habitat register lists only 5 places as critical habitat. The most recent critical habitat listing on the register was in 2005.

In early 2018 ACF undertook analysis of existing recovery plans for animals listed as critically endangered and endangered under the EPBC Act. Out of 230 listed species it was identified that 127 (55%) had recovery plans and 105 (45%) had clearly identified critical habitat that was essential to their survival. These included specific areas and locations as well as specific environmental values that would easily enable the listing of critical habitat. Of the species surveyed, 25 (10%) had identified critical habitat wholly or partly located on Commonwealth land. Despite this, only 2 had habitat listed on the national critical habitat register (Figure 9 below).

Figure 9

Total for fauna listed as Critically Endangered and Endangered



The existing critical habitat provisions (s207A - C) in the EPBC Act apply to all types of land tenure. However, due to an anomaly in the legislation, the penalty provisions for willfully

damaging critical habitat only apply to habitat in or on a Commonwealth area. There is no penalty for harming critical habitat listed on private or state owned land, rendering the listing legally powerless.

In nature, threatened species are not concerned by jurisdictional borders and types of land tenure. Under the EPBC Act, environmental impacts and development assessments and approvals are tenure blind, yet the critical habitat register is tenure constrained. The lack of application of critical habitat penalties and enforcement provisions across tenures is a significant flaw in national conservation policy and legislative design. The majority of critical habitat locations lie outside Commonwealth land. This means that in order to achieve effective legal protection for critical habitat, as well as greater public awareness through prominence on a publicly accessible register, the critical habitat provisions are in urgent need of reform and proper utilisation

Given the immediacy of threats and the importance of conservation actions for protecting threatened wildlife, it is of significant concern that no critical habitat has been listed for any species since 2005 and that only 5 places were listed on the register. It is clear that there are species on both Commonwealth and other land tenures that warrant the listing of their critical habitat.

The EPBC Act affords significant discretion to decision makers regarding the rigour and manner with which certain provisions are applied. The extent of the under-utilisation of critical habitat protections is a notable example. The Humane Society International has provided the Australian Government with data that would allow the Federal Environment Minister to register critical habitat for well over 60 species.⁶² It would appear that the lack of effective application of critical habitat laws in Australia is primarily due to a lack of political will.

The Federal Environment Minister is obliged to maintain a register, but is not legally obliged to list critical habitat on it. In contrast, the US Endangered Species Act makes listing of critical habitat obligatory within 12 months of a species being listed as threatened.

The existing legislation fails on a number of fronts. It fails in building public, industry and government awareness of critical habitat areas. It is subject to the political whims of ministers who are afforded broad ministerial discretion and may be subject to the pull of vested industry interests. It does not account for climate change or how this will drive species range shifts into the future. Reforming critical habitat protections is a significant opportunity under the legislation

⁶² Nicola Beynon, Michael Kennedy and Alistair Graham, 'Grumpy Old Greenies - lament waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs' Humane Society International, 2005.

Case study 8: the US Endangered Species Act and critical habitat protection

The critical habitat approach taken by the US through its Endangered Species Act demonstrates that critical habitat protection can result in substantial gains for threatened species when implemented properly.

Research has found that endangered species which had critical habitat listed in the US were more likely to be stable or improving than species that had no critical habitat protection within 2 years of the listing. Beyond 2 years, the data showed that species with critical habitat protections were twice as likely to be improving in terms of population size than those without protections.⁶³ In fact, critical habitat listing in the US has resulted in gains which exceed that of basic species listing and even implementation of some recovery plans.⁶⁴ When looked at holistically, the Endangered Species Act and the protection of critical habitat have played a significant role in reversing the declines in large numbers of threatened species.

The United States *Endangered Species Act* has been relatively successful in protecting and restoring population of threatened species since its inception in 1973. Key statistics highlighted by the US Centre for Biological Diversity include:

- From 1973 to 2013, the Act prevented extinction for 99 percent of species under its protection.⁶⁵
- The Act has shown a 90 percent recovery rate in more than 100 species throughout the United States.
- The Act has allowed the designation of millions of acres of critical habitat, which is crucial to species' survival and recovery.⁶⁶

The US Endangered Species Act has a broad approach which defines critical habitat to include areas which will be essential for the future conservation of a species

Additionally, there can be no argument over the interaction between the US ESA Act and the performance of the US economy. In fact the improved trajectory of US threatened species under the ESA regime is evidence that species recovery can be achieved and entirely decoupled from economic indicators.

The success in the US ESA identifies critical habitats and recovery actions within a specified timeframe from listing and providing industry with clear guidance as to where greater regulatory scrutiny and environmental protections are required.

⁶³ Martin Taylor, Kieran Suckling and Jeff Rachlinski 'The Effectiveness of the Endangered Species Act: A Quantitative Analysis' (April 2005) *BioScience*, 55, 4, 360-367.

⁶⁴ Martin Taylor, Kieran Suckling and Jeff Rachlinski 'The Effectiveness of the Endangered Species Act: A Quantitative Analysis' (April 2005) *BioScience*, 55, 4, 360-367.

⁶⁵ Centre for Biological Diversity *On Time, On Target: How the Endangered Species Act Is Saving America's Wildlife 2012*

⁶⁶ Centre for Biological Diversity, *A Wild Success: A Systematic Review of Bird Recovery Under the Endangered Species Act (2016)*

Recommendation

Retain and reform the critical habitat register to:

- *Better account for climate refugia habitat;*
- *Ensure penalty provisions apply across all land tenures;*
- *Require mandatory mapping and identification of critical habitat for all newly nominated threatened species;*
- *Require the registering of critical habitat occurs within 12 months of a species being added to the national threatened species list;*
- *Require mandatory community consultation and education programs associated with all threatened species and ecological community listings and critical habitat designations; and*
- *Ensure that critical habitat mapping and data are publicly available*

Commence an audit of mapping critical habitat knowledge and needs for all existing nationally threatened species

Improvements to recovery and threat abatement planning

Threatened Species Recovery Plans, developed under the EPBC Act are the Australian Government's key instrument for bringing threatened species back from the brink. They bring together the knowledge, science, and actions needed to recover threatened species and ecological communities.

For decades scientists, government agencies, community members and not-for-profits have worked together to tackle threats over long time horizons via threatened species recovery planning. Recovery plans are documents specified under national environmental law (the EPBC Act), but also have been developed and implemented at the state level. Recovery plans (which can be for single species, multiple species or ecosystems) are a critical part of the fight against extinction of native wildlife.

The key benefit of recovery planning frameworks is they bring stakeholders together to solve conservation problems over long time frames, they identify knowledge gaps, threats and options for recovery. Importantly recovery plans outline costed actions for the recovery of threatened species based on the best available knowledge and science. For example, the Australian Government released the Regent Honeyeater recovery plan which has costed actions set out over a 5-year time frame at a total cost of \$3.12 million.

Of Australia's 1974 threatened species and ecological communities, less than half are covered by a recovery plan. To date there are approximately 449 national recovery plans that cover 762 threatened plants, animals and ecosystems.⁶⁷

The Government largely has shifted from recovery plan development to focussing on conservation advices. The pivot of the department to almost exclusively focussing on conservation advices marks a worrying trend. Conservation advices are useful documents,

⁶⁷ SPRAT database - Accessed April 2020

but are not an adequate replacement for recovery plans. The distinction between the two is clear. Conservation advices are shorter, less detailed and contain no requirement for consultation. Further, these advices are not binding on decision makers. The EPBC Act only requires a Minister or their delegate to “have regard to” a conservation advice.

On the other hand, recovery plans are flexible documents that can occur for a single species, multiple species or an entire eco-region. They have specified structure, including setting out threats, actions and identifying critical habitat. Importantly, recovery plans have community and expert consultation built in and bind decision makers to “not act inconsistently” with the plan (s139). This ensures that recovery plans can operate as a binding standard on decision making, if the content of them are explicit enough. For example many recent recovery plans include guidance to decision makers. However more often these sections are sufficiently vague as to not enforce any meaningful decision making criteria under the EPBC Act.

Currently, the Federal Environment Minister cannot approve actions that are inconsistent with a recovery plan. This requirement, to avoid inconsistency with a recovery plan in approving development proposals, is an important way in which the EPBC Act can prevent threatened species habitat loss. It also, by virtue of s139 of the EPBC Act, was one of the few potential “standard setting tools” available within the EPBC Act. Despite this however, it will only be effective if the recovery plan clearly specifies the habitat requirements of the species and prescribes limits to the loss of habitat.

Analysis completed by the Australian Conservation Foundation, BirdLife Australia and Environmental Justice Australia in 2015 found that of the 120 most endangered animals covered by recovery plans, 80 (67%) listed habitat loss as a significant threat and recommended active protection of habitat. Despite this only 12 (10%) had a plan that indicated a prescriptive limit on the future loss of habitat.

The shift to favouring conservation advices within the Department is primarily driven by the lack of adequate resources rather than any meaningful policy rationale. Rather than addressing any inefficiencies in recovery planning, such as streamlining consultation, the Department has taken a simple yet far less effective approach to threatened species management. The end result is generally a poorer standard of management document to guide threatened species management and one that has no impact in regulatory decision making. The claim of the department above (of 99.7 percent coverage) is misleading, as it treats conservation advices and recovery plans as equivalent. There remain 180 recovery plans to be developed, with this number only being reduced by 5 over 5 years. In addition, at the time of writing, of the 746 species and ecological communities covered by a recovery plan only 168 (22.5%) have a recovery plan in force that is a subsequent (revised) plan. More than 300 species have a recovery plan which is out of date or passed its review time frame.

Recommendations

Require mandatory development of recovery planning instruments at the time of

species or ecological community listing in the vulnerable, endangered, critically endangered and extinct in the wild categories.

Establish a searchable database reporting on the status and implementation of all recovery actions and make such a database publicly available. The database should be collated, managed and published by the Australian Government.

Establish a statutory obligation (duty) to:

- *Implement endorsed recovery plans, including provision of adequate funding to recovery teams;*
- *Identify and incorporate critical habitat information in the recovery planning process; and*
- *Report annually on recovery plan implementation*

Threat abatement planning

Greater focus should be made on mandatory threat abatement planning. Public nomination for key threatening processes to be continued with assessment by the TSSC. All valid nominations for listing must be assessed within three years of nomination. The Act should require the Minister to ensure statutory assessment of all listing recommendations from the TSSC and listing periods are met. Listing outcomes and timeframes would be monitored and reported on publicly. All listed KTPs should have an instrument of response, including Threat Response Statement, Threat Response Statement or Threat abatement plan

On listing, a preliminary Threat Response Statement is issued as a science-based statement of what is needed to abate the threat, specifying the feasibility, urgency, benefits and likely costs of abatement, and providing advice about the most appropriate instruments to drive abatement efforts. The proposed actions are non-binding unless otherwise stated.

Threat abatement advice is issued when the threat is urgent, threat management is constrained by the absence of data or operational knowledge or other processes (such as policy or legislative changes) are needed to abate the threat.

Threat abatement plans are the primary threat response instrument and need to be clear and concise. They must be more tightly focused on threat abatement actions and include mandatory implementation obligations and commitments of all parties, a monitoring and reporting regime to track threat status and outcomes for threatened biota and explicit targets for abatement and triggers for review/revision of the TAP and how the TAP will be integrated with relevant recovery plans and other plans.

Similar to recovery plans there would need to be a mandatory annual monitoring system and an obligation for state and territory governments to implement plans.

Recommendation

Require a National Environment Commission to undertake 3 yearly audits to provide a comprehensive list of existing and new key threats, to inform nominations and key

areas of work. This process must only be directed by the best available scientific information.

Ensure all TAP nominations are considered within 3 years of nomination

Develop two new instruments:

- *Develop Threat Response Statement as an instrument which is developed at time of listing.*
- *Include provision for Threat Abatement Advice as an urgent interim instrument, that can be deployed prior to the full development of a Threat Abatement Plan.*

New legislation should automatically trigger the development of Threat Abatement Plans for all key threatening processes.

Establish a searchable database reporting on the status and implementation of all actions and make such a database publicly available. The database should be collated, managed and published by the Australian Government.

Establish a statutory obligation (duty) to:

- *Implement endorsed plans, including provision of adequate funding; and*
- *Report annually on plan implementation*

Species listings and emergency provisions

The bushfire crisis of 2019/20 exposed how poorly set up the EPBC Act to deal with significant ecological emergencies, especially around listing of threatened species and the protection of their habitat.

A new national Act will need to have provision for the emergency listing of species and their habitats that apply for up to 12 months. These provisions should also apply to critical habitat areas.

Additionally, the minister, EPA and/or NEC must be provided with the statutory ability to issue emergency ecosystem protection orders. Such an order would have specific criteria as to when it could be utilised (such as following natural disasters or significant and widespread ecological impacts in a short time frame) and take precedence over any approval or other statutory or policy decision under the legislation.

Species listing should only be informed by ecological scientific knowledge. It is a key barometer of how our environment is tracking. Introducing social or economic considerations into listing decisions would entirely detract from the purpose of listing species in the first place. These considerations can feature in the potential policy and decision making responses to a species or ecosystem listing event, but shouldn't factor into any listing decision, ever.

Recommendation

Reform species listing to provide for the emergency listing of species and their habitats that apply for upto 12 months

Introduce emergency protection orders, that would take precedence over other decision instruments, to provide the Minister and/or NEC and NEPA with the powers protect key ecological values

Additionally there should be provision for automatic inquiries into extinction events as well as major ecosystem destruction/ collapse events.

Retain and expand the provisions for federal conservation agreements to enable them to be explicitly attached to a place (registered on title)

Bioregional planning

Bioregional planning has been highlighted by a number of experts as key planning mechanisms to better guide conservation activities and land-use change. APEEL highlighted that bioregional planning can:

- provide greater certainty for resource users as well as for conservation, while ensuring integrated management;
- identify areas needed for effective completion of the National Reserve System and the National Representative System of Marine Protected Areas;
- outline appropriate resources use areas;
- provide for conservation connectivity across the landscape, including buffers around reserves and climate change refugia;
- offer a viable response to the management of cumulative impacts; and
- provide guidance and signals for investment⁶⁸

In a project completed through the National Environmental Research Program it was noted the benefits of bio-regional planning included:

“the boundaries of the plan can be defined to ensure ecological, social and governance coherence (in contrast with strategic assessment where the boundaries are defined by the policy, plan or program under assessment);

Enabled a proactive approach can be taken that establishes a framework for future management;

there is potential for bioregional planning to be applied in conjunction with other mechanisms and tools;

an integrated land management approach can be promoted through which private as well as public landowners can be encouraged to participate in management strategies delivering both public and private good in areas outside protected areas that may be established as a result of the bioregional planning process;

⁶⁸ Australian Panel of Experts on Environmental Law, *Blueprint for the Next Generation of Australian Environmental Law* (2017)

*lends itself to an adaptive management approach to biodiversity conservation*⁶⁹

The study outlined the key drawbacks of bioregional planning were largely a function of existing structures in the EPBC Act. Implementing reforms to bioregional planning mechanisms could substantially improve their effectiveness, particularly with improved governance arrangements

Pope and Moore⁷⁰ also highlighted that improved planning in the form of Regional sustainability planning offered the best of the two current approaches available under the EPBC Act. This is a useful assessment. Rather than create a new landscape scale mechanism, it is proposed to reform and improve bio-regional planning mechanisms that exist under the EPBC Act to ensure they are more easily applied in a terrestrial context.

There are existing provisions for bioregional planning in the EPBC Act, however these have not been used to good effect on terrestrial landscapes.

New national environmental laws should place a bioregional planning approach at its core. As this approach and role evolved it would remove the unexpected and adhoc role the Federal Government currently plays in environmental regulation. Addressing key environmental challenges through a planning focus would give sectors greater certainty, reduce land / sea use conflict and provide a more strategic approach to environmental management. Such a move would cement the federal government's role as leading on environmental outcomes through key planning, authorising and coordination functions.

It is important to note bioregional plans do not switch off other authorisations, but may help streamline these processes through identifying which projects are 'lower risk' and would require limited oversight.

Similarly such planning instruments would need to identify critical environmental assets and where these need to be preserved. A key advantage of bio-regional planning approach would be being able to focus on environmental restoration. Such measures could play an increasingly important role in shaping investments. When coupled with potential new environmental data and markets, such measures could proactively drive environmental protection and restoration efforts.

Bioregional plans would need to be underpinned by robust data environmental information (see data section below), which could be coordinated and managed by a National Environmental Commission.

Recommendations

⁶⁹ Pope J & Moore SA (2013) Planning and assessment for biodiversity conservation at a landscape-scale: an evaluation of current approaches and opportunities in Australia, University of Tasmania, Hobart Tasmania. (*National Environmental Research Program*)

⁷⁰ Ibid

Reform bio-regional planning provisions of the act to:

- *Ensure they have a legislated purpose to achieving the objects of the act*
- *Are coordinated with state and territory planning instruments*
- *Meet the improved principles of ESD (eg biodiversity principle)*
- *Require plans are built on scientific evidence, including and ecosystem assessment*
- *Have significant community engagement and consultation provisions*
- *Define key outcomes plans should achieve; including*
 - *Have SMART objectives*
 - *Are compliant with national standards*
 - *Protect national environmental matters, including the identification of Ecosystems of National Importance and critical habitats*
- *Require the EPA, Ministers and all levels of government to make decisions consistent with protections established in a bioregional plan;*
- *Ensure there is suitable review and accountability processes for plan implementation*
- *Identify classes of actions and appropriate regulatory pathways contingent on location, potential impact and relevant environmental and heritage values*
- *Replace outdated Regional Forest Agreements*

Regulatory tools, planning instruments and strategic assessments

Relates to discussion paper Question 13, Question 14

Within a new national environment Act there should be provision for the establishment of a range of tools to enable the federal government to provide leadership on key environmental protection and restoration measures.

The legislative framework would be underpinned by an expanded suite of National Environmental Matters and national plans and standards that guide environmental decision making.

Specific mechanisms are outlined further below:

National environment plan

A new Act should provide for the development of a National Environment Plan. This would be an overarching plan for Australia's environment. It should include national priorities, goals and metrics to protect and restore the environment in key areas regulated under the Act such as climate, native species and ecosystems, pollution, heritage, protected areas, land clearing. It will be made every five years and is the responsibility of the Commission. Such a plan would also form Australia's NBSAP for the UN CBD. Federal decision-makers and authorities would be required to act consistently with this Plan in their duties.

National standards and targets

The Act should contain power for a new National Environment Commission (or the Minister failing that) to make standards in regulations (in a situation where a national plan is not required/provided for). The non-regression principle would assist in preventing standards from being weakened by successive governments and State laws must not override or undermine national standards e.g. target to phase out single use plastic, conserve high conservation value vegetation or rehabilitation requirements for mining operations.

National environment impact assessment of national environment matters

The Act contains a list of National Environment Matters (NEMs) for which the Commonwealth has regulatory responsibility. Any person taking an action which is likely to trigger a specific impact threshold for a NEM must refer the action for environmental impact assessment (EIA) and a decision as to whether the action can go ahead or not. Most NEMs will have other conservation mechanisms in the Act too e.g. recovery and management plans. The trigger thresholds will include consideration of cumulative impacts and climate considerations. Decisions must give effect to the objects and purposes of the Act, must

comply with decision-making criteria in the Act, and be consistent with all relevant national plans and standards made under the Act, including recovery and bioregional plans.

Bioregional plans

Bioregional plans give Commonwealth, State and Local Governments the opportunity to map areas of environmental significance (such as critical habitat) across bioregions and make decisions about the need for protection of those areas. The Commonwealth has the power to make bioregional plans under the EPBC Act, but it has never been used for land assessments.

We recommend, consistent with the recommendations of APEEL and other reviews, much greater use of bioregional planning to identify upfront nationally significant areas (such as critical habitat areas) and better manage competing land-use.

Environment plans

The Act will require or allow a number of other environment plans to be made for specific areas that are the subject of the Act. There will be different types of plans, depending on the purpose of the plan. All plans must be consistent with the National Environment Plan, give effect to the objects and purpose of the Act, and comply with decision-making criteria under the Act. The plans would include:

- *Threat abatement plans (discussed in detail species and landscapes section)*
- *Recovery plans (discussed in species and landscapes) section)*
- *Pollution plans*
- *Management Plans for Ecosystems of National Significance, World Heritage Areas and Ramsar Wetlands*

Strategic assessments

Strategic impact assessments allow the Commonwealth and State Governments to conduct environmental impact assessments at a larger scale than individual project assessments, and assess cumulative impacts. However a big risk to the environment from strategic assessments is that individual projects that meet the conditions of the strategic assessment do not have to be individually assessed and approved, even if they occur many years later and environmental conditions have changed significantly.

It is important to reflect on the performance of strategic assessments that have been pursued under the EPBC Act. The Melbourne strategic assessment is a prime example of how the approach can be fundamentally flawed. The federal government essentially adopted a set and forget approach to the strategic assessment, stripping itself of any compliance capability or power once the agreement was signed off (see case study below).

Case study 9: Melbourne Strategic Assessment

It has been a decade since the Melbourne Strategic Assessment was approved and as part of that approval a commitment was made by the Victorian Government to secure a 15,000-hectare grassland reserve by 2020. The reserve was intended to provide a regional offset for the grasslands destroyed as part of Melbourne's urban sprawl. It would have been the biggest offset of its kind and would have protected one of the most at-risk ecological communities in the country from extinction.

While, over the decade, the anticipated urban sprawl has somewhat progressed, the Victorian Government has only secured approximately 9% of the reserve. The Victorian Government's plan to acquire the reserve with revenue from a levy on developers has not worked in practise. Revenue has been lower than anticipated and has not been helped by policies from the Victorian Government that have further exacerbated the slow drip of funding (for example, in 2018 the Victorian Government released a factsheet on their policy which allows developers to stage their payments of habitat compensation).⁷¹

Meanwhile, the quality of the grasslands in the proposed reserve is deteriorating and a large proportion is privately intended for development. Landholders in the public acquisition zone have applied for quarries and one has even advertised their block (and subsequently sold it) as a "land banking" development opportunity.⁷² When asked: Is the Department aware of the 6 proposed quarries in the prospective Western Grasslands Reserve that were applied for since the Melbourne Strategic Assessment was approved? The Department responded:

*No. It is the Victorian Government's responsibility to meet its commitments under the Melbourne Strategic Assessment Program, including in relation to the Western Grasslands Reserve.*⁷³

This problem is not isolated to the grasslands reserve. The Victorian Government is yet to formally *identify*, let alone secure, a 1,200-hectare grassy eucalypt woodland reserve also promised as part of the Strategic Assessment.

The application of strategic assessments should only occur with significant improvements including:

- strong legislated standards, decision-making criteria and science-based methods, including a 'maintain or improve' environmental outcomes test (such as for biodiversity, water quality, vegetation, carbon storage) and requirements to be consistent with recovery plans and threat abatement plans;

⁷¹ https://www.msa.vic.gov.au/_data/assets/pdf_file/0021/393042/MSA-Staging-fact-sheet-2018.pdf

⁷² From grassland to wasteland: Victoria breaks promise to create environmental reserve (SMH 2019) <https://www.theage.com.au/politics/victoria/from-grassland-to-wasteland-victoria-breaks-promise-to-create-environmental-reserve-20190512-p51mjd.html>

⁷³ Additional Estimates Senate Standing Committee on Environment and Communications Legislation Committee 18 -19 QoN 130

- cumulative impact assessment requirements, taking account of past, present and likely (approved) future activities at the relevant scale;
- comprehensive and accurate mapping and baseline environmental data;
- mandating transparency and public participation at all phases of the process, including to verify post-approval compliance, to ensure community confidence and acceptable outcomes;
- requiring alternative scenarios to be considered, including for climate change adaptation, to enable long-term planning for realistic worst-case scenarios (i.e. plan against failure);
- adaptive management and review once a program is accredited, to respond to new discoveries, correct unsuccessful trajectories or implement best available technology; as complement to individual project assessment where appropriate, not necessarily to replace it; and
- robust oversight, including via legislated, independent performance audit requirements, transparent verification of compliance, and 'call-in' powers for higher-risk actions and clear penalty provisions for non-compliance.
- Noting this we recommend that Australian Government led bioregional planning be used to better shape outcomes and manage competing land uses at a landscape scale.

Recommendations

A new Act should provide for a suite of tools for the Australian Government to achieve the objects of the Act, as noted through these recommendations. These tools should include:

National Environment Plan to set national priorities, goals and metrics to protect and restore the environment in key areas.

National Environmental Standards for key environmental values and issues, such as air pollution, mine rehabilitation and plastic pollution.

Protection of National Environment Matters which the Australian Government has regulatory responsibility and is required to issue federal approval and/or provide national oversight for

Bioregional and Environmental Plans

The Act should have a strong focus on reformed bioregional planning process (see above) as well as other plans that must be monitored and implemented, including:

- *Threat abatement plans*
- *Recovery plans*
- *Pollution plans*
- *Management Plans*

It is recommended that bioregional planning form the basis of the Australian Government strategic landscape scale interventions, if Strategic Assessment are to be utilised then the following improvements should include

- *strong legislated standards, decision-making criteria and science-based methods, including a 'maintain or improve' environmental outcomes test;*
- *cumulative impact assessment requirements, taking account of past, present and likely (approved) future activities at the relevant scale;*
- *comprehensive and accurate mapping and baseline environmental data;*
- *mandating transparency and public participation at all phases of the process, including post-approval compliance;*
- *requiring alternative scenarios to be considered and accounting for climate change impacts;*
- *adaptive management and review once a program is accredited, to respond to new discoveries, correct unsuccessful trajectories or implement best available technology; and*
- *robust oversight, including via legislated, independent performance audit requirements, transparent verification of compliance, and 'call-in' powers for higher-risk actions and clear penalty provisions for non-compliance.*

Indigenous self-determination and cultural heritage

Relates to discussion paper Question 19

A new generation of national environmental law must be reviewed based on close and participatory engagement with First Nations people. Strengthening the protection of Indigenous cultural values and approvals that factor in Free, prior and informed consent, consistent with Articles 19 and 32(2) of the UNDRIP.

Despite the publication of the *EPBC Act Engage Early Guidelines*⁷⁴, the EPBC Act does not effectively factor in free, prior and informed consent into its decision making process. Such principles are critical, especially for activities that impact on Indigenous cultural heritage, Indigenous owned land and Indigenous Protected Areas.

In 2010 Australia played an active role in progressing the Nagoya Protocol on access and benefit sharing under the Convention on Biological Diversity and formerly signed the treaty in 2012. Australia is yet to ratify the protocol. The Nagoya Protocol establishes a legally-binding framework that provides for access and use of biological resources, in return for a fair share of any benefits from their use. If enacted correctly it should enable Indigenous communities to receive economic benefits through a legal framework that respects the value of traditional knowledge associated with genetic resources. Such frameworks must be built on First Nations communities' rights to self-determination and on principles on free, prior and informed consent.

A key and repeated justification from governments on the failure to ratify the Nagoya Protocol over the past decade has been that it would involve substantial reform of the EPBC Act. This review presents an important opportunity to create mechanisms that respect the rights and interests of First Nations peoples to resources, and acknowledge their continuing traditional knowledge and connection to Country.

Recommendation

Any changes relating to the role of Indigenous peoples under the EPBC Act must be subject to effective and extensive consultation with Indigenous peoples, communities and organisations.

'Free, prior and informed' consent of Indigenous communities should become a mandatory operational principle, and consideration in decision making, particularly for any decision that will impact Indigenous heritage values, Indigenous Protected Areas, Indigenous owned land or land that is subject to a Native Title claim.

⁷⁴ Engage early – guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) Department of the Environment, 2016 <https://www.environment.gov.au/epbc/publications/engage-early>

The review should seek the views, and reflect the will, of Indigenous stakeholders on the ratification of the Nagoya Protocol on access and benefit sharing under the Convention on Biological Diversity and enactment of these commitments in national law.

New environmental law should value and take into account Indigenous knowledge in culturally appropriate ways, in close, effective and extensive consultation with Indigenous peoples, communities and organisations.

Governance, institutions and compliance

Relates to discussion paper Question 21

Effective environmental planning and approval decisions rely on robust and independent advice. Political interference in Australia's environment institutions has diminished their effectiveness. Increased Ministerial discretion has politicised environmental decision making, reducing community trust.

There is evidence of a degree of regulatory capture and/or political interference in the administration of the EPBC Act. This is outlined in a number of case studies and Part I of this submission (including Case Study 1).

As noted by the Productivity Commission:

good regulatory practices can only go so far in promoting certainty and transparency. Changes to regulatory governance and institutional arrangements also have a role to play. In particular, public confidence, competitive neutrality and impartiality are more likely to be established through independent regulatory agencies. This is one of the lessons from jurisdictions that have already established such agencies. The Commission proposes that jurisdictions pursue the institutional separation of their environmental assessment and enforcement functions from their environmental policy functions⁷⁵

This finding is supported by APEEL which highlighted the importance of institutional separation of policy, planning and regulatory functions.⁷⁶

The reality is that most effective regulation is implemented by independent regulators. This includes the corporate, financial and health sectors as evidenced through bodies such as the Australian Consumer Competition Commission, Australian Therapeutic Goods Administration and the Australian Health Practitioner Regulation Agency (to name but a few).

We propose two new institutions to oversee the implementation of key legislative functions:

A National Environment Commission, to independently oversee the development of plans, standards and collection of environmental data; and

A National Environmental Protection Authority to undertake assessment and approval functions as well ensure compliance with relevant authorisations and plans.

⁷⁵ Productivity Commission 2013, Major Project Development Assessment Processes, Research Report, Canberra.

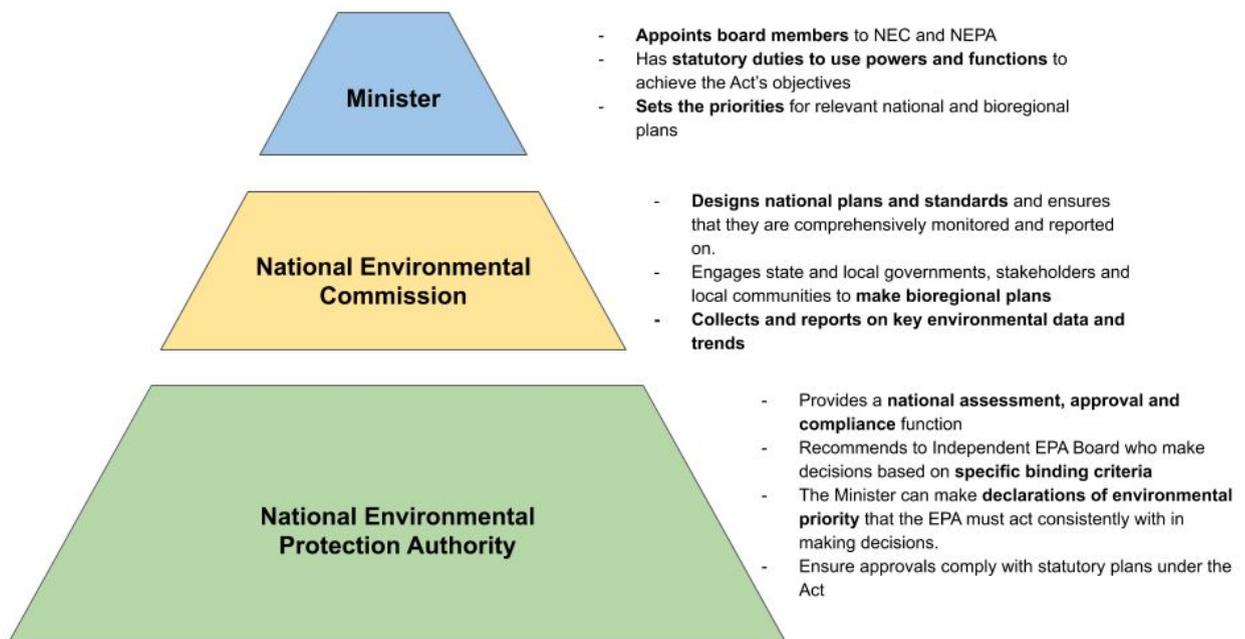
⁷⁶ Australian Panel of Experts on Environmental Law, Environmental Governance (Technical Paper 2, 2017)

A **National Environment Commission** would assist the Federal Government in developing a national plan for protecting and managing Australia’s environment, and will have authority to work with all jurisdictions to achieve the coordination and infrastructure to achieve that plan, 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 and decision making so politicians, business and the public can participate in informed decision making.

A **National Environment Protection Authority** should be established which would be the new Commonwealth assessment, approval and enforcement body for environment issues that are nationally important. The establishment and adequate resourcing of an independent national environment protection authority that operates at arm’s-length from government is key to the effective operation of future environmental law free from political interference.

Figure 10 - Institutions and Governance



Alongside independent institutions, there is a key role for strengthening accountability in the environmental consultant sector. This was highlighted by the Craik review, with the review noting:

Accrediting an organisation like EIANZ to accredit practitioners who can undertake surveys in support of EPBC Act referrals and assessments could help to remove uncertainty among project proponents in relation to the commissioning of surveys of acceptable quality to support referrals of actions under the Act. Clarity on necessary survey parameters and having a list of 'acceptable' consultants should help reduce the occurrence of survey repeats and speed up the referral and assessment process. If this approach were adopted, it would be important to regularly audit the association to ensure that high standards of accreditation were maintained.⁷⁷

Environmental consultants are an important, yet often overlooked, part of environmental governance frameworks. They are often the conduit between the regulated community and the regulator. They also fall into a grey space in terms of their accountability and governance. They are paid for by proponents, yet are required (in theory) to deliver impartial scientific advice. Unlike other consultants sectors there is no mandatory accreditation program for environmental consultants. Reforms should focus on the need for mandatory accreditation of consultants to industry best practices, including strong focus on ethics and statutory safeguards for industry whistleblowers.

Recommendations

A National Environment Commission would be established as an independent authority reporting annually to parliament on the state of the environment. It would:

- Develop and oversee national environmental goals, strategies, plans and standards;
- Require at least one full time Commissioner and independent public sector staff appointed from commencement of Act;
- Have the mandate to negotiate with all levels of government regarding plans, standards and environmental information.
- Gather and publicly disseminate evidence on environmental conditions and trends to inform decisions and improve outcomes over time;
- Ensure recovery plans, threat abatement plans, conservation advices and threat mitigation directives are up to date and integrated into bioregional plans.

A National Environment Protection Authority should be established which would be the new Commonwealth assessment, approval and enforcement body for environment issues that are nationally important. The establishment and adequate resourcing of an independent national environment protection authority that operates at arm's-length from government is key. It would:

- Be governed by an independent board and headed by a separate chief regulator;

⁷⁷ Craik, W. 2018. *Review of interactions between the EPBC Act and the agriculture sector*. Independent report prepared for the Commonwealth Department of the Environment and Energy <https://www.environment.gov.au/system/files/resources/0bb50a4d-b273-4a31-8fdb-dcde90edef3e/files/review-interactions-epbc-act-agriculture-final-report.pdf>

- Have statutory duties to use powers and functions to achieve the Act's aims;
- Undertake assessment, approval and enforcement of activities that affect environmental issues of national importance;
- Undertake impact assessment and approval of actions on land and waters;
- Undertake independent compliance, audit and enforcement roles;
- Include a separate unit responsible for post-approval project and plan compliance, audits, monitoring and reporting;
- Ensure approvals comply with statutory plans under the Act (e.g. recovery plans, threat abatement plans, bioregional plans);
- Review, advise and report openly to the Minister on specific development projects.

There should be mandatory accreditation of consultants who work on projects covered by new national legislation, to ensure industry best practices and ethical conduct. There should be a statutory process for complaints handling and safeguards for industry whistleblowers.

Compliance and enforcement

For new environmental law to successfully regulate environmental harms in Australia, it must have an effective and well-resourced compliance regime administered through an independent EPA. The regulated community should perceive the approval process (and protecting matters of national environmental significance) as the path of least resistance. This means there has to be an appropriate mix of incentives and disincentives, used fairly and appropriately.

The current mix and implementation, however, is having perverse outcomes—often the EPBC compliance regime is making it cheaper and more attractive for the regulated community not to comply. Many who do not comply fall through the cracks, and those who are subject to compliance action often face penalties and punishments that are less burdensome than the approval process.

The Department of Agriculture, Water and Environment currently administers a cost recovery scheme for referrals, the assessments of those referrals and changes made post-approval. This means that the cost of regulation is borne by the regulated community, but it is only borne by those in the community who are willing and able to comply. Conversely, those who do not comply are rewarded through more expedient and less costly development.⁷⁸

For example, companies requesting a change to the boundary of their protection area or requesting an extension to the deadline to secure their offset in post approval have to pay \$2,690 to the Department.

In the case of Meadowbank Station, the landholders simply unlawfully cleared native vegetation in their protection area and through the Department's compliance response, the

⁷⁸ Cost Recovery Implementation Statement 2016-17

<https://www.environment.gov.au/system/files/resources/148ab56d-0090-421a-ac66-9d3c87d507e0/files/cris-2016-17-current.pdf>

approval was varied for free. Granted, the landholders had to increase the protection area by 7 hectares however this came at no material cost and very minimal opportunity cost, reducing their total clearing area by 0.5 per cent.⁷⁹

In the case of Hovey Property Group's sand mine in West Australia, the Department's compliance area found they had not secured their offset in time and, because it was a compliance response, the variation for an extension to their deadline was free.⁸⁰

The current cost recovery scheme and the subsequent distribution of funds from that process does not extend to the cost of ensuring compliance with the EPBC Act. Over the years since cost recovery was implemented, the funding of the Department's compliance functions has progressively diminished, meaning its ability to effectively use existing compliance tools in the Act has become limited.

The limited funding of compliance and enforcement work, along with a lack of political will from successive Governments, has meant that often compliance cases involving politically sensitive proponents or politically sensitive issues (like broadscale land clearing in Queensland) do not progress. Therefore it can be cheaper not to engage with the EPBC Act or Department at all, whereas the less-privileged, but not worst-offending, are subject to compliance action (albeit mild).

While a better suite of compliance tools is recommended below, it is important to note that the existing tools are not being effectively used. An independent EPA (discussed above) goes some of the way towards dealing with this, but an additional and critical measure to ensure ongoing effective compliance is funding-certainty.

We acknowledge that *compliance* outcomes that generate revenue for further *compliance* work can compromise the perceived and actual impartiality, fairness and appropriateness of compliance decisions. However, the function of compliance is critical to the broader regulatory scheme and this should be acknowledged in EPBC cost recovery.

We recommend that the revenue from cost recovery mechanisms is distributed more widely to cover the costs of compliance and enforcement work. Like with the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*, an analogous federal regulatory scheme, compliance roles could have designated funding from a Special Account that cannot change with the whims of politicians. Legislated funding / resourcing should be feature of a National EPA

Along with fully resourced and independent compliance functions, there should be an appropriate range of tools available to authorised officers in investigating and responding to alleged non-compliance. In order to standardise the regulatory powers available to the

⁷⁹ EPBC 2016/7838 Variation

http://epbcnotices.environment.gov.au/_entity/annotation/206ac4ad-9f32-4ea11-a115-005056842ad1/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1586312750306

⁸⁰ EPBC 2014/716 Variation

http://epbcnotices.environment.gov.au/_entity/annotation/d5adb537-6f33-4ea11-a521-00505684324c/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1586312863688

Department, the Act should be amended to trigger the *Regulatory Powers (Standard Provisions) Act 2014*. This is an elegant solution to the gaps in current coercive and enforcement powers under the EPBC Act.

With guidance from the Attorney General's Department, the EPBC Act could cover best-practise powers that are consistent with other regulators (like powers of entry and powers to issue infringement notices), while retaining and adding powers bespoke to environmental regulation (like powers to make a remediation determination and environmentally specific enforceable undertakings).

Additional bespoke coercive and enforcement powers should include environmental protection orders which could require a person to undertake certain actions or to cease certain actions. Currently, if an offence is occurring, the Department must apply for an injunction through the Federal Court to compel the offender to stop. This is an expensive and time-consuming process which is infrequently used and is not immediate enough to prevent environmental harm and, hand-in-hand, the destruction of evidence. Other environmental regulators already have similar powers, for example the New South Wales EPA.

Further, new enforcement provisions for Strategic Assessments must allow for a graduated response to non-compliance. Currently, in response to non-compliance, the Department can go into mediation with the approval holder (who is more often than not a State Government) and/or revoke the Strategic Assessment (which, in practise, would punish developers for the failures of the State Government).

Part 10 of the EPBC Act should include enforcement provisions that allow for proportionate and fair compliance responses that encourage approval holders to prioritise their commitments made under Strategic Assessments. Entering into mediation with a State Government and revoking a Strategic Assessment, are both politically difficult and relatively severe actions to take as an initial response to an identified non-compliance.

If the Department were able to take a more graduated approach, for example issuing a warning notice or penalty when first milestones were not met, the Victorian Government may have prioritised securing the reserve and not, for example, allowed for developers to pay their levies slower.

A more graduated approach should also be built into the regulation of those taking environmentally harmful actions without approval by allowing for warning notices and infringement notices to be issued for Part 3 offences. Currently, an infringement notice can only be issued for breaches of approval conditions.

The penalty units attached to a breach of approval conditions should also be increased substantially from 60 units. A fine of \$12,600 is not a significant deterrent for companies undertaking large operations and may even be cheaper than the administrative cost of complying with conditions. The public is perpetually shocked to learn that big gas companies

and miners are fined so little for not meeting their environmental commitments.⁸¹ In contrast, tennis players may be fined hundreds of thousands of dollars for on-court mis-conduct. In an analogous federal regulatory scheme, supplying out-of-spec fuel results in a \$105,000 infringement under the *Fuel Quality Standards Act 2000*.⁸²

While substantial penalties can provide strong disincentives, in their current form they also present an opportunity cost. Authorised officers often must choose between the best outcome for the environment and the best outcome for deterrence. For example, in the case of Meadowbank Station, a monetary penalty may have had a stronger deterrent effect, however it would not have rectified the harm to the threatened species that was occasioned through the unlawful clearing.

We recommend that the EPBC Act is amended to set up a Special Account, like the Natural Heritage Trust, to ensure payments of infringement notices and civil penalties ultimately serve the environment (rather than Consolidated Revenue). This means that the use of strong deterrent enforcement powers does not preclude an environmental outcome.

Finally, there should be a public register for the monitoring and audit of compliance responses if they require environmental outcomes to be achieved (i.e. Conservation Agreements, Remediation Determinations, Remediation Orders made by the Federal Court and Enforceable Undertakings).

The EPBC Act requires that all referral decisions are made public—this allows for the community to see the conditions and access the public compliance reports of companies. It is reasonable to expect that previously non-compliant proponents should have (at the very least) the same transparency requirements and administrative costs as proponents who did not break the law and hold legal approvals.

Recommendations

New environment legislation should:

- *Establish a Special Account for the collection of payments from environmental infringement notices.*
- *Substantially increase the penalty units attached to a breach of approval conditions to provide adequate disincentive for non-compliance*
- *Trigger the Regulatory Powers (Standard Provisions) Act 2014 with exceptions made for environmentally-specific coercive and enforcement actions*
- *Contain provision of warning and infringement notices to be issued for Part 3 offences.*
- *Include strong enforcement and penalty provisions for Part 10 (strategic assessment) approvals that encourage approval holders to prioritise their commitments made under Strategic Assessments.*

⁸¹ Venture Minerals fined for breaching environmental approval conditions
<https://www.theadvocate.com.au/story/6554394/miner-fined-for-breaching-environmental-approval-terms/>
<https://www.abc.net.au/news/2019-08-14/inpex-pfas-environment-animals-at-risk-darwin-harbour/11412180>

⁸² Compliance with the Fuel Quality Standards Act 2000
<https://www.environment.gov.au/protection/fuel-quality/compliance-act/fuel-suppliers>

- Ensure adequate resourcing for compliance and enforcement activities, including earmarking components of cost-recovery revenue

Transparency, accountability and environmental democracy

Relates to discussion paper Question 20

Regulatory Capture

The department's regulatory framework includes an adapted version of Ayres and Braithwaite's enforcement pyramid from their research into responsive regulation. The Regulatory Framework also acknowledges the importance of influencers, in a subtle nod to tripartism.⁸³ As regulators try to become more adaptive to the needs of the regulated community

As noted by Ayers and Braithwaite, the theory of tripartism relates to:

Regulatory encounters that foster the evolution of cooperation also encourage the evolution of capture and corruption. Solutions to the problems of capture and corruption—limiting discretion, multiple-industry rather than single-industry agency jurisdiction, and rotating personnel—inhibit the evolution of cooperation. Tripartism—empowering public interest groups—is advanced as a way to solve this policy dilemma.⁸⁴

Empowering third-party actors to hold regulators to account on their decision making is an important component in preventing regulatory capture and corruption. This operates consistently under the United States *Clean Air Act* 1963, including provision for citizen suits that enable private citizens to hold government bodies to account for failing to perform a non-discretionary duty.

Regulatory capture presents significant risks to industry also. It drives societal discontent with the regulatory system, strips social license and can result in significant public opposition to approval decisions where these are perceived to not be made in the public interest. Safeguarding against regulatory capture is a critical element to any effective environmental regulatory regime.

Community review and enforcement rights to uphold environmental laws are fundamental to the public interest. The experience in jurisdictions with these rights demonstrates that, overwhelmingly, merits review proceedings and enforcement rights initiated by members of the public to uphold public environmental laws are done so legitimately in the public interest and generate important public environmental benefits.⁸⁵

⁸³ Regulatory Framework, Department of the Environment and Energy, 2017
<https://www.environment.gov.au/about-us/accountability-reporting/regulatory-framework>

⁸⁴ Ayers & Braithwaite, *Responsive Regulation* 1992 pp 54

⁸⁵ The Australia Institute, *Environmental Citizen Suits in the New South Wales Land and Environment Court: frequency, success rates and citizen suit subsidies* (unpublished paper), April 2016, p. 12.

A new Act must include built-in mechanisms for the community to seek arms-length review of processes and potential breaches in Court, independent of the government or an appointed regulator. Open standing for the public to seek judicial review of government decisions under the Act and Regulations, and the right to take environmental breaches to court, means that any person can ensure that key decisions impacting biodiversity and the environment are made according to the law.

Merits review

Merits review is a form of external review which, at the federal level, is undertaken by the Administrative Appeals Tribunal (AAT). It involves a rehearing of the matter in which the Tribunal can hear new evidence and can substitute its own decision for that of the primary decision-maker.⁸⁶ The review process follows the procedures set out in the Administrative Appeals Tribunal Act 1975.

In 2006, the EPBC Act was amended to remove the ability to seek merits review of permit decisions when made by the Minister. As a result, review of these decisions is now only available if the decision was made by a delegate. As a result merits review cases under the Act have almost stopped as the majority of potentially controversial decisions are made by the Minister⁸⁷.

The Independent Review of the EPBC Act recommended the 2006 amendment to restrict merits review to decisions made by delegates be repealed. In making that recommendation the independent reviewer, Alan Hawke, noted:

*There is no evidence that the merits review powers of the AAT were abused prior to the 2006 amendments. The number of cases brought to the AAT was small and typically involved significant issues.*⁸⁸

The Independent Review further recommended the government consider to enable merits review for controlled action decisions and decisions on impact assessment approach and to extend legal standing to persons who made submissions during the relevant public consultation process for the decision.

Proposed merits review in the next generation of national environment laws.

We recommend that the most important decisions that should be open to merits review are those for the approval of controlled actions. Merits review should also apply to decisions to exempt actions from the need for approval under Part 3. We consider this essential because *the primary focus of environment law is not on the protection of private rights but on the protection of the environment for the public in general.*⁸⁹

⁸⁶ 2009 Alan Hawke Independent Review of the *Environment Protection and Biodiversity Conservation Act*, 1999

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Sir Harry (Lord) Woolf, "Are the judiciary environmentally myopic?" (1992) 4 JEL 1, p4; cited by The Hon B.J. Preston, "Characteristics of successful environmental courts and tribunals", p34.

It is approval decisions which have the greatest potential for undue political influence and which have the greatest potential for devastating consequences for the environment and protected matters.

Ensuring appropriate expertise for merits review

If the opportunities for merits review under new national environment laws are expanded, it is recommended a consequential amendment to the Administrative Appeals Tribunal Act 1975 such that the AAT be required to appoint members with suitable environmental expertise.

Ensuring timely assessment of appeals

Merits review have strict time limits for commencing an appeal. AAT Act s29 sets out a time limit of 28 days to file an application for review (from the date when terms of decision are published, or when reasons are requested and received). If there is no prescribed time frame for certain decisions the tribunal can decide to accept applications within a ‘reasonable time’ taking into account various factors, and may also extend the time limit. The AAT will then generally determine the timelines to hear a case with a directions hearing involving both parties.

Citizen enforcement

Citizen enforcement (third party enforcement) gives the community the right to take environmental breaches to court when the regulator does not. Third party civil enforcement is a standard component of environmental law in other jurisdictions in Australia and is a key feature of the US Endangered Species Act.⁹⁰

The Department has been criticised by the ANAO for its weak enforcement of the EPBC Act, with the finding in 2014 that the Department is “passive in its approach to managing non-compliance with EPBC Act conditions of approval.”⁹¹ A 2017 audit found that although improvements had been made since that time, there was still a great deal of work to be done to improve enforcement of the EPBC Act.⁹²

The ability to enforce environmental law is of great concern to the community. When people have had consistent experience with a failure of the environmental regulator to take enforcement action, people feel dismayed, disempowered, and deeply disappointed. By including citizen enforcement rights into new national environmental laws, government communicates to the Australian public that it appreciates the public’s role in protecting the environment and the health of communities who are exposed to pollution and respects its right to do so.⁹³

⁹⁰ See *Environmental Protection Act 1994* (QLD) s. 505; *Protection of the Environment Operations Act 1997* (NSW) ss. 252-253; *Environment Protection Act 1993* (SA) s. 104; *Environmental Management and Pollution Control Act 1994* (TAS) s. 48; *Environment Protection Act 1997* (ACT) s. 127(2)(a)-(b)

⁹¹ ANAO Report No. 43 2013–14, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*.

⁹² ANAO Report No. 36 of 2016-2017, *Monitoring Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit*

⁹³ *Meriton Apartments Pty Ltd v Sydney Water Corporation* (2004) NSWLEC 699 [15] (Lloyd J).

New national environmental laws should include a right for citizen (third party) civil enforcement of the Act. The inclusion of third-party enforcement rights in national environmental laws would be consistent with most other Australian jurisdictions that have such provisions in their environmental protection legislation.

Expanded opportunities for merits reviews and citizen enforcement in a new national environment law will contribute to public scrutiny of environmental decisions and strengthen the integrity of the law, integrity which has been severely eroded under the EPBC Act as currently administered.

The benefits of merits review

As explained by the Administrative Review Council (ARC):

The principal objective of merits review is to ensure that those administrative decisions in relation to which review is provided are correct and preferable: correct – in the sense that they are made according to law; and preferable – in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts. This objective is directed to ensuring fair treatment of all persons affected by a decision. Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced.⁹⁴

Merits review plays a vital role as a safety valve for accountable decision making, this is a key point noted by the NSW Independent Commission Against Corruption which notes merits review

“provide[s] a safeguard against biased decision-making by consent authorities and enhance the accountability of these authorities.”⁹⁵

The Environmental Defenders Office describes the benefits of merits review in NSW as:

- 1) *Improving the consistency of decision making.*
- 2) *Improving the quality of decision-making, through: a) the development of an environmental jurisprudence; b) improving outcomes through conditions; c) providing scrutiny and facilitating good outcomes; and d) fostering natural justice and fairness.*
- 3) *Improving the accountability of decision-making⁹⁶.*

Dispelling concerns surrounding merits review and citizen enforcement

It is often said that giving citizens and community groups standing and opportunity to review government decision making gives rise to delays and vexatious claims. The evidence does

⁹⁴ Commonwealth of Australia Administrative Review Council, What decisions should be subject to merits review? (1999) http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review#dec7.

⁹⁵ NSW ICAC, Anti-Corruption Safeguards and the NSW Planning System, ICAC Report (2012)

⁹⁶ Merits Review in Planning in NSW, 2016 http://www.edonsw.org.au/merits_review_in_planning_in_nsw

not bear this out. Reflecting on a decade's experience in the NSW Land and Environment Court, the then Chief Justice noted:

It was said when the legislation was passed in 1980 that the presence of section 123 [in the NSW planning law] would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited.⁹⁷

The Administrative Appeals Tribunal Act 1975 (s42B) protects against frivolous and vexatious claims. The AAT can also reject an application that does not have reasonable prospects of success or if it is an abuse of the tribunal process. Appeals to review the merits of decisions are not taken lightly and are costly in time and money for the applicants.

Similarly there is no evidence from any jurisdiction to support the claim that a flood of unmerited or vexatious actions will be generated by the introduction of citizen enforcement rights. A recent study of environmental litigation in NSW found that 'the main concern is not a flood of environmental citizen suits, but a drought'.⁹⁸ In the period 2008 – 2015 the NSW Land and Environment court heard some 4621 cases, of which 188, or 4.1% were third-party actions under an environmental law.⁹⁹ Of these 188 cases, 21% concerned civil enforcement actions, 4% were joint judicial review/civil enforcement proceedings, and 14% were merits reviews. To put this in context, 100,000 development applications are determined in NSW every year.¹⁰⁰

Despite vested interest group lobbying and some sections of the media championing a restriction of section 487 of the EPBC Act, there is no evidence of vexatious litigation under the legislation. Under the EPBC Act there have been less than 50 public interest environmental cases that have proceeded to the federal court in the legislation's 20 year history.

Those championing the restriction of standing and the repeal of s487 do so more on ideological rather than policy grounds. Extended standing provisions were designed to remove a step from judicial processes, in effect to speed them up. Removing these provisions will force plaintiffs to undertake a preliminary step to establish standing, which would draw out legal proceedings and add to costs.

Automatic disclosure of decision making material

As noted in Part I the Department and EPBC Act are a modern anomaly when it comes to the disclosure and management of decision making material. ACF has experienced less than optimal service when requesting recommendation reports under s139A of the EPBC Act. The failure of transparency of the EPBC Act and the Department has multiple implications, it:

⁹⁷ Justice J Cripps, "People v The offenders", Dispute Resolution Seminar, Brisbane, 6 July 1990.

⁹⁸ Andrew Macintosh, Amy Constable, Isabella Comfort, Fathimath Habeeb, Mhairin Hilliker, Mandy Liang and Anna-Claudia Oliveros Reyes, *Environmental Citizen Suits in the New South Wales Land and Environment Court: Working Paper* (The Australia Institute, 2016).

⁹⁹ The Australia Institute, *Environmental Citizen Suits in the New South Wales Land and Environment Court: frequency, success rates and citizen suit subsidies* (unpublished paper), April 2016, pp. iii-iv, 19.

¹⁰⁰ S. Smith, *The NSW Planning System: Proposed Reforms* (2008).

- Erodes trust in the regulator
- Heightens conflict around decision making between multiple actors
- Increases the cost to those seeking decision making material
- Drains resources of the regulator as information is sought through protracted FOI decisions.

As a principle, under new environmental legislation all decision making material must be disclosed at the time of decision, including referrals, assessments, approvals, compliance, standards, planning and outcomes decisions.

Recommendation:

- *Mandatory and inclusive community consultation on all key components of new legislation including the development of statutory plans, standards and approval decisions.*
 - *Community panels should be pursued where feasible, however such panels must be chaired and convened by the EPA or NEC, not by proponents.*
- *Open standing for any person to seek review of government decisions or to enforce a breach or anticipated breach through third party enforcement.*
- *Extending legal standing to merits review of approval and permitting decisions. This has been shown to improve the rigour of decision making.*
- *A statutory right for citizens to ask the court to require performance of mandatory duties by the Minister or other decision-makers under the Act.*
- *Protection for costs for public interest legal proceedings, for example limiting upfront cost orders that deter the community from exercising legal rights.*
- *Automatic disclosure of all statutory decision making material at the time of decision*

Data and information

Relates to discussion paper Question 15

Robust data and transparent information systems must underpin a new national environmental protection framework. The most recent SoE report highlighted the paucity of the country's biodiversity monitoring framework.

In *Biodiversity Monitoring in Australia* scientific experts unpacked some of the key measures needed to improve the level of biodiversity data in Australia. They noted:

- Lack of awareness in decision makers of the need for robust monitoring frameworks
- Lack of institutional support for monitoring programs and the need for new institutions that drive coordinated monitoring but also allow for academic freedom in research design
- Ensuring adequate resourcing
- Improved data standards, that need to be adaptive to changing technology and new information
- Improved monitoring design that are created to track and report on clearly identified problems and answer well articulated questions

¹⁰¹Significant investment is needed in nationwide ecosystem and environmental health monitoring systems, such as the TERN and National Environmental Accounts. As noted by Gibbons and Lindenmeyer:

“There is typically a mismatch between the short timeframes for funding and political cycles versus the long time frames need for biodiversity monitoring”¹⁰²

Statutory data requirements and decision maker duties can break this cyclical mismatch.

Biodiversity data should aim to be nationally centralised and data provided by project proponents be made publicly available. This should occur through data standardisation policies and agreements with state and territory data brokers and regulators. This is a key point that has been raised in the Craik review also:

“It is recommended that datasets developed in support of referrals and assessments be conditioned to Commonwealth standards to enable relevant data to be incorporated into national datasets in a timely fashion and made publicly discoverable, accessible and reusable. Where there is an unacceptable risk that revealing the location of these species or ecological communities may result in their collection or destruction, the Department of the Environment and Energy’s sensitive data policy should apply”¹⁰³

¹⁰¹ David Lindenmeyer, Philip Gibbons April 2012 Biodiversity Monitoring in Australia CSIRO Publishing

¹⁰² Ibid

¹⁰³ Craik, W. 2018. *Review of interactions between the EPBC Act and the agriculture sector*. Independent report prepared for the Commonwealth Department of the Environment and Energy <https://www.environment.gov.au/system/files/resources/0bb50a4d-b273-4a31-8fdb-dcde90edef3e/files/review-interactions-epbc-act-agriculture-final-report.pdf>

Technology has shifted dramatically since 2000 when the EPBC Act was enacted. Remote sensing technology has, and will continue to, transform our understanding of the natural world and provide next to real time assessment of ecological impacts. The EPBC Act has used remote sensing in an ad-hoc way, especially when compared to jurisdictions such as Queensland, which produces the SLATS dataset. A new national regulatory framework must better embed remote sensing and field data into its operations.

Greater certainty and planning regimes will provide for clearer obligations for the regulated community, however there is no evidence of how automatic approvals could currently be issued as suggested in the discussion paper, particularly in the absence of robust, ground truthed data. This is where a bioregional planning approach would be of significant benefit in improving regional level data sets. For example, in the case of the hunter regional sustainability plan, significant environmental data was generated out of that project which better informed where and how developments were impacting MNES.

National environmental accounts are an important step toward developing a coherent national data set. The National environmental and economic accounts strategy was released in 2018, however its implementation appears patchy thus far with some states adopting a different approach. Ecosystem and biodiversity accounts are weak in the framework and must be strengthened

Along with national accounts and centralised environmental data, new legislation should focus on transparency around Australian Government decision making. Specifically:

- A national database detailing impacts, approval conditions and completed datasets should be developed and made publicly available.
- A national database should also be used to be a repository of all impact assessment information, so that information is available even after an assessment is completed.
- All decision material, such as assessment reports or recommendation reports that relate to federal environmental legislation should be released at the time a decision is made.
- A compliance database should also be developed (or included in the above) which outlines stages of monitoring and auditing of where projects are up to.

New legislation should continue to ensure the delivery of State of the Environment reports, via a National Environmental Commission, as well as yearly indicator reporting to parliament. A commission would also administer the National Environment Accounts, in partnership with other data driven agencies such as the BoM and ABS. These would track key environmental indicators and their extent, condition and threat status over time. The Commission would report to parliament against the goals and metrics identified in the National Environment Plan annually.

The discussion paper contemplates the development of a single point of entry for all environmental assessments. This is a proposal that is strongly supported, provided there is a robust and transparent database for projects (as outlined above) and that the federal government maintains an oversight and approval role in the process.

Recommendation

New environmental law should be underpinned by robust scientific information and strong data management systems, including

- *a centralised database or hub for biodiversity and ecosystem health data*
- *data standards to be set via subordinate instrument (such as via regulation)*
- *long term funding of the hub and duties on decision makers for maintenance of the data and relevant data-sharing agreements.*
- *that environmental information required as part of assessment and planning processes is consistent with relevant standards and entered into the database.*
- *that there is reasonable and open access to data, noting the need to safeguard some species location information.*

For assessment and approval information, legislation should ensure:

- *There is a publicly available national database detailing environmental impact assessment and compliance information as well as the details and locations of environmental offsets.*
- *All decision material, such as assessment reports or recommendation reports that relate to federal environmental legislation should be released at the time a decision is made.*
- *Provide a single point of entry and public oversight for referrals and assessments across jurisdictions, preferably managed through the NEPA.*

There should continue to be 5 yearly State of the Environment reporting, with a renewed effort in building and maintaining a system of National Environmental Accounts, which should release full accounts and key indicators against the SoE annually (at a minimum).

There should be improved remote sensing data capabilities and disclosure, to track status, trends and monitor compliance with relevant regulations.

Financing, innovation and environmental markets

Incentivising action

Relates to discussion paper Question 22, Question 23, Question 25

Alongside existing regulatory regimes there are a range of tools that are available to the government to incentivise positive action on private lands. Siloing and compartmentalisation of Departments means these are not often developed with regulatory approaches in mind

Agri-environment schemes have operated in Australia for decades with mixed success. For example the environmental stewardship programme, which contracted on-farm conservation activities from willing participants, was an important mechanism to encourage positive conservation efforts, but also had challenges in its application from complexity and lack of broader support.¹⁰⁴ The Biodiversity Fund provided mechanisms to support on-farm conservation through a variety of programs, however was discontinued. The current National Landcare Program is the primary Australian Government vehicle for the delivery of on-farm conservation, yet there is minimal alignment between NLP and the regulatory functions of the Department.

Alongside agri-environment schemes, options for the government also include improving tax incentives for on-farm conservation and access climate financing for native habitat conservation are other mechanisms that can play important roles. This may range from providing easier access to conservation tax relief. As noted by the Australian Conservation Lands Alliance:

Various but limited tax incentives currently exist for landowners who engage in private land conservation initiatives. These include income tax deductions and concessional capital gains tax treatment for entering into conservation covenants or other ATO-recognised permanent protection instrument registered on title, as well as deductions or concessions for landcare operations. Whilst these measures are intended to provide tax benefits and incentives to land-based environmental activities, they do so in a very limited manner. ALCA submits that reform is required to address limitations and barriers to landholder contributions to maintaining and often restoring the country's biodiversity and natural assets on private land.¹⁰⁵

Potential tax reforms, whilst largely out of scope of this inquiry, include:

- reviewing 'landcare operations' deductions under the Income Tax Assessment Act 1997 with a view to broadening the availability of concession to include 'ecological management and restoration'; and
- Including non-capital expenditure and entitlement of all landholders with conservation covenants to a deduction against assessable income for conservation works expenditure.

¹⁰⁴ Salt et al 2016 - Learning from agri-environment schemes in Australia: Investing in biodiversity and other ecosystem services on farms <https://press.anu.edu.au/publications/learning-agri-environment-schemes-australia>

¹⁰⁵ Australian Lands Conservation Alliance Submission to tax whit paper 2015

https://cdn.tspace.gov.au/uploads/sites/52/2015/06/Australian_Land_Consevation_Alliance_Submission_2.pdf

There is a significant opportunity for improving agri-environmental schemes alongside better environmental regulation under the EPBC Act.

Another mechanism for improving conservation outcomes includes certification schemes. Environmental certification schemes rely on a number of pre-conditions, including a willing and engaged sector, the capacity to ensure market advantage and a social license through clear differentiation of product based on environmental performance and genuine engagement with NGO's. Successful environmental certification schemes are reliant on constructive engagement and shared-ownership across regulated and interested sectors, such as is the case with the Forest Stewardship Council, which is governed by industry, social and environmental chambers.

New financing models for conservation and stewardship

New financing models for conservation and stewardship are being explored in different sectors, but are yet to reach an adequate national scale. Attention has focussed on the potential for biodiversity offset markets to bridge the divide, but this is a dangerous proposition. The reliance on offsets will mean that funding for stewardship will be inherently tied to the destruction of biodiversity. As outlined in case study 6 for NSW, this has meant some poor results for nature, despite the institutional integrity of the BCT. It is also worth reflecting on the Reef Trust which aimed to do a similar project for reef spending in 2014. Despite all the infrastructure existing within the Reef Trust, including a desire to pool offset funds with other mechanisms, the Government elected to disburse \$444 million to the Great Barrier Reef Foundation, a small NGO with strong ties to the corporate sector. There are clearly a range of political factors in this decision, nonetheless, the decision to bypass providing half a billion dollars to existing Reef Trust institutional arrangements would have to be one of the biggest votes of no confidence by a government in its own policy frameworks in recent memory. To be clear, the trust was directly established to handle this type of investment.

The Craik review proposes a \$1 billion investment fund to

It is recommended that an initial allocation of \$1 billion over four years be provided to establish a National Biodiversity Conservation Trust fund explicitly tied to the EPBC Act to support the public benefits of protection, including by farmers, of matters of national environmental significance through the adoption of a market-based approach that incentivises farmers (and others) to protect and actively manage matters of national environmental significance outside of legislated requirements. Where there is a public benefit, the Fund should have the capacity and authority to, inter alia:

- *support the purchase of private land management agreements acquired under Australian Government environmental offsetting programs.*
- *directly purchase environment protection and biodiversity conservation outcomes through the acquisition and active management of land, based on a strategic and proactive long-term investment plan.*
- *make payments to accredited state and territory Trusts that deliver actions in the long-term investment plan.*

- *compensate landholders affected by the influx of a mobile threatened species into an area causing significant financial burden.*

It is further recommended that the Department undertake some preliminary work to develop an approach to assessing public benefits and regularly monitoring, evaluating and publishing the results of the Trust's activities.

We support this in part, but note no public funding should be used to purchase private biodiversity offsets as is suggested in the fourth dot point. To clarify:

- the Federal Government should look to purchase ecosystem service credits where this provides a public good, such as the protection of threatened species habitat on private land or provision of essential ecosystem services.
- However if these measures were then used to justify the destruction elsewhere (eg purchasing ecosystems credits on behalf of farmers who wish to clear land elsewhere), it becomes a subsidy for habitat destruction elsewhere.
- A key principle of offsets is the internalisation of environmental harms/costs through a price signal. Therefore agricultural (or other interests) who wish to clear land with MNES should be liable for any offset provision.

It now appears unlikely that \$1 billion over four years would be sufficient, as proposed by the Craik review, in the context of the levels of investment needed post the 19/20 bushfire crisis.

Broader ecosystem service markets

The questions relating to establishing markets for biodiversity, particularly in the regulatory context are almost always geared toward the provision and trading of biodiversity offsets (see further discussion below). The failure to implement the EPBC Act offsets policy, track its implementation or develop the necessary business systems to ensure rigour in its implementation cast significant doubt on the capacity of the Department to develop an effective market based approach.

History also tells us that where natural resource markets have been developed by government policy, they need to be accompanied by a significant investment in oversight and accountability bodies. The evolution of the water market in the Murray Darling Basin and establishment of associated agencies are testament to this. From a poorly regulated market with cases of corruption and collusion culminating in explosive allegations aired on national television, to one with increasingly strict compliance frameworks and new regulators who are prepared to enforce laws and stronger monitoring requirements.

There are opportunities for increasing biodiversity investment through market based approaches, and these don't solely rely on regulated biodiversity offsets. Law can be a useful tool for helping to establish tradable units and investment products. For example creating a framework for the measurement and provision of ecosystem services.

Investment in Australia's environment would benefit from establishing a broader market for ecosystem services. It is difficult to ascertain cost versus benefits between economic

production and environmental value when environmental services such as pollination or water filtration through forests are not appropriately measured and valued.

Establishment of a market mechanism for ecosystem services including work on appropriate valuation would help to drive more investment into biodiversity which provide ecosystem services such as pollination or water filtration. An initial market with government involvement could be established beginning with a smaller group of services before enlarging the scope and number of participants. Getting the investment vehicle right and addressing market failures will be key. A national fund, similar to the Clean Energy Finance Corporation, could be established for natural resources and ecosystem services to leverage co-investment from other sectors. A national investment vehicle will be able to leverage the significant need for sustainable finance products to look at fit for purpose funding such as concessional finance, bonds and capped return investment as well as debt products and grants. Key to such a mechanism will be ensuring adequate measurement frameworks and broad sectoral buy-in and support.

Recommendation:

That a \$4.5 billion fund be established to provide incentives for private landowners and purchase ecosystem service from willing sellers. This should”

- *deliver funding through a mixture of investment vehicles, such as grants, impact bonds, ecosystem service investment*
- *Established to achieve the objectives of the the legislation and goals outlined in national plans;*
- *Leverage its size to deliver private sector co-investment in sustainable agriculture, water management and forestry*
- *provide funds to deliver investments in productive landscapes which are not tied or contingent on biodiversity offsets.*

The fund should be independently administered through the National Environment Commission or other independent statutory authority, and include

- *Independent governance and decision making*
- *High levels of transparency and accountability; and*
- *Expert advisory and community consultative bodies;*

Biodiversity offsets

Relates to discussion paper Question 24

Biodiversity offsets are a mechanism to compensate for the loss of habitat or other protected matter values as a result of development. Theoretically, they are an option of last resort after all avoidance and mitigation measures to reduce impacts have been pursued. They seldom operate this way - and often form a key focus of regulatory decision making.

Policies across Australia have varying objectives, 'net-gain' (Victoria), 'no-net loss' (NSW) or 'improve and maintain' (Federal). Research has highlighted that all Australian policies only deliver benefits when measured against assumed counterfactuals that inflate the rate of biodiversity loss. As noted in the study:

“crediting baselines in Australian offset schemes risk exacerbating biodiversity loss. The near-ubiquitous use of declining crediting baselines risks ‘locking in’ biodiversity decline across impact and offset sites, with implications for biodiversity conservation more broadly”¹⁰⁶

Generally, offsets are over-used in the regulatory tool-kit. And whilst there are offsets policies across jurisdictions, these are often focussed on different environmental values, depending on the key focus of legislations (for example the EPBC Act generally focuses on threatened species whereas the NSW Government approach focuses on native vegetation). Biodiversity offsets can send an important price signal and drive the internalisation of environmental harms/costs, however in general decision making criteria under EPBC are not robust enough to ensure price signals are heeded. It is often more attractive for proponents to negotiate or game down offset liabilities with the regulator than accept an offset liability that reflects the negative environmental cost and externalities of their activity (see case study below).

Issues with the administration of EPBC Offsets

There are systemic issues with how biodiversity offsets are tracked and disclosed under the EPBC Act. This lack of data capture and transparency creates issues with offset delivery and compliance with offset obligations. Whilst this is challenging for business, it presents a serious risk to environmental outcomes.

There is a significant absence of evidence that demonstrates, at a policy level, that biodiversity offsets are fulfilling their stated objectives to 'improve and maintain' the populations of threatened species. This is significantly exacerbated by the lack of data collection by the regulator. Given offsets have been implemented in Australia for two decades and there still remains a lack of evidence to their performance, an in-depth review is required to evaluate their efficacy and effectiveness as an environmental policy mechanism. There must also be clear limits to the use of offsets, especially for impacts on

¹⁰⁶ Martine Maron, Joseph W. Bull, Megan C. Evans, Ascelin Gordon, Locking in loss: Baselines of decline in Australian biodiversity offset policies, *Biological Conservation*, Volume 192, 2015,

species or ecosystems that are highly threatened, irreplaceable, or for which there is sufficient scientific uncertainty as to the key mechanisms for their recovery.

There has been a noted absence of additional policy guidance on the application of the EPBC Act offsets assessment guide, which relies on the interpretation of a number of technical elements to be inputted into a calculator. This lack of guidance and criteria have meant that the guide itself can be easily gamed to produce less than scientifically robust offset scenarios (see case study 10). This was reaffirmed by the Craik Review, which found:

“DoEE does not publish the information used to determine metrics for environmental offsets. Based on offsets cases heard throughout the course of this Review, it is possible to conclude that DoEE does not have a standard approach to determining environmental offset conditions or approvals and that there is no formal mechanism to ensure consistency across cases. The Review recommends that in addition to targeted guidance as to when and which environmental offsets are appropriate, guidance should also be provided on how offsets are calculated.”¹⁰⁷

The current approach to offsets are not codified in law and are viewed as only policy. Giving the minister, and more frequently department delegates, flexibility to bend outcomes depending on political, proponent and interest group pressure.

These issues are not new and are well known by the Department. They have been raised in numerous inquiries, submissions and meetings. The lack of policy refinement and improvement 8 years after the offsets policy was released highlights a significant amount of policy inertia.

Noting that departments take direction from the government and that there has been significant turnover in ministerial responsibilities, there has still been sufficient opportunity to drive improvements in these processes. The Department has, similar to its approach to approvals, backloaded these issues almost entirely into this review process. It reinforces the need to reset the departments regulatory and policy culture and the case for institutional and governance reforms, including new environmental institutions. To contrast, the NSW biodiversity offsets approach has gone through a continual period of review and evolution. From bio-banking in the early 2010's, to the FBA methodology in 2015 to the Biodiversity Assessment Method. Whilst not perfect, there has been a greater level of investment in policy development and market maturity in NSW.

Public policy is not static and it shouldn't be left to 10 year statutory reviews to evaluate the effectiveness of the EPBC Act offsets policy. The EPBC offsets policy outlined an adaptive approach, including a one year technical review and five year whole of policy review to improve its performance. It outlined a register to be developed to track and measure outcomes. None of this has occurred. The policy has been used for regulatory processes, but also treated as a legacy policy that effectively needs to be sunsetted, with reviews and refinements almost entirely deferred for its period of operation. When looked at in totality, it

¹⁰⁷ Craik, W. 2018. *Review of interactions between the EPBC Act and the agriculture sector*. Independent report prepared for the Commonwealth Department of the Environment and Energy <https://www.environment.gov.au/system/files/resources/0bb50a4d-b273-4a31-8fdb-dcde90edef3e/files/review-interactions-epbc-act-agriculture-final-report.pdf>

is a damning picture of public policy implementation. The lack of analysis of 8 years of offset data also limits the capacity of this review to fully understand where and how improvements need to be made.

Case study 10 - First Nine Residential Development, Qld

- The development of 'First Nine' is a master planned residential development located to the east of the existing Brookwater community and within the Greater Springfield Master Planned Development Area. Main uses include medium density and low density residential, roads and parks
- On 9 January 2018, the Minister's delegate approved the clearing of 46.2 hectares of koala habitat in Brookwater, Queensland, by Springfield Land Corporation (SLC) to make way for a residential development of 800-900 lots
- In an internal briefing, the Department of Environment and Energy describes the native vegetation proposed for clearing as "habitat critical to the survival of the koala" and notes that habitat loss is "one of the main threats to the koala".¹⁰⁸ Koalas were found in the native vegetation proposed for clearing. To compensate for this impact, the Department determined that SLC must secure an environmental offset.
- During a 21-month consultation and assessment process¹⁰⁹, SLC failed to identify a suitable offset. The Department repeatedly asked for this information from the proponent and, throughout the process, repeatedly made concessions that allowed them to complete the approval process without ever identifying a suitable offset.
- When the development was approved, the Department considered that the offset was inadequate. Nevertheless, they approved the development—citing that it was consistent with another development nearby, the "Spring Mountain project", that also did not meet its offset obligations when it was approved.¹¹⁰
- The Department's assessment of the proposed offset identified that the proponent had "potentially overstated the averted loss the offset will achieve", and, did not apply the offsets methodology correctly, "potentially providing results that do not accurately reflect habitat quality at the impact and offset sites".¹¹¹
 - The Department's own calculations, according to their communication with the proponent's consultant¹¹², found that the percentage of impact offset was 17.4% (as opposed to the conventional minimum of 90% described in the Department's offsets policy).¹¹³

¹⁰⁸ Page 2, Document 5, FOI 190207; Page 6, Document 5a, FOI 190207

¹⁰⁹ Referral published date is 1 April 2016, a variation was made to the approval in August 2016

¹¹⁰ Page 3, Document 5, FOI 190207

¹¹¹ Page 7, Document 5a, FOI 190207

¹¹² Page 7, Document 5f, FOI 190207

¹¹³ http://www.environment.gov.au/system/files/resources/12630bb4-2c10-4c8e-815f-2d7862bf87e7/files/offsets-policy_2.pdf

- There is no where in the EPBC Act offsets policy or guidance that says decision making based on precedence over-rides stated policy positions, such as the effective operation of the Offsets Assessment Guide.
- This highlights the failure to effectively implement the offsets policy - relying on a non-disclosed “precedence argument” diminishes environmental outcomes has two very serious negative consequences:
 - It diminishes environmental outcomes for the Koala, which has experienced close to 1 million ha of known habitat loss since 2000
 - It unfairly advantages those proponents who know to use this argument in diminishing their offset liability.
- The use of non-public reasoning presents a legal risk to decision making under the EPBC Act and demonstrates a high degree of regulatory capture.

Improving biodiversity offsets

A number of the principles that underpin EPBC Act offsets still represent sound policy thinking:

1. deliver an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected by national environment law and affected by the proposed action
2. be built around direct offsets but may include other compensatory measures
3. be in proportion to the level of statutory protection that applies to the protected matter
4. be of a size and scale proportionate to the residual impacts on the protected matter
5. effectively account for and manage the risks of the offset not succeeding
6. be additional to what is already required, determined by law or planning regulations or agreed to under other schemes or programs
7. be efficient, effective, timely, transparent, scientifically robust and reasonable
8. have transparent governance arrangements including being able to be readily measured, monitored, audited and enforced.

In assessing the suitability of an offset, government decision-making will be:

9. informed by scientifically robust information and incorporate the precautionary principle in the absence of scientific certainty
10. conducted in a consistent and transparent manner.

Many of these principles stand the test of time in relation to a counterfactual offset delivery model (noting other models of offset delivery discussed below).

Improvements to federal biodiversity offsets should include:

- Ensuring biodiversity offsets are not utilised for matters that cannot be restored or replaced, such as endangered or critically endangered species and ecological communities;

- Genuinely require that offsets are a last resort, after all efforts are made to avoid and minimise impacts;
- Provide clear guidance as to what impacts must be 'avoided', for example where they trigger a level of impact over a certain threshold on endangered MNES;
- Enable third party enforcement (of offset requirements) see more above.
- make clear that no offsets should be available for future mine remediation due to lack of evidence of success; and
- any offsetting must be consistent with recovery goals in recovery plans.

Offset investment vehicles

The discussion paper raises the issues of offsets in a number of questions, including question 23, 24 and 25 . The general intent seems to explore the desire and intent of developing an offset market, akin to the BCT in NSW. As noted in case study 6, despite institutional frameworks that are strong, the BCT is limited by the objects and intent of the legislation. In the case of NSW this has meant a significant increase in habitat destruction without equivalent conservation gains.

The risks of trust fund models are clear. Once offsets funds are pooled with other revenue streams, the delineation between the public and private investments become difficult. It also creates disincentives for others (private or public) to pool funds. There have been multiple attempts to funnel offset funds into government priorities as a means to offset declining public funding due to program and budget cuts.

Trust models rely on increasing turnover and liquidity to reach scale and size. This can be counter to the need for conservation outcomes if these models rely on offsets, as it means achieving scale relies on greater destruction of habitat occurring. If liquidity and market operation becomes the focus, as alluded to in the discussion paper, offsets would not be effective as a compensation mechanism.

Noting the above, there is a case for enabling proponents, who are not conservation or NRM organisations, to discharge their offset liabilities in a manner that is efficient and enables greater surety of outcomes.

Therefore the efficacy of the establishment of any trust model would entirely depend on the outcomes it proposes to deliver (including an adequate quantum of offsets), the institutional governance, transparency arrangements and accountability mechanisms

Target based compensation

Recent research has highlighted the potential for target based compensations as a new model for offset development. Additional research and prototyping of the approach is needed, but it presents a new approach that can *potentially* avoid the many pitfalls of existing approaches.

As noted in Simmonds et al:

“targeted conservation outcomes such as desired species populations or minimum ecosystem extents are set in absolute terms at the jurisdictional level. The required trajectory needed to achieve a target for a particular species, assemblage, or ecosystem (hereafter, “biodiversity feature”) depends on the level (e.g., number, amount, area) of the biodiversity feature when the jurisdictional-level target for that biodiversity feature was set. ¹¹⁴

Key to target based offsetting will be the strength and accuracy of targets and implementation frameworks (see above on environmental outcomes and standards). For Australia to avert its worsening biodiversity and extinction crisis, strong targets are needed. In the absence of ambitious targets, it is patently clear that target based offsetting would fail in delivering meaningful conservation benefit.

Table 2 - Advantages and challenges of Target Based and Counterfactual Based Offsetting from Simmonds et al

	Advantages	Risks and challenges
Counterfactual-based offsetting (aiming for no net loss relative to a counterfactual scenario)	<ul style="list-style-type: none"> • Can be implemented in the absence of any articulated conservation targets • Increases the attention on the difference made by a conservation intervention • Can be implemented for individual projects in poorly-regulated settings • Main concepts and approaches familiar to many practitioners / policy makers 	<ul style="list-style-type: none"> • Outcomes are relative to a dynamic counterfactual trajectory that cannot be known in advance, only estimated • Biodiversity decline continues even though a project may achieve no net loss relative to a declining counterfactual • Constructing robust counterfactuals is conceptually complex and can be data-hungry • The type and amount of offset action required is highly sensitive to assumptions about the counterfactual trajectory • The end point of the biodiversity trajectory is implicit or unknown • Relatively easy to manipulate the counterfactual and thus undermine the net outcome
Target-based ecological compensation (aiming for net jurisdictional outcomes aligned with specific biodiversity targets)	<ul style="list-style-type: none"> • Aligns outcomes of actions regulated by compensatory policy with overarching conservation objectives • Outcomes are explicit and relative to a fixed, known point in time • ‘No Net Loss’, ‘Net Gain’ and ‘Managed Net Loss’ have intuitive meanings • Standardises calculation of the type and amount of compensation required • Complex, dynamic counterfactual scenarios are not required 	<ul style="list-style-type: none"> • Requires articulation of conservation targets, potentially creating incentive to ‘set bar low’ to facilitate ‘business as usual’ compensatory policy (not advocated by this framework) • Requires estimate of the difference between the target state and current state of impacted biodiversity features • When targets are at odds with actions occurring or planned outside the scope of the compensatory policy, target-based actions can be suboptimal • Target-based ecological compensation is a relatively new concept (although similar approaches exist in some jurisdictions) and will take adjustment

As summarised by the researchers:

Ecological compensation should always be an option of last resort. In instances where the biodiversity features that are exposed to residual project losses are

¹¹⁴ Simmonds, JS, Sonter, LJ, Watson, JE, et al. Moving from biodiversity offsets to a target-based approach for ecological compensation. *Conservation Letters*. 2019;e12695. <https://doi.org/10.1111/conl.12695>

imperiled and irreplaceable—in other words, they cannot be feasibly improved or recreated—ecological compensation is not acceptable, and losses must be avoided altogether. Where residual losses can be reasonably addressed through compensatory interventions, this target-based framework provides a pathway toward more transparent and effective outcomes. It explicitly links compensatory actions to broader biodiversity targets, and clarifies and simplifies the expectations on and requirements of developers. In this regard, it represents a step toward the coordinated planning and integrated actions that will be crucial to stem and reverse biodiversity losses in the face of ongoing development pressures.¹¹⁵

The biggest risk in the context of this review is the implementation gap for offsets. The significant failure of implementation of the offsets policy, discussed throughout this submission means that central to policy reform, will be governance and regulatory culture reform. The two cannot be divorced.

Recommendations

The Department invest in collecting and evaluating the data on the delivery of existing EPBC Act offsets policy and performance of the EPBC Act offsets assessment guide.

As an urgent priority the Government must develop a register that can outline the:

- *Status*
- *Location*
- *Values protected*
- *Compliance record*

For all existing and potentially new biodiversity offsets. This should be done in a manner that can integrate with future data reforms (as outlined above)

Simpler and more transparent metrics for offset calculation should be developed.

Offset principles should be strengthened and build on existing EPBC offset principles including those relating to:

- *Aim to improve or maintain populations*
- *Like for like offsets*
- *Additionality*
- *Timeliness*
- *Accounting for risk: and*
- *Transparency*

Additional principles should be developed including

- *Ensuring there are limits to the application of biodiversity offset (eg offsets are not utilised for matters that cannot be restored or replaced, such as endangered or critically endangered species and ecological communities or critical habitat areas);*
- *Genuinely requiring that offsets are a last resort, after all efforts are made to avoid and minimise impacts;*

¹¹⁵ Ibid

- *Providing clear guidance as to what impacts must be 'avoided', for example where they trigger a level of impact over a certain threshold on endangered MNES;*
- *Enabling third party enforcement (of offset requirements) see more above.*
- *Ensuring existing obligations are not utilised for offsets, such as mine rehabilitation; and*
- *any offsetting must be consistent with recovery goals in recovery plans.*

Biodiversity offset policy should be driven by capacity for offsets to compensate for the loss of environmental values (and not enable offsets to be utilised where this is not possible) and not be driven by market size or liquidity.

Trust models for offsets can enable more strategic delivery of offsets, but come with risks to environmental outcomes, especially in the absence of robust governance frameworks. Any establishment of trust models for offset delivery must be accompanied by

- *robust rules for offset calculation and delivery*
- *Independent governance at arms length from ministerial intervention*
- *High levels of transparency and accountability*

Target based approaches to biodiversity offsets, consistent with latest scientific thinking, should be evaluated and openly modelled in the context of new statutory objectives, outcomes, targets, standards and plans under environmental law.

Future trends

Relates to discussion paper Question 7

Climate change

Climate change is going to dramatically impact Australia's environment, economy and society. We have now experienced a third major bleaching event in 4 years on the Great Barrier Reef. The catastrophic fires of the recent summer commenced in Spring 2019, well before our fire season started.

Natural disasters, such as droughts, floods and cyclones, will become more frequent and more severe under climate change.

The reality is that our current national environmental law is entirely silent on the issue of climate change, the biggest threat to our natural environment and society. The EPBC Act does not mention climate change or greenhouse gas emissions, nor reference Australia's obligations under the UNFCCC.

Any reform of environmental law must grapple with both the mitigation and adaptation of climate change impacts.

Steeper declines in biodiversity

The discussion paper rightly points out that The 2019/20 bushfire season was unprecedented in its duration and severity. The impacts on wildlife and ecosystems have been severe. Natural and human induced events that impact on biodiversity are occurring faster than predictions. Biodiversity declines are steeper and ecosystem collapse is happening at a much faster scale than models have predicted.

Increasing concern amongst Australians

Coinciding with increases in the impacts from climate change and steep declines in biodiversity, we are witnessing significant increases in the level of concern amongst Australian's for the health of our natural world, and this is across the political spectrum. As the discussion paper highlights, communities will have significant expectations that government will act. This was highlighted by recent nationally representative polling completed by YouGov on behalf of ACF and Places You Love which found:

- Most Australians (64 per cent) and the majority of Coalition voters (57 per cent) believe environment laws should be strengthened.
- Almost nine in 10 say unless something is done now to protect natural habitats following the bushfires, wildlife species are at risk of extinction (87 per cent).
- Most Australians believe the government should invest more in the recovery of Australia's wildlife and their natural habitats (84 per cent).

- Most believe the Federal Government is doing a poor job of protecting the country's forests, rivers and wildlife (57 per cent).
- Eight in ten Coalition voters agree the Government should be doing significantly more to protect and restore wildlife (82 per cent) and forests and natural landscapes (81 per cent).
- Two-thirds of Australians agree there should be a complete end to logging of native trees in Australia to facilitate a faster recovery following the bushfires (66 per cent).¹¹⁶

¹¹⁶ Nine in 10 Australians are worried about post-bushfire extinctions: poll
https://www.acf.org.au/nine_in_10_australians_worried_about_post_bushfire_extinctions