From:
Sent: Friday, 19 June 2020 10:40 AM
To:
Cc: James Tregurtha; Dean Knudson
Subject: Advance copy of the Interim Report [SEC=OFFICIAL]

Hi

This is an update to confirm the arrangements for providing the Minister with the EPBC Review Interim Report.

Graeme advises that he will provide an advance copy of his Interim Report for information to the Minister early next week. It will be the final version he has signed off, but wont at that point be tidied up, with the desktop editing and preparation for web publication to occur during the week. Graeme is aiming to publish the report on Tuesday the 30th of June, in line with his messaging to stakeholders.

It would be good to confirm a meeting slot with the Minister so that the provision of the advance copy can be supported by a talk through from Graeme. Can you advise if Tuesday is possible (the 23rd)?

Following the briefing we can work with the office to develop any supporting material for the Minister when Graeme publishes.

Bruce Edwards
Assistant Secretary - Environment Protection Reform

From:
Sent: Friday, 19 June 2020 12:24 PM
To:
Subject: Re: Advance copy of the Interim Report [SEC=OFFICIAL]

Yes

Sent from my iPhone

On 19 Jun 2020, at 11:23 am, wrote:

are you happy for meeting with Graeme to be scheduled for Tuesday?

From: Bruce Edwards
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Bruce Edwards
Assistant Secretary - Environment Protection Reform

From: Bruce Edwards
Sent: Monday, 22 June 2020 11:00 PM
To:
Cc: James Tregurtha; Dean Knudson;
Subject: EPBC Act Review Interim Report Exec Summary [SEC=OFFICIAL:Sensitive]
Attachments: MS20-000410 interim report exec summary briefing.docx; MS20-000410 Attachment A.pdf; MS20-000410 Attachment B.docx

Hi

See attached the briefing to support the Minister's meeting with Professor Samuel tomorrow at 11.30am. The brief includes a copy of the Executive Summary of the EPBC Review's Interim Report. Given the lateness of this material I thought it worth emailing it through, in advance of submitting via PDMS in the morning.

As noted in the brief, we will provide the full Interim Report in coming days once all drafting is complete. I expect we'll have it ready by mid-week.

We have provided talking points to support the Minister should she be approached for comment once the Interim Report is published next week.

Bruce

Bruce Edwards
Assistant Secretary - Environment Protection Reform

DEPARTMENT OF THE ENVIRONMENT AND ENERGY

MS20-000410

To: Minister for the Environment (For Information)

EPBC ACT REVIEW – INTERIM REPORT EXECUTIVE SUMMARY

Recommendation:

1. That you note the Executive Summary of the EPBC Act Review Interim Report (**Attachment A**) and associated talking points (**Attachment B**).

Noted / Please discuss

Minister: Date:

Comments:

Clearing Officer: Sent: xx/6/2020	James Tregurtha	First Assistant Secretary, Environment Protection Reform	
Contact Officer:	Bruce Edwards	Assistant Secretary, Environment Protection Reform	

Key Points:

1. This brief provides the Executive Summary of the EPBC Act Review Interim Report, prepared by Professor Graeme Samuel AC (**Attachment A**). An advance copy of the full Interim Report will be provided to your office this week, once all drafting is complete. The Interim Report has started the process of final desktop editing and layout, set to continue this week to support its publication on the Review's website in the week of 29 June.

2. The Interim Report is not required under the Review's Terms of Reference but has been developed by Professor Samuel to test early reform directions with stakeholders.

3. The Interim Report will be open for public comment through an online survey platform, for a comment period of 4 weeks. Professor Samuel will also undertake further targeted engagement with key stakeholder groups. These processes will help to fine-tune the reform ideas for inclusion in the Review's Final Report in October.

4. The Department has prepared talking points at **Attachment B** should you be approached for comment.

About the report

5. Professor Samuel prepared the Interim Report drawing on advice from the Expert Panel, engagement with key stakeholders and the content from public submissions. The Review received around 26,000 campaign submissions and 3,700 unique submissions.

6. Professor Samuel's interim view is that the EPBC Act does not position the Commonwealth to effectively protect the environment. The Act is dated and inefficient,

adding unnecessary costs for business; and, is not fit to manage current and future environmental challenges.

7. The report outlines a potential comprehensive package of reform, centred on legally enforceable National Environmental Standards to provide clarity about the outcomes sought under the Act. Standards would be granular and measurable, providing flexibility for development, without compromising environmental sustainability.

8. The National Environmental Standards are highlighted as a pathway to support trusted devolution of decision making. The report suggests supported devolution could be progressed immediately. Professor Samuel will provide 'prototype' interim standards that could underpin early progress in this area.

9. Other areas highlighted for early action include reducing points of clear duplication, inconsistencies, gaps and conflicts in the EPBC Act; measures to improve trust; and transparency and improvements to compliance and enforcement tools.

10. In the medium to longer term Professor Samuel suggests a greater shift to landscape scale approaches, such as regional planning; exploration of market or funding mechanisms to invest in environmental restoration; new data, monitoring and evaluation processes; and a complete re-write of the Act to simplify and modernise its operation.

Handling and sensitivities

11. It is unlikely that stakeholders will welcome all aspects of the report. There is however consensus that better certainty is needed for the environment and for business. Professor Samuel has encouraged stakeholders to consider how standards could be developed and improved over time to provide this certainty.

12. It will be important to remind stakeholders that this is an interim report from the Independent Reviewer. Their focus should now be on helping to develop the reform ideas, with an eye to how reform could best be supported by all parties. Stakeholders need to be pragmatic and willing to start with something reasonable that can be built on.

13. It is also noted that the Senate recently passed a motion to require the Interim Report to be tabled in Parliament by 7 July 2020. The Department will support you to table the report.

Attachments

A: EPBC Act Review –Interim Report Executive Summary
B: Talking points

Summary points

Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The current environmental trajectory is unsustainable.

The construct of Australia's federation means that the management of Australia's environment is a shared responsibility and jurisdictions need to work effectively together, and in partnership with the community.

The EPBC Act is ineffective. It does not enable the Commonwealth to play its role in protecting and conserving environmental matters that are important for the nation. It is not fit to address current, let alone future environmental challenges.

Fundamental reform of national environmental law is required, and legally enforceable National Environmental Standards should be the foundation. Standards should be granular and measurable, providing flexibility for development, without compromising environmental sustainability.

National Environmental Standards should be regulatory instruments. The Commonwealth should make National Environmental Standards, in consultation with stakeholders, including the States and Territories. The law must require the Standard to be applied, unless the decision maker can demonstrate that the public interest and the national interest is best served otherwise.

Precise, quantitative standards, underpinned by quality data and information, will support faster and lower cost assessments and approvals, including the capacity to automate consideration and approval of low risk proposals.

The EPBC Act has failed to fulfil its objectives as they relate to Indigenous Australians. Indigenous Australians' Traditional Knowledge and views are not fully valued in decision making, and the Act does not meet the aspirations of Traditional Owners for managing their land. A specific Standard for best practice Indigenous engagement is needed to ensure that Indigenous Australians that speak for, and have Traditional Knowledge of, Country have had the proper opportunity to contribute to decision-making.

Indigenous Australians seek stronger national-level protection of their cultural heritage. The suite of national level laws that protect Indigenous cultural heritage in Australia needs comprehensive review. Cultural heritage protections must work effectively with the development assessment and approval processes of the EPBC Act.

There is duplication between the EPBC Act and state and territory regulatory frameworks for development assessment and approval. While efforts have been made to harmonise and streamline with the states and territories, this has not gone far enough.

The proposed National Environmental Standards provide a clear pathway for greater devolution. Legally enforceable Standards, transparent accreditation of state and territory arrangements, and strong assurance are essential to provide community confidence in devolved arrangements. Greater devolution will deliver more streamlined regulation for business, while ensuring that environmental outcomes in the national interest are being achieved.

The community does not trust the Act to deliver effective protection of the environment and industry view it as cumbersome, duplicative, slow. Legal review is used to discover information and object to a decision, rather than to test and improve decision making consistent with the law. Reforms should focus on improving transparency of decision making, to reduce the need to resort to court processes to discover information. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

Decision makers, proponents and the community do not have access to the best available data, information and knowledge. There is no single national source of truth that people can rely on. This adds cost for business and government, as they collect and recollect the information they need. A national 'supply chain' of information is required so that the right information is delivered at the right time to those who need it. A transparent supply chain will build community confidence that decisions are made on comprehensive information and knowledge, and that decisions are contributing to intended outcomes.

A quantum shift is required in the quality of information accessible data and information available to decision makers so that decision-makers can comprehensively consider the environmental, economic, social, cultural factors. To apply granular standards to decision making, stakeholders need the capability to better model the environment, including the probability of outcomes from proposals. To do this well, investment is required to improve knowledge of how ecosystems operate and develop the capability to model them.

Given the state of decline of Australia's environment, restoration is required to enable future development to be sustainable. Available habitat needs to grow to be able to support both development and a healthy environment. The EPBC Act should require proponents to exhaust all reasonable options to avoid or mitigate impacts on the environment. Where this is not feasible, the remaining impacts the development should be offset in a way that restores the environment.

Monitoring, compliance, enforcement and assurance under the EPBC Act is ineffective, as a collaborative approach to compliance and enforcement is taken. Serious enforcement actions are rarely used, indicating a limited regard for the benefits of using of the full force of the law where it is warranted. When they are issued, penalties are not commensurate with the harm of damaging a public good of national interest. They do not provide adequate disincentive.

A strong, independent cop on the beat is required. An independent compliance and enforcement regulator, that is not subject to actual or implied political direction from the Minister, should be established. The regulator should be responsible for monitoring compliance, enforcement and assurance. It should be properly resourced and have available to it a full toolkit of powers.

The operation of the EPBC Act is ineffective and inefficient. Reform is long overdue. It is impossible for the Review to satisfy the aspirations of every person with an interest in the environment or in business development. The proposed reforms provide a way forward that seeks to build community trust that the national environmental laws deliver effective protections, while regulating businesses efficiently. The EPBC Act in its current form achieves neither.

While the proposed reforms are substantial, the changes are necessary to set Australia on a path of ecologically sustainable development. This path will deliver long-term economic growth,

environmental improvement and the effective protection of Australia's iconic places and heritage for the benefit of current and future generations.

Executive summary

Protection of Australia's environment and iconic places

Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The current environmental trajectory is unsustainable.

The overwhelming message received by the Review is that Australians care deeply about our iconic places and unique environment. Protecting and conserving them for the benefit of current and future generations is important for the nation.

The evidence received by the Review is compelling. Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The pressures on the environment are significant —including land-use change, habitat loss and degradation, and feral animal and invasive plant species. The impact of climate change on the environment is building, and will exacerbate pressures, contributing to further decline. Given its current state, the environment is not sufficiently resilient to withstand these threats. The current environmental trajectory is unsustainable.

The EPBC Act is ineffective. It does not enable the Commonwealth to effectively protect environmental matters that are important for the nation. It is not fit to address current, let alone future environmental challenges.

The way the EPBC Act operates means that good outcomes for the environment cannot be achieved under the current laws. While significant efforts are made to assess and list threatened species, once listed, not enough is done to deliver improved outcomes for them.

In the main, decisions that determine environmental outcomes are made on a project-by-project basis, and only when impacts exceed a certain size. This means that cumulative impacts on the environment are not systematically considered, and the overall result is net environmental decline, rather than protection and conservation.

The EPBC Act does not facilitate the restoration of the environment. Given the state of decline of Australia's environment, restoration to improve the environment is required to enable future development to be sustainable.

Key threats to the environment are not effectively addressed under the EPBC Act. There is very limited use of comprehensive plans to adaptively manage the environment on a landscape or regional scale. Coordinated national action to address key threats — such as feral animals are *ad hoc*, rather than a key national priority. Addressing the challenge of adapting to climate change is an implied, rather than a central consideration.

Fundamental reform of national environmental law is required, and National Environmental Standards should be the foundation.

The EPBC Act has no comprehensive mechanism to describe the environmental outcomes it is seeking to achieve, or to ensure decisions are made in a way that contributes to them. Ecologically sustainable development (ESD) should be the overall outcome the EPBC Act seeks to achieve. ESD means that development to meet today's needs is undertaken in a way that

ensures the environment, natural resources and heritage are maintained for the benefit of future generations.

Legally enforceable National Environmental Standards should be made to set the foundations for effective regulation, to ensure that decisions made under the Act clearly track towards ecologically sustainable development.

National Environmental Standards should be binding and enforceable regulations. The Commonwealth should make them, through a formal process set out in the EPBC Act. Standards should be developed in consultation with science, Indigenous, environmental and business stakeholders, and the community. While consultation with states and territories is essential, the process cannot be one of negotiated agreement, with rules set at the lowest bar.

National Environmental Standards should prescribe how decisions made contribute to outcomes for the environment. They should also include the fundamentally important processes for sound and efficient decision making. Standards should be concise, specific and focused on the requisite outcomes, with compliance focused on attaining the outcome. National Environmental Standards should *not* be highly prescriptive, where compliance is achieved by 'ticking the boxes' to fulfil a process.

As the centrepiece of regulation, National Environmental Standards should set clear rules for decision making. The law must require the Standards to be applied, unless the decision maker can demonstrate that the public interest and the national interest is best served otherwise. This contrasts to the current arrangements, where rules are buried in thousands of pages within hundreds of statutory documents, that collectively fail to provide clear and specific rules and enable highly discretionary decisions to be made.

National Environmental Standards will clearly demarcate the objectives in managing the environment, and the outcomes it seeks to achieve. This is important for the community, as they can know what they can expect from the Act. It is also important for business, who seek clear and consistent rules.

Interim Standards are recommended as a first step, to facilitate rapid reform and streamlining. These Interim Standards will need to define environmental outcomes in terms of clear limits that define acceptable impacts on nationally important environmental matters. Ultimately, Standards should be granular and measurable, and provide clarity as to where and how development can occur so as not to compromise environmental sustainability. A quantum shift will be required in the quality of accessible data and information, to increase the granularity of Standards.

Precise, quantitative Standards, underpinned by quality data and information, will provide for effective environment protection and biodiversity conservation, and ensure that development is sustainable in the long term. They will also support faster and lower cost assessments and approvals, including the capacity to automate consideration of low risk proposals.

The EPBC Act should focus on core Commonwealth responsibilities

The focus of the EPBC Act should be the Commonwealth's core responsibilities. The Act, and the National Environmental Standards that underpin its operation, should focus on the places, flora and fauna that the Commonwealth is responsible for protecting and conserving in the national

interest, including World and National Heritage, Ramsar wetlands, and nationally important species and ecological communities. Under the Act, these nationally important matters are called "Matters of National Environmental Significance" or MNES.

Proposals have been made to remove the Commonwealth's role on regulating water impacts from coal and coal seam gas, and nuclear activities. The Review considers the Commonwealth should maintain an ability to intervene where developments may result in the *irreversible depletion or contamination* of cross-border water resources. Similarly, for community confidence, the Commonwealth should retain the capacity to ensure nuclear (radioactive) activities are managed effectively.

The Review does not support the many proposals received to broaden the environmental matters dealt with in the EPBC Act. To do so would result in muddled responsibilities, leading to poor accountability, duplication and inefficiency.

While climate change is a significant and increasing threat to Australia's environment, successive Australian Governments have elected to adopt specific mechanisms and laws to implement their commitments to reduce greenhouse gas emissions, including those that operate economy wide.

The EPBC Act should not duplicate the Commonwealth's framework for regulating emissions. It should however require that development proposals explicitly consider the effectiveness of their actions to avoid or mitigate impacts on nationally protected matters under specified climate change scenarios.

This position is consistent with the foundational intergovernmental agreements. It was agreed that emissions would be dealt with by national level strategies and programs, rather than the EPBC Act. . The Review is considering the merit of whether proposals required to be assessed and approved under the EPBC Act (due to their impacts on nationally protected matters), should be required to transparently disclose the full emissions profile of the development.

Planning at the national and regional (landscape) scale is needed to take action where it matters most, and to support adaptive management

Regional (landscape) plans should be developed that support the management of threats at the right scale, and to set clear rules to facilitate and manage competing land uses. These plans should prioritise investment in protection, conservation and restoration to where it is most needed, such as biodiversity hotspots, and where the environment will most benefit.

Ideally these plans would be developed in conjunction with states and territories. Where this cooperation is not possible, the Commonwealth should develop its own plans to manage threats on a landscape scale, and cumulative impacts on MNES. The Commonwealth's regional planning efforts should be focused on those regions of highest pressure on MNES.

Strategic national plans should be developed for 'big-ticket', nationally pervasive issues such as the management of feral animals or adaptation of the environment to climate change. These plans should guide the national response and enable action and investment by all parties to be effectively targeted to where it delivers the greatest benefit. National level plans will support a consistent approach to addressing issues in regional plans or inform activities in those areas where there is no regional plan.

More needs to be done to restore the environment.

The operation of the EPBC Act needs to shift from permitting gradual decline, to halting decline and restoring the environment, so that development can continue in a sustainable way. Active mechanisms are required to restore areas of degraded or lost habitat to achieve the net gain for the environment that is needed.

The proposed regional plans are key mechanisms that can set the priorities for restoration and adaptation, and identify where investment will have the best returns for the environment. The Review has identified opportunities for national leadership outside the Act that should be considered. Existing markets, including the carbon market can be leveraged to help deliver restoration. There are also opportunities for greater collaboration between governments and the private sector, to invest in the both in the environment directly, and in innovation to bring down the costs of environmental restoration activities.

National Environmental Standards and national and regional (landscape) plans will support greater harmonisation with the States and Territories

The construct of Australia's federation means that the management of Australia's environment is a shared responsibility. The Commonwealth and States and Territories need to work effectively together, and in partnership with the community, to manage Australia's environment and iconic places well.

Jurisdictions have agreed their respective roles and responsibilities for protecting the environment, and where possible, they have agreed that they will accommodate each other's laws and regulatory systems. While a sound ambition, more needs to be done to realise it.

The National Environmental Standards and improved planning frameworks aim to support greater cooperation and harmonisation between the Commonwealth, states and territories. Setting clear, legally enforceable rules means that decisions should be made consistently, regardless of who makes them, providing a pathway for the Commonwealth to recognise and accredit the regulatory processes of others. In pursuing greater harmonisation, the Commonwealth should retain the ability to step in to make decisions, where it is in the national interest to do so.

National Environmental Standards and national and regional plans will enable the focus of the operation of the Act to protecting the environment in the national interest, rather than transactional elements that can be duplicative, costly to business and result in little tangible benefit to the environment.

Indigenous culture and heritage

Indigenous knowledge and views are not fully valued in decision making

The Review considers that the EPBC Act is not fulfilling its objectives as they relate to the role of Indigenous Australians in protecting and conserving biodiversity and heritage, and promoting the respectful use of their knowledge.

Over the last decade, there has been a significant evolution in the way Indigenous knowledge, innovations and practices are incorporated into environmental management, for example through investment in Indigenous Rangers. The EPBC Act lags well behind leading practice.

Western science is heavily prioritised in the way the EPBC Act operates. Indigenous knowledge and views are diluted in the formal provision of advice to decision makers. This reflects an overall culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians.

The operation of the EPBC Act Indigenous Advisory Committee (IAC) exemplifies the culture of tokenism. The Act does not require the IAC to provide decision makers with advice. The IAC is reliant on the Minister inviting its views. This is in contrast with other Statutory Committees, which have clearly defined and formal roles at key points in statutory processes.

The Department has issued guidance on best practice Indigenous engagement. This sets out expectations for applicants for EPBC Act approval, but it is not required or enforceable. It is not transparent how the Minister factors in Indigenous matters in decision making for EPBC Act assessments.

The proposed National Environmental Standards should include a specific standard on best practice Indigenous engagement. The purpose of the Standard is to ensure that Indigenous Australians that speak for and have Traditional Knowledge of Country have had the proper opportunity to contribute to decisions made under the EPBC Act.

The role of the IAC should be substantially recast. The EPBC Act should establish a committee for Indigenous Knowledge and Engagement, responsible for providing the Minister with advice on Standard for Indigenous engagement. This should include the development and application of the Standard, and ensuring its effectiveness through monitoring, evaluation and review.

Indigenous Australians seek, and are entitled to expect, stronger national-level protection of their cultural heritage

Places of natural and cultural value that are important to the world or Australia can be recognised and protected by listing them as national heritage, Commonwealth heritage or World Heritage under the EPBC Act. At the national level Indigenous cultural heritage is protected under numerous other Commonwealth laws, including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act). The ATSIHP Act can be used by Aboriginal people to ask the Commonwealth Minister for the Environment to protect an area or object where it is under threat of injury or desecration and where state or territory law does not provide for effective protection.

Contributions to the Review have highlighted the importance of cultural heritage issues being dealt with early in a development assessment process. However, under the ATSIHP Act, the timing of a potential national intervention is late in the development assessment and approval process.

Indigenous Australians have emphasised to the Review the importance of the Commonwealth's ongoing role in Indigenous cultural heritage protection. As the states and territories also play a key role in the legal framework for Indigenous heritage protection, the arrangements of the jurisdictions need to work well together to avoid duplication or regulatory gaps.

The current laws that protect Indigenous cultural heritage in Australia need comprehensive review. This review should explicitly consider the role of the EPBC Act in providing national-level protections. It should also consider how comprehensive national level protections are

given effect, for example how they interact with the development assessment and approval and regional planning processes of the EPBC Act.

The EPBC Act does not meet the aspirations of Traditional Owners for managing their land

The EPBC Act provides the legal framework for the joint management of three Commonwealth National Parks – Kakadu, Uluṟu-Kata Tjuṯa and Booderee. Traditional Owners lease their land to the Director of National Parks (DNP), a statutory position established under the EPBC Act. For each of these parks, a joint management board is established to work in conjunction with the DNP.

The structure of the DNP means that position is ultimately responsible for decisions made in relation to the management of Parks, and for the effective management of risks such as those relating to occupational health and safety. Given this responsibility, the DNP has made decisions contrary to the recommendations of joint boards or made a decision when the joint board has been unable to reach a consensus view. The contributions to the Review from Traditional Owners and the Land Councils who support them, indicate that the current settings for joint management fall short of their aspirations for genuine joint decision making or indeed sole management.

The first step is to reach consensus on the long-term goals for jointly managed parks, and the nature of the relationship between Traditional Owners and the Commonwealth. The policy, institutional and transition arrangements required to successfully achieve these goals should then be co-designed with Traditional Owners.

Reforms should co-designed with Indigenous Australians

This Review has highlighted significant shortcomings in the way the views, aspirations, culture, values and knowledge of Indigenous Australians are supported by the EPBC Act.

The Commonwealth Government has committed to recognising improved outcomes for Indigenous Australians through enabling co-design and policy implementation with Indigenous people. This commitment is reflected in COAG's Commitments in the Partnership Agreement for Closing the Gap. The proposed Indigenous Knowledge and Engagement committee should play a key leadership role in the co-design of reforms.

Legislative complexity

The EPBC Act is complex, its construction is archaic, and it does not meet best practice for modern regulation. Complex legislation makes it difficult, time-consuming and expensive for people to understand their legal rights and obligations. This leads to confusion and inconsistent decision making, creating unnecessary regulatory burdens for business, and restricting access to justice.

The policy areas covered by the EPBC Act are inherently complex. The way the different areas of the Act work together to deliver environmental outcomes is not always clear, and many areas operate in a largely siloed way. There is a heavy reliance on detailed prescriptive processes that are convoluted and inflexible, meaning engaging with the Act is time consuming and costly. This is particularly the case for environmental impact assessment. Convoluted processes are made more complex by key terminology being poorly defined or not defined at all.

In the short term, legislative amendments to the EPBC Act are required to address known inconsistencies, gaps, and conflicts in the Act. In the medium term, consideration should be given to dividing the EPBC Act, creating separate pieces of legislation for the key functional areas the Act, or along thematic lines. In the longer term comprehensive redrafting of the EPBC Act (or a new set of related Acts) is required. This should be done following the development of the key reforms proposed by this Review. This will ensure that legislation is developed in a way that supports the desired approach, rather than inadvertently hindering it.

Efficiency

A key criticism of the EPBC Act is that it duplicates state and territory regulatory frameworks for development assessment and approval. The Review has found that, with a few exceptions, this is largely true. There is no systematic way to determine the additional environmental benefits resulting from the EPBC Act.

There are examples where the EPBC Act has led to demonstrably different environmental outcomes than those arising from state and territory processes. While far from perfect, the EPBC requirement for 'like for like' offsets exceeds requirements in some jurisdictions and results in additional or different conditions placed on projects resulting in better outcomes than would have otherwise been the case.

Frustration rightly arises when Commonwealth regulation does not, or does not tangibly, correspond to better environmental outcomes, given the additional costs to business of dual processes.

Efforts made to harmonise and streamline with the states and territories have not gone far enough.

The EPBC Act allows for the accreditation of state laws and management systems for both assessments and approvals.

Under a bilateral assessment agreement, the Commonwealth retains responsibility for approvals, based on environmental impact assessments undertaken by the jurisdictions. For the five-year period between July 2014 and June 2019, 37 per cent of proposals under the EPBC Act were assessed (or are still being assessed) through either a bilateral assessment (25 per cent) or accredited assessment (12 per cent) arrangements with jurisdictions. The proportion of projects covered by an assessment bilateral agreement is limited, as not all state processes can deliver an adequate assessment of matters that are protected under the EPBC Act.

Approval bilateral agreements have never been implemented. Under this type of agreement, the Commonwealth would devolve its approval decision making powers to a state or territory decision-maker. Under the current settings, the mechanism to devolve approval decisions is inherently fragile. Particularly important amendments are needed to:

- enable the Commonwealth to complete an assessment and approval if a state or territory was unable to, and
- ensure agreements can endure minor amendments to state and territory settings, rather than requiring the bilateral agreement to be remade (and consequently be subject to disallowance by the Australian Parliament on each occasion).

These and other necessary amendments have failed to garner support in the Australian Parliament. Indeed, in 2015 the Parliament did not support these amendments, in response to significant community concerns about the ability of states to uphold the national interest when making a highly discretionary approval decision.

Legally enforceable National Environmental Standards provide a clear pathway for greater devolution

The foundational intergovernmental agreements on the environment envisaged that jurisdictions would accommodate their *respective* responsibilities in each other's laws and regulatory systems, where possible. This is a sound ambition, and one that governments should continue to pursue.

The National Environmental Standards proposed by the Review would provide a legally binding mechanism to provide confidence to support greater devolution. Accrediting an alternative regulator would be on an 'opt-in' basis, and they would need to demonstrate that their system can achieve the National Environmental Standard. This may require states and territories to adapt their regulations to meet National Environmental Standards and to satisfy accreditation requirements.

The proposed devolution model involves five key steps:

1) *National Environmental Standards* to set the benchmark for protecting the environment in the national interest and provide the ability to measure the outcomes of decisions.
2) *State or territory or other suitable authority to demonstrate that their systems meet National Environmental Standards.* This element includes a formal check to give confidence that arrangements are sound.
3) *Formal accreditation by the Commonwealth Minister.* This element is intended to provide accountability and legal certainty, and the Minister should seek the advice of the proposed Ecologically Sustainable Development Committee prior to an accreditation decision.
4) *A transparent assurance framework.* This element provides confidence that parties are implementing the processes and policies as agreed. It should include the mechanisms for the Commonwealth to step in when it is in the national interest to do so.
5) *Regular review and adaptive management* that ensures decision-making contributes to the objectives established in the Standards.

Pursuing greater devolution does not mean that the Commonwealth 'gets out of the business' of environmental protection and biodiversity conservation. Rather, the reform directions proposed would result in a shift with a greater focus on accrediting and providing assurance oversight of the activities of other regulators, and in ensuring national interest environmental outcomes are being achieved.

Commonwealth-led assessments and approvals should be further streamlined

The Commonwealth should retain its capability to assess and approve projects. Commonwealth assessments and approvals will be required where accredited arrangements are not in place (or cannot be used), at the request of a jurisdiction, when the Commonwealth exercises its ability to

step in on national interests grounds, when the activity occurs on Commonwealth land, or when it is undertaken by a Commonwealth Agency outside a State's jurisdiction.

The Review has identified opportunities to streamline Commonwealth environmental impact assessments and approvals that it conducts. The most significant gains will be realised by fundamental changes to the way the EPBC Act works. Reform proposals including the development of National Environmental Standards and regional plans, and improvements in the data, information and regulatory systems discussed further below are central to improving the quality and efficiency of Commonwealth-led processes.

Streamlining the assessment pathways available under the Act will reduce the complexity of and efficiencies in the current process. The first step in all assessment pathways is known as 'referral', where the decision maker determines whether a proposal requires more detailed assessment. For proposals where the need for detailed assessment and the relevant environmental matters are obvious, the referral creates an additional, pointless step in the process.

For other proposals, the lack of clarity on the requirements of the EPBC Act means that proponents refer proposals for legal certainty. More than half of all referrals result in a decision that detailed assessment and approval is not required, or not required so long as it is carried out in a particular manner. National Environmental Standards and regional plans will provide clarity on impacts that are acceptable, and those which will require assessment and approval, enabling the referral step to be avoided.

Interactions with other Commonwealth environmental management laws

The EPBC Act operates in a way that seeks to recognise other environmental regulatory and management frameworks, including the management of Commonwealth fisheries, Regional Forest Agreements (RFAs), and offshore petroleum activities. The interplay between the EPBC Act and these other frameworks is often more onerous than it needs to be.

The Australian Fisheries Management Authority (AFMA) is responsible for the day-to-day management and compliance of Commonwealth fisheries. Assessments under the EPBC Act are conducted on the environmental performance of all export fisheries and all Commonwealth managed fisheries to ensure that fisheries are managed in an ecologically sustainable way. There are opportunities to streamline the multiple assessment and permitting processes needed to undertake commercial fishing operations in Commonwealth waters or jointly managed fisheries. Given the maturity of the fisheries management framework administered by AFMA, the Review is confident that further streamlining can be achieved while maintaining assurance in the outcomes.

A regional forest agreement (RFA) is a regional plan, agreed between a state and the Commonwealth for management of native forests. RFAs balance economic, social and environmental demands on forests and seek to deliver ecologically sustainable forest management, certainty of resource access for the forest industry and protection of native forests as part of Australia's national reserve system. The EPBC Act recognises the RFA Act, and EPBC Act assessment and approvals are not required for forestry activities conducted in accordance with an RFA (except where forestry operations are in a World Heritage property or a Ramsar wetland).

During the course of this Review, the Federal Court found that an operator had breached the terms of an RFA and should therefore be subject to the ordinary controlling provisions of the EPBC Act. Legal ambiguities in the relationship between EPBC Act and the RFA Act should be clarified, so that the Commonwealth's interests in protecting the environment interact with the RFA framework in a streamlined way.

The regulation of wildlife trade

The EPBC Act gives effect to Australia's obligations as a member of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), including the international movement of wildlife specimens. The requirements of the EPBC Act exceed Australia's obligations under CITES. Aspects of wildlife trade provisions in the EPBC Act result in administrative process and costs for individuals, business and government, while affording no additional protection to endangered species. The EPBC Act should be amended to align the requirements of the Act with CITES, and to provide for a more efficient permitting process.

Trust in the EPBC Act

The community and industry distrust the Act, and there is merit in their concerns.

The community and industry do not trust the EPBC Act and the regulatory system that underpins its implementation.

A dominant theme in the 30,000 contributions received by the Review is that many in the community does not trust the Act to deliver for the environment. Limited access to information about decisions and the lack of opportunity to substantively engage in decision making under the EPBC Act further erodes trust.

The EPBC Act and its processes focus on the provision of environmental information, yet the Minister can and should consider social and economic factors when making an approval decision. The community can't see how these factors are weighed in EPBC Act decisions. Under the current arrangements, this leads to concern that the environment loses out to other considerations as proponents have undue influence on decision makers.

The EPBC Act is also not trusted by industry. They generally view it as cumbersome, pointing to duplication, slow decision making, and legal challenges being used as a tool to delay projects and drive up costs for business (often called 'lawfare').

An underlying theme of industry distrust in the EPBC Act relates to perceived duplication with state and territory processes (see above) and the length of time it takes to receive an approval. On average, complex projects can take nearly three years, or 1014 days to assess and approve, and this is too long. Recent provision of additional resources has improved on-time approval decisions from 19 per cent to 87 per cent of key decisions made on time.

Lengthy assessment and approval processes are not all the result of a 'slow' Commonwealth regulator. On average, the process is under the management of the proponent for more than three quarters of the total assessment time, indicative of the time taken to navigate current requirements and collect the necessary information for assessment documentation. For business, time is money. Delays, regardless of when they occur, can result in significant additional costs, particularly on large projects.

Legal standing and review

The Review has received highly conflicting evidence and viewpoints about the appeal mechanisms under the EPBC Act. Where concerns arise about environmental outcomes associated with a decision, public focus turns to challenging high profile decisions. Legal review is used to discover information and object to a decision, rather than its proper purpose to test and improve decision making consistent with the law. Industry is very concerned about the delay to projects that can arise from politically motivated legal challenges.

The public discourse on legal challenges is focused on large projects, with considerable economic benefits that are in highly valued environmental areas. Pro-development groups argue that the 'extended' standing provisions (standing beyond a person directly affected by a decision) should be removed from the Act.

The Review is not yet convinced that extended standing should be curtailed. Broad standing remains an important feature of environmental legislation, particularly given the presence of collective harm resulting from damage to environmental or heritage values. The evidence suggests that standing has not been interpreted broadly by the courts. The courts have the capacity to deal with baseless or vexatious litigation and litigation with no reasonable prospect of success can be dismissed in the first instance. It may though be beneficial for the Act to require an applicant seeking to rely on the extended standing provisions to demonstrate that they have an arguable case, or that the case raises matters of exceptional public importance before the matter can proceed.

In a mature regulatory framework, judicial and merits review operate in concert. Judicial review helps ensure legal processes are followed, complemented by merits review to ensure decisions are meeting the intent of the legislation, not simply following processes.

Full merits review is not advised. Opening decisions on appeal or review, to the admission of new documentation or materials for consideration delays decisions without necessarily improving outcomes. It also promotes forum shopping.

Reforms to the Act should focus on improving transparency of decision making, to reduce the need to resort to court processes to discover information. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

Adjustments to legal review provisions should be made to provide for limited merits review 'on the papers'. This form of review limits the considerations to those matters that were raised and maintained by the applicant during the due course of the regulatory decision or matters arising from a demonstrable material change in circumstances.

Transparent independent advice can improve trust in the EPBC Act

Low levels of trust are an underlying driver behind calls for independent institutions to be established to make decisions under the EPBC Act. This solution is not supported by the Review. It is entirely appropriate that elected representatives (and their delegates) make decisions that require competing values to be weighed and competing national objectives to be balanced.

Community confidence and trust in the process could be enhanced by the provision of transparent, independent advice on the adequacy of information provided to a decision-maker.

The statutory advisory committee structures in the EPBC Act should be recast. An Ecologically Sustainable Development (ESD) Committee should be established, comprising an independent chair and the chairs of the following committees:

- Information and knowledge (to advise on science, social impacts, economics and traditional knowledge).
- Indigenous knowledge and engagement (to advise on the co-design of reforms and the National Environmental Standard for Indigenous engagement).
- Threatened species science (to advise on the status of threatened species and ecological communities and actions needed to improve their condition in regional recovery plans).
- Australian Heritage Council (as established under the *Australian Heritage Council Act 2003* to provide advice on heritage matters).
- Water resource science (advising on impacts of large projects on cross border water resources and nationally protected matters).

The ESD Committee should provide transparent advice to the Minister to inform decisions on the making of National Environmental Standards, regional plans, and the accreditation of arrangements for devolving decision making. The Minister could ask for their advice on other decisions, where they had relevant expertise.

Data, information and systems

Decision makers, proponents and the community do not have access to the best available data, information and science. This results in sub-optimal decision making, inefficiency and additional cost for business, and poor transparency to the community. The Department's systems for information analysis and sharing are antiquated. Cases cannot be managed effectively across the full lifecycle of a project, the 'customer' experience is clunky and cumbersome for both proponents and members of the community interested in a project.

The collection of data and information is fragmented and disparate. There is no single national source of truth that people can rely on. This adds cost for business and government, as they collect and recollect the information they need. It also results in lower community trust in the process, as they question the quality of information on which decisions are made, and the outcomes that result from them.

A national 'supply chain' of information is required so that the right information is delivered at the right time to those who need it. This supply chain should be an easily accessible 'single source of truth' on which the public, proponents and Governments can rely. A custodian for the national environmental information supply chain is needed, and responsibility for national level leadership and coordination clearly assigned. Adequate resources should be provided to develop the systems and capability that is needed to deliver the evidence base for Australia's national system of environmental management. The 2019 financial commitment from the Commonwealth and West Australian Governments to the collaborative Digital Environmental Assessment Program, which will deliver a single online portal for assessments and biodiversity database, is a good first step in this direction.

In the short term, the granularity of National Environmental Standards is limited by the information available to define and apply them to decision making. A quantum shift in the quality of information required to transform standards from qualitative indicators of outcomes to quantified measures of outcomes. To apply granular standards to decision making, Government needs the capability to model the environment, including the probability of outcomes from proposals. To do this well, investment is required to improve knowledge of how ecosystems operate and develop the capability to model them. This requires a complete overhaul of the systems to enable improved information to be captured and incorporated into decision making.

Monitoring and evaluation

There is no effective framework to support a comprehensive, data-based evaluation of the EPBC Act, its effectiveness in achieving intended outcomes, and the efficiency of implementation activities. The EPBC Act includes some requirements for monitoring and reporting. These are not comprehensive, and follow-through is largely focused on bare minimum administrative reporting, rather than genuine monitoring and evaluation of outcomes to learn lessons, adapt and improve.

The development of a coherent framework to monitor and evaluate the effectiveness of the EPBC Act in achieving its outcomes and the efficiency of its implementation is needed. Key reforms proposed by this Review, particularly the establishment of National Environmental Standards and regional plans, provide a solid foundation for the development of a monitoring and evaluation framework for the EPBC Act as a whole. The framework must be backed in by commitment to its implementation.

The national State of the Environment (SoE) report is the established mechanism that seeks to 'tell the national story' on Australia's system of environmental management. While providing an important point in time overview, it is an amalgam of insights and information, and does not generate a consistent data series across reports. It lacks a clear purpose and intent. There is no feedback loop, and as a nation there is no requirement to stop, review, and where necessary change course.

A revamp of SoE reporting is required. The national SoE report should examine the state and trends of Australia's environment, and the underlying drivers of these trends, including interventions that have been made. National environmental economic accounts will be a useful tool for tracking Australia's progress to achieve ecologically sustainable development. The SoE Report should provide an outlook, and the Government should be required to formally respond, identifying priority areas for action, and the levers that will be used to act.

Efforts to finalise the development of these accounts should be accelerated, so that in time they can be a core input to SoE reporting.

Environmental restoration

Given the state of decline of Australia's environment, restoration and adaptation is required to enable future development to be sustainable. Available habitat needs to grow to be able to support both development and a healthy environment.

Environmental offsets do not offset the impacts of developments

Under the current arrangements, developers can compensate for the environmental impacts of their proposals, mostly by protecting areas like that which has been destroyed or damaged. This is known as an environmental offset.

Environmental offsets are often poorly designed and implemented, delivering an overall net loss for the environment. The stated intent of the offsets policy is to encourage proponents to exhaust reasonable options to avoid or mitigate impacts. In practice, offsets have become the default negotiating position, and a standard condition of approval, rather than only used as a mean to address residual impacts.

Offsets do not offset the impact of development. Proponents are permitted to clear habitat in return for protecting other areas of the same habitat from future development. It is generally not clear if the area set aside for the offset is at risk from future development, and overall there is a net loss of habitat.

Offsets need to include a greater focus on restoration and should be enshrined in the law. The EPBC Act should require that offsets only be considered when options to avoid and then mitigate impacts have been demonstrably exhausted. Where applied, offsets should deliver genuine restoration, avoiding a net loss of habitat.

There is an opportunity to incentivise early investment in restoration. If offsets were to be supported with greater certainty under the EPBC Act, then this could be the catalyst for a market response. Proponents are generally not in the business of managing habitats as their core business. There are however expert land managers and specialist project managers who deliver these services. The right policy and legal settings would provide certainty for these players to invest in landscapes, confident that proponents will be in the market to purchase offsets based on these investments down the track.

Broader opportunities for restoration

There are opportunities beyond the EPBC Act that should be explored to accelerate investment in restoration.

The carbon market, which already delivers restoration, could be better leveraged to deliver improved biodiversity outcomes. The Australian Government has recently agreed to carbon market reforms that will increase the competitiveness of carbon-farming when compared to other land uses. More could be done if credit for biodiversity outcomes could be 'stacked' on top of carbon credits, with one area of land delivering both carbon and biodiversity outcomes.

There is an opportunity to provide the policy settings to better leverage private interest in investing in the environment as well as drive down the cost of restoration. Globally, there is growing interest from the philanthropic and private sectors to invest in a way that improves environmental outcomes. A biodiversity market is one destination for this capital, another is co-investment to bring down the cost of environmental restoration, growing the habitat available to support healthy systems. The merits of the application of these types of models for investing in environmental improvement will be further explored prior to the finalisation of the Review.

Monitoring, compliance, enforcement and assurance

Compliance, enforcement and assurance under the EPBC Act is ineffective.

There has been limited activity to enforce the EPBC Act over the 20 year period it has been in effect, and the transparency of what has been done is limited.

While the Department has improved its regulatory compliance and enforcement functions in recent years, it relies on a collaborative approach to compliance and enforcement, which is weak. Serious enforcement actions are rarely used, indicating a limited regard for the benefits of using of the full force of the law where it is warranted. When issued, penalties issued are not commensurate with the harm of damaging a public good of national interest. Since 2010, a total of 22 infringements have been issued for breaches of conditions of approval, with total fines less than $230,000. By way of contrast, individual local governments frequently issue more than this amount in paid parking fines annually.

The compliance and enforcement powers in the EPBC Act are outdated. Powers are restrictive and can only be applied in a piecemeal way across different parts of the Act due to the way it is constructed. The complexity of the legislation, impenetrable terminology and the infrequency with which many interact with the law, make both voluntary compliance and the pursuit of enforcement action difficult.

A strong, independent cop on the beat is required

An independent compliance and enforcement regulator that is not subject to actual or implied direction from the Minister should be established. The regulator should be responsible for monitoring compliance, enforcement and assurance. It should be properly resourced and have available to it a full tool-kit of monitoring, compliance and enforcement powers.

Penalties and other remedies for non-compliance and breaches of the Act and the National Environmental Standards need to be adequate to ensure that compliance is regarded as mandatory not optional. The costs of non-compliance should not be regarded as simply a cost of doing business.

While the Minister must retain responsibility for setting the rules (including making decisions and setting conditions for development approvals), the regulator should be responsible for enforcing them.

The compliance and enforcement regulator must have a clear and strong regulatory stance. While it remains important to be proportional, and to work with people where inadvertent non-compliance has occurred, the regulator needs to establish a culture that does not shy from firm action where needed.

An independent compliance and enforcement regulator will build public trust in the ability of the law to deliver environmental outcomes and that breaches of the law will be fairly, proactively and transparently managed. Strong compliance and enforcement activities protect the integrity of most of the regulated community, who spend time and money to comply with the law, with those who break the rules facing appropriate consequences.

Assurance of devolved decision making

The Review proposes reforms that will support greater devolution in decision-making. Clear, legally enforceable National Environmental Standards combined with strong assurance are

essential to community confidence in these arrangements. The independent compliance and enforcement regulator should play a key role in providing assurance of devolved arrangements.

This will require a focus on oversight of these devolved and strategic arrangements, including auditing the performance of devolved decision makers. The devolved decision maker should remain primarily responsible for project level monitoring, compliance and enforcement, and transparently report actions taken. The Commonwealth should also retain the ability to intervene in project level compliance and enforcement, where egregious breaches are not being effectively enforced by the State regulator.

The reform pathway

The EPBC Act is ineffective, and reform is long overdue. Past attempts at reform have been largely unsuccessful. Commitment to a clear pathway for reform is required. The reform agenda proposed is not one to 'set and forget'. Settings should be monitored and evaluated, and the path forward adjusted as lessons are learnt and new information and ways of doing things emerge.

Effective administration of a regulatory system is not cost free. The reforms proposed seek to improve the overall efficiency of the system. It is important to consider how to best fund the implementation of a reformed system, including the fair costs that should be recovered from proponents. In principle Government should pay for elements that are substantially public benefits (e.g. the development of standards), while business should pay for those elements of the regulatory system required because of their impact on the environment to derive private benefits (e.g. approvals and monitoring, compliance and enforcement). There are elements of the regulatory system that have mixed benefits where costs should be shared (e.g. data and information).

Immediate steps to start reform should be taken. In the first instance, amendments should be made to:

- fix duplication, inconsistencies, gaps and conflicts
- enable National Environmental Standards to be made
- improve the durability of the settings for devolved decision making.

Interim National Environmental Standards should be made, to set clear rules for decision making and to support greater devolution in decision making.

Similarly, in the short term, the conversation to deliver complex reforms and the mechanisms to underpin continuous improvement should commence so that the policy development and implementation plans can be finalised, and resourcing commitments made. This includes:

- Reforms to establish the framework for monitoring, reporting and evaluating the performance of the EPBC Act, with a key focus on the arrangements for National Environmental Standards.
- Starting the conversation with the States and Territories about state-led regional planning priorities, and priorities for strategic national plans.
- Committing to sustained engagement with Indigenous Australians, to co-design reforms that are important to them — the culturally respectful use of their knowledge, effective

national protections for their culture and heritage, and working with them to meet their aspirations to manage their land in partnership with the Commonwealth.

- Appointing a national data and information custodian, responsible for delivering an information supply chain and overhauling the systems needed to capture value from the supply chain.
- Establishing the mechanisms to better leverage investment, to deliver the scale of restoration required for future development in Australia to be sustainable in the long term.

Once the policy direction is settled, and key initiatives are underway, the final phase of reform should involve complete legislative overhaul to establish the remaining elements of reform and to focus on implementing the reformed system.

The proposed reforms seek to build community trust that the national environmental laws deliver effective protections and regulate businesses efficiently. It is impossible for the Review to satisfy the aspirations of every person with an interest in the environment or in business development. Rather, the Review has attempted to provide a way forward, to ensure effective environment protection and biodiversity conservation and efficient regulation of business. The EPBC Act in its current form achieves neither.

While the proposed reforms are substantial, the changes are necessary to set Australia on a path of ecologically sustainable development. This path will deliver long-term economic growth, environmental improvement and the effective protection of Australia's iconic places and ancient heritage for the benefit of current and future generations.

Attachment B

Talking points

- Professor Graeme Samuel AC has released his Interim Report on the independent review of the EPBC Act.
- Professor Samuel has consulted widely since commencing the review in October last year and has received around 30,000 submissions into the review process.
- The Interim Report includes Professor Samuel's early views and key reform directions. He has published this document to share and test this early thinking.
- Professor Samuel will be accepting comments on the Interim Report until Friday, 31 July.
- I encourage all Australians to read the report and to provide feedback to Professor Samuel to help develop the reform ideas further.
- It is important that people constructively engage with the ideas put forward to support much needed reform in this area.
- Professor Samuel has found that the EPBC Act is not working for the environment, or for business. This appears to be an area of consensus.
- I am keen for people to be pragmatic and to consider what a reasonable starting point to reform could be, to be built on as we go.
- I will consider areas Professor Samuel has identified to improve the operation of the Act in the short-term, while maintaining strong environment protections. If there are sensible changes that we can make, then they should be made without delay.
- The Review is independent of Government. I will not comment on the specific ideas presented in the Interim Report.
- Professor Samuel has indicated to me that he is on track to deliver his Final Report to Government by the end of October 2020. I look forward to receiving his final recommendations.

From:
Sent: Tuesday, 23 June 2020 8:17 AM
To: Sussan Ley
Subject: Fwd: EPBC Act Review Interim Report Exec Summary [SEC=OFFICIAL:Sensitive]
Attachments: MS20-000410 interim report exec summary briefing.docx; ATT00001.htm; MS20-000410 Attachment A.pdf; ATT00002.htm; MS20-000410 Attachment B.docx; ATT00003.htm

Begin forwarded message:

From: Bruce Edwards
Date: 22 June 2020 at 11:00:14 pm AEST
To:

Cc: James Tregurtha Dean Knudson

Subject: EPBC Act Review Interim Report Exec Summary [SEC=OFFICIAL:Sensitive]

Hi

See attached the briefing to support the Minister's meeting with Professor Samuel tomorrow at 11.30am. The brief includes a copy of the Executive Summary of the EPBC Review's Interim Report. Given the lateness of this material I thought it worth emailing it through, in advance of submitting via PDMS in the morning.

As noted in the brief, we will provide the full Interim Report in coming days once all drafting is complete. I expect we'll have it ready by mid-week.

We have provided talking points to support the Minister should she be approached for comment once the Interim Report is published next week.

Bruce

Bruce Edwards
Assistant Secretary - Environment Protection Reform

From:
Sent: Tuesday, 23 June 2020 9:15 AM
To:
Subject: Fwd: EPBC Act Review Interim Report Exec Summary [SEC=OFFICIAL:Sensitive]
Attachments: MS20-000410 interim report exec summary briefing.docx; ATT00001.htm; MS20-000410 Attachment A.pdf; ATT00002.htm; MS20-000410 Attachment B.docx; ATT00003.htm

FYI

Begin forwarded message:

> **From:**
> **Date:** 23 June 2020 at 8:16:53 am AEST
> **To:** Sussan Ley
>
> **Subject: Fwd: EPBC Act Review Interim Report Exec Summary [SEC=OFFICIAL:Sensitive]**

Begin forwarded message:

> **From:** Bruce Edwards
> **Date:** 22 June 2020 at 11:00:14 pm AEST
> **To:**
>
> **Cc:** James Tregurtha Dean Knudson
>
> **Subject: EPBC Act Review Interim Report Exec Summary [SEC=OFFICIAL:Sensitive]**
>
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>
> Bruce
>
> **Bruce Edwards**

From: Bruce Edwards
Sent: Thursday, 25 June 2020 11:12 AM
To:
Cc: James Tregurtha; Dean Knudson
Subject: MS20-000440- Full report.doc [SEC=OFFICIAL]
Attachments: Minister Briefing - Interim Report.pdf; Brief - MS20-000440- Full report.docx

Hi , I have submitted the attached briefing via PDMS providing an advance copy of the Interim Report from the Reviewer. It is a meaty read so I'm sending via email in case it takes a while to come through via PDMS.

Bruce

Bruce Edwards
Assistant Secretary - Environment Protection Reform

From:
Sent: Thursday, 25 June 2020 11:14 AM
To: Ley, Sussan (MP)
Subject: FW: MS20-000440- Full report.doc [SEC=OFFICIAL]
Attachments: Minister Briefing - Interim Report.pdf; Brief - MS20-000440- Full report.docx

From: Bruce Edwards
Sent: Thursday, 25 June 2020 11:12 AM
To:
Cc: James Tregurtha Dean Knudson
Subject: MS20-000440- Full report.doc [SEC=OFFICIAL]

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Bruce

Bruce Edwards
Assistant Secretary - Environment Protection Reform

DEPARTMENT OF AGRICULTURE, WATER AND THE ENVIRONMENT

MS20-000440

To: Minister for the Environment (For Information)

EPBC ACT REVIEW – ADVANCE COPY OF PROFESSOR GRAEME SAMUEL'S INTERIM REPORT

Recommendation:

1. That you note the advance copy of EPBC Act Review Interim Report (**Attachment A**).

Noted / Please discuss

Minister: Date:

Comments:

Clearing Officer: Sent: 25/6/2020	James Tregurtha	First Assistant Secretary, Environment Protection Reform	Ph: Mob:
Contact Officer:	Bruce Edwards	Assistant Secretary, Environment Protection Reform	Ph: Mob:

Key Points:

1. As you are aware, the Department provides Secretariat support to the Independent Reviewer of the EPBC Act, Professor Graeme Samuel AC. Professor Samuel has asked the Secretariat to provide you with an advance copy of his Interim Report for information.
2. The Interim Report is at **Attachment A**. A copy of the report's executive summary was provided to your office earlier in the week (MS20-000410).
3. Professor Samuel has consistently indicated an intent to make the Interim Report available at the end of June 2020. To ensure this timeframe can be met, the Interim Report is now being edited and 'laid out' to enable its publication on the Review's website in the week of 29 June.
4. Professor Samuel is also working to finalise an Appendix to the report. This will be provided to you for information when finalised.
5. The Department's media unit will support your office to respond to any media inquiries received on public release of the Interim Report.

Attachments

A: EPBC Act Review – Interim Report

Foreword

I am pleased to present the Interim Report of my independent review of the *Environment Protection and Biodiversity Conservation Act 1999.*

In conducting this review my central focus has been to determine if the EPBC Act is effective in achieving its intended outcomes, whether its operation is efficient, and importantly, if it is fit for the future. My interim view is that the Act does not position the Commonwealth Government to protect the environment and Australia's iconic places in the national interest. The operation of the Act is dated and inefficient, and it is not fit to manage current, let alone future environmental challenges, particularly in light of climate change.

The purpose of this Interim Report is to set out my preliminary views on the fundamental inadequacies of the Act and propose key reform directions that are needed to address these. It is not an exposition of all problems, nor does it reference in full depth the comprehensive information, including relevant past reviews, on which I have relied to form my view.

It is unlikely that everyone will agree on all problems or support all the proposed reform directions. Complete agreement by everyone would be a mission impossible. But I have attempted to deal with the issues that have been raised in submissions and flowing from my research in a manner that seeks to satisfy the fundamental objective of Australia having effective and efficient environment protection and biodiversity conservation.In presenting this Interim Report, I would like to hear the views of interested stakeholders. What I have missed? How could the proposed reform directions be improved? Are there fundamental shortcomings that would require me to rethink?

The level of interest in the Review has been substantial, particularly given that during the course of the Review the summer bushfires and then COVID-19 have presented significant challenges for stakeholders. The Review received more than 3,000 unique submissions as well around 26,000 largely identical contributions. I would like to thank all those who have participated in the Review.

I also thank stakeholders who have been generous in sharing their knowledge of the Act— members of the EPBC Act statutory committees, state and territory government departments, Indigenous groups and community leaders, the science community, environment and industy groups, and legal experts. I look forward to engaging further with stakeholders as I finalise the Review by October.

I have been greatly assisted by contributions from the Review Expert Panel — Mr Bruce Martin, Dr Erica Smyth AC, Dr Wendy Craik AM, and until his appointment as Royal Commissioner, Professor Andrew Macintosh. I have valued their counsel, but take full responsibility for the views presented.

In closing, I acknowledge the work of the Review Secretariat. Despite the challenging times, their support to me has been unwavering.

I look forward to hearing your views.

Interim Report – Independent review of the Environment Protection and Biodiversity Conservation Act 1999

Contents

How to have your say about the Interim Report

This is an Interim Report. It sets out views on the fundamental inadequacies of the EPBC Act and proposes key reform directions to address these. It is not an exposition of all problems, nor does it reference in full depth the comprehensive information, including relevant past reviews, on which the Review has relied.

The Interim Report is structured around the key problems identified by the Review. Given the nature and interaction of key problems, and the proposed key reforms to the system, this report is necessarily repetitive. Multiple issues with the way the EPBC Act operates contribute to the ultimate problems observed. The structure of the Interim Report — with summary points, an executive summary and key points at the start of each chapter — is intentionally repetitive to enable the reader to understand the overall message of the review in as little or as much detail as they choose.

The Review would like to hear the views of stakeholders on the Interim Report. What has been missed? How could the proposed reform directions be improved? Are there fundamental shortcomings that would require the Review to rethink?

The Review will continue to engage with stakeholders. Necessarily, this will be done in a targeted way with the goal of testing and refining key reform proposals.

All interested parties are invited to visit the 'Have Your Say' website to provide feedback via a survey. The survey is set out to focus your comments on the key reform directions proposed in the Interim Report. This is deliberate so the Review can quickly gauge views and target analysis to areas of critical concern. You are encouraged to complete the survey as early as possible to ensure adequate time for its consideration. Please refrain from resending material you have already provided to the Review.

To have your say, please visit XXXXXX and complete the survey

The survey will close at 11:59pm, Sunday 2nd August 2020.

Summary points

Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The current environmental trajectory is unsustainable.

The construct of Australia's federation means that the management of the environment is a shared responsibility and jurisdictions need to work effectively together, and in partnership with the community.

The EPBC Act is ineffective. It does not enable the Commonwealth to play its role in protecting and conserving environmental matters that are important for the nation. It is not fit to address current, let alone future environmental challenges.

Fundamental reform of national environmental law is required, and legally enforceable National Environmental Standards should be the foundation. Standards should be granular and measurable, providing flexibility for development, without compromising environmental sustainability.

National Environmental Standards should be regulatory instruments. The Commonwealth should make National Environmental Standards, in consultation with stakeholders, including the States and Territories. The law must require the Standard to be applied, unless the decision maker can demonstrate that the public interest and the national interest is best served otherwise.

Precise, quantitative standards, underpinned by quality data and information, will support faster and lower cost assessments and approvals, including the capacity to automate consideration and approval of low risk proposals.

The EPBC Act has failed to fulfil its objectives as they relate to Indigenous Australians. Indigenous Australians' Traditional Knowledge and views are not fully valued in decision making, and the Act does not meet the aspirations of Traditional Owners for managing their land. A specific Standard for best practice Indigenous engagement is needed to ensure that Indigenous Australians that speak for, and have Traditional Knowledge of, Country have had the proper opportunity to contribute to decision-making.

Indigenous Australians seek, and are entitled to expect, stronger national-level protection of their cultural heritage. The suite of national level laws that protect Indigenous cultural heritage in Australia needs comprehensive review. Cultural heritage protections must work effectively with the development assessment and approval processes of the EPBC Act.

There is duplication between the EPBC Act and state and territory regulatory frameworks for development assessment and approval. While efforts have been made to harmonise and streamline with the states and territories, this has not gone far enough.

The proposed National Environmental Standards provide a clear pathway for greater devolution. Legally enforceable Standards, transparent accreditation of state and territory arrangements, and strong assurance are essential to provide community confidence in devolved arrangements. Greater devolution will deliver more streamlined regulation for business, while ensuring that environmental outcomes in the national interest are being achieved.

The community does not trust the Act to deliver effective protection of the environment and industry view it as cumbersome, duplicative, slow. Legal review is used to discover information and object to a decision, rather than to test and improve decision making consistent with the law. Reforms should focus on improving transparency of decision making, to reduce the need to resort to court processes to discover information. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

Decision makers, proponents and the community do not have access to the best available data, information and knowledge. There is no single national source of truth that people can rely on. This adds cost for business and government, as they collect and recollect the information they need. A national 'supply chain' of information is required so that the right information is delivered at the right time to those who need it. A transparent supply chain will build community confidence that decisions are made on comprehensive information and knowledge, and that decisions are contributing to intended outcomes.

A quantum shift is required in the quality of information accessible data and information available to decision makers so that decision-makers can comprehensively consider the environmental, economic, social, cultural factors. To apply granular standards to decision making, stakeholders need the capability to better model the environment, including the probability of outcomes from proposals. To do this well, investment is required to improve knowledge of how ecosystems operate and develop the capability to model them.

Given the state of decline of Australia's environment, restoration is required to enable future development to be sustainable. Available habitat needs to grow to be able to support both development and a healthy environment. The EPBC Act should require proponents to exhaust all reasonable options to avoid or mitigate impacts on the environment. Where this is not feasible, the remaining impacts the development should be offset in a way that restores the environment.

Monitoring, compliance, enforcement and assurance under the EPBC Act is ineffective, as a collaborative approach to compliance and enforcement is taken. Serious enforcement actions are rarely used, indicating a limited regard for the benefits of using of the full force of the law where it is warranted. When they are issued, penalties are not commensurate with the harm of damaging a public good of national interest. They do not provide adequate disincentive.

A strong, independent cop on the beat is required. An independent compliance and enforcement regulator, that is not subject to actual or implied political direction from the Minister, should be established. The regulator should be responsible for monitoring compliance, enforcement and assurance. It should be properly resourced and have available to it a full toolkit of powers.

The operation of the EPBC Act is ineffective and inefficient. Reform is long overdue. It is impossible for the Review to satisfy the aspirations of every person with an interest in the environment or in business development. The proposed reforms provide a way forward that seeks to build community trust that the national environmental laws deliver effective protections, while regulating businesses efficiently. The EPBC Act in its current form achieves neither.

While the proposed reforms are substantial, the changes are necessary to set Australia on a path of ecologically sustainable development. This path will deliver long-term economic growth,

environmental improvement and the effective protection of Australia's iconic places and heritage for the benefit of current and future generations.

Executive summary

Protection of Australia's environment and iconic places

Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The current environmental trajectory is unsustainable.

The overwhelming message received by the Review is that Australians care deeply about our iconic places and unique environment. Protecting and conserving them for the benefit of current and future generations is important for the nation.

The evidence received by the Review is compelling. Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The pressures on the environment are significant —including land-use change, habitat loss and degradation, and feral animal and invasive plant species. The impact of climate change on the environment is building, and will exacerbate pressures, contributing to further decline. Given its current state, the environment is not sufficiently resilient to withstand these threats. The current environmental trajectory is unsustainable.

The EPBC Act is ineffective. It does not enable the Commonwealth to effectively protect environmental matters that are important for the nation. It is not fit to address current, let alone future environmental challenges.

The way the EPBC Act operates means that good outcomes for the environment cannot be achieved under the current laws. While significant efforts are made to assess and list threatened species, once listed, not enough is done to deliver improved outcomes for them.

In the main, decisions that determine environmental outcomes are made on a project-by-project basis, and only when impacts exceed a certain size. This means that cumulative impacts on the environment are not systematically considered, and the overall result is net environmental decline, rather than protection and conservation.

The EPBC Act does not facilitate the restoration of the environment. Given the state of decline of Australia's environment, restoration to improve the environment is required to enable future development to be sustainable.

Key threats to the environment are not effectively addressed under the EPBC Act. There is very limited use of comprehensive plans to adaptively manage the environment on a landscape or regional scale. Coordinated national action to address key threats — such as feral animals are *ad hoc*, rather than a key national priority. Addressing the challenge of adapting to climate change is an implied, rather than a central consideration.

Fundamental reform of national environmental law is required, and National Environmental Standards should be the foundation.

The EPBC Act has no comprehensive mechanism to describe the environmental outcomes it is seeking to achieve, or to ensure decisions are made in a way that contributes to them. Ecologically sustainable development (ESD) should be the overall outcome the EPBC Act seeks to achieve. ESD means that development to meet today's needs is undertaken in a way that

ensures the environment, natural resources and heritage are maintained for the benefit of future generations.

Legally enforceable National Environmental Standards should be made to set the foundations for effective regulation, to ensure that decisions made under the Act clearly track towards ecologically sustainable development.

National Environmental Standards should be binding and enforceable regulations. The Commonwealth should make them, through a formal process set out in the EPBC Act. Standards should be developed in consultation with science, Indigenous, environmental and business stakeholders, and the community. While consultation with states and territories is essential, the process cannot be one of negotiated agreement, with rules set at the lowest bar.

National Environmental Standards should prescribe how decisions made contribute to outcomes for the environment. They should also include the fundamentally important processes for sound and efficient decision making. Standards should be concise, specific and focused on the requisite outcomes, with compliance focused on attaining the outcome. National Environmental Standards should *not* be highly prescriptive, where compliance is achieved by 'ticking the boxes' to fulfil a process.

As the centrepiece of regulation, National Environmental Standards should set clear rules for decision making. The law must require the Standards to be applied, unless the decision maker can demonstrate that the public interest and the national interest is best served otherwise. This contrasts to the current arrangements, where rules are buried in thousands of pages within hundreds of statutory documents, that collectively fail to provide clear and specific rules and enable highly discretionary decisions to be made.

National Environmental Standards will clearly demarcate the objectives in managing the environment, and the outcomes it seeks to achieve. This is important for the community, as they can know what they can expect from the Act. It is also important for business, who seek clear and consistent rules.

Interim Standards are recommended as a first step, to facilitate rapid reform and streamlining. These Interim Standards will need to define environmental outcomes in terms of clear limits that define acceptable impacts on nationally important environmental matters. Ultimately, Standards should be granular and measurable, and provide clarity as to where and how development can occur so as not to compromise environmental sustainability. A quantum shift will be required in the quality of accessible data and information, to increase the granularity of Standards.

Precise, quantitative Standards, underpinned by quality data and information, will provide for effective environment protection and biodiversity conservation, and ensure that development is sustainable in the long term. They will also support faster and lower cost assessments and approvals, including the capacity to automate consideration of low risk proposals.

The EPBC Act should focus on core Commonwealth responsibilities

The focus of the EPBC Act should be the Commonwealth's core responsibilities. The Act, and the National Environmental Standards that underpin its operation, should focus on the places, flora and fauna that the Commonwealth is responsible for protecting and conserving in the national

interest, including World and National Heritage, Ramsar wetlands, and nationally important species and ecological communities. Under the Act, these nationally important matters are called "Matters of National Environmental Significance" or MNES.

Proposals have been made to remove the Commonwealth's role on regulating water impacts from coal and coal seam gas, and nuclear activities. The Review considers the Commonwealth should maintain an ability to intervene where developments may result in the *irreversible depletion or contamination* of cross-border water resources. Similarly, for community confidence, the Commonwealth should retain the capacity to ensure nuclear (radioactive) activities are managed effectively.

The Review does not support the many proposals received to broaden the environmental matters dealt with in the EPBC Act. To do so would result in muddled responsibilities, leading to poor accountability, duplication and inefficiency.

While climate change is a significant and increasing threat to Australia's environment, successive Australian Governments have elected to adopt specific mechanisms and laws to implement their commitments to reduce greenhouse gas emissions, including those that operate economy wide.

The EPBC Act should not duplicate the Commonwealth's framework for regulating emissions. It should however require that development proposals explicitly consider the effectiveness of their actions to avoid or mitigate impacts on nationally protected matters under specified climate change scenarios.

This position is consistent with the foundational intergovernmental agreements. It was agreed that emissions would be dealt with by national level strategies and programs, rather than the EPBC Act. The Review considers there is merit in mandating proposals required to be assessed and approved under the EPBC Act (due to their impacts on nationally protected matters), to transparently disclose the full emissions profile of the development.

Planning at the national and regional (landscape) scale is needed to take action where it matters most, and to support adaptive management

Regional (landscape) plans should be developed that support the management of threats at the right scale, and to set clear rules to facilitate and manage competing land uses. These plans should prioritise investment in protection, conservation and restoration to where it is most needed, such as biodiversity hotspots, and where the environment will most benefit**.**

Ideally these plans would be developed in conjunction with states and territories. Where this cooperation is not possible, the Commonwealth should develop its own plans to manage threats on a landscape scale, and cumulative impacts on MNES. The Commonwealth's regional planning efforts should be focused on those regions of highest pressure on MNES.

Strategic national plans should be developed for 'big-ticket', nationally pervasive issues such as the management of feral animals or adaptation of the environment to climate change. These plans should guide the national response and enable action and investment by all parties to be effectively targeted to where it delivers the greatest benefit. National level plans will support a consistent approach to addressing issues in regional plans or inform activities in those areas where there is no regional plan.

More needs to be done to restore the environment.

The operation of the EPBC Act needs to shift from permitting gradual decline, to halting decline and restoring the environment, so that development can continue in a sustainable way. Active mechanisms are required to restore areas of degraded or lost habitat to achieve the net gain for the environment that is needed.

The proposed regional plans are key mechanisms that can set the priorities for restoration and adaptation, and identify where investment will have the best returns for the environment. The Review has identified opportunities for national leadership outside the Act that should be considered. Existing markets, including the carbon market can be leveraged to help deliver restoration. There are also opportunities for greater collaboration between governments and the private sector, to invest in the both in the environment directly, and in innovation to bring down the costs of environmental restoration activities.

National Environmental Standards and national and regional (landscape) plans will support greater harmonisation with the States and Territories

The construct of Australia's federation means that the management of Australia's environment is a shared responsibility. The Commonwealth and States and Territories need to work effectively together, and in partnership with the community, to manage Australia's environment and iconic places well.

Jurisdictions have agreed their respective roles and responsibilities for protecting the environment, and where possible, they have agreed that they will accommodate each other's laws and regulatory systems. While a sound ambition, more needs to be done to realise it.

The National Environmental Standards and improved planning frameworks aim to support greater cooperation and harmonisation between the Commonwealth, states and territories. Setting clear, legally enforceable rules means that decisions should be made consistently, regardless of who makes them, providing a pathway for the Commonwealth to recognise and accredit the regulatory processes of others. In pursuing greater harmonisation, the Commonwealth should retain the ability to step in to make decisions, where it is in the national interest to do so.

National Environmental Standards and national and regional plans will enable the focus of the operation of the Act to protecting the environment in the national interest, rather than transactional elements that can be duplicative, costly to business and result in little tangible benefit to the environment.

Indigenous culture and heritage

Indigenous knowledge and views are not fully valued in decision making

The Review considers that the EPBC Act is not fulfilling its objectives as they relate to the role of Indigenous Australians in protecting and conserving biodiversity and heritage, and promoting the respectful use of their knowledge.

Over the last decade, there has been a significant evolution in the way Indigenous knowledge, innovations and practices are incorporated into environmental management, for example through investment in Indigenous Rangers. The EPBC Act lags well behind leading practice.

Western science is heavily prioritised in the way the EPBC Act operates. Indigenous knowledge and views are diluted in the formal provision of advice to decision makers. This reflects an overall culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians.

The operation of the EPBC Act Indigenous Advisory Committee (IAC) exemplifies the culture of tokenism. The Act does not require the IAC to provide decision makers with advice. The IAC is reliant on the Minister inviting its views. This is in contrast to other Statutory Committees, which have clearly defined and formal roles at key points in statutory processes.

The Department has issued guidance on best practice Indigenous engagement. This sets out expectations for applicants for EPBC Act approval, but it is not required or enforceable. It is not transparent how the Minister factors in Indigenous matters in decision making for EPBC Act assessments.

The proposed National Environmental Standards should include a specific standard on best practice Indigenous engagement. The purpose of the Standard is to ensure that Indigenous Australians that speak for and have Traditional Knowledge of Country have had the proper opportunity to contribute to decisions made under the EPBC Act.

The role of the IAC should be substantially recast. The EPBC Act should establish a committee for Indigenous Knowledge and Engagement, responsible for providing the Minister with advice on Standard for Indigenous engagement. This should include the development and application of the Standard, and ensuring its effectiveness through monitoring, evaluation and review.

Indigenous Australians seek, and are entitled to expect, stronger national-level protection of their cultural heritage

Places of natural and cultural value that are important to the world or Australia can be recognised and protected by listing them as national heritage, Commonwealth heritage or World Heritage under the EPBC Act. At the national level Indigenous cultural heritage is protected under numerous other Commonwealth laws, including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act). The ATSIHP Act can be used by Aboriginal people to ask the Commonwealth Minister for the Environment to protect an area or object where it is under threat of injury or desecration and where state or territory law does not provide for effective protection.

Contributions to the Review have highlighted the importance of cultural heritage issues being dealt with early in a development assessment process. However, under the ATSIHP Act, the timing of a potential national intervention is late in the development assessment and approval process.

Indigenous Australians have emphasised to the Review the importance of the Commonwealth's ongoing role in Indigenous cultural heritage protection. As the states and territories also play a key role in the legal framework for Indigenous heritage protection, the arrangements of the jurisdictions need to work well together to avoid duplication or regulatory gaps.

The current laws that protect Indigenous cultural heritage in Australia need comprehensive review. This review should explicitly consider the role of the EPBC Act in providing national-level protections. It should also consider how comprehensive national level protections are

given effect, for example how they interact with the development assessment and approval and regional planning processes of the EPBC Act.

The EPBC Act does not meet the aspirations of Traditional Owners for managing their land

The EPBC Act provides the legal framework for the joint management of three Commonwealth National Parks – Kakadu, Uluṟu-Kata Tjuṯa and Booderee. Traditional Owners lease their land to the Director of National Parks (DNP), a statutory position established under the EPBC Act. For each of these parks, a joint management board is established to work in conjunction with the DNP.

The structure of the DNP means that position is ultimately responsible for decisions made in relation to the management of Parks, and for the effective management of risks such as those relating to occupational health and safety. Given this responsibility, the DNP has made decisions contrary to the recommendations of joint boards or made a decision when the joint board has been unable to reach a consensus view. The contributions to the Review from Traditional Owners and the Land Councils who support them, indicate that the current settings for joint management fall short of their aspirations for genuine joint decision making or indeed sole management.

The first step is to reach consensus on the long-term goals for jointly managed parks, and the nature of the relationship between Traditional Owners and the Commonwealth. The policy, institutional and transition arrangements required to successfully achieve these goals should then be co-designed with Traditional Owners.

Reforms should co-designed with Indigenous Australians

This Review has highlighted significant shortcomings in the way the views, aspirations, culture, values and knowledge of Indigenous Australians are supported by the EPBC Act.

The Commonwealth Government has committed to recognising improved outcomes for Indigenous Australians through enabling co-design and policy implementation with Indigenous people. This commitment is reflected in COAG's Commitments in the Partnership Agreement for Closing the Gap. The proposed Indigenous Knowledge and Engagement committee should play a key leadership role in the co-design of reforms.

Legislative complexity

The EPBC Act is complex, its construction is archaic, and it does not meet best practice for modern regulation. Complex legislation makes it difficult, time-consuming and expensive for people to understand their legal rights and obligations. This leads to confusion and inconsistent decision making, creating unnecessary regulatory burdens for business, and restricting access to justice.

The policy areas covered by the EPBC Act are inherently complex. The way the different areas of the Act work together to deliver environmental outcomes is not always clear, and many areas operate in a largely siloed way. There is a heavy reliance on detailed prescriptive processes that are convoluted and inflexible, meaning engaging with the Act is time consuming and costly. This is particularly the case for environmental impact assessment. Convoluted processes are made more complex by key terminology being poorly defined or not defined at all.

In the short term, legislative amendments to the EPBC Act are required to address known inconsistencies, gaps, and conflicts in the Act. In the medium term, consideration should be given to dividing the EPBC Act, creating separate pieces of legislation for the key functional areas the Act, or along thematic lines. In the longer term comprehensive redrafting of the EPBC Act (or a new set of related Acts) is required. This should be done following the development of the key reforms proposed by this Review. This will ensure that legislation is developed in a way that supports the desired approach, rather than inadvertently hindering it.

Efficiency

A key criticism of the EPBC Act is that it duplicates state and territory regulatory frameworks for development assessment and approval. The Review has found that, with a few exceptions, this is largely true. There is no systematic way to determine the additional environmental benefits resulting from the EPBC Act.

There are examples where the EPBC Act has led to demonstrably different environmental outcomes than those arising from state and territory processes. While far from perfect, the EPBC requirement for 'like for like' offsets exceeds requirements in some jurisdictions and results in additional or different conditions placed on projects resulting in better outcomes than would have otherwise been the case.

Frustration rightly arises when Commonwealth regulation does not, or does not tangibly, correspond to better environmental outcomes, given the additional costs to business of dual processes.

Efforts made to harmonise and streamline with the states and territories have not gone far enough.

The EPBC Act allows for the accreditation of state laws and management systems for both assessments and approvals.

Under a bilateral assessment agreement, the Commonwealth retains responsibility for approvals, based on environmental impact assessments undertaken by the jurisdictions. For the five-year period between July 2014 and June 2019, 37 per cent of proposals under the EPBC Act were assessed (or are still being assessed) through either a bilateral assessment (25 per cent) or accredited assessment (12 per cent) arrangements with jurisdictions. The proportion of projects covered by an assessment bilateral agreement is limited, as not all state processes can deliver an adequate assessment of matters that are protected under the EPBC Act.

Approval bilateral agreements have never been implemented. Under this type of agreement, the Commonwealth would devolve its approval decision making powers to a state or territory decision-maker. Under the current settings, the mechanism to devolve approval decisions is inherently fragile. Particularly important amendments are needed to:

- enable the Commonwealth to complete an assessment and approval if a state or territory is unable to, and
- ensure agreements can endure minor amendments to state and territory settings, rather than requiring the bilateral agreement to be remade (and consequently be subject to disallowance by the Australian Parliament on each occasion).

These and other necessary amendments have failed to garner support in the Australian Parliament. Indeed, in 2015 the Parliament did not support these amendments, in response to significant community concerns about the ability of states to uphold the national interest when making a highly discretionary approval decision.

Legally enforceable National Environmental Standards provide a clear pathway for greater devolution

The foundational intergovernmental agreements on the environment envisaged that jurisdictions would accommodate their *respective* responsibilities in each other's laws and regulatory systems, where possible. This is a sound ambition, and one that governments should continue to pursue.

The National Environmental Standards proposed by the Review would provide a legally binding mechanism to provide confidence to support greater devolution. Accrediting an alternative regulator would be on an 'opt-in' basis, and they would need to demonstrate that their system can achieve the National Environmental Standard. This may require states and territories to adapt their regulations to meet National Environmental Standards and to satisfy accreditation requirements.

The proposed devolution model involves five key steps:

1) *National Environmental Standards* to set the benchmark for protecting the environment in the national interest and provide the ability to measure the outcomes of decisions.
2) *State or territory or other suitable authority to demonstrate that their systems meet National Environmental Standards.* This element includes a formal check to give confidence that arrangements are sound.
3) *Formal accreditation by the Commonwealth Minister*. This element is intended to provide accountability and legal certainty, and the Minister should seek the advice of the proposed Ecologically Sustainable Development Committee prior to an accreditation decision.
4) *A transparent assurance framework.* This element provides confidence that parties are implementing the processes and policies as agreed. It should include the mechanisms for the Commonwealth to step in when it is in the national interest to do so.
5) *Regular review and adaptive management* that ensures decision-making contributes to the objectives established in the Standards.

Pursuing greater devolution does not mean that the Commonwealth 'gets out of the business' of environmental protection and biodiversity conservation. Rather, the reform directions proposed would result in a shift with a greater focus on accrediting and providing assurance oversight of the activities of other regulators, and in ensuring national interest environmental outcomes are being achieved.

Commonwealth-led assessments and approvals should be further streamlined

The Commonwealth should retain its capability to assess and approve projects. Commonwealth assessments and approvals will be required where accredited arrangements are not in place (or cannot be used), at the request of a jurisdiction, when the Commonwealth exercises its ability to

step in on national interests grounds, when the activity occurs on Commonwealth land, or when it is undertaken by a Commonwealth Agency outside a State's jurisdiction.

The Review has identified opportunities to streamline Commonwealth environmental impact assessments and approvals that it conducts. The most significant gains will be realised by fundamental changes to the way the EPBC Act works. Reform proposals including the development of National Environmental Standards and regional plans, and improvements in the data, information and regulatory systems discussed further below are central to improving the quality and efficiency of Commonwealth-led processes.

Streamlining the assessment pathways available under the Act will reduce the complexity of and efficiencies in the current process. The first step in all assessment pathways is known as 'referral', where the decision maker determines whether a proposal requires more detailed assessment. For proposals where the need for detailed assessment and the relevant environmental matters are obvious, the referral creates an additional, pointless step in the process.

For other proposals, the lack of clarity on the requirements of the EPBC Act means that proponents refer proposals for legal certainty. More than half of all referrals result in a decision that detailed assessment and approval is not required, or not required so long as it is carried out in a particular manner. National Environmental Standards and regional plans will provide clarity on impacts that are acceptable, and those which will require assessment and approval,enabling the referral step to be avoided.

Interactions with other Commonwealth environmental management laws

The EPBC Act operates in a way that seeks to recognise other environmental regulatory and management frameworks, including the management of Commonwealth fisheries, Regional Forest Agreements (RFAs), and offshore petroleum activities. The interplay between the EPBC Act and these other frameworks is often more onerous than it needs to be.

The Australian Fisheries Management Authority (AFMA) is responsible for the day-to-day management and compliance of Commonwealth fisheries. Assessments under the EPBC Act are conducted on the environmental performance of all export fisheries and all Commonwealth managed fisheries to ensure that fisheries are managed in an ecologically sustainable way. There are opportunities to streamline the multiple assessment and permitting processes needed to undertake commercial fishing operations in Commonwealth waters or jointly managed fisheries. Given the maturity of the fisheries management framework administered by AFMA, the Review is confident that further streamlining can be achieved while maintaining assurance in the outcomes.

A regional forest agreement (RFA) is a regional plan, agreed between a state and the Commonwealth for management of native forests. RFAs balance economic, social and environmental demands on forests and seek to deliver ecologically sustainable forest management, certainty of resource access for the forest industry and protection of native forests as part of Australia's national reserve system. The EPBC Act recognises the RFA Act, and EPBC Act assessment and approvals are not required for forestry activities conducted in accordance with an RFA (except where forestry operations are in a World Heritage property or a Ramsar wetland).

During the course of this Review, the Federal Court found that an operator had breached the terms of an RFA and should therefore be subject to the ordinary controlling provisions of the EPBC Act. Legal ambiguities in the relationship between EPBC Act and the RFA Act should be clarified, so that the Commonwealth's interests in protecting the environment interact with the RFA framework in a streamlined way.

The regulation of wildlife trade

The EPBC Act gives effect to Australia's obligations as a member of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), including the international movement of wildlife specimens. The requirements of the EPBC Act exceed Australia's obligations under CITES. Aspects of wildlife trade provisions in the EPBC Act result in administrative process and costs for individuals, business and government, while affording no additional protection to endangered species. The EPBC Act should be amended to align the requirements of the Act with CITES, and to provide for a more efficient permitting process.

Trust in the EPBC Act

The community and industry distrust the Act, and there is merit in their concerns.

The community and industry do not trust the EPBC Act and the regulatory system that underpins its implementation.

A dominant theme in the 30,000 contributions received by the Review is that many in the community do not trust the Act to deliver for the environment. Limited access to information about decisions and the lack of opportunity to substantively engage in decision making under the EPBC Act further erodes trust.

The EPBC Act and its processes focus on the provision of environmental information, yet the Minister can and should consider social and economic factors when making an approval decision. The community can't see how these factors are weighed in EPBC Act decisions. Under the current arrangements, this leads to concern that the environment loses out to other considerations as proponents have undue influence on decision makers.

The EPBC Act is also not trusted by industry. They generally view it as cumbersome, pointing to duplication, slow decision making, and legal challenges being used as a tool to delay projects and drive up costs for business (often called 'lawfare').

An underlying theme of industry distrust in the EPBC Act relates to perceived duplication with state and territory processes (see above) and the length of time it takes to receive an approval. On average, complex projects can take nearly three years, or 1014 days to assess and approve, and this is too long. Recent provision of additional resources has improved on-time approval decisions from 19 per cent to 87 per cent of key decisions made on time.

Lengthy assessment and approval processes are not all the result of a 'slow' Commonwealth regulator. On average, the process is under the management of the proponent for more than three quarters of the total assessment time, indicative of the time taken to navigate current requirements and collect the necessary information for assessment documentation. For business, time is money. Delays, regardless of when they occur, can result in significant additional costs, particularly on large projects.

Legal standing and review

The Review has received highly conflicting evidence and viewpoints about the appeal mechanisms under the EPBC Act. Where concerns arise about environmental outcomes associated with a decision, public focus turns to challenging high profile decisions. Legal review is used to discover information and object to a decision, rather than its proper purpose to test and improve decision making consistent with the law. Industry is very concerned about the delay to projects that can arise from politically motivated legal challenges.

The public discourse on legal challenges is focused on large projects, with considerable economic benefits that are in highly valued environmental areas. Pro-development groups argue that the 'extended' standing provisions (standing beyond a person directly affected by a decision) should be removed from the Act.

The Review is not yet convinced that extended standing should be curtailed. Broad standing remains an important feature of environmental legislation, particularly given the presence of collective harm resulting from damage to environmental or heritage values. The evidence suggests that standing has not been interpreted broadly by the courts. The courts have the capacity to deal with baseless or vexatious litigation and litigation with no reasonable prospect of success can be dismissed in the first instance. It may though be beneficial for the Act to require an applicant seeking to rely on the extended standing provisions to demonstrate that they have an arguable case, or that the case raises matters of exceptional public importance before the matter can proceed.

In a mature regulatory framework, judicial and merits review operate in concert. Judicial review helps ensure legal processes are followed, complemented by merits review to ensure decisions are meeting the intent of the legislation, not simply following processes.

Full merits review is not advised. Opening decisions on appeal or review, to the admission of new documentation or materials for consideration delays decisions without necessarily improving outcomes. It also promotes forum shopping.

Reforms to the Act should focus on improving transparency of decision making, to reduce the need to resort to court processes to discover information. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

Adjustments to legal review provisions should be made to provide for limited merits review 'on the papers'. This form of review limits the considerations to those matters that were raised and maintained by the applicant during the due course of the regulatory decision or matters arising from a demonstrable material change in circumstances.

Transparent independent advice can improve trust in the EPBC Act

Low levels of trust are an underlying driver behind calls for independent institutions to be established to make decisions under the EPBC Act. This solution is not supported by the Review. It is entirely appropriate that elected representatives (and their delegates) make decisions that require competing values to be weighed and competing national objectives to be balanced.

Community confidence and trust in the process could be enhanced by the provision of transparent, independent advice on the adequacy of information provided to a decision-maker.

The statutory advisory committee structures in the EPBC Act should be recast. An Ecologically Sustainable Development (ESD) Committee should be established, comprising an independent chair and the chairs of the following committees:

- Information and knowledge (to advise on science, social impacts, economics and traditional knowledge).
- Indigenous knowledge and engagement (to advise on the co-design of reforms and the National Environmental Standard for Indigenous engagement).
- Threatened species science (to advise on the status of threatened species and ecological communities and actions needed to improve their condition in regional recovery plans).
- Australian Heritage Council (as established under the *Australian Heritage Council Act 2003* to provide advice on heritage matters).
- Water resource science (advising on impacts of large projects on cross border water resources and nationally protected matters).

The ESD Committee should provide transparent advice to the Minister to inform decisions on the making of National Environmental Standards, regional plans, and the accreditation of arrangements for devolving decision making. The Minister could ask for their advice on other decisions, where they had relevant expertise.

Data, information and systems

Decision makers, proponents and the community do not have access to the best available data, information and science. This results in sub-optimal decision making, inefficiency and additional cost for business, and poor transparency to the community. The Department's systems for information analysis and sharing are antiquated. Cases cannot be managed effectively across the full lifecycle of a project, the 'customer' experience is clunky and cumbersome for both proponents and members of the community interested in a project.

The collection of data and information is fragmented and disparate. There is no single national source of truth that people can rely on. This adds cost for business and government, as they collect and recollect the information they need. It also results in lower community trust in the process, as they question the quality of information on which decisions are made, and the outcomes that result from them.

A national 'supply chain' of information is required so that the right information is delivered at the right time to those who need it. This supply chain should be an easily accessible 'single source of truth' on which the public, proponents and Governments can rely. A custodian for the national environmental information supply chain is needed, and responsibility for national level leadership and coordination clearly assigned. Adequate resources should be provided to develop the systems and capability that is needed to deliver the evidence base for Australia's national system of environmental management. The recent financial commitment from the Commonwealth and West Australian governments to the collaborative Digital Environmental Assessment Program, which will deliver a single online portal for assessments and biodiversity database, is a good first step in this direction.

In the short term, the granularity of National Environmental Standards is limited by the information available to define and apply them to decision making. A quantum shift in the quality of information required to transform standards from qualitative indicators of outcomes to quantified measures of outcomes. To apply granular standards to decision making, Government needs the capability to model the environment, including the probability of outcomes from proposals. To do this well, investment is required to improve knowledge of how ecosystems operate and develop the capability to model them. This requires a complete overhaul of the systems to enable improved information to be captured and incorporated into decision making.

Monitoring and evaluation

There is no effective framework to support a comprehensive, data-based evaluation of the EPBC Act, its effectiveness in achieving intended outcomes, and the efficiency of implementation activities. The EPBC Act includes some requirements for monitoring and reporting. These are not comprehensive, and follow-through is largely focused on bare minimum administrative reporting, rather than genuine monitoring and evaluation of outcomes to learn lessons, adapt and improve.

The development of a coherent framework to monitor and evaluate the effectiveness of the EPBC Act in achieving its outcomes and the efficiency of its implementation is needed. Key reforms proposed by this Review, particularly the establishment of National Environmental Standards and regional plans, provide a solid foundation for the development of a monitoring and evaluation framework for the EPBC Act as a whole. The framework must be backed in by commitment to its implementation.

The national State of the Environment (SoE) report is the established mechanism that seeks to 'tell the national story' on Australia's system of environmental management. While providing an important point in time overview, it is an amalgam of insights and information, and does not generate a consistent data series across reports. It lacks a clear purpose and intent. There is no feedback loop, and as a nation there is no requirement to stop, review, and where necessary change course.

A revamp of SoE reporting is required. The national SoE report should examine the state and trends of Australia's environment, and the underlying drivers of these trends, including interventions that have been made. National environmental economic accounts will be a useful tool for tracking Australia's progress to achieve ecologically sustainable development. The SoE Report should provide an outlook, and the Government should be required to formally respond, identifying priority areas for action, and the levers that will be used to act.

Efforts to finalise the development of these accounts should be accelerated, so that in time they can be a core input to SoE reporting.

Environmental restoration

Given the state of decline of Australia's environment, restoration and adaptation is required to enable future development to be sustainable. Available habitat needs to grow to be able to support both development and a healthy environment.

Environmental offsets do not offset the impacts of developments

Under the current arrangements, developers can compensate for the environmental impacts of their proposals, mostly by protecting areas like that which has been destroyed or damaged. This is known as an environmental offset.

Environmental offsets are often poorly designed and implemented, delivering an overall net loss for the environment. The stated intent of the offsets policy is to encourage proponents to exhaust reasonable options to avoid or mitigate impacts. In practice, offsets have become the default negotiating position, and a standard condition of approval, rather than only used as a mean to address residual impacts.

Offsets do not offset the impact of development. Proponents are permitted to clear habitat in return for protecting other areas of the same habitat from future development. It is generally not clear if the area set aside for the offset is at risk from future development, and overall there is a net loss of habitat.

Offsets need to include a greater focus on restoration and should be enshrined in the law. The EPBC Act should require that offsets only be considered when options to avoid and then mitigate impacts have been demonstrably exhausted. Where applied, offsets should deliver genuine restoration, avoiding a net loss of habitat.

There is an opportunity to incentivise early investment in restoration. If offsets were to be supported with greater certainty under the EPBC Act, then this could be the catalyst for a market response. Proponents are generally not in the business of managing habitats as their core business. There are however expert land managers and specialist project managers who deliver these services. The right policy and legal settings would provide certainty for these players to invest in landscapes, confident that proponents will be in the market to purchase offsets based on these investments down the track.

Broader opportunities for restoration

There are opportunities beyond the EPBC Act that should be explored to accelerate investment in restoration.

The carbon market, which already delivers restoration, could be better leveraged to deliver improved biodiversity outcomes. The Australian Government has recently agreed to carbon market reforms that will increase the competitiveness of carbon-farming when compared to other land uses. More could be done if credit for biodiversity outcomes could be 'stacked' on top of carbon credits, with one area of land delivering both carbon and biodiversity outcomes.

There is an opportunity to provide the policy settings to better leverage private interest in investing in the environment as well as drive down the cost of restoration. Globally, there is growing interest from the philanthropic and private sectors to invest in a way that improves environmental outcomes. A biodiversity market is one destination for this capital, another is co-investment to bring down the cost of environmental restoration, growing the habitat available to support healthy systems. The merits of the application of these types of models for investing in environmental improvement will be further explored prior to the finalisation of the Review.

Monitoring, compliance, enforcement and assurance

Compliance, enforcement and assurance under the EPBC Act is ineffective.

There has been limited activity to enforce the EPBC Act over the 20 year period it has been in effect, and the transparency of what has been done is limited.

While the Department has improved its regulatory compliance and enforcement functions in recent years, it relies on a collaborative approach to compliance and enforcement, which is weak. Serious enforcement actions are rarely used, indicating a limited regard for the benefits of using of the full force of the law where it is warranted. When issued, penalties issued are not commensurate with the harm of damaging a public good of national interest. Since 2010, a total of 22 infringements have been issued for breaches of conditions of approval, with total fines less than $230,000. By way of contrast, individual local governments frequently issue more than this amount in paid parking fines annually.

The compliance and enforcement powers in the EPBC Act are outdated. Powers are restrictive and can only be applied in a piecemeal way across different parts of the Act due to the way it is constructed. The complexity of the legislation, impenetrable terminology and the infrequency with which many interact with the law, make both voluntary compliance and the pursuit of enforcement action difficult.

A strong, independent cop on the beat is required

An independent compliance and enforcement regulator that is not subject to actual or implied direction from the Minister should be established. The regulator should be responsible for monitoring compliance, enforcement and assurance. It should be properly resourced and have available to it a full tool-kit of monitoring, compliance and enforcement powers.

Penalties and other remedies for non-compliance and breaches of the Act and the National Environmental Standards need to be adequate to ensure that compliance is regarded as mandatory not optional. The costs of non-compliance should not be regarded as simply a cost of doing business.

While the Minister must retain responsibility for setting the rules (including making decisions and setting conditions for development approvals), the regulator should be responsible for enforcing them.

The compliance and enforcement regulator must have a clear and strong regulatory stance. While it remains important to be proportional, and to work with people where inadvertent non-compliance has occurred, the regulator needs to establish a culture that does not shy from firm action where needed.

An independent compliance and enforcement regulator will build public trust in the ability of the law to deliver environmental outcomes and that breaches of the law will be fairly, proactively and transparently managed. Strong compliance and enforcement activities protect the integrity of most of the regulated community, who spend time and money to comply with the law, with those who break the rules facing appropriate consequences.

Assurance of devolved decision making

The Review proposes reforms that will support greater devolution in decision-making. Clear, legally enforceable National Environmental Standards combined with strong assurance are

essential to community confidence in these arrangements. The independent compliance and enforcement regulator should play a key role in providing assurance of devolved arrangements.

This will require a focus on oversight of these devolved and strategic arrangements, including auditing the performance of devolved decision makers. The devolved decision maker should remain primarily responsible for project level monitoring, compliance and enforcement, and transparently report actions taken. The Commonwealth should also retain the ability to intervene in project level compliance and enforcement, where egregious breaches are not being effectively enforced by the State regulator.

The reform pathway

The EPBC Act is ineffective, and reform is long overdue. Past attempts at reform have been largely unsuccessful. Commitment to a clear pathway for reform is required. The reform agenda proposed is not one to 'set and forget'. Settings should be monitored and evaluated, and the path forward adjusted as lessons are learnt and new information and ways of doing things emerge.

Effective administration of a regulatory system is not cost free. The reforms proposed seek to improve the overall efficiency of the system. It is important to consider how to best fund the implementation of a reformed system, including the fair costs that should be recovered from proponents. In principle Government should pay for elements that are substantially public benefits (e.g. the development of standards), while business should pay for those elements of the regulatory system required because of their impact on the environment to derive private benefits (e.g. approvals and monitoring, compliance and enforcement). There are elements of the regulatory system that have mixed benefits where costs should be shared (e.g. data and information).

Immediate steps to start reform should be taken. In the first instance, amendments should be made to:

- fix duplication, inconsistencies, gaps and conflicts
- enable National Environmental Standards to be made
- improve the durability of the settings for devolved decision making.

Interim National Environmental Standards should be made, to set clear rules for decision making and to support greater devolution in decision making.

Similarly, in the short term, the conversation to deliver complex reforms and the mechanisms to underpin continuous improvement should commence so that the policy development and implementation plans can be finalised, and resourcing commitments made. This includes:

- Reforms to establish the framework for monitoring, reporting and evaluating the performance of the EPBC Act, with a key focus on the arrangements for National Environmental Standards.
- Starting the conversation with the States and Territories about state-led regional planning priorities, and priorities for strategic national plans.
- Committing to sustained engagement with Indigenous Australians, to co-design reforms that are important to them — the culturally respectful use of their knowledge, effective

national protections for their culture and heritage, and working with them to meet their aspirations to manage their land in partnership with the Commonwealth.

- Appointing a national data and information custodian, responsible for delivering an information supply chain and overhauling the systems needed to capture value from the supply chain.
- Establishing the mechanisms to better leverage investment, to deliver the scale of restoration required for future development in Australia to be sustainable in the long term.

Once the policy direction is settled, and key initiatives are underway, the final phase of reform should involve complete legislative overhaul to establish the remaining elements of reform and to focus on implementing the reformed system.

The proposed reforms seek to build community trust that the national environmental laws deliver effective protections and regulate businesses efficiently. It is impossible for the Review to satisfy the aspirations of every person with an interest in the environment or in business development. Rather, the Review has attempted to provide a way forward, to ensure effective environment protection and biodiversity conservation and efficient regulation of business. The EPBC Act in its current form achieves neither.

While the proposed reforms are substantial, the changes are necessary to set Australia on a path of ecologically sustainable development. This path will deliver long-term economic growth, environmental improvement and the effective protection of Australia's iconic places and heritage for the benefit of current and future generations.

1 National level protection and conservation of the environment and iconic places

Key points

The environment and our iconic places are in decline and under increasing threat. The EPBC Act does not enable the Commonwealth to effectively protect and conserve nationally important environmental matters. It is not fit for current, let alone future environmental challenges.

The key reasons the operation of the EPBC Act does not effectively protect the environment are:

- It lacks clear national outcomes and effective mechanisms to address environmental decline. While Ecologically Sustainable Development is a key principle of the EPBC Act it is not well defined and it is not being applied or achieved.
- Decision making is focussed on processes and individual projects and does not adequately address cumulative impacts or emerging threats. Offsets have serious shortcomings. They have become the default, rather than the exception after all practical options to avoid or mitigate impacts have been exhausted.
- It does not facilitate the restoration of the environment. The current settings cannot halt the trajectory of environmental decline, let alone reverse it. There is no comprehensive planning to manage key threats to the environment on a national or regional (landscape) scale.
- Opportunities for coordinated national action to address key environmental threats such as feral animals, restoration of habitat, or planning to adapt as the climate changes are ad hoc, rather than a key national priority.

The key reform directions proposed by the Review are:

- Legally enforceable National Environmental Standards should be the foundation for effective regulation. The standards should focus on outcomes for Matters of National Environmental Significance, and the fundamentally important processes for sound and efficient decision making. Standards will provide certainty—in terms of the environmental outcomes the community can expect from the law, and the legal obligations of proponents.
- The goal of the EPBC Act should be to deliver ecologically sustainable development and require that National Environmental Standards are set and decisions are made in a way that ensures it is achieved. The EPBC Act should support a focus on protecting (avoiding impact), conserving (minimising impact), and restoring the environment.
- A greater focus on adaptive planning is required to deliver environmental outcomes. Regional plans should be developed that support the management of cumulative threats and to set clear rules to manage competing land uses at the right scale.
- Strategic National Plans should be developed for big-ticket, nationally pervasive issues such as the management of feral animals or adaptation of the environment to climate change. These plans should guide the national response and enable action and investment by all parties to be effectively targeted and efficient.

These reforms, along with those presented in the remainder of this report, combine to provide a more effective and efficient regime to protect Australia's unique environment and iconic places. They aim to foster greater cooperation and harmonisation between the Commonwealth, states and territories.

Protecting the environment and iconic places in the national interest is important for all Australians. Australia is recognised as a global biodiversity hotspot, with a unique assemblage of plants and animals found nowhere else in the world. Indigenous Australians have a deep connection to and knowledge of country. They are the custodians of the oldest continuous culture in the world. As the nation's central piece of environmental law, the EPBC Act must ensure the environment, natural resources and Australia's rich heritage is maintained for the benefit of future generations.

A healthy environment is important to the quality of life and health and wellbeing of all Australians. The recent bushfire season provided us with a stark reminder of this. For Indigenous Australians, connection to healthy country is their expression of culture. Many industries are reliant on the sustainable use of Australia's vast natural resource base, contributing to the long-term productivity, profitability and the vibrancy of regional areas and the nation as a whole. Many contributions to the Review have presented a strong view that nature has a right to exist for its intrinsic value, rather than simply being viewed as a resource.

The overwhelming message received from contributions to the Review is that Australians care immensely about the state, and future, of our unique and inspiring environment. They highlight a strong community expectation that the Commonwealth plays a key role in managing Australia's environment, and central to this, maintains effective national environment laws.

1.1 The environment and iconic places are in decline and under increasing threat

The evidence on the state of Australia's environment put forward by the science community to this Review is compelling. Overall, Australia's environment is in a state of decline, and is under increasing pressure. While there are localised examples of good outcomes, the national outlook is one of decline and increasing threat to the quality of the environment. At best, the operation of the EPBC Act has contributed to slowing the overall rate of decline (see Box 1).

In contrast to the outcomes for biodiversity, contributions to the Review present a mixed view in relation to heritage. While the EPBC Act has strengthened Commonwealth obligations and enabled resources to be targeted towards protecting Australia's significant and outstanding heritage places, the world heritage and national heritage values of some iconic places have diminished, and the recognition of and funding for community and historic heritage has reduced[i].

Box 1: State and trends in Australia's biodiversity, ecosystems and heritage

It is not the role of the Review to provide a comprehensive summary of the state of the environment. The following is a synopsis of the latest comprehensive Australia State of the Environment report (2016)[ii] and contributions to the Review from a range of experts[iii].

Threatened species and biodiversity – Australia is losing biodiversity at an alarming rate and has one of the highest rates of extinction in the world. More than ten per cent of Australia's land mammals are now extinct, and another 21 per cent are threatened and declining (Woinarski, 2015 in Ecological Society of

Australia[iv]). Populations of threatened birds, plants, fish and invertebrates are also continuing to decrease, and the list of threatened species is growing. While there is evidence of population increases where targeted management actions are undertaken (such as controlling or excluding feral animals or implementing ecological fire management techniques), these are exceptions rather than a broad trend.

Since the EPBC Act was introduced, the threat status of species has deteriorated. Four times more species have been listed as threatened than those that have shown an improvement. Over its 20-year operation, only 13 animal species have been removed from the EPBC Act's threatened species lists, and only one of these (Muir's Corella) is generally considered a case of genuine improvement (Wentworth Group of Concerned Scientists[v]).

Protected areas– The area of Australia that is protected from competing land uses, for example through national parks, marine reserves and Indigenous protected areas, has expanded. However, not all ecosystems or habitats are well represented, and their management is not delivering strong outcomes for threatened species. Consideration of future scenarios indicates that the reserve system is unlikely to provide adequate protection for species and communities in the face of future pressures such as climate change.

Oceans and marine – While aspects of Australia's marine environment are in good condition and there have been some management successes, our oceans face significant current and future threats from climate change and human activity.

While there have been some modest environmental successes such as an increase in humpback whale populations, submissions pointed to recent evidence of steep declines in habitats across Australia's marine ecosystems including coral reefs in the Great Barrier Reef, saltmarshes on the east coast, mangroves in northern Australia, and kelp forests in Tasmania (Centre for Marine Science and Australian Marine Conservation Society [vi]).

Heritage – The 2016 Australia State of the Environment report found that '*Australia's extraordinary and diverse natural and cultural heritage generally remains in good condition, despite some deterioration and emerging challenges since 2011'*. The IUCN[vii] has indicated it has specific concerns for three of Australia's 20 World Heritage places. The loss of heritage values since the last EPBC Act Review is due to a range of factors, most recently the impact of the 2019-2020 bushfire events on World Heritage and National Heritage areas.

There are significant future pressures facing the Australian environment, including land-use change, habitat fragmentation and degradation, and invasive species. Climate change continues to build as a pressure that will exacerbate these impacts contributing to further, ongoing decline.

The current state of the environment means that it is unlikely to be sufficiently resilient to increasing future threats. The lack of long-term monitoring data limits the ability to understand the pace and extent of environmental decline, which actions to prioritise, and whether previous interventions have been successful.

1.2 The EPBC Act does not enable the Commonwealth to play its part in managing Australia's environment

1.2.1 Managing Australia's environment is a shared responsibility

The construct of Australia's federation means that the management of Australia's environment is a shared responsibility, and jurisdictions need to work effectively together and in partnership with the community.

The Commonwealth, on behalf of the nation, has signed up to international agreements on the environment, and has a responsibility to ensure they are implemented[viii]. The Commonwealth's responsibilities in managing the environment have been confirmed by High Court decisions over time and agreed in foundational intergovernmental agreements on the environment[ix]. These agreements reflect the respective constitutional responsibilities of Commonwealth, states and territories. The Commonwealth's interests are known as 'Matters of National Environmental Significance' (MNES).

The EPBC Act implements the Commonwealth's responsibility for key MNES[x]. Changes over time, including to MNES, mean that the EPBC Act has lost focus on the Commonwealth's core interests and has resulted in a drift in the Commonwealth's role and duplication with the role of the states and territories. This is particularly the case for MNES that focus on activities that give rise to threats or risks to the environment, rather than protection of the environmental matter itself.

Ultimately, Australia's system of environment and heritage protection management must recognise the respective roles of the Commonwealth and states and territories, and jurisdictions need to work together effectively. This was acknowledged in the foundational intergovernmental agreements, which committed to an intent of harmonised laws and regulatory systems, with jurisdictions accommodating their respective responsibilities. This direction was embedded in the original design of the EPBC Act, but the implementation of the Act has failed to fulfil this ambition.

The EPBC Act is also the mechanism for the Commonwealth to regulate the environment of its own land and waters, and the environmental activities undertaken by the Commonwealth.

1.3 The EPBC Act does not enable the Commonwealth to effectively protect and conserve nationally important matters

1.3.1 The EPBC Act lacks clear outcomes for MNES

The EPBC Act is not clear on what environmental outcomes it seeks to achieve for MNES. The objects of the EPBC Act are written broadly which is appropriate to the scale and nature of national legislation. However, the EPBC Act does not provide specific framing for how these objects are to be interpreted and applied.

While MNES underpin the implementation of environmental regulation in the EPBC Act, this is not done in a consistent way across the Act. The EPBC Act lacks effective mechanisms to describe or measure the environmental outcomes it is seeking to achieve, or to ensure decisions are made in a way that contributes to these outcomes. Key plans (such as Recovery Plans) and other management documents do not clearly link to national outcomes.

Ecologically Sustainable Development (ESD) is a key principle of the EPBC Act[xi] but is not well defined and is not being applied or achieved. ESD should be the overall outcome the EPBC Act seeks to achieve. ESD means that development to meet the needs of Australians today should be done in way that ensures the environment, natural resources and heritage are maintained for the benefit of future generations.

While decisions under the EPBC Act are required to *consider* key principles like ESD and the precautionary principle (see Box 2), these are not given sufficient weight or prominence, particularly in development approvals. These principles underpin good environmental decision-making frameworks around the world and were agreed to by the Commonwealth and all states and territories in the Intergovernmental Agreement on the Environment in 1992[xii].

Box 2: The Precautionary Principle

The precautionary principle reminds us that if the impacts of a decision are not fully understood, then we should err on the side of caution, to avoid serious and irreversible consequences. Lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

1.3.2 The way the EPBC Act operates facilitates ongoing decline

Almost all of the ecological focus in environmental impact assessments is on specific, listed individual species and communities. Species and ecological communities are listed using a complex scientific assessment based on internationally determined scientific criteria. After listing, a Conservation Advice is prepared for each listed species or community, and there is the option for the Minister to decide that a more comprehensive Recovery Plan is required.

Currently, there are 719 Recovery Plans in place for species and 27 in place for ecological communities (of 1890 listed species and 84 listed communities)[xiii]. There is no requirement to implement a Recovery Plan, or report on progress or the outcomes achieved. Plans that are made are generally not backed in by the necessary action to implement them. The way the EPBC Act currently operates implies that the goal is to list a species and prepare a plan, rather than achieve environmental outcomes. Under these arrangements it is not surprising that the list of threatened species and communities has increased over time, and there have been very few species that have recovered to the point that they can be removed from the list

Cumulative impacts on and threats to the environment are often not well managed under the current settings. Assessment and approval decisions are largely made on a project-by-project basis, with the assessment of impacts largely done in isolation of other current or anticipated projects. This approach under-estimates the broad-scale cumulative impacts that development can have on a species, ecosystem or region. While each individual development may have minimal impact on the national environment, their combined impact can result in significant long-term damage.

Submissions to the Review have further pointed to the missed opportunity to incorporate Indigenous knowledge, including holistic land management practices, to protect the environment[xiv]. As stated by the Central Land Council[xv] in their submission *the knowledge and understanding held by Indigenous peoples, accrued over tens of thousands of years, provides rich expertise that should be more appropriately valued and engaged in protecting and managing Australia's environment.* While the objects of the Act include an intent to recognise the role of Indigenous people and promote the use of traditional knowledge, in practice this rarely occurs (see Chapter 2).

Provisions for more strategic approaches that can consider cumulative impacts, such as bioregional plans and strategic assessments, have a history of limited use. Administration of the EPBC Act has contracted to focus on core statutory requirements, such as approving projects.

This focus on project-based assessment and approvals sets the EPBC Act up to deliver managed decline, not sustainable maintenance or recovery. The impacts of development are not counter-balanced with legislated recovery processes. This is exacerbated by an ineffective offsets policy. The decision-making hierarchy of 'avoid, minimise, and only then offset' is not being applied, with offsets too often used as a default measure, not as a last resort (see Chapter 8).

The EPBC Act itself does little if anything to support environmental restoration. Stabilisation of decline let alone a net improvement in the state of the environment cannot be achieved under the current system. Given the state of decline of Australia's environment, restoration is required to enable future development to be sustainable.

1.3.3 Strategic, national-level opportunities are either poorly implemented or missed

When the EPBC Act was introduced it was intended to be part of a comprehensive package of initiatives, including the Natural Heritage Trust Reserve, which has a main objective '*to conserve, repair and replenish Australia's natural capital infrastructure'*[xvi]. The EPBC Act is limited in its ability to strategically conserve biodiversity, manage key threats or quickly respond to emerging threats such as bushfires, biosecurity incursions or other natural disasters.

Each MNES is separately described and managed through individual species or community Recovery Plans, and opportunities for more coordinated action are missed. While MNES influence funding programs that encourage restoration and threat abatement (such the National Landcare Program or the Threatened Species Recovery Fund), funding cycles do not support an enduring, focused or prioritised approach. Rather, funding is often scattergun, unreliable and short-term.

Provision in the EPBC Act for managing threats – such as the listing of Key Threatening Processes (KTPs) and the development and implementation of Threat Abatement Plans (TAPs) – were designed to support a coordinated and strategic approach to dealing with the major threats that cause the majority of extinctions and declines in Australia. However, these mechanisms are not achieving their intent and many threats in Australia are worsening[xvii].

The current list of 21 KTPs is not comprehensive, as the process largely relies on the receipt of nominations from the public. The listing process is slow and subject to Ministerial discretion. No new KTPs have been listed since 2014, and several major threats, such as inappropriate fire regimes, are not listed. There is a tendency to focus on immediate or existing threats where strong evidence is available, rather than emerging threats. This is despite evidence that early intervention on emerging threats is more cost effective and achieves better outcomes than responding to entrenched threats (Invasive Species Council[xviii]). Persistent and emerging threats can have devastating impact on threatened species and can also lead to more common species becoming rarer.

Even once a KTP is listed, action to address the threat is not required unless a Threat Abatement Plan is considered feasible, effective and efficient and put in place. There are current Threat Abatement Plans for only six of the listed KTPs, with others not required, out-of-date or an alternative, non-statutory approach used[xix].

The EPBC Act does not refer to climate change or explicitly require consideration of future pressures. There is no avenue for an emergency listing of newly threatened species in response to natural disasters such as the 2019–20 bushfires.

The administration of the EPBC Act has contracted to focus on core requirements. Pursuing strategic opportunities to improve outcomes in the national interest have become discretionary, particularly when resources are constrained. The Commonwealth has retreated to transactions, rather than 'leading' strategically in the national interest.

1.4 Key reform directions

1.4.1 The MNES in the EPBC Act should focus on Commonwealth responsibilities

The Review has received a wide range of views on the MNES that should be included in the EPBC Act (see Box 3). Many, including science stakeholders and ENGOs express a view that triggers should be more expansive, extending the reach of the Commonwealth to deliver greater environmental protections. Others, particularly industry groups and advocates of streamlined and efficient regulation, argue that current triggers result in duplication with other regulators and should be removed (see Chapter 4).

Box 3: Stakeholder suggestions[xx] for changes to Matters of National Environmental Significance

Ecosystems, biodiversity and habitat: National Reserve System (national parks, marine protected areas, covenanted private lands and Indigenous Protected Areas); vulnerable ecological communities: ecosystems of national importance; areas of outstanding biodiversity value (e.g. climate refuges, biodiversity hot-spots, critical habitat); wetlands of national significance, native vegetation.

Threats: Key threatening processes (e.g. significant land clearing, invasive species, or disaster-related impacts).

Cultural: Mechanisms for including Indigenous values, priorities and places, or entities of particular significance and concern (species, populations, ecological communities, ecosystems, stories, songlines); tangible and intangible cultural heritage.

Climate Change: Significant greenhouse gas emissions; protection of the environment from climate change impacts (discussed below).

Water: Significant water resources (including surface and groundwater, rivers, wetlands, aquifers and their associated values); an expanded water trigger beyond coal seam gas and large coal mining; nationally significant river systems; ground water dependent ecosystems. Other stakeholders suggest removing or reducing the scope of the water trigger to remove duplication with state and territory regulations.

Nuclear: Expand limitations (s140A) on approval of certain nuclear installations to include all uranium mining and milling actions. Other stakeholders suggest reducing the scope of the nuclear trigger to remove duplication with state, territory and other Commonwealth regulations.

Contributions to the Review have suggested that the EPBC Act should be expanded to include a climate trigger, which would seek to solve two apparent problems. The first view presented is that Australia's current emissions reduction policy settings are insufficient to meet our international commitments and more needs to be done. Advocates for a climate trigger suggest it would contribute to reducing Australia's emissions profile by reducing land clearing and regulating projects with large emission profiles. Successive Australian Governments have

elected to adopt specific policy mechanisms to implement their commitments to reduce emissions, including those that operate economy wide. The Review agrees that these mechanisms, not the EPBC Act, are the appropriate vehicle for addressing greenhouse gas emissions. The Review considers there is merit in mandating proposals required to be assessed and approved under the EPBC Act (due to their impacts on nationally protected matters), to transparently disclose the full emissions profile of the development.

The second view is that the EPBC Act does not effectively support adaptive management that uses best available climate modelling and scenario forecasting to ensure the actions we take to protect matters are effective in climate changed world.

The EPBC Act should however require that development proposals explicitly consider the effectiveness of their actions to avoid or mitigate impacts on nationally protected matters under specified climate change scenarios. Many of the suggestions about the Commonwealth taking on a broader role reflect a lack of trust that states and territories will manage these elements well. The Review does not agree with suggestions that the environmental matters the EPBC Act deals with should be broadened. The remit of the EPBC Act should not be expanded to cover environmental matters that are state responsibilities. To do so would result in muddled responsibilities, further duplication and inefficiency. Unclear responsibilities mean that the community is less able to hold governments to account.

The EPBC Act should focus on the places, flora and fauna that the Commonwealth is responsible for protecting and conserving in the national interest. This includes World and National heritage, internationally important wetlands, migratory species and threatened species and ecological communities, as well as the environment of Commonwealth areas and actions by the Commonwealth.

The Review considers that the Commonwealth must maintain the ability to intervene where a project may result in the *irreversible depletion or contamination* of cross border water resources. Similarly, for community confidence, the Commonwealth should retain the capacity to ensure radioactive activities are managed effectively (see Chapter 4).

1.4.2 The EPBC Act should apply and deliver ESD

The objects of the EPBC Act are sufficiently broad to enable the Commonwealth to fulfil its role. The range of views on the objects of the EPBC Act received by the Review span from full support to a complete revamp. The broadness of the objects has been applauded for flexibility, criticised for carrying little clout, and being 'uninspiring and perfunctory'[xxi].

The Review considers that amending the objects of the EPBC Act will not 'provide more clout' or deliver better outcomes unless other issues that diminish the effectiveness of the Act to protect the environment are addressed.

A fundamental shortcoming in the EPBC Act is that it does not clearly outline the outcomes it aims to achieve. ESD should remain the overall outcome that the EPBC Act seeks to achieve. To do this, the concept needs to be hardwired into the EPBC Act and the basis of the operation of the Act. This means that:

- the Act must require the Minister to apply and deliver ESD, rather than just consider it, and

- decisions must be based on a comprehensive assessment of ESD, including transparent environmental, social, economic, and cultural information (see Chapter 6).

Ideally, achieving ESD is a systems-based outcome rather than the outcome of every decision made. To support further development, the system needs flexibility to balance out impacts over space and time. This can be best achieved by adopting a regional planning approach.

To deliver ESD, the EPBC Act should support a focus on protecting (avoiding impact), conserving (minimising impact), and restoring the environment. Given the state of decline of Australia's environment, restoration is required to enable future development to be sustainable.

Key mechanisms are required to support restoration including regional plans to identify priorities (see below), and investment in restoration through markets and direct investments (see Chapter 7).

1.4.3 Legally enforceable National Environmental Standards should be the foundation for effective regulation

National Environmental Standards

Legally enforceable National Environmental Standards (in the form of a regulatory instrument) are required to underpin the effective operation of the EPBC Act. The law must require that these Standards are applied, unless the decision maker can demonstrate that the public interest and the national interest is best served otherwise.

National Environmental Standards serve two fundamental purposes: to improve the effectiveness and the efficiency of Australia's national environmental law. Strong, clear and nationally consistent Standards will improve outcomes for Australia's biodiversity and heritage, and ensure development is ecologically sustainable over the long-term. Improved certainty for all stakeholders will lead to a more efficient, accessible and transparent regulatory system, and enable faster and lower cost development assessments and approvals (see Chapter 4).

Biodiversity and environment protection standards are increasingly used internationally, including to set sustainability targets for internationally traded commodities such as coffee, banana, cocoa, cotton and others[xxii]. There is strong support for National Environmental Standards amongst submitters (e.g. 10 Deserts Project[xxiii], Australian Conservation Foundation[xxiv], Business Council of Australia[xxv], Minerals Council of Australia[xxvi], Wentworth Group of Concerned Scientists[xxvii], Western Australian Government[xxviii]).

The suite of National Environmental Standards should set the requirements for decision-making to deliver outcomes for the environment, and clearly define the fundamental processes that ensure sound and effective decision-making. As a starting point, the suite of National Environmental Standards should include requirements relating to:

- Ecologically Sustainable Development
- Matters of National Environmental Significance
- Transparent processes and robust decisions, including:
  - Transparency, including judicial review
  - Community consultation
  - Adequate assessment of impact, including climate impacts on MNES

  - Emissions profile disclosure
- Indigenous engagement and involvement in environmental decision making
- Monitoring, compliance and enforcement
- Data and information
- Environmental monitoring and evaluation of outcomes
- Restoration and recovery
- Wildlife permits and trade

The development of National Environmental Standards

The process for making National Environmental Standards should be set out in the EPBC Act. The EPBC Act should include requirements for regular monitoring and reporting, and periodic review and amendment as required, so that Standards remain contemporary and effectively deliver environmental outcomes.

The Commonwealth Minister should set the National Environmental Standards. It cannot be a process of negotiation with the states and territories which ends in agreement on a 'lowest common denominator'.

While set by the Commonwealth, Standards should be developed in consultation with science, Indigenous, environmental and business stakeholders, and the community. While consultation with states and territories is essential, the process cannot be one of negotiated agreement between governments, with rules set at the lowest bar. It is important that this process not be unnecessarily drawn out or arduous. Stakeholders from these key groups should be drawn together at an early stage to work on developing the suite of Standards, building on the constructive contributions that have already been provided to the Review.

Interim Standards are recommended as a first step, to facilitate rapid reform and streamlining. These Interim Standards will need to set out environmental outcomes in terms of clear limits that define acceptable impacts on nationally important environmental matters. They can and should evolve as soon as practicable into more specific, definitive and data-based Standards as information improves. As granularity in Standards is improved, more precision will provide increased certainty for all stakeholders. Improvements in Standards will drive faster and lower cost development assessments and approvals.

Ultimately, Standards should be granular and measurable, with targets that specify the intended outcomes, but without being overly prescriptive. This will provide flexibility without compromising the environment. A key problem with the administration of the current EPBC Act is that rules are buried in thousands of pages of hundreds of statutory documents, that collectively fail to provide clear and specific guidance for decision making.

A granular Standard for threatened species should be expressed in quantitative measures to support recovery over a specific timeframe. Measures such as population size and trends, and the area and quality of habitat available across a landscape type (i.e. population numbers, hectares, threat management and years) should be developed. In time, and with better information and the capability to model ecosystem outcomes, these Standards could shift to measures of probable outcomes for species (such as the likelihood of survival or recovery).

The specification of standards for pollutants under the National Environment Protection (Ambient Air Quality) Measure[xxix], is an example of a granular standard that has been adopted across Australia.

In the short term, the granularity of National Environmental Standards is limited by the information available to define them with certainty and effectively apply them to decision making. A quantum shift will be required in the quality of accessible data and information to increase the granularity of Standards.

The Commonwealth has made past attempts to define some standards for the EPBC Act[xxx]. Past attempts focused on clarifying important processes that were already set out in the EPBC Act and provide a useful foundation to build on in developing the full suite of National Environmental Standards. A key shortcoming of these is the absence of any clear articulation of the intended outcomes for, and acceptable impacts on, MNES. As a priority, an Interim Standard for Matters of National Environmental Significance is needed to address ongoing environmental decline and to provide clear, consistent rules for decision making.

A prototype Standard for Matters of National Environmental Significance is provided in Appendix 1, and an extract from this prototype is set out in Table 1 below. The prototype is a starting point to stimulate discussion. The Review acknowledges that further work is needed to test and refine the Standard. It is based on key principles such as prevention of environmental harm and non-regression, and has been developed using existing policy documents and legal requirements. The prototype shows that an Interim National Environmental Standard for MNES could be developed in short order and would immediately provide greater clarity and consistency for decision-making.

Table 1: Example of prototype Standard for MNES (see Appendix 1 for further details)

Matter	Prototype standard
World and National Heritage	• No development incursion into a World or National Heritage area, unless it promotes the management and values of the property or place. • Actions must not cause or contribute to a detrimental change to the World or National Heritage values of a property or place. • Management arrangements must ensure World and National Heritage values are protected and conserved.
Threatened species and communities	For vulnerable species: • No net loss for vulnerable species habitat. • Actions must manage on-site impacts and threats, where these are not managed through alternative frameworks. For endangered species and communities: • No net loss for endangered species habitat and ecological community distribution. • No detrimental change to the listed critical habitat of a species or ecological community. • Actions must manage on-site impacts and threats, where these are not managed through alternative frameworks. For critically endangered species and communities: • Actions must deliver a net gain for critically endangered species habitat and ecological community distribution.

	• No detrimental change to listed critical habitat of a species or ecological community. • Actions must manage on-site impacts and threats, where these are not managed through alternative frameworks.

1.4.4 A greater focus on adaptive planning is required to deliver environmental outcomes

Adaptive regional planning approaches that reflect National Environmental Standards

To support decision making, and to encourage greater cooperation between jurisdictions, the Commonwealth should adopt adaptive regional planning approaches that reflect National Environmental Standards.

Regional plans would take into account cumulative impacts, key threats and build environmental resilience in a changing climate by addressing cumulative risks at the landscape scale. Managing these threats to MNES at the regional scale will have flow-on benefits for more common species and biodiversity more broadly.

Regional plans should be developed that support the management of threats at the right scale, and to set clear rules to manage competing land uses. These plans should prioritise investment in protection, conservation and restoration to where it is most needed, and where the environment will most benefit.

Ideally these plans would be developed in conjunction with states and territories and community organisations, but where this is not possible, the Commonwealth should develop its own plans to manage threats and cumulative impacts on MNES. The Commonwealth's regional planning efforts should be focused on those regions of highest pressure on MNES.

Three regional planning tools are proposed:

a) Regional recovery plans - developed by the Commonwealth for MNES

b) Bioregional plans - developed collaboratively between the Commonwealth and state or territory Governments.

c) Strategic assessments - developed at the request of a proponent, with the Commonwealth and relevant state or territory.

Commonwealth-led regional recovery plans

A shift is required from recovery planning for an individual listed species or community, to the landscape scale with a focus on biodiversity conservation outcomes for listed threatened species and ecological communities. This drives efficiency, as many listed species in a region rely on the same habitat and suffer from the same threats. New listings in a region can be more easily incorporated, reducing the need for individual plans. Such landscape scale planning would also have benefits for more common species and contribute better to arresting the overall decline of the environment. Initial focus should be on Australia's unique biodiversity 'hotspots'.

Regional recovery plans should provide for coordinated management of threats to listed species and communities in a region, and to consider the cumulative impacts of these threats. They should identify important populations or areas of critical habitat.

Regional recovery plans should incorporate local ecological knowledge including Indigenous knowledge and could draw from regional scale plans that are already in place, including those prepared by natural resource management groups or Healthy Country Plans.

Importantly, regional recovery plans should provide the basis for prioritising Commonwealth action and investment, including the direction of offset obligations arising from development. These plans should identify areas where protection, conservation and restoration are needed, and areas for investment which will deliver the greatest environmental benefit.

Bioregional plans developed in collaboration with states and territories

Ideally, the Commonwealth would work with the states and territories to develop and agree bioregional plans which accommodate their respective interests in the environment. These plans would be developed consistent with the National Environmental Standards (and, where in place, regional recovery plans), and address environmental, economic, cultural and social values.

Bioregional plans should be developed in collaboration with a state or territory, or a jurisdiction could propose its own plan to be considered and accepted by the Commonwealth as a bioregional plan.

Bioregional plans would set the clear rules to manage competing land uses to support regulatory streamlining. They would identify areas where development is lower or higher risk to the environment, those areas where development assessment and approval is not required. The Minister (or delegated decision maker) should make decisions on development approvals in a way that is consistent with the provisions of the bioregional plan.

Strategic assessments

The EPBC Act already provides for landscape scale assessments in the form of strategic assessments (Part 10). While the legal arrangements for strategic assessments are complex (see Chapter 3), those that have been conducted have led to more streamlined regulatory arrangements, although some have been criticised for not achieving their intended environmental outcomes[xxxi].

The EPBC Act should continue to enable proponents to elect to enter into a strategic assessment with the Commonwealth for developments not covered by a bioregional plan. As is the case now, a strategic assessment would provide a single approval for a broad range of actions covering multiple projects to provide upfront certainty of permissible development areas and environmental outcomes.

A strategic assessment should be required to be developed in a manner that is consistent with the National Environmental Standards, and regional recovery plans where they are in place.

Strategic national plans

Not all issues or threats have a spatial lens. There are nationally pervasive issues that would benefit from strategic coordination.

Strategic plans for big-ticket items can provide a national framework to guide a national response, direct research (for example feral animal control methods), support prioritisation of investment (public and private) and enable shared goals and implementation across jurisdictions. National level plans can achieve efficiencies and provide a consistent approach, that can be reflected in regional plans or inform activities in those areas where a regional plan is not in place.

Specific opportunities that lend themselves to national strategic planning include:

- The delivery of a comprehensive, adequate and representative National Reserve System.
- High-level and cross-border threats, such as biosecurity or feral animals.
- The consideration of pressures and risks through forecasting and scenarios, for example how climate change scenarios should be used to support planning and decisions.

Table 1 provides a summary of the proposed adaptive planning tools.

Table 1 Proposed adaptive planning tools

Adaptive planning tool	Leadership, collaboration and approval	Scope	Intent	Spatial coverage
Regional Recovery Plans	Led by Commonwealth, approved by Commonwealth	Listed threatened species and ecological communities	• Coordinated threat management, consideration of cumulative impacts • Support prioritisation of Commonwealth action	Priority regions in the first instance
Bioregional Plans	Collaborative process led by jurisdictions or jointly between jurisdictions and the Commonwealth. Approved or accredited by the Commonwealth	Biodiversity, economic, cultural and social values	• Consistent with the National Environmental Standards and regional recovery plans • Set clear rules to manage competing land uses	Priority regions in the first instance, or where proposed by a jurisdiction for accreditation
Strategic Assessments	Led by proponents and approved by the Commonwealth	Biodiversity, economic, cultural and social values	• Consistent with the National Environmental Standards and regional recovery plans • Provide a single approval for a broad range of actions	Where instigated by proponent
Strategic National plans	Led by Commonwealth, approved by Commonwealth	Nationally pervasive issues such as high-level and cross-border threats	• Provide a national framework to guide a national response, direct research and support prioritisation • Enable shared goals and implementation across jurisdictions	Not spatially focused

1.4.5 Clear outcomes, national standards and regional plans need to be underpinned by fundamental changes to the way the EPBC Act operates

Core reforms proposed by the Review, including National Environmental Standards and improved planning frameworks, aim to support greater cooperation and harmonisation between the Commonwealth, states and territories (see Chapter 4).

The proposed reforms will enable the Commonwealth to step-up to protect the environment in the national interest, rather than focus its efforts on transactional elements that can be duplicative, costly to business and result in little tangible benefit to the environment.

To achieve this, a quantum change in the sophistication of the information, data and regulatory systems (see Chapter 6) and active mechanisms to restore areas of degraded or lost habitat are needed to ensure Australia's environment is conserved for the future (see Chapter 7).

This must be accompanied by transparency, fundamental improvements in monitoring and evaluation (Chapter 8) and strong compliance and enforcement (Chapter 9).

2 Indigenous culture and heritage

Key points

The Review considers that the EPBC Act is not fulfilling its objectives as they relate to the role of Indigenous Australians in protecting and conserving biodiversity, working in partnership with and promoting the respectful use of their knowledge.

The key reasons why the EPBC Act is not fulfilling its objectives are:

- There is a culture of tokenism and symbolism. Indigenous knowledge or views are not fully valued in decision making. The EPBC Act prioritises the views of western science, and Indigenous knowledge and views are diluted in the formal provision of advice to decision makers.
- Indigenous Australians are seeking stronger national protection of their cultural heritage. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) provides last-minute intervention and does not work effectively with the development assessment and approval processes of the EPBC Act. The national level arrangements are unsatisfactory.
- The EPBC Act does not meet the aspirations of Traditional Owners for managing their land. The settings for the Director of National Parks and the joint-boards means that ultimately, decisions are made by the Director.

The key reform directions proposed by the Review are:

- The National Environmental Standards should include specific requirements relating to best practice Indigenous engagement, to enable Indigenous views and knowledge to be incorporated into regulatory processes.
- The national level settings for Indigenous cultural heritage protection need comprehensive review. This should explicitly consider the role of the EPBC Act in providing protections. It should also consider how comprehensive national level protections are given effect, for example how they interact with the development assessment and approval process of the EPBC Act.
- Indigenous knowledge and western science should be considered on an equal footing in the provision of formal advice to the Minister. The proposed Science and Information Committee should be responsible for ensuring advice incorporates the culturally appropriate use of Indigenous knowledge.
- Where aligned with their aspirations, transition to Traditional Owners having more responsibility for decision making in jointly managed parks. For this to be successful in the long term there is a need to build capacity and capability, so that Boards can make decisions that effectively manage risks and discharge responsibilities.
- Improved outcomes for Indigenous Australians will be achieved by enabling co-design and policy implementation.
- The role of the Indigenous Advisory Committee should be substantially recast as the Indigenous Knowledge and Engagement Committee, whose role is to provide leadership in the co-design of reforms and advise the Minister on the development and application of the National Environmental Standard for Indigenous engagement.

Over the last decade, there has been increased recognition of the value of incorporating Indigenous knowledge, innovations and practices into environmental management to deliver positive outcomes for the Australian environment. Indigenous Australians play a significant role in direct land and sea protection and management throughout Australia. These activities are

supported by the Commonwealth, but most support mechanisms sit outside the operation of the EPBC Act such as:

- Indigenous Land Use Agreements (ILUAs), Indigenous ranger programs, Indigenous Protected Areas (IPAs) and savanna burning carbon farming projects.
- National investment in environmental research, for example through the National Environmental Science Program (NESP), also supports and facilitates the participation of Indigenous Australians in research and environmental management activities.

Within the operation of the EPBC Act, the participation of Indigenous Australians is formally focused on:

- An Indigenous Advisory Committee, whose remit is a broad advisory function and is not linked to specific decisions that are made.
- The arrangements for joint management of Commonwealth Reserves on land owned by Indigenous Australians.
- The protection of some Indigenous heritage, including requirements for the Australian Heritage Council to consult with Indigenous people who have 'rights or interests' in the places that it is considering.

While world leading when first legislated, the EPBC Act is now dated and does not support leading practice for incorporating the rights of Indigenous people in decision processes. It lags behind leading practice within Australia, and furthermore, lags behind key international commitments Australia has signed (Box 1).

Box 1 International agreements relating to Indigenous peoples' rights

The **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** "*affirms the minimum standards for the survival, dignity, security and well-being of Indigenous peoples worldwide and enshrines Indigenous peoples' right to be different*"[i]. It emphasises the right of Indigenous peoples to participate in the decision-making process for matters that affect them, the need for mechanisms for redress, and obliges signatory states to obtain free, prior and informed consent before taking actions that may impact Indigenous peoples, such as making laws or approving projects on Indigenous lands.

The **Convention on Biological Diversity (CBD)**[ii] provides for the recognition of Indigenous peoples' inherent ecological knowledge and, with the free, prior and informed consent of Indigenous knowledge holders, promotion of the wider application of such knowledge. It requires signatories, subject to their national legislation, to respect, preserve and maintain Indigenous peoples' ecological knowledge and practices with respect to the conservation and sustainable use of biological diversity.

The **Aichi Biodiversity Targets** agreed under CBD, include a specific target (Target 18) that '*by 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.*'[iii]

The Nagoya Protocol[iv] on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the Nagoya Protocol) is a global agreement that implements the access and benefit-sharing obligations of the CBD. The Nagoya Protocol establishes a framework that ensures the fair and equitable sharing of benefits that arise from the use of genetic resources. Indigenous communities

may receive benefits through associated frameworks that ensure respect for the value of traditional knowledge associated with genetic resources.

2.1 Indigenous knowledge and views are not fully valued in decision making

2.1.1 There is a culture of tokenism and symbolism

The EPBC Act heavily prioritises the views of western science, and Indigenous knowledge and views are diluted in the formal provision of advice to decision makers. This reflects an overall culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians.

While individuals may have good intentions, the settings of the EPBC Act and the resources afforded to implementation are insufficient to support effective inclusion of Indigenous Australians. The cultural issues are compounded as the EPBC Act does not have the mechanisms to require explicit consideration of Indigenous community values and Indigenous knowledge in environmental and heritage management decisions. While protocols and guidelines for involving Indigenous Australians have been developed[v], there is insufficient resourcing to implement them, and they are not a requirement.

There are, however, examples of how species recovery is being led by Indigenous communities for culturally important species using Recovery Planning tools within the EPBC Act (Box 2). In its submission to the Review, the Indigenous Advisory Committee noted that "*The inclusion of Indigenous Knowledge in other management instruments designed to inform the conservation of ecosystems and biodiversity (species and ecological community recovery plans, conservation advisories, research and monitoring plans) are not as numerous (as management plans) although they do exist.* "[vi] These examples are therefore the exception rather than the rule.

Box 2 Incorporating Indigenous knowledge into recovery plans

Draft Recovery Plan for the Greater Bilby [vii]

Over 70 per cent of naturally occurring bilby populations occur on Aboriginal lands, and the species continues to be culturally significant for many Aboriginal people even in areas where bilbies are locally extinct. The collaborative approach that was taken between Indigenous community groups and western scientists to develop the draft recovery plan for the Greater Bilby ensured that ongoing recovery efforts for the species incorporated traditional and contemporary knowledge.

As a result, the draft plan includes actions that will ensure:

- the cultural knowledge of the Greater Bilby is kept alive and strong
- community awareness of the Greater Bilby increases – locally and more broadly
- Indigenous Ranger support and activities are strengthened and increased
- management efforts are increased
- bilby distribution and abundance, threats, and management effectiveness are monitored and mapped,

Saving Alwal, The Golden-shouldered Parrot, Cape York

The Golden-shouldered Parrot Recovery Plan (2003 – 2007)[viii] demonstrates the value of Indigenous knowledge in recovering species, with Olkola Aboriginal Corporation partnering with landholders,

government and environment organisations to deliver the recovery actions. The Golden-shouldered Parrot Recovery Plan recognises the parrot, or Alwal, as a culturally significant species to Olkola people and outlines Traditional Owners as critical partners for landscape scale recovery actions through fire management. A key recovery action is using Traditional fire regimes on properties to reduce woody shrubs which threaten the seed grasses the parrots feed on (Action 7.1.1).

The Department has issued guidance *Engage Early – Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*[ix] . While this sets out expectations for applicants for EPBC Act approval, it is not an enforceable standard or requirement. Furthermore, it is not transparent how the Minister addresses Indigenous matters in their decision making for EPBC Act assessments.

The operation of the EPBC Act Indigenous Advisory Committee (IAC) exemplifies the culture of tokenism. The Act does not require the IAC to provide decision makers with advice. The IAC is reliant on the Minister inviting its views. This is in contrast to other Statutory Committees, which have clearly defined and formal roles at key points in statutory processes.

For example, the IAC does not provide independent advice on the adequacy of the incorporation of Indigenous Knowledge in key decision-making processes (such as listings, recovery plans and conservation advices, or environmental impact assessments).

While the IAC and other statutory committees have established dialogues and ad hoc interactions, this has been informal and lacks structured intent. Indigenous input to the deliberations of other committees has been tokenistic and representative. Representative(s)' of Indigenous Australians on certain, but not all committees is further accepted as satisfying the mandate to involve Indigenous Australians. But this involvement pays lip service to the ethic of involvement and respectful integration of Indigenous knowledge and culture into environment protection and biodiversity conservation. This lack of genuine involvement in committees, and decision-making processes has been raised in submissions to the Review including those from the IAC[x] and Indigenous Land Councils[xi].

The IAC's operating practice is to avoid cutting-across the roles of other Statutory Committees. The effective operation of the IAC is further limited by the lack of adequate funding.

2.1.2 Indigenous Australians seek, and are entitled to expect, stronger national-level protection of their cultural heritage

Places of natural and cultural value that are important to the world or Australia can be recognised and protected by listing them as national heritage, Commonwealth heritage or World Heritage under the EPBC Act.

These include places that hold particular cultural importance for Indigenous people. For example, Kakadu National Park, Tasmanian Wilderness, Uluṟu-Kata Tjuṯa and Willandra Lakes Region, Budj Bim Cultural Landscape, Brewarrina Aboriginal Fish Traps (Baiame's Ngunnhu), and the Myall Creek Massacre and Memorial Site are all places protected under the EPBC Act for their natural and/or Indigenous cultural values.

At the national level Indigenous cultural heritage is protected under numerous other Commonwealth laws, including the *Aboriginal and Torres Strait Islander Heritage Protection Act*

1984 (ATSIHP Act). The ATSIHP Act can be used by Aboriginal people to ask the Commonwealth Minister for the Environment to protect an area or object where it is under threat of injury or desecration and where state or territory law does not provide for effective protection.

At the Commonwealth level, cultural heritage is also protected under the *Copyright Act 1968* (for some intangible heritage) and the *Moveable Cultural Heritage Act 1986* (for tangible, moveable heritage).

The states and territories also play a role in Indigenous heritage protection, and submissions including from the Victorian Aboriginal Heritage Council[xii], have highlighted the potential for duplication. Others, such as the Tasmanian Aboriginal Centre[xiii], have noted the importance of the Commonwealth playing a role, where state-based arrangements, in their view, provide insufficient protections.

The ATSIHP Act does not align with the development assessment and approval processes of the EPBC Act. Cultural heritage matters are not required to be broadly or specifically considered by the Commonwealth in conjunction with assessment and approval processes under Part 9 of the EPBC Act. Interventions through the ATSIHP Act occur after the development assessment and approval process has been completed.

Contributions to the Review have highlighted the importance of considering cultural heritage issues early in a development assessment process, rather than Traditional Owners relying on a last minute ATSIHP Act intervention[xiv]. The misalignment of the operation of the EPBC Act and the ATSIHP Act promotes uncertainty for Traditional Owners, the community and for proponents.

In their submissions, stakeholders have raised their concerns that the Commonwealth does not provide sufficient protection of Indigenous heritage and that fundamental reform is both required and long overdue[xv]. For example, the New South Wales Aboriginal Land Council submission highlighted:

"*… significant improvements are needed to protect and promote Aboriginal cultural heritage. Successive 'State of the Environment' reports have highlighted the widespread destruction of Aboriginal cultural heritage and have observed that "approved destruction" and "economic imperatives" are key risks. Fundamentally, reforms are needed to ensure Aboriginal people are empowered to protect and promote Aboriginal heritage, make decisions, and are resourced to lead this work."*[xvi]

These submissions identify opportunities for the EPBC Act to play a more expansive role in Indigenous heritage protection at the national level.

2.1.3 The EPBC Act does not meet the aspirations of Traditional Owners for managing their land

Joint management arrangements for Commonwealth Reserves (Chapter 5, Part 15, Division 4 subdivision F) are in place for three Parks – Kakadu, Uluṟu-Kata Tjuṯa and Booderee. In these areas, Traditional Owners lease their land to the Director of National Parks (DNP). The DNP is a statutory position, established under Part 19 Division 5 of the EPBC Act. For each jointly-managed Park, a Board of management has been established.

The governance framework for jointly-managed Parks is shaped by the provisions of:

- the EPBC Act,
- the lease agreements between TOs and the Director of National Parks, and
- relevant Commonwealth Land Rights legislation – the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth).

The construct of the position of the DNP as a corporation sole under the Act means that ultimately, that position is responsible for decisions made in relation to the management of Parks and for the effective management of risks such as those relating to occupational health and safety. As a corporation sole, the DNP relies on resources provided to it by the Department to execute its functions. Employees in Parks are employed by the Department, consistent with APS requirements, and resourcing levels are subject to usual Government budgetary processes.

Previous reports[xvii] have highlighted shortcomings in the structure of the relationship between the Department and the DNP. This Review has not sought to revisit these issues given the comprehensive recent assessment.

The contributions of Traditional Owners of Kakadu, Uluṟu-Kata Tjuṯa and Booderee National Parks, as well as the Land Councils who support them, have indicated that the current settings in the EPBC Act for joint-management of Commonwealth Parks fall short of their aspirations. Examples[xviii] of this include:

- The inability for Traditional Owners of Booderee National Park to exercise functions, rights and powers under the relevant land rights law within the park.
- Limits on the number of Traditional Owners on boards, means that for Parks that comprise of many Traditional Owner groups, some groups are left out of decision making.
- Lease agreements stipulate that the DNP should actively seek that the majority of permanent employed positions be held by suitably qualified Indigenous staff members. APS wide employment conditions mean career progression is limited to lower levels of the public service.
- Traditional Owners feel that important opportunities for employment that support connection to Country (such as through 'day labour') have diminished over time.
- Traditional Owners feel they don't have recourse if the DNP fails to implement park management plans, decisions of boards of management, or lease obligations.
- Traditional Owners perceive that their views on restricting public access to particular areas of a park that have cultural significance or at particular times are not respected.

Decisions made by the Board can be overturned by the DNP. The ultimate decision-making position of the DNP does not empower Traditional Owners to make genuine "joint management" decisions. There are examples where boards have had the opportunity to participate in decision making, but have been unable to effectively do so. They are either reluctant to accept the responsibilities associated with decisions or are unable to draw together disparate community interests and aspirations.

The contributions received from Traditional Owners to the Review indicate that they seek a "real" partnership, and more responsibility to make decisions.

Some contributors to the Review seek a broader application of joint management settings[xix].

2.2 Key reform directions

2.2.1 Reforms should be pursued through co-designed policy making and implementation

The Australian Government is recognising improved outcomes for Indigenous Australians through enabling co-design and policy implementation with Indigenous people. It is important that any reform to the EPBC Act be conducted in a way that is consistent with the COAG Commitments in the Partnership Agreement for Closing the Gap and supporting processes (see Box 3).

The pursuit of reforms would occur alongside other Commonwealth initiatives, including those related to an Indigenous Voice, the Northern Australian economy, the protection of Indigenous intellectual property and development of a government-wide Indigenous Evaluation Strategy.

Aboriginal and Torres Strait Islander peoples and communities often engage with multiple departments and organisations across all levels of Government. It is a busy space, and activities should seek to align with or complement other work, while maintaining relevance to the environment portfolio.

Box 3 COAGs Closing the Gap Commitments

Key excerpts from the Agreement[xx]

- Priority Action 1 - developing and strengthening structures so that Aboriginal and Torres Strait Islander people share in decision making with governments on closing the gap.
- Priority Action 2 - Building formal Aboriginal and Torres Strait Islander community-controlled service sectors to deliver closing the gap services.
- Priority Action 3 - Ensuring mainstream government agencies and institutions that deliver services and programs to Aboriginal and Torres Strait Islander people undertake systemic and structural transformation to contribute to closing the gap.

Excerpts from a "New Way of Working" Coalition of the Peaks document[xxi]

- When Aboriginal and Torres Strait Islander people are included and have a real say in the design and delivery of services that impact on them, the outcomes are far better.
- Aboriginal and Torres Strait Islander people need to be at the centre of Closing the Gap policy: the gap won't close without our full involvement.
- COAG cannot expect us to take responsibility for outcomes or to be able to work constructively with them if we are excluded from decision making.

The practice of co-design should relate to both progressing the agreed recommendations from this Review and following on from this, how the approach is embedded into policy, procedures and behaviours going forward.

The role and membership of the IAC should be substantially recast, to form the Indigenous Knowledge and Engagement Committee (see Chapter 5 – Trust). The role of this Committee would be to:

- support the co-design of reforms (and the participation of Indigenous Australians in this process), and
- oversee the development of, and monitor and advise on, the application of the proposed National Environmental Standard for Indigenous engagement.

The philosophy adopted by the co-design process could include:

- genuinely demonstrate respect for Indigenous knowledge, worldviews, culture and ongoing custodianship,
- acknowledge and redress perceived imbalances of power,
- promote transparency, open communication and two-way knowledge sharing,
- be flexible in what engagement approaches could look like outside of traditional written and face to face consultations and in how the Commonwealth receives feedback and advice,
- support two-way communication and initiation of co-design, where all parties have equal rights and opportunities to initiate engagement and discussion,
- acknowledge the value of Indigenous knowledge across a diverse range of issues, that may extend beyond what has traditionally been determined issues of interest or significance for Indigenous peoples,
- support a continual process of monitoring, revision and review of approaches, that actively involve Indigenous peoples, and
- link in with or support more coordinated and consistent efforts at the Commonwealth level with respect to Indigenous engagement.

2.2.2 Best practice engagement to embed Indigenous knowledge and views in regulatory processes

Contributors to the Review[xxii] have highlighted that the EPBC Act should more actively facilitate Indigenous participation in decision making processes. Specifically, through a call for 'normalisation' of incorporating Aboriginal and Torres Strait Islander knowledge in environmental management planning and environmental impact assessment through culturally appropriate engagement.

Contributions have all highlighted the importance of the underpinning concept of free prior and informed consent and a range of views have been presented to the Review on how this could be achieved including:

- Specific regulatory requirements or standards expected in decision-making processes (e.g. standards for proponents in conducting environmental impact assessment), or binding standards for consultation with Indigenous Australians[xxiii].
- Requirements for the participation of Indigenous Australians in regional planning activities, so their knowledge and values can be incorporated into decision making (such as strategic assessments or bioregional plans).

- Greater investment in science research, where Indigenous Australians are co-researchers alongside western science[xxiv].

A National Environmental Standard for best-practice Indigenous engagement is required to ensure that Indigenous Australians that speak for Country have had the proper opportunity to do so, and for their views to be explicitly considered in decisions. The proposed National Environmental Standard for best practice Indigenous engagement should be developed in close collaboration with Indigenous Australians. Specifically, an Indigenous Knowledge and Engagement Committee (discussed further in Chapter 5) should be responsible for leading the co-design process.

The Standard would be applied to all aspects of decision making under the EPBC Act, including the development of regional plans and environment impact assessment and approval decisions. Existing relevant Commonwealth and key agency guidelines including *Engage Early – Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*[xxv]could be used as a starting point for the development of the Standards (Box 4).

Box 4 Building blocks for National Standards for Engagement with Aboriginal and Torres Strait Islander people and communities

Two Commonwealth Government guidelines have been developed to assist stakeholders of the EPBC Act to understand their obligations for engaging with Aboriginal and Torres Strait Islander peoples on Indigenous heritage matters, Native title agreements and other relevant considerations. These guidelines provide a starting point for reforms on Indigenous engagement under the EPBC Act, and the development of National Standards:

- *Engage Early – Guidance for proponents on best practice Indigenous engagement for environmental assessments under the EPBC Act'* [xxvi]aims to improve how proponents engage and consult Indigenous peoples during the environmental assessment process under the EPBC Act. The guidance encourages proponents to think more broadly than just matters that impact Indigenous Heritage, including interactions with the *Native Title Act 1993* and engaging Indigenous Australians to manage offsets. The guidance outlines some specific considerations for parties, including allowing additional time before statutory processes to engage and seek consent, establishing meaningful relationships with communities, and identifying any Native title agreements in place on the land.
- *Ask First: A guide to respecting Indigenous heritage places and values* [xxvii] was developed by the Australian Heritage Council (then Commission) soon after the EPBC Act was written to address '*lack of familiarity or awareness in the wider community*' in Indigenous Heritage matters. It identifies the links between the landscape as a whole and Indigenous Heritage Values and outlines that Indigenous Australians need to give their consent at most stages before activities which involve Indigenous Heritage proceeds. The guidelines established early that '*consultation and negotiation with Indigenous stakeholders'* is not only best practice, but essential for strengthening the protection of Indigenous Heritage values. The document clearly outlines actions which professionals and organisations should take, and offers additional, non-mandatory guidance.

2.2.3 National level cultural heritage protections need comprehensive review

The current laws that protect Indigenous cultural heritage at the national level need comprehensive review. This review should consider both tangible and intangible cultural heritage (see Box 5).

Box 5 Intangible cultural heritage

The concept of intangible cultural heritage relates to knowledge of or expressions of traditions. Intangible Indigenous cultural heritage is defined in various Commonwealth and state laws in Australia

Victorian Aboriginal Heritage Act 2006

Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition … and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.[xxviii]

Northern Territory Aboriginal Scared Sites Act 1989

Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

A sacred site means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.[xxix]

ATSIHP Act

…the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.[xxx]

Contributors to this Review [xxxi] have emphasised the intrinsic link between Indigenous peoples, land and water and their culture and wellbeing.

"For Indigenous Australians, Country owns people and every aspect of life is connected to it, it is much more than just a place. Inherent to Country are vistas, landforms, plants, animals, waterways, and humans. Country is loved, needed and cared for and Country loves, needs and cares for people. Country is family, culture and identity, Country is self." – Indigenous Working Group, Threatened Species Recovery Hub[xxxii]

These contributors have suggested that the EPBC Act could have a more expansive role to protect culturally important species, important cultural places that have intangible, ecological, environmental, and physical cultural assets.

There is a need for comprehensive review of national level Indigenous cultural heritage protection legislation. Reform should take into consideration processes currently underway that are looking to improve Indigenous cultural heritage protection outcomes.

The Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) has been working since 2018 to develop 'Best Practice Standards in Indigenous Cultural Heritage Management and Legislation'. This work is being done in partnership with Indigenous Heritage leaders. When finalised, the framework will provide a basis on which to comprehensively review how Indigenous heritage is protected by national laws in Australia, and how national laws should interact with state-based arrangements.

The goal of a national review would be to ensure that national laws provide best-practice protection of cultural heritage – tangible and intangible, and work in concert with protections afforded under state laws.

Given the intrinsic links between the environment, culture and wellbeing, and the objects of the EPBC Act, the Act could play a significant role in delivering more effective protections. This includes how Indigenous heritage is protected under the EPBC Act (e.g. places or culturally important, but common species) and how protections are given effect for example in regional planning processes, protected area management, or development assessment and approval processes.

However, the EPBC Act may not be best placed to protect all Indigenous cultural heritage (e.g. language, crafts) and that other laws or processes will need to work in concert with national environmental law to provide comprehensive, national level protections.

2.2.4 Combine Indigenous knowledge and western science in statutory advisory committees

The structure of the statutory advisory committees in the EPBC Act, and the lack of interaction between them engrains the cultural primacy of western science in the way that the Act operates.

The National Environmental Standard for best-practice Indigenous engagement is one mechanism to ensure that Indigenous Australians that speak for and have Traditional Knowledge of Country have had the proper opportunity to contribute to decisions made under the EPBC Act.

In addition to a substantial re-casting of the role of the Indigenous Advisory Committee, more needs to be done to enhance how Indigenous knowledge is considered alongside western science and information. This includes the following:

- Proposed reforms to the statutory advisory committees of the EPBC Act as set out in Chapter 5.
- Central to these reforms is the establishment of an Information and Knowledge Committee. The remit of this Committee should include the culturally appropriate use of Indigenous knowledge in decision making.
- The composition of the Information and Knowledge Committee should be such that scientific, economic, social and Traditional Knowledge required to underpin the operation of the EPBC Act are balanced.

2.2.5 Transition to Traditional Owners having more responsibility for managing their land

Traditional Owners of jointly managed parks have expressed their aspiration to have more responsibility and control over the management of their land and waters. Submissions received by the Review have highlighted opportunities to better support these aspirations. These include:

- Improved monitoring, compliance and review of joint management arrangements, to ensure the Director of National Parks (DNP) implements management activities in a manner consistent with agreed plans.

- Aspirations of genuine joint decision making, meaning that Boards accept the responsibilities and risks that are currently borne by the DNP.
- Improved employment opportunities, and through employment the opportunity to work on country and share knowledge of Country.
- Changes to the relationships between laws, to provide for greater local management and control.

The shared vision between Traditional Owners and the Australian Government on what they seek to achieve from their partnership in joint management, and how this builds toward the longer term aspirations of Traditional Owners is unclear.

A shared vision is essential for success. Without one, any change is likely to deliver unintended outcomes, diluted focus, or underinvestment in the transition needed to meet the aspirations of Traditional Owners. The first step is to reach consensus on the shared vision, and then co-design the policy, governance and transition arrangements needed to achieve it.

Any transition to greater responsibility for decision making by Traditional Owners will require support for owners to develop the capabilities to execute the legal and administrative responsibilities associated with managing Commonwealth parks. This includes responsibility for effective health and safety risks to Park staff and visitors, accountability for expending operating costs (between $7 million and $20 million per year) and for the effective management of capital works budgets[xxxiii]. The magnitude and significance of a transition to greater decision making for Traditional Owners should not be underestimated.

3 Legislative complexity

Key points

The EPBC Act is complex. Complex legislation makes it difficult, time-consuming and expensive for people to understand their legal rights and obligations. This leads to confusion and inconsistent decision-making, creating unnecessary regulatory burden for business, and restricts access to justice.

The key reasons the EPBC Act is complex are:

- The policy areas covered by the Act are inherently complex. Environmental approvals, Commonwealth reserves, wildlife trade, and the conservation and recovery of threatened species are complex policies. The way the different areas work together to deliver environmental outcomes is not always clear, and many areas operate in a largely siloed way.
- The EPBC Act relies heavily on detailed prescriptive processes that are convoluted and inflexible, meaning engaging with it is time consuming and costly. This is particularly the case for environmental impact assessment (EIA). Convoluted processes are made more complex by important terminology being poorly defined or not defined at all.
- The construction of the EPBC Act is archaic, and it does not meet best practice for modern regulation.

The key reform directions proposed by the Review are:

- In the short term, legislative amendments to the EPBC Act are required to address known inconsistencies, gaps, and conflicts in the Act.
- In the medium term, consideration should be given to dividing the EPBC Act, creating separate pieces of legislation for its key functional areas.
- In the longer term a comprehensive redrafting of the EPBC Act (or related Acts) is required. This should be done following the development of the key reforms proposed by this Review. This sequencing will ensure that legislation is developed in a way that supports the desired approach, rather than inadvertently hindering it.

3.1 The EPBC Act covers a wide range of complex policy areas

The original ambition of the EPBC Act for a 'joined up', comprehensive environmental framework—one that combined 5 pieces of legislation into one—has not been realised.

The complexity in the EPBC Act is in part driven by underlying policy complexity. The broad policy areas covered by the EPBC Act—environmental approvals, Commonwealth reserves, wildlife trade, and threatened species conservation and recovery—are complex in their own right.

Having multiple policy functions in the one Act makes it very challenging to understand how the requirements for these areas operate separately or together. This creates confusion and inconsistency in decisions, and limits the effectiveness of the compliance and enforcement function (see Box X for examples). The inter-relationships between the different parts of the

EPBC Act are often not clear, and there can be ambiguity when different parts of the Act are in operation.

Box X: Unclear linkages between the functional parts of the EPBC Act

Example 1: The link between recovery plans (Part 13) and approval decisions (Part 9)

It is administratively difficult to apply the current legislative requirement to "not act inconsistently with a recovery plan" made under Part 13, and an approval decision made under Part 9. There are commonly different opinions as to what practically amounts to an inconsistency. Recovery plans are written with a focus on protecting and enhancing species survival. Decisions made under Part 9 are generally applied in a way that minimises harm to the environment while facilitating development but do not aim to enhance species survival.

Example 2: The link between Permits (Part 13) and Approvals (Part 9) in a Commonwealth area

A Part 13 permit (to kill, injure, take, trade, keep or move a member of a listed species or ecological community in or on a Commonwealth area) is not required for actions that are covered by a Part 9 approval. However, where a Part 9 approval has not been granted (for example, where a 'not controlled action' decision or a 'particular manner' decision is made) a Part 13 permit is still required. This means that even when the same action is found not to have a significant impact on an MNES under one part of the Act, it could still be an offence under another.

3.2 Environmental impact assessment is a convoluted process, based on poorly defined key terms

The EPBC Act uses overly prescriptive processes. This means the effort of the regulator and the proponent is often focussed on completing the process as quickly as possible rather than achieving the outcome intended.

This is most visible for EIA, where the EPBC Act prescribes the:

- required, detailed steps for preparing content of relevant documents
- documents that must be provided
- way they must be considered by the decision maker (see Box X).

Box X: Complexity of EIA processes

Example 1: Part 9 decisions – approval of actions

The EPBC Act does not currently set out a clear standard for deciding whether to approve an action based on the acceptability or otherwise of the impacts (see Chapter 1).

The focus on process is at the expense of outcomes. The administrative overhead to manage the technicalities of prescriptive processes is significant and adds to delay and cost with no additional environmental benefit.

A decision-maker may approve an action if they follow the correct legal processes and have regard to all the relevant statutory considerations.

The statutory considerations a decision maker is required to apply differ depending on which information and documents need to be considered. For example, a decision maker may have to 'have regard to', 'take into account', 'consider', 'not act inconsistently with', 'not contravene', the relevant information or statutory document.

- This complexity must be reflected in the recommendation report and decision brief to meet all the requirements of the EPBC Act. Approval decisions have been overturned on technical grounds then remade with no change to the environmental outcomes.
- This has practical consequences. Where there is community concern arising from a decision, that decision is contested on technical grounds about the process rather than the environmental outcome (see Chapter 5).

Example 2: Poorly defined terms

Key terms in the EPBC Act lack clarity, which leads to confusion about obligations and inconsistent interpretation.

Terminology such as 'significant' (impact), 'action' or 'continuing use' means people, including departmental staff, aren't sure how the EPBC Act should apply.

Poorly defined terminology also leads to uncertainty about how to undertake self-assessment to determine if a referral is needed. This drives unnecessary referrals as proponents seek to manage risk by requesting a referral decision even if they don't think their action would trigger the EPBC Act.

The department has been inconsistent in its application and guidance about requirements under the EPBC Act, which has added to confusion and uncertainty. For example, whether to refer or not to refer, or whether something is a controlled action.

Example 3: There is uncertainty about the concept of 'controlled actions' and the controlling provisions in Part 3

The concept of controlled actions and controlling provisions is central to the referral and subsequent assessment and approval of an action but is unclear.

Before an assessment is carried out there is often insufficient information on MNES. At the referral stage, it is difficult for an assessment officer to identify all species by level of endangerment in order to identify with certainty which controlling provisions apply. If a controlling provision is not specified at the referral stage but is identified as relevant during the course of the assessment, the EPBC Act requires a reconsideration of the initial controlled action decision and the assessment process would need to begin again.

Example 4: There are legal uncertainties relating to condition-making powers

Usually, EIA approval decisions have conditions applied to them. There are uncertainties about how conditions are to be applied and what happens to them over time. For example, consent of an approval holder is required to apply conditions that are not 'reasonably related to an action', but it is unclear what this means.

Conditions relating to management plans are usually set early in the life of a project before impacts are fully understood making implementation and enforcement difficult. Changes in circumstances are also not well accommodated, meaning some conditions can cease to be appropriate or relevant but remain in force unless actively removed.

Example 5: There are inconsistent interactions between EIA and other parts of the EPBC Act

The EPBC Act seeks to simplify the operation of Part 10 (strategic assessments) by applying the Part 9 approval and post-approval processes to a strategic assessment approval. If a strategic assessment approval is in force, the EPBC Act applies several of the provisions of Part 9 to a strategic assessment approval (section 146D). This leads to potential legal inconsistencies as a Part 10 approval is quite different in practice to a Part 9 approval.

3.3 The construction of the EPBC Act is archaic

The EPBC Act does not meet Australian Government best practice guidance on minimising legislative complexity. The EPBC Act was drafted 20 years ago, and best practice legislative drafting has evolved since this time.

There is a general need to remove duplication, apply consistency and simplify the law where possible. An example of this is the distributed nature of compliance and enforcement provisions throughout the EPBC Act, rather than a broad set of compliance and enforcement tools that can be applied across it (see Chapter 9).

Many clauses in the EPBC Act are unnecessarily wordy and verbose, which makes them hard to read. For example, section 133(1):

> 'After receiving the assessment documentation relating to a controlled action, or the report of a commission that has conducted an inquiry relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action by a person'.

The inter-relationships between the EPBC Act and other laws (for example, the *Native Title Act 1993* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*) are not clear. This arises because definitions of terms, processes and outcomes set out in the EPBC Act do not always align or operate in conjunction with other legislation.

The level of detailed prescription in the EPBC Act is not consistent with the *Legislation Act 2003* or the *Acts Interpretation Act 1901.*

- The level of prescription in the EPBC Act on how an instrument is revoked or amended makes it difficult to amend that instrument where it is redundant or no longer has the intended effect.
- Instruments made under the EPBC Act can be amended by other instruments, leading to legal questions about its status. For example, heritage lists are published on the department's website, but can be amended by gazette notices (for inclusion), notifiable instruments or legislative instruments (for removal of places, depending on the reason for removal).

3.4 Key reform directions

Complexity of a policy area necessitates a degree of complexity in legislation. There is general acceptance that the core functions of the EPBC Act are all necessary to implement Australia's international obligations and to achieve national interest outcomes.

The key reform directions proposed by this Review, particularly those related to the hardwiring of the requirement for Ecologically Sustainable Development (ESD), the establishment of National Environmental Standards, and pursuing a regional planning approach, will all reduce the need for complexity in the law.

The controversial and contentious nature of some parts of the EPBC Act result in political sensitivity about the Act as a whole. Making administrative amendments or amendments to less controversial parts of the EPBC Act has proven difficult. Successive governments have been reluctant to propose amendments unless absolutely unavoidable, leading to a hesitation even

within the department to recommend amendments as such opportunities are seen as out of reach (when they should be a matter of routine). Largely uncontested changes to less-controversial parts of the EPBC Act (such as some related to wildlife trade or the management of Commonwealth reserves) have suffered from this unwillingness to amend the Act.

3.4.1 Make known improvements to the EPBC Act in its current form

In the short-term, legislative amendments to the EPBC Act are required to address known inconsistencies, gaps, and conflicts in the Act. Submissions to the Review have indicated this to be a priority[i].

Opportunities to reduce process prescription

Process prescription must be addressed both in how the EPBC Act is constructed as well as how it is implemented. Opportunities to reduce prescription include:

- reducing the number of statutory tests—many different statutory tests apply to a decision. For example, a decision maker may have to 'take into account', 'have regard to' and 'consider' different documents or requirements.
- clarifying the information that must be before the decision maker as part of a briefing (and the form in which it should be provided).
- removal of requirements for publication of notices in newspapers—these and similar reductions in process prescriptions affecting transparency should be offset by corresponding improvements in the accessibility of information and the use of alternative media to ensure the overall transparency of the EPBC Act is increased.

Resolving the connection between Part 9 and Part 10

Long-standing problems relating to the connection between approvals (Part 9) and strategic assessments (Part 10) should be addressed:

- The inability to vary a program once endorsed makes a Part 10 approval frozen in time and unable to respond to changes in information and circumstances. For example, strategic assessments are unable to deal with new listings. This means assessments that operate for long periods of time are unable to make adjustments to achieve the environmental outcomes envisaged.
- Where an agreed strategic assessment relies on an endorsed statutory regime (as is the case with the National Offshore Petroleum Safety and Environmental Management Authority) and these regimes are amended, there is a risk that future actions conducted consistent with the amended regime differ from those endorsed by the strategic assessment.
- Strategic assessments are made on a 'policy, plan or program', which commonly include commitments that must be fulfilled by different people. It is unclear whether a person can rely on a strategic assessment approval if a commitment has not been fulfilled. The consequences of a failure to implement a commitment in an endorsed 'policy, plan or program' are unclear.
- Strategic assessments give approval for many unidentified persons to undertake the approved action(s) or class of action. In most cases, there is no identified 'approval holder' for a Part 10 approval. This makes it difficult to vary the conditions of the strategic assessment approval where the consent of the approval holder is required, or to revoke or

suspend a Part 10 approval because there are legal difficulties in providing procedural fairness.

Other areas of amendment

Other chapters of this interim report highlight opportunities for amendments to the EPBC Act. These include:

- the need for a complete set of compliance and enforcement tools across the EPBC Act to harmonise monitoring, investigation, and enforcement powers (see Chapter 9). This could be done by referencing the *Regulatory Powers (Standard Provisions) Act 2014* (Cwlth) and providing necessary additional powers.
- amendments to align the EPBC Act with Australia's international obligations in relation to the protection of migratory species under the Bonn Convention and permits for wildlife trade to meet Australia's obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (see Chapter 4).

3.4.2 Split the EPBC Act into logical categories

In the medium-term, it may be prudent to divide the EPBC Act along functional or operational lines by creating separate legislation for some or all of the following functions:

- biodiversity and ecosystem management, to regulate the recovery of natural systems and nationally important biota (via national standards and regional planning)
- environment and heritage protection, to regulate EIA decision making in relation to MNES
- wildlife trade restrictions to meet CITES obligations
- protected areas management, to regulate Commonwealth reserves and heritage places and to administer Commonwealth reserves
- environmental data and reporting, to administer data coordination, and national and international reporting
- institutional arrangements, including those for compliance and enforcement
- national biodiversity markets.

Though separate legislative frameworks, any legislatively separate areas should be clearly integrated by:

- requiring decision making across relevant Acts to accord with regional planning requirements and national standards
- ensuring consistent data and reporting requirements, in line with proposed reforms for the monitoring, evaluation and reporting of the national system for environmental management.

3.4.3 Simplify the law

In the longer-term, comprehensive redrafting of the EPBC Act (or related Acts) is required. Redrafting should be framed around core principles for legislative drafting. For example, the *Fair Work Act 2009* was drafted using the principles[ii]:

- Policy simplification (where possible) should be carried out first.

- Material of most relevance to the reader should be placed upfront.
- Important concepts should be clearly defined.
- Language and sentence structure should follow guidance to reduce complexity.
- The overall structure of legislation and its provisions should be carefully constructed for readability.
- Only necessary detail should be included, and detail should be in the right place.

Plain English guidance material should also accompany legislation to aid interpretation and use and should be easily accessible and updated regularly.

Simplifying the legislation should follow the establishment of the proposed regulatory changes identified in this report, including the development of National Environmental Standards, regional planning, and improved data, information, and monitoring. This will ensure the legislation is developed in a way that supports the desired approach, rather than acting against it.

4 Efficiency

Key points

The Act is duplicative, inefficient and costly for the environment, business and the community.

The interaction between Commonwealth and state and territory laws and regulations leads to duplication. Despite efforts to streamline, significant overlap remains.

Past attempts to devolve decision making have been unsuccessful due to lack of defined outcomes and concerns that decisions would be inconsistent with the national interest.

Key reform directions to remove duplication between the EPBC Act and state and territory systems are:

- Devolve decisions to other jurisdictions, where they demonstrate National Environmental Standards can be met.
- Devolution should be based on sound accreditation, quality assurance and compliance, escalation (including step-in capability) and regular review.
- The reform directions proposed (National Environmental Standards, regional plans, information and data, modern regulatory systems) provide confidence for devolution, and will improve interoperability between the Commonwealth and jurisdictions.

Even with greater devolution, the Commonwealth is likely to have an ongoing role in directly assessing and approving some developments. It is therefore also important to address inefficiencies in Commonwealth-led project assessment and approval processes.

There is duplication with other Commonwealth regulations, and some activities are effectively regulated by others. The interplay between regulations is often more onerous than it needs to be.

The laws for permitting wildlife trade exceed international obligations, are inflexible and unnecessarily burdensome.

Key reform directions to further streamline the EPBC Act are:

- Assessment pathways should be rationalised and implemented with clear guidance, modern systems and appropriate cost recovery. Small investments can dramatically reduce cost and uncertainty and improve decision-making.
- These, and other reform directions proposed (National Environmental Standards, regional plans, information and data, modern regulatory systems) create opportunities for significant streamlining and efficiency, including where low risk actions will not require approval.
- Streamline provisions for permitting of wildlife trade and interactions with other environmental frameworks.

Regulation that protects the environment in the national interest is a reasonable expectation of Australians. As explored in Chapter 1, the way the EPBC Act operates does not effectively protect the environment in the national interest, and there is a high degree of mistrust in the community (Chapter 5).

It is reasonable for industry to expect governments to regulate efficiently, and wherever possible, harmonise regulation and ensure its interoperability. This reduces the costs of regulation to businesses that must comply with the law, and governments who administer it.

Suggested expansions to the remit of EPBC Act that intersect with state and territory responsibilities or other Commonwealth regulations are not supported by the Review (Chapter 1).

4.1 There is duplication with state and territory regulators

4.1.1 There have been efforts to streamline with the states and territories

The EPBC Act was drafted to include several tools to achieve streamlining and harmonisation between the Commonwealth and states and territories. Strategic assessments (see Chapter 1) have been one mechanism to do this. Others, including a common assessment method for listing threatened species, and bilateral assessment and approval agreements are explored further in this section.

The water trigger (Box 1) and nuclear trigger (Box 2) MNES are often cited as areas where streamlining is incomplete. The evidence presented to the Review suggests these areas have significant potential to be further streamlined, while ensuring that the national interests continues to be upheld.

Common assessment methods for threatened species listing

The Commonwealth and all state and territory governments have been working since 2015 to implement a common assessment method for listing threatened species and ecological communities. This work is formally underpinned by an intergovernmental memorandum of understanding.

Any jurisdiction can undertake a national assessment using the common assessment method, the outcome of which will be adopted by other jurisdictions where that species occurs, as well as the Commonwealth Government (under the EPBC Act). This means that a species is only assessed once and is listed in the same threatened category across all relevant jurisdictions.

This work is supported by the states and territories[i], and supports regulatory harmonisation, by aligning lists and providing consistent protections for regulation reducing confusion. Rather than a species being assessed numerous times, it can be considered once, with corresponding improvements in efficiency.

To date, 100 species listing decisions have been made under the EPBC Act based on state/territory-led assessments, and a further 47 are in progress. Consideration should be given to the benefits of moving to a single list of jurisdiction and national matters. The Commonwealth could maintain this list on behalf of all jurisdictions.

Bilateral assessment agreements

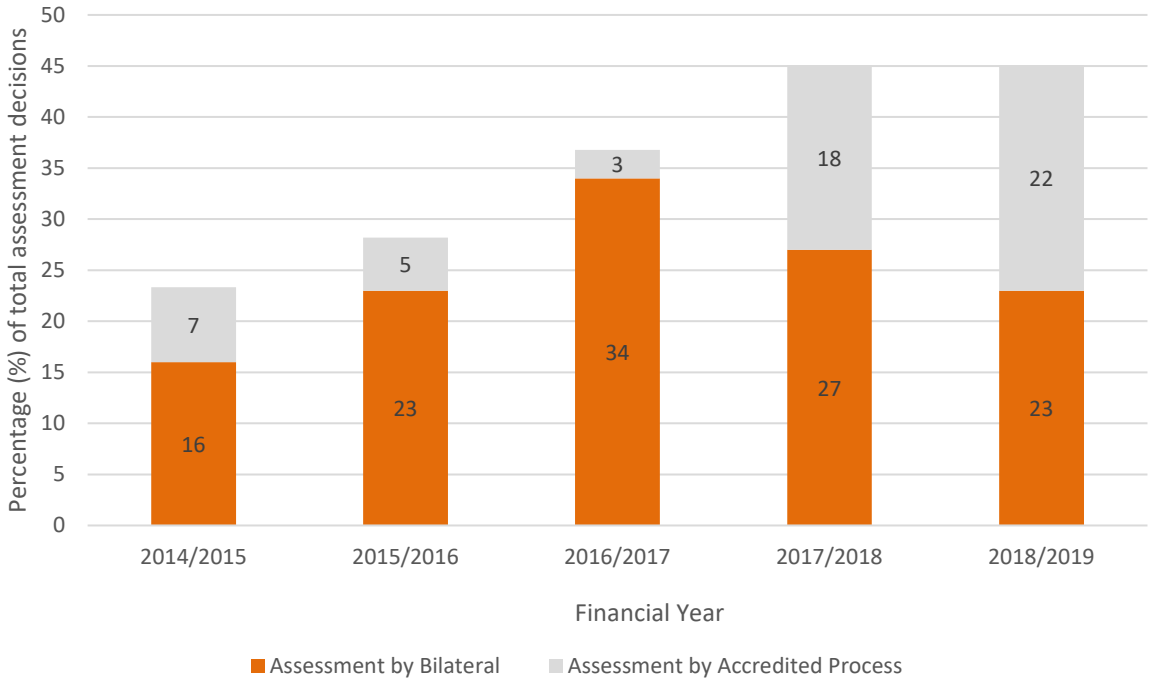
The EPBC Act allows for the accreditation of state laws and management systems where they provide appropriate protections for nationally protected matters. Under a bilateral assessment agreement, the Commonwealth retains responsibility for approvals, based on environmental impact assessments undertaken by the jurisdictions on nationally protected matters.

Assessment bilateral agreements are in place in all eight jurisdictions. However, recent changes to state and territory laws mean that some of these agreements are being re-made to make them fully operational. Where agreements are not fully operational, individual assessments are often undertaken jointly (known as accredited assessments) which

has the same effect as if a bilateral assessment agreement was in place. This ensures continued streamlining and reduced impact on projects but highlights the inherent fragility of the agreements.

Between July 2014 and June 2019, 37 per cent of proposals under the EPBC Act were assessed (or are being assessed) through either a bilateral assessment (25 per cent) or accredited assessment (12 per cent) arrangement with states and territories. Figure 1 shows the breakdown over this period.

Figure 1 Percentage of projects assessed under bilateral (orange) and accredited processes (grey) for all states and territories (1 July 2014 and 30 June 2019)



Source: Unpublished data, Department of Agriculture, Water and the Environment

There are significant shortcomings in the current arrangements. The requirements of the EPBC Act mean that even where they are in place, bilateral assessment agreements do not cover all development types. For example, where states do not actively assess certain development types (for example, code based developments) or where approvals are given by local councils under local planning laws these activities are unable to be accredited under the current inflexible bilateral provisions. For a single project, bilateral agreements may cover some aspects of the project, but not all. For example, not all clearing of habitat of nationally threatened species can be accredited due to the way state land clearing laws are constructed[ii].

Figure 2 provides the breakdown by jurisdictions and shows that approaches to streamline arrangements have had varied success between jurisdictions.

Figure 2 Percentage of projects assessed by bilateral (orange) and accredited processes (grey) for Australian states and territories (1 July 2014 to 30 June 2019)

Source: Unpublished data, Department of Agriculture, Water and the Environment.

Both proponents and regulators are supportive of bilateral assessment agreements and acknowledge the benefits they provide[iii]. Benefits for proponents include[iv]:

- Better communication between the parties, which translates to greater clarity for proponents.
- Cost savings for industry and government.
- Reduced administrative overheads, through production of a single set of assessment documentation.
- Greater alignment of approval conditions, including offsetting arrangements.
- As individual MNES are considered in the landscape context required by state arrangements, there are broader landscape scale benefits for the environment.

Similarly, as co-regulators with the Commonwealth, the States and Territories by and large support effective bilateral assessment agreements[v]. The benefits they see from harmonised assessments are:

- Increased cooperation, understanding and collaboration between assessment teams and proponents.
- Reduction in regulatory duplication in the assessment of proposals, including aligning conditions of approval where appropriate.
- Reduction in timeframes for project assessments.
  - For example, the NSW Government advises in their submission to the Review that since the commencement of the agreement in February 2015 '*6 projects (with a combined Capital Investment Value of $6.4 billion and the creation of up to 5,150 jobs) have been assessed through the streamlined process and has led to an overall reduction in timeframes for project assessments'*[vi].

Access to the same data and information is also important to promote efficiency in the conduct of joint assessments are efficient (see Chapter 6).

Box 1 The water trigger

The water trigger (section 24D) requires proposed coal seam gas and large coal mining developments likely to significantly impact on a water resource to be assessed and approved by the Commonwealth. The Parliament amended the EPBC Act in 2013 to include the water trigger, responding to community concern at the time of the perceived inadequacy of state-based water regulation of these types of activities. The 2013 EPBC Act amendments prohibit the Commonwealth devolving responsibility for water trigger approval decisions to the state.

Stakeholders have presented highly polarised views about the operation of the water trigger to the Review. Industry stakeholders argue that it duplicates state-based water regulatory frameworks and should be removed[vii]. Others call for an expansion of the trigger to cover activities such as shale or tight gas extraction, all hard rock mining, or indeed any action that may have a material impact on water resources[viii].

The operation of the water trigger suffers from insufficient definition of the water resources covered, or the scale of significance of the impact on these resources it is seeking to regulate. Further, it targets the activity of part of a specific sector, which seems to result in regulatory inconsistency. Only large coal mining and coal seam gas projects are regulated under the water trigger, when other activities may conceivably pose the same or greater risk of irreversible damage. Finally, the current construct of the

water trigger is inconsistent with the Commonwealth's agreed role in environmental and water resources management.

The states have constitutional responsibility for managing their water resources, and this responsibility is reflected in the National Water Initiative, the intergovernmental agreement that sets out the respective roles of jurisdictions in water management, and the water reform agenda they have collectively agreed to pursue.

The Review considers it is not the role of the EPBC Act to regulate impacts of projects on water resources more generally including impacts on other extractive water users such as towns or agricultural users. This is the responsibility of the states and territories, and they should be clearly accountable for the decisions they make. In its leadership role, the Commonwealth should continue to transparently report on the progress made by jurisdictions in advancing commitments to manage water under the National Water Initiative.

That said, the Commonwealth does have responsibility for protecting listed threatened or migratory species, wetlands of international importance (Ramsar wetlands), World Heritage sites and for leadership on cross-border issues. Proposals with the potential to impact protected matters as a result of direct or indirect changes to the water resources on which they rely have always triggered the Act and should continue to do so.

The Commonwealth should have the capacity to step in to protect water resources to adjudicate cross-border matters (for example on a water resource that spans jurisdictions such as the Great Artesian Basin). One state should not be able to unilaterally approve a project that risks irreversible damage to a water resources another relies on. The capacity to step in should be clearly linked to processes for development assessments and approvals.

The Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Developments (IESC) was established in part to provide technical advice to the Commonwealth and state and territory decision makers. The IESC has improved decision making and led to increased transparency and community confidence that cumulative impacts of proposals are assessed.

The Review proposes that the water trigger and IESC be retained but modified as follows:

- The trigger should be limited to consideration of any project that risks *irreversible depletion or contamination* of cross border water resources only. The argument that the trigger not be limited to large coal and coal seam gas projects is compelling, but any expansion of scope requires careful consideration to avoid duplication with other Commonwealth and State regulatory requirements.
- If state and territory laws meet Commonwealth standards, then they should be able to be accredited.
- The National Environment Standard for MNES should explicitly define key terms, including a cross-border water resource and *irreversible depletion or contamination* of the resource.
- If the water trigger is changed, the name and remit of the IESC should be adjusted to reflect any altered focus. The Minister (or devolved decision maker) must seek the advice of the Water Resource Science committee when considering a proposal against the National Environmental Standard. The expertise and advice of the Water Resource Science committee should be available to the states and territories at their request, subject to the capacity and priorities of the Committee.

Box 2 Nuclear activities

Nuclear activities are regulated under the EPBC Act in two ways. The first is section 140A, which prohibits the Minister from approving specific nuclear installations. This section reflects a policy choice of elected parliaments to ban specific nuclear activities in Australia, and any change in scope is similarly a policy

choice of elected parliaments. That said, should Australia's policy shift in relation to these types of nuclear activities, changes to s140A would be required.

The second way nuclear activities are regulated under the EPBC Act is the so-called 'nuclear trigger' (section 22(1)), whereby 'nuclear actions' that are likely to have a significant impact on the environment need to be assessed and approved by the Commonwealth Environment Minister. In practice, this trigger primarily captures:

- mining projects, including uranium mining, and rare earth and mineral sand mining, transport and milling activities that result in radioactive by-products that exceed the certain thresholds, and
- Commonwealth agencies undertaking nuclear transport, research or waste treatment.

For Commonwealth agencies, most referrals received do not require approval, as activities are conducted in accordance with the regulatory guidelines and protocols under the *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) and regulated by the Australian Radiation Protection and Nuclear Safety Authority (ARPANSA).

Uranium and other 'nuclear' mining projects that trigger the EPBC Act require a 'whole of environment' assessment. These expanded assessments cover impacts that the states and territories already regulate (such as air, noise and water quality), as well as duplicating state and territory regulation of mining projects. ARPANSA[ix] highlighted in its submission that if jurisdictions adopt relevant national codes developed under the ARPANS Act, then EPBC Act assessments can lead to 'substantially the same assessment activities being undertaken across multiple jurisdictions creating duplicative regulatory processes'.

To be able to ensure community confidence in these 'nuclear' activities, the Commonwealth should maintain the capacity to intervene. To achieve this, the key reform directions proposed by the Review are:

- The National Environmental Standard for MNES should include nuclear actions. To provide community confidence, the standard should reflect the regulatory guidelines and protocols of the all relevant national laws and requirements.
- Where states and territories can demonstrate their laws and management practices meet the National Environmental Standard, their arrangements should be able to be accredited under the proposed devolution model.
- Where arrangements are not accredited, projects should be assessed by the Commonwealth in accordance with the standard.

Bilateral approval agreements

Despite attempts by successive Commonwealth Governments, approval bilateral agreements have never been implemented. Under such an agreement, the Commonwealth would not apply the EPBC Act; instead relying on the state or territory decision to achieve an acceptable environmental outcome. As discussed above, at the time of its introduction the water trigger was prevented from being included in approval bilateral agreements (see Box 1).

Under the current settings, devolution is inherently fragile and amendments to the EPBC Act are required to make them stable and to work efficiently in practice. A suite of amendments[x] were pursued by the government in 2014 to support the implementation of its 'One Stop Shop' policy and to provide a more enduring framework for devolution. Particularly important amendments are needed to:

- enable the Commonwealth to complete assessment and approval if a state or territory is unable to, and
- ensure agreements can endure minor amendments to state and territory settings, rather than requiring the bilateral agreement to be remade (and consequently be subject to disallowance by the Australian Parliament on each occasion).

The government of the day was unable to secure the necessary Parliamentary support for the legislative changes required. Considerable community and stakeholder concern that environmental outcomes were not clearly defined and the states would not be able to uphold the national interest in protecting the environment, and a lack of clear environmental (as opposed to process) standards, fuelled political differences at the time.

This community concern remains. Submissions to the Review highlighted ongoing concern about the adequacy of state and territory laws, their ability to manage conflicts of interest, and increased environmental risks if the Commonwealth steps away[xi].

In their submissions to the Review, jurisdictions have expressed a range of views on this, including both an ongoing desire to pursue the devolution of approvals powers (e.g. Western Australian Government[xii] and South Australian Government[xiii]) as well as continue to improve existing arrangements (e.g. ACT Government[xiv], New South Wales Government[xv] and Northern Territory Government[xvi]).

4.1.2 Duplication with states and territories remains

Despite efforts to streamline, a key criticism of the EPBC Act from many proponents and their representatives is that the Act duplicates state and territory regulatory frameworks for development assessment and approval[xvii]. The Review has found that with a few exceptions, this is largely true.

The duplication that is evident does not mean, as suggested by some, that the EPBC Act is unnecessary and the Commonwealth should step out of the way. The Commonwealth has a clear role in Australia's system of environmental management (see Chapter 1). However, as the regulatory systems of the states and territories have matured over time, and with increasing jurisdictional cooperation, the regulatory gap filled by the EPBC Act has reduced, resulting in duplication. For example:

- Most states and territories have made changes to their environmental or planning laws to improve environmental assessment processes and laws to enable accreditation for bilateral agreements.
- Joined-up assessments mean that many EPBC Act project approvals mirror those given by the relevant state or territory. The EPBC Act Condition-setting Policy[xviii] currently aims to streamline approval conditions between jurisdictions, in circumstances where state or territory conditions are adequate to protect MNES.

There is no systematic way to determine the additional environmental benefits resulting from the EPBC Act. There are examples where the operation of the EPBC Act has led to demonstrably different environmental outcomes than those arising from state and territory processes. In some cases, states have used powers for state significant developments that effectively circumvent their impact assessment requirements, while the Commonwealth has maintained the importance of due process and undertaken EPBC Act assessment and approval. Submitters point

to examples such as the rejection of the state sponsored Traveston Dam in Queensland in 2009, and fast-tracked processes for state Significant Development in NSW as evidence of this[xix].

While far from perfect (see Chapter 1, Chapter 8) the EPBC Act policy for 'like for like' offsets exceeds requirements in some jurisdictions and results in additional or different conditions placed on projects that have better outcomes than would have otherwise been the case.

Contributions to the Review have highlighted that Commonwealth involvement should 'set the tone' and provide leadership as the Commonwealth is more at arms-length from the benefits that would arise from the project[xx]. While there is anecdotal evidence of this, there are also cases where the regulatory requirements of states are more stringent than those of the EPBC Act (for example Indigenous engagement requirements of Victoria and the Northern Territory[xxi]).

Frustration rightly arises when regulation under the EPBC Act does not, or does not tangibly, correspond to better environmental outcomes, given the additional costs to business of dual processes. Various estimates of the costs to industry and business of dual assessment and approval systems have been provided to the Review, including:

- Minerals Council of Australia[xxii] estimate delays can increase the cost up to $46 million per month for a major greenfield mining project (worth $3-4 billion) in Australia.
- Property Council of Australia[xxiii] estimate that delays in EPBC Act assessments can add up to $36,800 to the cost of new homes in some greenfield sites.
- The 2017 Independent Review of the Water Trigger Legislation[xxiv] estimated costs to industry of around $46.8 million per year.

Estimates of costs will invariably depend on the underpinning data, assumptions and the cost structures of projects. As the additional costs to business arising from the EPBC Act cannot always be clearly delineated from the impositions of other processes (such as costs associated with complying with state-based regulations), caution should be exercised. Nevertheless, the essential argument put forward by industry is undisputed, a reduction in time taken will reduce the cost of regulation.

As others have also done (e.g. Productivity Commission[xxv]), the Review finds there is regulatory duplication that should be addressed. There is a clear case for greater harmonisation, but to achieve this, states and territories must demonstrate they can effectively accommodate the national interest. It should not be a race to the bottom.

4.2 Key reform directions

The foundational intergovernmental agreements on the environment envisaged that jurisdictions would accommodate their respective responsibilities in each other's laws and regulatory systems, where possible. This is a sound ambition, and one the governments should continue to pursue.

Previous attempts to devolve decision making focussed too heavily on prescriptive processes and lacked clear expectations and thresholds for protecting the environment in the national interest. The National Environmental Standards proposed by this Review provide a legally binding pathway for greater devolution, while ensuring the national interest is upheld (Chapter 1).

Pursuing greater devolution does not mean that the Commonwealth 'gets out of the business' of environmental protection and biodiversity conservation. Rather, the reform directions proposed would result in a shift with a greater focus on accrediting and providing assurance oversight of the activities of other regulators and in ensuring national interest environmental outcomes are being achieved.

The devolution model proposed is not an 'all or nothing' concept. The Commonwealth would need to retain its capability to conduct assessments and approvals, where accredited arrangements are not in place (or cannot be used), at the request of a jurisdiction, when the Commonwealth exercises its ability to step in on national interest grounds, when the activity occurs on Commonwealth land, or when it is undertaken by a Commonwealth Agency outside a State or Territory's jurisdiction. Such capability is essential to ensure that EPBC Act requirements can continue to be upheld in circumstances where other regulators are, for whatever reason, unable to accommodate EPBC Act requirements in their processes. To weaken this capability would risk unnecessary delay for projects.

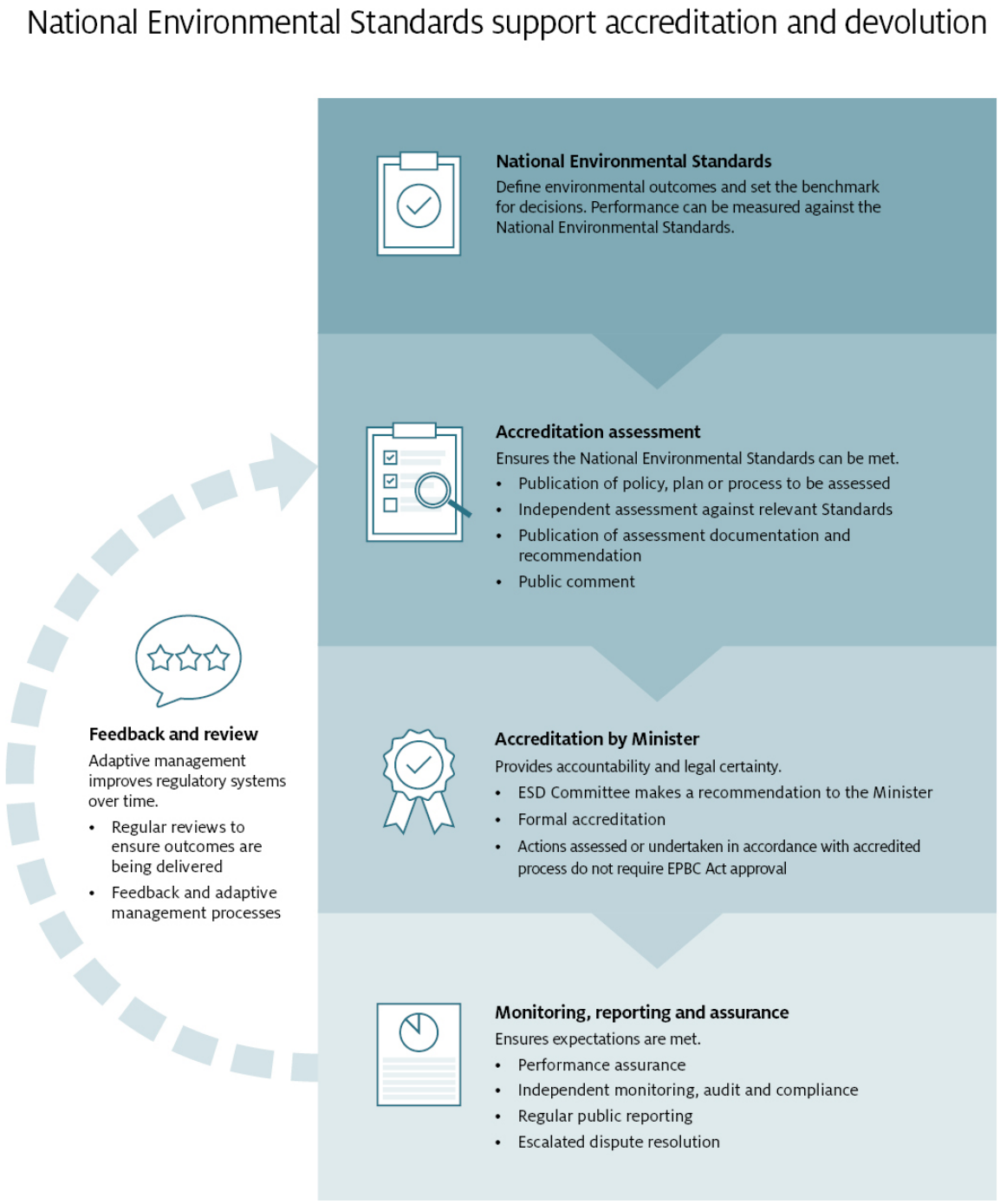
The Commonwealth could:

- Accredit state (and other regulatory) systems to assess and approve projects, where they can demonstrate they meet National Environmental Standards. This may require states and territories to adapt their regulations to meet National Environmental Standards and to satisfy accreditation requirements.
- Approve projects that have been assessed by the states under accredited assessment processes.
- Accredit activities on a regional basis, for example where a regional plan is in place.
- Accredit particular types of activities that are appropriately regulated by others (e.g. fisheries, see 4.2.4).

For projects approved under accredited arrangements, the accredited regulator would be responsible for ensuring that projects comply with requirements, across the whole project cycle including transparent post-approval monitoring, compliance and enforcement. The Commonwealth should retain to the ability to intervene in project level compliance and enforcement, where egregious breaches are not being effectively enforced by the accredited party.

The devolution model proposed by this Review is shown in Figure 3.

Figure 3 National Environmental Standards support accreditation and devolution



The proposed devolution model involves five key elements:

1) *National Environmental Standards* to set the benchmark for protecting the environment in the national interest and provide the ability to measure the outcomes of decisions.

2) *State or territory to demonstrate that their systems meet National Environmental Standards.* This element should include transparent assessment of the jurisdiction policy, plan or regulatory process against National Environmental Standards. It should include a formal check by the independent compliance and enforcement regulator, to give confidence that arrangements for monitoring and assurance of accredited arrangements are sound.

3) *Formal accreditation by the Commonwealth Minister.* This element provides accountability and legal certainty. The Minister should be required to seek the advice of the proposed Ecologically Sustainable Development Committee (Chapter 5), and this advice transparently provided as part of the accreditation process.

4) *A transparent assurance framework.* This element provides confidence that parties are implementing the processes and policies as agreed. It should include the mechanisms for the Commonwealth to step in when it is in the national interest to do so. The assurance framework should include:

- Governance, reporting and assurance arrangements.
- Independent monitoring, audit and compliance, to support public reporting on the operational and administrative performance of an accredited systems.
- Triggers for dispute resolution, to enable the Commonwealth to step in. These triggers should avoid any opportunity for gaming and unnecessary disruption to the whole regulatory system. Triggers could include:
  - Where the Commonwealth Minister deems a matter of such environmental significance that the Commonwealth should deal with it.
  - In an individual case if the National Environmental Standards are demonstrated not to have been met by the accredited party.
  - Where there is a systemic failure to meet National Environmental Standards leading to suspension (or ultimately revocation) of accreditation.

5) *Regular review and adaptive management* that ensures decision-making contributes to the objectives established in the National Environmental Standards.
  - Regular scheduled reviews of the accreditation system and whether the National Environmental Standards are delivering the outcomes intended.
  - Adaptive management over time, as data, information and knowledge improve, and regulatory systems mature.

As is the case now, where formal accreditation arrangements are not in place, Commonwealth and state collaboration (for example through the conduct of joint assessments) should continue to be pursued to facilitate streamlining and harmonisation.

4.3 Commonwealth-led assessment processes are inefficient

Assessment pathways provided by the EPBC Act are complex, inefficient and not supported by robust systems and processes. There is also duplication between the EPBC Act and the activities regulated by other Commonwealth laws and agencies. Strategic assessments and other approaches have resulted in some streamlining, but there are opportunities for further efficiency gains.

4.3.1 Multiple environmental approval pathways create unnecessary complexity and inefficiency

When a proposal is referred under the EPBC Act, the Minister determines if an action will, or is likely to have a significant impact. For those proponents where it is clear they will need to be assessed in detail, it creates an additional and time-consuming step in the process.

For some proponents, the lack of clarity on the requirements of the EPBC Act (for example key terms like 'significant impact'), means that they refer proposed actions for legal certainty. More than half of all referrals result in a decision that detailed assessment and approval is not required, or not required so long as it is carried out in a particular manner. Better guidance and clarity upfront on which impacts are acceptable, and those which will require assessment and approval, will enable the referral step to be avoided.

The EPBC Act contains five assessment pathways for environmental impact assessment:

1) Assessment on Referral Information
2) Preliminary Documentation, with or without further information
3) Public Environment Report
4) Environmental Impact Assessment, and
5) Public Inquiry

Each pathway has its own specific set of requirements, timeframes and processes set out in the EPBC Act. This increases the complexity of the regulatory framework, and the ability of the Department to clearly communicate regulatory requirements (see Chapter 8). The multiple pathways do not result in any additional environmental benefit or significantly change the assessment timeframes for the regulated community.

In practice the Assessment on Referral Information, Assessment on Public Environment Report and Assessment by Environmental Impact Statement pathways are rarely used, and the Public Inquiry pathway has never been used (see Table 1, below).

Table 1 Percentage of total assessment method decisions from 2014/15 – 2018/19 financial years[xxvi]

Assessment Approach	Per cent of total assessment method decisions
Accredited Process	25 %
Bilateral Process	12 %
Preliminary Documentation, with further information	58 %
Public Environment Report	2 %
Environmental Impact Assessment	2 %
Assessment on Referral Information	1 %
Preliminary Documentation, without further information	1 %
Public Inquiry	0 %

4.3.2 The systems that support the conduct of EIA are inefficient

The business and information systems that the Department uses for conducting EIA are antiquated and inefficient. File management systems used by assessment officers are cumbersome, information is handled, and double handed, throughout the process (see Chapter 6). Steps are missed or duplicated, interactions with proponents are not easily recorded, and project tracking is difficult, and often out of date.

There are inefficiencies arising from the way information is received from proponents. To determine if a 'valid' referral has been received, the Department conducts manual checks, rather

than a system saying that a referral isn't valid and not allowing a proponent to submit it. The EIS documentation provided by proponents are voluminous and can extend to more than 10,000 pages. These are provided in a form that is not word-searchable, and with data that cannot be interrogated.

There are inefficiencies in Department's procedures for conducting assessments. Precedent documents are not maintained and are not used to provide guidance to proponents about what they can expect, or to support consistent assessment and decision making. Relevant precedent projects are difficult to identify, and even if found, it is difficult to extract this information in a way that aids decision making. Where there is deviation from precedents, this is often not well explained.

4.3.3 Wildlife trade and permitting functions are unnecessarily prescriptive

The take, trade and movement of wildlife products (including live animals, plants and products) are regulated under Parts 13 and 13A of the EPBC Act. Part 13 includes permits to take, injure or kill protected matters in Commonwealth areas, including in Commonwealth waters. Part 13A is dedicated solely to the international movement of wildlife specimens and gives effect to Australia's obligations as a member of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) and the *Convention on the Conservation of Migratory Species* (Bonn Convention).

The EPBC Act goes beyond Australia's obligations under these international conventions. For example, the EPBC Act requires import permits to be issued for Appendix II CITES listed species, even though the exporting country has already conducted a sustainability assessment. This results in around 2,000 additional permits being issued each year, with costs to individuals, companies and the Department with no appreciable conservation benefit. Similarly, the movement of personal and household effects is overregulated. Australia requires permits for personal low-risk trade items such as tourist souvenirs, exceeding CITES requirements.

Prescription in these parts prevents flexibility and discretion, where this is warranted. Compliance breaches cannot be enforced in a proportionate manner. For example, the Minister must revoke an approval if a condition of a wildlife trade operation is not met, potentially resulting in businesses being shut down for months even for minor breaches.

Settings for the permitting of wildlife trade are inefficient and unnecessarily prescriptive. Long overdue amendments are required to reduce complexity and regulatory burden, without compromising the environmental or international standards.

have led to complexity and overlap

4.3.4 Efforts to recognise other environmental management frameworks

The EPBC Act operates in many areas of environmental management alongside other management frameworks, including the management of Commonwealth fisheries, Regional Forest Agreements (RFAs), offshore petroleum activities, and frameworks that regulate activities on Commonwealth land. Each of these are explored in turn below.

Commonwealth Fisheries

The Australian Fisheries Management Authority (AFMA) is responsible for the day-to-day management and compliance of Commonwealth fisheries. Assessments under the EPBC Act are conducted on the environmental performance of all export fisheries (Part 13A Assessments) and

all Commonwealth managed fisheries (Part 10 Strategic Assessments). These assessments ensure that, over time, fisheries are managed in an ecologically sustainable way.

EPBC Act assessments of fisheries are conducted against well established guidelines that assess the ecological sustainability of management arrangements[xxvii]. Lower risk fisheries are now assessed on 10 yearly rolling basis. Higher-risk fisheries, including those that interact with protected species such as dolphins, dugongs and sea lions are generally assessed every 3 years.

Parts 13 and 13A of the EPBC Act provide processes to assess impacts to protected marine species (including those protected under the Bonn Convention, see Box 1) and ensure compliance with export controls and international wildlife trade rules. These permitting processes are generally undertaken in parallel for Commonwealth managed fisheries and all export fisheries.

Box 3 The Bonn Convention

The Convention on the Conservation of Migratory Species (Bonn Convention) provides a global platform for the conservation and sustainable use of migratory animals and their habitats.

Under the Convention, only species listed under Appendix I need be afforded protected status. For species listed under Appendix II, the Convention encourages range states to enter into regional or global agreements to improve these species' conservation status.

Currently the EPBC Act requires the inclusion as a listed migratory species under the Act of any species listed under either of the Appendices to the Convention, making it an offence to catch, kill, injure, take, or move the species in Commonwealth waters without a permit issued under Part 13.

Listing is automatic and occurs without regard to the species' conservation status in Australia. For example, for some species included under Appendix II of the Convention, the Australian population is distinct from the global one and is sustainably harvested within Australia. Automatic inclusion under the provisions of the EPBC Act affords such species greater protection than is required under the Convention and is counter to the Convention's intent.

There are opportunities to streamline the multiple assessment and permitting processes needed to undertake commercial fishing operations in Commonwealth waters or jointly managed fisheries. Given the maturity of the fisheries management framework administered by AFMA, the Review is confident that further streamlining can be achieved while maintaining assurance in the outcomes. Opportunities for a more streamlined approach could include refining the process for strategic assessments of individual Commonwealth Fisheries or developing specific standards for marine areas and accrediting AFMA's regulatory framework against these standards.

Regional Forest Agreements

A regional forest agreement (RFA) is a regional plan, agreed between a state and the Commonwealth for management of native forests. RFAs balance economic, social and environmental demands on forests and seek to deliver ecologically sustainable forest management, certainty of resource access for the forest industry and protection of native forests as part of Australia's national reserve system.

The *Regional Forestry Agreement Act 2002* (RFA Act) is Commonwealth legislation under which RFAs are made. RFAs must have regard to a range of conditions, including those relevant to

MNES protected by the EPBC Act, such as endangered species and World Heritage Values (see Box 4).

Box 4 Conditions for RFAs that are relevant to the EPBC Act

The following are conditions for RFA's that are relevant to the EPBC Act.

The agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions[xxviii]:

- environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
- Indigenous heritage values;
- economic values of forested areas and forest industries;
- social values (including community needs);
- principles of ecologically sustainable management;
- the agreement provides for a comprehensive, adequate and representative reserve system;
- the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;

The EPBC Act recognises the RFA Act and EPBC Act assessment and approvals are not required for forestry activities conducted in accordance with an RFA (except where forestry operations are in a World Heritage property or a Ramsar wetland). These settings are colloquially referred to as the 'RFA exemption', which is somewhat of a misnomer.

The Review has received submissions from stakeholders concerned that the requirements of the EPBC Act are not sufficiently addressed in RFAs, and that compliance and enforcement activities are inadequate. During the course of this Review, the Federal Court found that an operator had breached the terms of the RFA and would therefore be subject to the ordinary controlling provisions of the EPBC Act.

Legal ambiguities in the relationship between EPBC Act and the RFA Act should be clarified, so that the Commonwealth's interests in protecting the environment interact with the RFA framework in a streamlined way.

Offshore Petroleum

The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is the Commonwealth regulator for offshore energy activities in Commonwealth waters. Since 2014, significant streamlining of the environmental regulation of offshore energy activities has been achieved by using a strategic assessment made under Part 10 of the EPBC Act.

The strategic assessment endorsed NOPSEMA's environmental management authorisation process. Activities undertaken in a way that is consistent with the authorisation process do not need to be separately referred, assessed and approved under the EPBC Act.

The current settings for strategic assessments have significant limitations (see Chapter 3), resulting in inflexibility in the streamlining arrangements in place with NOPSEMA. The strategic assessment endorsed NOPSEMA's arrangements that were in place at the point in time of the

agreement, in effect, freezing them in time, and invariably stifling continuous improvement, and further streamlining where there are opportunities to do so that do not lower environmental protections.

Activities on Commonwealth land

While a relatively small component of the broader regulatory system, the EPBC Act provides for streamlined assessments with other Commonwealth agencies in relation to airspace, airports, and foreign aid. Section 160 provides an alternative pathway for managing the environmental impacts of projects managed by other Commonwealth agencies (e.g. under the *Airports Act 1996*), based on advice from the Environment Minister.

While it is important that conflicts of interest be appropriately managed and situations of unconstrained self-regulation are avoided, the proposed National Environmental Standards outlined in Chapter 1 would support other Commonwealth regulators to accommodate EPBC Act requirements into their regulatory system, providing further opportunity to streamline processes within the Australian Government.

4.4 Key reform directions

4.4.1 Streamline environmental impact assessments conducted by the Commonwealth

The Commonwealth will continue to have a role undertaking environmental impact assessments and approvals for individual projects (see Box 5 – Pathways for a development proposal). To reduce the complexity of the regulatory process, the pathways for assessing proposals should be rationalised. Separate pathways should be provided for high and lower impact developments, so that the assessment is proportionate to the level of impact on MNES.

It is anticipated that with the proposed reform directions of this Review, the overall caseload of the Department will be reduced over time. National Environmental Standards and regional plans will set clear rules, meaning that proponents will be incentivised to develop projects with acceptable impacts, thereby streamlining, or indeed avoiding the need for any interaction with, the regulatory process. Lower-risk projects that still require assessment could receive approval with standard conditions (see Chapter 3, complex law), providing proponents with greater certainty.

Similarly, the proposed devolution model incentivises the states to enter into accredited arrangements with the Commonwealth, as the overall timeframe for project assessment and approval would be expedited.

Proposed reforms to information, data and regulatory systems will deliver further streamlining, by providing a single source of truth for environmental information, a modern interface for interactions on the EPBC Act, and an efficient system for case management (see Chapter 6).

Box 5 Pathways for a development proposal

Under the proposed reform directions, the pathways for a development proposal would be:

1. No Commonwealth assessment or approval required – a project can demonstrate it has been developed in accordance with the requirements of the Commonwealth standards and/or relevant regional planning requirements (noting a state approval may still be required). These projects should be self-registered and

include sufficient information to demonstrate due diligence that the scope and impacts of the proposal were consistent with the standard or regional plan.

2. No Commonwealth assessment (or approval) required –the project is assessed and/or approved under state or territory systems that are accredited by the Commonwealth under devolved decision-making arrangements.

3. Commonwealth assessment and approval required – a project cannot demonstrate it meets relevant standards or regional plans, state processes are not accredited.

4. Commonwealth assessment and approval required – a project occurs on Commonwealth land, or cannot demonstrate it has met standards and that conflicts of interest are managed.

5. Commonwealth assessment and approval required – a project is 'called in' by the Commonwealth Minister for assessment and approval (see devolution model).

6. Commonwealth assessment and approval required – a project is directly referred to the Minister for a decision by states, territories or another Commonwealth agency.

4.4.2 Improving the efficiency of wildlife permits and trade

The EPBC Act should be amended to clearly delineate between different international obligations arising from Appendix I and II Convention on Migratory Species listings. This would allow Australia to meet its international obligations under the Bonn Convention and continue to manage and protect migratory species domestically. To do this, Part 13 of the EPBC Act could be modified to allow the take of Appendix II listed species subject to all relevant management arrangements demonstrating that the take would not be detrimental to the survival of the species.

In the short-term, reforms to wildlife trade permitting arrangements should be made to align the EPBC Act with current CITES requirements. Long-overdue amendments to streamline permitting processes should also be pursued. In the longer term, wildlife trade provisions should be reformed to align regulatory effort proportionate to risk and conservation benefit.

5 Trust in the EPBC Act

Key points

The community and industry do not trust the EPBC Act and the regulatory system that underpins its implementation.

- A dominant theme in the 30,000 contributions received by the Review is that many in the community do not trust the Act to deliver for the environment.

The avenues for the community to substantively engage in decision making are limited. Poor transparency further erodes trust.

- The lack of trust is evident in high community interest in development applications, high-profile public campaigns, legal challenges to EPBC Act decisions, and a growing rate of both Freedom of Information (FOI) applications and requests for statements of reasons.
- The EPBC Act is not trusted by industry. They generally view it as cumbersome, pointing to duplication, slow decision making, and legal challenges being used as a tool to delay projects and drive up costs for business (often called 'lawfare') .

The key reform directions proposed by the Review are:

- Improve community participation in decision-making processes, and the transparency of both the information used and the reasons for decisions.
- Provide confidence that decision makers have access to the best available environmental, cultural, social and economic information.
- Amend the settings for legal review. While retaining extended standing, provide for limited merits review for development approvals. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

5.1 The community does not trust that the EPBC Act is delivering for the environment

The EPBC Act is broadly perceived as ineffective at protecting the environment. The lack of clear outcomes (Chapter 1), weak compliance and enforcement (Chapter 8) and ineffective monitoring and evaluation (Chapter 6), drive mistrust.

Limited access to information about decisions and the lack of opportunity to substantively engage in decision making under the EPBC Act adds to this mistrust. This drives the use of legal review to discover information, rather than its proper purpose to test and improve decision making.

5.1.1 Community participation is limited to process; they do not feel heard

The processes of the EPBC Act limit avenues for community participation in decision making. For example, participation in the process for listing species is largely limited to matters of scientific fact. There is no avenue in the process to raise concerns about the potential social and economic implications of listing additional species or ecological communities.

The experts who lead community engagement processes in EIA assessments highlight that "the levels of community outrage...increasingly reflect a greater community intolerance of

proponents who disregard community values…key stakeholders and communities are losing, or have lost, confidence in project development and government approval processes."[i]

The growth in community interest in environmental decisions is indicative of the degree of mistrust. People want to know why decisions are made and want to contribute to decisions that affect them and Australia's environment, especially when they believe those decisions are having negative consequences.

With limited trust in the effectiveness of the EPBC Act and no alternative avenue to participate, the community seeks information or influence through whatever means possible. The formal access options for both business and the community under the current arrangements are:

- FOI applications
- requesting statements of reasons
- judicial review
- merits review for Part 13A wildlife trade permit decisions (noting that merits review is not available for EIA decisions)
- public comment processes.

5.1.2 There is little transparency of the information and advice provided to decision makers, and how this is considered in decisions

A key theme in submissions is the lack of transparency of how information is collected and incorporated into decision-making processes. The public don't trust claims made by advocates or governments on the costs or benefits of a proposal, and they don't trust the effectiveness of compliance and enforcement activities. There are concerns that proponents themselves commission environmental consultants in the EIA process, but there are no professional standards or accreditation for these consultants, which further erodes trust in decision making.

Low transparency and a lack of early public engagement by some proponents means that it is often late in decision-making processes that community concerns are heightened, such as when a specific development application is being considered. This is the most likely point they will engage with the project impacts and the process.

Poor transparency encourages challenges to decisions. The growth in FOI requests is indicative of the degree of mistrust and the perceived lack of transparency and accountability for decision makers. People cannot understand how decisions to approval developments can be consistent with the laws that protect the environment, if overall environmental indicators are trending down.

This lack of visibility is exacerbated by the complexity of the EPBC Act and limitations in both the scope and transparency of information used for decision making, and to ensure compliance with the Act. There is a growing trend of 'post-approval arrangements', where specific environmental impacts and treatments are considered when proponent management plans are assessed. This happens without the opportunity for public comment.

The community also cannot see how allegations of non-compliance with the EPBC Act are investigated and resolved.

The EPBC Act and its processes focus on the provision of environmental information, yet the Minister can and must consider social and economic factors when making many decisions. The community can't see how these factors are weighed in EPBC Act decisions as under the current arrangements, there is no requirement for proponents to give fulsome information in relation to social and economic impacts of a project proposal, nor is there scope for the assessment process to test the veracity of that information.

The social and economic benefits and costs put forward by proponents are at the project scale, meaning decision making is not based on a complete nationally focussed economic or social analysis. The trade-offs and considerations of decision makers are not explicit, often happening behind closed doors, giving rise to allegations that proponents have undue influence on decision-makers and the environment loses out to other considerations.

The advice provided to support decisions is not always made publicly available. This promulgates concerns over the quality of the advice, or that government may have something to hide and shuns accountability for its decisions.

There is a lack of confidence in the quality of the advice provided, and views that decisions are biased towards competing imperatives other than protection of the environment. Many submissions to this Review have expressed a strong preference for decisions to be made by independent authorities or commissions, rather than democratically elected decision-makers and their delegates.

5.1.3 High-profile decisions are contested, as the community is dissatisfied with environmental outcomes

It is not clear how decisions explicitly contribute to environmental outcomes. Concerns raised in many contributions to the Review are that decisions made under the EPBC Act are out of step with the views and values of the community.

Where concerns arise about environmental outcomes associated with a decision – and with no other viable alternative for the community – public focus turns to challenging high profile decisions. These challenges can succeed on technical legal grounds rather than on environmental outcomes. For example, there is currently no avenue in the EPBC Act to challenge the merits of EIA decisions and consequently technical process compliance has become the focus.

In the Shree case[ii], the technicality was a failure to attach documents to a Ministerial decision brief. This legal challenge was on the basis of a failure to fulfil process obligations rather than questioning the outcomes resulting from the decision, which was remade with the same environmental outcome after legal proceedings were completed.

Where used, campaigns, protests and the use of the courts do slow down developments. These delays often result in no material change to the decision. Technical challenges result in delays and costs for industry and the economy with little, if any, benefit to the environment.

5.2 Industry perceives the EPBC Act to be cumbersome and prone to unnecessary delays

5.2.1 The complexity of the EPBC Act leads to uncertainty for business

The complexity of the EPBC Act leads to cumbersome processes, which are inefficient for both business and government. This adds to regulatory costs, without any associated environmental benefit (see Chapter 3, Chapter 7). For example, the EPBC Act does not allow decision makers to correct or adjust decisions that are faulty only on technical grounds. This leads to unnecessary process delays for industry, without necessarily changing the substance of the original decision.

Judicial review cases have driven a culture of risk-aversion 'box-ticking' within the department. This has led to fewer resources being dedicated to assisting proponents to improve outcomes for the environment and more on administering processes.

The information used to make a decision and how the decision is made based on that information is not always consistent or clear. This leads to uncertainty for proponents. Past decisions are not transparent. Industry cannot derive lessons from previous interactions with the Act, which would lead both to efficiency and improvements over time. This is in contrast to determinations made under tax law or competition law, which are public and searchable.

5.2.2 Duplicative processes and slow decisionmaking drive up costs

An underlying theme of industry mistrust in the EPBC Act relate to its perceived duplication with state and territory processes (see Chapter 4) and the length of time it takes to receive an approval. These are key reasons why industry is calling for a 'one-stop-shop' model to reduce duplication and assessment timeframes.

On average, resource projects can take nearly three years, or 1014 days to approve under the EPBC Act[iii], and this is too long. For business, time is money. On large projects time delays can result in significant additional costs (see Box X for timeframes related to resource projects). The recent provision of additional resources to conduct environmental impact assessments has improved performance from 19 per cent to 87 per cent of key decisions made on time.

There is also little accountability in the post-approval phase. There are no statutory timeframes for these decisions and this has led to increased uncertainty and delay for industry[iv].

Box X: Timeframes for assessment and approval of resource projects under the EPBC Act have increased over time

Since the commencement of the EPBC Act, the average time taken for large, complex resource projects to be assessed and approved has increased from 721 to 889 days (see Fig X). The time taken for the Commonwealth Environment Minister to make an approval decision on these projects also increased to an average of approximately 223 days.

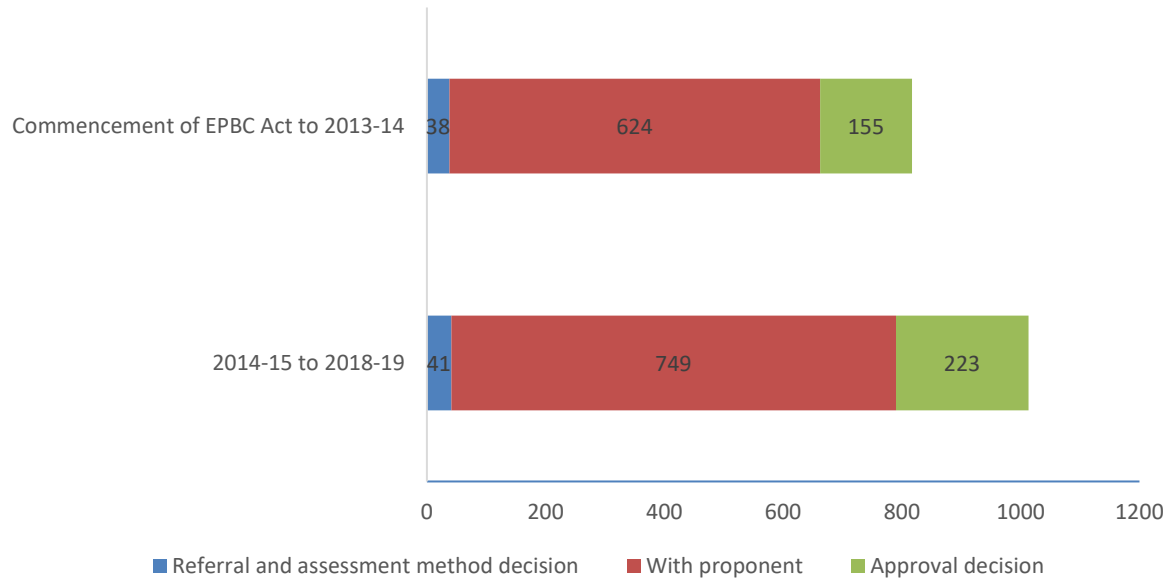


Figure X. Average number of days taken for approvals processes under the EPBC Act for resource projects[v]

These timeframes do not factor in time taken for post approval requirements, such as the development of management plans, which can be significant. They also do not factor in appeal timeframes.

Submissions have noted that businesses have experienced time delays due to statutory deadlines being missed by the regulator. The Minerals Council of Australia[vi] cited project examples of where it has taken seven months to make a controlled action decision with a 20 business day statutory timeframe (EPBC 2019/8534), and 87 business days to make an approval decision with a 40 business day statutory timeframe (EPBC 2017/7902).

Lengthy assessment and approval processes are not all the result of a 'slow' Commonwealth regulator. On average, the process is with the proponent for more than three quarters of the total assessment time (example in Figure X above). This includes the time required to collect required environmental information and collate necessary documentation, or when projects are shelved for periods of time for commercial reasons by proponents. In some instances, projects that require state and Commonwealth approvals can be held up by state or territory assessment and approval processes. In rare cases, Commonwealth approvals can be received years before a state or territory approval[vii].

5.2.3 Industry is concerned that legal challenges add further delays

Poor trust in the EPBC Act has played out in a lengthy public debate about 'green lawfare', with accusations that politically motivated environment groups utilise the courts to delay projects. The public discourse on legal challenges is focused on large projects, with considerable economic benefits that impact highly valued environmental areas[viii]. Pro-development groups argue that the 'extended' standing provisions (standing beyond a person directly affected by a decision) should be removed from the Act. Previous attempts have been made to remove these provisions[ix].

Highly conflicting evidence and viewpoints have been received by the Review about whether there is significant abuse or gaming of appeal mechanisms under the EPBC Act[x]. Generally, only a

small number of decisions have been challenged relative to the ~6500 projects referred under the EPBC Act (19 in the last five years).

Similarly, evidence from other jurisdictions indicates that open standing arrangements do not necessarily lead to excessive numbers of legal challenges. In NSW, less than two per cent of development applications are challenged via judicial or merits review[xi].

The focus should not be to limit the capacity of people to use legal review to challenge decisions in the public interest. Rather, the excessive process requirements as well as improving communication and transparency for the EPBC Act should be addressed as a matter of urgency to remove the most significant sources of delay and to increase certainty. This effort will minimise the drivers for legal challenge, particularly for litigation that is vexatious or without reasonable prospects of success.

5.3 Key reform directions

The national interest requires different objectives to be weighed and values reflected. This means that the EPBC Act will never satisfy all stakeholders all of the time. A key driver of low trust in the EPBC Act is lack of confidence that it is contributing to achieving environmental outcomes. The suite of reforms proposed by this Review is designed to work together to lift trust in the EPBC Act and its operation.

The setting of National Environmental Standards and the development of regional plans are key mechanisms to set the clear outcomes that the EPBC Act intends to achieve (Chapter 1). Many of the reform directions proposed in forthcoming chapters seek to provide greater confidence that decisions contribute to achieving these outcomes. These include a quantum change in the data and information that underpins the operation of the EPBC Act (Chapter 6), the development of effective frameworks for monitoring and evaluating the operation of the Act and the broader national environmental management system (Chapter 7), and effective, independent compliance and enforcement (Chapter 9).

Many of the reforms proposed will also reduce the time taken for regulatory decisions. Clear rules (Chapter 1), greater harmonisation with other regulators (Chapter 4) and better information, data and regulatory systems (Chapters 6 and 7) will speed up the time taken to receive environmental approval.

The aim of the key reform directions proposed in this chapter is to minimise the demand for formal review, while providing the necessary access to the law demanded of modern regulatory practice. They seek to address the reasons the community chooses legal challenge over other mechanisms, while allowing for improvements to be generated from effective scrutiny and testing of decision making through formal legal review.

5.3.1 Improve community participation in decision making and the transparency of information

A fundamental reform is to facilitate adequate time for the community to consider information and respond to it.

Improved community participation in processes can save time, by ensuring that the right information is surfaced at the right time and can be considered in the decision-making process. Best practice community consultative processes are well established[xii], and the National

Environmental Standard for transparent processes and robust decisions should include specific requirements for community consultation.

Better information management systems (see Chapter 6), that are interactive and digitally connected can improve community access to information about decisions, including greater transparency of the stage of the decision-making process, the opportunities for community participation, and the information that is being considered in the decision-making process.

Improving participation and transparency will mean that stakeholders will be less likely, and have less justification, to resort to legal challenge. The limited merits review model proposed below requires information to be introduced and sustained as part of the decision-making process. More complete information is therefore available to make the decision rather than being withheld for legal 'forum shopping'.

5.3.2 Strengthen independent advice to provide confidence that decision makers are using best available information

There is low trust that decisions are not subject to inappropriate political interference. Lack of trust is an underlying driver behind calls for greater independence of decision making[xiii].

This solution is not supported by the Review. It is entirely appropriate that elected representatives (and their delegates) make decisions that require competing values to be weighed and competing national objectives to be balanced. It is important that the law is clear and that core regulatory functions are carried out effectively, rather than decision making being 'independent'.

That said, community confidence and trust in the process could be enhanced by the provision of transparent, independent advice on the adequacy of information provided to a decision-maker. The statutory advisory committee structures in the EPBC Act should be recast. An Ecologically Sustainable Development (ESD) Committee should be established, comprising an independent chair and the chairs of the following committees:

- Information and knowledge (to advise on science, economic, social impacts and traditional knowledge).
- Indigenous knowledge and engagement (to advise on the co-design of reforms and the National Environmental Standard for Indigenous engagement).
- Threatened species science (to advise on the status of threatened species and ecological communities and actions needed to improve their condition in regional recovery plans).
- Australian Heritage Council (as established under the *Australian Heritage Council Act 2003* to provide advice on heritage matters).
- Water resource science (advising on impacts of relevant projects on cross border water resources and nationally protected matters).

The ESD Committee should provide transparent advice to the Minister to inform decisions on the making of National Environmental Standards, regional plans, and the accreditation of arrangements for devolving decision making. The Minister could request the Committee's advice on other issues or decisions where they have relevant expertise.

The ESD Committee should provide the Minister with transparent formal advice on:

- the adequacy of the information provided to inform the decision
- whether the processes that underpin the recommendation have been conducted in accordance with relevant standards (for example, for community or Indigenous engagement)
- whether the recommendation is consistent with the National Environmental Standards.

In making a decision, the Minister should be required to provide reasons as to how the advice of the ESD Committee was considered.

5.3.3 Retain standing with a refined, limited merits review mechanism

The legal review framework should not be the primary determinant for the performance of the EPBC Act. However, effective, efficient and transparent decisions based on clear outcomes should reduce the demand for legal review.

The Review is not yet convinced that the current standing provisions in the EPBC Act (section 487) should be removed, but adjustments to legal review provisions should be made to provide for limited merits review 'on the papers'. This form of review limits the considerations to those matters that were raised and maintained by the applicant during the due course of the regulatory decision or matters arising from a demonstrable material change in circumstances.

Standing

The Review is not convinced of the view that extended standing should be curtailed. Broad standing remains an important feature of environmental legislation, particularly given the presence of collective harm resulting from damage to environmental or heritage values. Individual loss is not always identifiable or quantifiable, reliance on which would result in restoration falling fully on the public purse.

The courts have the capacity to deal with baseless or vexatious litigation. Litigation with no reasonable prospect of success can be dismissed in the first instance. Both the Federal Court and the High Court have the capacity to maintain lists of vexatious litigants, who are prohibited from taking legal action without permission. This can also impact a litigant's ability to retain counsel.

The likely result in removing extended standing is that individuals with a direct interest in a project would be co-opted to join litigation driven by others or that courts would continue to grant standing to applicants in line with previous case law. It also means that hearings would be lengthened to consider arguments as to a person's standing before the substantive issues are considered.

Although the review also found no reason to broaden standing under the EPBC Act, even open standing (as opposed to extended standing as set out in section 487) is not likely to result in a deluge of cases. As highlighted in the submission from the Law Council of Australia[xiv], the case law supports a finding that standing is not interpreted broadly by the courts as it is aimed at protecting the public interest rather than private concerns.

Court time should be optimised by limiting vexatious litigation and litigation with no reasonable prospect of success. Reforms should focus on:

- improving transparency of decision making, to reduce the need to resort to court processes to discover information

- limiting legal challenges to matters of outcome not process, to reduce litigation that does not have a material impact on the outcome.

It may though be beneficial for the Act to require an applicant seeking to rely on the extended standing provisions to demonstrate that they have an arguable case, or that the case raises matters of exceptional public importance before the matter can proceed.

Form of legal review

Legal review processes are to ensure that decisions are:

- made correctly in accordance with the law (judicial review)
- 'preferable' such that, within the range of decisions possible under the law, the best decision is made based on the relevant facts (merits review)[xv].

In a mature regulatory framework, judicial and merits review mechanisms are complementary. They operate in concert to test and refine decision making over time to ensure that regulation achieves its objectives and is responsive to changing circumstances[xvi].

Whilst the existence of judicial review helps ensure legal processes are followed, there is a need for merits review to ensure decisions are meeting the intent of the legislation, not simply following processes.

Full merits review is not advised. The evidence in support of full merits review is limited and in fact indicates that it could lead to adverse consequences. Opening decisions, on appeal or review, to the admission of new documentation or materials for consideration delays decisions without necessarily improving outcomes. It can also result in the applicant receiving a substituted decision that is preferable or more complete in some way, leading to withholding of important information and forum shopping.

The proposal for limited merits review 'on the papers' has benefits in terms of:

- ensuring decisions are 'reasonable' given the material at the time of the decision
- contributing to ensuring decisions are of high quality — that is, transparent and consistent decisions; contested to a degree that is not detrimental to the effectiveness of regulation; and less open to gaming.

However, it must be carefully designed to minimise perverse outcomes.

- A focus on good, transparent decision making by the regulator is the primary consideration.
- Merits (and judicial) review should be a last resort to ensure correct decisions are being made.
- Limits on the ability to exercise merits review should be clear and in the interests of outcomes of the legislation.

The Review proposes merits review should be available for EIA decisions, but only:

- limited to specific decisions in the EIA process
- time limited in terms of when an action can be brought
- it is demonstrated that its application is in the interest of the desired outcomes.

6 Data, information and systems

Key points

Decision makers, proponents and the community do not have access to the best available data, information and science. This results in sub-optimal decision making, inefficiency and additional cost for business and poor transparency to the community. The key reasons why the EPBC Act is not using the best available information:

- The collection of data and information is fragmented and disparate. There is no single national source of truth that people can rely on.
- The right information is not available to inform decisions. Information is skewed towards western environmental science and does not adequately consider Indigenous knowledge of the environment, or social, economic and cultural information. This broader set of information is not clearly integrated to inform decisions that deliver ESD. Cumulative impacts and future challenges like climate change are not effectively considered.
- The Department's systems for information analysis and sharing are antiquated. Cases cannot be managed effectively across the full lifecycle of a project, the 'customer' experience is clunky and cumbersome for both proponents and members of the community interested in a project.

The key reform directions proposed by the Review are:

- A national 'supply chain' of information is required so that the right information is delivered at the right time to those who need it. This supply chain should be an easily accessible 'single source of truth' on which the public, proponents and Governments can rely.
- To deliver an efficient supply chain, a clear strategy is needed so that investments made build, deliver and improve the system over time.
- A custodian for the national environmental information supply chain is needed, and the Commonwealth should clearly assign responsibility for national level leadership and coordination. Adequate resources should be provided to develop the systems and capability that is needed to deliver the evidence base for Australia's national system of environmental management.
- A National Environmental Standard for information and data should set clear requirements for the provision of data and information in a way that facilitates transparency and sharing. The standard should apply to all sources of data and information, including that information collected by proponents.
- To apply granular standards to decision making, Government needs the capability to model the environment, including the probability of outcomes from proposals. To do this well, investment is required to improve knowledge of how ecosystems operate and develop the capability to model them. This requires a complete overhaul of the systems to enable improved information to be captured and incorporated into decision making.

6.1 There is no single source of truth for data and information

6.1.1 Data and information are hard to find, access and share

There is no single national source of truth that people can rely on.. This adds cost for business and government, as they collect and recollect the information they need. It also results in lower

community trust in the process, as they question the quality of information on which decisions are made, and the outcomes that result from them.

There are many sources of information on the environment. These are produced by a wide range of organisations including proponents, researchers, various Commonwealth agencies, state and territory governments, local governments and regional natural resource management organisations. Each organisation collects and manages information to suit their own needs.

There are many different portals, tools and datasets available, but there is no clear, authoritative source of environmental information, to help users identify and access information that is relevant. Department data sets including the Species Profile and Threats (SPRAT) Database and the Protected Matters Search Tool (PMST) do not refine and present data that provides useful information for proponents, assessment officers, decision makers or the general public. The Atlas of Living Australia attempts to bring disparate sources of data information together in one place, but even its custodian, CSIRO acknowledges its shortcomings (see Box 1 The Atlas of Living Australia).

Box 1 The Atlas of Living Australia

The Atlas of Living Australia (ALA) is a digital platform that pulls together Australian biodiversity data from multiple sources, making it accessible and reusable. It aims to support better decisions and on-ground actions and deliver efficiency gains for data management.

Launched in 2010, the ALA is hosted by CSIRO and funded under the National Collaborative Research Infrastructure Strategy. Further funding is secured out to 2023.

A wide range of organisations and individuals contribute data to the ALA, including universities, museums, governments, the CSIRO, Indigenous ecological knowledge holders, and conservation and community groups. The ALA provides the technology, expertise and standards to aggregate the data and make it available in a range of ways. The platform now contains over 85 million biodiversity occurrence records, covering over 111,000 species, including birds, mammals, insects, fish and plants.

The ALA provides a user-friendly, online interface that supports species information, data visualisation and mapping tools, download of data and access to more sophisticated analysis tools (https://www.ala.org.au/). Organisations can also build on the ALA's open IT infrastructure to enhance their own information services and products, for example the Department of Agriculture, Water and Environment's MERIT platform.

A recent review of the ALA[i] found that the ALA has 'pioneered a step-change' in the use of Australia's biodiversity data. However, the review noted some stakeholder concerns around the lack of controls and metrics around data quality and reliability, and data coverage and diversity. The report noted that minimal data is provided to the ALA by consultants and industry, which can represent a major source of biodiversity information. As well as not being a contributor, industry is not identified as a key user of the ALA, which appears to be a missed opportunity.

The issues identified by stakeholders in the ALA review highlight the overall lack of a strategic approach to delivering diverse, representative and comprehensive data to align with national needs, and consistent funding to do so.

Valuable data is often 'locked' in inaccessible formats. Valuable historical data is stored in paper reports. Information on listed species and communities, or assessment documents provided by proponents are usually in the form of individual PDF documents. To access this information, each document must be found, opened and read individually.

Large amounts of valuable environmental data collected are not shared within government, between governments, or made available for further use. Data collected by proponents to support environmental impact assessments or the acquisition and management of offsets is not provided in a way that is able to be shared or reused. It is often considered proprietary by proponents. Data is collected by the research community is often targeted for scientific publication and not always easily accessible for wider use. Regrettably, critical data and the opportunity to establish longitudinal data sets is lost over time as organisational priorities change, and the resources to maintain datasets are withdrawn.

The costs and frustrations of unclear requirements, limited access to shared data, duplication and lack of transparency in the environmental assessment process have been widely acknowledged. In November 2019, Environment Ministers from across Australia agreed to work together to digitally transform environmental assessment systems. In 2019 the Commonwealth and West Australian governments made financial commitments to the collaborative Digital Environmental Assessment Program. This will deliver a single online portal to submit an application across both tiers of Government and biodiversity database that will eventually be rolled out nationally[ii]. This is a good first step for the interface between proponents and regulators and the access and ease of use of information for environmental impact assessments.

6.1.2 No-one is responsible, and there is no clear strategy for environment information

Unlike other areas of national policy (such as the economy, the labor market, and health), environment and heritage policy does not have a comprehensive, well-governed and funded national information base. Efforts are duplicated, and as a nation, the most is not made of public investment in information and data. Multiple parties collect or purchase the same, or similar information, often because they aren't aware of other efforts. Similar systems and databases are built by multiple jurisdictions. It would be more efficient if they were shared or collectively developed.

A number of initiatives, funded by Governments, have sought to deliver greater coordination and standardisation of environmental data. This includes initiatives such as the National Environmental Information Infrastructure, the Terrestrial Ecosystem Research Network, the Atlas of Living Australia (see Box 1 The Atlas of Living Australia), the monitoring framework that underpins the Regional Land Partnerships Program, Digital Earth Australia and work of the Western Australia Biodiversity Science Institute.

Despite these efforts, governments often must resort to negotiating case-by-case data licensing and sharing, rather than having agreements on data and information sharing and the systems that can talk with each other. The collation of information on the impacts of the 2019-20 bushfires on the environment is an example of this.

There is no comprehensive long-term national strategy or coordination, and funding is often ad-hoc program-based investments, and therefore uncertain. There are custodians for some national level data and information (for example Geoscience Australia coordinates remotely sensed information, and GBRMPA information related to the Great Barrier Reef) but there are major gaps, particularly for terrestrial environments.

No single organisation has clear responsibility for stewardship and coordination across the breadth of national environmental information, let alone adequate and ongoing funding to do so. The lack of coordination drives higher costs and derives fewer benefits from the investments that are made in information collection and curation.

6.2 The right information is not available to inform decisions made under the EPBC Act

6.2.1 The current focus is on western scientific environmental information

To deliver ESD, decision-makers must weigh up this information on the long term environmental, economic, cultural and social impacts and benefits of their decisions.

The current focus of the EPBC Act is on western environmental science. There are currently clear structures and avenues for western scientific advice on the environment to be provided and considered, for example through the Threatened Species Scientific Committee for threatened species and communities listing and the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining (IESC) in relation to environmental impact assessments of large coal mining and coal seam gas proposals. There is no corresponding avenue or expectation for Indigenous environmental knowledge, nor economic or social information to be explicitly included or considered in statutory processes. Yet decision makers must weigh competing factors, yet the information they rely on to do so is not transparent.

The information base for development assessment decisions is heavily skewed to environmental information collected by the proponent. There is no requirement for the proponent to give fulsome information on social, economic or cultural impacts, or for the assessment process to examine the veracity of that information. The avenues to seek expert advice (beyond that provided by the IESC) in the development assessment process are limited, and rarely used in practice.

6.2.2 Cumulative impacts and future threats are not well considered

Environmental science and management have traditionally aimed to understand past environmental condition, how and why conditions have changed, and what needs to be done to 'return' the environment back to its 'past' health.

As highlighted in Chapter 1, a key shortcoming of the EPBC Act is the focus on project-by-project decisions. These decisions are largely based on project centric information, collected and collated for the purposes of conducting and environmental impact assessment. With limited exceptions (see, for example, Box 2), the cumulative impacts of decisions on the landscape are not well considered. This is a key shortcoming of the Act.

Box 2 Assessment of cumulative impacts of proposed coal seam gas or large coal mining developments

The analysis and advice provided by the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) is an example of a clear expectation and process for considering cumulative impacts in advice provided to the decision-maker.

The 'Information Guidelines for the Independent Expert Scientific Committee advice on coal seam gas and large coal mining development proposals'[iii] outline the definition and requirements for the consideration of cumulative impacts and provide advice on the scale and nature of assessment.

The consideration of cumulative impacts and risks needs to take into account 'all relevant past, present and reasonably foreseeable actions, programmes and policies that are likely to impact on water resources'. Consideration of local-scale cumulative impacts is undertaken by the proponent, informed by groundwater and surface modelling, Bioregional Assessments and other relevant regional plans. Advice on broader cumulative impacts may be provided by Australian government regulators.

This focus on considering and providing advice on cumulative impacts is facilitated by several factors, including:

- the broad definition of 'water resources' (defined according to the *Water Act 2007*), which supports more comprehensive and integrated scientific advice, and an holistic view of direct and indirect impacts on the physical, chemical and ecological processes that impact on species and ecosystems services,
- significant focus and investment in groundwater and surface water models over several decades,
- the more recent investment in the Bioregional Assessments[iv] to deliver independent, scientific assessments of the potential cumulative impacts of coal and unconventional gas developments on the environment, and
- the IESC's legislative functions, and its focus on developing a suite of resources to assist industry and regulators with environmental assessments, providing clarity around expectations and information needs.

The establishment of the IESC and the delivery of the Bioregional Assessments was part of a $150 million National Partnership Agreement announced by the Commonwealth government in 2012[v], with an additional $30.4. million in funding announced for the Geological and Bioregional Assessments Program in 2017. This highlights the significant amount of investment required in data aggregation, analysis and expert advice required to underpin the consideration of cumulative impacts.

With climate change, the past will no longer be a useful guide to the future. Key threats to the environment, including biosecurity incursions and altered fire regimes, will be compounded by climate change. While considering cumulative impacts is important now, this becomes increasingly so as the predicted widespread and substantial changes to the environment arising from climate change manifest.

There will always be inherent uncertainty about how future pressures will play out in terms of impacts on the environment, but it is possible to better understand how the future could play out under different scenarios to help inform decisions. There is a clear need to enhance capability to consider a dynamic environment and a changing future.

The proposed key reforms, including the setting of National Environmental Standards and the making of regional and strategic national plans enable cumulative impacts to be considered over long timeframes. This requires a substantially improved information base and a broader suite of information tools including the capacity to model the outcomes of alternative scenarios.

New information tools are needed. While proven and long used in many areas of environmental management (such as climate modelling, fisheries, the management the Great Barrier Reef and for water resources), the modelling capability to predict the impacts of threats and management actions on land-based biodiversity, while proving up are still relatively immature in Australia.

Furthermore, technologies to analyse and gain insights from diverse and very large data sets are not broadly used, but these insights are essential to develop and refine predictive models. This

contrasts to other areas of national policy such as the economy and health, where predictive modelling is a mainstream and widespread tool used to inform decision making.

6.3 The Department's information management systems are antiquated

The EPBC Act was developed in the last century, in a time where the use of paper was standard, and the internet was not yet central to the effective delivery of government services. The way the EPBC Act is administered has not kept pace with the rapid transformation in how government, businesses and people interact with technology. In essence, the department uses the systems of a policy agency which are insufficient to deliver its regulatory functions efficiently.

The online systems that support the EPBC Act are cumbersome, duplicative and slow – not meeting expectations for an easy, tailored, digital experience. The department's systems for managing assessment documentation result in the need to manually handle (and double handle) files, leading to mistakes and delays. Interactions with proponents are not easily recorded, resulting in duplication and a lack of structure.

There is no system for efficient case management, and it is not easy for the department, the proponent or the community to determine the status of a proposal in the assessment process or track a project after an approval has been granted. The systems do not link with those of the states and territories, there is no a single user portal.

The EPBC Act requires archaic methods of communication such as newspaper advertisements and publishing in the Government gazette. While not restrictive, the focus on meeting statutory requirements often comes at the expense of effort to use more modern forms of presenting and communicating information in an easily accessible way.

6.4 Key reform directions

6.4.1 A national environmental information supply chain, a comprehensive roadmap, and a national custodian

The provision of information can be viewed like a supply chain. Information is delivered through a series of processes that convert raw data into end products that can be 'used' – by decision makers to inform their decision, by proponents to help them understand and design their project proposals , and by the community to understand the impacts of decisions and the outcomes that are achieved.

As with other supply chains, effort and resourcing is required to deliver an efficient chain, so that the right products are delivered at the right time to the right customers. The 'customer' – the user – is central to the design of the supply chain.

The reforms proposed by this Review, including: requirements to make decisions that deliver ESD; the setting and implementation of National Environmental Standards; the development of regional environmental plans and the monitoring and evaluation framework of the EPBC Act (Chapter 7) are all core user needs for the supply chain of information for the implementation of the Act.

The opportunity though is broader than just the EPBC Act. A national environmental information supply chain that delivers for a national system of environmental management is needed. The national environmental information supply chain should:

- prioritise the collection of environmental and other information, making the most of modern technologies to do this efficiently,
- have a central repository (or clearly linked repositories), from where it can be curated into information and knowledge,
- incorporate the data and information that is owned and curated by others, including economic and social information. Indigenous data and knowledge should be also incorporated in a culturally appropriate way, that respects the custodians of that knowledge,
- incorporate predictive modelling capability, so cumulative pressures can be considered, future scenarios can be examined and risks comprehensively examined,
- supply the decision-making frameworks, that enable ESD to be effectively considered, and the precautionary principle applied, and
- feed into the frameworks that support monitoring and evaluation, of the National Environmental Standards, the operation of the EPBC Act, the broader national environmental management system.

A national supply chain, that can deliver the same information to a decision maker (for example the Commonwealth or a state or territory under a devolved arrangement), will make it more efficient for governments to demonstrate their systems deliver decisions that are consistent with the National Environmental Standards.

Significant upfront investment is required to deliver the substantial improvement in the information supply chain, and ongoing investment will be required to maintain the system over time. This is necessary and will improve the effectiveness in how Australia's environment is managed and deliver efficiency – for governments and for business.

Given the significant investment required, the supply chain should be delivered in a strategic and coordinated way. A comprehensive roadmap is needed. Responsibility for planning for and delivering the supply chain should be assigned to a national institution — a custodian of the national environmental information supply chain. While there are numerous potential candidates amongst key national institutions, the Review is not going to 'pick a winner'.

The national custodian would have clear responsibility for:

- facilitating the collaboration of relevant stakeholders to establish information needs for national-level reporting, and policy and program design,
- developing, publishing and maintaining a long-term data, information and systems strategy and road map that identifies priority needs,
- overseeing the central repository (or connected repositories) of information, noting that individual datasets may be managed by the collecting organisation that has the relevant expertise,

- providing advice on the national standards for data collection, management and use,
- coordinating national level capability for predictive modelling, including facilitating a community of knowledge to support the development and use of these models, and
- advising on the frameworks for delivering ESD in decision making and for applying the precautionary principle (which should be required by the EPBC Act).

6.4.2 A national environmental standard for information and data

A National Environmental Standard(s) for information and data should describe and define data requirements, and the form in which data should be provided to support data sharing and transparency. Building on existing technical data standards, it should provide a clear framework to supports the provision of the data and information that is needed, in a form that supports its integration into the supply chain.

While some standards for data and information already exist, there are rarely consequences if these standards are not used. Proponents should be required to submit data and information supporting development approval applications in a standardised way. Compliance with the standard should be a requirement for an application to be validly made.

The standard should apply to proponents and other providers of information and data including relevant departments. The 'Digital Transformation of Environmental Impact Assessment' work being delivered in partnership between the Department and the West Australian government provides a sound starting point for this standard[vi].

Legislative changes could further embed expectations for data collection and sharing in the EPBC Act. The EPBC Act could include powers that enable the Commonwealth to compel public institutions, researchers and other organisations that are funded by government grants and programs to provide the environmental information they collect in a manner consistent with the National Environmental Standard for information and data.

6.4.3 The Department's information management systems need a complete overhaul

The Department's information management systems need to be overhauled to provide a modern interface for interactions on the EPBC Act and to embed in systems the key decision-making frameworks that harnesses information and knowledge.

A modern interface includes:

- a case-management system that supports the full project lifecycle, from application through assessment, approval, to compliance and enforcement,
- the capacity to link with others— so that information can be provided once and shared many times (for example with the supply chain custodian or other regulators),
- the ability to record, share and search information related to EPBC Act decisions in a way that is accessible to both the public and proponents, and
- the ability to readily communicate decisions using modern communication channels, rather than relying on newspaper advertisements and the Government Gazette.

In the short term, the granularity of National Environmental Standards is limited by the information available to define and apply them to decision making. A quantum shift in the quality of information is required to transform standards from qualitative indicators of outcomes to quantified measures of outcomes. To apply granular standards to decision making, Government needs the capability to model the environment, including the probability of outcomes from proposals, drawing on predictive modelling capabilities and decision-making frameworks for ESD that will be delivered as part of the information supply chain.

To do this well, investment is required to improve knowledge of how ecosystems operate and develop the capability to model them, which is essential for testing scenarios and making informed, risk-based decisions. This requires a complete overhaul of the systems to enable improved information to be captured and incorporated into decision making.

The frameworks used to advise decision-makers, and how these have been applied in the development of advice for decision makers (for example in the making of a standard, regional plan or decision on a development application) should be publicly available information. The Government's systems should have the capability to efficiently support the preparation, consideration and publication of this information.

To build public trust and confidence, the proposed Information and knowledge committee should be responsible for providing the Minister with independent advice on the application of the National Environmental Standard and the ESD decision-making frameworks. This advice should be transparently provided, and, where the Minister acts in a manner contrary to the advice, a statement of reasons should be published.

6.4.4 Resourcing reforms

The Review acknowledges that a quantum shift required in information and data systems will come at significant cost.

A national information supply chain, with a custodian, should in time deliver efficiencies for all Governments. It is an upfront investment that negates the need for multiple systems to be developed by individual governments, or to fund new 'one-off' initiatives requiring grants or program funds.

CSIRO noted in their submission that systems of linked repositories and standardisation between jurisdictions could deliver both economic gains and increased transparency[vii]. In Western Australia, it is estimated that digitally transformed environmental impact assessment would deliver a benefit of more than $150 million every year through accelerated private and public project development[viii].

The need for investment in data, information and systems is in part generated by the need to regulate the impacts of development on the environment. Consistent with the principle that the impactor (or 'polluter') pays, proponents should be required to pay the efficient cost of the share of information, knowledge and systems required to underpin the regulation of their activities.

7 Monitoring, evaluation and reporting

Key points

There is no effective framework to support a comprehensive, data-based evaluation of the EPBC Act, its effectiveness in achieving intended outcomes, and the efficiency of implementation activities.

The EPBC Act includes some requirements for monitoring and reporting on activities and outcomes. However, these do not span the operation of the EPBC Act and follow-through is poor. Activities that are done lack a clear overall purpose, coordination and intent. There is a focus on 'bare minimum' administrative reporting, rather than genuine monitoring and evaluation of outcomes to learn lessons, adapt and improve.

The national State of the Environment (SoE) report is the established mechanism that seeks to 'tell the national story' on Australia's system of environmental management. While providing an important point in time overview, it is an amalgam of insights and information, and does not generate a consistent data series across reports. It lacks a clear purpose and intent. There is no feedback loop, and as a nation no requirement to stop, review, and where necessary change course.

Combined, these issues make it extremely difficult, if not impossible, to assess the relative effectiveness of the levers governments individually and collectively pull to manage Australia's environment.

The key reform directions proposed by the Review are:

- The development of a coherent framework to monitor and evaluate the effectiveness of the EPBC Act in achieving its outcomes and the efficiency of its implementation. The framework must be backed in by commitment to its implementation.
- A revamp of national SoE reporting should incorporate trend analysis and address future outlooks to provide the foundation for national leadership on the environment.
- National environmental economic accounts will be a useful tool for tracking Australia's progress to achieve ecologically sustainable development. Efforts to finalise the development of these accounts should be accelerated, so they can be a core input to SoE reporting.

Regular monitoring, evaluation and reporting are key features of modern public policy and regulation. They are essential for:

- understanding the success or failure of interventions, to enable improvements to be identified and settings to be adapted to enhance effectiveness or increase efficiency, and
- accountability to the public.

Effective monitoring, evaluation and reporting of the EPBC Act, and of the broader national environmental system is essential to achieve improved environmental outcomes. It is also central to improving and maintaining public trust in the regulatory system. If the community, and the regulated community can't 'see' the outcomes arising from regulatory intervention, then they question whether it is worthwhile.

Monitoring and evaluation is fundamentally linked to information and data management — it should inform the design of monitoring activities that provide data into the 'information supply

chain' (see Chapter 6), and the quality of insights that can be drawn from evaluations are dependent on how information is collated, shared and analysed.

The Review acknowledges that evaluating the effectiveness of environmental policy is challenging, and that attributing observed outcomes to individual interventions is extremely difficult. Many different organisations are involved at different levels, there are lengthy time lags between human actions and observed changes in the environment, and broader impacts (such as climate variability and change) that contribute to environmental outcomes can mask the impact of specific interventions.

But that does not mean we should put environmental monitoring and evaluation in the 'too hard basket'. This chapter examines the effectiveness of monitoring and evaluation of the EPBC Act. As the EPBC Act includes settings for the Australian State of the Environment Report, it also explores the leadership role the Commonwealth plays in monitoring, evaluation and reporting on the effectiveness of the nation's broader system of environmental management.

7.1 Monitoring, evaluation and reporting of the EPBC Act is inadequate

7.1.1 The EPBC Act lacks a cohesive monitoring and evaluation framework

There is nocomprehensive framework that supports effective, data-based evaluation across all the operations of the EPBC Act. The absence of a strategic monitoring and evaluation framework means that there are information gaps that hinder effective evaluation, the resources that are dedicated to monitoring are likely to be inefficient, and there is no clear pathway to learn lessons, adapt and improve.

The activities to monitor and report on the EPBC Act are patchy and inconsistent. They lack a clear overall purpose and intent, including how the operation of the EPBC Act contributes to the overall performance of the nation's environmental management system.

The broad policy areas of the EPBC Act (Chapter 3), combined with the lack of clearly defined outcomes that the Act seeks to achieve (Chapter 1) provide a challenging foundation for monitoring and evaluating the effectiveness of the Act. Furthermore, the Department lacks the systems (see Chapter 6) to collect data on its regulatory activities. This makes analysis of where resources are directed, and the efficiency of activities, difficult to assess.

To answer the fundamental question of whether the EPBC Act is operating effectively and efficiently, this Review has relied on diverse, disparate, and at times patchy sources of information and the deep knowledge of contributors. In modern public policy, this is unacceptable.

7.1.2 There are some requirements for monitoring and reporting

The EPBC Act includes some requirements for monitoring and reporting on activities and outcomes. However, these do not span the operation of the EPBC Act and follow through is poor. Resourcing constraints mean that the focus is on reporting to meet the bare minimum requirements, rather than monitoring and evaluation driving adaptive improvements over time.

For listed threatened species and ecological communities, requirements for monitoring are limited in scope. Recovery Plans for threatened species are required to include details on how

progress will be monitored, but there is no requirement to implement monitoring activities and report on whether outcomes are being achieved. This means that efforts to monitor and report are a rare exception, rather than the common practice.

Conservation Advices for listed threatened species and ecological communities have no detail on monitoring requirements, and most mandated 5-yearly reviews of Threat Abatement Plans are either well behind schedule or haven't occurred[i].

For developments approved under Part 9 of the EPBC Act, the Minister may attach conditions requiring specified environmental monitoring or testing to be carried out, and for reports to be prepared. This is an administrative decision, rather than a statutory requirement. As highlighted in Chapters 8 and 9, where offsets form a condition of approval, there is no comprehensive tracking of offsets, or assessment to determine if they are achieving the outcomes intended.

While not a requirement, strategic assessments made under Part 10 of the Act often include provisions as to how monitoring and evaluation will be achieved, and while approval holders are required to provide reports, the Department lacks the capacity to follow-up if activities are not conducted. Similarly, Bilateral Agreements 'may include' provisions for auditing, monitoring and reporting on the operation and effectiveness of all or part of the agreement, but these are not a requirement.

Other parts of the EPBC Act require management plans to be developed, and in some cases, reports against these plans to be prepared. While many requirements and approaches fall short of best practice, there is ongoing effort to improve the quality and consistency of planning and reporting.

For World Heritage places and National Heritage areas entirely on Commonwealth land, a management plan is required to be prepared and reviewed every five years, while for those not entirely on Commonwealth land 'best endeavours' must be made to ensure a plan is in place. Similar requirements are in place for Ramsar wetlands.

Solid processes are in place for the monitoring and reporting of World Heritage places, which is guided by the international World Heritage Council and highly scrutinised. Planning and review of National Heritage places is patchier. While some form of plan is in place or in preparation for most areas, a recent 5-yearly review by the Minister for the Environment did not assess their effectiveness[ii]. Work is currently underway to develop a standardised monitoring methodology for heritage places, consistent with the existing requirements for World Heritage properties.

The Director of National Parks (DNP) and the joint Boards of management are required to prepare management plans for jointly-managed Commonwealth reserves, which must be updated every 10 years. While all reserves have plans in place, a recent ANAO report identified shortcomings in their effectiveness and implementation[iii], which the DNP is working to address.

All Commonwealth entities are required to report on ESD activities and outcomes in their annual reports (s516A). While the intent is to provide a mechanism to ensure the Commonwealth Government is considering ESD in its operations, this has been lost over time. The reality is that most Commonwealth entities report on their use of recycled paper or the energy efficiency of buildings. It is an administrative burden with no real benefit.

The Department is required to report annually on the operation of the EPBC Act. This is currently delivered as part of the Department's annual report. Despite some recent improvements, in practice, this reporting is output and activity-focused, rather than focused on the outcomes arising from the operation of the EPBC Act. The measures used to report publicly on the operation of the EPBC Act consolidate performance information across several programs and they change from year to year. This greatly reduces the usefulness of the reporting effort that is made.

7.2 Monitoring and evaluation of Australia's environmental management system is fragmented

7.2.1 Monitoring and evaluation of Australia's environment management system is challenging

The management of Australia's environment is a shared responsibility between the Commonwealth and the states and territories, with jurisdictions working in partnership with the community and the private sector (Chapter 1). To meet its international obligations, the Commonwealth has an overarching responsibility to monitor and report on the national environment.

The approach to monitoring and evaluation within the system happens at a range of scales (project site, environmental asset, region), for a range of reasons (project, program, regulatory framework) and varies considerably. Some of the monitoring and evaluation frameworks are strong and have benefited from decades of investment and effort, others are emerging and some, like many under the EPBC Act, are immature (see Box 1 Examples of environmental monitoring, evaluation and reporting).

Box 1 Examples of environmental monitoring, evaluation and reporting

The Reef 2050 Long-term Sustainability Plan provides the overarching strategy for the Great Barrier Reef, developed by the Australian and Queensland governments and partners. It is underpinned by a coordinated and integrated monitoring, modelling and reporting program to support an adaptive management approach[iv]. It guides the coordination and alignment of existing long-term monitoring programs, to capitalise on existing investment and avoid duplication, and informs annual report cards and the Great Barrier Reef Marine Park Authority's five yearly outlook reports.

The Commonwealth's Regional Land Partnerships program has a long-term monitoring framework for projects, which builds on improved practices for collecting and storing information on on-ground activities funded by the Commonwealth under previous programs. The current work has a greater emphasis on processes to support monitoring and evaluation of ecological outcomes at the project and program level, with an aim to promote more robust, long-term ecological modelling and evaluation more broadly[v].

There is no cohesive mechanism that brings the various efforts together to present a picture of the performance of our national system of environmental management. This is a key shortcoming that should be addressed.

7.2.2 The purpose of state of the environment reporting is not clear

The national State of the Environment (SoE) report is the established mechanism that seeks to 'tell the national story' on Australia's system of environmental management. While significant

improvements have been made in the way the SoE is presented, in its current form the SoE report as the centrepiece of monitoring and environmental reporting on Australia's national environmental system is dated.

The EPBC Act requires the preparation of the SoE report every five years (s516B). Five SoE reports have been delivered, the first in 1996 and the most recent in 2016. The practice has been for the SoE to be prepared by a team of independent authors with the approach to each report determined by the authors. This has influenced capacity to use the SoE as the driver for establishing longitudinal datasets.

While the national SoE reports provide an important overview of the state and trend of Australia's environment, it is an amalgam of insights drawn from disparate sources, does not generate a consistent data series across reports and is an attempt to report on everything for everyone. There is no feedback loop, and as a nation there is no requirement to stop, review, and where necessary change course.

The EPBC Act provides no guidance as to the purpose or objective of the SoE, and while provision is made for this to be clarified in regulations, this has never been done. It relies on collating available data and information and authors have repeatedly highlighted the inadequacy of data and long-term monitoring as a key challenge to effective environmental management. The SoE report's purpose is not clear, and it lacks a coherent framework that supports consistency over time.

National SoE reports provide little insight into the effectiveness of different activities to manage the environment, and there is no requirement for a government response. The links between SoE and other initiatives, such as the development of national Environmental Economic Accounts (see Box 2 Environmental Economic Accounting) is not clear.

Box 2 Environmental Economic Accounting (EEA)

In April 2018 the Australian Government and all state and territory governments agreed on a strategy to implement a common system of environment-economic accounts across Australia[vi].

EEA is a framework for organising statistical information to help decision-makers better understand how the economy and the environment interact. The importance of the environment and its contribution to our economic and social wellbeing is often overlooked because it is not fully reflected in traditional financial accounting methods, which have developed and improved over decades.

The ultimate outcomes of a national system of environment-economic accounts include that:

- policy and decisions by government, business and community take into account the benefits of a healthy environment
- decisions makers balance social, economic and environmental outcomes
- return on investment into the environment can be demonstrated; and
- information on the condition and value of environmental assets is fully integrated into measures of social and economic activity – such as reports prepared by Treasury and the Department of Finance.

In practice, EEA brings together information on the environment and how it is changing over time in a consistent way that can be easily integrated with social and economic data. The common national approach to EEA agreed as part of the 2018 National Strategy will adopt the internationally agreed System of Environmental Economic Accounting framework. It starts by classifying and measuring the extent of

environmental assets, then considers the condition or health of the asset and the range of goods and services that the asset provides. The values of those services are estimated based on market transactions, or techniques to assess non-market value.

For example, the value of a national park may be demonstrated through the income from park entry fees, and the value of tourism to the local economy. The park also provides health benefits for physically active park visitors, with a value estimated from avoided health care costs. Other benefits include pollination for local agriculture, water supply and filtration, climate change mitigation, biological diversity and flood protection.

The 2018 National Strategy sets out a roadmap with intermediate outcomes delivered over 5 years, including improving the consistency of reporting on Australia's environment and the coordination of, and access to, the data that underpins it. Several pilot accounts are underway, but they have yet to be picked up and implemented in Commonwealth or jurisdictional level reporting.

7.3 Key reform directions

7.3.1 A specific monitoring and evaluation framework for the EPBC Act

A comprehensive and coherent framework to monitor and evaluate the effectiveness of the EPBC Act in achieving its outcomes and the efficiency of its implementation is required.

The fundamental purpose of this framework is to enable two key questions to be answered:

- Is the EPBC Act achieving its intended outcomes?
- Is the EPBC Act operating efficiently?

A comprehensive framework backed in by the systems required to support its implementation will mean the next review of the EPBC Act will start with a comprehensive evidence base on which judgements can be made. The framework should specify:

- the key outcomes to be measured, noting that the outcomes and objectives of the National Environmental Standard provides a key basis for this,
- the spatial and temporal scale at which outcomes should be measured, and
- the monitoring and data required, including how requirements for specific areas of the EPBC Act (e.g. standards, regional plans) come together.

The reforms proposed by this Review, particularly the establishment of National Environmental Standards and regional plans provide a solid foundation for the development of a monitoring and evaluation framework for the EPBC Act as a whole. The implementation of the framework should be underpinned by the data and information supply chain (Chapter 6).

The National Environmental Standard for monitoring and evaluation is envisaged to ensure that those that interact with the EPBC Act (such as proponents or accredited regulators) are required to contribute their information as appropriate to populate the framework.

In line with this framework, the annual reporting on the operation of the EPBC Act should be enhanced. It should report against the achievement of the National Environmental Standards, where standards have not been achieved, and the core activities undertaken to support the operation of the EPBC Act.

7.3.2 Revamp State of the Environment reporting

A revamp of SoE reporting is required to provide the foundation for Commonwealth leadership on the environment. It should be the vehicle through which Australia, as nation, tells its story on the environment, both to itself and to the world.

The national SoE report should continue to be independently prepared, so that judgements are made at arm's length and without fear or favour. But the report should be rooted in a nationally agreed evaluation framework, to which the data and information collected by many can support. This framework will provide focus and consistency to the reports, while being sufficiently flexible so as not to limit the ability of the report to consider information in new ways or talk to emerging issues.

The national SoE report should examine the state and trends of Australia's environment, and the underlying drivers of these trends, including interventions that have been made, and current and emerging pressures. It should provide an outlook for Australia's environment, based on future scenarios.

Government should be required to formally respond to the national SoE report. It could, for example, respond in the form of a national plan for the environment, that identifies priority areas for action, and the levers that will be used to act.

This revamp of the national SoE report requires an ongoing commitment to resourcing and maintaining capacity for national scale monitoring. Ideally, national SoE reports should be published on a cycle that enables comprehensive input into strategic planning and the statutory reviews of the operation of the EPBC Act.

The EPBC Act should be amended to set the formal objectives for the national SoE report, require the Government to respond, and to better align the timing of the report with the statutory review.

7.3.3 Accelerate efforts on national environmental economic accounts

Environmental-economic accounting provides a mechanism to underpin consistent ESD reporting across governments (see Box 2 Environmental Economic Accounting (EEA)). The collaborative development of a nationally consistent system will support greater coordination and the capacity to better tell a national-level story.

While a National Strategy and Action Plan for a common national approach to environmental economic accounting was agreed in 2018, progress has been slow. A series of pilot and experimental accounts have been developed, but it has yet to be incorporated into State of the Environment reporting at the state and territory or Commonwealth level.

Efforts to finalise the development of these accounts should be accelerated, so that in time they can be a core input to SoE reporting, and are used to promote explicit consideration of environmental, heritage and cultural assets as part of Australia's broader national accounts.

8 Restoration

Key points

To deliver Ecologically Sustainable Development, the EPBC Act must encourage restoration. Given the state of decline of Australia's environment, restoration is required to enable future development to be sustainable. Available habitat needs to grow to be able to support both development and a healthy environment. The current settings of the EPBC Act do not support effective or efficient restoration.

Environmental offsets are poorly designed and implemented, delivering an overall net loss for the environment.

- The stated intent of the offsets policy, to only be used once proponents have exhausted all reasonable options to avoid or mitigate impacts on MNES, is not occurring. In practice, offsets have become the default negotiating position, and a normal condition of approval, rather than the exception.
- Offsets do not currently offset the impact of development. Proponents are allowed to clear or otherwise impact habitat by purchasing and improving other land with the same habitat and protecting it from future development. It's generally not clearly established that the area set aside for the offset is at risk from future development, and overall there is a net loss of habitat.

Offsets need to include a focus on restoration and should be enshrined in the law, rather than departmental policy. The Act should:

- Require offsets to be considered only when options to avoid and then mitigate impacts have been actively considered, and demonstrably exhausted.
- Require offsets, where they are applied, to deliver protection and restoration that genuinely offsets the impacts of the development, avoiding a net loss of habitat.
- Incentivise investment in restoration, by requiring decision makers to accept robust restoration offsets, and create the market mechanisms to underpin the supply of restoration offsets.

There are opportunities for Government to explore policy mechanisms to accelerate environmental restoration including those to:

- Leverage the carbon market, which already delivers restoration, to deliver improved biodiversity in suitable habitat types.
- Co-invest with the philanthropic and private sectors, including funding innovation to bring down the cost of environmental restoration, growing the habitat available to support healthy systems.

The reforms proposed by this Review recommend the EPBC Act focus on protecting, conserving and restoring the environment, so that development can proceed in a sustainable way (Chapter 1). To deliver the net gain for the environment that is needed, the national focus on restoration must be enhanced (see Box x).

Box X What does restoration mean

Restoration in this chapter refers to improvement in the condition of the environment to a state that is required to be sustainable in the long term, or a state that is desirable. It should not be inferred as a blanket ambition for a return to a particular historic environmental condition (though this may be a reasonable goal for some areas), as this may not be possible, particularly considering ongoing impacts such as climate change.

Central to the proposed reform agenda is a commitment to monitoring and evaluating progress made, and reviewing and amending settings to ensure that interventions made are on track to deliver intended environmental outcomes. The proposed National Environmental Standards and regional plans (Chapter 1) are key mechanisms that specify the outcomes sought from development decisions and the priorities for restoration. Reviewing and, where needed, amending these instruments, is critical to delivering ecological sustainable development in the long term. A recurring cycle of review provides the opportunity to adjust the rules when circumstances change or where outcomes are not being achieved.

In addition to this commitment to adaptive management, specific action is required to support restoration. Fundamental change to the way developments are permitted to 'offset' the impacts of their development are needed.

The Review has identified opportunities for national leadership outside the Act that should be considered. Existing markets, including the carbon market can be leveraged to deliver restoration in appropriate areas, and greater effort can be made to coordinate the investments in restoration made by governments and the private sector. Biodiversity markets investment vehicles at scale also provide an opportunity to and to improve techniques used for restoration, so that it can be delivered at least cost. These opportunities are explored below, although no firm reform directions are proposed at this stage. The Review will continue to consider the merits of these concepts.

8.1 Environmental offsets do not offset the impacts of developments

8.1.1 The offsets policy permits continued environmental decline

The EPBC Act offsets policy was implemented in 2012[i]. The policy enables developers to compensate for unavoidable environmental impacts, mostly by protecting areas of habitat similar to the area that has been destroyed or damaged by the project.

The policy embeds a hierarchy of considerations when assessing the impacts of a proposal. In the first instance, impacts on MNES should be avoided. Once all reasonable efforts are made to *avoid*, remaining impacts should be '*mitigated*', with efforts made to reduce the impact(s) on MNES. The 'residual impacts' — those remaining after all reasonable efforts to avoid and mitigate have been exhausted — can then be *offset*, in accordance with the rules of the offsets policy.

The offsets policy is based on the notion that as suitable habitat becomes more scarce overtime, offsets become harder to find and secure, and therefore more expensive. While this has played out, it has not resulted in projects avoiding increasingly scarce habitat. Rather, it has led to concern from business that the scarcity of some offsets creates an 'unworkable' cost of doing business.[ii]

While the *avoid, mitigate, offset* hierarchy is its stated intent, this is not how the policy has been applied in practice. Proponents see offsets as something to be negotiated from the outset, rather than a commitment to fulsome exploration (and exhaustion) of options to avoid or mitigate impacts.

This is in part because the proponent's decision to develop a particular site (or on a specific footprint within a site) has generally already been made before a referral is made under the EPBC Act. This limits real consideration of broadscale avoidance. Project cost and difficulty drives final decisions about siting of projects, rather than environmental considerations.

For example, the Review has noted proposals where proponents have placed linear infrastructure through habitat, rather than considering all opportunities to secure agreement(s) to site it through adjacent already disturbed or cleared lands. In other cases, proponents have identified multiple prospective areas for extraction activities and have chosen sites for solely commercial reasons (such as lower costs due to proximity to transport hubs), despite generating potentially high environmental impacts.

Once a proposal is referred, assessment officers have limited scope and time to work with proponents to avoid and mitigate impacts. Once a proposal is referred, assessment officers have limited scope and time to work with proponents to avoid and mitigate impacts. This becomes a 'nice to do', rather than a core focus of their efforts. An offset has become an expected condition of approval, rather than an exception.

Further to problems with application, there are significant shortcomings with the design of the offsets policy. The current policy is based on the concept of 'averted loss'. This means that proponents usually seek to meet the offset requirement by purchasing and improving land with the same habitat, and protecting it from future development. However, there is no formal requirement for the proponent to demonstrate that the area set aside for the offset was sufficiently likely and able to be cleared for future development. The environmental outcome achieved by the purchase of the offset may therefore not be genuinely 'additional' to the outcome that would have been achieved anyway.

While the policy allows proponents to meet their offset condition by improving degraded land (an approach the Review terms a restoration offset) or by using an offset that has been delivered in advance of the impact occurring (an 'advanced offset'), most offset conditions are met by protecting areas of like habitat (an averted loss offset) (see Box x).

Box X – Averted loss, advanced and restoration offsets

Averted loss offsets

These offsets are met by purchasing and improving an area of land with the *same* habitat as that which is destroyed or damaged by the development. This offset is then protected from future development. A development with an averted loss offset results in a net reduction of habitat.

Restoration offsets

These offsets are met by creating new or recovering old habitat from highly degraded land. These offsets are met by creating new (or recovering old) habitat from highly degraded land. A development with a restoration offset can result in a net gain of habitat.

Advanced offsets

Advanced environmental offsets are those that are 'supplied' in advance of an impact occurring. The offset area is set aside for potential future use by the owner, or to sell to another developer. The current offset policy allows advanced offsets for:

- protecting and improving existing habitat (averted loss)

- creating new habitat from highly degraded land (restoration)

Advanced offsets are difficult to deliver under the current settings. There is no guarantee that the Minister will accept an advanced offset, nor is it possible to accurately determine the area of offset required prior to an approval being granted. This makes investing in an advanced offset a risky proposition, and so proponents focus on protecting what is left, rather than promoting restoration. This means that over time, the policy permits continued loss and ongoing decline, rather than realising a gain (or at least no net loss) to offset expected realising a gain (or at least no net less) to offset expected environmental impacts, let alone improve them.

Offset requirements are a condition of approval. As with other conditions (see Chapter 9), offset conditions are not adequately monitored, and efforts to enforce compliance are weak. There is no transparency of the location, quality or quantity of offsets. There is no 'register of offsets', and in the absence of such a tool it may well be possible that the same area of land has been 'protected' more than once.

As most offsets are averted loss offsets, in its current form, the offset policy delivers little other than weak protection of remnant habitats of MNES, that may have never been at risk of development. It requires fundamental review.

8.1.2 Key reform directions

The offset policy should be replaced with clear laws. The EPBC Act should require offsets only be considered when options to avoid and then mitigate impacts have been demonstrably exhausted.

The EPBC Act should require that offsets deliver genuine restoration to offset the impacts of the development. Requirements for restoration should be proportional to the risk to MNES, with more stringent requirements for more highly endangered species or ecological communities.

To provide the certainty needed to invest in restoration ahead of impacts occurring, the EPBC Act should require a decision maker to accept *robust* advanced offsets that are created prior to an approval being granted. Restoration offsets should be encouraged to enable a net gain for the environment to be delivered.

If offsets, including advanced offsets, were to be supported with greater certainty under the EPBC Act, then this could be the catalyst for a market response. Proponents are generally not in the business of managing habitats as their core business. There are however expert land managers and specialist project managers who deliver these services, as has been demonstrated through the operation of the carbon market[iii]. The right policy settings would provide certainty for these players to invest in landscapes, confident that developers will be in the market to purchase the restored and protected habitat or management services down the track.

The concept of a biodiversity restoration market should frame the approach to offset reforms. Settings should promote regulatory certainty, transparency and competition, and the supply of robust offsets including:

- Market depth. The ability for a wide range of participants to purchase restoration for a range of reasons. Voluntary buyers (e.g. companies purchasing credits for green

credentials), philanthropic investors and government funds should be able to purchase credits

- Market integrity. The integrity of the environmental market unit is central to a successful and trusted market. This requires market transparency, clear standards, reporting and registries all backed by firm compliance and enforcement.
- Market efficiency. Buyers and sellers should be able to easily find each other, and the overhead costs to participate kept as low as possible.

Laws that accept advanced restoration offsets, and provide a robust market to underpin them, will mean that third parties will pre-empt the needs of developers, invest in restoration activities now, and then on sell the robust offset to proponents when they need them. This will in turn provide business with a far simpler mechanism to meet their residual obligations to offset their impacts.

There are barriers between biodiversity markets that are currently delivered at an individual state level. Consideration should be given to how systems could be better aligned (for example by enabling recognition of cross border offsets). This would reduce costs for business while delivering the same environmental benefits.

8.2 The carbon market could be leveraged to deliver environmental restoration

There is an opportunity to better leverage other schemes that promote environmental restoration. Australia's carbon market, underpinned by the *Carbon Credits (Carbon Farming Initiative) Act 2011* has successfully promoted environmental restoration since its inception.

To participate in the carbon market, farmers and other land managers can change the way they use their land to absorb and store carbon dioxide. Land is managed in accordance with prescribed rules (called 'methods') to earn carbon credits. These credits are then on sold either to the Government or another purchaser (for example a philanthropic investor or a company voluntarily purchasing to enhance its 'green' credentials).

Carbon credits can be earned in in many ways, including by allowing or actively promoting, the restoration of native forests. Since 2013, when the rules for these types of activities were put in place, more than 2.3 million hectares of land have been restored[iv], expanding the area of natural habitat.

To date, most restoration activity under the carbon market (by area and credits generated) has occurred in drier regions of Australia[v], where both biodiversity and the numbers of threatened species are lower. In these areas, the returns from using land for carbon are often greater than returns from other land uses.

The Commonwealth Government has recently agreed to carbon market reforms that are intended to increase the competitiveness of carbon-farming when compared to other land uses. These reforms include the ability to use different carbon methods on the same parcel of land (for example for one area to be credited for the carbon sequestered in vegetation and soil). This is known as 'stacking' carbon credits. These reforms will result in a shift in restoration arising from the carbon markets into areas of higher biodiversity, and higher numbers of threatened species.

This is because the returns from 'farming carbon' will be greater than alternatives, resulting in land use change to deliver environmental outcomes.

The value derived from using land to deliver environmental outcomes can be further increased if credits from a biodiversity market can be 'stacked' on top of carbon credits, with one area of land delivering both carbon and biodiversity outcomes.

While not covering the entirety of the biodiversity habitat types likely to be required enhancing the links between the carbon market and biodiversity markets can shift restoration efforts into many areas of higher biodiversity, delivering multiple benefits for the community including:

- An increase in the overall sequestration of carbon over time, as the regions where carbon and biodiversity farming is a commercially viable land use would increase.
- The recovery of threatened species, as the area of habitat necessary to their survival would be increased.

It would also lower the overall cost of achieving carbon and threatened species outcomes, as both benefits can be realised from the one activity.

8.3 Investments in restoration could be better coordinated to maximise outcomes

Commonwealth Government programs for investment in environmental restoration have been a constant feature of national environmental policy over the past 20 years. These include the National Heritage Trust, Caring for Country, the Environmental Stewardship Program, the National Landcare Program, Green Army, Threatened Species Recovery Fund and the Reef Trust.

The current streams of Commonwealth funding allocated towards environmental protection conservation and restoration, while aligned with matters of national environmental significance, are not comprehensively coordinated to prioritise investment in a way that achieves the greatest possible biodiversity benefits.

The reforms proposed by this Review, with a focus on National Environmental Standards and national and regional planning, will provide a foundation for more effective prioritisation and coordination of investments by governments.

There is an opportunity to provide the policy settings to better leverage private interest in investing in the environment as well as drive down the cost of restoration. A global shift towards companies focusing on their corporate social responsibilities, has resulted in growing interest from the private sector to invest in a way that improves environmental outcomes. The pool of available capital has grown over the past decade. In 2018 the responsible investment market in Australia reached $980 billion with sustainability-themed investments accounting for $70 billion.[vi] It is also likely the resources available to invest in environmental outcomes will continue to grow.

The biodiversity offset markets proposed above are one destination for this capital. Philanthropic and other investors could also be voluntary participants in the market purchasing restoration.

Contributions to the Review have suggested that a national biodiversity trust be established that links government and philanthropic investments, as well as enabling developers to meet their offset obligations. These proposals are similar to those implemented in some states and territories, such as the NSW Biodiversity Conservation Trust and Queensland Land Restoration Fund. These models are government-run, sometimes independent legal entities and investment vehicles designed to oversee the collection and allocation of money to improve the environment. They have legal, governance and financial structures; capitalisation and resourcing strategies. Environmental trust funds come from both public funding, philanthropic donations, and from developers who pay the trust to discharge their development approval offset obligations.

Contributions to the review have highlighted the key role the philanthropic sector plays in 'testing new solutions to tough problems'[vii]. A proposal posed to the Review is for co-investment to advance innovation and bring down the costs of environmental restoration[viii]. This is akin to the role that the Australian Renewable Energy Agency (ARENA) plays in supporting activities in the renewable energy sector that are not yet commercially viable. ARENA co-invests with the private sector in projects to research, develop and demonstrate new approaches, providing a pathway to prove the viability of technologies to support commercialisation and uptake. The uptake of proven restoration 'technologies' or new approaches could be accelerated by government— for example by recognising their suitability in the biodiversity market, or by underwriting access to the finance need for upfront investment.

The merits of the application of these types of models for biodiversity will be further explored prior to the finalisation of the Review.

9 Compliance, enforcement and assurance

Key points

Compliance, enforcement and assurance under the EPBC Act is ineffective. There has been limited activity to enforce the EPBC Act over the period of 20 years it has been in effect, and the transparency of what has been done is limited.

The culture of compliance, enforcement and assurance is not forceful. Weak monitoring, compliance and enforcement erodes public trust in the ability of the law to deliver environmental outcomes.

There is broad consensus from the regulated community and the experts that advise them, that it is not easy to comply with the EPBC Act. Likewise for the Department, the complexity of the EPBC Act impedes compliance and enforcement.

The compliance and enforcement powers in the EPBC Act are outdated. Powers are restrictive and can only be applied in a piecemeal way across different parts of the EPBC Act due to the way it is constructed.

Monitoring, compliance and enforcement activities are significantly under-resourced.

The key reform directions proposed by the Review are:

- Establish a modern, independent regulator responsible for compliance, enforcement and assurance to be a strong cop on the beat.
- Increase the transparency of compliance and enforcement activities.
- Effectively draw on Standards, simplified law, and better systems to increase compliance and easier enforcement.
- Shift in focus toward assurance of devolved decision making and monitoring, compliance and enforcement of national strategic plans, regional plans, offsets and regeneration.
- Provide the regulator with a full suite of modern regulatory compliance and enforcement tools and adequate funding.

Compliance, enforcement and assurance is core to delivering the intent of the EPBC Act. There is little point in putting rules in place if they will not be monitored and if failure to meet them does not result in appropriate compliance and enforcement action.

Strong compliance, enforcement and assurance is essential to protecting the environment and build trust that breaches of the EPBC Act will be fairly, proactively and transparently addressed. It is also necessary to protect the integrity of most of the regulated community, who spend time and money to comply with the law, with those that do not play by the rules facing theconsequences.

9.1 Compliance, enforcement and assurance approach is not forceful

9.1.1 The Department has a collaborative approach to compliance and enforcement, which is too weak

The Department has improved its regulatory compliance and enforcement functions in recent years but it does not have a strong compliance culture. Progress has included the establishment of a dedicated Office of Compliance, the development of a regulatory framework and new compliance policies that identify priority areas for focus.

While these were small steps forward, the foundations of the Department's regulatory posture focus heavily on supporting a voluntary approach to compliance. The Department has positioned itself as a collaborative regulator, working to reach agreement with the regulated community.

The Department's compliance policy describes its approach as 'fair, reasonable, respectful, reliable'. This stance comes from good intentions of recognising the majority who work to be compliant. It is however a passive approach that has resulted in a culture that has limited regard for the benefits of using the full force of the law where it is warranted.

There is limited evidence of proactive compliance effort, and the compliance posture of the Department is reactionary. Enforcement efforts often rely on a tip off from the public, rather than active surveillance driving enforcement activities. There is little active monitoring to provide assurance that conditions of approval are being met. As highlighted in Chapter 8, assurance to confirm that environmental offsets have been secured and are delivering intended outcomes is limited. There are insufficient resources dedicated to proactive compliance.

9.1.2 Compliance and enforcement options are limited, and under utilised

Enforcement provisions are rarely applied, particularly to Part 3 activities (requirements for environmental approvals), and the penalties do not appear commensurate with the harm of damaging a public good of national interest.

There have only been 29 breaches of the EPBC Act related to impacting threatened species and communities that have been subject to compliance outcomes[i]. Serious enforcement actions are rarely used.

The largest penalty issued under the EPBC Act was via an enforceable undertaking with a company to regenerate 31.5 ha of Central Hunter Valley Eucalypt Forest Woodland for a cost of $2.1 million. While a suspended jail sentence has been handed down for failure to refer an activity for consideration under the EPBC Act, from the evidence available to the Review to date, a jail sentence has not been applied for a breach of a condition of approval.

Since 2010, a total of 22 infringements have been issued by the regulator for breaches of conditions of approval granted under Part 9, with total fines less than $230,000. Local governments issue more than this amount in paid parking fines annually. By way of contrast, local governments often issue more than this amount in paid parking fines annually, for example, Dubbo and Orange Councils in NSW respectively issued more than $220,000 and $1.15 million in parking fines in the 2018/19 financial year [ii].

While provisions are not fully utilised, the regulator is also impeded by some limitations in the powers at their disposal. The EPBC Act provides an incomplete and inconsistent set of regulatory tools that are spread across different parts of the Act. Some enforcement mechanisms, for example. apply only to specific contraventions of the EPBC Act. The EPBC Act lacks contemporary powers needed to address breaches of the law. This includes powers for information sharing and tracking.

This can also lead to inefficient and mismatched pathways being taken. For example, the ability to issue an infringement notice under the EPBC Act is limited to instances where a breach of approval conditions has occurred. If a person cleared a protected habitat and wasn't an approval holder the regulator is limited to pursuing court or other actions even where a fine might be the most direct and appropriate way to respond.

9.1.3 There is inadequate transparency of monitoring, compliance and enforcement functions

The transparency of monitoring, compliance and enforcement under the EPBC Act, including proactive communication with the regulated community, is limited.

Compliance and enforcement reporting is limited to departmental annual reports. Some compliance and enforcement activities online, but the lack of a mandatory requirement to do so under the EPBC Act results in incomplete reporting and the use of different approaches over time.

Submissions received by the Review indicate that the lack of transparency of current compliance arrangements is contributing to low public trust that appropriate action is taken. In the absence of that line-of-sight, submitters to the Review highlighted their view that compliance actions may be subject to political interference.

Most modern regulators have clear logs that include investigation of potential breaches and comprehensively list even minor notices that have been issued. The lack of thorough reporting for the EPBC Act makes it hard to find information, failing to provide any disincentive to others not to breach the EPBC Act or clear assurance to the community that matters are followed-up.

9.2 Complexity impedes compliance and enforcement

As discussed in Chapter 3, the EPBC Act is long and complex. The complexity of the legislation, impenetrable terminology and the infrequency with which many interact with the law, makes voluntary compliance and the pursuit of enforcement action difficult.

The EPBC Act primarily relies on a self-assessment by proponents to determine whether they are likely to have a significant impact on a nationally protected matter. The Department provides some guidance material to assist with that process but submitters to the review have highlighted that interpreting the EPBC Act remains a challenge due to its size and complexity.

Understanding is further strained where related state-based rules change, generating confusion about how local rules relate to national-level rules. For example, changes to Queensland and New South Wales land-clearing rules in recent years resulted in confusion about whether activities that could be legally conducted under new state arrangements also needed to be considered under the EPBC Act, even though the EPBC Act requirements had not changed. For

the person on the ground, it didn't matter whose rules had changed, this just led to a new layer of confusion.

For many Australians, they will never need to interact with the EPBC Act. For some, interaction may be limited to a single circumstance. This contrasts with other broad and complex laws, where frequent interactions mean that the regulated community builds knowledge of their obligations over time. For example, most of the adult population engages with the Income Tax Assessment Act 1997 on an annual basis, and both employees and employers frequently engage with their obligations under employment laws.

The infrequency of interactions with the EPBC Act is further complicated as the circumstances in which the rules apply change each time the lists of the threatened species and ecological communities is added to or amended. While companies of reasonable scale have the capacity to deal with these adjustments, compliance in this context is particularly difficult for individuals and small landholders. This was highlighted in the Craik review as a challenge for the agricultural sector[iii].

9.3 Monitoring, compliance and enforcement activities are significantly under-resourced

The available resources for monitoring, compliance and enforcement constrain the ability of the Department to deliver credible functions.

The monitoring, compliance and enforcement functions of the EPBC Act are not supported by cost recovery arrangements. Compliance and enforcement staff also undertake compliance and enforcement of other Commonwealth environment laws, constraining the pool of resources dedicated to delivering EPBC Act compliance and enforcement. The resources available for monitoring, compliance and enforcement are insufficient and the monitoring, compliance and enforcement caseload continues to increase, as more projects are approved.

A move toward risk-based regulation is far from complete and the full investment needed to deliver efficiency by the use of modern risk-based systems and analytics has not yet been made.

9.4 Key reform directions

An effective EPBC Act monitoring, compliance, enforcement and assurance function will require legislative amendments to improve the regulatory toolkit and structural change to increase independence and build trust. These amendments to the EPBC Act will be best supported by commensurate resourcing and evolution of a stronger culture.

Key reforms proposed by the Review, including simplifying the EPBC Act and setting clear standards, as outlined in Chapters 1 and 3, will assist with greater clarity of obligations to support voluntary compliance and the ability to better enforce provisions. These reforms should be supported by specific guidance for sectors in line with recommendations by the Craik Review. Combined, these efforts will improve the ability of the Department to convey regulatory obligations, and for the regulated community to understand them.

9.4.1 Independent monitoring, compliance and enforcement, with improved transparency

An independent compliance and enforcement regulator that is not subject to actual or implied direction from the Minister should be established. This is important to address significant community concern about perceived conflict of interest, which is undermining their trust in the EPBC Act.

An independent, strong 'cop' on the beat will provide confidence that once conditions are set, they will be enforced to deliver the intended outcomes.

The compliance and enforcement regulator should have improved transparency, publishing all actions taken in a timely manner. It should publish on its website the directions, prohibition notices and improvement notices it makes and provision of follow up on when they have been met. The regulator should also maintain the practice of publishing a clear set of compliance priorities and should report against an annual compliance plan.

The compliance regulator must also set out a clear and strong regulatory stance. While it remains important to be proportional, and to work with people where inadvertent non-compliance has occurred, the regulator needs to establish a culture that does not shy from firm action where needed. This is essential to providing community confidence and giving business a clear and level playing field.

9.4.2 Consolidate, strengthen and modernise monitoring, compliance and enforcement provisions within the EPBC Act

The monitoring, compliance and enforcement powers in the EPBC Act should be overhauled. The Regulatory Powers (Standard Provisions) Act 2014 provides a standardised approach to setting out such powers, and these should be bolstered with specific arrangements to ensure that monitoring, compliance and enforcement powers in the EPBC Act are fit for purpose. The regulator should have a full 'tool-kit' available to it, so that fair, consistent and proportionate action can be taken across different scenarios.

Changes to the monitoring compliance and enforcement provisions of the EPBC Act should include, but not be limited to:

- Standardised powers to delegate authorised officers to undertake EPBC compliance, including to states and territories.
- Incorporation of modern information sharing provisions – supporting collaboration with other regulators.
- Improvements to coercive powers under the EPBC Act to facilitate greater intelligence capability, including using surveillance warrants.

Penalties must be sufficient to be an active deterrent, rather than a cost of doing business. A review of the adequacy of penalties and provisions should consider, but not be limited to:

- Ensuring penalties across the EPBC Act align with the potential harm or benefit and provide a reasonable deterrance.

- Due to the potential significant financial benefit from some areas of non-compliance, monetary penalties are unlikely to provide adequate disincentive, suggesting remediation orders that deliver restoration are fundamental.
- In serious cases of egregious and irreparable damage, criminal prosecutions may be appropriate.

9.4.3 Shift focus of monitoring, compliance, enforcement towards assurance of standards

The Review proposes reforms that will support greater devolution in decision-making (see Chapter 4). Clear, legally enforceable National Environmental Standards combined with strong assurance are essential to community confidence in these arrangements.

The proposed reform promotes the greater use of regional-level plans, with other regulators and proponents working under agreed rules in a regional context. Together with the National Environmental Standards, a simplified Act, better guidance material, and the potential of intelligent systems, will increase confidence in the self-assessment of actions and provide assurance for those actions that demonstrate they can meet the rules.

This shift will not remove the need for monitoring, compliance and enforcement on individual projects, but it will require a refocus and shift over time to provide the assurance needed that standards, plans and other strategic tools are delivering the intended environmental outcomes.

Transparent, independent oversight of these devolved and strategic arrangements will be critical to building community trust that the EPBC Act is effectively protecting the environment and our iconic places in the national interest.

The Commonwealth independent regulator must have power and authority to deal with all breaches of the EPBC Act, even by accredited decision makers, such as a state or territory. The devolved decision maker should remain primarily responsible for monitoring, compliance and enforcement of conditions set to meet National Environmental Standards. Reporting on accredited arrangements should include reporting on all potential breaches, and the response taken. The Commonwealth should retain the ability to intervene in project level compliance and enforcement, where egregious breaches are not being effectively dealt with by the state regulator.

While transition will occur, it is important that the legacy of projects already approved under the EPBC Act will have appropriate monitoring and oversight. Approved activities often take years to complete and will continue to require careful management and oversight to ensure environmental protection is achieved over the long-term.

9.4.4 Sustainable resourcing

Monitoring, compliance, enforcement and assurance functions must be adequately resourced, and resources sustained over the long term.

In the short-term there is a need to invest in appropriate systems and tools to enable the independent compliance regulator to effectively deliver monitoring and risk-based compliance, to help people comply with the EPBC Act and to assure the community that risks to the

environment from non-compliance are identified and managed. Resourcing must support adequate monitoring and more than basic follow-up action to respond to issues as they arise. Proactive monitoring, surveillance and investigation are needed to restore public trust in the system and to review and ensure actions that have occurred to date are in fact meeting requirements and delivering for the environment.

10 Proposed reform pathway

Key points

The EPBC Act is ineffective, and reform is long overdue. Past attempts to do so have been largely unsuccessful. Commitment to a clear pathway for reform is required.

Immediate steps to start reform should be taken, focussing on:

- Reducing points of clear duplication, inconsistencies, gaps and conflicts in the EPBC Act.
- Improving the settings for devolved decision making, including issuing interim National Environmental Standards to provide confidence that outcomes will be delivered.
- Building the foundations to provide a solid base for longer-term reform.

Similarly, in the short term, the conversation to deliver complex reforms and the mechanisms to underpin continuous improvement should commence so that policy development and implementation plans can be finalised, and resourcing commitments made.

Once these steps are taken, reform should focus on comprehensively fixing the problems with the EPBC Act, with this phase of reform focused on:

- Developing a full suite of National Environmental Standards, refined from the lessons learned from implementing the interim standards, and armed with improved data and information
- Redrafting the Act to simplify, clarify and strengthen it.
- Embedding changes to governance arrangements.

The environment, heritage and Indigenous policy areas covered by the EPBC Act are complex. The benefit of reforms commenced now will reap benefits over the next decade and beyond.

The reform agenda proposed is not one to 'set and forget'. Settings should be monitored and evaluated, and the path forward adjusted as lessons are learnt and new information and ways of doing things emerge.

The EPBC Act is long overdue for improvement. Despite multiple past efforts, the Act has remained largely unreformed over its two decades of operation. It is not fit-for-purpose as it is not able to deliver long-term sustainable growth.

Effective administration of a regulatory system is not cost free. The reforms proposed seek to improve the overall efficiency of the system. It is important to consider how to best fund the implementation of a reformed system, including the fair costs that should be recovered from proponents. In principle, government should pay for elements that are substantially public benefits (e.g. the development of standards), while business should pay for those elements of the regulatory system required because of their impact on the environment to derive private benefits (e.g. approvals and monitoring, compliance and enforcement). There are elements of the regulatory system that have mixed benefits where costs should be shared (e.g. data and information).

While the reform pathway is ultimately a decision for Government, the Review considers a phased approach is necessary to deliver immediate improvements to the effectiveness and efficiency of the EPBC Act, while taking the time to do the detailed work required to deliver more complex reforms. Three key phases should be considered.

- **Phase 1** should deliver urgent, long-overdue changes to the EPBC Act and take the steps needed to build the core foundations for more complex reform. There is no reason to wait to commence this phase.
- **Phase 2** should commence early, to start the conversation on complex policy reforms and to deliver those elements of reform required to support continuous improvement in the way the EPBC Act operates.
- **Phase 3** should build on Phases 1 and 2, with a focus on delivering the more complex legislative reform that will take time to develop and implement.

10.1 Phase 1 — fix long known issues, and set the foundations

The initial phase of reform should fix long-known standing issues with the EPBC Act within its current construct and set the base for key reform foundations that can be built on and improved over time. The five areas of focus for phase 1 reforms are:

- Reduce points of clear duplication, inconsistencies, gaps, and conflicts in the EPBC Act.
- Issue interim National Environmental Standards to set clear national environmental outcomes against which decisions are made.
- Improve the durability of devolved decision-making, to deliver efficiencies in development assessments and approvals, where other regulators can demonstrate they can meet interim National Environmental Standards.
- Early steps and key foundations to improve trust and transparency in the EPBC Act, including publishing all decision materials related to approval decisions.
- To legislate a complete set of compliance and enforcement tools across the EPBC Act.

10.2 Phase 2 — initiate complex reforms and establish the mechanisms for continuous improvement.

The proposed reform agenda involves key elements that need to be initiated and established, and require ongoing development, review and adjustment. These reform proposals require sustained investment, as they underpin the effective and efficient operation of the EPBC Act.

This phase of reform should commence as soon possible, so that the policy development, implementation plans can be finalised, and resourcing commitments made.

The six areas of ongoing focus for phase 2 are:

- Establishing the framework for monitoring, reporting on, and evaluating the performance of the EPBC Act, with a key focus on the arrangements for National Environmental Standards and national and regional plans. Commitment to implementing the framework is essential, to enable the settings to be improved over time.
- Starting the conversation with the States and Territories about state-led regional planning priorities, and priorities for strategic national plans.
- Starting the conversation on the revamp of the national State of the Environment report to support a step forward in the delivery of the upcoming 2021 report, and establish the

formal objectives, timing and approach to the Government response for the subsequent reports.

- Committing to sustained engagement with Indigenous Australians, to co-design reforms that are important to them — the culturally respectful use of their knowledge, effective national protections for their culture and heritage, and working with them to meet their aspirations to manage their land in partnership with the Commonwealth.
- Appointing a national custodian, responsible for delivering the information supply chain and overhauling the systems that the Department needs to capture value from the supply chain.
- Establishing the mechanisms to better leverage investment, to deliver the scale of restoration required for future development in Australia to be sustainable in the long term.

10.3 Phase 3 —New law and implementation of the reformed system

Once the policy direction is settled, and key initiatives are underway, the final phase of reform should involve complete legislative overhaul to a focus on establishing remaining elements of reform and implementing the reformed system.

In this phase a full suite of National Environmental Standards should be made that cover all areas for standards that have been identified by this Review. This should draw on the experience of implementing the Interim National Environmental Standards, and with improved data and information. Other regulators seeking to be devolved decision makers, including states and territories, must demonstrate how their regulatory approach meets the National Environmental Standards. All arrangements in place for devolved decision making should be formally reviewed at this time. Where necessary, the settings in the EPBC Act for making standards, accrediting other regulators and quality assurance of the devolved model and compliance should be amended based on lessons learned.

Phase 3 should deliver a comprehensive redrafting of the EPBC Act to simplify, clarify and strengthen the law. The re-drafted law should incorporate key reform proposals including:

- Settings to hardwire the concept of ecologically sustainable development (ESD) into the Act and require that it forms the basis of all decisions, as it is the overall outcome that the EPBC Act seeks to achieve,
- Settings for making and reviewing national and regional plans,
- Measures to improve trust in decision making, including:
  - Requirements for greater transparency
  - An independent compliance, enforcement and assurance regulator, not subject to actual or implied direction from the Minister that has a clear mandate to enforce compliance with law.
  - Changes to the structures of statutory advisory committees, to provide confidence that decision makers receive sound information and advice for making decisions
  - Revised legal review mechanisms to provide regulatory certainty and build trust in decision making.

- Hierarchy of protecting (avoiding impact), conserving (minimising impact) and restoring the environment, including incorporating restoration focused environmental offsets into the law.
- The mechanisms to support the use of markets and trusts to deliver environmental restoration.

In embarking on re-drafting the law, the merits of separating the EPBC Act along key functional lines should be considered.

The proposed reforms seek to build community trust that national environmental laws deliver effective protections and regulate businesses efficiently. It is impossible for the Review to satisfy the aspirations of every person with an interest in the environment or in business development. Rather, the Review has attempted to provide a way forward, to ensure effective environment protection and biodiversity conservation and efficient regulation of business. The EPBC Act in its current form achieves neither.

While the proposed reforms are substantial, the changes are necessary to set Australia on a path of ecologically sustainable development. This path will deliver long-term economic growth, environmental improvement and the effective protection of Australia's iconic places and heritage for the benefit of current and future generations.