

Performance Audit Report No. 43 (2013-14)

Managing Compliance with EPBC Act Conditions of Approval

Introduction

- 3.1 Chapter 3 discusses the Joint Committee of Public Accounts and Audit (JCPAA) review of Australian National Audit Office (ANAO) Report No. 43, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*, Department of the Environment (2013-14). The chapter comprises:
- an overview of the report, including the audit objective, criteria and scope; audit conclusion; and audit recommendations and agency response
 - Committee review
 - Committee comment

Report overview

- 3.2 The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), administered by the Department of the Environment (Environment), is the Australian Government's primary legislation to protect Australia's environment and conserve its biodiversity.
- 3.3 Part 3 of the EPBC Act prohibits the undertaking of an action (project, development, activity) without approval from the Minister for the Environment that is likely to have a significant impact on matters of

national environmental significance (MNES). Proponents (such as landholders, developers and miners) are required to refer their proposed actions to the Minister, via the department, to determine whether approval of the action is required under the EPBC Act.

- 3.4 In circumstances where the Minister decides an action requires approval (that is, the action is a 'controlled action'), an environmental assessment of the action must be undertaken. The Minister will then decide, under Part 9 of the EPBC Act, whether to approve the controlled action and the types of conditions, if any, to impose. Proponents are required to comply with the conditions attached to approved controlled actions. Compliance with approval conditions 'underpins the effective operation of Part 9 of the EPBC Act and the public's confidence that approved actions will not detrimentally affect MNES'.¹
- 3.5 Since the enactment of the EPBC Act in 2000, the Australian Government has approved over 600 controlled actions under Part 9, many with conditions attached that are designed to ensure MNES are not adversely impacted by the controlled actions.² As at September 2013, there were almost 8,000 conditions attached to approved controlled actions that were established to protect around 1,300 MNES.³

Audit objective, criteria and scope

- 3.6 The objective of the audit was to assess the effectiveness of Environment's regulation of proponents' compliance with Part 9 of the EPBC Act. To form a conclusion against the audit objective, the ANAO adopted the following high-level criteria:
- a structured risk management framework to assess and manage compliance risks has been developed;
 - a risk-based compliance program to effectively communicate regulatory requirements and to monitor compliance with regulatory objectives has been implemented;
 - arrangements to manage non-compliance are effective; and
 - appropriate governance arrangements are in place to effectively support EPBC Act Part 9 regulation.⁴

1 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*, Department of the Environment, Commonwealth of Australia, p. 12.

2 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 15.

3 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 15.

4 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, pp. 14-15.

Audit conclusion

3.7 The ANAO made the following audit conclusion:

... Environment is responsible for regulating controlled actions approved under Part 9 of the EPBC Act. Environment's regulatory activities involve the monitoring of proponents' compliance with conditions attached to approved controlled actions ... However, nearly 14 years after the enactment of the EPBC Act, Environment is yet to establish mature administrative arrangements to effectively discharge its regulatory responsibilities in relation to approved controlled actions. As a consequence, the assurance that the department has regarding proponents' compliance with action approval conditions, which are designed to address the risks posed to MNES, is limited ...

The extent of the shortcomings in, and challenges facing, Environment's regulation of approved controlled actions – particularly in relation to compliance monitoring – does not instil confidence that the environmental protection measures considered necessary as part of the approval of controlled actions have received sufficient oversight over an extended period of time.⁵

Audit recommendations and agency response

3.8 Table 3.1 sets out the recommendations for ANAO Report No. 43 and Environment's response.⁶

Table 3.1 ANAO recommendations, Report No. 43 (2013-14)

1	<p>To better assess and manage the risks to matters of national environmental significance posed by approved controlled actions, the ANAO recommends that the Department of the Environment develop and implement an annual program of compliance activities having regard to:</p> <ul style="list-style-type: none"> • a structured approach to collect, retain and regularly analyse, compliance intelligence; and • the identification and regular review of relevant risk factors for approved controlled actions. <p>Environment's response: <i>Agreed.</i></p>
2	<p>To strengthen compliance monitoring of approved controlled actions, the ANAO recommends that the Department of the Environment:</p> <ul style="list-style-type: none"> • transfer approved controlled actions to the compliance monitoring area at the time of their approval, unless a specific need has been identified for the assessment branches' retention of the actions; and

5 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, pp. 15-17.

6 For details of Environment's response to the ANAO's recommendations, see ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, pp. 54-55, 81, 97-98, 119-120, 122-123.

	<ul style="list-style-type: none">• establish, and monitor adherence to, appropriate protocols and procedures to help ensure that approved controlled actions retained by the assessment branches are transferred to the compliance monitoring area once the specific need has been addressed. <p>Environment's response: <i>Agreed.</i></p>
3	<p>To improve the management of risks to compliance and matters of national environmental significance, the ANAO recommends that the Department of the Environment:</p> <ul style="list-style-type: none">• review standard operating procedures and reinforce the need for staff to document the assessment and/or approval of material submitted by proponents of approved controlled actions;• better target monitoring activities towards those approved controlled actions that pose the greatest risks to matters of national environmental significance; and• develop and resource a coordinated program of compliance monitoring activities, monitoring inspections and compliance audits. <p>Environment's response: <i>Agreed.</i></p>
4	<p>To improve processes for responding to instances of non-compliance, the ANAO recommends that the Department of the Environment:</p> <ul style="list-style-type: none">• reinforce to staff the need for all instances of non-compliance by proponents of approved controlled actions to be recorded centrally; and• improve the documentation of reasons for enforcement decisions, including the key factors considered when an appropriate response was determined. <p>Environment's response: <i>Agreed.</i></p>
5	<p>To improve the governance and oversight of the compliance monitoring function, the ANAO recommends that the Department of the Environment:</p> <ul style="list-style-type: none">• implement improvements to IT systems and records management practices, to address identified gaps and enhance functionality;• improve the frequency and coverage of management reports in relation to compliance monitoring activities, outputs and outcomes; and• develop and report against appropriate performance measures that relate to the activities undertaken to monitor compliance with the EPBC Act. <p>Environment's response: <i>Agreed.</i></p>

Committee review

- 3.9 Representatives from Environment gave evidence at the Committee's public hearing on 23 October 2014.
- 3.10 As discussed below, the Committee focused on four key issues regarding the ANAO report findings and evidence provided at the public hearing:
- Environment's management of compliance with EPBC Act conditions of approval
 - departmental initiatives to improve management of compliance

- one-stop-shop arrangements
- governance arrangements

Managing compliance

3.11 The following key aspects were of interest concerning Environment's management of compliance with EPBC Act conditions of approval: overall management of compliance, responding to non-compliance and risk management.⁷

Overall management of compliance

3.12 The Auditor-General summed up the ANAO's concerns with Environment's overall management of compliance with EPBC Act conditions of approval, as follows:

... nearly 14 years since the enactment of the act, the environment department was yet to establish mature administrative arrangements to effectively discharge its regulatory responsibilities in relation to approved controlled actions. As a consequence, the assurance the department has regarding proponents' compliance with action approval conditions, which are designed to address risks posed to matters of national environmental significance, is limited ...

The increasing workload on the department's compliance monitoring staff over time had resulted in it adopting ... a generally passive approach to monitoring proponents' compliance with most approval conditions ... The extent of the shortcomings in and challenges facing the environment department's regulation of approved controlled actions, particularly in relation to compliance monitoring, did not instil confidence that the environment protection measures considered necessary as part of the approval of controlled actions, have received sufficient oversight over an extended period of time.⁸

3.13 The ANAO report found that Environment's regulation of proponents' compliance with conditions requiring the submission, approval and/or publication of plans and compliance returns had 'generally been

⁷ As discussed in the next section, 'Departmental initiatives to improve managing compliance', it is noted that Environment has implemented, and is continuing to implement, strategies designed to improve its compliance management framework and address the ANAO's performance audit recommendations concerning this matter – see Environment, *Submission 1*, for a list of these activities.

⁸ Mr Ian McPhee, Auditor-General, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 1.

inadequate', with the ANAO's examination of 64 approved controlled actions (10 per cent, as at September 2013) indicating:

- numerous overdue plans and returns – 22 plans relating to 10 controlled actions (15.6 per cent) and 18 compliance returns relating to nine controlled actions (14.1 per cent) were overdue for submission by proponents (many of which had been overdue for more than 18 months, including eight plans that the department was not aware were overdue);
- retention of evidence demonstrating the appropriate assessment of submitted plans and returns was generally poor – the department retained only partial or limited evidence of its assessment of 41 of the 67 approved plans (61.2 per cent). In addition, the department retained only limited evidence of its assessment of 36 of the 84 plans, reports and compliance returns (42.9 per cent) not requiring approval; and
- a significant proportion of unpublished plans and returns – 13 of the 51 plans, reports and compliance returns (25.5 per cent) requiring publication could not be located on proponents' websites as at December 2013.⁹

3.14 The ANAO report noted that, for most approved controlled actions, Environment had 'not actively monitored proponents' compliance with their approval conditions' and, as a consequence, Environment has 'limited awareness of the progress of many approved controlled actions'.¹⁰ The department had retained 'limited evidence' of active monitoring for 44 controlled actions (68.8 per cent of the actions examined), with conditions designed to protect 93 MNES under the EPBC Act.¹¹ The ANAO report further observed that Environment's guidance material supporting its compliance framework was 'not current' and did not address 'numerous better practice regulatory considerations'.¹²

Responding to non-compliance

3.15 The Auditor-General observed that Environment had adopted a 'generally passive approach' to managing non-compliance with EPBC Act conditions of approval – in many cases, 'instances of proponent non-compliance were

9 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, pp. 20-21.

10 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 80.

11 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 21.

12 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 22.

... not identified by staff or were identified but not referred for assessment and possible enforcement action'.¹³

3.16 More specifically, the ANAO report found that:

Although many unreported instances of non-compliance were of a technical nature ... they can nonetheless have an impact on the effectiveness of environmental safeguards. Of the 151 instances of non-compliance detected by the ANAO from an examination of approved controlled actions, information had not been retained to evidence that compliance monitoring staff had referred 88 instances (59.5 per cent) relating to 20 approved controlled actions (31.3 per cent of actions examined) to the section responsible for investigating non-compliance ... or that they had been centrally recorded.¹⁴

Risk management

3.17 Robust risk assessment processes, informed by timely analysis of compliance intelligence, underpin an effective regulatory regime. Risk assessments can be used to develop compliance strategies that target the greatest compliance and environmental risks. The Auditor-General observed that Environment 'was not well placed to demonstrate that it was effectively targeting its compliance monitoring activities to the areas of greatest risks'.¹⁵

3.18 More specifically, the ANAO report found that Environment was 'yet to establish an effective compliance intelligence capability to collect, store and analyse compliance intelligence'.¹⁶ The report further found that:

While the department has identified a small number of risk factors against which all approved controlled actions are to be assessed, it is yet to identify an appropriate set of relevant factors against which risks can be assessed and ranked. The risk assessments of approved controlled actions, required since late 2011 were not prepared for 40 per cent of actions examined by the ANAO and, where prepared, the assessments often contained errors and have not been updated over time.¹⁷

13 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 1.

14 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 22.

15 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 1.

16 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 16.

17 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 18.

- 3.19 A targeted approach to managing compliance can also assist in promoting cost-effectiveness and limiting the regulatory burden. As the ANAO report noted, a risk-based approach to compliance monitoring ‘helps to ensure that limited regulatory resources are targeted toward the controlled actions that pose the greatest risk and to limit the regulatory burden on compliant proponents’.¹⁸

Departmental initiatives to improve managing compliance

- 3.20 Environment has implemented, and is continuing to implement, strategies designed to improve its compliance management framework and address the ANAO’s performance audit recommendations concerning this matter. As the Auditor-General noted:

Environment has acknowledged the shortcomings in its regulation of approved controlled actions and has initiated a broad program of work to address the shortcomings over recent years, including those identified from earlier reviews and from this audit.¹⁹

- 3.21 The ANAO report further observed that:

Environment is ... implementing strategies to address shortcomings in its compliance framework, with an estimated completion date of August 2014.

As part of a coordinated and strategic approach to regulatory compliance, the department has also committed to risk-assessing its regulatory priorities so that it can better determine compliance resourcing needs across the department and to improve internal management reporting of departmental regulatory activities.²⁰

- 3.22 Mr Malcolm Thompson, Deputy Secretary, Environment, confirmed that the department had ‘accepted the recommendations of the audit’ – ‘we consider this a timely audit review. We have welcomed the findings, we are acting on them and we take it seriously’.²¹ Mr Thompson further stated that a ‘number of issues raised in the audit itself and during the audit and the subsequent recommendations were previously identified by the department and action had already commenced to address them’.²² In

18 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 49.

19 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 2.

20 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, pp. 96-97.

21 Mr Malcolm Thompson, Deputy Secretary, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 2.

particular, Environment pointed to the implementation of its business improvement program:

The department has made significant improvement in its compliance and enforcement capacity since 2012. A business improvement program has been implemented which significantly increases the department's ability to target its resources to projects that pose the highest risk to matters of national environmental significance, which of course is the focus of the Environment Protection and Biodiversity Conservation Act.²³

3.23 The department's submission to the inquiry further confirmed that the business improvement program had 'already been implemented to address the majority of the recommendations from the ANAO audit ... with the remaining recommendations due to be addressed by the end of 2014'.²⁴ Environment pointed to a number of initiatives as part of this program (some completed and others currently underway) specifically directed at improving its compliance management framework and addressing the ANAO's recommendations, including:

- an 'assurance framework', with an 'internal audit currently being conducted by Ernst & Young' to track 'ongoing efforts and implementation of the improvements'
- implementation of a 'risk-based case prioritisation model based on the Australian Crime Commission practice to focus investigations on highest risk cases'
- development of a 'risk-based prioritisation model, NESTRA' (the National Environmental Significance Threat Risk Assessment model, developed in collaboration with the Commonwealth Scientific and Industrial Research Organisation), which focuses the department's monitoring activities on approved projects posing the highest risk
- implementation of a 'compliance and enforcement management system to track and coordinate investigations and intelligence gathering'
- 'significantly increasing resources to support post-approval activities'²⁵

22 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 2. There was some discussion in the ANAO report about the extent to which Environment had improved regulatory performance in this area over the period examined by the audit – see ANAO, Report No. 43, *Managing Compliance with EPBC Act Conditions of Approval*, p. 25 and p. 123.

23 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 2.

24 Environment, *Submission 1*, p. 1.

25 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 2. See Environment, *Submission 1*, for a full list of the various elements and implementation dates of the department's business improvement program and for a full list of the department's work, as at October 2014, to address the ANAO's recommendations, including due dates and

3.24 In addition to these business improvement initiatives, Environment highlighted that the department had ‘significantly increased ... proactive engagement of approval holders to educate and encourage voluntary compliance’.²⁶ By way of example, Environment noted that, since January 2012, the department had ‘undertaken more than 191 variations to conditions to assist proponents with voluntary compliance’.²⁷ Environment also provided further details about its progress in implementing a targeted risk-based approach to managing compliance:

After the ANAO audit, we agreed to a range of recommendations, and they were to implement a risk based process. We have now undertaken a risk assessment with CSIRO and it has a range of risk factors. It considers the risk the project would pose to the environment. It also has an element of the risk that the proponent poses in not complying with their conditions. So it has a risk-and-consequence scale, which gives us a total risk. We have a team of officers now who go in and do checks of those projects, from the highest risks down ...

On top of that, we do site inspections and check annual compliance reports. We use directed audits more frequently now. That is a function where a delegate of the minister or the minister can direct a proponent to go and get a third party to come in and audit the entire suite of conditions.²⁸

One-stop-shop arrangements

3.25 As noted in the ANAO report, the Government is establishing a one-stop-shop for environmental approvals under the EPBC Act. Under proposed arrangements, the assessment and approval of most projects against Commonwealth environmental requirements, which are currently undertaken by Environment, would be undertaken by the states/territories using existing processes once accredited. The states and territories would also be responsible for monitoring and enforcing

completion dates, pp. 1-8. See also the department’s *Compliance Monitoring Plan 2014-15*, <http://www.environment.gov.au/epbc/publications/compliance-monitoring-plan-2014-15> (accessed November 2014).

26 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 2.

27 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 2. Environment further confirmed that these variations had not weakened conditions attached to EPBC Act approvals and that to do so would be in breach of the act – see Mr Shane Gaddes, Assistant Secretary, Compliance and Enforcement Branch, Environment Assessment and Compliance Division, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 4.

28 Mr Gaddes, Environment, *Committee Hansard*, Canberra, 23 October 2014, pp. 3-4. In terms of how many of the controlled actions were being actively monitored, Mr Gaddes confirmed that the department would ‘actively monitor the top 100 highest-risk projects’, p. 4.

proponents' compliance with EPBC Act conditions of approval for actions they approve.²⁹

3.26 The Committee was therefore interested in Environment's future arrangements, as part of the one-stop-shop, for managing compliance with EPBC Act conditions of approval, with a particular focus on the department's:

- ongoing implementation of the ANAO recommendations under these new arrangements, with the possibility of a follow-up ANAO audit of this area
- implementation of a new one-stop-shop assurance framework
- efforts in limiting the regulatory burden on compliant proponents and business compliance costs

Ongoing implementation of ANAO recommendations and possible follow-up ANAO audit

3.27 The implementation of the one-stop-shop arrangements under the EPBC Act will mean that, as more projects become subject to that policy, fewer projects will require compliance monitoring by Environment. The number of approved controlled actions monitored by the department will therefore peak during 2014-15 and gradually reduce over subsequent years as actions are completed.³⁰ However, as the ANAO clarified, 'the department will still have responsibility for all controlled actions that are approved under current arrangements' and, given that 'some of those activities extend over many years', a compliance program will be in place for a reasonably lengthy period of time.³¹

3.28 The Committee was therefore interested in establishing what impact the transition to the one-stop-shop arrangements might have on Environment's ongoing implementation of the recommendations from the ANAO report.

3.29 The ANAO emphasised that it had 'crafted the recommendations on the basis that they would still have relevance in the context of the different policy setting if that was to be implemented' and confirmed that there should not be 'any impact of that arrangement on the department's ability

29 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 14. The policy will be implemented through bilateral agreements between the Australian Government and each state and territory.

30 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 14.

31 Mr Mark Simpson, Acting Group Executive Director, Performance Audit Services Group, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 3.

to implement the five recommendations made in the audit report'.³² Environment confirmed that:

In practice, we will still have a legacy of compliance activity to undertake ... and we will continue to do that assiduously under a one-stop-shop environment.³³

We do not see that one-stop-shop policy as inconsistent with being able to achieve those objectives.³⁴

3.30 In terms of managing compliance under the new arrangements, the Auditor-General noted that he was 'encouraged' that the department were being 'guided by the experience of the audit to inform their own approach in dealing with the states' – 'that is positive, and I appreciate what I think is a fairly positive response by the department to the report overall'.³⁵ The Auditor-General further pointed to the potentially 'complicated arrangement' under the one-stop-shop – 'when you are looking to other parties to take on responsibilities under the legislation and to take on a more monitoring role and getting feedback from the performance ... I think it is rather challenging'.³⁶ Accordingly, the Auditor-General signalled that there would be benefit in programming a future audit to follow up on this matter:

I have thought it is an audit that in a couple of years time, if the one-stop shop arrangements come into place, we would probably program, to just see how the department has managed these arrangements, because it is a crucially important area – and the department accepts that. In this Federation, when the Commonwealth seeks to work with the states, sometimes we do wonderfully well and other times we do not do quite as well. I think we might say to the committee: we will make a note to program a future audit so we can follow this up and see how the arrangements work in the new world and how successful the department has been in addressing these issues under the new model.³⁷

3.31 Mr Thompson, Deputy Secretary, Environment, confirmed that:

We want to be ready for that. I would also add that ANAO scrutiny will not be the only scrutiny the department will be under

32 Mr Simpson, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 3.

33 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 2.

34 Mr Dean Knudson, First Assistant Secretary, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 3.

35 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 6.

36 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 23 October 2014, pp. 6-7.

37 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 7.

in relation to this. There is an enormous amount of scrutiny around ensuring that the implementation of the one-stop shop works and that we get it right, including from the business community, because we do not want to create additional risk for them if it is done badly. In that sense, the incentives are aligning around trying to make this work, and we will do our best to do that.³⁸

- 3.32 In terms of a follow-up audit, the Auditor-General further pointed to a newly revised ANAO better practice guide on administering regulation,³⁹ noting that '[w]e will be guided by that too in the context of the auditor's normative model to see just how the department has done its implementation of that. We will take that on board'.⁴⁰ It was noted that a follow-up audit might also look at how the one-stop-shop arrangements had limited the regulatory burden on compliant proponents and business compliance costs against projected savings.

New one-stop-shop assurance framework

- 3.33 Environment highlighted that, under the one-stop-shop arrangements, its compliance activity would shift to more of an assurance framework, to ensure the states and territories undertake the necessary compliance for projects they have approved. The department further confirmed that the ANAO report was informing its design of the one-stop-shop assurance framework:

... we are using the ANAO report to inform our own design of the assurance framework that we have within the one-stop shop. The one-stop shop and the arrangements that we have with the states are obviously negotiated outcomes, so we are working with the states to identify what we think are the other standards that they should be meeting by way of their processes and the outcomes that we are seeking to achieve.⁴¹

- 3.34 Environment explained that the assurance framework for the one-stop-shop had three major elements:

... one is that we are going to be focused on working with states to be able to [ensure] that they can demonstrate that the appropriate process is followed – so, making sure that the standards of the legislation are upheld through state processes. Second of all,

38 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 7.

39 ANAO, *Administering Regulation: Achieving the Right Balance*, Better Practice Guide, June 2014.

40 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 8.

41 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 2, p. 6.

ensuring that the outcomes that were expected are actually achieve[d] – so beyond process and focus on outcomes. The third is we are building in an escalated process for dispute resolution between ourselves and the state should any matter arise.⁴²

- 3.35 It was confirmed that, under the one-stop-shop arrangements, the states and territories would have responsibility for managing compliance for projects they had approved but that there would still be ‘Commonwealth responsibility for the national system overall’:

While there is accreditation of states, it has to be done within that framework and the minister is responsible for ensuring that framework is met. That will always remain the case. What is different is that the states will take on responsibility for making the approval decision ...

On the compliance space ... the fundamental responsibility is with the states, but ... a similar assurance framework exists in effect over the compliance space, where, yes, there is that possibility of the Commonwealth stepping in. It is not our intended objective that that will be a regular course ... The objective is to work with the states to make sure that they are not only undertaking the assessments and the approvals in the appropriate way but also doing the compliance and enforcement. That will be our primary focus, but the system does allow for Commonwealth interventions as required, in both those spaces.⁴³

- 3.36 Environment therefore noted that there would be a range of ‘checks and balances’ in place under the assurance framework and the one-stop shop policy, and audits would be a ‘routine’ part of that – ‘[i]f we were to receive a credible allegation that the state was not enforcing conditions then we would still have the capacity to go in and investigate that to determine whether it was a breach of the bilateral approvals agreement’.⁴⁴

Limiting regulatory burden and business compliance costs

- 3.37 There was interest in how implementation of the compliance monitoring framework under the one-stop-shop arrangements might assist in limiting
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42 Mr Knudson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 2.

43 Mr Knudson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 3, p. 6.

44 Mr Gaddes, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 3. Environment further emphasised that there were dispute resolution procedures in place under the assurance framework, as well as ‘some of the reserve rights that the Commonwealth retains in the specific area of compliance’, with the minister able to ‘call in a project individually if there was an issue during the assessments phase’ and a ‘reserve power to cancel the agreement for an individual project’, Mr Knudson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 8.

the regulatory burden on compliant proponents and business compliance costs. Environment noted that:

We have been ... thinking about how we ensure that matters of national environmental significance are protected while reducing the burden of compliance on business. We are balancing both of those things. Clearly, the act requires us to favour the former rather than the latter but, as modern administrators, we want to do both, and that is clearly part of the government's agenda.

In that context, one of the things that we have reflected on is, in the conditions that we have imposed on approvals, we have often gone for quantity – we have listed a lot of conditions at a greater level of detail than arguably is required. That is something that we have reflected on and are trying to work through currently on whether we can do that better and frame the conditions more at the outcomes level.⁴⁵

3.38 Environment further commented that it had completed 'a fair amount of quantification of the benefits to industry from moving to the one-stop shop, and our conservative estimate there is about \$426 million a year':

That is due to the delay that happens, because the states will make their decision, and we wait to see what conditions they put in place, what residual requirements are necessary to put in place, and that delay is a big driver of that \$426 million. We have not done the same analysis on the post-approval work.⁴⁶

3.39 Environment explained that it had recently completed a pilot with some companies in the approvals area but the next phase, to prepare for a possible rollout, would be to 'quantify exactly that, if we took an outcomes based approach on the approval space but also on the post-approval work ... what sort of savings would that realise, while not lowering environmental standards'.⁴⁷

3.40 The ANAO noted that Environment's implementation of a risk based approach to managing compliance could assist in promoting better targeting of resources:

In relation to the audit report, we are not saying the department needs to do more compliance work necessarily and place a greater burden on industry or proponents. Essentially what we are saying is ... they need to improve their compliance intelligence capability so they can direct their limited resources ... poorly designed

45 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 7.

46 Mr Knudson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 7.

47 Mr Knudson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 7.

regulation places an impact on proponents but also places an impact on governments because somebody has to follow up on them. What we are trying to encourage is much more targeted checks. Ideally, you focus your effort on those proponents that pose the greatest risk and you lighten the load on the others that have demonstrated over time an ability to comply. That is the key message that we are trying to give through the audit report.⁴⁸

Governance arrangements

- 3.41 The ANAO report noted that regulation of the broad range of controlled actions approved under the EPBC Act requires 'appropriate governance ... to position Environment to effectively manage its regulatory responsibilities and build stakeholder and public confidence'.⁴⁹ Key aspects of an agency's governance arrangements include its performance framework and key performance indicators (KPIs), and resource management practices, including staffing, IT systems and records management.
- 3.42 The Auditor-General observed that performance information being captured relevant to the EPBC Act's compliance monitoring function had been 'limited' and this had 'hindered the department's governance of this function and adversely impacted on its ability to publicly report relevant performance information'.⁵⁰
- 3.43 More specifically, the ANAO report found there would be benefit in Environment developing KPIs that 'directly relate to the monitoring of regulatory compliance undertaken by the department under all parts of the EPBC Act'.⁵¹ The report further noted that the 'limited information that Environment has included in its annual reports in relation to its EPBC Act Part 9 compliance activities does not provide stakeholders with sufficient information on which to determine the extent to which these activities are appropriate or sufficient to protect MNES'.⁵²
- 3.44 Environment outlined its progress to date in responding to the ANAO report recommendation concerning its governance arrangements.⁵³

48 Mr Simpson, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 8.

49 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 99.

50 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 1.

51 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 117.

52 ANAO, Audit Report No. 43 (2013-14), *Managing Compliance with EPBC Act Conditions of Approval*, p. 24.

53 See Environment, *Submission 1*, pp. 7-8.

3.45 There was interest in what KPIs the department was using to monitor outcomes in the protection of MNES. Environment explained that:

... we are on that journey ... to push the department and ourselves ... as many agencies around the world are, to try and focus more on environmental outcomes, which have traditionally been difficult, partly because of the costs associated with monitoring at broad scale, especially on a continent like Australia and partly because different people attach different values to the environment, either economic or scientific et cetera, but also because some of the impacts can be quite distant in a dynamic or a time sense from when the action was taken.⁵⁴

3.46 In particular, the department noted that, '[i]n relation to the management plans that are often approved for the projects themselves, there are individual KPIs that will seek to identify not just process outcomes but environmental outcomes'.⁵⁵ Environment pointed to a range of other initiatives relevant to this area, including the scientifically based threatened-species process, 'which identifies on an ongoing basis when species are becoming at risk, endangered or critically endangered'; state-of-the-environment reporting, 'which happens every five years and is expert based and an independent assessment of the state of Australia's environment'; and the latest data from natural resource management bodies across the country, undertaking 'detailed planning and monitoring of what is happening across the nation'.⁵⁶ Environment further emphasised that 'one of the things that is fundamentally [embedded] into the one-stop-shop agreements is the public provision of information on individual assessments':

What happens right now is that parts of that information are not, as a default, necessarily made public. We are trying to reverse that so that it is in the public domain. We think that is really an important element in terms of providing community confidence and transparency around approvals so that you can have academics, community groups, et cetera go in and see what the raw data was on an individual project, and so that provides another level of assurance.⁵⁷

3.47 There was also interest in the staff resources being allocated for compliance activities under the pre and post one-stop-shop arrangements. Environment provided further details on its previous and current staff

54 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 5.

55 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 4.

56 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 4, p. 5.

57 Mr Knudson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 5.

resource allocations for compliance monitoring.⁵⁸ In terms of the post one-stop-shop arrangements, the department confirmed that ‘those specific allocation decisions have not been made yet. But it is very much under consideration’.⁵⁹ However, the department noted that it was ‘reallocating responsibilities’:

Over the course of three years we are reducing numbers by about 25 per cent, and those reductions in staff are being experienced across all divisions. At the same time, that sort of reduction requires, as we have been doing in the context of some of the responses to the ANAO report, a redesign of your business. How can you do your business with fewer people and do it better? The risk based approach we are taking to compliance now is a very useful way to target those areas of compliance, those companies and those projects that we are most concerned about. That is an example ... it does not necessarily mean lots more resourcing; it just means better using the resources that you have got.⁶⁰

- 3.48 As Environment further explained, ‘when approved projects start going through the one-stop shop process and they are then monitored by the states, our workload in that area will reduce over time.’⁶¹ The department therefore confirmed that it would consolidate some of the compliance areas for its regulatory activities – ‘[t]hey currently sit in two divisions and we will consolidate them into one division’.⁶²

Committee comment

Managing compliance and departmental improvement initiatives

- 3.49 Proponents’ ongoing compliance with approved conditions underpins effective operation of the EPBC Act. The Committee therefore notes the seriousness of the Auditor-General’s findings concerning Environment’s management of compliance with EPBC Act conditions of approval.⁶³
- 3.50 The Committee is encouraged that Environment has taken action in this area, to improve its management of compliance and address the ANAO’s recommendations. The Committee acknowledges the broad program of work undertaken to date by the department as part of its business

58 Mr Gaddes, Environment, *Committee Hansard*, Canberra, 23 October 2014, pp. 8-9.

59 Mr Knudson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 8.

60 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 9.

61 Mr Gaddes, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 9.

62 Mr Thompson, Environment, *Committee Hansard*, Canberra, 23 October 2014, p. 8.

63 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 23 October 2014, p. 1.

improvement program – in particular, the implementation of a risk-based approach to managing compliance and the development of an assurance framework to coordinate and track ongoing implementation of its improvement initiatives. The Committee is also pleased to note the department's development of a one-stop-shop assurance framework to assist with managing compliance under the new arrangements and that the design of this framework is being informed by the ANAO report findings and recommendations.

- 3.51 However, the Committee emphasises that it will require a sustained effort from Environment to ensure ongoing implementation of improvements in this area in the transition to, and establishment of, the new one-stop-shop arrangements. The Committee therefore points to the need for Environment to continue to demonstrate that it is improving its overall management of compliance with EPBC Act conditions of approval. In particular, Environment needs to continue to develop and resource a coordinated program of compliance monitoring activities. It also needs to continue to demonstrate that it is more effectively targeting its compliance monitoring activities to areas of greatest risk to MNES.

Recommendation 4

- 3.52 **The Committee recommends that the Department of the Environment report back to the Joint Committee of Public Accounts and Audit, within six months of the tabling of this report, on its continued progress:**
- **implementing the Australian National Audit Office (ANAO) recommendations in Report No. 43 (2013-14)**
 - **implementing improvement initiatives for managing compliance under its business improvement program**
 - **implementing the new one-stop-shop assurance framework, including:**
 - ⇒ **details of how the development of this framework has been informed by the findings and recommendations of ANAO Report No. 43 (2013-14)**
 - ⇒ **the sample size and ratio selected for compliance review**
 - ⇒ **staff breakdown, including how many staff are allocated to legacy compliance activities and how many allocated to one stop assurance**
 - ⇒ **details of any staff, including their employment level, who have been deployed to state offices to oversee the**

compliance activities by state governments

- **implementing up-to-date guidance material that reflects better practice regulatory considerations**

One-stop-shop arrangements

- 3.53 Under the new one-stop-shop arrangements with the states and territories for environmental approvals under the EPBC Act, the number of approved controlled actions monitored by Environment will peak during 2014-15 and gradually reduce over subsequent years as actions are completed. The Committee understands that the department will retain responsibility for all controlled actions approved under current arrangements and that, given some of those activities extend over many years, Environment will still have a legacy of compliance activity to undertake. The Committee was pleased to note the department's confirmation that the one-stop-shop arrangements will not impact on Environment's implementation of the recommendations from the ANAO report and, further, that the department is using the recommendations to inform the design of its new assurance framework for compliance activity under these arrangements, to ensure that the states and territories can demonstrate appropriate processes are being followed.
- 3.54 However, the Committee emphasises that it will require a sustained effort from Environment to ensure ongoing implementation of improvements in this area in the transition to, and establishment of, the new one-stop-shop arrangements. Accordingly, the Committee agrees with the Auditor-General that there would be merit in the ANAO conducting a future audit to follow up on this matter.⁶⁴ The Committee believes that a follow-up audit might also usefully consider how the one-stop-shop arrangements, as managed by Environment, had reduced business compliance costs against projected savings. A follow-up audit could further look at the effectiveness of the department's reporting against appropriate performance measures relating to activities undertaken to monitor compliance with EPBC Act conditions of approval.

64 The duties of the JCPAA do not authorise the Committee to direct the activities of the Auditor-General – see s8(1A) of the *Public Accounts and Audit Committee Act 1951*. In terms of the one-stop-shop arrangements, the JCPAA is not requesting that the Auditor-General undertake a performance audit of a Commonwealth partner (state/territory) under s18B(1)(a) of the *Auditor-General Act 1997*.

Recommendation 5

- 3.55 The Committee recommends that the Australian National Audit Office (ANAO) consider including, in its schedule of performance audits for the next 12-18 months, a follow-up audit of the Department of the Environment's management of compliance with *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) conditions of approval, with a particular focus on:
- the effectiveness of the department's ongoing implementation of the ANAO recommendations in Report No. 43 (2013-14)
 - the department's management of compliance under the new one-stop-shop arrangements, including the effectiveness of the department's one-stop-shop assurance framework as regards this area
 - the effectiveness of the department's reporting against appropriate performance measures relating to activities undertaken to monitor compliance with EPBC Act conditions of approval
 - whether there has been a reduction in business compliance costs against projected savings under the one-stop-shop arrangements, as managed by the department
 - the department's guidance material, IT systems and record management practices for the compliance monitoring function under the new one-stop-shop arrangements

Governance arrangements

- 3.56 The Committee notes that appropriate governance arrangements need to be in place to effectively support EPBC Act regulation, including a robust performance monitoring and reporting framework. The Committee agrees with the ANAO that performance information being captured by Environment relevant to the EPBC Act's compliance monitoring function needs to be improved. This in turn will improve the department's public reporting of relevant performance information in its annual reports. Annual reports are an important accountability mechanism for agencies to report their performance to the Parliament and the public.
- 3.57 In particular, the Committee notes that KPIs need to be developed that directly relate to the monitoring of compliance undertaken by the department under all parts of the EPBC Act, including the frequency of risk-based monitoring of approved controlled actions and whether management plans and compliance returns have been assessed/approved

within set timeframes. The Committee further emphasises the need for KPIs to focus on outcomes rather than process.

- 3.58 The Committee welcomes Environment's progress in this area to date, including the department's response to the ANAO recommendation concerning its governance arrangements.⁶⁵
- 3.59 However, the Committee emphasises that the department will need to maintain its momentum in this area, in ensuring it continues to adopt an outcomes focus and rigorous KPIs for managing compliance in the transition to the new one-stop-shop arrangements. The Committee also points to the usefulness of the ANAO better practice guides in this context, including the recently revised guides on *Public Sector Governance: Strengthening Performance through Good Governance* (June 2014) and *Administering Regulation: Achieving the Right Balance* (October 2014).

Recommendation 6

- 3.60 **The Committee recommends that the Department of the Environment take a leadership role in its governance arrangements concerning management of compliance with *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) conditions of approval, particularly in the context of the new one-stop-shop arrangements, by demonstrating effective reporting against appropriate performance measures.**

⁶⁵ See Environment, *Submission 1*, pp. 7-8.