AUSTRALIAN CONSERVATION FOUNDATION

# ACF Submission to the Senate Environment and Communication Legislation Committee Inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental* Approvals) Bill 2020

## About ACF

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

## Overview

**ACF is opposed to the legislation before the senate** – it does nothing to address the fundamental failures in our national environmental legislation nor does it present a durable reform that has strong buy-in across the community.

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

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

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

The key drivers of species loss are well known including: habitat clearing and fragmentation, invasive species and inappropriate fire regimes as well as disease, pollution and over-exploitation. Climate change represents one of the most pervasive threats to

biodiversity. Creating longer, hotter fire seasons, causing ocean warming and acidification and triggering heat waves that can potentially wipe out entire populations of species.

The 2019/20 bushfires across Australia highlighted the devastating duel impacts of climate change and biodiversity loss. The burned through 12 million hectares and killed an estimated 3 billion native animals. The fires focussed Australia's attention on our environment. Alongside the loss of property, life, wildlife and ecosystems, the fires brought to the front of mind the need to protect the air we breathe and conserve the places we love.

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

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

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

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

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

The legislation before the senate does not address any of the key failings in our environmental law. Rather it exacerbates them.

The establishment of this inquiry, with such a short public comment and hearing process is also deeply troubling, given the significant implications of this legislation for Australia's environmental governance.

The Australian Government currently has the final report and recommendations of the Independent Review of the EPBC Act produced by Professor Graeme Samuel AO. This review received approximately 30,000 public submissions, consulted with numerous experts and stakeholders and has taken a year to complete. The findings and recommendations of this review are critical pieces of information that should inform this Inquiry and the fact the government has this information but is not presenting it as evidence to this committee, limits the efficacy of this inquiry.

ACF supports systemic reforms to address the lack of effectiveness of the EPBC Act and improve the Act's efficiency. Ideally reforms would come before Parliament as a complete

package after the release of Professor Samuels' Final Report and adequate time would be provided for the Parliament and community to understand the legislative implications of any changes. This process, patently, does not meet this requirement.

### The development of the *Streamlining Approvals Bill 2020*

On the 29 October 2020 the independent review of the EPBC Act was initiated by the Morrison government, which appointed Professor Graeme Samuel as the independent reviewer.

On 22 November 2019 Rio Tino wrote to Environment Minister Sussan Ley requesting the government pursue approval bilateral agreements. On that same day WA Premier Mark McGowan wrote to the Prime Minister requesting the government enter into an approval bilateral agreement with the state.

On 17 February 2020, prior to any findings being released by the independent review, the Prime Minister wrote to the Environment Minister asking her to pursue legislation to enable an approval bilateral agreement with Western Australia by the middle of the year.

On 19 June 2020, again before the findings of the independent review were released the Department of Agriculture, Water and the Environment issued drafting instructions for this bill.

In late June 2020 Professor Samuel handed his interim report to the government, and on 20 July 2020 the interim report was publicly released.

It is clear from these records that development of the *Streamlining Approvals Bill 2020* was initiated prior to any finding of the independent review and that the legislation was a predetermined outcome of the government, rather than a direct response to the independent review. For this reason alone, the bill should be abandoned, and a more fulsome legislative response addressing the serious issues in relation to the EPBC Act be developed.

### Interaction with the Independent Review of the EPBC Act

The independent review of the EPBC Act presents a critical moment to address some fundamental failings of the EPBC Act and address Australia's growing rates of extinction and biodiversity decline.

The independent review received 30,000 public submissions during its public consultations. No other environmental law reform process has received this volume of public interest. It also consulted with a significant number of expert and community stakeholders. Whilst there is no final report or recommendation from the review in the public domain, it did issue an interim report, which found that the current legislation is failing to address the degradation of Australia's environmental assets. Specifically, it found:

> *"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 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."*[1]

The interim report also noted that there is significant community mistrust in environmental regulation in Australia. This has been exacerbated by poor transparency in decision making and poor compliance and enforcement of the law:

> "*A dominant theme in the 30,000 contributions received by the Review is that many in the community do not trust the EPBC 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 Act further erodes trust."*[2]

The interim report flagged a significant overhaul of Australia's national environmental law, including: establishing new legally enforceable National Environmental Standards that would underpin any streamlining measures; improved transparency and accountability of decision makers, including limited merits review; a 'quantum shift' in the data and information systems underpinning national environmental law; a rethink of biodiversity offsetting; dramatically reshaping Indigenous participation and cultural heritage protection and a 'strong independent cop on the beat' in relation to environmental compliance and enforcement.

Accompanying a new standards regime, Professor Samuel proposed in the interim report that states and territory governments should be accredited to approve projects on behalf of the Commonwealth where they can meet specific environmental outcomes standards. He notes that such a regime would need to be underpinned by rigorous processes, including standard development, transparency, accountability and assurance.

However, in doing so, he provided a direct critique of the approach taken in 2014, which the current Streamlining Approvals Bill 2020 mirrors almost word for word. Professor Samuel, specifically noting:

> *In 2014 the then Australian Government was unable to secure the necessary parliamentary support for the legislative changes required. There was considerable community and stakeholder concern that environmental outcomes were not clearly defined, and the states and territories would not be able to uphold the national interest in protecting the environment.*
>
> *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.*[3]

Professor Samuel then sets out five key pillars to underpin any accreditation (emphasis added):

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.*

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[1] Samuel, G 2020, Independent Review of the EPBC Act—Interim Report, Department of Agriculture, Water and the Environment, Canberra, June. CC BY 4.0. ,p3
[2] Ibid, p10
[3] Ibid, p53

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 monitoring, compliance, enforcement and assurance regulator, to give confidence that arrangements for monitoring and assurance of accredited arrangements are sound.***
3. *Formal accreditation* by *the Commonwealth Environment Minister. This element provides accountability and legal certainty.* ***The Minister should be required to seek the advice of the proposed Ecologically Sustainable Development (ESD) Committee*** *(see 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:*
    1. *governance, reporting and assurance arrangements*
    2. ***independent monitoring, audit and compliance, to support public reporting on the operational and administrative performance of an accredited systems***
    3. *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:*
        1. *where the Environment Minister deems a matter of such environmental significance that the Commonwealth should deal with it*
        2. ***in an individual case if the National Environmental Standards are demonstrated not to have been met by the accredited party***
        3. *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, including*
    1. ***regular scheduled reviews of the accreditation system and whether the National Environmental Standards*** *are delivering the outcomes intended*
    2. *adaptive management over time, as data, information and knowledge improve, and regulatory systems mature.*[4]

None of the above steps recommended in the interim report are currently in place and we are yet to see any form of National Environmental Standards released from the Australian Government publicly.

At its core, the legislation before the senate does not address any of the issues raised by the Samuel review in relation to appropriate accreditation arrangements.

[4] Ibid, p56

## National environmental standards

The centrepiece of the Professor Samuel's Interim report is national environmental standards that would be used to underpin devolution of federal decision making. The strength or otherwise of these standards will be a key determining factor as to whether the reforms recommended can actually address the significant challenges Australia's environment faces.

The government is yet to publicly release any national standards that would underpin any proposed approval bilateral agreements.

There is currently no provision or head of power in the EPBC Act for the development of enforceable national environmental standards.

ACF strongly supports the development of a robust set of national environmental standards that will genuinely lead to an overall improvement in matters of national environmental significance (MNES). Our view is that it is critical that these standards:

- Are built on a legislative head of power within the EPBC Act or any subsequent legislation
- Established through regulation and subject to parliamentary oversight
- Based on scientific and traditional cultural knowledge (whereby traditional knowledge is relied upon only where there is free, prior and informed consent)
- Have high levels of public transparency in their development, including opportunities for public input.

National environmental standards should include both outcomes standards (for each MNES) as well as procedural standards, such as those that govern compliance, assurance, transparency and accountability (including through the courts).

### Making of standards

A transparent and open process should be pursued in relation to the development of final environmental standards. Our view is such a process

1. New national environmental legislation should set out the key issues (National Environmental Matters) for which the Commonwealth will develop standards.
2. Expert independent committees would be established to develop national standards, building on existing structures. This could include newly created independent Committees or existing Committees such as the Threatened Species Scientific Committee for the development of standards relating to threatened species or the Australian Heritage Council for standards relating to heritage matters.
3. Expert committees would be tasked with developing a draft set of national standards for community and industry consultation. Industry sectors are to be specifically precluded from privileged access on standard development. Consultation and engagement across sectors and communities must be transparent and meeting logs publicly disclosed.
4. The process for standard development should specify:
    a. There is a statutory period for initial standard consultation [90 days]

b. Following consultation and development the Committees will issue a preliminary national standard for a final [30 day] consultation within [6 months of the initial consultation]
c. Following this, and within a set statutory timeframe [28 days], the Committee must provide the recommendation to the Minister on:
    i. The content, nature, duration and operation of the standards
    ii. Once received the Minister is not able to change the content or operation of a standard contrary to the advice of the committee
    iii. Once received the Minister must either:
        1. Enact the standard as regulation under the legislation; or
        2. Elect not to enact a standard, and provide reasons for doing so; or
        3. Publicly request the committee to re-evaluate the standard for a further 30-day period [this may only be pursued once].

### An Independent National Regulator

Critical to the overall reform process is the establishment of robust governance, assurance and compliance framework. The interim report specifically called for a new independent regulator to be established:

> *"An independent compliance and enforcement regulator that is not subject to actual or implied direction from the Commonwealth Minister should be established. The regulator should be responsible for monitoring compliance, enforcement, monitoring and assurance. It should be properly resourced and have available to it a full toolkit of powers."*[5]

There has been no mention of building the requisite governance or assurance reforms in the context of the *Streamlining Approvals Bill 2020.* A national independent assurance and compliance body is an absolute necessity to oversee the implementation of national environmental standards. Such a body would help build community and stakeholder trust in the overall system.

### State and territory capacity to undertake Australian Government responsibilities

The Australian Government has clearly defined international and national responsibilities for the protection of MNES, including threatened species and ecological communities, migratory species, water resources, nuclear actions and world heritage and national heritage areas, and this is acknowledged by the interim report. Protecting Matters of National Environmental Significance requires a national perspective across state boundaries.

The interim report states there are interdependencies in the system that it recommends - that any approval bilateral agreement with state and territory governments must be accompanied by robust legally enforceable National Environmental Standards, transparency and accountability frameworks and an independent federal compliance regulator.

The Commonwealth can only delegate its powers under the Act if the States which are to exercise these powers have the legislative and regulatory frameworks in place to enable them to do so. Importantly, the Minister can only enter into an approval bilateral agreement if satisfied that there has been or will be an adequate assessment of the impacts on MNES.

[5] Ibid, p2

Independent analysis by the Australian Environment Defender Office has found that no state or territory planning or environmental laws currently meet the minimum requirements set out by the Commonwealth (see Figure 1 below)

### Resourcing

Currently states do not have the capacity to take on delegated Commonwealth powers under the Act. At present approximately 48% of EPBC referrals are completed through assessment bilateral agreements or accredit processes (i.e. the assessment is completed by the states and territories). These processes do not currently account for the additional resources required to approve projects on behalf of the Commonwealth.

The other remaining 52% of EPBC projects are currently entirely assessed and approved by the Commonwealth. The transferral of these responsibilities to the states and territories will involve a significant increase in their state-based assessment teams and a cost shift of the legal and policy responsibilities needed to deliver approvals in a legally robust fashion.

### Conflict of interest

States are frequently the proponents of actions referred to the Commonwealth Minister under the Act. If the Commonwealth Government were to delegate its decision-making powers under the Act, it would create a situation in which a state government could be the proponent assessor, decision-maker, and compliance enforcer of a development proposal which impacts a MNES. The conflict of interest inherent in this situation is clear. However even in cases where the state is not the formal proponent, the financial benefits to the state that would flow from a proposed project, whether through royalties or investments, make it extremely difficult for a state to make an impartial decision in the national interest.

An example is from Western Australia where the Supreme Court ruled in August 2013 that the WA Government had acted unlawfully in approving the proposed gas plant at James Price Point in the Kimberley. The Supreme Court rejected all environmental approvals for the area due to conflicts of interest of Board members sitting on the state's Environment Protection Agency (EPA). The state government consistently backed the gas hub project with clear statements from the Premier saying that the project was of enormous significance for the economic prosperity of the State, giving the community no confidence that the project received objective and independent environmental assessment and approval.

Another prime example is the case of Toondah Harbour in Qld, which is currently before the Environment Minister for assessment under the EPBC Act. This project has effectively been exempted from Queensland state environmental law by previous governments, despite impacting on an internationally protected Ramsar wetland, critical habitat for critically endangered species as well as impacting on koala populations. This means the only meaningful environmental assessment of the project is occurring under national environmental law.

### Removal safeguards for the 'water trigger'

The 'water trigger' was established in 2013 in response to the failure of state and territory governments to adequately assess and regulate the impacts of coal mines and coal seam gas operations (fracking) on water resources. For this reason, the possibility to accredit a state or territory approval process in relation to the water trigger using an approval bilateral agreement was explicitly precluded.

The water trigger was the subject of an exhaustive Independent Review in 2017, totalling 85 pages. In summary, it found:

- The water trigger is an appropriate measure to address the regulatory gaps regarding risks to water resources.
- The water trigger is an appropriate manner to seek to alleviate public concern about the impacts to water from coal seam gas and large coal mining developments.
- In practice, the scope of the legislation was in keeping with Parliament's intention.
- The characteristics of the legislation and the manner it has been implemented give confidence that it is capable of being effective.
- The legislation can deliver a net benefit to Australia.[6]

The bill proposes to undo this provision and enable states and territories to approve projects on behalf of the Commonwealth where a proponent impacts on water resources. This is a reckless move that could jeopardise water resources, including drinking water storages for some of our major population centres. It is especially concerning in the complete absence of national environmental standards, a federal assurance and compliance regulator or increased transparency and accountability provisions.

### Switches off Part 7 referrals

The legislation removes the need to refer a project under Part 7 where a bilateral approval agreement applies. This runs contrary to the intention of the act when provision for bilateral approval agreements was established. The switching off of Part 7 will effectively remove all Commonwealth visibility and capacity to screen projects that may impact on matters of national environmental significance (MNES) as they move through state-based systems.

There has been no other mechanism proposed to replace this provision, which in turn relegates the Commonwealth to a position where it will be forced to intervene late in any process where there is an unacceptable risk to MNES.

### Enables agreements to be amended without further consultation or parliamentary oversight

The legislation makes it easier for states and territories to amend their laws without having to revisit or alter a bilateral agreement. Schedule 4 notes that where amendments to state and territory law are made, that such amendments may not trigger a review of the bilateral agreement.

The management of bilateral agreements by the Commonwealth to date has been implemented poorly. Their maintenance and management are under-resourced. This provision must be treated with extreme caution.

It provides an exceptional amount of discretion to the Federal Environment Minister to determine what a "minor" amendment may be considered. The caveats that govern the Environment Minister's discretion on what constitutes a "minor" amendment, themselves are exceptionally broad – such as having a material adverse impact on a protected matter.

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[6] The Independent Review of the Water Trigger Legislation, Commonwealth of Australia 2017
https://www.environment.gov.au/epbc/publications/independent-review-water-trigger-legislation

The real impact of this will be less public and parliamentary scrutiny of bilateral agreements and their operation, and an accompanying reduction in community trust in environmental decision makers.

Significant shifts in state and territory policy can effectively be waived through and not be reflected in a bilateral agreement.

### Enables the accreditation of non-legislative instrument and bodies other than state or territory government

One of the most concerning elements of the bill is the dilution of instruments and bodies that it can accredit for the purposes of the EPBC Act. Currently only legislation can be accredited for the purposes of a bilateral agreement. Schedule 3 in the bill seeks to allow measures partly set out in state law. This provision increases the capacity for state and territory government to alter operating guidelines and procedures in the absence of parliamentary scrutiny. Coupled with the provisions in Schedule 4, which enables the bilateral agreements to be altered without being tabled in the senate at the discretion of the Environment Minister, it creates a situation whereby significant changes to assessment and approval processes can bypass parliaments at both the state and Commonwealth level.

Similarly, the amendments in Schedule 5 propose to enable a broader range of entities to be accredited for the purposes of approving impacts on MNES. This includes local government. Local government are not resourced or well placed to make decisions in the national interest. By definition, their focus is on local issues. Local government play an important role in the day-to-day lives of every Australian, but significant decisions on national matters are not delegated to them in any other instance.

Local government decision making has been demonstrated to be the least transparent and most vulnerable to corruption and regulatory capture, as evidenced by the 2018 Queensland Crime and Corruption Commission Report into Ipswich council. It found

> *In October 2016, the CCC commenced a corruption investigation, Operation Windage, in relation to allegations of corrupt conduct involving elected officials and senior executive employees of the Ipswich City Council. To date, 15 people have been charged with 86 criminal offences. Of the 15 people charged, seven are either current or former council employees or councillors. All of the criminal matters are currently before the courts and it is not appropriate to discuss the details publicly. The investigation also identified significant governance failures and cultural issues that appear to have been occurring over many years and which would not have occurred in an environment in which the values of transparency, accountability and good governance were paramount. The CCC has decided to issue a public report on this matter in order to identify corruption risks that arise when governance, legislative and disclosure obligations pertaining to local government are ignored, and to remind public officials and elected officials of the importance of transparency and accountability.*[7]

Had the predecessor of this legislation passed when attempted in 2014, the council subject to the above proceedings may have been charged with making decisions on key national environmental matters on behalf of the Australian Government.

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[7] Culture and corruption risks in local government Lessons from an investigation into Ipswich City Council (Operation Windage) August 2018 Queensland Crime and Corruption Commission p6

The possibility of local councils, such as those that operated in Ipswich and were subject to the above corruption investigations, being placed in charge of making decisions on MNES, such as nationally threatened species, irreplaceable cultural and natural world heritage areas, is one that should not be contemplated.

Figure 1

**Comparison Table – Do State and Territory planning laws explicitly incorporate core EPBC Act standards?**

| EPBC Act core standard | Qld | Tas | ACT | SA | NT | Vic | NSW | WA |
|---|---|---|---|---|---|---|---|---|
| Does the state (or territory) planning law explicitly refer to the principles of **ESD** in objects? | Partly[1] | Partly | Yes | Partly[2] | Yes | No | Yes[3] | Partly[4] |
| Does state planning law explicitly refer to the **World Heritage Convention**? | No | No | No | No | No | No | No[5] | No |
| Does state law specifically refer to the **Ramsar** (Wetlands) Convention? | Partly[6] | No | Partly[7] | No | No | No | Partly[8] | Partly[9] |
| Does state threatened species list include all **federally listed species and communities**? | No | No | Partly[10] | No | No[11] | No[12] | No[13] | No[14] |
| Does state planning law specifically refer to the **Convention on Biological Diversity**? | No | No | No[15] | No | No | No | No | No |
| Does state threatened species list include all **federally listed migratory species?** | No | No | Partly[16] | No | No[17] | No | No | No |
| Does state law specifically refer to **Convention on Migratory Species, JAMBA, CAMBA, ROKAMBA**? | Partly[18] | No | No | No | No | No | No | Partly[19] |
| Does state law prohibit the approval of **nuclear actions**? | No[20] | Partly | No | Partly[21] | No[22] | Yes[23] | Partly[24] | Partly[25] |
| Does state law provide equivalent **standing for third parties**[26] to bring proceedings in relation to major projects? | Partly[27] | Yes[28] | Partly[29] | No | Partly[30] | No[31] | Partly[32] | Partly[33] |
| Do state **offset standards** meet Commonwealth standards regarding 'like for like' and limited use of indirect offsets? | No[34] | No[35] | Yes[36] | Partly[37] | No[38] | No[39] | No[40] | No[41] |
| Is the state **environment minister** responsible for approving major projects? | No | No[42] | No | No | Yes | No | No[43] | Partly[44] |
| Does state appoint **independent decision makers** for state-proposed projects? | No | No[45] | No[46] | No | No[47] | No | No[48] | No[49] |
| Do state laws provide special procedures for **early refusal** where project impacts are 'clearly unacceptable'?[50] | No | No[51] | No[52] | No[53] | Partly[54] | Partly | No[55] | Partly[56] |
| Do state laws adequately assess **impacts of large coal and coal seam gas projects on water resources**? | No[57] | No[58] | N/A | No | No[59] | Partly | Partly[60] | No[61] |

*Source: Devolving Extinction, The risks of handing environmental responsibilities to state & territories Environmental Defenders Office 2020*

*https://www.edo.org.au/wp-content/uploads/2020/10/201004-EDO-PYL-Devolving-Extinction-Report-FINAL.pdf*