Environmental Defenders Office

Submission to the 10 year review of the EPBC Act

April 2020

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

EPBC Act Review Secretariat
Department of Environment & Energy
GPO BOX 787
CANBERRA ACT 2601

By email: epbcreview@environment.gov.au

For further information on this submission, please contact:

Rachel Walmsley
Director Policy and Law Reform (Sydney)
T: [redacted]
[redacted]

Contents

Executive Summary

The Environmental Defenders Office Ltd (**EDO**) has extensive experience across Australia in providing legal advice on how the *Environment Protection & Biodiversity Conservation Act 1999* (**EPBC Act**) currently works and on how it could be reformed to more effectively clarify national leadership, strengthen and coordinate processes, and deliver environmental outcomes. We welcome the opportunity to provide input to the 10 year statutory review.

The EPBC Act is now 20 years old and is in need of extensive reform. It is complex, inefficient, and most importantly, it is not meeting its aim of protecting the environment and conserving biodiversity. It fails to address some of the most significant environmental challenges facing Australia, including climate change, land clearing and cumulative impacts. Its implementation has been undermined by resourcing issues. EDO recommends a new, clear Act be drafted to effectively address the major environmental challenges we face, and to reverse the declining environmental trends.

This review provides an opportunity to re-write the law to better recognise our interdependence with the environment and the pathways necessary to ensure we deliver a healthy, thriving and resilient environment for future generations.

This submission addresses the 26 questions in the *Independent review of the EPBC Act Discussion Paper*, November 2019 (**Discussion Paper**) by grouping the questions into seven themes: objects and principles; scope of the Act; purpose of the Act; role of the Commonwealth; indigenous issues; community participation, accountability and transparency; and in relation to specific mechanisms and tools.

In summary, we identify the following priorities for a new national environment Act:

Scope and national leadership

- A new Australian Environment Act that elevates environmental protection and biodiversity conservation as the primary aim of the Act, consistent with Australia's international obligations.
- Duties on decision makers to exercise their powers to achieve the Act's aims – ie, deliver environmental outcomes.
- Effective mechanisms to addresses the most significant environmental challenges: climate change, land clearing, and cumulative impacts. In addition to existing triggers, new triggers for federal protection should include:
    - significant greenhouse gas emissions, (in addition to other measures to address climate change throughout the Act, for example, adaptation planning through bioregional plans and recovery plans),
    - significant land-clearing activities,
    - the National Reserve System (terrestrial and marine protected areas),
    - Ecosystems of National Importance,
    - vulnerable ecological communities (alongside other listed species, populations, ecological communities and critical habitat), and
    - significant water resources (beyond large coal and coal seam gas project impacts).

  Required outcomes should be identified for each of these matters.

Governance and accountability

- Two new statutory environmental authorities – a National Environment Protection Authority (EPA) and a National Sustainability Commission (Sustainability Commission) should be established to identify outcomes and ensure they are achieved.

- To ensure outcomes are progressed, accountability mechanisms should be established to hold the regulator and decision-makers to account including:
    - Access to information and data disclosure provisions to ensure greater transparency,
    - Public participation in decision-making and planning, and
    - Third party review rights (including merits review).
- Greater emphasis on Indigenous leadership and rights (including free prior informed consent requirements), land management and biodiversity stewardship, including formal recognition of Indigenous Protected Areas.

Outcomes and efficiency

- Improved national standards to drive best practice including:
    - A clear process for accreditation of assessment processes that meet strict national standards (for example, biodiversity offsets), with retention of Commonwealth approval and call-in powers,
    - Clear upfront guidance on assessment requirements (including red lights) to improve certainty,
    - Clear objective decision-making criteria set out in legislation,
    - Strengthened strategic assessment and bioregional planning provisions, and
    - Independently appointed and accredited consultants to improve assessment quality and information.
- A national environmental data and monitoring program that links federal, state and territory data on biodiversity, strategic planning and environmental impact assessment (underpinned by a National Ecosystems Assessment). This is needed to measure outcomes and trends.
- Improved regulatory culture and outreach, and resource effective compliance and enforcement.

These priority areas for reform are explored through detailed recommendations responding to themes in the Discussion Paper. While some of the necessary reforms could be implemented through substantial amendment to the EPBC Act, given the scale of reform required, the Act would need to be largely re-written.

Summary of recommendations

Part One

Recommendations on evidence and trends

- This review incorporates analysis of extreme weather, climatic and health trends.
- This review undertakes a broader examination of costs, including consideration of the value of ecosystem services.
- A National Ecosystem Assessment be undertaken to underpin legislative reform and to establish a comprehensive suite of indicators to ensure a new (or substantially amended) Act is effective in achieving its objects.

Part Two

1. Recommendations regarding objects and principles:

- An overarching object to protect Australia's environment and biodiversity.
- Secondary objects to support national environmental leadership, biodiversity stewardship and fair decision-making.
- Clear statutory duties and mechanisms to implement and fulfil the objects.
- A modernised framework to achieve Ecologically Sustainable Development (ESD), including new principles to support high environmental standards, non-regression and continuous improvement, and resilience to threats.
- A strengthened set of reform principles.

2. Recommendations regarding scope of the Act:

- Retain existing matters of national environmental significance triggers.
- Add new triggers for:
  - the National Reserve System (terrestrial and marine protected areas);
  - Ecosystems of National Importance (including High Conservation Value vegetation, Key Biodiversity Areas and wetlands of national importance);
  - Vulnerable ecological communities (alongside other threatened species and ecological communities);
  - Significant land-clearing activities;
  - Significant greenhouse gas emissions, (including prohibiting specified greenhouse gas emitting activities that are in exceedance of Australia's carbon budget); and
  - Significant water resources (expanded beyond large coal and coal seam gas impacts).
- Include a regulatory power to add new triggers.
- Review exemptions for regulating offshore petroleum by NOPSEMA, forestry under Regional Forest Agreements, and activities under the national interest exemption.

3. Purpose of the Act - Recommendations for delivering environmental outcomes include:

- The Act and relevant plans should establish clear outcomes, standards and reporting indicators, that can be amended over time in light of scientific evidence.
- Sustainability Commission reporting to be tabled in Parliament on the State of the Environment and National Sustainability Outcomes.
- Require Commonwealth, State and Territory governments to respond to State of the Environment and National Sustainability Outcomes reports.
- Mandatory monitoring and reporting requirements on matters of national environmental significance.
- A set of National Environmental Accounts that track natural assets and their extent, condition and threat status over time.
- An online monitoring and reporting hub for comparative analysis; easy access to public registers; and transparent, up-to-date information about environmental outcomes across Australia.
- Mandatory public inquiries into the extinction of threatened species.

4. Role of the Commonwealth

Recommendations for improved governance and institutions include:

- Enforceable duties on decision-makers to use their powers to achieve the Act's objects.
- Clear criteria and public accountability for key stages of decision-making, including requirements for objective, science-based outcomes assessment.
- A new national Environmental Protection Authority (EPA) – to assess, approve or refuse projects, monitor project-level compliance and take enforcement action.
- A new National Sustainability Commission – to coordinate national plans and actions, set national environmental standards, provide high-level oversight and give strategic advice and oversight to Ministers, agencies and the wider community.
- Establish expert advisory Councils and task forces where needed.

Recommendations relating to standards

- The new Sustainability Commission should set national goals to achieve positive environmental outcomes under rolling National Environment and Sustainability Plans (National Plans).

Recommendations for bioregional planning

- Key elements for bioregional planning processes are set out in the Act.

Recommendations regarding accreditation, streamlining and de-regulation:

- Simplify and clarify the referral and assessment process.
- Improve environmental impact assessment (EIA).
- Improve certainty and efficiency by setting clear thresholds, rules and guidance upfront on unacceptable impacts.

- Establish clear referral duties and powers for relevant Ministers and agencies, the National EPA, and the public to formally request an action be referred.
- Strengthen criteria for conducting strategic environmental assessment to support and complement (but not replace) project assessment.
- Retain accreditation where there is evidence of environmental outcomes being achieved – for example, accreditation of fisheries.
- Revoke accreditation where there is no evidence of environmental outcomes being achieved – for example, Regional Forestry Agreements.
- Establish a system for the accreditation of consultants and experts who prepare EIA reports.
- Undertake a review of current self-regulatory schemes in terms of whether they achieve environmental outcomes.
- Improve effectiveness and efficiency by improvements to data coordination, sharing, transparency (including by establishing a National Ecosystem assessment, environmental accounts, data hub, and requirements to publicise EIA information).

Recommendations regarding compliance and enforcement include:

- A consolidated part in the Act on compliance and enforcement, penalties and tools.
- Explicit powers for a new national EPA as chief environmental regulator.
- A comprehensive suite of investigative powers for authorised officers.
- Open standing for the community to seek judicial review of erroneous decisions, civil enforcement of breaches, and performance of non-discretionary duties by the Minister or other decision-makers under the Act.
- A full range of best-practice criminal, civil and administrative sanctions.
- Harmonised federal-state regulation based on the most stringent standards and clearly assigned responsibilities.
- Cost recovery provisions.
- Adaptive management and ability to strengthen approval conditions over time in response to the best available science.

Recommendations for funding

- Increase Commonwealth funding for implementation of the Act including better resourcing and foresight for agencies, conservation programs and natural resource management, including multi-sector investment in ecosystem services, databases and new tools.
- The Act should require the Environment Minister to consult on, approve and coordinate implementation of a National Biodiversity Conservation and Investment Strategy (NBCIS).

5. Recommendations relating to Indigenous self-determination and relationships to country and sea country include:

- Any changes relating to the role of Indigenous peoples under the Act must be subject to effective consultation with Indigenous peoples, communities and organisations.
- 'Free, prior and informed' consent of Indigenous communities becomes a mandatory operational principle within the Act.
- A specific governance mechanism (a body such as a Commissioner or agency) be established to operationalise 'free, prior and informed' consent.
- 'Free, prior and informed' consent is particularly required for any decision that will impact Indigenous heritage values or Indigenous Protected Areas.
- Indigenous peoples, communities and organisations should be provided with the opportunity to conduct independent Environmental Impact Assessments.
- Indigenous Protected Areas (IPAs) be recognised as a matter of national environmental significance.
- Improve joint management structures around Commonwealth reserves to ensure there is self-determination and appropriate decision-making power on the part of Traditional Owners.
- Indigenous knowledges should be taken into account in all decision-making in ways that appropriately safeguard Indigenous communities and peoples.

6. Recommendations for public participation, transparency and access to justice include:

- Strong and iterative community engagement and public participation provisions at all key stages of the Act, from strategic planning to project assessment and compliance monitoring, reporting and enforcement.
- Rights for interested community members to seek merits review of key decisions under the Act (such as when a nominated entity or place is declined for listing; on the adequacy of an approved recovery plan; or whether a proposed action requires Commonwealth assessment; along with for approvals granted under the Act).
- Easily accessible, timely public information on actions and decisions.
- 'Open standing' for the community to seek judicial review of legal errors.
- 'Open standing' to pursue civil enforcement for a breach of the Act or regulations.
- Protective costs orders for legal actions brought in the public interest.

7. Specific tools

Recommendations relating to markets and offsetting

- Any biodiversity offsetting must be based on clear scientific principles and limits.
- Carbon farming should meet clear criteria for additionality and abatement.

Recommendations relating to restoration, incentives and private land conservation

- Critical habitat declarations should trigger private conservation funding under agreement with affected landholders.
- Establish a Capital Funds Conservation Program to receive capital contributions, and reinvigorate a national 'stewardship payments' fund for private landholders to achieve priority outcomes for national and bioregional biodiversity conservation.

Recommendations relating to listing threatened species and other protected matters include:

- Independent Scientific Committee to assess and directly list threatened species, ecosystems for national protection.
- Simpler and faster nomination and listing processes, and strong, non- regressive common standards for assessment across the Commonwealth, states and territories.
- All valid nominations to be assessed within statutory timeframes.
- Stronger protections for threatened species, important populations, ecological communities and critical habitat across Australia.
- Vulnerable ecological communities be a 'trigger' for impact assessment and approval (via existing matters of national environmental significance).
- Emergency listing provisions for threatened species and ecological communities and critical habitats.
- Permitting nomination and listing of important populations of a species.
- Applying the precautionary principle to listing decisions.
- Requiring decisions affecting species and ecological communities are consistent with approved conservation advices, recovery plans, threat abatement plans and international agreements.
- Impacts on critical habitat must be refused and conservation agreements sought with landowners. The Act should include a conservation covenanting mechanism.
- Critical habitat must be identified, mapped and included on the Critical Habitat Register at the time a species or ecological community is listed.
- Extending critical habitat protections beyond Commonwealth areas.
- New threat categories to reflect international (IUCN) standards, including for near-threatened and data-deficient species and ecological communities.
- Mandatory requirements for recovery plans and threat abatement to be developed and implemented in a coordinated manner across Australia.
- Mandatory goals to be addressed in recovery plans.

Recommendations relating to heritage provisions include:

- Establish an Independent Australian Heritage Committee to assess and directly list natural and cultural heritage places for national protection.
- Provide for Indigenous Cultural Heritage to be primarily identified and assessed by Indigenous representatives, with new laws to replace the outdated 1984 indigenous

heritage legislation. Listing of Indigenous cultural heritage should include the ability to list the intangible heritage value of a site.

- The Act should expressly protect World Heritage properties as well as World Heritage values.
- Simpler and faster heritage nomination and listing processes, and strong, non-regressive common standards for assessment across the Commonwealth, states and territories.
- All valid nominations to be assessed within statutory timeframes.
- Emergency listing provisions national heritage places.
- Applying the precautionary principle to listing decisions.

Additional Issues

- The review consider additional issues not raised in the Discussion Paper relating to:
    - Climate change
    - Regulation of wildlife trade
    - Integrated oceans management

Introduction

Environmental Defender's Office Ltd (**EDO**) welcomes the opportunity to provide input to the 10 year statutory review of the *Environment Protection & Biodiversity Conservation Act 1999* (**EPBC Act**). The EDO has extensive experience across Australia in providing advice on how the EPBC Act currently works and on how it could be reformed to more effectively clarify national leadership, strengthen and coordinate processes, and deliver environmental outcomes.

The EPBC Act is now 20 years old and is in need of reform. It is lengthy complex, inefficient, fails to address major challenges, and its implementation has been undermined by resourcing issues. EDO recommends a new, clear Act be drafted.

Part One of this submission summarises the operation of the Act as currently drafted and identifies evidence supporting the need for reform. (This part responds to Discussion Paper Questions 6 and 7).

Part Two of this submission makes recommendations for priority areas in response to the 26 questions set out in the *Independent review of the EPBC Act Discussion Paper*, November 2019 (**Discussion Paper**). We have grouped the Discussion Paper questions into seven themes and structured Part Two of our submission accordingly:

1. **Objects and principles** (Questions 2, 3, and 26)
2. **Scope** (Questions 1 and 4)
3. **Purpose – delivering environmental outcomes** (Questions 5, 8, 9 and 22)
4. **Role of the Commonwealth**
    - Governance (Questions 9 and 21)
    - Standard setting (Questions 6 and 10)
    - Bioregional planning (Question 16)
    - Accrediting/streamlining (OSS) (Questions 13, 14, 15,17 and 18)
    - Compliance and enforcement
    - Funding (Question 25)
5. **Indigenous Issues** (Questions 12 and 19)
6. **Community participation, transparency and accountability** (Questions 20, 21)
7. **Specific tools:**
    - Restoration, incentives and private land conservation (Questions11 and 25)
    - Markets and offsetting (Questions 23 and 24)
    - Biodiversity provisions (Questions 5 and 8)
    - Heritage provisions (Question 12)

We also identify **additional issues** not covered in the Discussion Paper including climate legislation, provisions relating to wildlife trade, and oceans management.

In the **Appendix** we provide an example of how to draft a significant land clearing trigger.

Part One: Evidence supporting the need for reform

Discussion Paper Questions:

QUESTION 6: How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation? What have been the economic costs associated with the operation and administration of the EPBC Act?

QUESTION 7: What additional future trends or supporting evidence should be drawn on to inform the review?

The terms of reference for this review state that in accordance with section 522A of the EPBC Act, the review will examine:

- the operation of the Act, and
- the extent to which the objects of the Act have been achieved.

In response to the terms of reference and the Discussion Paper questions, this part of the submission does two things: first, it reflects on 20 years of the EPBC Act and identifies strengths, weaknesses, and barriers that have prevented achievement of the objects. This part refers the review to evidence supporting a clear *need for reform* to strengthen national environmental law. Second, this part identifies the *context for reform*. At a time of heightened awareness of public and planetary health, this review provides an opportunity to establish clear, integrated and strategic laws to deliver ecologically sustainable development and build ecosystem health and resilience for all Australians. Short-term responses to the COVID-19 pandemic that focus solely on immediate economic stimulus measures by reducing environmental protections or public involvement may in fact have damaging long-term consequences. Rebuilding and restoring ecosystems burnt by bushfires, and sustainably managing landscapes scarred by climate change, extreme weather and drought, will require laws to deliver a long-term vision for human and environmental health and resilience.

This part of the submission examines the:

- **State of the environment**
- **State of the Act – positive elements and regulatory failings**
- **Barriers to achieving objectives**
- **Costs**
- **Future trends and supporting evidence**
- **National Ecosystems Assessment**

State of the environment

Question 6 in the Discussion paper asks: *How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation?*

The most recent *State of the Environment Report* (2016) confirms that many elements of Australia's environment are in decline. For example, in relation to biodiversity, the 2016 State of Environment report concluded:

> *Australia's biodiversity is under increased threat and has, overall, continued to decline. All levels of Australian government have enacted legislation to protect*

biodiversity... However, many species and communities suffer from the cumulative impacts of multiple pressures. Most jurisdictions consider the status of threatened species to be poor and the trend to be declining. Invasive species, particularly feral animals, are unequivocally increasing the pressure they exert on Australia's biodiversity, and habitat fragmentation and degradation continue in many areas. The impacts of climate change are increasing…

The outlook for Australian biodiversity is generally poor, given the current overall poor status, deteriorating trends and increasing pressures. Our current investments in biodiversity management are not keeping pace with the scale and magnitude of current pressures. Resources for managing biodiversity and for limiting the impact of key pressures mostly appear inadequate to arrest the declining status of many species.

A similar prognosis is forecast for other environmental indicators. We refer the review to the following sources of evidence:

- **Great Barrier Reef Outlook Report 2019** identifies the Great Barrier Reef Region still faces significant pressures ranging in scale from local to global, and finds the greatest threat to the Reef is still climate change. The other main threats are associated with coastal development, land-based run-off, and direct human use (such as illegal fishing). The report is available at: http://www.gbrmpa.gov.au/our-work/outlook-report-2019
- The **Australian Threatened Species Index** and the *Threatened Bird Index 2019* provide data on the status of threatened species in Australia, with clear evidence of declines in certain species. This data is available at: https://tsx.org.au/tsx/#/
- **IUCN Red List of Threatened Species** provides information about the status of Australian species is available (under Oceania). The list is available at: https://www.iucnredlist.org/
- The **Senate Inquiry into Australia's Faunal Extinction Inquiry** – received submissions on the state of Australia's unique fauna. This inquiry is due to provide its final report by the second sitting Wednesday of 2021.The submissions are available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalextinction2019/Submissions and the interim report can be found at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalextinction2019/Interim_Report
- The **CSIRO Outlook Report 2019** – part 2.3 identifies risks and declines relating to climate change and environment noting: "*[Climatic] changes will also increase the stress on Australia's ecosystems, which are already threatened. Australia is considered to be one of the world's mega-diverse countries. However, over the past 200 years, Australia has lost more species than any other continent, and continues to have the highest rate of species decline among OECD countries. Making matters worse, the legacy of intensive agriculture on a fragile environment continues to be felt in Australia's soils. Although farmers have made important advances in land management, acidification is at worrying levels in many lighter soils, soil carbon levels remain historically low and the risk of erosion increases with an increasing frequency of droughts and lower groundcover. These processes threaten productivity and reduce crop choice*." The report is available at: https://www.csiro.au/en/Showcase/ANO.

State of the Act

Based on a desktop analysis of the Act according to publicly available information, the following table summarises two key functions of the EPBC Act over the last 20 years: listings and referrals. There are some very clear themes such as the very small number of refusals, and the fact that listed species do not all have recovery plans.

Table 1 – Listing statistics

Mechanism	**2018/2020**	**Total (since EPBC Act – 2000)**
Listed threatened species (Total)	**45**	**1890**
Extinct Fauna	1	54[1]
Extinct Fauna in the Wild	0	1
Critically Endangered Fauna	11	89
Endangered Fauna	6	162
Vulnerable Fauna	3	203
Conservation dependent Fauna	0	8
Total Fauna[2]	**21**	**517**
Extinct Flora	1	37
Critically Endangered Flora	11	191
Endangered Flora	12	557
Vulnerable Flora	0	588
Total Flora[3]	**24**	**1373**
Threatened Ecological Communities[4]	6	86
Species and ecological communities removed from threatened list[5]	17	173
Species and ecological communities' additions to list[6]	39	-
Species uplisted	8	-
Species downlisted	3	-
Species deleted from list	11	-
Register of Critical Habitat[7]	0	5
Key threatening processes[8]	1	21
Species assessed as data deficient[9]	0	16
Threatened species requiring recovery plan[10]	142	-
Threatened ECC requiring recovery plan[11]	30	-
Recovery plans[12]	5	762
Threat Abatement Plans[13]	1[14]	13

[1] We note that most of the 54 species listed as extinct were included on the list on 16 July 2000 (including the Tasmanian Tiger), so therefore this figure includes extinctions that pre-date the Act.
[2] https://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=fauna
[3] https://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=flora
[4] https://www.environment.gov.au/cgi-bin/sprat/public/publiclookupcommunities.pl
[5] https://www.environment.gov.au/cgi-tmp/publiclistchanges.30165e1d380604357b3d.html
[6] See Table A4.A.8 Table A4.A.4 https://www.environment.gov.au/system/files/resources/1c417884-f855-4411-943b-c284450cfd1b/files/annual-report-2018-19-full.pdf;
[7] https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl
[8] http://www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl
[9] https://www.environment.gov.au/biodiversity/threatened/nominations/data-deficient-species
[10] See Table A4.A.10.
[11] Ibid.
[12] https://www.environment.gov.au/cgi-bin/sprat/public/publicshowallrps.pl
[13] https://www.environment.gov.au/biodiversity/threatened/threat-abatement-plans/approved
[14] This plan was for the Red Imported fire ant (*Solenopsis invicta*).

Referral statistics

A review of publicly available statistics indicates that there are 21 active bilateral assessments[15], and 17 active accredited processes[16]. There have been 6403 referrals received[17], and 638 total referrals withdrawn.[18]

Other reviews have found that some sectors do not make many referrals under the Act. For example, the 2018 *Review of interactions between the EPBC Act and the agriculture sector* found there are comparatively few referrals from the agricultural sector, a sector that can have significant impacts on matters of national environmental significance through tree clearing in particular, along with nutrient and sediment run off and other impacts.[19] Referrals under the Act are summarised in Table 2. In some years, in some jurisdictions, there have only been a handful of referrals. Such numbers do not support arguments of an undue regulatory burden imposed by the Act. Similarly, the numbers suggest a lack of referrals in some sectors and jurisdictions.

Table 2 – Nationwide summary of referrals (as at 1/1/2020)

	SA	NSW	Tas	WA	Vic	NT	Qld	ACT	Cth Marine	Other	Australia
from 7/2000	4	25	3	11	17	1	19	13	16	2	111
2001	25	76	12	35	61	13	80	13	35	9	358
2002	16	98	14	25	67	4	70	9	12	9	324
2003	23	69	9	30	56	7	75	16	17	4	305
2004	28	57	15	33	66	6	84	16	20	17	343
2005	19	54	13	60	61	10	94	17	26	9	363
2006	10	53	17	56	68	15	86	9	27	11	350
2007	29	63	17	54	56	11	93	19	35	9	385
2008	25	54	24	90	92	9	126	14	24	5	463
2009	26	58	16	70	77	10	95	22	21	13	408
2010	18	69	15	86	80	9	102	19	28	7	433
2011	21	93	16	85	71	12	90	10	26	2	426
2012	21	68	21	105	65	11	105	21	27	7	451
2013	13	66	10	100	45	8	102	5	27	7	384
2014	10	49	3	73	46	9	81	6	5	4	286
2015	9	45	3	59	25	9	61	3	3	0	216
2016	6	39	3	56	38	5	54	9	2	3	215
2017	10	38	13	86	43	7	70	7	4	1	280
2018	1	43	8	76	42	5	49	5	4	1	234
2019	7	39	5	45	20	2	42	10	3	3	170
TOTAL	**321**	**1156**	**237**	**1235**	**1096**	**163**	**1578**	**243**	**362**	**123**	**6514**

Positive elements of the Act

At the time it was made, the EPBC Act represented an ambitious legislative effort to coordinate and clarify a number of Acts and establish a coordinated regime with clearly identified areas of national responsibility. There are a number of elements of the Act that have made significant progress toward achieving objects for biodiversity conservation and environmental protection. These include:

[15] Table A4.A.4 https://www.environment.gov.au/system/files/resources/1c417884-f855-4411-943b-c284450cfd1b/files/annual-report-2018-19-full.pdf; https://www.environment.gov.au/epbc/one-stop-shop
[16] Ibid.
[17] Table A4.A.1 https://www.environment.gov.au/system/files/resources/1c417884-f855-4411-943b-c284450cfd1b/files/annual-report-2018-19-full.pdf
[18] Ibid.
[19] Craik, W. 2018. *Review of interactions between the EPBC Act and the agriculture sector*. Independent report prepared for the Commonwealth Department of the Environment and Energy. Available at: https://www.environment.gov.au/epbc/publications/review-interactions-epbc-act-agriculture-final-report

- The articulation of matters of national environmental significance, linked to international law obligations.
- The requirement to accredit fisheries - The EPBC Act initiated Commonwealth environmental impact assessment for fisheries, and overall, Environment portfolio involvement has been essential in driving significant improvements in the way Australia's Commonwealth and export fisheries are managed.
- Indigenous protected areas (IPAs) – The achievement of the Aichi target of 17% of Australia being in terrestrial reserves was in a large part met (and exceeded) by the significant land area now covered by IPAs. There are both social, cultural and environmental benefits of IPAs.
- Clear nuclear prohibitions.
- Specific whale and cetacean provisions with associated policies and guidelines that have contributed to protection and recovery of species.
- The listing of threatened species and the development of recovery plans for some species has enabled more understanding and direction in recognising which species need attention and how best to manage activities to reduce their threatened status.
- Extended standing provisions to allow experts and groups to bring public interest cases to uphold the law. Although infrequently used, these provisions have proved to be an important accountability safeguard.

Examples of specific regulatory failings of the Act

- The Act does not prevent extinction – for example, the Bramble Cay Meloyms recently became extinct despite its dire threatened status being recognised.[20]
- Climate change is the most significant environmental threat, and yet is not referred to in the Act[21]
- Empirical evidence and mapping shows that under the habitat loss is not regulated effectively under the Act – see case study below[22]
- Referrals are not made for all relevant activities. This may be due to a lack of understanding about the operation of the Act along with a lack of enforcement of the Act and the onus being on proponents to refer their activity proactively.[23]
- Departmental funding has been cut over recent years leaving inadequate resources and staff for effective implementation.
- The National Reserve System (NRS) is not comprehensive, adequate or representative (CAR).
- World heritage properties and values are at risk.[24]
- Ramsar wetlands are at risk.[25]
- Access to information about decisions under the Act can take years[26]

[20] Woinarski et al. 'The contribution of policy, law, management, research and advocacy failings to the recent extinctions of 3 Australian vertebrate species' (2016) *Conservation Biology*.
[21] As recognized in the State of Environment Report 2016, CSIRO Outlook Report 2019 in relation to ecosystems, and in successive IPCC reports.
[22] Michelle S. Ward; Jeremy S. Simmonds; April E. Reside; James E. M. Watson ; Jonathan R. Rhodes; Hugh P. Possingham; James Trezise; Rachel Fletcher; Lindsey File ; Martin Taylor "Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia" (2019) *Conservation Science and Practice* Volume1, Issue11, November 2019, available at: https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/csp2.117
[23] Craik, W. 2018. *Review of interactions between the EPBC Act and the agriculture sector*. Independent report prepared for the Commonwealth Department of the Environment and Energy. Available at: https://www.environment.gov.au/epbc/publications/review-interactions-epbc-act-agriculture-final-report
[24] As noted in the Discussion paper p18 "the IUCN presently has four of Australia's natural World heritage properties listed as being of significant concern."
[25] Modelling undertaken for the Murray Darling Basin Plan indicated that under current water management scenarios (ie, water recovery targets), a number of ecological assets (including Ramsar wetlands) are at risk. For more information see: https://www.mdba.gov.au/discover-basin/environment/significant-environmental-sites; and https://www.environment.gov.au/water/wetlands/ramsar.
[26] See for example, the access to information case study relating to the HSI AAT proceedings.

- Our wildlife trade laws do not prohibit our unique wildlife being exported for commercial purposes to convicted wildlife traders.[27]

Case study: Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia

A 2019 expert review of the Act concluded:

Australia has one of the worst extinction rates of any nation, yet there has been little assessment of the effect of its flagship environmental legislation, the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), to prevent species extinction. By coupling remotely sensed forest and woodland data with the distributions of 1,638 terrestrial threatened species, terrestrial migratory species, and threatened ecological communities, we quantified the loss of potential habitat and communities since the EPBC Act came into force in 2000. We found that over 7.7 million ha of potential habitat and communities were cleared in the period 2000–2017. Of this clearing, over 93% was not referred to the Federal Government for assessment, meaning the loss was not scrutinized under the EPBC Act. While 1,390 (84%) species suffered loss, Mount Cooper striped skink, Keighery's macarthuria, and Southern black-throated finch lost 25, 23, and 10% of potential habitat, respectively. Iconic Australian species, such as koala, also lost ~1 million ha (2.3%) of potential habitat. Our analysis showed that the EPBC Act is ineffective at protecting potential habitat for terrestrial threatened species, terrestrial migratory species, or threatened ecological communities. We recommend that when scientifically determinable, critical habitat is demarcated for listed species and communities, which provides absolute protection that is enforced, monitored, and investigated by the regulator. Without a fundamental change in how environmental law is enforced, Australia faces an increasing extinction rate.

Source: https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/csp2.117

These strengths and weaknesses are explored further throughout this submission in terms of what mechanisms should be retained and strengthened, and what provisions should be repealed and replaced.

Barriers to achieving objectives

The 2016 State of the Environment Report outlines six key barriers to effective national management of the environment.[28] None of these barriers can be overcome without national leadership. A new Act, or amendments to the EPBC Act, will need to confront these challenges head-on:

- *lack of an overarching national policy that establishes a clear vision for the protection and sustainable management of Australia's environment to the year 2050 which is supported by*
  - *specific action programs and policy to preserve and, where necessary, restore natural capital and our unique environments, taking into account the need to adapt to climate change*
  - *complementary policy and strengthened legislative frameworks at the national, state and territory levels*
  - *efficient, collaborative and complementary planning and decision-making processes across all levels of government, with clear lines of accountability.*
- *poor collaboration and coordination of policies, decisions and management arrangements across sectors and between managers (public and private);*
- *a lack of follow-though from policy to action;*
- *inadequacy of data and long-term monitoring, which interferes with our ability to apply effective policy and management, and establish adequate early warning of threats. For example, our understanding of even the most iconic and well-known species in Australia is*

[27] See: EDO and HSI (2019) Next generation: Best practice wildlife trade provisions in national law; available at: https://www.edo.org.au/publication/wildlife-trade-best-practice-national-law/
[28] *State of the Environment 2016* Report to the Australian Government, 'Overview', at https://soe.environment.gov.au/theme/overview.

often patchy, and sufficient knowledge of ecosystem processes that maintain the 99 per cent of species that account for Australia's biodiversity is missing;
- *insufficient resources for environmental management and restoration; and*
- *inadequate understanding and capacity to identify and measure cumulative impacts, which reduces the potential for coordinated approaches to their management.*

The argument that state and territory legislation adequately covers the field on environmental issues is not supported by evidence in terms of delivery of environmental outcomes. In 2012 and 2014 EDO was commissioned to produce audits of state and territory biodiversity and planning legislation. The clear conclusion from our audits was *that no state or territory legislation met the full suite of national standards required to effectively protect the environment*. Since these audits were undertaken, many states have actually reduced the protections in legislation – for example in relation to land clearing in NSW and Queensland. (This is discussed further in **Part Two** of this submission).

Costs

Question 6 also asks: *What have been the economic costs associated with the operation and administration of the EPBC Act?*

We recommend in considering the issue of costs, the review needs to look beyond the departmental operational costs and costs relating to project approval processes. The review needs to ask what the economic, social and opportunity costs (including the losses of environmental assets without monetary values) are from the failings of the Act to meet its objectives?

Too often the discussion of the EPBC Act focusses on project approval timeframes and costs, without any fulsome consideration of environmental externalities and values over the medium and long term. For example, the suggestion that the EPBC Act "is resulting in unnecessary uncertainty and delays" (Discussion Paper, p15) needs to be examined further. This does not just involve looking at the total length of the assessment and approval process but also at the: adequacy of the assessment reports being provided by proponents (for example the preliminary documentation, referral information and the EIS), delays by proponents in responding to information requests; and also valuing the role of community input through submission periods etc. Case studies have been examined previously in relation to how much of the total project assessment time elapsed while the process was awaiting action or information from the proponent.[29]

We recommend that the Review examine the issue of costs far more broadly to also consider: costs of continued environmental degradation; costs of inaction on climate change (for example increasing natural disaster and insurance costs); subsidies that undermine environmental goals; and also how to actually value ecosystem services.

Valuing ecosystem services

Sustained investment in biodiversity conservation yields significant benefits by safeguarding and enhancing *ecosystem services* that healthy biological systems provide to humans. Ecosystem services assist food and fibre production, regulate water, soil and atmospheric systems, and support recreational, cultural and mental health.

The concept of ecosystem services is not new, but must be better integrated into national goals and government policies, strategic plans, development assessment and decision-making:

[29] See for example, evidence presented to the 2014 Senate Inquiry into *streamlining environmental regulation, 'green tape', and one stop shops*, available at: https://www.aph.gov.au/greentape.

> *Estimating the value of ecosystem services can reveal social costs or benefits that otherwise would remain hidden. Once identified and understood, these values can be considered and accounted for in the policy and decision-making process.*[30]

In the United Kingdom,[31] United States,[32] Canada[33] and elsewhere,[34] governments and their agencies are integrating ecosystem services into strategic planning, assessment and land management programs. Integrating ecosystem services into our environmental laws is consistent with our recommended primary object of the Act and the *improved valuation* principle of ESD (as discussed below). Importantly this must go beyond environmental agencies – to Treasury, infrastructure, agriculture, aid and trade agency decisions.

New tools proposed in this submission would help to ensure environmental values are properly accounted for. These tools include National Environmental Accounts, bioregional planning, upfront environmental assessment of policy and law reform actions, a National Biodiversity Conservation and Investment Strategy and a new Capital Stewardship Fund to conserve and restore environmental assets.

Future trends and supporting evidence

QUESTION 7: What additional future trends or supporting evidence should be drawn on to inform the review?

The Discussion Paper text under the heading "Businesses will adapt to remain competitive" presents one perspective, and it is unclear what data or analysis is used to make the assertions. This review needs to look fulsomely at different sectors of the economy, particularly the regulated community under the EPBC Act (for example, the resources sector) and to consider where there may inadvertently be incentives to minimise/avoid environmental obligations (for example, fines for non-compliance are minimal where non-compliance is profitable, or where subsidies may incentivise behaviours that undermines environmental goals). As part of a more holistic consideration of the operating context, it may also be useful to consider the extent to which other statutory obligations, like duties to shareholders and corporate reporting obligations, support or hinder environmental objectives.

In addition to the CSIRO Outlook Report noted above, there are a number of trends relevant to this review. For example:

- The changing way we **generate and use energy** is a significant trend that is not acknowledged to date in the review, including predictions about the speed with which renewable energy generation costs will decrease and the pace at which coal has entered structural decline.
- Weather and climate predictions from CSIRO and the Bureau of Meteorology. The recent bushfires have shown the potential for catastrophic impacts on the environment from **extreme weather events** related to climate change. Environmental laws need to be able to effectively plan for, mitigate (where possible) and respond to these trends and events.

---

[30] Ontario Biodiversity Council, *State of Biodiversity 2015 – Indicators report* (p 138), at http://sobr.ca/report/.
[31] In 2013 the UK Government issued guidance for policy and decision makers on using an ecosystems approach and valuing ecosystem services. See: https://www.gov.uk/guidance/ecosystems-services.
[32] In 2015 the then US President issued a White House directive to all federal agencies to develop ecosystem services frameworks in forward planning. See: https://www.whitehouse.gov/blog/2015/10/07/incorporating-natural-infrastructure-and- ecosystem-services-federal-decision-making.
[33] The Ontario Biodiversity Council has set goals and targets to implement ecosystem services approaches by 2020. See *State of Biodiversity 2015 – Summary report* (Target 14) http://sobr.ca/report/.
[34] See for example the Global Footprint Network online tools at https://www.footprintnetwork.org.

- The emerging data about the **health impacts** and costs of climate change, and the public health impacts related to other areas of environmental regulation including biosecurity, and more recently the illegal wildlife trade.
- Corporate social responsibility and **market trends towards sustainability**, triple bottom line accounting, and implementing the SDGs.
- Moves to integrate **indigenous perspectives** in land management and decision-making consistent with UNDRIP.

National Ecosystems Assessment

To ensure that we have a baseline to measure the effectiveness of a new or amended Act, EDO recommends a National Ecosystems Assessment.

This positive flagship initiative should be coordinated by the Environment Department, assisted by a new Sustainability Commission, National EPA and counterpart state/territory agencies (discussed further below). This is a priority activity that could be initiated ahead of (or at least concurrent with) law reform so that it could feed into timely bioregional planning once a new law is in place.

A National Ecosystems Assessment would bring together and enable some of the important new tools and programs recommended in this submission. In particular, it could:

- involve a rapid initial assessment to identify areas under imminent threat, and other immediate and essential actions to protect the national environment, such as the identification and protection of High Conservation Value Vegetation (**interim report**). This kind of assessment is urgently needed in light of the recent bushfires;
- support the Minister's legal duty to identify, assess and list (via the Scientific Committee) all nationally Threatened Ecological Communities within five years (**major report**), with ongoing duties to keep lists up-to-date;
- identify, recognise and map Ecosystems of National Importance and a comprehensive, adequate and representative National Reserve System;
- provide a properly resourced and comprehensive update to Australia biodiversity mapping and integrated data-sharing systems;
- better informing a national network of Bioregional Plans;
- identify baselines, reference points or indicators for a system of National Environmental Accounts, with clear timeframes, stages and budgetary allocations from the Commonwealth, state and territory governments; and,
- promote the concept of *ecosystem services* and identify the benefits (or services) that key natural assets provide to human society,[35] consistent with Aichi targets under the Convention on Biological Diversity.

The UK's National Ecosystems Assessment provides a useful point of reference. With initial findings delivered in 2011, it was a broad collaboration that focused on the connection between ecosystems, the services they provide and emerging pressures on the environment.[36]

Australia's initiative should be a legal requirement that fits within the new framework, as a rapid and dedicated way to identify and list all threatened entities as a priority. An interim and final report should be delivered within five years, with clear interim timeframes, stages

[35] For example, water purification by swamps, pest control by birds, bats and insects, pollination by native bees, carbon storage in wetlands, climate control by urban forests, soil erosion and salinity prevention from rural ecological communities, storm surge protection from coastal mangroves.
[36] Robert Watson & Steve Albon, 'UK NEA: Synthesis of Key Findings' (2011) at http://www.wensumalliance.org.uk/publications/UKNEA_SynthesisReport.pdf: p 15.

and budgetary allocations across all bioregions. The Act should also require the National Ecosystems Assessment to be reviewed and updated periodically, for example, within 10 years of the first assessment's final report.

In summary, in response to the terms of reference and question 6, evidence suggests that the EPBC Act has not been successful in achieving statutory objectives regarding protection of the environment, ESD and biodiversity conservation. Further, the true costs of the operation of the Act – including the regulatory failings – have not been adequately assessed. A number of trends – including for example extreme weather and climatic events and energy use trends – should be brought into this review. A National Ecosystem Assessment and a more comprehensive suite of indicators and evidence is needed to underpin legislative reform to ensure a new (or amended) Act is effective in achieving its objects.

Recommendations:

- **This review incorporates analysis of extreme weather, climatic and health trends.**
- **This review undertakes a broader examination of costs, including consideration of the value of ecosystem services.**
- **A National Ecosystem Assessment be undertaken to underpin legislative reform and to establish a comprehensive suite of indicators to ensure a new (or substantially amended) Act is effective in achieving its objects.**

Part Two: Recommendations for reform

Part Two of this submission makes recommendations for reform relating to **seven themes** in the Discussion Paper:

- **Objects and principles**
- **Scope**
- **Purpose – delivering environmental outcomes**
- **Role of the Commonwealth**
  - **Governance**
  - **Standard setting**
  - **Bioregional planning**
  - **Accreditation**
  - **Compliance and enforcement**
  - **Funding**
- **Indigenous issues**
- **Community participation, transparency and accountability**
- **Specific tools**
  - **Markets and offsets**
  - **Restoration and private land conservation**
  - **Biodiversity provisions**
  - **Heritage provisions**

1. Objects and principles

Discussion Paper Questions:

QUESTION 2: How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?

QUESTION 3: Should the objects of the EPBC Act be more specific?

QUESTION 26: Do you have suggested improvements to the suggested principles? How should they be applied during the Review and in future reform?

A new Environment Act for Australia should have clear objects and be guided by clear principles. This part of the submission addresses:

- **Objects**
  - **Overarching object**
  - **Secondary objects**
  - **Achieving the objects in practice**
  - **Ecologically sustainable development**
- **Principles**

1.1 Objects

QUESTION 3: Should the objects of the EPBC Act be more specific?

Yes. EDO recommends that the Act establish:

- a new overarching object that more clearly directs the purpose of the Act as being the conservation of Australia's environment and biodiversity,
- secondary objects, and
- provisions to ensure objects are effectively operationalised.

Overarching object

The Act should include a primary object to the following effect:

> *The primary aim of this Act is to conserve, protect and recover Australia's environment, its natural heritage and biological diversity including genes, species and ecosystems, its land and waters, and the life-supporting functions they provide.*[37]

This elevates the conservation and restoration of the environment as the primary object of the Act. It ensures biodiversity and ecological integrity are a fundamental consideration in decision-making. Social, economic and equitable issues would continue to be taken into account in decision-making as integrated but secondary considerations, consistent with updated principles of Ecologically Sustainable Development (see below).

Secondary objects

The Act should also include a limited number of secondary objects. For example:

(a) To provide **national leadership** and partnership on the environment and sustainability, and to achieve **ecologically sustainable development**;
(b) **To recover, prevent the extinction or further endangerment** of Australian plants, animals and their habitats, and to **increase the resilience** of native species and ecosystems to key threatening processes, including climate change;
(c) To ensure **fair and efficient decision-making**; **government accountability**; early and ongoing **community participation** in decisions that affect the environment and future generations; and **improved public transparency**, understanding and oversight of such decisions and their outcomes;
(d) To recognise **Aboriginal and Torres Strait Islander** peoples' knowledge of Country, and stewardship of its landscapes, ecosystems, plants and animals; to foster the involvement of the Australia's First Nations peoples in land management; and expand the ongoing and consensual use of traditional ecological knowledge across Australia's landscapes;
(e) To fulfil Australia's **international environmental obligations** and responsibilities, in particular to take all steps necessary and appropriate to achieve the purposes of the following treaties, conventions and their subsidiary instruments (among others):[38]
    (i) the World Heritage Convention;[39]
    (ii) the Convention on Biological Diversity;
    (iii) the Ramsar Convention on Wetlands of International Importance;

[37] This proposal and prioritisation is consistent with recommendations of the *Report of the Independent review of the EPBC Act 1999* (2009) (**Hawke Review**), at 1.49-1.50: *The primary object of this Act is to protect the environment, through the conservation of ecological integrity and nationally important biological diversity and heritage.*
[38] See for example, *Endangered Species Act (United States)* 16 USC S 1531, s. 2.
[39] *Convention Concerning the Protection of the World Cultural and Natural Heritage* (Paris, 1972).

(iv) the Bonn Convention on the Conservation of Migratory Species of Wild Animals
(v) the Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**);
(vi) the United Nations Declaration on the Rights of Indigenous Peoples; and
(vii) the United Nations Framework Convention on Climate Change (as applicable to emissions reduction and carbon management under the Act), and
(viii) special bilateral or multilateral conservation agreements (including agreements with Japan, China and the Republic of Korea to protect migratory birds in danger of extinction).

(f) To recognise and promote the **intrinsic importance of the environment** and the value of **ecosystem services** to human society, individual health and wellbeing.

Achieving the objects in practice

The Act should also include an introductory section that specifies how the objects are to be achieved. For example:

The objects of this Act are to be achieved by:

(a) **requiring Ministers and government agencies** to:
  i) exercise their powers and functions under this Act to achieve the Act's primary aim and objects;
  ii) maintain or improve the environmental and heritage values and ecological character of protected matters under the Act;[40]
  iii) make decisions in accordance with the principles of Ecologically Sustainable Development (**ESD principles** – outlined below);
(b) **partnering with other levels of government** and **participants across all sectors** to achieve environmental goals and apply ESD principles in decisions and actions;
(c) **listing and protection of matters of national environmental significance** (or a similar term), and the effective, mandatory implementation of **recovery planning, threat abatement planning and bioregional planning**;[41]
(d) **establishing independent institutions** to gather evidence, provide oversight of national environmental outcomes and provide advice to decision-makers;
(e) **coordinating all levels of government** to develop national environmental goals, standards, actions and decision-making, including cooperation on bioregional planning, in the interests of strong environmental outcomes;
(f) **applying the principle of non-regression** to environmental goals and protections, and **continuous improvement** in environmental standards and management over time;[42]
(g) **maintaining, improving and measuring Australia's natural wealth**, including through periodic national ecosystem assessments and a system of national environmental accounts; and
(h) ensuring Australia's agencies, people and corporations act as **responsible global citizens** with respect to environmental protection in Australia and overseas.

The objects should also be operationalised through specific plans, standards and goals (for example: net gain of threatened species, no reduction in critical habitat extent and quality, no detrimental change in ecological character of Ramsar wetlands or in the outstanding

[40] Ecological character is used in the Ramsar Convention on Wetlands, for example. It refers to the combination of ecosystem components, processes, benefits and services that characterise a wetland at a given point in time (Ramsar Convention 2005a, Resolution IX.1 Annex A).
[41] In particular to achieve recovery, prevent extinction, and increase resilience.
[42] Non-regression and continuous improvement are proposed as additional ESD principles, but could be expressed separately in the preliminary part of the Act and its objects, as shown here.

universal value of world heritage sites (for example, % coral cover restored in the Great Barrier Reef). Plans, standards and goals are discussed further below.

Ecologically sustainable development

QUESTION 2: How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?

EDO recommends that the Act provide a modernised definition and framework for Ecologically Sustainable Development.

For the past three decades, *sustainable development* has commonly been defined by the international community as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. In Australia this became known as ***Ecologically Sustainable Development*** (**ESD**), namely:

> *'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.*[43]

Under the EPBC Act and several state laws, ESD is to be achieved by the *effective integration of short and long-term environmental, social, equitable and economic factors* in decision-making, along with other important safeguards together known as ESD principles. An effective ESD framework cannot be used simply as a 'balance' or 'trade off' exercise. Rather it recognises that long-term environmental health and socio-economic outcomes are deeply interconnected.[44]

The Australian Panel of Experts on Environmental Law (**APEEL**) has called for a national collaborative discussion to inform the next generation of ESD or its successor.[45] This recognises the fact that ESD is a society-wide goal - it won't be effective if its only implemented through environmental or natural resources legislation - but it remains a core component of environment legislation and an updated definition is needed. Drawing on these definitions and sources, we provide a starting point for next generation ESD principles below.

Achieving ESD requires the effective integration of short and long-term environmental, economic, social, and equitable considerations, including through the following principles (***ESD principles***) in public and private sector decision-making:

- Taking *preventative* actions against likely harm to the environment and human health (**prevention of harm**).
- Taking *precautionary* actions against harm that would be serious or irreversible, but where scientific uncertainty remains about that harm; and engaging transparently with the risks of potential alternatives (**precautionary principle**).

[43] Australian Government, *National Strategy for ESD*, 'What is Ecologically Sustainable Development?' at http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1#WIESD.
[44] As the State of the Environment report 2011 put it, 'Australians can no longer afford to see themselves as separate from the environment.'
[45] APEEL, *Blueprint for the Next Generation of Australian Environmental Law* (2017) at www.apeel.org.au.

- The **present generation have an obligation to ensure:**
    - that the health, diversity and productivity of the environment are *maintained or enhanced* for the benefit of future generations (**intergenerational equity**), and
    - that environmental costs, benefits and outcomes are borne **equitably** across society (**intra-generational equity**).
- Ensuring that *biodiversity and ecological integrity* are a *fundamental consideration* in decision-making, including by preventing, avoiding and minimising actions that contribute to the risk of extinction (**biodiversity principle**).
- Ensuring that the true value of environmental assets is accounted for in decision-making – including intrinsic values, cultural values and the value of present and future ecosystem services provided to humans by nature (**environmental values principle**); and
- That those responsible for generating waste or causing environmental degradation bear the costs of safely removing or disposing of that waste, or repairing that degradation (**polluter pays principle**).

New and additional ESD principles should be considered and adopted, including for *high levels of environmental protection*, *non-regression* of standards and *resilience*:

- **Achieving high levels of environmental protection**, including by requiring:
    - the use of best available scientific and commercial information;
    - continuous improvement of environmental standards, and
    - the use of best available techniques for environmental management.
- Non-regression in environmental goals, standards, laws, policies and protections (**non-regression principle**).
- Strengthening the resilience of biodiversity and natural systems to climate change and other human-induced pressures on the environment (**resilience principle**).

ESD should therefore remain a fundamental reference point in the Act which all decision criteria reflect. Embedding a modernised set of ESD principles as outlined above will ensure that decision-making is consistent with maintaining and strengthening the environmental systems that operate on a local, regional, national and global level.

Further, in relation to cost-benefit analysis, we note that there are certain limitations and assumptions to consider. For example, the use of cost-benefit analysis (**CBA**) assumes that all aspects of the environment can be reduced to a dollar value. It is also difficult to accurately identify what value a future generation will place on a particular ecosystem, ecosystem service or other aspect of the natural environment. Any cost benefit analysis must ensure that true environmental costs are included as to date, environmental values are not adequately and true environmental costs are not adequately represented in CBAs. For example, cost-benefit considerations in many state and Commonwealth Regulatory Impact Statements often may make general statements about low environmental impacts or costs of proposed regulatory changes without transparent evidence or apparent expertise on which to base these claims. As noted in Part One, Question 6 does not ask the right questions – the review also needs to ask and examine what are the economic, social and opportunity costs (as well as losses without dollar values) that come from the failings of the Act?

Continual assessment of the performance of the Act in achieving these elements of ESD is needed. Such analysis would need to include for example whether conditions imposed in response to the precautionary principle are actually effective.

1.2 Principles

QUESTION 26: Do you have suggested improvements to the suggested principles? How should they be applied during the Review and in future reform?

In addition to the principles of ESD, the Discussion Paper seeks feedback on the following principles:

> *Effective Protection of Australia's environment*
> *Protecting Australia's unique environment and heritage through effective, clear and focussed protections for the benefit of current and future generations.*
>
> *Making decisions simpler*
> *Achieving efficiency and certainty in decision making, including by reducing unnecessary regulatory burdens for Australians, businesses and governments.*
>
> *Indigenous knowledge and experience*
> *Ensuring the role of Indigenous Australians' knowledge and experience in managing Australia's environment and heritage.*
>
> *Improving inclusion, trust and transparency*
> *Improving inclusion, trust and transparency through better access to information and decision making, and improved governance and accountability arrangements.*
>
> *Supporting partnerships and economic opportunity*
> *Support partnerships to deliver for the environment, supporting investment and creating new jobs.*
>
> *Integrating planning*
> *Streamlining and integrating planning to support ecologically sustainable development.*

EDO supports the intent of these as guiding principles for legislative design, noting that they are not legal principles, and the detail for how they are implemented must be provided for in both legislation and regulatory practice.

The principles could use stronger wording, for example – to "ensure" ESD, rather than just "support" ESD; and "elevating" the role of Indigenous Australians in land management. The first principle could refer to achieving or delivering environmental outcomes. It is also necessary to clarify the intent behind the word 'focussed' in the first principle to ensure it is consistent with landscape scale approaches and mainstreaming biodiversity conservation (ie, it does not mean 'limited' in area or scope). The second principle may be unclear in terms of what is "unnecessary."

We refer this review to an extensive analysis of principles for environmental law undertaken by the APEEL project. The conclusions are summarised in the following box.[46]

[46] APEEL, *Blueprint for the Next Generation of Australian Environmental Law* (2017) at www.apeel.org.au.

Table 1: SUMMARY OF THE FOUNDATIONS OF ENVIRONMENTAL LAW

Societal goal

A fundamental goal for all environmental laws should be based on an overarching societal goal in relation to environment and development that is the result of a process of consultation and consensus building. This process would involve a reflection on the existing goal of ecologically sustainable development, the UN Sustainable Development Goals and emerging, broader sustainability-based approaches.

Objectives of environmental law

Next generation laws should include concise and specific objectives that are designed to elaborate the broader societal goal and also include a limited number of additional objectives that are fundamental to the specific subject-matter of the legislation. Objects clauses should not extend to the prescription of directing principles.

Design principles

When designing future Australian environmental laws, law makers should design laws consistent with principles promoting:

- 'smart regulation' (e.g. using complementary regulatory instruments and a broader range of environmental actors as regulators);
- particular economic instruments and measures, for example, that polluters pay for their environmental impacts;
- particular tools or mechanisms for environmental management (for example, impact assessment – including environmental, social, health, project and strategic, and also assessment of cumulative impacts);
- environmental democracy such as access to environmental information, public participation and access to justice;
- responsive and flexible environmental governance;
- ecological restoration at a landscape scale; and
- non-regression (that is, there should be no reduction in the level of environmental protection provided by the law).

Directing principles

The next generation of environmental laws should prescribe directing or rules-based principles that are required to be applied as a first priority by decision-makers, as follows:

- the precautionary principle;
- the prevention principle; and
- principles for environmentally sustainable innovation:
  - a high level of environmental protection principle; and
  - a Best Available Techniques principle.

Environmental rights

Legal norms in the form of substantive and procedural rights that give effect to the concept of environmental democracy should be a core component of the next generation of environmental law. These should include:

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

Environmental duties

Individuals, the private sector and governments should be subject to two important general environmental duties in the next generation of environmental law:

- a duty of care to avoid causing environmental harm; and
- a duty on responsible parties to repair environmental damage and restore impaired ecosystems and landscapes to the greatest extent practicable.

Recommendations regarding objects and principles:

- **An overarching object to protect Australia's environment and biodiversity.**
- **Secondary objects to support national environmental leadership, biodiversity stewardship and fair decision-making.**
- **Clear statutory duties and mechanisms to implement and fulfil the objects.**
- **A modernised framework to achieve Ecologically Sustainable Development (ESD), including new principles to support high environmental standards, non-regression and continuous improvement, and resilience to threats.**
- **A strengthened set of reform principles.**

2. Scope of the Act

Discussion Paper Questions:

QUESTION 1: Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?

QUESTION 4: Should the matters of national environmental significance within the EPBC Act be changed? How?

(Note: Question 14 also refers to refining matters of national environmental significance to avoid duplication).

It is vital that national environmental legislation effectively covers the issues of national environmental significance.

EDO recommends that current matters of national environmental significance be retained and strengthened, and the scope of the Act be expanded to include new triggers. This is needed to ensure that our national environment Act adequately addresses the most pressing environmental challenges that we face today and into the future.

The Act must retain federal responsibility for existing matters of national environmental significance – using this or similar terminology (for example, nationally protected matters, national environmental priorities or Commonwealth environmental interests[47]). The Act should also expand federal responsibility to additional matters to overcome the current limitations regarding scope and effectiveness.

A range of prominent legal experts including the members of APEEL are in broad agreement that the Australian Constitution provides significant scope to widen Commonwealth responsibility in environmental matters.[48] The ample Constitutional power for the Commonwealth to expand the scope of the Act is discussed below in theme 4 – Role of the Commonwealth.

This part of the submission addresses:

- **Existing and new matters of national environmental significance**
- **Regulatory power to declare new triggers**
- **Current exemptions under the Act**

2.1 Matters of national environmental significance or 'triggers'

Existing matters of national environmental significance under the EPBC Act should be retained, namely:

1. Nationally listed threatened species and ecological communities (vulnerable, endangered and critically endangered)
2. Migratory species

[47] See for example Australian Panel of Experts on Environmental Law, *Environmental Governance* (2017), Technical Paper 2, at: http://apeel.org.au/papers/.
[48] See for example, Australian Panel of Experts in Environmental Law (APEEL). 'Constitutional authority of the Australian Government to make next generation environmental laws', Technical Paper 2 - Environmental Governance (2017), pp 13-17.

3. World Heritage Areas
4. National Heritage Places
5. Wetlands of international significance (Ramsar wetlands)
6. Great Barrier Reef Marine Park
7. Nuclear actions
8. Water resources (impacts of large coal-mining and coal seam gas projects)
9. Commonwealth areas (land and waters).

In addition to retaining and strengthening these existing triggers, the Act should also use the Commonwealth's significant Constitutional powers (including powers to make laws in relation to external affairs, corporations, international and interstate trade) to enact a suite of expanded 'triggers' under national law. This would provide strategic, coordinated and efficient regulation of key threats and activities, and protect the biodiversity and heritage areas that Australian communities value.

New matters of national significance would be grouped under six **new or expanded triggers**:

- **the National Reserve System** (terrestrial and marine protected areas)
- **Ecosystems of National Importance** (including High Conservation Value Vegetation, Key Biodiversity Areas and wetlands of national importance)
- **Vulnerable ecological communities** (alongside other threatened species and ecological communities)
- **Significant land-clearing activities**
- **Significant greenhouse gas emissions**
- **Significant water resources (expanded beyond large coal and coal seam gas impacts).**

Each of these new triggers is outlined in more detail below.

a. National Reserve System (NRS) – Australia's protected area network

As the Department website explains:

> *The National Reserve System is Australia's network of protected areas, conserving examples of our natural landscapes and native plants and animals for future generations. Based on a scientific framework, it is the nation's natural safety net against our biggest environmental challenges.*
>
> *The reserve system includes more than 10,500 protected areas covering 19.63 per cent of the country – over 150 million hectares. It is made up of Commonwealth, state and territory reserves, Indigenous lands and protected areas run by non-profit conservation organisations, through to ecosystems protected by farmers on their private working properties.*[49]

However, the EPBC Act does not currently recognise the National Reserve System as a matter of national environmental significance. This means that where an action is likely to have a significant impact on part of the NRS it does not have to be referred for assessment or approval.

Consistent with a more strategic approach, the Act should require federal approval of activities that could have significant impacts on areas under the NRS (including terrestrial

[49] See: https://www.environment.gov.au/land/nrs.

and marine protected areas), including Commonwealth and state-based national parks, IPAs and private conservation covenanted land.

At a minimum, this trigger should apply to NRS areas designated as strict nature reserves, wilderness areas and national parks;[50] and private conservation-covenanted lands.[51]

For actions affecting IPAs, Traditional Owners and/or Indigenous land managers could be prescribed as the approval authority if they wish to have this responsibility.[52]

We note that adding the NRS as a new trigger must not create a disincentive for states to declare new national parks. We recommend that the Act should set national goals and targets to complete the NRS as a 'comprehensive, adequate and representative' array of Australia's terrestrial and marine ecosystems, and refer to strategic goals and targets under the Convention on Biological Diversity. New priority areas for the NRS could be identified in the National Ecosystems Assessment and in bioregional plans (discussed further below). Importantly, there should be funding for new protected areas driven by needs identified in bioregional planning processes.

b. Ecosystems of National Importance

The Act should enable identification and listing of **Ecosystems of National Importance**. This is consistent with the Act's dual focus on species and landscape-scale protections. It also reflects the recommendations of the Hawke Review.

Ecosystems of National Importance are areas of outstanding ecological or scientific significance (with proposed criteria below). They need not be currently threatened, and listing would aim to prevent them from becoming so.

Protection of these ecosystems would be proactive as well as reactive. Listing would have two key effects:

- actions that may have impacts on these areas would require assessment and approval from the national EPA[53]; and
- bioregional planning processes and/or site-based plans of management would need to proactively protect them.

By identifying and protecting exceptional concentrations of biodiversity, this new matter of national environmental significance would help the Commonwealth to protect the most species and valuable ecosystem services at the least management cost.[54]

---

[50] IUCN Categories Ia, Ib and II. On IUCN categories see further the Department of Environment: https://www.environment.gov.au/node/20957. The Commonwealth manages 6 national parks and 59 marine reserves, although most national parks are state-based. On Commonwealth national parks see: www.environment.gov.au/topics/national-parks. Commonwealth reserves are currently managed under Part 15 Division 4 of the EPBC Act (with interim protections available as 'conservation zones'). Many works cannot be carried out in a Commonwealth reserve unless permitted by a management plan (EPBC Act s 353). Activities on *'Commonwealth land'* with a significant impact on the environment require approval under Part 3 of the EPBC Act (ss 26-27A).

[51] About 1200 private conservation covenanted lands are currently in the NRS.

[52] This proposal would need fulsome input from and co-design with Aboriginal and Torres Strait Islander peoples and other experts. Section 5 of this submission proposes consultation on other specific ways to increase opportunities to indigenous engagement and leadership.

[53] To increase clarity and certainty, certain types of clearing may be prohibited under the proposed trigger for significant land clearing.

[54] Myers et al. '*Biodiversity hotspots for conservation priorities', Nature,* volume 403, 853–858 (24 February 2000).

Ecosystems of National Importance should include the following examples – many of which are not currently eligible for protection under the EPBC Act:

- High concentrations of biodiversity such as Key Biodiversity Areas[55] and biodiversity hotspots;[56]
- High Conservation Value Vegetation[57] (see further explanation below);
- Nationally important wetlands;[58]
- Travelling Stock Reserves;[59]
- Significant wildlife corridors;[60]
- Wild rivers;[61]
- Outstanding representations of particular Australian landscapes or seascapes (which may later become protected under the National Reserve System); and
- Climate refugia (current and potential).[62]

This new category is very similar but not identical to protections recommended in the Hawke Review. Namely, to 'include "ecosystems of national significance" as a new matter of national environmental significance. The "matter protected" should be the ecological character of a listed ecosystem.[63]

EDO recommends listing of Ecosystems of National Importance should be based on the area meeting one or more of the following **criteria**, set out in the Act and regulations:

- it has high comparative biological diversity within its ecosystem type (this could be identified using classifications such as biodiversity hotspots and key biodiversity areas);
- it provides critical nationally important ecosystem functions (which could include carbon sequestration, protection of drinking water catchments, prevention of erosion of slopes and soils, or aquatic nursery grounds for example);
- it has a significant potential contribution to building resilient sustainable landscapes;
- it contains high value remnants of a particular type of habitat;
- it contains high value areas that create connectivity between other ecosystems;

[55] See for example, Birdlife Australia, 'Identifying KBAs', http://www.birdlife.org.au/projects/KBA/identifying-kbas.
[56] See (former) Department of Environment and Energy, 'Australia's 15 National Biodiversity Hotspots', at 'http://www.environment.gov.au/biodiversity/conservation/hotspots/national-biodiversity-hotspots.
[57] See for example, High Conservation Values Network, at https://www.hcvnetwork.org/about-hcvf.
[58] The Australian Wetlands Database holds descriptions of more than 900 Directory of Important Wetlands in Australia. Only 65 wetlands are internationally recognised under the Ramsar Convention. See: http://www.environment.gov.au/water/wetlands/australian-wetlands-database/directory-important-wetlands.
[59] For example, the Biodiversity chapters of the *NSW State of the Environment* reports in 2012 and 2015 noted that TSRs contain some of the best remaining examples of remnant biodiversity in regional NSW. They also provide essential wildlife corridors on public land.
[60] See (former) Australian Government Department of Environment and Energy, http://www.environment.gov.au/topics/biodiversity/biodiversity-conservation/wildlife-corridors/what-are-wildlife-corridors.
[61] See for example Stein et al. 'The Identification of Wild rivers', Australian Heritage Council,1998, www.environment.gov.au/heritage/ahc/publications/identification-wild-rivers. See also NSW Office of Environment and Heritage 'Wild rivers', http://www.environment.nsw.gov.au/parktypes/wildrivers.htm.
[62] The Department of Environment's draft Conservation Investment Strategy defined climate refugia as: 'areas that are relatively buffered from contemporary climate change, where over time biodiversity can retreat to, persist in, and can potentially expand from, as the climate changes' – see: https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/biodiversity-conservation-trust/investment-strategy. The US *Endangered Species Act* gives an example of how climate-related shifts can be integrated into law. Its rules enable potential critical habitat to be listed and protected even if a threatened species is not yet present there.
[63] Hawke Review (2009), recommendation 8. *Ecological character* refers to the combination of an ecosystem's components, processes, benefits and services (see e.g. Ramsar Convention 2005a, Resolution IX.1 Annex A).

- it is significant in building a comprehensive, adequate and representative system of habitat types in Australia;[64]
- it is an intact natural landscape that contains viable populations of the great majority of the naturally-occurring species in that type of landscape, in natural patterns of distribution and abundance;
- it provides habitat critical to the long-term survival of listed threatened species;
- it is a climate change refuge for nationally-threatened species or ecological communities (or is likely to become so in future), or is otherwise of national importance; or
- it is under severe and imminent threat.

Ecosystems of National Importance as recommended are distinct from threatened ecological communities, as listing could occur whether or not the ecosystem is threatened.[65] They are distinct from Ramsar wetlands and World Heritage areas, as the ecosystems need not be protected by international agreements, but deserve national protection.[66]

Ecosystems of National Importance should be identified in various ways under the Act:

- a prioritised list of Ecosystems of National Importance would be identified for protection on commencement of a new Act, finalised by the Scientific Committee;
- identification and mapping via a National Ecosystems Assessment;
- identification and mapping in bioregional plans, which identify both *regionally* and *nationally* important ecosystems for strategic protection;
- a public nomination process established in the Act;
- the Minister may request the Scientific Committee to consider a nomination; and
- an accreditation process to recognise protected areas identified under state and territory laws – such as Areas of Outstanding Biodiversity Value in NSW[67] and critical habitat elsewhere (this will reduce duplication and provide for efficient national recognition of important ecosystems identified by states).

Overall, **Ecosystems of National Importance** is an umbrella term that reflects a strategic, landscape-scale focus. It encompasses existing and emerging concepts that recognise areas of rare or concentrated values, such as Biodiversity Hotspots, Key Biodiversity Areas, Areas of Outstanding Biodiversity Value[68] and High Conservation Value Vegetation (as explained further in the following box).

[64] This criterion would be used if necessary as a supplement or precursor to National Reserve System (NRS) protection, noting that the NRS is proposed as a separate nationally-protected matter above.
[65] Note: *ecosystems* include non-living components and features.
[66] The primary Constitutional basis for this trigger would therefore be the Convention on Biological Diversity rather than the World Heritage or Ramsar Convention, for example.
[67] See Part 3 of the *Biodiversity Conservation Act 2016* (NSW).
[68] The *Biodiversity Conservation Act 2016* (NSW) provides for Areas of Outstanding Biodiversity Value (including critical habitat and other areas) to be declared and prioritised for private conservation funding.

High Conservation Value Vegetation

As part of a wider focus on Ecosystems of National Importance, the new Act should aim to identify and permanently protect High Conservation Value Vegetation (**HCV Vegetation**) from land-clearing and degradation, including deforestation and forestry actions.[69] It would regulate and assess actions across all sectors on private or public land identified as containing HCV Vegetation.

The term High Conservation Values draws on six recognised categories.[70] HCV Vegetation could also be used to help identify international protections under the Act.[71]

It is proposed that HCV Vegetation should include all primary 'old growth' forests, with other secondary or regrowth vegetation to be listed as HCV based on peer-reviewed scientific principles. It is envisaged that HCV Forests would be identified and mapped as part of the broader National Ecosystems Assessment (staged over five years) and protected as Ecosystems of National Importance.

Protection would be further secured through the creation of formal protected areas added to the National Reserve System; effective and well-resourced conservation management of forests and plantations; and private conservation agreements or incentive schemes on private lands containing HCV Vegetation.

This approach would aim to be consistent with, and help to achieve, Australia's conservation obligations under the Convention on Biological Diversity and its carbon storage and ecosystem resilience obligations under the Paris Climate Change Agreement.[72]

A more sustainable land sector would also be promoted by establishing a significant land clearing trigger as proposed below.

c. Vulnerable ecological communities

The current trigger should be expanded to include a requirement to assess likely significant impacts on vulnerable ecological communities. This is consistent with a precautionary approach and would ensure cumulative impacts on vulnerable communities are taken into account before it is too late and the community needs to be up-listed.

Similarly, further consideration could be given to extending the trigger to 'near threatened' or conservation dependent species too, to ensure that a proposed action is consistent with the identified conservation measures.[73] For example, the trigger could be limited to actions inconsistent with conservation measures identified in the listing advice. EDO has previously prepared legal advice identifying shark species listed as conservation dependent, when they actually met the criteria for the endangered category and therefore warranted stronger protection and clearly identified conservation measures.

d. Significant land-clearing trigger

As noted, the EPBC Act is currently ineffective at addressing the most significant threats to biodiversity including habitat loss through vegetation clearing, along with the release of significant carbon emissions. Accordingly, EDO recommends that a new Act should adopt a trigger to regulate significant clearing of native vegetation (**land-clearing trigger**). Land-

[69] As noted in this submission, EDO recommends that new or amended laws should replace the Regional Forestry Agreements and include mechanisms for identifying and protecting High Conservation Value Vegetation.
[70] See HCV Network (2017) (a member-based group of prominent conservation NGOs, est. 2005) at: https://www.hcvnetwork.org/about-hcvf/what-are-high-conservation-value-forests.
[71] In particular, forest species and ecosystems protected by international agreement (concerning the actions of Australian corporations overseas, such as forestry, mining companies and banks).
[72] See for example, Paris Climate Change Agreement Article 7, at 7.9(e).
[73] Note in part 7 of this submission we recommend replacing 'conservation dependent' with 'near threatened' to better align with recognized IUCN categories.

clearing that meets certain thresholds should be a controlled action that requires federal assessment and approval. Sensitive areas such as High Conservation Value Vegetation (**HCV**) should be off-limits to clearing other than for clearly identified conservation and emergency management purposes.

There is currently no specific trigger in the EPBC Act to regulate the serious impacts of land-clearing and degradation, including deforestation. Land-clearing can only be referred to the Commonwealth if the clearing action is likely to have a significant impact on a listed matter of national environmental significance - for example, an internationally protected wetland, or mapped habitat of nationally threatened species.

Land-clearing is mainly regulated by the states and territories, with limited effectiveness or strategic oversight. High levels of clearing are still lawful or unregulated, and illegal clearing continues with limited resourcing for enforcement at state or federal level. In recent years state laws have been weakened, putting national biodiversity, water and soil health at risk, and making it more expensive and difficult to achieve greenhouse gas reduction targets. The following case study evidences problems with Northern Territory native vegetation laws, including the sheer scale of clearing permitted at the state and territory level.

Case study: Land clearing at Maryfield Station, Northern Territory

In a landmark ruling, the Northern Territory Supreme Court revoked a permit to clear more than 20,000 hectares of native vegetation at Maryfield Station, southeast of Katherine, NT. North Star Pastoral had been granted a permit to clear 20,431 hectares in 2017 for planting pasture and grazing stock. This was the single largest land-clearing permit ever to be issued in the Northern Territory, and was granted without the proponent being required to undertake an environmental impact assessment under the NT's environmental laws. The estimated greenhouse gas emissions from this permit would have been 2-3 million tonnes, about 18.5% of the Northern Territory's entire annual emissions.

In a legal first in the NT, the Environment Centre Northern Territory (ECNT), represented by the EDO, challenged the permit to allow the clearing, including on climate change grounds, and was successful in having the permit declared invalid.

The proponent has subsequently applied for, and received approval to clear 5,000 ha at Maryfield Station (again, without any proper environmental impact assessment), and the NT's legislation contains no mechanism to prevent the 'stacking' of further land clearing permits nor to properly consider the cumulative impacts of land clearing.

It is extraordinary that clearing of this scale was not referred to the Commonwealth and did not trigger the EPBC Act.

A comprehensive federal land-clearing trigger would ensure that Commonwealth efforts to preserve national biodiversity, reduce greenhouse gas emissions and achieve landscape-scale conservation are not undermined by a constantly changing patchwork of state land clearing laws and policies.

A new land-clearing trigger should include three elements, based on *scale*, *sensitivity* and *high conservation value*. Any of these would constitute significant land-clearing that requires Commonwealth assessment, approval to proceed, or outright prohibition:

- ***Scale:*** proposals to clear 100 hectares or more of native vegetation in any *two year period* (designed to record and regulate cumulative impacts);
- ***Sensitivity***: a schedule of *regulated* activities, regardless of the scale of clearing proposed (e.g. low-level clearing in over-cleared catchments); and

- ***Protected area prohibitions:*** a scheduled list of *prohibited* activities[74] in nationally protected areas (for example – clearing, modification or degradation of native vegetation that is known or critical habitat for endangered species or ecological communities; High Conservation Value Vegetation, Key Biodiversity Areas and other Ecosystems of National Importance; national heritage places and Ramsar wetlands).[75]

It would be an offence to undertake significant land-clearing without Commonwealth approval, and an aggravated offence to undertake prohibited clearing. Applications would be assessed by the National EPA against scientific guidelines, requirements in bioregional plans, recovery plans and other relevant strategies, taking account of local data and any assessments and approvals conducted at state or territory level.

A draft of how a native vegetation clearing trigger could be drafted in the current framework is at **Appendix A**.

e. **Significant greenhouse gas emissions trigger**

The Bramble Cay Melomys is the first Australian mammal to disappear as a direct result of climate change. Nominated as an endangered species by HSI in 2006, its island home was increasingly inundated by sea level rise. A delayed response from state and federal agencies turned a species emergency into an extinction tragedy.[76] The bleaching of the Great Barrier Reef, also a matter of national environmental significance in its own right and as a World Heritage area, is another key example of climate change repercussions having significant degrading impacts on our nationally important environmental values. There are many such examples from around Australia including the loss of Tasmania's giant east coast kelp forests, and the 2019 fires caused by unprecedented lightning strikes in the Tasmanian Wilderness World Heritage Area which destroyed Gondwanan landscapes - both events linked to climate change.

Human-induced climate change has been listed as a key threatening process to biodiversity for nearly two decades. Yet the extinction of the melomys and the increasingly serious degradation of the Reef are both harbingers of biodiversity loss that Australia will increasingly face if our regulatory systems fail to respond more effectively to climate change.

Ideally, Australia would introduce legislation to place a cost on greenhouse gas emissions and legislate targets for emissions reductions across all sectors and relevant decision-making frameworks as a centralised legal framework. (The need for stand-alone climate legislation is noted below in this submission under – Additional issues). In the absence of specific climate legislation, national environmental legislation must also address and properly regulate the impacts of climate change on biodiversity. This means systematically embedding greenhouse gas emission reduction and adaptation in environmental law, policy and decision-making frameworks.

The Climate Council states:

> *The inevitable conclusion from the commitment by the world's governments to protect humanity from climate change is that the vast bulk of fossil fuel reserves*

[74] Limited exemptions would allow for environmental conservation and emergency management works.
[75] This would be consistent with any red lights or prohibitions identified in the proposed Ecosystems of National Importance trigger.
[76] Woinarski et al. 'The contribution of policy, law, management, research and advocacy failings to the recent extinctions of 3 Australian vertebrate species' (2016) *Conservation Biology*.

> *cannot be burned. To have just a 50:50 chance of preventing a 2°C rise in global temperature: 88% of global coal reserves, 52% of gas reserves and 35% of oil reserves are unburnable and must be left in the ground. Put simply, tackling climate change requires that most of the world's fossil fuels be left in the ground, unburned.*
> *…*
> *What does this mean for Australia? If all of Australia's coal resources were burned, it would consume two-thirds of the global carbon budget based on a 75% chance of meeting the 2°C warming limit. For Australia to play its role in preventing a 2°C rise in temperature requires over 90% of Australia's coal reserves to be left in the ground, unburned. Similarly, the development of new coal mines, particularly the Galilee Basin, is incompatible with tackling climate change. Instead, if developed, they could well become stranded assets in a world that is rapidly cutting carbon emissions.*[77]

A national trigger to oversee high greenhouse gas emitting projects has long been a major gap in the national environmental law. Setting aside the biodiversity imperative, Australia needs to urgently ramp up its efforts to meet the Paris Agreement with an economy-wide legal framework and carbon budget[78] that is consistent with limiting warming to 1.5 degrees.

While this could be dealt with via standalone legislation, a new Environment Act trigger (or trigger inserted into the EPBC Act) would link Australia's carbon accounting and emissions reduction targets with impact assessment and development conditions.

The trigger could have two limbs:

- At a strategic level, the Act would require decision-makers to consider climate change mitigation and adaptation opportunities in strategic assessments and bioregional planning processes.
- At the project level, the national EPA would assess projects with major greenhouse footprints, reject unacceptable climate impacts, and apply conditions and limits on other assessable projects.

Clearly inappropriate activities which pose significant greenhouse gas emissions, including downstream 'scope 3' emissions resulting from the activity, should be prevented from being approved or applied for under the EPBC Act where in exceedance of Australia's carbon budget. The mechanisms used in the Act to prevent approval of nuclear installations and designated commercial fishing activities provide helpful examples of how clearly inappropriate greenhouse gas emitting activities could be prohibited under the Act.[79] These activities could include, for example, fossil fuelled power stations, thermal coal mines and gas activities above a specified threshold.

At present, EPBC Act assessment and conditions related to climate change can only be incidental to protecting listed matters of national environmental significance, such as threatened species or world heritage areas. The Environment Minister cannot definitively review or reject a proposal on the grounds that its greenhouse gas emissions are excessive or an unacceptable risk to the environment or the community.

Most sources of Australia's emissions require some form of development approval at the state or territory level (for example, land-clearing, mining, new power stations and major

[77] See: http://www.climatecouncil.org.au/uploads/a904b54ce67740c4b4ee2753134154b0.pdf piii-iv.
[78] For example, the Climate Change Authority (2012) recommended that Australia adopt a national emissions budget of 10.1 billion tonnes CO_2-e for the period 2013 to 2050.
[79] This power has been used in the EPBC Act for inappropriate commercial fishing activities (Ch5B) and certain nuclear installations (s140A).

transport infrastructure). Yet state planning laws do not require decision-makers to meaningfully take into account a project's impacts on climate change.[80] States do not generally impose conditions to minimise climate impacts, plan for adaptation or set cumulative carbon budgets.[81] Climate change readiness, like biodiversity protection, needs national leadership.

Previous ministers and several reviews have considered or recommended a greenhouse trigger under the EPBC Act.[82] However, uncertainty and polarisation of climate and energy policy remains problematic. A greenhouse trigger under a new or amended Act would complement the proposed land-clearing trigger. It would also need to interact with any sector-specific laws and emissions reduction policies.[83]

Overall, in the absence of standalone Commonwealth climate legislation, a greenhouse trigger in environmental legislation would give the national EPA strategic oversight of high-emissions proposals that are not sufficiently regulated by existing laws; and would ensure strategic plans under the Act are climate-ready.

We recommend:

- Add a greenhouse gas emission trigger that recognises **any development that produces over 100,000 tonnes of CO2 equivalent per year** (including downstream emissions) as a matter of national environmental significance.
- This should be supplemented by provision for all projects on a **designated development list** (including expansion of existing projects and significant land use change, including significant land clearing (if no separate clearing trigger) and motorway projects etc) to trigger the approval provisions. This would ensure the trigger was more comprehensive in capturing diffuse emissions. A quantitative trigger is easier to apply and administer but might miss smaller but still significant projects, hence the need for a schedule list.
- For clarity, high emission projects should be prohibited or unable to be approved where they are in exceedance of Australia's carbon budget.
- Best practice climate EIA must include mandatory consideration of scope 3 emissions in applying the trigger.
- We are also recommend a **call in power** – this could potentially capture projects that may have a significant climate impact that aren't necessarily covered by the threshold or the designated development schedule.

In addition to a trigger, climate considerations need to be embedded in relevant plan-making processes and standard setting mechanisms under the Act, including:

- Bioregional plans – to assist adaptation planning including for developments in hazard zones (bushfire/floods), wildlife corridors/climate refugia. (This should be coordinated with states and territories);
- Consideration for strategic assessments in terms of both emissions reduction and adaptation planning;

[80] See NSW Planning for Climate Change Report available at: www.edo.org.au.
[81] Many states have recently set emissions reduction targets. Some have been legislated, and this is to be commended. However, state laws do not set systematic carbon budgets, nor do they cap or forecast cumulative emissions from developments they approve.
[82] When Environment Minister Robert Hill introduced the EPBC Bill in 1998, he noted his government's commitment to negotiate a greenhouse trigger once the Act was passed: Senate Hansard, *Environment Protection and Biodiversity Conservation Bill 1998* [1999], Second Reading Speech, 22 June 1999, at 5990. The Hawke Review proposed an interim greenhouse trigger until an economy-wide carbon price was in place, and a requirement for strategic-level mitigation (recommendation 10).
[83] For example, electricity, mining, forestry, the land sector and native vegetation clearing, livestock agriculture, vehicle emissions, major transport infrastructure, building efficiency and waste.

- Recovery plans – as highlighted by the recent bushfires recovery actions may need to be reviewed and strengthened to recover species and build ecosystem resilience;
- Emergency listing provisions of species and ecological communities most at risk;
- Standard setting for air pollutants;
- In all relevant decisions to ensure the objects of the Act are operationalised; and
- National plans, standards and goals – this can and should be linked to setting carbon budgets.[84]

As stated throughout this submission, ideally, we need a national Climate Change Act to ensure a whole-of-govt response, but getting climate change provisions and a trigger in environmental law is an essential reform in the short term.

f. Significant water resources trigger

Australia's water regulation is at a crossroads. It is a complex area of regulation at all levels,[85] but environment legislation does play an important part at the federal level.

In 2013, a limited 'water trigger' was added to the EPBC Act. Water resources are currently a matter of national environmental significance where a large coal mining or coal seam gas (**CSG**) project would have a significant impact on a water resource. A 2017 statutory review confirmed the water trigger is operating effectively within its legislative scope, including the application of independent expert scientific expertise to consideration of impacts to water of coal seam gas and large coal mining developments.[86]

In 2017, revelations of alleged water theft, poor monitoring, systemic non-compliance and potential corruption shook public faith in Australia's water management framework more generally, particularly in the Murray-Darling Basin.

While much of the ongoing law reform response is outside the scope of this review, consideration should be given to expanding the water trigger to assess significant impacts on other key water resources, beyond large coal mining or CSG projects. This would ensure appropriate assessment and scrutiny of cumulative project impacts, foster strategic linkages and help restore public faith in how water is managed and shared (for example between farmers and extractive industries).

We therefore recommend the trigger be expanded to include shale gas[87], consistent with the recent findings and recommendation of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory*, which noted that there is no rationale to apply the water trigger to CSG and large coal mines but not to shale gas, given water use is also of high environmental significance to shale gas projects.[88] More generally, the trigger could be expanded to apply to all mining activities, that may have a significant impact on water resources.

---

[84] We note this could be done in stand alone climate legislation as recently proposed by Hon Zali Steggall MP see:
https://www.zalisteggall.com.au/climate_change_national_framework_for_adaptation_and_mitigation_bill_2020
[85] Extensive analysis of NSW and national water law is available at:
https://www.edonsw.org.au/water_management_policy
[86] S. Hunter, *Independent Review of the Water Trigger Legislation*, 2017, at:
http://www.environment.gov.au/epbc/publications/independent-review-water-trigger-legislation.
[87] Final Report of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, Chapter 7,* Recommendation 7.3, see: https://frackinginquiry.nt.gov.au/inquiry-reports?a=494293
[88] Final Report of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, Chapter 7,* Recommendation 7.3, see: https://frackinginquiry.nt.gov.au/inquiry-reports?a=494293

2.2 Regulatory powers to declare matters of national environmental significance

Finally, in relation to expanding the scope of the Act by way of triggers, the Act should retain and strengthen a clear power for the Environment Minister to specify additional protected matters or controlled actions in the regulations. Similar powers exist in the EPBC Act but have not been exercised to date.[89]

This provision would allow a new national EPA to assess emerging actions or cumulative impacts that do not fall within an existing trigger. There has to be flexibility to add new MNES or other regulatory tools in response to changes in technology, changes in industry practices and emerging environmental issues (for example, the water trigger was introduced in response to the emergence of unconventional gas and changes in coal mining practices). The recent bushfires also indicate that our laws may not be fully equipped to address catastrophic impact events.

Environmental regulation must keep pace with what is happening in both the economy and the environment. This power would complement the general power to 'call in' proposed actions that have not been referred to the Department or new EPA. New matters declared in the regulations must be justified in the national environmental interest and fall within Commonwealth constitutional powers.

2.3 Current exemptions

When discussing the appropriate scope of our national environmental law, it is also necessary to consider what activities are currently exempt from the Act.

We recommend that the review consider three current exemptions that undermine the intent of the Act:

- The delegation of the assessment and approval of offshore petroleum by **NOPSEMA**;
- The regulation of forestry under **Regional Forestry Agreements (RFAs);** and
- The **national interest exemption**, that for example, currently exempts broad categories of activity from the operation of the Act.

We note up front that there is a high level of concern regarding **Regional Forest Agreements**. A range of serious concerns have been raised at our recent EPBC Act review seminars and we have been contacted by concerned community members and scientists across the country. There is well-founded concern about the roll over of RFAs in NSW and just recently in Victoria, in the absence of evidence that they are achieving the required environmental outcomes. These concerns are exacerbated by the continuation of the RFAs without proper assessment of the impacts of recent bushfires. EDO strongly agrees with recent analysis that concludes the current RFAs are no longer tenable.[90]

These three issues are discussed further below in theme 4 Role of the Commonwealth - Accreditation.

[89] For example, the provisions could be based on EPBC Act s. 25, with some drafting clarifications.
[90] We refer the review to the recent EJA report *No longer tenable: Bushfires and Regional Forest Agreements*, available at: https://www.envirojustice.org.au/wp-content/uploads/2020/03/EJA-report-No-longer-tenable-1.pdf

Recommendations regarding scope of the Act:

- **Retain existing matters of national environment significance triggers**
- **Add new triggers for:**
  - **the National Reserve System (terrestrial and marine protected areas)**
  - **Ecosystems of National Importance (including High Conservation Value Vegetation, Key Biodiversity Areas and wetlands of national importance)**
  - **Vulnerable ecological communities (alongside other threatened species and ecological communities)**
  - **Significant land-clearing activities**
  - **Significant greenhouse gas emissions (including prohibiting specified greenhouse gas activities that are in exceedance of Australia's carbon budget)**
  - **Significant water resources (expanded beyond coal and gas impacts).**
- **Include a regulatory power to add new triggers**
- **Review exemptions for regulating offshore petroleum by NOPSEMA, forestry under Regional Forest Agreements, and activities under the national interest exemption.**

3. Purpose of the Act - delivering environmental outcomes

Discussion Paper Questions:

QUESTION 5: Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

QUESTION 8: Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

QUESTION 9: Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?

QUESTION 22: What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?

A clear theme in the Discussion paper focuses on process versus outcomes. The Discussion Paper states:

> *Legislation should be about achieving clear, specifically determined outcomes, rather than compliance with process. This requires improved performance measurement and reporting to monitor impacts and performance, help set expectations and improve trust in the system.*

And a number of questions refer to environmental outcomes as opposed to the current rules-based approach.[91] This part of the submission addresses this theme in terms of:

- **Priorities for reform**
- **Recommendations for reform to deliver outcomes**
  - **Articulating outcomes**
  - **Process for ensuring and delivering outcomes**
- **Oversight of outcomes**
  - **Mandatory monitoring and reporting requirements**
  - **Online Hub and public registers for reporting**
  - **State of Environment and National Sustainability Outcomes reporting**
  - **National Environmental Accounts**
  - **Mandatory public inquiries into extinction**

[91] See Discussion Paper, p21.

3.1 Priorities for reform

QUESTION 5: Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

EDO recommends that the Act be substantially overhauled, if not re-written as a new Environment Act. It will not be sufficient to choose certain parts of the legislation to amend. Evidence-based comprehensive review of the strengths and weaknesses of the Act as a whole is required to ensure effective provisions are retained and resourced, and ineffective clauses are repealed or re-written.

It is therefore not a matter of focussing on ***either*** "assessment and approval processes ***or*** on biodiversity conservation" (emphasis added) as suggested in Question 5. The two issues are intrinsically related. Similarly, legislation needs *both* incentive mechanisms as well as regulatory controls. Best practice environmental legislation involves providing a mix of tools, and applying the appropriate tool or mechanism best fitted for delivering the desired outcome.

We note many state jurisdictions have separate legislation for biodiversity conservation and for planning assessment and approval processes. While this can allow for shorter more focused Acts, it does not necessarily deliver better environmental outcomes where planning processes (for example to fast track major project approval processes) can override environmental protections in separate legislation. This would not be appropriate at the federal level – given international obligations, focus must remain on protecting matters of national environmental significance. As noted, based on audits conducted by EDO, no state or territory planning and biodiversity laws meet national standards. It is therefore not simply a matter of focussing separately on approvals and biodiversity conservation.

Analysis and discussion on this question should be supported by data from the federal department about the extent to which elements of the EPBC Act have been used, and whether they have been successful in delivering environmental and biodiversity outcomes.

The current drought, bushfire and climate crisis show that integrated joined-up strategic thinking is needed now more than ever.

As part of a comprehensive review and re-write, (as noted above) we have identified the following priority areas for reform to ensure the Act identifies and delivers environmental outcomes:

Scope and national leadership

- A new Australian Environment Act that elevates environmental protection and biodiversity conservation as the primary aim of the Act, consistent with Australia's international obligations.
- Duties on decision makers to exercise their powers to achieve the Act's aims – ie, deliver environmental outcomes.
- Effective mechanisms to addresses the most significant environmental challenges: climate change, land clearing, and cumulative impacts. In addition to existing triggers, new triggers for federal protection should include:
    - significant greenhouse gas emissions, (in addition to other measures to address climate change throughout the Act, for example, adaptation planning through bioregional plans and recovery plans),

- significant land-clearing activities,
- the National Reserve System (terrestrial and marine protected areas),
- Ecosystems of National Importance,
- vulnerable ecological communities (alongside other listed species, populations, ecological communities and critical habitat), and
- significant water resources (beyond large coal and coal seam gas project impacts).

Required outcomes should be identified for each of these matters.

Governance and accountability

- Two new statutory environmental authorities – a National Environment Protection Authority (EPA) and a National Sustainability Commission (Sustainability Commission) should be established to identify outcomes and ensure they are achieved.
- To ensure outcomes are progressed, accountability mechanisms should be established to hold the regulator and decision-makers to account including:
  - Access to information and data disclosure provisions to ensure greater transparency,
  - Public participation in decision-making and planning, and
  - Third party review rights (including merits review).
- Greater emphasis on Indigenous leadership and rights (including free prior informed consent requirements), land management and biodiversity stewardship, including formal recognition of Indigenous Protected Areas.

Outcomes and efficiency

- Improved national standards to drive best practice including:
  - A clear process for accreditation of assessment processes that meet strict national standards (for example, biodiversity offsets), with retention of Commonwealth approval and call-in powers,
  - Clear upfront guidance on assessment requirements (including red lights) to improve certainty,
  - Clear objective decision-making criteria set out in legislation,
  - Strengthened strategic assessment and bioregional planning provisions, and
  - Independently appointed and accredited consultants to improve assessment quality and information.
- A national environmental data and monitoring program that links federal, state and territory data on biodiversity, strategic planning and environmental impact assessment (underpinned by a National Ecosystems Assessment). This is needed to measure outcomes and trends.
- Improved regulatory culture and outreach, and resource effective compliance and enforcement.

EDO strongly supports innovative approaches that incentivise environmental protection (Question 22), such as incentives for private land conservation. However, we do not believe that a priority for this review should be the removal of regulatory requirements as suggested in Question 5. As discussed further below, there is a lack of evidence that self-regulation is effective in ensuring environmental outcomes. In contrast, there is evidence to show self-regulation trends at the state level are failing to deliver environmental outcomes (see the case study below - under Accreditation – where a NSW Audit Office review and a Natural

Resources Commission review have both identified regulatory failure in relation to land clearing under new self-assessable codes in NSW).[92]

It is not simply a matter of having innovation *or* regulation (carrots *or* sticks). To deliver outcomes, the law must have both. As noted, best practice environmental legislation incorporates a mix of tools – applying the appropriate to tool to the action or actor.

3.2 Recommendations for reform to deliver outcomes

QUESTION 8: Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

QUESTION 9: Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?

QUESTION 22: What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?

Articulating outcomes

At the outset, we recommend that the review and resulting legislation should identify key outcomes that are to be delivered through implementation of the Act, and improved implementation of the new objects (as discussed above). By way of example, we note that the Places You Love Alliance have identified a set of outcomes as outlined in the following box.

Places You Love Brief: Key outcomes under National Environmental Law Reform March 2019

*To ensure that we **address the growing extinction and pollution crisis** that is gripping the nation, the next Australian Government must create laws that:*

1. Ensure the Federal Government assumes responsibility and leadership for reversing the decline in Australia's environment;
2. Ensure zero destruction of primary, remnant, old-growth or high-conservation value forests and bushland;
3. Prevent the extinction of native fauna and flora;
4. Protect and recover key biodiversity areas, threatened ecological communities and threatened species including strict protection for their critical habitats;
5. Substantially reduce Australia's greenhouse gas pollution and increase carbon sequestration in biodiverse landscapes;
6. Safeguard freshwater ecosystems, including from extractive and industrial processes;
7. Reduce, to as close to zero as possible, air pollution, plastic pollution and chemical pollution across Australia;
8. Maintain and strengthen the prohibition on domestic nuclear power, enrichment and reprocessing whilst advancing responsible domestic radioactive waste management.
9. Safeguard the natural and Indigenous cultural values of Australia's protected areas, heritage places, and other conservation tenures;

[92] Audit Office of NSW *Managing Native Vegetation*, 27 June 2109 – available at: https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation; and see Natural Resources Commission *Land management and biodiversity conservation reforms, Final advice on a response to the policy review point*, July 2019, available at: https://drive.google.com/file/d/1aYqKtF7A9JrHyrOWCjPF_4nZoQPHZkE8/view.

10. Prevent the introduction of, and reduce the current extent, spread and population size of invasive species that are threatening biodiversity;
11. Effectively protect Australia's wildlife from commercial exploitation including illegal wildlife trade and unsustainable fishing.

Key legislative outcomes
To strengthen Australia's democracy and ***create a planning and assessment regime that is more accessible, fair, transparent and accountable and that delivers the above environmental outcomes****, new national environment laws must:*

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

Places You Love Alliance
March 2019

A guiding object and design principle for the Act should be to achieve **strong environmental outcomes**, especially for biodiversity. Strong biodiversity outcomes will only be possible with a much greater emphasis on front-end goal setting and coordinated back-end information, monitoring and reporting systems.

We are concerned that Question 8 seems to contemplate the EPBC Act becoming more like the *National Environment Protection Council Act 1994* (Cth) (**NEPC Act**). There have been extensive criticisms of the NEPC Act and the National Environmental Protections Measures (**NEPM**) approach. If that model was applied it would lead to slow and inconsistent implementation by the states and, most likely, increasing uncertainty for businesses operating in multiple jurisdictions. We do not recommend the NEPM vehicle for delivering outcomes due to the length of time it takes to establish standards, the fact that negotiations can lead to compromise on lower standards, and the lack of enforceability under the model. The review may like to consider the Air quality NEPM as an illustration of these issues.

Case study: Air quality NEPM

The air quality standards provided by the NEPM framework have notoriously been slow to be implemented by states and territories in their relevant legislation, where these standards are put into regulatory effect. For example, in 2015 the standards for particulate matter (PM) 2.5 and PM10 were strengthened by agreement under the NEPM framework. Only in 2019, over 3 years later, did the Queensland Government update the state law enshrining these standards for Queensland (the Environmental Protection (Air) Policy 2008). This is a significant delay which has meant all communities impacted by new proposals that have been assessed and approved in the meantime have not been protected by the implementation of the agreed improved standards. This delay in implementation is exacerbated by the infrequent reviews of the standards. For example, standards for sulphur oxides, nitrogen oxides and Ozone have not been reviewed since they were made in 1997, with a current review process potentially expanding out to 2021 until its completed. In addition, Queensland has not updated licence conditions of the facilities it regulates and so many high emitting activities are still operating on pre-2003 air quality limits which are now far outdated and are risking the health of those living nearby.

We reiterate that to turn our environmental decline around we need laws that enshrine Commonwealth leadership and action to deliver specified environmental outcomes.

Robust clear process for clear outcomes

It is impossible to remove all procedural steps from complex environmental assessment processes. The Act cannot simply identify outcomes and provide no guidance – for example, on how to ensure transparency, accuracy and robustness of methods used to achieve outcomes. In order to achieve desired outcomes, legislation will still need to establish some process requirements, transparency and accountability safeguards and mechanisms. These will need to be clear, certain and efficient. This is discussed further below in relation to impact assessments.

We understand the review has concerns about the federal department being bogged down in procedure and focussing on ticking check lists rather than delivering outcomes.[93] We agree that processes should be clarified and foster innovation to deliver outcomes, but clear standards need to be set in terms of mandatory steps, transparency and ensuring outcomes are achieved. This is discussed further in relation to the role of the Commonwealth (section 4 below) in setting standards.

3.3 Oversight of outcomes

A number of the Discussion Paper questions relate to achieving outcomes and this submission makes a number of recommendations relating to outcomes monitoring, reporting and continuous improvement. A critical part of delivering outcomes is monitoring success. To do this, the Act should require the establishment of long-term biodiversity goals, standards, indicators and reporting to inform policy and decision-making. SMART goals and standards must be related to indicators and tracked via mandatory monitoring and reporting requirements in the Act. Monitoring of biodiversity goals, indicators and outcomes must be well-resourced and audited, including where appropriate via environmental taxation and industry levies.

Importantly, new and improved monitoring and reporting tools must be fully integrated with policy development, plan making, impact assessment and decision-making under the Act.

EDO makes five recommendations to improve oversight, monitoring, reporting and tracking of outcomes:

- **Mandatory monitoring and reporting of the health of matters of national environmental significance is necessary to improve conservation strategies**
- **An online monitoring and reporting hub** for comparative reporting with easy public and professional access to comprehensible documents on public registers; licensing, compliance and enforcement data; bioregional plans, policies accredited under strategic assessments, and associated performance audits; periodic and annual reports (including the State of the Environment Report and National Sustainability Outcomes Report); and the National Environmental Accounts;
- **Independent *State of the Environment*** and ***National Sustainability Outcomes* reporting** – to improve public awareness, agency policy-making and implementation, and environmental performance;
- **National Environmental Accounts** that track natural assets and their extent, condition and threat status over time; and,
- **Mandatory public inquiries into the extinction of threatened species** – akin to coronial inquests.

[93] As discussed at a meeting with Professor Samuel, the Review secretariat, and EJA, Melbourne, 9 December 2019.

Mandatory monitoring and reporting of matters of national environmental significance is necessary to improve conservation strategies

We recommend that the existing biodiversity monitoring framework in the EPBC Act be extended to include all matters of national environmental significance and be made mandatory. This will enable a more accurate assessment of environmental effects, reduce costs to industry for the approval process and lead to more effective conservation. Moreover, it will follow in the steps of other jurisdictions which have introduced mandatory monitoring requirements such as the United States of America,[94] the United Kingdom,[95] and Germany.[96]

In contrast, the EPBC Act currently provides that the Minister 'may […] co-operate with, and give financial or other assistance to, any person for the purpose of identifying and monitoring components of biodiversity.'[97] The assistance may be made subject to the Minister's conditions,[98] and is therefore subject to significant discretion.

We propose three changes to this framework.

First, we recommend that 'components of biodiversity' be replaced with matters of national environmental significance. We acknowledge that the current definition of 'components of biodiversity' is broad and includes 'species, habitats, ecological communities, genes, ecosystems and ecological processes.'[99] However, because subsequent provisions heavily focus on monitoring being used for conservation of components of biodiversity,[100] we believe the current monitoring framework is primarily aimed at population monitoring for threatened species and ecosystems. A more comprehensive monitoring framework which observes the ecological health of all matters of national environmental significance will better serve the purpose of improving environmental protection, and ensuring outcomes are being delivered.

Second, we recommend that a new provision be introduced creating transparent monitoring and reporting obligations for certain entities (hereafter '**monitoring entities**'). Mandatory transparent monitoring is crucial because the scientific community, assessors, developers and the general public require access to consistent and continuous long-term monitoring data of matters of national environmental significance to better determine cumulative impacts and outcomes of recovery activities. The availability of such data is sorely needed by conservation managers and policy makers in order to efficiently report on the effectiveness of conservation management actions in delivering outcomes, and to support more robust decision-making.[101]

This issue was explored by the Senate Environment and Communications References Committee in its 2011 report, *The koala – Saving our national icon*. A lack of published scientifically peer-reviewed estimates of the koala population was highlighted as a significant

[94] Endangered Species Act of 1973 (16 USC § 1533) §1533(3)(C)(iii): 'The Secretary *shall implement a system to monitor effectively the status of all species* with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 [1] to prevent a significant risk to the wellbeing of any such species.' (emphasis added).
[95] Conservation of Habitats and Species Regulation 2017 (UK) s 50(1): 'The appropriate *authority must make arrangements* in accordance with paragraphs (4) to (6) *for the surveillance of the conservation status of natural habitat types* of national interest and species of national interest, and in particular priority natural habitat types and priority species.' (emphasis added).
[96] Bundesnaturschutzgesetz [Federal Nature Protection Act] (Germany) 29 July 2009, BGBI. I S. 2542, Art 20b(1): 'The Länder *shall take the appropriate action to describe and assess* relevant populations, biocoenoses and biotopes of wild fauna and flora, in particular those of endangered species, which are of importance from the point of view of species conservation.' (emphasis added).
[97] EPBC Act s 171(1).
[98] EPBC Act s 171(5).
[99] EPBC Act s 171(3).
[100] EPBC Act s 171(2).
[101] David Lindenmayer and Gene Likens, *Effective Ecological Monitoring* (CSIRO Publishing, 2018).

issue in accurately assessing the biodiversity threat experienced by koalas.[102] Poor estimates were also seen to create large cost burdens for industry, through project delays, business uncertainty and additional consultancy fees.[103] The report recommended that '…the Australian Government establish a nationally coordinated and integrated program for population monitoring of threatened species'.[104]

Although the Government took some steps to improve monitoring such as by introducing a Threatened Species Commissioner in 2014, the scope of this reform was limited to monitoring a prioritised list of threatened species. While the reforms have improved monitoring and conservation for certain threatened species, a broader mandatory monitoring system linked to outcomes, was not implemented.[105]

Third, the Minister should have a mandatory obligation to cooperate with and assist monitoring entities in the discharge of their monitoring activities. This support will ensure that the data collected is of a high quality. The Minister's existing ability to impose conditions may be used to ensure data is collected in an efficient and timely manner.

Online hub and public registers for national environmental reporting

EDO recommends that data collected through mandatory monitoring and reporting should be centrally compiled by or with the assistance of the relevant Department.

Repeated State of the Environment reports have noted deficiencies in environmental data and the absence of joined-up environmental information across the jurisdictions. The State of the Environment Report 2016 reiterated that a lack of monitoring and reporting data is hindering effective policy-making and environmental management in every jurisdiction.

We note the Discussion Paper (p19) raises the option of a single, streamlined interface for all users of the Act as a central point for input and access to information underpinning decisions. We recommend a hub that would have benefits for users and for tracking and reporting on outcomes.

The Act should require the Environment Minister to establish an online hub for national environmental reporting and public registers, including for biodiversity. This would consolidate a range of accessible, reliable and comparable environmental information across the Commonwealth, States and Territories. For example:

- State of the Environment and National Sustainability Outcomes reports;
- Performance audits of bioregional plans and strategic assessments;
- Strategic environmental data from state and local governments (and the private sector where reliable and practicable);
- Licensing information regarding Commonwealth threatened species; and
- Project-level environmental impact assessment data, post-approval audits and compliance and enforcement records, including from the National EPA.

We propose that data gathered through the mandatory monitoring and reporting be compiled, managed and made publicly available by the relevant Department.

[102] Environment and Communications References Committee, *The koala – saving our national icon* (September 2011) 39-42.
[103] Ibid at 40.
[104] Ibid at ix (Recommendation 3).
[105] See Sally Box, *Threatened Species Strategy – Year Three Progress Report* (Department of the Environment and Energy, 2019) 43-4. The strategy is limited to 20 species of mammal, 20 species of bird and 30 species of plant, and admitted shortcomings in ensuring comprehensive data gathering; 16-7.

Conservationists currently rely on data collected within short timeframes for discrete research projects, such as PhD theses or short-term reports. Such data is often fragmented and inconsistent, and while beneficial, do not provide the insight conservationists need to manage biodiversity over much longer time periods, and to assess whether outcomes are being achieved.[106]

This problem can be resolved by centrally compiling publicly accessible monitoring data, which, together with monitoring and reporting obligations, will facilitate the collection of high-quality scientific data covering much longer timeframes. Indeed, the Hawke Review recommended the establishment of an 'effective national environmental information management system' through the development of the National Environmental Accounts.[107] The Government at the time agreed in principle with this recommendation.[108] Following this, the National Environmental Economic Account was created in November 2016 to monitor the effect of the environment on the economy; this could be extended to collecting information on the health of MNES more generally.[109]

Alternatively, we recommend that an expanded version of the existing Threatened Species Index database could also be used.[110] This database is a collaborative research project coordinated by The University of Queensland and BirdLife Australia and is supported by the Australian Government's National Environmental Science Program, the Commonwealth Department of the Environment and Energy, all State and Territory governments, and over 30 other conservation and research organisations. In 2019, the index was adopted by the then Department of the Environment and Energy as an official performance criterion to report on Australia's threatened species over the next four years. Although the index is currently limited to population data on monitored threatened species, we recommend that it be expanded and sufficiently resourced to include data on the ecological health of matters of national environmental significance.

A new online data hub would require a significant injection of funding from all jurisdictions, timeframes and responsibilities for its establishment and maintenance. The Act would need to place non-discretionary duties on the Environment Minister to negotiate data-sharing agreements with State and Territory counterparts within a certain timeframe. The Environment Department or Environmental Commission could host the online hub.

State of the Environment and National Sustainability Outcomes reporting

In addition to the monitoring, reporting and online information hub, there needs to be overarching reporting on whether outcomes are being achieved or at least progressed.

The Act should require a new Sustainability Commission to prepare or commission an independent ***State of the Environment*** **(SOE) report** and a ***National Sustainability Outcomes*** (**NSO**) **report** to be tabled in the Australian Parliament. The Act should set a timetable for delivery of both reports, so that they feed into the five-year review cycle of a National Environment and Sustainability Plan.[111]

---

[106] Estes et al., 2018.
[107] Dr Allan Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, 2009) 18, 316-7, 320 (Recommendation 67).
[108] Department of Sustainability, Environment, Water, Population and Communities, *Australian Government Response to the Report of the Independent Review of the EPBC Act* (Commonwealth of Australia, 2011) 109-20.
[109] Department of Environment and Energy, *Environmental Economic Accounting: A Common National Approach Strategy and Action Plan* (Commonwealth of Australia, 2018) 4-5.
[110] The index can be accessed at tsx.org.au.
[111] For example, the SOE and NSO reports could be delivered (alternately or together) within four years of a National Plan's commencement. This would provide a further 12 months for Governments to respond to the reports and for the Commission to coordinate an updated and adaptive National Plan.

To ensure national coordination and government responsiveness, the Act should require government responses to the SOE and NSO reports to be tabled by state and territory governments (3 months to respond) and the Commonwealth government (within 6 months, allowing for consideration of state responses).[112]

The two types of proposed reporting are outlined below.

SOE reports should provide a national snapshot of environmental outcomes, comparative performance, key threat assessments and emerging environmental management priorities. They should also provide a high-profile record for the Sustainability Commission to track outcomes and report progress against national environmental goals and standards.

SOE reports should include rigorous, comprehensive assessment and tracking of environmental baselines, outcomes and trends across a range of themes over time. For biodiversity, this must include:

- threatened species and ecological community nominations, listings and trends;
- management of existing and emerging key threats to biodiversity;
- efficacy of recovery plan development and implementation, and reporting on achievement of goals in recovery plans such as the loss or expansion of species'/ ecological communities' habitat extent and condition;[113]
- implementation of bioregional plans and protected area management plans;
- outcomes from public and private conservation programs;
- funding and outcomes of a National Biodiversity Conservation and Investment Strategy; and
- other relevant indicators from a National Environment & Sustainability Plan.

NSO reports could be tabled together or alternately with SOE reports. NSO reporting refers to broad sustainability outcomes and human pressures related to urban settlements, consumption and production, transport, ecological and carbon footprints, economic and population growth. The inaugural *Sustainable Australia 2013* report by the former National Sustainability Council (now disbanded) is a good reference point for NSO reporting.

NSO reporting is an important tool for integrating environmental considerations with social, economic and equitable considerations to achieve ESD. By reporting and evaluating progress on broader sustainability goals, strategies and actions (such as those in National Environment and Sustainability Plans, or agreed under the UN Sustainable Development Goals), NSO reporting recognises that sustainability cannot be achieved by the "environmental sector" alone. Rather, it requires systemic economic and social changes, for example, to Australia's systems for production, consumption and waste. Sustainability also requires new public awareness, behaviour and attitudes to embed sustainable living principles and concepts like the 'ecological footprint' into the mainstream.

More frequent reporting should occur under the National Environmental Accounts and detailed data from specific actions and environmental assessments would be published in the online data hub (discussed below).

[112] Comparable processes are currently required for parliamentary inquiries in certain states; as well as agency responses to government audit and performance reports.
[113] Plans are discussed further below in section 7.

National Environmental Accounts

Another important tool for tracking outcomes is environmental accounting. The Act should require the Sustainability Commission or Environment Minister to establish a National Environmental Accounts framework, underpinned by a peer-reviewed scientific method.[114]

National Environmental Accounts would assess the extent, condition and trends in key natural resources and environmental assets across Australia's states, territories and bioregions. Assets to be monitored would include, for example:

- landscape health (forests, grasslands, wetlands, estuaries etc),
- threatened and other biodiversity (terrestrial and aquatic),
- native vegetation cover and condition,
- urban and regional carbon footprints,
- estimated carbon storage and loss,
- salinity and soil health, and
- water quality.

The system would track, by way of an annual series of accounts:

- the extent, condition (e.g. from very poor to excellent health) and threatened status of key environmental assets over time;
- stocks and flows of environmental assets and natural resources (i.e. whether they are being depleted, replenished or sustainably used) – enabling region by region comparisons across Australia); and
- information on the extent and impact of key threatening processes such as invasive species, habitat loss and degradation, disease and climate change.

Decisions under the Act should be required to refer to natural resource management (**NRM**) and biodiversity goals and outcomes, and be informed by reliable data. Environmental accounting is an important and complementary part of this approach, enabling adaptation to change in environmental health, pressures and outcomes. The new system should draw on the Wentworth Group's *Accounting for Nature* program and subsequent pilots, and other relevant work in Australia and overseas.[115]

Once established, National Environmental Accounts should lessen or automate reporting burdens. As a monitoring and reporting tool, the Accounts would support a range of functions under the Act: policymaking, bioregional planning, strategic environmental assessment, decision-making on project proposals and actions, as well as SOE and Sustainability Outcomes reporting. National Environmental Accounts would also enable authorities like the Sustainability Commission to assess progress against national biodiversity goals and targets (based on nationally consistent criteria).

[114] Previously recommended by the Hawke Review (2009), Ch. 19, and other expert bodies.
[115] See Wentworth Group of Concerned Scientists (www.wentworthgroup.org), *Accounting for Nature* (2008); and Australian Regional Environmental Accounts Trial - Report to NRM Regions Australia (March 2015). See also the separate work of ABS / Bureau of Meteorology*, Environmental-Economic Accounts 2017* at: www.abs.gov.au/ausstats/abs@.nsf/mf/4655.0. See also US White House directive, *Incorporating natural infrastructure and ecosystem services in Federal Decision-Making* (Oct. 2015); see further Australian Chapter of the IUCN, *Valuing Nature* (2015).

Mandatory public inquiries into the extinction of threatened species[116]

As noted above, the objects of the Act should explicitly aim to prevent extinction and ensure recovery of threatened species. Where these aims have not been met and the tragedy of extinction does occur, the Act should include a process of formal inquiry that is analogous to coronial inquests into human deaths and tragedies.

Inquiries into extinction would be conducted by a panel of qualified experts, to determine the (likely multiple) causes of extinction, make recommendations on future conservation management, policy or law reform, and identify lessons to be learned to prevent future extinctions. Similar ideas have been raised in the context of the recent catastrophic bushfires.

Recommendations for delivering environmental outcomes include:

- **The Act and relevant plans should establish clear outcomes, standards and reporting indicators, that can be amended over time in light of scientific evidence.**
- **Sustainability Commission reporting to be tabled in Parliament on the State of the Environment and National Sustainability Outcomes.**
- **Requiring Commonwealth, State and Territory governments to respond to State of the Environment and National Sustainability Outcomes reports.**
- **Mandatory monitoring and reporting requirements on matters of national environmental significance**
- **A set of National Environmental Accounts that track natural assets and their extent, condition and threat status over time.**
- **An online monitoring and reporting hub for comparative analysis; easy public and professional access to public registers; and transparent, up-to-date information about environmental outcomes across Australia.**
- **Mandatory public inquiries into the extinction of threatened species.**

[116] This recommendation is based on the findings of Woinarski et al. in 'The contribution of policy, law, management, research and advocacy failings to the recent extinctions of 3 Australian vertebrate species' (2016) *Conservation Biology*.

4.Role of the Commonwealth

> *The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.*
>
> *– State of the Environment Report 2011*

As discussed above, Discussion Paper Question 9 asks: *Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system?* The short answer is yes.

A range of prominent legal experts including the members of APEEL are in broad agreement that the Australian Constitution provides significant scope to widen Commonwealth responsibility in environmental matters.[117] Relevant heads of power include external affairs, the corporations power, and power to regulate trade and commerce trade and commerce with other countries and between the states.[118] For example, the external affairs power is used to implement Australia's obligations and commitments under the Convention on Biological Diversity and other international agreements.[119] The following example illustrates how the corporations powers could be more effectively used for environmental regulation.

Case study – Corporations power

There are long-standing and robust precedents for how Constitutional powers can be effectively used to regulate pressing issues that are not adequately dealt with by states. For example, decades ago the *Trade Practices Act 1974 (Cth)* clearly established how by using the corporations power, as well as the trade and commerce and posts and telegraph powers, the operation of federal law could by section 6 of that Act be 'distributed' across available federal powers to regulate policy areas previously deemed to have been the province of the States. This meant that the restrictive commercial practices of the market and the abuse of consumers previously left to ineffective State management were instead addressed by national law.[120]

It can be argued that the EPBC Act, using the corporations power as its fundamental base, could be amended to regulate all corporate behaviour by or for the benefit of trading, financial or foreign corporations, likely to have a significant effect on the environment.[121]

The three most crucial areas in which this test could apply, whether they are added to a list of matters of national environmental significance or covered in specific prohibitions, as for the heads of prohibited commercial conduct under the *Competition and Consumer Act 2010*, are:

- Conduct likely to impact on climate control and greenhouse gas emissions
- Conduct on land likely to have a significant impact on the environment
- Conduct in relation to water likely to have a significant impact on the environment

Again, using the distributive method of the trade practices and consumer laws, these can cover both conduct by and for the benefit of corporations as well as conduct in relation to interstate and foreign trade.

[117] See for example, Australian Panel of Experts in Environmental Law (APEEL). 'Constitutional authority of the Australian Government to make next generation environmental laws', in APEEL, Environmental Governance (2017), Technical Paper 2, pp 13-17.
[118] Australian Constitution, subsections 51(xxix), 51(xx) and 51(i) respectively.
[119] To rely on the external affairs power, a law must be reasonably capable of being considered appropriate and adaptable to fulfilling the obligations and benefits of an international instrument. See for example *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1 (Tasmanian Dams case); see also *Victoria v Commonwealth* [1996] HCA 56; *(1996)* 187 CLR 416 (Industrial Relations case) at 34.
[120] The law was initially expressed to cover corporate conduct and then by s.6 extended to cover conduct by anyone in interstate or foreign trade, or in the case of the consumer protection provisions, using the telecommunications system, ie covering all media.
[121] The *Trade Practices Act 1974*, now the *Competition and Consumer Act 2010,* regulates corporate conduct likely to have a substantial effect on competition - the same qualitative test.

Taxation and the power to grant financial assistance to the States also provide important Commonwealth leverage to resource and implement environmental goals and actions.[122]

Options also exist to refer state powers to the Commonwealth.

As noted by APEEL, if necessary 'the Commonwealth could override (or "pre-empt") State and Territory environmental laws if it wishes, making use of section 109 of the Australian Constitution.'[123]

Commonwealth interests

In order to conserve and protect the environment in accordance with the legislated objects, the Act must make clear that Commonwealth interests include:

- **Retaining federal responsibility** for existing matters of national environmental significance – using this or new terminology[124];
- **Expanding federal responsibilities** to include the following new matters (as discussed above):
  - The National Reserve System (of protected areas)
  - Ecosystems of National Importance
  - Vulnerable ecological communities (offences will now apply)
  - Significant land-clearing activities
  - Significant greenhouse gas emissions
  - Significant water resources (expanded) and
  - Powers to declare other matters of national environmental significance.
- **Avoiding and mitigating development impacts** on listed matters of national environmental significance;
- **Strengthening biodiversity protections** for threatened species and ecological communities, including for **critical habitat**;
- **Setting national environmental goals** and standards, indicators and reporting in relation to biodiversity and ecological integrity of plants, animals, ecosystems and protected areas, invasive species, marine plastics, and air pollution;
- **Nationally coordinated landscape-scale protection** and natural resource management, including via:
  - **bioregional planning** and **strategic environmental assessment**; and
  - **joint implementation** of **mandatory key threat abatement**, **recovery plans** for single or multiple species and ecological communities, and a **National Biodiversity Conservation and Investment Strategy** across all levels of government.
- Leading, coordinating and fulfilling Australia's **international obligations**, including under multilateral environmental agreements.

An essential part of Commonwealth leadership must involve coordinated NRM planning and the integration of conservation goals and programs, from national to state/territory and local level.

This part of the submission addresses questions related to:

- **Governance**
- **Standard setting**

[122] Australian Constitution, subsection 51(ii) and section 96 respectively.
[123] Australian Panel of Experts in Environmental Law, 'Constitutional authority of the Australian Government to make next generation environmental laws', 2017.
[124] For example, Commonwealth environment interests, nationally protected matters, or national environmental priorities.

- **Bioregional planning**
- **Accreditation, streamlining, deregulation**
- **Compliance and enforcement**
- **Funding**

4.1 Governance

QUESTION 21: What is the priority for reform to governance arrangements? The decision-making structures or the transparency of decisions? Should the decision makers under the EPBC Act be supported by different governance arrangements?

We agree with the statement on p23 of the Discussion Paper:

> *Trusted regulatory frameworks have effective governance arrangements that ensure decisions are properly made. Inappropriate governance arrangements, including poor guidance on regulatory requirements, can limit efficient and effective administration of legislation and undermine certainty and trust in the regulatory framework.*

We agree there is a need for reform to clarify accountability and certainty. We submit that public trust in government's capacity and integrity to implement best-practice biodiversity laws requires three elements:

- **Duties on decision-makers**
- **Clear decision-making criteria and accountability**
- **Independent, trusted institutions**

This Part addresses each element in turn.

Duties on decision-makers

A significant limitation of the current EPBC Act is the widely discretionary ways it can be used (or not used). For example:

- threshold-setting (what is a *controlled action* or a *significant impact*);
- decisions to approve significant impacts with conditions, or to refuse them;
- the slow pace of listing protected areas and threatened species, ecological communities and national heritage; and
- prioritisation of resources (to keep lists up to date, to simplify regulation, to assess and approve applications, to issue licences or to monitor compliance).

High levels of discretion, control and direction by Ministers mean there is often little the community (or bureaucracy) can do to address poor implementation. This problem is punctuated by relatively frequent changes of Ministers and governments, and a lack of institutional knowledge and continuity.

It is therefore important that the Act includes new mechanisms to better hold the Commonwealth to account for its responsibilities, and to empower Ministers and decision-makers to fulfil them. The Act should impose clear duties on Ministers and agencies[125] to:

- exercise their powers, functions and decisions under this Act to achieve the Act's objects;
- maintain and improve the environmental values and ecological character of protected matters under the Act; and

[125] Such as the Sustainability Commission, Environment Department, National EPA and Scientific Committee.

- make decisions in accordance with ESD principles.

In addition, the Act should include enforceable or 'non-discretionary' duties to implement and apply the Act's decision-making tools. Specific obligations would ensure key mechanisms are utilised, directed to achieve their aims, and are effective.

Specific statutory obligations to be given effect in the Act could include, for example:[126]

- ensuring that mandatory recovery plans and threat abatement plans are established within legislative timeframes, maintained in force and up to date;
- requiring that critical habitat is designated on a Critical Habitat Register at the time a species is listed;
- requiring that lists of threatened species and ecological communities are kept up-to-date, including by ensuring sufficient resources to listing Committees and relevant sections of the Department;
- requiring that all threatened ecological communities are identified and listed within five years of the Act's commencement, and that they be kept up-to-date thereafter;
- preparing and designating a list of Ecosystems of National Importance, namely areas of principal importance to maintaining and enhancing Australia's biodiversity and identified in accordance with criteria in the Act and regulation;
- duties on all agencies to refer to the national EPA any actions ensuring that bioregional plans are established through negotiation with other levels of government and/or Commonwealth declaration and complied with;
- ensuring a National Ecosystems Assessment is conducted, with an interim and final report within five years, and periodically as specified thereafter; and,
- establishing and maintaining a system of national (or regional) environmental accounts.

There are various examples of enforceable, statutory environmental duties overseas:

- The US *Endangered Species Act* (1973) places non-discretionary duties on the Secretary and federal agencies, such as requiring that critical habitat is designated at the time a species is listed; and that federal agencies consult the Fish and Wildlife Service if their actions may affect threatened species. The public can bring Court proceedings for failure to fulfil those duties.[127]
- In the separate context of pollution law, the United States EPA is bound by its own legislation to regulate certain pollutants and set standards for them. Failure to fulfil these duties in the past has exposed the EPA to litigation.[128]
- The *Environment (Wales) Act 2016* (s. 7) places a duty on Welsh Ministers to: 'prepare and publish a list of the living organisms and types of habitat which in their opinion are of principal importance to maintaining and enhancing biodiversity' in Wales (in consultation with Natural Resources Wales). The Ministers must also 'take all reasonable steps to maintain and enhance the living organisms and types of habitat included in any list'. The Welsh Act also requires that "A public authority **must seek to maintain and enhance biodiversity in the exercise of functions** in relation to Wales, **and in so doing promote the resilience of ecosystems**, so far as consistent with the proper exercise of those functions" (section 6) (emphasis added).

[126] Where duties relate to functions or powers held by other entities, such as the Sustainability Commission, Scientific Committee or national EPA, the duty could be placed on those entities directly or on the Minister to provide a level of resourcing reasonably required for the entity to fulfil that function or power.
[127] See US Code 16 U.S.C. § 1540(g): https://www.law.cornell.edu/uscode/text/16/chapter-35.
[128] For example see: *Massachusetts et al., Petitioners v. Environmental Protection Authority et al. 529 U.S. 497 (2007)*.

Our national environmental law should adopt similar duties and accountabilities for decision-makers under the Act.

These duties are distinct from a general duty to avoid harm that could be required of landholders, developers and government agencies as recommended by APEEL.[129]

Clear decision-making criteria and accountability

In addition to enforceable duties, the Act should ensure that key decisions are made in accordance with clear criteria.

As noted, there has been criticism that the current approach requires a risk-averse box ticking process for federal bureaucrats that does not necessarily deliver environmental outcomes. We agree. This review presents an opportunity to refine and clarify the essential decision-making steps that are needed to ensure outcomes are delivered. However, criticism of current process is not a reason to limit judicial review as it remains an essential accountability mechanism to ensure the rule of law. Instead of removing decision-making criteria and review mechanisms, this review should focus on how to make the criteria clearer, more effective and linked to environmental outcomes.

First, this can be done upfront by requiring decision-makers to exercise their functions to achieve the Act's objects.

Second, the Act must identify key decision-making points in the legislative framework (such as listing decisions, critical habitat identification, thresholds for 'controlled actions',[130] recovery planning and bioregional planning) and the objective criteria that decision-makers must apply to them. This means:

- identifying the outcome to be achieved;
- framing functions and powers as obligations rather than discretions (for example, *must* establish and implement recovery plans for listed species, rather than *may* establish…);[131]
- setting clear and concise lists of matters that *must* be taken into account in a decision, and/or matters that must *not* be taken into account (for example, only scientific considerations should determine whether a species is listed as threatened with extinction);
- requiring objective evidence (such as baseline data) and independent advice;
- maximising reliance on objective facts, rather than the decision-maker's subjective opinion or a state of satisfaction (for example, as to a 'significant' impact); and
- providing that certain decisions or processes are undertaken by an independent expert body rather than the Environment Minister (for example, threatened species listing decisions would be made by the independent Scientific Committee; heritage areas would be listed by the Australian Heritage Committee; and controlled action decisions would be made by the National EPA).

The review should also consider tools that would help with ensuring decisions are objective, consistent, and science-based. Examples of these tools include **Environmental Outcome Assessment Methodologies** that can be applied by accredited experts to proposals.[132]

---

[129] See APEEL, *Blueprint for the next generation of Australian environmental law* (2017), idea 4.
[130] For example, the threshold or trigger for the EPBC Act to apply is a 'significant impact' on a listed matter.
[131] See for example the *Endangered Species Act* (US) s. 4(f) (16 U.S.C. § 1533): 'The Secretary shall develop and implement plans [recovery plans] for the conservation and survival of endangered species and threatened species listed… unless he [sic] finds that such a plan will not promote the conservation of the species'.
[132] An example of a robust science-based tool is the *Environmental Outcomes Assessment Methodology* developed under the NSW *Native Vegetation Act 2003* and *Native Vegetation Regulation 2005.*

These requirements should apply to all relevant processes, including for example, the national heritage list. Currently, the list has had nominations made but those nominations are anecdotally 2-3 years behind because there are no resources to assess the nominations. Such delays could result in losing nationally significant places, or losing opportunities to develop tourism opportunities from those places, due to the want of resourcing. Likewise, compliance and enforcement must be resourced to ensure that referrals are made, that conditions are complied with and to prevent breaches leading to irreversible environmental harm.

Third, the Act should provide public and independent oversight once a decision is made by:

- maximising transparency and community input prior to the decision;
- requiring statements of reasons for decisions (for example, 'controlled action' decisions and determinations to approve or refuse a controlled action);[133] and
- providing public access to the courts or independent tribunals for merits review and judicial review of government decisions (for example, listing, permitting and controlled action decisions) and civil enforcement of breaches (including to require decision-makers to fulfil non-discretionary duties as noted above).[134]

Third party review is discussed below in theme 6 – Community participation, transparency and accountability.

Finally, we note the importance of adequately resourcing the Department and new EPA to undertake core functions in a timely manner. Better resourcing would improve procedural efficiency by ensuring that staff are adequately, diversely skilled and have sufficient time to undertake assessment and test the validity of assessment documentation.

Independent, trusted institutions

To overcome existing barriers and effectively address challenges, the Act should establish new institutions for effective implementation and administration of the legislation, and to provide independent advice to decision-makers on, and oversight of, national environmental outcomes.

In summary, new and re-invigorated institutions to support the Act are as follows:

- **National EPA**
- **National Sustainability Commission**
- **Independent Scientific and Heritage Committees**
- **Advisory councils and expert taskforces**

The key institutions are outlined in turn.

National EPA

First, the Act should support greater independence and public trust by establishing a national EPA at arms-length from the Department, and provide that the Department would still be responsible for a variety of policy development and program implementation. Independent regulators are seen to be free from improper influence (including short-term political

[133] The level of detail in statements of reasons should be proportionate to the decision's significance. For example, greater detail should be required where a decision-maker departs from expert advice.
[134] See *Endangered Species Act* (US) 16 U.S.C. § 1540(g): https://www.law.cornell.edu/uscode/text/16/chapter-35.

considerations), and is a key way to deliver the review principle on improving trust (Question 26).

In brief, we recommend that a new national EPA would:

- be governed by an independent board and headed by a separate chief regulator;
- undertake environmental impact assessment of projects and planning proposals that affect matters of national environmental significance under the new Act;
- coordinate environmental management standards (for example, replacing the role of the ministerial group currently known as the National Environmental Protection Council or Authority)
- replace National Environmental Protection Measures and related legislation with more efficient, enforceable and coordinated national standards, based on continuous improvement and best available techniques;[135] and
- include a separate unit responsible for post-approval project and plan compliance, audits, monitoring and reporting.

National Sustainability Commission

Second, we support establishing a statutory **National Sustainability Commission** responsible for developing national plans, strategies and standards, as well as strategic oversight, advisory and reporting functions. The Commission should have its own sizable staff and budget, advise the Environment Minister, the Department and other institutions on national priorities, be independent of departmental or ministerial direction, and report annually to the Parliament on the state of the environment and sustainability (that is, the achievement of ESD).[136]

Detailed structure and governance of the Sustainability Commission would need to be set out in the Act and regulations. We propose that the Act would require at least one full-time Commissioner and independent public sector staff to be appointed from commencement of the Act. The Act would allow multiple commissioners to be appointed to lead on specific areas and chair expert advisory panels, such as on biodiversity, water, Indigenous traditional knowledge, youth and future generations. For example, drawing on the Productivity Commission model of multiple Commissioners, positions could include the following:

- Biodiversity Commissioner (scientific committee oversight, bioregional planning etc).[137]
- Sustainability Commissioner (urban settlements, infrastructure, waste, building standards).
- Climate Commissioner (to track carbon budgets, mitigation and adaptation law and policy).

[135] Alternatively, if the Sustainability Commission is appointed to develop and coordinate national standards, the national EPA would be closely consulted.

[136] For example, the Commission could regularly report to the Australian Parliament via *State of the Environment* and *National Sustainability Reports*, with more frequent annual statements, inquiries and appearances before parliamentary inquiries.

[137] Biodiversity oversight and reporting would be a major role for the Commission, including long-term reporting on indicators for recovery of threatened species and ecological communities, and key threat abatement. For this purpose, a statutory Biodiversity Commissioner should be appointed to oversee and advise on:

- the Commonwealth's independent Scientific Committee;
- listing processes and common assessment method implementation;
- bioregional planning, recovery plan implementation and threat abatement;
- bilateral assessment agreements; and
- review/audit of biodiversity-related impact assessments by the National EPA.

- Water Commissioner, in lieu of a re-established National Water Commission (National Water Initiative; strategic water resources beyond the Murray-Darling Basin; oversight of Wild Rivers).
- Indigenous Commissioner (leadership, engagement, customary rights to biodiversity, traditional ecological knowledge, Indigenous Protected Areas, cultural heritage law and policy). This is discussed further below in our section – Indigenous issues.
- Rural Lands Commissioner (native vegetation, soil and water quality, invasive species management, farm certification standards).
- Commissioner for Future Generations and Young People (intergenerational equity).

Independent Scientific and Heritage Committees

An expanded independent **Scientific Committee** should be empowered to assess and list nationally threatened species and important populations, ecological communities and ecosystems of national significance. A separate **Australian Heritage Committee** should assess nominations and list heritage areas and sites.

Both Committees would provide independent advice to Ministers, the Sustainability Commission, the Department and other decision-makers – including on recovery planning, key threatening processes, management plans and actions that positively or negatively affect Australia's environment and heritage.

Advisory councils and taskforces

Advisory councils and taskforces should be established to support these institutions. For example, an Indigenous Advisory Council and Biodiversity Expert Taskforce could have a role in identifying national environmental and heritage priorities, and advise on bioregional planning, and the National Biodiversity Conservation Investment Strategy (discussed below).

A new Sustainability Commission should establish an intergovernmental Biodiversity Expert Taskforce to advise on national biodiversity priorities, building on stakeholder consultation and investment over many years. The Taskforce could be made up of senior state and Commonwealth conservation agencies and independent scientists. The Taskforce could also assist the Commission in reviewing bioregional plans.

As outlined below, we recommend the Act include a reinvigorated bioregional planning process that involves an efficient technical assessment of each bioregion in Australia, to provide upfront protection of valuable environmental assets and manage key threats. The Act must ensure that national biodiversity priorities are addressed in bioregional plans. To achieve this, the Taskforce should review draft plans and advise the Sustainability Commission on investment strategy (discussed below) integration at the regional level, before bioregional plans are finalised. The Taskforce could also help identify opportunities for regional conservation funding from federal, state or private sector sources.

Recommendations for improved governance and institutions include:

- **Enforceable duties on decision-makers to use their powers to achieve the Act's objects.**
- **Clear criteria and public accountability for key stages of decision-making, including requirements for objective, science-based outcomes assessment.**
- **A new national EPA – to assess, approve or refuse projects, monitor project-level compliance and take enforcement action.**

- **A new National Sustainability Commission – to coordinate national plans and actions, set national environmental standards, provide high-level oversight and give strategic advice and oversight to Ministers, agencies and the wider community.**
- **Provide for expert advisory Councils and taskforces to be established.**

4.2 Standard setting

QUESTION 10: Should there be a greater role for national environmental standards in achieving the outcomes the EPBC Act seeks to achieve? In our federated system should they be prescribed through:

- Non-binding policy and strategies?
- Expansion of targeted standards, similar to the approach to site contamination under the National Environment Protection Council, or water quality in the Great Barrier Reef catchments?
- The development of broad environmental standards with the Commonwealth taking a monitoring and assurance role? Does the information exist to do this?

QUESTION 6: What high level concerns should the review focus on? For example, should there be greater focus on better guidance on the EPBC Act, including clear environmental standards?

National environmental plans, goals and standards

EDO supports national standard-setting based on best available science and closely linked to outcomes (Discussion paper, p16). But standard setting must involve more than setting guidelines to build consensus etc (p16). It is not sufficient for national standards to be guidance only, be aspirational or create a lowest common denominator approach.

The lack of clear and consistent national environmental goals, standards, indicators and data is a major barrier to effective environmental decision-making in Australia. A headline challenge identified in the *State of the Environment 2016* report is the:

> *lack of a nationally integrated and cohesive policy and legislative framework that deals with the complex and systemic nature of the issues facing our environment, and provides clear authority for actions to protect and maintain Australia's unique natural capital.*[138]

To address this we recommend that the Act should require a new Sustainability Commission (or EPA if no Commission) to set national goals to achieve positive environmental outcomes under rolling **National Environment and Sustainability Plans** (**National Plans**).

National Plans should establish short and long-term environmental goals, standards, indicators and reporting to inform policy and decision-making, including for biodiversity conservation, air, land and water management (among other things). For example, in relation to biodiversity, plans could:

- Include explicit goals to prevent extinction of native species and ecosystems,
- Identify goals for recovery of species and ecological communities, and ecological character of protected values;

[138] See https://soe.environment.gov.au/theme/overview/topic/overview-challenges-effective-management

- set goals in recovery plans for example relating to retention, restoration and expansion of habitat, reporting on loss of habitat, population increases or decreases, and changes to mortality rates from key threats; and
- integrate and assess 'ecosystem services' and values in all levels of decision-making.[139]

The intent is that National Plans enable Australia to develop a shared environmental vision and a level of continuity and coordination beyond the political cycle. Reviews and updates would give National Plans the flexibility to adapt to emerging threats and new opportunities to mainstream sustainability.

To achieve this, the Act should set out processes to develop and implement National Plans, including:

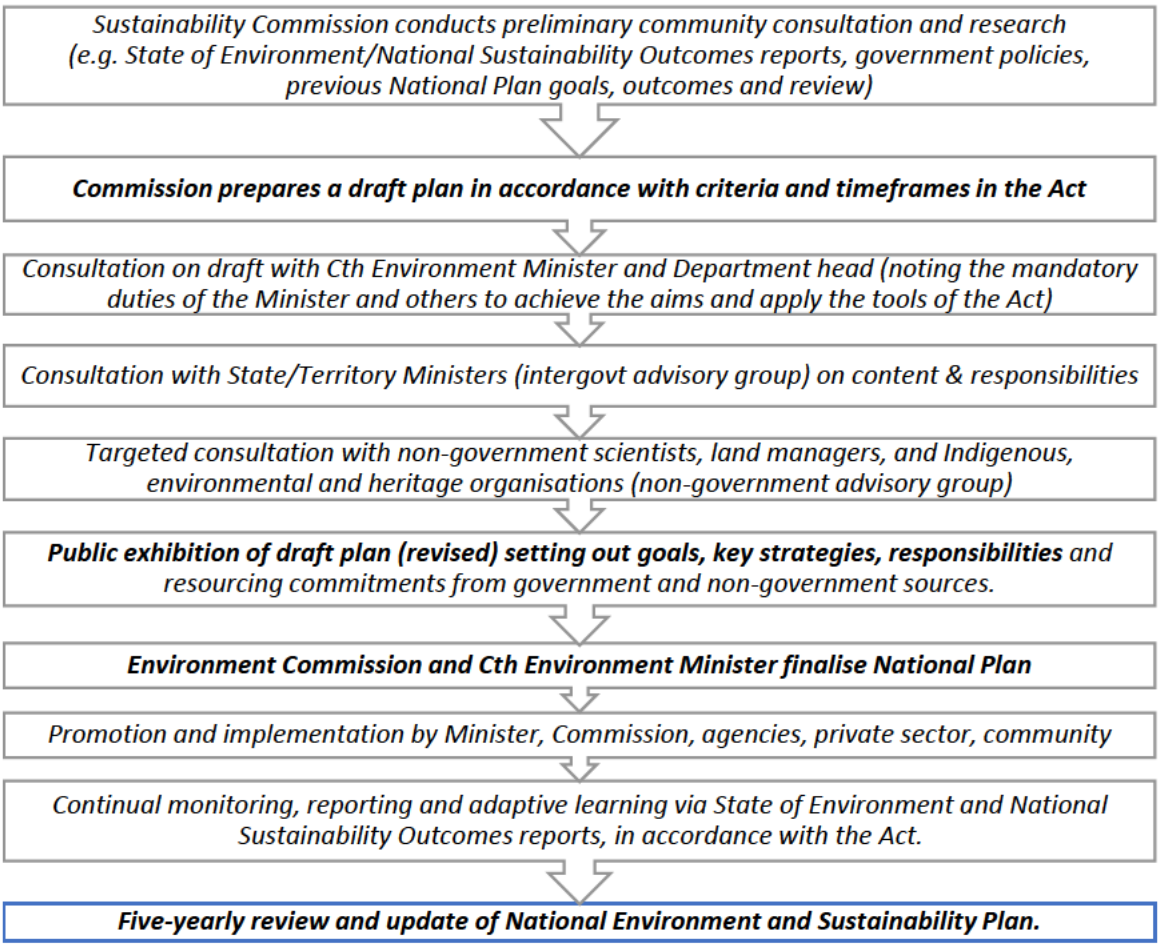
- setting long-term national environmental goals and shorter-term targets based on the best-available science, evidence and expert advice from government and the non-government scientific community;
- goals, strategies and indicators must be Specific, Measurable, Attainable, Relevant, Timely (**SMART**), and aim to achieve ESD;
- high-level goals to be further informed by international agreements and strategies, domestic environmental issues and strategies, and emerging threats;
- relevant evidence to include National Environmental Accounts, *State of the Environment* and *National Sustainability Outcomes* reporting;
- requirements for the Commission to engage with the community and consult publicly on draft plans and goals, and demonstrably take into account public submissions;
- the Commission must also take into account the advice of the Environment Department and Commonwealth, State and Territory Environment Ministers;
- powers for the Commission to determine goals and finalise national plans with the Environment Minister's concurrence, in accordance with the Act;
- clear and accountable responsibilities to resource and implement strategies and actions within specific timeframes;
- requirements for the Commission (or an expert panel appointed by it) to review and consult on National Plans every five years to inform the next iteration; and
- a statutory duty to ensure non-regression and continuous improvement of environmental goals, standards and protections in National Plans – this will insulate National Plans from political cycles, and ensure efficiency and continuity.

National goals need coordinated implementation

The Act must also require processes and oversight to ensure that nationally-agreed environmental goals and standards (as determined by the Sustainability Commission) are given effect where necessary in Commonwealth, state/territory planning, environmental and NRM laws. State laws and permits for planning, mining, water, native vegetation must not override or undermine national environmental standards. Instead, incentives and sanctions must ensure a highest common denominator across the jurisdictions. Interstate competition and industry should be driven by innovation and a race to the top, not the bottom, to meet national standards.

[139] For other countries' commitments on ecosystem services, see for example, Ontario Biodiversity Strategy; US Presidential Memorandum of 2015; UK National Ecosystems Assessment and guidelines on ecosystem services. See also Wentworth Group of Concerned Scientists' *Blueprint for a Healthy Environment and Productive Economy*, and the IUCN Australian Chapter's guidance on *Valuing Nature*.

Example process for preparing a National Environment & Sustainability Plan



In summary, it will not be sufficient to address environmental challenges by establishing aspirational or guidance-only standards. Standards are discussed further below in relation to accreditation.

Recommendations relating to standards

- **The new Sustainability Commission should set national goals to achieve positive environmental outcomes under rolling National Environment and Sustainability Plans (National Plans).**

4.3 Bioregional planning

QUESTION 16: Should the Commonwealth's regulatory role under the EPBC Act focus on habitat management at a landscape-scale rather than species-specific protections?

Landscape-scale protections

The Act should adopt a dual focus on resilient species and healthy ecosystems. This would support the aim of avoiding extinction and allow for synergies such as regional and multi-species recovery plans (applied across all relevant jurisdictions, not just Commonwealth land and waters).

The EPBC Act is best known for project assessments, decisions and site-based conditions of approval. Operating at this level remains important to address local impacts on national icons, and reduce the combined impacts of a certain scale of activity. Yet there is a well-recognised need for biodiversity laws to expand beyond individual species protection to greater landscape-scale protection.[140]

Landscape-scale approaches plan holistically for ecosystem health, resilience, connectivity and climate change readiness. A major component of this approach will be to identify and protect Ecosystems of National Importance (whether or not they are threatened), such as climate refugia, key biodiversity areas and High Conservation Value Vegetation.

The Discussion Paper groups a number of current activities under "regional approaches" including: marine bioregional plans, strategic assessments, the National Reserve System, and Regional Forestry Agreements (**RFAs**) (p20). These are different tools for different purposes. Strategic assessments and RFAs are tools specifically designed for accreditation – ie, to replace individual project approval requirements. This is a very different purpose to bioregional planning and these approaches are critiqued in the next section – 'Accreditation, streamlining and deregulation.' In contrast, bioregional planning is a different and more important tool, with a different purpose.

Bioregional planning

As noted in the Discussion Paper, bioregional planning has been used for marine areas under the current Act. While the Discussion Paper claims this has been "relatively successful" (p20), it does not acknowledge the serious political influence and delays in the drawn-out process and the resulting reduction in environmental protections (eg: sanctuary zones) in some areas.[141] No terrestrial bioregional plans have been completed under the current Act.

Bioregional planning has been recognised by a range of experts as **the key tool** for landscape planning to address cumulative impacts, foster climate resilience and guide sustainable natural resource management.[142]

The Act should establish a system of cross-sectoral, ecosystem-based planning and management for terrestrial, marine and coastal areas. Bioregional planning should be a centrepiece of the Commonwealth's strategic environmental focus, national leadership and

[140] See for example the Hawke Review of the EPBC Act (2009) and Australian Government's response.
[141] See: Submission on the reports of the Commonwealth Marine Reserves Review, 31 October 2016; ANEDO Submission on the Commonwealth Marine Reserves Review, 31 March 2015 ; ANEDO Submission on the Coral Sea Commonwealth marine reserve proposal, 27 February 2012; ANEDO Submission on the Commonwealth marine reserves network proposal and draft Marine Bioregional Plan for the Temperate East Marine Region, 21 February 2012 – available at: https://www.edonsw.org.au/coastal_marine_fisheries_management_policy
[142] APEEL, *Blueprint for the Next Generation of Australian Environmental Law* (2017) at 4.1.

cooperation. It would also be a principal responsibility for the new Sustainability Commission, with a clear role to negotiate draft plans and implementation agreements with all levels of government, and finalise the plans in accordance with the Act.

This would require the development of some 89 technical regional biodiversity strategies (one for each IBRA bioregion in Australia[143]), to employ the most effective management strategies for key environmental assets identified across each region.[144] The process is regionally specific but could be centrally managed by an intergovernmental Biodiversity Expert Taskforce (discussed above) – to increase coherency, efficiency and delivery of priorities under the National Biodiversity Conservation and Investment Strategy.

Teams of conservation professionals could be engaged to rapidly assess each bioregion, where possible based on collation of existing data (with additional collection for data-poor regions). For example, this could aim for assessment and completion of two bioregional plans per state each year, over six years. For example, HSI has recommended prioritising the 15 national biodiversity hotspots.[145] In addition to public consultation, a Biodiversity Expert Taskforce could assess draft plans and advise the Sustainability Commission before plans are accredited to meet national standards.

A clearer legal framework for bioregional planning – in both procedure and desired outcomes – would improve certainty for ESD and economic growth, address cumulative impacts upfront, and reduce future site-by-site land-use conflicts. Bioregional plans are targeted documents that seek to achieve the environmental protection aims of the Act in practical ways at a regional level. They should integrate with, but not seek to replace, the multi-levelled urban and environmental planning instruments at state and territory level. An efficient, pragmatic assessment approach to bioregional plans would provide a focal point for implementing the National Biodiversity Conservation and Investment Strategy.

We recommend that actions, authorisations and prohibitions in bioregional plans would be binding on Commonwealth Ministers and agencies, state and local governments, and the private sector, including for statutory planning and development decisions, and natural resource management decisions.

We recommend that the Act set out key elements for the bioregional planning process, including:

- **a clear, legislated purpose** tied to achieving the objects of the Act and achieving positive environmental outcomes at a regional and national scale;
- **an initiation and coordination role for the Sustainability Commission** to develop bioregional plans, supported by state and federal department data;
- **an adaptable process that responds to criteria** in the Act and Regulation, such as:
    - setting **SMART[146] objectives** and priorities for regional biodiversity that link to the National Biodiversity Conservation & Investment Strategy;
    - aiming to ***maintain or improve*** **specific environmental outcomes** in the region, including for the benefit present and future generations;
    - requiring plans to be based on **strong scientific and socio-economic evidence**
    - consider the **status and trends** of regional biodiversity in all its forms, as well as **limiting factors and future scenarios**;

[143] On the IBRA system see: http://www.environment.gov.au/land/nrs/science/ibra.
[144] See P. Sattler, 'Bioregional Conservation Strategies and National Priorities' (2016) in M. Kennedy, *Threatened*, Humane Society International Australia, pp 92-95.
[145] Ibid, p 95-94.
[146] Specific, Measurable, Attainable, Relevant and Timely. See for example the Australian Government's Five-year review of the *National Biodiversity Conservation Strategy* 2010-2030 (2016), Appendix C.

  - adopting the most appropriate **mix of conservation responses** tailored for that bioregion, having regard to the likely effectiveness of responses and cost;
  - **explicitly considering cumulative impacts** of past, present and future development and environmental pressures, and assessing the bioregion's carrying capacity[147] for development and ecological services;
  - **applying ESD principles**, including short and long-term considerations, and ensuring biodiversity and ecological integrity are fundamental considerations in plan-making;
  - a **Regional Threat Assessment** to address recovery plans, key threatening processes and regional pressures; and
  - conditions and circumstances requiring further **impact assessment of actions**.
  - protecting **critical habitats** and **achieving goals** in recovery plans and threat abatement plans.
- **assigning responsibilities** to consult on, develop and implement plans within a certain timeframe (involving all levels of government, but ultimately give bioregional plan-making powers to the Sustainability Commission, with step-in powers and incentives to reward state or local government implementation);
- **deep engagement** with local communities, regional NRM bodies and all levels of government to coordinate priorities and build on successful programs;
- **systematically applying new tools to identify protected matters** – for example, a **National Ecosystems Assessment** may initially identify areas at the bioregion level, either for listing and protection as **Ecosystems of National Importance**,[148] or identify **Ecosystems of *Regional* Importance** for strategic long-term protection in the bioregional plan;
- **protecting other sensitive areas from impacts** upfront, such as highly productive agricultural landscapes and peri-urban farmlands;
- establish processes to **identify co-benefits** from optimal land uses (for example, biodiversity and carbon benefits);
- **integrating infrastructure planning** to conserve and restore bioregional values;
- **requiring the EPA, Ministers and all levels of government to make decisions consistent** with protections established in a bioregional plan;
- **open standing for any person to seek civil enforcement** of a breach of a bioregional plan, or to challenge validity of a plan if improperly made;
- a consistent, well-resourced and mandatory **monitoring, reporting and improvement** program; and
- **regular reviews** (for example every 10 years) and requirements to amend and update plans based on new information and continuous improvement.

Recommendation for bioregional planning:

- **The Act set out key elements for a bioregional planning process as set out above.**

[147] See for example John Williams Scientific Services Pty Ltd, *An analysis of coal seam gas production and natural resource management in Australia: Issues and ways forward* (October 2012).
[148] Such as climate refugia, significant wetlands, wildlife corridors, High Conservation Value Vegetation, Key Biodiversity Areas and biodiversity hotspots.

4.4 Accrediting, streamlining and deregulation

Discussion Paper Questions

QUESTION 13: Should the EPBC Act require the use of strategic assessments to replace case-by-case assessments? Who should lead or participate in strategic assessments?

QUESTION 14: Should the matters of national significance be refined to remove duplication of responsibilities between different levels of government? Should states be delegated to deliver EPBC Act outcomes subject to national standards?

QUESTION 15: Should low-risk projects receive automatic approval or be exempt in some way?

- *How could data help support this approach?*
- *Should a national environmental database be developed?*
- *Should all data from environmental impact assessments be made publically available?*

QUESTION 17: Should the EPBC Act be amended to enable broader accreditation of state and territory, local and other processes?

QUESTION 18: Are there adequate incentives to give the community confidence in self-regulation?

The Discussion Paper (p18) discusses 'more efficient and effective regulation and administration.' EDO supports reform to make national environmental law more efficient and effective, provided there is no reduction in levels of environmental protection and the Act demonstrably delivers improved environmental outcomes.

The Discussion Paper (p19) identifies the lack of strategic environmental assessments, duplication and the lack of upfront guidance and clarity as existing inefficiencies.

We note that it is still government policy to create a "one stop shop" for environmental approvals to improve efficiency.[149] This involves devolving federal approval responsibilities to states and territories. This is highly problematic and unlikely to achieve the desired efficiency due the difficulties of creating eight "one stop shops" and attempting to accredit state regimes that do not satisfy national standards. For example, the Commonwealth accredited the *Environmental Assessment Act 1982* in the Northern Territory which is 6 pages long (plus administrative procedures which are about 14 pages of unintelligible drafting).[150]

Box: Critique of the one stop shop

Environmental assessments and approvals, 'green tape', 'red tape', 'streamlining' and 'one stop shop' ideas have been examined by a number of parliamentary inquiries (both Senate and House of Representatives), and by independent bodies such as the Productivity Commission and the Australian Law Reform Commission. EDO has presented extensive evidence to these various inquiry processes for almost a decade. We list some examples of our submissions below, and would be happy to provide the review with our detailed submissions.

For the purpose of this submission, we note that while most environmental decision-making happens at the state level, there are five crucial reasons why the Australian Government must retain a leadership and approval role in environmental assessments and approvals of matters of national environmental significance. These reasons are:

[149] See: https://www.environment.gov.au/epbc/one-stop-shop
[150] See: https://legislation.nt.gov.au/Legislation/ENVIRONMENTAL-ASSESSMENT-ACT-1982

- **only the Australian Government can provide national leadership on national environmental issues, strategic priorities and increased consistency;**
- **the Australian Government is responsible for our international obligations, which the EPBC Act implements;**
- **State and Territory environmental laws and enforcement processes are not always up to standard, and do not consider cross-border, cumulative impacts of decisions;**
- **States and Territories are not mandated to act (and do not act) in the national interest; and**
- **State and Territory governments often have conflicting interests – as a proponent, sponsor or beneficiary of the projects they assess.**

We refer the review to the following resources that detail the myriad legal problems with the 'one stop shop' model:

- *EDO submission to the Inquiry into Environmental assessments and approvals* – June 2017
- *House of Representatives inquiry into streamlining environmental regulation, 'green tape' and 'one stop shops' for environmental assessments and approvals - ANEDO submission* - April 2013 – **Download PDF** Available at: https://www.aph.gov.au/greentape
- *Submission to Productivity Commission inquiry on Major Project assessment* (2013)
- Submissions on draft Commonwealth-State bilateral assessment agreements (2013 – 2017 various jurisdictions)
- EDO Submission on the EPBC Amendment (Standing) Bill 2015, 11 September 2015
- *ANEDO submission to the ALRC Freedoms Inquiry on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, February and September 2015
- *ANEDO submission to Federal parliamentary inquiry into environmental regulation*, April 2014 - **Download PDF**
- ANEDO *Submission on the Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act 1999,* 23 November 2012
- *An Assessment of the Adequacy of Threatened Species and Planning Laws in all Jurisdictions of Australia* (2012 and 2014)
- A further summary of key issues is at: "Australia's environment: Breaking the One-stop-shop deadlock" Nari Sahukar, *IMPACT!* Issue 97, 2016 available at: https://www.edonsw.org.au/impact_issue_97

We would be happy to provide the review with detail on any of these submissions.

There are better ways to increase efficiencies without abrogating responsibilities.[151] This part of the submission makes efficiency and effectiveness recommendations relating to:

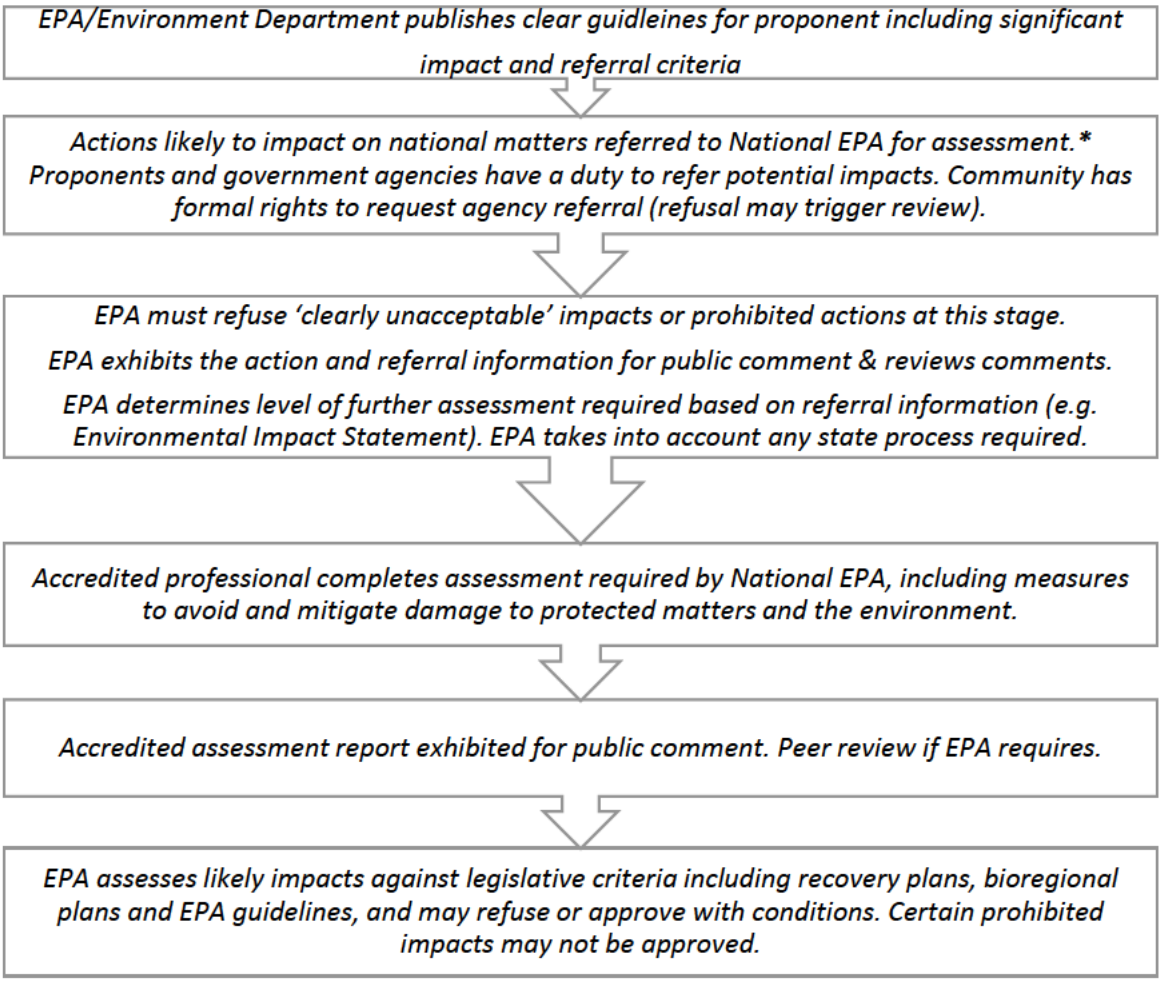
- **Simplified referral and assessment process**
- **Improved environmental impact assessment (EIA)**
- **Clarity – threshold setting**
- **Upfront guidance**
- **Call-in powers**
- **Strategic environmental assessment**
- **Accreditation**
- **Self-regulation**
- **Data**

[151] See for example, Wentworth Group of Concerned Scientists – *Statement on changes to the Commonwealth Powers to Protect Australia's Environment*, 2012, available at: https://wentworthgroup.org/2012/09/statement-on-changes-to-commonwealth-powers-to-protect-australias-environment/2012/.

Assessing actions with potentially significant impacts on federal matters

A new or amended Act should boost protections for matters of national environmental significance against adverse impacts from site-based development and other actions, through improved assessment of potentially significant impacts by the national EPA.

Outline of referral and assessment if proposal triggers Act



NB: ***National EPA assessment can be done concurrently with state assessment processes.*** *Concurrent assessment will help improve efficiency and project time frames. This could include identifying a single set of assessment criteria to meet both state and national requirements.*

More effective assessment of proposed actions and impacts

The Act should include several important changes to improve current EIA processes including:

- **Clear upfront guidance** should be provided to proponents that clearly sets out significant impact and referral criteria. This guidance should identify 'red flag' areas and issues so that proponents have upfront certainty about what impacts will be unacceptable.
- **Government actions may trigger impact assessment under the Act, including plans, programs, law reform and policy changes** that may have a significant

environmental impact.[152] For example, a new international trade treaty or an overhaul of state native vegetation laws should need to be referred to the National EPA for assessment as a controlled action (analogous to the United States *National Environment Protection Act*, the US *Endangered Species Act* and other safeguards).[153]

- **Technical referral and assessment information must be prepared by an accredited person** with the necessary ecological or other prescribed qualifications, expertise and experience (i.e. a Commonwealth accreditation program, or government/industry-accredited standard recognised under the Act). For example, NSW biodiversity laws establish such an accreditation scheme by order of the state Environment Minister.[154]
- The national EPA should also have powers to require accredited professionals be **independently appointed**, or commission an independent **peer review**.
- The Act must require consideration of **cumulative impacts** on biodiversity of an activity in combination with other past, present and likely future activities.
- The Act should require **Health Impact Assessment** of proposals.
- **Broad powers for the National EPA or Environment Minister to 'call-in' an activity that has not been referred, on the grounds of national environmental interest** – for assessment, refusal or approval with conditions. A call-in should be supported by a statement of reasons as to why Commonwealth (EPA) oversight is in the national interest, and information on the Constitutional basis for intervention.
- **Stronger and clearer *significant impact* criteria** would, for example, require assessment of impacts on threatened ecological communities in lower condition (not just in good condition). This would promote resilience and ensure assessment and approval conditions meet recovery plan goals and actions.
- **Adverse impacts on a number of listed matters should be prohibited and must not be approved** – including identified *critical habitat*; *endangered* or *critically endangered* species; *endangered* or *critically endangered* ecological communities in *good condition*;[155] *High Conservation Value Vegetation;* and – as noted – high emitting projects that are in exceedance of Australia's carbon budget. As noted, early clarification of these thresholds will create certainty and save time and money for proponents.
- **The broad 'national interest' exemptions from assessment should be replaced** with a limited exemption for national defence and security matters.[156] To avoid arbitrary exclusion of actions and impacts from EPA assessment, the Act should provide that the Environment Minister:
    - could only exempt a specified person in relation to a specified action;

[152] EPBC Act ss. 524-524A define and limit what is an 'action', including in relation to government bodies. 'Impact' (direct or indirect) is also defined. The new Act would explicitly clarify that government plans, programs, law reform and policy changes (at Commonwealth, state and local level) may trigger assessment as an action controlled by the Act. The US *Endangered Species Act* (16 U.S.C. § 1536) requires all federal agencies to consult with the wildlife department to ensure 'agency actions' (including authorisations) do not risk extinction of a listed species or result in destruction or adverse modification of listed critical habitat.

[153] First, the United States *National Environment Protection Act* (1969) and Council on Environmental Quality regulations require environmental assessment of certain federal agency actions. Second, the *Endangered Species Act* (US) requires federal agencies to consult with the Fish and Wildlife Service if *actions they take, fund or authorise* may affect threatened species. Third, US Congress processes include detailed scrutiny of the environmental credentials of trade agreements and international treaties.

[154] For example, NSW biodiversity laws establish such an accreditation scheme by order of the state Environment Minister - see the *Biodiversity Conservation Act 2016* (NSW), s 6.10.

[155] The Act or regulations and National EPA guidelines would require that Endangered or Vulnerable Ecological Communities in *poor condition* could only be cleared if a recovery plan is in place; and approval of the action would not jeopardise the community's likelihood of recovery.

[156] Cf EPBC Act s. 158, which is too broad and discretionary an exemption, as recent use demonstrates, for example to address local impacts of flying foxes.

- must be satisfied that the exemption is *necessary* in the interests of Australia's *defence or national security*, or in preventing, mitigating or responding to a *national emergency*; and
- must provide and concur with a written declaration from the relevant portfolio Minister or the Prime Minister.[157]

These reform proposals are consistent with a national strategic environmental focus and a commitment to clearer, high environmental standards.

Clearer 'significant impact' threshold

In recent years there has been heightened concern at the level of government discretion in decisions about 'controlled actions'. That is, whether a proposed development or action is likely to have a significant impact on national environmental matters, and therefore needs EPBC Act assessment.

The gap between the number of proposed actions referred, and the lower number found to be controlled actions, may suggest that some industries and agencies take a more precautionary approach to significant impacts than the Department. In other cases, such as land-clearing in Queensland, a period of weakened state laws sent a signal that landscapes could be cleared *en masse*, with little government oversight.[158] It is estimated over 250,000 ha were cleared during the de-regulated years.[159] Environment groups have raised concerns that the Commonwealth is failing to secure referrals or call-in numerous actions likely to significantly affect the national environment.[160] Another issue relates to inadequate assessment processes being applied to significant clearing, as illustrated by the Kingvale case study.

Case study: Minister concedes unlawful decision on land clearing in Reef catchment

27 November 2018: In a case demonstrating the critical role community organisations play in holding elected officials to account, the Federal Court has upheld a challenge by the Environment Council of Central Queensland (ECOCeQ) – represented by EDO NSW – to a proposal to clear 2,100 ha of native vegetation on Kingvale Station on the Cape York Peninsula in the Great Barrier Reef catchment.[161]

Early in 2018, the Federal Minister for the Environment decided that the proposed clearing could undergo the least rigorous form of environmental assessment available under Commonwealth environmental law. The Minister was required, among other things, to be satisfied that the degree of public concern about the action is, or is expected to be, 'moderately low'.

The Government's own experts found that the proposed clearing would have a significant impact on the Great Barrier Reef and a number of threatened species. The Minister conceded that decision was not made lawfully.

Reforms are needed to address the lack of public confidence and high level of discretion in the current impact assessment threshold and referrals. A clearer test for federal oversight could be achieved by making the 'significant impact' threshold more robust, objective and accountable; or by better defining the word 'significant' (or replacing it with more clearly

[157] A defence or security exemption would require a written declaration of the Prime Minister, the Attorney-General or Defence Minister, with the concurrence of the Environment Minister. A national emergency would require a written declaration of the Prime Minister or Emergency Services Minister, with the concurrence of the Environment Minister.
[158] See: https://www.qld.gov.au/environment/land/management/mapping/statewide-monitoring/slats/slats-reports
[159] See: https://www.qld.gov.au/environment/land/management/mapping/statewide-monitoring/slats
[160] See for example, WWF, *Accelerating Bushland Destruction In Queensland* (2017).
[161] See: https://www.edonsw.org.au/ecoceq_v_environment_minister_harris

defined alternatives such as 'substantial', 'more than minimal' or 'adverse' – which ever wording is established for a test must be better defined to give clarity to proponents and the community on when the test is likely to be met). While there are pros and cons of each approach, this submission proposes establishing a clearer 'significant impact' threshold. This is on the critical proviso that the national EPA assesses more potential impacts, based on clear guidelines with objective and consistent standards.

EPA's Impact Guidelines

Proponents, agencies and the community need better information on whether national assessment is required. New national EPA guidelines should be made to set out the threshold for 'significant' impacts on biodiversity, based on clearer criteria, cumulative impact considerations and more comprehensive mapping of relevant matters. To ensure rigorous and consistent assessment, a decision that a proposal is not a 'controlled action' should be subject to a rapid merits review.[162]

The national EPA should assess the impacts of the action on federal matters and have the power to approve or refuse the action, relying on scientific advice and up-to-date accurate data, in accordance with the Act and regulatory guidelines.

Powers to reject *clearly unacceptable impacts* early in the process should be retained and broadened, to reflect the Commonwealth's broad environmental leadership role. This would increase certainty and efficiency by giving proponents a clear and early indication of the viability of their proposal. It would save time and money being wasted on proposals that ultimately would be refused.

Assessment under a new Act must take into account the cumulative impact of past, present and likely future development (e.g. combined pressures from multiple threats). This should begin at the strategic level (see bioregional planning above) but extend to site-based assessment requirements. Cumulative impact assessment should identify biodiversity trends based on National Environmental Accounts, State of the Environment reports and other data.

As noted, the Act must include clear prohibitions. For example, the Act must make clear that the National EPA must not approve adverse development in areas of critical habitat (for endangered species or ecological communities) – but instead must proactively seek conservation agreements or covenants with affected landholders. This approach could draw on the requirements of the US Endangered Species Act.[163]

There should also be clearer links between decision-making and recovery planning. For example, the Act should require approval decisions to be consistent with approved conservation advices and recovery plans for threatened species and threatened ecological communities. Approval decisions must not jeopardise recovery goals for listed threatened species and ecological communities.

The Act should address effective options to integrate state planning processes and minimum national assessment standards. To improve efficiency a national EPA should coordinate with state departmental assessments; but the Commonwealth should retain approval powers where there is potential to significantly impact matters of national environmental significance. Bilateral agreements to delegate *assessment* (for example, to a state EPA or planning

[162] For example, internally by the National EPA, or externally by a specialist in the Administrative Appeals Tribunal or Federal Court. Such rapid reviews should be able to be brought by third parties.
[163] As noted above, the *US Endangered Species Act* (16 U.S.C. § 1536) s. 7 requires all federal agencies to consult and ensure 'agency actions' (including authorisations) do not risk extinction, or destruction or adverse modification of listed critical habitat.

department) would need verification of equivalent protections by a national EPA, and sign-off and oversight by the Sustainability Commission.

Call-in powers, referral duties and community rights

To ensure that all significant impacts on the national environment are properly assessed, the Act should include clearer referral duties and powers for:

- **government Ministers and agencies** at all levels (for projects they may authorise, and the impacts of their own laws, policies and programs);
- **the national EPA** to call-in and assess proposed actions (at its own initiative, or at the Environment Minister's request); and
- **the public** (to formally request a proponent or agency to refer an action, and to seek an injunction and merits review if a significant impact is not referred).

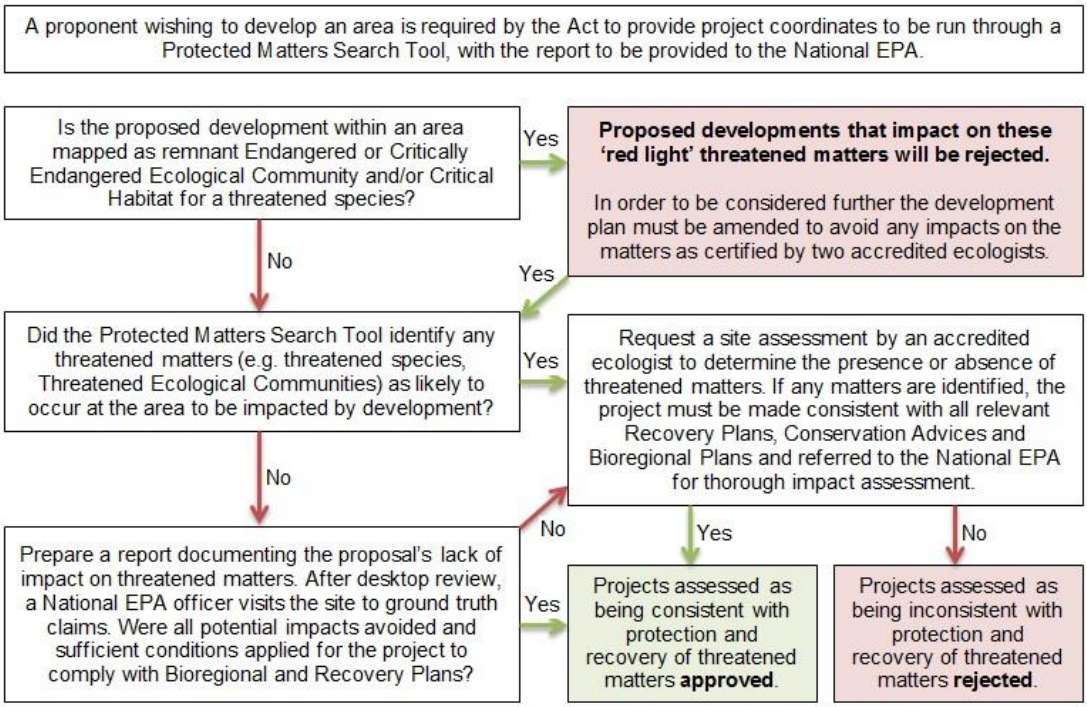
If referral criteria are made clearer, this power would only be exercised rarely, but its existence in legislation would be an important safeguard should the Act not be adequately addressing and emerging environmental issue.

A general 'call-in' or national environmental interest power would allow adverse environmental impacts to be considered that may not trigger a listed matter of national environmental significance.[164] This would address the existing limitation of the EPBC Act where significant impacts are considered through a narrow lens. Requiring environmental assessment of government law and policy changes will ensure that other federal or state laws and policies do not undermine the Act, and address a gap in traditional regulatory impact statements.[165]

Proponents of an action and all levels of government should have a duty to refer to the National EPA any action with potentially significant impacts on any protected matters. Community members should also have a formal right to request a federal, state or local agency to refer a public or private sector action if it meets certain criteria.[166] Refusal to refer an action at the community's request could trigger a right to seek judicial review to enforce the agency's mandatory duty to refer (or a right to refer the matter directly to the EPA).[167]

Below is an example of referring an action for potential impacts on a Threatened Ecological Community. Note that the impact assessment is conducted by the national EPA rather than the Environment Minister or Department:

[164] Where relevant Commonwealth constitutional powers exist, as noted in a statement of reasons.
[165] As noted above, for example, cost-benefit considerations in many state and Commonwealth Regulatory Impact Statements often may make general statements about low environmental impacts or costs of proposed regulatory changes without transparent evidence or apparent expertise on which to base these claims.
[166] For example, as noted, an agency would have a duty to consider a request made in the appropriate form if it is an action for which the agency has responsibility, carriage, oversight or authorisation.
[167] See for example the *Endangered Species Act* (US) citizen enforcement mechanism (16 U.S.C. § 1540(g)), available at: https://www.law.cornell.edu/uscode/text/16/1540.



Strategic environmental assessment

QUESTION 13: Should the EPBC Act require the use of strategic assessments to replace case-by-case assessments? Who should lead or participate in strategic assessments?

The Discussion Paper (p20) refers to the potential for strategic environmental assessment to increase efficiency. We agree that best practice strategic environmental assessment when done properly is a critical tool for addressing cumulative impacts (in a far more effective way than project by project assessment), but the Act must strengthen the rigour of strategic environmental assessment processes (**strategic assessment**).

Under current law, strategic assessments under Part 10 of the EPBC Act 'switch off' federal project-level approvals by relying on the accredited process. However, EPBC Act strategic assessments have not demonstrably delivered environmental outcomes or efficiencies.

At the outset we note that strategic assessments do not displace the need for case-by-case assessments. Strategic assessments should be used to create good data about the environment of the region, identify acceptable thresholds of impact, and create clear decision rules for project-level assessment. Project-level assessments would then become quicker and cheaper (because the data already exists), with clearer goal-posts for project design (because the strategic assessment has identified the acceptable level of impact and decision rules).

All projects should remain subject to appropriate levels of EIA.

Strategic assessment can be used to assess multiple future activities or projects upfront, under a government policy or environmental impact assessment system that is legally enforceable and objectively accredited to meet Commonwealth standards set by the Sustainability Commission (**accreditation**).

Strategic assessment and accreditation could increase efficiencies while maintaining sufficient national EPA oversight, approval and/or 'call-in' of impacts on nationally significant

matters. It may be used for a particular sector or program that can clearly and efficiently meet federal legal standards for environmental protection.

As noted above, this is different to *bioregional planning*, which is envisaged as a systematic, integrated national planning process for environmental protection and ESD across each Australian bioregion.

Strategic assessment and accreditation must be underpinned by rigorous, objective and transparent requirements set out in the Act and regulations. These should include criteria for Commission accreditation, consultative policy design processes, requirements on responsible parties to demonstrate strong biodiversity and environmental outcomes from accredited laws and programs, and transparent compliance monitoring against Commonwealth standards by the national EPA.

The Act should embed best practice strategic assessment by specifying:

- **strong legislated standards**, decision-making criteria and science-based methods, including a **'maintain or improve' environmental outcomes** test (such as for biodiversity, water quality, vegetation, carbon storage) and requirements to be **consistent with recovery plans and threat abatement plans**;[168]
- **cumulative impact assessment** requirements, taking account of past, present and likely (approved) future activities at the relevant scale (for example, IBRA subregion);
- **guidelines to support integration** of federal strategic assessment with state and local planning processes at the earliest possible stage;
- **comprehensive and accurate mapping** and baseline environmental data;
- **mandating transparency and public participation** at all phases of the process, including to verify post-approval compliance, to ensure community confidence and acceptable outcomes;
- requiring **alternative scenarios** to be considered, including for **climate change adaptation**, to enable long-term planning for realistic worst-case scenarios (i.e. plan against failure);
- **ground-truthing** of landscape-scale assessment via local studies and input;
- **adaptive management and review** once a program is accredited, to respond to new discoveries, correct unsuccessful trajectories or implement best available technology;
- strategic assessment may complement and assist **site-level assessment** where appropriate, but not replace it; and
- **robust oversight by the national EPA**, including via legislated, independent performance audit requirements, transparent verification of compliance, and 'call-in' powers for higher-risk actions.

In addition to clear legislative provisions, a new national EPA should publish guidelines on strategic assessment, verification and approval requirements under the new Act.

Accreditation

It is recommended that a new national EPA should have greater oversight in areas that are currently delegated to separate authorities. For example, in relation to regulation of offshore petroleum by EDO has engaged with NOPSEMA through submissions and direct meetings since its establishment. The accreditation of NOPSEMA to undertake assessments and approvals has required third party input to point out where NOPSEMA processes have not been equivalent to EPBC Act standards. [169]

[168] The Hawke Review recommendation 6 agreed with the need to make EPBC Act strategic assessment 'more substantial and robust', including a 'maintain or improve' test for environmental outcomes.
[169] https://www.edo.org.au/publication/submissions-involving-nopsema/

Accreditation of state laws (as distinct to accreditation of federal agencies) is discussed throughout this submission in relation to the need for national standards and the flawed 'one stop shop' proposal. However, we reiterate that our audits and everyday experience is that state and territory laws do not generally meet national standards, and proposed accreditations of state laws where protections have been reduced are legally problematic.

This part of the submission examines two examples of accreditation – in relation to forestry and fisheries.

Forestry oversight

Existing national oversight and governance of forestry has been highly inadequate. For the last 20 years, Commonwealth exemptions have applied to forestry operations under Regional Forest Agreements between the Commonwealth and some states (NSW, Tasmania, Victoria and Western Australia). These agreements provide an exemption from standard EPBC Act assessment processes, but in many cases rely on poorly enforced state laws (see case study).

Despite a built-in commitment to regularly review the agreements, transparency and compliance has been poor, environmental monitoring has been patchy, and five-year reviews have been grossly delayed.[170] In a scathing assessment in 2009, the Hawke Review described this as completely unacceptable, but the delays have not been rectified since then.[171] A specific example is that several mandatory reviews were not completed by the statutory deadlines, despite governments announcing their intentions to renew the expiring Regional Forest Agreements regardless.

It is evident that the Regional Forest Agreements are outdated, based on science that does not account for climate change, and are no longer tenable regulatory instruments. There are many instances where logging of native forest continues to contribute to the incremental loss of habitat, and decline in listed threatened species and communities, and as such do not achieve the objects of the Act.

Case study: The Tasmanian RFA and the Swift Parrot

The primary species at risk from forest practices operations in Tasmania is the Swift Parrot *Lathamus discolor* which is identified as critically endangered under the IUCN Red List and the EPBC Act, with a population of less than 2500.

Swift Parrot is on a 10 year pathway to extinction,[175] unless all steps to recover the species are taken, including by retention of its existing breeding and feeding habitat. Tasmanian native forests contain the entirety of its breeding habitat. Key threats to its survival are its breeding success, including nest predation by Sugar Gliders and habitat loss. Sugar glider predation is made more likely through fragmentation caused by logging in breeding habitat. And yet, the continued logging of critical Swift Parrot breeding habitat is allowed for under the Tasmanian Regional Forest Agreement with no consequences. The RFA only requires management prescriptions identified at the State level to be met, without specifying what those prescriptions are or what outcome they are intended to meet.

The development of standard prescriptions under the State's Forest Practices Code have been questioned in numerous reports in cases. For instance, by the Federal Court in Brown v Forestry Tasmania (No 4) [2006] FCA 1729, Justice Marshall found that the State's management

[170] See: Review of the Regional Forestry Agreements – Combined second and third five yearly reports, and Independent Review by Ewan Waller (*Independent review of the report on progress with the implementation of the New South Wales Regional Forest Agreements for the second and third five-yearly reviews 2004 – 2014*), available at: https://www.epa.nsw.gov.au/your-environment/native-forestry/about-public-native-forestry/regional-forest-agreements-assessments/review-regional-forest-agreements

[171] See for example, Hawke Review of the EPBC Act (2009), Chapter 10.

prescription under the Forest Practices Code did not in fact "protect" listed threatened species, including the Swift Parrot. The Court made findings that expert zoologist advice was routinely ignored, and that on one occasion logging in fact took place in an area meant to be protected.

Justice Marshall found the forestry operations authorised under State foresty practices laws were not "in accordance with" with the RFA and therefore were not covered by s38 of the EPBC Act. The Commonwealth government's response was to amend the RFA, not to require the State to amend the management prescriptions, and the Full Court on appeal found the amended RFA did not intend the management prescriptions to be binding.

Documents produced under Right to Information laws in 2015 demonstrated no change to these practices. This evidence indicated that scientific advice on logging of coupes containing Swift Parrot habitat was provided to DPIPWE (the agency with oversight of threatened species protection), but DPIPWE did not follow it in allowing approval of logging of those coupes.[176]

The Tasmanian Regional Forest Agreement substantively does not protect or seek to recover threatened species. It is not an instrument that achieves the objects of the Act. These issues would not be fixed by amending Regional Forest Agreement, rather, the science underpinning that agreement and forestry regulation at a State level need wholescale review. As Justice Marshall pointed out in the *Wielangta* case, the RFA provides an alternative to the normal assessment process under the EPBC Act, and should achieve the same standards.[177]

The Act should provide more effective oversight of forestry by the national EPA and the Australian community, including enforceable protections through assessment, approval and offence provisions applying to forestry activities, rather than exemptions under inadequate and outdated Regional Forest Agreements.

The impacts of recent bushfires on forest biodiversity have been almost catastrophic for many species. It is estimated that 113 threatened species have been impacted.[172] The need to identify the impacts and plan for recovery is urgent, and the need for long-term independent oversight is even more critical. It is particularly disturbing that at this time that state government (for example in NSW) are allowing salvage logging to occur in already stressed burnt areas.[173] National leadership on forests must be regained and strengthened.

Fisheries accreditation

The Act should retain and improve specific strategic assessment processes to accredit regulation of fisheries. Consistent with other recommended reforms, the national EPA (instead of the Environment Minister) should be responsible for approving Commonwealth and export fisheries for their ecological sustainability and providing strategic oversight.

The EPBC Act initiated Commonwealth environmental impact assessment for fisheries. Overall, Environment portfolio involvement has been essential in driving significant improvements in the way Australia's Commonwealth and export fisheries are managed. This should continue under a more independent framework in the Act.

The Act should be strengthened to improve ecologically sustainable fisheries management by the following additional reforms:

- stricter requirements to avoid killing listed species during fishing operations, with national EPA oversight, in order to qualify for exemptions for offences;

[172] See: https://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources
[173] See: https://www.epa.nsw.gov.au/your-environment/native-forestry/integrated-forestry-operations-approvals/coastal-ifoa

- the Scientific Committee, or a special advisory group to the Committee, should steer an initial 12-month project to assess all harvested and bycaught species in Commonwealth fisheries identified as 'at risk' in relevant Risk Assessment processes, to bring the threatened species lists up-to-date and to ensure those species are being managed appropriately;
- protecting highly migratory species listed on Annex I of the UN Convention on the Law of the Sea as a protected matter under the Act;[174]
- extending mandatory critical habitat listing to include listed migratory species, including a prohibition on adverse impacts to identified critical habitat;
- all species, including commercially fished marine fish, should be nationally listed in the appropriate threatened category according to scientific and biological criteria;
- set out mandatory duties to develop and apply recovery and threat abatement plans; and
- threatened categories in the new Act would more closely reflect IUCN categories, including *near-threatened* and *data-deficient* categories.

Accreditation of consultants

There are some instances where accreditation schemes can improve the rigour and effectiveness of a process. EDO supports accreditation of ecological consultants and other relevant experts and assessors who undertake EIA. We also recommend that accredited consultants be appointed to assess a project from an independent pool. This enhances objectivity. EDO would be happy to provide further detail on how an expert accreditation could work at a national level.

Self-regulation

QUESTION 18: Are there adequate incentives to give the community confidence in self-regulation?

The notion that a single standard can be set, following which self-regulation is possible, is not supported by evidence – especially in relation to environmental protection outcomes. Self-regulatory regimes in the environmental management context do not have adequate regard to the fact that incremental impacts from multiple projects won't simply be additive and linear or to the fact that there will be impacts beyond which no further impacts should be permitted. There is minimal scope to address cumulative impacts in self-regulatory regimes. Some of the limitations are illustrated in the following case study.

Case studies – Land clearing in NSW under self-assessable codes

In 2016, NSW repealed the ban on broadscale land clearing in favour of codes. The new laws established out assessment and approval requirements for vegetation clearing (for example, approval by a new Native Vegetation Panel), but those processes remain largely unused due to the new option of undertaking clearing under largely self-assessed codes. In the absence of a regulatory map to underpin the scheme, landholder decide for themselves whether their land is regulated or not, and some types of code clearing have notification requirements only (ie, no assessment or verification is required).

In 2019, a Report by the NSW Audit Office Report[175] into NSW laws made the following conclusion:

The clearing of native vegetation on rural land is not effectively regulated and managed because the processes in place to support the regulatory framework are weak. There is no evidence-based assurance that clearing of native vegetation is being carried out in accordance with approvals.

[174] See: http://www.un.org/depts/los/convention_agreements/texts/unclos/annex1.htm.
[175] See: Audit Office of NSW *Managing Native Vegetation*, 27 June 2109 – available at: https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation

Responses to incidents of unlawful clearing are slow, with few tangible outcomes. Enforcement action is rarely taken against landholders who unlawfully clear native vegetation…

Not releasing the map has made it harder for landholders to identify the portions of their land that are regulated and ensure they comply with land clearing rules. It has also limited OEH's ability to consult on and improve the accuracy of the map.

More recently, the NSW Natural Resources Commission undertook a review of clearing rates under the codes and confirmed regulatory failure of the new laws, as illustrated in the following diagram.[176]

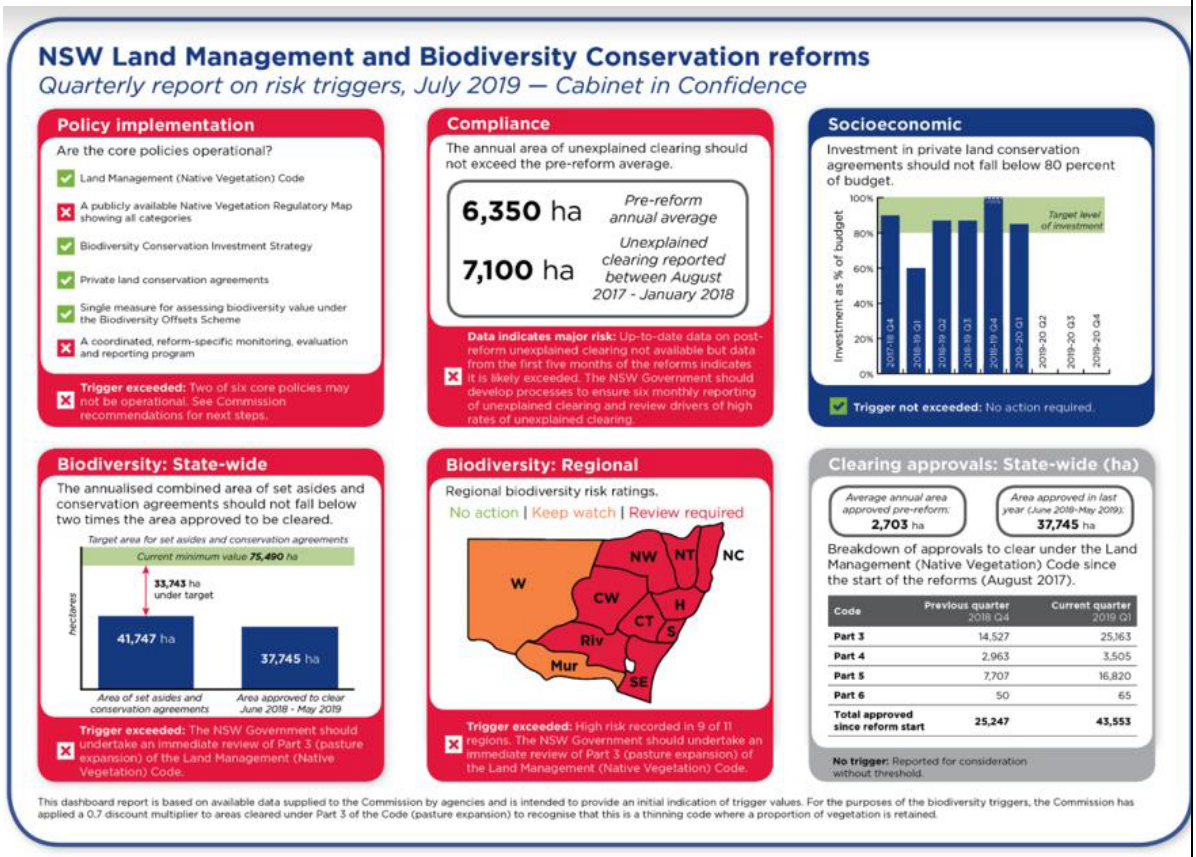


Figure 2: Proposed trigger reporting dashboard and current trigger value

There are other examples of where voluntary initiatives and self-regulation have failed. For example, while a number of large retailers voluntarily initiated plastic bag charges, due to negative consumer feedback these were reversed (eg Target stores). Many jurisdictions have realised that to achieve the environmental outcome of reducing plastic pollution, a regulatory ban on single use plastic bags is required.

[176] See Natural Resources Commission *Land management and biodiversity conservation reforms, Final advice on a response to the policy review point*, July 2019, available at: https://drive.google.com/file/d/1aYqKtF7A9JrHyrOWCjPF_4nZoQPHZkE8/view. See also: https://www.edo.org.au/2020/04/02/native-veg-clearing-nsw-regulatory-failure/

Data

QUESTION 15: Should low-risk projects receive automatic approval or be exempt in some way?

- How could data help support this approach?
- Should a national environmental database be developed?
- Should all data from environmental impact assessments be made publically available?

As discussed above in theme 3 in relation to delivering outcomes, we make recommendations about improving coordinating and publicising data. The need for improved data to underpin operation of the Act and for planning cannot be understated. As noted, we suggest a number of recommendations in relation to a data hub, portal, system of environmental accounts and a National Ecosystem Assessment. The role of collating analysing, updating and applying this data should be a key role of a new Sustainability Commission (as recommended above). We therefore support a national environmental database.

We also strongly support data from EIA being made publically available.

However, we have concerns about data being used for automated approvals, as proposed in question 15. Under state laws various categories of exempt or complying development can still have significant cumulative impacts, and the use of private certifiers to 'tick off' on these developments has been problematic.

As recommended above, we strongly support better up front guidance on whether a project requires assessment. There may be some scope (if data sets were comprehensive) for a proponent to confirm that there were no protected matters or relevant impacts in the area of their proposed development to show due diligence that they had considered if national law applied, but there would need to be clear detail on how this would work for data-poor areas.

Recommendations regarding accreditation, streamlining and de-regulation:

- **Simplify and clarify referral and assessment process.**
- **Improve environmental impact assessment (EIA).**
- **Improve certainty and efficiency by setting clear thresholds, rules and guidance upfront on unacceptable impacts.**
- **Establish clear referral duties and powers for relevant Ministers and agencies, the National EPA, and the public to formally request an action be referred.**
- **Strengthen criteria for conducting strategic environmental assessment to support and complement (but not replace) project assessment.**
- **Retain accreditation where there is evidence of environmental outcomes being achieved – for example: accreditation of fisheries.**
- **Revoke accreditation where there is no evidence of environmental outcomes being achieved – for example: Regional Forestry Agreements.**
- **Establish a system for the accreditation of consultants and experts who prepare EIA reports.**
- **Undertake a review of current self-regulatory schemes in terms of whether they achieve environmental outcomes.**
- **Improve effectiveness and efficiency by improvements to data coordination, sharing, transparency (including by establishing a National Ecosystem assessment, environmental accounts, data hub, and requirements to publicise EIA information).**

4.4 - Compliance and enforcement

Another important issue relating to the role of the Commonwealth in terms of improved governance and oversight of environmental outcomes relates to compliance and enforcement. (Third party enforcement is discussed further in theme 6 - Community participation, transparency and accountability below).

Our national environmental law requires a diverse and flexible enforcement toolkit, penalties for strong deterrence and an expanded role for third parties as 'surrogate regulators' (including civil society, supply chain operators and others).[177]

Penalties and incentives must make it more attractive to comply with the law than to risk non-compliance. Decisions to comply or not to comply should have financial and reputational consequences, and directors should be personally liable for company behaviour that was known, or ought to have been known by the directors, to be illegal.

In brief, compliance and enforcement under the Act must include:[178]

- A **consolidated part** on compliance and enforcement, penalties and tools.
- Explicit powers for a new **National EPA** as the chief environmental regulator.
- **Open standing** for third party civil enforcement by community members including Court orders for injunctions, declarations and compensation.
- Power for community members to **seek performance of enforceable duties** under the Act, such as requirements to assess nominations, prepare a recovery plan within a statutory timeframe or comply with particular decision criteria.
- A comprehensive suite of **investigative powers** for authorised officers (for entry, seizure, information-gathering etc).
- New powers to issue **warning notices** and **environmental protection notices** to direct certain action (such as to cease an activity), including in response to minor breaches or where more evidence is needed for the suspected breach.
- A full suite of **criminal, civil**[179] **and administrative sanctions**[180] to respond to breaches, to apply across the spectrum of non-compliance in the Act.
- A **comprehensive definition of 'take'** in relation to animals that belong to a threatened species or ecological community – one that expands on existing terms, 'harvest, catch, capture, trap and kill' to include actions to 'harass, harm or pursue' an animal, or to *attempt* any of these actions.[181]
- Provisions to enable **detention of non-citizens** suspected of breaching the Act and to enable the seizure of wildlife specimens (with enforceable conditions).
- **Harmonised federal-state regulation** based on the most stringent standards and clearly assigned responsibilities.[182]
- A **proactive compliance monitoring and auditing system**, including discretion for the national EPA to conduct audits, and strategic oversight by the Sustainability Commission.
- Investigation and prosecution **costs would be recoverable** from offenders.
- Other fees and penalties would be hypothecated to the **Capital Stewardship Fund**, rather than consolidated revenue, for increased investment.
- **High maximum penalties** would be retained (at least equivalent to the EPBC Act) while penalties under the associated Regulation would be **increased**. This provides appropriate incentives and deterrence for mid-tier compliance.
- Triggers or thresholds that enable **adaptive management** (and regulator intervention) if impacts increase or desired outcomes are not being achieved.
- Ability for consent authorities to **update conditions over time** (including for strategic assessments) to ensure **continuous improvement** of outcomes and the use of **best available techniques** for environmental management.

Recommendations regarding compliance and enforcement include:

- **A consolidated part on compliance and enforcement, penalties and tools.**
- **Explicit powers for a new national EPA as chief environmental regulator.**
- **A comprehensive suite of investigative powers for authorised officers.**
- **Open standing for the community to seek judicial review of erroneous decisions, civil enforcement of breaches, and performance of non-discretionary duties by the Minister or other decision-makers under the Act.**
- **A full range of best-practice criminal, civil and administrative sanctions.**
- **Harmonised federal-state regulation based on the most stringent standards and clearly assigned responsibilities.**
- **Cost recovery and environmental funding provisions.**
- **Adaptive management and ability to strengthen approval conditions over time in response to best available science.**

4.5 Funding

Adequate resourcing

The recent announcement of $50 million of Commonwealth funding for emergency wildlife and habitat recovery as part of bushfire response is welcomed but highlights a number of issues with environment funding.

As successive State of the Environment reports have found, effective implementation of environmental protections, management and restoration requires significantly increased resources[183] – for listing and conserving threatened species, ecological communities and heritage places, landscape-scale planning, NRM and conservation programs, ecological mapping, monitoring and enforcement.

Yet state and federal environmental management resourcing and agency capacity is trending in the wrong direction, and is frequently disrupted by political cycles, stop-start program funding, agency restructures and 'efficiency measures.' Meanwhile key threats like climate change, land clearing and invasive species accelerate.

Detailed analysis of resourcing for environmental protection and regulation is beyond the scope of this submission. Nevertheless, the Act will need to trigger establishment of and stimulate innovative, inter-government and multi-sector funding sources. An example in relation to a specific program, HSI has previously recommended a quadrupling of resources

[177] See further N. Gunningham and D. Sinclair, *Designing Smart Regulation* (1999) OECD.
[178] The framework proposed here includes (but is not limited to) many of the recommendations from the Hawke Review to improve EPBC Act enforcement (see Hawke 2009, Chapter 16).
[179] Civil penalties are fines that can be proven on the 'balance of probabilities' standard. This is separate and additional to 'civil enforcement' action by community members to seek a remedy, such as an injunction or a declaration of breach.
[180] Administrative sanctions include novel orders such as enforceable undertakings i.e. a binding commitment for which non-compliance is a legal breach), conservation agreements and remediation orders and directions to the to publish notice of the breach.
[181] Cf EPBC Act general definition, s. 528, and s. 303BC ('take' in relation to international movement of wildlife specimens includes 'kill'). Additional terms are in the US *Endangered Species Act* definition, s. 3 (16 U.S.C. § 1532).
[182] For example, in relation to whale watching regulations and offences.
[183] Australia's *State of the Environment 2016* report identifies 'insufficient resources for environmental management and restoration' and 'inadequacy of data and long-term monitoring' among six key challenges. See: https://soe.environment.gov.au/theme/overview/topic/overview-challenges-effective-management.

to the Department of Environment's Threatened Ecological Communities team to systematically identify, assess and recommend listings of those communities, estimated at $10 million over five years.

National Biodiversity Conservation and Investment Strategy

The Act should require the Environment Minister to consult on, approve and coordinate implementation of a National Biodiversity Conservation and Investment Strategy (**NBCIS**). Unlike existing strategies, the NBCIS should be directly interwoven with the fabric of the Act and National Environment Plans.

The Act should also provide for the following to establish the NBCIS:

- Require the NBCIS to be directed towards achieving the objects of the Act, and SMART national environmental goals and targets relevant to biodiversity;
- An intergovernmental or cross-sectoral Biodiversity Expert Taskforce to advise the Sustainability Commission on national biodiversity priorities, building on public consultation, bioregional plans and existing investments;[184]
- Clear integration with bioregional plans and technical assessments;
- Specific national programs on biodiversity education, research, monitoring, government funding and other investment;
- Set clear responsibilities, including non-discretionary duties on the Minister;
- Enable the Minister to delegate administration to the Department of Environment and otherwise by agreement with States and Territory ministers;
- Clear criteria, consultation processes and timeframes to engage stakeholders (the community, scientists, indigenous groups and protected area managers, conservation, Landcare and wildlife groups, state and territory agencies, and private sector providers such as private conservation funds and biobankers);
- Requirements to integrate with bioregional planning aims and outcomes and strengthened joint recovery and threat abatement planning (with significantly increased resourcing);
- Requirements to estimate timeframes and investment levels to achieve goals;
- Use of robust environmental valuation of potential losses of biodiversity and ecological services, and potential gain through implementing the NBCIS; and
- The Sustainability Commission should have oversight of performance monitoring and achievement of the NBCIS as part of *State of the Environment* reporting.

Recommendations for funding

- **Increase Commonwealth funding for implementation of the Act including better resourcing and foresight for agencies, conservation programs and natural resource management, including multi-sector investment in ecosystem services, databases and new tools.**
- **The Act should require the Environment Minister to consult on, approve and coordinate implementation of a National Biodiversity Conservation and Investment Strategy (NBCIS).**

[184] See P. Sattler, 'Bioregional Conservation Strategies and National Priorities' in HSI Australia, *Threatened* (2016) pp 92-96.

5. Indigenous issues

Discussion Paper Questions:

QUESTION 12: Are heritage management plans and associated incentives sensible mechanisms to improve? How can the EPBC Act adequately represent Indigenous culturally important places? Should protection and management be place-based instead of values based?

QUESTION 19: How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management?

- How can we best engage with Indigenous Australians to best understand their needs and potential contributions?

- What mechanisms should be added to the Act to support the role of Indigenous Australians?

A central flaw in the EPBC Act is that it fails to recognise the importance of Indigenous self-determination and Indigenous rights and relationships to country and sea country. To address this we make recommendations regarding:

- **Indigenous self-determination and relationships to country and sea**
- **Recognising Indigenous self-determination by centering Indigenous peoples in all aspects of decision-making**
- **Strengthening the framework around Indigenous Protected Areas**
- **Improving joint management structures around Commonwealth reserves**
- **Taking into account, and protection of, Indigenous knowledges**

5.1 Indigenous self-determination and relationships to country and sea country

The Act should establish new mechanisms, in accordance with its objects, to recognise the core relationship of Australia's First Nations people to country, by entrenching the role of Indigenous peoples in the conservation and ecologically sustainable use of Australia's biodiversity and to promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge. Based on our experiences operating within the EPBC Act, the EDO makes the following suggestions for reform. However, while we offer the following ideas as ways to better recognise Indigenous peoples' connection to country through the EPBC Act, we strongly submit that the design of any mechanisms must be first and foremost developed with Indigenous peoples, organisations and communities.

Effective consultation with Indigenous peoples, communities and organisations

Article 19 of the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) requires national governments to consult and cooperate to obtain 'free, prior and informed consent before adopting and implementing legislative or administrative measures' that may affect Indigenous peoples. Australia supports the UNDRIP, and the rights in UNDRIP are legally underpinned by the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, all of which Australia is a signatory to.

5.2 Recognising Indigenous self-determination by centering Indigenous peoples in all aspects of decision-making

'Free, prior and informed' consent of Indigenous communities

The Act must enshrine clear requirements for 'free, prior and informed' consent from Indigenous peoples for all relevant actions that impact on their country. This is consistent with Articles 19 and 32(2) of the UNDRIP. We note that other pieces of legislation, such as the *Native Title Act 1993* (Cth), do not offer sufficient opportunities to meet the requirements of 'free, prior and informed' consent in relation to actions pursuant to the EPBC Act. These other pieces of legislation have different focus points, whereas, the EPBC Act needs to apply 'free, prior and informed' consent in a broader way - both in terms of the breadth of communities who are consulted/consent is required and the subjects of consultation/consent. There is a legislative and policy disconnect between Indigenous peoples and communities, Indigenous rights (for example, native title and heritage) and environmental law. Enshrining 'free, prior and informed' consent in the EPBC Act, or a new Act, and then operationalising the principle, provides a unique opportunity to consider environmental actions in a context that is informed by a fuller understanding of country.

A specific governance mechanism (a body such as a Commissioner or agency) to operationalise 'free, prior and informed' consent

'Free, prior and informed' consent should be thought of as a flexible right, the content of which is informed by Indigenous peoples. However, it is clear that where there will be a substantial impact on Indigenous culture, there should be a right for Indigenous peoples to refuse consent.

We submit that operationalising 'free, prior and informed' consent will require consultation and planning. One way this could be achieved would be an Indigenous Country (Land and Waters) Commissioner and associated Advisory Council. For example, one of the first tasks of such a Commissioner could be to determine how 'free, prior and informed' consent would operate under the Act. We suggest the Commissioner's role would be to propose regulations that set out how this would be undertaken in the practical context of the Act. These regulations would need sufficient breadth to be able to be applied across diverse Indigenous communities and in relation to the different forms of approval in the Act.

'Free, prior and informed' consent for any decision that will impact Indigenous heritage values or Indigenous Protected Areas

While we submit that there should be requirements for 'free, prior and informed' consent from Indigenous peoples for all relevant actions that impact on country, at a minimum, 'free, prior and informed' consent should be required for any decision that will impact Indigenous heritage values or IPAs.

Indigenous heritage values are already recognised under the Act and there are relevant penalties for impact on Indigenous heritage values. However, the litigation relating to the 4WD tracks in the Western Tasmanian Aboriginal Cultural Landscape (at first instance: *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2016] FCA 168) demonstrated that Aboriginal communities still face significant difficulties in protecting their recognised Aboriginal heritage values.[185] As a signatory to all of the relevant conventions protecting the rights of Indigenous peoples,

[185] At first instance: *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2016] FCA 168.

Australia should be ensuring that those rights are adequately protected in the national Act, beyond protections or omissions at the State level.

Consistent with our recommendation for a new NRS trigger, IPAs should become a matter of national environmental significance. We recommend that 'free, prior and informed' consent be required from the relevant Traditional Owners and Indigenous land managers when assessing any impact on an IPA. (IPAS are discussed further below).

Indigenous peoples, communities and organisations should be provided with the opportunity to conduct independent Environmental Impact Assessments

Specific impacts on Indigenous communities of any action under the Act must be addressed and this must be done in consultation with Indigenous peoples. Providing the opportunity for Indigenous communities, if they choose, to conduct independent Environmental Impact Assessments (EIAs), that must be considered by the EPA or Minister in making decisions on referred actions, allows Indigenous peoples to effectively and actively engage with proposals that directly impact on them. This opportunity must be properly funded and resourced so that Indigenous communities and organisations have the practical ability to conduct their own EIAs. In Canada, part of the impact assessment includes the decision-maker taking into account 'any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project.'[186]

5.3 Strengthen framework around Indigenous Protected Areas

IPAs now make up a large proportion of the NRS and make a significant contribution to Australia's international environmental obligations on protected areas. However, currently IPAs do not have a secure legal basis or funding. Our overarching suggestion is that along with other elements of the NRS, IPAs should be recognised as matters of national environmental significance under the Act. This would extend to Sea Country IPAs, which should also be included in the marine equivalent of the NRS: the National Reserve System of Marine Protected Areas (NRSMPA). We also suggest that the EPBC Act include a framework for IPAs that provides long term security that the program will continue but is not so prescriptive as to undermine the current benefits of flexibility.

Given the unique qualities of IPAs, as compared to other NRS protected areas, specific processes should be developed for assessing proposals that may significantly impact an IPA. For example, for actions affecting IPAs, Traditional Owners and/or Indigenous land managers could be prescribed as the approval authority if they wish to have this responsibility. Traditional Owners and Indigenous land managers would need to be funded to undertake their role in relation to controlled actions. Further, IPAs more generally, require more secure funding.

5.4 Improving joint management structures around Commonwealth reserves

We understand that current joint management arrangements are not operating effectively in relation to Commonwealth reserves, including Kakadu National Park and Uluru-Kata Tjuta National Park. The EPBC Act review offers an important opportunity to engage with Traditional Owners of Commonwealth reserves and to identify ways to improve joint management structures within the Act, to ensure there is self-determination and appropriate decision-making power on the part of those Traditional Owners with respect to their management.

[186] *Impact Assessment Act,* SC 2019, c. 28, s22(1)(q).

5.5 Taking into account, and protection of, Indigenous knowledges

Indigenous knowledges should be taken into account in all decision-making, including through the various mechanisms we have identified above for inclusion in the Act: 'free, prior and informed' consent procedures; independent Indigenous EIAs; and/or assessment of impacts on IPAs. Of course, this should be subject to requirements that Indigenous knowledges that are required to be kept confidential must be able to be communicated to relevant bodies with confidence that appropriate secrecy will be maintained. In Canada, legislation provides that part of the impact assessment includes the decision-maker taking into account 'Indigenous knowledge provided with respect to the designated project'.[187] Further, the Canadian legislation requires that the report of the relevant Agency must set out how they 'took into account and used any Indigenous knowledge provided with respect to the designated project'.[188] This could be a suitable model for adoption under a new or amended EPBC Act.

Recommendations relating to Indigenous self-determination and relationships to country and sea country include:

- **Any changes relating to the role of Indigenous peoples under the Act must be subject to effective consultation with Indigenous peoples, communities and organisations.**
- **'Free, prior and informed' consent of Indigenous communities becomes a mandatory operational principle within the Act.**
- **A specific governance mechanism (a body such as a Commissioner or agency) be established to operationalise 'free, prior and informed' consent.**
- **'Free, prior and informed' consent is particularly required for any decision that will impact Indigenous heritage values or Indigenous Protected Areas.**
- **Indigenous peoples, communities and organisations should be provided with the opportunity to conduct independent Environmental Impact Assessments.**
- **IPAs be recognised as a matter of national environmental significance.**
- **Improve joint management structures around Commonwealth reserves to ensure there is self-determination and appropriate decision-making power on the part of Traditional Owners.**
- **Indigenous knowledges should be taken into account in all decision-making in ways that appropriately safeguard Indigenous communities and peoples.**

[187] *Impact Assessment Act,* SC 2019, c. 28, s22(1)(g).
[188] *Impact Assessment Act,* SC 2019, c. 28, s28(3-1).

6. Community participation, transparency, and accountability

Discussion Paper Questions

QUESTION 20: How should community involvement in decision making under the EPBC Act be improved? For example, should community representation in environmental advisory and decision-making bodies be increased?

QUESTION 21: What is the priority for reform to governance arrangements? The decision-making structures or the transparency of decisions? Should the decision makers under the EPBC Act be supported by different governance arrangements?

To ensure public confidence, transparency, accountability for environmental outcomes, a new Environment Act (or amended EPBC Act) must include a range of key safeguards to ensure public participation, transparency and access to justice.

We reiterate our support for the proposed principle to guide future reform (Discussion Paper p26):

> ***Improving inclusion, trust and transparency***
>
> *Improving inclusion, trust and transparency through better access to information and decision-making, and improved governance and accountability arrangements.*

Community access to justice is an absolutely crucial component of good decision-making because:

- it increases public confidence in decision-making and environmental outcomes and supports the rule of law;[189]
- transparency and independent oversight of government action improves decision-making, public accountability and deters corruption;[190]
- best practice laws require an expanded role for third parties – civil society, supply chain operators and others – as 'surrogate regulators'; and
- Australia is also a signatory to several international commitments promoting legal rights to participate in decision-making processes and to have access to the courts to ensure accountability.[191]

There are significant benefits to be gained by having comprehensive participation and accountability provisions set out in law. They include better community understanding and buy-in when consulted at early stages of a planning process leading to reduced conflict at later stages; more robust assessment when a range of perspectives are considered; more robust and accountable decision-making due to the very existence of accountability and review measures in law (even though these are rarely exercised); and greater chance that environmental outcomes will be delivered as intended with both government and community oversight.

[189] *The rule of law* means that the Australian community is confident that the law applies equally to all parties, ensures procedural fairness, prevents favouritism or privilege of certain parties, and provides that breaches will be enforced.
[190] As recognized by bodies such as the NSW Independent Commission Against Corruption.
[191] These include the *International Covenant on Civil and Political Rights*, the *Rio Declaration on Environment and Development* (1992) and related *UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (2010) (see www.unep.org).

Unfortunately, in a number of jurisdictions there has been a loss of faith in governments to impartially and objectively administer legislation to achieve intended outcomes for environments and the community. A compelling example of regulatory failure relates to water management in the Murray Darling Basin. This has involved preferential treatment of industry stakeholders in being consulted, a lack of compliance action, rule making behind closed doors, and a failure to deliver environmental outcomes specified in legislation. Following a number of inquiries and a Royal Commission, significant governance reforms have commenced to address the lack of trust and the regulatory failure.[192]

In this context, public participation, transparency and accountability safeguards are more important than ever in the management of our environment.

In this part of the submission, EDO makes recommendations to meaningfully implement the proposed principle of "inclusion, trust and transparency" by establishing:

- **The "lawfare" myth**
- **Strong public participation provisions**
- **Merits review for key decisions**
- **Easily accessible, timely public information on actions and decisions**
- **Open standing to review legal errors and enforce breaches**
- **Protective costs orders**

6.1 The "lawfare" myth

In addition to a lack of trust in government, there has been a concurrent attack on the role of the community in seeking to hold government decision makers to account. Referred to as "lawfare", it is suggested that the rights of third parties to bring cases against proposals under the Act is being abused. **This is a dangerous myth that threatens to undermine the rule of law**.

The extended standing rules, introduced with the EPBC Act in 1999, reflect the importance of our national environment and the wider public's role in protecting it:

> *[environmental] objectives in bringing litigation – such as to prevent environmental impacts, raise issues for legislative attention and improve decision making processes – reflect public rather than private concerns, such as protecting property and financial interests.*[193]

Rather than acknowledging the critical role of the community in holding government decision-makers to account and ensuring the laws are followed, there has been serious misinformation in the media perpetuating the myth of "lawfare" in relation to environmental issues (ie, the idea that environmental groups or individuals are using legal review rights to unnecessarily delay developments and projects). It is important that the review takes into account the reality of how these fundamental rights work in practice.

There is a strong public policy rationale for retaining broad standing provisions that allow conservation groups and individual 'third parties' to seek judicial review:

- First, there is a general public interest in ensuring that decision-makers lawfully comply with legislative procedures – this is the role of judicial review.

[192] For example, NSW has established a new Natural Resources Access Regulator that has commenced compliance action to better enforce the NSW *Water Management Act 2000*.
[193] A. Edgar (2011), 'Extended standing - Enhanced Accountability? Judicial Review of Commonwealth Environmental Decisions' FLR 38, 435-62; cited in Productivity Commission, Major Project Development Assessment Processes (2013), p 272.

- Second, the potential for additional scrutiny promotes better decision making, accountability and public confidence that the law will be upheld.[194]
- Third, broad standing means that 'directly affected' landholders don't bear the entire burden of protecting the nation's environmental icons – such as our unique threatened species or World Heritage Areas like the Great Barrier Reef. All Australians have an interest in seeing our unique natural heritage is protected.
- Fourth, for over a decade, various independent reviews support legal standing at least as broad as the current EPBC Act provisions. These include the:
    - Independent Review of the EPBC Act (2009) (Hawke Review),
    - NSW Independent Commission Against Corruption (2012) (ICAC),
    - Administrative Review Council (2012) and
    - Productivity Commission (2013).
- Fifth, having third party rights in national law is consistent with Australia's international legal obligations.[195]

It is also important to note these facts:[196]

- there are significant barriers to bringing a public interest court case, including time and cost;
- there are already court rules and procedures in place to ensure cases brought to court are not frivolous or vexatious;
- there are court procedures in place recognising the importance of public interest cases in some jurisdictions, for example, protective costs orders and extended standing;
- under the EPBC Act, there is not open standing, cases can only be brought by for example, recognised conservation groups or experts;
- the rights of community and proponents to seek review are not equal, with the vast majority of merit reviews actually brought by industry and project proponents;
- where third party review rights do exist in law, they are exercised rarely;[197]
- it is even rarer for a court case to actually stop a project completely;
- there is no evidence to show there has been a misuse of review rights or a flood of public interest cases; and
- public interest court cases can result in improved environmental outcomes, for example when a court may add more effective conditions to an approval or clarify the meaning and application of a provision.

As summarised by the Productivity Commission:

> *The Commission considers there is a public interest in allowing third parties to bring judicial review applications, as it allows the legality of the process to be enforced, providing an important 'safety valve' in the system. This suggests the need for broad standing provisions, but completely open standing is not appropriate – having some*

[194] For example, NSW planning laws provide 'open standing' for judicial review and civil enforcement. This has widespread support including from an independent review panel in 2012. Further, 'expanding third party merit appeals' was one of six key safeguards in ICAC's report, Anti-corruption safeguards in the NSW planning system (2012).
[195] For example, see ICCPR Article 14, the Rio Declaration Article 10, and the UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (2010), available via www.unep.org.
[196] For further detail we refer the Review to the EDO submission to the Inquiry examining the EPBC Amendment (Standing) Bill 2015 - 11 September 2015, available at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2241/attachments/original/1442298845/150911_EPBC_Amendment_Standing_Bill_2015_-_EDOA_sub_FINAL.pdf?1442298845
[197] A 2015 Senate inquiry confirmed that less than half a percent of project referrals under the EPBC Act were actually challenged (0.43%): Senate Environment & Communications Legislation Committee, Parliament of Australia Inquiry into the EPBC (Standing) Bill 2015, 18 November 2015 (Senate Report).

> *restrictions on standing provides a means for managing unmeritorious review applications (ARC 2012). Courts also have the inherent ability to strike out vexatious claims (p 274)*[198]

Even in jurisdictions where there is "open" standing, there has not been a flood of cases. Chief Justices of the NSW Land & Environment Court have long recognised this fact:

> *Any fears that open standing will encourage proceedings which have the potential to destabilise orderly government have been unfounded. …there has been no suggestion that the open standing provisions have led to litigation which adversely impacts upon the well-being of the whole community. The contrary is undoubtedly true*.[199]

We refer the review to further recent analysis that confirmed the concept of "lawfare" is not supported by evidence based on how public interest environmental litigation is undertaken in practice.[200]

As the experts in public interest environmental law in Australia, EDO can provide the review with expert insights into how community participation and review rights actually work, and what the current limitations are. For example, EDO lawyers often provide legal advice to clients to the effect that there are no legal grounds to bring a case. The idea that the existence of review rights has resulted in a flood of frivolous cases has been absolutely disproven. As recognised by Chief Justices, sitting judges and independent reviews, there is no evidence to support the "opening of the flood gates" argument.

Any recommendation that government decision-making should be exempt from judicial review is inconsistent with the rule of law. Any proposal to reduce third party rights in favour of "efficiency" is strongly opposed. Such a move would actually widen the existing gap between community and government and undermine trust even further, which would be inconsistent with the proposed reform principle for this review of: 'Improving inclusion, trust and transparency through better access to information and decision making, and improved governance and accountability arrangements' (p26 Discussion Paper).

In any event, limiting third party standing rights would only prolong litigation by unnecessary arguments over common law standing. This can only result in greater cost to all parties, proponents included, and delay, while procedural arguments are heard, rather than proceeding to the substantive issues in the proceeding.

6.2 Strong public participation provisions

"Public participation" includes a range of activities. It is not limited to public notification and submission writing. There are a range of ways that community engagement is undertaken – some government agencies and some proponents do it better than others. In our experience

---

[198] Productivity Commission, Major Project Development Assessment Processes (2013), p 274.

[199] The Hon Justice Peter McClellan, 'Access To Justice In Environmental Law – An Australian Perspective', Commonwealth Law Conference 2005, London, 11-15 September 2005. Similarly Chief Justice Cripps noted: *It was said when the legislation was passed in 1980 that the presence of section 123 [in the NSW planning law] would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise,* ***I think that that argument has been wholly discredited****.* See: Justice J. Cripps, "People v The Offenders", Dispute Resolution Seminar, Brisbane, 6 July 1990.

[200] See: Pepper R, and Chick R, "Ms Onus and Mr Neal: Agitators in an Age of "Green Lawfare"" (2018) EPLJ 177; Andrew Macintosh, Heather Roberts and Amy Constable, "An Empirical Evaluation of Environmental Citizen's Suits under the Environment Protection & Biodiversity Conservation Act 1999 (Cth)" (2017) 39 Sydney Law Review 85 – this review described the empirical foundation for 'lawfare" arguments as "weak" with only 5 projects over 15 and a half year study period being substantially delayed by court proceedings, and only two of these were capital intensive; C McGrath, "Myth Drives Australian Government Attack on Standing and Environmental 'Lawfare'" (2016) 33 EPLJ 3, 12.

the most effective public participation is where communities and individuals are engaged early and iteratively. It is where public involvement is genuinely valued and incorporated into decision-making processes. We also note that no one method of consultation will suit all communities and issues. Rather a range of methods are needed to ensure public participation.

In particular, we note the need for culturally appropriate consultation with Indigenous peoples as determined by Indigenous peoples (see our comments above in relation to free prior informed consent).

We refer the Review to the following case study that identifies some useful principles.

Case study: Carson & Gelber - Ten principles of effective public participation:[201]

Make it timely
Participation should not be so late in the life of an issue that it is tokenistic, or merely confirms decisions already made. The timing should occur when citizens have the best chance of influencing outcomes. Give people enough time to express their views.

Make it inclusive
Participants should be selected in a way that is not open to manipulation, and should include a cross-section of the population — as individuals and as groups. Random selection offers the best chance of achieving this.

Make it community-focussed
Ask participants not what they want personally or what is in their self-interest, but what they consider appropriate in their role as citizens.

Make it interactive and deliberative
Avoid reducing questions to a simplistic either/or response. Allow consideration of the big picture, so people can really become engaged.

Make it effective
Although decision-making can strive for consensus, complete agreement need not be the outcome. Be clear on how the decisions will be made so that participants know and understand the impact of their involvement. Make sure all participants have time to become well-informed about and to understand material they are unlikely to have a prior familiarity with.

Make it matter
It is important that there is a strong likelihood that any recommendations which emerge from the consultative process will be adopted. If they are not, it is important that a public explanation is provided. Faith in the process is important by both the power holders and the participants.

Make it well-facilitated
It is important that all participants control the agenda and content because this will give the process more credibility. An independent, skilled and flexible facilitator with no vested interest is essential in order to achieve this.

Make it open, fair and subject to evaluation
The consultation method should be appropriate to the target group. Evaluation questions should be formulated in advance. Decide how the 'success' of the consultation will be measured. Include factors beyond the adoption of recommendations. Feedback to the community after consultation is over is essential.

[201] Source: from **'**Ideas for Community Consultation: A discussion on principles and procedures for making consultation work', prepared for the NSW Department of Urban Affairs and Planning, February 2001, by Dr Lyn Carson and Dr Katharine Gelber. Available at: http://www.activedemocracy.net/articles/principles_procedures_final.pdf

Make it cost effective
It is difficult to measure community satisfaction, or savings in costly litigation that could arise in the absence of consultation and participation. However, factors can be considered including how many and which types of community members should be consulted on a given issue. Some questions will require broader consultation, others more targeted consultation. Costs will vary and are adaptable, but the process selected must be properly resourced.

Make it flexible
A variety of consultation mechanisms exist. Choose the one which best suits the circumstances. Try a variety of mechanisms over time. Think how to reach all your users, including those with special needs (e.g. language, disabilities, the elderly, the young). Different communities and different questions will produce better responses with different forms of consultation. Mix qualitative and quantitative research methods.

The following matrix is also useful. Source: IAO2's Public Participation Spectrum.

INCREASING IMPACT ON THE DECISION

	INFORM	CONSULT	INVOLVE	COLLABORATE	EMPOWER
PUBLIC PARTICIPATION GOAL	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision making in the hands of the public.
PROMISE TO THE PUBLIC	We will keep you informed.	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision. We will seek your feedback on drafts and proposals.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will work together with you to formulate solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.

To restore trust and achieve improved outcomes, community engagement must be at the centre of the Act. This would include early engagement and public participation provisions at all key stages to inform decisions under the Act. In particular:

- National Environment and Sustainability Plans,
- Draft policies and standards made by the Sustainability Commission,
- Draft impact assessment guidelines by the national EPA,
- Nomination and listing of threatened biodiversity and heritage places,
- Recovery and threat abatement planning,
- Bioregional planning,
- Strategic environmental assessments,
- Project EIA and approvals,
- Wildlife licensing and trade,
- Post-approval compliance, and
- Performance monitoring and reporting.

The Act should require that decisions are to be informed by community engagement, including taking all public submissions into account, providing statements of reasons for decisions, and demonstrating how public feedback affected the final outcome.[202]

6.3 Merits review for key decisions

There is often misunderstanding about what merits review is. Merits review is where a court or tribunal can 'stand in the shoes' of the original decision maker, consider all the evidence, and make a fresh decision. It is different to judicial review where a court can only examine whether procedural steps were followed as required by law, and cannot re-examine the merits of an action or project. (Judicial review is discussed further below). Where provided for in regulatory frameworks, merits review is typically only available in a limited set of circumstances, and typically only to those who are directly impacted by the decision or who have demonstrated an interest in the decision, for example by providing a submission during a public notification period relevant to the decision.

There are a range of benefits that arise from allowing merits review of certain decisions, especially in relation to major projects.[203] These benefits relate to improving the consistency, quality and accountability of decision-making in environmental matters. In particular, in jurisdictions such as NSW and Queensland planning matters, merits review has facilitated the development of an environmental jurisprudence, enabled better outcomes through conditions, provides scrutiny of decisions and fosters natural justice and fairness. Better environmental and social outcomes and decisions based on ESD is the result.

To maximise these benefits and ensure environmental outcomes are delivered, we recommend that the Act provide standing for interested parties to seek merits review of a limited set of key decisions that impact the environment in an arms-length court or tribunal. This anti-corruption and accountability measure is in keeping with various expert reviews and recommendations.[204]

Merits review should apply equally to decisions made by the EPA, Sustainability Commission, the Minister or their delegate. Further, all significant decisions should be published and accompanied by a statement of reasons. For example, decisions on whether an action triggers national EPA assessment; approval or refusal of an action, strategic assessment/program accreditations and licensing decisions.

In particular, interested parties such as scientists and conservation groups should be able to seek merits review of decisions on the following matters (within a limited time after the decision is publicly notified):

- decision not to list (or up-list) a nominated species, ecological community, national heritage, critical habitat, or protected area;
- whether a proposed activity is a 'controlled action' under the Act, and if so, the assessment method required;
- adequacy of a recovery plan made for a species or ecological community;
- the approval of activities impacting any matters of national environmental significance;
- international trade and movement of wildlife, and advice about whether an action would breach a conservation order.

[202] Similar public participation improvements have been enacted in the NSW planning system, under the *Environmental Planning and Assessment Amendment Act 2017*.
[203] See EDO NSW, *Merits reviews in planning in NSW* (2016), at: http://www.edonsw.org.au/merits_review_in_planning_in_nsw.
[204] Community rights to merits reviews are supported by both the Hawke Review of the EPBC Act and the Independent Commission Against Corruption, *Anti-corruption safeguards in the NSW planning system* (2012).

6.4 Accessible and timely public information

EDO regularly assists clients who are attempting to access information about processes under the Act. While a substantial amount of information is currently made available on the departmental website, there are some significant gaps, and the departmental website and documentation are tailored more to accessibility and ease for proponents, with little supporting information or website functionality for community members seeking to engage in decision making processes.

Seeking information through freedom of information laws can be a frustrating, expensive and very lengthy process. For some of our clients it can literally take years to obtain requested information, undermining the utility of enabling public access to information through lack of timeliness and undermining trust in government processes and standards, as illustrated by the following case study.

Case study – Three year process to access information about biodiversity offsets policy

It took a three-year legal process for the Humane Society International (HSI), represented by EDO NSW, to access documents about how the Australian Government came to accredit a NSW biodiversity offsets policy for major projects. The NSW policy in question allowed significant biodiversity trade-offs (that is, permitting developers to clear habitat in return for compensatory actions elsewhere) seemingly inconsistent with national biodiversity offset standards. HSI wanted to know how the national government could accredit a policy that didn't meet its own standards.

The original FOI request in this case was submitted in early 2015, during a time when federal, state and territory governments were actively in consultation on handing over federal approval powers to the states and territories under the EPBC Act. This was to be done in the name of efficiency, with the assurance that national standards would be upheld by the states.

Over 60 documents finally accessed by HSI show this was a false promise. After a three year process, on the eve of a hearing at the Administrative Appeals Tribunal, the federal Environment Department agreed and released over 60 documents. The documents reveal that federal bureaucrats in the Environment Department identified key areas of the NSW policy that differed from federal standards.

Three years is an unacceptable time for information to be made accessible to the public. A delay of this nature can render the information useless at achieving the purposes it was originally sought.

Timeliness is a key factor in providing access to information. The International Open Data Charter provides timeliness as the second principle, stating:

> *'2. Timely and Comprehensive: Open data is only valuable if it's still relevant. Getting information published quickly and in a comprehensive way is central to its potential for success. As much as possible governments should provide data in its original, unmodified form.'*[205]

We recommend that the Act should strengthen provisions requiring easily accessible, timely public information on both policies and policy changes as well as on specific actions, assessments and decisions.

Information on environmental decision making is essential for all stakeholders to understand how public interest decisions are being made, such as decisions that might significantly impact environmental and community health. Failure to provide adequate access to information risks jeopardising the integrity of processes and decisions made by government.

[205] Available at: https://opendatacharter.net/principles/

All relevant information about a proposed action or a decision must be transparent and readily available to the community. Examples include providing reasons for decisions; all background information relevant to a decision such as decision briefs and correspondence between parties and the government relevant to a decision, mandatory notice of decisions and appeals (or rights to appeal) to all interested parties; and avoiding information asymmetry between the community, development proponents and other stakeholders.[206] This includes the areas that require public participation noted above, as well as habitat maps, government research and data and compliance and enforcement information on an online environmental information hub.[207]

As recommended above, the national EPA and Environment Department should maintain a comprehensive set of public registers, accessible via an online hub, for transparency and effective public oversight of activities and outcomes post-approval. Public registers should include all background information relevant to assessment processes, licences and approvals, penalty notices and enforcement actions, the location of offset and regeneration sites, and conservation covenants (subject to confidentiality protections for sensitive environmental information).

6.5 Open standing to seek review of legal errors and enforce breaches

Judicial review is a fundament of the rule of law in Australia. By allowing the courts to oversee the activities of the executive, judicial review is an important safeguard against legal errors and decisions that go beyond the powers granted to the decision-maker.

For the reasons stated above, we recommend that the Act build-in mechanisms for the community to seek arms-length review of decisions, administrative processes and potential breaches of the Act and regulations.[208] This is a fundamental element of the rule of law.

The existence of various legal duties on the Environment Minister and other institutions means that a failure to fulfil those duties – including a failure to meet statutory deadlines (e.g. listing) should be enforceable by the community. While legal proceedings are rarely exercised by the general community in practice, the mere existence of these rights ensures that decision-makers are on notice to make proper, lawful and timely decisions.

Clearer legislation (clearer process) and improved implementation (improved resourcing) should mean these rights will not need to be exercised regularly, only rarely by the community or individuals in the public interest.

Legal proceedings should be heard in a court or tribunal with specialist environmental expertise, independent of the Executive government and regulatory agencies. As in NSW, any person should be able to bring civil enforcement proceedings in these circumstances (known as ‘open standing’).

Open standing for the public to seek judicial review of government decisions, and the right to take environmental breaches to court, means that any person can ensure that key decisions are made according to the law.[209] Such ‘third party civil enforcement’ is a standard

[206] That is, where information is available to some parties but concealed from others. The term information asymmetry is often used to refer to parties in an economic transaction, but is also applicable to the environmental context.
[207] For example, NSW pollution laws establish a public register of licences and compliance information. See NSW EPA website, at http://www.epa.nsw.gov.au/prpoeoapp/.
[208] There are many precedents in existing provisions, see for example the *Environmental Planning and Assessment Act 1979*, s. 123; and *Protection of the Environment Operations Act 1997* (s. 252).
[209] That is, standing to challenge an environmental decision or to bring civil enforcement proceedings should not be restricted to a person ‘whose interests are adversely affected by the decision’, as required under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The difference is important because:

component of environmental law in other jurisdictions, including in states and territories in Australia. For example NSW planning laws provide 'open standing' for any person to seek judicial review, and limited standing for 'third party objectors' to seek merits review.[210]

As the NSW Independent Commission Against Corruption (**ICAC**) notes, third party rights provide 'an important check on executive government'. These public rights reduce the likelihood of any undue favouritism being afforded in decision-making, particularly in relation to development approvals. ICAC supports further expanding merit appeal rights in NSW, noting that the absence of third party appeal rights 'creates an opportunity for corrupt conduct to occur'.[211]

For similar reasons, the current EPBC Act includes extended standing for environment groups, instead of requiring a 'special interest'. The provision of extended standing for judicial review, and third party powers to restrain offences or seek other orders, have been critical to public interest legal proceedings under the EPBC Act. However as noted, the threat of adverse costs orders, the significant cost of legal action, and lack of merits review remain considerable barriers to government accountability being achieved through the EPBC Act framework. These obstacles, coupled with the very low proportion of community litigation under the EPBC Act or NSW planning laws, disprove the 'floodgates' argument often raised against extended standing provisions.[212]

6.6 Protective costs orders

To enable third parties to use laws to protect the environment in the public interest, the Act should provide for protective costs orders for public interest legal proceedings (as distinct from cases where the applicant's predominant interest relates to private property, personal or financial gain).

This means the Act would need to:

- empower the Federal Court (using relevant environmental expertise) to decide whether a case is a 'public interest proceeding' and, if so, determine the appropriate form of 'public interest costs order';
- prohibit 'security for costs' orders in public interest proceedings under the Act; and
- not require a public interest applicant to give an 'undertaking as to damages' as a pre-condition to granting an interim injunction, where the action is to urgently protect a matter of national environmental significance.

Such provisions work effectively at the state level for example in the NSW Land and Environment Court jurisdiction.

The aim is to enable community members to defend biodiversity and matters of national environmental significance generally against unlawful or inappropriate degradation, by ensuring the costs of access to information and civil enforcement are no barrier and are equitably distributed. This will ensure equitable protections for proceedings brought in the public interest.

[environmental] objectives in bringing litigation – such as to prevent environmental impacts, raise issues for legislative attention and improve decision-making processes – reflect public rather than private concerns, such as protecting property and financial interests.

[210] See for example the *Environmental Planning and Assessment Act 1979* (NSW), s. 123 and 98; *Protection of the Environment Operations Act 1997* (NSW), s. 252. NSW biodiversity, mining and water laws also provide 'open standing' for civil enforcement.

[211] See for example, ICAC, *Anti-corruption safeguards in the NSW planning system* (2012) and subsequent submissions on reforms to the NSW planning system.

[212] See for example Cripps J *op cit*; Pepper and Chick *op cit*; and C. McGrath, 'Flying Foxes, Dam and Whales: using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324.

Recommendations for public participation, transparency and access to justice include:

- **Strong, meaningful and iterative community engagement and public participation provisions at all key stages of the Act, from strategic planning to project assessment and compliance monitoring, reporting and enforcement.**
- **Rights for interested community members to seek merits review of key decisions under the Act (such as when a nominated entity or place is declined for listing; on the adequacy of an approved recovery plan; or whether a proposed action requires Commonwealth assessment; along with for approvals granted under the Act).**
- **Easily accessible, timely public information on actions and decisions.**
- **'Open standing' for the community to seek judicial review of legal errors.**
- **'Open standing' to pursue civil enforcement for a breach of the Act or regulations.**
- **Protective costs orders for legal actions brought in the public interest.**

7.Specific tools

This section responds to Discussion Paper questions relating to the following tools and mechanisms:

- **Markets and offsetting**
- **Restoration, incentives and private land conservation**
- **Biodiversity provisions**
- **Heritage provisions**

7.1 Markets and offsetting

Discussion Paper Questions:

QUESTION 23: Should the Commonwealth establish new environmental markets? Should the Commonwealth implement a trust fund for environmental outcomes?

QUESTION 24: What do you see are the key opportunities to improve the current system of environmental offsetting under the EPBC Act?

Australia currently has a range of existing and developing environmental markets. Some of them, such as the Hunter River Salinity Trading Scheme in NSW, are considered to be highly successful in limiting environmental impacts to sustainable limits and improving environmental outcomes, but many have failed to deliver improved environmental outcomes. The success or otherwise of environmental markets is highly dependent on whether the market settings adequately reflect the limited nature of natural resources and properly price the costs of environmental harm, including those costs that traditional economic models consider to be 'externalities'. Other features of the Hunter River Salinity Trading Scheme that contribute to its success include extensive and continuous real-time monitoring of environmental conditions and discharges, strict adherence to targets, and a clear and transparent mechanism for allocating credits that permit discharge of saline water.[213]

This part of the submission addresses: biodiversity offsets, carbon offset markets, and how a trust fund might work.

Limits to biodiversity offsetting

Biodiversity offsets are now common practice, albeit with differing standards, across Australia. As the Discussion Paper points out (p25) the Commonwealth has had an offsets policy since 2012 that was "developed with a focus on regulatory and scientific considerations rather than the potential for a market." In contrast, the NSW biodiversity offsets market has been designed with a focus on encouraging market growth, rather than on scientific limits, as the following case study shows. It is essential that any biodiversity offset market is based on science and ecological outcomes.

[213] For further information see: https://www.epa.nsw.gov.au/licensing-and-regulation/licensing/environment-protection-licences/emissions-trading/hunter-river-salinity-trading-scheme

Case study – Biodiversity Offsetting in NSW

Biodiversity offsetting began to feature in NSW environment and planning laws from the mid-2000s. For example:

- In 2006 NSW first established a Biodiversity Banking scheme that enabled developers to buy biodiversity credits to offset the impacts of their developments.[214] The scheme provided for offset sites to be established by landowners who could then get paid to manage the sites to generate biodiversity credits for the market. The Biobanking scheme was only voluntary and, given the significant costs of undertaking the necessary assessments, the market did not develop as rapidly as hoped.
- Offsetting was a component of the Environment Outcomes Assessment Methodology (EOAM), that underpinned land clearing applications under the *Native Vegetation Act 2003* (NSW).
- The former NSW Office of Environment and Heritage developed 13 guiding, non-binding principles for determining biodiversity impacts and offset requirements during the assessment of development applications under the *Environmental Planning and Assessment Act 1979.* [215]

The *Biodiversity Offsets Policy for Major Projects*[212] introduced in 2014 included weaker standards in an effort to make offsetting easier for State significant development and infrastructure.

Recent reforms in NSW under the *Biodiversity Conservation Act 2016* established a single Biodiversity Offsets Scheme (**BOS**) for application across NSW, replacing the various earlier offset mechanisms. The BOS further weakened offsetting standards applied through a new Biodiversity Assessment Methodology (**BAM**). While there is a benefit to having a single scheme apply consistently (instead of differing voluntary arrangements), the policy enshrines a lowest common denominator approach. It has shifted so far from the science (for example of no longer requiring strict "like for like" offsets), that now almost everything is amendable offsetting, and if a developer cannot find an offset they can simply pay money into a fund for a different offset elsewhere. Mine rehabilitation action decades in the future can also be counted as offsets.

The NSW scheme does not actually offset biodiversity impacts and instead facilitates net loss of biodiversity and local extinctions. (As noted in the case study relating to access to information, the NSW policies do not meet EPBC Act standards). Subsequently, a *Biodiversity Offsets Policy for Major Projects*[216] was developed which included weaker standards in an effort to make offsetting easier.

And the following case study.

Case study: Offsets in the Northern Territory

In 2011, the INPEX offshore LNG production and onshore gas processing facility based at Middle Arm Peninsula in Darwin, Northern Territory, was granted approval under the EPBC Act (ref. 2008/4208). It was a controlled action on the basis of its potential impact on listed threatened species and communities, listed migratory species, and Commonwealth marine areas. Key issues of concern for the community included the impacts of the project on the sensitive marine environment of Darwin Harbour, as well as the greenhouse gas emissions associated with the project.

The approval required INPEX to submit a Coastal Offset Strategy to implement various coastal and marine offset programs, and to set aside 2000 ha for permanent protection of terrestrial vegetation and mangroves and the permanent protection of marine habitat, to be managed for the life of the project. While delivery of some of the offset programs is underway, despite almost 10 years having

[214] Part 7A – Biodiversity Banking – *Threatened Species Conservation Act 1995* (NSW).
[215] NSW Office of Environment & Heritage (OEH) principles can be found at: https://www.environment.nsw.gov.au/biodivoffsets/oehoffsetprincip.htm
[216] See: https://www.environment.nsw.gov.au/resources/biodiversity/140672biopolicy.pdf

passed (of a 40 year project) INPEX has yet to fulfil its requirements to establish the permanent protected areas, and the establishment of a marine megafauna project.

The continued delay by INPEX in fulfilling these offsetting requirements highlights the challenges associated with implementing and enforcing offsetting arrangements under the EPBC Act in a way that is consistent with best practice offsetting principles, particularly when the impacts they are directed at offsetting have already occurred and the offsets are 'indirect' offsets.

A recommendation to establish an offsets market in law (rather than just policy) (Discussion Paper p26) would need to include clear scientific limits, to avoid a weakening of standards as has occurred in NSW and Queensland. The Commonwealth must avoid a lowest common denominator standard that relies solely on the market to deliver outcomes and instead enshrine scientifically rigorous, best practice offsetting designed to ensure biodiversity outcomes.

A new Act (or amended EPBC Act) should have clear science-based limits. As a minimum, the Act should not permit biodiversity 'offsetting' of impacts on critical habitat, endangered or critically endangered species and ecological communities.[217] This recognises that some assets are too significant (or outcomes too uncertain) to 'offset'. This approach also reinforces incentives to conserve species at a landscape scale to avoid extinction risk in the first place.

Resort to biodiversity offsets, if any, should be minimised, with clear guidance on what impacts are so unacceptable that they should not be allowed and cannot be offset. Offsets should require a precautionary approach given the long timeframes and current uncertainty of offsetting being capable of delivering successful outcomes.[218] Any offsetting (such as for vulnerable, near-threatened or non-threatened biodiversity and ecological communities) would require a scientifically robust National Offsets Policy and consistent standards.

Policy and standards must:

- Ensure biodiversity offsets are not available for critical habitat (due to its essential role in preventing extinction), endangered or critically endangered species and ecological communities;
- require that offsets are a last resort, after all efforts are made to avoid and minimise impacts;
- provide clear guidance as to what impacts must be 'avoided', for example where they trigger a level of impact over a certain threshold on endangered matters of national environmental significance;
- meet strict scientific like-for-like biodiversity principles;
- adopt a 'maintain or improve' or 'net gain' standard to measure outcomes;
- ensure offsets are protected in perpetuity (offsets cannot be offset);
- provide accountability, transparency and enforceability (including third party enforceability) in the delivery of the offset;
- provide for offsets that are truly 'additional' protections rather than securing already protected areas;
- be consistent with a precautionary approach;
- make clear that no offsets should be available for future mine remediation due to lack of evidence of success; and
- any offsetting must be consistent with recovery goals in recovery plans.

[218] See for example, M. Maron et al., '*Faustian bargains? Restoration realities in the context of biodiversity offset policies', Biological Conservation* Vol. 155, Oct. 2012, pp 141-148, at: *https://doi.org/10.1016/j.biocon.2012.06.003*.

Carbon market

Further to our comments above regarding a greenhouse gas trigger, we make additional comments about carbon markets in response to Discussion Paper Question 23.

EDO supports establishment of a carbon market that facilitates genuine verified carbon sequestration by the land sector. There is potential to achieve co-benefits for biodiversity and carbon sequestration outcomes in a well-designed market. The land sector provides an enormous opportunity to combat climate change, restore the landscape, improve biodiversity and support regional development all at the same time. The introduction of the Carbon Farming Initiative (CFI) was a welcome recognition of these opportunities and imperatives.

(We note that this is currently done under separate carbon farming legislation that is not subject to this review).

Despite the potential benefits, we note that applying a carbon offsets scheme to drive greenhouse gas abatement in the land sector can be problematic.

Like with biodiversity, carbon offsets schemes should not be used as a regulatory tool of first resort. The climate action hierarchy requires that emission should first be avoided, if that is not possible they should be reduced, and if that is not possible they should be offset.[219] Offsets schemes can be a useful way to complement other laws and measures which aim to drive greenhouse gas abatement, but by themselves they are problematic.

The biggest problem is that by themselves, carbon offsets schemes are unable to guarantee net emissions reductions. This is because they work on a project-by-project basis, rather than an economy-wide basis. A well-designed offset scheme can guarantee that an offset has succeeded in reducing greenhouse gas at that location, but it cannot guarantee that abatement is not cancelled out by an increase in emissions elsewhere.[220] This is the problem of 'carbon leakage'. If, for example, a landholder reduces their emissions by reducing the number of cattle they keep, there is nothing to say that other landholders will not increase the number of cattle they keep to make up for that shortfall in supply. Carbon farming legislation recognises this problem in requiring methodologies to account for increases in carbon caused by the project. But in practice, it is difficult - if not impossible - to identify such increases. Only an economy-wide cap on carbon (or at least, a price on carbon) can ensure that emissions reductions are not negated by increases elsewhere.

Carbon offsets schemes can also be unfair. To begin with, the additionality requirement means that they only reward people who start carbon abatement activities for the first time — they do not reward early movers who are already undertaking carbon abatement. This is an inherent weakness of offsets schemes, and cannot be remedied without sacrificing the all-important requirement of additionality.

If avoided emissions activities are included, offsets schemes can also be inconsistent with the 'polluter pays' principle. Take avoided deforestation, for example. Providing tradeable credits to a landholder for not clearing a forest essentially involves paying them not to pollute. This is inconsistent with the 'polluter pays' principle, which requires that "those who generate pollution and waste should bear the cost of containment, avoidance or abatement."[221] It is also unsound regulatory practice — this is not the way that governments usually prevent pollution, and for good reason.

[219] Environment Protection Authority (Vic), Carbon Management Principles Discussion Paper (2007). See also the hierarchy for native vegetation offsets in the Victoria Planning Provisions cl 15.09, and the 'waste management hierarchy' in Environment Protection Act 1970 (Vic) s 1I; Zero Waste SA Act 2004 (SA) s 3(2).
[220] Garnaut Climate Change Review Update Paper No 4, Transforming Rural Land Use (2011) 14.
[221] Protection of the Environment Administration Act 1991 (NSW) s 6(2)(d)(i).

Last, but not least, a poorly designed offset scheme will spread its problems far and wide if tradeable credits are used. Every time an Australian Carbon Credit Unit (ACCU) is created and sold to a polluting company, that company has an excuse not to reduce their emissions. They can even justify an increase in their emissions by 'offsetting' it with abatement under the CFI. This becomes hugely problematic if ACCUs do not represent real and genuine abatement. If the ACCU does not represent genuine abatement (for example, because the offset project it represents is reversed by a natural disaster, or based on poor science, or not truly new and additional to existing abatement) the polluting purchaser will nonetheless still be allowed to increase their emissions. In this way, the CFI will effectively 'export' any deficiencies into other trading schemes, including a domestic carbon price.

It is also important to recognise that land carbon offsets cannot be used to offset fossil fuel carbon emissions. The Climate Council report *Land Carbon: No Substitute for Action on Fossil Fuels*[218] identified that because land carbon offsets operate within the 'active' carbon cycle – this is carbon that moves between the land, ocean and atmosphere - they are vulnerable to loss from activities such as bushfires, droughts, insect attacks and heatwaves. In contrast, carbon in fossil fuels has been locked away for millions of years. Therefore, burning fossil fuels and releasing carbon dioxide to the atmosphere introduces a store of carbon that is additional to the current 'active' carbon cycle. While the land and ocean will absorb some of this extra carbon, almost half of the carbon dioxide emitted from fossil fuel combustion remains in the atmosphere, driving global warming.[219] According to the Climate Council report, current annual global carbon emissions from fossil fuels are ten times greater than the annual amount of carbon that could be stored by sustainable land carbon mitigation methods.

EDO submits that these intrinsic weaknesses of carbon offset schemes make them a less attractive option than imposing a carbon price on these activities. EDO recognises the difficulties of imposing a carbon price on the land sector by including it in an emissions trading scheme. However, we submit that the Government should explore other ways to impose a price on carbon in these sectors. Many of these problems could also be avoided by establishing a fund for activities which improve biodiversity and increase carbon abatement. For example, see the Climate Change and Ecosystem Protection Fund proposed by the Australian Conservation Foundation.

As noted, EDO strongly supports activities and land-uses with co-benefits (for example, both carbon and biodiversity benefits).

Key elements for carbon offset legislation are:

- A strong carbon price is needed to make the schemes such as the CFI work;
- There must be a strong and clear additionality test;
- The scientific credibility of offset projects must be guaranteed, including a recognition that land carbon cannot be used to carbon emissions from fossil fuel projects;
- Eligible offset projects must not have adverse environmental impacts;
- Offset projects that improve biodiversity outcomes must be prioritised;
- Permanence mechanisms must be strengthened; and,
- Schemes must be subject to continuous review and improvement to ensure environmental outcomes are delivered.

Trust Fund

Question 23 asks whether the Commonwealth should implement a trust fund for environmental outcomes. EDO supports the idea of a trust fund where funds are required to be spent in line with the best available science, there are clear independent governance arrangements, and strong transparency and accountability frameworks.

Advantages of a trust fund include the ability to deliver strategic environmental outcomes, rather than piecemeal protection, funds can be dedicated to ensuring the ongoing delivery of environmental improvements regardless of annual budget cycles, and trust funds would have the ability to accept funding from other sources, such as Court imposed fines for environmental offences to build the pool of available funding. However, these benefits can only be realised where there are strong governance and accountability arrangements that ensure there is a clear definition of the purpose of the trust and funding can only be used for that purpose, recommendations on appropriate environmental works are made by independent experts with specialist expertise in the relevant disciplines, and there can be public scrutiny of decisions, including publication of information where decisions have been made that are contrary to scientific recommendations.

However, trust funds should be not be used to delay deliver of environmental outcomes. For example, establishment of a trust fund should not remove a requirement for biodiversity offsets to be delivered in advance of, or at the time that, biodiversity impacts take place. Mechanisms must also be implemented to ensure that accumulated funds are not used to undertake works that are the existing responsibility and core business of Government, and are not used to fund corporate environmental obligations required under other legislation.

Recommendations relating to markets and offsetting

- **Any biodiversity offsetting must be based on clear scientific principles and limits**
- **Carbon farming should meet clear criteria for additionality and abatement.**

7.2 Restoration, incentives and private land conservation

Discussion Paper Questions:

QUESTION 11: How can environmental protection and environmental restoration be best achieved together?

- Should the EPBC Act have a greater focus on restoration?
- Should the Act include incentives for proactive environmental protection?
- How will we know if we're successful?
- How should Indigenous land management practices be incorporated?

QUESTION 25: How could private sector and philanthropic investment in the environment be best supported by the EPBC Act?

- Could public sector financing be used to increase these investments?
- What are the benefits, costs or risks with the Commonwealth developing a public investment vehicle to coordinate EPBC Act offset funds?

Restoration and incentives

EDO strongly supports both requirements and incentives for restoration in our national environmental law. Restoration of degraded and rare habitats is an important challenge that requires clear legislative protections and land management incentives.

In terms of general requirements, one way that the Act could facilitate restoration would be to include specific duties. As noted, the APEEL experts recommended establishing a specific duty "be imposed on all legal persons by the next generation of environmental laws, in

particular to:…repair environmental harm they have caused and restore ecological functions they have impaired (to the greatest extent practicable)."[222]

The Act should make clear that the national EPA must not approve adverse actions in areas of **critical habitat** for threatened species or ecological communities. This is similar to recommended protections for critically endangered and endangered ecological communities. No biodiversity offsets should be available for critical habitat due to its essential role in preventing extinction. Impacts on critical habitat must be refused in favour of conservation agreements. That is, legislation should set out a process for identifying and declaring critical habitat that triggers a process for negotiating incentive funding for any affected landholder to protect, manage and restore the site.

Instead, the Commonwealth must proactively seek conservation agreements or covenants[223] with private landholders (or government authorities), to protect the critical habitat using private land conservation funds. The Act should have its own conservation covenanting mechanism rather than relying on state or territory resources and agencies (recognising that state agencies are likely to have their own conservation investment plans).

Capital Stewardship Fund to deliver national and regional biodiversity outcomes

EDO works with landholders and Landcare groups across Australia who do amazing work in restoring landscapes. We strongly support increased core funding for this work from the Australian Government.

The Act should reinvigorate a national 'stewardship payments' fund for private landholders to achieve priority outcomes for national and bioregional biodiversity conservation.

The Act could establish a Capital Funds Conservation Program to receive capital contributions, and generate stewardship payments to landholders.[224] The Fund and Program would be directed to the recovery of listed threatened ecological communities, critical habitat management and other nationally protected matters – both for initial recovery actions and ongoing payments to secure conservation management in perpetuity.

This incentive program is consistent with the introduction of a land-clearing trigger that seeks to curb the destruction of threatened and High Conservation Value Vegetation and recognise the enduring national value of retaining it. Benefits include diversified income, restored and enhanced ecosystem services, co-benefits of biodiverse carbon storage, and resilience to key threats such as salinity, invasive species and climate change.

Finally, as discussed above in theme 4 – Role of the Commonwealth – core funding and an investment strategy are critical. We recommend a **National Biodiversity Conservation and Investment Strategy**. It is not sufficient to rely on markets or philanthropic investment to fund core environmental protection and restoration activities. Such other funds can complement the core government funding, but not replace this funding. It is essential that the Government coordinates, funds and is accountable for the delivery of environmental outcomes.

Recommendations relating to restoration, incentives and private land conservation

- **Critical habitat declarations should trigger private conservation funding under agreement with affected landholders**

[222] *Blueprint for the next generation of Australia's environmental laws* available at: http://apeel.org.au/ (idea 4).
[223] See http://www.environment.gov.au/protection/environment-assessments/conservation-agreements; and http://www.environment.gov.au/topics/biodiversity/biodiversity-conservation/conservation-covenants.
[224] See P. Sattler, 'Bioregional Conservation Strategies and National Priorities' in HSI Australia, *Threatened* (2016) p 96.

- **The Act should reinvigorate a national 'stewardship payments' fund for private landholders to achieve priority outcomes for national and bioregional biodiversity conservation.**
- **The Act could establish a Capital Funds Conservation Program to receive capital contributions, and generate stewardship payments to landholders**

7.3 Biodiversity provisions

Discussion Paper Questions:

QUESTION 5: Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

QUESTION 8: Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

Some 1,890 species of flora and fauna are listed as threatened in Australia, including 92 documented extinctions. The Environment Act must reverse this concerning trend.

As recommended above, the Act should primarily aim to 'conserve and protect Australia's environment, its natural heritage and biological diversity…' with secondary aims including:

> *to recover, prevent the extinction or further endangerment of Australian plants, animals and their habitats, and to increase the resilience of native species and ecosystems to key threatening processes;*

Australian and international experience shows there are a number of important benchmarks for consistent, rigorous and accessible listing processes for threatened species, ecological communities, local populations and key threatening processes. Listing is a vital step on the road to preventing further extinctions and promoting resilience and recovery of biodiversity. It must be supported by systematic processes of recovery planning, management, impact assessment and protection, key threat abatement and monitoring and reporting.

The Act must have an independent, science-based listing process for threatened species and their critical habitats, threatened ecological communities, and key threatening processes that must be arrested to reverse biodiversity decline. The Act should simplify the public nomination process for nationally protected matters, including faster mandatory assessment timeframes.

While this part is not exhaustive, key elements for the Act to deliver better biodiversity outcomes include the following:

- **Independent Scientific Committee to list matters of national environmental significance**
- **Simpler, faster assessment of listing nominations**
- **Making the Common Assessment Method subject to national standards and non-regression**
- **Strong and effective protections for threatened species, ecological communities and critical habitat**
- **Expanded listing categories**
- **Comprehensive data, mapping and information sharing**

Independent Scientific Committee to list matters of national environmental significance

An independent Scientific Committee is essential for public trust and effectiveness of biodiversity laws. The Committee is responsible for efficiently considering and listing nominated threatened species, important populations,[225] ecological communities, key threatening processes and areas of global or national importance.

In best practice biodiversity legislation, the Scientific Committee would have the power to list threatened and protected matters directly, with reasons based on scientific evidence. The Committee would also be responsible for writing conservation advices, identifying critical habitat and other known or potential habitat based on scientific criteria. The Committee would provide its conservation advice to the Environment Department, and where relevant to state/territory Environment Ministers, agencies and scientific committees. This information would be embedded in mandatory recovery plans, threat abatement plans and bioregional planning. The Commonwealth Minister would have duties to ensure the Committee is sufficiently resourced to fulfil its role and keep lists up to date.[226]

Nomination and assessment of terrestrial, marine and aquatic threatened species, populations, ecological communities, and new ecosystems of national importance would follow a consistent process led by one Committee. Experts on the matter or place being assessed would assist the Committee at its discretion. Scientific listings would not be subject to a disallowance motion by Members of Parliament.

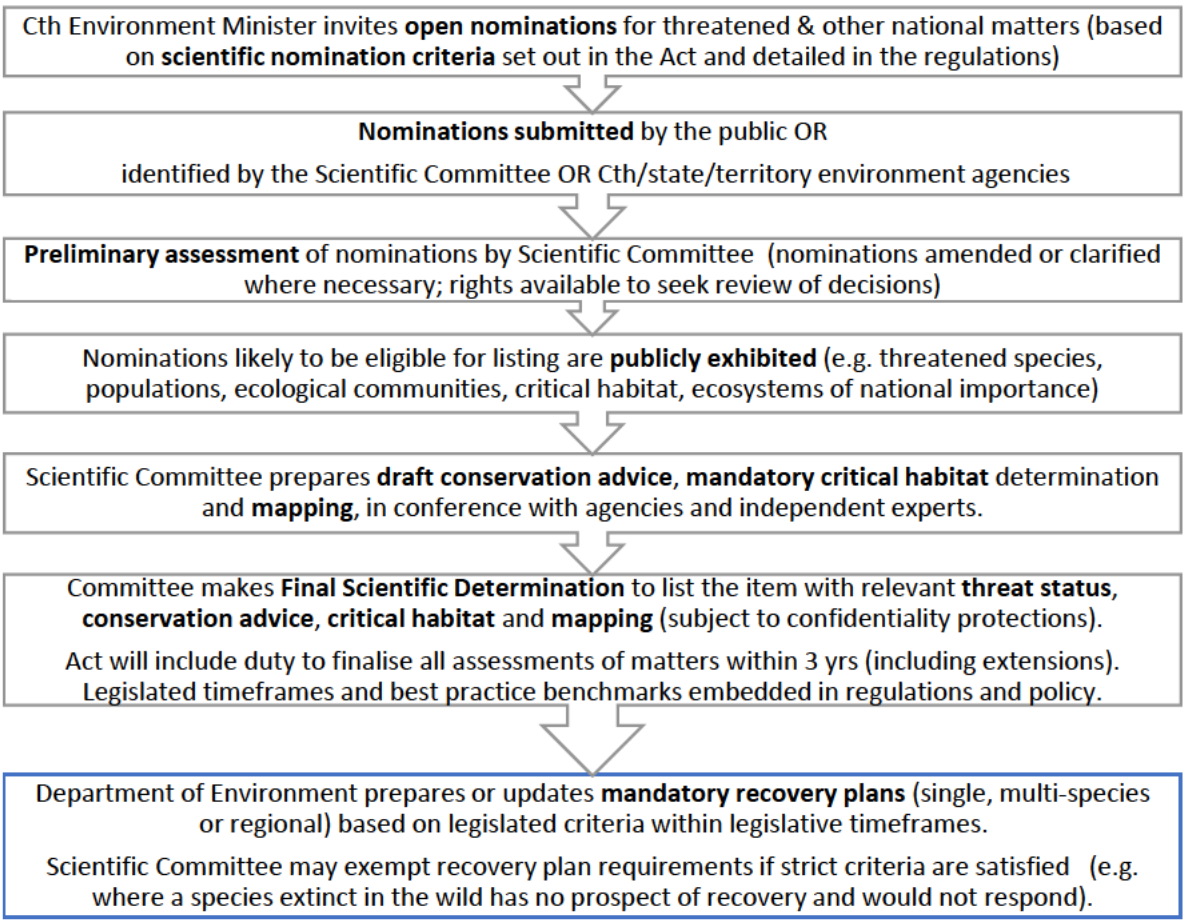
Specialised bodies such as for Commonwealth or national heritage and Aboriginal cultural heritage would be maintained and their independence strengthened.

Simpler, faster nomination and listing

A current flaw of the EPBC Act is the time it takes to nominate, assess and list an endangered entity. We recommend that all valid nominations for listing must be assessed within three years of nomination. The Act must require the Minister to ensure statutory assessment and listing periods are met, with listing outcomes and timeframes monitored and reported on publicly. This will ensure that nominations don't languish while impacts and threats increase. The following diagram sets out a proposed process.

[225] *Population* means a distinct, local occurrence of a single species, and is important to genetic diversity.
[226] Intergovernmental agreements to fund the Committee may help coordinate effective national listings. Optimal arrangements should be developed in the context of a Common Assessment Method.

Indicative outline of recommended listing process



Listing must continue to be on scientific grounds only. There would be other parts of the Act where decision-making may explicitly take account of social or economic factors (e.g. conditions of approval), but this should not occur at the listing stage.

Nomination, consultation and listing processes must be accessible to the community. Public nomination and participation should be encouraged. The Committee should be expected to prepare their own nominations to keep the lists up to date. The listing process must be scientifically rigorous but not administratively onerous, with clear stages to meet or exceed mandatory timeframes. The Scientific Committee and its staff must be well-resourced for efficient and effective listing, in accordance with ministerial duties.

We recommend that within 12 months of listing a Threatened Ecological Community all remnants must be mapped and published on a publicly available database.

Common Assessment Method – national standards and non-regression

The Act should continue transitioning to a national Common Assessment Method for assessing and listing threatened species and ecological communities (first agreed in 2015[227]). This would enable states and territories that meet national standards to assess species' threat status at the national level. However, this should be subject to the Commonwealth Scientific Committee's oversight (including a 2-year operational review) and the principle of non-regression of environmental protections.[228]

[227] See: https://www.environment.gov.au/biodiversity/threatened/cam
[228] For example where a species or ecological community is already listed at state level.

Acknowledging the seriousness of extinction risk, the Common Assessment Method must take a highest common denominator approach to protection and ensure state lists are kept up to date as well as Commonwealth lists. This could mean, for example, that a species would not be down-listed to a lower threat category unless recovery objectives are demonstrably met in all relevant states or territories.

Where a species is more endangered in a particular state or territory than other jurisdictions and this status would be lost in the averaging over other jurisdictions, the higher vulnerability in the relevant jurisdiction should be reflected in the listing and regulation of impacts to the species. (See also the section below on nomination and listing of important populations of a species).

Assessment must remain subject to legislative timeframes, and legislation should ensure that a jurisdiction could not use the Method as a reason to delay or opt out of assessment or listing. To ensure consistency between Commonwealth and state/territory lists, each jurisdiction should be required to update their corresponding lists of threatened matters within, at most, three months of the Scientific Committee's gazettal of a new matter (or, in the case of existing matters requiring higher threat categories, from the Act's commencement).

Benefits of a well-designed Common Assessment Method for listing include clearer, more efficient and consistent requirements for impact assessment; coordinated resourcing; and smoother joint recovery planning for biodiversity.

Consistent with a harmonised listing approach, the Act should also require the Commonwealth Scientific Committee to consider whether a state/territory-listed species or ecological community should also be listed for national protection under the Act (if it is not already so listed). Similar provisions existed in the EPBC Act until 2006.[229]

Strong protections for threatened species, ecological communities and critical habitat

This part makes recommendations to strengthen protections for threatened species, important local populations,[230] ecological communities[231] and critical habitat[232] in various ways. These provisions and amendments are needed to achieve the objects to prevent extinction and promote recovery.

The provisions recommended below would improve general biodiversity protections, and complement other reforms related to listing, impact assessment and merits review. Critical habitat protections are outlined separately further below.

Emergency listing provisions for threatened species and ecological communities etc

The Act should include new provisions for emergency listing of species (including newly discovered populations and critical habitat), ecological communities, ecosystems of national

[229] See former s. 185(2) of the EPBC Act (repealed in 2006):

> (2) The Minister must decide whether to amend the list referred to in section 181 to include an ecological community that is described as critically endangered, endangered or vulnerable in a list that is:
>
> (a) kept by:
>
> (i) a State; or
>
> (ii) a self-governing Territory; or
>
> (iii) the body known as the Australian and New Zealand Environment and Conservation Council; and
>
> (b) identified by the Minister by a notice published in the Gazette.

[230] *Population* means a distinct, local occurrence of a single species, and is important to genetic diversity.

[231] A Threatened Ecological Community (EEC) is a recognised group of native species of plants and animals that naturally live together, and that is at risk of extinction.

[232] i.e. habitat identified as critical to the survival of threatened species and ecological communities.

importance and heritage places. Emergency listing should be activated by the Environment Minister or the Scientific and Heritage Committees (including at the community's request) where there is the potential for immediate, significant threats.

The Act should stipulate that at the time of an emergency listing:

- the regular process of species or ecological community nomination and evaluation does not apply;
- immediate interim protection applies for up to 12 months after the listing date; and
- formal assessment must be undertaken within 12 months of emergency listing to determine the eligibility of the species or ecological community (etc) to remain on the threatened list.

The EPBC Act currently only includes emergency listing processes for National Heritage places (s. 324JL) and the Commonwealth Heritage list.[233] These would be carried over. NSW is the only jurisdiction with emergency listings for threatened species.[234] The impacts of the recent bushfires on biodiversity have highlighted the need for more responsive listing processes.

Protecting Vulnerable *Ecological Communities*[235]

The aim of listing is to prevent further decline and to promote recovery of threatened species and ecological communities. Yet the current EPBC Act offence provisions do not protect listed *vulnerable* ecological communities from harm.[236] Similar exemptions occur in some state legislation.

An ecological community is *vulnerable* if it is facing a high risk of extinction in the wild in the medium-term future (for example, the next 50 years). Existing pressures, combined with accelerating climate change, increase the need to protect them.

The Act should extend assessment, authorisation and offence provisions so that *vulnerable ecological communities* are protected from harm, alongside vulnerable threatened species and other entities. Actions that could have significant impacts on vulnerable ecological communities should require environmental impact assessment and EPA approval. Actions may only be approved if they do not jeopardise the goals in a recovery plan. Approvals may not be granted if a recovery plan is not in place.

Nomination and listing of important populations of a species

Local populations make a significant contribution to genetic diversity, have local and regional cultural significance, and can increase public awareness of conservation needs. Maintaining genetic diversity makes species more robust to threats such as disease and climate change. However, as the EPBC Act does not currently permit the listing of local populations, there is no federal law to prevent local extinction of a species or protect significant populations. Similarly, state planning or biodiversity laws might not recognise a population's importance.

---

[233] The Hawke Review of the EPBC Act (2009) supported an emergency listing process (recommendation 16), as did the Australian Government's response (2011). More recently, a Senate Inquiry into a private member's Bill supported emergency listing in principle, but the Bill was not passed.

[234] Under the *Biodiversity Conservation Act 2016* (NSW) and the former *Threatened Species Conservation Act 1995* (NSW). i.e. The provisions to list species and communities do not unnecessarily duplicate state processes, and there is no equivalent process in the EPBC Act.

[235] Vulnerable ecological communities are currently not protected by harm offences under the EPBC Act (sections 18-18A), and similar exemptions occur in some state legislation.

[236] EPBC Act sections 18-18A include offences to protect:

- *species* that are vulnerable, endangered, critically endangered and extinct in the wild; and
- *ecological communities* that are endangered and critically endangered.

Listing and protecting a local population would therefore help address cumulative impacts and threats of local extinction that may otherwise be overlooked.

We recommend the Act should include provisions permitting the public to nominate important local populations of a species for listing and protection. EPA guidelines for eligibility should be developed to support nomination and listing.

Applying the precautionary principle to listing decisions

We recommend that the Act should require the Scientific Committee to act consistently with the *precautionary principle*[237] when deciding whether to list a species, ecological community or other entity as threatened.

As noted above, the precautionary principle is a key principle of Ecologically Sustainable Development. In simple terms it states that a lack of full scientific certainty should not prevent or delay action to avoid serious or irreversible harm.[238] The principle already applies to certain decisions under the EPBC Act.[239]

In practice, applying this principle to a listing decision means that the Scientific Committee should list the species, ecological community or place if (in the absence of listing) the scientific evidence shows a threat of serious or irreversible environmental harm (such as a risk of extinction), even if that threat is subject to some uncertainty.

Decisions affecting species and ecological communities must be consistent with Approved Conservation Advices, Recovery Plans, Threat Abatement Plans etc.

It is currently an offence to kill, injure, take,[240] trade, keep or move a listed species without authorisation (including threatened and migratory species, cetaceans or marine species). These provisions of the Act should apply anywhere in Australia, not only on Commonwealth land and waters. One form of authorisation should involve assessment and approval by a National EPA.

When the National EPA is deciding whether or not to approve a controlled action,[241] the Act should explicitly require that it 'must act consistently with' any:

- Approved conservation advice;[242]

---

[237] Section 391: *Minister must consider precautionary principle in making decisions*. The EPBC Act establishes the precautionary principle as a principle of Ecologically Sustainable Development (ESD) under s. 3A:

> *(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;*

[238] The principle is activated when two triggers are satisfied by the evidence:

- there is a threat of serious or irreversible environmental damage, *and*
- lack of full scientific certainty as to the environmental damage.

See for example *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133, at [128], [140] and [148]: (i.e. the threat has reasonable scientific plausibility but there is uncertainty as to its nature and scope).

[239] The EPBC Act, section 391, requires the precautionary principle to be considered in various other decisions under the Act, but this does not currently include listing decisions.

[240] The new definition of 'take' in relation to animals that belong to a threatened species or ecological community should expand on EPBC Act terms ('harvest, catch, capture, trap and kill') to include actions to 'harass, harm or pursue' an animal, or to *attempt* any of these actions. These additional terms are in the US *Endangered Species Act* definition, s. 3 (16 U.S.C. § 1532).

[241] (or any other relevant decision-maker is making decisions that affect listed threatened species, populations or ecological communities).

[242] Approved conservation advices are brief scientific and legal documents that essentially explain the conservation requirements of species to avoid their extinction (see EPBC Act s. 266B). The failure to consider them has been determined by the Courts to be a fundamental error of law. See: *Tarkine National Coalition*

- Recovery plan (including prohibitions on harm);
- Threat abatement plan;
- Bioregional plan (which may specify regional protections);
- Plan of Management for a listed heritage site (such as World Heritage Areas); or
- International obligations under environmental treaties and instruments.

These requirements clarify and expand on similar provisions in the EPBC Act.[243] Decisions and approvals would be aided by the fact that these plans would integrate with one another. Plans would be informed by Australia's international obligations. Sound decisions should be supported by national EPA guidelines and oversight.

Consistent with the objective to prevent extinctions, impacts on critically endangered and endangered ecological communities – those at extreme or very high risk of extinction – must not be approved. Further, we recommend that significant impacts on vulnerable ecological communities may only be approved if a recovery plan is in place for the entity (single, multi-species or regional recovery plan); and the action is demonstrated to be consistent with the recovery plan.[244]

Even where actions are approved (for example, significant land-clearing), all reasonable steps must be taken to avoid harm to nationally protected species, and offences for cruelty to animals would still apply.

The prevention of unacceptable impacts, as early as possible, is consistent with the aims of the Act, as noted above in relation to improving certainty and efficiency.

Critical habitat.[245]

As noted above in relation to incentives for restoration we recommend that impacts on critical habitat must be refused in favour of conservation agreements.

The Act should make clear that the national EPA must not approve adverse actions in areas of **critical habitat** for threatened species or ecological communities. This is similar to protections for critically endangered and endangered ecological communities recommended above. No biodiversity offsets should be available for critical habitat due to its essential role in preventing extinction.

Instead, the Commonwealth must proactively seek conservation agreements or covenants[246] with private landholders (or government authorities), to protect the critical habitat using private land conservation funds. The new or amended Act should have its own conservation covenanting mechanism rather than relying on state or territory resources and agencies (recognising that state agencies are likely to have their own conservation investment plans).

Incorporated v Minister for Sustainability, Water, Population and Communities [2013] FCA 694, at [49]. It is proposed that the Scientific Committee prepares Advices to assist recovery plans.

[243] Under the EPBC Act, section 139 currently requires that 'the Minister must not act inconsistently with' a range of international obligations as well as *recovery plans* and *threat abatement plans*. By contrast, the Minister must only 'have regard to' any Approved Conservation Advice for an affected species or ecological community. The new Act would make these obligations clear and consistent.

[244] These criteria would be subject to certain thresholds. For example, the Act, regulations and National EPA guidelines would require that if Endangered or Vulnerable Ecological Communities are in *poor condition*, they could only be cleared if a recovery plan is in place; and approval of the action would not jeopardise the community's likelihood of recovery.

[245] i.e. habitat identified as critical to the survival of threatened species and ecological communities.

[246] See http://www.environment.gov.au/protection/environment-assessments/conservation-agreements; and http://www.environment.gov.au/topics/biodiversity/biodiversity-conservation/conservation-covenants.

Critical habitat must be identified, mapped and included on the Critical Habitat Register at the time a species or community is listed (subject to confidentiality)

The Act should require that critical habitat is identified in conservation advices and recovery plans at the time a threatened species or community is listed. As in the United States, this may include habitat that is not currently occupied by the species but is seen as 'essential' to its future recovery.[247]

The Act should retain the Register of Critical Habitat[248] (incorporating climate refugia and *potential* critical habitat noted above) so that information is centrally accessible for conservation and land-use planning purposes.

The Act should require that all critical habitat identified in conservation advices and recovery plans must automatically be included on the Register. The Act should also require published mapping of identified critical habitat, subject to security precautions specifically to protect threatened entities.[249]

To fill some of the high priority gaps in the current Critical Habitat Register, the Act should require the Minister (with the Scientific Committee's assistance) to identify and list the critical habitats of all *critically endangered species* when a new Bill is introduced following this review;[250] and transfer all existing, identified critical habitat (for all species and ecological communities currently listed) to the Register within 12 months of the Act's passage.

Extend critical habitat protections beyond Commonwealth areas

The Act should extend critical habitat provisions to protect habitats beyond Commonwealth areas, to include state and territory lands and waters,[251] to the full extent of Commonwealth powers. Importantly this would mean that offences for damaging critical habitat extend beyond the limited range of Commonwealth areas, to include other land and waters in a state or territory.

Expanded categories for threatened species status

The EPBC Act listing categories for threatened species and ecological communities should be expanded in line with internationally recognised (IUCN) criteria.[252] Threat categories available for listing species and ecological communities would therefore include:

- **Extinct**
- **Extinct in the wild**
- **Critically endangered** – i.e. at extreme risk in the immediate future
- **Endangered** – at very high risk of extinction in the near future
- **Vulnerable** – at high risk of extinction in the medium-term future

[247] See for example, US *Endangered Species Act* (16 U.S.C. § 1532) sections 3 and 4, 'critical habitat'.
[248] The EPBC Act enables critical habitat to be identified on a Register under s. 207A. However, the current Register is not mandatory and is rarely used.
[249] E.g. EPBC Regulations 2000 (clause 7.10) require the Register be published, subject to confidentiality affecting the protected species, ecological community, habitat, or the interests of relevant landholders.
[250] Table 1 in this submission indicates that 280 (89 fauna and 191 flora) species and ecological communities were listed as critically endangered under the EPBC Act (i.e. known to face an extremely high risk of extinction in the wild in the immediate future). See Department of Environment and Energy, SPRAT database, at: https://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl
[251] An example amendment relative to the EPBC Act is as follows. At section 207B (*Offence of knowingly damaging critical habitat*), delete: 'and (c) the habitat is in or on a Commonwealth area.'
[252] The EPBC Act enables the listing of threatened species and ecological communities as 'vulnerable' (i.e. at high risk of extinction in the medium-term future), 'endangered' (very high risk in the near future) or 'critically endangered' (extreme risk in the immediate future); along with further listing categories of 'extinct', 'extinct in the wild' or 'conservation dependent' (EPBC Act, s. 179).

- **Near-Threatened**
- **Data-Deficient.**

The EPBC Act's *conservation dependent* category should be removed,[253] and the IUCN *near-threatened* and *data-deficient* categories would be enacted.[254]

Near-threatened would provide flexibility to protect species and ecological communities at risk from, for example, present and future climate change. *Data-deficient* listing could prevent species from languishing on a long-list, and encourage sound resourcing decisions and targeted research.[255] *Near-threatened* and *data-deficient* entities should be eligible for Commonwealth and joint implementation funding for research and monitoring as a consequence of listing.

Threatened entities including commercially harvested fish species must be listed in the highest ecologically appropriate threat category they qualify for. Near-threatened species that are currently commercially harvested could still be harvested, but only if an EPA-verified conservation program is in place.

Standards or regulations may require Commonwealth agencies to establish conservation programs for *near threatened* species within a given timeframe to prevent their status deteriorating, particularly if the species is commercially exploited. Conservation programs would need to meet Sustainability Commission standards overseen by the national EPA.

Coordinated listing, Recovery Plan actions and Threat Abatement Planning

As proposed above, listing of threatened species and ecological communities should to be accompanied by approved conservation advices, mapped critical habitat areas and single or multi-species recovery plans.

Recovery plans should be a mandatory requirement of listing a threatened species or ecological community,[256] including detailed recovery goals, actions, estimated timeframes to achieve goals and milestones, and metrics to measure progress.[257] Multi-species plans should be encouraged where this is efficient and scientifically sound.

The Scientific Committee and Sustainability Commission could propose a standard set of recovery plan goals,[258] where the specifics and timeframes are tailored to the species, but the same goals should apply to meet the overarching aim of recovery.

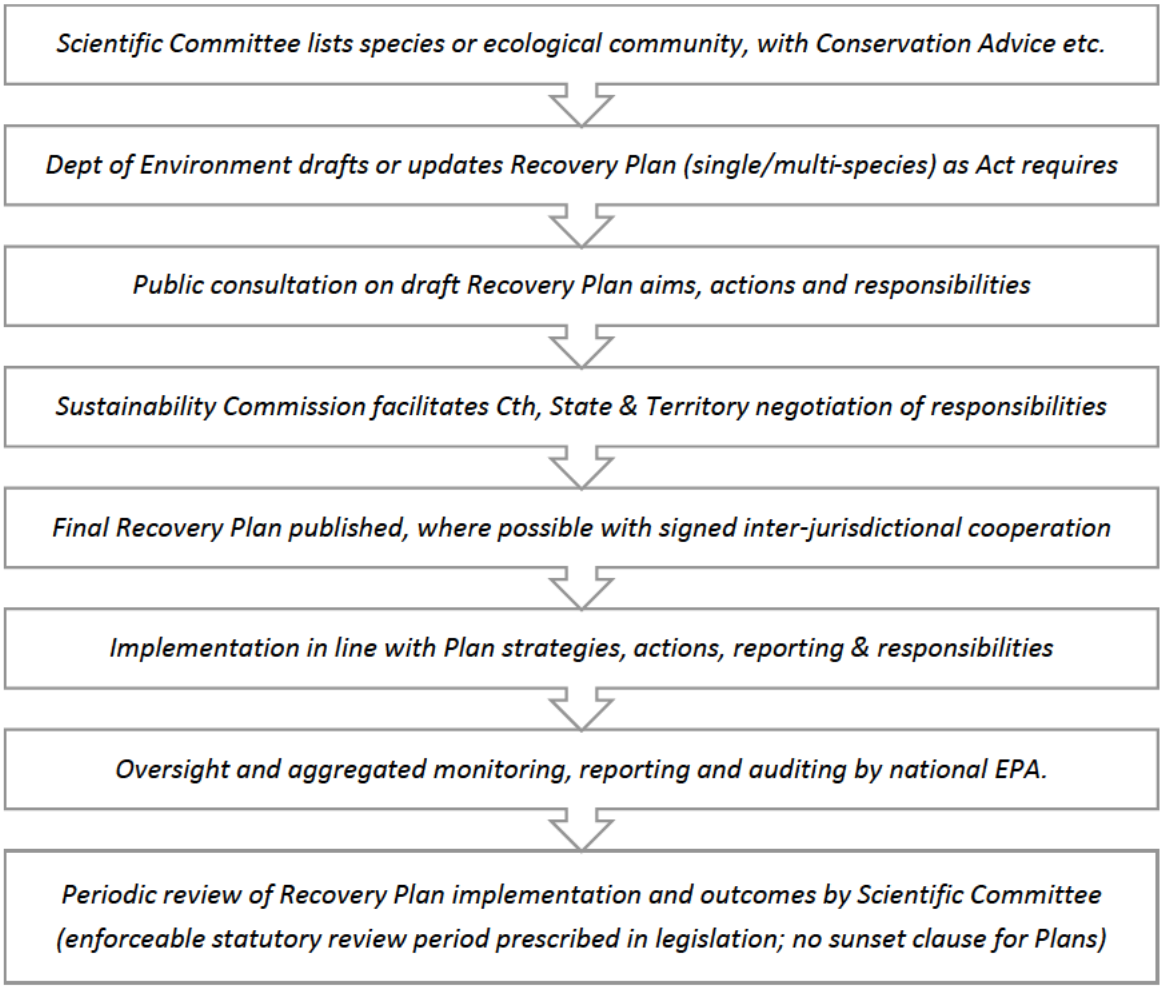
Plans of Management would be required to maintain or improve the values of natural and cultural heritage places, and these should be integrated into bioregional plans.

The Act must ensure recovery plan instruments are continually in force and do not simply expire after a period. The Minister should have a duty to ensure recovery plans are in place, and to review and update recovery plans at least once every 10 years.

---

[253] Conservation dependent means specific conservation measures are in place, without which the species' risk of extinction would increase. See EPBC Act ss. 179; s. 180 (Native species of marine fish).
[254] See further: IUCN, *Application of the IUCN Red List Criteria at Regional and National levels* (2010), Figure 2, p 14, at http://www.iucnredlist.org/technical-documents/red-list-training/red-list-guidance-docs.
[255] For example, Canada recognises near-threatened species as of 'special concern'. The *Endangered Species Act* (US) provides for 'candidate species' that are believed to be threatened but a proposed listing regulation is precluded by other, higher priority listings.
[256] Unless the Scientific Committee certifies that a recovery plan would not materially benefit the entity because it is extinct or extinct in the wild.
[257] Example metrics include habitat restoration and extent, reduction in percentage of habitat cleared, percentage increase in critical habitat under protection, or a percentage reduction in mortality from a key threat.
[258] For example, each recovery plan would need a goal for: reducing habitat destruction, habitat restoration, critical habitat protection and mortality reduction from key threats (with tailored specifics).

Simplified outline of Recovery Planning *(Act requirements and timeframes apply)*



Recovery plans are only as good as their implementation and resourcing. The Act and regulations should establish a defined period (for example, six months from listing) for the Sustainability Commission to negotiate and agree on joint recovery management arrangements with relevant States and Territories (including funding incentives), to ensure recovery plans and protections apply across federal and state jurisdictions.[259] If no agreement can be reached, the Commission must finalise management arrangements to the full extent of Commonwealth constitutional powers.

As an example of coordination, state and territory strategic planning processes should integrate and protect national threatened and sensitive biodiversity areas upfront (such as Key Biodiversity Areas, High Conservation Value Vegetation and other Ecosystems of National Importance). Also, state threatened species programs should coordinate with national listings and programs. For example, by coordinating resources and effort on shared goals; and by identifying high-priority gaps in existing programs where complementary effort is needed by another level of government.

Finally, if the Sustainability Commission or the Minister fail to prepare an adequate recovery plan, or fail to meet another mandatory duty under the Act because any plan in force is not

[259] Statutory requirements to develop and apply recovery plans should provide additional incentives, because in some cases development with impacts may only proceed if a recovery plan is in place (e.g. for vulnerable ecological communities).

being implemented, community members should be empowered to seek orders from a Court or tribunal requiring those duties to be performed.[260]

Threat Abatement Planning

Threat abatement is a critically important mechanism – as illustrated by the recent bushfires. Key threatening processes can be listed under the current Act, but many threats have no threat abatement plans even after years of being listed. The mechanism needs to be strengthened. Consistent with landscape-scale protections and efficient management, the Act should provide for greater operational focus on mandatory threat abatement planning.

Threat abatement goals and efforts should generally be focused on sets of threats that overlap and interact to affect large numbers of species. Plans and goals should be clear and concise, and be more tightly focused on threat abatement actions, outcomes (e.g. measurable mortality reduction), monitoring and reporting. Threat abatement plans should be subject to guidelines and approval by the Sustainability Commission or the Scientific Committee.

The part of the Act dealing with threat abatement plans should adopt similar processes and safeguards to recovery plans, such as evidence-led plan preparation, consultation, partnership agreements and implementation across tenures within set timeframes. Funding incentives could assist cooperative agreement with the states and territories. If no agreement can be reached, the Commonwealth should be required to finalise management arrangements to the full extent of its constitutional powers.

To fully operationalise threat abatement plans, bioregional planning should include a Regional Threat Assessment process. This would ensure that bioregional plans address key threats and threat abatement plans to the satisfaction of the Sustainability Commission and any guidelines.

Finally, the Scientific Committee should review the Climate Change[261] and Land Clearance Key Threatening Processes as a priority (both were listed in 2001, yet neither has a threat abatement plan). The Climate Change Key Threatening Process review should consider the need for specific adaptation and conservation strategies for biodiversity, and improved land carbon accounting and climate impact assessment. This could include mandatory climate impact statements for projects, submitted with environmental impact assessments.

Recommendations relating to listing threatened species and other protected matters include:

- **Independent Scientific Committees to assess and directly list threatened species, ecosystems for national protection.**
- **Simpler and faster nomination and listing processes, and strong, non-regressive common standards for assessment across the Commonwealth, states and territories.**
- **All valid nominations to be assessed within statutory timeframes.**
- **Stronger protections for threatened species, important populations, ecological communities and critical habitat across Australia.**
- **Vulnerable ecological communities be a 'trigger' for impact assessment and approval (via existing matters of national environmental significance).**
- **Emergency listing provisions for threatened species & ecological communities and critical habitats.**

[260] Similar to citizen petition rights in the US *Endangered Species Act* and US air pollution regulation.
[261] 'Loss of climatic habitat caused by anthropogenic emissions of greenhouse gases'.

- **Permitting nomination and listing of important populations of a species.**
- **Applying the precautionary principle to listing decisions.**
- **Requiring decisions affecting species and ecological communities are consistent with approved conservation advices, recovery plans, threat abatement plans and international agreements.**
- **Impacts on critical habitat must be refused and conservation agreements sought with landowners. The Act must include a conservation covenanting mechanism.**
- **Critical habitat must be identified, mapped and included on the Critical Habitat Register at the time a species or ecological community is listed.**
- **Extending critical habitat protections beyond Commonwealth areas only.**
- **New threat categories to reflect international (IUCN) standards, including for near-threatened and data-deficient species and ecological communities.**
- **Mandatory requirements for recovery plans and threat abatement to be developed and implemented in a coordinated manner across Australia.**
- **Mandatory goals to be addressed in recovery plans**

7.4 Heritage provisions

This section of the submission makes recommendations for improving the protection of heritage.

Australian Heritage Committee and listing processes

Listing places of national or world heritage significance should be clearer, simpler and more effective under the new Act (or amended EPBC Act). For example, the Act should expressly protect World Heritage *properties* as well as World Heritage *values*.[262] Native species should also be eligible for national heritage listings as well as places.[263]

Like threatened species, the Act should require all validly made public nominations for heritage listing to be assessed within a clear statutory timeframe (a maximum of three years, including any necessary extensions). Refusal to list a place should be subject to merits review.

To align with the independent role of the Scientific Committee, the Act should prescribe the Australian Heritage Committee as both the independent assessment and decision-making body for heritage listings. The Committee would receive public nominations and be empowered to identify and nominate heritage areas itself.

The Act should require that Committee members have a range of expertise related to natural and cultural heritage and other technical disciplines.[264] Indigenous heritage places should be primarily identified and assessed by Indigenous representatives, with new laws to replace the outdated 1984 indigenous heritage legislation. Listing of Indigenous cultural heritage should include the ability to list the intangible heritage value of a site.

[262] The World Heritage Operational Guidelines (which are an integral part of World Heritage processes) require each Party to protect the entire World Heritage area, not just its values. See Haigh, David, 'Australian World Heritage, the Constitution and international law', (2005) *EPLJ* 385.
[263] For example, species like the dingo would be a potential candidate for a heritage listing given their place in Australia's national identity and their importance in Indigenous Australian culture. Listing of non-native species - such as brumbies in Kosciuszko National Park - is not appropriate given the damage they cause to environmental values.
[264] Such as heritage law, archaeology, geography, environmental history, anthropology and ecology. Protection of natural heritage should also be expressed to include native species in a declared place.

For all other heritage, the process to nominate, assess, publicly exhibit, consult on and finalise heritage nominations should follow a similar pathway to threatened species nominations above. In making listing decisions, in addition to public and landholder consultation, the Committee should be required to consider the advice of the relevant Commonwealth Minister (and/or Department agency head), and any state or territory Ministers relevant to the location.

The Heritage Committee, with the assistance of the Department (and other experts at the Council's discretion), should be required to prepare statutory guidelines to assist the nomination, assessment and protection of heritage areas under the Act. The guidelines would aim to ensure that the legal framework, implemented in practice, will maintain or improve the heritage values of Australia's special places. They would include clearer criteria for the nomination of natural areas as National Heritage. The Department should have a duty to facilitate public nominations and to assist the community to prepare nominations. Registers, heritage strategies and management plans would also need to be established and used in accordance with the guidelines.

Protections in the Act would need to be consistent with international obligations and commitments, including under the World Heritage Convention. The Hawke Review also made a number of useful recommendations on heritage reforms, including to 'simplify the nomination, prioritisation, assessment and listing processes for National and Commonwealth Heritage;'[265] new heritage guidance, leadership and active promotion of a national approach to heritage.[266] The new Act should reflect the Hawke Review recommendations, while drawing on the experiences of heritage experts, enthusiasts and Aboriginal groups who have used the EPBC Act in the decade since.

Consistent with our comments in relation to engagement with First Nations peoples above, we recommend that where national heritage places are listed because of cultural heritage values, the EPBC Act should give effect to UNDRIP by providing for the free prior and informed consent of the peoples affected by development within that landscape.

The new or amended Act could also provide for the National Ecosystems Assessment to engage with the Heritage Committee, to identify and accelerate the listing of priority natural areas that meet National Heritage criteria. This process (or a parallel National Heritage Assessment to be conducted periodically) would assist the Minister, Department and Council to fulfil international commitments and other statutory duties, such as to keep lists up-to-date.

[265] As the Australian Government notes: 'The Commonwealth Heritage List… comprises natural, Indigenous and historic heritage places *on Commonwealth lands and waters or under Australian Government control.*' (Emphasis added.) Whereas the National Heritage List 'has been established to list places of outstanding heritage significance to Australia. It includes natural, historic and Indigenous places that are of outstanding national heritage value to the Australian nation.' A place may be protected under multiple provisions, 'For example, a Commonwealth Heritage Place might also be on the National Heritage List or the World Heritage List.' See: http://www.environment.gov.au/heritage/about/national; and http://www.environment.gov.au/heritage/about/commonwealth-heritage.

[266] See Hawke Review of the EPBC Act (2009), Chapter 8 – Heritage, recommendations 28-30.

Recommendations relating to heritage provisions

- **Establish an Independent Australian Heritage Committee to assess and directly list natural and cultural heritage places for national protection.**
- **Provide for Indigenous Cultural Heritage to be primarily identified and assessed by Indigenous representatives, with new laws to replace the outdated 1984 indigenous heritage legislation. Listing of Indigenous cultural heritage should include the ability to list the intangible heritage value of a site.**
- **The Act should expressly protect World Heritage *properties* as well as World Heritage *values***
- **Simpler and faster nomination and listing processes, and strong, non-regressive common standards for assessment across the Commonwealth, states and territories.**
- **All valid nominations to be assessed within statutory timeframes.**
- **Emergency listing provisions national heritage places**
- **Applying the precautionary principle to listing decisions.**

Additional issues

This part of the submission is to draw the Review's attention to issues that are not covered by the 26 Discussion Paper questions, specifically:

1. **Climate Change legislation**
2. **Regulation of wildlife trade**
3. **Integrated Oceans management**

Climate Legislation

Current Australian laws are inadequate in meeting our responsibility in curbing dangerous climate change and to provide for necessary adaptation measures.

Urgent, whole-of-government law reform is needed, including a new national Climate Change Act, and embedding requirements to mitigate greenhouse gas emissions and adapt to climate change impacts across all portfolios of Government, including Commonwealth environmental laws.

Australia's climate has warmed by just over one degree Celsius (°C) since 1910 and average temperatures are projected to rise further.[267] Impacts that are the result of a changing climate are already occurring in Australia, including the warming and acidification of oceans, sea level rise, changes in rainfall patterns, and an increase in extreme weather events including fires, flooding and drought. And the impacts of climate change are not just environmental; there are significant implications across all sectors, including health, the economy and national security.[268]

In light of the unequivocal scientific evidence of the impacts of anthropogenic climate change, the international community agreed in late 2015 to keep the increase in global average temperature to well below 2°C above pre-industrial levels; and to pursue efforts to limit the increase to 1.5°C.

Yet despite Australia's commitments on the international stage (that have attracted strong criticism as being inadequate[269]), and the fact that everyday Australian's are suffering the impacts of climate change, Australia's national laws are woefully inadequate in requiring action to mitigate greenhouse gas emissions and adapt to the impacts of climate change.

Our national environmental laws do not explicitly require decision-makers to consider climate change impacts in environmental decision- making. At present, under the EPBC Act, assessment and conditions related to climate change can only be incidental to protecting listed matters of national environmental significance, such as threatened species or world heritage areas. The Environment Minister cannot definitively review or reject a proposal on the grounds that its greenhouse gas emissions are excessive or an unacceptable risk to the environment or the community.

There is no overarching national legal framework, such as a national Climate Change Act, that would ensure a whole-of-government approach for tackling climate change in Australia.

---

[267] See Commonwealth Scientific and Industrial Research Organisation (CSIRO), *Climate change in Australia - Projections for Australia's NRM regions*, https://www.climatechangeinaustralia.gov.au/en/climate-projections/future-climate/regional-climate-change-explorer/clusters/

[268] The impacts of a warming climate on Australia are set out in more details in Bureau of Meteorology and CSIRO, *State of the Climate 2018* (2018), www.bom.gov.au/state-of-the-climate.

[269] See for example, Climate Transparency, *Brown to Green Report 2019,* available at https://www.climate-transparency.org/g20-climate-performance/g20report2019

This review provides an opportunity to not only embed climate change considerations in our national environmental laws as recommended in this submission, but to recognise and recommend that for Australia to effectively mitigate and adapt to climate change an overarching whole-of-government approach is needed, including a new Climate Change Act.

In addition to the climate related recommendations for a new or amended Environment Act, EDO recommends that the development of a new national climate Act.

Australia should implement a whole-of-government approach to climate change by enacting a new national Climate Change Act that addresses both climate change mitigation and adaptation in a clear and coordinated way.[270] A new national Climate Change Act would include the elements set out below.

***Objects*:** set a clear overarching objective to reduce greenhouse gas emissions and make decisions consistent with limiting the increase in global warming to no more than 1.5 degrees Celsius above pre-industrial levels. The objects should also refer to planning for a rapid and just transition away from fossil fuel production.

Targets: set legislative short-term and long-term emissions reduction target, with mechanisms to require review and non-regressive improvements to targets against best available science.[271]

***Independent expert advice*:** formalise a skills-based independent statutory *Climate Change Advisory Council* to advise the Government and the Parliament based on the best available science for climate mitigation, and assess and report on progress in relation to meeting targets and implementing adaptation plans, and require decision makers to not act inconsistently with this advice.

***Duties*:** create an enforceable duty on Ministers and relevant decision-makers to make decisions consistent with relevant climate change legislative objects and targets when exercising prescribed functions under Commonwealth legislation.

Risk assessment: adopt a process for a national climate risk assessment, and require specific policies and initiatives for sectors identified as high risk from climate change impacts (e.g. housing, infrastructure, agriculture, energy, insurance).

***Adaptation Plans*:** require a national Adaptation Plan to be made, published, and periodically reviewed by the Climate Change Advisory Council; sectoral and regional adaptation plans could also be made consistent with the national adaptation plan.

***Monitoring progress*:** Develop national indicators, including for emissions reduction in line with set targets, adaptation planning and climate-readiness of legislation; and annually report against those indicators.

[270] The recently proposed by private members Bill (*Climate Change (National Framework for Adaptation and Mitigation) Bill 2020*) by the Hon. Zali Steggall MP, provides an example of a possible national Climate Change Act see: https://www.zalisteggall.com.au/climate_change_bill_2020_business_overview

[271] Alternatively, impose duties on Government Ministers to set periodic and long-term emissions reduction targets and carbon budgets, based on expert advice consistent with internationally agreed climate goals, best available science, and the principles of ecologically sustainable development. It is noted that the Commonwealth has already set legislated renewable energy targets, see section 40 of the *Renewable Energy (Electricity) Act 2000.*

***Governance*:** Allocate Ministerial responsibility specifically for climate change[272], and stand-alone government Climate Change division that administers an overarching Climate Change Act (assisted by advice from the independent Climate Change Advisory Council) and supports interagency collaboration on emissions reduction and adaptation.

The EDO would be happy to provide the Review with further detail on these recommendations.

Regulation of wildlife trade

The COVID-19 pandemic has highlighted the links between environmental regulation and public health with respect to the illegal wildlife trade.[273] Wildlife trade has significant impacts on our unique and highly sought-after wildlife, but also on human health. However, the Discussion Paper includes only a passing reference to wildlife trade in the context of economic growth (p19). It is currently regulated under Part 13A of the EPBC Act. We refer this review to a detailed report recommending specific reforms to strengthen regulation and enforcement of provisions relating to the lucrative legal and illegal trade in wildlife produced by EDO and HSI. ***Next generation: Best practice wildlife trade provisions in national law*** is available at: https://www.edo.org.au/publication/wildlife-trade-best-practice-national-law/

Integrated Oceans Management: An Oceans Act

As noted, the Discussion paper refers to marine bioregional planning under the EPBC Act, and this submission makes recommendations regarding species listing and fisheries accreditation. However, it has long been argued that due to the number of different sectors, jurisdictions, and impacts involved, management of Australia's oceans would be better coordinated under a stand-alone Oceans Act. We refer the Review to recommendations made in our report: ***More than just fish and ships: A case for an Oceans Act*** available at: https://www.edo.org.au/publication/more-than-just-fish-and-ships/

[272] It is noted that there is currently a Commonwealth Minister for Energy and Emissions Reduction (a position currently held by The Hon. Angus Taylor, MP). We would recommend that Ministerial responsibility should encompass emissions reduction and climate adaptation and be responsible for coordinating a whole-of-Government response to climate change and administration of a new Climate Change Act.
[273] See: https://theconversation.com/coronavirus-has-finally-made-us-recognise-the-illegal-wildlife-trade-is-a-public-health-issue-133673

Appendix

Draft trigger for significant land clearing

The following is a draft of how provisions could be inserted into the EPBC Act. (Note: This could be complemented by a new trigger for Ecosystems of National Significance, and potentially a greenhouse gas emissions trigger).

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 SUBDIVISION FC—Land clearing

24F - Requirement for approval of activities with a significant impact on native vegetation
24G – What is a land clearing action?
24H - Offences relating to clearing of native vegetation
24I - Aggravated offence—clearing native vegetation in prohibited areas
Schedule X - Sensitive regulated areas and activities
Schedule Y – Prohibited areas

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 - SECT 24F

Requirement for approval of activities with a significant impact on native vegetation

(1) A person must not take a land clearing action that:
  (a) has or will have a significant impact on native vegetation; or
  (b) is likely to have a significant impact on native vegetation.

Civil penalty:
  (a) for an individual--5,000 penalty units;
  (b) for a body corporate--50,000 penalty units.

(2) Subsection (1) does not apply to a land clearing action if:
  (a) an approval of the taking of the action by the person is in operation under Part 9 for the purposes of this subsection; or
  (b) Part 4 lets the person take the action without an approval under Part 9 for the purposes of this section; or
  (c) there is in force a decision of the Minister under Division 2 of Part 7 that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner; or
  (d) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 - SECT 24G

What is a land clearing action?

(1) In this Act:

"land clearing action " means any of the following:

(a) clearing of 100 or more hectares of native vegetation in any two year period[274]
(b) clearing of habitat for nationally-listed threatened species or ecological communities
(c) clearing of a sensitive regulated area, or is a sensitive regulated activity listed in **Schedule X**
(d) clearing of an area listed in **Schedule Y**

"clearing" **native vegetation** means any one or more of the following:

(a) cutting down, felling, thinning, logging or removing native vegetation,
(b) killing, destroying, poisoning, ringbarking, uprooting or burning native vegetation.

"***native vegetation***" means any of the following types of indigenous vegetation:

(a) trees (including any sapling or shrub, or any scrub),
(b) understory plants,
(c) groundcover (being any type of herbaceous vegetation),
(d) plants occurring in a wetland

Vegetation is indigenous if it is of a species of vegetation, or if it comprises species of vegetation, that existed in Australia before European settlement.

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 - SECT 24H

Offences relating to land clearing

(1) A person commits an offence if:
(a) the person takes a land clearing action; and
(b) the action results or will result in a significant impact on native vegetation; and
(c) the native vegetation is a category of native vegetation listed in section 24G.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) An offence against subsection (1) is punishable on conviction by imprisonment for a term not more than 7 years, a fine not more than 420 penalty units, or both.

(3) In the case of an aggravated offence—imprisonment for X years or X penalty units, or both;

Note 1: Subsection 4B(3) of the *Crimes Act 1914* lets a court fine a body corporate up to 5 times the maximum amount the court could fine a person under this subsection.
Note 2: An executive officer of a body corporate convicted of an offence against this section may also commit an offence against section 495.
Note 3: If a person takes an action on land that contravenes this section, a landholder may commit an offence against section 496C.
Note 4: For the extra element of an aggravated offence, see section 24I

(4) Subsections (1), (2) and (3) do not apply to an action if:
(a) an approval of the taking of the action by the person is in operation under Part 9 for the purposes of this section; or
(b) Part 4 lets the person take the action without an approval under Part 9 for the purposes of this section; or

[274] The 2 year period needs explanation, for example, that it's trying to prevent cumulative impact of multiple applications below threshold. Guidance on the trigger would need to address how proponents/agencies identify the 2 year period and can track past clearing. This could rely on state approval data, or unauthorised clearing data from satellites etc, showing areas cleared in the 2 years prior (i.e. prior to the proposal submitted to State Government, prior to Commonwealth referral, or prior to the action being carried out without authority). Also State agency land-clearing forms could ask how much clearing has been done in last 2 years, noting that EPBC trigger may apply to cumulative clearing, and it is an offence to give false/misleading information in a land-clearing application.

(c) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).

Note: The defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 - SECT 24I

Aggravated offence—clearing native vegetation in prohibited areas

(1) For the purposes of this section, an offence against section 24H (the ***underlying offence***) is an ***aggravated offence*** if a land clearing action is undertaken in an area listed in Schedule Y.

(2) If the prosecution intends to prove an aggravated offence, the charge must allege the relevant aggravated offence.

(3) Strict liability applies to the physical elements of the offence in subsection (1).

Note: For strict liability, see section 6.1 of the *Criminal Code.*

SCHEDULE X – Sensitive regulated areas and activities [275]

(a) (1) For the purpose of subdivision FC, section 24G, sensitive regulated areas include: The Great Barrier Reef Catchment
(b) RAMSAR wetlands
(c) Key biodiversity areas
(d) Other ecosystems of national importance
(e) National heritage places

(2) For the purpose of subdivision FC, section 24G, sensitive regulated activities include:
(a) Low-level clearing in over-cleared catchments
(b)

SCHEDULE Y – Prohibited areas

(1) For the purpose Subdivision FC, section 24G, areas include:[276]
(a) Critical habitat for endangered species or ecological communities
(b) High conservation value vegetation

(2) The areas listed in subsection (1) do not include areas where clearing native vegetation is authorised for the purposes of environmental conservation and emergency management works.

[275] Schedule X could list other environmentally sensitive areas or high conservation value areas that are designed to capture clearing that is not otherwise regulated by (a)-(c) of the "land clearing action" definition. There will be instances where clearing of far less than 100ha should require federal assessment due to the area's sensitivity. Other areas that could be listed include land adjacent to World Heritage, National Heritage, Ramsar wetlands, however, there is overlap with existing MNES triggers for these. As a safeguard, Schedule X could refer to clearing in a buffer zone distance around those areas.

[276] This schedule is intended to capture highly sensitive or important areas where land clearing would be outright prohibited.