EDOs of Australia

Inquiry into Australia's faunal extinction crisis

EDOs of Australia
10 September 2018

EDOs of Australia (formerly ANEDO, the Australian Network of Environmental Defender's Offices) consists of eight independently constituted and managed community legal centres located across the States and Territories.

Each EDO is dedicated to protecting the environment in the public interest. EDOs:

- provide legal representation and advice,
- take an active role in environmental law reform and policy formulation, and
- offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

The biodiversity of Australia is extraordinary. It is diverse, spectacular, often unique, and is vital for ecosystem health, human health and wellbeing, and productive landscapes. It has immense intrinsic as well as commercial value. It is also under threat.

Extinction of fauna species is a national tragedy. And it is a national embarrassment that we are world leaders in fauna extinction rates. We needs laws in place to prevent extinctions, but also more broadly, to address the threats that cause the habitat and biodiversity declines that lead to extinctions.

At least 75 species of Australian mammals, birds, frogs and other fauna are at extreme risk of extinction in the immediate future (critically endangered).

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.*

EDOs of Australia (**EDOA**) is a network of community legal centres that specialise in public interest environmental law and policy. Based on our practical experience, we have advised and written extensively on biodiversity and environmental law reform at the national level and in each jurisdiction. A strong legal framework to protect biodiversity and build resilience is essential for reversing the declining trajectory towards extinction facing many of our unique species.

We therefore welcome the opportunity to comment on the *Inquiry into Australia's faunal extinction crisis*.

EDOs are all about protecting the environment through law, and our contribution to this inquiry focuses on legal solutions to the extinction crisis.

Our offices have used the law to protect our most threatened fauna for more than three decades. Our litigation and advice teams have run cases to help concerned communities, groups and individual uphold the law to protect many species ranging from the yakka skink and ornamental snake; regent honeyeater; threatened sharks; black throated finch; to koala habitat, and Southern blue fin tuna. A list of fauna species that EDOs have used the law to protect is at **Annex B**.

Almost 2000 species and ecological communities are listed as critically endangered, endangered or vulnerable to extinction in Australia. This includes fauna and flora species, and unique assemblages of both (endangered ecological communities –

habitats where many of our threatened fauna survive). Many more are in danger at state and territory level.

Australia's laws are sometimes accused of merely 'cataloguing extinction', rather than preventing it. Unless laws and government policies require decision-makers to address the causes of extinction risk, genetic and evolutionary lineages that exists nowhere else on earth will continue to be forever extinguished.

Our law reform lawyers have undertaken two audits of threatened species law in each Australian jurisdiction, with a key finding being that no state or territory laws meet best practice standards for biodiversity protection.[1]

Based on our extensive experience across Australia of the limitations of current laws, we make detailed recommendations for a new generation of biodiversity provisions that should form part of new national environmental laws, based on a report recently published by EDO NSW and Humane Society International (HSI) ***Next generation biodiversity laws – Best practice elements for a new Commonwealth Environment Act*** (**EDO/HSI Report**).

The full report is attached (**Annex A**) for the Committee and includes a suite of detailed amendments which are relevant to addressing the fauna extinction crisis.

We recommend a new Environment Act for Australia is needed to address the contemporary, interlinked challenges of extinction and biodiversity protection, natural resource management, land use, human settlements, production and consumption systems and climate change. The Environment Act must be underpinned by renewed national leadership, independent and trusted institutions, high levels of environmental protection, with strong community engagement and access to justice.

To assist the Committee, this submission first notes the 13 broad recommendations for biodiversity reform, and then identifies specific recommendations related to the terms of reference (**ToR**).

Summary of recommendations for biodiversity law reform

Due to the limitations of existing laws, EDOs of Australia support the development of stronger national environmental law. In summary, key reform elements include:

1. A new Australian Environment Act that elevates environmental protection and biodiversity conservation as the primary object or aim of the Act.
2. Duties on decision makers to exercise their powers to achieve the Act's aims, apply expanded principles of Ecologically Sustainable Development (**ESD**) and non-discretionary obligations to apply the tools in the Act.
3. Strong institutions to steer proactive and evidence-based environmental policy advice, development, coordination, oversight and compliance activity. Two new statutory environmental authorities would be created, separate from the Department of Environment – a National Sustainability Commission (**Sustainability Commission**) and a National Environment Protection Authority (**EPA**).

[1] *An assessment of threatened species and planning law in Australian jurisdictions* 2012 and 2014, commissioned by the Places You Love Alliance of environmental NGOs. Available at: www.edondsw.org.a/...

4. New triggers for federal protection. In addition to the existing matters of national environmental significance, the National EPA will assess actions that significantly affect the following:
    - the National Reserve System (terrestrial and marine protected areas)
    - Ecosystems of National Importance (such as significant wetlands, key biodiversity areas and high conservation value vegetation, whether or not they are under threat)
    - Vulnerable ecological communities (which currently receive less protection than listed species, populations, ecological communities and critical habitat)
    - Significant land-clearing activities
    - Significant greenhouse gas emissions
    - Significant water resources (beyond coal and gas project impacts)
    - Powers to declare other matters of national environmental significance.
5. A dual focus on protection and recovery of threatened species and ecological communities; and on landscape-scale conservation plans and programs guided by national environment and sustainability plans.
6. Simpler, timely and accountable listing processes for nationally protected matters, backed by strengthened protections.
7. A new framework and emphasis on integrated, multi-sector bioregional plans to coordinate action, protect natural and cultural heritage places, achieve biodiversity goals and ensure ecologically sustainable development.
8. A National Ecosystems Assessment to holistically identify important natural assets, their status and the 'ecosystem services' that nature provides to human society.
9. Greater emphasis on indigenous leadership, land management and biodiversity stewardship, including formal recognition of Indigenous Protected Areas to enable greater access to ongoing funding and legal protections.
10. Strong public participation through greater community engagement, transparency and reasons for decisions.
11. Improved access to justice via merit review rights on decisions that affect the environment, open standing for the public to take breaches to Court, protective costs orders for legal proceedings in the public interest, and a modern compliance and enforcement toolkit to deter misconduct and improve public trust.
12. A national environmental data and monitoring program that links federal, state and territory data on biodiversity, strategic planning and environmental impact assessment to ensure strong biodiversity outcomes.
13. A suite of international conservation protections to ensure Australian governments, companies, citizens and supply chains protect and support global biodiversity.
14. Better resourcing and foresight for agencies, conservation programs and natural resource management, including a cohesive National Biodiversity Conservation and Investment Strategy that pools resources, multi-sector investment in ecosystem services, databases and new tools.

Recommendations relating to inquiry terms of reference

To assist the Committee, specific recommendations from the EDO/HSI report relating to terms of reference for this inquiry are set out and cross referenced below.

ToR C: the international and domestic obligations of the Commonwealth Government in conserving threatened fauna;

Australia is a signatory to a range of important multi and bilateral international environmental agreements, including the *Convention on Biological Diversity*.[2] It is the obligation to implement these agreements domestically that gives the Australian Government the Constitutional power and mandate to make biodiversity laws (see further **Part B** of the EDO/HSI report). The effective domestic implementation of these obligations is absolutely critical to addressing biodiversity decline and preventing extinction.

While current laws such as the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) explicitly recognise some specific obligations – for example through identifying matters of national environmental significance that relate directly to agreements such as wetlands, migratory species; and include wildlife trade provisions – we recommend a strengthened role for the Australian Government in implementing these obligations through law.

In terms of other specific international obligations, our recommendations for reform are set out in **Part J (International obligations & transboundary protections)** of the EDO/HSI Report, and include:

- Requiring the Australian Government to take all necessary steps to fulfil its commitments under international conservation treaties, including seeking Sustainability Commission advice and [3]environmental impact assessment of relevant government proposals overseas.
- Requiring that government laws and actions that may affect international conservation responsibilities are to be accompanied by a Statement of Compatibility (akin to Commonwealth human rights legislation).
- Requiring earlier community engagement and greater public scrutiny of trade agreements and negotiations.
- Enabling the automatic listing and protection of overseas threatened species, ecological communities, critical habitats and protected areas.
- Applying Environment Act offences to the actions of Australian citizens and corporations that affect overseas threatened species and protected areas, and requiring Australian companies to comply with foreign conservation laws.

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[2]Australia is signatory to the following agreements: Convention on Biological Diversity, Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), Convention on International Trade in Endangered Species of Wild Flora and Fauna, Convention on Migratory Species , Ramsar Convention on Wetlands, UN Convention to Combat Desertification , UN Framework Convention on Climate Change World Heritage Convention, , Agreement on the Conservation of Albatrosses and Petrels Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment (CAMBA), Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment (JAMBA), and Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds (ROKAMBA).

[3] See for example, Endangered Species Act (United States) 16 USC S 1531, s. 2.

In terms of domestic obligations, we make a range of recommendations for strengthening and expanding national leadership in **Part A (Objects for a new Australian Environment Act)** and **Part B (Scope of Commonwealth responsibility for biodiversity)** of the EDO/HSI Report. We recommend that strengthened laws would include:

- 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.[4]
- A modernised framework to achieve Ecologically Sustainable Development (**ESD**), including new principles to support high environmental standards, non-regression and continuous improvement, and increasing resilience to environmental threats.
- Retaining and expanding Commonwealth environmental responsibilities in accordance with constitutional powers.
- New Commonwealth oversight of the National Reserve System, Ecosystems of National Importance,[5] greenhouse gas emissions, significant land clearing activities and significant water resources.
- Coordinated natural resource management planning, and national, state and local integration of conservation goals and programs.

ToR D: the adequacy of Commonwealth environment laws, including but not limited to the Environment Protection and Biodiversity Conservation Act 1999, in providing sufficient protections for threatened fauna and against key threatening processes;

There are a number of reasons why the application of the EPBC Act is limited and is failing to prevent dramatic declines and extinctions of our unique fauna species.

First, the core function of the EPBC Act is to protect matters of national environmental significance (**MNES**), including listed threatened species. Accordingly, any 'action' that is likely to have a significant impact on a listed species (or one of the 10 MNES) must be assessed and approved under the EPBC Act. The requirement that an action would have a 'significant impact' on a specified list of matters sets a high threshold for federal consideration under the Act. As a consequence, the vast majority of development proposals will only require assessment at a local or State level, which lies outside the scope of national law.

Second, as the EPBC Act generally only regulates high-impact individual developments (such as mining operations or large infrastructure projects), it does not require assessment and approval for some of the major impacts on threatened species such as the *cumulative impacts* of individual vegetation clearing across the landscape. Most impacts – such as land clearing - are regulated by State and Territory Governments – except in very rare instances where for example, clearing is likely to have a significant impact on a MNES.

Third, the Minister is not required to refuse a development proposal even if it is likely to have a significant impact on a MNES, such as a listed threatened species. Rather, the

[4] For example the US Endangered Species Act (1973) places non-discretionary duties on the Secretary and federal agencies, and a failure to fulfil these duties can result in court proceedings to enforce them (*Endangered Species Act* (US) 16 USC S 1540(g)).
[5] Such as wetlands on the directory of national importance, key biodiversity areas, climate refugia and high conservation value vegetation.

Minister may – and in almost all cases does – issue a conditional approval. Only a handful of the matters that have required Ministerial assessment and approval under the Act have ever actually been refused.[6] In other words, the Act is not prohibitive or particularly restrictive in the way it is applied. Rather – and like most environmental legislation in Australia – it is based on a system of permits and approvals which authorise and mitigate activities with adverse impacts on threatened species.

Fourth, the Act actually includes many of the necessary mechanisms – such as for recovery planning, threat abatement planning, and identifying critical habitat – but these are under-utilised and under-resourced. It is therefore not always a deficiency in legislative provisions, it is a failure of effective *implementation* of the laws. Enforcement of the Act has been weak and under-resourced.

Fifth, there are certain significant impacts that are exempt from the Act. For terrestrial fauna, the exclusion of forestry under Regional Forest Agreements means significant impacts on species such as critically endangered Leadbeaters possum in Victoria, are not assessed under the EPBC Act. In the marine environment, impacts of offshore petroleum developments on threatened species and cetaceans is outsourced to NOPSEMA.

To address these limitations we make recommendations relating to: **Governance & institutions (Part C) Listing threatened species and other protected matters (Part D) and Operational provisions, programs and tools (Part E)** of the EDO/HSI report.

Key recommendations for strengthening **governance & institutions (Part C)** 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.
- 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.
- A new national EPA – to assess, approve or refuse projects, monitor project-level compliance and take enforcement action.
- A new system of five-yearly National Environment and Sustainability Plans.
- Better resourcing and foresight for agencies, conservation programs and natural resource management, including multi-sector investment in ecosystem services, databases and new tools.

Key recommendations for strengthening **Listing threatened species and other protected matters (Part D)** include:

- Independent Scientific and Heritage Committees to assess and directly list threatened species, ecosystems and natural and cultural heritage places for national protection.
- Simpler and faster nomination and listing processes, and strong, non-regressive common assessment standards 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 will be a 'trigger' for impact assessment and approval (via existing matters of national environmental significance).

[6] See: Australian Government, *Department of the Environment Annual Reports.*

- Emergency listing provisions for threatened species & ecological communities, critical habitats and national heritage places.
- New threat categories to reflect international (IUCN) standards, including for near-threatened and data-deficient species and ecological communities.
- 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.
- 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.

Key recommendations for strengthening **Operational provisions, programs and tools (Part E)** include:

- A trigger to identify and protect Ecosystems of National Importance, such as wetlands of national importance, Key Biodiversity Areas, climate refugia and High Conservation Value Vegetation.
- A greenhouse trigger to ensure that climate change impacts are embedded in strategic planning and that high-emission projects have their impacts thoroughly assessed against international climate goals and national commitments.
- A trigger to assess significant land-clearing proposals, and to prohibit unacceptable impacts on critical habitat, High Conservation Value Vegetation and Key Biodiversity Areas.
- A clear 'significant impact' threshold for Commonwealth assessment, with objective standards, national EPA 'impact guidelines' and cumulative impact assessment.
- Stronger referral powers and duties for all government agencies, call-in powers for the Minister and national EPA, and a formal request process for community members.
- Renewed focus on strategic environmental outcomes.
- Upfront investment in bioregional plans to protect natural assets across Australia.
- Strong environmental assessment and accreditation provisions (including for fisheries) to maintain or improve environmental standards and values.
- Effective national oversight of forestry, including enforceable protections rather than exemptions under inadequate and outdated Regional Forest Agreements.

ToR E: the adequacy and effectiveness of protections for critical habitat for threatened fauna under the Environment Protection and Biodiversity Conservation Act 1999;

There are at least three reasons why critical habitat protections in the EPBC Act are ineffective.

The first problem with critical habitat protection under the EPBC Act is that is discretionary. While the EPBC Act does have a register for listing critical habitat for threatened species, it is up to the Environment Minister whether to register areas that are critical to a threatened species' survival, or not.[7] Unfortunately there have only been five places listed – and none in the last decade – despite increasing threats in areas of high development pressure or susceptibility to changing climate. 99% of threatened species do not have registered critical habitat refuges that protect areas critical to their survival.

A more successful approach in other jurisdictions, such as the USA, is to identify and register critical habitat as a mandatory step in the listing process.[8] This is the minimum required, because such habitat is considered critical to the survival of the species or ecological community.

A second problem is this: although 'significant impacts' on critical habitat must be referred to and assessed by the federal Environment Department, these impacts can still be approved by the federal Environment Minister. Habitat that is critical to the survival of a threatened species can still be legally destroyed if the Environment Minister permits it. A better approach would be to prohibit adverse impacts on critical habitat, and to establish a fund to partner with owners of critical habitat to restore and protect it.

The third major problem is that protections for critical habitat (such as the registration of critical habitat and the offence of knowingly damaging critical habitat[9]) only apply in Commonwealth areas. This means protections are unenforceable outside the very limited land and waters that are owned or controlled by the Commonwealth. To be nationally effective, critical habitat identification and protection must apply across all tenures, including public and private lands regulated by the States and Territories.

We recommend (see **Part D** of the EDO/HSI Report):

- Critical habitat must be identified, mapped and included on the Critical Habitat Register at the time a species or ecological community is listed.
- Impacts on critical habitat must be refused and conservation agreements sought with landowners. The Environment Act will include a conservation covenanting mechanism.
- Extending critical habitat protections beyond Commonwealth areas only.
- Ensure there are effective penalty provisions for damaging critical habitat.

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[7] Analysis from ACF, Birdlife Australia and EJA in 2015 found that 86 out of 120 recovery plans identify critical habitat. However, the vast majority of Australia's threatened species do not have recovery plans. For those that do, critical habitat may or may not be identified, and is only listed on the critical habitat register on a handful of occasions. See *Recovery planning: Restoring life to our threatened species*, Australian Conservation Foundation, Birdlife Australia and Environmental Justice Australia (2015), p 9. Available at: http://www.birdlife.org.au/documents/OTHPUB-Recovery-Planning-Report.pdf.

[8] See for example, *Endangered Species Act* (US) 16 USC S 1532, sections 3 & 4 (critical habitat).

[9] Under the EPBC Act (s. 207B), the offence of *knowingly damaging critical habitat* can only be enforced on 'Commonwealth areas': narrowly prescribed areas of land and waters owned or controlled by the Australian Government.

ToR F: the adequacy of the management and extent of the National Reserve System, stewardship arrangements, covenants and connectivity through wildlife corridors in conserving threatened fauna;

Australia has not achieved a truly Comprehensive, Adequate and representative (**CAR**) national reserve system, and further investment is needed to complete this. EDOs of Australia supports a significant increase in investment for completing the National Reserve System (**NRS**) and achieving Aichi targets under the *Convention of Biological Diversity*.[10] We also support formal Commonwealth protection of areas in the NRS.

We recommend (under **Part E of the EDO/HSI report**):

- A legislative trigger to guard the NRS of protected areas against significant impacts.
- A National Ecosystems Assessment to rapidly identify key natural assets and ecosystem services that deserve national recognition and monitoring.

ToR G: the use of traditional knowledge and management for threatened species recovery and other outcomes as well as opportunities to expand the use of traditional knowledge and management for conservation;

EDOs of Australia strongly support increased traditional owner involvement in management and custodianship of biodiversity. In **Part G** of the EDO HSI Report that relates to **Indigenous knowledge, engagement & leadership,** our recommendations include:

- An Indigenous Land and Waters Commissioner, and/or Indigenous Cultural Heritage Advisory Council to support the new Sustainability Commission.
- Legislative recognition, protection and secure long-term funding for Indigenous Protected Areas.
- New Commonwealth cultural heritage protection laws to replace the outdated *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
- Measures to improve Indigenous engagement, leadership and capacity-building, customary rights to use biodiversity, and knowledge sharing for biodiversity conservation.

ToR H; the adequacy of existing funding streams for implementing threatened species recovery plans and preventing threatened fauna loss in general;

> *Resources for managing biodiversity and for limiting the impact of key pressures mostly appear inadequate to arrest the declining status of many species.*
>
> - *State of the Environment 2016*, report to the Australian Government

We strongly support a dedicated and vastly increased funding stream allocated to developing and implementing joint recovery plans for threatened fauna, and threat abatement plans for the major drivers of extinction (see **Part C.5 of EDO/HSI report)**. Smart investment in threatened species recovery, natural resource management to reduce threats and restore landscapes will deliver benefits for resilience and productivity.

[10] See Aichi target 11: https://www.cbd.int/sp/targets/rationale/target-11/

Successive *State of the Environment* (**SOE**) reports describe the under-resourcing of natural resource management – which protects Australia's environment, and supports healthy and productive landscapes for agriculture, water supply, food production and recreation. These are factors on which Australians' quality of life, now and in the future, depends.

One the six key challenges that the SOE 2016 identifies is: 'insufficient resources for environmental management and restoration'. Unfortunately there is no obligation on governments to table a response to SOE reports under the EPBC Act, or to act on priorities and challenges those expert reports identify. The problem is, the costs of environmental decline, and the benefits of reversing it, are largely ignored or invisible.

Part of the solution to this investment shortfall is to formally identify and recognise 'ecosystem services' in decision-making. Ecosystem services are the socio-economic benefits that a healthy environment provides – such as pollination, food production, water filtration, salinity protection, storm surge resilience, carbon storage, cultural connection and recreation. As many Australian species remain undiscovered, there is also huge scientific and economic potential to conserve and better understand our species and ecosystems that exist nowhere else.[11]

Several conservation groups have identified both a decline in government resourcing for threatened species recovery and potential areas where investment should be targeted. For example, a 2015 report on recovery planning recommended:[12]

- investing $200 million per year in a threatened species recovery fund; and
- investing at least $170 million per year for growing the National Reserve System; grants to establish and manage public, private and indigenous protected areas and private land conservation covenants.

Adequate funding for threatened species recovery and key threat abatement requires a coordinated system of national environment plans, indicators and strategies. National environment plans should have a legislative basis led by the National Sustainability Commission, that requires all levels of government (in partnership with other sectors) to develop, implement, resource and monitor shared goals for threatened species and other environmental assets. As national environment plans would be much broader than threatened species, specific goals and targets can be achieved through a National Biodiversity Conservation & Investment Strategy.

Term of reference 'H' (funding) is closely related to 'I' below (monitoring). In particular, a necessary improvement to monitoring is a system of national environmental accounts. We recommend:

- A National Biodiversity Conservation & Investment Strategy that pools resources and links the tools above with national, state and regional conservation goals and efforts. (see **Part E**).

[11] See for example, Australian Academy of Science, *Discovering Biodiversity: A decadal plan for taxonomy and biosystematics in Australia and New Zealand 2018–2027*. Available at: https://www.science.org.au/support/analysis/decadal-plans-science/discovering-biodiversity-decadal-plan-taxonomy.

[12] See for example, *Recovery planning: Restoring life to our threatened species*, Australian Conservation Foundation, Birdlife Australia and Environmental Justice Australia (2015), pp 3 and 15. Available at: http://www.birdlife.org.au/documents/OTHPUB-Recovery-Planning-Report.pdf.

ToR I: the adequacy of existing monitoring practices in relation to the threatened fauna assessment and adaptive management responses;

'Inadequacy of data and long-term monitoring' is another of the six key challenges identified in the *State of the Environment 2016 Report*.

The EDO/HSI Report makes recommendations regarding **outcomes monitoring, reporting & improvement** in **Part H.** These recommendations include:

- 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.
- Independent National Sustainability Commission reporting should 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 public inquiries into the extinction of threatened species.

ToR K: the adequacy of existing compliance mechanisms for enforcing Commonwealth environment law;

Compliance and enforcement currently resides within the Department of Environment. There are two central problems with the enforcement of Commonwealth environmental law: lack of resourcing and lack of formal independence from the Executive or Ministers. These should be resolved by a well-resourced and independent environmental regulator.

We recognise and support public officials who are making genuine attempts to oversee compliance and to enforce EPBC Act protections. However, we note that the ANAO has issued recent reports on compliance failures by the Department as a whole.[13] For example, post-approval oversight has been patchy; a lack of clearly documented investigations and departmental procedures; and a blurring of role responsibilities between approval and post-approval compliance areas (both located in the one agency).

Locating enforcement within the Department means it is subject to actual and perceived political pressures from ministers and Members of Parliament (who may attempt to exert pressure on behalf of constituents being investigated[14]), as well as internal political pressures within the Department.

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[13] See: *Monitoring Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit that concluded that the Department for* Environment had made progress in addressing the five recommendations made in ANAO Report No. 43 2013–14, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval, however, "*to date, limited progress has been made in relation to the implementation of broader initiatives to strengthen the department's regulatory performance" at https://www.anao.gov.au/work/performance-audit/monitoring-compliance-epbc-act-follow
And https://www.anao.gov.au/work/performance-audit/managing-compliance-environment-protection-and-biodiversity-conservation-act;

[14] See for example, reports of attempted influence in *The Guardian*, M. Slezak, 'Lobbying by MPs forced government to back off on land-clearing enforcement', 5 March 2018, available at: https://www.theguardian.com/environment/2018/mar/02/deeply-regret-australias-apology-to-landholders-suspected-of-planning-unlawful-clearing.

An example of these external and internal pressures at play is the process of 'accrediting' state and territory laws to take on Commonwealth assessment (or approval) functions.[15] Over several years from 2013, there was significant political pressure on the Department to controversially accredit state laws and policies, as part of a concerted withdrawal of the Commonwealth from environmental decision-making. However, the Act requires certain standards to be met before accreditation. After a lengthy freedom of information dispute, documents released by the federal Environment Department show departmental staff had significant concerns about accrediting NSW biodiversity 'offsetting' policies compared to federal standards. Yet NSW laws and policies were accredited anyway.[16]

We make a number of recommendations to improve compliance and enforcement in **Part I** and **Part F** of the EDO/HSI Report.

To strengthen compliance & enforcement we recommend **(Part I):**

- 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 update approval conditions over time.

An essential accountability mechanism is to have a role for communities and third parties to become involved where appropriate or necessary to ensure the law is applied and upheld. In this context, we also recommend amendments to ensure **public participation, transparency & access to justice** including (at **Part F**, EDO/HSI report):

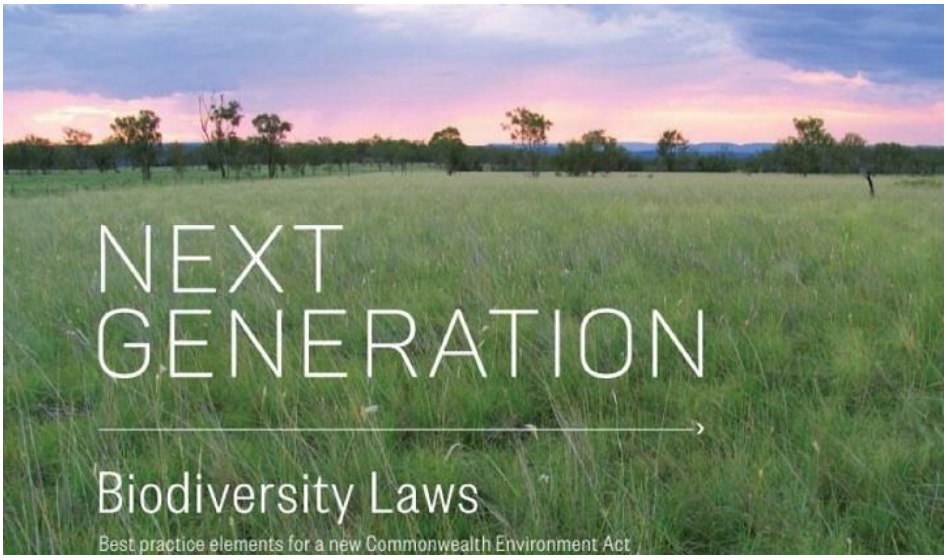
- Strong community engagement and public participation provisions at all key stages, from strategic planning to project assessment and compliance monitoring, reporting and enforcement.
- Rights for interested community members to seek merits review of key decisions under law (such as when a nominated entity or place is declined for listing; on the adequacy of an approved recovery plan; or whether a proposed action requires Commonwealth assessment).
- 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.

[15] These accreditation processes are in two distinct forms under the EPBC Act: bilateral agreements under Part 4; and strategic assessments under Part 10 of the Act.
[16] See further EDO NSW, 14 May 2018, https://www.edonsw.org.au/foi_offsets_win_hsi.

Annex A

We refer the Committee to the full report for the detail of these recommendations. The report is also available at:

https://www.edonsw.org.au/next_gen_biodiversity_laws



<u>Annex B</u> – Examples of threatened fauna species that have been the subject of EDO litigation and legal advice work

Photographs sourced from: http://www.environment.gov.au and https://www.environment.nsw.gov.au

- Regent honeyeater (*Anthochaera Phrygia*)

- Black throated finch (*Poephila Cincta Cincta*)

- Koala (*Phascolarctos Cinereus*)

- Southern blue fin tuna (*Thunnus maccoyii*)

- Yakka skink (*Egernia rugosa*)

- Ornamental snake (*Denisonia maculata*)

- Grey headed flying foxes (*Pteropus Poliocephalus*)

- Rose crowned fruit dove (*Ptilinopus Regina*)

- Swift parrot (*Lathamus discolor*)

- Greater long-eared bat (*Nyctophilus Corbeni*)

- Giant barred frog (*Mixophyes Iteratus*)

- Spectacled flying foxes (*Pteropus Conspicillatus*)

- Grey nurse shark (*Carcharias Taurus*)

- Carnaby's Black Cockatoo (*Calyptorhynchus Latirostris*)

- White Bellied Sea Eagle (subsequently delisted) (*Haliaeetus leucogaster*)

- Eastern Osprey (*Pandion cristatus*)

- Red and spotted handfish (*Thymichthys politus* and *Brachionichthys hirsutus*)

- Tasmanian devil (*Sarcophilus harrisii*)

- Tasmanian wedge tailed eagle (*Aquila audax subsp. Fleayi*)

- Maugean skate (*Zearaja maugeana*)

- Southern right whale (*Eubalaena australis*)

- Golden Sun Moth (*Synemon plana*)

- Pink Tailed Worm Lizard (*Aprasia parapulchella*)

- Spotted-tailed Quoll (*Dasyurus maculatus maculatus*)

- Superb Parrot (*Polytelis swainsonii*)

- Mahony's toadlet (*Uperoleia Mahonyi*)