

# Chapter 1

## Introduction

1.1 On 27 June 2018, the Senate referred the following matter to the Environment and Communications References Committee (the committee) for inquiry and report by 4 December 2018:

Australia's faunal extinction crisis, including:

- a) the ongoing decline in the population and conservation status of Australia's nearly 500 threatened fauna species;
- b) the wider ecological impact of faunal extinction;
- c) the international and domestic obligations of the Commonwealth Government in conserving threatened fauna;
- 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;
- e) the adequacy and effectiveness of protections for critical habitat for threatened fauna under the *Environment Protection and Biodiversity Conservation Act 1999*;
- 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;
- 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;
- h) the adequacy of existing funding streams for implementing threatened species recovery plans and preventing threatened fauna loss in general;
- i) the adequacy of existing monitoring practices in relation to the threatened fauna assessment and adaptive management responses;
- j) the adequacy of existing assessment processes for identifying threatened fauna conservation status;
- k) the adequacy of existing compliance mechanisms for enforcing Commonwealth environment law; and
- l) any related matters.<sup>1</sup>

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1 *Journals of the Senate*, No. 104, 27 June 2018, p. 3338.

1.2 On 26 November 2018, the Senate granted an extension of time to report until 29 May 2019.<sup>2</sup> On 2 April 2019, the Senate granted an extension of time to report until 13 November 2019.<sup>3</sup>

### **Conduct of the inquiry**

1.3 The committee advertised the inquiry in the usual manner on its website, and wrote to a number of organisations and individuals, inviting them to make submissions by 13 August 2018. On 8 August 2018, the Committee agreed to extend the date for the receipt of submissions to 10 September 2018.

1.4 The committee has received 420 submissions, which are listed at Appendix 1 of this report, and available in full on the committee's website.

1.5 The committee held a number of public hearings to take evidence. A list of all witnesses that appeared at these hearings can be found at Appendix 2 of this report, and full Hansard transcripts of proceedings can be found on the committee's website. These hearings were held in:

- Canberra on 8 October 2018;
- Melbourne on 22 November 2018;
- Brisbane on 1 February 2019;
- Tasmania on 4 and 5 February 2019; and
- Canberra on 14 February 2019.

1.6 The committee also undertook site visits in:

- Victoria on 21 November 2018, to visit the Toolangi State Forest and the Healesville Sanctuary; and
- Queensland on 31 January 2019, to visit the site of proposed developments at Toondah Harbour, Cleveland.<sup>4</sup>

### **Structure of this report**

1.7 This report is an interim report that draws on the committee's work to date. It concentrates on evidence received by the committee on whether the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is currently fulfilling its objectives in protecting threatened species.

1.8 It should be noted that this interim report is focussed on the effectiveness of the EPBC Act as a legislative framework for managing the Australian environment,

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2 *Journals of the Senate*, No. 130, 26 November 2018, p. 4230.

3 *Journals of the Senate*, No. 141, 2 April 2019, p. 4793.

4 An account of both these site visits can be found in Appendix 3.

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rather than its implementation. The committee recognises that evidence canvassed serious shortcomings with the implementation of the Act and other related areas, such as its interaction with state and territory frameworks. However, the committee does not seek to address these issues in this report.

1.9 The interim report consists of four chapters:

- Chapter 1 provides a background to the inquiry and its administration, a summary of the EPBC Act, and an overview of relevant reviews of and inquiries into the Act;
- Chapter 2 provides an overview of the faunal extinction crisis in Australia and the key threats to the survival of Australia's unique fauna;
- Chapter 3 considers the evidence received by the committee on the effectiveness of the EPBC Act, and potential reforms that should be considered by the Commonwealth; and
- Chapter 4 sets out the committee's views and recommendations.

## **Background**

1.10 The EPBC Act is the Commonwealth's key environmental legislation relating to the protection of threatened species of flora and fauna, as well as ecological communities and heritage sites. The Act came into force on 16 July 2000, and is administered by the Department of the Environment and Energy (the department).<sup>5</sup>

1.11 The EPBC Act contains provisions for the Commonwealth to assess actions that are likely to have a significant impact on a matter of national environmental significance (MNES) in Australia. It also contains provisions to list and manage threatened species, ecological communities, and protected areas, and also regulates wildlife trade.

1.12 The department noted that 'Australia's international obligations provide the overarching framework and constitutional basis by which the Australian Government and the Department seek to deliver national policies and programs that provide for the conservation and protection of biodiversity, including threatened fauna'.<sup>6</sup> International agreements to which Australia is a signatory include the United Nations Sustainable Development Goals, Convention on Biological Diversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on the Conservation of Migratory Species, the Ramsar Convention on Wetlands of International Importance and the World Heritage Convention. The department added that 'as a signatory to these conventions and agreements Australia

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5 Department of the Environment and Energy, 'About the EPBC Act', [www.environment.gov.au/epbc/about](http://www.environment.gov.au/epbc/about) (accessed 20 February 2019).

6 Department of the Environment and Energy, *Submission 57*, p. 11.

has committed to care for, and report on progress towards, global biodiversity goals and targets'.<sup>7</sup>

1.13 The department also stated that it:

...leads Australia's engagement in the United Nations Convention on Biological Diversity, and represents national interests at intersessional meetings and biannual Conferences of the Parties. The Convention on Biological Diversity is dedicated to promoting sustainable development. As a Party to the Convention, Australia's obligations include having a national biodiversity strategy and action plan that demonstrates how Australia will contribute to global targets and reporting internationally every four years on how we have contributed to the Aichi Biodiversity Targets.<sup>8</sup>

1.14 Apart from the EPBC Act, the Commonwealth also protects the environment through a number of other non-statutory measures, including 'programs that invest in recovery and restoration, national policies and strategies that guide national action, and funding activities that support science and monitoring for the conservation and protection of threatened fauna'.<sup>9</sup>

1.15 *Australia's Biodiversity Conservation Strategy 2010–2030* provides the 'guiding national framework to conserve national biodiversity to 2030' for Australian governments. According to the department:

It provides an overview of the state of Australia's biodiversity and outlines collective priorities for conservation. The strategy also provides relevant guidance to non-government organisations and individuals on how and where they should be focussing their conservation efforts.<sup>10</sup>

### ***Other stakeholders in environmental conservation and protection***

1.16 The states and territories also have a major role in environmental matters being 'the primary regulators for Australia's native plants and animals'. All jurisdictions 'have legislation to conserve biodiversity and to retain and manage habitats, including through a conservation reserve system involving national parks, nature reserves, conservation parks and marine parks'. In addition, the state and territory governments operate native vegetation conservation programs, while also providing for sustainable development of lands and waters within their jurisdictions.<sup>11</sup>

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7 Department of the Environment and Energy, *Submission 57*, p. 11.

8 Department of the Environment and Energy, *Submission 57*, p. 11.

9 Department of the Environment and Energy, *Submission 57*, p. 5.

10 Department of the Environment and Energy, *Submission 57*, p. 17.

11 Department of the Environment and Energy, *Submission 57*, p. 5.

1.17 Non-governmental stakeholders including landholders, communities, traditional owners, and private sector and non-government organisations also play a key role. For example:

All responsible landholders, managers and lessees contribute to biodiversity conservation through their management of lands and waters across Australia. This contribution ranges from retaining the productive potential of the lands and waters, to conserving particular species or habitats and even providing habitats for native species such as frogs, birds, reptiles and small mammals in towns and city areas.

Other groups and sectors that invest considerable time and effort to protect biodiversity include Indigenous and community groups, environmental non-government organisations, businesses, and the research and education sector. These groups have considerable Indigenous ecological or local knowledge, technical expertise and play a critical role in onground implementation and raising community awareness. Many biodiversity conservation successes are the product of effective partnerships between governments and nongovernment groups.<sup>12</sup>

### ***Objectives of the EPBC Act***

1.18 The broad objectives of the EPBC Act are to:

- provide for the protection of the environment, especially matters of national environmental significance;
- conserve Australian biodiversity;
- provide a streamlined national environmental assessment and approvals process;
- enhance the protection and management of important natural and cultural places;
- control the international movement of plants and animals (wildlife), wildlife specimens and products made or derived from wildlife;
- promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
- recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; [and]
- promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge.<sup>13</sup>

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12 Department of the Environment and Energy, *Submission 57*, pp. 5–6.

13 Department of the Environment and Energy, 'About the EPBC Act', [www.environment.gov.au/epbc/about](http://www.environment.gov.au/epbc/about) (accessed 20 February 2019).

### *Actions requiring assessment*

1.19 The Commonwealth Minister for the Environment must consider and approve all 'actions' that are likely to impact on NMES.<sup>14</sup> Actions are defined in section 523 of the Act as including:

- (a) a project; and
- (b) a development; and
- (c) an undertaking; and
- (d) an activity or series of activities; and
- (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).<sup>15</sup>

1.20 Currently, there are nine NMES that require ministerial consideration under the EPBC Act, which are also referred to as 'triggers'. These MNES relate to actions potentially affecting:

- world heritage properties;
- national heritage places;
- wetlands of international importance (often called 'Ramsar' wetlands after the international treaty under which such wetlands are listed);
- nationally threatened species and ecological communities;
- migratory species;
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park;
- nuclear actions (including uranium mining);
- a water resource, in relation to coal seam gas development and large coal mining development.<sup>16</sup>

1.21 A number of other activities must also be assessed by the Minister, including actions that may affect the environment being undertaken by Commonwealth agencies, as well as any actions affecting the environment on Commonwealth-owned land. There is also some scope for the Minister to add other triggers to the list by

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14 Department of the Environment and Energy, 'About the EPBC Act', [www.environment.gov.au/epbc/about](http://www.environment.gov.au/epbc/about) (accessed 20 February 2019).

15 *Environment Protection and Biodiversity Conservation Act 1999*, section 523.

16 Department of the Environment and Energy, 'About the EPBC Act', [www.environment.gov.au/epbc/about](http://www.environment.gov.au/epbc/about) (accessed 20 February 2019).

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regulations, although this must be done in consultation with the jurisdictions, even if their agreement is not required.<sup>17</sup>

1.22 Additionally, threatened species and ecological communities can also receive protection through other relevant triggers in the EPBC Act. This means, for instance, that threatened species occurring in world heritage sites, Ramsar-protected wetlands, Commonwealth marine parks or the Great Barrier Reef Marine Park would also have some protections under the relevant MNES. In addition, some threatened species and ecological communities receive protection through other 'landscape-level' mechanisms, such as Commonwealth marine areas, and the National Reserve System.<sup>18</sup>

### ***Biodiversity conservation and the listing of threatened species***

1.23 As noted above, threatened species and ecological communities are a MNES under the EPBC Act. Chapter 3 of the Act sets out a regime for biodiversity conservation in Australia. This includes provisions for the 'listing' of nationally threatened native species and ecological communities, which involves the:

- identification and listing of species and ecological communities as threatened;
- development of conservation advice and recovery plans for listed species and ecological communities;
- development of a register of critical habitat;
- recognition of key threatening processes; [and]
- where appropriate, reducing the impacts of these processes through threat abatement plans.<sup>19</sup>

### ***Conservation advices and recovery plans***

1.24 The EPBC Act requires the preparation of conservation advices when a species is listed as threatened, to assist in its recovery. According to the department, a conservation advice 'provides guidance on immediate recovery and threat abatement activities that can be undertaken to ensure the conservation of a newly listed species'.<sup>20</sup>

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17 Department of the Environment and Energy, 'EPBC Act—Environment Assessment Process', *Fact sheet*, p. 2. See [www.environment.gov.au/system/files/resources/d60cdd6a-8122-473a-bbd0-d483662cef3e/files/assessment-process\\_1.pdf](http://www.environment.gov.au/system/files/resources/d60cdd6a-8122-473a-bbd0-d483662cef3e/files/assessment-process_1.pdf) (accessed 22 February 2019).

18 Department of the Environment and Energy, *Submission 57*, pp. 8–9.

19 Department of the Environment and Energy, 'Listed threatened species and ecological communities', [www.environment.gov.au/epbc/about](http://www.environment.gov.au/epbc/about) (accessed 20 February 2019).

20 Department of the Environment and Energy, *Submission 57*, pp. 12–13.

1.25 The department indicated that 99.7 per cent of all nationally listed species and communities have a recovery plan or conservation advice. The department added that, of the 449 listed fauna species:

- 337 have a conservation advice
- 206 have a recovery plan in place, noting some species have both
- Plans are being finalised as a priority for three listed species currently not covered by either.<sup>21</sup>

### ***Key threatening processes and threat abatement plans***

1.26 The EPBC Act also provides for the identification and listing of 'key threatening processes' (KTPs) and the development of 'threat abatement plans' (TAPs).

1.27 A KTP is defined as a process that 'threatens or may threaten the survival, abundance or evolutionary development of a native species or ecological community'.<sup>22</sup> Listing of a KTP provides official recognition that a process is a key threat to biodiversity at the national level. Currently there are 21 listed KTPs.<sup>23</sup>

### ***Commonwealth environmental assessment processes***

1.28 Assessment of actions that may have a significant impact on a MNES must be referred to the Minister for assessment. A flow chart of the assessment process regarding referrals is at Appendix 4.

1.29 In making a decision on projects, the Minister can decide that proposed actions are 'clearly unacceptable'. Where this finding is made, proponents are able to re-submit an amended proposal as a new referral, or request that the Minister reconsider the decision. The Minister can also decide whether approval of proposals is required under the EPBC Act, as well as the process of assessment. Alternative paths of assessment can include referrals being considered as:

- a controlled action, where approval is subject to conditions under the EPBC Act;
- not as a controlled action in a 'particular manner', which means that approval is subject to specified conditions; or

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21 Department of the Environment and Energy, *Submission 57*, p. 13.

22 Department of the Environment and Energy, 'Key threatening processes under the EPBC Act', [www.environment.gov.au/biodiversity/threatened/key-threatening-processes](http://www.environment.gov.au/biodiversity/threatened/key-threatening-processes) (accessed 6 March 2019).

23 These are listed at: Department of the Environment and Energy, 'Listed Key Threatening Processes', [www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl](http://www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl) (accessed 18 March 2019).



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- not a controlled action, if the action is taken in accordance with the referral.<sup>24</sup>

1.30 The Minister can also decide to carry out a 'strategic assessment' under which can allow consideration of 'cumulative impacts' on MNES, with an eye to achieving 'conservation and planning outcomes on a much larger scale than can be achieved through project-by-project assessments'. For example, a large urban growth area that will be developed over many years. This means that individual approval for relevant projects may not need to be undertaken through the EPBC Act.<sup>25</sup>

### *The approvals process*

1.31 In deciding to approve a project that has been assessed, the Minister must consider a number of matters, which are set out in section 136 of the EPBC Act. These include consideration of:

- the principles of ecologically sustainable development [outlined in section 3A of the Act]
- the results of the assessment of the impacts of the proposed action, including the relevant recommendation report from the secretary of the federal environment department
- referral documentation
- community and stakeholder comments
- any other relevant information available on the impacts of the proposed action, and
- relevant comments from other Australian Government and state and territory government ministers (such as information on social and economic factors).

The minister may also take into account the environmental history of the individual or company proposing to take the action, including the environmental history of the executive officers of companies, and parent companies and their executive officers.<sup>26</sup>

1.32 In approving a project, the Minister can determine that certain conditions must be met such as undertaking repair or mitigation of any damage caused by an action on an environmental matter protected by the EPBC Act. The Minister has a range of mechanisms, including requiring bonds or other securities, independent environmental auditing and compliance monitoring. Additionally, Commonwealth approval of a proposed action under the EPBC Act does not remove the requirement for proponents

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24 Department of the Environment and Energy, 'EPBC Act—Environment Assessment Process', *Fact sheet*, p. 3.

25 Department of the Environment and Energy, 'Strategic Assessments', *Fact sheet*, p. 3. See [www.environment.gov.au/protection/assessments/strategic](http://www.environment.gov.au/protection/assessments/strategic) (accessed 6 March 2019).

26 Department of the Environment and Energy, 'EPBC Act—Environment Assessment Process', *Fact sheet*, p. 6.

to seek any other relevant state and territory approvals.<sup>27</sup> A flow chart of the assessment process regarding the assessment/ decision to approve is at Appendix 4.

### ***Bilateral agreements***

1.33 The Commonwealth currently has bilateral agreements in place with all states and territories, which devolve certain powers to the jurisdictions. Bilateral agreements give state and territory governments the responsibility for undertaking environmental assessments and/or approvals for certain issues. Bilateral agreements exist between the Commonwealth and all other Australian jurisdictions.<sup>28</sup>

1.34 Chapter 3 of the EPBC Act sets out the objects and provisions for bilateral agreements. It states that bilateral agreements are made to:

- (a) protect the environment; and
- (b) promote the conservation and ecologically sustainable use of natural resources; and
- (c) ensure an efficient, timely and effective process for environmental assessment and approval of actions; and
- (d) minimise duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (and vice versa).<sup>29</sup>

1.35 Assessment bilateral agreements are developed provide for:

...a single environmental assessment process conducted by the state. At the completion of the assessment the state provides a report to the Australian Government assessing the likely impacts of the project on matters of national environmental significance.

Following the assessment stage, the state and the Australian Government each make a decision on project approval and conditions to meet differing requirements. This may result in two approval decisions and two sets of conditions.<sup>30</sup>

1.36 The department submitted that the Commonwealth currently has assessment bilateral agreements in place with all states and territories.<sup>31</sup>

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27 Department of the Environment and Energy, 'EPBC Act–Environment Assessment Process', *Fact sheet*, pp. 6–7.

28 Department of the Environment and Energy, 'Environment assessments' [www.environment.gov.au/protection/environment-assessments](http://www.environment.gov.au/protection/environment-assessments) (accessed 18 March 2019).

29 EPBC Act, section 44.

30 Department of the Environment and Energy, 'One-Stop Shop for environmental approvals', [www.environment.gov.au/epbc/one-stop-shop](http://www.environment.gov.au/epbc/one-stop-shop) (accessed 18 March 2019).

31 Department of the Environment and Energy, *Submission 57*, p. 6. See also Department of the Environment and Energy, 'One-Stop Shop for environmental approvals', [www.environment.gov.au/epbc/one-stop-shop](http://www.environment.gov.au/epbc/one-stop-shop) (accessed 18 March 2019).

1.37 Under approval bilateral agreements:

...the state assesses the likely impacts of a project on the environment and makes a decision on approval, accounting for both state matters and matters of national environmental significance. Only one decision is made and includes conditions (if appropriate).<sup>32</sup>

***Exemptions***

1.38 The EPBC Act contains exemptions for the assessment and approvals process for certain types of activities. This includes:

- forestry activities conducted under Regional Forestry Agreements (RFAs), which are exempted from assessment from EPBC Act assessment by section 38 of the Act;
- offshore oil and petroleum activities, which from 2014 are assessed under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGGS Act), regulated by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA);
- actions that the Minister considers are 'in the national interest' to approve without following the usual assessment process, under section 158 of the EPBC Act;
- actions that are necessary to address matters of national security or 'in relation to preventing, mitigating or dealing with a national emergency', which is provided for under section 28(3) of the EPBC Act; and
- any activities undertaken by a Commonwealth agency granted an exemption by the Minister for the usual approvals process, subject to the Minister being satisfied that the agency 'will comply with state/territory environment protection laws when undertaking the action or class of actions to which the declaration applies'.<sup>33</sup>

1.39 A list of exemptions for particular actions is published on the department's website, alongside reasons for exemptions being granted by the Minister, as required by sections 158 and 303A of the EPBC Act.<sup>34</sup>

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32 Department of the Environment and Energy, 'One-Stop Shop for environmental approvals', [www.environment.gov.au/epbc/one-stop-shop](http://www.environment.gov.au/epbc/one-stop-shop) (accessed 18 March 2019).

33 Department of the Environment and Energy, 'Exemptions', [www.environment.gov.au/epbc/exemptions](http://www.environment.gov.au/epbc/exemptions) (26 February 2019).

34 'Exemption notices', <http://epbcnotices.environment.gov.au/exemptionnotices/>. For assessments subject to the OPGGS Act, see NOPSEMA, 'Legislation and regulations', [www.nopsema.gov.au/about/legislation-and-regulations/](http://www.nopsema.gov.au/about/legislation-and-regulations/) (both accessed 26 February 2019).

### ***Review mechanisms and access to courts***

1.40 The EPBC Act provides three means of seeking review or reconsideration of administrative decisions, namely: request for consideration; merits review; and judicial review.<sup>35</sup>

1.41 Reconsideration and merits review of administrative decisions enable all aspects of a decision to be reconsidered on their merits. If successful, a new decision can be substituted in place of the original decision.

1.42 In contrast, merits review is a form of external review conducted at the federal level by the Administrative Appeals Tribunal (AAT). Merits review is available for a wide range of decisions relating to permits (sections 206A, 221A and 243A), except those decisions made personally by the Minister.<sup>36</sup>

1.43 Judicial review is not concerned with the merits of an administrative decision, rather with whether the decision-maker acted lawfully when making the decision (for example, all relevant considerations were taken into account).

### **Reviews of and inquiries into the EPBC Act**

1.44 There have been a number of inquiries and reviews which have commented on aspects of the EPBC Act which are relevant to the committee's current inquiry.

#### ***The 2009 Hawke Review***

1.45 The EPBC Act stipulates that a statutory review must be undertaken every 10 years.<sup>37</sup> The first of these reviews was undertaken by Dr Allan Hawke in 2009. The department confirmed to the committee that the next statutory review must commence by October 2019, and that this would involve extensive consultation.<sup>38</sup>

1.46 In considering the first 10 years of the EPBC Act's operation, the Hawke Review made 71 recommendations to Government.<sup>39</sup> Most notably, Recommendation 1 of the Hawke Review was that the EPBC Act should be repealed and replaced with a new Act, 'The Australian Environment Act', which would:

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35 *Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) (Hawke Review), p. 252.

36 Originally, the EPBC Act allowed for merits reviews of a small range of decisions only: Hawke Review, p. 255.

37 EPBC Act, section 522A.

38 Department of the Environment and Energy, *Submission 57*, p. 16.

39 The recommendations can be found at: Hawke Review, pp. 27–44. The Government's response to the recommendations was: Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (August 2011), [www.environment.gov.au/resource/australian-government-response-report-independent-review-environment-protection-and](http://www.environment.gov.au/resource/australian-government-response-report-independent-review-environment-protection-and) (accessed 8 March 2019).

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- (1) be restructured and drafted to modernise, clarify, simplify and streamline both language and process;
  - (2) reduce duplication of processes; and
  - (3) increase the focus on strategic approaches to environmental management.<sup>40</sup>

1.47 The Hawke Review set out the rationale for this recommendation:

It is clear from comments that many people, including professionals, find the Act hard to understand and navigate. The Act is currently repetitive, lengthy, unnecessarily complex, often unclear and, in some areas, overly prescriptive. As a consequence many provisions need to be re-drafted.

The simplest way to achieve the necessary reordering and redrafting would be to repeal the Act and replace it with a new *Australian Environment Act*. A complete redraft will enable legislators to use modern drafting techniques which will also aid simplification and clarity of the Act in general, although the effect of many of the provisions that exist currently in the Act will not change.<sup>41</sup>

1.48 The Government Response to the Hawke Review stated that, although it agreed with the 'intent' of this recommendation, the Government intended to achieve this 'through amendment of the EPBC Act rather than by drafting an entirely new Act'. The Government supported this position as follows:

The drafting of a new Act would require substantial legislative drafting, stakeholder education and revision of administrative documents. The government will focus on progressing amendments that achieve the greatest outcomes for the environment and for proponents. This approach is consistent with the Review's general acknowledgement that the EPBC Act is still effective in achieving its aims. In a number of cases the amendments will include clarification, simplification and streamlining [as recommended].<sup>42</sup>

1.49 The Hawke Review made 70 other recommendations for reform of the EPBC Act. These are discussed in the following chapters of this report, where relevant to the evidence received by the committee.

### *Senate committee inquiries*

1.50 The predecessor to this committee has produced a range of reports into issues relating to the EPBC Act.

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40 Hawke Review, p. 27.

41 Hawke Review, p. 27

42 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (August 2011), p. 7.

1.51 In 2009, the committee tabled two reports for the inquiry into *The Operation of the Environment Protection and Biodiversity Conservation Act 1999*.<sup>43</sup> The final report of the committee made a number of recommendations, including:

- the potential inclusion of greenhouse gas emission and land clearing triggers in the Act;
- greater resources for the department for assessment, monitoring, complaint investigation, compliance, auditing projects approved under Part 3, and enforcement;
- regular evaluation and adequate resourcing of long-term environmental decisions made under the Act;
- a review of the effects of bilateral agreements with jurisdictions 'on the quality of environmental assessments of matters of national environmental significance', which was to be undertaken either as part of the independent statutory review of the Act, or by the Australian National Audit Office (ANAO);
- review of the interaction of the EPBC Act with the *Fisheries Management Act 1991* in the assessment and conservation of fish species;
- amending the timeline for nomination and listing of threatened species or ecological communities, to improve 'transparency, rigour and timeliness';
- the use of 'offsets' for habitat conservation only as 'a last resort' that 'must deliver a net environmental gain', and not be 'accepted as a mitigating mechanism where other policies or legislation (such as state vegetation protection laws) are already protecting the habitat proposed for use as an offset'; and
- consideration of expanding the scope for merits review 'in relation to ministerial decisions under the Act', particularly relating to 'whether an action is a controlled action; assessment decisions; and decisions on whether a species or ecological community is to be listed under the Act'.<sup>44</sup>

1.52 Following the tabling of the committee's reports for this inquiry, the then-Environment Minister, the Hon Peter Garrett AM MP, wrote to Dr Hawke, asking him to 'consider the findings and recommendations of the Senate Inquiry in his Independent Review of the EPBC Act'. The 2011 Government Response to the inquiry

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43 The Senate Standing Committee on Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999: First Report* (2009), p. ix–x.

44 The Senate Standing Committee on Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999: Final Report* (2009), pp. ix–x.

report acknowledged that the committee's findings and recommendations had been considered as part of the Hawke Review in 2009.<sup>45</sup>

1.53 This committee also undertook an inquiry in 2013 into the *Effectiveness of threatened species and ecological communities' protection in Australia*. The committee made 44 recommendations to improve the Act's protection of threatened species. This included recommendations aimed at:

- reducing duplication between Commonwealth and jurisdictions, including in environmental law and in the administration of the listings process;
- reforming of the listing process for threatened species and ecological communities;
- improving recovery planning, and Action and Threat Abatement Plans;
- bolstering funding for implementation;
- working to address threats from invasive species and feral animals;
- more stringent monitoring and review processes, including preparation of national accounts provided to Parliament;
- reviewing the effectiveness of RFAs with state governments, particularly regarding threatened species protection;
- the undertaking of an audit of offsets granted under the Act;
- consultation with affected stakeholders prior 'to the introduction of amendments...to establish cost recovery mechanisms for environmental assessment processes';
- ensuring that 'conditions on approvals' made under the Act are 'kept as straightforward as possible and worded clearly to ensure that conditions are enforceable';
- developing better compliance strategies in consultation with jurisdictions for monitoring and compliance activities relating to the Act, as well as an audit of compliance with approval conditions to be undertaken by the ANAO; and
- more streamlined fisheries management provisions, to provide a 'single strategic assessment framework for Commonwealth and state-managed fisheries to deliver a single assessment and approval framework'.<sup>46</sup>

1.54 The Government Response to this report was tabled in August 2014. It noted that the recent appointment of Australia's first Threatened Species Commissioner was an indication of the importance the Government placed on threatened species

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45 Australian Government, *Australian Government Response to the Senate Inquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (2011), p. 2.

46 Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia* (2013), pp. vii–xiii.

management, and a 'new national focus' for conservation efforts for endangered flora and fauna.<sup>47</sup>

1.55 The Government Response also agreed with a number of committee recommendations. This included recommendations for the: harmonising of lists of threatened species between the Commonwealth and jurisdictions (Recommendation 1); improved coordination of action plans (Recommendation 11); a review of all TAPs more than five years old, to be undertaken and released publicly within five years (Recommendation 21); and more stringent identification and mapping of critical habitats for threatened species and ecological communities in recovery plans and conservation advices (Recommendation 23).<sup>48</sup>

1.56 In 2011, this committee undertook an inquiry into the status, health and sustainability of Australia's koala population, which touched on the operation of the EPBC Act's protection of threatened species. The committee concluded that:

The EPBC threatened species listing process is reactive and not well suited to the conservation needs of the koala. In the committee's view, there ought to be processes available to enable proactive protection for the koala as well as other significant Australian species. In this regard the committee notes the possible mechanisms announced as part of the government's response to the review of the EPBC Act which could enable a more proactive approach to koala conservation. Perhaps, building on the [Threatened Species Scientific Committee's (TSSC)] proposal to monitor species of cultural, evolutionary and/or economic significance, there ought to be a category of nationally significant species.<sup>49</sup>

1.57 In relation to threatened species more generally, the committee recommended:

Recommendation 3:

...the Australian Government establish a nationally coordinated and integrated program for population monitoring of threatened species and other culturally, evolutionary and/or economically significant species.

[and]...

Recommendation 5:

...the Threatened Species Scientific Committee provide clearer information to the Environment Minister in all future threatened species listing advices, including species population information, and that the Threatened Species

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47 Australian Government, *Australian Government response to the Senate Environment and Communications References Committee report: Effectiveness of threatened species and ecological communities' protection in Australia* (2014), p. 2.

48 Australian Government, *Australian Government response to the Senate Environment and Communications References Committee report: Effectiveness of threatened species and ecological communities' protection in Australia* (2014), pp. 3, 11, 17 and 19 respectively.

49 Environment and Communications References Committee, *The koala—saving our national icon* (2011), p. xix.



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Scientific Committee review its advice to the Minister on the listing of the koala in light of the findings of this inquiry.<sup>50</sup>

1.58 The Government Response agreed in part with Recommendation 3, noting a number of measures being taking to establish 'a national coordinated system' for monitoring the environment, including biodiversity. This included the development of 'environmental indicators' by the department to improve monitoring, the appointment of a Threatened Species Commissioner in mid-2014, and other programs to improve the information base for threatened species.<sup>51</sup>

1.59 The Government Response agreed with Recommendation 5. It noted that the TSSC takes account of available information relevant to the criteria for listing. It also stated that the Minister had decided to list koala populations in New South Wales, Queensland and the ACT as vulnerable under the EPBC Act.<sup>52</sup>

### *Australian National Audit Office (ANAO) audits*

1.60 In 2014, the ANAO conducted an audit of the department's monitoring of compliance with the EPBC Act. The final report found that there were significant shortcomings with the department's management of EPBC Act compliance and risk management frameworks, stating:

...nearly 14 years after the enactment of the EPBC Act, [the department] is yet to establish mature administrative arrangements to effectively discharge its regulatory responsibilities in relation to approved controlled actions. As a consequence, the assurance that the department has regarding proponents' compliance with action approval conditions, which are designed to address the risks posed to MNES, is limited.<sup>53</sup>

1.61 The ANAO also found that 'the increasing workload on compliance monitoring staff over time' had led to a 'generally passive approach' to monitoring compliance with approval conditions. As a consequence, the department only had a limited visibility of the progress of many controlled actions, and any subsequent risks to MNES. Additionally, the ANAO found that this passive approach was noticeable in its management of non-compliance.<sup>54</sup> In many cases, it stated:

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50 Australian Government, *Australian Government response to the Senate Environment and References Committee report: The koala—saving our national icon* (2014), pp. 6–7.

51 Australian Government, *Australian Government response to the Senate Environment and References Committee report: The koala—saving our national icon* (2014), pp. 5–6.

52 Australian Government, *Australian Government response to the Senate Environment and References Committee report: The koala—saving our national icon* (2014), p. 8.

53 Australian National Audit Office, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval* (2014).

54 Australian National Audit Office, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval* (2014), p. 16.

...instances of proponent non-compliance (mostly of a technical nature—such as, a missed deadline to submit a management plan) were either not identified by staff, or were identified but not referred for assessment and possible enforcement action. The failure to appropriately respond to identified non-compliance can: impact on the effectiveness of environmental safeguards; risk environmental damage; jeopardise the department's ability to take future enforcement action; and harm the public's confidence in the regulator. Also, in the absence of appropriate procedures, the department's investigations into reported non-compliance with approval conditions were conducted inconsistently.<sup>55</sup>

1.62 In 2017, the ANAO undertook a follow-up audit, which found some of the department's performance had improved, but concluded that only limited progress had been made to strengthen the department's regulatory performance more generally:

Environment has made progress in addressing the five recommendations made in [the 2014 ANAO report]...To date, limited progress has been made in relation to the implementation of broader initiatives to strengthen the department's regulatory performance.<sup>56</sup>

### **Recent reforms to Commonwealth environment law and policy**

1.63 There have been a number of recent amendments to the EPBC Act and other Australian laws and policies for the protection and management of the environment.

1.64 In 2013, a water trigger was added to the EPBC as a new MNES, particularly relating to coal seam gas projects and large coal mining developments.<sup>57</sup>

1.65 In 2014, the Commonwealth appointed a Threatened Species Commissioner to 'bring national focus to threatened species'. The Commissioner also leads the implementation of the Government's Threatened Species Strategy and its five-year Action Plan.

1.66 In 2015, the Commonwealth worked with jurisdictions to implement a 'Common Assessment Method', which is designed to:

...align the assessment and listing of nationally threatened species across Australian jurisdictions. The Common Assessment Method provides a consistent approach to assessments, reducing duplication of effort and improving clarity for stakeholders.<sup>58</sup>

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55 Australian National Audit Office, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval* (2014), pp. 16–17.

56 Australian National Audit Office, *Monitoring compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit* (2014), p. 7.

57 Department of the Environment and Energy, 'Fact Sheet 4: EPBC Water Act Amendments—Water Trigger', [www.environment.gov.au/epbc/publications/factsheet4-oss-epbc-act-amendments-water-trigger](http://www.environment.gov.au/epbc/publications/factsheet4-oss-epbc-act-amendments-water-trigger) (accessed 1 March 2019).

58 Department of the Environment and Energy, *Submission 57*, p. 7.