

Chapter 3

The adequacy of the EPBC Act

3.1 This interim report provides an outline of the committee's preliminary deliberations to date concerning the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) in relation to halting Australia's faunal extinction crisis. The following chapter canvasses evidence which commented broadly on the adequacy of the EPBC Act and whether it should be repealed and replaced with a new Act.

3.2 This chapter also looks at particular provisions of the EPBC Act that were highlighted in evidence as in need of reform.

3.3 Lastly, the evidence received regarding the need for an independent Environmental Protection Agency (EPA) to administer and oversee the management and protection of the environment in Australia is considered.

3.4 The committee reiterates that this is an interim report on the committee's work so far. It does not seek to be a comprehensive report outlining the entirety of the challenge faced by our threatened species, or to set out all possible reforms that the Commonwealth could undertake to amend the EPBC Act's legislative provisions and its implementation. Rather, it is intended that these matters should be taken up in the future work of the committee, should the Senate and the future committee be willing to do so in the next Parliament.

Views on the EPBC Act

3.5 Some evidence received by the committee suggested that the Commonwealth should develop a new Environment Act to replace the EPBC Act, arguing that its flaws would be too significant to address through amendments alone. Others told the committee that the current Act provides a solid foundation for the protection and management of the environment, even if it was acknowledged that there is significant need for reform of its provisions and implementation.

Support for a new Environment Act

3.6 Some stakeholders argued that the Commonwealth should consider replacing the EPBC Act with new environmental legislation.¹ It was argued that the current

1 For example, see: Doctors for the Environment, *Submission 3*, p. 2; Northern Plains Conservation Management Network, *Submission 39*, p. 2; EDOs of Australia, *Submission 52*, p. 3; Humane Society International, *Submission 98*, p. 7; International Fund for Animal Welfare, Oceania Region, *Submission 115*, p. 9; BirdLife Australia, *Submission 118*, p. 1 and Attachment 1 (BirdLife Australia, *Restoring the Balance: The Case for a New Generation of Australian Environmental Laws*), p. 5; Australian Conservation Foundation, *Submission 137*, p. 4. See also Professor Frank Carrick, *Proof Committee Hansard*, 1 February 2019, p. 20.

approach had failed to meet its objectives, particularly for the protection of threatened species. In considering this, it was suggested that developing a new Act would be more effective than amending the existing flawed EPBC framework.

3.7 For example, BirdLife Australia argued the repeated failures of the EPBC Act in protecting threatened species demonstrates that:

Australia requires a new generation of environment laws that genuinely protect nature and restore our threatened species. It will require the establishment of independent institutions free from political interference, and improved accountability towards meeting our international commitments to biodiversity conservation.²

3.8 The Australian Conservation Foundation (ACF) stated that the EPBC Act has mostly failed to protect threatened species and pointed to a range of issues, including: the extent of ministerial discretion; the focus on a narrow set of environment issues; the lack of third party enforcement; the lack of provisions for emergency listing of threatened species; and insufficient monitoring requirements.³ Mr James Trezise, a Policy Analyst for the ACF, argued that the EPBC Act was so flawed that a new approach to environmental management and protection was needed. Mr Trezise stated:

If you were to look at the EPBC Act, when it was drafted—it's what we call an omnibus bit of legislation—it is a very difficult bill to navigate. It's probably one of the most poorly drafted bills that is still in operation. If you were to talk about the kinds of changes—trying to put in a new institution, trying to make binding national standards and trying to insert community rights or citizen rights into the existing legislation—you're kind of creating Frankenstein's monster to a degree. It's a very difficult to bill and navigate as it is. It could be done, but you'd be basically rewriting that legislation and just keeping the name.⁴

3.9 Dr Nicole Rogers, who appeared in a private capacity, also endorsed a complete overhaul of Australia's current legislation, so that it reflected current knowledge about threatened species and their vulnerability:

I think we should start again. I think we need to start again with the premise that having a permissive regime, a regime which relies upon ministerial permission to carry out activities, is not working. We need to have a regime which has much stronger prohibitions set in place and isn't so dependent upon discretion and upon one individual...My view would be, yes, we do need a new piece of legislation that reflects where we are at this point in time, what we have come to realise about the vulnerability of our environment and fellow species, and the interactive systems that are

2 BirdLife Australia, *Submission 118*, p. 2.

3 Australian Conservation Foundation, *Submission 137*, pp. 8–9.

4 Mr James Trezise, Policy Analyst, Australian Conservation Foundation, *Committee Hansard*, 8 October 2018, p. 7.

currently in operation on the planet...I would go with the 'tear it up and start again' approach.⁵

3.10 The submission from the Australian Network of Environmental Defenders' Offices (EDOs of Australia) also set out the case for the development of a new legislative framework, concluding:

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.⁶

3.11 Support for a new Act was provided by the Humane Society International which stated that it:

...considers that in light on the multiple and complex factors facing threatened fauna, a new Environment Act is required to ensure sufficient protection can be provided to fauna and their critical habitats. Whilst the EPBC Act has made some improvements, the challenges facing our biodiversity, including Australia's fauna, are many and increasing. Only a new Environment Act will help ensure our fauna can deal with the cumulative impacts facing them.⁷

3.12 The committee notes that the 2009 Hawke Review recommended that the EPBC Act be repealed and replaced by a new Environment Act. In making this recommendation, the Hawke Review stated:

The Act is currently too repetitive, unnecessarily complex and, in some areas, overly prescriptive. It needs restructuring to make it more accessible, easier to navigate and reduce the regulatory and resource burden on those impacted by the Act, requiring the recasting of many of its provisions.⁸

Areas of the EPBC Act in need of reform

3.13 This section considers the evidence received in relation to reform of the EPBC Act to improve the protection of threatened species. Areas considered in evidence include:

- the discretionary power of the Minister to make decisions under the Act;
- the lack of mandatory timeframes and implementation for certain decisions;

5 Dr Nicole Rogers, Private capacity, *Proof Committee Hansard*, 4 February 2019, p. 70.

6 EDOs of Australia, *Submission 52*, p. 3.

7 Humane Society International, *Submission 98*, p. 5.

8 Hawke Review, p. 27.

- the scope of the current Act, including potential new triggers for 'matters of national environmental significance (MNES) and the exemptions made for some industries;
- the adequacy of key threatening processes and threat abatement plans made for threatened species, including the difficulties of addressing cumulative impacts; and
- a lack of mandatory monitoring of and compliance with conditions of approval of EPBC Act decisions; and
- the available mechanisms for appeal and review of decisions made under the Act.

Ministerial discretion

3.14 The EPBC Act allows for ministerial discretion in decision-making for a large number of matters.

3.15 The committee received evidence that expressed concern that the level of ministerial discretion for EPBC Act decisions was too great, whereas the guidance for the use of this discretion is insufficient. For example, Ms Jess Feehely, Law Council of Australia (Law Council), expressed concern that there is too much discretionary power vested in the Minister particularly as the EPBC Act lacks stringent requirements to ensure ministerial decisions are implemented. Ms Feehely said:

There is a lot of discretion that is provided [in the EPBC Act]. I think one of the criticisms of the EPBC Act...is that it is a process based system as opposed to an outcome based system, so the discretion would be reduced if the legislation demanded particular outcomes rather than just requiring an assessment process to be undertaken and then leaving the decision at the discretion of the decision-maker.⁹

3.16 Dr Rogers also commented on the discretionary powers of the Minister and stated 'this enormous amount of discretionary power that's vested in one individual is, to my mind, not an appropriate way in which we can manage environment and manage what, as I said, has been conceded is a crisis'.¹⁰

3.17 The committee received a range of evidence outlining the areas where stakeholders considered that the ministerial discretion was too broad and could lead to adverse outcomes for Australia's biodiversity. Dr Philippa McCormack and Professor Jan McDonald pointed to the following:

The EPBC Act gives the Environment Minister too much discretion in making key decisions affecting species. These include:

9 Ms Jess Feehely, Committee Member, Environment and Planning Law Committee, Legal Practice Section, Law Council of Australia, *Committee Hansard*, 5 February 2019, p. 18.

10 Dr Nicole Rogers, Private capacity, *Proof Committee Hansard*, 4 February 2019, p. 70.

- deciding whether to take protective actions, such as eg listing a species that is threatened with extinction;
- determining whether an activity will have a 'significant' impact on a species; and
- 'taking into account' the presence of a listed species when deciding to approve an action that may have a significant impact on the species)...¹¹

3.18 Dr Bruce Lindsay, Environmental Justice Australia (EJA), set out the consequences of having decision-making power concentrated in the Minister's discretionary powers, including in relation to controlled actions:

...environmental governance under the EPBC Act in particular excessively focuses on ministerial discretion. This is particularly the case with assessment and approval decisions, bioregional planning and the making of conservation instruments such as recovery plans. The consequence[s] of this approach have really been an absence of strong, binding legislative standards for environmental management and a propensity to approve environmental damage, usually with conditions and largely for reasons of expediency. Very few controlled action decisions under the EPBC Act are actually refused approval...An example of that is the fate of red-tailed black cockatoos in Victoria and South Australia.¹²

3.19 Many submitters pointed to the assessment of the Toondah Harbour development as a significant example of the use of ministerial discretion resulting in detrimental outcomes for the environment. In the case of Toondah Harbour, the proponent sought approval for the development of 3600 apartments on a wetlands site protected by the Ramsar Convention, which includes critical habitat for the threatened migratory bird, the Eastern Curlew.¹³

3.20 In its assessment of the proposal, the Department of the Environment and Energy (the department) advised the Minister that the proposal EPBC referral number 2017/7939 was 'clearly unacceptable', including because it would certainly impact on Ramsar-protected areas. According to evidence received by the committee, the Toondah Harbour project was then referred a third time as EPBC referral number 2018/8225, and determined to be a 'controlled action' to be assessed under an

11 Research Centre for Future Landscapes, *Submission 162*, p. 4.

12 Dr Bruce Lindsay, Lawyer, Environmental Justice Australia, *Committee Hansard*, 22 November 2018, p. 22.

13 Please note, given the focus of this interim report on the EPBC Act's provisions, the committee is not able to fully to consider the issues raised by Toondah Harbour at this time. However, the committee does intend to maintain an ongoing interest in this issue in its future work. Mr Chris Walker, Secretary, Redlands2030 Inc, *Proof Committee Hansard*, 1 February 2019, p. 27.

Environmental Impact Statement (EIS).¹⁴ Evidence provided by Mr Chris Walker, Secretary of Redlands2030 Inc, noted that substantial impacts of the proposal on MNES remain. He told the committee:

Despite significant community opposition and advice from within the department of the environment, this project was eventually declared a controlled action by the federal minister for the environment, who also approved assessment by the proponent under an environmental impact statement....

It's difficult to believe the construction of 3,600 apartments could ever be considered wise use of Ramsar wetlands, so the developer is at risk of doing an EIS that should never be approved by the minister for the environment acting properly. The notion that this inconvenient constraint can be overcome by jiggling the Ramsar site boundaries has been mooted, but any such action would be in conflict with Australia's international obligations under the Ramsar convention. The threat of destruction to this Ramsar habitat and its endangered species should never have got to this stage.¹⁵

Ministerial discretion and recovery plans

3.21 The committee also received much evidence regarding the ministerial discretion in relation to Recovery Plans. It was noted that the original requirement for threatened species to have Recovery Plans was removed in 2007. As a consequence of the amendment of the EPBC Act, the Minister may opt to develop non-binding Conservation Advices.

3.22 The Western Australian Government submitted that the move away from recovery plans for most species is 'due to the onerous requirement for review and replacement of recovery plans under the EPBC Act'.¹⁶

3.23 Submitters argued that Conservation Advices did not provide the same level of protection as Recovery Plans. For example, the Ecological Society of Australia (Ecological Society) was highly critical of the use of Conservation Advices in place of Recovery Plans and stated that 'a key difference between a Conservation Advice and a Recovery Plan is that the Minister is able to make decisions that are inconsistent with a Conservation Advice'.¹⁷ The Ecological Society added that there were benefits in the use of Recovery Plans as:

Recent studies have shown conclusively that Recovery Plans help drive efforts and investment for threatened species, and lack of Recovery Plans

14 See, for example, evidence given by Mr Chris Walker, Secretary, Redlands2030 Inc, and Dr Stephen Prowse and Ms Sheena Gillman, respectively Chair, and Secretary and Project Coordinator, Protect the Bush Alliance, *Proof Committee Hansard*, 1 February 2019.

15 Mr Chris Walker, Secretary, Redlands2030 Inc, *Proof Committee Hansard*, 1 February 2019, p. 27.

16 Western Australian Government, *Submission 9*, p. 3.

17 Ecological Society of Australia, *Submission 86*, p. 4.

can contribute to extinction of threatened species. Recovery Plans are also long-term in nature, providing an evidence-based strategy to work towards species protection regardless of changes in Government that may occur. Thus, in order to address the faunal extinction crisis, the Act should be amended to restore the requirement for Recovery Plans for all listed threatened species.¹⁸

3.24 Both the Ecological Society and the Research Centre for Future Landscapes noted that unlike a Recovery Advice, the Minister is prohibited from approving actions or making decisions that are counter to the provisions in a Recovery Plan.¹⁹ the Ecological Society submitted that should Recovery Plans not be developed for all listed threatened species, 'Conservation Advices could be given the same level of protection as Recovery Plans so that the Minister may not make decisions that are inconsistent with Conservation Advices'.²⁰

3.25 Another area of concern was raised by Dr McCormack and Professor McDonald, who commented that 'the wide discretion afforded to the Minister is especially problematic in light of the increasing use of biodiversity offsets as conditions on the approval of activities with significant adverse impacts'.²¹

3.26 Evidence received by the committee noted some other discretionary mechanisms contained in the EPBC Act that were not being used by Ministers. For example, Dr Lindsay of the EJA noted that bioregional plans were 'quite a useful mechanism', however they are not often developed. He also noted that decisions to list threatened habitat on the Act's Critical Habitat Register was discretionary, and that the protection process even for listed critical habitat was 'complicated'.²²

Scope of the EPBC Act

3.27 The committee received evidence in relation to the adequacy of the triggers in the EPBC Act and the inclusion of exemptions.

Potential new triggers or matters of national significance

3.28 As noted in chapter 1, there are currently nine matters of national environmental significance under the EPBC Act. A number of submitters and witnesses advocated for new triggers to be added to these existing matters of national significance (MNES).

18 Ecological Society of Australia, *Submission 86*, p. 4.

19 Ecological Society of Australia, *Submission 86*, p. 4; Research Centre for Future Landscapes, La Trobe University, *Submission 123*, p. 5.

20 Ecological Society of Australia, *Submission 86*, p. 4.

21 Dr Philippa McCormack and Professor Jan McDonald, *Submission 162*, p. 4.

22 Dr Bruce Lindsay, Lawyer, Environmental Justice Australia, *Committee Hansard*, 22 November 2018, p. 27.

3.29 For example, Dr Lindsay of EJA highlighted that land clearing and climate change are not sufficiently addressed by the EPBC Act:

Key gaps...in the Commonwealth's direct role in preventing or responding to harms or threats are those such as posed by land clearing or by climate change.²³

3.30 Ms Feehely of the Law Council also put the case for broadening the existing triggers contained in the Act:

For many years, there have been calls to broaden [existing MNES] out to include, for example, large scale land clearing or developments which have emissions above a certain threshold. So those are two very clear examples where they have been discussed at length and they have been recommended by the government's own agencies for consideration—and I think both of those would significantly broaden out the Commonwealth's involvement in managing biodiversity loss rather than having that ad hoc state based assessment of land clearing, for example.²⁴

3.31 The Hawke Review noted the difficulties of introducing a climate change trigger, especially given its intersection with the then-policy of the Commonwealth Government for a market-based emissions abatement scheme, the Carbon Pollution Reduction Scheme (CPRS).²⁵ It recommended an interim 'greenhouse trigger' with a threshold of '500,000 tonnes of carbon dioxide equivalent emissions' at most, which would sunset at the commencement of the CPRS'.²⁶

Exemptions

3.32 The EPBC Act contains exemptions for certain industry activities (also referred to as 'carve-outs'). Under section 38, forestry activities conducted under the Regional Forest Agreements (RFAs) are not subject to the environmental assessment and approval provisions in Part 3 of the EPBC Act. Offshore oil and gas projects are exempt from assessment under the EPBC Act, instead being assessed under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.²⁷

3.33 A number of submissions commented that the Commonwealth should consider reforms to these current exemptions. For example, the Law Council of Australia submitted that an area for potential EPBC Act reform would be:

23 Dr Bruce Lindsay, Lawyer, Environmental Justice Australia, *Committee Hansard*, 22 November 2018, p. 22.

24 Ms Jess Feehely, Committee Member, Environment and Planning Law Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 5 February 2019, p. 21.

25 Hawke Review, pp. 113–116.

26 Hawke Review, p. 116.

27 As noted earlier in this report.

Ensuring industries currently regulated outside the EPBC Act, such as offshore petroleum activities and forestry operations, are subject to equivalent assessment of impacts on threatened species.²⁸

Key threatening processes and threat abatement plans

3.34 As outlined in chapter 1, the EPBC Act provides for the identification and listing of 'key threatening processes'. Once a threatening process is listed, a threat abatement plan (TAP) may be put into place if it is shown to be a 'feasible, effective and efficient way' to abate the threatening process.

3.35 As at February 2019, at the Commonwealth level, there were 21 listed key threatening processes (KTPs). The last threatening process—aggressive exclusion of birds from potential woodland and forest habitat by over abundant noisy miners (*Manorina melnocephala*)—was listed in May 2014.²⁹ There are 14 listed approved TAPs with one—TAP for beak and feather disease—having been replaced by a non-statutory threat abatement advice and another—the TAP to reduce the impacts of tramp ants on biodiversity in Australia and its territories—having ceased in October 2016, which 'may soon be replaced by a new plan'.³⁰

3.36 Concerns with the EPBC Act's provisions for listing KTPs were raised in evidence. Some of this evidence pointed out that the KTP listings process has not kept up with developing threats. Others noted the lack of requirement for developing TAPs for all KTPs, as well as insufficient resourcing for their implementation.

Key threatening processes

3.37 A number of areas were highlighted in evidence as requiring consideration for listing as KTPs under the EPBC Act. Some of the issues canvassed included the challenges posed by: population growth; alteration to natural water flow of rivers, streams, floodplains and wetlands; logging of native forests; ocean acidification; dieback and inappropriate fire regimes; and the loss of hollow bearing trees that support some threatened species.³¹

28 Law Council of Australia, *Submission 121*, p. 7.

29 Department of the Environment and Energy, 'Listed Key Threatening Processes', www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl (accessed 18 March 2019).

30 Department of the Environment and Energy, 'Approved threat abatement plans', www.environment.gov.au/biodiversity/threatened/threat-abatement-plans/approved (accessed 18 March 2019).

31 Sustainable Population Australia, *Submission 87*, p. 9; National Parks Association of NSW, *Submission 91*, p. 7; Professor Tim Stephens, *Submission 93*, p. 5; City of Mandurah, *Submission 100*, p. 1; and the Nature Conservation Society of South Australia, *Submission 105*, p. 4.

3.38 The Centre for Ecosystem Science, UNSW, submitted that there had been a noticeable decline in the use of a number of EPBC framework assessment tools, particularly the KTP listing process:

Resourcing of extinction risk assessment for species of fauna and other biodiversity, key threatening process listing, recovery planning and threat abatement planning has languished. This is particularly true for key threatening processes, with no listing since 2011, despite good knowledge of the effects of threats on biodiversity...³²

3.39 In 2001, the EPBC Act was amended to incorporate the 'Loss of climatic habitat caused by anthropogenic emissions of greenhouse gases' as a KTP. This included consideration of 'reductions in the bioclimatic range' of critical habitat, and noted that: 'Non-biological components of the process include: temperature rise; changes in rainfall patterns; changes to the El Nino Southern Oscillation; and sea level rise'.³³ However, the KTP advice offered to the Minister advised against the development of a TAP for climate change in this case, stating:

In their original assessment of the nomination ESSS provided advice that 'a reduction in the emission of greenhouse gases requires an internationally-coordinated effort and that international efforts have been and will continue to be made in this area'. ESSS concluded that a nationally coordinated threat abatement plan was not considered a feasible, effective and efficient way to abate the process, 'as most emissions of greenhouse gases are produced outside Australia and a reduction in emissions will require complex national and international negotiations'. ESSS also added 'As part of this process Australia should be making every effort to significantly reduce its contribution of greenhouse gases to the atmosphere'.³⁴

3.40 It was noted that the specified timeframes in the EPBC Act for the consideration of new KTPs is rarely met. For example, the Humane Society International submitted that there was a need for a new mechanism to prioritise urgent listings where immediate or significant threats are faced by a species.³⁵

32 Centre for Ecosystem Science, UNSW, *Submission 56*, p. 13.

33 Department of the Environment and Energy, 'Loss of terrestrial climatic habitat caused by anthropogenic emissions of greenhouse gases', www.environment.gov.au/biodiversity/threatened/key-threatening-processes/loss-of-habitat-caused-by-greenhouse-gases (accessed 12 March 2019).

34 Department of the Environment and Energy, 'Loss of terrestrial climatic habitat caused by anthropogenic emissions of greenhouse gases', www.environment.gov.au/biodiversity/threatened/key-threatening-processes/loss-of-habitat-caused-by-greenhouse-gases (accessed 12 March 2019).

35 See Humane Society International, *Submission 98*, pp. 17–18.

Threat abatement plans

3.41 Ms Veronica Blazely, Acting Assistant Secretary of the Wildlife Trade and Biosecurity Branch of the department, told the committee that the Threatened Species Scientific Committee (TSSC) had not recommended the development of TAPs for the threats posed by land clearing, fire regimes that were not effective, and climate change.³⁶ Mr Murphy of the department, explained why TAPs are not in place for all KTPs:

...there are key threatening processes that don't have threat abatement plans, because they don't necessarily fit the criteria in the legislation for the making of a plan... The criteria are in the act... The making of the plan has to be sort of feasible and effective to abate the threat.³⁷

3.42 The Ecological Society argued that the provision to make TAPs under the EPBC Act should be used more often, as it represents:

...a cost-effective mechanism to efficiently address threats to Australia's biodiversity, and so the Act should be amended to require Threat Abatement Plans for all Key Threatening Processes and for additional processes identified as drivers of biodiversity loss.

Addressing widespread threatening processes such as invasive species, habitat loss, overharvesting of species, and climate change and extreme weather events through the established but underutilised Threat Abatement Plans may enable more efficient use of conservation resources.³⁸

3.43 A number of recommendations made by the Hawke Review went to the effectiveness of KTPs and TAPs, including that the Act be amended to:

- allow greater flexibility in developing recovery plans and TAPs, especially their development at a regional scale, as well as creating better opportunities and links to funding initiatives;
- better define KTPs, allow more flexibility in the criteria used to evaluate potential KTPs, and allowing the strategic identification of KTPs at a range of scales;
- provide more flexibility in developing and implementing TAPs, and allow transition to regional planning approaches and strategic threat management; and

36 Ms Veronica Blazely, Acting Assistant Secretary, Wildlife Trade and Biosecurity Branch, Department of the Environment and Energy, *Committee Hansard*, 8 October 2018, p. 29.

37 Mr Paul Murphy, Assistant Secretary, Wildlife Trade and Biosecurity Branch, Department of the Environment and Energy, *Proof Committee Hansard*, 14 February 2019, pp. 29–30.

38 Ecological Society of Australia, *Submission 86*, p. 4.

- require the development of a 'threat abatement advice' when a new KTP is listed.³⁹

Assessment of cumulative impacts

3.44 Concerns regarding the assessment of cumulative impacts have been raised in a number of the committee's previous inquiries including the inquiry into the protection of Aboriginal rock art of the Burrup Peninsula.⁴⁰

3.45 While there is scope in the approval process for the decision-maker to have regard for any matters that are occurring at that time, the legal requirement for consideration of cumulative impacts is limited. Professor Bax, CSIRO, noted that:

...unless you go to the stage of an integrated assessment the act does not easily allow for cumulative impacts. So, while it would look at one application at a time, it doesn't take into account that each action, each development, might have an impact on this species habitat such that overall it becomes an unsustainable situation, even though each individual agreement may be appropriate.⁴¹

3.46 Dr McCormack and Professor McDonald similarly commented on the lack of adequate recognition of cumulative impacts in the EPBC Act:

The State of the Environment Report 2016 confirms Australia's biodiversity decline is largely due to the cumulative impacts of multiple pressures. The Federal Court's narrow interpretation of the Minister's obligation to consider the cumulative impacts of proposed activities highlights the inadequacy of the EPBCA's position on cumulative impacts. The [EPBC Act] should oblige the Minister to consider both the combined impact of past and likely future activities, the interaction of impacts from proposed activities and other stressors, and the prospect of approval setting a precedent for further development in the same location or of a similar type.⁴²

3.47 Professor Brendan Wintle, Director of the Threatened Species Recovery Hub, noted that the Hawke Review had advocated for more strategic planning 'as a way of trying to avoid death by a thousand cuts'. In this regard, he noted potential dangers of strategic assessment approach, particularly if it was not backed up by appropriate funding:

...we do need to go back and try to revisit the role of strategic assessment in protecting habitat for threatened species or protecting MNES in this

39 Hawke Review, Recommendations 18–21 respectively, pp. 3–4.

40 See, for example, the report of the Environment and Communications References Committee, *Protection of Aboriginal rock art of the Burrup Peninsula* (2018).

41 Professor Nic Bax, Senior Principal Research Scientist, Oceans and Atmosphere, CSIRO, *Proof Committee Hansard*, 4 February 2019, p. 3.

42 Dr Philippa McCormack and Professor Jan McDonald, *Submission 162*, p. 6.

country. But strategic assessments and strategic approvals can be quite dangerous, on one hand, because at any one time you can be signing off on the loss of a whole lot of habitat in a region. You've really got to get them right, and they really have to be very carefully supported by scientific analysis of what's in the region that you're doing your assessment of. If you sign off on the loss of these areas, are we really going to be able to compensate through the protection and conservation management of other areas? If we're going to do strategic assessment, which I think is definitely still a very good idea, we have to make sure we resource it properly.⁴³

Monitoring and compliance

3.48 Some evidence noted that the EPBC Act does not have adequate requirements for the monitoring of and compliance with the approval conditions for projects. It was noted that this made Commonwealth enforcement of the Act very difficult, which was compounded by the under-resourcing of the department for oversight of approvals.

3.49 Professor McDonald, appearing in a private capacity, stated that:

There's virtually no independent monitoring of compliance by the agency. Compliance is almost entirely driven by either self-reporting as part of an approval condition by proponents or developers of activities, or by reports from third parties...

There is very little active monitoring, and that's a resourcing question. The department has been stripped, so there's not the personnel to undertake that kind of monitoring. From a compliance perspective, what we also see, and I think it's more worrying, is this pattern where an in-principle approval is given subject to the completion of plans of management, whether it's to do with biodiversity offsetting or water management. We saw that with Adani—plans of management that meet certain environmental criteria and they get developed later. The approval gets given and then, down the track, it turns out, 'It's not possible for us to meet these environmental criteria.' And rather than saying, 'That was the condition on which we gave you the approval; we won't allow you to proceed,' what ends up happening is that conditions get modified.⁴⁴

3.50 Indeed some evidence presented to the committee pointed to the problem that many actions that should be referred under the EPBC Act are never referred in the first place. For example, Dr Martin Taylor, Protected Areas and Conservation Science Manager of WWF Australia, commented that:

It's hard for us to say what enforcement action, if any, has been taken, because there is zero transparency under the current laws around what happens when a proponent fails to refer an action that significantly impacts on threatened species. How much is the department, in essence, approving

43 Professor Brendan Wintle, Director, Threatened Species Recovery Hub, *Proof Committee Hansard*, 14 February 2019, p. 17.

44 Professor Jan McDonald, Private capacity, *Proof Committee Hansard*, 4 February 2019, p. 59.

by failing even to discover what's happening, or by investigating it and then deciding not even to prosecute—which has happened in case after case that we've looked at?⁴⁵

Mechanisms for appeal of EPBC Act decisions

3.51 A number of stakeholders observed that there were limited avenues for appealing or reviewing decisions made under the EPBC Act. In this regard, the limitations of judicial review were broadly noted by evidence, as were the barriers to individuals and organisations seeking to challenge decisions. Moreover, some evidence advocated for the Commonwealth to expand the scope for merits review for decisions under the Act. For example, a number of submitters advocated for the reforms to guarantee community rights and participation in environmental decision-making, including through open standing provisions; review of decisions based on their merits; third-party enforcement provisions; and protections from cost orders in public interest proceedings.⁴⁶

Judicial review

3.52 In relation to judicial review, Ms Feehely, Law Council, outlined general concerns with the existing provisions of EPBC decisions:

So where there is a broad discretion given to decision-makers and the only opportunity to challenge is through a judicial review, there is a very limited opportunity for people who are concerned by the outcomes to actually challenge the decision that has been made and to ensure that the decisions are made on the basis of science.⁴⁷

3.53 The committee notes that the Hawke Review concluded that the existing regime for judicial review of decisions made under the EPBC Act was 'adequate in ensuring procedural fairness', particularly given that applications for judicial review

45 Dr Martin Taylor, Protected Areas and Conservation Science Manager, WWF Australia, *Committee Hansard*, 8 October 2019, p. 4.

46 See, for example: Jane Goodall Institute, *Submission 15*, p. 5; Hamilton Field Naturalists Club, *Submission 38*, pp. 2–3; Cumberland Bird Observers Club Inc., *Submission 78*, p. 3; Portland Field Naturalists' Club Inc., *Submission 83*, p. 3; Koala Action Inc., *Submission 92*, p. 6; Humane Society International, *Submission 98*, p. 23; Nature Conservation Society of South Australia, *Submission 104*, p. 3; Centre for Environmental Law, *Submission 108*, p. 6; Victorian National Parks Association, *Submission 110*, p. 9; Conservation Council of South Australia, *Submission 117*, p. 2; Australian Conservation Foundation, *Submission 137*, pp. 4 and 16; Greenpeace Australia Pacific, *Submission 164*, p. 5; Ms Zoe Reynolds, Australian Labor Party Clovelly Branch, *Submission 229*, p. 4; Name Withheld, *Submission 248*, p. 3; Dr Colin Hocking, *Submission 289*, p. 3; and Name Withheld, *Submission 381*, p. 6.

47 Ms Jess Feehely, Committee Member, Environment and Planning Law Committee, Legal Practice Section, Law Council of Australia, *Committee Hansard*, 5 February 2019, p. 18.

could be made under the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903*.⁴⁸

Merits review

3.54 Unlike judicial review, merits review must be specifically assigned by legislation. The EPBC Act allows for merits review by the Administrative Appeals Tribunal (AAT) in certain specific instances including for:

- permits for activities affecting protected species;
- permits for the international movement of wildlife; and
- advice about whether an action would contravene a conservation order.⁴⁹

3.55 The committee notes that amendments to the EPBC Act in 2006 removed decisions made by the Minister personally from review by the AAT. The power is now confined to review of decisions made by a delegate of the minister.⁵⁰

3.56 EDOs of Australia submitted that the lack of an independent review process undermines compliance and enforcement of the EPBC Act. EDOs of Australia recommended that any new legislation:

...must build-in mechanisms for the community to seek arms-length review of decisions, administrative processes and potential breaches of the Environment Act and regulations.⁵¹

3.57 EDOs of Australia went on to comment that one of these mechanisms would be allowing 'standing for interested parties to seek merits review of a limited set of key decisions that impact biodiversity in an arms-length court or tribunal'.⁵²

3.58 The committee notes that the Hawke Review made four recommendations about broadening the scope for merits review of EPBC Act decisions, as well as allowing for more open access to review processes.⁵³

48 Hawke Review, p. 261 and Hawke Review, Interim report, p. 314.

49 Hawke Review, p. 255.

50 As noted by the Hawke Review, p. 255.

51 EDOs of Australia, *Submission 52*, Attachment 1 (NSW EDO and Humane Society International, *Next generation biodiversity laws—Best practice elements for a new Commonwealth Environment Act*), p. 74.

52 EDOs of Australia, *Submission 52*, Attachment 1 (NSW EDO and Humane Society International, *Next generation biodiversity laws—Best practice elements for a new Commonwealth Environment Act*), p. 73. Note that the Senate Environment and Communications Legislation Committee considered the issue of 'standing' in its report into the inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (2015).

53 Hawke Review, p. 40.

Lack of independent oversight

3.59 A number of stakeholders pointed to the need for an independent institution to administer and oversee Australia's environmental protection framework, as well as to provide advice to the Minister. It was argued that a federal Environment Protection Agency (EPA) would ensure that decisions affecting the environment were made in a more informed and transparent manner, and allow a shift towards a more bipartisan approach to Australia's environmental management and conservation framework.

3.60 For example, Mr Eric Woehler, Convenor of BirdLife Tasmania, spoke positively about an independent EPA, outlined what activities it would undertake, and the problems with the current approach that it would address:

We need an independent EPA to ensure that any management efforts, any conservation efforts—anything that is done is actually efficient and is working to minimise the risk of extinction of a species, not, as we're seeing, an increasing spectrum of species sliding towards extinction...

We've seen too much—and we've heard examples this morning—of political interference. We've seen advice from the scientific community provided to ministers, and then ministers will sit on those decisions. They'll avoid making the decision, or there'll be some form of political interference to a process that should be science driven and evidence based. So, by taking that role away and having an independent EPA, you minimise the potential for political interference in a science based, evidence based approach.⁵⁴

3.61 Mr Vica Bayley, the Tasmanian Campaign Manager for The Wilderness Society, suggested that a federal EPA could lift environmental outcomes across all Australian jurisdictions:

...while the federal government may have responsibility for federally-listed threatened species, it's ultimately the states and state agencies that are managing the land and many of the programs, so we have a dislocation when it comes to the responsibility for actually taking steps required to protect these species. That's where we critically need an agency at the federal level, which is independent of government, resourced adequately and able to make the decisions required to properly protect these species. We need a national environmental agency or similar that can actually do the assessments of projects that are going to threaten matters of national environmental significance—that is able to enforce and regulate what assessments are approved and so forth—and take that forward. We have this absolute dislocation whereby intent at the federal level, even if we do have it, quite often doesn't necessarily translate to action at the local and state levels.⁵⁵

54 Mr Eric Woehler, Convenor, BirdLife Tasmania, *Proof Committee Hansard*, 4 February 2019, p. 35.

55 Mr Vica Bayley, Tasmanian Campaign Manager, The Wilderness Society, *Proof Committee Hansard*, 4 February 2019, p. 25.

3.62 Mr Trezise of the ACF stressed that a federal EPA would not take away powers from the states and territories. Instead, he suggested, it would look to improve performance of local regimes by enforcing national standards:

One of the key things that we are pushing for is an environmental protection authority that operates at the federal level, brings up the standards of the states where they are below a certain standard and operates as a check and balance against environmental laws that may not be up to scratch in states and territories. It's not to assert a takeover of those functions; it's to set a baseline, a minimal federal environmental standard that we can't go below, because, as this committee has surely heard, we are in the grip of the sixth extinction crisis, and we have to do something about it.⁵⁶

3.63 Dr McCormack stressed that the existing EPBC Act could be more effectively administered by an independent agency, even if a new Act were not developed:

...existing laws could provide a key role in reversing historical trends, if they were fully implemented, appropriately funded and overseen by an independent agency, and that includes addressing ongoing habitat loss and actively tackling the threat of invasive species. These two examples are particular examples of non-climate stressors that are widely recognised in the scientific literature as essential to be addressed to help plants and animals adapt as the climate changes. If we can take some of those stressors off our biodiversity, they will be better equipped to adapt and cope with the threat that climate change poses.⁵⁷

56 Mr James Trezise, Policy Analyst, Australian Conservation Foundation, *Proof Committee Hansard*, 14 February 2019, p. 6.

57 Dr Phillipa McCormack, Private capacity, *Proof Committee Hansard*, 4 February 2019, p. 54. See also Dr Phillipa McCormack and Professor Jan McDonald, *Submission 162*, p. 11.

