

**Joint Public Accounts and Audit**

Answers to questions on notice

**Agriculture, Water and the Environment Portfolio**

**Committee:** Joint Public Accounts and Audit

**Inquiry:** Regulatory Activities: Inquiry into Auditor-General's Reports 33, 47, 48 (2019-20) and 5 and 8 (2020-21)

**Question No:** 1

**Hearing Date:** 4 March 2021

**Division/Agency:** Compliance Division (CD)

**Topic:** Department's progress in implementing Recommendation 1

**Question Date:** 12 March 2021

**Question Type:** Written

**The Joint Public Accounts and Audit Committee asked:**

1. The audit identified weaknesses in the Department's collection and management of regulatory information. Recommendation 1 says that the Department should implement a plan to better enable compliance information to be used in regulatory activity (p. 25). The DAWE submission notes that processes were underway to improve the Department's business systems to address these weaknesses. Could you update the Committee on the Department's progress in implementing this recommendation and provide a timeline for its completion?

**Answer:**

The Department of Agriculture, Water and the Environment agrees with the recommendation and welcomes the finding. We recognise the need to formalise information sharing arrangements within the department to better enable that information to be used at a strategic level for decision-making. There are a number of ways the department already routinely collects, stores and shares information within the department and specifically between the compliance and assessments divisions.

In response to the audit recommendation, the department is also in the process of procuring Information Technology for an assessments system and a compliance case management system.

The integration of the two systems in the future will allow for a complete information workflow. The department is on track to have the systems implemented within the next two years.

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**Question No:** 2

**Hearing Date:** 4 March 2021

**Division/Agency:** Environment Approvals Division (EAD)

**Topic:** Scope of the independent Environmental Compliance Regulatory Risk Review

**Question Date:** 12 March 2021

**Question Type:** Written

**The Joint Public Accounts and Audit Committee asked:**

2. The report recommended that the Department conduct an up-to-date risk assessment of non-compliance with its regulatory regimes (Recommendation 2, p. 26). The DAWE submission said in response that the Department has 'engaged an external expert to carry out an independent Environmental Compliance Regulatory Risk Review which will provide systematic assessment and prioritisation of risk across the Department's regulatory regimes' (DAWE submission p. 5). Could you provide some detail on the scope of this assessment and advise when you expect it to be completed?

**Answer:**

The regulatory risk review commenced on 11 February 2021.

The scope for the project is to identify the non-compliance risks with each environmental regulatory regime administered by the Department of Agriculture, Water and the Environment, to identify the compliance activities already undertaken by the department to manage those risks, to identify benchmarks and mechanisms used in other environmental regulatory jurisdictions for allocating resourcing levels across compliance regulatory functions, and to identify other regulatory tools that the department should consider using.

This work is expected to be completed this financial year.

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**Question No:** 3

**Hearing Date:** 4 March 2021

**Division/Agency:** Compliance Division (CD)

**Topic:** Assessment of compliance risks under the Act

**Question Date:** 12 March 2021

**Question Type:** Written

**The Joint Public Accounts and Audit Committee asked:**

3. What measures have been undertaken to improve the Department's assessment of compliance risks under the Act? How have these policies changed, if at all, in light of the recommendations contained in the Samuel report?

**Answer:**

The Department of Agriculture, Water and the Environment agrees with the recommendation made by the ANAO and has initiated work to address the recommendation.

The department currently assesses compliance risk through a range of measures including intelligence, compliance history, site visits, compliance reports, and other measures.

In response to the ANAO findings, the department has engaged an independent consultant to provide a review of regulatory risks associated with environmental legislation. The final report will further inform our assessment of environmental compliance risks.

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**Question No:** 4

**Hearing Date:** 4 March 2021

**Division/Agency:** Environment Approvals Division (EAD)

**Topic:** Implementation of Recommendations 7 and 8

**Question Date:** 12 March 2021

**Question Type:** Written

**The Joint Public Accounts and Audit Committee asked:**

4. Recommendations 7 and 8 aimed, in part, to ensure conditions of approval are aligned with risks to the environment. How has the Department taken this into account in implementing its response to this audit's recommendations? What programs or reforms can the Department point to, and what are their implementation timeframes?

**Answer:**

4. The Department of Agriculture, Water and the Environment has commenced a project to strengthen quality control processes for condition writing in line with best regulatory practice. This will include consideration of how risk to the environment is considered in drafting conditions of approval. This work is expected to be substantially progressed by the end of 2021, with implementation in 2022.

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**Question No:** 5

**Hearing Date:** 4 March 2021

**Division/Agency:** Environment Approvals Division (EAD)

**Topic:** Conflict of interest declarations

**Hansard Page:** 39

**Question Date:** 4 March 2021

**Question Type:** Spoken

**Mr Hill asked:**

Mr HILL: ... The department claimed that they had not established a conflicts of interest register as it had not identified any conflicts of interest. Does the department stand by that statement?

Ms Colreavy: That's not quite true. The former department had a conflict of interest process, and that required staff who identified a conflict of interest in relation to what they were doing to declare that conflict. But, following the ANAO audit, we revamped that completely, and we now have instituted a mandatory conflict of interest process with an ongoing register that is maintained within the division. That register and the process for rolling it out for—for requiring staff to update changing circumstances, et cetera—is made very clear to staff. For every new starter, the first thing they do, on day one, is complete their form.

Mr HILL: How many conflicts have been identified since that was put in place?

Ms Colreavy: I don't have that with me. It was a very small number. Any conflicts that have been identified were required to be reported to the senior executive of the branch where that staff member was located, and a management strategy put in place to deal with the conflict. That needed to meet the satisfaction of the senior executive.

Mr HILL: That's a requirement; can you take on notice and give us an updated number. As of 26 November, 216 staff had made a declaration, with 58 declaring a conflict. In that division, I'm not sure I would characterise that as a small number. It's quite a sizeable number.

Ms Colreavy: We asked for perceived conflicts as well as actual—

Mr HILL: As is required by the Public Service framework.

Ms Colreavy: Of course.

Mr HILL: How many staff in this area had declared conflicts previously under the more general departmental regime?

Mr Knudson: I don't think we have that number. We can come back to you on that.

**Answer:**

1. As at 22 February 2021, 63 staff within the Environment Approvals division had declared potential, perceived or actual conflicts of interest.
2. As reported to the ANAO during the recent audit, the Department did not previously maintain an ongoing register of the Environment Approvals Division's declared conflicts of interest. Under the previous regime conflicts of interest were managed on a case by case basis.

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**Question No:** 6

**Hearing Date:** 4 March 2021

**Division/Agency:** Environment Approvals Division (EAD)

**Topic:** Document not on file for 23 approvals

**Hansard Page:** 42

**Question Date:** 4 March 2021

**Question Type:** Spoken

**Mr Hill asked:**

Mr HILL: in these things to protect the environment. Can you take on notice and provide us with full details of those 26 approvals that were assessed and which of the 23 did not have this document?

Ms Mellor: We can take it on notice.

Mr HILL: Thanks. The department claimed that these documents were no longer needed—I think that was the department's response.

Mr Knudson: I'm not sure we're familiar with what you're pointing to.

Mr HILL: Is that correct from the Audit Office's perspective? What was the department's explanation for the fact that 23 out of 26 of these decisions audited didn't have this critical document?

Mr White: We take the evidence as given during the audit. We've provided the draft report and the standard 28 days for the department to go through the work. If there was anything there that they disagreed with then, we had a discussion about it and amended it. So at this point in time we're taking it as a fact, and the department stands by it. We may need to look into the exact question or the department may need to.

Mr Knudson: It does sound like we'll need to come back on notice. To be helpful, if you've got a reference in either the audit that you're particularly pointing to—

Mr HILL: I suppose you can take it on notice. We see noncompliance in all sorts of areas, but for 23 out of 26 key decisions audited to not have this critical outcomes document on file is beyond normal practice.

Mr Knudson: Are you talking about offsets? What is the critical document? That's what's missing for us.

Mr HILL: I'll come back to you with some clarification.

**Answer:**

It is not fully understood by the department what question is being asked as no further clarification has been provided. However, it appears that the question relates to the department's guidance on the preparation of approval conditions. As per footnote 98 of the audit report, the department informed the ANAO that these documents were no longer used as they were replaced by content in the new assessment manual chapters.

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**Question No:** 7

**Hearing Date:** 4 March 2021

**Division/Agency:** Environment Approvals Division (EAD)

**Topic:** Number of approvals challenged in the court process

**Hansard Page:** 43

**Question Date:** 4 March 2021

**Question Type:** Spoken

**Senator Scarr asked:**

Senator SCARR: I just have a quick follow-up question in relation to those figures that the witness quoted about the 6,900 approvals and only seven overturned through court proceedings. Just for the sake of completeness: do you have the number of approvals which have been challenged in the court process, just to give us a better feel of the percentages?

Mr Knudson: I don't, but I can say with confidence that we win far, far more than we've ever lost. It's a relatively small number that we've been challenged on, but I don't know that we have it. We definitely don't have it at hand. But I also know our success rate is quite high.

Senator SCARR: Would you mind just taking that on notice? I'd be interested to see the figures. Thank you.

Mr Knudson: Understood. Thank you.

**Answer:**

There have been 58 assessment or approval decisions under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) judicially reviewed since the Act commenced, with three proceedings yet to be resolved. As a result of these challenges, 12 decisions were set aside, including six by consent. In one other case, the decision under review was upheld by the Court but the Department was required to issue a new notice pursuant to section 77 of the EPBC Act to reflect the Court's interpretation of the EPBC Act provisions.

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**Question No:** 8

**Hearing Date:** 4 March 2021

**Division/Agency:** Environment Approvals Division (EAD)

**Topic:** Overturned approvals

**Hansard Page:** 43

**Question Date:** 4 March 2021

**Question Type:** Spoken

**Ms Wicks asked:**

CHAIR: I was asking before if you could outline some examples, and you gave a specific example of when decisions were overturned due to a lack of compliance with the act. You then said that, out of all of these numbers—and, I'm sorry, the sound quality wasn't great; I couldn't figure out whether you were saying 600 or 6,000, but it was a '6' with large numbers. You then said that seven were overturned. Were all of those seven due to lack of compliance with the act?

Mr Knudson: They were due to various reasons, and we can certainly come back and walk through why those were overturned.

CHAIR: Perhaps on notice?

Mr Knudson: There would also be examples—and I'm going back in my memory. For example, another challenge, another example, was that Adani, again, was proposing to build a large water pipe, and they didn't trigger, under our act, for an assessment of what's known as the water trigger, because that was dealt with with the mine proper. We were challenged on that decision, and I would argue that's a substantive challenge by the NGO in question saying, 'No, the water trigger should apply to the pipeline as well as the mine.' So you will have some examples like that, where we're being challenged, as I would argue, on a substantive policy question, and others were on administrative issues. We'll come back on notice. But, to hopefully clarify, it was 6,900 decisions under the act for parts 7 to 9 of the act, of which the seven had been overturned.

CHAIR: Okay. If you could provide examples around that, particularly in relation to compliance, documentation and record keeping. That is what my question is referring to. A fulsome outline would be very much appreciated. You have outlined one example and you are going to provide more examples. Perhaps as part of that, because I am conscious of time, you could outline for each one of them, where the reasons are different, what the department has done to address this to ensure it doesn't recur, since the ANAO's report.

**Answer:**

The table below sets out the cases in which an assessment or approval decision under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* was set aside.

Case name	Date of judgment/orders	Applicant	EPBC approval	Reason decision set aside
<i>Queensland Conservation Council Inc v Minister for the</i>	19/12/2003	Third party	EPBC 2002/770	The decision that the action is a controlled action was <b>set aside</b> on the basis



<i>Environment and Heritage</i> [2003] FCA 1463; [2004] FCAFC 190			Sudaw Developments Ltd, Nathan Dam, QLD	there was a failure to consider the indirect impacts of the action as required by s75 of the EPBC Act.  The Full Federal Court upheld the judgment on appeal.
<i>Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)</i> [2008] FCA 1521	13/08/2008	Proponent	EPBC 2001/487  Phosphate Resources Ltd, Christmas Island	The decision to refuse to approve the action was <b>set aside</b> on the basis there was a failure to consider the environment impact statement under s136(2)(c) of the EPBC Act and to apply the correct statutory test under sections 130 and 133 by failing to decide whether to approve or refuse for the purposes of sections 16, 17B, 23 and 24A of the EPBC Act.
<i>Lansen v Minister for Environment &amp; Heritage</i> [2008] FCAFC 189	17/12/2008	Third party	EPBC 2003/954  MIM Holdings Ltd, McArthur River Mine Expansion, NT	The decision to approve the action was <b>set aside</b> on appeal on the basis that there was a failure to consider a relevant consideration under s134 of the EPBC Act, namely the conditions imposed by the Northern Territory Minister under the law of the Northern Territory in accordance with his obligations under s134(4) of the EPBC Act.
<i>Western Australian Land Authority (Landcorp) v Minister for SEWPAC</i> [2012] FCA 226	15/03/2012	Proponent	EPBC 2010/5410  Landcorp, Mandurah Junction Commercial and Residential Development, WA	The decision to confirm a controlled action decision was <b>set aside</b> on the basis that the Applicant was not given the opportunity to make submissions on draft guidelines for three threatened black cockatoos or on cumulative impacts.
<i>Western Australian Land Authority (Landcorp) v Minister for SEWPAC</i>	19/12/2012	Proponent	EPBC 2010/5410  Landcorp, Mandurah Junction Commercial	The decision to approve the action subject to conditions was <b>set aside by consent</b> as a result of the judgment in <i>Western Australian Land Authority</i>

			and Residential Development, WA	<i>(Landcorp) v Minister for SEWPAC [2012] FCA 226.</i>
<i>Tarkine National Coalition Incorporated v Minister for SEWPAC [2013] FCA 694</i>	17/07/2013	Third party	EPBC 2012/6339  Venture Minerals Limited, DSO Hematite Mine, TAS	The decision to approve the action was <b>set aside</b> on the basis the Minister failed to have regard to the approved conservation advice for the Tasmanian Devil as required by s139(2) of the EPBC Act.
<i>Mackay Conservation Group v Commonwealth of Australia, Minister for the Environment and Adani Mining Pty Ltd</i>	4/08/2015	Third party	EPBC 2010/5736  Adani, Carmichael Coal Mine and Rail Project, QLD	The decision to approve the action was <b>set aside by consent</b> as a result of the failure to have regard to the approved conservation advices for the yakka skink and the ornamental snake.
<i>The Environment Centre Northern Territory Incorporated v The Minister for the Environment</i>	21/10/2016	Third party	EPBC 2015/7510  Ezion Offshore Logistics Hub (Tiwi) Pty Ltd, Melville Island, NT	The decision that action is not a controlled action if undertaken in a particular manner was <b>set aside by consent</b> on the basis that the result of the exercise of the power was uncertain because the means by which compliance with some of the matters specified in the decision notice was to be obtained.
<i>Environment Council of Central Queensland Inc v Minister for the Environment (Cth) &amp; Scott Harris</i>	26/11/2018	Third party	EPBC 2016/7751  Scott Harris, clearing of vegetation at Kingvale Station, QLD	The decision on assessment approach was <b>set aside by consent</b> on the basis there was a failure to reach the requisite level of satisfaction on a mandatory pre-condition under regulation 5.03A of the <i>Environment Protection and Biodiversity Conservation Regulations 2000</i> .
<i>Australian Conservation Foundation Inc v Minister for the Environment (Cth)</i>	12/06/2019	Third party	EPBC 2018/8191  North Galilee Water Scheme, QLD	The decision that the proposed action is a controlled action, but not for the purposes of ss24D and 24E of the EPBC Act, was <b>set aside by consent</b> on the basis there was a failure to consider some of the public comments as

				required by s75(1A) of the EPBC Act.
<i>Wilderness Society (TAS) Inc v Minister for the Environment</i> [2019] FCA 1842	4/12/2019	Third party	EPBC 2018/8177 Wild Drake Pty Ltd, Lake Malbena, TAS	The decision that action is not a controlled action was <b>set aside</b> for a failure to consider whether the proposed action was part of a larger action under s74A of the EPBC Act and whether the action should be a not controlled action if undertaken in a particular manner pursuant to s77A.
<i>Polaris Coomera Pty Ltd v Minister for the Environment</i>	07/02/2019	Proponent	EPBC 2017/8134 Coomera Woods development, South East QLD	The decision that the action is a controlled action was <b>set aside by consent</b> on procedural fairness grounds.

The table below sets out one case in which the decision was not set aside, but the court required the department to amend the particular manner notice.

<i>Triabunna Investments Pty Ltd &amp; Ors v Minister for the Environment and Energy &amp; Anor</i> [2019] FCAFC 60	15/04/2019	Third party	EPBC 2017/7954 Tassal Finfish Aquaculture, TAS	The decision that action is not a controlled action if undertaken in a particular manner was upheld by the Court but the department was required to issue a fresh s77 notice under the EPBC Act to reflect the Court's decision.
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With respect to what the department has done since the ANAO's report to address these issues:

The department routinely monitors decisions made by the court to inform our program of business improvement and quality assurance. This informs changes to business processes, including updates to training programs, templates and guidance documents as required.

The department has accepted the findings of the audit and agreed to implement all eight recommendations made by the ANAO. Since publication of the ANAO audit report, the department has moved quickly to implement a series of early measures to address key areas for improvement. The department has also put in place a comprehensive forward program of work that directly addresses the audit findings and recommendations and will drive best practice improvements for efficient and effective regulation.

Key long-term initiatives on which work has commenced include preparation of a new Quality Assurance Framework as part of the department's implementation of ANAO audit recommendation no 5. The Quality Assurance Framework will provide ongoing assurance that

procedural guidance is implemented consistently, and that the quality of decisions made under the EPBC Act is appropriate. It has been designed to drive continuous improvement of our quality controls, processes, and systems over time, including responding to the outcomes of court cases. Implementation of the Quality Assurance Framework will commence in 2021.

The department is also making significant investment in new IT solutions to improve the efficiency and effectiveness of our administration. A new Digital Environmental Assessments Program is being developed which will include a Portal and Assessment System for environmental assessments under the EPBC Act. This new workflow system will embed quality assurance and quality control processes to improve the legal robustness of decisions by establishing a proper workflow system to replace the current manual one.