

Submission to the Independent  
Review of the *Environment  
Protection and Biodiversity  
Conservation Act 1999*

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WENTWORTH GROUP OF CONCERNED SCIENTISTS

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## SUBMISSION TO THE INDEPENDENT REVIEW OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999*

*“Providing for a sustainable environment both now and in the future is a national issue requiring leadership and action across all levels of government, business and the community.”*

***Australian State of the Environment Committee, 2016***

Australia is one of the most biologically diverse countries in the world, with more endemic mammals and reptiles than any other nation and more unique plants than 98% of the world’s countries.<sup>1</sup> This biodiversity underpins the health and wellbeing of communities, supports industries particularly in regional Australia, and is intrinsically linked to indigenous culture and the identity of all Australians.

In recognition of its importance, the Australian Parliament committed to safeguarding biodiversity through the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), a single overarching framework for national environmental protection. The EPBC Act emanated from Australia’s obligations as a signatory to the international Convention on Biological Diversity and commitments made under COAG’s Intergovernmental Agreement on the Environment in 1992. The primary role of the EPBC Act is to “provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance.”<sup>2</sup>

Twenty years since the Act was passed, scientific evidence clearly demonstrates that its objectives are not being met. Nearly 100 species, including 27 mammals, 22 birds and at least 37 plants have become extinct since European settlement, and a further 463 animal species, 1336 plant species and 87 ecological communities are listed as threatened with extinction.<sup>3</sup> Of the 7.7 million hectares of potential habitat for listed threatened species and ecological communities that was cleared in Australia between 2000 and 2017, over 93% was not referred to the Federal Government for assessment under the EPBC Act.<sup>4</sup> Of the 3,058 projects referred in the same period seeking to remove habitat, only four were rejected.<sup>4</sup> The EPBC Act is failing to capture most impacts, and those it captures, it permits regardless, with inadequate conditions of approval.

The EPBC Act Review offers the opportunity to help bend back the curve of biodiversity decline in Australia, while simultaneously simplifying and streamlining assessment and approval processes for business. Our submission describes the changes that will, in our view, deliver better environmental outcomes while reducing regulatory burden and duplication for business. Our submission draws upon the recommendations of the Hawke Review of the EPBC Act in 2009, a statement written to COAG in 2012 by the Wentworth Group together with leading experts in science and law, and recent evidence of the effectiveness and operation of the EPBC Act.

### **Overall Recommendations**

#### **1. Deliver better environmental outcomes, by:**

- a. Establishing a clear, legal requirement for consideration of cumulative impact;
- b. Enhancing the role of Regional Environment Plans
- c. Streamlining approvals through Strategic Environmental Assessments;
- d. Publishing continental-scale maps to clarify where development approvals are required;
- e. Establishing national environmental accounts to measure outcomes;
- f. Improving conditions of approval including offset standards; and
- g. Delivering real improvements by linking funding to outcomes.

#### **2. Reduce regulatory burden and duplication for business, by:**

- a. Developing national environmental assessment standards to achieve consistency and reduce uncertainty around assessment processes;
- b. Streamlining assessment processes by enabling states with accreditation to undertake environmental assessments on behalf of the Commonwealth;
- c. Ensuring the Commonwealth Minister retains decision-making powers supported by an independent regulatory body; and
- d. Developing better guidelines to improve certainty for business.

## 1. An effective EPBC Act is desperately needed

The EPBC Act was legislated by the Australian Parliament in 1999 as the single overarching framework for national environmental protection. The Act emanated from the 1992 Council of Australian Governments' *Intergovernmental Agreement on the Environment* which set out, inter alia, "the responsibilities and interests of the Commonwealth in safeguarding and accommodating national environmental matters." The Act prescribes powers to the Australian Government to protect matters of national environmental significance, including its international treaty obligations such as those under the 1993 Convention on Biological Diversity. Seven objectives are defined by the Act (see Box 1).

Twenty years on, scientific evidence clearly demonstrates that the objectives of the Act are not being met. Despite investments by Commonwealth, State and Territory governments and the private sector over many decades, there has been no observable slowing in the rate of biodiversity loss because the main causes driving extinction have not been addressed. As a consequence, nearly 100 species have become extinct since European settlement, and a further 463 animal species, 1336 plant species and 87 ecological communities are listed as threatened with extinction.<sup>3</sup>

The status of most listed species is deteriorating, with four times as many vulnerable species declining in their threat status than improving since the EPBC Act was introduced.<sup>5</sup> Geyle et al. (2018) estimate that another seven Australian mammals and ten Australian birds will be extinct in the next two decades unless management improves. Recent catastrophic fires have likely exacerbated the status of ecological communities, with just under half (37 of 84) of the nationally listed threatened ecological communities and 327 threatened species affected over a six month period.<sup>7</sup> Only 13 animal species have been de-listed since the Act's inception, and only one of these (Muir's corella) may be considered a case of genuine improvement.<sup>8</sup>

The 2016 *State of the Environment Report* stated "the most significant pressures are clearing, fragmentation and declining quality of habitat; invasive species; climate change; changed fire regimes; grazing; and changed hydrology. Most of these exert a high to very high pressure on biodiversity, and are worsening. The cumulative and interacting effects of many of these pressures amplify the threat to biodiversity in Australia."<sup>9</sup>

The primary role of the EPBC Act is to "provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance". Habitat loss affects 81% of all threatened species in almost all (90%) subcatchments across Australia.<sup>10</sup> A study by Ward et al. (2019) found that of the 7.7 million hectares of potential habitat for listed threatened species and ecological communities that was cleared in Australia between 2000 and 2017, over 93% was not referred to the Federal Government for assessment under the EPBC Act. Of the 3,058 projects referred in the same period seeking to remove habitat, only four were rejected.<sup>4</sup> Conditions were placed on a further 806 projects. These data show that the current referral process is ineffective in mitigating significant adverse impacts on habitat for listed terrestrial species and communities, which by their very definition are matters of national environmental significance for which the EPBC Act was established to protect.

### **Box 1. Objects of the EPBC Act (Chapter 1 Part 1.3)**

- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
- (c) to promote the conservation of biodiversity; and
- (ca) to provide for the protection and conservation of heritage; and
- (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
- (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and
- (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- (g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

The EPBC Act is failing to capture most impacts, and those it captures, it permits regardless, with inadequate conditions of approval. A core reason for this is the limitation of the EPBC Act itself to take into account the cumulative impact of development on matters of national environmental significance. This was confirmed in a judgement by the Federal Court of Australia in 2015 which found that the Commonwealth Environment Minister is not required to consider cumulative impacts of proposals approved under the EPBC Act 1999.<sup>11</sup>

The second major failing of the EPBC Act widely cited by business groups regards the unnecessary red tape that is associated with the administration of the Act. In an effort to address this, in August 2011, COAG agreed to major reforms of environmental regulation across all levels of government to “reduce regulatory burden and duplication for business and to deliver better environmental outcomes.”<sup>12</sup> Despite continued, widespread agreement from stakeholders that such reform is both essential and possible,<sup>13</sup> it has not eventuated.

## **2. Delivering better environmental outcomes**

### **2.1. Establish a clear legal requirement for consideration of cumulative impact**

A major flaw of the EPBC Act is that it does not effectively manage the cumulative environmental impacts of multiple developments on biodiversity.<sup>14</sup> By themselves, individual developments may have minimal impact on the environment, but when combined, their cumulative impact can result in long-term damage to Australia’s land, water and marine species and ecosystems.

For example, deforestation of woody vegetation in the Great Barrier Reef catchments has risen since 2009, with over 300,000 hectares of vegetation cleared in a two year period over 2016 to 2018.<sup>15</sup> The Great Barrier Reef Marine Park Authority’s 2014 Outlook report stated “the resultant loss and modification of habitats has led to significant increases in pollutants, principally nutrients and sediments, entering the Great Barrier Reef lagoon which has reduced the ecosystem’s ability to bounce back after impacts.”<sup>16</sup> The report also states that numerous marine species including freshwater sawfish are now threatened, in part, due to the cumulative impacts of habitat loss.

COAG’s 1992 *Intergovernmental Agreement on the Environment* requires that all signatories take into account “the assessment of the regional cumulative impacts of a series of developments and not simply the consideration of individual development proposals in isolation.”<sup>17</sup> However, a judgement in 2015 by the Federal Court of Australia regarding a proposed iron ore mine in the Tarkine region of north-western Tasmania has demonstrated that the Commonwealth Environment Minister was not required to consider cumulative impacts of proposals approved under the EPBC Act 1999.<sup>18</sup> The Minister is only required to consider “relevant impacts” of an action.

The lack of requirement for the Commonwealth to consider likely cumulative impacts is one of the main reasons why the EPBC Act is failing to capture and address impacts on matters of national environmental significance. Without addressing this problem, the Act is incapable of achieving its objective to “provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance.”

To “deliver better environmental outcomes” as agreed by COAG,<sup>12</sup> the Act needs to be changed to establish a clear, legal requirement for the consideration of cumulative impact. This means a shift from individual project-by-project development assessment and approvals, towards a more strategic and long-term approach to guiding development and sustainable use of natural resources. If implemented properly, this amendment would provide a legislative mandate for the management of cumulative impacts through the prevention or mitigation of significant impacts of development on matters of national environmental significance.

This will deliver better environmental outcomes, including through greater use of regional planning and strategic assessments as outlined below, and will create a greater level of certainty for developers and the community, because the critically-important areas for biodiversity are identified upfront, as are areas in which development impacts on matters of national environmental significance are likely to be manageable.

Long-term landscape-scale planning is needed to determine where, and under what conditions, development can occur without causing significant impacts. The EPBC Act already has voluntary (opt in) provisions for regional environment plans and strategic assessments. What is needed is to expand the role of regional plans and strategic assessments, strengthen the assessment process and require assessments to be mandatory where there are possible impacts on matters of national environmental significance. Adequate information is needed to underpin rigorous assessments of cumulative impacts, with maps to provide greater clarity on the extent of likely impacts, and environmental accounts to track change in environmental condition at landscape, community and species levels.

Similarly, long-term planning for conservation of freshwater-based matters of national environmental significance is required to determine where, and under what conditions, development can safely occur. Two anomalies highlight the ad hoc nature of the current provisions of the Act for conserving freshwater ecosystems. Firstly, the 'water trigger' only applies to coal seam gas and large coal mining developments. Sustainable management of water on the driest inhabited continent requires broadening the trigger to cover any proposal likely to have significant and/or cumulative impacts on the hydrology or quality of a water resource. Secondly, while under the threatened species and national heritage triggers, new matters may be added through a public nomination processes, the owners of a wetland of international importance cannot nominate their own site for listing as a Ramsar site through a codified and transparent process. Broadening application of these triggers will allow for the management of cumulative impacts on freshwater ecosystems nationally, and provide better alignment with Commonwealth and state government processes that address cumulative impacts, for example, water sharing plans and cap and trade markets for consumptive water entitlements (as are implemented across the Murray-Darling Basin).

## **2.2. Enhancing the role of Regional Environment Plans**

Regional Environment Plans provide for a practical, proactive and integrated approach to the protection of matters of national environmental significance at a regional scale. The EPBC Act already provides for regional environment plans to conserve biodiversity and protect other environmental values. However despite the use of regional planning for marine areas under the Act, there are no terrestrial regional plans in place. These plans are needed to ensure that conservation objectives and priorities align with regional efforts, and management actions are properly integrated with local and regional planning processes.

The Act should be amended to require, for each region, a funded plan which sets out practical and evidence-based management strategies for protecting key environmental assets within the landscape. The plan would integrate with and guide, but not seek to replace, the urban and environmental planning instruments at the state and territory level.

Regional environment plans would identify:

- Areas where matters of national and state environmental significance are located in a landscape and the threats to those assets including climate change risks;
- Fixed baselines and agreed conservation targets which form the basis for assessment of cumulative impact; and
- Mechanisms to guide and coordinate actions (including government funding, land use plans and conservation plans) to protect and manage threats to environmental assets, especially those actions likely to have a cumulative impact.

A regional approach supports integrated assessments of threats across multiple species, allowing for recovery actions that are effective and strategic. This is important because existing recovery plans are species-specific and threat abatement plans focus on singular threats, so they overlook opportunities to address multiple outcomes and are inadequate for recovering populations exposed to several threats.

The 56 natural resource management regions across Australia would be the most appropriate scale at which to develop and implement these plans. This approach would strengthen and draw on existing regional natural resource management organisations, who already have a wealth of knowledge on the environmental values in

their region and opportunities to enhance conservation and sustainable development. Regional environment plans should be developed collaboratively, with Commonwealth and state/territory governments, local councils, other environmental management and land use planning agencies, Indigenous land and sea management organisations and industry. Targets and actions set in these plans should be binding.

Designing and implementing effective regional environment plans requires a government commitment to long-term planning, cooperation, and a significant investment in the scientific information to underpin decision-making.

### 2.3. Streamlining approvals through Strategic Environmental Assessments

The EPBC Act provides a mechanism for the strategic assessment of plans, policies and programs, by which governments and developers can assess and manage impacts from multiple developments and activities on the environment (see Box 2).

Strategic assessments can be used to identify matters of both national and state environmental significance therefore streamlining and simplifying development planning by enabling all environmental values to be considered together.

Following a strategic assessment, if the Commonwealth Environment Minister is satisfied the plan, policy or program adequately addresses impacts on matters of national environmental significance, the Minister can endorse it. The Minister can then approve classes of actions within the plan. In other words, if the Minister is satisfied a plan, policy or program will deliver acceptable environmental outcomes, then developments that are in accordance with that plan, policy or program will not require further Commonwealth assessment.

Strategic assessments benefit business by providing certainty on where sustainable development can occur and the type of activities that may be allowed. They also benefit business by clarifying environmental requirements and conditions up-front and early in the planning or project development process. Strategic assessments can also exempt certain actions from the need for further assessment under the EPBC Act.

Strategic assessments done well can also be of benefit to the environment. Rather than leaving the assessment until after a plan, policy or program has been finalised and actions set in place, strategic assessments completed either before, or at the same time as, the development of a major plan or policy are more likely to deliver better environmental outcomes.

If strategic assessments are to deliver better environmental outcomes, the EPBC Act would need to be amended to specify the following standards:

1. A requirement that the plan, policy or program demonstrate that it will improve or maintain environmental outcomes including for matters of national environmental significance;
2. Science-informed goals or targets for environmental outcomes, including all relevant matters of national environmental significance, such as 'avoid net reductions in extent and condition of endangered and critically endangered ecosystems', and resource use or pollution caps for ensuring cumulative impacts do not exceed ecological thresholds;
3. Minimum requirements for information on environmental values, how environmental values are to be measured, and use of objective decision-making tools;

#### Box 2. Examples of how strategic assessments might apply to plans, policies and programs

- A plan could be, for example, a local council's land use plan, and the strategic assessment might consider different land use zoning tools as mechanisms for avoiding impacts on matters of national significance. The Ginninderry suburban expansion in Canberra's north west is an excellent example of enabling development with conservation.
- A policy could be, for example, a bushfire management policy of a state government agency, and the strategic assessment might consider different options for managing bushfire risk that avoid impacts on threatened species.
- A program could be a state government's coastal management, planning and development framework, for example, the Queensland Government's Great Barrier Reef strategic assessment.



4. Clear decision-making rules, trigger criteria or zoning to guide approval decisions following endorsement. This might include 'traffic light' zoning that identifies areas off limits to certain developments and areas where developments can go ahead under specified conditions (see section 2.4 below), and clear thresholds for clearly unacceptable impacts on matters of national environmental significance (e.g. actions that may result in change of the ecological character of a Ramsar-listed wetland);
5. Clear mechanisms (such as spatial zoning or standards and codes) to deal with both broad- and fine-scale environmental values and impacts;
6. Adherence to mandatory information standards for assessment (including consideration of alternative development scenarios and cumulative impacts);
7. Comprehensive monitoring, evaluation and compliance regimes to be put in place to check whether outcomes are being achieved and approval conditions are being adhered to;
8. Comprehensive public participation processes that provide adequate information and allow sufficient time for members of the public to consider and comment on the assessment;
9. Flexibility mechanisms that allow changes to be made to the plan and the approval conditions, if new information comes to light or evidence of past or future events shows approaches need to change
10. Ongoing independent performance auditing to ensure endorsed plans, policies or programs and their conditions are being complied with; and
11. Call-in powers where an endorsed plan, policy or program is not achieving required outcomes.

#### **2.4. Public maps showing where development approvals are required**

To underpin the EPBC Act's effectiveness, the Commonwealth Government should invest in comprehensive and accurate maps showing the areas where development is likely to have a significant impact on matters of national environmental significance. These maps should be nation-wide and publicly available.

The maps could delineate the development approval requirements based on a 'traffic light' approach with three categories:

- "Green Light" = Areas where development proposals are unlikely to impact on matters of national environmental significance (taking into account cumulative impact) and could be rapidly assessed for approval based on minimal information.
- "Amber Light" = Areas where development proposals may adversely impact on matters of national environmental significance. An example would be clearing of intact bushland listed as a threatened ecological community, and developers would know that further assessment is needed and possible conditions will be required.
- "Red Light" = Areas where development proposals are likely to adversely impact on matters of national environmental significance (taking account the likely cumulative impacts), and the proponent is unable to offset such damage. Development in such areas should be refused approval (i.e. "no-go zones").

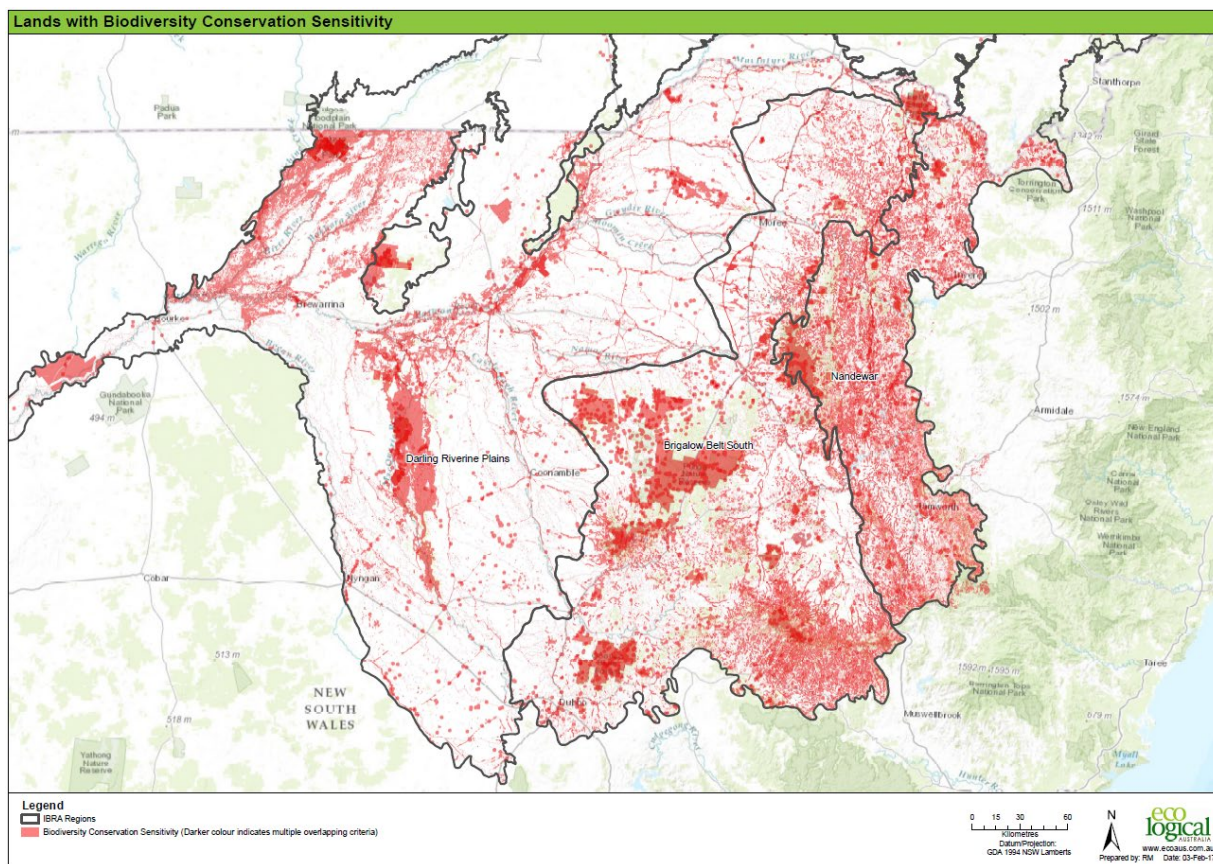
At a property scale, this information would assist in streamlining assessment processes by providing greater clarity to developers on the conditions of approval prior to submitting a referral.

At a regional level, these 'traffic light' maps would also assist natural resource management groups to develop comprehensive Regional Environment Plans to protect matters of national environmental significance.

Figure 1 shows the location of high conservation values for three IBRA bioregions in New South Wales: Darling Riverine Plains, the Brigalow Belt South and Nandewar Ranges. These types of maps should be the basis of a 'traffic light' map to guide assessment processes and support regional planning under the EPBC Act.

The status of mapped assets can also be verified with satellite imagery to allow the Commonwealth Government to audit progress towards achieving national targets, and to report statistics to the wider community.





**Figure 1. Map showing areas of high conservation significance, comprised of identified high conservation value areas, protected areas and location of threatened species, critical habitats, threatened ecological communities and vulnerable lands (supplied by WWF Australia).**

## 2.5. Establishing national environmental accounts to measure outcomes

In a world with readily available market measures of things like jobs, exports, and income, the lack of an accepted system for measuring the condition of the nation’s environmental assets has compromised our ability to manage them. If you don’t measure it, you can’t manage it.

Regular reporting of environmental condition is essential for understanding the effectiveness of the EPBC Act and informing investments in landscape conservation. Yet current measurement and monitoring efforts vary across programs, and there is a lack of nationally-consistent measures to allow comparison and aggregation across state and territory borders.

A system of regional scale national environmental accounts is needed to measure and track changes in the extent and condition of key environmental assets, such as native vegetation, soil, rivers and wildlife. Environmental accounts can be nested for particular species, communities or geographic areas to reveal changes in condition of a region as a whole and for specific assets of national environmental significance (see Figure 2). This information would underpin environmental impact assessment, improve management decisions and support measurement of the effectiveness of the EPBC Act.

In 2015, the Wentworth Group together with Australia’s Regional Natural Resource Management authorities, published a continental scale trial to test the practical application of a model for environmental accounting, *Accounting for Nature*.<sup>19</sup> This trial made significant progress in demonstrating that it is practical to establish a robust and on-going national program to measure the condition of Australia’s environmental assets.

REGIONAL ASSET ACCOUNT SEQ CATCHMENTS, QUEENSLAND			
Summary Table			
Class	Asset	Econd & ICS	
LAND	Native Vegetation	Econd	
		Extent (Ha)	
		Composition (index) Configuration (rank)	
FRESH-WATER	Rivers	Econd	
		Physical/chemical index (%)	
		Nutrient cycling index (%) Macroinvertebrates index (%) Fish index (%)	
Wetlands	Econd		
	Extent (Ha)		
	Composition (index)		
COASTAL	Estuaries	Econd	
		Physical/chemical index (%)	
		Biological Health Rating (%)	
Moreton Bay	Econd		
	Physical/chemical index (%)		
	Biological Health Rating (%)		
MARINE	Dugong	Econd	
		Dugong population	

ESTUARIES ASSET ACCOUNT SEQ CATCHMENTS, QUEENSLAND					
Asset Table: Freshwater > Estuaries					
Class	Indicator (unit)	Reference Benchmark	2009 Measure	ICS	FC
State	Albert River estuary				
	Physical/chemical index (%)	100	15.2	15	
	Biological Health Rating (%)	100	29.2	29	
	Foreshore / riparian habitat extent (km)	32.2	15.5	48	
Former River estuary					
	Physical/chemical index (%)	100	15.2	15	
	Biological Health Rating (%)	100	33.3	33	
	Foreshore / riparian habitat extent (km)	34.8	15.3	44	
Future River estuary					
	Physical/chemical index (%)	100	26.2	26	
	Biological Health Rating (%)	100	47.2	47	
	Foreshore / riparian habitat extent (km)	160.6	51.4	32	
Bridge/Trestle estuary					
	Physical/chemical index (%)	100	10.6	11	
	Biological Health Rating (%)	100	36.1	36	
	Foreshore / riparian habitat extent (km)	12.5	7.4	59	
Abandoned River estuary					
	Physical/chemical index (%)	100	9.8	10	
	Biological Health Rating (%)	100	66.7	67	
	Foreshore / riparian habitat extent (km)	42.7	26.9	63	

ESTUARIES ASSET ACCOUNT SEQ CATCHMENTS, QUEENSLAND			
Data Table: Coastal > Estuaries > Albert River Estuary > 2010 - 2011			
Indicator	Reference benchmark	Measure	ICS
Physical/chemical index (%)	100	12.4	12
Chlorophyll-a (index)	100	2	2
Dissolved Oxygen (%)	100	46	46
Total Nitrogen (index)	100	14	14
Total Phosphorus (index)	100	0	0
Turbidity (index)	100	0	0

Figure 2. Example of the South East Queensland’s Regional Environmental Account with nested tables showing specific assets of interest (estuaries) and their condition measures.

In 2016, Commonwealth, state and territory governments committed to producing a core set of national environmental-economic accounts to inform decision-making in government, community and business. The Common National Approach Strategy and Action Plan released in 2018 stated that “understanding the extent and condition of environmental assets can help assess which assets are being depleted or lost, which assets are declining in condition, how to make best use of these assets and to appropriately manage the risk of environmental degradation and the impact of climate change.”<sup>20</sup>

Embedding environmental accounts within the *State of the Environment* reporting is an important step towards a more effective EPBC Act, and ultimately a common national understanding of changes in condition of Australia’s most important assets. *State of the Environment* reporting should continue to provide independent advice to the Minister and Parliament on the state of the environment and the achievement of ecologically sustainable development.

## 2.6. Improved conditions of approval including offset standards

An important role of the Commonwealth Government is to ensure high standards of Commonwealth and State-based conditions of approval, including offsetting requirements and processes, to ensure that matters of national environmental significance are not compromised when impacts on them are permitted.

One of the most effective ways to promote this is for the Commonwealth Government to require specific ecological outcomes as a condition of approval, stated in such a way that proponents can tell from the start whether they can achieve the outcomes. To ensure these outcomes are achieved in practice, there should be a requirement that the proponent holds enduring liability to achieve and maintain the outcomes. This needs to be demonstrated through proper measurement, monitoring, auditing and enforcement of agreed actions and most importantly, outcomes.

Offsets can, if carefully-managed with strict additionality rules, allow for a system which gives value to remnant vegetation and regrowth, allowing for private trading and thereby leading to improved environmental outcomes at reduced public cost. This will help farmers recognise native vegetation as an asset and reward them for managing this resource on behalf of the proponent.

The current offsets policy is largely aligned with best practice, but its implementation is not always aligned with its intent. To be effective in supporting the Act’s objectives, offsets should result in a net enhancement of the overall condition of matters of national environmental significance, at the project scale. The following changes are needed to ensure the offsets policy is effective in delivering these outcomes:

- Offsetting needs to be applied as a last resort, only where impacts are unavoidable. This is not currently the case: biodiversity offsetting appears to be more readily used as a default measure;

- Offsets should be secured before the impact is made to provide greater assurance that the outcomes will be realised in practice;
- Offsets must achieve measurable gains that counterbalance the losses for the environmental asset being impacted. Investment in research and other measures that are not 'like for like' or measurable undermine the objectives and could create a conflict of interest where the Department is both a project assessor and potential recipient of research funding; and
- The net outcome to be achieved by the offset for each matter of national environmental significance should be an explicit requirement. These net outcomes (losses and gains – not inputs or actions) should be monitored and reported upon, to allow continuous learning about the effectiveness of alternative approaches. Net outcomes for individual matters of national environmental significance should be aligned with desired net outcomes for matters of national environmental significance at larger scales.

## **2.7. Deliver real improvements by linking funding to outcomes**

Ensuring an outcomes-focused Act with effective regional environment plans and strategic assessments requires substantial investments of time and resources. However, only 15% of the required funding for target species recovery is currently available.<sup>21</sup> Poor allocation of existing funds have further hampered recovery efforts.

Adequate funding is needed to provide stronger incentives for positive conservation actions, including species recovery, regional environment planning and strategic assessments. Funding should be tied to the delivery of measurable on-ground outcomes. Investment may be directed to state or national programs as well as through Regional Environment Plans which can assist in the efficient and strategic fund allocation particularly where local efforts align with Commonwealth priorities.

## **3. Reducing regulatory burden and duplication for business**

One of the major concerns of business about the operation of the EPBC Act lies in the duplication of state and Commonwealth environmental assessment processes and uncertainty about the expectations of different regulators. As noted by COAG in August 2011, "reforms are needed to better integrate state, territory and commonwealth regulatory arrangements for environmental protection."<sup>12</sup>

There have now been several reviews of the operation of state and Commonwealth development assessment processes: a Senate inquiry into the operation of the EPBC Act in 2009;<sup>22</sup> the statutory 'Hawke Review' of the EPBC Act in 2009;<sup>23</sup> a Productivity Commission report into planning, zoning and development assessments in 2011;<sup>24</sup> audits by the Australian National Audit Office in 2014 and 2017;<sup>25</sup> and a Senate inquiry into Australia's faunal extinction crisis in 2019.<sup>26</sup>

The 2009 Hawke Review, through a rigorous and consultative review process, proposed a comprehensive package of reforms to improve, expand and refine the Act "directed at better placing the Australian Government to manage the environmental challenges of the future."<sup>23</sup> These reforms have only been partially adopted by the government, and a number of recommendations aimed at strengthening the Act have not yet been implemented.<sup>27</sup>

The 2011 Productivity Commission's report found that the different local, state and Commonwealth planning, zoning and development assessment systems constitute one of the most complex regulatory regimes in Australia.<sup>28</sup> It highlighted a set of leading practices, including simplifying development instruments, improving development assessment criteria and processes, and public participation and transparency standards.

While some bilateral agreements have accredited some aspects of state assessment and approvals, the system has not worked because it retains much duplication, and is subject to frequent changes in state processes. The following recommendations provide a number of opportunities to streamline state and Commonwealth development assessment processes and at the same time improve environmental standards.

### **3.1. Develop national environmental assessment standards to achieve consistency and reduce uncertainty around assessment processes**

National environmental assessment standards would give business the option to use a single entry point for project assessments by state and Commonwealth governments, and support the ability of the Commonwealth Environment Minister to delegate more project assessments to state governments (see Box 3). This would streamline assessment processes and reduce uncertainties for business in negotiating different requirements across different jurisdictions.

#### **Box 3. Role of National Environmental Assessment Standards**

- To determine whether the action is likely to have an adverse impact on a matter of national environmental significance, taking into account the likely cumulative impact of such developments (see section 2.1);
- To ensure all significant impacts on all matters of national environmental significance are assessed according to Commonwealth guidelines, using appropriate scientific and technical standards and survey methodologies;
- To ensure that state processes meet, at the very least, minimum public information and consultation standards provided for in the EPBC Act; and
- To ensure that state processes meet, at the very least, minimum third party review rights provided for in the EPBC Act.

The development of national environmental assessment standards should be based on best available science, and require a full public consultation process to ensure they were acceptable and appropriate.

State planning and environmental assessment systems would need to be upgraded to meet these standards. Many State government laws and processes are not adequate for protecting matters of national environmental significance, and in many cases do not meet national standards for public participation, transparency, information, review and objective decision-making.

Once state systems are improved to meet these standards, they would then be able to be accredited, and bilateral agreements would be signed, delegating to states the ability to conduct assessments on behalf of the Commonwealth for five year periods, with renewal subject to an independent review of performance and outcomes.

These bilateral agreements would only succeed on the condition that states accept the following Commonwealth safeguards:

1. The Commonwealth Environment Minister would retain call-in or veto powers for individual projects;
2. The Commonwealth Environment Minister would conduct project assessments in those instances where the state government is the project proponent;
3. Regular reports (at least every five years) would be prepared by states on their implementation of the bilateral agreements which would be audited by an independent body; and
4. The Commonwealth Environment Minister would retain the right to withdraw accreditation of state assessment processes at any time if national standards are not being met.

### **3.2. Streamline assessment processes by enabling states with accreditation to undertake environmental assessments on behalf of the Commonwealth**

Duplication between state and Commonwealth processes can be reduced if business is given the option to have state governments administer the environmental assessment and approval process on behalf of the Commonwealth – provided each state and territory has legislation and processes that comply with national environmental assessment standards (section 3.1).



Each state has had a bilateral agreement in place that accredits some of its planning processes as suitable for conducting environmental impact assessments on behalf of the Commonwealth. However in the past five years, of the projects that were submitted for approval, only one third of assessments were delegated to state governments.<sup>29</sup>

There is an opportunity to improve procedures and cooperation between agencies, and standardising environmental impact assessment approaches.

Under this arrangement, at the very least, a developer should have the option to submit their project referral to the relevant state government agency, which would then automatically refer it on to the Commonwealth, rather than a developer having to submit referrals to these two levels of government separately.

In practice this would mean that:

1. Each government would specify requirements for assessment (if required), and the state government would consolidate these requirements in one document for the developer. These requirements would have to meet national assessment standards.
2. The developer would then (if required) submit one environment impact report/statement that covers the requirements of the two levels of government.
3. The state or territory and the Commonwealth would then assess the development independently (but concurrently), or in those instances where there is an assessment bilateral in place, the state would assess the development on behalf of the Commonwealth.
4. The state and the Commonwealth would make independent approval decisions according to their respective legislated standards, but these approvals would be consolidated within one approval document containing a combined set of approval conditions.

Successful administration of this process would rely on improved cooperation between both levels of government - in coordinating and clarifying information requirements for developers, in liaising on processing times and key decisions, and in consolidating state and Commonwealth conditions into one simple approval.

### **3.3. Commonwealth Minister retains decision-making powers supported by an independent regulatory body**

Under the bilateral arrangements outlined above, the Commonwealth Environment Minister would still retain final EPBC Act approval powers, but there would be one process, one set of documentation and common public participation periods. In making a decision, the Minister must be appropriately informed, the assessment must be fully transparent, and there must be opportunities for public scrutiny and review.

An independent regulatory body could support the Minister to implement the Act in several ways: (1) by safeguarding the delegation of more environmental assessments to states; (2) by undertaking monitoring, auditing, compliance and enforcement functions under the Act; (3) by taking on an assurance role in auditing the performance of states against standards and agreements, (4) by providing advice to the Minister to support decisions about the environmental impact assessment and approval process under the Act; and (5) by undertaking regular reviews of progress towards the Act's objectives.

### **3.4. Develop better guidelines to increase certainty for business**

The 2018-19 annual report of the Commonwealth environment department shows that 68% of projects referred to the Commonwealth over the life of the Act have not needed further assessment and approval,<sup>30</sup> because either:

- they were found to not have a significant impact on any matters of national environmental significance (50% of projects); or
- the Minister decided that, provided a project was carried out in a 'particular manner', it would not cause a significant impact (18% of projects).<sup>31</sup>

This represents a substantial amount of compliance and assessment work by business before finding that approval under the EPBC Act was not needed.

In 2011, the Productivity Commission recommended that the Commonwealth provide better guidance on what constitutes a significant impact on a matter of national environmental significance.<sup>28</sup> This would provide more certainty to developers in determining whether their project triggers the Act, avoiding the time and cost spent in completing unnecessary referrals.

Public maps showing the location of matters of national environmental significance within the landscape are fundamental to providing better guidance for businesses, together with the approval requirements based on the 'traffic light' approach identified in section 2.4.

In addition, the Commonwealth could use guidelines and standards to prescribe how projects could be carried out to avoid or mitigate impacts on matters of national environmental significance. As long as the project referral could demonstrate that it was complying with the relevant guideline or standard, and that the project was not going to contribute to a cumulative impact, the Minister could decide the project required no further assessment under the EPBC Act.

The government could develop sets of guidelines or standards based on best available science for:

- some or all of the matters of national environmental significance;
- classes of actions, for example, activities associated with providing water to downstream Ramsar sites; and/or
- specific business sectors, for example, residential and urban development or gas exploration.

Whilst guidelines and standards can improve certainty, developers should also respect the rights of civil society to appeal the decisions made under them.

The vast majority of developments that trigger the EPBC Act, 81% in 2018-19 (Table 1),<sup>30</sup> did so because of their potential to have a significant impact on threatened species and threatened ecological communities and/or migratory species.

The obvious starting point is to develop scientific guidelines that enable developers to more readily assess whether their project is likely to have a significant impact on threatened and migratory species. The government could also develop more specific standards that indicate acceptable approaches to avoiding or mitigating impacts on threatened and migratory species. There are a number of such science based, peer-reviewed standards which could be drawn upon.

Better guidance on these matters would mean fewer projects need to be referred to the Commonwealth, reducing the regulatory burden for business.

**Table 1. Projects triggering EPBC Act in 2018-19 based on likely impact on MNES<sup>30</sup>**

MATTER OF NATIONAL ENVIRONMENTAL SIGNIFICANCE	NUMBER OF PROJECTS TRIGGERED (%)
1 World Heritage values of a World Heritage listed property	1
2 National Heritage values of a National Heritage listed place	5
3 The ecological character of a declared <i>Ramsar</i> wetland	3
4 Listed threatened species and ecological communities	70
5 Listed migratory species	11
6 Nuclear activities with a significant impact on the environment	1
7 Commonwealth marine environment	3
8 The Great Barrier Reef Marine Park	1
9 Affects at least one water resource	5
<i>Total</i>	<i>100</i>

## 4. Conclusion

The 2016 *State of the Environment Report* documents the continuing decline in the health of Australia's environmental assets: our land, water and marine ecosystems.<sup>9</sup> Since the EPBC Act was passed by the Australian Parliament in 1999, three native Australian species have become extinct and another 17 could become extinct over the next 20 years.<sup>32, 6</sup> More than 1,800 Australian plants and animals are listed as threatened with extinction. How governments and communities manage the ever-increasing demands on Australia's natural assets and the ecosystems they are a part of, is fundamental to the future of Australia as a prosperous nation with a healthy environment.

The independent review of the EPBC Act has the potential to vastly improve environmental protection and biodiversity conservation in Australia through recommending a suite of reforms which would deliver better environmental outcomes and reduced regulatory burden and duplication for business.



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