

Policy and law reform advice to  
Humane Society International Australia



**HUMANE SOCIETY  
INTERNATIONAL**



Prepared by



# NEXT GENERATION

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## Biodiversity Laws

Best practice elements for a new Commonwealth Environment Act



## About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

***Successful environmental outcomes using the law.*** With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

***Broad environmental expertise.*** EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

***Independent and accessible services.*** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of the Environmental Defenders Offices of Australia, a national network of centres that help to protect the environment through law in their states.

## About Humane Society International

Humane Society International (HSI) is a national and international conservation and animal protection NGO that specialises in the application of domestic and international environment law. Established in Australia in 1994, HSI works to change government conservation and animal protection policies and law for the better, while striving to enforce the effective implementation of those laws.

### A grateful thanks:

Many thanks to **Nari Sahukar** and **Rachel Walmsley** at **EDO** for their tremendous efforts in drafting this next generation national biodiversity law. Many thanks also to **HSI's Evan Quartermain, Nicola Beynon, Alexia Wellbelove** and **Alistair Graham** for their long-term commitment in promoting, using and developing biodiversity law in general, and this project in particular.

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**Publishers note:**

This report, commissioned by Humane Society International (HSI) from the Environmental Defenders Office New South Wales (EDO NSW), sets out the basic requirements for the introduction of next generation national biodiversity law in Australia.

This work reflects HSI's belief in the primacy of national environmental law to safeguard our natural heritage in perpetuity, and our extremely productive 25 year association with the offices of EDO NSW.

HSI has specialised in utilising Commonwealth law to help protect threatened species and places since our inception in 1994, reflected for example in our subsequent key role in the passage of the *Environment Protection & Biodiversity Conservation Act 1999* (EPBC Act). HSI has made more use of the EPBC Act than most other NGOs in Australia, successfully listing many dozens of species, Threatened Ecological Communities, Natural Heritage Places and Key Threatening Processes – while at the same time undertaking an increasing number of public interest court actions, or contributing financially to our colleague NGO legal challenges.

But in the past decade or so, Commonwealth Governments of both political persuasions have significantly reduced the impact of a potentially very powerful law, starting in 2006 when the Coalition Government moved very damaging amendments to the Act. Legal, institutional and administrative arrangements have gradually deteriorated to such an extent, that coupled with existing and wide ministerial discretion and a complete lack of political will, effective national environmental protection has never been more in doubt.

This work follows on from proposals prepared for HSI by EDO NSW relating to the development of priority EPBC Act amendments in late 2015, and updated again for our 2017 publication, *'Threatened – An overview of HSI's Threatened Species Program & 235 suggested Commonwealth policy actions'*. The pages that follow build upon these earlier works and HSI's experiences in trying to make environmental law work in Australia, offering next generation solutions.

These proposals will be provided to all political parties operating in Canberra, while we continue discussions with EDO, other conservation organisations and the public, on progressing towards a national environmental law regime that will truly protect Australia's fast diminishing biological diversity.



Erica Martin  
Chief Executive Officer  
HSI Australia



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Co-Founder  
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## Introduction

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

The 2016 State of Environment report concluded:

*Australia's biodiversity is under increased threat and has, overall, continued to decline. All levels of Australian government have enacted legislation to protect biodiversity... However, many species and communities suffer from the cumulative impacts of multiple pressures. Most jurisdictions consider the status of threatened species to be poor and the trend to be declining. Invasive species, particularly feral animals, are unequivocally increasing the pressure they exert on Australia's biodiversity, and habitat fragmentation and degradation continue in many areas. The impacts of climate change are increasing...*

*The outlook for Australian biodiversity is generally poor, given the current overall poor status, deteriorating trends and increasing pressures. Our current investments in biodiversity management are not keeping pace with the scale and magnitude of current pressures. Resources for managing biodiversity and for limiting the impact of key pressures mostly appear inadequate to arrest the declining status of many species.*

**Biodiversity** means the variability of living things, including plants, animals, fungi and other organisms. It includes the diversity of genes, species and ecosystems that make up the web of life, and maintains resilience to environmental pressures.

Improving protection, management and resilience of biodiversity is essential for life and human society to flourish. This report examines Australia's national law and identifies a need for strengthened biodiversity laws to address the primary threats and achieve Ecologically Sustainable Development (**ESD**). Almost 30 years ago, Australia's *National Strategy for ESD* recognised this concept as:

*using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.*

The focus of this report is biodiversity, but the law reform recommendations form a key component of a larger law reform goal – to develop a next generation of national environmental laws.

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

EDO NSW has prepared this policy and law reform report in collaboration with Humane Society International Australia (**HSI**). EDO NSW has been instructed to propose a number of best practice elements necessary to protect Australia's



biodiversity – including its threatened species, ecological communities and ecosystems – under a new Environment Act.

The report draws on the experience of **EDO NSW** and the Environmental Defenders Offices of Australia, the Australian Panel of Experts in Environmental Law (**APEEL**), the Places You Love Alliance (**PYL Alliance**) of conservation groups, and **HSI** – a member of the PYL Alliance. It also draws on the independent and comprehensive 2009 review (**Hawke Review**) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), recognising that most of the Hawke Review's 71 recommendations to improve the existing national biodiversity law have not been implemented.

This report does not deal with all facets necessary for new environmental laws and natural resource management, but draws on key concepts and institutional reforms proposed by expert bodies to protect biodiversity. This aims to provide consistency between best practice biodiversity protections and the broader suite of national environmental law reform that is needed. The report does deal in some depth with important tools, including listing of threatened species and ecological communities, impact assessment, bioregional planning, environmental accounting, monitoring and reporting, community access to justice, and enforcement.

Importantly, while retaining existing Matters of National Environmental Significance in the EPBC Act, our report also proposes a suite of expanded protections under national law, to provide strategic, coordinated and efficient regulation of major threats to biodiversity, and to protect areas that Australian communities value.

**Key elements of Next Generation Biodiversity Laws proposed in this paper include:**

1. A new Australian Environment Act that elevates environmental protection and biodiversity conservation as the primary object or aim of the Act.
2. Duties on decision makers to exercise their powers to achieve the Act's aims, apply expanded principles of Ecologically Sustainable Development (**ESD**) and non-discretionary obligations to apply the tools in the Act.
3. Strong institutions to steer proactive and evidence-based environmental policy advice, development, coordination, oversight and compliance activity. Two new statutory environmental authorities would be created, separate from the Department of Environment – a National Sustainability Commission (**Sustainability Commission**) and a National Environment Protection Authority (**EPA**).
4. New triggers for federal protection. In addition to the existing matters of national environmental significance, the National EPA will assess actions that significantly affect the following:
  - the National Reserve System (terrestrial and marine protected areas)
  - Ecosystems of National Importance
  - Vulnerable ecological communities (alongside other listed species, populations, ecological communities and critical habitat)
  - Significant land-clearing activities
  - Significant greenhouse gas emissions
  - Significant water resources (beyond coal and gas project impacts)
  - Powers to declare other matters of national environment significance.

5. A dual focus on protection and recovery of threatened species and ecological communities, and on landscape-scale conservation plans and programs.
6. Simpler, timely and accountable listing processes for nationally protected matters, backed by strengthened protections.
7. A new framework and emphasis on integrated, multi-sector bioregional plans to coordinate action, protect natural and cultural heritage places, achieve biodiversity goals and ensure ecologically sustainable development.
8. A National Ecosystems Assessment to holistically identify important natural assets, their status and the 'ecosystem services' that nature provides to human society.
9. A national environmental data and monitoring program that links federal, state and territory data on biodiversity, strategic planning and environmental impact assessment to ensure strong biodiversity outcomes.
10. Strong public participation through greater community engagement, transparency and reasons for decisions.
11. Improved access to justice via merit review rights on decisions that affect the environment, open standing for the public to take breaches to Court, protective costs orders for legal proceedings in the public interest, and a modern compliance and enforcement toolkit to deter misconduct and improve public trust.
12. Greater emphasis on indigenous leadership, land management and biodiversity stewardship, including formal recognition of Indigenous Protected Areas to enable greater access to ongoing funding and legal protections.
13. A suite of international conservation protections to ensure Australian governments, companies, citizens and supply chains protect and support global biodiversity.

# Summary

*The key recommendations for inclusion in the next generation of environmental law in Australia that are needed to arrest Australia's biodiversity crisis:*

## Objects

- **An overarching object** to protect Australia's environment and biodiversity.
- **Secondary objects to support** national environmental leadership, biodiversity stewardship and fair decision-making.
- **Clear statutory duties** and mechanisms to implement and fulfil the objects.
- **A modernised framework** to achieve Ecologically Sustainable Development (ESD), including new principles to support high environmental standards, non-regression and continuous improvement, and resilience to threats.

## Commonwealth leadership

- **Retaining and expanding** Commonwealth environmental responsibilities in accordance with Constitutional Commonwealth oversight of the National Reserve System, Ecosystems of National Importance, greenhouse gas emissions, significant land clearing activities and significant water resources.
- **Coordinated natural resource** management planning, and national state and local integration of conservation goals and programs.

## Governance & institutions

- **Enforceable duties on decision-makers** to use their powers to achieve the Act's objects.
- **Clear criteria and public accountability** for key stages of decision-making.
- **A new National Sustainability Commission** – to coordinate national plans and actions, set national environmental standards, provide high-level oversight and give strategic advice and oversight to ministers, agencies and the wider community.
- **A new National EPA** – to assess, approve or refuse projects, monitor project-level compliance and take enforcement action.
- **A new system** of five-yearly National Environment and Sustainability Plans.
- **Better resourcing and foresight** for agencies, conservation programs and natural resource management, including multi-sector investment in ecosystem services, databases and new tools.

## Listing threatened species & protected matters

- **Independent Scientific and Heritage Committees** to assess and directly list threatened species, ecosystems and natural and cultural heritage places for national protection.
- **Simpler, faster nomination and listing processes** and strong, non-regressive common standards for assessment across the Commonwealth, states and territories.
- **All valid nominations** to be assessed within statutory timeframes.
- **Stronger protections** for threatened species, important populations, ecological communities and critical habitat across Australia.
- **Vulnerable ecological communities** will be a 'trigger' for impact assessment and approval (via existing Matters of National Environmental Significance).
- **Emergency listing provisions** for threatened species and ecological communities, critical habitats and national heritage places.
- **Permitting nomination and listing** of important populations of a species.
- **Applying the precautionary principle** to listing decisions.
- **Requiring decisions** affecting species and ecological communities are consistent with approved conservation advices, recovery plans, threat abatement plans and international agreements.
- **Impacts on critical habitat** must be refused and conservation agreements sought with landowners. The Environment Act will include a conservation covenanting mechanism.
- **Critical habitat** must be identified, mapped and included on the Critical Habitat Register at the time a species or ecological community is listed.
- **Extending critical habitat protections** beyond Commonwealth areas only.
- **New threat categories** to reflect international (IUCN) standards, including for near-threatened and data-deficient species and ecological communities.

- Mandatory requirements for recovery plans and threat abatement to be developed and implemented in a coordinated manner across Australia.
- Mandatory goals to be addressed in recovery plans.

### Operational provisions, programs & tools

- A trigger to guard the National Reserve System of protected areas against significant impacts.
- A trigger to identify and protect Ecosystems of National Importance, such as wetlands of national importance, Key Biodiversity Areas, climate refugia and High Conservation Value Vegetation.
- A greenhouse trigger to ensure that climate change impacts are embedded in strategic planning and that high-emission projects have their impacts thoroughly assessed against international climate goals and national commitments.
- A trigger to assess significant land-clearing proposals, and to prohibit unacceptable impacts on critical habitat and High Conservation Value Vegetation and Key Biodiversity Areas.
- A trigger to protect significant water resources against coal and gas projects and other adverse impacts, subject to the oversight of a National Water Commissioner (or the Sustainability Commission).
- A clear 'significant impact' threshold for Commonwealth assessment, with objective standards, National EPA 'impact guidelines' and cumulative impact assessment.
- Stronger referral and call-in powers for all government agencies, ministers, the National EPA, and a formal request process for community members.
- Renewed focus on strategic environmental outcomes.
- Upfront investment in bioregional plans to protect natural assets across Australia.
- Strong environmental assessment and accreditation provisions (including for fisheries) to maintain or improve environmental standards and values.
- Effective national oversight of forestry, including enforceable protections rather than exemptions under inadequate and outdated Regional Forest Agreements.
- A National Ecosystems Assessment to rapidly identify key natural assets and ecosystem services that deserve national recognition and monitoring.
- A National Biodiversity Conservation & Investment Strategy that pools resources and links the tools above with national, state and regional conservation efforts.

### Public participation & access to justice

- Strong and iterative community engagement and public participation provisions at all key stages of the Act, from strategic planning to project assessment and compliance monitoring, reporting and enforcement.
- Rights for interested community members to seek merits review of key decisions under the Environment Act (such as when a nominated entity or place is declined for listing; on the adequacy of an approved recovery plan; or whether a proposed action requires Commonwealth assessment).
- Easily accessible, timely public information on actions and decisions.
- 'Open standing' for the community to seek judicial review of legal errors.
- 'Open standing' to pursue civil enforcement for a breach of the Act or regulations.
- Protective costs orders for legal actions brought in the public interest.

### Indigenous knowledge, engagement & leadership

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

## Outcomes monitoring, reporting & improvement

- Independent Sustainability Commission reporting to be tabled in Parliament on the State of the Environment and National Sustainability Outcomes.
- Requiring Commonwealth, State and Territory governments to respond to State of the Environment and National Sustainability Outcomes reports.
- A set of National Environmental Accounts that track natural assets and their extent, condition and threat status over time.
- An online monitoring and reporting hub for comparative analysis; easy public and professional access to public registers; and transparent, up-to-date information about environmental outcomes across Australia.
- Mandatory public inquiries into the extinction of threatened species.

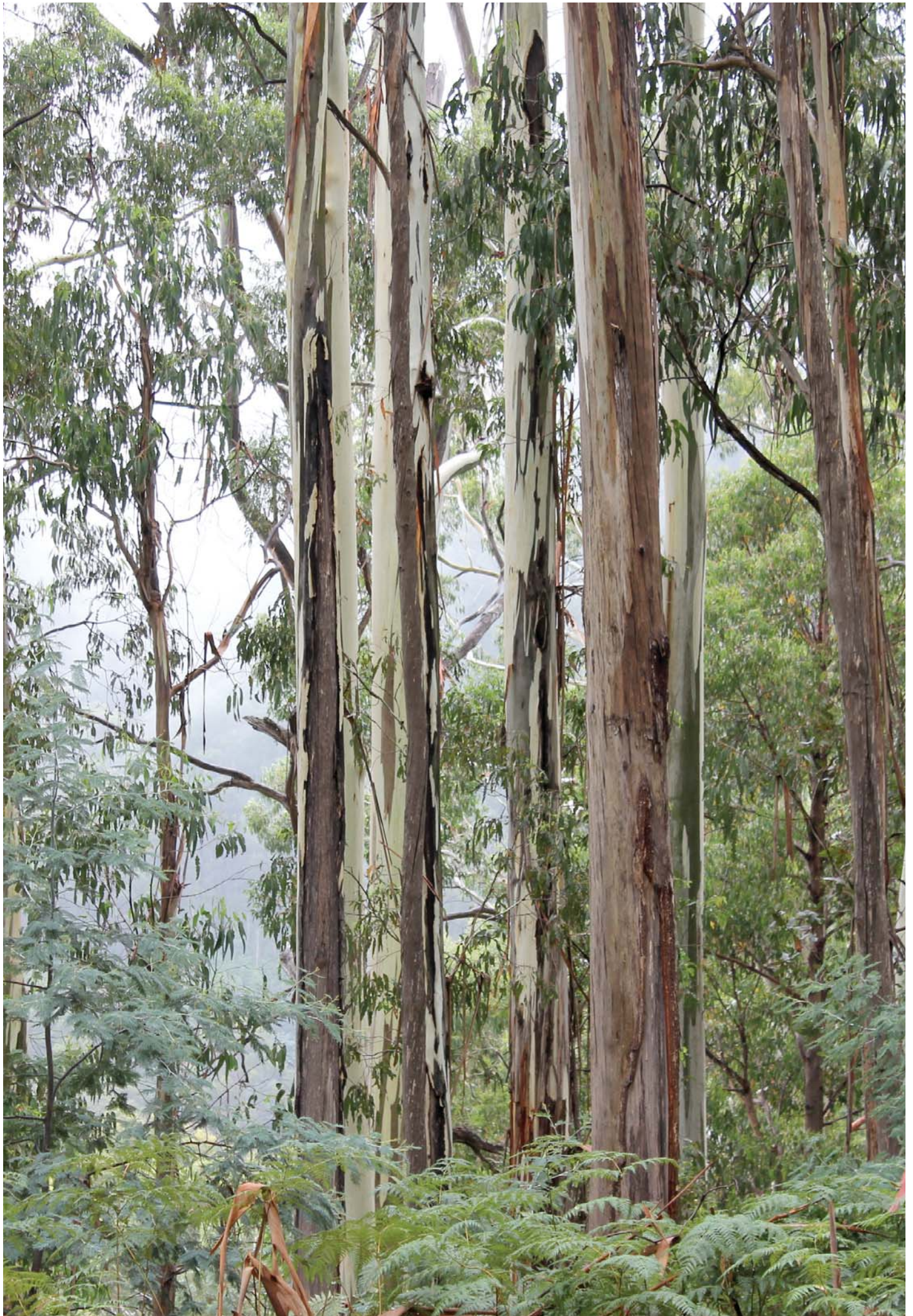
## Compliance & enforcement

- A consolidated part on compliance and enforcement, penalties and tools.
- Explicit powers for a new National EPA as chief environmental regulator.
- A comprehensive suite of investigative powers for authorised officers.
- Open standing for the community to seek judicial review of erroneous decisions, civil enforcement of breaches, and performance of non-discretionary duties by the Minister or other decision-makers under the Act.
- A full range of best-practice criminal, civil and administrative sanctions.
- Harmonised federal-state regulation based on the most stringent standards and clearly assigned responsibilities.
- Cost recovery and environmental funding provisions.
- Adaptive management and ability to update approval conditions over time.

## International obligations & transboundary protections

- Applying Environment Act offences to the actions of Australian citizens and corporations that affect overseas threatened species and protected areas, and requiring Australian companies to comply with foreign conservation laws.
- Requiring the Australian Government to fulfil its commitments under international conservation treaties, including Sustainability Commission advice and environmental impact assessment of government proposals.
- Requiring earlier community engagement and greater public scrutiny of trade agreements and negotiations.
- Requiring that government laws and actions that may affect international responsibilities are to be accompanied by a Statement of Compatibility (akin to Commonwealth human rights legislation).
- Enabling the automatic listing and protection of overseas threatened species, ecological communities, critical habitats and protected areas.
- Establish a REDD+ Fund to support scientifically credible forest and land carbon stewardship in the region (particularly Indonesia) linked to Article 5 of the Paris Agreement.
- Establishing a Biodiversity Conservation Aid program that supports technology transfer and access between Governments and helps to meet Australia's obligations under the Convention on Biological Diversity.
- Establishing a clearing house for international technical and scientific cooperation to support global biodiversity protection, and that helps to meet Australia's obligations under the Convention on Biological Diversity.
- Establishing an initial \$10m Asia-Pacific regional biodiversity program, providing a competitive grants system for conservation NGOs in the region.
- Becoming a financial member of the Critical Ecosystems Partnership Fund.
- Prohibiting the import and sale of palm oil that has involved 'unsustainable palm oil production'.
- Improved labelling of palm oil and seafood products under the Australian Consumer Law.
- Strengthening supply chain protections, enforcement actions and advisory functions in the Illegal Logging Prohibition Act 2012 (Cth).





## A. OBJECTS FOR A NEW AUSTRALIAN ENVIRONMENT ACT

A new Environment Act for the Commonwealth of Australia should provide for:

1. **A clear overarching object to protect Australia's environment**
2. **Secondary objects**
3. **Clear mechanisms to implement the objects**
4. **A modernised framework to achieve Ecologically Sustainable Development (ESD).**

### 1. Overarching object

The new Environment Act should include a primary object to the following effect:

*The primary aim of this Act is to conserve and protect Australia's environment, its natural heritage and biological diversity including genes, species and ecosystems, its land and waters, and the life-supporting functions they provide.<sup>2</sup>*

This elevates the environment as the primary object of the Act. It ensures biodiversity and ecological integrity are a fundamental consideration in decision-making. Social, economic and equitable issues will continue to be taken account in decision-making as integrated but secondary considerations, and consistently with the principles of Ecologically Sustainable Development (which will be defined and updated in the Act).

### 2. Secondary objects

The Act should also include a limited number of secondary objects, including with regard to protecting biodiversity and ecological integrity. For example:<sup>3</sup>

- (a) To provide **national leadership** and partnership on the environment and sustainability, and to achieve **ecologically sustainable development**;
- (b) **To recover, prevent the extinction or further endangerment** of Australian plants, animals and their habitats, and to **increase the resilience** of native species and ecosystems to key threatening processes;
- (c) To ensure **fair and efficient decision-making**; **government accountability**; early and ongoing **community participation** in decisions that affect the environment and future generations; and **improved public transparency**, understanding and oversight of such decisions and their outcomes;
- (d) To recognise **Aboriginal and Torres Strait Islander** peoples' knowledge of Country, and stewardship of its landscapes, ecosystems, plants and animals; to foster the involvement of these First Australians in land management; and expand the ongoing and consensual use of traditional ecological knowledge across Australia's landscapes;
- (e) To fulfil Australia's **international environmental obligations** and responsibilities, in particular to take all steps necessary and appropriate to

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<sup>2</sup> This proposal and prioritisation is consistent with recommendations of the *Report of the Independent review of the EPBC Act 1999 (2009) (Hawke Review)*, at 1.49-1.50:

*The primary object of this Act is to protect the environment, through the conservation of ecological integrity and nationally important biological diversity and heritage.*

<sup>3</sup> The Places You Love Alliance notes four essential principles for national environmental laws:

(1) *National leadership*. (2) *Central role for community*. (3) *Trusted institutions*. (4) *Strong environmental outcomes*.

achieve the purposes of the following treaties, conventions and their subsidiary instruments (among others):<sup>4</sup>

- (i) the World Heritage Convention;<sup>5</sup>
  - (ii) the Convention on Biological Diversity;
  - (iii) the Ramsar Convention on Wetlands of International Importance;
  - (iv) the Bonn Convention on the Conservation of Migratory Species of Wild Animals;
  - (v) the Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**);
  - (vi) the United Nations Declaration on the Rights of Indigenous Peoples;
  - (vii) the United Nations Framework Convention on Climate Change (as applicable to emissions reduction and carbon management under the Act); and
  - (viii) special bilateral or multilateral conservation agreements (including agreements with Japan, China and the Republic of Korea to protect migratory birds in danger of extinction).
- (f) To recognise and promote the **intrinsic importance of the environment** and the value of **ecosystem services** to human society, individual health and wellbeing.

### **3. Achieving the objects in practice**

The Act should also include an introductory section that specifies how the objects are to be achieved. For example:

The objects of this Act are to be achieved by:

- (a) **requiring Ministers and government agencies** to:
  - i) exercise their powers and functions under this Act to achieve the Act's aims;
  - ii) maintain or improve the environmental and heritage values and ecological character of protected matters under the Act;<sup>6</sup>
  - iii) make decisions in accordance with the principles of Ecologically Sustainable Development (**ESD principles** – outlined at 4 below<sup>7</sup>);
- (b) **partnering with other levels of government and participants across all sectors** to achieve environmental goals and apply ESD principles in decisions and actions;
- (c) **listing and protection of matters of national environmental significance** (or a similar term), and the effective, mandatory implementation of **recovery planning, threat abatement planning and bioregional planning**;<sup>8</sup>
- (d) **establishing independent institutions** to gather evidence, provide oversight of national environmental outcomes and provide advice to decision-makers;

<sup>4</sup> See for example, Endangered Species Act (United States) 16 USC S 1531, s. 2

<sup>5</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage* (Paris, 1972).

<sup>6</sup> Ecological character is used in the Ramsar Convention on Wetlands, for example. It refers to the combination of ecosystem components, processes, benefits and services that characterise a wetland at a given point in time (Ramsar Convention 2005a, Resolution IX.1 Annex A).

<sup>7</sup> The meaning of ESD should begin with and modernise the accepted definitions in existing law and policy (see 'A modernised framework for ESD' below).

<sup>8</sup> In particular to achieve recovery, prevent extinction, and increase resilience.



- (e) **coordinating all levels of government** to develop national environmental goals, standards, actions and decision-making, including cooperation on bioregional planning, in the interests of strong environmental outcomes;
- (f) **applying the principle of non-regression** to environmental goals and protections, and **continuous improvement** in environmental standards and management over time;<sup>9</sup>
- (g) **maintaining, improving and measuring Australia's natural wealth**, including through periodic national ecosystem assessments and a system of national environmental accounts; and
- (h) ensuring Australia's agencies, people and corporations act as **responsible global citizens** with respect to environmental protection in Australia and overseas.<sup>10</sup>

#### **4. Modernised framework for Ecologically Sustainable Development (ESD)**

For the past three decades, *sustainable development* has commonly been defined by the international community as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. In Australia this became known as **Ecologically Sustainable Development (ESD)**, namely:

*'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.<sup>11</sup>*

Under the EPBC Act and several state laws, ESD is to be achieved by the *effective integration of short and long-term environmental, social, equitable and economic factors* in decision-making, along with other important safeguards together known as ESD principles. An effective ESD framework cannot be used simply as a 'balance' or 'trade off' exercise. Rather it recognises that long-term environmental health and socio-economic outcomes are deeply interconnected.<sup>12</sup>

The Australian Panel of Experts on Environmental Law (**APEEL**) has called for a national collaborative discussion to inform the next generation of ESD or its successor.<sup>13</sup> Drawing on these definitions and sources, we provide a starting point for next generation ESD principles in a new Australian Environment Act below.

Achieving ESD requires the effective integration of short- and long-term environmental, economic, social, and equitable considerations, including through the following principles (**ESD principles**) in public and private sector decision-making:

- Taking *preventative* actions against likely harm to the environment and human health (**prevention of harm**).

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<sup>9</sup> Non-regression and continuous improvement are proposed as additional ESD principles, but could be expressed separately in the preliminary part of the Act and its objects, as shown here.

<sup>10</sup> International protections are dealt with in Part J of this report.

<sup>11</sup> Australian Government, *National Strategy for ESD*, 'What is Ecologically Sustainable Development?' at <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1#WIESD>.

<sup>12</sup> As the State of the Environment report 2011 put it, 'Australians can no longer afford to see themselves as separate from the environment.'

<sup>13</sup> APEEL, *Blueprint for the Next Generation of Australian Environmental Law* (2017) at [www.apeel.org.au](http://www.apeel.org.au).

- Taking *precautionary* actions against harm that would be serious or irreversible, but where scientific uncertainty remains about that harm; and engaging transparently with the risks of potential alternatives (**precautionary principle**).
- The **present generation have an obligation to ensure:**
  - that the health, diversity and productivity of the environment are *maintained or enhanced* for the benefit of future generations (**intergenerational equity**), and
  - that environmental costs, benefits and outcomes are borne **equitably** across society (**intra-generational equity**).
- Ensuring that *biodiversity and ecological integrity* are a *fundamental consideration* in decision-making, including by preventing, avoiding and minimising actions that contribute to the risk of extinction (**biodiversity principle**).
- Ensuring that the true value of environmental assets is accounted for in decision-making – including intrinsic values, cultural values and the value of present and future ecosystem services provided to humans by nature (**environmental values principle**); and
- That those responsible for generating waste or causing environmental degradation bear the costs of safely removing or disposing of that waste, or repairing that degradation (**polluter pays principle**).

New and additional ESD principles should be considered and adopted, including for *high levels of environmental protection, non-regression* of standards and *resilience*:

- **Achieving high levels of environmental protection**, including by requiring:
  - the use of best available scientific and commercial information;
  - continuous improvement of environmental standards, and
  - the use of best available techniques for environmental management.
- Non-regression in environmental goals, standards, laws, policies and protections (**non-regression principle**).
- Strengthening the resilience of biodiversity and natural systems to climate change and other human-induced pressures on the environment (**resilience principle**).

Ecologically Sustainable Development will therefore remain a fundamental reference point in the Environment Act, as it should be in decisions under the EPBC Act. Embedding a modernised set of ESD principles as outlined above will ensure that decision-making is consistent with maintaining and strengthening the environmental systems that operate on a local, regional, national or global level, including to support the diversity of life on Earth.

**To recap, key elements of Next Generation Biodiversity Laws in this part (Objects for a new Australian Environment Act) include:**

- **An overarching object to protect Australia’s environment and biodiversity.**
- **Secondary objects to support national environmental leadership, biodiversity stewardship and fair decision-making.**
- **Clear statutory duties and mechanisms to implement and fulfil the objects.**
- **A modernised framework to achieve Ecologically Sustainable Development (ESD), including new principles to support high environmental standards, non-regression and continuous improvement, and resilience to threats.**

## B. COMMONWEALTH LEADERSHIP ON BIODIVERSITY PROTECTION

The new Environment Act will ensure that the Commonwealth has strong leadership, oversight, approval and coordination roles.

The Act should set out key Commonwealth responsibilities and areas of interest – or prescribe a mechanism to prescribe and expand these. For example, APEEL has proposed a Commonwealth Statement of Environmental Interests based on a new and nationally agreed division of responsibilities.

This part of the report gives an overview of Commonwealth responsibility at four levels:

1. **Constitutional powers**
2. **Responsibility for biodiversity protection**
3. **Existing and expanded matters of Commonwealth responsibility**
4. **National integration.**

### 1. Constitutional powers

A range of prominent legal experts including the members of APEEL are in broad agreement that the Constitution provides significant scope to widen Commonwealth responsibility in environmental matters.<sup>14</sup>

Relevant heads of power include external affairs, the corporations power, and trade and commerce with other countries and between the states.<sup>15</sup> For example, the external affairs power is used to implement Australia's obligations and commitments under the Convention on Biological Diversity and other international agreements (see A.2 above).<sup>16</sup> Options also exist to refer state powers to the Commonwealth.

Taxation and the power to grant financial assistance to the states also provide important Commonwealth leverage to resource and implement environmental goals and actions.<sup>17</sup>

Finally, APEEL notes that if necessary 'the Commonwealth could override (or "pre-empt") State and Territory environmental laws if it wishes, making use of section 109 of the Australian Constitution.'<sup>18</sup>

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<sup>14</sup> See for example, Australian Panel of Experts in Environmental Law (APEEL). 'Constitutional authority of the Australian Government to make next generation environmental laws', in APEEL, Environmental Governance (2017), Technical Paper 2, pp 13-17.

<sup>15</sup> Australian Constitution, subsections 51(xxix), 51(xx) and 51(i) respectively.

<sup>16</sup> To rely on the external affairs power, a law must be reasonably capable of being considered appropriate and adaptable to fulfilling the obligations and benefits of an international instrument. See for example *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1 (Tasmanian Dams case); see also *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 (Industrial Relations case) at 34.

<sup>17</sup> Australian Constitution, subsection 51(ii) and section 96 respectively.

<sup>18</sup> Australian Panel of Experts in Environmental Law, 'Constitutional authority of the Australian Government to make next generation environmental laws', 2017.

## **2. Responsibility for biodiversity protection**

In order to conserve and protect biodiversity in accordance with the legislated objects, the Environment Act will make clear that Commonwealth interests include:

- **Retaining federal responsibility** for existing matters of national environmental significance – using this or new terminology<sup>19</sup> (see **B.3**);
- **Expanding federal responsibilities** to include the following new matters (see **E.1**):
  - The National Reserve System (of protected areas)
  - Ecosystems of National Importance<sup>20</sup>
  - Vulnerable ecological communities (offences will now apply)
  - Significant land-clearing activities
  - Significant greenhouse gas emissions
  - Significant water resources (expanded) and
  - Powers to declare other matters of national environmental significance.
- **Avoiding and mitigating development impacts** on listed Matters of National Environmental Significance (see **E.2**);
- **Strengthening biodiversity protections** for threatened species and ecological communities, including for **critical habitat** (see **D.4**);
- **Setting national environmental goals** and standards (see **C.4**), indicators and reporting in relation to biodiversity and ecological integrity of plants, animals, ecosystems and protected areas (see **Part H**);
- **Nationally coordinated landscape-scale protection** and natural resource management, including via:
  - **bioregional planning** and **strategic environmental assessment** (see **E.4** and **E.5**);
  - **joint implementation of mandatory key threat abatement, recovery plans** for single or multiple species and ecological communities, and a **National Biodiversity Conservation and Investment Strategy** across all levels of government (see **D.6** and **E.7**).
- Leading, coordinating and fulfilling Australia's **international obligations**, including under multilateral environmental agreements (see **Part J**).

For upfront context, below we outline existing and expanded matters of national environmental significance (or Commonwealth responsibility); and examples of the Commonwealth's renewed national integration role.

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<sup>19</sup> For example, Commonwealth environment interests, nationally protected matters, or national environmental priorities.

<sup>20</sup> See for example, Birdlife Australia, 'Key Biodiversity Areas', <http://www.birdlife.org.au/projects/KBA>.

### **3. Matters of Commonwealth responsibility – Existing and expanded**

The new Act would retain federal responsibility for existing Matters of National Environmental Significance – using this or similar terminology (for example, nationally protected matters, national environmental priorities or Commonwealth environmental interests<sup>21</sup>). The Act would also expand federal responsibility to additional biodiversity related matters.

**Existing Matters of National Environmental Significance** under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) include:

1. Nationally threatened species (vulnerable, endangered and critically endangered)
2. Critically endangered and endangered ecological communities
3. Migratory species
4. World Heritage Areas
5. National Heritage Places
6. Wetlands of international significance (Ramsar wetlands)
7. Great Barrier Reef Marine Park
8. Nuclear actions
9. Water resources (impacts of coal-mining and coal seam gas projects)
10. Commonwealth areas (land and waters).

**Additional Matters of National Environmental Significance** (or an equivalent term) would include federal protection for:

11. The **National Reserve System** of protected areas (including national parks, reserves, covenanted private lands and Indigenous Protected Areas)
12. **Ecosystems of National Importance** (including High Conservation Value Vegetation<sup>22</sup>, nationally important wetlands, biodiversity hotspots, Key Biodiversity Areas<sup>23</sup> and climate refugia)
13. **Vulnerable ecological communities** (as an extension of the existing trigger for endangered and critically endangered ecological communities)
14. Regulating **significant land-clearing** (identified by scale, sensitivity or protected area prohibitions)
15. Regulating **significant greenhouse gas emissions** (with reference to project type and scale, international and domestic commitments or targets)
16. A wider range of **significant water resources** (beyond coal and gas impacts)

**Overseas species and ecosystems** protected by bilateral and multilateral international agreements would also be protected (to enable conservation funding and regulate supply chains and actions of Australian corporations overseas).

For further details see **Part E, New triggers, impact assessments and strategic tools** and **Part J, International obligations and transboundary protections**.

Finally, the new Act needs mechanisms to better hold the Commonwealth to account for its responsibilities, and to empower Ministers and decision-makers to fulfil them. For further details see **Part C, Governance and Institutions**.

<sup>21</sup> See for example Australian Panel of Experts on Environmental Law, *Environmental Governance* (2017), Technical Paper 2, at: <http://apeel.org.au/papers/>.

<sup>22</sup> See for example, High Conservation Values Network, at <https://www.hcvnetwork.org/about-hcvf>.

<sup>23</sup> See for example, Birdlife Australia, 'Key Biodiversity Areas', <http://www.birdlife.org.au/projects/KBA>.

#### 4. National integration

*The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.*

*– State of the Environment Report 2011*

The 2016 State of the Environment Report outlines six key barriers to effective national management of the environment.<sup>24</sup> None of these barriers can be overcome without national leadership. The new Act will need to confront these challenges head-on:

- *lack of an overarching national policy that establishes a clear vision for the protection and sustainable management of Australia's environment to the year 2050...*,<sup>25</sup>
- *poor collaboration and coordination of policies, decisions and management arrangements across sectors and between managers (public and private)*
- *a lack of follow-through from policy to action*
- *inadequacy of data and long-term monitoring, which interferes with our ability to apply effective policy and management, and establish adequate early warning of threats. For example, our understanding of even the most iconic and well-known species in Australia is often patchy, and sufficient knowledge of ecosystem processes that maintain the 99 per cent of species that account for Australia's biodiversity is missing*
- *insufficient resources for environmental management and restoration*
- *inadequate understanding and capacity to identify and measure cumulative impacts, which reduces the potential for coordinated approaches to their management.*

An essential part of Commonwealth leadership in next generation biodiversity laws will involve coordinated natural resource management (**NRM**) planning and the integration of conservation goals and programs, from national to state/territory and local level.

We provide examples below relevant to biodiversity, threatened species and ecological communities, with more detailed proposals outlined in later parts:

- The new Act will require the National Sustainability Commission to consult on and set **national environmental goals** to achieve positive outcomes and ensure non-regression of environmental standards and protections. This will include developing **National Environment and Sustainability Plans** (see **C.4** below).
- Clear requirements, processes and oversight to **integrate national environmental goals and standards** into state and territory planning, environmental and NRM laws.
- Coordinated **bioregional planning** will improve consistency of NRM efforts and planning decisions between different levels of government, and address cumulative impacts (see **E.4**).
- **Strengthened mandatory environmental impact assessment processes** will focus on avoiding harm to threatened species, ecological communities and

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<sup>24</sup> *State of the Environment 2016* Report to the Australian Government, 'Overview', at <https://soe.environment.gov.au/theme/overview>.

<sup>25</sup> ... which is supported by

- *specific action programs and policy to preserve and, where necessary, restore natural capital and our unique environments, taking into account the need to adapt to climate change*
- *complementary policy and strengthened legislative frameworks at the national, state and territory levels*
- *efficient, collaborative and complementary planning and decision-making processes across all levels of government, with clear lines of accountability.*

important natural assets – including **Ecosystems of National Importance** that need not be ‘threatened’ with extinction (see **D.4**, **E.1** and **E.2**).

- The Sustainability Commission will advise government on goals and standards, monitor and report on state and agency performance, and provide regular State of the Environment and Sustainability Outcomes reports to Parliament (see **H.1**).

**To recap, key elements of Next Generation Biodiversity Laws in this part (Commonwealth leadership on biodiversity protection) include:**

- **Retaining and expanding Commonwealth environmental responsibilities in accordance with Constitutional powers.**
- **New Commonwealth oversight of the National Reserve System, Ecosystems of National Importance, greenhouse gas emissions, significant land clearing activities and significant water resources.**
- **Coordinated natural resource management planning, and national state and local integration of conservation goals and programs.**



## C. GOVERNANCE & INSTITUTIONS

Public trust in government's capacity and integrity to implement best-practice biodiversity laws requires five elements:

1. **Duties on decision-makers**
2. **Clear decision-making criteria and accountability**
3. **Independent, trusted institutions**
4. **National environmental goals, plans and standards**
5. **Adequate resourcing.**

This Part addresses each element with particular regard to biodiversity protection.

### 1. Duties on decision-makers

A significant limitation of the current EPBC Act is the widely discretionary ways it can be used (or not used) to protect biodiversity. For example:

- threshold-setting (what is a *controlled action* or a *significant impact*);
- decisions to approve significant impacts with conditions, or to refuse them;
- the pace of listing protected areas and threatened species, ecological communities and national heritage places; and
- prioritisation of resources (to keep lists up to date, to simplify regulation, to assess and approve applications, to issue licences or to monitor compliance).

High levels of discretion, and high levels of control and direction of ministers, mean there is often little the community (or bureaucracy) can do to address poor implementation. This problem is punctuated by relatively frequent changes of ministers and governments, and a lack of institutional knowledge and continuity.

It is therefore important that the new Act includes mechanisms to better hold the Commonwealth to account for its responsibilities, and to empower Ministers and decision-makers to fulfil them. As noted in **Part A**, the Act would impose duties on ministers and agencies<sup>26</sup> to:

- exercise their powers, functions and decisions under this Act to achieve the Act's objects;
- maintain or improve the environmental values and ecological character of protected matters under the Act; and
- make decisions in accordance with ESD principles.

In addition the Environment Act will include enforceable or 'non-discretionary' duties to implement and apply the Act's decision-making tools. Specific obligations would ensure key biodiversity protections are utilised, directed to achieve their aims, and are effective.

Specific statutory obligations to be given effect in the Act include, for example:<sup>27</sup>

<sup>26</sup> Such as the Sustainability Commission, Environment Department, National EPA and Scientific Committee.

<sup>27</sup> Where duties relate to functions or powers held by other entities, such as the Sustainability Commission, Scientific Committee or National EPA, the duty could be placed on those entities directly or on the Minister to provide a level of resourcing reasonably required for the entity to fulfil that function or power.



- ensuring that mandatory recovery plans and threat abatement plans are established within legislative timeframes, maintained in force and up to date;
- requiring that critical habitat is designated on a Critical Habitat Register at the time a species is listed;
- requiring that lists of threatened species and ecological communities are kept up-to-date, including by ensuring sufficient resources to listing Committees and relevant sections of the Environment Department;
- requiring all threatened ecological communities to be identified and listed within five years of the Act's commencement, and be kept up-to-date thereafter;
- preparing and designating a list of Ecosystems of National Importance, namely areas of principal importance to maintaining and enhancing Australia's biodiversity and identified in accordance with criteria in the Act and regulation;
- duties on all agencies to refer to the national EPA any actions ensuring that bioregional plans are established through negotiation with other levels of government and/or Commonwealth declaration and complied with;
- ensuring a National Ecosystems Assessment is conducted, with an interim and final report within five years, and periodically as specified thereafter;
- establishing and maintaining a system of national (or regional) environmental accounts.

There are various examples of enforceable, statutory environmental duties overseas:

- The US *Endangered Species Act* (1973) places non-discretionary duties on the Secretary and federal agencies, such as requiring that critical habitat is designated at the time a species is listed; and that federal agencies consult the Fish and Wildlife Service if their actions may affect threatened species. The public can bring Court proceedings for failure to fulfil those duties.<sup>28</sup>
- In the separate context of pollution law, the United States Environmental Protection Authority (**US EPA**) is bound by its own legislation to regulate certain pollutants and set standards for them. Failure to fulfil these duties in the past has exposed the EPA to litigation.<sup>29</sup>
- The *Environment (Wales) Act 2016* (s. 7) places a duty on Welsh Ministers to: 'prepare and publish a list of the living organisms and types of habitat which in their opinion are of principal importance to maintaining and enhancing biodiversity' in Wales (in consultation with Natural Resources Wales). The Ministers must also 'take all reasonable steps to maintain and enhance the living organisms and types of habitat included in any list'.

Next generation biodiversity laws will adopt similar duties and accountabilities for decision-makers under the Act.

These duties are separate from a general duty to avoid harm that could be required of landholders, developers and government agencies (which are beyond the scope of this report).<sup>30</sup>

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<sup>28</sup> See US Code 16 U.S.C. § 1540(g): <https://www.law.cornell.edu/uscode/text/16/chapter-35>.

<sup>29</sup> *Massachusetts et al., Petitioners v. Environmental Protection Authority et al.* 529 U.S. 497 (2007).

<sup>30</sup> But see APEEL, *Blueprint for the next generation of Australian environmental law* (2017), idea 4.

## **2. Clear decision-making criteria and accountability**

In addition to enforceable duties, best-practice biodiversity laws would ensure that key decisions are made in accordance with clear criteria.

First, this can be done upfront by requiring decision-makers to exercise their functions to achieve the Act's objects (see **Part A**).

Second, the Act must identify key decision-making points in the legislative framework (such as listing decisions, critical habitat identification, thresholds for 'controlled actions',<sup>31</sup> recovery planning and bioregional planning) and the objective criteria that decision-makers must apply to them. This means:

- framing functions and powers as obligations rather than discretions (for example, *must* establish and implement recovery plans for listed species, rather than *may* establish...);<sup>32</sup>
- setting clear and concise lists of matters that *must* be taken into account in a decision, and/or matters that *must not* be taken into account (for example, only scientific considerations should determine whether a species is listed as threatened with extinction);
- requiring objective evidence (such as baseline data) and arms-length advice;
- maximising reliance on objective facts, rather than the decision-maker's subjective opinion or a state of satisfaction (for example, as to a 'significant impact'); and
- providing that certain decisions or processes are undertaken by an independent expert body rather than the Environment Minister (for example, threatened species listing decisions would be made by the independent Scientific Committee; heritage areas would be listed by the Australian Heritage Committee controlled action decisions would be made by the National EPA).

Third, the Act should provide public and independent oversight once a decision is made by:

- maximising transparency and community input prior to the decision;
- requiring statements of reasons for decisions (for example, 'controlled action' decisions and determinations to approve or refuse a controlled action);<sup>33</sup> and
- providing public access to the courts or independent tribunals for merits review and judicial review of government decisions (for example, listing, permitting and controlled action decisions) and civil enforcement of breaches (including to require decision-makers to fulfil non-discretionary duties as noted above).<sup>34</sup>

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<sup>31</sup> For example, the threshold or trigger for the EPBC Act to apply is a 'significant impact' on a listed matter.

<sup>32</sup> See for example the *Endangered Species Act* (US) s. 4(f) (16 U.S.C. § 1533): 'The Secretary shall develop and implement plans [recovery plans] for the conservation and survival of endangered species and threatened species listed... unless he [sic] finds that such a plan will not promote the conservation of the species'.

<sup>33</sup> The level of detail in statements of reasons should be proportionate to the decision's significance. For example, greater detail should be required where a decision-maker departs from expert advice.

<sup>34</sup> See *Endangered Species Act* (US) 16 U.S.C. § 1540(g):  
<https://www.law.cornell.edu/uscode/text/16/chapter-35>.

### 3. Independent, trusted institutions

To overcome existing barriers and effectively address challenges, the next generation of biodiversity laws will require new institutions for effective implementation and administration of the new laws. New laws will therefore need to establish trusted institutions to provide independent advice to decision-makers on, and oversight of, national biodiversity outcomes.

In summary, new and re-invigorated institutions to support the Act are as follows:

- **National Sustainability Commission:** to develop and oversee national environmental goals, strategies, plans and standards to achieve ESD; and gather evidence on environmental conditions and trends to inform decisions and improve outcomes over time.
- **National EPA:** the new Commonwealth assessment, approval and enforcement body for activities that affect Matters of National Environmental Significance.
- **Independent Scientific and Heritage Committees:** to assess and directly list nationally threatened species, important populations, ecological communities, Ecosystems of National Importance, heritage places and other Commonwealth protected matters on the basis of clear scientific criteria.
- **Advisory councils and expert taskforces:** established where required to support the Sustainability Commission, Scientific Committee and the National EPA.

The key institutions are outlined in turn.

#### **National Sustainability Commission**

First, we support establishing a statutory **National Sustainability Commission** responsible for developing national plans, strategies and standards, as well as strategic oversight, advisory and reporting functions. The Commission would have its own sizable staff and budget, advise the Environment Minister, the Department and other institutions on national priorities, be independent of departmental or ministerial direction, and report annually to the Parliament on the state of the environment and sustainability (that is, the achievement of ESD).<sup>35</sup>

Detailed structure and governance of the Sustainability Commission would be set out in the Act and regulations. We propose that the Act would require at least one full-time Commissioner and independent public sector staff to be appointed from commencement of the Act. The Act would allow multiple commissioners to be appointed to lead on specific areas and chair expert advisory panels, such as on biodiversity, water, Indigenous traditional knowledge, youth and future generations.<sup>36</sup>

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<sup>35</sup> For example the Commission could regularly report to the Australian Parliament via *State of the Environment* and *National Sustainability Reports*, with more frequent annual statements, inquiries and appearances before parliamentary inquiries.

<sup>36</sup> For example, drawing on the Productivity Commission model of multiple Commissioners, positions could include the following:

- Biodiversity Commissioner (scientific committee oversight, bioregional planning etc).
- Sustainability Commissioner (urban settlements, infrastructure, waste, building standards).
- Climate Commissioner (to track carbon budgets, mitigation and adaptation law and policy).
- Water Commissioner, in lieu of a re-established National Water Commission (National Water Initiative; strategic water resources beyond the Murray-Darling Basin; oversight of Wild Rivers).
- Indigenous Commissioner (leadership, engagement, customary rights to biodiversity, traditional ecological knowledge, Indigenous Protected Areas, cultural heritage law and policy).

Biodiversity oversight and reporting would be a major role for the Commission, including long-term reporting on indicators for recovery of threatened species and ecological communities, and key threat abatement. For this purpose, a statutory Biodiversity Commissioner should be appointed to oversee and advise on:

- the Commonwealth's independent Scientific Committee;
- listing processes and common assessment method implementation;
- bioregional planning, recovery plan implementation and threat abatement;
- bilateral assessment agreements; and
- review/audit of biodiversity-related impact assessments by the National EPA.

### **National EPA**

Second, the new Act would support greater independence and public trust by establishing a National EPA at arms-length from the Department of Environment (the Department would still be responsible for a variety of policy development and program implementation).

In brief, the National EPA would:

- be governed by an independent board and headed by a separate chief regulator;
- undertake environmental impact assessment of projects and planning proposals that affect matters of national environmental significance under the new Act;
- coordinate environmental management standards (for example, replacing the role of the ministerial group currently known as the National Environmental Protection Council or Authority)
- replace National Environmental Protection Measures and related legislation with more efficient, enforceable and coordinated national standards, based on continuous improvement and best available techniques;<sup>37</sup>
- include a separate unit responsible for post-approval project and plan compliance, audits, monitoring and reporting.

### **Independent Scientific and Heritage Committees**

An expanded independent **Scientific Committee** would be empowered to assess and list nationally threatened species and important populations, ecological communities and ecosystems of national significance. A separate **Australian Heritage Committee** would assess nominations and list heritage places and sites.

Both Committees will provide independent advice to Ministers, the Sustainability Commission, the Environment Department and other decision-makers – including on recovery planning, key threatening processes, management plans and actions that positively or negatively affect Australia's environment and heritage.

**Part D** explores these listing processes in detail.

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- Rural Lands Commissioner (native vegetation, soil and water quality, invasive species management, farm certification standards).
  - Commissioner for Future Generations and Young People (intergenerational equity).

<sup>37</sup> Alternatively if the Sustainability Commission is appointed to develop and coordinate national standards, the national EPA would be closely consulted.

## Advisory councils and taskforces

Advisory councils and taskforces will be established to support these institutions. For example an Indigenous Advisory Council (see **G.1**) and Biodiversity Expert Taskforce to assist with bioregional planning and the National Biodiversity Conservation Investment Strategy (see **E.7**).

## Indicative summary of institutional roles under new Environment Act

### ENVIRONMENT MINISTER

- Can 'call in' actions for national EPA assessment under criteria
- Approves National Environment and Sustainability Plan
- Statutory duties to use powers and functions to achieve the Act's aims, apply conservation tools etc.
- Approves recovery plans and threat abatement plans
- Responsible for international negotiations at multilateral environment agreements

### INDEPENDENT ENVIRONMENT COMMISSION

- Develops National Environment and Sustainability Plan
- Develops Bioregional Plans
- Has mandate to negotiate with and direct all levels of government re Plans
- Statutory duties to use powers and functions to achieve the Act's aims, apply conservation tools etc.
- Monitors trends
- Reports on indicators
- Ensures recovery plans, threat abatement plans, conservation advice and threat mitigation directives are integrated into bioregional plans

### INDEPENDENT SCIENTIFIC COMMITTEE

- Lists threatened species, ecological communities, key threats, ecosystems of national importance as objective scientific decisions
- Writes conservation advice for each listing which identifies critical habitat and condition thresholds as objective scientific exercises

### DEPARTMENT OF ENVIRONMENT

- Develops recovery plans, threat abatement plans, management plans for ecosystems of natural importance
- Responsible for policy development
- Responsible for international negotiations at multilateral environmental agreements

### NATIONAL ENVIRONMENT PROTECTION AGENCY

- Impact assessment and approval of actions on land and waters
- Independent compliance, audit and enforcement roles
- Statutory duties to use powers and functions to achieve the Act's aims

#### **4. National environmental plans, goals and standards**

The lack of clear and consistent national environmental goals, standards, indicators and data is a major barrier to effective environmental decision-making in Australia. A headline challenge identified in the *State of the Environment 2016* report is the:

*lack of a nationally integrated and cohesive policy and legislative framework that deals with the complex and systemic nature of the issues facing our environment, and provides clear authority for actions to protect and maintain Australia's unique natural capital*<sup>38</sup>

The new Environment Act would require the Sustainability Commission to set national goals to achieve positive environmental outcomes under rolling **National Environment and Sustainability Plans (National Plans)**.

National Plans would establish short and long-term environmental goals, standards, indicators and reporting to inform policy and decision-making, including for biodiversity conservation, air, land and water management (among other things). For example, biodiversity goals could include specific aims to:

- prevent extinction of native species and ecosystems,
- meet goals in recovery plans;<sup>39</sup> and
- integrate and assess 'ecosystem services' and values in all levels of decision-making.<sup>40</sup>

The intent is that National Plans enable Australia to develop a shared environmental vision and a level of continuity and coordination beyond the political cycle. Reviews and updates would give National Plans the flexibility to adapt to emerging threats and new opportunities to mainstream sustainability.

To achieve this, the Act will set out processes to develop and implement National Plans, including:

- setting long-term national environmental goals and shorter-term targets based on the best-available science, evidence and expert advice from government and the non-government scientific community;
- goals, strategies and indicators must be Specific, Measurable, Attainable, Relevant, Timely (**SMART**), and aim to achieve Ecologically Sustainable Development;
- high-level goals are to be further informed by international agreements and strategies, domestic environmental issues and strategies, emerging threats;
- relevant evidence will include National Environmental Accounts (see **Part E**), *State of the Environment* and *National Sustainability Outcomes* reporting (see **Part H** below);
- the Commission must engage the community and consult publicly on draft plans and goals, and demonstrably take into account public submissions;

<sup>38</sup> See <https://soe.environment.gov.au/theme/overview/topic/overview-challenges-effective-management>.

<sup>39</sup> Such as retention, restoration and expansion of habitat, reporting on loss of habitat, population increases or decreases, and changes to mortality rates from key threats.

<sup>40</sup> For other countries' commitments on ecosystem services, see for example, Ontario Biodiversity Strategy; US Presidential Memorandum of 2015; UK National Ecosystems Assessment and guidelines on ecosystem services. See also Wentworth Group of Concerned Scientists' *Blueprint for a Healthy Environment and Productive Economy*, and the IUCN Australian Chapter's guidance on *Valuing Nature*.

- the Commission must also take into account the advice of the Environment Department and Commonwealth, State and Territory Environment Ministers;
- the Commission has the power to determine goals and finalise national plans with the Environment Minister’s concurrence, in accordance with the Act;
- National Plans must include clear and accountable responsibilities to resource and implement strategies and actions within specific timeframes;
- the Commission (or an expert panel appointed by it) must review and consult on National Plans every five years to inform the next iteration;
- a statutory duty will ensure non-regression and continuous improvement of environmental goals, standards and protections in National Plans – this will insulate National Plans from political cycles, ensure efficiency and continuity.

### **National goals need coordinated implementation**

The new Act must also require processes and oversight to ensure that nationally-agreed environmental goals and standards (as determined by the Sustainability Commission) are given effect where necessary in Commonwealth, state/territory planning, environmental and NRM laws. State laws and permits for planning, mining, water, native vegetation and similar discretions must not override or undermine national biodiversity standards. Instead, incentives and sanctions must ensure a highest common denominator across the jurisdictions. Interstate competition and industry will be driven by innovation and a race to the top, not the bottom, to meet national standards.

### ***Example process for preparing a National Environment & Sustainability Plan***



## 5. Adequate resourcing

As successive State of the Environment reports have found, effective implementation of biodiversity protections requires significantly increased resources<sup>41</sup> – for listing and conserving threatened species, ecological communities and heritage places, landscape-scale planning, NRM and conservation programs, ecological mapping, monitoring and enforcement.

Yet state and federal environmental management resourcing and agency capacity is trending in the wrong direction, and frequently disrupted by political cycles, stop-start program funding, agency restructures and ‘efficiency measures’. Meanwhile key threats like climate change, land clearing and invasive species accelerate.

Detailed analysis of resourcing for environmental protection and regulation is beyond the scope of this report. Nevertheless, the new Act will need to enact and stimulate innovative, inter-government and multi-sector funding sources. For example, HSI has previously recommended a quadrupling of resources to the Department of Environment’s Threatened Ecological Communities team to systematically identify, assess and recommend listings of those communities, estimated at \$10 million over five years.

### **Investing in ecosystem services, databases and new tools**

Sustained beneficial investment in biodiversity conservation will require far greater public recognition of *ecosystem services* that healthy biological systems provide to humans. Ecosystem services assist food and fibre production, regulate water, soil and atmospheric systems, and support recreational, cultural and mental health.

The concept of ecosystem services is not new, but must be better integrated into national goals and government policies, strategic plans, development assessment and decision-making:

*Estimating the value of ecosystem services can reveal social costs or benefits that otherwise would remain hidden. Once identified and understood, these values can be considered and accounted for in the policy and decision-making process.*<sup>42</sup>

In the United Kingdom,<sup>43</sup> United States,<sup>44</sup> Canada<sup>45</sup> and elsewhere,<sup>46</sup> governments and their agencies are integrating ecosystem services into strategic planning, assessment and land management programs. Integrating ecosystem services is consistent with the primary object of the Environment Act (at **Part A** above) and the

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<sup>41</sup> Australia’s *State of the Environment 2016* report identifies ‘insufficient resources for environmental management and restoration’ and ‘inadequacy of data and long-term monitoring’ among six key challenges. See: <https://soe.environment.gov.au/theme/overview/topic/overview-challenges-effective-management>.

<sup>42</sup> Ontario Biodiversity Council, *State of Biodiversity 2015 – Indicators report* (p 138), at <http://sobr.ca/report/>.

<sup>43</sup> In 2013 the UK Government issued guidance for policy and decision makers on using an ecosystems approach and valuing ecosystem services. See: <https://www.gov.uk/guidance/ecosystems-services>.

<sup>44</sup> In 2015 the then US President issued a White House directive to all federal agencies to develop ecosystem services frameworks in forward planning. See: <https://obamawhitehouse.archives.gov/blog/2015/10/07/incorporating-natural-infrastructure-and-ecosystem-services-federal-decision-making>.

<sup>45</sup> The Ontario Biodiversity Council has set goals and targets to implement ecosystem services approaches by 2020. See *State of Biodiversity 2015 – Summary report* (Target 14) <http://sobr.ca/report/>.

<sup>46</sup> See for example the Global Footprint Network online tools at <https://www.footprintnetwork.org>.



*improved valuation* principle of ESD. Importantly this must go beyond environmental agencies – to Treasury, infrastructure, agriculture, aid and trade agency decisions.

New tools proposed in this report will help to ensure environmental values are properly accounted for. These tools include National Environmental Accounts, bioregional planning, upfront environmental assessment of policy and law reform actions, a National Biodiversity Conservation and Investment Strategy and a new Capital Stewardship Fund to conserve and restore environmental assets.

**Operational provisions, programs and tools** are discussed at **Part E** below.

**To recap, key elements of Next Generation Biodiversity Laws in this part (Governance & institutions) include:**

- **Enforceable duties on decision-makers to use their powers to achieve the Act's objects.**
- **Clear criteria and public accountability for key stages of decision-making.**
- **A new National Sustainability Commission – to coordinate national plans and actions, set national environmental standards, provide high-level oversight and give strategic advice and oversight to Ministers, agencies and the wider community.**
- **A new national EPA – to assess, approve or refuse projects, monitor project-level compliance and take enforcement action.**
- **A new system of five-yearly National Environment and Sustainability Plans.**
- **Better resourcing and foresight for agencies, conservation programs and natural resource management, including multi-sector investment in ecosystem services, databases and new tools.**

## D. LISTING THREATENED SPECIES & OTHER PROTECTED MATTERS

Some 1,800 species of flora and fauna are listed as threatened in Australia, including 90 documented extinctions. The Environment Act must reverse this concerning trend.

The new Act will primarily aim to 'conserve and protect Australia's environment, its natural heritage and biological diversity...'. As **Part A** notes, secondary aims include:

*to recover, prevent the extinction or further endangerment of Australian plants, animals and their habitats, and to increase the resilience of native species and ecosystems to key threatening processes;*

Australian and international experience shows there are a number of important benchmarks for consistent, rigorous and accessible listing processes for threatened species, ecological communities, local populations and key threatening processes. Listing is a vital step on the road to preventing further extinctions and promoting resilience and recovery of biodiversity. It must be supported by systematic processes of recovery planning, management, impact assessment and protection, key threat abatement and monitoring and reporting.

The Environment Act will adopt an independent, science-based listing process for threatened species and their critical habitats, threatened ecological communities, and key threatening processes that must be arrested to reverse biodiversity decline. The Act will simplify the public nomination process for nationally protected matters, including faster mandatory assessment timeframes.

While this part is not exhaustive, key elements for the new Act include the following:

1. **Independent Scientific Committee**
2. **Simpler, faster assessment**
3. **Common Assessment Method subject to national standards and non-regression**
4. **Strong and effective protections for threatened species, ecological communities and critical habitat**
5. **Expanded listing categories**
6. **Comprehensive data, mapping and information sharing**
7. **Australian Heritage Committee and listing processes.**

### 1. **Independent Scientific Committee to list matters of national environmental significance**

An independent Scientific Committee is essential to public trust and effectiveness of biodiversity laws. The Committee will be responsible for efficiently considering and listing nominated threatened species, important populations,<sup>47</sup> ecological communities, key threatening processes and areas of global or national importance.

The Scientific Committee would have the power to list threatened and protected matters directly, with reasons based on scientific evidence. The Committee would also be responsible for writing conservation advices, identifying critical habitat and other known or potential habitat based on scientific criteria. The Committee would provide its conservation advice to the Environment Department, and where relevant

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<sup>47</sup> *Population* means a distinct, local occurrence of a single species, and is important to genetic diversity.

to state/territory Environment Ministers, agencies and scientific committees. This information will be embedded in mandatory recovery plans, threat abatement plans and bioregional planning. The Commonwealth Minister would have duties to ensure the Committee is sufficiently resourced to fulfil its role and keep lists up-to-date.<sup>48</sup>

Nomination and assessment of terrestrial, marine and aquatic threatened species, populations, ecological communities, and new ecosystems of national importance would follow a consistent process led by one Committee. Experts on the matter or place being assessed would assist the Committee at its discretion. Scientific listings would not be subject to a disallowance motion by Members of Parliament.

Specialised bodies such as for Commonwealth or national heritage and Aboriginal cultural heritage would be maintained and their independence strengthened. (See **D.7** and **Part G** below.)

## **2. Simpler, faster nomination and listing**

All valid nominations for listing must be assessed within three years of nomination. The Act will require the Minister to ensure statutory assessment and listing periods are met. Listing outcomes and timeframes will be monitored and reported on publicly.

### **Indicative outline of listing process under the new Environment Act**



<sup>48</sup> Intergovernmental agreements to fund the Committee may help coordinate effective national listings. Optimal arrangements would be developed in the context of a Common Assessment Method (below).

Listing must continue to be on scientific grounds only. There would be other parts of the Act where decision-making may explicitly take account of social or economic factors (e.g. conditions of approval), but this should not occur at the listing stage.

Nomination, consultation and listing processes must be accessible to the community. Public nomination and participation should be encouraged. The Committee should be expected to prepare their own nominations to keep the lists up to date. The listing process must be scientifically rigorous but not administratively onerous, with clear stages to meet or exceed mandatory timeframes.<sup>49</sup> The Scientific Committee and its staff must be well-resourced for efficient and effective listing, in accordance with ministerial duties.

Within 12 months of listing a Threatened Ecological Community all remnants must be mapped and published on a publicly available database.

### **3. Common Assessment Method – national standards & non-regression**

The new Act would continue transitioning to a national Common Assessment Method for assessing and listing threatened species and ecological communities (first agreed in 2015). This would enable states and territories that meet national standards to assess species' threat status at the national level. However, this would be subject to the Commonwealth Scientific Committee's oversight (including a 2-year operational review) and the principle of non-regression of environmental protections.<sup>50</sup>

Acknowledging the seriousness of extinction risk, the Common Assessment Method would take a highest common denominator approach to protection and ensure state lists are kept up-to-date as well as Commonwealth lists. This could mean, for example, that a species would not be down-listed to a lower threat category unless recovery objectives are demonstrably met in relevant states.

Assessment would remain subject to legislative timeframes, and a jurisdiction could not use the Method as a reason to delay or opt out of assessment or listing. To ensure consistency between Commonwealth and state/territory lists, each jurisdiction must update their corresponding lists of threatened matters within, at most, three months of the Scientific Committee's gazettal of a new matter (or, in the case of existing matters requiring higher threat categories, from the Act's commencement).

Benefits of a well-designed Common Assessment Method for listing will include clearer, more efficient and consistent requirements for impact assessment; coordinated resourcing; and smoother joint recovery planning for biodiversity (see **D.6** below).

Consistent with a harmonised listing approach, the Environment Act will also require the Commonwealth Scientific Committee to consider whether a state/territory-listed species or ecological community should also be listed for national protection under the Environment Act (if it is not already so listed). Similar provisions existed in the EPBC Act until 2006.<sup>51</sup>

<sup>49</sup> See 'Strong and effective protections for threatened species...' at 3 below.

<sup>50</sup> For example where a species or ecological community is already listed at state level.

<sup>51</sup> See former s. 185(2) of the EPBC Act (repealed in 2006):

(2) The Minister must decide whether to amend the list referred to in section 181 to include an ecological community that is described as critically endangered, endangered or vulnerable in a list that is:

#### **4. Strong protections for threatened species, ecological communities and critical habitat**

The Environment Act will strengthen protections for threatened species, important local populations,<sup>52</sup> ecological communities<sup>53</sup> and critical habitat<sup>54</sup> in various ways. This is intended to achieve the objects to prevent extinction and promote recovery.

The below provisions will improve general biodiversity protections, and complement other reforms related to listing, impact assessment and merits review. Critical habitat protections are outlined separately further below.

#### **Emergency listing provisions for threatened species & ecological communities etc.**

The Act will include new provisions for emergency listing of species (including newly discovered populations and critical habitat), ecological communities, ecosystems of national importance and heritage places. Emergency listing may be activated by the Environment Minister or the Scientific and Heritage Committees (including at the community's request) where there is the potential for immediate, significant threats.

At the time of an emergency listing:

- the regular process of species or ecological community nomination and evaluation does not apply;
- immediate interim protection applies for up to 12 months after the listing date; and
- formal assessment must be undertaken within 12 months of emergency listing to determine the eligibility of the species or ecological community (etc.) to remain on the threatened list.

The EPBC Act only includes emergency listing processes for National Heritage places (s. 324JL) and the Commonwealth Heritage list.<sup>55</sup> These would be carried over. NSW is the only jurisdiction with emergency listings for threatened species.<sup>56</sup>

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- (a) kept by:  
(i) a State; or  
(ii) a self-governing Territory; or  
(iii) the body known as the Australian and New Zealand Environment and Conservation Council; and  
(b) identified by the Minister by a notice published in the Gazette.

<sup>52</sup> *Population* means a distinct, local occurrence of a single species, and is important to genetic diversity.

<sup>53</sup> A Threatened Ecological Community (TEC) is a recognised group of native species of plants and animals that naturally occur together, and that is at risk of extinction.

<sup>54</sup> i.e. habitat identified as critical to the survival of threatened species and ecological communities.

<sup>55</sup> The Hawke Review of the EPBC Act (2009) supported an emergency listing process (recommendation 16), as did the Australian Government's response (2011). More recently, a Senate Inquiry into a private member's Bill supported emergency listing in principle, but the Bill was not passed.

<sup>56</sup> Under the *Biodiversity Conservation Act 2016* (NSW) and the former *Threatened Species Conservation Act 1995* (NSW). i.e. The provisions to list species and communities do not unnecessarily duplicate state processes, and there is no equivalent process in the EPBC Act.

### **Protecting Vulnerable Ecological Communities alongside threatened species and ecological communities (offences to harm will apply)<sup>57</sup>**

The aim of listing is to prevent further decline and to promote recovery of threatened species and ecological communities. Yet the current EPBC Act offence provisions do not protect listed *vulnerable* ecological communities from harm.<sup>58</sup> Similar exemptions occur in some state legislation.

An ecological community is *vulnerable* if it is facing a high risk of extinction in the wild in the medium-term future (for example, the next 50 years). Existing pressures, combined with accelerating climate change, increase the need to protect them.

The Environment Act will extend assessment, authorisation and offence provisions so that *vulnerable ecological communities* are protected from harm, alongside vulnerable threatened species and other entities. Actions that could have significant impacts on vulnerable ecological communities will need EPA approval. Actions may only be approved if they do not jeopardise the goals in a recovery plan. Approvals may not be granted if a recovery plan is not in place.

### **Nomination and listing of important populations of a species**

The Act will include provisions permitting the public to nominate important local populations of a species for listing and protection. Scientific Committee guidelines for eligibility will support nomination and listing.

Local populations make a significant contribution to genetic diversity, have local and regional cultural significance, and can increase public awareness of conservation needs. Maintaining genetic diversity makes species more robust to threats such as disease and climate change. However, as the EPBC Act does not currently permit the listing of local populations, there is no federal law to prevent local extinction of a species or protect significant populations. Similarly, state planning or biodiversity laws might not recognise a population's importance.

Listing and protecting a local population would therefore help address cumulative impacts and threats of local extinction that may otherwise be overlooked.

### **Applying the precautionary principle to listing decisions**

The Environment Act will require the Scientific Committee to act consistently with the *precautionary principle*<sup>59</sup> when deciding whether to list a species, ecological community or other entity as threatened.

The precautionary principle is a key principle of Ecologically Sustainable Development. In simple terms it states that a lack of full scientific certainty should not

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<sup>57</sup> Vulnerable ecological communities are currently not protected by harm offences under the EPBC Act (sections 18-18A).

<sup>58</sup> EPBC Act sections 18-18A include offences to protect:

- *species* that are vulnerable, endangered, critically endangered and extinct in the wild; and
- *ecological communities* that are endangered and critically endangered.

<sup>59</sup> 391: *Minister must consider precautionary principle in making decisions.* The EPBC Act establishes the precautionary principle as a principle of Ecologically Sustainable Development (ESD) under s. 3A: (b) *if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;*

prevent or delay action to avoid serious or irreversible harm.<sup>60</sup> The principle already applies to certain decisions under the EPBC Act.<sup>61</sup>

In practice, applying this principle to a listing decision means that the Scientific Committee should list the species, ecological community or place if (in the absence of listing) the scientific evidence shows a threat of serious or irreversible environmental harm (such as a risk of extinction), even if that threat is subject to some uncertainty.

### **Decisions affecting species & ecological communities must be consistent with Approved Conservation Advices, Recovery Plans, Threat Abatement Plans etc.**

It will continue to be an offence to kill, injure, take,<sup>62</sup> trade, keep or move a listed species without authorisation (including threatened and migratory species, cetaceans or marine species). These provisions of the Environment Act will apply anywhere in Australia, not only on Commonwealth land and waters. One form of authorisation involves assessment and approval by the National EPA.

When the National EPA is deciding whether or not to approve a controlled action,<sup>63</sup> the Act will also require that it 'must act consistently with' any:

- Approved conservation advice<sup>64</sup>
- Recovery plan (including prohibitions on harm)
- Threat abatement plan
- Bioregional plan (which may specify regional protections)
- Plan of Management for a listed heritage site (such as World Heritage Areas)
- International obligations under environmental treaties and instruments.

These requirements clarify and expand on similar provisions in the EPBC Act.<sup>65</sup> Decisions and approvals would be aided by the fact that these plans would integrate with one another. Plans would be informed by Australia's international obligations. Sound decisions will be supported by National EPA guidelines and oversight.

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<sup>60</sup> The principle is activated when two triggers are satisfied by the evidence:

- there is a threat of serious or irreversible environmental damage, *and*
- lack of full scientific certainty as to the environmental damage.

See for example *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133, at [128], [140] and [148]: (i.e. the threat has reasonable scientific plausibility but there is uncertainty as to its nature and scope).

<sup>61</sup> The EPBC Act, section 391, requires the precautionary principle to be considered in various other decisions under the Act, but this does not currently include listing decisions.

<sup>62</sup> The Environment Act's definition of 'take' in relation to animals that belong to a threatened species or ecological community will expand on EPBC Act terms ('harvest, catch, capture, trap and kill') to include actions to 'harass, harm or pursue' an animal, or to *attempt* any of these actions. See Part I below. These additional terms are in the US *Endangered Species Act* definition, s. 3 (16 U.S.C. § 1532).

<sup>63</sup> (or any other relevant decision-maker is making decisions that affect listed threatened species, populations or ecological communities).

<sup>64</sup> Approved conservation advices are brief scientific and legal documents that essentially explain the conservation requirements of species to avoid their extinction (see EPBC Act s. 266B). The failure to consider them has been determined by the Courts to be a fundamental error of law. See: *Tarkine National Coalition Incorporated v Minister for Sustainability, Water, Population and Communities* [2013] FCA 694, at [49]. It is proposed that the Scientific Committee prepares Advices to assist recovery plans.

<sup>65</sup> Under the EPBC Act, section 139 currently requires that 'the Minister must not act inconsistently with' a range of international obligations as well as *recovery plans* and *threat abatement plans*. By contrast, the Minister must only 'have regard to' any Approved Conservation Advice for an affected species or ecological community. The new Act would make these obligations clear and consistent.

Consistent with the objective to prevent extinctions, impacts on critically endangered and endangered ecological communities – those at extreme or very high risk of extinction – will not be approved. Significant impacts on vulnerable ecological communities may only be approved if a recovery plan is in place for the entity (single, multi-species or regional recovery plan); and the action is demonstrated to be consistent with the recovery plan.<sup>66</sup>

Even where actions are approved (for example, significant land-clearing), all reasonable steps must be taken to avoid harm to nationally protected species, and offences for cruelty to animals would still apply.

The prevention of unacceptable impacts, as early as possible, is consistent with the aims of the Act. For further information on significant impacts, see **E.2**.

The provisions outlined below include **improvements specific to critical habitat**.<sup>67</sup>

### **Impacts on critical habitat must be refused in favour of conservation agreements**

The Act will require that the National EPA must not approve adverse actions in areas of **critical habitat** for threatened species or ecological communities. This is similar to protections for critically endangered and endangered ecological communities above. No biodiversity offsets will be available for critical habitat due to its essential role in preventing extinction.

Instead, the Commonwealth must proactively seek conservation agreements or covenants<sup>68</sup> with private landholders (or government authorities) to protect the critical habitat using private land conservation funds. The Environment Act will have its own conservation covenanting mechanism rather than relying on state or territory resources and agencies (recognising that state agencies are likely to have their own conservation investment plans).

### **Critical habitat must be identified, mapped and included on the Critical Habitat Register at the time a species or community is listed (subject to confidentiality)**

As noted above, the Environment Act will require that critical habitat is identified in conservation advices and recovery plans at the time a threatened species or community is listed. As in the United States, this must include habitat that is not currently occupied by the species but is seen as 'essential' to its future recovery.<sup>69</sup>

The Act will retain the Register of Critical Habitat<sup>70</sup> (incorporating climate refugia and *potential* critical habitat noted above) so that information is centrally accessible for conservation and land-use planning purposes.

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<sup>66</sup> These criteria would be subject to certain thresholds. For example, the Act, regulations and National EPA guidelines would require that if Endangered or Vulnerable Ecological Communities are in *poor condition*, they could only be cleared if a recovery plan is in place; and approval of the action would not jeopardise the community's likelihood of recovery.

<sup>67</sup> i.e. habitat identified as critical to the survival of threatened species and ecological communities.

<sup>68</sup> See <http://www.environment.gov.au/protection/environment-assessments/conservation-agreements>; and <http://www.environment.gov.au/topics/biodiversity/biodiversity-conservation/conservation-covenants>.

<sup>69</sup> See for example, US *Endangered Species Act* (16 U.S.C. § 1532) sections 3 and 4, 'critical habitat'.

<sup>70</sup> The EPBC Act enables critical habitat to be identified on a Register under s. 207A. However, the current Register is not mandatory and is rarely used.



All critical habitat identified in conservation advices and recovery plans will be automatically included on the Register.

The Act would require published mapping of identified critical habitat, subject to security precautions specifically to protect threatened entities.<sup>71</sup>

To fill some of the high priority gaps in the current Critical Habitat Register, the Act will require the Minister (with the Scientific Committee's assistance) to identify and list the critical habitats of all *critically endangered species and ecological communities* when the new Bill is introduced;<sup>72</sup> and transfer all existing, identified critical habitat (for all species and ecological communities currently listed) to the Register within 12 months of the Act's passage.

### **Extend critical habitat protections beyond Commonwealth areas**

The new Act would extend critical habitat provisions to protect habitats beyond Commonwealth areas, to include state and territory lands and waters,<sup>73</sup> to the full extent of Commonwealth powers. Importantly this would mean that offences for damaging critical habitat extend beyond the limited range of Commonwealth areas, to include other land and waters in a state or territory.

## **5. Expanded categories for threatened species status**

The EPBC Act listing categories for threatened species and ecological communities would be expanded in line with internationally recognised (IUCN) criteria.<sup>74</sup> Threat categories available for listing species and ecological communities would include:

- **Extinct**
- **Extinct in the wild**
- **Critically endangered** – i.e. at extreme risk in the immediate future
- **Endangered** – at very high risk of extinction in the near future
- **Vulnerable** – at high risk of extinction in the medium-term future
- **Near-Threatened**
- **Data-Deficient.**

The EPBC Act's *conservation dependent* category would be removed,<sup>75</sup> and the IUCN *near-threatened* and *data-deficient* categories would be enacted (see IUCN figure below).<sup>76</sup>

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<sup>71</sup> E.g. EPBC Regulations 2000 (clause 7.10) require the Register be published, subject to confidentiality affecting the protected species, ecological community, habitat, or the interests of relevant landholders.

<sup>72</sup> As at May 2018, 268 Australian species and ecological communities were listed as critically endangered under the EPBC Act (i.e. known to face an extremely high risk of extinction in the wild in the immediate future). This included 75 fauna species (birds, reptiles, fishes, frogs, mammals and others), 159 flora species and 34 ecological communities. See Department of Environment and Energy, SPRAT database, at: <https://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl>.

<sup>73</sup> An example amendment relative to the EPBC Act is as follows. At section 207B (*Offence of knowingly damaging critical habitat*), delete: 'and (c) the habitat is in or on a Commonwealth area.'

<sup>74</sup> The EPBC Act enables the listing of threatened species and ecological communities as 'vulnerable' (i.e. at high risk of extinction in the medium-term future), 'endangered' (very high risk in the near future) or 'critically endangered' (extreme risk in the immediate future); along with further listing categories of 'extinct', 'extinct in the wild' or 'conservation dependent' (EPBC Act, s. 179). Cf IUCN (2010) below.

<sup>75</sup> Conservation dependent means specific conservation measures are in place, without which the species' risk of extinction would increase. See EPBC Act ss. 179; s. 180 (Native species of marine fish).

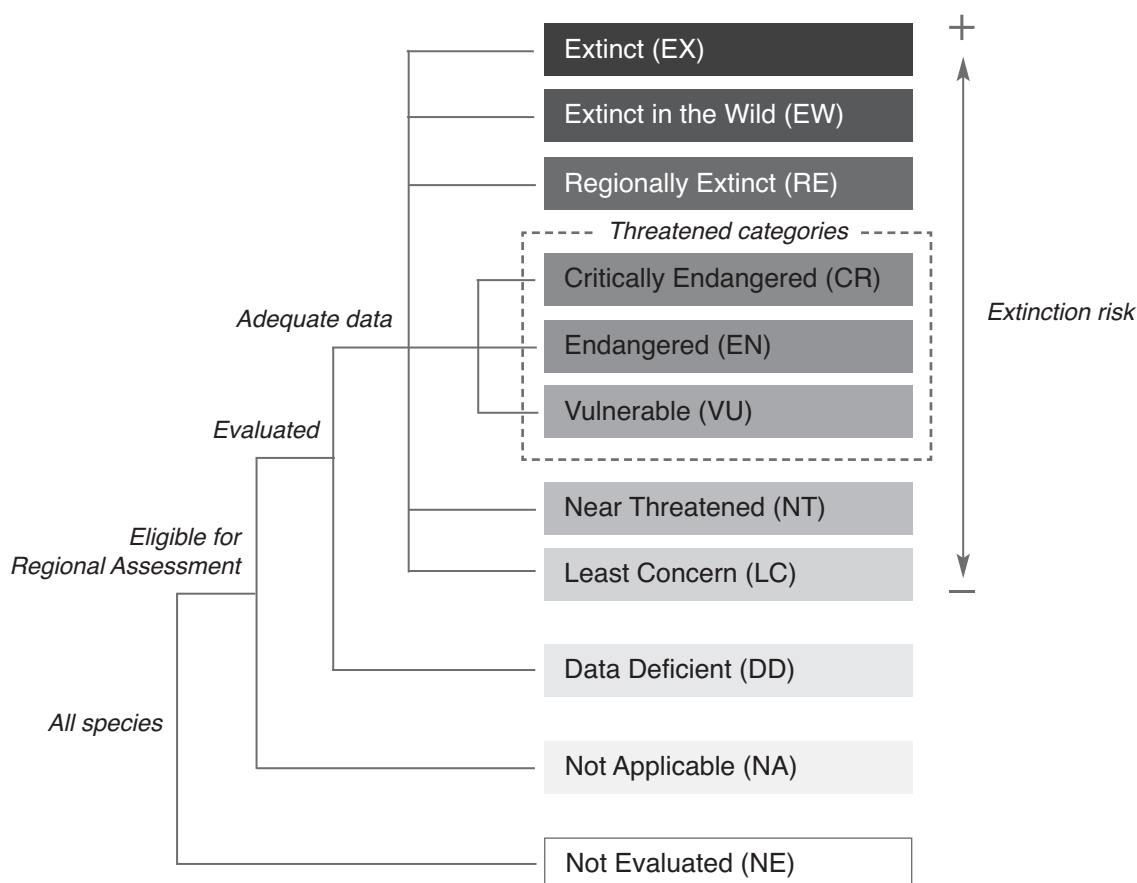
<sup>76</sup> See further: IUCN, *Application of the IUCN Red List Criteria at Regional and National levels* (2010), Figure 2, p 14, at <http://www.iucnredlist.org/technical-documents/red-list-training/red-list-guidance-docs>.

*Near-threatened* would provide flexibility to protect species and ecological communities at risk from, for example, present and future climate change. *Data-deficient* listing could prevent species from languishing on a long-list, and encourage sound resourcing decisions and targeted research.<sup>77</sup> *Near-threatened* and *data-deficient* entities would be eligible for Commonwealth and joint implementation funding for research and monitoring.

Threatened entities including commercially harvested fish species must be listed in the highest ecologically appropriate threat category they qualify for. Near-threatened species that are currently commercially harvested could still be harvested, but only if an EPA-verified conservation program is in place.

Standards or regulations may require Commonwealth agencies to establish conservation programs for *near-threatened* species within a given timeframe to prevent their status deteriorating, particularly if the species is commercially exploited. Conservation programs would need to meet Sustainability Commission standards overseen by the National EPA.

### IUCN threat categories



Source: IUCN, *Application of the IUCN Red List Criteria at Regional and National levels* (2010), p 14.

<sup>77</sup> For example, Canada recognises near-threatened species as of 'special concern'. The *Endangered Species Act* (US) provides for 'candidate species' that are believed to be threatened but a proposed listing regulation is precluded by other, higher priority listings.

## **6. Coordinated listing, Recovery Plan actions & Threat Abatement Planning**

As proposed above, listing of threatened species and ecological communities is to be accompanied by approved conservation advices, mapped critical habitat areas and single or multi-species recovery plans.

Recovery plans will be a mandatory requirement of listing a threatened species or ecological community,<sup>78</sup> including detailed recovery goals, actions, estimated timeframes to achieve goals and milestones, and metrics to measure progress.<sup>79</sup> Multi-species plans will be encouraged where this is efficient and scientifically sound.

The Scientific Committee and Environment Commission could propose a standard set of recovery plan goals,<sup>80</sup> where the specifics and timeframes are tailored to the species, but the same goals would apply to meet the overarching aim of recovery.

Plans of Management will be required to maintain or improve the values of natural and cultural heritage places, and these would be integrated into bioregional plans.

The Act will ensure recovery plan instruments are continually in force and do not simply expire after a period. The Minister will have a duty to ensure recovery plans are in place, and to review and update recovery plans at least once every 10 years.

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<sup>78</sup> Unless the Scientific Committee certifies that a recovery plan would not materially benefit the entity because it is extinct or extinct in the wild.

<sup>79</sup> Example metrics include habitat restoration and extent, reduction in percentage of habitat cleared, percentage increase in critical habitat under protection, or a percentage reduction in mortality from a key threat.

<sup>80</sup> For example, each recovery plan would need a goal for: reducing habitat destruction, habitat restoration, critical habitat protection and mortality reduction from key threats (with tailored specifics).

***Simplified outline of Recovery Planning (Act requirements and timeframes apply)***



Recovery plans are only as good as their implementation and resourcing. The Act and regulations will require a defined period (for example, six months from listing) for the Sustainability Commission to negotiate and agree on joint recovery management arrangements with relevant states and territories (including funding incentives), to ensure recovery plans and protections apply across federal and state jurisdictions.<sup>81</sup> If no agreement can be reached, the Commission must finalise management arrangements to the full extent of Commonwealth constitutional powers.

As an example of coordination, states strategic planning processes should integrate and protect national threatened and sensitive biodiversity areas upfront (such as Key Biodiversity Areas, High Conservation Value Vegetation and other Ecosystems of National Importance). Also, state threatened species programs should coordinate with national listings and programs. For example, by coordinating resources and effort on shared goals; and by identifying high-priority gaps in existing programs where complementary effort is needed by another level of government.

Finally, if the Sustainability Commission or the Minister fail to prepare an adequate recovery plan, or fail to meet another mandatory duty under the Act because any plan in force is not being implemented, community members would be empowered to seek orders from a Court or tribunal requiring those duties to be performed.<sup>82</sup>

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<sup>81</sup> Statutory requirements to develop and apply recovery plans will provide additional incentives, because in some cases development with impacts may only proceed if a recovery plan is in place (e.g. for vulnerable ecological communities).

<sup>82</sup> Similar to citizen petition rights in the US *Endangered Species Act* and US air pollution regulation.

## **Threat Abatement Planning**

Consistent with landscape-scale protections and efficient management, the Act would provide for greater operational focus on mandatory threat abatement planning.

Threat abatement goals and efforts should generally be focused on sets of threats that overlap and interact to affect large numbers of species. Plans and goals should be clear and concise, and be more tightly focused on threat abatement actions, outcomes (e.g. measurable mortality reduction), monitoring and reporting. Threat abatement plans would be subject to guidelines and approval by the Sustainability Commission or the Scientific Committee.

The part of the Act dealing with threat abatement plans will adopt similar processes and safeguards to recovery plans, such as evidence-led plan preparation, consultation, partnership agreements and implementation across tenures within set timeframes. Funding incentives could assist cooperative agreement with the states and territories. If no agreement can be reached, the Commonwealth must finalise management arrangements to the full extent of its constitutional powers.

To fully operationalise threat abatement plans, bioregional planning should include a Regional Threat Assessment process. This would ensure that bioregional plans address key threats and threat abatement plans to the satisfaction of the Sustainability Commission and any guidelines.

Finally, the Scientific Committee should review the Climate Change<sup>83</sup> and Land Clearance Key Threatening Processes as a priority (both were listed in 2001 following HSI nominations, yet neither has a threat abatement plan). The rapid review should determine whether these processes warrant threat abatement plans under the new Act. The Climate Change review should consider the need for specific adaptation and conservation strategies for biodiversity, and improved land carbon accounting and climate impact assessment. This could include mandatory climate impact statements for projects, submitted with environmental impact assessments.

## **7. Comprehensive data, mapping and reporting**

As noted in the 2016 SOE Report, the lack of data and information from long-term monitoring of biodiversity is universally acknowledged as a major impediment to biodiversity conservation.<sup>84</sup> Current laws are hampered by the lack of detailed mapping of nationally threatened species and ecological communities (i.e. known to be threatened), and a lack of data and knowledge about the range and status of biodiversity across Australia (i.e. known to exist, but threat status unknown) for all listed species, ecological communities and ecosystems of national importance.

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<sup>83</sup> 'Loss of climatic habitat caused by anthropogenic emissions of greenhouse gases'.

<sup>84</sup> Australian Government, *2016 State of the Environment report – Biodiversity – Key Finding*.  
At: <https://soe.environment.gov.au/theme/biodiversity/key-findings?year=96#key-finding-120176>.

Correcting this imbalance will require specific and dedicated information management programs and funding at the Commonwealth and all levels of government (for examples see **Part G** below).

Three other major initiatives that will assist comprehensive data-gathering and sharing under the new Act are the:

- listing of Ecosystems of National Importance
- five-year National Ecosystems Assessment, and
- new system of bioregional plans (see **Part E** below).

## **8. Australian Heritage Committee and listing processes**

Listing places of national or world heritage significance would be clearer, simpler and more effective under the new Environment Act. For example, the Act would expressly protect World Heritage *properties* as well as World Heritage *values*.<sup>85</sup> Species should also be eligible for national heritage listings as well as places.<sup>86</sup>

Like threatened species, the Act would require all validly made public nominations for heritage listing to be assessed within a clear statutory timeframe (a maximum of three years, including any necessary extensions). Refusal to list a place would be subject to merits review.

To align with the independent role of the Scientific Committee, the Act should prescribe the Australian Heritage Committee as both the independent assessment and decision-making body for heritage listings. The Committee would receive public nominations and be empowered to identify and nominate heritage places itself.

The Act would require that Committee members have a range of expertise related to natural and cultural heritage and other technical disciplines.<sup>87</sup> Indigenous heritage places should be primarily identified and assessed by Indigenous representatives, with new laws to replace the outdated 1984 Indigenous heritage legislation (see **Part G**).

The process to nominate, assess, publicly exhibit, consult on and finalise heritage nominations would follow a similar pathway to threatened species nominations above. In making listing decisions, in addition to public and landholder consultation, the Committee would be required to consider the advice of the Commonwealth Environment and Heritage Minister (and/or Department agency head), and any state or territory Ministers relevant to the location.

The Heritage Committee, with the assistance of the Department (and other experts at the Council's discretion), would be required to prepare statutory guidelines to assist the nomination, assessment and protection of heritage areas under the Act. The guidelines would aim to ensure that the legal framework, implemented in practice, will maintain or improve the heritage values of Australia's special places. They would include clearer criteria for the nomination of natural areas as National Heritage.

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<sup>85</sup> The World Heritage Operational Guidelines (which are an integral part of World Heritage processes) require each Party to protect the entire World Heritage area, not just its values. See Haigh, David, 'Australian World Heritage, the Constitution and international law', (2005) *EPLJ* 385.

<sup>86</sup> For example, species like the dingo would be a potential candidate for a heritage listing given their place in Australia's national identity and their importance in Indigenous Australian culture.

<sup>87</sup> Such as heritage law, archaeology, geography, environmental history, anthropology and ecology. Protection of natural heritage should also be expressed to include native species in a declared place.

The Department would have a duty to facilitate public nominations and to assist the community to prepare nominations. Registers, heritage strategies and management plans would also need to be established and used in accordance with the guidelines.

Protections in the Act would need to be consistent with international obligations and commitments, including under the World Heritage Convention. The Hawke Review also made a number of useful recommendations on heritage reforms, including to 'simplify the nomination, prioritisation, assessment and listing processes for National and Commonwealth Heritage,'<sup>88</sup> and new heritage guidance, leadership and active promotion of a national approach to heritage.<sup>89</sup> The new Act should reflect the Hawke Review recommendations, while drawing on the experiences of heritage experts, enthusiasts and Aboriginal groups who have used the EPBC Act in the decade since.

The new Act could also provide for the National Ecosystems Assessment (see **E.6** below) to engage with the Heritage Committee, to identify and accelerate the listing of priority natural areas that meet National Heritage criteria. This process (or a parallel National Heritage Assessment to be conducted periodically) would assist the Minister, Department and Council to fulfil international commitments and other statutory duties, such as to keep lists up-to-date.

**To recap, key elements of Next Generation Biodiversity Laws in this part (Listing threatened species and other protected matters) include:**

- **Independent Scientific and Heritage Committees to assess and directly list threatened species, ecosystems and natural and cultural heritage places for national protection.**
- **Simpler and faster nomination and listing processes, and strong, non-regressive common standards for assessment across the Commonwealth, states and territories.**
- **All valid nominations to be assessed within statutory timeframes.**
- **Stronger protections for threatened species, important populations, ecological communities and critical habitat across Australia.**
- **Vulnerable ecological communities will be a 'trigger' for impact assessment and approval (via existing matters of national environmental significance).**
- **Emergency listing provisions for threatened species and ecological communities, critical habitats and national heritage places.**
- **Permitting nomination and listing of important populations of a species.**
- **Applying the precautionary principle to listing decisions.**
- **Requiring decisions affecting species and ecological communities are consistent with approved conservation advices, recovery plans, threat abatement plans and international agreements.**
- **Impacts on critical habitat must be refused and conservation agreements sought with landowners. The Environment Act will include a conservation covenanting mechanism.**

<sup>88</sup> As the Australian Government notes: 'The Commonwealth Heritage List... comprises natural, Indigenous and historic heritage places *on Commonwealth lands and waters or under Australian Government control*.' (Emphasis added.) Whereas the National Heritage List 'has been established to list places of outstanding heritage significance to Australia. It includes natural, historic and Indigenous places that are of outstanding national heritage value to the Australian nation.' A place may be protected under multiple provisions, 'For example, a Commonwealth Heritage Place might also be on the National Heritage List or the World Heritage List.' See: <http://www.environment.gov.au/heritage/about/national>; and <http://www.environment.gov.au/heritage/about/commonwealth-heritage>.

<sup>89</sup> See Hawke Review of the EPBC Act (2009), Chapter 8 – Heritage, recommendations 28-30.

- **Critical habitat must be identified, mapped and included on the Critical Habitat Register at the time a species or ecological community is listed.**
- **Extending critical habitat protections beyond Commonwealth areas only.**
- **New threat categories to reflect international (IUCN) standards, including for near-threatened and data-deficient species and ecological communities.**
- **Mandatory requirements for recovery plans and threat abatement to be developed and implemented in a coordinated manner across Australia.**
- **Mandatory goals to be addressed in recovery plans.**





## E. NEW TRIGGERS, IMPACT ASSESSMENTS & STRATEGIC TOOLS

This part of the report sets out a framework for substantive operational provisions, programs and tools for next generation biodiversity laws. These provisions would protect and apply to existing and expanded matters of national environmental significance as outlined under **Part B, Scope of Commonwealth responsibilities for biodiversity**.

This part deals with:

1. **Expanded Commonwealth responsibilities (new Environment Act triggers)**
2. **Assessing, avoiding and mitigating actions with significant impacts on nationally protected matters**
3. **Landscape-scale protections - a strategic focus in the Environment Act**
4. **Bioregional planning**
5. **Strategic environmental assessment & accreditation (including fisheries)**
6. **National Ecosystems Assessment**
7. **National Biodiversity Conservation & Investment Strategy**

### 1. **Expanded Commonwealth responsibilities (new Environment Act triggers)**

As Part B notes, the new Act would retain Commonwealth responsibility for existing Matters of National Environmental Significance – using this or similar terminology.<sup>90</sup>

The Environment Act would also use the Commonwealth's significant Constitutional powers<sup>91</sup> to enact a suite of expanded 'triggers' under national law. This would provide strategic, coordinated and efficient regulation of key threats and activities, and protect biodiversity and heritage areas that Australian communities value.

New Matters of National Environmental Significance would be grouped under six **new or expanded triggers**:

- **the National Reserve System** (terrestrial and marine protected areas)
- **Ecosystems of National Importance** (including High Conservation Value Vegetation, Key Biodiversity Areas and wetlands of national importance)
- **Vulnerable ecological communities** (alongside other threatened species and ecological communities)
- **Significant land-clearing activities**
- **Significant greenhouse gas emissions**
- **Significant water resources (expanded beyond coal and gas impacts).**

The new Act would continue to permit the Environment Minister to declare other matters or actions that should be regulated by Commonwealth powers in the interests of the national environment.

Each of these new triggers is outlined in more detail below.

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<sup>90</sup> For example, Commonwealth Environmental Interests or National Environmental Priorities.

<sup>91</sup> For example, external affairs, corporations power, international and interstate trade (see B.1 above).

## National Reserve System (NRS)<sup>92</sup> – Australia’s protected area network

As the Department of Environment explains:

*The National Reserve System is Australia’s network of protected areas, conserving examples of our natural landscapes and native plants and animals for future generations. Based on a scientific framework, it is the nation’s natural safety net against our biggest environmental challenges.*

*The reserve system includes more than 10,500 protected areas covering 19.63 per cent of the country – over 150 million hectares. It is made up of Commonwealth, state and territory reserves, Indigenous lands and protected areas run by non-profit conservation organisations, through to ecosystems protected by farmers on their private working properties.<sup>93</sup>*

However, the EPBC Act does not recognise the National Reserve System as a Matter of National Environmental Significance.

Consistent with a more strategic approach, the new Act would require federal EPA approval of activities that could have significant impacts on areas under the National Reserve System (including terrestrial and marine protected areas), including Commonwealth and state-based national parks, Indigenous Protected Areas and private conservation-covenanted land.

At a minimum, this trigger should apply to NRS areas designated as strict nature reserves, wilderness areas and national parks;<sup>94</sup> and private conservation-covenanted lands.<sup>95</sup>

For actions affecting Indigenous Protected Areas, Traditional Owners and/or Indigenous land managers could be prescribed as the approval authority if they wish to have this responsibility.<sup>96</sup>

The Act would also set national goals and targets to complete the NRS as a ‘Comprehensive, Adequate and Representative’ array of Australia’s terrestrial and marine ecosystems, and refer to strategic goals and targets under the Convention on Biological Diversity. New priority areas for the NRS could be identified in the National Ecosystems Assessment (see **E.6**) and in bioregional plans (**E.4** below).

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<sup>92</sup> See EDO NSW advice to HSI (2015), Priority EPBC Act Amendments, recommendation 6: [http://hsi.org.au/assets/publications/HSI\\_EPBC\\_Act\\_priority\\_amendments\\_2016.pdf](http://hsi.org.au/assets/publications/HSI_EPBC_Act_priority_amendments_2016.pdf).

<sup>93</sup> Department of Environment and Energy, at <https://www.environment.gov.au/land/nrs>.

<sup>94</sup> IUCN Categories Ia, Ib and II. On IUCN categories see further the Department of Environment: <https://www.environment.gov.au/node/20957>. The Commonwealth manages 6 national parks and 59 marine reserves, although most national parks are state-based. On Commonwealth national parks see Department of Environment: [www.environment.gov.au/topics/national-parks](http://www.environment.gov.au/topics/national-parks). Commonwealth reserves are currently managed under Part 15 Division 4 of the EPBC Act (with interim protections available as ‘conservation zones’). Many works cannot be carried out in a Commonwealth reserve unless permitted by a management plan (EPBC Act s 353). Activities on ‘Commonwealth land’ with a significant impact on the environment require approval under Part 3 of the EPBC Act (ss 26-27A).

<sup>95</sup> About 1200 private conservation covenanted lands are currently in the NRS.

<sup>96</sup> This proposal would need fulsome input from and co-design with Aboriginal and Torres Strait Islander peoples and other experts. While further details are beyond the scope of this report, **Part G** proposes consultation on other specific ways to increase opportunities to indigenous engagement and leadership.

## Ecosystems of National Importance

The Environment Act will enable identification and listing of a new protected matter: **Ecosystems of National Importance**. This is consistent with the Act's dual focus on species and landscape-scale protections. It also reflects the recommendations of the Hawke Review.

Ecosystems of National Importance are areas of outstanding ecological or scientific significance (with proposed criteria below). They need not be threatened, and listing would aim to prevent them from becoming so.

Protection of these ecosystems would be proactive as well as reactive. Listing would have two key effects:

- Actions that may have impacts on these areas would require assessment and approval from the National EPA; and
- Bioregional planning processes and/or site-based plans of management would need to proactively protect them.

By identifying and protecting exceptional concentrations of biodiversity, this new Matter of National Environmental Significance will help the Commonwealth to protect the most species and valuable ecosystem services at the least management cost.<sup>97</sup>

Ecosystems of National Importance would include the following examples – many of which are not currently eligible for protection under the EPBC Act:

- High concentrations of biodiversity such as Key Biodiversity Areas<sup>98</sup> and biodiversity hotspots<sup>99</sup>
- High Conservation Value Vegetation<sup>100</sup> (see further explanation below)
- Nationally important wetlands<sup>101</sup>
- Travelling Stock Reserves<sup>102</sup>
- Significant wildlife corridors<sup>103</sup>
- Wild rivers<sup>104</sup>
- Outstanding representations of particular Australian landscapes or seascapes (which may later become protected under the National Reserve System) and
- Climate refugia (current and potential).<sup>105</sup>

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<sup>97</sup> Myers et al. 'Biodiversity hotspots for conservation priorities', *Nature*, volume 403, 853–858 (24 February 2000).

<sup>98</sup> See e.g. Birdlife Australia, 'Identifying KBAs', <http://www.birdlife.org.au/projects/KBA/identifying-kbas>.

<sup>99</sup> See Department of Environment and Energy, 'Australia's 15 National Biodiversity Hotspots', at: <http://www.environment.gov.au/biodiversity/conservation/hotspots/national-biodiversity-hotspots>.

<sup>100</sup> See for example, High Conservation Values Network, at <https://www.hcvnetwork.org/about-hcvf>.

<sup>101</sup> The Australian Wetlands Database holds descriptions of more than 900 Directory of Important Wetlands in Australia. Only 65 wetlands are internationally recognised under the Ramsar Convention. See: <http://www.environment.gov.au/water/wetlands/australian-wetlands-database/directory-important-wetlands>.

<sup>102</sup> For example, the Biodiversity chapters of the NSW State of the Environment reports in 2012 and 2015 noted that TSRs contain some of the best remaining examples of remnant biodiversity in regional NSW. They also provide essential wildlife corridors on public land.

<sup>103</sup> See Australian Government Department of Sustainability, Environment, Water, Population and Communities 2012 National Wildlife Corridors Plan: <http://155.187.2.69/biodiversity/wildlife-corridors/publications/pubs/national-wildlife-corridors-plan.pdf>.

<sup>104</sup> See for example Stein et al. 'The Identification of Wild rivers', Australian Heritage Council, 1998, [www.environment.gov.au/heritage/ahc/publications/identification-wild-rivers](http://www.environment.gov.au/heritage/ahc/publications/identification-wild-rivers). See also NSW Office of Environment and Heritage 'Wild rivers', <http://www.environment.nsw.gov.au/parktypes/wildrivers.htm>.

<sup>105</sup> The Department of Environment's draft Conservation Investment Strategy defined climate refugia as:

The new category is very similar but not identical to protections recommended in the Hawke Review. Namely, to 'include "ecosystems of national significance" as a new Matter of National Environmental Significance. The "matter protected" should be the ecological character of a listed ecosystem.'<sup>106</sup>

As proposed, listing of Ecosystems of National Importance would be based on the area meeting one or more of the following criteria, set out in the Act and regulations:

- it has high comparative biological diversity within its ecosystem type (this could be identified using classifications such as biodiversity hotspots and Key Biodiversity Areas);
- it provides critical nationally important ecosystem functions (which could include carbon sequestration, protection of drinking water catchments, prevention of erosion of slopes and soils, or aquatic nursery grounds);
- it has a significant potential contribution to building resilient sustainable landscapes;
- it contains high value remnants of a particular type of habitat;
- it contains high value areas that create connectivity between other ecosystems;
- it is significant in building a comprehensive, adequate and representative system of habitat types in Australia;<sup>107</sup>
- it is an intact natural landscape that contains viable populations of the great majority of the naturally-occurring species in that type of landscape, in natural patterns of distribution and abundance;
- it provides habitat critical to the long-term survival of listed threatened species;
- it is a climate change refuge for nationally-threatened species or ecological communities (or is likely to become so in future), or is otherwise of national importance; or
- it is under severe and imminent threat.

Ecosystems of National Importance are distinct from Threatened Ecological Communities, as listing could occur whether or not the ecosystem is threatened.<sup>108</sup> They are distinct from Ramsar wetlands and World Heritage areas, as the Ecosystems need not be protected by international agreements, but deserve national protection.<sup>109</sup> Priority Ecosystems of National Importance should be determined prior to the new Act's commencement and included within its schedules from the outset.

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'areas that are relatively buffered from contemporary climate change, where over time biodiversity can retreat to, persist in, and can potentially expand from, as the climate changes'. The US *Endangered Species Act* gives an example of how climate-related shifts can be integrated into law. Its rules enable potential critical habitat to be listed and protected even if a threatened species is not yet present there.

<sup>106</sup> Hawke Review (2009), recommendation 8. *Ecological character* refers to the combination of an ecosystem's components, processes, benefits and services (see e.g. Ramsar Convention 2005a, Resolution IX.1 Annex A).

<sup>107</sup> This criterion would be used if necessary as a supplement or precursor to National Reserve System (NRS) protection, noting that the NRS is proposed as a separate nationally-protected matter above.

<sup>108</sup> Note: *ecosystems* include non-living components and features.

<sup>109</sup> The primary Constitutional basis for this trigger would therefore be the Convention on Biological Diversity rather than the World Heritage or Ramsar Convention, for example.

Ecosystems of National Importance would be identified in various ways under the Act:

- a prioritised list of Ecosystems would be identified for protection on commencement of the new Act, finalised by the Scientific Committee;
- identification and mapping via the National Ecosystems Assessment (see **E.6** below);
- identification and mapping in bioregional plans, which identify both *regionally* and *nationally* important ecosystems for strategic protection (see **E.4**);
- a public nomination process established in the Act;
- the Minister may request the Scientific Committee to consider a nomination; and
- an accreditation process to recognise protected areas identified under state and territory laws – such as Areas of Outstanding Biodiversity Value in NSW<sup>110</sup> and critical habitat elsewhere (this will reduce duplication and provide for efficient national recognition of important ecosystems identified by states).

Overall, **Ecosystems of National Importance** is an umbrella term that reflects a strategic, landscape-scale focus. It encompasses existing and emerging concepts that recognise areas of rare or concentrated values, such as Biodiversity Hotspots, Key Biodiversity Areas, Areas of Outstanding Biodiversity Value<sup>111</sup> and High Conservation Value Vegetation.

#### *High Conservation Value Vegetation*

As part of a wider focus on Ecosystems of National Importance, the new Act would aim to identify and permanently protect High Conservation Value Vegetation (**HCV Vegetation**) from land-clearing, degradation including deforestation and forestry actions.<sup>112</sup> It would regulate and assess actions across all sectors on private or public land identified as containing HCV Vegetation.

The term High Conservation Value draws on six recognised categories.<sup>113</sup> HCV Vegetation could also be used to help identify international protections under the Act (see **Part J**).<sup>114</sup>

It is proposed that HCV Vegetation would include all primary ‘old growth’ forests, and other secondary or regrowth vegetation to be listed as HCV based on peer-reviewed scientific principles. It is envisaged that HCV Forests would be identified and mapped as part of the broader National Ecosystems Assessment (staged over five years) and protected as Ecosystems of National Importance.

Protection would be further secured through the creation of formal protected areas added to the National Reserve System; effective and well-resourced conservation management of forests and plantations; and private conservation agreements or incentive schemes on private lands containing HCV Vegetation.

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<sup>110</sup> See Part 3 of the *Biodiversity Conservation Act 2016* (NSW). AOBVs replace critical habitat in NSW.

<sup>111</sup> The *Biodiversity Conservation Act 2016* (NSW) provides for Areas of Outstanding Biodiversity Value (including critical habitat and other areas) to be declared and prioritised for private conservation funding.

<sup>112</sup> As noted under E.5 below, next generation biodiversity laws would replace the Regional Forestry Agreements that are otherwise currently in the process of expiry and renegotiation. Identifying and protecting High Conservation Value Vegetation is one such mechanism.

<sup>113</sup> See HCV Network (2017) (a member-based group of prominent conservation NGOs, est. 2005) at: <https://www.hcvnetwork.org/about-hcvf/what-are-high-conservation-value-forests>.

<sup>114</sup> In particular, forest species and ecosystems protected by international agreement (concerning the actions of Australian corporations overseas, such as forestry, mining companies and banks).

This approach would aim to be consistent with, and help to achieve, Australia's conservation obligations under the Convention on Biological Diversity and its carbon storage and ecosystem resilience obligations under the Paris Climate Change Agreement.<sup>115</sup>

As noted under **E.5** below, next generation biodiversity laws would also need to replace the Regional Forestry Agreements that are otherwise in the process of expiry and renegotiation. Identifying and protecting High Conservation Value Vegetation is one such mechanism.

A more sustainable land sector would also be promoted via Commonwealth land clearing regulation.

### **Significant land-clearing trigger**

The new Act would adopt a trigger to regulate significant clearing of native vegetation (**land-clearing trigger**). Land-clearing that meets certain thresholds would be a controlled action that requires federal assessment and approval. Sensitive areas such as High Conservation Value Vegetation would be off-limits to clearing other than for clearly identified conservation and emergency management purposes.

There is currently no specific trigger in the EPBC Act to regulate the serious impacts of land-clearing and degradation, including deforestation ('Land clearance' was listed as a Key Threatening Process in 2001 following an HSI nomination). Land-clearing can only be referred to the Commonwealth if the clearing action is likely to have a significant impact on a listed Matter of National Environmental Significance. For example, an internationally-protected wetland, or mapped habitat of nationally-threatened species.

Land-clearing is mainly regulated by the states and territories, with limited effectiveness or strategic oversight. High levels of clearing are still lawful, and illegal clearing continues with limited resourcing for enforcement at state or federal level. In recent years state laws have been weakened, putting national biodiversity, water and soil health at risk, and making it more expensive and difficult to achieve greenhouse gas reduction targets.

A comprehensive federal land-clearing trigger would ensure that Commonwealth efforts to preserve national biodiversity, reduce greenhouse gas emissions and achieve landscape-scale conservation are not undermined by a constantly changing patchwork of state land-clearing laws and policies.

The new land-clearing trigger would include three elements, based on *scale*, *sensitivity* and *high conservation value*. Any of these would constitute significant land-clearing that requires Commonwealth assessment, approval to proceed, or outright prohibition:

- **Scale:** proposals to clear 100 hectares or more of native vegetation in any *two year period* (designed to record and regulate cumulative impacts);
- **Sensitivity:** a schedule of *regulated* activities, regardless of the scale of clearing proposed (e.g. low-level clearing in over-cleared catchments); and

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<sup>115</sup> See for example, Paris Climate Change Agreement Article 7, at 7.9(e).

- **Protected area prohibitions:** a scheduled list of *prohibited* activities<sup>116</sup> in nationally protected areas (for example – clearing, modification or degradation of native vegetation that is known or critical habitat for endangered species or ecological communities; High Conservation Value Vegetation, Key Biodiversity Areas and other Ecosystems of National Importance; National Heritage places and Ramsar wetlands).

It would be an offence to undertake significant land-clearing without Commonwealth approval, and an aggravated offence to undertake prohibited clearing. Applications would be assessed by the National EPA against scientific guidelines, requirements in bioregional plans, recovery plans and other relevant strategies, taking account of local data and any assessments and approvals conducted at state or territory level.

### **Significant greenhouse gas emissions trigger**

The Bramble Cay melomys is the first Australian mammal to disappear as a direct result of climate change. Nominated as an endangered species by HSI in 2006, its island home was increasingly inundated by sea level rise. A delayed response from state and federal agencies turned a species emergency into an extinction tragedy.<sup>117</sup>

Human-induced climate change has been listed as a Key Threatening Process to biodiversity for nearly two decades (listed in 2001 following an HSI nomination). Yet the extinction of the melomys is a harbinger of biodiversity loss that Australia will increasingly face if our regulatory systems fail to respond more effectively to climate change.

Next generation biodiversity laws must address the impacts of climate change on biodiversity. This means systematically embedding adaptation and greenhouse gas emission reduction in law, policy and decision-making frameworks.

A national trigger to oversee high greenhouse gas emitting projects has long been a major gap in the national environmental law. Setting aside the biodiversity imperative, Australia needs to urgently ramp up its efforts to meet the Paris Agreement with an economy-wide legal framework and carbon budget<sup>118</sup> that is consistent with avoiding 2 degrees warming.

While this could be dealt with via standalone legislation, a new Environment Act trigger would link Australia's carbon accounting and emissions reduction targets with impact assessment and development conditions.

The trigger could have two limbs:

- At a strategic level, the Environment Act would require decision-makers to consider climate change mitigation and adaptation opportunities in strategic assessments and bioregional planning processes
- At the project level, the national EPA would assess projects with major greenhouse footprints, reject unacceptable climate impacts, and apply conditions and limits on other assessable projects.

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<sup>116</sup> Limited exemptions would allow for environmental conservation and emergency management works.

<sup>117</sup> Woinarski et al. (2016) 'The contribution of policy, law, management, research and advocacy failings to the recent extinctions of 3 Australian vertebrate species' *Conservation Biology*.

<sup>118</sup> For example, the Climate Change Authority (2012) recommended that Australia adopt a national emissions budget of 10.1 billion tonnes CO<sub>2</sub>-e for the period 2013 to 2050.

At present, EPBC Act assessment and conditions related to climate change can only be incidental to protecting listed Matters of National Environmental Significance, such as threatened species or World Heritage areas. The Environment Minister cannot definitively review or reject a proposal on the grounds that its greenhouse gas emissions are excessive or an unacceptable risk to the environment or the community.

Most sources of Australia's emissions require some form of development approval at the state or territory level (for example, land-clearing, mining, new power stations and major transport infrastructure). Yet state planning laws do not require decision-makers to meaningfully take into account a project's impacts on climate change. States do not generally impose conditions to minimise climate impacts, plan for adaptation or set cumulative carbon budgets.<sup>119</sup> Climate change readiness, like biodiversity protection, needs national leadership.

Previous ministers and several reviews have considered or recommended a greenhouse trigger under the EPBC Act.<sup>120</sup> However, uncertainty and polarisation of climate and energy policy remains problematic. A greenhouse trigger under the new Act would complement the proposed land-clearing trigger. It would also need to interact with any sector-specific laws and emissions reduction policies.<sup>121</sup> Further detail or thresholds for a greenhouse trigger are therefore beyond the scope of this report.

Overall, in the absence of standalone Commonwealth climate legislation, a greenhouse trigger in the Environment Act would give the national EPA strategic oversight of high-emissions proposals that are not sufficiently regulated by existing laws; and would ensure strategic plans under the Environment Act are climate-ready.

### **Significant water resources trigger**

Australia's water regulation is at a crossroads. As water law experts and scientists noted in 2016:<sup>122</sup>

*After 2 decades of cooperative governmental reforms on water, Australia established a world-leading hybrid governance system involving top-down regulation, water markets and water planning with stakeholder cooperation. Yet, with the abolition of the National Water Commission (NWC) in 2015, there is a growing belief that Australia may have "dropped the ball on water"*

*... It is increasingly unclear how resilient Australia's water reform blueprint (the National Water Initiative) will be in the face of shifting political agendas, growing complexity, reform fatigue, shrinking public resources at state levels and the absence of an independent oversight body like the NWC.*

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<sup>119</sup> Many states have recently set emissions reduction targets. Some have been legislated, and this is to be commended. However, state laws do not set systematic carbon budgets, nor do they cap or forecast cumulative emissions from developments they approve.

<sup>120</sup> When Environment Minister Robert Hill introduced the EPBC Bill in 1998, he noted his government's commitment to negotiate a greenhouse trigger once the Act was passed: Senate Hansard, Environment Protection and Biodiversity Conservation Bill 1998 [1999], Second Reading Speech, 22 June 1999, at 5990. The Hawke Review proposed an interim greenhouse trigger until an economy-wide carbon price was in place, and a requirement for strategic-level mitigation (recommendation 10).

<sup>121</sup> For example, electricity, mining, forestry, the land sector and native vegetation clearing, livestock agriculture, vehicle emissions, major transport infrastructure, building efficiency and waste.

<sup>122</sup> E. Carmody et al. 'The future of water reform in Australia — starting a conversation', *Australian Environment Review*, August 2016, Vol. 31 No. 4, 132-135. The authors make 10 proposals for reform.



In 2013, a limited 'water trigger' was added to the EPBC Act. Water resources are a matter of national environmental significance where a coal or coal seam gas (CSG) project would have a significant impact on a water resource. A 2017 statutory review confirmed the water trigger is operating effectively within its legislative scope, including the application of independent expert scientific expertise to consideration of impacts to water of coal seam gas and large coal mining developments.<sup>123</sup>

In 2017, revelations of alleged water theft, poor monitoring, systemic non-compliance and possible corruption shook public faith in Australia's water management framework more generally, particularly in the Murray-Darling Basin.

Consideration should be given to expanding the water trigger to assess significant impacts on other key water resources, beyond coal or CSG projects. As Commonwealth and state laws cross-cut water regulation, any such trigger would need to effectively interact with these evolving frameworks, including the *Water Act 2007* (Cth). This may include for example appointing a Water Commissioner within the Sustainability Commission, or re-establishing the National Water Commission itself, to oversee a reinvigorated National Water Initiative.<sup>124</sup>

### **Regulatory powers to declare matters of national environmental significance**

Finally the Environment Act would include a clear power for the Environment Minister to specify additional protected matters or controlled actions in the regulations. Similar powers exist in the EPBC Act but have not been exercised to date.<sup>125</sup>

This provision would allow the national EPA to assess emerging actions or cumulative impacts that do not fall within an existing Environment Act trigger. It would complement the general power to 'call in' proposed actions that have not been referred to the EPA. New matters declared in the regulations must be justified in the national environmental interest and fall within Commonwealth constitutional powers.

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<sup>123</sup> S. Hunter, *Independent Review of the Water Trigger Legislation*, 2017, at:

<http://www.environment.gov.au/epbc/publications/independent-review-water-trigger-legislation>.

<sup>124</sup> *The National Water Initiative (NWI)*, agreed in 2004 by the Council of Australian Governments (COAG), is the national blueprint for water reform: <http://www.agriculture.gov.au/water/policy/nwi>.

<sup>125</sup> For example, the provisions could be based on EPBC Act s. 25, with some drafting clarifications.

## **2. Assessing actions with potentially significant impacts on federal matters**

The Act would boost protections for Matters of National Environmental Significance against adverse impacts from site-based development and other actions, through improved assessment of potentially significant impacts by the National EPA.

### ***Simple outline of referral and assessment if proposal triggers Environment Act***

Actions likely to impact on national matters referred to National EPA for assessment.\*  
Proponents and government agencies have a duty to refer potential impacts.  
Community has formal rights to request agency referral (refusal may trigger review).

EPA must refuse 'clearly unacceptable' impacts or prohibited actions at this stage.  
EPA exhibits the action and referral information for public comment and reviews comments.  
EPA determines level of further assessment required based on referral information (e.g. Environmental Impact Statement). EPA takes into account any state process required.

Accredited professional completes assessment required by National EPA, including measures to avoid and mitigate damage to protected matters and the environment.

Accredited assessment report exhibited for public comment. Peer review if EPA requires.

EPA assesses likely impacts against legislative criteria including recovery plans, bioregional plans and EPA guidelines, and may refuse or approve with conditions. Certain prohibited impacts may not be approved.

\* **NB:** *National EPA assessment can be done concurrently with state assessment processes.*

## More effective assessment of proposed actions and impacts

The Act would include several important changes to improve current EIA processes:

- **Government actions may trigger impact assessment under the Act, including plans, programs, law reform and policy changes** that may have a significant environmental impact.<sup>126</sup> For example, a new international trade treaty or an overhaul of state native vegetation laws would need to be referred to the National EPA for assessment as a controlled action (analogous to the United States *National Environment Protection Act*, the US *Endangered Species Act* and other safeguards).<sup>127</sup>
- **Technical referral and assessment information must be prepared by an accredited person** with the necessary ecological or other prescribed qualifications, expertise and experience (i.e. a Commonwealth accreditation program, or government/industry-accredited standard recognised under the Act). For example, NSW biodiversity laws establish such an accreditation scheme by order of the state Environment Minister.<sup>128</sup>
- The National EPA would also have powers to require accredited professionals be **independently appointed**, or commission an independent **peer review**.
- The Act will require consideration of **cumulative impacts** on biodiversity of an activity in combination with other past, present and likely future activities.
- **Broad powers for the National EPA or Environment Minister to ‘call-in’ an activity that has not been referred, on the grounds of national environmental interest** – for assessment, refusal or approval with

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<sup>126</sup> EPBC Act ss. 524-524A define and limit what is an ‘action’, including in relation to government bodies. ‘Impact’ (direct or indirect) is also defined. The new Act would explicitly clarify that government plans, programs, law reform and policy changes (at Commonwealth, state and local level) may trigger assessment as an action controlled by the Act. The US *Endangered Species Act* (16 U.S.C. § 1536) requires all federal agencies to consult with the wildlife department to ensure ‘agency actions’ (including authorisations) do not risk extinction of a listed species or result in destruction or adverse modification of listed critical habitat.

<sup>127</sup> First, the United States *National Environment Protection Act* (1969) and Council on Environmental Quality regulations require environmental assessment of certain federal agency actions. Second, the *Endangered Species Act* (US) requires federal agencies to consult with the Fish and Wildlife Service if *actions they take, fund or authorise* may affect threatened species. Third, US Congress processes include detailed scrutiny of the environmental credentials of trade agreements and international treaties.

<sup>128</sup> See the *Biodiversity Conservation Act 2016* (NSW), s 6.10. For example:

(4) *A scheme for the accreditation of persons under this section may (without limitation) include the following:*

- (a) the qualifications or experience required for persons to be accredited to apply the biodiversity assessment method,*
- (b) the accreditation of Public Service employees or other persons,*
- (c) the procedure for applying for accreditation,*
- (d) the grant of accreditation and the conditions on which it is granted,*
- (e) the period for which accreditation remains in force,*
- (f) the renewal, variation, suspension or cancellation of accreditation,*
- (g) the payment of fees for applications for the grant or renewal of accreditation (including periodic fees while an accreditation remains in force),*
- (h) the provision of information by accredited persons to the Environment Agency Head and other persons in relation to biodiversity assessment reports prepared by the accredited persons,*
- (i) the integrity of biodiversity assessment reports prepared by accredited persons (including the audit of those reports and the establishment of protocols on the engagement of accredited persons to ensure the independent exercise of their functions),*
- (j) the information that an accredited person is required to obtain from a person requesting a biodiversity assessment report.*

conditions. A call-in must be supported by a statement of reasons as to why Commonwealth (EPA) oversight is in the national interest, and information on the Constitutional basis for intervention.

- **Stronger and clearer *significant impact* criteria** would, for example, require assessment of impacts on Threatened Ecological Communities in lower condition (not just in good condition). This will promote resilience and ensure assessment and approval conditions meet recovery plan goals and actions.
- **Adverse impacts on a number of listed matters are prohibited and must not be approved** – including identified *critical habitat*; *endangered* or *critically endangered* species; *endangered* or *critically endangered* ecological communities in *good condition*;<sup>129</sup> and *High Conservation Value Vegetation*.
- **The broad ‘national interest’ exemptions from assessment would be replaced** with a limited exemption for national defence and security matters.<sup>130</sup> To avoid arbitrary exclusion of actions and impacts from EPA assessment the Environment Minister:
  - could only exempt a specified person in relation to a specified action;
  - must be satisfied that the exemption is *necessary* in the interests of Australia’s *defence or national security*, or in preventing, mitigating or responding to a *national emergency*; and
  - must provide and concur with a written declaration from the relevant portfolio Minister or the Prime Minister.<sup>131</sup>

These reform proposals are consistent with the Commonwealth’s strategic environmental focus and a commitment to clearer, high environmental standards.

### Clearer ‘significant impact’ threshold

In recent years there has been heightened concern at the level of government discretion in decisions about ‘controlled actions’. That is, whether a proposed development or action is likely to have a significant impact on national environmental matters, and therefore needs EPBC Act assessment.

The gap between the number of proposed actions referred, and the lower number found to be controlled actions, may suggest that some industries and agencies take a more precautionary approach to significant impacts than the Department. In other cases, such as land-clearing in Queensland, weakened state laws have sent a signal that landscapes can be cleared *en masse*, with little government oversight. Environment groups have raised concerns that the Commonwealth is failing to secure referrals or call-in numerous actions likely to significantly affect the national environment.<sup>132</sup>

Next generation biodiversity laws must address the lack of public confidence and uncertain discretion in the current impact assessment threshold and referrals. A clearer test for federal oversight could be achieved by making the ‘significant

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<sup>129</sup> The Act or regulations and National EPA guidelines would require that Endangered or Vulnerable Ecological Communities in *poor condition* could only be cleared if a recovery plan is in place; and approval of the action would not jeopardise the community’s likelihood of recovery.

<sup>130</sup> Cf EPBC Act s. 158, which is too broad and discretionary an exemption, as recent use demonstrates.

<sup>131</sup> A defence or security exemption would require a written declaration of the Prime Minister, the Attorney-General or Defence Minister, with the concurrence of the Environment Minister. A national emergency would require a written declaration of the Prime Minister or Emergency Services Minister, with the concurrence of the Environment Minister.

<sup>132</sup> See for example, WWF, *Accelerating Bushland Destruction In Queensland* (2017).

impact' threshold more robust, objective and accountable; or by removing the word 'significant' (and replacing it with 'substantial', 'more than minimal' or 'adverse', for example). While there are pros and cons of each approach, this report proposes retaining a clear 'significant impact' threshold. This is on the critical proviso that the National EPA assesses more potential impacts, based on clear guidelines with objective and consistent standards.

### **EPA's Impact Guidelines**

Proponents, agencies and the community need better information on whether national assessment is required. New national EPA guidelines will set out the threshold for 'significant' impacts on biodiversity, based on clearer criteria, cumulative impact considerations and more comprehensive mapping of relevant matters. To ensure rigorous and consistent assessment, a decision that a proposal is not a 'controlled action' would be subject to a rapid merits review.<sup>133</sup>

The National EPA would assess the impacts of the action on federal matters and have the power to approve or refuse the action, relying on scientific advice and up-to-date biodiversity information, in accordance with the Act and regulatory guidelines.

Powers to reject *clearly unacceptable impacts* on biodiversity early in the process would be retained and broadened, to reflect the Commonwealth's broad environmental leadership role.

Assessment under the new Act must take into account the cumulative impact of past, present and likely future development (e.g. combined pressures from multiple threats) on biodiversity. This should begin at the strategic level (see bioregional planning below) but extend to site-based assessment requirements. Cumulative impact assessment would identify biodiversity trends based on National Environmental Accounts, State of the Environment reports and other data.

The Environment Act would include clear prohibitions. For example, the National EPA must not approve adverse development in areas of critical habitat (for endangered species or ecological communities) – but instead must proactively seek conservation agreements or covenants with landholders. This approach could draw on the requirements of the US Endangered Species Act.<sup>134</sup>

There would also be clearer links between decision-making and recovery planning. For example, the Act would require approval decisions to be consistent with approved conservation advices and recovery plans for threatened species and Threatened Ecological Communities. Approval decisions could not jeopardise recovery goals for listed threatened species and ecological communities.

The Act should address effective options to integrate state planning processes and minimum national assessment standards. To improve efficiency the National EPA would coordinate with state departmental assessments; but the Commonwealth would retain approval powers where there is potential to significantly impact Matters of National Environmental Significance. Bilateral agreements to delegate *assessment* (for example, to a state EPA or planning department) would need verification of

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<sup>133</sup> For example, internally by the National EPA, or externally by a specialist in the Administrative Appeals Tribunal or Federal Court.

<sup>134</sup> As noted above, the *US Endangered Species Act* (16 U.S.C. § 1536) s. 7 requires all federal agencies to consult and ensure 'agency actions' (including authorisations) do not risk extinction, or destruction or adverse modification of listed critical habitat.

equivalent protections by the National EPA, and sign-off and oversight by the Sustainability Commission.

### **Call-in powers, referral duties and community rights**

To ensure that all significant impacts on the national environment are properly assessed, the Environment Act will include clearer referral duties and powers for:

- **government ministers and agencies** at all levels (for projects they may authorise, and the impacts of their own laws, policies and programs);
- **the National EPA** to call-in and assess proposed actions (at its own initiative, or at the Environment Minister's request); and
- **the public** (to formally request a proponent or agency to refer an action, and to seek an injunction and merits review if a significant impact is not referred).

The general 'call-in' or national environmental interest power would allow adverse environmental impacts to be considered that may not trigger a listed Matter of National Environmental Significance.<sup>135</sup> This is an identified weakness of the EPBC Act, where significant impacts are considered through a narrow lens. Requiring environmental assessment of government law and policy changes will ensure that other federal or state laws and policies do not undermine the Environment Act, and address a gap in traditional Regulatory Impact Statements.<sup>136</sup>

Proponents of an action and all levels of government would have a duty to refer to the National EPA any action with potentially significant impacts on biodiversity and other protected matters. Community members also have a formal right to request a federal, state or local agency to refer a public or private sector action if it meets certain criteria.<sup>137</sup> Refusal to refer an action at the community's request could trigger a right to seek judicial review to enforce the agency's mandatory duty to refer (or a right to refer the matter directly to the EPA).<sup>138</sup>

Below is an example of referring an action for potential impacts on a Threatened Ecological Community. Note that the impact assessment is conducted by the National EPA rather than the Environment Minister or Department:

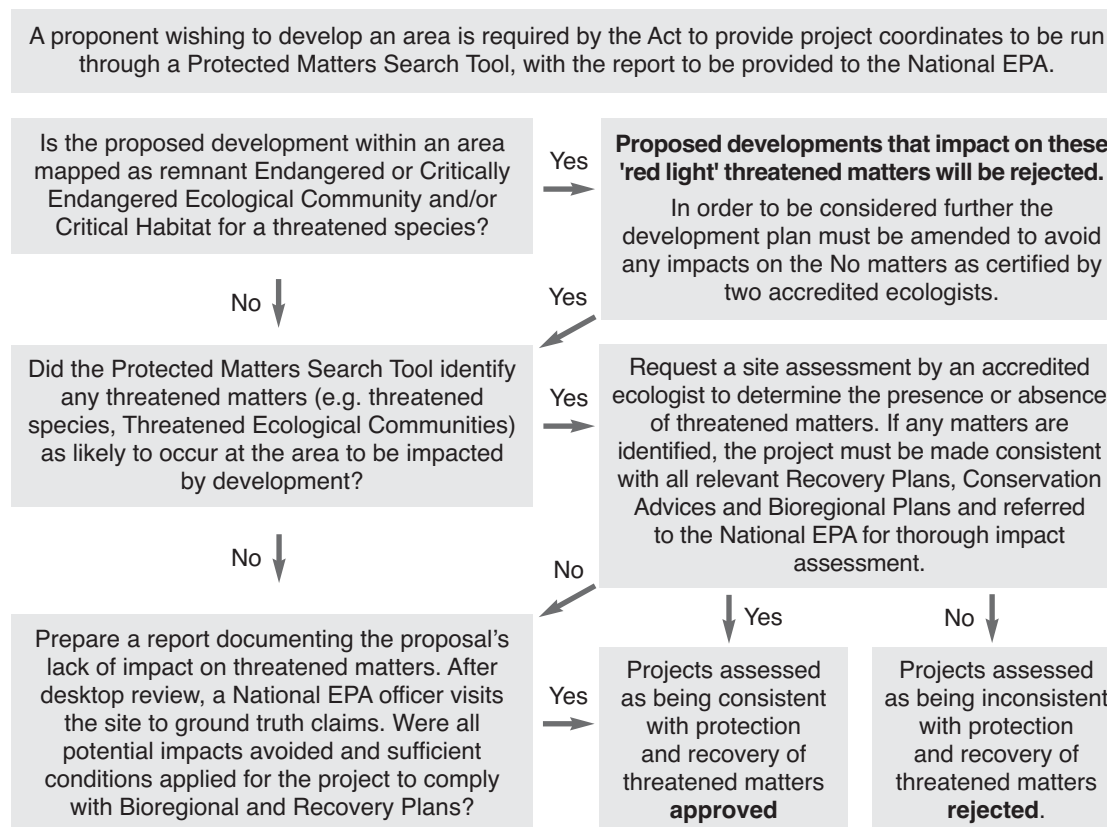
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<sup>135</sup> Where relevant Commonwealth constitutional powers exist, as noted in a statement of reasons.

<sup>136</sup> For example, cost-benefit considerations in many state and Commonwealth Regulatory Impact Statements often may make general statements about low environmental impacts or costs of proposed regulatory changes without transparent evidence or apparent expertise on which to base these claims.

<sup>137</sup> For example, an agency would have a duty to consider a request made in the appropriate form if it is an action for which the agency has responsibility, carriage, oversight or authorisation.

<sup>138</sup> See for example the *Endangered Species Act* (US) citizen enforcement mechanism (16 U.S.C. § 1540(g)), available at: <https://www.law.cornell.edu/uscode/text/16/1540>.



### Limits to biodiversity offsetting

Finally, the Act would not permit biodiversity ‘offsetting’ of impacts on critical habitat, endangered or critically endangered species and ecological communities.<sup>139</sup> This recognises that some assets are too significant (or outcomes too uncertain) to ‘offset’. This approach also reinforces incentives to conserve species at a landscape scale to avoid extinction risk in the first place.

Resort to biodiversity offsets, if any, should be minimised and require a precautionary approach given the long timeframes and current uncertainty of offsetting being capable of delivering successful outcomes.<sup>140</sup> Any offsetting (such as for vulnerable, near-threatened or non-threatened biodiversity and ecological communities) would require a scientifically robust National Offsets Policy and consistent standards.

Policy and standards must require that offsets are a last resort, after all efforts are made to avoid and minimise impacts; meet strict scientific like-for-like biodiversity principles; adopt a ‘maintain or improve’ standard to measure outcomes (or ‘no net loss and preferably net gain’); and ensure offsets are protected in perpetuity (offsets cannot be offset). Offset calculations must be consistent with a precautionary approach, and no offsets would be available for future mine remediation due to lack of evidence of success. Furthermore, any offsetting must be consistent with recovery goals in recovery plans.

<sup>140</sup> See for example, M. Maron et al., ‘Faustian bargains? Restoration realities in the context of biodiversity offset policies’, *Biological Conservation* Vol. 155, Oct. 2012, pp 141-148, at: <https://doi.org/10.1016/j.biocon.2012.06.003>.

### **3. Landscape-scale protections - a strategic focus in the Environment Act**

The new Act would adopt a dual focus on resilient species and healthy ecosystems. This will support the aim of avoiding extinction and allow for synergies such as regional and multi-species recovery plans (applied across all relevant jurisdictions, not just Commonwealth land and waters).

The EPBC Act is best known for project assessments, decisions and site-based conditions of approval. Operating at this level remains important to address local impacts on national icons, and reduce the combined impacts of a certain scale of activity. Yet there is a well-recognised need for biodiversity laws to expand beyond individual species protection to greater landscape-scale protection.<sup>141</sup>

Landscape-scale approaches plan holistically for ecosystem health, resilience, connectivity and climate change readiness. A major component of this approach will be to identify and protect Ecosystems of National Importance (whether or not they are threatened), such as climate refugia, Key Biodiversity Areas and High Conservation Value Vegetation. Two important tools are *bioregional planning*, and *strategic environmental assessment*, as outlined below.

### **4. Bioregional planning**

The new Act should establish a system of cross-sectoral, ecosystem-based planning and management for terrestrial, marine and coastal areas.<sup>142</sup> Bioregional planning would be a centrepiece of the Commonwealth's strategic environmental focus, national leadership and cooperation. It would also be a principal responsibility for the new Sustainability Commission, with a clear role to negotiate draft plans and implementation agreements with all levels of government, and finalise the plans in accordance with the Act.

The Act will require the development of some 89 technical regional biodiversity strategies (one for each IBRA bioregion in Australia<sup>143</sup>), to employ the most effective management strategies for key environmental assets identified across each region.<sup>144</sup> The process is regionally specific but could be centrally managed by an intergovernmental Biodiversity Expert Taskforce – to increase coherency, efficiency and delivery of priorities under the National Biodiversity Conservation and Investment Strategy (E.7 below).

Teams of conservation professionals would be engaged to rapidly assess each bioregion, where possible based on collation of existing data (with additional collection for data-poor regions). For example, this could aim for assessment and completion of two bioregional plans per state each year, over six years. HSI has recommended prioritising the 15 national biodiversity hotspots.<sup>145</sup> In addition to public consultation, a Biodiversity Expert Taskforce could assess draft plans and advise the Sustainability Commission before plans are accredited to meet national standards.

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<sup>141</sup> See for example the Hawke Review of the EPBC Act (2009) and Australian Government's response.

<sup>142</sup> APEEL, *Blueprint for the Next Generation of Australian Environmental Law* (2017) at 4.1.

<sup>143</sup> On the IBRA system see: <http://www.environment.gov.au/land/nrs/science/ibra>.

<sup>144</sup> See P. Sattler, 'Bioregional Conservation Strategies and National Priorities' (2016) in M. Kennedy, *Threatened*, Humane Society International Australia, pp 92-95.

<sup>145</sup> See P. Sattler, 'Bioregional Conservation Strategies and National Priorities' (2016) in M. Kennedy, *Threatened*, Humane Society International Australia, p 95-94.



A clearer legal framework for bioregional planning – in both procedure and desired outcomes – will improve certainty for Ecologically Sustainable Development and economic growth, address cumulative impacts upfront, and reduce future site-by-site land-use conflicts. Bioregional plans are targeted documents that seek to achieve the environmental protection aims of the Act in practical ways at a regional level. They would integrate with, but not seek to replace, the multi-levelled urban and environmental planning instruments at state and territory level. An efficient, pragmatic assessment approach to bioregional plans will provide a focal point for implementing the National Biodiversity Conservation and Investment Strategy (see E.7 below).

It is proposed that actions, authorisations and prohibitions in bioregional plans would be binding on Commonwealth Ministers and agencies, state and local governments, and the private sector, including for statutory planning and development decisions, and natural resource management decisions.

The Act would set out key elements for the bioregional planning process, including:

- **a clear, legislated purpose** tied to achieving the objects of the Act and achieving positive biodiversity outcomes at a regional and national scale;
- **an initiation and coordination role for the Sustainability Commission** to develop bioregional plans, supported by state and federal department data;
- **an adaptable process that responds to criteria** in the Act and Regulation, such as:
  - setting **SMART**<sup>146</sup> **objectives** and priorities for regional biodiversity that link to the National Biodiversity Conservation & Investment Strategy;
  - aiming to **maintain or improve specific biodiversity outcomes** in the region, including for the benefit present and future generations;
  - requiring plans to be based on **strong scientific and socio-economic evidence**
  - consider the **status and trends** of regional biodiversity in all its forms, as well as **limiting factors and future scenarios**;
  - adopting the most appropriate **mix of conservation responses** tailored for that bioregion, having regard to the likely effectiveness of responses and cost;
  - **explicitly considering cumulative impacts** of past, present and future development and environmental pressures, and assessing the bioregion's carrying capacity<sup>147</sup> for development and ecological services;
  - **applying ESD principles**, including short and long-term considerations, and ensuring biodiversity and ecological integrity are fundamental considerations in plan-making;
  - a **Regional Threat Assessment** to address recovery plans, key threatening processes and regional pressures;
  - conditions and circumstances requiring further **impact assessment of actions**; and
  - protecting **critical habitats** and **achieving goals** in recovery plans and threat abatement plans.

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<sup>146</sup> Specific, Measurable, Attainable, Relevant and Timely. See for example the Australian Government's Five-year review of the *National Biodiversity Conservation Strategy 2010-2030* (2016), Appendix C.

<sup>147</sup> See for example John Williams Scientific Services Pty Ltd, *An analysis of coal seam gas production and natural resource management in Australia: Issues and ways forward* (October 2012).

- **assigning responsibilities** to consult on, develop and implement plans within a certain timeframe (involving all levels of government, but ultimately give bioregional plan-making powers to the Sustainability Commission, with step-in powers and incentives to reward state or local government implementation);
- **deep engagement** with local communities, regional NRM bodies and all levels of government to coordinate priorities and build on successful programs;
- **systematically applying new tools to identify protected matters** – for example, a **National Ecosystems Assessment** may initially identify areas at the bioregion level, either for listing and protection as **Ecosystems of National Importance**,<sup>148</sup> or identify **Ecosystems of Regional Importance** for strategic long-term protection in the bioregional plan;
- **protecting other sensitive areas from impacts** upfront, such as highly productive agricultural landscapes and peri-urban farmlands;
- **integrating infrastructure planning** to conserve and restore bioregional values;
- **requiring the EPA, Ministers and all levels of government to make decisions consistent** with protections established in a bioregional plan;
- **open standing for any person to seek civil enforcement** of a breach of a bioregional plan, or to challenge validity of a plan if improperly made;
- a consistent, well-resourced and mandatory **monitoring, reporting and improvement** program; and
- **regular reviews** (for example every 10 years) and requirements to amend and update plans based on new information and continuous improvement.

## **5. Strategic environmental assessment & accreditation**

Next generation biodiversity law will strengthen the rigour of strategic environmental assessment processes (**strategic assessment**). Strategic assessment can be used to assess multiple future activities or projects upfront, under a government policy or environmental impact assessment system that is legally enforceable and objectively accredited to meet Commonwealth standards set by the Sustainability Commission (**accreditation**).

Strategic assessment and accreditation aims to increase efficiencies while maintaining sufficient national EPA oversight, approval and/or 'call-in' of impacts on nationally significant matters. It may be used for a particular sector or program that can clearly and efficiently meet federal legal standards for biodiversity protection.

This is different to *bioregional planning* (under **E.4** above), which is envisaged as a systematic, integrated national planning process for environmental protection and ESD across each Australian bioregion.

Strategic assessment and accreditation will be underpinned by rigorous, objective and transparent requirements set out in the new Act and regulations. These would include criteria for Commission accreditation, consultative policy design processes,

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<sup>148</sup> Such as climate refugia, significant wetlands, wildlife corridors, High Conservation Value Vegetation, Key Biodiversity Areas and biodiversity hotspots.

requirements on responsible parties to demonstrate strong biodiversity and environmental outcomes from accredited laws and programs, and transparent compliance monitoring against Commonwealth standards by the National EPA.

The new Act will embed best practice strategic assessment by specifying:

- **strong legislated standards**, decision-making criteria and science-based methods, including a ‘**maintain or improve**’ **environmental outcomes** test (such as for biodiversity, water quality, vegetation, carbon storage) and requirements to be **consistent with recovery plans and threat abatement plans**;<sup>149</sup>
- **cumulative impact assessment** requirements, taking account of past, present and likely (approved) future activities at the relevant scale (for example, IBRA subregion);
- **guidelines to support integration** of federal strategic assessment with state and local planning processes at the earliest possible stage;
- **comprehensive and accurate mapping** and baseline environmental data;
- **mandating transparency and public participation** at all phases of the process, including to verify post-approval compliance, to ensure community confidence and acceptable outcomes;<sup>150</sup>
- requiring **alternative scenarios** to be considered, including for **climate change adaptation**, to enable long-term planning for realistic worst-case scenarios (i.e. plan against failure);
- **ground-truthing** of landscape-scale assessment via local studies and input;
- **adaptive management and review** once a program is accredited, to respond to new discoveries, correct unsuccessful trajectories or implement best available technology;
- strategic assessment may complement **site-level assessment** where appropriate, not necessarily replace it,; and
- **robust oversight by the National EPA**, including via legislated, independent performance audit requirements, transparent verification of compliance, and ‘call-in’ powers for higher-risk actions.

Under current law, strategic assessments under Part 10 of the EPBC Act ‘switch off’ federal project-level approvals by relying on the accredited process. However, EPBC Act strategic assessments have involved a range of inadequacies. For example:

- the assessment of ecological impacts in the Melbourne Urban Growth Boundary,
- inadequate offset standards for the Western Sydney Growth Centres, and
- the hasty accreditation, limited transparency, oversight and environmental criteria of the National Offshore Petroleum Safety and Environmental Management Authority.

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<sup>149</sup> The Hawke Review recommendation 6 agreed with the need to make EPBC Act strategic assessment ‘more substantial and robust’, including a ‘maintain or improve’ test for environmental outcomes.

<sup>150</sup> For example, scoping and preliminary assessment, regional vision, baseline conditions, detailed assessment, comment on proposed approval or accreditation conditions, post-approval monitoring of compliance and enforcement).

These examples provide lessons for improving transparency, implementation and outcomes of strategic assessment. The National EPA will publish guidelines on strategic assessment, verification and approval requirements under the new Act.

It is proposed that the National EPA would have greater oversight in areas that are currently delegated to separate authorities or to the states, such as offshore petroleum and forestry. Commonwealth accreditation of fisheries would continue with some improvements (see below).

### **Forestry oversight**

A new Environment Act would provide more effective oversight of forestry by the National EPA and the Australian community, including enforceable protections rather than exemptions under inadequate and outdated Regional Forest Agreements.

Existing national oversight and governance of forestry has been highly inadequate. For the last 20 years, Commonwealth exemptions have applied to forestry operations under Regional Forest Agreements between the Commonwealth and some states (NSW, Tasmania, Victoria and Western Australia). These agreements provide an exemption from standard EPBC Act assessment processes, but in many cases rely on poorly enforced state laws.

Despite a built-in commitment to regularly review the Agreements, transparency and compliance has been poor, environmental monitoring has been patchy, and five-year reviews have been grossly delayed. In a scathing assessment in 2009, the Hawke Review described this as completely unacceptable, but the delays have not been rectified since then.<sup>151</sup> Indeed, several mandatory reviews are yet to be completed, despite governments announcing their intentions to renew the expiring Regional Forest Agreements.

As noted, the Act will also introduce new triggers for significant land-clearing, and Ecosystems of National Importance, which may include protecting identified areas of High Conservation Value Vegetation (see **E.1** above).

### **Fisheries accreditation**

The new Act would retain and improve specific strategic assessment process to regulate fisheries. Consistent with other reforms, the National EPA (instead of the Environment Minister) would be responsible for approving Commonwealth and export fisheries for their ecological sustainability and providing strategic oversight.

The EPBC Act initiated Commonwealth environmental impact assessment for fisheries. Overall, Environment portfolio involvement has been essential in driving significant improvements in the way Australia's Commonwealth and export fisheries are managed. This will continue under a more independent framework in the new Act.

The Act will improve ecologically sustainable fisheries management by the following additional reforms:

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<sup>151</sup> See for example, Hawke Review of the EPBC Act (2009), Chapter 10.

- stricter requirements to avoid killing listed species during fishing operations, with National EPA oversight, in order to qualify for exemptions for offences;
- the Scientific Committee, or a special advisory group to the Committee, would steer an initial 12-month project to assess all harvested and bycaught species in Commonwealth fisheries identified as 'at risk' in relevant Risk Assessment processes, to bring the threatened species lists up-to-date and to ensure those species are being managed appropriately;
- protecting highly migratory species listed on Annex I of the UN Convention on the Law of the Sea as a protected matter under the Act;<sup>152</sup>
- extending mandatory critical habitat listing to include listed migratory species, including a prohibition on adverse impacts to identified critical habitat;
- all species, including commercially fished marine fish, should be nationally listed in the appropriate threatened category according to scientific and biological criteria (as noted above);
- mandatory duties to develop and apply recovery and threat abatement plans;
- threatened categories in the new Act would more closely reflect IUCN categories, including *near-threatened* and *data-deficient* categories (see **D.5** above).

## **6. National Ecosystems Assessment**

Next generation biodiversity laws should be supported by a positive flagship initiative called the Australian National Ecosystems Assessment. This would be coordinated by the Environment Department, assisted by the Sustainability Commission, National EPA and counterpart state/territory agencies. This is a priority activity that could be initiated ahead of law reform so that it could feed into timely bioregional planning once a new law is in place.

The National Ecosystems Assessment would bring together and enable some of the important new tools and programs of next generation biodiversity law proposed in this report. In particular:

- a rapid initial assessment to identify areas under imminent threat, and other immediate and essential actions to protect the national environment, such as the identification and protection of High Conservation Value Vegetation (**interim report**);
- support the Minister's legal duty to identify, assess and list (via the Scientific Committee) all nationally Threatened Ecological Communities within five years (**major report**), with ongoing duties to keep lists up-to-date;
- identify, recognise and map the new Commonwealth-protected matters of Ecosystems of National Importance and a comprehensive, adequate and representative National Reserve System;
- provide a properly resourced and comprehensive update to Australia biodiversity mapping and integrated data-sharing systems;
- better informing a national network of Bioregional Plans;

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<sup>152</sup> See: [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/annex1.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/annex1.htm).

- identify baselines, reference points or indicators for a system of National Environmental Accounts, with clear timeframes, stages and budgetary allocations from the Commonwealth, state and territory governments; and
- promote the concept of *ecosystem services* and identify the benefits (or services) that key natural assets provide to human society,<sup>153</sup> consistent with Aichi targets under the Convention on Biological Diversity.

The UK's National Ecosystems Assessment provides a useful point of reference. With initial findings delivered in 2011, it was a broad collaboration that focused on the connection between ecosystems, the services they provide and emerging pressures on the environment.<sup>154</sup>

Australia's initiative would be a legal requirement that fits within the new framework, as a rapid and dedicated way to identify and list all threatened entities as a priority. An interim and final report should be delivered within five years, with clear interim timeframes, stages and budgetary allocations across all bioregions. The Act would also specify the National Ecosystems Assessment be reviewed and updated periodically, for example, within 10 years of the first assessment's final report.

## **7. National Biodiversity Conservation and Investment Strategy**

The Act would require the Environment Minister to consult on, approve and coordinate implementation of a National Biodiversity Conservation and Investment Strategy (**NBCIS**). Unlike existing strategies, the NBCIS would be directly interwoven with the fabric of the new Environment Act and National Environment Plans.

The new Act would also provide for the following to establish the NBCIS:

- Require the NBCIS to be directed towards achieving the objects of the Act, and SMART national environmental goals and targets relevant to biodiversity;
- An intergovernmental or cross-sectoral Biodiversity Expert Taskforce to advise the Sustainability Commission on national biodiversity priorities, building on public consultation, bioregional plans and existing investments;<sup>155</sup>
- Clear integration with bioregional plans and technical assessments (see **E.4**);
- Specific national programs on biodiversity education, research, monitoring, government funding and other investment;
- Set clear responsibilities, including non-discretionary duties on the Minister;
- Enable the Minister to delegate administration to the Department of Environment and otherwise by agreement with States and Territory ministers;
- Clear criteria, consultation processes and timeframes to engage stakeholders (the community, scientists, indigenous groups and protected area managers, conservation, Landcare and wildlife groups, state and territory agencies, and private sector providers such as private conservation funds and biobankers);

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<sup>153</sup> For example, water purification by swamps, pest control by birds, bats and insects, pollination by native bees, carbon storage in wetlands, climate control by urban forests, soil erosion and salinity prevention from rural ecological communities, storm surge protection from coastal mangroves.

<sup>154</sup> Robert Watson & Steve Albon, 'UK NEA: Synthesis of Key Findings' (2011) at [http://www.wensumalliance.org.uk/publications/UKNEA\\_SynthesisReport.pdf](http://www.wensumalliance.org.uk/publications/UKNEA_SynthesisReport.pdf): p 15.

<sup>155</sup> See P. Sattler, 'Bioregional Conservation Strategies and National Priorities' in HSI Australia, *Threatened* (2016) pp 92-96.

- Requirements to integrate with bioregional planning aims and outcomes and strengthened joint recovery and threat abatement planning (with significantly increased resourcing);
- Requirements to estimate timeframes and investment levels to achieve goals;
- Use of robust environmental valuation of potential losses of biodiversity and ecological services, and potential gain through implementing the NBCIS; and
- The Sustainability Commission will have oversight of performance monitoring and achievement of the NBCIS as part of *State of the Environment* reporting.

### **Revised goals for the initial NBCIS**

The Australian Government's 2016 review of the *National Biodiversity Conservation Strategy 2010-30* demonstrates the need for clearer and more realistic goal-setting, responsibilities, monitoring and accountability.<sup>156</sup>

In 2016, HSI Australia published a critique and 12 recommendations on that Strategy,<sup>157</sup> which provides a useful reference point for the initial NBCIS. In response to the official 2016 review, Australia's governments exhibited a high-level revised draft of the 2010-2030 strategy (entitled *Australia's Strategy for Nature*) in early 2018. The revised draft fell far short of HSI's recommendations and failed to respond effectively to the official review. Its objectives and explanations were ambiguous, and its proposal for an open-ended 'actions inventory' ignored recommendations on the need for specific, measurable, assigned, realistic and timely (SMART) targets. Replacing this proposal with a best practice NBCIS that reflects national biodiversity priorities will be a priority under the new Act.

### **Expert Taskforce to identify national biodiversity priorities & link to other plans**

The Sustainability Commission would establish an intergovernmental Biodiversity Expert Taskforce to advise on national biodiversity priorities, building on stakeholder consultation and investment over many years. The Taskforce could be made up of senior state and Commonwealth conservation agencies and independent scientists. The Taskforce could also assist the Commission in reviewing bioregional plans (**E.4**).

As outlined throughout **Part E**, the Environment's Act reinvigorated bioregional planning process will include an efficient technical assessment of each bioregion in Australia, to provide upfront protection of valuable environmental assets and manage key threats. The Act will ensure that national biodiversity priorities are addressed in bioregional plans. To achieve this, the Taskforce will review draft plans and advise the Sustainability Commission on NBCIS integration at the regional level, before bioregional plans are finalised. The Taskforce could also help identify opportunities for regional conservation funding from federal, state or private sector sources.

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<sup>156</sup> Australian Government, *Report on the Review of the first five years of Australia's Biodiversity Conservation Strategy* (2016), Department of the Environment and Energy, available at: <http://www.environment.gov.au/biodiversity/publications/australias-biodiversity-conservation-strategy-five-year-review>.

<sup>157</sup> See J. Lambert, 'National Biodiversity Conservation Strategy [2010-30] – Report Card and Revised Goals' in *Threatened – Threatened Species Conservation in Australia* (2016) HSI, pp 72-91.

## **Capital Stewardship Fund to deliver national & regional biodiversity outcomes**

As part of the NBCIS, the new Act should reinvigorate a national ‘stewardship payments’ fund for private landholders to achieve priority outcomes for national and bioregional biodiversity conservation.

The Act could establish a Capital Funds Conservation Program to receive capital contributions, and generate stewardship payments to landholders.<sup>158</sup> The Fund and Program would be directed to the recovery of listed threatened ecological communities, critical habitat management and other nationally protected matters – both for initial recovery actions and ongoing payments to secure conservation management in perpetuity.

This incentive program is consistent with the introduction of a land-clearing trigger that seeks to curb the destruction of threatened and High Conservation Value Vegetation and recognise the enduring national value of retaining it. Benefits include diversified income, restored and enhanced ecosystem services, co-benefits of biodiverse carbon storage, and resilience to key threats such as salinity, invasive species and climate change.

**To recap, key elements of Next Generation Biodiversity Laws in this part (New triggers, impact assessments & strategic tools) include:**

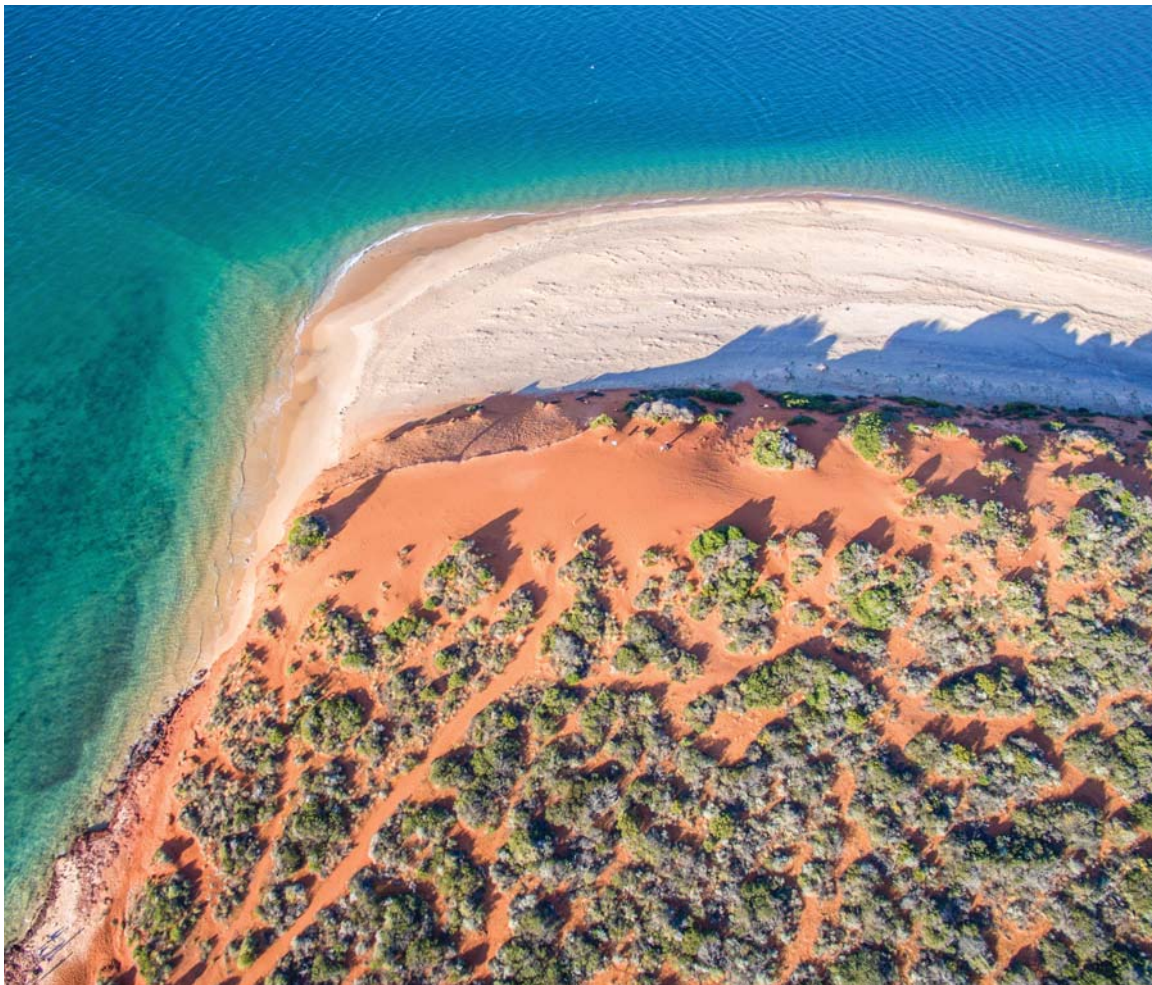
- **A trigger to guard the National Reserve System of protected areas against significant impacts.**
- **A trigger to identify and protect Ecosystems of National Importance, such as wetlands of national importance, Key Biodiversity Areas, climate refugia and High Conservation Value Vegetation.**
- **A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

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<sup>158</sup> See P. Sattler, ‘Bioregional Conservation Strategies and National Priorities’ in HSI Australia, *Threatened* (2016) p 96.



- **A National Ecosystems Assessment to rapidly identify key natural assets and ecosystem services that deserve national recognition and monitoring.**
- **A National Biodiversity Conservation & Investment Strategy that pools resources and links the tools above with national, state and regional conservation efforts.**



## F. PUBLIC PARTICIPATION, TRANSPARENCY & ACCESS TO JUSTICE

To ensure public confidence, transparency, accountability for biodiversity outcomes, the new Environment Act must include a range of key safeguards to ensure public participation, transparency and access to justice. In particular:

1. **Strong public participation provisions**
2. **Merits review for key decisions**
3. **Easily accessible, timely public information on actions and decisions**
4. **Open standing to review legal errors and enforce breaches**<sup>159</sup>
5. **Protective costs orders.**<sup>160</sup>

We briefly outline each of these safeguards below. By way of context, community access to justice is a crucial component of good decision-making because:

- It increases public confidence in decision-making and environmental outcomes and supports the rule of law;<sup>161</sup>
- Transparency and independent oversight of government action improves decision-making, public accountability and deters corruption;
- Next generation laws require an expanded role for third parties – civil society, supply chain operators and others – as ‘surrogate regulators’ (see H below);
- Australia is also a signatory to several international commitments promoting legal rights to participate in decision-making processes and to have access to the courts to ensure accountability.<sup>162</sup>

### 1. Strong public participation provisions

Community engagement should be at the centre of the new Act. This would include early engagement and public participation provisions at all key stages to inform decisions under the Act. In particular:

- National Environment and Sustainability Plans;
- Draft policies and standards made by the Sustainability Commission;
- Draft impact assessment guidelines by the National EPA;
- Nomination and listing of threatened biodiversity and heritage places;
- Recovery and threat abatement planning;
- Bioregional planning;
- Strategic environmental assessments;
- Project EIA and approvals;
- Wildlife licensing and trade;
- Post-approval compliance; and
- Performance monitoring and reporting.

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<sup>159</sup> See for example the *Environmental Planning and Assessment Act 1979*, s. 123; *Protection of the Environment Operations Act 1997* (s. 252); NSW mining and water laws.

<sup>160</sup> For further information see EDO NSW advice to HSI on *Access to Justice* (2015).

<sup>161</sup> *The rule of law* means that the Australian community is confident that the law applies equally to all parties, ensures procedural fairness, prevents favouritism or privilege of certain parties, and provides that breaches will be enforced.

<sup>162</sup> These include the *International Covenant on Civil and Political Rights*, the *Rio Declaration on Environment and Development* (1992) and related *UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (2010) (see [www.unep.org](http://www.unep.org)).

The Act would require that decisions are to be informed by community engagement, including taking all public submissions into account, providing statements of reasons for decisions, and demonstrating how public feedback affected the final outcome.<sup>163</sup>

## **2. Merits review for key decisions**

The new Act must provide 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. This anti-corruption and accountability measure is in keeping with various expert reviews and recommendations.<sup>164</sup>

Merits review would apply equally to decisions made by the EPA, Sustainability Commission, the Minister or their delegate. All significant decisions would be published and accompanied by a statement of reasons. For example, decisions on whether an action triggers National EPA assessment; approval or refusal of an action, strategic assessment/program accreditations and licensing decisions.

In particular, conservation groups would be able to seek merits review of decisions on the following matters (within a limited time after the decision is publicly notified):

- decision not to list (or uplist) a nominated species, ecological community, national heritage, critical habitat, or protected area;
- whether a proposed activity is a 'controlled action' under the Environment Act, and if so, the assessment method required;
- adequacy of a recovery plan made for a species or ecological community;
- permits affecting nationally-protected species;
- international trade and movement of wildlife,<sup>165</sup> and advice about whether an action would breach a conservation order.

## **3. Accessible and timely public information**

The Environment Act should require easily accessible, timely public information on actions, biodiversity assessments and decisions.

All relevant information about a proposed action or a decision must be transparent and readily available to the community. Examples include providing reasons for decisions; mandatory notice of decisions and appeals (or rights to appeal) to all interested parties; and avoiding information asymmetry between the community, development proponents and other stakeholders.<sup>166</sup> This includes the areas that require public participation noted above, as well as habitat maps, government research and data and compliance and enforcement information on an online environmental information hub (discussed at **H.3**).<sup>167</sup>

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<sup>163</sup> Similar public participation improvements have been enacted in the NSW planning system, under the *Environmental Planning and Assessment Amendment Act 2017*.

<sup>164</sup> Community rights to merits reviews are supported by both the Hawke Review of the EPBC Act and the Independent Commission Against Corruption, *Anti-corruption safeguards in the NSW planning system* (2012). See also EDO NSW, *Merits reviews in planning in NSW* (2016), at: [http://www.edonsw.org.au/merits\\_review\\_in\\_planning\\_in\\_nsw](http://www.edonsw.org.au/merits_review_in_planning_in_nsw).

<sup>165</sup> For example, whether exchanging animals between zoos will have a conservation benefit.

<sup>166</sup> That is, where information is available to some parties but concealed from others. The term information asymmetry is often used to refer to parties in an economic transaction.

<sup>167</sup> For example, NSW pollution laws establish a public register of licences and compliance information. See NSW EPA website, at <http://www.epa.nsw.gov.au/prpoeoapp/>.

The National EPA and Environment Department should maintain a comprehensive set of public registers, accessible via the online hub, for transparency and effective public oversight of activities and outcomes post-approval. Public registers should include information about issued licences and approvals, penalty notices and enforcement actions, the location of offsetting impact and regeneration sites, and conservation covenants (subject to confidentiality protections for sensitive environmental information).

#### **4. Open standing to seek review of legal errors and enforce breaches**

The Act 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. The existence of various legal duties on the Environment Minister and other institutions means that a failure to fulfil those duties – including a failure to meet statutory deadlines (e.g. listing) will be enforceable by the community. While legal proceedings are rarely exercised by the general community in practice, the mere existence of these rights ensures that decision-makers are on notice to make proper and timely decisions, and that decisions are free from bias and corruption.

Legal proceedings should be heard in a court or tribunal with specialist environmental expertise, independent of the Executive government and regulatory agencies. As in NSW, any person should be able to bring civil enforcement proceedings in these circumstances (known as ‘**open standing**’).

Open standing for the public to seek judicial review of government decisions, and the right to take environmental breaches to court, means that any person can ensure that key decisions are made according to the law.<sup>168</sup> Such ‘third party civil enforcement’ is a standard component of environmental law in other jurisdictions, including in Australia. For example NSW planning laws provide ‘open standing’ for any person to seek judicial review, and limited standing for ‘third party objectors’ to seek merits review.<sup>169</sup>

As the NSW Independent Commission Against Corruption (**ICAC**) notes, third party rights provide ‘an important check on executive government’. These public rights reduce the likelihood of any undue favouritism being afforded in decision-making, particularly in relation to development approvals. ICAC supports further expanding merit appeal rights in NSW, noting that the absence of third party appeal rights ‘creates an opportunity for corrupt conduct to occur’.<sup>170</sup>

For similar reasons, the current EPBC Act includes extended standing for environment groups, instead of requiring a ‘special interest’. Extended standing for judicial review, and to restrain offences or seek other orders, has been critical to

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<sup>168</sup> That is, standing to challenge an environmental decision or to bring civil enforcement proceedings should not be restricted to a person ‘whose interests are adversely affected by the decision’, as required under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The difference is important because:

*[environmental] objectives in bringing litigation – such as to prevent environmental impacts, raise issues for legislative attention and improve decision-making processes – reflect public rather than private concerns, such as protecting property and financial interests.*

<sup>169</sup> See for example the *Environmental Planning and Assessment Act 1979* (NSW), s. 123 and 98; *Protection of the Environment Operations Act 1997* (NSW), s. 252. NSW biodiversity, mining and water laws also provide ‘open standing’ for civil enforcement.

<sup>170</sup> See for example, ICAC, *Anti-corruption safeguards in the NSW planning system* (2012) and subsequent submissions on reforms to the NSW planning system.

public interest legal proceedings under the EPBC Act. However, the threat of adverse costs orders, the significant cost of legal action, and lack of merits review remain considerable barriers to litigation. These obstacles, coupled with the very low proportion of community litigation under the EPBC Act or NSW planning laws, disprove the ‘floodgates’ argument often raised against extended standing provisions.<sup>171</sup>

## **5. Protective costs orders**

To enable third parties to use laws to protect biodiversity, the Environment Act must provide for protective costs orders for public interest legal proceedings (as distinct from cases where the applicant’s predominant interest relates to private property, personal or financial gain).

This means the Environment Act would need to:

- empower the Federal Court (using relevant environmental expertise) to decide whether a case is a ‘public interest proceeding’ and, if so, determine the appropriate form of ‘public interest costs order’;
- prohibit ‘security for costs’ orders in public interest proceedings under the Act; and
- not require a public interest applicant to give an ‘undertaking as to damages’ as a pre-condition to granting an interim injunction, where the action is to urgently protect a matter of national environmental significance.

The aim is to enable community members to defend biodiversity against unlawful or inappropriate degradation, by ensuring the costs of access to information and civil enforcement are no barrier and are equitably distributed. This will ensure equitable protections for proceedings brought in the public interest.

**To recap, key elements of Next Generation Biodiversity Laws in this part (Public participation, transparency & access to justice) include:**

- **Strong and iterative community engagement and public participation provisions at all key stages of the Act, from strategic planning to project assessment and compliance monitoring, reporting and enforcement.**
- **Rights for interested community members to seek merits review of key decisions under the Environment Act (such as when a nominated entity or place is declined for listing; on the adequacy of an approved recovery plan; or whether a proposed action requires Commonwealth assessment).**
- **Easily accessible, timely public information on actions and decisions.**
- **‘Open standing’ for the community to seek judicial review of legal errors.**
- **‘Open standing’ to pursue civil enforcement for a breach of the Act or regulations.**
- **Protective costs orders for legal actions brought in the public interest.**

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<sup>171</sup> See for example C. McGrath, ‘Flying Foxes, Dam and Whales: using Federal Environmental Laws in the Public Interest’ (2008) 25 *Environmental and Planning Law Journal* 324.

## G. INDIGENOUS KNOWLEDGE, ENGAGEMENT & LEADERSHIP IN BIODIVERSITY LAND MANAGEMENT

In Australia and around the world, indigenous peoples have been the long-term custodians of biodiversity.<sup>172</sup>

The new Environment Act would establish new mechanisms, in accordance with its objects, to better recognise and promote indigenous environmental management and consensual knowledge-sharing. Subject to consultation as proposed below, this would include:

1. An **Indigenous Land and Waters Commissioner** and an **Indigenous Cultural Heritage Advisory Council** to support the new Sustainability Commission;
2. Formal recognition of **Indigenous Protected Areas (IPAs)** as Matters of National Environmental Significance under the Environment Act;
3. **New Commonwealth cultural heritage protection laws** to replace the outdated *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
4. **Measures to improve Indigenous engagement, leadership and capacity-building, recognising customary rights** to use biodiversity, and knowledge sharing for biodiversity conservation.

### 1. Indigenous Commissioner/Advisory Council

The Act's institutional reforms must include culturally appropriate governance and advisory roles for Aboriginal and Torres Strait Islander peoples. This could include an Indigenous Land and Waters Commissioner on the Sustainability Commission (see **Part C**); and an Advisory Council to support the work of the Commissioner.

### 2. Recognition of Indigenous Protected Areas

A significant proportion of the Australian continent is owned and managed solely by Aboriginal and Torres Strait Islander peoples as Indigenous Protected Areas (**IPAs**).

The IPA program was established in 1997 in accordance with IUCN guidelines, marking a trend shifting away from the model of government owned national parks.<sup>173</sup> IPAs now make up a large proportion of the National Reserve System, making a significant contribution to Australia's international environmental obligations on protected areas.

However, as Grace (2017) notes, the National Reserve System is not yet formally recognised as a matter of national environmental significance under the EPBC Act; the Commonwealth provides no guaranteed funding or regulatory framework to support IPAs; and state legislation is patchy.

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<sup>172</sup> P. Grace, 'Indigenous-Led Conservation: experiences from the Kimberley' *National Environmental Law Association Journal* (2017) citing Sobrevila (2008).

<sup>173</sup> Ibid. As Grace (2017) notes, models of indigenous conservation involvement are a spectrum from indigenous sole management, to co-management, to government management with indigenous advisory roles.

The voluntary structure of IPAs can result in a lack of legal recognition, enforcement or resourcing. Nevertheless, there is strong potential for Indigenous people to be controlling and managing conservation outcomes on Indigenous lands. The new Environment Act and standalone cultural heritage laws would better recognise IPAs.

### **3. New Commonwealth Cultural Heritage Protection Law**

Next generation environmental laws will renew focus on Aboriginal and Torres Strait Islander engagement, leadership and land management. This is to be accompanied by parallel reforms for new standalone Commonwealth cultural heritage protection laws.

In 2009 the Commonwealth Environment and Heritage Department published a discussion paper seeking feedback on the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSHP Act)*. It concluded that the ATSHP Act needed reform and proposed that common standards for Indigenous heritage protection should apply to every state and territory.<sup>174</sup> Nearly a decade on, and the 1984 Act is still failing to deliver comprehensive, timely and sensitive protection of indigenous cultural heritage at the Commonwealth level. For example:

- A lack of legislative timeframes and detailed procedures for site or object protection applications mean that applications can take many years to be resolved;
- A condition for certain applications is that the site or object is already under threat of injury or desecration.<sup>175</sup> Applications are therefore often made late in the process, when the costs of changing plans are at their highest.
- Civil and criminal offences are also inadequate to deter the full range of actions which can desecrate or adversely impact on cultural heritage.

### **4. Engagement on leadership, capacity-building, customary use & knowledge sharing**

While detailed arrangements are outside the scope of this report, these proposals should be explored through deep consultation with Aboriginal peoples, Traditional Owners and representative bodies groups, and based on the principle of free, prior and informed consent.

As the Australian Panel of Experts on Environmental Law concludes:<sup>176</sup>

*Commonwealth and state governments should make a clear commitment to ensure effective consultation with, and the active participation of, Aboriginal and Torres Strait Islander peoples in environmental protection measures, cultural heritage conservation and NRM. This commitment requires support for robust and culturally appropriate governance for Indigenous Protected Areas (IPAs), co-managed areas and Aboriginal and Torres Strait Islander peoples' land and waters and respect for the principle of free, prior and informed consent in regard to Aboriginal and Torres Strait Islander land and waters.*

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<sup>174</sup> Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform* (Discussion Paper, Department of the Environment, Water, Heritage and the Arts (August 2009) p1.

<sup>175</sup> i.e. Applications made under sections 9, 10 and 12 of the *ATSHP Act 1984* (Cth).

<sup>176</sup> APEEL, *Terrestrial natural resources management* (2017), Technical Paper 3 (2017), recommendation 3.7; see also APEEL *Democracy and the Environment* (2017) Technical Paper 8.

To recap, key elements of Next Generation Biodiversity Laws in this part (Indigenous knowledge, engagement & leadership) include:

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





## H. OUTCOMES MONITORING, REPORTING & IMPROVEMENT

A guiding object and design principle for a new Environment Act is to achieve **strong environmental outcomes**, especially for biodiversity. Strong biodiversity outcomes will only be possible with a much greater emphasis on front-end goal setting and coordinated back-end information, monitoring and reporting systems.

As noted under Part C, the new Act would require the establishment of long-term biodiversity goals, standards, indicators and reporting to inform policy and decision-making. SMART goals and standards must be related to indicators and tracked via mandatory monitoring and reporting requirements in the Act. Monitoring of biodiversity goals, indicators and outcomes must be well-resourced and audited, including where appropriate via environmental taxation and industry levies.

Importantly, new and improved monitoring and reporting tools must be fully integrated with policy development, plan making, impact assessment and decision-making under the Act. Four key elements are:

1. **Independent *State of the Environment* (SOE) and *National Sustainability Outcomes* (NSO) reporting** – to improve public awareness, agency policy-making and implementation, and environmental performance.
2. **National Environmental Accounts** that track natural assets and their extent, condition and threat status over time.
3. **An online monitoring and reporting hub** for comparative reporting and easy public and professional access to public registers; licensing, compliance and enforcement data; bioregional plans, policies accredited under strategic assessments, and associated performance audits; periodic and annual reports (including SOE and NSO); and the National Environmental Accounts.
4. **Mandatory public inquiries into the extinction of threatened species** – akin to coronial inquests.

### 1. State of the Environment & National Sustainability Outcomes reporting

The new Act would require the Sustainability Commission to prepare or commission an independent ***State of the Environment* (SOE) report** and a ***National Sustainability Outcomes* (NSO) report** to be tabled in the Australian Parliament. The Act should set a frequency to deliver both reports, so that they feed in to the five-year review cycle of the National Environment and Sustainability Plan (**C.4** above).<sup>177</sup>

To ensure national coordination and government responsiveness, the Act would require government responses to the SOE and NSO reports to be tabled by state and territories (3 months to respond) and Commonwealth governments (within 6 months, allowing for consideration of state responses).<sup>178</sup>

The two types of proposed reporting are outlined below.

SOE reports will provide a national snapshot of environmental outcomes, comparative performance, key threat assessments and emerging environmental

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<sup>177</sup> For example, the SOE and NSO reports could be delivered (alternately or together) within four years of a National Plan's commencement. This would provide a further 12 months for Governments to respond to the reports and for the Commission to coordinate an updated and adaptive National Plan.

<sup>178</sup> Comparable processes are currently required for parliamentary inquiries in certain states; as well as agency responses to government audit and performance reports.

management priorities. They will also provide a high-profile record for the Sustainability Commission to track outcomes and report progress against national environmental goals and standards.

SOE reports would include rigorous, comprehensive assessment and tracking of environmental baselines, outcomes and trends across a range of themes over time. For biodiversity, this must include:

- threatened species and ecological community nominations, listings and trends;
- management of existing and emerging key threats to biodiversity;
- efficacy of recovery plan development and implementation, and reporting on achievement of goals in recovery plans such as the loss or expansion of species' / ecological communities' habitat extent and condition;
- implementation of bioregional plans and protected area management plans;
- outcomes from public and private conservation programs;
- funding and outcomes of the National Biodiversity Conservation and Investment Strategy; and
- other relevant indicators from the National Environment & Sustainability Plan.

National Sustainability Outcomes (**NSO**) reports could be tabled together or alternately with SOE reports. NSO reporting refers to broad sustainability outcomes and human pressures related to urban settlements, consumption and production, transport, ecological and carbon footprints, economic and population growth. The inaugural *Sustainable Australia 2013* report by the former National Sustainability Council (now disbanded) is a good reference point for NSO reporting.

NSO reporting is an important tool for integrating environmental considerations with social, economic and equitable considerations to achieve Ecologically Sustainable Development. By reporting and evaluating progress on broader sustainability goals, strategies and actions (such as those in National Environment and Sustainability Plans, or agreed under the UN Sustainable Development Goals), NSO reporting recognises that sustainability cannot be achieved by the “environmental sector” alone. Rather, it requires systemic economic and social changes, for example, to Australia’s systems for production, consumption and waste. Sustainability also requires new public awareness, behaviour and attitudes to embed sustainable living principles and concepts like the ‘ecological footprint’ into the mainstream).

More frequent reporting will occur under the National Environmental Accounts (see **2** below) and detailed data from specific actions and environmental assessments would be published in the online data hub (see **3** below).

## **2. National Environmental Accounts**

The new Act would require the Sustainability Commission or Environment Minister to establish a National Environmental Accounts framework, underpinned by a peer-reviewed scientific method.<sup>179</sup>

National Environmental Accounts would assess the extent, condition and trends in key natural resources and environmental assets across Australia’s states, territories and bioregions. Assets to be monitored would include, for example:

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<sup>179</sup> Previously recommended by the Hawke Review (2009), Ch. 19, and other expert bodies.

- landscape health (forests, grasslands, wetlands, estuaries etc),
- threatened and other biodiversity (terrestrial and aquatic),
- native vegetation cover and condition,
- urban and regional carbon footprints,
- estimated carbon storage and loss,
- salinity and soil health, and
- water quality.

The system would track, by way of an annual series of accounts:

- the extent, condition (e.g. from very poor to excellent health) and threatened status of key environmental assets over time;
- stocks and flows of environmental assets and natural resources (i.e. whether they are being depleted, replenished or sustainably used) – enabling region by region comparisons across Australia); and
- information on the extent and impact of key threatening processes such as invasive species, habitat loss and degradation, disease and climate change.

Decisions under the Act must refer to NRM and biodiversity goals and be informed by reliable data. Environmental accounting is an important and complementary part of this approach, enabling adaptation to changes in environmental health, pressures and outcomes. The new system should draw on the Wentworth Group's *Accounting for Nature* program and subsequent pilots, and other relevant work in Australia and overseas.<sup>180</sup>

Once established, National Environmental Accounts should lessen or automate reporting burdens. As a monitoring and reporting tool, the Accounts will support a range of functions under the new Environment Act: policy-making, bioregional planning, strategic environmental assessment, decision-making on project proposals and actions, as well as State of the Environment and Sustainability Outcomes reporting. National Environmental Accounts will also enable authorities like the Sustainability Commission to assess progress against national biodiversity goals and targets (based on nationally consistent criteria).

### **3. Online hub and public registers for national environmental reporting**

Repeated State of the Environment reports have noted deficiencies in environmental data and the absence of joined-up environmental information across the jurisdictions. The SOE 2016 reiterated that a lack of monitoring and reporting data is hindering effective policy-making and environmental management in every jurisdiction.

The new Act would require the Environment Minister to establish an online hub for national environmental reporting and public registers, including for biodiversity. This would consolidate a range of accessible, reliable and comparable environmental information across the Commonwealth, states and territories. For example:

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<sup>180</sup> See Wentworth Group of Concerned Scientists ([www.wentworthgroup.org](http://www.wentworthgroup.org)), *Accounting for Nature* (2008); and Australian Regional Environmental Accounts Trial - Report to NRM Regions Australia (March 2015). See also the separate work of ABS / Bureau of Meteorology, *Environmental-Economic Accounts 2017* at: [www.abs.gov.au/ausstats/abs@.nsf/mf/4655.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/4655.0). See also US White House directive, *Incorporating natural infrastructure and ecosystem services in Federal Decision-Making* (Oct. 2015); see further Australian Chapter of the IUCN, *Valuing Nature* (2015).

- State of the Environment and National Sustainability Outcomes reports;
- Performance audits of bioregional plans and strategic assessments;
- Strategic environmental data from state and local governments (and the private sector where reliable and practicable);
- Licensing information regarding Commonwealth threatened species; and
- Project-level environmental impact assessment data, post-approval audits and compliance and enforcement records, including from the National EPA.

The new online data hub would require a significant injection of funding from all jurisdictions, timeframes and responsibilities for its establishment and maintenance. The new Act would place non-discretionary duties on the Environment Minister to negotiate data-sharing agreements with state and territory counterparts within a certain timeframe. The Environment Department or Environmental Commission could host the online hub.

#### **4. Mandatory public inquiries into the extinction of threatened species**<sup>181</sup>

The objects of the Environment Act would aim to prevent extinction and ensure recovery of threatened species. Where these aims have not been met and the tragedy of extinction does occur, the Act will include a process of formal inquiry that is analogous to coronial inquests into human deaths and tragedies.

Inquiries into extinction would be conducted by a panel of qualified experts, to determine the (likely multiple) causes of extinction, make recommendations on future conservation management, policy or law reform, and identify lessons to be learned to prevent future extinctions.

**To recap, key elements of Next Generation Biodiversity Laws in this part (Outcomes monitoring, reporting & improvement) include:**

- **Independent Sustainability Commission reporting to be tabled in Parliament on the State of the Environment and National Sustainability Outcomes.**
- **Requiring Commonwealth, state and territory governments to respond to State of the Environment and National Sustainability Outcomes reports.**
- **A set of National Environmental Accounts that track natural assets and their extent, condition and threat status over time.**
- **An online monitoring and reporting hub for comparative analysis; easy public and professional access to public registers; and transparent, up-to-date information about environmental outcomes across Australia.**
- **Mandatory public inquiries into the extinction of threatened species.**

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<sup>181</sup> This recommendation is based on the findings of Woinarski et al. in 'The contribution of policy, law, management, research and advocacy failings to the recent extinctions of 3 Australian vertebrate species' (2016) *Conservation Biology*.

## I. COMPLIANCE & ENFORCEMENT

Next generation biodiversity laws require a diverse and flexible enforcement toolkit, penalties for strong deterrence and an expanded role for third parties as ‘surrogate regulators’ (including civil society, supply chain operators and others).<sup>182</sup>

Penalties and incentives must make it more attractive to comply with the law than to risk non-compliance. Decisions to comply or not to comply should have financial and reputational consequences, and directors should be personally liable for company behaviour that was known, or ought to have been known by the directors.

In brief, compliance and enforcement under the new Environment Act would include:<sup>183</sup>

- A **consolidated part** on compliance and enforcement, penalties and tools.
- Explicit powers for a new **National EPA** as the chief environmental regulator.
- **Open standing** for third party civil enforcement by community members (see **F.4**) including Court orders for injunctions, declarations and compensation.
- Community members can **seek performance of enforceable duties** under the Act, such as requirements to assess nominations, prepare a recovery plan within a statutory timeframe or comply with particular decision criteria.
- A comprehensive suite of **investigative powers** for authorised officers (for entry, seizure, information-gathering etc).
- New powers to issue **warning notices** and **environmental protection notices** to direct certain action (such as to cease an activity), including in response to minor breaches or where more evidence is needed for the suspected breach.
- A full suite of **criminal, civil**<sup>184</sup> **and administrative sanctions**<sup>185</sup> to respond to breaches, to apply across the spectrum of non-compliance in the Act.
- A **comprehensive definition of ‘take’** in relation to animals that belong to a threatened species or ecological community – one that expands on existing terms, ‘harvest, catch, capture, trap and kill’ to include actions to ‘harass, harm or pursue’ an animal, or to *attempt* any of these actions.<sup>186</sup>
- Provisions to enable **detention of non-citizens** suspected of breaching the Act and to enable the seizure of wildlife specimens (with enforceable conditions).

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<sup>182</sup> See further N. Gunningham and D. Sinclair, *Designing Smart Regulation* (1999) OECD.

<sup>183</sup> The framework proposed here includes (but is not limited to) many of the recommendations from the Hawke Review to improve EPBC Act enforcement (see Hawke 2009, Chapter 16). Detailed provisions are beyond the scope of this report.

<sup>184</sup> Civil penalties are fines that can be proven on the ‘balance of probabilities’ standard. This is separate and additional to ‘civil enforcement’ action by community members to seek a remedy, such as an injunction or a declaration of breach.

<sup>185</sup> Administrative sanctions include novel orders such as enforceable undertakings i.e. a binding commitment for which non-compliance is a legal breach), conservation agreements and remediation orders and directions to publish notice of the breach.

<sup>186</sup> Cf EPBC Act general definition, s. 528, and s. 303BC (‘take’ in relation to international movement of wildlife specimens includes ‘kill’). Additional terms are in the US *Endangered Species Act* definition, s. 3 (16 U.S.C. § 1532).

- **Harmonised federal-state regulation** based on the most stringent standards and clearly assigned responsibilities.<sup>187</sup>
- A **proactive compliance monitoring and auditing system**, including discretion for the National EPA to conduct audits, and strategic oversight by the Sustainability Commission.
- Investigation and prosecution **costs would be recoverable** from offenders.
- Other fees and penalties would be hypothecated to the **Capital Stewardship Fund** (see E.7), rather than consolidated revenue, for increased investment.
- **High maximum penalties** would be retained (at least equivalent to the EPBC Act) while penalties under the associated Regulation would be **increased**. This provides appropriate incentives and deterrence for mid-tier compliance.
- Triggers or thresholds that enable **adaptive management** (and regulator intervention) if impacts increase or desired outcomes are not being achieved.
- Ability for consent authorities to **update conditions over time** (including for strategic assessments) to ensure **continuous improvement** of outcomes and the use of **best available techniques** for environmental management.

These provisions apply in addition to open standing for civil enforcement (see F.4).

**To recap, key elements of Next Generation Biodiversity Laws in this part (Compliance & enforcement) include:**

- **A consolidated part on compliance and enforcement, penalties and tools.**
- **Explicit powers for a new National EPA as chief environmental regulator.**
- **A comprehensive suite of investigative powers for authorised officers.**
- **Open standing for the community to seek judicial review of erroneous decisions, civil enforcement of breaches, and performance of non-discretionary duties by the Minister or other decision-makers under the Act.**
- **A full range of best-practice criminal, civil and administrative sanctions.**
- **Harmonised federal-state regulation based on the most stringent standards and clearly assigned responsibilities.**
- **Cost recovery and environmental funding provisions.**
- **Adaptive management and ability to update approval conditions over time.**

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<sup>187</sup> For example, in relation to whale watching regulations and offences.

## J. INTERNATIONAL OBLIGATIONS & TRANSBOUNDARY PROTECTIONS

Next generation biodiversity laws need stronger and clearer mechanisms for implementation of international biodiversity obligations. Accordingly, the new Act and new institutions should address:

1. **Ensuring Australian companies are responsible environmental citizens**
2. **Conservation treaties & Statements of Compatibility**
3. **International trade negotiations & aid programs**
4. **Overseas cooperation, conservation funding & assistance programs**
5. **Australian consumer & supply chain safeguards for global biodiversity.**

### 1. Ensuring Australian companies are responsible environmental citizens

The new Environment Act will extend the reach of Australia's biodiversity laws to regulate and monitor the actions of Australian corporations overseas, and to regulate international supply chains to Australia that involve significant risks to global biodiversity (see **J.5** below). Incentives and safeguards in Australia and overseas will be geared towards responsible global citizenship, so that positive practices are rewarded rather than outcompeted by unsustainable, negligent or illegal business models.

The Environment Act would apply to and regulate Australian citizens and corporate activities overseas (in relation to all listed threatened species and places), and constrain Australian persons from contravening foreign conservation laws, to the extent practicable. These provisions could draw on the extra-territorial application of existing environmental laws and policies.<sup>188</sup>

The Act's international aims will be further supported by the provisions and programs outlined below.

### 2. Conservation treaties & Statements of Compatibility

The Environment Act will create stronger obligations to implement all signed conservation treaties, and improved processes for assessment, entry into and ratification of agreements that affect the environment. The Act will achieve this with four elements:

- the Sustainability Commission must be invited by the Minister or agency head of the Department of Foreign Affairs and Trade to provide early, ongoing and transparent advice on relevant treaties during the negotiation phase;
- treaties, international agreements or related actions that substantively affect the environment – in Australia or overseas – must be accompanied by an Environmental Impact Statement prepared by an accredited/qualified professional, and assessed by the National EPA (the EPA may engage the assistance of international law experts or other expertise as it sees fit);
- the Commonwealth will be required to submit to the Parliament a *Statement of Compatibility with Environmental Agreements* (equivalent with Statements

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<sup>188</sup> See for example, *Whale Protection Act 1980* (Cth), section 6 (2) (a); and offences under the *EPBC Act 1999* (Cth), sections 229, 229A, 229B, 229C. See further the intent of the *National Biodiversity Conservation Strategy 2010-2030*, section 6.2.2.

on Human Rights<sup>189</sup>) when proposing to enter or negotiate any treaty, trade agreement, or other international agreement or action – to ensure Australia upholds its international environmental obligations; and

- require greater openness, public engagement and review of outcomes for treaties, proposed trade agreements and other international agreements. For example, a Conservation Treaties Advisory Council should advise and update the Sustainability Commission on the effectiveness of the implementation of treaty obligations, the development of required regulations, review of delegation briefs to treaty meetings, and ensure full public consultation processes.

### **3. International trade negotiations & aid programs**

As part of the legislative aim that Australian companies are responsible global environmental citizens, the new Act will include appropriate safeguards on foreign aid and trade. In particular:

- requiring **public consultation and adherence to conservation obligations** in negotiation of new international trade agreements;
- requiring all new trade agreements to contain detailed, **binding Environment Chapters** that support multilateral environmental agreement implementation and dispute settlement;<sup>190</sup>
- a risk-based requirement to **assess (as controlled actions) any foreign aid and financial assistance projects** supported by the Commonwealth, a state or territory government that could have adverse environmental and biodiversity impacts overseas (applying to actions by or on behalf of all Australian companies and citizens);<sup>191</sup>
- **similarly, new trade agreements must be assessed** under the Environment Act prior to signature and ratification;
- requiring **public consultation on wildlife import or export** to or from **Australian zoos**, and requiring applicants to demonstrate there is a conservation benefit;
- prohibiting the possession or sale of **wildlife protected by overseas laws**;<sup>192</sup>
- prohibiting the sale of **all ivory and rhino horn** by national agreement, or to the extent of Commonwealth powers. All existing wildlife trade prohibitions will be retained; and

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<sup>189</sup> Equivalent to a *Statement of Compatibility with Human Rights* under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx>.

<sup>190</sup> See for example aspects of Chapter 20 of the unfinalised Trans Pacific Partnership (TPP) Agreement (e.g. articles 20.4 – multilateral environmental agreements; 20.7 - procedural matters; 20.8 – public participation; 20.13 – trade and biodiversity; 20.16 – marine capture fisheries; 20.17 – conservation and trade). There have been several valid criticisms of the TPP (including concerns about Investor-State Dispute Settlement or ISDS provisions; and attempts to water down US *Lacey Act* protections on movement of wildlife). Nevertheless, United States Congressional oversight of international agreements, and civil society demands for greater public transparency of the TPP under the previous administration, meant that parts of the TPP's draft Environment Chapter attempted to support and reinforce various multilateral environmental agreements such as CITES and the Biodiversity Convention.

<sup>191</sup> Risk-based requirement: criteria should be established for determining unacceptable environmental risks, with explicit provisions for both judicial and merits review of the Minister's decision.

<sup>192</sup> The US *Lacey Act* of 1900, as amended, is a useful reference point, despite pressures to weaken it. These provisions complement the US *Endangered Species Act* listing of overseas threatened species.



- establishing a **Biodiversity Conservation Aid program** focused on biodiversity-related aid, and technology transfer and access between Governments (under Article 16 of the Convention on Biological Diversity), Including **biodiversity country profiles** for Australia's priority aid recipients. Regulations would outline a range of biodiversity-related aid actions to be promoted and funded under the Convention's obligations.<sup>193</sup>

#### **4. Overseas cooperation, conservation funding & assistance programs**

The Environment Act will help Australia to support conservation actions overseas, including under the UN Framework Convention on Climate Change to reduce emissions from deforestation and forest degradation; listing and protecting overseas species and protected areas under Australian law; and a range of information exchange, cooperation, conservation funding and assistance programs. These initiatives are outlined in turn.

#### **Actions under the Climate Convention, REDD+ and Tropical Forest obligations**

*We are committed to intensifying efforts to protect forests, to significantly restore degraded forest, peat and agricultural lands, and to promote low carbon rural development. To scale up ambition and demonstrate political leadership, we are committed to collectively continue to support and implement at significant scale national REDD+ and sustainable land-use and climate change programs and, importantly, to generate and reward verified results.*

- *Leaders' Statement on Forests & Climate Change, 30 November 2015, including Australia, Brazil, Canada, Colombia, Democratic Republic of Congo, Ethiopia, France, Gabon, Germany, Indonesia, Japan, Liberia, Mexico, Norway, Peru, United Kingdom, and the United States.*<sup>194</sup>

The Environment Act would require that the Australian Government to establish a **REDD+ Results-based Payments Funding Facility (REDD+ Fund)** within the Department of Foreign Affairs and Trade with an overall goal of implementing REDD+ (Reducing Emissions from Deforestation and Forest Degradation in Developing Countries).

This is to be pursued under Article 5 of the Paris Agreement annexed to the UNFCCC Paris COP 21 Decision<sup>195</sup> and relevant previous decisions that together form REDD+, with four specific objectives:

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<sup>193</sup> In particular, the Commonwealth shall, in full recognition of the obligations pursuant to the Convention on Biological Diversity, Article 16.(1) (2) (3) (4) and (5) 'Access to and Transfer of Technology', provide and/or facilitate access by, and transfer to, developing countries particularly in the Asia-Pacific Region, technologies that are relevant to the conservation and ecologically sustainable use of biological diversity, or that make use of genetic resources and do not cause significant damage to the environment. Within 12 months of the passage of this Act, the Commonwealth shall put in place regulations that meet Australia's obligations under Article 16(1)-(5) above. Such regulations will be developed in full consultation with industry, state and territory governments and the public.

<sup>194</sup> See UNFCCC Newsroom, 'Government Leaders Endorse Forests as Key Climate Solution', 30 November 2015. Full statement available at: [https://www.regjeringen.no/globalassets/departementene/kld/kos/indonesia/leaders-statement-on-climate-and-forests-for-paris\\_pdf.pdf](https://www.regjeringen.no/globalassets/departementene/kld/kos/indonesia/leaders-statement-on-climate-and-forests-for-paris_pdf.pdf).

<sup>195</sup> Under Article 5 of the Paris Agreement, 'Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases... including forests.' In addition, 'Parties are encouraged to take action to implement and support, including through results-based payments, the

- (a) to financially reward landholders, communities and/or governments able to demonstrate a reduction in greenhouse gas emissions attributable to a decision to **permanently protect areas of intact rainforest** from degradation, including deforestation;
- (b) to financially reward landholders, communities and/or governments able to demonstrate a reduction in **greenhouse gas emissions** attributable to a decision to rewet areas of drained **peatland, wetland or other organic soil**;
- (c) **an initial focus on Indonesia** with a view to complementing growing efforts both within Indonesia and throughout the international community to reduce the extraordinarily high levels of emissions from **forest and peat fires**, including associated health and biodiversity conservation impacts; and
- (d) consider allowing Australian carbon emitters to purchase a proportion of their total carbon mitigation budget from approved **overseas avoided deforestation schemes** (with strict eligibility and biodiversity criteria).

The REDD+ Fund would be focused on achieving the above by establishing a **program to protect intact forests in the context of climate change** within the Department of Foreign Affairs. This program would provide an initial \$500 million as an investment towards working with other nations and international initiatives to reduce carbon emissions from global degradation including deforestation.<sup>196</sup>

### **Listing of overseas species & protected areas under the Environment Act**

The new Environment Act will enable the automatic listing, and protection under Australian law, of threatened species, ecological communities, critical habitats and protected areas *located overseas*. The aim is to help the recovery and conservation of these species, and ensure that the actions of Australian corporations or citizens overseas do not threaten them further. These provisions are intended to apply to two categories:

- species, ecosystems and places listed by other countries as threatened or protected under international agreements to which Australia is a party;<sup>197</sup> and
- other species, ecosystems or places that are negotiated for listing and protection between Australia and relevant overseas governments.<sup>198</sup>

The Environment Act should initially include a schedule listing overseas threatened and migratory species,<sup>199</sup> habitats and protected areas<sup>200</sup> currently listed under the major environmental conventions and conservation treaties. As noted in this section, the Act would enable the establishment of financial assistance programs, and identify

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existing framework' of agreed policies and incentives including REDD+. The Paris Agreement is at: <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>.

<sup>196</sup> Noting that at the Paris Conference, Norway, Germany and the UK pledged US\$5 billion for REDD+ programs from 2015-2020 (or \$1bn per year by 2020).

<sup>197</sup> See for example EPBC Act Ch. 5, Part 13, Div. 7 *Aid for conservation of species in foreign countries*:

**[section] 302 Aid for conservation of species in foreign countries**

On behalf of the Commonwealth, the Minister may give financial assistance to the governments of foreign countries and organisations in foreign countries to help the recovery and conservation, in those countries, of species covered by international agreements to which Australia is a party.

<sup>198</sup> For example, the Australian and Indonesian governments might agree to protect certain areas in Indonesia (which may not be internationally listed) from environmental and climate impacts of peat fires.

<sup>199</sup> In particular: IUCN Red Lists, CITES lists, Convention on Migratory Species lists, and other bilateral migratory species agreements - with China (CAMBA), Japan (JAMBA) and Korea (ROKAMBA).

<sup>200</sup> In particular: IUCN Red List of ecosystems, Key Biodiversity Areas, World Heritage Sites and Ramsar sites.

new and existing programs where funding can be sourced to protect global biodiversity.

For similar reasons the US Endangered Species Act 'requires the [Fish and Wildlife] Service to list species as endangered or threatened regardless of which country the species lives in.'<sup>201</sup> The US Act prohibits activities such as unauthorised import, export, take, commercial activity, interstate commerce and foreign commerce. The US Act's prohibitions apply to people subject to the US jurisdiction. Additional conservation benefits of listing overseas matters for protection include 'increased awareness of listed species, research efforts... or funding for in-situ conservation' of species in their range countries, and financial assistance for overseas conservation programs, personnel and training.<sup>202</sup>

### **Information exchange, cooperation, conservation funding & assistance**

In implementing its obligations under the Convention on Biological Diversity, Australia is required to facilitate information exchange and promote international technical and scientific cooperation (Articles 17 and 18). The Environment Act and regulations would establish a **clearing house for technical and scientific cooperation** to facilitate the implementation these obligations and to promote biological diversity conservation in developing countries.

The new Act will also establish an **Asia-Pacific regional biodiversity program**, providing a competitive grants system for conservation NGOs operating in the Asia-Pacific Region. This would begin with a 3-year commitment of \$10 million, jointly managed by the Department of the Environment and AusAID. The regulations would establish an advisory council to give expert advice on project expenditure (on-ground wildlife conservation activities), with at least two conservation NGO representatives.

Within one year of the passage of the Act, the Commonwealth should become a financial member of the **Critical Ecosystem Partnership Fund**,<sup>203</sup> to coordinate and direct international resources and prioritise grants to global biodiversity hotspot conservation programs.

## **5. Australian consumer & supply chain safeguards for global biodiversity**

Finally, the Environment Act would be accompanied by a new framework to regulate key products linked to global biodiversity loss under the Australian consumer law. This should include three initial measures outlined below:

- Regulatory safeguards on palm oil import and production;
- Labelling standards for palm oil and seafood; and
- Stricter controls against illegal timber imports.

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<sup>201</sup> See US Fish and Wildlife Service, 'Foreign Species - Overview' at <https://www.fws.gov/endangered/what-we-do/foreign-species.html>. See also Endangered Species Act (US) section 4, 16 U.S. Code § 1533(a) and (b)(1)(B).

<sup>202</sup> US Fish and Wildlife Service, 'Foreign Species - Overview', <https://www.fws.gov/endangered/what-we-do/foreign-species.html>.

<sup>203</sup> In cooperation with the World Bank, the Government of Japan, the Global Environment Facility, Conservation International, the MacArthur Foundation and the Government of France.

## Regulatory safeguards on palm oil import and sale

Historical and ongoing destruction of tropical forests and conversion to palm oil plantations is, like illegal logging, a serious driver of global biodiversity loss and habitat degradation, including deforestation. Yet Australian consumers have no easy way of knowing whether their individual purchases are contributing to this serious problem, or which of Australia's palm oil supply chains are working to combat it.

To date, international voluntary certification schemes have had very limited impact on the Australian market; there is no mandatory product certification scheme; and there is no oversight from Australia's *Illegal Logging Prohibition Act 2012* (Cth) (**Illegal Logging Act**) – as palm oil is a processed product from palm plantations, not a commercial timber.

The new Act would include a part that regulates the importation and sale of palm oil, modelled on the *Illegal Logging Prohibition Act 2012* (Cth) (**Illegal Logging Act**) and Regulation,<sup>204</sup> with appropriate improvements. The aim is to prohibit unsustainable palm oil as a single product. Regulating palm oil as an ingredient is addressed further below.

To ensure that Australia's palm oil imports and sales do not contribute to global biodiversity loss, the new part would include the following (among other provisions):

- A prohibition on the *import* of palm oil that has involved 'unsustainable palm oil production'.<sup>205</sup>
- A prohibition on the *sale* of palm oil that has involved 'unsustainable palm oil production'. This would capture any locally grown palm oil (and be designed to comply with World Trade Organisation regulations).
- A definition of 'unsustainable palm oil production' to include palm oil production that results in the destruction of High Conservation Value Vegetation or critical habitat for threatened species (listed in Australia or overseas).
- Due diligence requirements that apply to all palm oil importers. These could be modelled on provisions in the *Illegal Logging Act* and *Regulation*.
- Reporting requirements that apply to all importers that must undertake due diligence. These provisions could be modelled on those outlined in the *Illegal Logging Act* and *Illegal Logging Regulation*.
- Monitoring, auditing and investigative provisions. For example, importers subject to the due diligence requirements must be audited every five years.
- A requirement that all palm oil be declared to the Customs Minister.
- Offence provisions for breaching this part's prohibitions or requirements.
- A public register of importers that breach any provisions in the legislation.
- Open standing provisions for judicial review of any decisions made under the legislation.
- Third party civil enforcement provisions to allow communities to seek declarations and orders in the Federal Court.

This part of the new Act could also create or nominate a national body responsible for certifying palm oil, and products containing palm oil, that have not involved

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<sup>204</sup> *Illegal Logging Prohibition Regulation 2012* (Cth) (**Illegal Logging Regulation**).

<sup>205</sup> Note that this would only cover actual palm oil (not products containing palm oil) as it would be impossible to prohibit such a wide variety of products. Palm oil products will be dealt with in Part 4.2.

‘unsustainable palm oil production’. Products that meet the necessary criteria could be certified by this body and labelled accordingly. The national certification body would form part of a complementary scheme to improve labelling of palm oil products under the Australian Consumer Law.

### **Improved labelling of palm oil and seafood products**

#### *Palm oil labelling*

A national consumer labelling scheme for palm oil and its products will greatly assist consumers, retailers and suppliers to ensure they are not inadvertently contributing to global biodiversity loss through tropical forest destruction and conversion.

The most appropriate legislative framework for a uniform Commonwealth palm oil labelling scheme (**Palm Oil Labelling Scheme**) is the *Competition and Consumer Act 2010*, which replaced the *Trade Practices Act 1974*.<sup>206</sup> The Palm Oil Labelling Scheme would be inserted into the Australian Consumer Law,<sup>207</sup> by creating a new part that deals specifically with the Scheme.<sup>208</sup>

The Palm Oil Labelling Scheme should apply to all products containing palm oil. Note that this is intended to complement the part of the Environment Act outlined above, which aims to prohibit palm oil as a single product, rather than an ingredient. Products containing palm oil must be labelled as *containing palm oil* (as opposed to one of the many terms that are currently used in place of the term ‘palm oil’).

The amendments should provide that it is an offence to supply, offer, possess or control palm oil products in trade or commerce that do not comply with the Palm Oil Labelling Scheme. Penalties for breaching these offence provisions are to be commensurate with existing penalty provisions in the Competition and Consumer Act, in particular penalties for breaching information standards.

We note that any attempts to improve labelling of imported products must comply with World Trade Organisation regulations and Australian Consumer Law amendments would be drafted to ensure this.

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<sup>206</sup> This approach is recommended after considering several options and factors, including the purposes of the Competition and Consumer Act and of the labelling schemes suggested here; past unsuccessful attempts to legislate country of origin labelling under the Competition and Consumer Act; and regulatory options under the Australia New Zealand Food Standards Code (noting that many non-food products contain palm oil, and the *Food Standards Australia New Zealand Act 1991* (Cth) is not sufficiently up-to-date for regulating food products on environmental grounds, as distinct from human health for example.

<sup>207</sup> The Australian Consumer Law is contained in Schedule 2 of the *Competition and Consumer Act 2010*.

<sup>208</sup> This model is recommended to ensure that the Palm Oil Labelling Scheme has legislative status. The Scheme could, for example, be inserted after *Part 3-4* of the Australian Consumer Law, which provides for the creation of ‘information standards’. The amendment should specify that the Palm Oil Labelling Scheme prevails over any analogous Commonwealth, State or Territory schemes, to the extent of any inconsistency.

### *Seafood labelling*

Commercial seafood harvesting by unsustainable methods and quantities is another major driver of global biodiversity loss. The social and economic costs of cheap, unsustainable seafood are in some cases linked to corruption and modern slavery. While there are several voluntary certification schemes and numerous uncertified claims about canned fish for example, Australian consumers, restaurants and supply chains need clearer information and verification that their practices are working to resolve, rather than exacerbate risks of marine extinctions.

The most appropriate legislative framework for a uniform Commonwealth seafood labelling scheme (**Seafood Labelling Scheme**) is again to create a new part of the Australian Consumer Law that deals specifically with the Scheme.<sup>209</sup>

The Seafood Labelling Scheme should apply to both locally caught and imported seafood. This would be broadly defined to include fresh or frozen seafood products.<sup>210</sup> Local seafood could be accredited via the Environment Act's fisheries assessment provisions, working in concert with state and territory regulators.

The Scheme would require seafood to be labelled so as to specify:

- Species name and scientific name (**name**).
- Whether the species is a listed species for the purposes of Commonwealth, State or Territory biodiversity protection legislation – or for imported seafood, whether it is a listed species in the country of origin (**listing**).
- Where the seafood was caught (**origin**).
- How the seafood was caught (**fishing gear category**).
- Whether it was caught in freshwater, ocean caught or farmed (**production method**).

Amendments to the Competition and Consumer Act should provide that it is an offence to supply, offer, possess or control seafood products in trade or commerce that do not comply with the Seafood Labelling Scheme. Penalties for breaching these offence provisions are to be commensurate with existing penalty provisions in the Competition and Consumer Act, in particular penalties for breaching information standards.

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<sup>209</sup> To ensure that the Seafood Labelling Scheme has legislative status, the new part could be inserted (along with the Palm Oil Labelling Scheme above) after Part 3-4 of the Australian Consumer Law, which provides for the creation of information standards. The amendment should specify that the Seafood Labelling Scheme prevails over any analogous Commonwealth, State or Territory schemes, to the extent of any inconsistency.

<sup>210</sup> i.e. 'Seafood' would be defined to include both marine and freshwater species in the following forms:

- fresh seafood, unpackaged;
- frozen seafood, unpackaged;
- fresh seafood (single species), packaged;
- frozen seafood (single species), packaged;
- processed seafood (single species), packaged;
- fresh seafood (mixed species), packaged;
- frozen seafood (mixed species), packaged;
- processed seafood (mixed species), packaged;
- products containing 1% by weight of seafood, packaged;
- products containing 1% by weight of seafood, unpackaged;
- pet food containing 1% by weight of seafood.

The Seafood Labelling Scheme is intended to apply to wholesale and retail sales as well as restaurants, cafes and takeaway shops selling seafood for immediate consumption. Exemptions could apply to a limited range of facilities such as prisons, hospitals, aged care facilities, food rescue organisations and other institutions that prepare or offer food for immediate consumption.

### **Strengthening the *Illegal Logging Prohibition Act 2012* (Cth)**

Illegal logging has been ranked as the third largest global transnational crime, after counterfeiting and drug trafficking, with an estimated annual value of up to 157 billion US dollars.<sup>211</sup>

Illegal logging drives biodiversity loss and causing significant greenhouse gas emissions. It also has devastating economic and social impacts in forest producer countries. Illegal logging operations frequently involve human rights abuses, including violence against local communities, forced labour in logging camps, and pollution of fresh water supplies. The illicit wood trade facilitates networks of organised crime engaging in systemic corruption and money laundering to hide profits. The supply of cheap illegal wood represents unfair competition to Australian and international companies playing by the rules, while threatening Australian jobs.<sup>212</sup>

Amidst pressure from some quarters to water down the due diligence requirements in Australia's *Illegal Logging Prohibition Act 2012* and its Regulation, these attempts should be resisted in favour of strengthened safeguards as the Act moves into a mature implementation, compliance and enforcement phase.<sup>213</sup> This is consistent with the new Environment Act's *non-regression* and *continuous improvement* principles.

Consistent with the Environment Act's aim that Australian companies are responsible global environmental citizens, the Illegal Logging Act should be amended to:

- make it an offence for a person<sup>214</sup> to knowingly or negligently distribute (including sell, purchase, transport, store or receive) illegal timber or products containing illegal timber within Australia;<sup>215</sup>
- include both criminal and civil penalty provisions for illegal distribution;

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<sup>211</sup> Global Financial Integrity ranks illegal logging as the most lucrative natural resource crime, worth US\$52 bn to \$157bn per year: *Transnational Crime and the Developing World*, Global Financial Integrity (March 2017), at <http://www.gfintegrity.org/report/transnational-crime-and-the-developing-world/>.

<sup>212</sup> See the *Joint Statement on Implementing the Illegal Logging Prohibition Act*, Australia (2017), to which HSI Australia is a signatory. Available at <https://s3.amazonaws.com/environmental-investigation-agency/assets/2017/ILPA+Joint+Statement+May+2017-10.pdf>.

<sup>213</sup> The *Joint Statement on Implementing the Illegal Logging Prohibition Act* (2018) urges the Australian Government to fully implement and enforce the Illegal Logging Act and Regulation by:

- immediately ending the "soft start" compliance period;
- maintaining the existing due diligence requirements. These should not be weakened via proposed "deemed to comply arrangements" for voluntary certification schemes, low-risk countries, Country Specific Guidelines or State Specific Guidelines;
- maintaining the existing consignment value threshold of \$1000. Proposed increases in the threshold, as well as the exclusion of "personal" imports, will create significant loopholes for the trade in illegal timber; and
- providing adequate support, financing, staffing and training for enforcement and compliance in the respective agencies.

<sup>214</sup> Constitutional constraints would limit this to: constitutional corporations; or distribution occurring between States, or States and Territories; or within Territories; or on behalf of the Commonwealth.

<sup>215</sup> As per the *Lacey Act* of 1900 (United States).

- create an advisory or steering committee that includes civil society representatives, tasked with advising the Commonwealth on strategic matters relevant to illegal logging (such as likely breaches of the Act or Regulation);
- enable third parties to seek to restrain a breach, including an apprehended breach, of the Act or Regulation;<sup>216</sup> and
- maintain existing due diligence requirements at a minimum, and increase transparency by requiring importers and processors to publish all records online.<sup>217</sup>

**To recap, key elements of Next Generation Biodiversity Laws in this part (International obligations & transboundary protections) include:**

- **Applying Environment Act offences to the actions of Australian citizens and corporations that affect overseas threatened species and protected areas, and requiring Australian companies to comply with foreign conservation laws.**
- **Requiring the Australian Government to fulfil its commitments under international conservation treaties, including Sustainability Commission advice and environmental impact assessment of government proposals.**
- **Requiring earlier community engagement and greater public scrutiny of trade agreements and negotiations.**
- **Requiring that government laws and actions that may affect international responsibilities are to be accompanied by a Statement of Compatibility (akin to Commonwealth human rights legislation).**
- **Enabling the automatic listing and protection of overseas threatened species, ecological communities, critical habitats and protected areas.**
- **Establish a REDD+ Fund<sup>218</sup> to support scientifically credible forest and land carbon stewardship in the region (particularly Indonesia) linked to Article 5 of the Paris Agreement.**
- **Establishing a Biodiversity Conservation Aid program that supports technology transfer and access between Governments and helps to meet Australia's obligations under the Convention on Biological Diversity.**
- **Establishing a clearing house for international technical and scientific cooperation to support global biodiversity protection, and that helps to meet Australia's obligations under the Convention on Biological Diversity.**
- **Establishing an initial \$10m Asia-Pacific regional biodiversity program, providing a competitive grants system for conservation NGOs in the region.**
- **Becoming a financial member of the Critical Ecosystems Partnership Fund.**
- **Prohibiting the import and sale of palm oil that has involved 'unsustainable palm oil production'.**
- **Improved labelling of palm oil and seafood products under the *Australian Consumer Law*.**
- **Strengthening supply chain protections, enforcement actions and advisory functions in the *Illegal Logging Prohibition Act 2012 (Cth)*.**

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<sup>216</sup> As per the US Lacey Act.

<sup>217</sup> This builds on clauses 16 and 25 of the Regulations (Due diligence requirements – records). This combined with publicly available records, would enable greater scrutiny of timber imports and enable the Commonwealth to share the regulatory burden with civil society organisations.

<sup>218</sup> REDD+: Reducing Emissions from Deforestation and Forest Degradation in Developing Countries.







2018



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DEFENDING THE ENVIRONMENT  
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