DEVOLVING EXTINCTION?

Environmental Defenders Office

The risks of handing environmental responsibilities to states & territories

OCTOBER 2020

PLACES YOU LOVE

EXECUTIVE SUMMARY

The Australian Government is poised to hand over their national environmental approval responsibilities to states and territories, so the Places You Love alliance commissioned the Environmental Defenders Office to analyse whether state and territory laws can do the job? The clear answer is **no**.

Our national environment law – the *Environment Protection & Biodiversity Conservation Act 1999* (**EPBC Act**) – is under independent statutory review and is earmarked for comprehensive reform to address our extinction crisis and deteriorating environment. However, ahead of the final review report, the Australian Government is already fast-tracking legislation to facilitate the hand-over of environmental approval powers for matters of national environmental significance to states and territories, under the guise of COVID 19 economic recovery.

The *EPBC Amendment (Streamlining Environmental Approvals) Bill 2020* is being promoted by the Government as comprising minor technical amendments needed to facilitate the making of durable bilateral agreements between the Commonwealth and States and Territories to hand over environmental approval powers.

In fact, the implications of the Bill are far from minor and technical.

The proposal to devolve environmental responsibilities is not new and remains fraught with risk. In 2012 and 2014, the Places You Love alliance commissioned the Environmental Defenders Office to undertake audits of state and territory laws. The conclusion of both audits was that **no state or territory legislation met the full suite of existing national environmental standards required to protect matters of national environmental significance**. Given the re-appearance of the 'one stop shop' policy and the resurrection of the failed 2014 Bill, we have updated our audit analysis. An updated review of state and territory laws shows the same conclusion – **not only does no state or territory law meet current national standards, but in some jurisdictions, the environmental protections in state and territory laws have actually been weakened.**

EDO has analysed case studies from across the country. This report includes the **top 30 case studies** that illustrate through actual examples how state and territory laws, processes and policies do not meet current national standards and do not provide assurance that environmental outcomes will be delivered under a system of devolved responsibilities. Common themes in the case studies provide evidence for the following conclusions:

1. Does Commonwealth accreditation of state and territory laws deliver environmental outcomes? **Mostly no.**
2. Can state and territory laws guarantee national standards will be implemented? **No**
3. Do state and territory systems have independent assurance, compliance and enforcement (and deal effectively with conflicts of interest)? **No**
4. Do state and territory laws adequately implement international obligations? **No**
5. Do state and territory laws adequately address cumulative and cross boundary impacts? **No**

This audit of core standards in state and territory legislation (Part 1), combined with the case studies (Part 2), highlight the need for comprehensive legislative and governance reform at all levels, and the importance of the Commonwealth in taking a long-term leadership role to protect and enhance our unique environment for future generations.

Andrew Picone

PART ONE

Do state and territory laws address matters of national environmental significance?

The proposal that state and territory legislation can adequately address matters of national environmental significance is not supported by evidence in terms of delivery of environmental outcomes. A 2020 desktop analysis confirms the conclusion that no state or territory planning and environmental legislation adequately addresses the necessary suite of current national environmental standards.

State and territory laws are not designed to specifically address matters of national environmental significance, and this analysis confirms that the laws do not comprehensively address existing EPBC Act standards. It is clear that for state and territory laws to actually meet existing standards, law reform is already needed.

For state and territory laws to meet **new** national standards for environmental outcomes and assurance - as foreshadowed by the independent review process - there would need to be significant reform at the national, state and potentially regional and local levels. There would need to be both legislative reform, governance reform and significant resourcing at multiple levels to ensure that national standards were consistently applied and enforced on the ground at the project level. **This analysis shows the scale of the reform task is substantial and should not be underestimated.**

Table 1, right, summarises the analysis of planning and environment legislation in each state and territory against core EPBC Act standards.

Comparison Table – Do State and Territory planning laws explicitly incorporate core EPBC Act standards?

EPBC Act core standard	Qld	Tas	ACT	SA	NT	Vic	NSW	WA
Does the state (or territory) planning law explicitly refer to the principles of **ESD** in objects?	Partly[1]	Partly	Yes	Partly[2]	Yes	No	Yes[3]	Partly[4]
Does state planning law explicitly refer to the **World Heritage Convention**?	No	No	No	No	No	No	No[5]	No
Does state law specifically refer to the **Ramsar** (Wetlands) Convention?	Partly[6]	No	Partly[7]	No	No	No	Partly[8]	Partly[9]
Does state threatened species list include all **federally listed species and communities**?	No	No	Partly[10]	No	No[11]	No[12]	No[13]	No[14]
Does state planning law specifically refer to the **Convention on Biological Diversity**?	No	No	No[15]	No	No	No	No	No
Does state threatened species list include all **federally listed migratory species?**	No	No	Partly[16]	No	No[17]	No	No	No
Does state law specifically refer to **Convention on Migratory Species, JAMBA, CAMBA, ROKAMBA**?	Partly[18]	No	No	No	No	No	No	Partly[19]
Does state law prohibit the approval of **nuclear actions**?	No[20]	Partly	No	Partly[21]	No[22]	Yes[23]	Partly[24]	Partly[25]
Does state law provide equivalent **standing for third parties**[26] to bring proceedings in relation to major projects?	Partly[27]	Yes[28]	Partly[29]	No	Partly[30]	No[31]	Partly[32]	Partly[33]
Do state **offset standards** meet Commonwealth standards regarding 'like for like' and limited use of indirect offsets?	No[34]	No[35]	Yes[36]	Partly[37]	No[38]	No[39]	No[40]	No[41]
Is the state **environment minister** responsible for approving major projects?	No	No[42]	No	No	Yes	No	No[43]	Partly[44]
Does state appoint **independent decision makers** for state-proposed projects?	No	No[45]	No[46]	No	No[47]	No	No[48]	No[49]
Do state laws provide special procedures for **early refusal** where project impacts are 'clearly unacceptable'?[50]	No	No[51]	No[52]	No[53]	Partly[54]	Partly	No[55]	Partly[56]
Do state laws adequately assess **impacts of large coal and coal seam gas projects on water resources**?	No[57]	No[58]	N/A	No	No[59]	Partly	Partly[60]	No[61]

See endnotes on pages 42-43

PART TWO

Case studies illustrating the risks of devolving environmental responsibilities to states and territories

This part identifies 30 case studies from across Australia. The case studies document the environmental outcomes of Commonwealth accreditation of state and territory schemes such as Regional Forest Agreements and strategic assessments; include examples of where state and territories approved projects despite impacts on matters of national environmental significance; expose divergence of Commonwealth versus state standards – for example, for biodiversity offsets; demonstrate inaction on compliance and enforcement at the state level; identify limitations on current standards setting regimes – for example, NEPMs; expose the impacts of deregulation or weakened laws at a state level, for example in relation to land clearing; demonstrate the critical role of third party review and access to information; and provide specific examples of the failures of states and territories to implement international obligations, for example in relation to unique world heritage, Aboriginal cultural heritage, Ramsar wetlands, and migratory species.

Jerry Galea

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CASE STUDY 1

The Victorian RFA and Leadbeater's Possum

Regional Forests Agreements developed in the 1990s are an example of the failure of devolution of national responsibilities to protect threatened species to state governments. These Agreements are intended to provide an alternative mechanism for meeting the threatened species conservation objectives of the EPBC Act and form the basis for an exemption from the usual threatened species protections contained in the Act.

Despite their intentions, these 20 year Agreements have failed to protect forest dependant threatened species. They provide a salutary warning of the risks of devolution of responsibilities under the EPBC Act to state and territory governments.

In Victoria species like the Leadbeater's possum have been up listed under the EPBC Act from endangered to critically endangered, and previously common species like the Greater Glider are now listed under State and Commonwealth laws as vulnerable to extinction.

Unsustainable native forest logging has contributed to the continuing decline of the Leadbeater's Possum and Greater Glider. This has occurred because of complicated and inadequate protections under Victoria laws, and poor implementation and enforcement of these laws by the Victorian government. A 2018 Independent Review of Timber Harvesting Regulation in Victoria found that the State government owned logging agency, VicForests, was practically operating under a system of self-regulation.[1]

The Commonwealth government endorsed this system of regulation under Regional Forests Agreements first entered into in the 1990s, and has recently agreed to further extensions of agreements in Victoria and other states. Requirements to review the operation of the agreements have proven ineffective and, in many cases, have not been carried out at all. Such breaches of clear statutory requirements have not resulted in any suspension of accreditation.

It was left to small community group, the Friends of Leadbeater's Possum, to expose this situation. Frustrated by the continuing failure of the Commonwealth and Victorian governments to effectively protect threatened species imperilled by logging, in 2017 the Friends commenced Federal Court proceedings against VicForests.

The Friends alleged that VicForests logging operations in Victoria's Central Highlands failed to comply with Victorian timber harvesting regulations, and that this failure meant that the exemption from the usual EPBC Act protections did not apply. They further claimed that VicForests logging operations did not comply with the EPBC Act and that past and planned logging has had and will continue have a significant impact on the Leadbeater's Possum and Greater Glider.

Leadbeater's Possum. 📷 *D. Harley*

In May 2020 Justice Mortimer upheld the Friend's claims, finding that VicForests logging was in breach of both Victorian laws and the EPBC Act.[2] The Court found that past logging was illegal under the EPBC Act and that planned logging operations were also likely to contravene the Act. VicForests is now appealing the Federal Court decision.

The case demonstrates both the failure of Victorian threatened species protection laws, and the continuing failure of the Victorian government to provide adequate protection to the Leadbeater's Possum, Greater Glider and other forest dependant species under the Central Highlands Regional Forests Agreement. More broadly, the case demonstrates the failure of the system of accrediting these laws under Regional Forests Agreements. Not only has the Commonwealth government effectively endorsed a system of regulation that the Court found amounted to a breach of the EPBC Act, it has failed to use the review and oversight measures available under Regional Forests Agreements protect federally listed threatened species such as the Leadbeater's Possum and Greater Glider.

1. Independent Review of Timber Harvesting Regulation, 2018. Page 34.
2. *Friends of Leadbeater's Possum Inc v VicForests* (No 4) [2020] FCA 704.

CASE STUDY 2

The Melbourne Strategic Assessment

Melbourne's urban growth impacts several threatened species and communities listed under the EPBC Act. These include the Natural Temperate Grassland and Grassy Eucalypt Woodland of the Victorian Volcanic Plain, listed as critically endangered in 2008 and 2009, and threatened species such as the Growling Grass Frog and Southern Brown Bandicoot.

Only 5% of Victoria's critically endangered grasslands remain, much of this in small remnants. Clearance and other threats from urbanisation are a major threat to these grasslands so when the Victorian government proposed to expand Melbourne's urban growth boundary and permit development in areas containing important areas of grassland, the Commonwealth and Victorian governments agreed to assess the impacts of the proposal on nationally listed species and communities by way of a strategic assessment under the EPBC Act. In 2010, the Australian Government endorsed the 'Delivering Melbourne's Newest Sustainable Communities program' report (the Melbourne Strategic Assessment, MSA program), which was the first strategic assessment under the EPBC Act to be endorsed.

Strategic assessment, and the subsequent devolution of responsibility for protecting nationally listed threatened species under the endorsed program of measures to state governments, is an alternative to case by case approvals under the EPBC Act. In principle, strategic assessment has the potential to deliver improved conservation outcomes. Conducting an impact assessment of a program rather than individual developments at scale and early in time responds to one of the key problems with case by case assessments – the challenge of cumulative impacts. Strategic assessment should also allow for coordinated and strategic minimisation and mitigation measures, including the effective use of genuine offsets. In practice, achieving these outcomes requires state environmental impact assessment and threatened species protection laws that are strong on paper and implemented well in practice, as well as ongoing Commonwealth government oversight to ensure that the objectives of the EPBC Act are being achieved. **The absence of both of these measures has meant that to date the Melbourne Strategic Assessment has been an expensive failure, costing the Victorian government hundreds of millions of dollars and failing to deliver the promised conservation outcomes.**

A key outcome that the Melbourne Strategic Assessment was intended to deliver was the creation of a 15,000 hectare Western Grasslands Reserve and 1200 hectare Grassy Eucalypt Woodlands Reserve by 2020. These new reserves were intended to be acquired using offset payments derived from habitat destruction permitted within the new urban growth boundary.

According to a 2020 report of the Victorian Auditor General, by December 2019, the Victorian government "had acquired around 10 per cent of land in the WGR, or 1,568.6 hectares. It has not yet acquired any land for the GEWR".[3] Not only has the program failed to deliver the reserves promised, but existing remnants within the urban growth boundary and remnants in areas earmarked for reserves continue to decline in extent and quality, and the small reserves that have been created are difficult and expensive to manage effectively.

The Victorian conservation regulations and the program endorsed by the Commonwealth government under the strategic assessment are failing to protect the critically endangered grasslands and listed threatened species. The Auditor General's assessment of the management of the program is scathing, noting that "the governance structure for the program has changed several times". An interdepartmental committee which, despite the program having been endorsed in 2010, was only formed in 2013 and only met twice in that year. Since 2016, the Victorian environment department has "focused on addressing the legal and financial issues that were affecting program outcomes, it has managed the MSA program internally".[4]

As the findings from the Victorian Auditor General make clear, in addition to failing to deliver the intended conservation outcomes, the program has proved costly for the Victorian government. Not only has the Victorian government undertaken much of the environmental impact assessment that would normally have been undertaken by private developers standing to gain from environmental approvals under the EPBC Act, it has had to manage continuing financial and legal challenges as the program is rolled out.

As if this was not enough, property developers the Dennis Family Corporation are now reported to be suing the Victorian government for $240 million over disputed compensation for the acquisition of land in the Western Grassland Reserve. According to The Age report "It's claim is likely to provide a signal to other landowners within the reserve to take their complaints to court".[5]

This case study evidences the failure to deliver agreed environmental outcomes under the strategic assessment accredited under the EPBC Act, and a lack of corresponding Commonwealth oversight and enforcement of the standards and conditions in the strategic assessment; resulting in actual net losses and deteriorating condition of matters of national environmental significance.

3. Victorian Auditor General (2020), *Protecting Critically Endangered Grasslands. Independent assurance report to Parliament 2019-20:16*, p.9.
4. Ibid p.13.
5. "Property owner sues Victorian government for $240 million over grassland" The Age, 3 September 2020. https://www.theage.com.au/national/victoria/property-owner-sues-victorian-government-for-240-million-over-grassland-20200903-p55s6s.html

CASE STUDY 3

Carnaby's cockatoos – Western Australia

Carnaby's black cockatoo. 📷 *Ralph Green, Flickr*

Carnaby's Black-Cockatoo is federally listed as Endangered, and the Perth-Peel subpopulation of Carnaby's Black-Cockatoos is estimated to have declined by 35% since 2010, due to the ongoing clearing of foraging and roosting habitat on the Swan Coastal Plain. With more than 70 per cent of banksia woodland now cleared, the species has become increasingly reliant upon pine plantations north of Perth to survive.

The importance of pines as a food source for Carnaby's is well understood (and recognised in the species' Recovery Plan). Indeed, in 2017, three quarters of Perth-Peel Carnaby's were recorded roosting within one kilometre of Perth's pine plantations, underscoring the importance of the plantations to sustain this population. Despite the known importance of this habitat, these plantations have been harvested—without replacement—at a rate of around 1,000 hectares each year since 2004. At its greatest, this plantation spanned 23,000 hectares; today, less than 5,000 hectares remains and all pines will be harvested by 2023.

Harvesting pines without adequately compensating for the loss of habitat has demonstrable consequences for this Endangered species. Since 2010, BirdLife Australia has undertaken regular monitoring of Perth's Carnaby's Black-Cockatoo population via its Great Cocky Count and has recorded sharp declines linked to the cumulative removal of mature pine trees.

In 2014, BirdLife Australia wrote to the Federal Environment Minister and their State counterpart with the results of the 2014 Great Cocky Count, indicating that legal advice received suggested 'harvesting without replacement' did not constitute a lawful continuation of a use of land under section 43B of the EPBC Act, and met the criteria for 'significant impact' on a Matter of National Environmental Significance. BirdLife Australia requested this be referred to the Federal Department of Environment to determine if it constituted a 'controlled action' (requiring further assessment of environmental impacts) and sought assurances from both the State and Federal Ministers that any further harvesting without replacement would be subject to referral under Part 7 of the EPBC Act, pointing to powers of the Federal Minister under section 70 to request a referral of the proposal. To date, the Government of Western Australia has failed to refer this action to the Commonwealth for assessment, despite repeated requests by BirdLife Australia, and the ongoing and significant decline of Carnaby's Black-Cockatoo populations. **By failing to refer the action for assessment under Commonwealth laws, the WA Government's action raises serious issues of transparency and accountability—legal responsibility is avoided and compliance seems optional.**

In response to repeated referral requests, successive Federal Ministers have cited the removal of pine plantations, and any potential impact on the Carnaby's Black-Cockatoo, as being considered within the **Strategic Assessment of the Perth and Peel Regions**—a process that commenced in 2011 and has now been abandoned. During this time, at least 5,000 hectares of pine forest has been cleared without replacement, consideration or recourse for its impact on a nationally-listed threatened species. The discretionary powers available to the Minister to call an action in, which in this case were not exercised, also point to a legal system vulnerable to politicisation—even when the case for referral is clear, the Minister is not compelled to act.

The information provided by the WA State Government through the Strategic Assessment consultation process was grossly inadequate. Endeavours by BirdLife Australia and other groups to provide constructive feedback were thwarted by a lack of disclosure of key information, including granular mapping and modelling projections, ultimately requiring requests under Freedom of Information laws. This highlights the inherent challenges the community faces when seeking to effectively participate in or scrutinise assessment processes. While the data produced by organisations like BirdLife Australia fills critical knowledge gaps and is relied upon to inform environmental decision making, the burden of holding governments to account for poor decisions, non-referral and the outright dismissal of scientific evidence effectively outsources regulatory and compliance responsibility to non-state actors. Prohibitive legal costs also represent a significant barrier to individuals and non-government organisations, acting as a further deterrent to ensuring robust environmental checks and balances, and undermining the effectiveness of the legal system tasked with the protection of federally listed species.

This case study demonstrates how responsibility for acting on known impacts from individual actions can be deferred pending an accreditation process such as a strategic assessment process, and that significant impacts continue to occur whilst accreditation processes are being undertaken.

CASE STUDY 4

The Tasmanian Regional Forest Agreement and the Swift Parrot

The primary species at risk from forest practices operations in Tasmania is the Swift Parrot (*Lathamus discolor)* which is identified as critically endangered under the IUCN Red List and the EPBC Act, with a population of less than 2500.

Swift Parrot is on a 10 year pathway to extinction, unless all steps to recover the species are taken, including by retention of its existing breeding and feeding habitat. Tasmanian native forests contain the entirety of its breeding habitat. Effective management of key threats, including nest predation of adults, chicks and eggs by Sugar Gliders and habitat loss, is critical to the species' survival and recovery. Sugar glider predation is exacerbated by fragmentation of breeding habitat caused by logging. And yet, the continued logging of critical Swift Parrot breeding habitat is allowed under the Tasmanian Regional Forest Agreement with no consequences. The RFA only requires management prescriptions identified at the State level to be met, without specifying what those prescriptions are or what outcome they are intended to meet.

The development of standard prescriptions under the State's Forest Practices Code have been questioned in numerous reports in cases. For instance, by the Federal Court in *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729, Justice Marshall found that the State's management prescription under the Forest Practices Code did not in fact "protect" listed threatened species, including the Swift Parrot. The Court made findings that expert zoologist advice was routinely ignored, and that on one occasion logging in fact took place in an area that was meant to be protected.

Justice Marshall found the forestry operations authorised under State forestry practices laws were not "in accordance with" with the RFA and therefore were not covered by s38 of the EPBC Act. The Commonwealth government's response was to amend the RFA, not to require the State to amend the management prescriptions, and the Full Court on appeal found the amended RFA did not intend the management prescriptions to be binding.

Documents produced under Right to Information laws in 2015 demonstrated no change to these practices. This evidence indicated that scientific advice on logging of coupes containing Swift Parrot habitat was provided to DPIPWE (the agency with oversight of threatened species protection), but DPIPWE did not follow it in allowing approval of logging of those coupes.

The Tasmanian Regional Forest Agreement substantively does not protect or seek to recover threatened species. It is not an instrument that achieves the objects of the Act. These issues would not be fixed by amending Regional Forest Agreement, rather, the science underpinning that agreement and forestry regulation at a State level need wholescale review. As Justice Marshall pointed out in the Wielangta case, the RFA provides an alternative to the normal assessment process under the EPBC Act, and should achieve the same standards.

Swift Parrot. 📷 *Dave Curtis, Flickr*

CASE STUDY 5

Export fishery accreditation – Queensland

The EPBC Act requires the Australian Government to regulate fisheries, including the commercial export of fisheries products, to ensure that fisheries are managed in an ecologically sustainable way and to avoid harm to protected species including cetaceans and listed marine species. This includes:

- the strategic assessment of Commonwealth managed fisheries under Part 10 of the Act;
- the accreditation of plans of management (or similar) for State and Territory managed fisheries under Part 13;
- the declaration of Wildlife Trade Operations (**WTOs**) that in effect permit the export of native species under Part 13A.

If the Minister is satisfied that a fishery is being managed in an ecologically sustainable way, they can make a WTO declaration for that fishery permitting export of native species. This approval can be made subject to conditions designed to ensure sustainability. WTO declarations can last for up to three years.

The Queensland East Coast Inshore Fin Fish Fishery (**ECIFFF**) was most recently declared an approved WTO in December 2018. Approval of the ECIFFF WTO was subject to 9 conditions. Condition 9 requires the Queensland Department of Agriculture and Fisheries (**QDAF**) to implement harvest strategies that monitor and manage impacts associated with the ECIFFF on target, by-product and bycatch (including protected species).

Green Sea Turtle, Queensland. 📷 *Paul Asman/Jill Lenoble*

This condition was deemed necessary due to the risks the ECIFFF posed to EPBC Act listed species including inshore dolphins (snubfins and humpback dolphins), sawfish, turtles and dugongs. These species, or groups of species, were considered especially vulnerable to being killed in fishing nets. For dugongs and inshore dolphins, only a small number of deaths can cause depletion of regional populations. The harvest strategies were required to be in place by January 2020.

Where a Minister is satisfied that a WTO condition has been contravened, they have a duty, under section 303FT(9) of the EPBC Act to revoke the relevant WTO declaration.

Early in 2020, a number of environmental NGOs expressed concern about apparent non-compliance with Condition 9. As of February 2020, QDAF were yet to circulate a draft ECIFFF harvest strategy and/or commence their ordinary public consultation processes for a draft strategy. This resulted in EDO writing to the Federal Minister for the Environment, on behalf of the Australian Marine Conservation Society (**AMCS**), requesting that the Minister investigate, on an urgent basis, whether QDAF had contravened Condition 9 of the ECIFFF WTO.

As a result of this letter, the federal Minister for the Environment wrote to the Queensland Fisheries Minister seeking evidence that the harvest strategy condition had been implemented. In September 2020, the federal Minister wrote to the Queensland Minister stating that she was satisfied that four conditions of the WTO declaration had not been satisfied, including condition 9. The other conditions that have been contravened relate to data collection and validation programs, a range of shark protection measures, and implementation of risk mitigation strategies. Citing section 303FT(9), the Minister stated that the WTO declaration would be revoked on 30 September 2020.

The WTO has now been revoked. This means domestic trade from the fishery will not be affected but export of 'regulated native specimens' (currently all native species taken from within the ECIFFF) will not be lawful until a new WTO is in force. It was reported that the failure to implement the harvest strategy was, at least in part, a consequence of the stalling of fishery sustainability reforms in Queensland, however we note that the Queensland Government has now announced significant sustainable fisheries reforms as a result.

This is a clear example of the need for Commonwealth involvement and oversight in accredited schemes and ongoing compliance to ensure that Australia's international obligations in relation to environmental management are met and nationally listed species are protected.

CASE STUDY 6

Traveston Crossing Dam – Queensland

On 15 November 2006, Queensland Water Infrastructure Pty Ltd referred a proposed action to build Traveston Crossing dam to the Federal Environment Minister [6]. Expert review determined that this would harm "important habitat for the Mary River Turtle, Mary River Cod, Australian Lungfish and the Southern Barred Frog that is critical to their ongoing survival[7]" and was critical of many of the mitigation and offset measures proposed by the proponent.

On 2 December 2009, a decision was made to refuse approval for the project by the then Environment Minister Peter Garrett due to the "unacceptable impact" it would have on listed threatened species, including the Mary River turtle and Australian lungfish. "Mr Garrett made the decision after reviewing a report by Queensland Co-ordinator General Colin Jensen which found the dam was feasible. However, the Environment Minister said in the material before him, the dam "wouldn't really have been needed until 2026" providing "plenty of opportunity" for the State Government to look for alternatives to secure South-East Queensland's future water supply"[8].

If this decision had been devolved to the state government there is little doubt the project would have gone ahead. The government had already purchased land and spent millions on planning while the EPBC Act decision was pending. As noted by the Wentworth Group of Concerned Scientists in their response to the previous 'One Stop Shop' proposal in 2012:

The single example used by the Business Council of why state governments should be given Commonwealth approval powers actually serves to demonstrate precisely why they shouldn't. The Traveston Crossing Dam on the Mary River was proposed by a Queensland Government corporation and was recommended for approval by the Queensland Coordinator General. ... This [EPBC Act] decision was supported by the leader of the National Party, Mr Warren Truss, who said "the environmental evidence was overwhelming and Mr Garrett had no option but to reject (the) ill-conceived proposal."[9]

This case study highlights the importance of a Commonwealth role in objectively applying national threatened species standards, particularly where there are potential conflicts or vested government interests at the state level.

Site of proposed Traveston Crossing Dam in 2007. 📷 *Patrick McCully, Flickr*

6. http://www.environment.gov.au/node/18584
7. http://www.environment.gov.au/node/18584
8. https://www.smh.com.au/environment/unacceptable-garrett-rejects-blighs-traveston-dam-20091111-i91e.html
9. Wentworth Group *Statement on Changes to Commonwealth Powers to Protect Australia's Environment*, September 2012, available at https://wentworthgroup.org/wp-content/uploads/2013/11/Statement-on-Changes-to-Powers-to-Protect-the-Environment.pdf

CASE STUDY 7

Land clearing at Maryfield Station – Northern Territory

In 2017, North Star Pastoral had been granted a permit to clear 20,431 hectares for planting pasture and grazing stock at Maryfield Station, southeast of Katherine, NT. This was the single largest land-clearing permit ever to be issued in the Northern Territory, and was granted without the proponent being required to undertake an environmental impact assessment under the NT's environmental laws. The estimated greenhouse gas emissions from this permit would have been 2-3 million tonnes, about 18.5% of the Northern Territory's entire annual emissions.

In a legal first in the NT, the Environment Centre Northern Territory, represented by the EDO, challenged the permit to allow the clearing, including on climate change grounds, and was successful in having the permit declared invalid. In a landmark ruling, the Northern Territory Supreme Court revoked the permit to clear.

The proponent has subsequently applied for, and received approval to clear 5,000 ha at Maryfield Station (again, without any proper environmental impact assessment), and the NT's legislation contains no mechanism to prevent the 'stacking' of further land clearing permits nor to properly consider the cumulative impacts of land clearing.

It is extraordinary that clearing of this scale was not referred to the Commonwealth and did not trigger the EPBC Act. This case study demonstrates the sheer scale of what can be approved by a territory government without adequate environmental impact assessment.

Northern Territory, landscape after rain, Environmental Defender's Office. 📷 *David Morris*

CASE STUDY 8

Native Vegetation Management – Queensland

States and territories may have the capacity to quickly change their legislation because of their Parliamentary structure, for instance Qld, ACT and NT only have a single Legislative Assembly. The serious risks in environmental regulation from this vulnerability were seen in Queensland in 2013, when the Newman LNP Government greatly weakened vegetation clearing laws, resulting in a fivefold increase in mature forest being destroyed over 5 years.

Jeremy Porter

The law was not tightened again until 2018.[10] This resulted in cumulative impacts to the water quality of the Great Barrier Reef, which was of serious concern to the World Heritage Committee and was one of the reasons (along with coral bleaching) that the Reef was nominated for the List of World Heritage in Danger in 2015. The impacts of rapid regulatory change make devolution to states and territories highly risky.

WWF calculates that over the period 2016-18, nearly 250,000ha of EPBC listed threatened species habitats were bulldozed in Queensland[11], almost entirely for livestock pasture development, without a single referral being made, and not a single enforcement action being taken into regard to this unauthorised destruction of matters of national environmental significance (**MNES**).

Specific case studies demonstrate the need for certain clearing to have adequate federal scrutiny and assessment. For example, *Kingvale: land clearing in Great Barrier Reef catchment*.

In November 2018, in a case demonstrating the critical role community organisations play in holding elected officials to account, the Federal Court upheld a challenge by the Environment Council of Central Queensland represented by EDO, to a proposal to clear 2,100 ha of native vegetation on Kingvale Station on the Cape York Peninsula in the Great Barrier Reef catchment.[12] This clearing had been approved by the Queensland LNP Government prior to them losing the election.

Early in 2018, the Federal Minister for the Environment decided that the proposed clearing could undergo the least rigorous form of environmental assessment available under Commonwealth environmental law. The Minister was required, among other things, to be satisfied that the degree of public concern about the action is, or is expected to be, 'moderately low'.

The Government's own experts found that the proposed clearing would have a significant impact on the Great Barrier Reef and a number of threatened species. The Minister conceded that decision was not made lawfully.

Like the Maryfield NT clearing approval, **this case study shows the scale of habitat destruction permitted under state law, in this case in an internationally important and environmentally sensitive catchment, and the current reliance on third party review to ensure appropriate standards and processes are applied.**

10. https://www.abc.net.au/news/2016-08-19/queensland-parliament-tree-clearing-laws-fail-unesco-fears/7765214
11. Taylor, M, 2020. Pervasive inaction on national conservation law in Queensland, 2016-18. WWF-A.
12. See: https://www.edonsw.org.au/ecoceq_v_environment_minister_harris

CASE STUDY 9

Biodiversity Offsetting in NSW

Biodiversity offsetting - where loss of biodiversity values is allowed at a development site on the condition that biodiversity values at an offset site are protected and enhanced - is increasingly featured as a component of environmental approval regimes across Australia. However, despite extensive scientific research showing that strict offset rules are required to ensure no net loss of biodiversity, offset standards vary across the country, there are no biodiversity offsetting systems that meet the necessary ecologically rigorous standards, and progressive changes to biodiversity schemes are weakening, rather than enhancing, environmental protection.

For example, biodiversity offsetting began to feature in NSW environment and planning laws from the mid-2000s. In 2006 NSW first established a Biodiversity Banking scheme that enabled developers to buy biodiversity credits to offset the impacts of their developments. The scheme provided for offset sites to be established by landowners who could then get paid to manage the sites to generate biodiversity credits for the market. The Biobanking scheme was voluntary and, given the significant costs of undertaking the necessary assessments, had limited and inconsistent take up. Offsetting was also a component of the Environment Outcomes Assessment Methodology, that underpinned land clearing applications under the *Native Vegetation Act 2003* (NSW).

In 2014, NSW introduced the *Biodiversity Offsets Policy for Major Projects* (**Major Projects Offset Policy**). This policy included weaker offset standards than those required by the Biobanking scheme in an effort to make offsetting easier for State significant development and infrastructure. These standards allowed significant biodiversity trade-offs (that is, permitting developers to clear habitat in return for compensatory actions elsewhere) and was seemingly inconsistent with national biodiversity offset standards, including the *EPBC Act Environmental Offsets Policy*. Despite this, the Major Projects Offsets Policy was accredited under the NSW Bilateral Assessment Agreement.

In early 2015, during another occasion on which federal, state and territory governments were actively in consultation on handing over federal approval powers under the EPBC Act, the Humane Society International - Australia (**HSI**), represented by EDO, used Freedom of Information (**FOI**) processes to request access documents about how the Australian Government came to accredit a policy that didn't meet its own standards. After a three year legal process, on the eve of a hearing at the Administrative Appeals Tribunal, the federal Environment Department agreed to the FOI request and released over 60 documents. **The documents revealed that federal bureaucrats in the Environment Department identified key areas of the NSW policy that differed from federal standards but the Major Projects Offset Policy was accredited nonetheless.**

Recent reforms in NSW under the *Biodiversity Conservation Act 2016* have again changed the biodiversity offsetting regime by establishing a single Biodiversity Offsets Scheme (**BOS**) for application across NSW, replacing the various earlier offset mechanisms. The new scheme further weakens offsetting standards applied through a new Biodiversity Assessment Methodology. While there is a benefit to having a single scheme apply consistently (instead of differing voluntary arrangements), the policy enshrines a lowest common denominator approach. It has shifted so far from the science (for example of no longer requiring strict "like for like" offsets), that now almost everything is amenable to offsetting, and if a developer cannot find an offset they can simply pay money into a fund for a different offset elsewhere. Mine rehabilitation action decades in the future can also be counted as offsets.

The NSW scheme does not actually offset biodiversity impacts and instead facilitates net loss of biodiversity and local extinctions. Accreditation of this scheme would clearly be inconsistent with the objects of the EPBC Act and the EPBC Act offset standards.

CASE STUDY 10

National Environment Protection Measure – Air quality

National Environment Protection Measures (**NEPMs**) are legal instruments that set national objectives and standards to assist in protecting or managing particular aspects of the environment. NEPMs exist for air toxics, ambient air quality, assessment of site contamination, diesel vehicle emissions, movement of controlled waste, the National Pollutant Inventory and used packaging. They are binding on all Governments that are members of the National Environment Protection Council (**NEPC**), that is all state, territory and the Commonwealth governments, and are given regulatory effect through state and territory legislation.

Standards are notoriously slow to be developed and then implemented by states and territories in their relevant legislation. For example, the NEPC conducted a public *Review of the National Environment Protection (Ambient Air Quality) Measure* (**Air Quality NEPM**) in September 2011. This review aimed to strengthen the standards for particulate matter (**PM**), specifically PM2.5 (particles with a diameter of 2.5 micrometres or less) and PM10 (particles with a diameter of 10 micrometres or less) under the NEPM framework. The review resulted in a consultation on a proposed variation and notice of intention to vary the Air Quality NEPM in 2014 with a variation to the Air Quality NEPM coming into effect on 15 December 2015.

Despite the binding nature of the NEPMs, only in 2019, over 3 years later, did the Queensland Government update the state law enshrining these standards for Queensland (the *Environmental Protection (Air) Policy 2008*).

These are significant delays which have meant all communities impacted by new proposals that have been assessed and approved between 2011 (when it was recognised that reform was needed) and implementation of the new standards in each jurisdiction have not been protected by the improved standards. Further, a number of jurisdictions do not have regular reviews of existing facilities meaning improved standards have not been applied to licence conditions. For example, Queensland has not updated licence conditions of the facilities it regulates and so many high emitting activities are still operating on pre-2003 air quality limits which are now far outdated and are risking the health of those living nearby.

The Air Quality NEPM is not the only NEPM where reviews leading to improved environmental outcomes have been slow. Standards for sulphur oxides, nitrogen oxides and ozone have not been reviewed or updated since they were made in 1997. A current review process may not be completed until 2021. Despite a Commonwealth Senate inquiry into impacts on health of air quality in Australia recommending that the Commonwealth develop a national emissions standard for diesel engines in 2015, there have been no moves to update the *National Environment Protection (Diesel Vehicle Emissions) Measure*. This measure was implemented in 2001 and the only change made to the measures since was a minor variation in 2009.

This examples clearly shows that states and territories are slow to enact and enforce even 'binding' national standards and cannot be relied on to do so in a timely manner in the future without mandatory timeframes.

CASE STUDY 11

The Gorgon Gas Project – Western Australia

The Gorgon Gas Development is a liquified natural gas (LNG) plant operated by Chevron Pty Ltd (Chevron) located on Barrow Island in northern WA. Barrow Island is a class A nature reserve (the highest level of protection in the WA statutory reserve system) that is recognised for its high terrestrial and marine conservation values. The project extracts gas from the Gorgon offshore gas field, which has particularly high levels of reservoir CO2.

In WA, the Environmental Protection Authority conducts assessments under the *Environmental Protection Act 1986* (WA) (**EP Act**) and provides its report on environmental considerations to the Minister for Environment for a final decision on approval (which is reached in conjunction with other relevant government Ministers and decision-making authorities).

The EPA published its report on the project on 6 June 2006[13]. The report found that the project was environmentally unacceptable due to risks of impacts to flatback turtle populations, impacts on the marine ecosystem from dredging, risk of introduction of non-indigenous species and potential loss of subterranean and short-range endemic invertebrates species. The EPA also found that the project would be environmentally unacceptable if it did not include a scheme to inject or otherwise abate reservoir CO2 vented to the atmosphere. This report was then provided to the State government.

Despite the report, the WA Minister for Environment approved the project on 6 September 2007[14]. In a subsequent announcement the WA government stated that the project would "boost the Australian economy and provide thousands of jobs for Western Australians" and that the State government had "worked tirelessly to facilitate major developments, particularly the massive Gorgon project"[15].

Under the EPBC Act, the federal Minister for the Environment approved a modified version of the project on 26 August 2009[16].

Under Condition 26 of the WA statutory approval instrument for the project (Ministerial Statement 800 (**MS800**)) Chevron is required to design, construct and implement a Reservoir Carbon Dioxide Injection System (**CO2 Injection System**). Condition 26 requires Chevron to:

- design and construct CO2 Injection System infrastructure that is capable of disposing by underground injection, 100% of the volume of reservoir CO2 to be removed during operations that would otherwise be vented to the atmosphere;
- implement all practicable means to inject all reservoir CO2; and
- ensure 80% of reservoir CO2 is injected on a 5 year rolling average.

The commissioning of the CO2 Injection System was substantially delayed due to technical problems.[17] Accordingly, no reservoir CO2 was injected in 2016, 2017 or 2018. When the CO2 Injection System commenced operation on 8 August 2019, the project had been venting reservoir CO2, without injection, for approximately 3 years, resulting in an excess of approximately 6.2 million tonnes of reservoir CO2 being vented as at 2018.[18] Overall, the delays have resulted in more than 8 million tonnes of reservoir CO2 being removed (and therefore vented) without injection,[19] since the project commenced operation.

The venting of this quantity of CO2 has caused Chevron to breach various obligations in Condition 26. Further, the venting has contributed to global greenhouse gas emissions and the likelihood of adverse impacts of climate change, therefore has arguably caused environmental harm and/or pollution, which are offences under the EP Act.

It appears that to date no enforcement action has been taken in response by the Department of Water and Environmental Regulation (**DWER)** or the Minister for Environment despite them both having enforcement powers under the EP Act which would enable them to, for example, require Chevron to abate the impact of the emissions by obtaining offsets.

This case study demonstrates both the potential for State interests to lead to the approval of projects that are environmentally unacceptable, and the lack of adequate enforcement action that is taken by environmental regulatory bodies in Western Australia. Without enforcement, there is little incentive for industry to comply with Ministerial conditions or reduce their greenhouse gas emissions. It also illustrates that an objective EPA can provide robust advice concerning unacceptable impacts, although this does not prevent an approval due to Ministerial discretion.

13. EPA Bulletin 1221 https://epa.wa.gov.au/sites/default/files/EPA_Report/B1221.pdf
14. https://epa.wa.gov.au/sites/default/files/Ministerial_Statement/000748_0.pdf
15. WA Government media statement 14 September 2009 https://www.mediastatements.wa.gov.au/Pages/Barnett/2009/09/Gorgon-set-to-take-Western-Australia-to-new-heights-in-oil-and-gas-industry.aspx
16. http://www.environment.gov.au/system/files/pages/dcd6650f-0e0b-4ab4-bd84-2b519e26f9cb/files/variation-decision.pdf
17. Chevron, 2017 Environmental Performance Report, p 54.
18. Kathryn Diss, 'How the Gorgon gas plant could wipe out a year's worth of Australia's solar emissions savings', 21 June 2018, *ABC News* <https://www.abc.net.au/news/2018-06-21/gorgon-gas-plant-wiping-out-a-year-of-solar-emission-savings/9890386>.
19. Chevron, 2016 Environmental Performance Report, p 49; 2017 Environmental Performance Report, p 53; 2018 Environmental Performance Report, p 47; and 2019 Environmental Performance Report, p 40.

CASE STUDY 12

Red-tailed Black-Cockatoo habitat – Victoria

Documents obtained under Freedom of Information (**FOI**) laws provide evidence that the Australian Government failed to act on an investigation that showed the Victorian Department of Environment, Land, Water and Planning (**DELWP)** was responsible for illegal clearing of South-eastern Red-tailed Black-Cockatoo habitat trees as part of fire management activities in South West Victoria.[20] A range of documents showed that an investigation was sought and conducted. However, a report on the investigation was provided to senior Commonwealth bureaucrats and then dropped, in favour of a 'strategic assessment' of Victoria's Bushfire fuel management program.

The documents – although substantially redacted – show various correspondence back and forth regarding the investigation, including that the federal department met with DELWP about the clearing on 18 Nov in 2015, then on 23 December the Executive Director of DELWP Fire and Emergency Management wrote back to say they would like more time to respond to the expert report, and its conclusions, which DELWP did not agree with. Then the next piece of correspondence is a letter in June 2016 about a strategic assessment of Victoria's bushfire fuel management program – an assessment that is yet to take place.

The documents that were released indicate that the Commonwealth Department wrote a negative report that was not acted upon. The action was not referred even though it appears that the clearing that occurred on the Casterton-Dartmoor Road in south-west Victoria was inconsistent with DELWPs planned burns policy.

This case study demonstrates serious issues relating to state impacts on matters of national environmental significance, ineffective federal oversight, state level conflicts of interest, access to information barriers, and the use of strategic assessments as an excuse not to address individual action impacts.

Red Tailed Black Cockatoo. 📷 *Dan Armbrust, Flickr*

20. See: https://www.theguardian.com/environment/2020/sep/28/no-penalty-for-victoria-despite-wanton-destruction-of-trees-vital-to-red-tailed-black-cockatoo

CASE STUDY 13

Manyana – Residential subdivision development in bushfire-ravaged NSW

A 20-hectare site at Manyana in NSW was spared from the devastating Black Summer bushfires of 2019/20 and has become a potentially critical refuge for native plants and animals, including federally listed species such as a colony of vulnerable grey-headed flying foxes and the threatened Greater Glider. However, under NSW laws the site was approved and about to be cleared for conversion into a 180-lot residential subdivision.

In May 2020, the Manyana Matters Environmental Association represented by EDO took court proceedings to protect the bushland, and successfully secured the voluntary undertaking from OzyHomes that it would not commence clearing of any vegetation – other than that required for perimeter fencing. Justice Wigney of the Federal Court made orders noting the developer's undertaking that no work commence while an ecologist is surveying the land for the presence of the threatened Greater Glider. The orders also note OzyHomes' agreement to provide access to the site for the community group's expert to undertake site surveys. In June, the developer provided a further undertaking to give two weeks' notice to Manyana Matters prior to commencing any work.

The case relied on part of the EPBC Act which allows people to step in to stop an action that will breach the law, including unapproved actions that potentially have a significant impact on Commonwealth listed species.

During Australia's summer of bushfires, an estimated 12 million hectares of land was burnt and an estimated billion animals were killed. Development projects which may not have had a significant impact on threatened species before the fires now could. The importance of the block at Manyana is not yet known, with key surveys now to be undertaken, but a precautionary approach is needed.

The matter was later referred to Federal Environment Minister Sussan Ley to consider whether the development should be assessed under the EPBC Act. On 16 August 2020, it was announced that the project required assessment under the EPBC Act. The Minister has reportedly called for more studies on the development and its impact on threatened species, including the grey-headed flying fox and the Greater Glider.

This case study demonstrates the importance of assurance and accountability mechanisms for third parties – like the Manyana community; the importance of federal step in powers; and the inflexibility of state laws to address adaptive management of climate change impacts.

CASE STUDY 14

Governance and Conflicts of interest – Queensland

A 2017 Transparency International Australia (**TIA**) report on mining[21] identified vulnerabilities of state assessment and approval processes to corruption, particularly in WA and Queensland. For example, in Queensland, under the coordinated projects assessment process, vulnerabilities/risks exposing the potential for conflicts of interest impacting decision making have been identified as:

- Inadequate due diligence into the character and integrity of an applicant, and its principal/s, for mining leases, where international;
- the discretion of the Coordinator-General to make evaluations and recommendations that override all other decision makers, including the Court;
- limited independent review of modelling systems used in the environmental impact statement (**EIS**);
- lack of transparency in agreements between mining companies and native title holders; and
- industry influencing decision-making.

Adani's Abbot Point coal spill. 📷 *Dean Sewell/Oculi*

Under the *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWO Act**) the Coordinator-General is empowered to declare certain proposals as 'coordinated projects', which allows the coordination of their environmental assessment by the Coordinator-General. While this coordination can assist in simplifying what can be a complicated environmental assessment process, there is concern that the powers and discretion granted to the Coordinator-General under the SDPWO Act extend beyond this remit and inappropriately enable the Coordinator-General to interfere with the final decision making process, particularly of the Department of Environment and Science for the environmental authority.

Inadequate due diligence of environmental record of operators

While there is an assessment as to the suitability of an operator to hold an environmental authority under the *Environmental Protection Act 1994* (Qld), this assessment does not assess performance in other Australian states or outside of Australia. Applicants are required to declare convictions for environmental offences and the cancellation or suspension of environmental authorities, licences or permits in Australia; however, there is no requirement to self-report environmental offences outside Australia. TIA cite the example of Adani Mining, which received approval for its Carmichael Coal Mine despite a history of environmental contraventions in India, as an example of the high risk this limited assessment creates in allowing authorities to be granted to operators with a history of non-compliance.

High level of discretion of the Coordinator-General – which can override the Court and Department

Under the SDPWO Act, the Coordinator-General has discretion around a number of key decisions for coordinated-projects decisions without meaningful criteria to guide this decision; such as whether to allow public notification of the terms of reference, and the length of any notification, and whether to notify any further draft EIS; whether the environmental impacts posed are significant enough to warrant an EIS or lesser assessment; whether to accept the draft EIS as the final EIS; whether to cancel, lapse or extend a declaration; and, most concerningly, the power to state conditions that must be imposed on other approvals, with which conditions imposed by other Department or Court cannot be inconsistent.

21. Transparency International (2017) Corruption Risks: Mining Approvals in Australia https://transparency.org.au/publications/australia-corruption-risks-mining-approvals-in-australia/

Currently specialist Departments and even the Land Court cannot impose conditions that are inconsistent with conditions that the Coordinator-General stated for approval in the EIS evaluation report. This is inappropriate, given that the Land Court undertakes a full merits review in any mining objections hearing for the mining lease, with expert assistance to analyse the application material before it – often leading to better understanding of the likely impacts - after the Coordinator-General provides these conditions. It also restrains specialist experts in the Department of Environment and Science in providing conditions.

Recently the Land Court commented about the situation of being prohibited from recommending conditions inconsistent with the Coordinator-General as follows: "I find this a most unsatisfactory position to be placed in, but the legislation leaves me no option. One could be forgiven for thinking the position that I find myself in is absurd, given that this Court has heard in such extensive detail from two highly regarded experts in the acoustic field, as well as all of the material that was before the Coordinator-General. In simple terms, this Court has had the benefit of much more information placed before it than the Coordinator-General and that information and evidence has been subject to intense scrutiny, yet I am precluded from recommending the result of that evidence to either the MRA Minister or the administering authority for the EPA." (*New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4) [*2017] QLC 24, [787])

Limited checks and balances to ensure accountable and transparent processes under the SDPWO Act.

Statutory judicial review is unavailable for most decisions under the Act, however common law judicial review is still available. No merits review is available for third parties of decisions of the Coordinator-General, so there is limited scrutiny. The Land Court objections process for the environmental authority and mining lease applications is therefore the main merits review of primary approvals required for mining projects. However, the Land Court does not make a final decision on referred objections, but rather makes a recommendation to the ultimate decision-makers. In this respect, the mining assessment and Court objection hearing process is an anomaly when compared to the typical assessment process and court involvement in other development approval processes, which generally involve a final decision by the government and then a post-approval merits appeal process. This limitation on the Land Court's power in mining objection hearings has hampered the Court's ability to conduct matters fairly and efficiently, and increases the time, complexity and costs for all parties. The NSW Independent Commission Against Corruption (**ICAC**) remarked, in the context of planning merits appeals, that '[t]he absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system'. Broadly speaking, third-party merits review is well-accepted as improving the consistency, quality and accountability of decision-making in environmental matters.

Coordinated projects are typically the largest, most impactful projects proposed in Queensland. Therefore, it is essential that the environmental assessment for these projects is of the highest quality, and is subject to proven accountability and transparency mechanisms designed to ensure the environmental assessment is based on reliable, quality information subject to strong scrutiny and free from the influence of politics as far as possible. States/territories can have a clear conflict of interest regarding environmental assessment of mining where they stand to benefit from mining royalties. These existing sources of risk will likely intensify if states are also able to exercise both state and Commonwealth approval powers. Minister Ley has referred to excluding situations where the "states mark their own homework"[22] but there is no clear definition at this point on the situations when the Commonwealth would retain approval powers over decisions.

This case study highlights a lack of independence and assurance for major project assessment at a state level, and a lack of scrutiny where there may be potential conflicts of interest.

22. Press conference, 20 July 2020, release of interim report and Government response.

CASE STUDY 15

Land clearing under self-assessable codes – NSW

Land clearing can have significant impacts on nationally listed threatened species and ecological communities, nationally and internationally important wetlands, migratory species, and heritage values. Despite these impacts, jurisdictions like NSW have weakened habitat protections in recent years by de-regulating rural land clearing.

In 2016, NSW repealed the ban on broadscale land clearing on rural land in favour of allowing significant clearing under self-assessable codes. The new laws established assessment and approval requirements for vegetation clearing (for example, approval by a new Native Vegetation Panel), but those processes remain largely unused due to the scale of clearing allowed under codes. In the absence of a finalised and published regulatory map to underpin the scheme, landholders decide for themselves whether their land is regulated or not, and some types of code clearing have notification requirements only (ie, no assessment or verification is required).

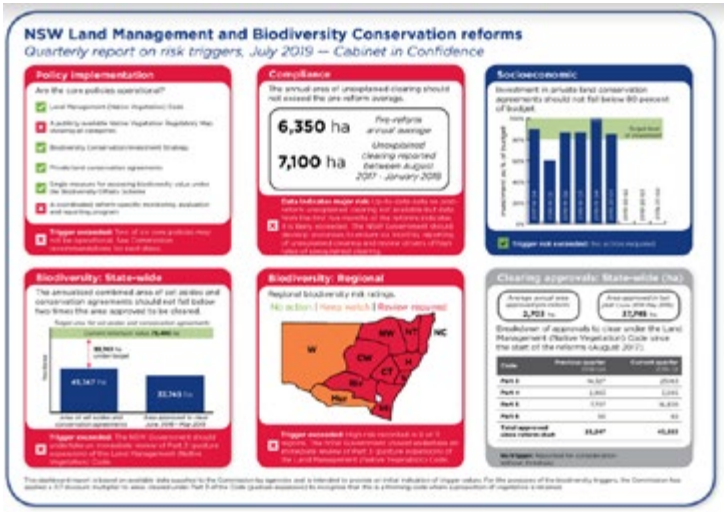

Figure 2: Proposed trigger reporting dashboard and current trigger value

In 2019, a Report by the NSW Audit Office Report[23] into NSW laws made the following conclusion:

> *The clearing of native vegetation on rural land is not effectively regulated and managed because the processes in place to support the regulatory framework are weak. There is no evidence-based assurance that clearing of native vegetation is being carried out in accordance with approvals. Responses to incidents of unlawful clearing are slow, with few tangible outcomes. Enforcement action is rarely taken against landholders who unlawfully clear native vegetation...*
>
> *Not releasing the map has made it harder for landholders to identify the portions of their land that are regulated and ensure they comply with land clearing rules. It has also limited OEH's ability to consult on and improve the accuracy of the map.*

The NSW Natural Resources Commission also undertook a review of clearing rates under the codes and confirmed regulatory failure of the new laws, as illustrated in the following diagram.[24] Key findings were:

- Clearing rates have increased almost 13-fold – from an annual average rate of **2,703ha** a year under the old laws to **37,745ha** under the new laws;
- Biodiversity in **9 out of 11 regions** is now at risk;
- Unexplained clearing has increased, with the NRC concluding that "compliance frameworks are inadequate and high rates of clearing pose a major risk";
- The proposed 'set aside' areas and areas managed under conservation agreements that were supposed to offset cleared areas – i.e. the government's whole justification for relaxing rules and introducing self-assessable codes – are woefully inadequate, being 33,743ha below the minimum required area; and
- Compliance frameworks are inadequate and high rates of unexplained clearing pose a major risk.

This case study shows that amendments to laws at the state level have resulted in a return to broadscale clearing in NSW, vastly inadequate restoration activities to offset clearing, and almost non-existent compliance and enforcement. The lack of specific data on clearing under codes also makes it difficult to assess the cumulative impacts of incremental clearing on matters of national environmental significance.

23. See: Audit Office of NSW *Managing Native Vegetation*, 27 June 2109 – available at: https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation
24. See Natural Resources Commission *Land management and biodiversity conservation reforms, Final advice on a response to the policy review point*, July 2019, available at: https://drive.google.com/file/d/1aYqKtF7A9JrHyrOWCjPF_4nZoQPHZkE8/view. See also: https://www.edo.org.au/2020/04/02/native-veg-clearing-nsw-regulatory-failure/

CASE STUDY 16

McArthur River mine – Northern Territory

The McArthur River Mine is located about 970 kilometres south-east of Darwin, near the township of Borroloola in the Northern Territory (**NT**). It is managed by McArthur River Mining (the **Operator**), a wholly owned subsidiary of Glencore, and is one of the world's largest open cut zinc-lead mines. It has been operating since 1993 and has, on the Northern Territory Environment Protection Authority (**NT EPA)**'s own account, a "complex and, at times, contentious" history[25].

In its various phases, the mine has had a significant impact on the community and the environment. In 2006, controversial approvals[26] from both the NT and Commonwealth Governments resulted in the six-kilometre diversion of the McArthur River and the transformation of the mine into an open cut mine. In 2014, the Operator obtained approval from the Northern Territory Government to expand operations, including by increasing the production rate and doubling the size of the open pit. At that time, due to the significant misclassification of potentially acid forming characteristics of waste rock, there were a number of incidents with the mine's waste rock pile including occasions where it spontaneously combusted. While an event of this kind was foreshadowed by the Independent Monitor in 2010, an independent body that was established to oversee both the Operator and the regulator's performance since 2006[27], no action – either by the Operator or the NT Government - was taken to respond to the inadequate waste rock classification system until four years later.

In 2014, due to the increased risk of serious environmental impacts, the Operator was required by the NT EPA to address these risks at the mine site and in doing so undertake further environmental impact assessment (**EIA**) and obtain further approvals from the NT's Minister for Primary Industry and Resources (**NT Resources Minister**), and the Commonwealth Government.

In 2019, the Commonwealth granted an amended approval under the EPBC Act, which, extraordinarily, is effective until 3019, due to the 1000+ years of rehabilitation and monitoring that has been identified as being required at the mine site. The EPBC approval is publicly available and includes a range of robust monitoring and reporting requirements that have clear and specific actions and timeframes associated with them, including in relation to impacts to surface and groundwater and Commonwealth listed species.

Conversely, there remains considerable lack of transparency and uncertainty about what operations the NT Resources Minister has approved at the mine site and how the mine is being regulated under NT legislation, following the EIA process. While, for the first time, the NT Resources Minister publicly released the mine's authorisation in 2019 which attempted to impose more stringent obligations on the Operator, the conditions are often drafted in excessively discretionary and vague terms, and do not include the level of detail and specificity required to ensure a proper level of oversight of the mine's critical environmental issues. They also appear, in parts, inconsistent and contradictory[28]. Further, it appears that there has already been non-compliance with some conditions. For example, the mine's Mining Management Plan (**MMP**) - the key document which governs the Operator's activities at the mine site - is not publicly available. While the NT Government has committed to making MMPs publicly available, with a condition in the mine's NT authorisation requiring it to be published, this condition has not been complied with to date.

Given the mine's history, it is uncertain as to whether the Operator will comply with the various conditions of its authorisation or that the NT regulator, will enforce them, particularly as the relevant legislation, the *Mining Management Act 2001* (NT), contains weak enforcement provisions, and there are no third party appeal rights or enforcement avenues.

The lack of transparency and accountability, along with the inherent conflicts of interest that arise with the NT Government being the promotor and regulator of the McArthur River Mine, means the Commonwealth plays a critical role in ensuring proper regulatory oversight that is not currently provided for at the NT level. Current provisions in the EPBC Act that promote transparency and accountability, including publication of approvals and associated documents, strong compliance and enforcement provisions, and access to justice provisions, are all not available under NT approval framework applicable to the mine.

If the Commonwealth Government was to devolve its powers under the EPBC Act to the NT Government, it is likely that the mine would continue to operate without rigorous regulatory scrutiny, and without appropriate levels of public transparency and accountability. Amongst other things, there is a real risk that matters of national environmental significance at the mine site would not be adequately protected.

25. See: https://ntepa.nt.gov.au/__data/assets/pdf_file/0004/553081/mrm_overburden_assessment_report.pdf at pxii
26. Traditional owners launched two legal proceedings (NT and Cth) challenging this approval, but the NT government passed special legislation to enable the mine to proceed, and the relief from the Federal Court came after the McArthur River had already been diverted.
27. Northern Territory Department of Primary Industry and Resources, 'McArthur River Mine Independent Monitor' <https://dpir.nt.gov.au/mining-and-energy/public-environmental-reports/mining/mcarthur-river-independent-monitor>.
28. See for example: https://www.theguardian.com/australia-news/2019/aug/21/glencore-to-extend-controversial-mining-operations-at-mcarthur-river-in-northern-territory

CASE STUDY 17

Yeleerie Uranium – Western Australia

The Yeelirrie uranium project was subject to assessment and approval requirements under both the *Environmental Protection Act 1986* (WA) and the EPBC Act.

In WA, the Environmental Protection Authority conducts assessments under the EP Act and provides its report on environmental considerations to the Minister for Environment for a final decision on approval (which is reached in conjunction with other relevant government Ministers and decision-making authorities). Under the EPBC Act, the federal Minister for the Environment determined the project would be assessed through an accredited assessment, being the EPA's report under the EP Act. Further information is added to the EPA's report on the assessment by the federal Secretary to ensure matters the EPA cannot consider (e.g. the social and economic impacts of the proposal) are provided to the federal Minister for their approval decision (i.e. there are still separate approvals at State and Commonwealth levels).

On 3 August 2016, the EPA published its report on the project. The report found that the project would cause the extinction of several subterranean fauna species and therefore recommended that the project should not be approved. The report was subject to merits appeals to the Minister for Environment under the EP Act, which included appeals from Traditional Owners, the proponent, community groups and individuals. The appeals were generally dismissed, with the EPA's report and findings confirmed. This report was then provided to the State and Commonwealth governments.

On 16 January 2017, 16 days before the State government went into caretaker mode before an election (and noting that the incoming government ran on a platform of banning uranium projects), the WA Minister for Environment published an EP Act approval for the project.

This approval was challenged by Traditional Owners and the Conservation Council of WA represented by EDO through judicial review in the Supreme Court. The litigation included an appeal to the Court of Appeal after the review application was dismissed. While these court proceedings were underway, the federal Minister for the Environment did not proceed to make an approval decision under the EPBC Act – until 24 April 2019, when the Minister published an approval decision dated 10 April 2019 (1 day before the Commonwealth government went into caretaker mode).

The decision brief from the federal Department of Environment included the EPA report and supported its findings. In relation to the potential extinctions, a set of conditions were recommended that would ensure this did not occur (i.e. that the proponent must prove to the federal government that the species would not be made extinct) along with a set of conditions that would "manage" the risk of extinction without ruling it out. The federal Minister imposed the latter.

The experience of the Yeelirrie assessments and approvals at both State and Commonwealth levels reflects the risks associated with politicised decision-making as well as the importance of independent, specialised assessment processes. The State-based assessment process was able to provide independent expert findings on the serious environmental impacts of the project. Similarly, the federal assessment process took the EPA report and confirmed its scientific findings, also providing key evidence on social and economic impacts of the proposal and relevance to international obligations, and adding important conditions. Both of these reports are publicly available, ensuring some degree of transparency and accountability in respect of the impacts of the project and subsequent government decision-making.

CASE STUDY 18

Tourism in World Heritage area, Lake Malbena – Tasmania

The proposed helicopter-accessed tourist accommodation at Lake Malbena, within Tasmanian Wilderness World Heritage Area (**TWWHA**) provides a good example of why it is so important to maintain the EPBC Act assessment function with the Commonwealth.

Since 2014, the Tasmanian Government has actively been seeking and approving tourism proposals within the TWWHA and Tasmania's national parks and reserves. The first of the proposals to go through the Government's Expressions of Interest (**EOI**) process was Wild Drake Ltd's heli-tourism proposal at on Halls Island, Lake Malbena. Halls Island is within the Walls of Jerusalem National Park and forms part of the TWWHA. The TWWHA is an internationally listed World Heritage site and a listed National Heritage place. The tourism proposal involves an accommodation complex and board-walking on Halls Island, a helicopter landing site off-island and up to 240 helicopter flights to and from Lake Malbena. The entire 10ha island is subject to a lease and licence issued by the Tasmanian Minister for Parks which apparently gives the proponent the right to exclude members of the public.

Part of the Tasmanian Government's EOI process requires projects go through a reserve activity assessment (**RAA**). The RAA is a non-statutory process that the Tasmanian Parks and Wildlife Service (**PWS**) undertakes with respect to proposed developments within parks and reserves. There are no statutory criteria applied by the PWS through the RAA process, no guaranteed opportunities of public comment, or appeal rights for either proponents or the public.

Concerningly, in undertaking the assessment for the Lake Malbena proposal, the Parks and Wildlife Service did not attempt to undertake a complete assessment of the proposal's impacts on the World Heritage values of the area, including the wilderness values. In particular, the PWS did not undertake, or require the proponent to provide a wilderness impact assessment, the methodology for which is set out in the TWWHA Management Plan 2016. Despite this, the PWS "approved" the proposal through the assessment stages of the RAA, and then "endorsed" it for external statutory assessments, such as that required under the EPBC Act.

In April 2018, Wild Drake Pty Ltd referred its proposal to the Minister for the Environment under the EPBC Act. In their first opportunity to comment of the proposal, 936 people made submissions opposing the proposal when the referral was open for public comment. Notably, expert statutory bodies, such as the National Parks and Wildlife Advisory Committee, Tasmanian Aboriginal Heritage Council and the Australian Heritage Council made comments opposing the proposal on the basis it was not consistent with the TWWHA Management Plan 2016 and because of its likely adverse impacts on World Heritage and cultural heritage values, threatened species and threatened vegetation communities. In contrast, the Tasmanian Government actively endorsed the proposal when asked to comment on the referral.

On 31 August 2018, the Minister's delegate decided that the action was not a controlled action. Despite the fact that in its referral, the proponent provided numerous documents setting out how the proposed flights and tourist activities would be managed to mitigate impact on Matters of National Environmental Significance, the delegate also decided not to issue any particular manner notice which tied the action to complying with the management plans.

Acting on behalf of the Tasmanian Wilderness Society, the EDO successfully applied to the Federal Court for the judicial review of the delegate's decision. **In overturning the decision, the Federal Court was critical of the Tasmanian Government's RAA process, and noted it was not sufficient to satisfy either Australia's international obligations with respect to World Heritage, or the requirements for an assessment approved under a bilateral agreement under the EPBC Act.**

On 16 September 2020, Minister Ley remade the referral decision on the Lake Malbena proposal. She decided that it was a controlled action and must be subject to an assessment under the EPBC Act (on preliminary documentation).

As this example demonstrates, if the assessment and approval of proposals in Tasmanian Wilderness World Heritage Area is left to the Tasmanian Government, no comprehensive environmental assessment would be undertaken, and there would be no guarantee of public comment or appeal. Such a situation poses a significant risk of lasting adverse impacts on World Heritage, National Heritage and threatened species and threatened vegetation communities.

CASE STUDY 19

Shamrock Station Irrigation Project – Western Australia

The Argyle Cattle Company Pty Ltd (**ACC**) manages Shamrock Station, 64 km south of Broome in WA. On 5 October 2017, ACC referred the Shamrock Station Irrigation Project (**the proposal**) to the WA Environmental Protection Authority (**EPA**) under Part IV of the *Environment Protection Act 1986* (WA). The proposal aims to produce fodder for station use and includes: clearing up to 650 ha, plus disturbance of an additional 550 ha for related infrastructure; construction of 12 circular irrigation pivots, each up to 42.5 ha; installation of 12 groundwater abstraction bores; and abstraction (in Stage 1) of up to 9.5 GL of groundwater annually from the Broome Sandstone Aquifer to supply the irrigation system.

The proposal referred to the WA EPA was supported by a 2017 hydrogeological assessment report that, synthesising information available at the time, purported to model the number of bores that could be established without impacting existing users and sites of ecological and cultural importance.

On 21 November 2017, the WA EPA determined that the proposal should be assessed on the basis of referral information. The notice explaining that decision states "that the proponent has undertaken an appropriate hydrological assessment for the proposed 9.5 GL/annum abstraction".

The same proposal was later referred to the federal Minister under Part 7 of the EPBC Act. On 2 February 2018, the federal Minister's delegate found the proposal to be a controlled action.

However, far from accepting the proponent's 2017 hydrogeological assessment report, the delegate required that the assessment consider whether the 9.5 GL of groundwater abstraction will be of such magnitude as to impact: seagrass and intertidal mudflat communities at the coast, home to threatened and migratory species not considered in the modelling report; the ecological character of the Roebuck Bay Ramsar site; and the heritage values of the West Kimberley National Heritage area.

Despite the WA assessment not including any information about any of these possible impacts, the WA Minister approved the proposal in November 2018 (Ministerial Statement 1086).

During the assessment at the federal level, the Australian Conservation Foundation commented on other inadequacies in the assessment information, specifically on impacts to Greater Bilby and the proposed offset.

On 6 August 2020, a notice was published advising that a recommendation report has been finalised on the proposal. The project was approved on 10 September 2020 with conditions, including in relation to the Greater Bilby.

This case study demonstrates how state level assessments based on inadequate referral information fail to address impacts on matters of national environmental significance including migratory species, Ramsar wetlands and national heritage.

Similar examples relate to petroleum projects in WA. For example, in 2013 the Commonwealth refused a seismic survey for petroleum exploration by Apache just outside the **Ningaloo Coast World Heritage property**, consistent with its international obligations under the World Heritage Convention. This decision was sharply contrasted by the failure of the WA Government to ensure the proposal would be subject to any form of assessment under Part IV of the EP Act. This failure apparently stemmed from policy guidance that deemed the proposal to not require environmental assessment.

CASE STUDY 20

Warragamba Dam – NSW

The NSW Government is proposing to raise the height of the Warragamba Dam wall by 17m to provide temporary storage capacity and facilitate flood mitigation downstream.[29] Being a controlled action under the EPBC Act, WaterNSW, an NSW Government Agency, have provided a draft environmental impact statement of the Great Blue Mountains Heritage Area (**GBMWHA**). The proposal is said to have been conducted in line with relevant state planning rules.

However, a federal analysis provided by the Department of Agriculture, Water and Environment found that the impacts on the outstanding universal value (**OUV**) of the GBMWHA provided by WaterNSW were not fully adequate.[30] The Department concluded that the proposed action failed to adequately assess: the impact to animals and plants which are attributes of the OUV of the property, the impact to the visual amenities of the area, and the impact of the 2019/2020 bushfires. The Department made the following criticisms:

- → WaterNSW only made assessment to the visual impact of the project on the two most visited lookout sites of the World Heritage Area. Numerous less-visited sites were omitted. WaterNSW further failed to assess the visual impact of extra eroded lake margins and dead vegetation;
- → The lack of justification or explanation for the inadequate offsets proposed.
- → Impacts on as many as 55 federally listed plants and animals was not adequately assessed in the EIS provided by WaterNSW.
- → Further, impacts to iconic species that are part of the recognised outstanding values of the world heritage area including the platypus, echidna, and eucalypt diversity; as well as other species of aquatic macroinvertebrates and the Blue Mountains Perch were not addressed. The omission of the platypus was especially concerning as both its food supply and nesting habitat upstream and downstream were likely to be affected by the proposal.

The inadequacies apparent in the draft EIS provided by WaterNSW in terms of accurately assessing the impacts on the world heritage area have been highly criticised, and the proposal to postpone the impact assessment of the bushfires on 25 threatened plant and animal species until *after* approval is given, raises further concerns about the adequacy of the assessment of impacts on natural and heritage values.[31]

This case study highlights the importance of national scrutiny where the state government is a proponent and there are impacts on multiple matters of national environmental significance, including world heritage and listed species and communities. It highlights the risk of inadequate state-based environmental impacts statements that do not adequately address all relevant impacts.

29. NSW Government, *State Significant Infrastructure: Warragamba Dam Raising < https://www.planningportal.nsw.gov.au/major-projects/project/10571>*
30. Department of Agriculture, Water and Environment, *Comments on Warragamba Dam Raising Draft EIS* (10 June 2020).
31. Peter Hannam, "Unacceptable': Federal Department Blasts Warragamba Dam Wall Plan', *Sydney Morning Herald* (17 August 2020) < https://www.smh.com.au/environment/conservation/unacceptable-federal-department-blasts-warragamba-dam-wall-plan-20200816-p55m5v.html>; and Lisa Cox, 'NSW Government Ordered to Revisit World Heritage Assessments for Warragamba Dam Expansion', *The Guardian*, 18 September 2020 < https://www.theguardian.com/environment/2020/sep/18/nsw-government-ordered-to-revisit-world-heritage-assessments-for-warragamba-dam-expansion>.

CASE STUDY 21

Shoalwater and Corio Bays Area – Queensland

On 31 July 2008, Waratah Coal Inc referred a proposed project under the EPBC Act to establish a major new coal mine, railway and port to export coal for electricity production, stated to be worth $5.3 billion. The proposed location was the Shoalwater and Corio Bays Area – a Wetland of International Importance and Shoalwater is Commonwealth Heritage listed. The project was strongly supported by the Queensland state government which would benefit from coal royalties from the mine. The then federal Environment Minister, Peter Garrett, refused the project on 15 September 2008 under section 74B of the EPBC Act stating that:

"This proposal would have clearly unacceptable impacts on the internationally recognised Shoalwater and Corio Bay Ramsar wetlands and the high wilderness value of Shoalwater which is acknowledged in its Commonwealth Heritage listing."[32]

This was a rare decision because as at 8 May 2019, only 10 proposals have ever been ruled out as 'clearly unacceptable' at the referral stage[33] without going to an environmental impact assessment stage. Again, had the decision been left to the state, it would almost certainly have been approved.

Bar-Tailed Godwits. 📷 *Jochen Bullerjahn, Flickr*

32. http://envlaw.com.au/waratah-coal-case/
33. https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Quick_Guides/EPBC

CASE STUDY 22

Protection of Aboriginal and Torres Strait Islander Heritage – Juukan caves, WA

Aboriginal and Torres Strait Islander heritage is predominantly protected by State and Territory legislation. However, at a Commonwealth level there is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) and Indigenous heritage can be protected as a national heritage place through the EPBC Act. The ATSIHP Act is used only as a 'last resort' and the EPBC Act does not effectively interact with the State/Territory heritage legislation. This legislative framework poses two issues: heavy reliance on State/Territory heritage legislation which in some jurisdictions is inadequate; and siloing of heritage and environmental laws, at Local, State/Territory and Federal levels, that leads to a lack of coherent protection for Aboriginal and Torres Strait Islander heritage.

As demonstrated by the devastating destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia, several jurisdictions have Indigenous heritage laws that are not adequate. The Section 18 approval granted to Rio Tinto allowed for that destruction to legally occur. Section 18 approvals are in effect, approvals to destroy, damage, alter etc a heritage site. Only a few days prior to the Rio Tinto incident, the Minister representing the Minister for Aboriginal Affairs was asked in the WA Legislative Council how many section 18 applications for land described as a mining lease were brought before the ACMC [Aboriginal Cultural Materials Committee] since 1 July 2010 and how many of these applications had been declined? The relevant Minister replied that there had been 463 applications and none of them had been declined. The relevant Minister added that: 'This confirms what I have consistently highlighted, the obligations under the Aboriginal Heritage Act 1972 are not an impediment to the effective operations of the mining industry, particularly where mining companies enter into positive consultations with Traditional Owners.' This statement failed to consider that having had no applications denied in nearly ten years is an indication that the system is not operating adequately. The Rio Tinto example then quickly confirmed that more 'impediments' were needed to ensure that First Nation's cultural heritage was properly protected.

There is nothing in the section 18 process that mandates any involvement of First Nations. The current situation in Western Australia, where there is no statutory requirement to involve First Nations (or relevant Traditional Owners relating to particular sites) in either assessment of significance of sites or the section 18 process, is completely unacceptable and absolutely at odds with any sense of First Nations self-determination, First Nations decision-making and principles of free, prior and informed consent.

We note that the relevant legislation in that situation, the *Aboriginal Heritage Act 1972* (WA), is now undergoing a process of major reform which is a positive step. Tasmania and NSW, jurisdictions that have inadequate heritage legislation, have also started reform processes. We note that the NSW reform process appears to have been heavily delayed and it is not clear when it will progress. However, even if the State/Territory legislation is fit for purpose, the problems with siloing will continue.

The cultural heritage of First Nations has not been adequately recognised, respected or protected in this nation since Europeans arrived and our laws today are still failing to provide necessary respect and protection to both First Nations and their cultural heritage. This failure is a breach of our international law obligations, including under the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**), which Australia has adopted. While UNDRIP is not legally binding, the rights (and consequential obligations on States) contained within it are derived from pre-existing human rights and international law developed under treaties to which Australia is a party and are binding on Australia.

There is a great opportunity to improve the EPBC Act to assist in protecting Aboriginal and Torres Strait Islander heritage. In particular, the EPBC Act could play a crucial role in considering heritage as part of country and sea country; heritage as being situated in the wider environment. However, before such reform can be attempted, a review needs to be undertaken specifically to understand the interaction between all the different pieces of legislation in relation to heritage protection.

This case study has attracted international attention and condemnation of the fact that Australian state laws permit destruction of unique Indigenous cultural heritage of international significance by private proponents, without the free prior informed consent of the Traditional Owners, the Puutu Kunti Kurrama and Pinikura peoples. This clearly demonstrates the need for comprehensive reform and national leadership.

CASE STUDY 23

Four-wheel drive tracks, Arthur Pieman Conservation Area – West Coast, Tasmania

The coastal area of the West Coast of Tasmania, within takayna / the Tarkine, is one of the longest inhabited in Tasmania. It is an area where Tasmanian Aboriginal people(s) have a continuing spiritual relationship with the land. This country is a cultural heritage landscape, rich in evidence of the continuous occupation of Tasmanian Aboriginal people(s), including hut depressions, high density midden deposits, petroglyphs, and known burial sites.

EDO represented the Tasmanian Aboriginal Centre (TAC) in legal action taken between 2014-2016 to prevent the Tasmanian government from opening and re-opening a number of four-wheel drive (4WD) tracks in the National Heritage listed Western Tasmania Aboriginal Cultural Landscape (WTACL) within takayna / the Tarkine.

The 4WD tracks in this area were closed by the Tasmanian government in 2012 after extensive community consultation because of unacceptable impacts on Aboriginal cultural heritage. The WTACL was listed as a National Heritage place under the EPBC Act in 2013 because of the significance of its Aboriginal cultural heritage values. However, in 2014, a newly elected Tasmanian Government announced that the tracks would be opened/re-opened. Despite the National Heritage listing, no approval was sought by the Government under the EPBC Act and no assessment of the impacts on the cultural values of this area to Tasmanian Aboriginal people(s).

EDO successfully took legal proceedings on behalf of TAC to prevent the opening/re-opening of the 4WD tracks. As a consequence of the legal action, the Tasmanian Government referred the proposal for assessment under the EPBC Act. The Federal Minister's delegate decided on 16 October 2017 that the opening/reopening of the tracks is a controlled action and determined that the proposed works must be assessed by way of Public Environment Report (PER).

No approval can be granted until after a PER has been submitted, public notice given and an assessment by the Federal Environment Department. The terms of reference for the PER were published on 13 March 2018.

It is now the responsibility of the Tasmanian Government to prepare a PER in accordance with the terms of reference, and release that for public comment. There is no timeframe for that to occur. Our clients continue to urge the Tasmanian Government to abandon the proposal altogether, particularly given the Government's commitments to "resetting the relationship" with Tasmania's Aboriginal community.

This example shows how important it is that the Commonwealth retains the power to assess proposals such as this where Aboriginal cultural heritage and national heritage is involved. In this way, the EPBC Act acts as an appropriate "check" on the power on the states to push ahead with environmentally and culturally insensitive proposals.

CASE STUDY 24

Great Barrier Reef Management – Queensland

The Great Barrier Reef was one of the first World Heritage sites listed by Australia. Through this listing, the Commonwealth Government has committed to the international community to, amongst other things:

- protect, conserve, present and transmit to future generations the outstanding universal value of the site (article 4); and
- ensure that effective and active measures are taken to ensure the above duty is fulfilled (article 5).[34]

As party to the World Heritage Convention, it is directly the responsibility of the federal government to ensure that these obligations are met. Without such oversight, there is potential for the Queensland Government (who is only vicariously obliged to uphold the international convention through the Commonwealth) to fail to ensure the future management and coastal development is consistent with the high standards for conservation of the Reef's Outstanding Universal Value. The Great Barrier Reef Intergovernmental Agreement Guiding Principles provide the parties acknowledge that "A collaborative and cooperative approach is fundamental to the effective long-term protection, conservation and management of the Great Barrier Reef as this is beyond the power and remit of either jurisdiction.

In June 2012, UNESCO raised the possibility of placing the Great Barrier Reef on the 'List of World Heritage in Danger'. In the monitoring mission report of this meeting, several significant threats under direct jurisdiction of the Queensland Government were highlighted, including:

- catchment runoff and water quality, particularly due to tree clearing and agricultural impacts upstream;
- rapid scale and pace of increase in coastal developments, in highly sensitive or already pressured areas;
- direct use of the reef (related to commercial, recreational and traditional activities); and
- port development and shipping.[35]

Many of these impacts are under the regulatory remit of the Queensland Government, with some oversight from the EPBC Act and other federal laws. The Reef has been kept off the 'in danger' list to date due to commitments made by the Commonwealth and Queensland Governments to improve regulation of these impacts in the *Reef 2050 Long Term Sustainability Plan*. However, the ease with which regulatory amendments can occur through Queensland's unicameral parliament, combined with the political vulnerability of regulations around tree clearing and water quality which are currently under attack ahead of the Queensland Government election in October 2020,[36] demonstrate the strong need for federal oversight to bring more stability and oversight to improve the chances of the Reef's protection from unsustainable impacts going forward.

Further, the initial reason the Queensland and Commonwealth Government's management of the Reef has been subject to international scrutiny was due to the poor monitoring and compliance activities of the Queensland Government which led to the leakage of spoil into the Reef from a bund wall at the Gladstone port.[37] An independent report into the incident found that this poor regulatory response was likely a result of insufficient allocation of resources to monitoring compliance.[38] Consequently, it seems that **without strong oversight, the Queensland Government is vulnerable to errors which can have significant impacts on the health of the GBR. Shifting compliance monitoring squarely onto the shoulders of the Queensland Government without providing the extra necessary resources to do so exposes the Reef even further to unsustainable impacts. Ensuring that the Federal Government retains oversight over such projects is a crucial step in avoiding such catastrophes.**

34. *Convention Concerning the Protection of the World Cultural and Natural Heritage 1972*.
35. *State of conservation of properties inscribed on the World Heritage List and/or on the List of World Heritage in Danger*, 6 July 2012, pp. 25-32, <file:///C:/Users/frase/Downloads/RMM_GBR%20Report_14June2012.pdf>.
36. https://www.miragenews.com/marine-conservationists-seek-clarification-on-lnp-reef-water-regs-plans/; https://www.fassifernguardian.com/prop-ag/lnp-to-overhaul-anti-farmer-land-clearing-laws-if-elected.
37. *Independent Review of the Bund Wall at the Port of Gladstone*, April 2014 (Report on findings) <https://www.environment.gov.au/system/files/resources/82279d41-cb4d-4bae-bcc4-c068577d0d31/files/report-findings.pdf>.
38. Ibid.

CASE STUDY 25

Toondah Harbour

A mixed use residential development, including 3600 units, and marina has been proposed at Toondah Harbour south-east of Brisbane. The development area was declared a 'priority development area' by the Queensland Government in June 2013, yet it incorporates parts of the Moreton Bay Ramsar listed wetland area as well as habitat for critically endangered waterbirds in Moreton Bay, Queensland. Moreton Bay is home to five nationally threatened plant species that are wetland dependant, and provides habitat for humpback whales, dolphins, six of the world's seven species of marine turtles, grey nurse shark, dugong, wallum sedge frog, water mouse and oxleyan pygmy perch fish. Critically, it is one of the top migratory shorebird habitats in Australia. During the summer months some 32 species of migratory shorebirds comprising over 40,000 individuals visit the Bay. This includes significant worldwide populations, including 20% of all eastern curlews and 50% of all grey-tailed tattlers.

The designation as a 'priority development area' means that normal public scrutiny, transparency and accountability provided by the planning and environmental assessment processes under Queensland law no longer apply. Instead the area is regulated by a less transparent development scheme unique to that area. This process is intended to streamline the assessment process and remove the powers of the public to challenge whether decisions are being made in the public interest and adequately protecting the local environment in an independent court.

The development has been referred three times under the EPBC Act (2015/7612, 2017/7939, 2018/8225).[39] For the first two referrals, the Department recommended the project be determined clearly unacceptable twice due to unacceptable impacts on the Moreton Bay Ramsar Wetland. The then Environment Minister rejected this advice for 2017/7939 and the development is currently undergoing an environmental impact assessment for its third referral. If approved, it will involve the active destruction of a wetland of international significance. The ABC revealed the department received advice that any development inside the wetland would contravene Australia's international obligations.[40]

Serious questions have been asked around the proponent's influence over the development assessment process, and the impacts on public scrutiny and accountability that have arisen from a confidentiality deed entered between the developer, the local government and the state government which has prevented open consideration and discussion of the controversial project.[41] Further, in 2016, while the project was actively being considered by the federal Coalition Government, the developer donated $200,000 to the federal Liberal Party. Developer donations are banned in a number of jurisdictions due to their ability to impact on planning and approval decisions, however, no such ban exists at a federal level to reduce the potential impacts on important decisions under the EPBC Act.

Pelican, Moreton Bay Marine Park. 📷 *Wikipedia*

This case study shows the tension between state development priorities and proper assessment of impacts on matters of national environmental significance – including sites of international importance for migratory species; and that state laws to fast track major projects can have reduced scrutiny and accountability/assurance mechanisms.

39. For further detail see: https://www.edo.org.au/protecting-toondah/
40. See: https://www.abc.net.au/news/2018-12-09/the-developer-the-whistleblower-and-the-minister-toondah-harbour/10487806?nw=0
41. Ibid.

CASE STUDY 26

Water sharing in the Murray-Darling Basin – South Australia and NSW

A summary of water management in the Murray Darling Basin provides a clear example of the need for national leadership on cross-boundary environmental impacts – multiple jurisdictions and multiple matters of national environmental significance are impacted by decisions made at multiple levels.

The First People of the Murray-Darling Basin (**MDB**) managed its land and waters sustainably and equitably. By way of contrast, water sharing in the colonial era has been consistently fraught. This was initially reflected in the series of colony-based Royal Commissions which took place in the 1880s which culminated in a basic 50:50 water sharing agreement between New South Wales and Victoria. Several water sharing agreements between states would follow in the post-Federation era, beginning with the River Murray Water Agreement (**RMWA**) which was entered into between NSW, Victoria and South Australia in 1914. The RMWA recognised the interests of each state, guaranteed a minimum flow of water to South Australia, provided for reductions in water allocations between states during dry periods, and established a River Murray Commission. However, the RMWA was not designed to protect the basin as a whole – and in particular South Australia – from over-extraction.

Nation building and over-extraction

The following sixty years or so were characterised by intense infrastructure development (including the construction of major storage dams) and from the 1960s onwards in particular, the intensification of irrigated agriculture. Both were conceived as part of a nation building exercise and were undertaken with little regard for the longer-term sustainability and health of the entire river system. This was exacerbated by the fact that water management, including the distribution of licences, was undertaken on a state-by-state basis with limited consideration of the impacts of overallocation and overuse on downstream states, communities and ecosystems. As a consequence, the mouth of the Murray River closed for the first time in recorded, colonial history in 1980 and would remain closed but for dredging undertaken by the South Australian Government (which continues to this day).

In 1987, the RMWA and River Murray Commission were replaced by the Murray-Darling Basin Agreement (**MDB Agreement**), Murray-Darling Basin Commission (**MDBC**) and a new governance structure in the form of a 'Ministerial Council'. While the MDBA continued to focus on water sharing in the southern MDB, it did extend its scope to cover the entire MDB with Queensland becoming a party to the Agreement in 1992. Under the auspices of this Agreement, basin governments spent the next decade or so tackling salinity, a significant environmental issue (and one which ultimately requires enough water to flush salt out of the mouth of the Murray and into the Southern Ocean). However, like the RMWA before it, the MDB Agreement was not designed to protect the overall health of the basin or to maintain ecosystems. Nor was it designed to replace state-by-state management of extractions.

Environmental impacts of state mismanagement

As a consequence of ongoing over-extraction in the northern MDB (which encompasses southern QLD and northern NSW), the Darling/Barka River experienced a significant outbreak of blue-green algae in 1991-2. The nature and intensity of this event was sufficient to prompt basin governments to introduce a basin-wide cap on diversions in 1995 (set at 1993/4 levels of development). However, this proved insufficient to curb ecosystem decline, as reflected in the results of an assessment of riverine health undertaken by the CSIRO. Prepared for the MDBC and published in 2001, the report found that 95 percent of the river system assessed was in a degraded state. A subsequent assessment, known as the Sustainable Rivers Audit (2008), found that 20 out of 23 major river systems in the MDB were in poor or very poor health.

Response: Water Act 2007

Against this backdrop of declining ecosystem health and mismanagement of water resources by basin states, the Howard Government announced the National Plan for Water Security in January 2007. In his landmark speech, Prime Minister Howard described water as 'Australia's greatest conservation challenge. No single substance has a greater impact on the human experience or on our environment.' He went on to announce a $10 billion plan to 'improve water efficiency and to address the over-allocation of water in rural Australia, particularly in the Murray-Darling Basin.'

The legal cornerstone of this program—the *Water Act 2007*—was enacted by the Australian Parliament shortly thereafter. An ambitious and complex piece of legislation, its objective is distilled in the requirement to reinstate an 'environmentally sustainable level of take' (**ESLT**) across the MDB. The Act sets out the two main mechanisms by which this is to be achieved: the development of a legislative instrument known as the 'Basin Plan' imposing limits on water extraction across the basin and the establishment of a statutory authority known as the 'Commonwealth Environmental Water Holder' tasked with purchasing water entitlements from willing sellers in order to 'return' water to the environment and ensure that these limits are met.

The Act and Basin Plan (which was made law in 2012) remain contentious, reflecting the persistently fraught nature of water politics in the MDB. For example, it has been persuasively argued by independent experts that additional water must be reallocated to the environment to fulfil the legal requirements of the *Water Act 2007* and to restore the health of the MDB and its struggling rivers and wetlands. However, and despite its deficiencies, it remains an important step forward and at the very least establishes a legal framework that – if properly implemented – would

Darling River at Menindee, NSW. 📷 *Wikipedia/Sheba Also*

help to reverse decades of overuse and mismanagement by basin states, in particular by the upstream jurisdictions of QLD and NSW. As such, **it demonstrates the role that the Commonwealth can and must play in passing laws designed to manage nationally significant environmental assets.**[42]

The Barwon Darling River in NSW provides an example of how poorly implemented state laws and local rule variations can undermine overarching water sharing principles and objectives. A 2019 report by the **Natural Resources Commission (NRC) on the Water Sharing Plan of the Barwon-Darling Unregulated and Alluvial Water Sources 2012, concluded that 'the Barwon-Darling is an ecosystem in crisis.'**

The NRC noted the water sharing plan has failed to implement the water sharing prioritisation rules set by the *Water Management Act 2000 (NSW)*. The Act requires that water sharing plans allocate water first to the protection of the water source and its dependent ecosystems, then to fulfilling basic landholder rights, with any additional water to be made available for other extractive uses (such as under water access licences). The NRC found that, instead of implementing these rules, the Barwon-Darling water sharing plan impermissibly prioritised the economic interests of some upstream users at the expense of the "ecological and social needs of the many." In reaching these conclusions, the NRC revealed some less visible die-offs of other species which accompanied significant fish kills and the impacts that the lack of flows in the Barwon-Darling has had on communities, on culture and on mental health.

The conclusions of the report indicate that in addition to the well-known failures in enforcement (as identified in the *4 Corners* episode 'Pumped' and the independent review by Ken Mathews into water management and compliance[43]) implementation of water management in NSW has also failed river communities and the environment at the critical plan-making stage. The NRC has made a suite of recommendations aimed at rectifying the defects in the Barwon-Darling water sharing plan, some to be implemented in the short term and others to be implemented when the plan is re-made in 2023 to be consistent with requirements of the *Water Act 2007* (Cth) and Basin Plan 2012 for Water Resource Plans.

The expose of water mis-management by the NSW Government has galvanised reform at the state level. While the reform is ongoing, a positive development has been the establishment of the Natural Resources Access Regulator (**NRAR**). This is an independent statutory body that is not subject to direction of the state Minister and undertakes effective and successful compliance and enforcement activity. **This illustrates the necessity and benefits of having an independent, statutory watch dog for compliance and enforcement at the state level. Independent oversight from the national to the local level is critical where activities have cumulative and cross-boundary impacts on the environment.**

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42. *The Barwon-Darling*. See also: Carmody, Emma, *The Unwinding of Water Reform in the Murray-Darling Basin: A Cautionary Tale for Transboundary River Systems*, in Holley, Cameron and Sinclair, Darren, *Reforming Water Law and Governance: From Stagnation to Innovation in Australia*. Springer, 2018; CSIRO, Snapshot of the Murray-Darling Basin River Condition, 2001. Available online; Guest, Chris, Sharing the water: one hundred years of River Murray politics, 2016; Howard, John, National Plan for Water Security. Full speech to the Press Club available online; Sustainable Rivers Audit 1, 2008. Available online; Sustainable Rivers Audit 2, 2010. Available online.
43. See: https://www.industry.nsw.gov.au/water/what-we-do/how-water-is-managed/independent-review-water-management-and-compliance

CASE STUDY 27

Spectacled flying Foxes – Queensland

Spectacled Flying Foxes are a keystone species that move seeds of the rainforest and other trees from one isolated patch of rainforest to another, and are a significant long distance pollinator of the World Heritage listed Wet Tropics. Cairns is home to one of the 6 nationally important camps. The Cairns CBD camp is one of the last major strongholds of the species, home to an estimated 8,000 spectacled flying foxes, which is around 12% of Australia's remaining population.

In Queensland, local governments have an "as of right" authority under section 41A of the *Nature Conservation (Wildlife Management) Regulation* 2006. Section 41A applies to a local government dealing with a flying-fox roost located in an urban flying-fox management area in the local government area. This "right" allows Councils to destroy a flying fox roost, drive away, or attempt to drive away, a flying fox from a flying fox roost or disturb a flying fox in a flying fox roost so long as the actions taken comply with the Flying Fox Management Code. These "as of right" actions occur without State oversight where the only duty is to inform the State of the intended actions and if a breach of the Code has occurred.

In Cairns there has been encroachment of development into the Cairns CBD camp from Cairns Regional Council's overuse of its "as of right" authority to manage the Cairns CBD Roost. The Cairns Regional Council has systematically undermined the Cairns CBD camp one tree at a time. This habitat destruction was allowed because the trees were removed over time and the cumulative impacts were not assessed under State or Commonwealth laws. Although the Council was fined in August 2016 for failing to comply with the Code, the nominal fine did not prevent the continual destruction of the camp. This habitat destruction became the basis of Council's argument for the need to disperse the roost as there was insufficient habitat to sustain the colony. This planned dispersal finally triggered the Commonwealth to step in and deem the dispersal of the camp to be a controlled action.

The controlled action to disperse the camp over five years required approval under the EPBC Act. The Commonwealth finally approved the camp dispersal in May of this year despite there being significant decline in the population, a catastrophic heat-wave decimated a third of the population (roughly 23,000 died) and the species being upgraded from threatened to endangered. One of the conditions imposed was that within 40 days of the first 30 day dispersal period an ecologist must review the dispersal and the impacts on the species. However, a later variation to the conditions extended the first period to 90 days. This means it will not be known until December of this year how the colony has fared. This extension to the first period also permits the dispersal to coincide with the breeding and pup rearing season.

This historical devastation of the Cairns CBD camp has occurred with nominal State oversight and has set a death by a thousand cut precedent with other local Council's following Cairns lead including Charters Towers, Ingham and Innisfail.

This case study demonstrates that local processes are not designed to protect matters of national environmental significance and can result in net loss of matters of national environmental significance such as listed species. Local processes that do not meet national standards should not be accredited. It also evidences a failure of local decisions to prevent cumulative impacts on a nationally listed species.

CASE STUDY 28

Water storages and the Macquarie Marshes – NSW

The NSW Government has proposed to capture unregulated flows for storage downstream of the Gin Gin weir on the Macquarie River in north-western NSW, and has indicated that WaterNSW will conduct an accredited assessment process of the project under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act). The referral documents provided by WaterNSW indicate that the project would not have a significant impact on the Macquarie Marshes.[44]

However, evidence presented by Professor Richard Kingsford provides that:

> 'the proposed development...is likely to have a significant impact on a considerable range of Matters of National Environmental Significance (MNES), particularly the Macquarie Marshes Ramsar site, national threatened species and migratory species, under the EPBC Act'.[45]

Further criticisms made by Professor Kingsford include:[46]

- The project is specifically designed to impact the natural flow regime of the Macquarie River and thus will contribute to the current poor condition of the Macquarie Marshes Ramsar site.
- WaterNSW made their assessment with reference to insufficient scientific evidence regarding the relationship between river flows and flooding regime and dependent ecosystems. The re-regulating storage is likely to have a significant impact of nationally threatened fish, bird, especially waterbirds, frog, plant and migratory species.

This case study demonstrates that problems arise when the assessor, i.e. the NSW Government, is also the project proponent, i.e. WaterNSW, and thus Commonwealth oversight is essential to adequately assess the environmental impacts of proposed development.

Macquarie Marshes erosion, July 2008. 📷 *Cameron Muir*

44. Emma Carmody, 'Comment on Environment Protection and Biodiversity Conservation Act 1999 Referral 2020/8652 - Macquarie River Re-regulating Storage' (12 June 2020) *EDO Submission*.
45. Professor Richard Kingsford, 'Submission on EPBC Act Referral 2020/8652: WaterNSW Macquarie River Re-regulating Storage' (5 June 2020) *UNSW*.
46. Ibid.

CASE STUDY 29

Olympic Dam mine expansion proposal – South Australia

The Olympic Dam mine near Roxby Downs which is around 560 km north west of Adelaide has operated since 1988. BHP became the owners in 2005. The operation consists of an underground mine, milling, mineral processing plant, copper smelter and refinery, and associated infrastructure to produce copper, uranium oxide, gold and silver projects. Olympic Dam is regulated by its own legislation which guides existing and future operations and so is not subject to the usual provisions in the South Australian *Mining Act 1971* and other legislation such as the South Australian *Environment Protection Act 1993*.

In 1997 BHP received approval to increase production to 200 000 tonnes per annum (tpa) of copper and proposed further expansion to 350 000 tpa. At the time the Federal government said that any expansion to 350 000 tpa was possible provided that there was no change in water use from the Great Artesian Basin (GAB), beyond that currently approved ie 42ML per day. In 2005 BHP submitted a formal proposal for a major open pit expansion and whilst it was approved in 2011 by the SA, NT and federal governments, it did not proceed.

In 2019 BHP formally proposed an increase in production up to 350 000 tpa (amended August 2020 to 300 000 tpa) and to facilitate this an increase in water usage from GAB up to a total of 50ML per day annual average. On the 14/2/19 the proposal was given major project status under the SA Development Act but this was varied on the 19/9/19 to exclude the assessment of existing operations or business as usual (BAU), up to a level of mining and production of 200 000 tpa of copper and associated products.

Over several months in 2019 BHP made 3 related referrals to the Federal Government under the EPBC Act. These were for a Tailings Storage Facility (TSF) (EPBC 2019/8465), an Evaporation Pond (EP) (EPBC 2019/8526) and the Olympic Dam mining development generally (EPBC 2019/8570). Matters of NES relevant to the proposal are listed threatened species, listed threatened ecological communities and listed migratory species. In addition, as the proposed action is a nuclear action, the impact on the whole of the environment is also relevant.

BHP's use of GAB water is staggering. If approval is granted, the increase in water usage of the full 8ML equates to an extra 18.25 billion litres of water per year extracted from the GAB every year over the life of the mine (approximately 25 years). Specific environmental concerns include:

- → The GAB underlies about 22% of the Australian continent and provides the only reliable source of freshwater for rural communities in Qld, NSW, SA and NT and is therefore of regional and national importance;
- → GAB outflows hold great significance for first nations people, for example the Mound Springs on the south western edge to the Arabuna people;
- → The impacts on listed threatened species, threatened ecological communities and migratory species. The Mound Springs are outstanding and unique natural features located near the water supply infrastructure for the Olympic Dam operation and provide important habitat for a number of native species. It has a restricted geographic distribution and drawdown of GAB water represents a threat to its existence. Whilst BHP has concluded in its referral that there will be no impacts the documents suggest that further work needs to be done to adequately assess the impacts on the environment and particularly the impacts on groundwater and threatened ecological communities;
- → Evaporation ponds represent a threat to listed birds; and the
- → Tailings Storage Facilities represent a toxic threat to the environment if they fail.

By having three separate referrals there is now an unsatisfactory piecemeal approach to environmental assessment. Some state assessment of the TSF and EP was completed in November 2019.

On the 19/12/19 the Federal Government decided not to reject the split referral even though it has the discretion to do so under the EPBC Act. It determined that referrals 2019/8465 and 2019/8526 were not controlled actions and so did not need to be assessed in line with EPBC Act requirements. In making the decision regard was given to BHP's "efforts to publicise their proposals" and to account for all relevant impacts in the referrals. It was concluded that the objects of the EPBC Act would not be frustrated by the separate referrals and further it "will not diminish the assessment of any significant impacts of the projects on EPBC Act protected matters; nor will it result in particular controlling provisions- that would be triggered if the referral was for the whole development – being avoided".[47]

This appears contrary to decisions made in 2011 in relation to the previous proposed expansion where the entire Olympic Dam operation (existing and expanded) had to have a single EPBC Act approval. EPs had to be 'phased out as soon as practicable' to reduce impacts on listed birds and TSFs were required to undergo a 'comprehensive safety assessment' including a determination of environmental impacts posed for a minimum of 10,000 years. Arguably the TSF should be fully assessed as they have been categorized as an 'extreme risk' due to the nature of a potential catastrophic failure[48]. The separation out of aspects of

47. Australian Government Statement of Reasons for decision on Controlled Action under the EPBC Act (EPBC 2019/8465)
48. BHP, 'Tailings Facilities Disclosure: Response to the Church of England Pensions Board and the Council on Ethics Swedish National Pension Funds' (2019) 11-12.

the current BHP proposal where some are not assessed and others are appears to do the opposite of promoting protection of the environment.

On the 26/11/19, the remainder of the project (EPBC 2019/8570) was declared a controlled action under the EPBC Act. **On the 19/3/20 the Australian Government decided that an environmental impact assessment under the major projects provisions of the SA Development Act would satisfy assessment under both the EPBC Act and applicable SA laws.** In May 2020 assessment guidelines were released to be used by BHP to guide the development of its environmental impact assessment report (EIS) which is the highest level of assessment under the SA Development Act.

However not only will there be no full assessment of the EP and TSF projects under the requirements of the EPBC Act, but they are also excluded due to the September 2019 BAU exemption to the SA Development major projects declaration. This is despite the fact that it is clearly envisaged that both the TSF and the EP will be used in the proposed expansion. It is also possible that only the proposed increase in water usage will be assessed not the extraction of water across existing operations.

This situation is clearly at odds with the importance of assessing cumulative impacts. Assessing the cumulative impacts of a proposal has long been recognized as vitally important and BHP in fact recognizes this in its documentation. However, BHP's statements are difficult to reconcile with the current legal requirements for assessment which specifically exclude BAU operations.

The next step is for BHP to produce the draft report. Following that there will be at minimum 6 weeks public consultation followed by a report outlining BHP's response to the consultation. The final step is for the State and Federal governments to approve or reject the proposal.

On the 15/6/20 the Federal Government announced it would seek to try to shorten timeframes for approvals by setting up a joint assessment team to focus on 15 key projects around Australia including the proposed expansion of the Olympic Dam mine. Shortening time frames could compromise appropriate environmental impact assessment. State governments are also often promoters of such projects and can have a conflict of interest in decision making. It is important that in this situation the Federal Minister also makes a decision on a project and not leave the State Minister to be the only decision maker.

This case study raises concerns about fast tracking major projects; failure to address cumulative impacts; state conflicts of interest, and the need to address cross boundary impacts and consider total cumulative impacts not piecemeal applications with exclusions.

Olympic Dam main shafts. 📷 *Wikipedia/Geomartin*

CASE STUDY 30

Koala habitat protection – NSW

Koalas are currently listed as a vulnerable threatened species in NSW, and under the EPBC Act, meaning there is a high risk of extinction in the medium-term.

Accurately estimating koala numbers is difficult. Despite regulations, policies and community initiatives, overall koala numbers in NSW are in decline. In 2016, the NSW Chief Scientist relied on the figures of Adams-Hoskings *et.al.* in estimating approximately 36,000 koalas in NSW, representing a 26% decline over the past three koala generations (15-21 years).[49] Other reports suggest koala numbers are even lower than this.[50] These estimates were made before the catastrophic bushfire events of this summer, which have been devastating for koalas, with estimates showing that more than 24% of all koala habitats in eastern NSW are within fire-affected areas.[51]

A NSW Parliamentary inquiry recently concluded that koalas in NSW could become extinct by 2050 without intervention.[52]

Despite these facts, the NSW Government is currently considering weakening an already weak policy for political reasons in the absence of evidence. The new state environmental planning policy (**SEPP**) is one legal tool intended to help koalas, but in fact the SEPP will remain largely ineffective in addressing the exacerbated threats currently facing koalas. It took just weeks for almost a quarter of koala habitat in NSW to be burnt in the bushfires, while it has taken the NSW Government 10 years to update the list of relevant koala habitat trees in the SEPP, and now even that improvement may be wound back. The need for enforceable and effective laws is now more urgent than ever. The suggestion that this limited policy should be further weakened is 100% politics and 0% evidence-based.

The fact remains that outside of national parks, no areas of koala habitat are off-limits to clearing or offsetting – NSW laws do not prohibit the clearing of koala habitat and still allow koala habitat to be cleared with approval. The new Koala SEPP simply requires decision-makers to ensure development approvals are consistent with koala plans of management (**PoMs**) or, if a PoM is not in place, that the (yet-to be-finalised) Guidelines are taken into account. The requirement for councils to prepare Comprehensive Koala PoMs remains voluntary, and the new Koala SEPP still only applies to limited types of development approved by local councils. This means that the new Koala SEPP does not apply to the wide range of development and activities that can impact on koala habitat, including complying development, major projects (State significant development and State significant infrastructure), activities undertaken by public authorities, and significant land clearing activities.

The new Koala SEPP highlights the overarching deficiencies in NSW laws to provide genuine protections for nationally important species and their habitat. While environmental laws provide processes for assessing environmental impacts, at the end of the day weak offsetting laws and discretionary decision-making powers allow destructive activities to go ahead to the detriment of our iconic species. Contradictory policy settings in NSW laws mean that laws aimed at conserving biodiversity and maintaining the diversity and quality of ecosystems (such as the *Biodiversity Conservation Act* 2016) are undermined by other legislation that facilitates forestry, agricultural activities and developments (such as the *Local Land Services Act*, *Forestry Act 2012*, and *Environmental Planning and Assessment Act 1979*).

Many of the recent initiatives by the NSW Government to address koala conservation have focused mainly on funding and policy, without substantial legislative or regulatory reform to increase legal protections for koala populations and habitat. The new Koala SEPP is no exception. While some improvements have been made, particularly in relation to the definition of core koala habitat, overall, many concerns remain and the Koala SEPP is unlikely to result in improved outcomes for koalas. Until state laws are strengthened to truly limit or prohibit the destruction of koala habitat, koala populations and their habitat will continue to be at risk and koala numbers will continue to decline in NSW, possibly to the point of local extinction.

In July, the NSW Government approved clearing of 100 football fields of core koala habitat to facilitate expansion of a quarry at Brandy Hill, near Port Stephens. The forest is an "area of regional koala significance" and breeding koalas have been recently seen in the area. Now the decision is sitting on the desk of the Federal Environment Minister, Sussan Ley.

The 'vulnerable' status of the koala is now under consideration as the koala is among 28 animals that could have their threat status upgraded following the impact of the bushfires. Minister Ley has asked the threatened species scientific committee to complete its assessments by October next year.[53]

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49. NSW Chief Scientist & Engineer, *Report of the Independent Review into the Decline of Koala Populations in Key Areas of NSW*, December 2016 above no 6, citing Adams-Hosking, C, McBride, M.F, Baxter, G, Burgman, M, de Villiers, D, Kavanagh, R, Lawler, I, Lunney, D, Melzer, A, Menkhorst, P, Molsher, R, et al. (2016). *Use of expert knowledge to elicit population trends for the koala (Phascolarctos cinereus)*. Diversity and Distributions, 22(3), 249-262. doi: 10.1111/ddi.12400
50. See, for example, Paull, D., Pugh, D., Sweeney, O., Taylor, M.,Woosnam, O. and Hawes, W. *Koala habitat conservation plan. An action plan for legislative change and the identification of priority koala habitat necessary to protect and enhance koala habitat and populations in New South Wales and Queensland* (2019), published by WWF-Australia, Sydney, which estimates koala numbers to be in the range of 15,000 to 25,000 animals. In 2018, the Australian Koala Foundations estimates koala numbers in NSW to be between 11,555 and 16,130 animals, see www.savethekoala.com/our-work/bobs-map-%E2%80%93-koala-populations-then-and-now
51. See Department of Planning, Industry and Environment, *Understanding the impact of the 2019-20 fires*, https://www.environment.nsw.gov.au/topics/parks-reserves-and-protected-areas/fire/park-recovery-and-rehabilitation/recovering-from-2019-20-fires/understanding-the-impact-of-the-2019-20-fires
52. See: https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2536
53. See: https://www.theguardian.com/environment/2020/sep/25/sliding-towards-extinction-koala-may-be-given-endangered-listing-as-numbers-plummet

This case study demonstrates the failure of state laws and policies to protect nationally iconic species, and the role that current conflicting state laws play in undermining biodiversity objectives. This poses a significant problem for any proposed Commonwealth accreditation of laws and policies in the absence of significant law reform at the state level.

Endnotes

1 *Planning Act 2016* (Qld), section 3 states: 'The purpose of this Act is to establish an efficient, effective, transparent, integrated, coordinated, and accountable system of land use planning (*planning*), development assessment and related matters that facilitates the achievement of ecological sustainability', with a definition of ecological sustainability provided but which is different to the National Strategy for Ecologically Sustainable Development (1992) and makes no direct reference to 'principles of ecologically sustainable development'. Contrastingly, the *Environmental Protection Act 1994* (Qld) utilises the National Strategy definition in the object in section 3. The *Nature Conservation Act 1992* (Qld) references 'ecologically sustainable use' in describing how the object of the Act is to be achieved in section 5(e). The *Sustainable Ports Development Act 2015* (Qld) refers to the principles of ecologically sustainable development in the purpose of the Act in section 2(2)(b).

2 The *Planning, Development and Infrastructure Act 2016* (PDI Act) is to become fully operational in 2021. The primary object of the Act is to 'support and enhance the States liveability in prosperity in ways that are ecologically sustainable…' (s12(1)) and refers to consistency with planning principles. These are outlined in s 14: s 14(a)(i) states policy frameworks should be 'ecologically sound' and promote inter-generational equity, and s14(e)(iii) promotes the minimisation on 'human activities on natural systems that support life and biodiversity'.

3 The *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) s. 1.3 includes, as one of ten equally-weighted objects, an object to facilitate ecologically sustainable development, as defined in the *Protection of the Environment Administration Act 1991* (NSW), s 6(2).

4 WA planning legislation does not refer to principles of ESD, but both the *Environment Protection* Act *1986* (WA) (s 4A) and the *Biodiversity Conservation Act 2016* (s 4) do.

5 There are very limited references in the *National Parks and Wildlife Act* 1974 (NSW): for example, when reserving lands under Part 4 the Chief Executive is to have regard to the desirability of protecting world heritage properties and values (s. 7). The *Biodiversity Conservation Regulation 2017* (NSW) under the *Biodiversity Conservation Act 2016* (NSW) provides (at cl 1.3(g)) that, for the purposes of the Regulation, 'national park estate and other conservation areas' includes a declared World Heritage property within the meaning of the EPBC Act.

6 The *Environmental Protection Regulation 2019* (Qld) refers (sch 19, pt1(2)) to the Convention but this has limited application in Queensland development laws.

7 The *Nature Conservation Act 2014* (ACT) Part 8.4 governs Ramsar wetlands management plans and whilst it does not refer specifically to the Convention, it cross-references to the EPBC Act, for example s190(2) refers to s17 EPBC Act. Ramsar wetlands are also referred to tin the *Planning and Development 2007* Act including under Part 4.3 Development proposals requiring EIS.

8 There is limited general protection of wetlands in NSW. The *State Environmental Planning Policy (Coastal Management) 2018* (Coastal Management SEPP) under the EP&A Act (NSW) and the *Coastal Management Act 2016* (NSW) apply to limited mapped coastal wetland areas. The Coastal Management SEPP requires development consent to clear or develop coastal wetlands, and (at cl 10(4)) consent must not be granted unless the consent authority is satisfied that sufficient measures have been or will be, taken to protect, and where possible enhance, the biophysical, hydrological and ecological integrity of the coastal wetland. The *Biodiversity Conservation Regulation 2017* (NSW) provides that the Biodiversity Values Map *may* include land that is a declared Ramsar wetland. Currently the 12 Ramsar sites in NSW are included on the Biodiversity Values Map (BV Map). Any development proposal on land identified on the BV Map must be accompanied by a biodiversity development assessment report (BDAR) under the *Biodiversity Conservation Act 2017* and the consent authority must consider the likely impact of the proposed development on biodiversity values.

9 Schedule 1 item 13 of the *Biodiversity Conservation Act 2016* (WA) allows regulations to be made for the 'conservation, protection and management' of a 'declared Ramsar wetlands consistent with Australian Ramsar management principles', however it does not specifically mention the Convention and no regulations have been made yet.

10 Part 5.1, s 109 of the *Nature Conservation Act 2014* refers to s528 of the EPBC Act that cross-references listing provisions s178 and 181.

11 Some species listed on both NT and Commonwealth lists (although the category of listing seems to vary); and some species are listed nationally, but not at the NT level. See also: <https://nt.gov.au/environment/animals/threatened-animals> and here https://nt.gov.au/environment/native-plants/threatened-plants>

12 But note that 2019 reforms to the *Flora and Fauna Guarantee Act 1988* now adopt the Common Assessment Methodology (CAM) for species (not communities). Section 16E of the Act now provides for the adoption of listing decisions made in other jurisdictions under the CAM.

13 Part 4 of the *Biodiversity Conservation Act 2016* (NSW) requires the NSW Scientific Committee to consider whether to list species in NSW. There is no provision in the *Biodiversity Conservation Act 2016* for the automatic listing of species or communities listed under the EPBC Act.

14 Section 109 *Environmental Protection Amendment Bill 2020* (threatened ecological community definition) refers to s 528 of the EPBC Act (cross referenced with listing provisions in s 181).

15 The ACT *Nature Conservation Act 2014* does not specifically refer to the "Convention on Biological Diversity", however Part 8.5 governs "Access to biological resources in reserves ". This Part appears to reflect the broad objectives of the CBD.

16 Section 109 *Nature Conservation Act 2014* refers to s528 of the EPBC Act that cross-references listing provision s209.

17 At least one federally listed migratory species is listed here <https://nt.gov.au/environment/animals/threatened-animals>.

18 The *Environmental Protection Regulation 2019* (Qld) (sch 19, pt1(2)(b)(i) refers to the 'Convention on the Conservation of Migratory Species of Wild Animals' (Bonn, 23 June 1979) but it has limited application to development laws.

19 A native species is eligible for listing if the 'species is the subject of an international agreement…that binds the Commonwealth' under s 15 of the *Biodiversity Conservation Act 2016* (WA).

20 Note, while the Newman government briefly lifted a 30 year ban in October 2012, the current Queensland Government reinstated a policy banning the approval of uranium mining in 2015.

21 Section 3 *Nuclear Waste Storage Facility (Prohibition) Act* 2000 prohibits the establishment of certain nuclear waste storage facilities in SA but there is no prohibition on exploration and mining (see *Mining Act 1971* s 10A).

22 However the Northern Territory Minister for Primary Industry and Resources can only grant uranium exploration and mining approvals and exercise powers in accordance with the advice of the Commonwealth Minister administering the *Atomic Energy Act 1953* (s 187, *Mineral Titles Act 2010 (NT)).*

23 The *Nuclear Activities (Prohibitions) Act 198*3 prohibits uranium mining, uranium processing and construction of nuclear facilities.

24 Since 2012 NSW laws allow uranium exploration, but uranium mining and construction of nuclear facilities are prohibited (see *Mining Act 1992*; *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986*). There is currently a One Nation Bill to overturn the ban on uranium mining under consideration.

25 The WA EPA must assess and approve all proposed uranium projects. The current WA government has implemented a practical ban of uranium mining since 2017, in the form of a 'no uranium mining' condition on all future Mining Leases granted under the *Mining Act 1978* (WA). The ban is not codified in legislation. Further approvals are required if the proposed activity will impact on a registered heritage site as defined under the *Aboriginal Heritage Act 1972* (WA).

26 For example, 'interested persons' or 'persons aggrieved' (see EPBC Act sections 475(6); 487) or better (e.g. 'open standing').

27 In relation to major projects requiring an Environmental Authority under the *Environmental Protection Act 1994* (Qld), there is limited third party standing only for 'site-specific' applications where a properly made submission was made – per sections 520(2) and 524 *Environmental Protection Act 1994* (Qld). For assessments of major projects under the *State Development and Public Works Organisation Act 1971* (Qld) (SDPWO Act) there is no standing for merits review of decisions under this Act, Part 4A of the SDPWO ACT does not exclude statutory judicial review, however there is no extended standing for judicial review akin to s.487, or for third party enforcement akin to s.475 EPBC Act, and there is no third party enforcement including for offences for providing false and misleading information. Part 4 *State Development and Public Works Organisation Act 1971* (Qld) expressly excludes statutory judicial review and omits third party enforcement. While the *Planning Act 2016* (Qld) provides standing for applications which are 'impact assessable' for those who have provided a properly made submission, many major projects are assessed under laws that override this framework and do not provide standing for third party merits review and which often remove statutory judicial review rights; such as large mixed residential and marina developments like the Toondah Harbour project being assessed under the *Economic Development Act 1992 (*Qld) as a priority development area, or resorts or casinos under the *Integrated Resort Development Act 1987* (Qld).

28 Currently, if a major project is assessed by the local government and the EPA under s.57 of the *Land Use Planning and Approvals Act 1993* (Tas) third party representors have standing to commence or join merits appeals or persons with a 'proper interest' have standing to commence civil enforcement proceedings (s.64(1) *Land Use Planning and Approvals Act 1993* (Tas)). However, under the proposed changes to the *Land Use Planning and Approvals Act 1993* (Tas) for major projects there will be no merits appeals for third parties, and no open standing to seek the review of the major projects assessment panel decision, however 'interested persons' will still be able to take civil enforcement proceedings in relation to contraventions of major projects permits.

29 Section 4A of the *Administrative Decisions Judicial Review Act 1989 (ACT)* provides an 'eligible person' (i.e. an individual or a corporation in certain circumstances) can make an application for judicial review, subject to subsections (2) and (3). Subsection (2) provides that a person may make an application only if the person's interests are, or would be, adversely affected by the decision. Subsection (3) relates to legislation other than the *Planning & Development Act 2007;* an entity can seek an ACAT review of a decision to approve a development application in the 'impact track' provided the entity lodged a representation and the approval of the development application may cause the entity to suffer 'material detriment': *Planning & Development Act* 2007, s.407 & Sch. 1.

30 Section 230 of the *Environment Protection Act 2019 (*NT) provides that a person who is affected by an alleged act or omission that contravenes or may contravene the Act may apply for an injunction, while section 276 provides that a person directly affected by a decision, or a person who has made a genuine and valid submission during an environmental impact assessment and environmental approval process under the Act to which the decision relates may seek judicial review of the decision. While there are third party merits review rights provided for under section 17 of the *Planning Act 1999* (NT), they are heavily curtailed by Part 4 of the *Planning Regulations 2000* (NT) and generally are available only in relation to residential zones.

31 An 'interested person' can apply for merits review of the grant of a planning permit if they previously objected to the grant of the permit, unless the Minister 'calls in' the project in which case no merits review is available. There is no merits review for major transport projects and or major mining projects. Judicial review is more limited than the EPBC Act as the common law 'special interest' test applies.

32 The EP&A Act (NSW) generally allows 'open standing' to bring civil proceedings against a breach of the Act or Regulations (s 9.45) (except, for example, regarding Critical State Significant Infrastructure – s 5.27). There is limited third party standing for 'objectors' to bring merit appeals against major private project approvals i.e. 'designated development' and 'State Significant Development' (SSD) (s 8.8) – but SSD appeal rights do not apply where the Independent Planning Commission holds a public hearing (s 8.6).

33 For some decisions (EPA report and recommendations, amendment of and conditions on licences and works approvals, grant and amendment of and conditions on a clearing permit) 'any person' can apply for merits review by the Minister for Environment under Part VII of the *Environmental Protection Act 1986* (WA). Only the proponent may apply for merits review of conditions on a decision to authorise implementation of a project (no merits review of the decision to authorise is available). For judicial review proceedings there are no open standing provisions and the Supreme Court of WA has applied the common law 'special interest' test.

34 Unlike offsets under the EPBC Act, in Queensland offsets providing social, cultural, economic or environmental benefits are allowed in national parks – *Environmental Offsets Act 2014* (Qld) s 7(3). Financial settlement offsets (i.e. paying money for the government to provide an offset) are available upon the proponent's election – *Environmental Offsets Act 2014* (Qld) s 18. Calculation of offset area required has capped ratios that are not scientifically-based.

35 The *General Offset Principles* published by the Tasmanian Department of Primary Industries, Parks Water and Environment provide general guidance only, stating that offsets "should aim to maintain or improve conservation outcomes, and offsets should generally be for the same species, native vegetation community, or other natural value that is to be adversely impacted by the proposal." The Principles do not explicitly deal with indirect offsets.

36 The ACT Environmental Offsets Policy is a statutory policy under changes to the Planning and Development Act 2007 through the Planning and Development (Bilateral Agreement) Amendment Act 2014 which commenced on 2 April 2015. The policy was developed in order to align requirements for offsets in the ACT with those required for environmental approvals under the Environment Protection and Biodiversity Conservation Act 1999.

37 The *Native Vegetation Act 1991* (SA) and *Native Vegetation Regulations 2017* reference offsetting. The 'Policy for a Significant Environmental Benefit' does address like-for-like offsetting in Principle 4 stating it 'should' occur and that indirect offsetting is 'not supported'.

38 Sections 125 and 126 of the *Environment Protection Act 2019* (NT) provide for the establishment of an environmental offsets framework and allow the Minister to publish guidelines for that framework, and consideration of offsets are integrated throughout other sections – see for example, section 26 (environmental decision-making hierarchy) and section 76 (whether the Minister should decide a project may have an unacceptable statement). The NT Government is however still in the process of developing the offsets guidelines/policies, so it is unlikely that the Territory's offsets standard meet Commonwealth standards at the present time. The first component of the NT's Offsets Framework, the Northern Territory Offsets Principles, released in June 2020, does not include a commitment to 'like for like' nor provide for limited use of indirect offsets (and in fact, may encourage the opposite by moving towards a 'targets based' approach, rather than like for like offsetting). See: https://denr.nt.gov.au/environment-information/northern-territory-offsets-framework/northern-territory-offsets-principles

39 Victoria allows limited use of indirect offsets, however does not require like for like offsetting. Offset standards have been further relaxed since the 2012 and 2014 audits.

40 Part 6 of the *Biodiversity Conservation Act 2016* (NSW) provides for the biodiversity offsets scheme in NSW. This scheme does not meet the federal offsets policy standards, with a high degree of indirect offsetting permitted, including (but not limited to) that in NSW proponents have the option to pay an amount to the Biodiversity Conservation Fund in lieu of securing like-for-like offsets, and offsets for future mine rehabilitation. See EDO's Submission on the Proposed amendments to the NSW Bilateral Agreement in relation to Environmental Assessment (21 February 2019) at https://www.edo.org.au/wp-content/uploads/2020/01/190221_-_NSW_Bilateral_Agreement_amendments_-_EDO_NSW_submission.pdf.

41 WA allows limited use of indirect offsets, however WA uses a 'proportionate' impact consideration (WA Environmental Offsets Policy 2011), 'like-for like' is referenced in the guidelines, but not the headline policy.

42 The Tasmanian Premier approves declared "projects of state significance", under the proposed changes to the *Land Use Planning and Approvals Act 1993* (Tas) for major projects, the State Planning Minister will be responsible for declaring major projects.

43 Either the NSW Minister for Planning and Public Spaces (or delegate), or the Independent Planning Commission, is the decision maker for State significant development (s 4.5, EP&A Act (NSW) and cl 8A *State Environmental Planning Policy (State and Regional Development) 2011).*

44 The WA Minister for Environment is responsible for determining whether proposals can be implemented where they have been referred to and assessed by the EPA (see Part IV of the *Environmental Protection Act 1986* (WA) and after consultation with other decision-making authorities relevant to the proposal. For major projects, this will typically require agreement with other Ministers (e.g. other Ministers for Resources, Planning or Aboriginal Affairs).

45 Currently the EPA Board makes the decision or Tasmanian Planning Commission. There is no distinction between state-proposed and private projects. In proposed changes to the *Land Use Planning and Approvals Act 1993* (Tas) for major projects, an independent assessment panel will be appointed by the Tasmanian Planning Commission.

46 Note, there may be some oversight provided by the ACT Commissioner for the Environment and Sustainability - an independent statutory position whose functions include the investigation of complaints about the management of the environment by the ACT government and can initiate investigations into actions of an agency where those actions would have a substantial impact on the environment of the ACT.

47 Where a proposal has the potential to have a significant impact on the environment (which may include state-proposed projects), the Northern Territory Environment Protection Authority (an independent body) will assess the project and make recommendations to the Minister of Environment who is the final decision maker on approvals under the *Environment Protection Act 2019*.

48 The NSW Minister for Planning and Public Spaces (or delegate) is the decision maker. See EP&A Act (NSW), Part 5.1, State Significant Infrastructure, s 5.14. The Minister has discretion to seek advice from the Independent Planning Commission (EP&A Act (NSW) and must consider any such advice, sections 2.9(1)(c); 5.18(2)(c), 5.19(2)(c)).

49 A senior project coordination team can be assigned to assist in WA. Development Assessment Panels, with two independent expert members, are used for certain planning decisions (See *Planning and Development Act 2005* (WA) Part 11A and *Planning and Development (Development Assessment Panels) Regulations 2011* (WA). Under the *Environmental Protection Act 1986* (WA) there is no distinction between approval of state-proposed and private projects.

50 The federal Environment Minister may decide within 20 business days to inform proponent, etc. (EPBC Act, Part 7, Div. 1A (s 74B-74C)).

51 Although a local council may reject an application within 7 days (see, s.57(2) *Land Use Planning and Approvals Act 1993 (Tas)*), this power is generally exercised only where the application is incomplete or for a use or development that is currently prohibited under the planning scheme. In proposed changes to the *Land Use Planning and Approvals Act 1993* (Tas) for major projects, prior to the assessment the panel may give a "no reasonable prospects notice" and the Minister may decide to revoke a major project declaration as a consequence.

52 The phrase 'clearly unacceptable' does not appear in the *Planning and Development Act 2007* (ACT) or the *Nature Conservation Act 2014* (ACT).

53 We note there is an amendment to the *Mining Act* 1971 yet to come into force that will allow the Minister to refuse an application for a lease at any time during the process taking into account the public interest and other matters.

54 The NT Environment Protection Authority can recommend to the Minister that it considers an action will have an unacceptable impact and to not issue an environmental approval (see section 66, and Part 5, Division 4 *Environment Protection Act 2019*), but discretion to approve rests with the Minister, and this decision-making power arises following completion of the environmental impact assessment process.

55 Although incomplete or illegible applications can be rejected within 14 days (see, for example, EP&A Regulation 2000 (NSW), cl. 51).

56 The EP Act (WA) does allow for early refusal in some respects for administrative reasons (eg. a works approval application that does not have the supporting documentation, prescribed fee etc can be declined early; see s 54(2)(a) *Environmental Protection Act 1986*; a termination of an assessment under s 40A(1)), however the WA planning laws do not.

57 The groundwater modelling put forward in EIS documents to support numerous large mining proposals in Queensland, that have passed the assessment of the Coordinator-General and the Department of Environment and Science, have repeatedly been found to be flawed under the scrutiny of the Land Court and expert analysis assisting the Court. See for example: *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection* (No. 4) [2014] QLC 12; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48; *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* (No. 4) [2017] QLC 24.

58 Presently no CSG extraction is allowed in Tasmania. The Tasmanian Government has extended a moratorium on the approval of any hydraulic fracking for the purpose of hydrocarbon extraction until March 2025. The take of groundwater associated with coal mining is not regulated under the *Water Management Act 1999* (Tas) unless it is within a declared groundwater management area and required by Ministerial order – see s. 48A and 124A. Currently, there is only one notified groundwater area (Sassafras Wesley Vale Groundwater Area), and this is a coal mining region in Tasmania. The EPA's assessment of a proposed coal mine may take account of groundwater impacts, but there is no guaranteed, dedicated expert assessment of impacts.

59 If the coal and/or coal seam gas project is captured by the *Environment Protection Act 2019* (NT), then theoretically yes, but there is no legal guarantee that water would be identified as an impact that must be assessed. However, the inadequacy the Northern Territory's water regulatory framework, in particular water extraction licensing under the *Water Act 1992 (NT)*, could undermine the impact assessment process.

60 The NSW *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* requires an application for a gateway certificate relating to development on land that is biophysical strategic agricultural land, to be referred to the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development established by the EPBC Act. (cl 17G).

61 Environmental Impact Assessments can be conducted on proposals likely to have a significant effect on the environment under Part IV Div 1 of the *Environmental Protection Act 1986* (WA). The WA Government lifted a moratorium on fracking in parts of WA, but the implementation policy will not be introduced before the election in March 2021.

PLACES YOU LOVE

Environmental Defenders Office

Places You Love Alliance has over 60 members including WWF-Australia, The Wilderness Society, Australian Conservation Foundation, Birdlife Australia, Humane Society International and many conservation councils and local groups around the country.

The Environmental Defenders Office is a legal advisor to the Places You Love Alliance.