

Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* Discussion Paper

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The NSW Young Lawyers Environment and Planning Committee and NSW Young Lawyers Animal Law Committee (**Committees**) make the following submission in response to the Independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Discussion Paper (**Discussion Paper**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO₂ (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The NSW Young Lawyers Environment and Planning Committee comprises of a group of approximately 250 members interested in our natural and built environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

The NSW Young Lawyers Animal Law Committee (**ALC**) comprises a group of over 400 members interested in animal protection laws regulating the treatment of animals. The ALC aims to raise awareness and provide education to the legal profession and wider community, while increasing understanding about the importance of protecting animals from abuse and neglect. A common theme amongst ALC members is a passion and desire to use their legal skills and the law to improve protections for animals.

Summary of recommendations

1. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) be amended to explicitly require consideration of cumulative impacts arising from an action.
2. The EPBC Act be amended to include a requirement for persons undertaking an action to state how that action will achieve the principles of ecologically sustainable development (**ESD**).
3. The EPBC Act be amended to ensure ESD is the overarching object of the Act.
4. The EPBC Act be amended to include an object to promote climate change mitigation and adaptation strategies.
5. Section 3(1)(c) be amended to specifically refer to the conservation of flora and fauna.
6. Section 3(2)(e)(iv) be amended to emphasise the need to protect threatened and endangered species.
7. The EPBC Act be amended to include greenhouse gas emissions as a Matters of National Environmental Significance (**MNES**).
8. Subdivision FB of Part 3 of the EPBC Act be amended to include a requirement for approval of developments with a significant impact on water resources, irrespective of whether the relevant development relates to coal seam gas extraction or large coal mining developments.
9. The following measures be prioritised for reform:
 - more holistic national habitat management;
 - documentation and protection;
 - more effective collaboration between Federal and State agencies in data sharing and protection and conservation measures;
 - greater emphasis on the importance of environmental water to sustain water-dependant habitats; and
 - more strategic and considered assessment of projects that jeopardise vulnerable inland water ecosystems.
10. The EPBC Act should focus on defining and regulating environmental and heritage outcomes that have sufficient specificity to be measured, monitored and enforced. Where environmental and heritage outcomes lack specificity due to a lack of scientific knowledge, the precautionary principle should be applied.
11. The EPBC Act should make adequate allowance for the enforcement of outcomes-based regulation.
12. Should automatic approvals be incorporated into the EPBC Act, consideration must be given to the following factors for each relevant type of development:
 - whether the type of development works is objectively low impact;
 - the extent of pre-assessment done by regulators, for example, whether the regulator in preparing zoning maps has already collated and considered at an aggregate level data concerning the environmental impacts of particular forms of development, such that individual assessment of projects is unnecessary;
 - the availability of data regarding environmental impacts, such as mapping of zoning, flood risk, bushfire risk, geotechnical risk, ecological sensitivity and/or heritage items; and

- any scientific or technical data available regarding environmental impacts and mitigation strategies for particular forms of development, such as town planning reports, strategic assessment reports, and fauna or flora studies.
13. That any mechanism for creating exemption or automatic approval schemes should include safeguards against improper lobbying of government Ministers or departments to improperly influence a new exemption being created. This could include, for example, criteria in the legislation for when it is appropriate to establish a generic exemption or automatic approval scheme for a type of development. Alternatively, the regulation writing authority might be required to provide a statement of reasons.
 14. That the Commonwealth explore (in consultation with the States and Territories) a process and plan to establish a searchable online national database of environment and planning data, which aims to consistently map matters dealt with under Commonwealth and State legislation dealing with town planning, geotechnical hazards, flood and bushfire risks, contamination, European and Aboriginal heritage, biodiversity, and the like.
 15. Environment impact assessments should be made publicly available, unless they contain sensitive information about a legal person or a matter of National security or Defence, of which case it may be appropriate to redact the document in whole or part.
 16. The Commonwealth, in consultation with State and Territory governments, amend the EPBC Act to include an additional level of landscape-scale environmental impact assessment for any habitats containing a listed species that must be adhered to at the state level.
 17. Environmental markets should not be established for ecological systems for which there remains scientific uncertainty in relation to (without limitation) its assessment, categorisation or threats, or that is not capable of being adequately defined and valued.
 18. Effective regulation should remain a key focus in complementing and supplementing environmental markets to achieve environmental outcomes. Any new environmental markets should be the subject of adequate public consultation to ensure stakeholders are given the opportunity to review and make submission on new market models.

Introduction

The Committees welcome the opportunity to comment on the Discussion Paper. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) represents an opportunity to ensure that there is an overarching environmental management framework protecting and restoring Australia’s unique ecosystems. The second independent review of the EPBC Act also represents an opportunity to consider whether the EPBC Act fulfills its role in the Australian legislative landscape and how it can be improved to meet modern environmental challenges, most notably climate change, species decline and land clearing.

All provisions referred to in this submission are references to the EPBC Act, unless otherwise specified.

Structure of submission

The Committees’ submission will address the following questions from the Discussion Paper:

Question 2	How could the principle of ESD be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?
Question 3	Should the objects of the EPBC Act be more specific?
Question 4	Should the MNES within the EPBC Act be changed? How?
Question 5	Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect MNES and biodiversity, removing the need for regulation in the right circumstances?
Question 8	Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?
Question 15	Should low-risk projects receive automatic approval or be exempt in some way? <ul style="list-style-type: none"> • How could data help support this approach? • Should a national environmental database be developed? • Should all data from environmental impact assessments be made publicly available?
Question 16	Should the Commonwealth’s regulatory role under the EPBC Act focus on habitat management at a landscape-scale rather than species-specific protections?
Question 23	Should the Commonwealth establish new environmental markets? Should the Commonwealth implement a trust fund for environmental outcomes?

Question 2

How could the principle of ESD be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?

The Committees submit that the principle of ESD could be better reflected in the EPBC Act through:

1. explicit inclusion of a requirement to consider cumulative impacts of an action; and
2. requiring persons undertaking actions to explicitly establish how they are satisfying the principles of ESD.

Each recommendation is addressed below.

First, in relation to cumulative impacts, both case law and commentators have indicated that assessments undertaken under the EPBC Act should involve some consideration of ESD.¹ Further, Godden and Peel have indicated that the inclusion of the assessment of cumulative impacts under the EPBC Act would also serve to create greater opportunities for the community to hold governments and developers to account due to broader assessment requirements.²

Inclusion of a requirement to consider cumulative impacts of an action would assist in achieving inter-generational equity (s 3A(c)) and the conservation of biological diversity (s 3A(d)).

The Committees also address the inclusion of ESD as an overarching object of the EPBC Act in response to question three below.

Recommendation 1: the EPBC Act be amended to explicitly require consideration of cumulative impacts arising from an action.

Second, the Committees submit that there should be a specific requirement for those undertaking an action under the EPBC Act to set out how the action will achieve the principles of ESD. The developers will have to establish the future impacts of their application and provide an instruction on how the developer intends to mitigate the risk of these impacts.

Recommendation 2: the EPBC Act be amended to include a requirement for persons undertaking an action to state how that action will achieve the principles of ESD.

Question 3

Should the objects of the EPBC Act be more specific?

The Committees submit that the objects of the EPBC Act are appropriate and should be retained. The breadth of the current objects is generally appropriate, given the myriad of environmental issues the EPBC Act purports to address.

¹ The Hon Justice Brian Preston SC, 'The Judicial Development of Ecologically Sustainable Development' IUCNAEL Colloquium, 22 June 2016 (Norway), 18.

² Lee Godden and Jacqueline Peel, 'The *Environment Protection and Biodiversity and Conservation Act 1999* (Cth): Dark sides of virtue' Melbourne University Law Review 31 (2007) 106, 131-132.

However, the Committees submit that the following amendments could strengthen the objects of the EPBC Act and their application:

First, promoting ESD, presently addressed in s 3(1)(b) of the EPBC Act, should be the overarching object of the Act. Currently, in deciding whether to permit an action to be carried out, the Minister must have regard to the objects of the EPBC Act, but there is no requirement for actions to seek to achieve ESD. The Committees submit that if achieving ESD forms part of an overarching object of the EPBC Act, it will be given greater weight by decision makers and will therefore have greater practical significance.

Recommendation 3: The EPBC Act be amended so that achieving ESD is the overarching object of the Act.

Second, promoting climate change mitigation and adaptation strategies should be incorporated as an additional object of the EPBC Act. Climate change has had and will continue to have adverse impacts on MNES, plant and animal biodiversity more generally: see our discussion on the Great Barrier Reef below. In a time of unprecedented environmental and climactic change, the role of the EPBC Act should reinforce the immediate action required to protect MNES and the Australian environment.

The inclusion of an additional object relating to climate change mitigation strategies would also be consistent with other objects of the EPBC Act, including to give effect to Australia's obligations under international law, particularly Australia's obligations under the Paris Agreement and Kyoto Protocol. It would also serve to make Australia's environmental laws international best practice, in line with international principles such as the Oslo Principles on Global Obligations to Reduce Climate Change.³

Recommendation 4: The EPBC Act be amended to include an object to promote climate change mitigation and adaptation strategies.

Third, s 3(1)(c) be amended to specifically refer to the conservation of flora and fauna.

Section 3(2)(e) provides that in order to achieve its objects, the EPBC Act:

(e) enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to:

- (i) protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species; and*
- (ii) establish an Australian Whale Sanctuary to ensure the conservation of whales and other cetaceans; and*
- (iii) protect ecosystems by means that include the establishment and management of reserves, the recognition and protection of ecological communities and the promotion of off-reserve conservation measures; and*
- (iv) identify processes that threaten all levels of biodiversity and implement plans to address these processes;*

Species are defined under s 528 as meaning:

a group of biological entities that:

³ Oslo Principles on Global Climate Change Obligations, 1 March 2015, <https://globaljustice.yale.edu/sites/default/files/files/OsloPrinciples.pdf>

- (a) *interbreed to produce fertile offspring; or*
 - (b) *possess common characteristics derived from a common gene pool;*
- and includes:*
- (c) *a sub-species; and*
 - (ca) *for the purposes of Part 13A--a distinct population of such biological entities; and*
 - (d) *except for the purposes of Part 13A--a distinct population of such biological entities that the Minister has determined, under section 517, to be a species for the purposes of this Act.*

The definition of “species” is broad as it does not distinguish between flora and fauna.

The Committees recognise that fauna are sentient beings by virtue of their ability to subjectively feel and perceive the world around them.⁴ By reason of their sentient status, fauna has intrinsic value, making them deserving of being specifically referred to in Australia’s efforts to enhance the conservation of its biodiversity. This will ensure an adequate level of welfare is afforded to fauna with respect to Australia’s provision of proper and humane care, management and treatment of its biodiverse fauna.

Recommendation 5: Section 3(1)(c) be amended to specifically refer to the conservation of flora and fauna.

On 4 April 2019, the 45th Parliament’s Standing Committee on Environment and Communications produced its interim report on Australia’s Faunal Extinction Crisis (**interim report**).⁵ The report found a number of issues in relation to Australia’s care and protection of its fauna. Firstly, the interim report found that ‘Australia has one of the world’s worst records for the extinction and lack of protection for threatened fauna.’⁶ Secondly, the submissions received by the committee detailed that there is a decline in the number of in terrestrial land species, birds, marine fauna⁷ and reptiles.⁸ Finally, the EPBC Act has only formally acknowledged a little over half of the extinctions of mammal species.⁹ The objective of the EPBC Act, ‘to promote the conservation of biodiversity’ is not reflected in the current state of Australia’s fauna. What is required is an objective that is cognisant to the protection of Australia’s flora and fauna and this ought to be expressly provided as an objective under the EPBC Act. as the Committees suggest the following revision of the objective:

‘to conserve the biodiversity of all flora and fauna in Australia to the fullest extent’

By expressing the objective in this way, it supports a number of other objectives contained within s 3 of the EPBC Act, including strengthening the principles of ESD.¹⁰

⁴ *Animal Welfare Act 1992* (ACT) s 4A.

⁵ Senate Environment and Communications References Committee, Parliament of Australia, *Australia’s Faunal Extinction Crisis* (Interim Report, 3 April 2019).

⁶ *Ibid* 2.4.

⁷ *Ibid* 2.3 – 2.6.

⁸ *Ibid* 2.33.

⁹ *Ibid* 2.30.

¹⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3A.

Recommendation 6: Section 3(2)(e)(iv) be amended to emphasise the need to protect threatened and endangered species.

Question 4

Should the MNES within the EPBC Act be changed? How?

There are currently nine MNES protected by the EPBC Act. These are:

1. world heritage areas;
2. national heritage places;
3. wetlands of international importance (Ramsar wetlands);
4. listed threatened species and ecological communities;
5. listed migratory species;
6. protection of the environment from nuclear actions;
7. Commonwealth marine areas;
8. the Great Barrier Reef Marine Park; and
9. water resources in relation to coal seam gas and large mining developments.¹¹

Since its inception in 1999, just three new areas have been added: national heritage places in 2003,¹² the Great Barrier Reef Marine Park in 2008¹³ and the water trigger in 2013.¹⁴ Despite this, there have been numerous calls for new MNES to be added.

The Committees submit that greenhouse gas emissions should be included as an additional MNES.

Further, the Committees recommend that amendments should be made to the existing MNES of protecting water resources from coal seam gas development and large coal mining development as set out below.

Greenhouse gas emissions as a MNES

The effects of climate change are well established.¹⁵ As succinctly described by Paul Carr:

*'Dry regions of the earth are becoming drier causing droughts and wildfires threefold, wet regions are becoming wetter as a result of floods and snow caused by the atmosphere retaining more water vapour at higher temperatures.'*¹⁶

¹¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Ch2, Pt 3.

¹² *Environment and Heritage Legislation Amendment Act (No 1) 2003*.

¹³ *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008*.

¹⁴ *Environment Protection and Biodiversity Conservation Amendment Act 2013*.

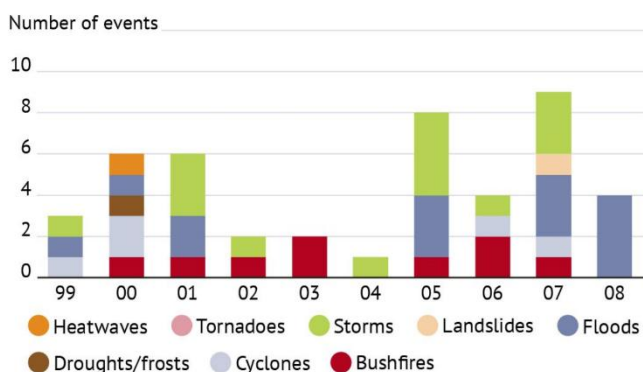
¹⁵ See Paul Carr, 'What is climate change doing to us and for us?' 53 (2018) 2 *The Wicked Problem of Climate Change*, 443-447; Hon. Justice Brian Preston SC (speech delivered at the launch of (2016) 39(4) *UNSW Law Journal Thematic Issue: Rethinking Climate Change and the Law*, King & Wood Mallesons Sydney 22 November 2016) 2.

¹⁶ Carr, 'What is climate change doing to us and for us?' 443, 447.

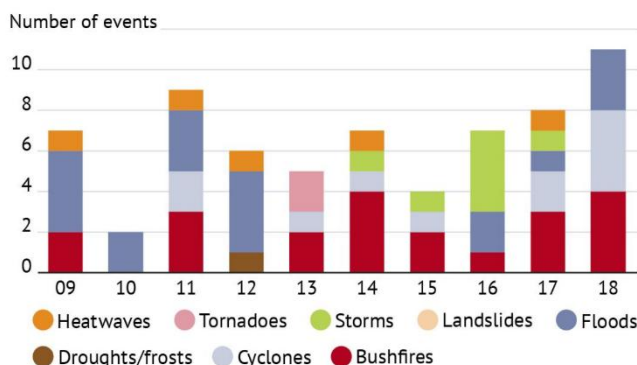
In addition, climate change is likely to have flow on economic and social impacts, due to the increasing frequency of natural disasters and weather events.¹⁷

According to figures from the Australian Institute for Disaster Resilience (see charts below),¹⁸ the main categories of climate change-related natural disasters include drought, heatwaves, severe storm events, flooding, bushfires and marine heatwaves. It is also evidence from the charts below that there has been an increase in the number of bushfire, flooding and heatwave events in the past 10 years. Climate change has been linked to a significant increase in drought conditions, heatwaves and bushfire activity with a measurable mean surface air temperature increase of 1 °C in Australia since 1910.¹⁹

Natural disasters by type of disaster 1999-2008



Natural disasters by type of disaster 2009-2018



Source: Australian Institute for Disaster Resilience

At a national level, Australia’s recent bushfire and flooding crisis is estimated to have killed over one billion animals and burnt around 12.6 million hectares of land.²⁰ Climate change has been linked with extreme weather events, such as “more severe droughts, heatwaves, floods and increased bushfire risk.”²¹ The EPBC Act is currently unable to adequately protect our environment following this national disaster. This is not only due to the absence of a climate change trigger, but also due to the rigidity of the act and the lack of mechanisms to address emergency situations in a matter that better serves the EPBC Act’s objectives.

Certain species and ecological communities may now be considered threatened or endangered, and thus could be captured within the scope of protections offered by the EPBC Act. However, the classification process requires that, *inter alia*, they be assessed and approved by the Threatened Species Scientific Committee.²²

¹⁷ Shane Wright and Clancy Yeates, ‘Climate Change, Natural Disasters Posing Greater risk to mortgages: Moody’s’, The Sydney Morning Herald, 23 September 2019, <https://www.smh.com.au/politics/federal/climate-change-natural-disasters-posing-greater-risk-to-mortgages-moody-s-20190923-p52tzt.html>.

¹⁸ Ibid.

¹⁹ Shane Wright and Clancy Yeates, ‘Climate Change, Natural Disasters Posing Greater risk to mortgages: Moody’s’, The Sydney Morning Herald, 23 September 2019 <https://www.smh.com.au/politics/federal/climate-change-natural-disasters-posing-greater-risk-to-mortgages-moody-s-20190923-p52tzt.html>.

²⁰ Joel Werner, ‘The size of Australia’s bushfire crisis captured in five big numbers’, ABC (online, 5 March 2020) <<https://www.abc.net.au/news/science/2020-03-05/bushfire-crisis-five-big-numbers/12007716>>.

²¹ Jeff Smith and NSW EDO Defending the Environment Advancing the Law, ‘What Will Australia’s Nature Look Like In 50 Years’ Time? (Web Page, 8 September 2014) <https://www.edonsw.org.au/what_will_australia_s_nature_look_like_in_50_years_time>.

²² Australian Government Department of Agriculture, Water and the Environment, EPBC Act List of Threatened Ecological Communities (2020) <<http://www.environment.gov.au/cgi-bin/sprat/public/publiclookupcommunities.pl>>.

While this process is important for capturing slower changes to the environment, it does not provide protections during times of rapid and uncertain change.

The impacts of climate change are largely unpredictable and abrupt. Those of the natural disasters that regularly plague large areas of Australia are equally so. The Committees consider there to be a clear need for legislation that can effectively and urgently address the changing environments and new climactic threats.

Including a greenhouse gas emission trigger as a MNES is both consistent with the objects of the EPBC Act (in particular the need to promote ESD), but will also assist in protecting other MNES. For example, the Committees submit that a greenhouse gas emission trigger would serve to greater protect the Great Barrier Reef.

The Reef continues to be at risk from the effects of climate change, ocean warming and acidification. This is in addition to the effects of over-development, poor catchment management, mineral extraction, and shipping.²³ Onshore developments also result in the destruction and degradation of coral communities and seagrass beds which provide critical habitat for endangered dugongs and turtles.²⁴

Mass bleaching events, which are directly attributed to climate change have resulted in consecutive years of coral bleaching.²⁵ The results of a warming climate continue to reduce the biodiversity of the Reef.²⁶

As outlined by the Great Barrier Reef Marine Park Management Authority in 2019:

*'Climate change is the greatest threat to the Great Barrier Reef. Only the strongest and fastest possible actions to decrease global greenhouse gas emissions will reduce the risks and limit the impacts of climate change on the Reef. Further impacts can be minimised by limiting global temperature increase to the maximum extent possible and fast-tracking actions to build Reef resilience.'*²⁷

Allan Hawke's review of the *EPBC Act* in 2009 (the Hawke Review)²⁸ called for the inclusion of 'Greenhouse Gas Emissions and Climate Change.' The Environmental Defenders Office has proposed the inclusion of greenhouse gas emissions, land clearing, dioxins, wild rivers and wilderness.²⁹ The Australian Labor Party proposed a 'national parks trigger' in 2016.³⁰ As well as this, there have been numerous failed attempts to include new species³¹ and land areas within the scope of the current MNES. Notably, the Great Australian Bight proposal failed in April 2019.³² In December 2019, approval was granted for oil drilling 2 km off the South

²³ Commonwealth of Australia *Reef 2050 Long – Term Sustainability Plan* (July 2018).

²⁴ Great Barrier Reef Marine Park Management Authority 'Coastal Development' (Web Page, January 5 2020) <http://www.gbrmpa.gov.au/our-work/threats-to-the-reef/coastal-development>; Commonwealth of Australia *Reef 2050 Long – Term Sustainability Plan* (July 2018).

²⁵ Great Barrier Reef Marine Park Authority, *Threats to the Reef* (Web Page, January 5 2020) <http://www.gbrmpa.gov.au/our-work/threats-to-the-reef>.

²⁶ Great Barrier Reef Marine Park Authority, *Position Statement Climate Change* (Position Paper, 25 June 2019).

²⁷ Great Barrier Reef Marine Park Authority, *Position Statement Climate Change* (Position Paper, 25 June 2019).

²⁸ Allan Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 2009* (Report, October 2009), III.

²⁹ Australian Network of Environmental Defender's Offices, *Possible new matters of National Environmental Significance under the EPBC Act 1999* (2005).

³⁰ Australian Labor Party, *National Parks Trigger Fact Sheet* (2016).

³¹ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2F4687871%22>.

³² Environment Legislation Amendment (Protecting Dugongs and Turtles) Bill 2019.

³² Environment Protection and Biodiversity Conservation Amendment (Heritage Listing for the Bight) Bill 2019.

Australian coast.³³ While the proposed company has since pulled out, the lack of heritage listing leaves this unique marine environment open for potential future drilling.

The vast number of recommendations in the Hawke Review demonstrate that the EPBC Act currently is unable to adequately protect Australia's environment. Perhaps the most notable and far reaching area missing from the legislation is a 'climate change trigger.'

NSW Young Lawyers declared a climate emergency in November 2019. More than 50 local governments in Australia, and the Australian Capital Territory, have made similar declarations.³⁴ This is a topic of both national and global significance. A report from the United Nations Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services described climate change as a key driver in the 'unprecedented' decline in nature and the 'accelerating' rate of species extinction.³⁵

The Committees also note that the inclusion of climate change as a MNES was recommended by the NSW Young Lawyers Environment and Planning Committee in its submission dated 19 December 2008³⁶ in response to the first independent review of the EPBC Act. It is now more important than ever, given the increasing prevalence of climate change-related natural disasters outlined above, that climate change be incorporated as a MNES to mitigate further damage to Australia's unique flora, fauna and heritage items. The Committees implore the Australian government to take this seriously.

Recommendation 7: the EPBC Act be amended to include greenhouse gas emissions as a MNES.

Groundwater Resources

Groundwater is found across Australia's diverse landscapes, linking together our ecological and hydrological systems.³⁷ Groundwater supports agriculture, extractive industries, domestic use and town water supplies.³⁸

Groundwater is to an extent, already incorporated as a MNES, through subdivision FB of Part 3 of the EPBC Act. However, groundwater is only protected to the extent that a coal seam gas and/or large coal mining development will have a significant impact on groundwater. The Committees submit the protection of water resources (as defined in the *Water Act 2007* (Cth), see also s 528 of the EPBC Act), should extent to any development which is likely to have a significant impact.

³³ Adam Morton, 'Great Australian Bight: Norwegian energy company Equinor given environmental approval to drill for oil', *The Guardian* (online, 18 December 2019) <<https://www.theguardian.com/australia-news/2019/dec/18/great-australian-bight-norwegian-energy-company-given-environmental-approval-to-drill-for-oil>>.

³⁴ Climate Emergency Declaration, 'Climate emergency declarations in 1087 jurisdictions and local governments cover 266 million citizens' (3 October 2019) <<https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/>>.

³⁵ United Nations, *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Global Assessment Report on Biodiversity and Ecosystem Services* (2019), as cited in United Nations, 'UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating' (Web Page, 6 May 2019) <<https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>>.

³⁶ Submission of New South Wales Young Lawyers Environmental Law Committee to the Independent review of the Environmental Protection and Biodiversity Conservation Act 1999 (Discussion Paper), 19 December 2008, <https://www.environment.gov.au/system/files/pages/dacbaf4-0bca-46ee-9271-2fa95ce1b6dc/files/074-nsw-young-lawyers.pdf>

³⁷ Department of Agriculture, 'National Groundwater Strategic Framework 2016 – 2026' (2016).

³⁸ *Ibid.*

The National Groundwater Strategic Framework 2016 – 2026 builds upon water reforms initiated during the Council of Australian Governments (COAG) 1994 meeting and the National Water Initiative 2004.³⁹ The importance of understanding and protecting our groundwater resources are highlighted by the National Water Commissions \$82 million dollar investment into the Groundwater Action Plan. These reforms, initiatives and investments underline the critical value of groundwater across Australia.⁴⁰

Recommendation 8: subdivision FB of Part 3 of the EPBC Act be amended to include a requirement for approval of developments with a significant impact on water resources, irrespective of whether the relevant development relates to coal seam gas extraction or large coal mining developments.

Question 5

Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect MNES and biodiversity, removing the need for regulation in the right circumstances?

The Committees note that certain areas of the current regime have displayed particularly concerning shortcomings and warrant more robust reconsideration. These include:

1. the management of inland water;
2. habitat and ecosystem protection, and the prevention of habitat fragmentation;
3. the permissibility and distribution of land-clearing activities;
4. effective resource allocation; and
5. responding to climate change.

The Committees also note that any new priorities for reform must be accompanied by adequate resourcing and mechanisms to ensure compliance.

1. Management of Inland Water

The health of Australia's waterways and the viability of the fauna that inhabits them has been a highly publicised failure in the national water management regime more broadly in the past ten years. While certain positives have been documented in this time, including a strong fish population recovery in 2011-2014,⁴¹ the recent Royal Commission into the management of the Murray-Darling Basin System has highlighted inland water management as a problem area for the national environmental management regime. This has then manifested itself in, inter alia, the loss of over a million fish in a matter of months due to poor basin and river system health.⁴²

³⁹Department of Agriculture, 'National Groundwater Strategic Framework 2016 – 2026' (2016); COAG 2010, *National Water Initiative Policy Guidelines for Water Planning and Management*, Council of Australian Governments.

⁴⁰ Department of Agriculture, 'National Groundwater Strategic Framework 2016 – 2026' (2016).

⁴¹ Argent, RM (2016) 'Inland water: State and trends' in *Australia State of the Environment 2016*, Australian Government Department of the Environment and Energy, Canberra.

⁴² Murray Darling Basin Authority, *Fish deaths in the Lower Darling* (20 December 2019)

<<https://www.mdba.gov.au/managing-water/drought-murray-darling-basin/fish-deaths-basin/fish-deaths-lower-darling>>

While the above is largely a matter for the Murray Darling Basin Authority and water legislation, the EPBC Act has an evident role to play in a number of concerning trends in recent years,⁴³ including:

- “poor” and “deteriorating” fauna population and viable habitat;
- loss of habitat for vulnerable and endangered amphibious species;
- a decline in wetland abundance and the richness of breeding species;
- ongoing inflation of endangered, threatened and extinct species lists (above and beyond the increase expected as a result of improved monitoring methods alone);⁴⁴ and
- unmitigated drought impacts on a number of water-dependant bird and amphibian species.

2. Prevention of habitat degradation and fragmentation

The long-term viability of vulnerable habitats and ecosystems has continued to be placed under significant pressures; land-clearing (addressed more below), fragmentation, inadequate protections for whole ecosystems and inappropriately streamlined approvals are all threats.

Habitat loss is a primary driver of species reduction and extinction across the board in Australia,⁴⁵ and basic barriers to improvement prevail. Logistically and temporally, many bars for protection are too high for each individual assessment and so, unless there is an obvious, internationally recognised status attached to a certain site or area (e.g. Ramsar Wetlands, World Heritage sites), clearing and development is likely to be approved.⁴⁶

While development need not be congested with assessment and approval processes, the Committees recommend that the efficacy displayed in streamlining approvals be replicated in the streamlining of data collection and strategic planning to ensure that development and environmental protection are equally facilitated in the right places at the right times. For example, the Committees agree with calls from other bodies who have made submissions on this review, including the Environmental Defenders Office, for national protection triggers for ecosystems of national importance and significant land-clearing activities.⁴⁷

3. Land-clearing

While the rate of land-clearing has reduced nationally in the past decade, fragmentation and modification of habitat “remains one of the most significant pressures on biodiversity.”⁴⁸ Moreover, habitat fragmentation resulting from land-clearing remains a strategic problem; it is not only a matter of extent, but also context.

⁴³ Argent (2016).

⁴⁴ Evans K, Bax NJ, Smith DC (2016) ‘Marine environment: State and trends’ in *Australia state of the Environment 2016*, Australian Government Department of the Environment and Energy, Canberra, <<https://soe.environment.gov.au/theme/marine-environment/framework/state-and-trends>, DOI 10.4226/94/58b657ea7c296>

⁴⁵ See analyses of different groupings at Cresswell ID, Murphy H (2016) ‘Biodiversity: State and trends’ in *Australia state of the Environment 2016*, Australian Government Department of the Environment and Energy, <Canberra, <https://soe.environment.gov.au/theme/biodiversity/framework/state-and-trends>, DOI 10.4226/94/58b65ac828812>

⁴⁶ Hepburn, Samantha, ‘Why aren’t Australia’s environment laws preventing widespread land clearing?’ The Conversation (online, 8 March 2018) <<https://theconversation.com/why-arent-australias-environment-laws-preventing-widespread-land-clearing-92924>>

⁴⁷ Walmsley, Rachel, Environmental Defenders Office, ‘Analysis: The EPBC Act review – a once-in-a-decade opportunity’ (25 November 2019) <<https://www.edo.org.au/2019/11/25/analysis-the-epbc-act-review-a-once-in-a-decade-opportunity/>>

⁴⁸ Cresswell ID, Murphy H (2016).

Land-clearing has been identified as a primary threat to biodiversity since the 2001 State of the Environment reports, and while it is slowing, it remains unsustainable and inappropriately located and/or assessed. Fragile ecosystems remain largely unprotected, threatening the natural processes and the biologically significant fauna within those ecosystems.⁴⁹

The cumulative impacts of land-clearing require more robust protection and holistic consideration; each small piece of readily approved land-clearing has represented another cut in this ever-growing problem, more so than a cutting of red tape.⁵⁰ The Committees emphasise that, at this stage, this is more a matter of considering land-clearing proposals less in terms of total area but rather in terms of location of the area cleared. To this end, more comprehensive mapping of ecosystems with respect to proximate ecosystems is required to prevent fragmentation and, in the case of larger projects, the Committees submit that proponents be required to show that potentially irreparable fragmentation will not result from a proposal. Bilateral agreements are likely to play an important role in this process as well in instances of interstate ecosystems, areas on state borders and nationally scarce habitat types.

4. Resource allocation and responses

The Committees note that, nationally, many processes for recognising threatened species and developing plans for recovery appear sound. However, resources for responding to identified issues are inadequate, on the ground efforts are lacking and the output (i.e. recovery of the species) has been largely unsuccessful for some time.⁵¹

It is encouraging, while simultaneously concerning, that improvements in data collection and monitoring have led to a greater number of species being recognised as threatened or endangered in the past decade. However, as this fact illustrates, there has been little success in efforts aimed at removing species from those lists. Biodiversity of flora and fauna alike remains “poor and worsening” in Australia.⁵²

While monitoring improvements can still be made, strategic and fulsome protection and conservation measures are required if the EPBC Act is to be considered a successful instrument. Matters such as the speed of approvals (in which the EPBC has been ‘improving’) is not an appropriate measure for the success of the national environmental protection legislation.⁵³

To this end, the Committees submit that more stringent measures are required in circumstances where species and habitat vulnerability are identified to ensure that they are then protected. For example, the Committees note the abnormally high concentration of threatened or endangered mammals, amphibians and reptiles on the nation’s north-eastern coastline.⁵⁴ This represents a prime location for higher resource allocation and more stringent assessment of proposals.

5. Responses to climate change

The impacts of climate change are only likely to worsen in circumstances where current conditions already threaten the survival of certain species. For example, the Bramble Cay melomys, a rodent with limited habitat, is now considered extinct largely as a result of the manifestations of climate change. That limited habitat

⁴⁹ Hepburn (2018).

⁵⁰ Jan McDonald, ‘Our nature laws are being overhauled. Here are 7 things we must fix’ *The Conversation* (online, 30 October 2019) <<https://theconversation.com/our-nature-laws-are-being-overhauled-here-are-7-things-we-must-fix-126021>>

⁵¹ See comments in Cresswell ID, Murphy H (2016).

⁵² Ibid.

⁵³ Walmsley (2019).

⁵⁴ Cresswell ID, Murphy H (2016).

consisted of vegetated coral cay in the Great Barrier Reef and has now been damaged by more frequent inundation and storm activity, driving the melomys to likely extinction.⁵⁵

More generally, low species distribution and habitat fragmentation are likely to be exacerbated by climate change. Prolonged drought, extreme weather events, restriction of vegetation growth and the augmentation of pest and disease distribution have intensified and are projected to continue to intensify. Accordingly, a legislative response is required to ensure the EPBC Act remains fit for purpose.

The Committees submit that this response may include, but ought not be limited to:

- a broadening of the scope of the precautionary principle for projects in increasingly vulnerable areas;
- more conservative forecasts for species survival and recovery;
- a 'buffer' for environmental water to protect against prolonged drought; and
- consideration of matters pertaining to habitat fragmentation mentioned above.

Recommendation 9: The following areas should be prioritised for reform:

1. management of inland water;
2. habitat and ecosystem protection, and the prevention of habitat fragmentation;
3. permissibility and distribution of land-clearing activities;
4. effective resource allocation; and
5. responding to climate change.

Question 8

Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

It is important for the EPBC Act to be adaptable to changing technology, information and environmental priorities as climate change impacts on the Australian environment. An outcome focussed approach encourages innovation in achieving outcomes in a bespoke way tailored to the specific circumstances of a species, community, or heritage item.

As identified in the Department of the Environment's presentation at the 2014 EIANZ Annual Conference,⁵⁶ it is imperative to have accurate baseline data from which outcomes can be measured. Any amendment to the EPBC Act should make adequate allowance for the enforcement of outcomes based regulation.

Recommendation 10: The EPBC Act should focus on defining and regulating environmental and heritage outcomes that have sufficient specificity to be measured, monitored and enforced. Where environmental and heritage outcomes lack specificity due to a lack of scientific knowledge, the precautionary principle should be applied.

⁵⁵ Gynther I, Waller N & Leung LK-P (2016) *Confirmation of the extinction of the Bramble Cay melomys Melomys rubicola on Bramble Cay, Torres Strait: results and conclusions from a comprehensive survey in August-September 2014*, report to the Queensland Department of Environment and Heritage Protection, Brisbane.

⁵⁶ Department of the Environment, *Outcomes-based environmental regulation: an Australian Government perspective*, EIANZ Annual Conference 2014

Recommendation 11: The EPBC Act should make adequate allowance for the enforcement of outcomes based regulation.

Question 15

Should low-risk projects receive automatic approval or be exempt in some way? How could data help support this approach? Should a national environmental database be developed? Should all data from environmental impact assessments be made publically available?

Should low-risk projects receive automatic approval or be exempt in some way?

Under s 158, the Minister for the Environment (**Minister**) may exempt a person proposing to take an action from the requirement to conduct an environmental assessment and/or obtain approval in relation to the action to which the exemption relates. Currently, such an exemption may only be granted if the Minister is satisfied that it is in the national interest to do so.

Under the EBPC Act, the operation of s 146 strategic assessments in respect of large scale urban planning, allows for pre-emptive approvals for works that may likely have a significant impact on a protected matter, where so long as the outcomes of any such assessment are complied with, there is no need for future assessment or approvals.

Automatic approvals and exemptions for environmental assessments in other jurisdictions

In other jurisdictions, the legislative scheme for carrying out environmental assessments often include generic mechanisms by which a proposed development can be automatically exempted from requiring approval, either in whole or in part, without seeking a specific exemption for that project. For example:

1. In NSW, *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (NSW), exempts particular forms of development from requiring any approval or assessment, where the proposal is a specific form of development, and complies with specific development standards. The types of development specifically captured by this policy are typically low impact works with negligible environmental or social impact. The kinds of development standards required to be complied with can include fairly granular metrics such as distance of the proposed development from a neighbouring property, as well as broader criteria such as not being in land already mapped as subject to a particular environmental hazard or sensitivity.
2. In the ACT and NSW, planning instruments can provide a minimally assessed approval stream, where pre-determined forms of development which meet particular development standards are automatically approved. In the ACT this is referred to as the 'Code' assessment track, and in NSW this is referred to as complying development. While the project is scrutinised by the relevant approval body, this is against the criteria only, rather than the merits of the project as a whole or its environmental impacts generally. More complex assessment is undertaken for development unable to meet the pre-determined criteria.

The criteria used in such exemption regimes are of a highly objective nature, without any subjective or merits based criteria. This includes objective and readily ascertainable features of the proposal such as:

- measurements of spaces of, or within, a development;
- distances between the development and other sensitive items (such as neighbouring properties);

- size of the development;
- whether or not the development is in land mapped as sensitive or subject to hazards;
- the zoning of the land; and/or
- the capacity of the installation (such as the kilowatt capacity of a solar panel unit).

The types of development typically exempted, or automatically approved, under these schemes include low impact works such as:

- building a single dwelling house or granny flat in already urbanised land; or
- minor additions to an existing premises, such as installing pergolas or air-conditioning units.

Benefits of exemption schemes

The primary benefit of such schemes is that they simplify the process for proponents to obtain all necessary approvals before carrying out their project. This enables their proposal to be carried out more quickly and cheaply than if more detailed environmental assessment was undertaken, which can require preparation of detailed expert reports. It also provides more certainty of outcome.

Another benefit is that automatic approvals free the resources of regulators to assess more complex proposals, as they can divert less time (or no time) to reviewing low impact and uncontroversial proposals.

Issues with exemption schemes

The success of exemption schemes often lies with whether there is good scientific and technical data to support the types of development pre-approved, and the criteria selected to differentiate between non-contentious and contentious projects. It relies on the regulator having collated and prepared accurate data on the impacts and mitigation strategies for different forms of development and different regions where the scheme will apply.

Unfortunately such regimes can be subject to political interference or improper influence. For example, an unfettered power for regulators to prepare generic exemption policies or regulations can create potential for developers to lobby politicians or public servants for particular forms of development to be included in an exemption scheme.

Recommendation 12: Should automatic approvals be incorporated into the EPBC Act, consideration must be given to the following factors for each relevant type of development:

- whether the type of development works are objectively low impact;
- the extent of pre-assessment done by regulators, for example, whether the regulator in preparing zoning maps has already collated and considered at an aggregate level data concerning the environmental impacts of particular forms of development, such that individual assessment of projects is unnecessary;
- the availability of data regarding environmental impacts, such as mapping of zoning, flood risk, bushfire risk, geotechnical risk, ecological sensitivity and/or heritage items; and
- any scientific or technical data available regarding environmental impacts and mitigation strategies for particular forms of development, such as town planning reports, strategic assessment reports, and fauna or flora studies.

Recommendation 13: Any mechanism for creating exemption or automatic approval schemes should include safeguards against improper lobbying of government Ministers or departments to improperly influence a new exemption being created. This could include, for example, criteria in the legislation for when it is appropriate to establish a generic exemption or automatic approval scheme for a type of development. Alternatively, the regulation writing authority might be required to provide a statement of reasons.

Potential Models

A number of different models could be adopted by the Commonwealth to establish an exemption or automatic approval regime. These models include:

1. Amending the Act to authorise preparing a Legislative Instrument which can list generic development types which are automatically exempted or approved. The Legislative Instrument could list a number of generic exemptions for particular specific types of low impact works which meet particular criteria. This would essentially reflect how States and Territories allow for exemptions through delegated legislation. Considerations of this method include:
 - a. **Benefits** - creating a single, consistent national regime. Input from states could be obtained for example through a national inquiry panel consisting of recognised scientific experts, State, Territory and Commonwealth Government officers, and community representatives. Use of delegated legislation would allow more flexibility to create, alter, and remove exemptions or automatic approvals as better scientific data is ascertained.
 - b. **Potential pitfalls** – difficulties in preparing a national exemption, as it would require consistent and available data from each State and Territory to support inclusion of a particular form of development.
2. Amending the Act to authorise amending or entering into bilateral agreements which deal with automatic exemptions or approvals. Under this mechanism, a State or Territory could negotiate to include particular exemptions or automatic approvals for development in their jurisdiction. Considerations of this method include:
 - a. **Benefits** – allowing more flexibility so that each state has more input into the regime, and the criteria and types of development better reflect the conditions in that State or Territory. The Commonwealth can scrutinise whether suggested exemptions by that state are appropriate.
 - b. **Potential pitfalls** – that the approach will not be nationally consistent.
3. Amending the Act to include a provision that low impact development which is exempted or automatically approved under state or territory planning legislation is also automatically exempted or automatically approved under the EPBC Act. Considerations of this method include:
 - a. **Benefits** – imposing the least administrative burden on the Commonwealth to implement.
 - b. **Potential pitfalls** – it is possible that State or Territory legislation may inappropriately or unjustifiably exempt or automatically approve particular types of development, with the consequence that the EPBC Act is circumvented as the proponent can rely on potentially weak State legislation. This may weaken Commonwealth scrutiny over contentious projects in instances where economic development pressures and/or State or Territory infrastructure priorities may conflict with areas of high environmental value.

How could data help support this approach?

To assist the process of identifying low-risk works appropriate for exemptions, currently available data from State, Territory and Commonwealth Databases could be used and/or consolidated to identify auto-exemptions for classes of activities across known NES areas. This could include:

1. analysing previous and current exempted project approvals made under s 158 exemptions, to ascertain any patterns or types of development for potential of inclusion;
2. using existing Commonwealth datasets of flora, fauna, biodiversity, Indigenous and non-Indigenous heritage, and contamination; or
3. using existing State and Territory datasets of flora, fauna, biodiversity, Indigenous and non-Indigenous heritage, contamination, geotechnical risk, flood risk, bushfire risk, and other environmental sensitivities or hazards.

Such data could be used to either frame a nation-wide list of exempted development, or assist the Commonwealth in assessing the appropriateness of state by state exemptions.

Should a national environmental database be developed?

The Ecological Communities of National Environmental Significance Database contains spatial information that includes data on the distribution of ecological communities related to the EPBC Act.⁵⁷

An expanded and searchable database could be developed. Such a database could map matters dealt with under Commonwealth and State legislation dealing with town planning, geotechnical hazards, flood and bushfire risks, contamination, European and Aboriginal heritage, biodiversity, etc. Many states already collect and maintain databases and maps of data of this nature, for example the NSW Planning Portal website. The database could just deal with Commonwealth regulated environmental matters, or also include datasets from each State concerning environmental matters regulated in that jurisdiction.

Such a database could allow public users to generate a report to determine whether MNES, or other matters protected by the EPBC Act exist in a specific area of interest. For example, the NSW Planning Portal website has this capability. This may provide developers and incoming purchasers of land greater certainty over their approval obligations, by allowing them to ascertain whether an automatic exemption or approval applies to their property, and any other environmental considerations.

This database could assist regulators with the process of agreeing or preparing automatic exemption or approval regimes, as use of data encompassing indigenous significance and heritage, economic, demographic, ecological, geographical, bush fire, flood hazard and other climatic data, could be used to identify or exclude certain development from automatically approvals.

The database might also assist regulators to assess projects, by allowing them to fact check information made in an application, and identify the level and complexity of assessment required for a particular project.

Practical challenges for such a national database include:

- the cost and challenge of collating existing State, Territory and Commonwealth datasets, including harmonising potentially inconsistent data sets and data collection methods, and potentially having to assist states to compile this data and present it in a harmonised format;
- risks of data integrity and security; and
- responsibility and funding of on-going maintenance of website and updating the data.

⁵⁷ See 'protected matters' search tool, <http://www.environment.gov.au/webgis-framework/apps/pmst/pmst.jsf>.

Recommendation 14: That the Commonwealth explore (in consultation with the States and Territories) a process and plan to establish a searchable online national database of environment and planning data, which aims to consistently map matters dealt with under Commonwealth and State legislation dealing with town planning, geotechnical hazards, flood and bushfire risks, contamination, heritage, biodiversity, etc.

Should all data from environmental impact assessments be made publicly available?

Generally speaking, it is ideal for government decision making processes to be open to public scrutiny, including access to records which underlie that decision making process. The importance of such accountability and scrutiny is reflected in the Commonwealth Government open data access policy.⁵⁸

Confidence in the assessment scheme and legislation is facilitated by maintaining transparency and accountability of decisions, by allowing members of the public to assess the competency and appropriateness of assessment procedures. Often members of the public may have an interest in the assessment process and outcome of a project. The availability of application materials and assessments may assist in satisfying the public that the decision made was appropriate based on the evidence provided by a proponent in support, or otherwise allow them to challenge decisions which have been made in breach of the law.

It would be appropriate for material to be withheld where it contains sensitive information such as individual's personal information, or matter of national security or defence.

Publicly available documents should include material included with the Proponents' application or subsequently submitted, correspondence between the Proponent and approval body during the application and assessment process, records of decisions made by the approval body, and any other information used to inform the deliberation process.

Recommendation 15: Environment impact assessments should be made publically available, unless they contain sensitive information about a legal person or a matter of National security or Defence, of which case it may be appropriate to redact the document in whole or part.

Question 16

Should the Commonwealth's regulatory role under the EPBC Act focus on habitat management at a landscape-scale rather than species-specific protections?

The Committees note that a significant range of categories of ecosystems across the country are susceptible to adverse impacts caused by, amongst other things, soil erosion, flooding events, introduced species and natural habitat loss; all of which are exacerbated by climate change.

It is considered to be ecologically myopic to focus only on a single threatened or endangered species when the sustainability of that species' habitat is dependent on a range of other species, whether they be flora or fauna, which may not be afforded the same level of protection. This is particularly true when the impacts caused by overdevelopment result in the removal of habitat that, despite the presence of an endangered

⁵⁸ Commonwealth Governments open data access policy statement, Commonwealth of Australia 2015.

species, is permitted with inadequate offsetting or biobanking measures put in place as conditions of development consent.

Instead, significant species ought to have their habitats (regardless of the health or extent of sprawl of those habitats) afforded the same level of protection as the species themselves, in acknowledgement of the crucial role that a healthy habitat plays in ensuring the sustainability of a species in a particular locality and on a broader national scale.

This would, naturally, have the concomitant effect of affording higher levels of environmental protection on other species that are necessary to the health and survival of the habitats of those species listed in the EPBC Act. However, the Committee acknowledges that this would elevate a substantial number of species and habitats to a level of environmental preservation that would cause an imbalance in, and inflexibility of, the various State-level planning and development instruments.

Accordingly, it is recommended that these broader, 'landscape-scale' assessment requirements only supplement rather than replace project and site-specific assessments, but that landscape-scale habitat management be incorporated into the EPBC Act as a mandatory requirement (such as, using NSW as an example, requiring a referral to be made in the same manner as is standard with an integrated development application requiring general terms of approval from other statutory bodies). The Committees note that a similar recommendation was made in the 2009 Hawke Review, but that this additional level of environmental impact assessment was not incorporated by the federal government.

An alternative to the application of landscape-scale environmental impact assessment in this fashion would be to consult and request each State and Territory to pass a uniform environmental protection and impact assessment instrument, in a similar fashion to the reforms to the Australian Consumer Law and Trade Practices Acts in various states.

If implemented properly and at the right place in the various State and Territory environment and planning statutory frameworks (such as, again using NSW as an example, at the State Environmental Planning Policy level), this would enable consent authorities to leverage their own internal ecological experts to assess the impact of proposed development on the habitats of species listed in the EPBC Act and ensure that landscape-scale habitat management is quickly and cheaply yet effectively handled without any substantial costs implications or additional time introduced into the assessment process.

The Committees note in concluding this response that this high level, strategic assessment-style habitat management process cannot and should not replace site-by-site environmental assessment.

Recommendation 16: The Commonwealth, in consultation with State and Territory governments, amend the EPBC Act to include an additional level of landscape-scale environmental impact assessment for any habitats containing a listed species that must be adhered to at the state level.

Question 23

Should the Commonwealth establish new environmental markets? Should the Commonwealth implement a trust fund for environmental outcomes?

Markets create an effective incentive for ecosystem preservation and services that may otherwise not be seen as creating a specific benefit to an individual due to lack of ownership in the process and its outcome. It is important however to be able to understand and attribute a value to ecosystem processes and to define and assign ownership to such systems. Not all systems can appropriately be captured by an environmental market, specifically where the ecological system is not clearly defined, verifiable or enforceable and cannot be

transferred.⁵⁹ Further, where there are high levels of scientific uncertainty around a system, or the system is likely to be the subject of greater State interference at a later point in time (devaluing the market), a market based approach is not appropriate.

Recommendation 17: Environmental markets should not be established for ecological systems for which there remains scientific uncertainty in relation to (without limitation) its assessment, categorisation or threats, or that is not capable of being adequately defined and valued.

As environmental markets are not appropriate to value and incentivise environmental outcomes in all areas, regulation of impacts on ecological systems remains important to complement or supplement market based approaches. For example, restriction on the allowable impact to an ecological system is likely to create value in the environmental market for that system. However for this to be effective in achieving environmental outcomes, the value in the market needs to be sufficiently formulated to ensure no net impact to the ecological system. Similarly, where no market should be established by reason of for example scientific uncertainty, regulation will continue to be the primary tool for the Commonwealth in achieving environmental outcomes.

Recommendation 18:

- Effective regulation should remain a key focus in complementing and supplementing environmental markets to achieve environmental outcomes.
- Any new environmental markets should be the subject of adequate public consultation to ensure stakeholders are given the opportunity to review and make submission on new market models.

⁵⁹ Murtough, G., Aretino, B. and Matysek, A. 2002, Creating Markets for Ecosystem Services, Productivity Commission Staff Research Paper, AusInfo, Canberra.

Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.




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