Environmental Justice Australia

Submission

in response to

The second independent 10 year review of the EPBC Act

prepared by

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About Environmental Justice Australia

Environmental Justice Australia is a not-for-profit public interest legal practice. We are independent of government and corporate funding. Our legal team combines technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to community-based environment groups, regional and state environmental organisations, and larger environmental NGOs, representing them in court when needed. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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1. Introduction

As evidenced in the *Australian State of the Environment Report*[1] (SOE report) and the Australian National University's recently released *Australia's Environment in 2019* report[2], the state of the environment has declined significantly since the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) came into force. The ANU gave the state of the environment for 2019 a score of 0.8 out of 10 – the lowest score since at least the year 2000 - based on 15 indicators including threatened species, tree cover, plant growth, river flows and wetland. Scores decreased in all states and territories. Clearly our current system of environmental laws at the federal and state level are not meeting even basic tests of success.

It is important to remember the context of the EPBC Act when it was drafted over 20 years ago. It was a significant step forward for the Commonwealth at the time. It was not considered to be a perfect solution to the problems, even at the time of drafting. Rather it reflected a complicated negotiation with state governments, the prevailing legal view at the time of the Commonwealth's power to legislation with respect to the environment under the Constitution, and what would be politically acceptable federally.

However much has changed since then. The biophysical environment has changed significantly, with acceleration of climate impacts, serious and ongoing decline in health of the environment, and the catastrophic impacts of the 2019/2020 bushfires. The bushfires are estimated to have burnt over 12.6 million hectares across the continent.[3] In NSW and Victoria alone over 20% of the country's temperate broadleaf and mixed forest biome burned, a globally extraordinary extent.[4] An estimated billion birds, mammals and reptiles have been killed or affected by the fires, together with many more billions of invertebrates, plants and other organisms.[5] Much of this will not recover.

The other significant change since the EPBC Act was drafted is the evolution of Commonwealth's powers to make laws for what have traditionally been considered state matters, as a result of major constitutional High Court cases. It is now well recognised that the Commonwealth has much greater powers to regulate in a broad range of areas previously considered to be state matters, including environmental matters, provided it is done in accordance with Constitutional law.[6]

These things combined warrant an overhaul of our federal environmental laws, refocusing them so that Australia can start to reverse the decline in environmental trends and protect Australia's critical natural assets.

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[1] Available at https://soe.environment.gov.au/
[2] Available at https://www.wenfo.org/aer/
[3] See: https://www.abc.net.au/news/science/2020-03-05/bushfire-crisisfive-big-numbers/12007716
[4] Boer, M.M., Resco de Dios, V. & Bradstock, R.A. Unprecedented burn area of Australian mega forest fires. Nat. Clim. Chang. 10, 171–172 (2020). https://doi.org/10.1038/s41558-020-0716-1
[5] See: https://sydney.edu.au/news-opinion/news/2020/01/08/australianbushfires-more-than-one-billion-animals-impacted.html
[6] See for example, Australian Panel of Experts in Environmental Law (APEEL). 'Constitutional authority of the Australian Government to make next generation environmental laws', Technical Paper 2 - Environmental Governance (2017), pp 13-17.

There are four overriding principles that should guide the independent review of the EPBC Act, and the government's response -

- **Ecological stewardship** should be the primary focus and goal in the way our environmental laws are formulated and implemented;
- Australia's premier federal environment law must include **climate change** adaptation and mitigation.
- I**ndigenous rights and knowledge must** be recognised in federal environmental laws
- Federal environmental laws must be capable of effectively **responding to ecological crises** such as the devastating 2019/2020 bushfires.

1.1 Comments about the independent review

We express our serious concerns about the lack of environmental law or ecology expertise on the review committee. This, coupled with the lack of direct consultation with environment and conservation groups and ecology experts during the submission period due to the COVID-19 lockdown gives us significant concerns about the outcomes of this review. While the submission deadline was appropriately extended significantly due to the bushfire crisis, the timeframe for the interim and final review reports was not, meaning that the timeframe for the independent review team to fully consider submissions and discuss their content with stakeholders is seriously compromised. The timeframes for the interim and final review report should be extended until after the COVID-19 crisis passes, to allow proper consultation and consideration of the issues.

2 The need for a new generation of federal environmental law

As can be seen from the evidence of Australia's declining environment, the EPBC Act is not providing anywhere near adequate protection of the environment, and in particular, is not able to cope with the increased challenges Australia faces with species extinction and climate change.

Although targeted amendments to the EPBC Act could provide incremental improvements in some areas, the root problems with the Act could not be addressed without substantial amendments that would make an already poorly drafted Act unmanageable.

For the Commonwealth to hold an effective leadership role in managing Australia's environment it requires a suite of regulatory tools that are fit for purpose. These include both mechanisms to avoid, control and mitigate impacts on the environment, and proactive provisions that enable protection of key environmental values. We do not think this can be achieved by amendments to the EPBC Act. Rather a new federal environmental law - a National Environment Act - is required which is simpler, contains clear duties on decision-makers, puts a greater focus on bioregional planning, and contains clear and measurable outcomes that the Commonwealth and the states must achieve. In some cases it should also include prescriptions or processes for how to achieve those outcomes, where doing so would provide certainty, efficiency and better environmental outcomes. Replacing the EPBC Act with

new federal environmental laws is supported by numerous environmental law experts[7] as well as being a key recommendation of the first independent 10 year review of the EPBC Act led by Alan Hawke (the Hawke review).

In this submission, we make recommendations about what a new National Environment Act should contain. In the alternative, this could be read as being amendments to the EPBC Act, with the caveat outlined above. Therefore this submission frequently uses the "The Act" to apply to the EPBC Act, or a new federal environmental law.

Recommendation: The EPBC Act should be replaced with a new federal environmental laws - the National Environment Act - that protects and restores our natural environment, strengthens our democracy and supports community involvement.

3 Framework and key elements of new environmental laws

We set out below the framework and key elements of a new federal environmental law that focuses on biodiversity protection, but which is expanded to include other nationally significant environmental matters which require a national response such as climate change and air pollution. A number of these elements are discussed in more detail throughout the submission.

The Commonwealth should have a suite of tools that enable it to promote ecological stewardship, in a way that would more effectively and efficiently protect the environment.

3.1 Key elements of new national environmental laws

3.1.1 National Environment Plan

New legislation should require the Commonwealth to develop an overarching plan for Australia's environment. It should include national priorities, goals and metrics to protect and restore the environment in key areas regulated under the Act such as climate, native species and ecosystems, pollution, heritage, protected areas, land clearing etc.

3.1.2 National Environment Impact Assessment of National Environment Matters

A new federal environment Act should contain an expanded list of matters of Matters of National Environmental Significance (MNES) under the new term National Environment Matters, for which the Commonwealth has regulatory responsibility. Any person taking an action which is likely to trigger a specific impact threshold for a National Environment Matter must refer the action for environmental impact assessment (EIA) and a decision as to whether the action can go ahead or not. Most National Environment Matters would have other conservation mechanisms in the Act too e.g. recovery and management plans. The trigger thresholds would include consideration of cumulative impacts and climate considerations. The Act should require decisions to give effect to the objects and purposes of

[7] See for example the work of the Australian Panel of Experts on Environmental Law at http://apeel.org.au/

the Act, comply with decision-making criteria in the Act, and be consistent with all relevant national plans and standards made under the Act, including recovery and bioregional plans.

3.1.3 Environment Plans

The Act should require or allow a number of environment plans to be made for specific areas that are the subject of the Act. There should be different types of plans, depending on the purpose of the plan and the Constitutional head of power that its made under. All plans must be consistent with the National Environment Plan, give effect to the objects and purpose of the Act, and comply with decision-making criteria under the Act. The plans would include:

- Bioregional plans
- Threat abatement plan
- Recovery plans
- Pollution abatement plans
- Management Plans for Ecosystems of National Importance, World Heritage Areas and Ramsar Wetlands

3.1.4 National standards and targets

The Act should contain a new tool which would allow the Commonwealth to regulate nationally significant matters, in a different way - power for the Minister or the National Environment Commission to make environmental standards in regulation (in a situation where a national plan is not required/provided for). The non-regression principle would assist in preventing standards from being weakened by successive governments and State laws must not override or undermine national standards e.g. target to phase out single use plastic, conserve high conservation value vegetation or rehabilitation requirements for mining operations.

3.1.5 Conservation agreements / conservation covenant mechanisms

The Commonwealth should have the power to make in perpetuity conservation agreements / conservation covenants with any entity, including private landowners. The Act should state that agreements and covenants must comply with all relevant plans under the Act and have a binding effect on the title of any property on which they apply.

3.1.6 Data gathering and reporting

To support planning and decision-making under the Act, a system of National Environment Accounts should be developed, administered by the National Environment Commission, which would track key environmental indicators and their extent, condition and threat status over time. The Commission should report to Parliament against the goals and metrics identified in the National Environment Plan annually.

3.1.7 Provisions to deal with crises such as bushfires

The bushfires catastrophe is an example of the broader climate crisis, and biodiversity protection laws need to respond to this. The Act requires a suite of emergency provisions to deal with major crises like the bushfires, and significantly improved monitoring and accountability. This includes provisions such as the power to make emergency listings for threatened species and ecological communities and other relevant matters under MNES; a greater focus on threat abatement, and the ability for the Minister to more easily make new MNES.

Recommendation: The new National Environment Act should contain a range of powers, tools and requirements to more effectively regulate the environment such as a binding National Environment Plan, Environment Plans, standards and targets, and emergency provisions.

4 Role of the Commonwealth and the EPBC Act

4.1 The Commonwealth's leadership role in protection of the environment

Australia's system of environmental laws does not use the combined strengths of the Commonwealth and the States to achieve a strong and cohesive system of national environmental law. There is a lack of national goals and direction, and environmental laws provide differing and inadequate levels of protection across jurisdictions. It is unclear who is ultimately responsible for ensuring Australia's environment is managed well. A lack of nationally consistent monitoring and reporting makes evidence-based decision making difficult for governments and increases costs for businesses attempting to comply with eight different, often-changing regulatory regimes.

A truly national approach to environmental protection would build on Australia's international responsibilities, and use the strengths of the Commonwealth and the strengths of the States to create an effective national system of biodiversity protection.

There is a clear and essential role for the Commonwealth Government to lead the development of a national framework for environmental protection and restoration. The Commonwealth Government should take a greater role in regulating environmental protection, including by increasing the range of matters that it directly regulates, strengthening its regulation of the matters already within the EPBC Act, and in appropriate cases setting national standards that all states must comply with. The Commonwealth Government has capacity to bring authority and resources to environmental governance and it should do this in a way that raises the standard of environmental protection across Australia.

National leadership under a new environmental framework should deliver:

- Accountability for the improvement of environmental indicators;
- Development of national goals, standards and reporting;

- Protection for specific parts of the environment that are considered to be nationally significant or where a national response is the most effective and efficient solution; and
- Coordination of multiple jurisdictions and regulatory regimes.

A well drafted Commonwealth environmental law, combined with independent and well resourced institutions could achieve all these things. These are discussed below.

4.2 Using the strengths of the Commonwealth to lead environmental protection

New federal environmental laws should provide the Commonwealth with all the powers it needs to fulfil a greater leadership role in the protection of Australia's environment.

- The Act should ensure the Commonwealth retains primary regulatory responsibility for an expanded list of matters of national environmental significance (see section 7 below).
- The Act should give the Commonwealth power to set binding national standards and objectives that all states must adhere to, in order to bring all states and territories up to a higher and consistent national standard. This includes in new areas of national environmental significance where the Commonwealth would not directly regulate, but wants to ensure a high a consistent level of protection is achieved across Australia, such as for air pollution.
- In order to avoid duplication of processes, the Act should allow the Commonwealth to delegate environmental impact assessment functions under the Act to the states only in certain circumstances namely:
    - For assessment of environmental impacts of project only (ie assessment bilateral agreements), **not** a delegation of its approval powers (approval bilateral agreements). **All approval powers for nationally significant matters should be retained by the Commonwealth**.
    - Any accreditation and delegation of assessment powers to the states must done using independent auditors to ensure state laws meet Commonwealth standards.

We do not support Commonwealth powers being handed over to the States in circumstances other than independently audited assessment bilateral agreements. We do not support self-regulation of any kind. There are very few examples of effective industry self-regulation, and numerous examples of the failures of self-regulation schemes.

Recommendation: Australia's system of environmental laws should use the combined strengths of the Commonwealth and the States to achieve a strong and cohesive system of national environmental law. The Commonwealth Government should lead the development of a national framework for environmental protection and restoration and take a greater role in regulating environmental protection.

5 Principles that should govern federal environmental laws

5.1 Principles of the Act

Ecologically sustainable development (ESD) has been routinely adopted as a guiding principle in Australian environmental laws at the state and commonwealth level since the 1992 Intergovernmental Agreement on the Environment. However it is widely recognised now that ESD is not a useful guiding principle in law,[8] and should be replaced with a set of principles that give greater guidance to decision-makers than an elusive request to 'balance' competing considerations.

Commonwealth environmental law should contain a number of principles that decision-makers must *act in accordance with* when making decisions under the Act. Key principles include:

- The principle of **non-regression** to environmental goals and protections, and continuous improvement in environmental standards and management over time.
- The principle of free, prior and informed consent of indigenous groups for relevant actions (**principle of free, prior and informed consent**).
- Updated ecologically sustainable development principles ("ESD+") including:
    - Taking preventative actions against likely harm to the environment and human health (**prevention of harm**).
    - Taking precautionary actions against harm that would be serious or irreversible, but where scientific uncertainty remains about that harm; and engaging transparently with the risks of potential alternatives (**precautionary principle**).
    - The present generation have an obligation to ensure:
        - that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations (**intergenerational equity**), and
        - that environmental costs, benefits and outcomes are borne equitably across society (**intra-generational equity**).
    - Ensuring that biodiversity and ecological integrity are a fundamental consideration in decision-making, including by preventing, avoiding and minimising actions that contribute to the risk of extinction (**biodiversity principle**).
    - Ensuring that the true value of environmental assets is accounted for in decision-making – including intrinsic values, cultural values and the value of present and

[8] See for example the comprehensive discussion of ESD by the Australian Panel of Experts on Environmental Law in Australian Panel of Experts on Environmental Law, The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, 2017) available at http://apeel.org.au/papers

future ecosystem services provided to humans by nature (**environmental values principle**); and

- That those responsible for generating waste or causing environmental degradation bear the costs of safely removing or disposing of that waste, or repairing that degradation (**polluter pays principle**).

- Increasing accountability in decision-making by guaranteeing the right for members of the public to (a) have access to reliable and relevant information to facilitate a good understanding of risks of harm to human health and the environment and of how decisions are made under the Act; and (b) be engaged and given opportunities to fully participate in decisions made under the Act; (c) have their interests taken into account in decisions made under this Act and (d) have to the right to appeal decisions and enforce breaches of the law (**principle of accountability**).

Recommendation: The Act should contain clearer guiding principles, including an expanded concept of ecologically sustainable development (ESD) as outlined above.

5.2 Suggested wording for the Objects of the Act

The current objects of the Act are fairly strong, but they could be stronger. We suggest the primary object of a new Act should be:

> "to conserve, protect and recover Australia's environment, its natural and related cultural; heritage and biological diversity including genes, species and ecosystems, its land and waters, and the life-supporting functions and the multitude of benefits to Australian society that they provide."

The Act should also include a number of secondary objects, including with regard to protecting biodiversity and ecological integrity. These should include:

a) To provide **national leadership** and partnership on the environment and sustainability, and to achieve ecologically sustainable development;

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

c) To ensure fair and efficient decision-making; **government accountability**; early and ongoing community participation in decisions that affect the environment and future generations; and improved public transparency, understanding and oversight of such decisions and their outcomes;

d) To recognise **Aboriginal and Torres Strait Islander** peoples' knowledge of Country, and stewardship of its landscapes, ecosystems, plants and animals; to foster the involvement of

these First Australians in land management; and expand the ongoing and consensual use of traditional ecological knowledge across Australia's landscapes;

e) To contribute to the reduction of global **greenhouse gas emissions** by ensuring that decisions under this Act are consistent with Australia's equitable obligations to limiting the increase in global warming to well below 2℃ and pursuing efforts to limit it to 1.5℃ above pre-industrial levels, and minimise damage to the environment from unavoidable impacts of climate change, prioritising early action to avoid future additional cost and risks.

f) To ensure that Australian plants, animals and their habitats are given the best chance of adapting to the impacts of **climate change**.

g) To protect human and environmental health by **reducing pollution** to as low as possible.

h) To fulfil Australia's **international environmental obligations** and responsibilities, in particular to take all steps necessary and appropriate to achieve the purposes of the following treaties, conventions and their subsidiary instruments:

(i) the World Heritage Convention;

(ii) the Convention on Biological Diversity;

(iii) the Ramsar Convention on Wetlands of International Importance;

(iv) the Bonn Convention on the Conservation of Migratory Species of Wild Animals;

(v) the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);

(vi) the United Nations Declaration on the Rights of Indigenous Peoples; (vii) the United Nations Framework Convention on Climate Change (as applicable to emissions reduction and carbon management under the Act);

(viii) United Nations Convention to Combat Desertification;

(ix) special bilateral or multilateral conservation agreements (including agreements with Japan, China and the Republic of Korea to protect migratory birds in danger of extinction) and

(x) any other international agreement relevant to the objects of this Act

a) To recognise and promote the intrinsic importance of the environment and the value of ecosystem services to human society, individual health and wellbeing.

b) Ensure the Minister and all agencies and persons involved in the administration of the Act must act consistent with, and seek to further, the primary object of the Act.

Recommendation: The primary object of the Act should be stronger, and should be supported by a number of strong and clear secondary objects covering biodiversity, indigenous rights, climate change, pollution and accountability.

5.3 How should the principles and objects be achieved?

One of the key failures - if not the key failure - of the EPBC Act in achieving any kind of measureable improvement in the environment is the high level of discretion afforded to decision-makers and policy-makers under the Act. The Act contains no targets for improvement, and no requirement to make decisions that will improve the condition of the environment. The key parts of the Act – particularly in relation to the assessment and approval scheme in Chapters 2 and 4 – are merely a shopping list of things to assess and consider, than can then be set aside by competing interests. It is no wonder that the Act not achieved a measurable positive environmental impact.

If this discretionary decision-making, unattached to any particular goal or requirement, is not rectified, the condition of the environment will continue to decline. The Act must instead include a combination of goals, targets, and mandatory duties and requirements that decision-makers must adhere to. This is discussed further below. In relation to the objects and principles of the Act, the Act must require all decision-makers and agencies to exercise their powers, functions and decisions under the Act to achieve the Act's objects and make decisions in accordance with the Act's principles.

This removal of discretion will make the Act, and the decisions made under the Act, clearer and more predictable, will reduce costs and increase certainty, while providing improving environmental indicators.

Recommendation: The objects and principles of the Act should be achieved by requiring decision-makers to exercise their powers, functions and decisions under the Act to achieve the Act's objects and make decisions in accordance with the Act's principles.

6 Increasing Indigenous involvement, knowledge and rights

The treatment of Aboriginal rights and interests in environmental law, including the EPBC Act, is infected fundamentally and unfortunately by the tendency of law to fragment, compartmentalise and frequently marginalise those rights and interests (and their expression), confining them to questions for instance of the exercise of native title rights and interests. At their highest environmental and natural resources laws tend to employ statutory models of consultation, such as in planning contexts, or, rarely but importantly, in adaptation of protective legal schemes to issues or matters in which Aboriginal interests are significant or even predominant. The examples of the declaration of the Budj Bim Cultural Landscape as a World Heritage Property or of co-management regimes for certain national parks under the Act (eg Bodoree, Kakadu) are relevant in the latter context.

In our view, the mere consultation approach is insufficient to effect properly Aboriginal rights and interests in environmental management and the adaptation of existing protective mechanisms (eg heritage listing or national park establishment) is important but ad hoc and does not deal with how environmental law can or should systematically reconcile with the unique and distinctive place of Aboriginal peoples.

In short, the EPBC Act perpetuates a terra nullius conception of the environment, softened with terms of recognition and very limited consultation provisions. A post-colonial EPBC Act is needed or at least legislative reform that moves genuinely in that direction.

A cornerstone of this shift needs to be incorporation of concepts of what is termed 'free, prior and informed consent' of Aboriginal communities in environmental decision-making. Forms of the right to FPIC are contained in, relevantly, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Comparable or analogous provisions are contained in the Biodiversity Convention (Art 8(j)), as well as 'participatory management' provisions under treaties such as the Ramsar Convention. The drafting of these various international instruments varies. For instance, UNDRIP engages a strong and express discourse of indigenous rights, including obligations on states to give effect to rights in relation to land, waters and natural resources. The CBD and Ramsar Convention refer to state obligations to implement procedural (participatory) rights as well as benefit-sharing. Work under the CBD also has established models of integrated assessment (Akwe:Kon Guidelines) placing indigenous interests and engagement at the heart of environmental assessment processes. In Australia, these models inform water resources management for instance.

In our view, a post-colonial track for the EPBC Act needs to give operational expression to these various obligations, as well as to the unique and distinctive relationship of Aboriginal peoples to land, waters and resources now widely recognised in Australia law. It presently does not. More generally, the important and leading role for Aboriginal communities in management, recovery and restoration of biodiversity in Australia needs to be recognised and given effect through an amended Act.[9]

We refer the Reviewer to and we endorse the proposed reforms set out by APEEL in Technical Paper 8, which include the following recommendations:

> … Australian environmental law should include the principle of FPIC by Aboriginal communities in actions significantly affecting them or their interests. The operation of that right might be framed in the following manner:
>
> - The right of FPIC should be framed as deriving from:

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[9] The *Final Report of the SA Royal Commission into the Murray Darling Basin* (2018), Ch 11 is instructive both at the level of general principles of legislative recognition of Aboriginal peoples in land and resource management (in that case, water resources) and specific proposals for legislative amendment. The Commissioner concluded, at pp 500-501:

> The overwhelming evidence of the Basin's traditional owners is that its waterscape is intrinsic to their cultural identity. They have deep, valuable cultural knowledge about the behaviour of its ecosystems that should be employed centrally in the co-operative Federal scheme established by the Water Act for its restoration and management.

The Commissioner recommended adoption of reform proposals from one of the peak Aboriginal bodies (NBAN) which is also relevant to the EPBC Act:

> *NBAN recommends that, in order to more consistently give effect to the CBD, such as Article 8(j), there could be an amendment to section 21 of the Water Act, to ensure consistency with how the biodiversity elements of the convention are treated within the Water Act and how the Act treats the cultural rights of Aboriginal Peoples.*
>
> *…Insert new Section 21(2)(a)(iii)*
>
> *"the fact that the cultural rights of Aboriginal People have been adversely impacted, as a result, and require special measures to ensure consistency with relevant international agreements".*

- an obligation 'to consult and cooperate…in order to obtain consent';
- an obligation properly grounded on voluntary and fully informed participation, commenced early in the planning or proposal-making stages of the relevant actions; and
- an obligation operating along a spectrum from consultation to accommodation or veto, depending on the circumstances (such as the nature of rights and interests affected, the scale of actions, and so on).
- A right attached to environmental actions at key points of decision-making cycles, such as the referral stage of proposals, the bioregional assessment and planning stages of landscape management, or nomination for heritage listing.
- A right attached to those stages where an Aboriginal community can show their interests are likely to be affected significantly, specifically as those interested are expressed in impacts on connections to land or resources. 'Connection' should be understood in a wide, rather than narrow, sense;
- The right to FPIC under national environmental legislation is a 'reserved' right where other forms of legal rights or interests, such as recognised through title, agreement or allocation, are not available to an Aboriginal community who seek participation in environmental or natural resources governance and decision-making.

Recommendation: The Act should to give operational expression the free, prior and informed consent obligations enshrined in international instruments, as well as to the unique and distinctive relationship of Aboriginal peoples to land, waters and resources now widely recognised in Australia law.

7 Matters of national environmental significance

The current list of Matters of National Environmental Significance (MNES) are very narrow and do not reflect the full range of environmental matters that are in fact nationally significant. Reliance on such a narrow list effectively divides the environment up into slices and prevents the Commonwealth from conducting holistic assessments of significant impacts.

The Australian Government should retain existing MNES and create an expanded list of MNES that provides for national protection of critical environmental values. As noted above, and set out by the Australian Panel of Experts on Environmental Law, the Commonwealth has significant powers to expand the current list of MNES.[10] We endorse the Environmental Defenders Office's recommendations for an expanded list of MNES namely:

- Australia's parks and reserves
- Critical habitats and climate refugia

[10] Australian Panel of Experts in Environmental Law (APEEL). 'Constitutional authority of the Australian Government to make next generation environmental laws', Technical Paper 2 - Environmental Governance (2017), pp 13-17.

- Impacts from land clearing
- Greenhouse gas emissions and air pollution
- Water resources
- Ecosystems of National Importance
- Protecting against invasive species
- Vulnerable ecological communities.

The way MNES are implemented can also be significantly improved. MNES should be linked to clearer tests of significance to determine if the Act is triggered, that link back to the targets and goals set out in the National Environment Plan. Once impacts are assessed there should be clear requirements on a decision-maker when determining whether to approve or not approve an action, and if approved what conditions to apply, which link to the standards, bioregional plans, targets etc in the Act, as set out above. In some cases, adverse impacts should be prohibited and must not be approved (eg critical habitat, endangered and critically endangered species).

There should also be a requirement to consider cumulative impacts (in conjunction with good bioregional planning under other provisions of the Act) which is a significant failing of the current regime.

Environmental impact assessments of the MNES should be depoliticised, their quality and integrity improved, and their timeframe sped up by being under the remit of a new, fully resourced, independent National EPA (discussed below). This should include decisions on whether the MNES are triggered, oversight of the assessment of impacts, approval decisions, and the setting of conditions. Assessments should only be conducted by environmental consultants who are independent, and accredited to conduct assessments by the National EPA.

Recommendation: The Australian Government should retain existing MNES and create an expanded list of MNES that provides for national protection of critical environmental values.

8 Regulating pollution (plastics and air pollution)

At present, the EPBC Act does not regulate pollution such as air pollution or plastic pollution. Most pollution issues are regulated at state level by state EPAs and other environmental regulators. For some pollution issues it is appropriate for state governments to continue to have primary responsibility. However some pollution issues are being regulated inconsistently and ineffectively across states, with the result that pollution levels and impacts in some areas are unacceptable. Plastic pollution and air pollution are two such areas. These issues are nationally significant, and require a national approach.

In our view the Commonwealth Government should play a standard setting role to limit and control harmful pollution that pose risks to environmental and human health. We do not think the Commonwealth should take over direct regulation of pollution management, rather that it should

play a standard setting role, which must be adhered to by the states and territories. This differs from many other areas discussed in this submission, where it is appropriate and necessary for the Commonwealth to directly regulate.

8.1 Health impacts of air pollution

Despite improvements over the past two decades, a 2013 Senate Committee inquiry found that air quality is still a major problem in many parts of Australia. More than 4880[11] people die from air pollution in Australia every year – over four times the national road toll. There is no 'safe' level of exposure for many pollutants and there are harmful impacts from exposure at levels even below the current air quality standards.[12]

Air pollution is also a significant cause of environmental injustice in Australia. Communities with social and economic disadvantage often bear a greater burden of environmental harm from pollution than the rest of the community.[13]

8.2 Environmental impacts of plastic pollution

Plastic pollution has become an environmental disaster. Of the 322 million tonnes of plastic produced globally, 12.7 million tonnes of this ends up in the world's oceans each year. Australians also produce more waste per capita[14] than other comparable OECD nation - except for the UK - and most plastic rubbish found on Aussie beaches, comes from Australian sources[15], with the most polluted areas near cities. Australia is experiencing a waste crisis, with the majority of plastics that the community is putting in recycling bins currently going to landfill or being stockpiled. State Governments have failed to prevent this foreseeable crisis from happening, and while measures are being taken to improve the situation, much more must be done. The federal government must step in to help provide a nation-wide solution to the crisis.

8.3 National air pollution standard setting is failing to protect communities

Effective regulation of air pollution is critical to ensuring Australians are safe from air pollution. Individuals cannot readily control the extent to which they are exposed to harmful air-borne pollutants. They need the law to protect them. Yet air pollution in Australia is inadequately regulated, monitored and enforced.

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[11] Institute for Health Metrics and Evaluation (IHME). Global Burden of Disease Study 2017. Seattle, WA: IHME, University of Washington, 2017. Available from: http://vizhub.healthdata.org/gbd-compare

[12] National Environment Protection Council, Impact Statement on the proposed variation to the Ambient Air Quality NEPM 2014 http://www.environment.gov.au/protection/nepc/nepms/ambient-air-quality/variation-2014/impact-statement

[13] Chakraborty J and Green D, Australia's first national level quantitative environmental justice assessment of industrial air pollution Environmental Research Letters, Vol 9 No 4 2014 https://iopscience.iop.org/article/10.1088/1748-9326/9/4/044010/meta

[14] http://www.environment.gov.au/system/files/consultations/0258ae81-1408-42f6-862f-d5468f84d2a3/files/updating-nwp-2009-discussion-paper.pdf

[15] https://www.csiro.au/en/News/News-releases/2014/Plastic-on-the-coasts-is-ours

The current system is based on a completely unsatisfactory arrangement that leaves important standards to protect health to be set by complex intergovernmental arrangements involving all Commonwealth, State and Territory governments, coming together as the National Environment Protection Council (NEPC). This process of using negotiated 'National Environment Protection Measures' (NEPMs) to set national standards is no longer effective.

Some of the key problems with this process are:

- The complex intergovernmental arrangements in place to vary NEPMs to make new national air pollution standards means that changes take many years to finalise. For example, it took NEPC sixteen years to make a compliance standard for $PM_{2.5}$, (fine particulate matter that is very harmful to health) despite those standards already being in place in other countries for years. Standards for SO_2, NOx and Ozone have not been revised for 22 years, despite significant new information about the severe health impacts of those pollutants. In 2011 it was recommended that they be revised, and nine years later that review drags on.[16]
- Rather than the national pollution standards being set at levels necessary to protect human health, they reflect the 'lowest common denominator' approach, because in practice they result from political negotiations between States and Territories. There is no independent body to advise on or set the standards based on health criteria. An example is the 2015 review of PM_{10} standards. The NSW department leading the review considered options of 12, 16 and 20 ug/m^3 as annual PM_{10} limits, but political negotiations at Ministerial level resulted in 25 ug/m^3.
- Even once standards are agreed to by all jurisdictions, states do not have to implement them into their pollution regulation. Instead, they are 'taken into account' by jurisdictions when setting state standards and making licence conditions. This has resulted in inadequate protection for communities across Australia.

We need leadership from the Commonwealth to end the regulatory mess we are in.

8.4 National standards for pollution

The lack of a national air pollution regulatory framework contributes to many of these problems. There is no reason why one community should be allowed to be exposed to more harmful levels of pollution than another community. Air pollution is a national problem and should have a national solution.

At present, Australia is not using its federated system to its best advantage for air pollution prevention and management. A national system that takes advantage of the strengths of the

[16] National Environment Protection Council website on the AAQ NEPM review http://www.nepc.gov.au/nepms/ambient-air-quality/proposed-variation/consultation-2019

Commonwealth, as well as the strengths of the States and Territories could achieve fairer, more effective air pollution regulation across Australia.

The Commonwealth Government should take responsibility for achieving clean air across Australia by implementing a national scheme for air pollution that the States and Territories comply with. The Commonwealth would be responsible for standard setting to ensure communities across Australia have the same strong level of protection. The States would have responsibility for on-ground implementation of air pollution laws and would be required to implement the national laws in each jurisdiction in a way that works best in that jurisdiction, provided they are meeting national standards and requirements.

The Act should include powers for the Commonwealth to take national action on air pollution. As noted elsewhere in this submission, the Commonwealth has ample power to directly regulate pollution via the corporations power and other powers of the Constitution. [17]

A national scheme for air pollution that complies with the Constitution and leaves the majority of regulation with the states could be set up in the following way:

- Include power in the legislation for the Commonwealth Government to make a Commonwealth action plan that sets out measures and standards to reduce pollution including national power station stack emission standards, vehicle emission standards and ambient air standards.
- Standards would be set by a new independent *National Environment Commission* at a level that adequately protects human health and the environment. States would be free to set stronger, but not weaker standards and could implement the standards in a way that suited them, provided the standards were being complied with.
- The *National Environment Commission* would accredit State and Territory regulation against the national standards to ensure the standards are being complied with.
- The Commonwealth Minister would have power to directly regulate companies' activities to achieve the Commonwealth action plan if one or more states fail to make their own plan that is compliant with the Commonwealth plan. The Commonwealth does not have power to directly regulate against the states to force them to comply with the standards, however states are likely to opt in to the national plan to avoid the Commonwealth stepping in to directly regulate companies.
- The new National Environment Protection Authority would have responsibility for monitoring and reporting on whether the States and Territories are complying with the standards.

[17] Australian Panel of Experts in Environmental Law (APEEL). 'Constitutional authority of the Australian Government to make next generation environmental laws', Technical Paper 2 - Environmental Governance (2017), pp 13-17.

- The laws should include a right to citizen enforcement so that communities affected by pollution laws can ensure the Commonwealth is enforcing the standards.

Such a scheme could also be used for a range of pollution issues (such as plastic pollution), if and when the Commonwealth sees a need to have a national approach on a particular pollution issue.

Recommendation: The Act should include powers for the Commonwealth to take national action on air pollution and plastic pollution via setting binding national standards

9 Climate change (mitigation and adaptation)

Climate change is largely ignored in federal environmental laws, and in the EPBC Act in particular. Given the severity of the 2019/2020 bushfires, and widespread impacts of global warming on nature and communities, it would be reckless in 2020, to review the EPBC Act and not recommend that it address climate change. This review should be taken as an opportunity to create a number of tools and obligations to assist Australia to do its fair share keep global warming to 1.5 degrees, and ensure that ecosystems are given their best chance to adapt to the unavoidable impacts we are already experiencing.

Clearly, to meet this challenge Australia needs standalone climate legislation that is economy-wide. We do not propose that the entirety of the legal framework for emissions reduction fall within the EPBC Act. However, there is clearly a role for provisions that assess emissions from major projects, support the retention and recovery of carbon sinks, and assist ecosystems to adapt to the climate impacts we are already experiencing.

9.1 Greenhouse gas MNES

The Act should include a new MNES that will trigger an assessment of a proposed activity's greenhouse gas emissions, as has been recommended by numerous experts as well as the Hawke review.[18] A greenhouse gas MNES should link with Australia's emissions reduction targets to ensure that the Commonwealth is not approving project that make it harder to meet Australia's targets.

There should be a clear test of significance, where any action that is likely to emit of a certain amount of greenhouse gas emissions, or remove a certain amount of a carbon sink, must be assessed. Projects that are deemed to have unacceptably high emissions should be rejected, and other projects deemed significant should conditions and limits on their emissions. As with all of the current MNES, downstream, or scope 3 emissions, must be included in assessments of significance and impact.[19] Assessments and decisions should be linked to Australia's emission reduction target and/or climate

[18] See for example Australian Panel of Experts on Environmental Law, Environmental Governance (Technical Paper 2, 2017),
[19] See Australian Government, Matters of National Environmental Significance Significant impact guidelines 1.1 Environment Protection and Biodiversity Conservation Act 1999 2013

pollution plan legislated under the Act (see below) to ensure decisions were consistent with national emission reduction requirements.

9.2 Setting climate change as a national priority

As mentioned above, we advocate for a National Environment Plan to be developed as an overarching statutory plan under the Act. It would set national priorities, goals and metrics to protect and restore the environment in key areas regulated under the Act. The National Environment Plan should set climate change mitigation and adaptation as a national priority of the highest significance, and include a goal of taking action to ensure Australia is doing its fair share to keep global warming below 1.5 degrees. This would ensure that decision-makers must to consider climate change mitigation and adaptation opportunities when making strategic level assessments such as strategic impact assessments and bioregional planning, and in decision-making within the EIA process.

9.3 Climate pollution plan

As mentioned above, the Act should require or allow a number of environment plans to be made for specific areas that are within the scope of the Act (eg threat abatement plans, bioregional plans). Pollution plans, including a climate pollution plan should be part of this. The climate pollution plan would assist the Australian Government to comply with its obligations under the United Nations Framework Convention on Climate Change and associated instruments, and allow the Federal Government to set national level policy settings to mitigate pollution, increase biosequestration, and support adaptation measures for biodiversity.

The Act should also allow for a national climate adaptation plan to be made, which can set national level policy settings to assist climate adaptation in any area of the environment, including human health.

9.4 National standards and targets for emission reduction

Australia needs an economy wide Climate Change Act. However in the absence of that, it makes sense for Australia's emission reduction target to be legislated in our primary federal environmental legislation.

The Act should contain power for the Minister to make standards and targets in relation to climate change. This would allow the federal government to legislate a target that reflects Australia's Nationally Determined Contribution (NDC) under the Paris Climate Agreement to demonstrate within Australia the government's commitment to emission reductions. Legislating national or state emission reduction targets is now commonplace in many jurisdictions around the world, as well as in a number of Australian states. For example, Victoria's *Climate Change Act 2017* contains a legislated emission reduction target of net zero emissions by 2050, and requires the Premier to set five-yearly interim targets starting from 2021. The Act should require the Minister to set five yearly targets that

aligns with best available science, and the criteria in the Paris Agreement[20], e.g. each successive 5 yearly target will:

- represent a progression beyond the previous target,
- reflect Australia's highest possible ambition,
- reflect Australia's international obligation to reduce emissions based on equity, and common but differentiated responsibilities and capability.

Targets after the first target could be set via regulation.

9.5 Climate adaptation

It is astonishing that the EPBC Act still does not include provisions that will assist ecosystems to adapt to the impacts of climate change. The Act should contain climate adaptation provisions such as requirements to protection climate refugia, requirements to consider the impacts of climate change when making decisions about threatened species and ecological communities, Ramsar wetlands etc.

We endorse the Environmental Defenders Office's recommendations regarding embedding climate adaptation provisions in the Act.

Recommendation: The Act should contain provisions that will substantially reduce Australia's greenhouse gas pollution, increase carbon sequestration in biodiverse landscapes and assist ecosystems to adapt the impacts of climate change.

10 Urban biodiversity and restoration

The overwhelming majority of the Australian population lives in cities or other urban centres, such as regional towns. It is a glaring omission in environmental law and policy that so little, if any, consideration is given to the specific circumstances of urban biodiversity. The EPBC Act reflects this failure. Environmental law mainly applied to the urban context where general measures, such as those contained in MNES, apply to urban contexts, rather than providing any specific legislative guidance or direction on biodiversity in the urban context as such. This is despite a relatively high degree of protected areas, threatened species[21] and other biodiversity residing in (and adapting to) urban settings. There has emerged also increasing recognition of the importance of protection and restoring nature in cities, such as expressed in Victoria's most recent biodiversity strategy, in extensive literature on 'green cities', and in 're-wilding' movements.

[20] Article 4, section 3 of "*Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*."
[21] Sara Bekessy, Georgia Gerrard and L Mata and R Hobbs 'The critical role of "everyday nature" in the future of cities' RMIT University, 2019; C Ives et al 'Cities are hotspots for threatened species' (2016) 25 Global Ecology and Biogeography 117

Within the CBD framework a series of conferences and declaration were established in order to highlight the concerns and opportunities for urban biodiversity.[22]

Models for urban biodiversity and 'green infrastructure' in cities have grown significantly in recent years. Australia has pioneered the idea of 'biodiversity sensitive urban design' (BSUD), including principles for the integration of nature and biodiversity into urban planning.[23]

The Act should make specific provision for biodiversity protection and conservation in the urban context. Additionally, specific policy for the application of key functions of the Act, such as assessments and approvals or strategic assessments, should be prepared, informed by the substantial body of emerging literature and practice concerning urban biodiversity.

Provisions could include:

- Establish a discrete Part of the Act dealing with urban biodiversity.
- Within that part, establish BSUD principles in the Act. These principles include, consistent with international biodiversity obligations in general:
    - Maintain and introduce habitat
    - Facilitate dispersal
    - Minimise threats and anthropogenic disturbance
    - Facilitate natural ecological processes
    - Improve potential for positive human-nature interactions.[24]
- These principles can be operationalised in the following protocol:
    - identify and map ecological values, including the value of novel ecosystems and amenity vegetation
    - define ecological objectives
    - identify development objectives
    - identify actions required to achieve objectives considering the five BSUD principles
    - quantitative assessment of contribution to biodiversity
    - identify the BSUD actions that best meet ecological objectives (step 2), while accommodating development objectives (step 3) for the area.

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[22] Eg Mumbai Declaration 2012, https://www.fh-erfurt.de/urbio/httpdocs/content/documents/mumbai_declaration_urbio_2012.pdf; the Urbio Network is the main site for consideration of urban biodiversity issues within the CBD framework: https://www.cbd.int/subnational/partners-and-initiatives/urbio

[23] G Garrard et al 'Biodiversity sensitive urban design' (2017) 11 Conservation Letters 2 1

[24] G Garrard et al 'Biodiversity sensitive urban design' (2017) 11 Conservation Letters 2 1, 3-4

- A requirement for actions or projects, such as infrastructure projects, in urban settings to demonstrate design and key delivery measures are consistent with principles of BSUD.
- Application of BSUD to specific projects can be achieved by way of a declaration by the Minister in circumstances where it is reasonably likely an action or project will have a significant impact on ecological values or processes in the urban environment.
- Application of BSUD protocols are a requirement of expenditure of Federal funds on urban infrastructure projects. Further, as appropriate, require expenditure of federal funds on urban infrastructure projects to include assessment of 'nature-based' infrastructure solutions against other infrastructure options in 'business cases.'

Recommendation: The Act should make specific provision for biodiversity protection and conservation in the urban context, as well as specific policy for key functions of the Act such as assessments and approvals or strategic assessments to protect urban biodiversity.

11 Threatened species management and recovery planning

11.1 Recovery Planning

Recovery plans for threatened species and ecological communities provide the Commonwealth, State and Territory Governments the legislative instrument to establish the processes and mechanisms for ecological restoration and species recovery. The EPBC Act details the development of Recovery Plans but lacks clear frameworks to enforce, implement, fund and review them.

The following should be adopted:

- mandatory development of Recovery Plans for threatened species or ecological communities consistent with the best available science;
- the identification of critical habitat;
- including better guidance to decision makers for impacts on threatened species;
- establishing a national recovery fund that invests directly in recovery plan implementation and strategic priority actions;
- a framework to assess and monitor the effectiveness of Recover Plans that should include mandated annual reporting and auditing of plan implementation and performance.

There should also be obligations for state and territory jurisdictions to actively assist and/or lead on recovery plan implementation.

Recommendation: recovery planning provisions should be significantly improved, including mandatory requirements to for the identification of critical habitat, development of recovery plans for all threatened species and ecological communities, and establishing a national recovery fund.

11.2 Threat abatement planning

Greater focus should be made on mandatory threat abatement planning. Public nomination for key threatening processes to be continued with assessment by the Threatened Species Scientific Committee (TSSC). All valid nominations for listing must be assessed within three years of nomination. The Act should require the Minister to ensure statutory assessment of all listing recommendations from the TSSC and listing periods are met. Listing outcomes and timeframes should be monitored and reported on publicly. All listed Key Threatening Processes (KTPs) should have an instrument of response, including Threat Response Statement, Threat Response Statement or Threat abatement plan

On listing, a preliminary Threat Response Statement should be issued as a science-based statement of what is needed to abate the threat, specifying the feasibility, urgency, benefits and likely costs of abatement, and providing advice about the most appropriate instruments to drive abatement efforts.

Threat abatement advice should be issued when the threat is urgent, threat management is constrained by the absence of data or operational knowledge or other processes (such as policy or legislative changes) are needed to abate the threat.

Threat abatement plans are the primary threat response instrument and need to be clear and concise. They must be more tightly focused on threat abatement actions and include mandatory implementation obligations and commitments of all parties, a monitoring and reporting regime to track threat status and outcomes for threatened biota and explicit targets for abatement and triggers for review/revision of the TAP and how the TAP will be integrated with relevant recovery plans and other plans.

Similar to recovery plans there needs to be a mandatory annual monitoring system and an obligation for state and territory governments to implement plans.

Recommendation: Greater focus should be made on mandatory threat abatement planning, with strict timeframes on assessments of all nominations and recommendations from the TSSC, and a much greater response to Key Threatening Processes

12 Regional planning

12.1 Bioregional planning

Bioregional plans give Commonwealth, State and Local Governments the opportunity to map areas of environmental significance (such as critical habitat) across bioregions and make decisions about the

need for protection of those areas. The Commonwealth has the power to make bioregional plans under the EPBC Act, but it has never been used for land assessments.

We recommend much greater use of bioregional planning to identify upfront nationally significant areas such as critical habitat, Ramsar wetlands, and national heritage. However bioregional planning provisions should be strengthened to allow the Commonwealth to identify 'no go zones' where development cannot occur, such as critical habitat, and a requirement that decision-makers make decisions that give effect to bioregional plans.

Recommendation: bioregional planning should be used as a key tool of the Act, to identify upfront nationally significant areas such as critical habitat, Ramsar wetlands, and national heritage and allow the Commonwealth to identify 'no go zones' such as critical habitat where development cannot occur.

12.2 Strategic impact assessments

Strategic impact assessment (SIA) allows the Commonwealth and State Governments to conduct environmental impact assessments at a larger scale than individual project-based assessments. This occurs through environmental assessment of plans, policies or programs. There is scope within this device to assess cumulative impacts.

Early SIAs conducted under the EPBC Act attracted some positive commentary, such as those conducted in relation to fisheries. The general principles and concepts behind SIA may be sound, such as the capacity to undertake assessment at greater spatial and temporal dimensions. But design and application of SIA at the Federal level has been flawed[25] and in certain cases we are now seeing these flaws undermining environmental outcomes (such as for threatened species and communities) and the objects of the Act.

This is particularly the case in relation to land-use planning decisions, such as the Melbourne Strategic Assessment (MSA). In that case, a program for significant expansion of the urban growth boundary was subject to SIA procedures under the Act, in order to protect listed threatened species and communities, such as those associated with critically endangered grasslands. More than two decades on from the commencement of that program and its assessment, the consequences have been in essence rapid conversion of land uses to urban development and at best uncertain and, more likely, pronounced failure to protect MNES impacted within the program areas.

A key feature of the MSA was widespread use of offsets to 'maintain or improve' threatened species and communities' habitat, especially where focused on the formation of new reserves, both within the UGB and outside of it. Failures in design and administration have led currently to the likely loss and degradation of habitat values in both types of reserve. For example, the Western Grasslands

[25] See eg Marsden 'Strategic environment assessment in Australia: an evaluation of s 1467 of the Environmental Protection and BiodiversityConservation Act 1999' (1999) 8 Griffith Law review 394

Reserve has not been established nor the conservation values at the site maintained.[26] Within the UGB the design principle that small patches of high quality habitat should be sacrificed in order to aggregate values into fewer larger reserves (such as the Western Grassland Reserve) may well be flawed.[27] Lack of infrastructure, monitoring and enforcement also likely contributed to poor outcomes under the MSA.

The effective role of the SIA process in fast-tracking the urban development program on Melbourne's urban fringes, including by way of the SIA process functioning in a manner that accelerated and 'bundled' up environmental approvals at scale, resulted in subordination of the approval process to development imperatives rather than biodiversity protection imperatives as the Act requires.

Key risks to the environment from strategic assessments include avoidance of individual project assessment that meet the conditions of the strategic assessment. Approval via this mechanism can occur many years later and environmental conditions have changed significantly. Moreover, it avoids finer scale assessments, judgments and decision-making where this approach remains essential to biodiversity outcomes and, indeed, achievement of biodiversity protection as a fundamental consideration.

Strategic assessment should only be used in combination with strict rules, most importantly:

- strong legislated standards, decision-making criteria and science-based methods, including a 'maintain or improve' environmental outcomes test (such as for biodiversity, water quality, vegetation, carbon storage) and requirements to be consistent with recovery plans and threat abatement plans;
- cumulative impact assessment requirements, taking account of past, present and likely (approved) future activities at the relevant scale;
- comprehensive and accurate mapping and baseline environmental data;
- mandating transparency and public participation at all phases of the process, including to verify post-approval compliance, to ensure community confidence and acceptable outcomes;
- requiring alternative scenarios to be considered, including for climate change adaptation, to enable long-term planning for realistic worst-case scenarios (i.e. plan against failure);
- adaptive management and review once a program is accredited, to respond to new discoveries, correct unsuccessful trajectories or implement best available technology;
- as complement to individual project assessment where appropriate, not necessarily to replace it; and
- robust oversight, including via legislated, independent performance audit requirements, transparent verification of compliance, and 'call-in' powers for higher-risk actions and clear penalty provisions for non-compliance.

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[26] https://www.theage.com.au/politics/victoria/from-grassland-to-wasteland-victoria-breaks-promise-to-create-environmental-reserve-20190512-p51mjd.html

[27] See Marshall Start with the Grasslands: Design guidelines to Support Nastive Grasslands in Urban Areas 92013), https://vnpa.org.au/wp-content/uploads/2017/02/Start-with-the-Grasslands.pdf

Recommendation: the many failings of recent strategic impact assessments under the EPBC Act should be recognised, and future strategic impact assessments should only be used in conjunction with strict rules as outlined in this submission.

12.3 Regional Forest Agreements

Regional Forest Agreements (RFA's) should be abolished. They are inconsistent with conservation of forest dependant species and inappropriate given the massive destruction of forests by fires. Forestry should be treated the same way as any other industry under the Act.

EJA recently published a report analysing the failings of the RFA system and in particular the impact of the recent bushfires on RFAs. The fires, particularly through their impacts on the CAR reserves, have destroyed the policy foundations of the RFA system, rendering it untenable. Governments have so far failed to respond to the changed circumstances, continuing instead to operate on a 'business as usual' basis. The report concludes:

> Current and future fires challenge the foundations of the RFA system. They are no longer a tenable basis for enabling native forest logging to continue exempt from contemporaneous impact assessments and Commonwealth scrutiny. This is because, under the factual circumstances of extreme fire changing the forest ecosystem so frequently and rapidly, it is impossible to proceed with logging without an impact assessment that considers the environment at the time of the proposed logging – that is, a contemporaneous assessment that looks at the forest being logged and the species in it at that point in time. The uncertainty makes planning and resource allocation based on long-term assessments impossible.
>
> The damage to CAR reserves caused by this past summer's fires highlights the problem. The damage to the core conservation commitment of the RFAs demands a political response but none has been forthcoming. Rather, the presumption appears to be business as usual. In NSW, forests burned just weeks earlier continue to be logged. In Victoria it is likely that RFAs due to expire on 31 March 2020 will be extended. The Commonwealth has given no indication that it will move in respect of RFAs to support priority species identified by its wildlife and threatened species bushfire recovery Expert Panel.
>
> RFAS themselves do not provide a framework for resolving the problem. As noted above (section 3.4) the RFAs do not require the Commonwealth or Victoria or NSW to respond to the catastrophic impact of the fires.
>
> The newer versions of RFAs adopted in NSW provide for five-year reviews and audit at the option of a party. These too are inadequate to the task of assessing and realigning forest management in response to the impact of fires that challenge the very basis of the RFA system. The next five-year review of NSW RFAs does not commence until 2024.
>
> RFAs are legally uncertain in their current form but cannot be fixed within the framework of the RFAs themselves. They were failing before the fires and are even more untenable now.[28]

Recommendation: Regional Forestry Agreements should be abolished and forestry should be treated the same way as any other industry under the Act.

[28] Environmental Justice Australia, *No longer Tenable: Bushfires and Regional Forest Agreements* March 2020, p14 available at https://www.envirojustice.org.au/wp-content/uploads/2020/03/EJA-report-No-longer-tenable-1.pdf

13 Offsetting

13.1 Offsets undermine legal protection

Environmental offsets, in particular biodiversity offsets, are one example of the failure of Australian environmental law to protect, restore and enhance the environment. Offsets undermine environmental protection by legitimising the issue of permits for the destruction of biodiversity on the basis of a legal fiction that biodiversity loss can be "offset" when it can't.

We do not support the use of biodiversity offsets in regulatory approvals as there is no evidence that biodiversity offset programs contribute to enhancement, or even maintenance of biodiversity[29], and instead significant evidence that they lead to degradation of biodiversity[30].

The intention of biodiversity offsets is preferably to achieve a net gain, or at a minimum a no net loss of biodiversity on the ground. However after over decade of offsetting in Australia there are no studies that show this is what occurs in practice. Indeed, studies indicate the opposite.

There is recognition globally of the failure of using offsetting systems as part of a regulatory framework. In 2013, over 140 international organisations released a statement rejecting environmental offsetting due to the inability of offsetting to reduce biodiversity loss and the harm to communities.[31]

The following comments address the main problems with the use of environmental offsets.

13.2 Biodiversity values are incommensurable

Biodiversity offsetting is dealing in subject-matter that is inherently incommensurable. The entire biodiversity offsetting process is an attempt to establish a regulatory process to overcome the incommensurability of the transaction (what is lost and what is gained).

It is a regulatory mechanism, constructed for the purposes of providing discretion, flexibility, and capacity for bargaining between regulator, proponent and other interested parties. While biodiversity offset processes can provide funds and means of delivering environmental restoration programs, including for the values represented by matters of national environmental significance (MNES), they are first and foremost a tool of regulatory negotiation to facilitate development.

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[29] Pickett et al, (2013) 'Achieving no net loss in habitat offset of a threatened frog required high offset ratio and intensive monitoring'. *Biological Conservation* 157 (2013) 156–162.
[30] See for example Martine Maron and Ascelin Gordon, 'Biodiversity offsets could be locking in species decline' *The Conversation* 6 June 2013, http://theconversation.com/biodiversity-offsets-could-be-locking-in-species-decline-14177
[31] See the statement at http://no-biodiversity-offsets.makenoise.org/ and reporting on the statement in http://saveourwoods.co.uk/biodiversity-offsetting-2/140-organisations-from-across-the-world-call-for-an-end-to-biodiversity-offsetting-plans/ and http://www.theguardian.com/environment/2014/mar/11/owen-paterson-bidiversity-offsetting

13.3 Environmental offsets in Federal environmental approvals

Offsetting under the EPBC Act necessarily must comply with the EPBC Act. This includes the intention to avoid significant impacts on MNES, and the prohibition on acting inconsistently with certain international obligations or with recovery plans (in the case of threatened species). The concept and practices of offsetting are required to be consistent with and not undermine those statutory obligations. Absent such consistency or avoidance of impacts, the appropriate course of decision-making is refusal of approval of the 'action' at issue. However this is not what occurs in practice.

There are numerous examples of projects being approved that do not in practice meet these EPBC Act standards, but that get 'over the line' via the use of (often inadequate) offsets. For example it is clear from internal government documents that the Whitehaven Coal Maules Creek coalmine should not have been approved due to the known and significant impacts on listed threatened species.[32]

To achieve the required standards of environmental management in the EPBC Act, considerable weight and evidence needs to be placed on *avoidance* of loss or destruction in the first place. Offsetting is designed to function with an 'avoidance hierarchy'. To give meaning and effect to that hierarchical principle the initial consideration should be: what is the threshold at which avoidance of loss or destruction is necessary and what test should apply to avoidance? In practice, offsetting should be a subsidiary mechanism within a scheme of environmental protection and biodiversity conservation rather than a 'planning tool for facilitating development outcomes'[33]. The EPBC Act is substantially a legislative scheme for protection of vulnerable and threatened species and ecosystems (including enactment in domestic law of international obligations to that effect). Therefore any offsetting that occurs should emphasise the compensatory and residual character of offsets, rather than the facilitative approach common in practice at present.

13.4 Monitoring, evaluation and delivery on the promises of offsets

The prevailing tendency of biodiversity offsetting to function, in practice, as a means of facilitating development all too often means that the focus of effort is on securing offset arrangements as an element of regulatory compliance for development activity. Once this is achieved there is far less focus on monitoring, compliance and facilitation of the ecological management and restoration activities inherent in the offset project. The absence of either ad hoc or systematic monitoring and evaluation of offset projects is frequently referred to in the burgeoning literature on the subject of offsets.

The systemic failure of monitoring and compliance activity is arguably a contributing factor in a general absence of a comprehensive, scientific dataset on the impact of offsetting on environmental management. In Victoria for example, a 'net gain' objective governed a previous Native Vegetation Management Framework. Only one limited study was undertaken by the Victorian Government[34] to

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[32] Documents can be found at http://www.abc.net.au/radionational/programs/backgroundbriefing/2014-03-16/5312944#transcript

[33] Martin Fallding 'Biodiversity Offsets: Practice and Promise' (2014) 31 *EPLJ* 11, 27

[34] DSE *Native Vegetation Net Gain Accounting: First Approximation Report* (2008)

assess whether or not that objective was being achieved. Offset provisions were obviously significant to the overall outcome. The study found that objective was not being achieved. The balance of losses and gains on private land (to which the native vegetation regulatory system primarily applies) was particularly poor: an estimate loss of 10,000 habitat hectares per annum.

These systemic failures in monitoring and performance mean that biodiversity offset systems will not work without regulatory and institutional reform, in particular an independent, properly-resourced agency responsible for monitoring and compliance. At the Commonwealth level, a National Environment Commissioner would be needed to perform independent monitoring and evaluation functions.

As can be seen from the above discussion, environmental offsets are beset by failings. Some of these result from the incommensurability of offsetting biodiversity, and some from the reluctance or refusal of government decision-makers to genuinely apply EPBC Act standards and impose and enforce rigorous offset standards that meet the net gain criteria. In our view these problems cannot and will not be addressed such that offsetting leads to an improvement or even maintenance of biodiversity in Australia. For these reasons we do not support the use of environmental offsetting as a tool in regulatory approvals and submit that environmental offsets be removed from the EPBC Act approvals process.

Recommendation: Biodiversity offsets should not be used under federal environmental law.

14 Governance and accountability

14.1 Independent institutions

Public confidence in environmental decision-making and the administration of Australia's environmental laws is low. Concerns include transparency, accountability and the quality and independence of decision-making. The Hawke review concluded that the establishment of an independent advisory and review body would help to ensure the rigour, transparency and accountability of decision-making and more robust administration of Commonwealth environmental laws.

We support the position of the Place You Love Alliance that there should be two new institutions to ensure accountability, independent decision-making and regulation.

A National Environment Commission should be established which would be a body independent of departmental or ministerial direction reporting annually to parliament on the state of the environment. It would:

1. Develop and oversee national environmental goals, strategies, plans and standards;
2. Require at least one full time Commissioner and independent public sector staff appointed from commencement of the Act;

3. Have the mandate to negotiate with all levels of government regarding Plans etc;
4. Progress development of National Environmental Accounts that includes, but not limited to, National Environmental Matters;
5. Gather and publicly disseminate evidence on environmental conditions and trends to inform decisions and improve outcomes over time;
6. Ensure recovery plans, threat abatement plans, conservation advices and threat mitigation directives are up to date and integrated into bioregional plans.

A National Environment Protection Authority should be established which would be the new Commonwealth assessment, approval and enforcement body for environment issues that are nationally important. The establishment and adequate resourcing of an independent national environment protection authority that operates at arm's-length from government is key. It would:

2. Be governed by an independent board and headed by a separate chief regulator;
3. Have statutory duties to use powers and functions to achieve the Act's aims;
4. Undertake assessments, approvals, refusals and enforcement of activities that affect environmental issues of national importance;
5. Undertake impact assessment and approval of actions on land and waters including strategic assessments and accreditations;
6. Undertake independent compliance, audit and enforcement roles;
7. Include a separate unit responsible for post-approval project and plan compliance, audits, monitoring and reporting;
8. Ensure approvals comply with statutory plans under the Act (e.g. recovery plans, threat abatement plans, bioregional plans);
9. Review, advise and report openly to the Minister on specific development projects; and
10. Be adequately resourced.

Recommendation: To ensure rigour, transparency and accountability of decision-making and more robust administration of Commonwealth environmental laws, an independent National Environment Commission and an independent national Environment Protection Authority should be established and tasked with performing key functions under the Act.

14.2 Community rights to review decisions and enforce breaches of the Act

Many false claims have been made in recent years that providing for community rights to appeal decisions and enforce the law will "open the floodgates" and allow a rash of vexatious litigation. In fact there is no evidence, from any jurisdiction in Australia, that this occurs. Indeed the opposite is true, that proponents use appeal rights far more frequently than the community, and more

community appeals and enforcement actions are needed to ensure transparency and good decision-making. The only peer reviewed article on third party appeals under the EPBC Act by Professor Andrew MacIntosh et al[35] confirms that arguments of 'lawfare' under the EPBC Act are a fallacy. Justice Pepper of the NSW Land and Environment Court comes to the same conclusion in her 2018 paper[36]. A 2016 study of environmental litigation in NSW found that 'the main concern is not a flood of environmental citizen suits, but a drought'.[37] The Australian Law Reform Commission (ALRC) has also repeatedly dismissed 'floodgate' arguments as having no basis. [38]

Access to justice is a crucial component of public confidence in environmental decision making. It is also one of the best ways to ensure accountability, transparency, and guard against corruption in decision-making.

The Act must include:

- Open standing for any person to seek review of government decisions or to enforce a breach or anticipated breach through third party enforcement.
- Extending legal standing to merits review of approval and permitting decisions. This has been shown to improve the rigour of decision making.
- A statutory right for citizens to ask the court to require performance of mandatory duties by the Minister or other decision-makers under the Act.
- Protection for costs for public interest legal proceedings, for example limiting upfront cost orders that deter the community from community from excising legal rights.
- A right to access all information that has contributed to the development of a decision under the Act, information about the condition of the environment, and information about breaches and enforcement of the Act in a timely manner.

Recommendation: The Act should contain strong rights for community participation including the ability to review government decision and enforce breaches of the Act, a right to require performance of mandatory duties under the act, a right to access information.

[35] Macintosh, Andrew; Roberts, Heather; Constable, Amy "An Empirical Evaluation of Environmental Citizen Suits under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)" [2017] SydLawRw 4; (2017) 39(1) http://www5.austlii.edu.au/au/journals/SydLawRw/2017/4.html

[36] Pepper, Rachel "Ms Onus And Mr Neal: Agitators In An Age Of 'Green Lawfare'" 2018 available at - http://www.lec.justice.nsw.gov.au/Documents/Speeches%20and%20Papers/PepperJ/PepperJ%20Ms%20Onus%20and%20Mr%20Neal%20Agitators%20in%20an%20age%20of%20green%20lawfare.pdf

[37] Andrew Macintosh, Amy Constable, Isabella Comfort, Fathimath Habeeb, Mhairin Hilliker, Mandy Liang and Anna-Claudia Oliveros Reyes, *Environmental Citizen Suits in the New South Wales Land and Environment Court: Working Paper* (The Australia Institute, 2016).

[38] See for example, Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129, 2015) [15.63]