

5.1. ENVIRONMENTAL PROTECTION AND BIODIVERSITY CONSERVATION ACT

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DEPARTMENT Environment and Planning

RECOMMENDATION

That Council resolves to support and submit the attached Environmental Protection and Biodiversity Conservation Act Submission to the Department of the Environment and Energy Independent Review Panel.

EXECUTIVE SUMMARY

The Department of Environment and Energy Independent Review Panel has invited Douglas Shire Council to provide a submission regarding the Environmental Protection and Biodiversity Conservation (EPBC) Act 1999.

BACKGROUND

The EPBC Act 1999 is the Australian Government's central piece of environmental legislation. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places.

The objectives of the EPBC Act are to:

1. Provide for the protection of the environment, especially matters of nationally environmental significance.
2. Conserve Australian biodiversity.
3. Provide a streamlined national environmental assessment and approval process.
4. Enhance the protection and management of important natural and cultural places.
5. Control the international movement of plants and animals, wildlife specimens and products made or derived from wildlife.
6. Promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources.
7. Recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity.
8. Promote the use of Indigenous people's knowledge of biodiversity with the involvement of, and in-cooperation with, the owners of the knowledge.

The Department of the Environment and Energy undertakes an independent review of the EPBC Act at least once every ten years. Professor Graeme Samuel AC has been appointed to lead the 2020 review. Professor Samuel is a Professorial Fellow in Monash University's Business School and School of Public Health & Preventative Medicine. In 2010, he was made a Companion of the Order of Australia for eminent service to public administration through contributions in economic reform and competition law.

COMMENT

The EPBC Act is currently under review, the Independent Review Panel has prepared a Discussion Paper and invited submissions from all levels of government, businesses and individuals. The dedicated website is publicly available here:

<https://epbcactreview.environment.gov.au/>

Council Officers have reviewed the EPBC Act and the Discussion Paper (**Attachment 1**), and prepared a submission (**Attachment 2**).

PROPOSAL

That Council resolves to support and submit the attached Environmental Protection and Biodiversity Conservation Act Submission to the Department of the Environment and Energy Independent Review Panel.

FINANCIAL/RESOURCE IMPLICATIONS

None at this stage.

SUSTAINABILITY IMPLICATIONS

Economic: The Discussion Paper recognises Ecologically Sustainable Development (ESD) and states that environmental, social and economic factors, as well as cost benefit analysis, could be included within the revised Act.

Environmental: The Discussion Paper recognises that during the life of the EPBC Act the health of the Australian environment and its biodiversity has continued to decline; the revised Act seeks to rectify this.

Social: The Discussion Paper indicates that the revised Act seeks to provide a mechanism for greater knowledge sharing and consultation with Traditional Owners and community members.

CORPORATE/OPERATIONAL PLAN, POLICY REFERENCE

This report has been prepared in accordance with the following:

Corporate Plan 2019-2024 Initiatives:

Theme 5 - Robust Governance and Efficient Service Delivery

Strong governance and financial management are the foundations of the way in which Council will conduct its business and implement the initiatives of the Corporate Plan.

Goal 1 - We will conduct Council business in an open and transparent manner with strong oversight and open reporting.

Operational Plan 2019-2020 Actions:

3.2.2 - Undertake 2019/20 actions in the Corporate Sustainability Strategy 2017-20

COUNCIL'S ROLE

Council can play a number of different roles in certain circumstances and it is important to be clear about which role is appropriate for a specific purpose or circumstance. The implementation of actions will be a collective effort and Council's involvement will vary from information only through to full responsibility for delivery.

The following areas outline where Council has a clear responsibility to act:

Advocate Council makes representation on behalf of the community on important issues, funding opportunities, projects and programs. Council will use its influence to seek the best outcomes for the community.

CONSULTATION

Internal: Development and Assessment; Environmental Health; Sustainability; Council Workshop 15 January 2020.

External: None

COMMUNITY ENGAGEMENT

The ability to submit a submission to the EPBA Independent Review Panel is available to all.

ATTACHMENTS

1. EPBC Act Review Discussion Paper [5.1.1 - 30 pages]
2. EPBC Act Douglas Shire Council Submission [5.1.2 - 14 pages]

Independent review of the **EPBC Act**

DISCUSSION PAPER



Professor Graeme Samuel AC

November 2019

The review acknowledges the Traditional Owners of Country throughout Australia and recognises their continuing connection to land, waters and community. We pay our respects to their cultures and their elders past, present and emerging.

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FOREWORD

I am pleased to have been asked to undertake the second independent review of Australia's primary national environmental law, the *Environment Protection and Biodiversity Conservation Act 1999*, also known as the EPBC Act.

Australia's environment is essential to our cultural identity, our way of life, our economy and the prosperity of our society. The connection of Indigenous Australians to Country is central to their culture, spirituality, language and wellbeing. Australia's biodiversity — its plants, animals and ecosystems — is rich, unique and globally important. Our diverse landscapes and seascapes contain up to 10 per cent of all the world's plants and animals. Australia has natural, Indigenous and historic places of significance to the nation and the world, such as the Great Barrier Reef, Uluru, Kakadu National Park, Budj Bim, the Sydney Opera House and the Tasmanian Wilderness.

The EPBC Act plays a significant role in the protection and management of our environment and heritage. It operates within a broader context, alongside other Commonwealth laws and activities and those of state, territory and local governments. The activities of businesses, land managers and the community are also central to achieving environmental outcomes.

The EPBC Act is more than 1000 pages of complex legislation, to which has been added over 400 pages of regulations. This review is a once in a decade opportunity to look closely at the Act, how it operates, and what it is achieving. While it is not a review of environment policy – which is the job of government – this review is a crucial opportunity to make recommendations to ensure that the Act is fit for the future. Changing land use, invasive pests and weeds, a changing climate, more frequent extreme weather events, and fires continue to put pressure on our environment and heritage. Australia's population, the ways that businesses operate, and how governments regulate are changing. Community and business expectations of governments are vastly different from when the EPBC Act was first legislated 20 years ago.

It is vital that our primary national environmental law is well placed to deliver better outcomes for Australia's environment and heritage, for business and for the community. I have released this discussion paper to start the conversation, and this is the first of several opportunities for you to participate in the review. The material it contains is designed to be thought-provoking and includes potential focus areas for reform and possible alternatives. These are not my settled views but are provided for discussion and for you to respond to. I encourage you to be involved and look forward to hearing your views.

Professor Graeme Samuel AC

1. ABOUT THE REVIEW

THE SCOPE AND CONDUCT OF THE REVIEW

The EPBC Act requires that an independent review be undertaken at least once every ten years. The review must examine the operation of the Act and the extent to which its objects have been achieved. The last review was completed in 2009. The Australian Government has issued broad terms of reference for the Review. These are set out in Box 1.

Box 1: Terms of Reference for the Review

The Australian Government is committed to delivering improved national environmental laws to ensure a healthy environment and a strong economy. The EPBC Act is the Australian Government's central piece of national environmental law. The EPBC Act requires there be an independent review at least once every ten years.

These are the terms of reference for the second independent review of the EPBC Act.

In accordance with section 522A of the EPBC Act, the review will examine:

- a) the operation of the Act, and
- b) the extent to which the objects of the Act have been achieved.

The review will make recommendations to modernise the EPBC Act and its operation to address current and future environmental challenges, including consideration of:

- a) The objects in section 3(1)(a)-(g) of the Act
- b) Australia's international environmental responsibilities
- c) Indigenous peoples' knowledge and role in the management of the environment and heritage
- d) implementation of relevant agreements between the Commonwealth, states and territories
- e) other legislation that may relate to the operation of the Act
- f) recommendations of previous reviews and inquiries and significant publications regarding the operation of the Act and potential reform
- g) broad consultation, including with state, territory and other levels of government, non-government organisations, Indigenous peoples, members of the community, industry and academia, and
- h) costs and benefits of recommendations.

The review will be guided by the principles of:

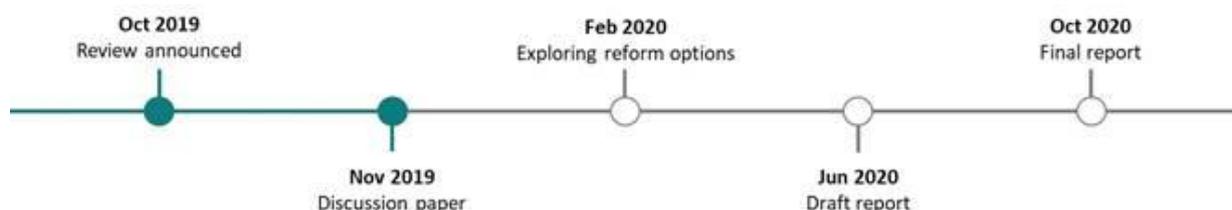
- a) protecting Australia's unique environment through strong, clear and focussed protections
- b) making decisions simpler, including by reducing unnecessary regulatory burdens for Australians, businesses and governments
- c) supporting partnerships to deliver for the environment, supporting investment and creating new jobs
- d) improving transparency to ensure better use of information, accountability and trust in the system, and
- e) streamlining and integrating planning to support ecologically sustainable development.

The Independent Reviewer will provide a report to the Minister for the Environment within 12 months of the commencement of the review.

Professor Graeme Samuel AC will conduct the review, supported by an Expert Panel comprising Mr Bruce Martin, Dr Erica Smyth AC, Dr Wendy Craik AM and Professor Andrew Macintosh. The review will draw upon the knowledge and experience of a range of scientific and other technical bodies throughout the process including the Commonwealth Scientific and Industrial Research Organisation (CSIRO), Geoscience Australia, the six National Environmental Science Program hubs, the Threatened Species Scientific Committee and the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development. The knowledge and experience of the Indigenous Advisory Committee and Australian Heritage Council will also be sought.

The review will examine a wide range of information and explore views through extensive consultation with state and territory governments, interest groups, scientists, Indigenous Australians, academics, and the general public. Over the next 12 months there will be many opportunities to be involved (see Figure 1).

Figure 1 – Indicative review timeline



ABOUT THIS DISCUSSION PAPER

This discussion paper is the first step in consultation for the review.

With broad terms of reference, a key early step in the review process will be to identify those areas where reform will deliver the greatest benefit for the environment, business, and the community, while maintaining strong environmental standards.

In addition to outlining the EPBC Act, what it does and where it came from, this paper is intended to be thought-provoking. It identifies some of the long-term pressures on Australia's environment and heritage, and known concerns with the operation of the legislation, especially with its regulatory processes.

Potential areas of focus for the review are explored, and some possible options for reform are floated. These are not settled views, rather a starting point to stimulate discussion. The aim is to explore a wide range of options and to develop sensible recommendations for reform that can be implemented.

Over the next 12 months the review will consider a wide range of information and explore ideas provided by communities, business, environmental groups, Indigenous Australians, academics and others.

Your input is welcome at any time during the review. Targeted engagement activities will be undertaken during the consultation period for this discussion paper. Further consultation will be undertaken as the review progresses.

MAKE A SUBMISSION

All interested parties are invited to provide written submissions to the review, particularly in response to the ideas and questions set out in this discussion paper. You are encouraged to provide your submission as early as possible as this feedback will shape thinking and inform further consultation with stakeholders in 2020.

Submissions on this discussion paper are due by 5pm (AEDST) Friday, 14 February 2020.

Information on how to submit your views is at end of this paper. You can also visit www.epbcactreview.environment.gov.au.

2. ABOUT THE EPBC ACT

THE ROLE OF THE COMMONWEALTH

The Commonwealth, state and territory governments, local government, non-government organisations, the private sector and the community all play a role in the protection and management of Australia's environment and heritage.

State and territory governments have primary responsibility for most land use planning and environmental protection. They have specific environmental laws and programs designed to protect and manage the environment within their jurisdictions. Local government also plays a key role, particularly in local land use planning. The private sector and the community are important participants, particularly in managing land and property and investing in environmental management and restoration.

The Commonwealth's environmental responsibilities, while not explicitly defined in the Constitution, have been interpreted over time and largely rely on indirect Constitutional powers. Prior to the EPBC Act, Commonwealth environmental laws focussed on activities where the Commonwealth had exclusive responsibility, including regulating the activities of Commonwealth agencies and managing Commonwealth land. Over time, the Commonwealth's role has become more expansive, driven in large part through the evolving nature of our federated system of government and Australia's international commitments.

The Commonwealth has an important role in bringing together and facilitating cooperation between the states and territories, particularly to reach agreement on nationally coordinated approaches to protection and management of the environment. This cooperation is particularly important where environmental issues cross state and territory borders.

Commonwealth, state, territory and local governments have formally set out their interests in the environment, their respective roles and responsibilities, and their commitment to the principles of ecologically sustainable development. A foundational agreement was the Intergovernmental Agreement on the Environment (1992) and the subsequent Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment (1997). These agreements set out Commonwealth commitments to safeguard matters of national environmental significance (see Box 4) and ensure Australia's international obligations are met.

THE HISTORY OF THE EPBC ACT

In 1998, the Commonwealth implemented its intergovernmental commitments with a comprehensive package of initiatives focussed on environmental issues of national interest and importance and Australia's international commitments. The package included the creation of the EPBC Act¹ and other initiatives, such as the Natural Heritage Trust, Australia's Oceans Policy and the National Environment Protection Council. Together, these initiatives sought to address issues including land degradation, the retention of native vegetation, air quality, sustainable oceans use, and greenhouse gas emissions.

¹ The EPBC Act replaced five (later six) pieces of Commonwealth legislation with a single legal framework and common objectives.

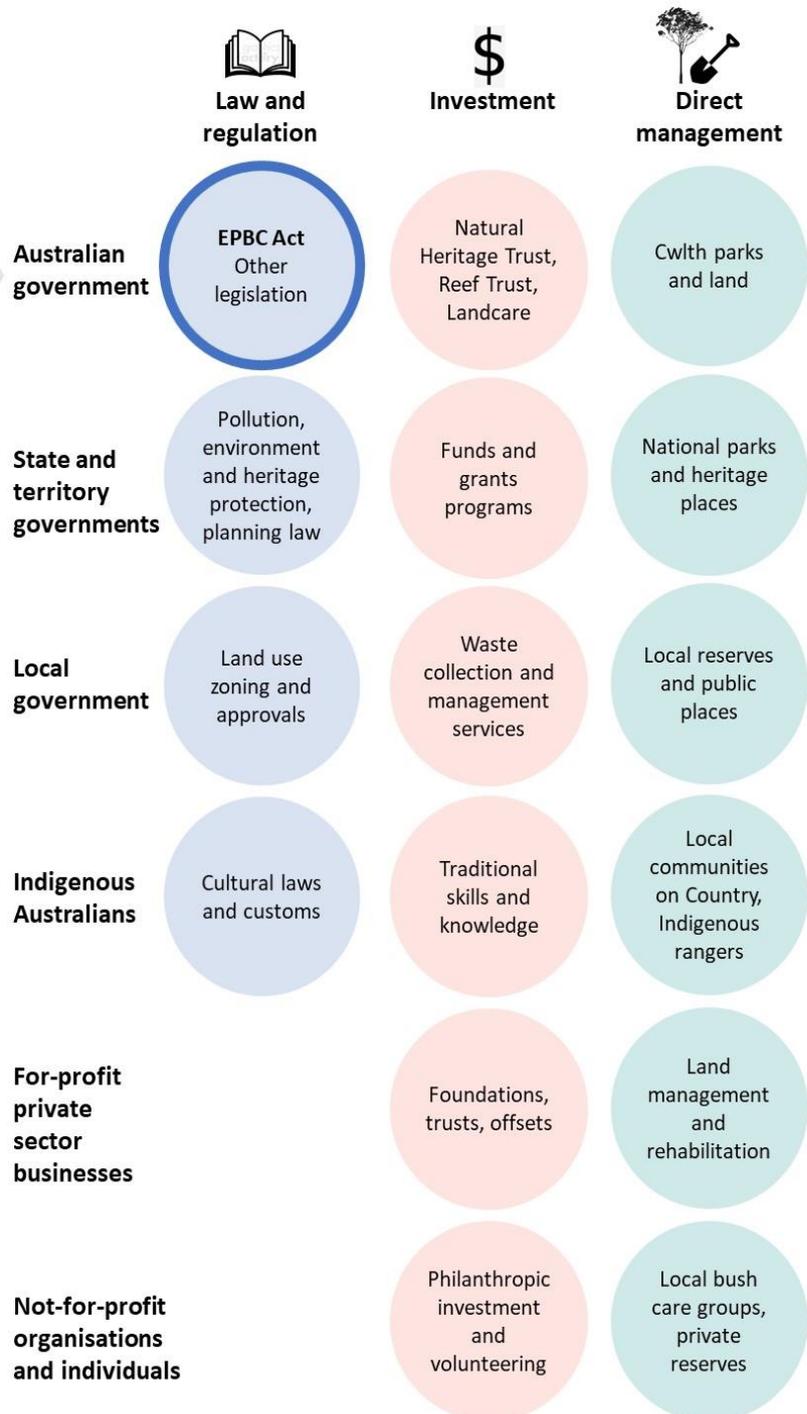
The EPBC Act, as the Australian Government’s central piece of national environmental law, reflects the role of the Commonwealth to address matters of national environmental significance, provide a nationally coordinated approach to managing our environment and meet our international commitments.

The EPBC Act remains an important part of a broad suite of Commonwealth and state and territory laws and activities that seek to protect Australia’s heritage and the environment (see Figures 2a and 2b). Significant investment by the Australian Government in programs such as the National Landcare Program, Australian Heritage Grants Program, Reef Trust and the National Environmental Science Program also seek to preserve and protect biodiversity and heritage.

Figure 2a. Drivers of the Australian Government’s approach to environmental management



Figure 2b. Managing Australia’s environment and heritage: examples of government and non-government activities



The role of Indigenous Australians in the natural and cultural environment is reflected in the EPBC Act and supported through other programs. For example, the Indigenous Protected Areas Program and Indigenous Rangers Program recognise and promote the role of Indigenous Australians in the conservation and ecologically sustainable use of Australia's biodiversity. Traditional Owners jointly manage Commonwealth National Parks and funding is provided through the National Landcare Program to support Indigenous people and organisations to participate in the delivery of natural resource management activities.

The EPBC Act has been amended on a number of occasions. Wildlife trade was incorporated in 2001 and Regional Forestry Agreements in 2002. New matters of national environmental significance have been added over time; national heritage places in 2004, the Great Barrier Reef Marine Park in 2009, and the 'water trigger' in 2013².

QUESTION 1: Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?

WHAT THE EPBC ACT DOES

The EPBC Act passed the Australian Parliament in 1999 and commenced on 16 July 2000.

It aims to protect and conserve Australia's environment, biodiversity and heritage, and promote ecologically sustainable development through the conservation and sustainable use of natural resources.

The Act:

- gives effect to the Commonwealth's commitment to ensure the principles of ecologically sustainable development are taken into account in policy and decision-making process (see Box 2)
- recognises the vital role Indigenous Australians and their knowledge play in the conservation and sustainable use of Australia's environment and heritage
- facilitates cooperative arrangements with the states and territories
- implements international commitments on biodiversity, heritage and other relevant matters
- provides a framework for managing Commonwealth parks and reserves, and
- promotes biodiversity protection and recovery.

² Further detail on changes to the EPBC Act since its commencement can be found at <https://www.environment.gov.au/epbc/about/history>

Box 2: Ecologically sustainable development

Section 3A of the EPBC Act defines the principles of ecologically sustainable development as follows:

- (a) Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.
- (b) If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation (the precautionary principle).
- (c) The principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.
- (d) The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making.
- (e) Improved valuation, pricing and incentive mechanisms should be promoted.

QUESTION 2: How could the principle of ecologically sustainable development (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 'objects' (or objectives) of the Act define what it aims to achieve (see Box 3).

Box 3: The objects of the EPBC Act

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

QUESTION 3: Should the objects of the EPBC Act be more specific?

The Act identifies nine nationally and internationally important matters, which are defined in the EPBC Act as **matters of national environmental significance** (see Box 4). These include plants, animals, ecological communities, heritage places, water resources and nuclear actions. They are also known as 'triggers', as they trigger the assessment processes under the Act. Individuals or companies must not carry out an action that could significantly impact one or more of these matters unless this action has been assessed and approved by the Commonwealth.

Box 4: Matters of national environmental significance

Part 3 of the EPBC Act sets out the matters of national environmental significance:

- world heritage
- national heritage (added in 2003)
- wetlands of international importance (listed under the Ramsar Convention)
- listed threatened species and communities
- listed migratory species
- protection of the environment from nuclear actions (such as uranium mines, although nuclear power plants are prohibited),
- marine environment³
- the Great Barrier Reef Marine Park (added in 2009), and
- protection of water resources from coal seam gas development and large coal mining development⁴ (added in 2013).

QUESTION 4: Should the matters of national environmental significance within the EPBC Act be changed? How?

The EPBC Act includes both regulatory (decision making) and non-regulatory (cooperative and facilitative) approaches. A broad description of the elements of the EPBC Act is set out in Figure 3.

³ Protection of Commonwealth marine areas

⁴ Known as the 'water trigger'

Figure 3 – Summary of the broad elements of the EPBC Act

Protected areas and heritage

Areas of ecological, cultural and/or heritage significance are identified, protected and managed under the Act. These include world and national heritage properties, Ramsar wetlands of international importance, and Commonwealth land and marine reserves (National Parks).

Biodiversity protection

The Act enables the Australian Government to list migratory species, threatened species and ecological communities. It includes mechanisms to mitigate impacts on, protect and recover biodiversity, including conservation agreements and threat abatement plans.

Assessments and approvals

Environmental Impact Assessment is a regulatory mechanism provided in the Act that aims to ensure that significant impacts to matters of national environmental significance are either avoided, mitigated or offset. This mechanism generally applies at a local scale and includes the regulation of Commonwealth land and actions by Commonwealth agencies

Strategic approaches

The Act provides for the protection of the environment on a landscape or regional scale. This protection includes mechanisms such as strategic assessments and bioregional planning.

International wildlife trade

The Act regulates the export of Australian native species and the import of live plants and animals.

Indigenous involvement

Places with Indigenous heritage can be protected and managed under the Act. Traditional Owners can be involved in the management of Commonwealth reserves. There are other mechanisms in the Act to support the contribution of Indigenous people.

Compliance and enforcement

The Act (particularly Part 17) includes monitoring, audit, compliance and enforcement for approvals and permits. The Act also provides the regulatory framework for general and specific deterrence for those who choose to take actions without required permits or approvals.

Partnerships and advice

The Act enables cooperative partnerships to be established with states and territories, Indigenous people and private landowners. Advisory committees are established under the Act. They provide advice to the Minister on specific issues.

Information and reporting

The Act has mechanisms that require the Australian Government to report on the effectiveness of the Act. These include Annual Reports and State of the Environment Reports.

Decision making

The Act sets out who has the responsibility to make decisions, and what they need to consider. It also provides for decisions to be published and reviewed.

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 matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

THE PERFORMANCE OF THE EPBC ACT

Since it commenced, the performance of the Act has been examined through a range of reviews and inquiries. Stakeholders have repeatedly raised a range of concerns with the Act, what it is achieving and how it is operating. This section identifies some of these key concerns as a starting point for discussion.

Effectiveness

In the main, during the life of the EPBC Act the health of the Australian environment and its biodiversity has continued to decline⁵.

The EPBC Act was developed as a key statutory component of a package of initiatives to deliver ecologically sustainable development in Australia. Given it is part of a broader environmental protection system, it is very difficult (and often impossible) to determine the exact impact of the EPBC Act on Australia's environment over its two decades of operation. Notwithstanding this uncertainty, many consider that the operation of the Act has been insufficient to protect and conserve the environment.

⁵ State of the Environment Report 2016 (and previous State of the Environment reports).

This is in light of ongoing impacts of past activities and a failure to adequately manage the impacts of new developments and emerging threats. In contrast to biodiversity outcomes, Australia's network of protected areas has expanded, delivering positive environmental outcomes.

The Act supports only constrained consideration of the social, economic and environmental costs and benefits that relate to some key elements of ecologically sustainable development.

Efficiency

Many businesses regulated under the Act say that it is complex, cumbersome and at times unreasonably delays development. Previous reviews and inquiries have concluded that the EPBC Act is difficult to navigate, inflexible, and duplicates state and territory processes. Inefficient regulation imposes costs on the economy and the community, while having little impact on the environmental outcomes that are achieved through regulation.

Other stakeholders have noted however that Australia's economy has consistently expanded over the past 20 years while key environmental indicators have continued to decline.

Certainty

Some sectors, such as agriculture, highlight that many small businesses lack awareness of their obligations under the EPBC Act. Past reviews have highlighted examples that indicate the current regulatory framework imposed by the EPBC Act is hard to work with, due to uncertainty about what is required and what to expect. There is low understanding about how decisions are made and high potential for unexpected delays in decisions, particularly when individuals, partnerships or small businesses have to interact with the Act's regulatory regime. A lack of clear environmental standards contributes to this uncertainty and costs.

Inclusion

The EPBC Act includes specific objects to recognise the role of Indigenous Australians and to promote the use of their knowledge in the protection of the environment and biodiversity. However, stakeholders have suggested that the involvement of Indigenous Australians in the operation of the EPBC Act has been inconsistent and potentially inadequate. Shortcomings often raised include environmental impact assessment, protection of Indigenous heritage and understanding the cultural significance of Australia's plants, animals and cultural landscapes.

Trust and transparency

The increasing volume of legal challenges to decisions under the EPBC Act indicates both concern about the outcomes of regulatory decisions, and a decline in trust in the decision-making process. Requests for further information about decisions under the EPBC Act are also increasing, suggesting that many stakeholders are seeking greater transparency.

QUESTION 6: What high level concerns should the review focus on? For example, should there be greater focus on better guidance on the EPBC Act, including clear environmental standards? How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation? What have been the economic costs associated with the operation and administration of the EPBC Act?

3. WHAT THE FUTURE LOOKS LIKE

As independent reviews of the EPBC Act occur once each decade, it is important that this review ensures its recommendations are fit for the future. To do this well, the review will need to draw on the best available information to forecast the likely future operating context for the Act.

To start this forecasting, the review is examining key reports⁶ — such as the State of the Environment Report 2016, Australian Bureau of Statistics (ABS) population projections, CSIRO's global megatrends analysis, State of the Climate reporting by CSIRO and the Bureau of Meteorology (BOM), and the Treasury's Intergenerational Report — to identify key environmental, social, and economic trends likely to shape the future operating environment of the EPBC Act.

PRESSURE ON THE ENVIRONMENT WILL INCREASE

The 2016 State of the Environment Report identifies changing land use, habitat fragmentation and degradation, climate change and invasive species as key pressures on Australia's environment. Many Australian species and habitats are in decline and the rate of this decline does not appear to be slowing. There have been permanent changes for some species and habitats as a result of past activities and ongoing impacts from invasive and feral animals and plants. While some ecosystems — such as oceans — are considered to be in good condition, further declines in habitat and biodiversity are expected.

The State of the Climate Report projects increases in sea and air temperatures, more extreme weather events, sea level rises, ocean acidification, and shifts in rainfall. While the full extent of climate change impacts on the environment is difficult to determine, CSIRO and BOM indicate that these changes can have a very significant impact on ecosystems, and that widespread ecological change is likely unavoidable.

THE ECONOMY WILL CONTINUE TO GROW

CSIRO's megatrend analysis shows that the Australian economy has grown consistently over the last three decades and is projected to grow into the future. Despite recent headwinds, the global economy is also expected to grow in the coming decades, and continue its shift towards Asia.

These trends are expected to transition millions of people out of poverty, with 65 per cent of the world's middle classes expected to reside in Asia by 2030. By 2030, the Asia-Pacific region is expected to consume more than half of the world's food and 40 per cent of its energy.

These global economic trends are likely to create opportunities for the Australian economy, and increase the pressure on our environment. A growing global middle class will increase demand for Australian products and resources, and the mix of goods and services is likely to change with increased affluence. For Australia, this means the role of tourism in our economy will grow significantly, and changed commodity export and business opportunities may emerge. The trend of increased international trade with, and travel to, Australia is expected to create additional demand for wildlife products and increase the risk of the incursion of pests, diseases and weeds.

⁶ State of the Environment Report 2016; ABS population projections; CSIRO (2012), Our future world: global megatrends that will change the way we live; The Treasury, 2015 Intergenerational Report, Australia in 2055, CSIRO and BOM State of the Climate Report 2018.

AUSTRALIA'S POPULATION WILL GROW, WITH CHANGING EXPECTATIONS

Treasury's intergenerational analysis indicates that Australia's population will continue to age, and could grow by 50 per cent by 2050. This level of growth is likely to increase pressure on the Australian environment, with greater demand for our natural resources.

Submissions to the Hawke and Craik reviews⁷ indicate that Australians' interest in protecting the environment has remained high over the last decade. Governments and communities will need to find new ways to maintain the quality of life for current and future generations within the confines of finite natural resources. There is growing recognition of the value of involving Australian communities, particularly Indigenous Australians, more directly in managing the environment.

BUSINESSES WILL ADAPT TO REMAIN COMPETITIVE

Trust in both public and private institutions has fallen in recent times. Businesses are responding to international and domestic community and consumer preferences. They are playing an increasingly active role in sustainable environmental management to build and maintain community support and social licence. For example, businesses are increasingly looking for opportunities to contribute to the United Nations Sustainable Development Goals (SDGs). The SDGs are a common reference point for all sectors and a framework to focus our collective efforts on a sustainable future for all.

The rapid expansion of the digital world and disruptive technologies is changing business models and altering the economy. It is also resulting in greater expectations among the Australian community toward digital delivery of services and the accessibility of information that is important to them.

QUESTION 7: What additional future trends or supporting evidence should be drawn on to inform the review?

⁷ Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (October 2009), Final Report; Review of the interactions of the EPBC Act with the agriculture sector (2018), Final Report. The full reports can be found at www.environment.gov.au

4. FOCUS AREAS: HOW CAN THE EPBC ACT BE IMPROVED?

A key first step in the review process will be to identify areas where reform could make the biggest difference to the environment, business and the community. While the Reviewer is yet to form a view about particular areas of focus for the review, this chapter outlines six broad potential focus areas for reform to stimulate thinking and promote discussion. The focus areas consider what the EPBC Act should aim to achieve and how to best deliver these aims. The proposals are relevant across the Act.

- A. The role of the EPBC Act
- B. Better environment and heritage outcomes
- C. More efficient and effective regulation and administration
- D. Indigenous Australians' knowledge and experience
- E. Community inclusion, trust and transparency
- F. Innovative approaches

A. THE ROLE OF THE EPBC ACT

While existing agreements between the Commonwealth, states and territories define respective roles and responsibilities in relation to the environment, there is scope within these agreements for the Commonwealth to consider the most appropriate role for the EPBC Act. For example, matters of national environmental significance have changed over time. Some stakeholders have proposed that they could be further altered to remove nuclear actions and the water trigger, while others have suggested adding land clearing and climate change triggers.

There are concerns the EPBC Act has not done enough to protect the environment. Business and government at all levels are affected by environmental regulation of activities. This regulation is resulting in unnecessary uncertainty and delays with flow on impacts to industry, governments and the community. The review provides the opportunity to modernise national environmental law to improve outcomes for industry and the environment both now and in the future.

A reformed EPBC Act could take a 'standards-setting' or coordination approach, relying more on endorsed state and territory processes to address specific impacts on matters of national environmental significance. For example, impacts on plants and animals that live exclusively within the boundary of one state or territory could be dealt with under that jurisdiction's regulatory process.

Alternatively, if the current role of national environmental law remains largely unchanged, there are many potential administrative improvements that could increase certainty and transparency in decision-making. These could include improved communication of expectations, making better use of existing information, greater use of cross-jurisdictional standards such as the Common Assessment Method for threatened species listing, automated publication of decision-making material and streamlined public facing systems.

QUESTION 8: Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

B. BETTER ENVIRONMENT AND HERITAGE OUTCOMES

The objects of the EPBC Act reflect an ambition to unite biodiversity and heritage conservation with sustainable development principles, and to promote the conservation and sustainable use of natural resources. While states and territories have primary responsibility for land use planning and management of environmental matters within their borders, the Commonwealth has responsibility for matters of national or international significance, as well as its own actions and its own land.

Since the beginning of the Act, there have been some clear improvements in some areas, including substantial expansion to the network of parks and protected areas. However, many parts of Australia's environment and heritage continue to decline. Many Australians have strong views about the outcomes they want from protecting the environment and Australia's heritage.

QUESTION 9: Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?

Environmental standards

The EPBC Act currently relies on regulatory process to deliver consistent environmental outcomes in many areas complemented by a range of strategies and plans, such as the Reef 2050 Water Quality Improvement Plan 2017-22. These regulatory processes provide further guidance on environmental standards and targets in some areas. The EPBC Act could be amended to move towards a national standard setting approach, based on the best available science and more closely linked to outcomes.

The EPBC Act already includes tools that enable a form of environmental standards-setting through accrediting other legislative processes or plans that meet national standards. Examples include the accreditation of National Offshore Petroleum Safety and Environmental Management Authority's environment management processes through a strategic assessment, and bilateral agreements with states and territories to undertake environmental impact assessments. Examples of possible alternatives include:

- The Commonwealth could refine policies and strategies to deliver greater clarity on expected national standards related to the objects of the EPBC Act. These standards would continue to act as guidance, aiming to build consensus and national consistency on the outcomes we are seeking to achieve.
- Existing outcomes-based standards such as those for air quality, waste and site contamination under the National Environment Protection Council⁸, and water quality in the Great Barrier Reef catchments, are examples of how the Commonwealth and states and territories could agree to environmental standards.
- The Commonwealth could alternatively prescribe broad national environmental standards that seek to deliver the objects of the EPBC Act, to guide state and territory regulators, with the Commonwealth taking only a monitoring and assurance role.

⁸ National Environment Protection Council Act 1994 (Cth); National Environment Protection (Ambient Air Quality) Measure 2016 (Cth), (Which sets standards agreed to by the Commonwealth and states and territories to measures and limit PM_{2.5} and PM₁₀)

QUESTION 10: Should there be a greater role for national environmental standards in achieving the outcomes the EPBC Act seeks to achieve? In our federated system should they be prescribed through:

- Non-binding policy and strategies?
- Expansion of targeted standards, similar to the approach to site contamination under the National Environment Protection Council, or water quality in the Great Barrier Reef catchments?
- The development of broad environmental standards with the Commonwealth taking a monitoring and assurance role? Does the information exist to do this?

Environmental protection and restoration

The current state of the Australian environment is a legacy of past development and other impacts, much of which occurred prior to the implementation of the EPBC Act. The EPBC Act is focussed on protecting the environment through supporting ecologically sustainable development for activities after 1999. In practice, environmental restoration and sustainable development are intertwined as it is simpler and easier to ensure development is sustainable if it occurs within a healthy and resilient environment. This focus area seeks to consider if the EPBC Act could deliver better environmental outcomes were it focussed on both environmental protection and greater restoration.

The package of environmental initiatives implemented in the late 1990s, of which the EPBC Act was a component, included the \$1.1 billion Natural Heritage Trust which incorporated a focus on restoration of historical environmental impacts. This enabled the EPBC Act to focus on promotion of biodiversity, rather than including a greater regulatory focus on environmental restoration. It may be possible however to achieve better, more robust environmental outcomes by increasing the regulatory focus of the EPBC Act to incorporate environmental restoration.

While the combination of Natural Heritage Trust and the EPBC Act have delivered benefits to the environment, more action to support the recovery of species and ecosystems through national environmental law, or its application, may help in achieving ecologically sustainable development in the future. This is particularly true in the face of growing demands on natural resources and a changing climate.

It is also possible that environmental restoration should predominantly remain the focus of strategies and programs that sit outside the EPBC Act, such as the National Landcare Program. The substantial expansion of carbon farming projects, many of which store carbon by the regeneration of forests, may deliver improved environmental outcomes if the projects expanded into areas with greater biodiversity values.

Mitigation and offsetting requirements could be better directed towards areas of the most beneficial protection and restoration. Better use of new technologies could make information about priority recovery activities more contemporary, regionally relevant and accessible, and support monitoring and reporting.

QUESTION 11: How can environmental protection and environmental restoration be best achieved together?

- Should the EPBC Act have a greater focus on restoration?

- **Should the Act include incentives for proactive environmental protection?**
- **How will we know if we're successful?**
- **How should Indigenous land management practices be incorporated?**

Heritage protection and management

Nationally significant heritage places provide important cultural benefits to the Australian community, in addition to the use and enjoyment they provide to their owners and users. The International Union for Conservation of Nature presently has four of Australia's natural World Heritage properties listed as being of significant concern. Some have also suggested Indigenous heritage values are potentially underrepresented in Australia's heritage places.

Currently, the allocation of resources for heritage protection is risk-based. This risk-based approach to heritage protection could be changed to increase its focus and resources on national and Indigenous managed and World Heritage properties. The Commonwealth could consider if other jurisdictions or sectors could better manage or monitor heritage sites that are currently managed by the Commonwealth. Some categories of future listings could be constrained to help ensure potentially under-represented values increase over time. Further, greater emphasis could be put on developing conservation management plans for listed heritage places and to encourage greater recognition of privately-owned heritage places through appropriate incentives.

QUESTION 12: Are heritage management plans and associated incentives sensible mechanisms to improve? How can the EPBC Act adequately represent Indigenous culturally important places? Should protection and management be place-based instead of values based?

C. MORE EFFICIENT AND EFFECTIVE REGULATION AND ADMINISTRATION

Improving the efficiency and effectiveness of regulation through changes to the Act or its implementation can deliver benefit to both the economy and environment. This may reduce the regulatory costs to businesses and the broader community. It may also improve environmental outcomes, particularly if changes facilitate greater compliance with the law or improve the focus of regulation toward areas of the greatest environmental benefit.

Reducing regulatory complexity

Commentary on the EPBC Act suggests it is challenging to navigate. Specifically, it is repetitive, complex, unclear in some areas and overly prescriptive in others. Changes to reduce unnecessary complexity and provide greater clarity could reduce confusion around obligations, remove duplication between jurisdictions, lower costs and improve environmental outcomes.

This complexity is evident in environment assessments and approvals:

- The EPBC Act includes regulatory tools that intend to reduce the need for case-by-case approvals. Strategic assessments can approve policies, plans or programs that outline upfront

clear rules that apply broadly. Despite these tools existing in the EPBC Act, most projects are still being assessed on a case-by-case basis, with little differentiation for risk to the environment.

- The matters protected under the EPBC Act are often also protected by states and territories. However, jurisdictions can have differing requirements, meaning approval conditions set by a state for a project may not be sufficient to meet EPBC requirements. In other cases, such as for nuclear developments, the EPBC Act requires a whole-of-environment assessment, considering impacts on nationally protected matters but also impacts normally regulated by states and territories, such as noise or local air quality impacts. There may be an opportunity to refine the matters of national environmental significance to remove duplication of requirements.
- The requirement for proponents to self-assess the significance of their development against the range of matters of national environmental significance can be challenging, particularly for smaller organisations and individual land holders. This can impose unnecessary costs as it's often difficult to be certain if actions are significant early in the process, even for relatively low-risk actions that end up not requiring approval under the Act.

The Act could be amended to simplify language and approaches, with more emphasis on clear communication of obligations. There is also an opportunity to unify and streamline key processes under the Act, including public consultation, applications, publication, management plans and issuing permits. The Act could also be substantially simplified through greater use of subordinate legislation, rules and guidelines.

QUESTION 13: Should the EPBC Act require the use of strategic assessments to replace case-by-case assessments? Who should lead or participate in strategic assessments?

QUESTION 14: Should the matters of national significance be refined to remove duplication of responsibilities between different levels of government? Should states be delegated to deliver EPBC Act outcomes subject to national standards?

Simpler and clearer interactions with government

The EPBC Act places obligations on a wide range of organisations and individuals. These include businesses, importers and exporters, farmers, communities, environmental consultants, and researchers. Clearly outlining obligations for specific audiences, and leveraging new technologies and approaches, could deliver improvements in user experience and compliance.

Future economic growth is expected to increase the volume of regulatory approvals and wildlife trade. One option to better manage this increased volume of approvals is to ensure the Act and its implementation keeps pace with community needs and expectations for digital services. A single, streamlined interface that reflects efforts to better align Commonwealth and state and territory processes could significantly reduce frustration and duplicated effort, and provide a central point for input and access to the information used to underpin decisions.

The information collected to support environmental approval decisions under the EPBC Act and those by states and territories is not easily accessible or transparent. Improving access to this information could reduce costs to industry and other stakeholders, as the same information can be re-purposed. It could also increase the consistency of, and confidence in, decision making across different levels of government, as decisions would be underpinned by the same information.

An alternative regulatory model could tailor obligations to the expected level of environmental impact assessed by an initial automated process. This could provide a higher level of transparency, predictability and consistency. Further capacity for fully automated decision making to authorise low-risk projects that do not require referral under the Act could be developed.

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?

Regional approaches

Many of Australia's ecosystems are at risk from a broad range of threats, including invasive species, habitat loss and climate change. There are also future development pressures from urban growth and resource developments in particular geographic areas. It is possible that these threats and development pressures could be more effectively addressed through a landscape-scale approach, rather than on a project or species basis. While there are a range of definitions of landscape-scale approaches, they tend to include the consideration of large spatial areas through an integrated multidisciplinary approach to better manage the cumulative impacts on the environment, with consideration of economic and social factors. The potential benefit of landscape-scale solutions is that they may enable better protection of matters of national significance, longer-term streamlining of administrative decision making and compliance, and coordinated investment in protection and restoration.

A regional approach has been relatively successful in the Commonwealth marine environment with plans developed for four of Australia's marine regions. These plans identify conservation priorities, strategies and actions to address those priorities and obligations under the EPBC Act.

A number of existing approaches under the EPBC Act such as strategic assessments, bioregional planning and the National Reserve System were designed to deliver landscape-scale approaches. The intent of these approaches is to reduce the need for individual project approvals to protect important areas, while delivering on ecologically sustainable development. In practice, these approaches in their current form have not always fully delivered on this intent with strategic assessments of large areas of land and bioregional plans seen as complex, slow and subject to legislative constraints on their use.

One success has been the use of regional planning and strategic assessments in the Commonwealth marine environment. This success may be linked to the Commonwealth being the sole jurisdiction in these areas. The application of Regional Forestry Agreements outside the EPBC Act is another example of a regional approach. The Commonwealth could expand regional planning to areas where multiple jurisdictions have a role. This could include potentially accrediting state and territory approaches to regional planning, where relevant landscapes exist completely within one jurisdiction. The Commonwealth could retain responsibility for plans that are wholly within Commonwealth jurisdiction, or those that cross state boundaries.

Efforts could also be made to clarify when regional planning should be used within the broader regulatory framework to help focus efforts and resources to those areas where the most benefits can be

gained. For example, where development pressures intersect with areas of high environmental value or to ensure the impact of the combination of individual threats are adequately addressed.

Integrated regional or landscape-scale plans could be a priority for development in partnership with states and territories to meet a range of national and state level requirements, including developing an integrated and representative reserve system, determining priorities for investment and the valuation of co-benefits.

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?

Alternative regulatory approaches

The EPBC Act is an example of a traditional rules-based regulatory model. The Act prescribes rules and processes to be followed and provides penalties if they are not. This approach to legislation relies on the assumption that the processes will deliver the intended outcome. It is also one reason why the EPBC Act is more than 1000 pages long. It is important to question if the current process-based regulatory approach is delivering the desired environmental outcomes, and whether this is being done in a timely or efficient way.

Alternatives to traditional rules-based regulation can be more effective, in certain circumstances, at achieving policy outcomes at lower cost and with less regulatory burden. Legislation should be about achieving clear, specifically determined outcomes, rather than compliance with process. This requires improved performance measurement and reporting to monitor impacts and performance, help set expectations and improve trust in the system.

The EPBC Act could be modified to enable self-regulation or co-regulation where basic conditions are met, such as where the regulated community has a vested interest in being subject to regulation, and where there are well-developed and accepted codes of practice. Accreditation of environmental professionals could also improve consistency of information and trust in advice. The Commonwealth could also further accredit the states and territories, setting national standards and adopting a focus on an enhanced coordination and assurance stance to ensure good outcomes are achieved. Alternatively, the EPBC Act could implement general duties, similar to occupational health and safety duties, applicable to all actions that could impact the environment and heritage.

QUESTION 17: Should the EPBC Act be amended to enable broader accreditation of state and territory, local and other processes?

QUESTION 18: Are there adequate incentives to give the community confidence in self-regulation?

D. INDIGENOUS AUSTRALIANS' KNOWLEDGE AND EXPERIENCE

Indigenous Australians are the custodians of the oldest continuous culture in the world. Over tens of thousands of years, they have built a deep connection with Country. This connection is central to their

culture, spirituality, language and wellbeing. The active management of the environment and associated cultural practices by Indigenous Australians have significantly shaped the natural environment of Australia.

The role of Indigenous Australians in the natural and cultural environment was recognised in the objects of the EPBC Act at its inception. This was a significant step at the time. Three of the eight objects of the EPBC Act recognise the role of Indigenous Australians: Indigenous roles in the protection and management of the environment; conservation and ecologically sustainable use of biodiversity; and promoting the use of Indigenous Australians' knowledge of biodiversity.

Since the EPBC Act was introduced, respect for and appreciation of Aboriginal and Torres Strait Islander people and their cultures has deepened. To strengthen the role of Indigenous Australians in the implementation of the Act, emphasis in the Act itself could be placed on early and genuine engagement with them. The process and nature of longer-term involvement in environmental and cultural management could be determined in collaboration with Indigenous communities as part of this early engagement, reflecting the unique needs of different communities.

One pathway could be to update the objects of the Act to provide more emphasis and clarity on the involvement and interests of Indigenous Australians. This could be achieved by changing the wording in the objects from "to promote the use of Indigenous peoples' knowledge..." to "to provide for the use of Indigenous peoples' knowledge...", and including appropriate supporting mechanisms in the Act. This would provide a more direct and clear role for Indigenous Australians in managing Australia's plants, animals and cultural landscapes.

QUESTION 19: How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management?

- How can we best engage with Indigenous Australians to best understand their needs and potential contributions?

- What mechanisms should be added to the Act to support the role of Indigenous Australians?

E. COMMUNITY INCLUSION, TRUST AND TRANSPARENCY

Australia's environment is a valuable asset. Greater inclusion of Australians in the processes that protect, manage and promote the environment and heritage may help foster the best environmental outcomes for all Australians. Greater inclusion also facilitates transparency in decision making and fosters community trust in regulators and regulatory outcomes.

Inclusion and transparency

Australians have a long history of active involvement in environmental matters. This role is critical in directing Government, industry and community activity towards important environmental values. The Australian Government fosters these activities through programs that support on ground action, including by investing directly in community environmental programs. Additional models to increase community inclusion could also be considered. For example, Government could work with industry on a code-of-practice to support deep and early engagement of the community in environmental approval applications. Alternatively, Government could seek greater community involvement in co-designing approaches, such as new strategic assessments. It may also be possible for Government to deliver

greater inclusion of Australians in the regulatory decision-making process, such as through new formal advisory bodies that include a range of community interest groups. Further, existing advisory bodies for decision makers could be required to have greater community membership.

Greater transparency of decision making could be achieved by requiring automatic publication of greater information about decisions including for example, decision-making materials, external advice and offset agreements. This would also reduce the risk of administrative delays arising from the diversion of resources to respond to individual requests for information.

QUESTION 20: How should community involvement in decision making under the EPBC Act be improved? For example, should community representation in environmental advisory and decision-making bodies be increased?

Governance, certainty and accountability

Trusted regulatory frameworks have effective governance arrangements that ensure decisions are properly made. Inappropriate governance arrangements, including poor guidance on regulatory requirements, can limit efficient and effective administration of legislation and undermine certainty and trust in the regulatory framework. Effective governance arrangements generally:

- define who sets policy
- identify the responsible decision makers
- identify how advice is used to inform decisions, and
- enable decision makers to be held accountable.

The existing governance model of the EPBC Act involves the Commonwealth Minister for the Environment as the primary decision maker. This is a valid model to consider due to the complex nature of decisions that must consider competing environmental, social, and economic factors, while also remaining accountable to the community. Accountability and certainty could be increased through changes that further clarify existing roles and responsibilities under the Act for decision-makers and those providing advice.

Recently a number of stakeholders have proposed structural changes in governance. Options for broad reform have included creating new advisory bodies to inform decisions on approvals. It has also been suggested that a separate, statutory authority could become the responsible decision maker under the Act, similar to models used at state and territory level or Commonwealth regulators in other sectors. A different model again could be the creation of a single statutory office holder to determine environmental approvals, similar to the Director of National Parks. While these potential changes would alter decision making and accountability, recent public concern with outcomes delivered by other Commonwealth and state and territory regulators suggest improvement is by no means certain. Successful change of this nature would also likely require additional legislative rules and administrative costs.

QUESTION 21: What is the priority for reform to governance arrangements? The decision-making structures or the transparency of decisions? Should the decision makers under the EPBC Act be supported by different governance arrangements?

F. INNOVATIVE APPROACHES

The EPBC Act was created 20 years ago and takes a traditional regulatory approach – imposing rules on individuals and business through legislation to achieve environmental protection. The Act was not designed to consider or promote alternatives, such as ecosystem services markets, alternative financing arrangements, co- or self-regulation, environmental accounting and information and education-based approaches, noting there are likely limitations on the potential for these alternatives. The review provides an opportunity to consider increasing the role of environmental accounting, incentives and ecosystem services markets to complement the right environment protection rules.

Ecosystem services are functions performed by ecosystems that lead to desirable environmental outcomes. They include for example air and water purification, flood mitigation, and the stabilisation of climate in accordance with the Paris Agreement. Examples of potential markets for ecosystem services include tradeable units for carbon sequestration, or those for biodiversity conservation⁹. The expansion of ecosystem services markets in the past 20 years has been helped by the rapid growth in experience, data, analytics and digital technology. Ecosystem services markets for carbon and biodiversity are in limited use by both the Commonwealth and state and territories.

The limited capacity of government resources to directly manage Australia's environment may constrain the achievement of environmental outcomes. Greater use of ecosystem services markets could make it easier for business to meet their obligations by investing in environmental outcomes. There is also an opportunity to take advantage of the greater focus on corporate social responsibility to increase private sector interest in improving the environment.

As noted earlier, where the interests of the regulated community aligns with the regulatory outcome, there may also be advantage in leveraging mature industries' ability to self-regulate, with the Commonwealth retaining oversight. These arrangements can be more adaptive in a rapidly changing world and have greater support than traditional regulation, especially if there is connected and coordinated investment in what matters most, with transparency of obligations supported by quality assurance arrangements.

Finally, the provision of greater information and education can change the behaviour of consumers and business, such as through labelling and other information products.

QUESTION 22: What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?

Offsets and market-based approaches

Since 2012, the Department of the Environment and Energy's adoption of a formal offsets policy in environmental impact assessment decisions has created an emerging national biodiversity market. Companies purchase offsets (most often land with similar habitat) and are required to protect them as part of their conditions for development approval under the EPBC Act where residual impacts cannot be

⁹ Creating Markets for Ecosystem Services, Productivity Commission, 2002

avoided or mitigated. The Offsets Policy¹⁰ was developed with a focus on regulatory and scientific considerations rather than the potential for a market. In reality, a national biodiversity offsets market exists in parallel with expanding states and territory biodiversity offset markets.

A greater focus on developing efficient ecosystem services markets may lower costs and support greater investment in the environment. There may also be opportunity to improve the environmental outcomes that the current biodiversity offsets system delivers and the systems that maintain the integrity of offsets.

Providing national biodiversity markets with greater long term certainty, such as converting policy into law, could reduce risk for the private sector when making the required long-term investments in the biodiversity market. Lower risk could be expected to reduce costs. It may also be possible to expand the scope of the national biodiversity market from a focus on offsets toward greater ecosystem recovery.

QUESTION 23: Should the Commonwealth establish new environmental markets? Should the Commonwealth implement a trust fund for environmental outcomes?

QUESTION 24: What do you see are the key opportunities to improve the current system of environmental offsetting under the EPBC Act?

Alternative financing approaches

The use of trusts and other financial mechanisms to deliver environmental outcomes has expanded in the past decade at both the state and territory and Commonwealth Government levels. Their use may have potential to deliver improved environmental and business outcomes.

There are opportunities for governments to increase leverage of private sector investment. For example, investments targeted to deliver sustainable agriculture, carbon emissions reductions and regional development could also deliver improved public good in the form of environmental protection and recovery.

The EPBC Act and its associated policies could be modernised, and data and information systems improved, to enable the scaling up of philanthropic and private sector investment in Australia. This could be achieved by developing national environmental accounts that are clearly understood and usable by both the government, philanthropic and private sectors.

The Commonwealth could also develop its own investment vehicle, such as an environmental trust, to fund direct conservation outcomes and provide a coordinated vehicle to manage EPBC Act offset funding. This could deliver lower costs by enabling strategic investment over longer timeframes. It could also deliver more inter-connected areas of protected habitat than the present offsets policy delivers, improving ecosystem benefits.

QUESTION 25: How could private sector and philanthropic investment in the environment be best supported by the EPBC Act?

¹⁰ *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy 2012*

- Could public sector financing be used to increase these investments?
- What are the benefits, costs or risks with the Commonwealth developing a public investment vehicle to coordinate EPBC Act offset funds?

5. PRINCIPLES TO GUIDE FUTURE REFORM

It is important that future reforms are guided by a set of principles. These principles should reflect what is important to Australians, and our goals for national environmental law.

We are keen to hear your views about these principles and others we should consider.

Effective Protection of Australia's environment

Protecting Australia's unique environment and heritage through effective, clear and focussed protections for the benefit of current and future generations.

Making decisions simpler

Achieving efficiency and certainty in decision making, including by reducing unnecessary regulatory burdens for Australians, businesses and governments.

Indigenous knowledge and experience

Ensuring the role of Indigenous Australians' knowledge and experience in managing Australia's environment and heritage.

Improving inclusion, trust and transparency

Improving inclusion, trust and transparency through better access to information and decision making, and improved governance and accountability arrangements.

Supporting partnerships and economic opportunity

Support partnerships to deliver for the environment, supporting investment and creating new jobs.

Integrating planning

Streamlining and integrating planning to support ecologically sustainable development.

QUESTION 26: Do you have suggested improvements to the above principles? How should they be applied during the Review and in future reform?

6. QUESTIONS AND HOW TO MAKE A SUBMISSION

In addition to the specific questions asked throughout this discussion paper, the broad questions that this review is seeking to answer are:

- Is the EPBC Act delivering what was intended in an efficient and effective manner?
- How well is the EPBC Act being administered?
- Is the EPBC Act sufficient to address future challenges? Why?
- What are the priority areas for reform?
- What changes are needed to the EPBC Act? Why?

The questions in this discussion paper are provided as a guide only and are not intended to limit your comments. In providing your responses it will be helpful if you:

- where possible, identify which parts of the EPBC Act your comments relate to
- describe what is working well and what improvements can be made
- explain what the impact of these improvements would be on you, others and the environment, and
- provide any available data, evidence or case studies to support your views.

HOW TO MAKE A SUBMISSION

Our preference is to receive written contributions through an online form. The questions in this discussion paper have been extracted into our online form to support you to do this. This form helps us efficiently process comments and submissions, allowing us to focus on the content and ideas rather than administration. Contributions can also be made by post or email. Details for contacting the Secretariat are available on the review website.

Submissions on this discussion paper are due by 5pm (AEDST) Friday, 14 February 2020.

You can make a brief comment at any time on the review website. While comments are easy to make, they are likely to be given less weight than a formal submission.

We will publish each submission and comment on our website, except for those provided to us in confidence. Before making a comment or submission, we encourage you to read the information on how we will protect your privacy (<http://www.environment.gov.au/privacy-policy>) and treat the information that you give us. The Department's Privacy Policy contains information about how to access or correct your personal information or make a complaint about a breach of the Australian Privacy Principles.

The review is committed to treating confidential information responsibly and in accordance with the law. In some circumstances, the review may be legally required to produce confidential information. Any request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act. We will publish the name of the individual(s) or organisation making the submission, unless requested otherwise. We will also publish information provided on the stakeholder category that best fits the individual or organisation, and the themes covered by the submission.

We will not publish material on our website that is offensive, potentially defamatory, contains personal information (other than your name) or is clearly out of scope or factually incorrect.

For full details, please visit the review website at: <https://epbcactreview.environment.gov.au/>

EPBC ACT 1999 REVIEW

A Submission to the EPBC
Independent Panel

21 January 2020



Improving Environmental Performance
Ngaral Kulji Bubungu - Eastern Kuku Yalanji
Pulmpa dakit jarral-a-kaling - Yirrganydji

Image: Daintree Rainforest

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OVERVIEW

The Environmental Protection and Biodiversity Conservation (EPBC) Act 1999 is currently under review. Douglas Shire Council has been invited to prepare a submission on the EPBC Act 1999 to the Independent Panel. The following documents have been reviewed and informed this submission:

- The Environmental Protection and Biodiversity Conservation Act 1999
- EPBC Act Discussion Paper, available on the following website:
<https://epbcactreview.environment.gov.au/>

HISTORY OF THE ACT

- 1. Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?**
 - The existing penalties within the Act are sufficient, however more enforcement is required, e.g. on-the-ground resources and power for regulating officers to hold people accountable.
 - Perhaps fresh water bodies, including their water quality should be considered Matters of National Environmental Significance, due to their ecological and water security importance.
 - The EPBC Act currently sits outside State/Territory and local assessment and referral triggers. The EPBC Act should have better integration with State/Territory and local assessments/legislation to enable streamlining of the assessment processes, e.g. threatened species and communities (MNES) should have particular triggers included in State/Territory legislation to identify any issues before damage is done, e.g. Ant plants.
 - Climate change and disaster related impacts should form part of the assessment process, becoming an additional trigger.
 - There should be greater recognition and acknowledgment of Traditional Owners within the revised Act, e.g. processes to leverage their knowledge and ensuring their interests are represented throughout the assessment.

WHAT THE EPBC ACT DOES

2. How could the principle of ecologically sustainable development (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?

- There is sufficient reference to the ESD throughout the current Act, however the ESD could be better defined.
- There is a risk of watering down the EPBC Act if the ESD becomes a core component, creating more loop holes for applicants.
- Perhaps consideration on the overarching costs of services or benefits provided by the environment could be included, e.g. air and water quality. This needs to be done at a national level.

3. Should the objects of the EPBC Act be more specific?

- The current objectives are suitable, however it is recommended that climate change and impacts of disasters should to be included.

4. Should the matters of national environmental significance within the EPBC Act be changed?

How?

- The criteria for threatened species & ecological communities (critically endangered, endangered and vulnerable) differ from State/Territory and international (e.g. IUCN) criteria. From a conservation point of view there would be great benefit in having consistent terminology.
- The EPBC Act currently sits outside State/Territory and local assessment and referral triggers. The EPBC Act should have better integration with State/Territory and Local assessments/legislation to enable streamlining of assessment processes e.g. threatened species and communities (MNES) should have particular triggers included in State/Territory legislation to identify issues before damage is done e.g. Ant plants.
- The GBR, listed as a Matter of National Environmental Significance is strongly supported.
- The States and Territories approach to climate change is currently inconsistent. It is recommended that standardised outcomes relevant to climate change (e.g. sea level rise)

are developed. Issues should be assessed based on scientific evidence and research, as opposed to political agendas.

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 matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

- The focus of the Act should remain on biodiversity conservation, followed by assessment, approval and enforcement.
- Landholder areas could be addressed under a structured mechanism and formally recorded on a database, e.g. the Queensland Government's Nature Refuge program. This should be communicated to local governments for their records.
- Threatened Species Recovery should include ecosystems not just species. A mechanism for the Federal Government to trigger recovery of threatened ecosystems and species should be developed. This needs to include standardisation of assessment and response. Decision making power on whether a recovery plan is made, adopted and implemented, should be expanded to include the relevant authority. The process for developing recovery plans needs to be more accountable and transparent, with greater emphasis on the ecosystem as opposed to the landholder

THE PERFORMANCE OF THE EPBC ACT

6. What high level concerns should the review focus on? For example, should there be greater focus on better guidance on the EPBC Act, including clear environmental standards? How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation? What have been the economic costs associated with the operation and administration of the EPBC Act?

- The Discussion Paper recognises that the health of the Australian environment and its biodiversity has declined over time, this has occurred whilst the Australian economy as a whole has continued to grow.
- The high level concerns should focus on:

- Biodiversity and habitat protection
- Consideration of climate change and disaster related impacts.
- National environmental standards should align with international environmental best practice standards.
- Better integration for businesses and developers with assessment to create effective processes. This process should be streamlined, without compromising the EPBC objectives.
- The economic costs to Local Governments include permit fees and administration.

WHAT THE FUTURE LOOKS LIKE

7. What additional future trends or supporting evidence should be drawn on to inform the review?

- New technologies, e.g. drones, could assist with enforcement, access, surveillance and provide more accurate mapping.
- Increasing biosecurity threats, requiring more stringent quarantine measures, e.g. postage system.
- Increase in natural disasters and impacts, e.g. fires.
- Consideration of impacts associated with climate change.
- Expansion of the listed MNES, e.g. there may be a need to include insects.
- Focus on ecosystems not just species.
- Increased pressure on genetic banks, to ensure good coverage of species, e.g. Corals.
- A better understanding of the interrelationships between ecosystem, fauna and flora.

THE ROLE OF THE EPBC ACT

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

- The focus of the Act should be on preventative measures to protect the environment from detrimental outcomes.
- It is acknowledged that Australia is already experiencing impacts from climate change and this could be addressed within the Act.

- Both environmental and heritage outcomes should be regulated, with standardised processes and procedures to be adopted by State and Local Government.

9. Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?

- States/Territories should continue to have primary responsibility for land use planning and environmental management.
- Reporting should utilise existing reporting platforms, e.g. State of Environment Reports.
- Achievable outcomes should consider the overall health of ecosystem, decreased habitat fragmentation, decreased deforestation, increased numbers in vulnerable flora and fauna. This could be facilitated by aerial mapping and targeted on-ground surveys.
- The Commonwealth should have a stronger supporting role in delivering the outcomes e.g. through enforcement.
- Utilise independent experts and panels to assess if the outcomes are being achieved. This will allow greater oversight to increase objectivity.

10. Should there be a greater role for national environmental standards in achieving the outcomes the EPBC Act seeks to achieve? In our federated system should they be prescribed through:

- **Non-binding policy and strategies?**

- **Expansion of targeted standards, similar to the approach to site contamination under the National Environment Protection Council, or water quality in the Great Barrier Reef catchments?**

- **The development of broad environmental standards with the Commonwealth taking a monitoring and assurance role? Does the information exist to do this?**

- National environmental standards would be welcomed, these would need to be consistent with existing legislation and be communicated effectively to the wider public. However, the standards and reporting mechanisms should not create an administrative burden on on-ground resources.

- Develop a Commonwealth policy that stands up to international scrutiny. This should have regard to both National and International agreements and policies.
- Monitoring, report cards and assurances should not divert resources from on-ground operations.
- Utilise local entities with regards to monitoring and assurances, however additional resources will be required.

11. How can environmental protection and environmental restoration be best achieved together?

- Should the EPBC Act have a greater focus on restoration?

- Should the Act include incentives for proactive environmental protection?

- How will we know if we're successful?

- How should Indigenous land management practices be incorporated?

- Protection and natural regeneration should be the focus of the Act, however there should be some allowances for restoration work in appropriate areas.
- Incentives for proactive environmental protection can work effectively but shouldn't divert large amounts of money from the core aspects of the Act.
- Incentives should be considered on a geographical basis to prevent multiple groups (each with their own administrative and operational costs) in one area obtaining grant funds at the expense of other areas in need.
- Recognition of private groups undertaking proactive environmental protection and restoration. E.g. through accreditation.
- Audit and review of restoration practices (on-going monitoring).
- Indigenous land management practices could be incorporated through consultation with Traditional Owners on a local basis. Identified practices should take into account the latest science and proven techniques.

12. Are heritage management plans and associated incentives sensible mechanisms to improve? How can the EPBC Act adequately represent Indigenous culturally important places? Should protection and management be place-based instead of values based?

- The EPBC should continue to focus on national significance MNES, which should then be aligned and incorporated into State legislation.

- Indigenous culturally sensitive places should be considered within the Act through consultation with Traditional Owners.
- Heritage sites should be assessed from both a place and value based perspective.

MORE EFFICIENT AND EFFECTIVE REGULATION AND ADMINISTRATION

13. Should the EPBC Act require the use of strategic assessments to replace case-by-case assessments? Who should lead or participate in strategic assessments?

- A strategic assessment would streamline processes, provided adequate rules, guidelines and factsheets are provided. There will always be a need for case-by-case assessment for unique projects, however reducing the number would make the Act easier to apply and fairer.
- It is recommended that the Act uses simplified language and approaches as suggested in the Discussion Paper.
- The Commonwealth should lead by providing State/Territory's with rules, guidelines and factsheets. Under the bilateral agreement States/Territories would then be best placed to undertake the strategic assessments.
- It is recommended that there is better integration of assessment processes. Who should lead assessment should depend on the nature of the development. The EPBC Act currently sits outside State and Local assessment and referral triggers. The EPBC Act should have better integration with State and Local assessments/legislation to enable streamlining of assessment processes e.g. threatened species and communities (MNES) should have particular triggers included in state legislation to identify issues before damage is done e.g. Ant plants.

14. Should the matters of national significance be refined to remove duplication of responsibilities between different levels of government? Should states be delegated to deliver EPBC Act outcomes subject to national standards?

- Yes as detailed in Question 13.
- States should be delegated to deliver the Act outcomes subject to national standards if adequate resources are made available. E.g. Wet Tropics and Great Barrier Reef Marine Park.

- Standards should apply to philanthropic groups.

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?

- Low-risk projects under a predefined quantifiable limit referred by other levels of government (e.g. local government) should be accepted development (self-assessable). A register should be kept and publically available. This should be audited for review to monitor impact and outcomes of multiple projects
- As much data as possible from environmental impact assessment should be made publically available providing it doesn't breach data and privacy legislation e.g. culturally sensitive information.

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

- Incorporating landscape-scale planning into the existing species-specific protection would be complimentary, e.g. Cassowary habitat management in one location may differ to another location.
- The assessment process should consider ecosystem scale and elements integral to the ecosystem.

ALTERNATIVE REGULATORY APPROACHES

17. Should the EPBC Act be amended to enable broader accreditation of state and territory, local and other processes?

- Whilst traditional rules-based regulation can be cumbersome, it is prescriptive and ensures permits are assessed fairly.
- The seriousness of breaching the Act will be compromised if the Commonwealth is not the primary regulator. However, it is recognised that the State/Territories have an important role in assisting with the assessment process.
- It is recommended that there is a standardised framework and criteria across all levels of government.

- Consider using philanthropic/accredited groups to deliver outcomes.
- Regular monitoring and auditing of outcomes.
- Offer incentives to groups that meet accreditations (national/international standards), monitoring and auditing outcomes e.g. funding.

18. Are there adequate incentives to give the community confidence in self-regulation?

- Other levels of governments should be leveraged or incentivised to regulate on behalf of the Commonwealth.
- Easier access to transparent accreditation to achieve national standards.
- Accreditation of environmental professionals would be beneficial.
- International standard of accreditation to increase objectivity.
- Develop a national database of auditors.

INDIGENOUS AUSTRALIANS' KNOWLEDGE AND EXPERIENCE

19. How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management?

- **How can we best engage with Indigenous Australians to best understand their needs and potential contributions?**

- **What mechanisms should be added to the Act to support the role of Indigenous Australians?**

- There should be greater recognition and acknowledgment of Traditional Owners within the revised Act, e.g. processes to leverage their knowledge and ensuring their interests are represented throughout the assessment.
- Engagement requests should be directed to the relevant Traditional Owners and take into account location specific requirements.

COMMUNITY INCLUSION, TRUST AND TRANSPARENCY

20. How should community involvement in decision making under the EPBC Act be improved? For example, should community representation in environmental advisory and decision-making bodies be increased?

- Community consultation should shape the principles outlined in the Act, which applications are assessed against.
- Communities should have input into the national standards framework.
- The level of community involvement should reflect the level of the development/assessment. It is recommend that criteria is developed to determine the level of community involvement.
- Scientific research and evidence should be prioritised.

21. What is the priority for reform to governance arrangements? The decision-making structures or the transparency of decisions? Should the decision makers under the EPBC Act be supported by different governance arrangements?

- The reforms should build on the existing governance arrangements, focusing on increased transparency and referral to independent specialist parties as required, e.g. complex, politely sensitive applications. This would ensure applications are reviewed objectively and completed in a timely and cost efficient manner, whilst balancing the risks associated with one person (the Commonwealth Minister for the Environment) being the primary decision maker.
- The EPBC Act currently sits outside State and Local assessment and referral triggers. The EPBC Act should have better integration with State and Local assessments/legislation to enable streamlining of assessment processes e.g. threatened species and communities (MNES) should have particular triggers included in State legislation to identify issues before damage is done e.g. Ant plants.

INNOVATIVE APPROACHES

22. What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?

- It is recommended that a review of international best practise and proven techniques is undertaken.
- Genetic banks, e.g. seeds, corals biobanks.
- Consider the interrelationship between MNES.
- Consider ecosystems and the role they play in the environment.

- Consider funding from philanthropic groups e.g. set national accreditation standards for delivery.
- National standard of education on the environment. Incorporate this into the national education curriculum (across all levels of education – primary to tertiary).
- Safeguards could include ensuring applicants have a proven track record before being granted approvals for large-scale projects.
- Whilst safeguards are needed, there will always be a need for effective enforcement.

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

- New environmental markets should be established, e.g. it is recommended that the Emission Trading Scheme is re-established with a realistic carbon price. Additional markets, such as biodiversity markets (reef credits, cassowary credits) should also be explored.
- Trust fund should be set up with contributions by private sector/philanthropic group/individuals through services/advice or financial. E.g. provide and implement an accredited recovery plan on threatened species.

24. What do you see are the key opportunities to improve the current system of environmental offsetting under the EPBC Act?

- It is recommended that there is greater transparency to improve social trust in the system.
- Auditing and review of current and new systems.
- Offsetting needs to be relevant to the environment being damaged, e.g. the removal of a mangrove community should be offset by establishing new mangroves within the same locality.

25. How could private sector and philanthropic investment in the environment be best supported by the EPBC Act?

- **Could public sector financing be used to increase these investments?**

- **What are the benefits, costs or risks with the Commonwealth developing a public investment vehicle to coordinate EPBC Act offset funds?**

- The Commonwealth should allocate local government funds, which have been generated from the private sector and philanthropic investment, in line with priority conservation/biodiversity areas.
- Local governments are best placed for coordinating tangible, on-ground projects, given they have stringent administration, reporting and auditing requirements.
- A public investment vehicle to coordinate offset funds would generate jobs and have tangible environmental benefits. Suitable criteria will need to be developed and have transparency and accountability, e.g. public register of projects and funds flow.

PRINCIPLES TO GUIDE FUTURE REFORM

26. Do you have suggested improvements to the above principles? How should they be applied during the Review and in future reform?

- The proposed principles are sufficient, however 'Principal 1: Effective Protection of Australia's Environment' should remain the priority, with the other principles being value-add. Principle 1 should include setting a framework/standards and consider recovery, restoration and resilience.
- Principle 2: Making decisions simpler – It is suggested to remove “unnecessary regulatory burdens” and change to duplicate assessments.
- Principle 6: Integrated Planning – specifically integrate State and Local assessments.
- The principles should inform the assessment criteria which applications are assessed against.

ADDITIONAL COMMENTS

Whilst the Dissuasion Paper was a useful tool guiding the submission process, some of the questions were very leading and it is recommended that future questions are presented in a more impartial manner.