may receive benefits through associated frameworks that ensure respect for the value of traditional knowledge associated with genetic resources.

2.1 Indigenous knowledge and views are not fully valued in decision making

2.1.1 There is a culture of tokenism and symbolism

The EPBC Act heavily prioritises the views of western science, and Indigenous knowledge and views are diluted in the formal provision of advice to decision makers. This reflects an overall culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians.

While individuals may have good intentions, the settings of the EPBC Act and the resources afforded to implementation are insufficient to support effective inclusion of Indigenous Australians. The cultural issues are compounded as the EPBC Act does not have the mechanisms to require explicit consideration of Indigenous community values and Indigenous knowledge in environmental and heritage management decisions. While protocols and guidelines for involving Indigenous Australians have been developed[v], there is insufficient resourcing to implement them, and they are not a requirement.

There are, however, examples of how species recovery is being led by Indigenous communities for culturally important species using Recovery Planning tools within the EPBC Act (Box 2). In its submission to the Review, the Indigenous Advisory Committee noted that "*The inclusion of Indigenous Knowledge in other management instruments designed to inform the conservation of ecosystems and biodiversity (species and ecological community recovery plans, conservation advisories, research and monitoring plans) are not as numerous (as management plans) although they do exist.* "[vi] These examples are therefore the exception rather than the rule.

Box 2 Incorporating Indigenous knowledge into recovery plans

Draft Recovery Plan for the Greater Bilby [vii]

Over 70 per cent of naturally occurring bilby populations occur on Aboriginal lands, and the species continues to be culturally significant for many Aboriginal people even in areas where bilbies are locally extinct. The collaborative approach that was taken between Indigenous community groups and western scientists to develop the draft recovery plan for the Greater Bilby ensured that ongoing recovery efforts for the species incorporated traditional and contemporary knowledge.

As a result, the draft plan includes actions that will ensure:

- the cultural knowledge of the Greater Bilby is kept alive and strong
- community awareness of the Greater Bilby increases – locally and more broadly
- Indigenous Ranger support and activities are strengthened and increased
- management efforts are increased
- bilby distribution and abundance, threats, and management effectiveness are monitored and mapped,

Saving Alwal, The Golden-shouldered Parrot, Cape York

The Golden-shouldered Parrot Recovery Plan (2003 – 2007)[viii] demonstrates the value of Indigenous knowledge in recovering species, with Olkola Aboriginal Corporation partnering with landholders,

government and environment organisations to deliver the recovery actions. The Golden-shouldered Parrot Recovery Plan recognises the parrot, or Alwal, as a culturally significant species to Olkola people and outlines Traditional Owners as critical partners for landscape scale recovery actions through fire management. A key recovery action is using Traditional fire regimes on properties to reduce woody shrubs which threaten the seed grasses the parrots feed on (Action 7.1.1).

The Department has issued guidance *Engage Early – Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*[ix]. While this sets out expectations for applicants for EPBC Act approval, it is not an enforceable standard or requirement. Furthermore, it is not transparent how the Minister addresses Indigenous matters in their decision making for EPBC Act assessments.

The operation of the EPBC Act Indigenous Advisory Committee (IAC) exemplifies the culture of tokenism. The Act does not require the IAC to provide decision makers with advice. The IAC is reliant on the Minister inviting its views. This is in contrast to other Statutory Committees, which have clearly defined and formal roles at key points in statutory processes.

For example, the IAC does not provide independent advice on the adequacy of the incorporation of Indigenous Knowledge in key decision-making processes (such as listings, recovery plans and conservation advices, or environmental impact assessments).

While the IAC and other statutory committees have established dialogues and ad hoc interactions, this has been informal and lacks structured intent. Indigenous input to the deliberations of other committees has been tokenistic and representative. Representative(s)' of Indigenous Australians on certain, but not all committees is further accepted as satisfying the mandate to involve Indigenous Australians. But this involvement pays lip service to the ethic of involvement and respectful integration of Indigenous knowledge and culture into environment protection and biodiversity conservation. This lack of genuine involvement in committees, and decision-making processes has been raised in submissions to the Review including those from the IAC[x] and Indigenous Land Councils[xi].

The IAC's operating practice is to avoid cutting-across the roles of other Statutory Committees. The effective operation of the IAC is further limited by the lack of adequate funding.

2.1.2 Indigenous Australians seek, and are entitled to expect, stronger national-level protection of their cultural heritage

Places of natural and cultural value that are important to the world or Australia can be recognised and protected by listing them as national heritage, Commonwealth heritage or World Heritage under the EPBC Act.

These include places that hold particular cultural importance for Indigenous people. For example, Kakadu National Park, Tasmanian Wilderness, Uluṟu-Kata Tjuṯa and Willandra Lakes Region, Budj Bim Cultural Landscape, Brewarrina Aboriginal Fish Traps (Baiame's Ngunnhu), and the Myall Creek Massacre and Memorial Site are all places protected under the EPBC Act for their natural and/or Indigenous cultural values.

At the national level Indigenous cultural heritage is protected under numerous other Commonwealth laws, including the *Aboriginal and Torres Strait Islander Heritage Protection Act*

1984 (ATSIHP Act). The ATSIHP Act can be used by Aboriginal people to ask the Commonwealth Minister for the Environment to protect an area or object where it is under threat of injury or desecration and where state or territory law does not provide for effective protection.

At the Commonwealth level, cultural heritage is also protected under the *Copyright Act 1968* (for some intangible heritage) and the *Moveable Cultural Heritage Act 1986* (for tangible, moveable heritage).

The states and territories also play a role in Indigenous heritage protection, and submissions including from the Victorian Aboriginal Heritage Council[xii], have highlighted the potential for duplication. Others, such as the Tasmanian Aboriginal Centre[xiii], have noted the importance of the Commonwealth playing a role, where state-based arrangements, in their view, provide insufficient protections.

The ATSIHP Act does not align with the development assessment and approval processes of the EPBC Act. Cultural heritage matters are not required to be broadly or specifically considered by the Commonwealth in conjunction with assessment and approval processes under Part 9 of the EPBC Act. Interventions through the ATSIHP Act occur after the development assessment and approval process has been completed.

Contributions to the Review have highlighted the importance of considering cultural heritage issues early in a development assessment process, rather than Traditional Owners relying on a last minute ATSIHP Act intervention[xiv]. The misalignment of the operation of the EPBC Act and the ATSIHP Act promotes uncertainty for Traditional Owners, the community and for proponents.

In their submissions, stakeholders have raised their concerns that the Commonwealth does not provide sufficient protection of Indigenous heritage and that fundamental reform is both required and long overdue[xv]. For example, the New South Wales Aboriginal Land Council submission highlighted:

"*... significant improvements are needed to protect and promote Aboriginal cultural heritage. Successive 'State of the Environment' reports have highlighted the widespread destruction of Aboriginal cultural heritage and have observed that "approved destruction" and "economic imperatives" are key risks. Fundamentally, reforms are needed to ensure Aboriginal people are empowered to protect and promote Aboriginal heritage, make decisions, and are resourced to lead this work.*"[xvi]

These submissions identify opportunities for the EPBC Act to play a more expansive role in Indigenous heritage protection at the national level.

2.1.3 The EPBC Act does not meet the aspirations of Traditional Owners for managing their land

Joint management arrangements for Commonwealth Reserves (Chapter 5, Part 15, Division 4 subdivision F) are in place for three Parks – Kakadu, Uluṟu-Kata Tjuṯa and Booderee. In these areas, Traditional Owners lease their land to the Director of National Parks (DNP). The DNP is a statutory position, established under Part 19 Division 5 of the EPBC Act. For each jointly-managed Park, a Board of management has been established.

The governance framework for jointly-managed Parks is shaped by the provisions of:

- the EPBC Act,
- the lease agreements between TOs and the Director of National Parks, and
- relevant Commonwealth Land Rights legislation – the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth).

The construct of the position of the DNP as a corporation sole under the Act means that ultimately, that position is responsible for decisions made in relation to the management of Parks and for the effective management of risks such as those relating to occupational health and safety. As a corporation sole, the DNP relies on resources provided to it by the Department to execute its functions. Employees in Parks are employed by the Department, consistent with APS requirements, and resourcing levels are subject to usual Government budgetary processes.

Previous reports[xvii] have highlighted shortcomings in the structure of the relationship between the Department and the DNP. This Review has not sought to revisit these issues given the comprehensive recent assessment.

The contributions of Traditional Owners of Kakadu, Uluṟu-Kata Tjuṯa and Booderee National Parks, as well as the Land Councils who support them, have indicated that the current settings in the EPBC Act for joint-management of Commonwealth Parks fall short of their aspirations. Examples[xviii] of this include:

- The inability for Traditional Owners of Booderee National Park to exercise functions, rights and powers under the relevant land rights law within the park.
- Limits on the number of Traditional Owners on boards, means that for Parks that comprise of many Traditional Owner groups, some groups are left out of decision making.
- Lease agreements stipulate that the DNP should actively seek that the majority of permanent employed positions be held by suitably qualified Indigenous staff members. APS wide employment conditions mean career progression is limited to lower levels of the public service.
- Traditional Owners feel that important opportunities for employment that support connection to Country (such as through 'day labour') have diminished over time.
- Traditional Owners feel they don't have recourse if the DNP fails to implement park management plans, decisions of boards of management, or lease obligations.
- Traditional Owners perceive that their views on restricting public access to particular areas of a park that have cultural significance or at particular times are not respected.

Decisions made by the Board can be overturned by the DNP. The ultimate decision-making position of the DNP does not empower Traditional Owners to make genuine "joint management" decisions. There are examples where boards have had the opportunity to participate in decision making, but have been unable to effectively do so. They are either reluctant to accept the responsibilities associated with decisions or are unable to draw together disparate community interests and aspirations.

The contributions received from Traditional Owners to the Review indicate that they seek a "real" partnership, and more responsibility to make decisions.

Some contributors to the Review seek a broader application of joint management settings[xix].

2.2 Key reform directions

2.2.1 Reforms should be pursued through co-designed policy making and implementation

The Australian Government is recognising improved outcomes for Indigenous Australians through enabling co-design and policy implementation with Indigenous people. It is important that any reform to the EPBC Act be conducted in a way that is consistent with the COAG Commitments in the Partnership Agreement for Closing the Gap and supporting processes (see Box 3).

The pursuit of reforms would occur alongside other Commonwealth initiatives, including those related to an Indigenous Voice, the Northern Australian economy, the protection of Indigenous intellectual property and development of a government-wide Indigenous Evaluation Strategy.

Aboriginal and Torres Strait Islander peoples and communities often engage with multiple departments and organisations across all levels of Government. It is a busy space, and activities should seek to align with or complement other work, while maintaining relevance to the environment portfolio.

Box 3 COAGs Closing the Gap Commitments

Key excerpts from the Agreement[xx]

- Priority Action 1 - developing and strengthening structures so that Aboriginal and Torres Strait Islander people share in decision making with governments on closing the gap.
- Priority Action 2 - Building formal Aboriginal and Torres Strait Islander community-controlled service sectors to deliver closing the gap services.
- Priority Action 3 - Ensuring mainstream government agencies and institutions that deliver services and programs to Aboriginal and Torres Strait Islander people undertake systemic and structural transformation to contribute to closing the gap.

Excerpts from a "New Way of Working" Coalition of the Peaks document[xxi]

- When Aboriginal and Torres Strait Islander people are included and have a real say in the design and delivery of services that impact on them, the outcomes are far better.
- Aboriginal and Torres Strait Islander people need to be at the centre of Closing the Gap policy: the gap won't close without our full involvement.
- COAG cannot expect us to take responsibility for outcomes or to be able to work constructively with them if we are excluded from decision making.

The practice of co-design should relate to both progressing the agreed recommendations from this Review and following on from this, how the approach is embedded into policy, procedures and behaviours going forward.

The role and membership of the IAC should be substantially recast, to form the Indigenous Knowledge and Engagement Committee (see Chapter 5 – Trust). The role of this Committee would be to:

- support the co-design of reforms (and the participation of Indigenous Australians in this process), and
- oversee the development of, and monitor and advise on, the application of the proposed National Environmental Standard for Indigenous engagement.

The philosophy adopted by the co-design process could include:

- genuinely demonstrate respect for Indigenous knowledge, worldviews, culture and ongoing custodianship,
- acknowledge and redress perceived imbalances of power,
- promote transparency, open communication and two-way knowledge sharing,
- be flexible in what engagement approaches could look like outside of traditional written and face to face consultations and in how the Commonwealth receives feedback and advice,
- support two-way communication and initiation of co-design, where all parties have equal rights and opportunities to initiate engagement and discussion,
- acknowledge the value of Indigenous knowledge across a diverse range of issues, that may extend beyond what has traditionally been determined issues of interest or significance for Indigenous peoples,
- support a continual process of monitoring, revision and review of approaches, that actively involve Indigenous peoples, and
- link in with or support more coordinated and consistent efforts at the Commonwealth level with respect to Indigenous engagement.

2.2.2 Best practice engagement to embed Indigenous knowledge and views in regulatory processes

Contributors to the Review[xxii] have highlighted that the EPBC Act should more actively facilitate Indigenous participation in decision making processes. Specifically, through a call for 'normalisation' of incorporating Aboriginal and Torres Strait Islander knowledge in environmental management planning and environmental impact assessment through culturally appropriate engagement.

Contributions have all highlighted the importance of the underpinning concept of free prior and informed consent and a range of views have been presented to the Review on how this could be achieved including:

- Specific regulatory requirements or standards expected in decision-making processes (e.g. standards for proponents in conducting environmental impact assessment), or binding standards for consultation with Indigenous Australians[xxiii].
- Requirements for the participation of Indigenous Australians in regional planning activities, so their knowledge and values can be incorporated into decision making (such as strategic assessments or bioregional plans).

- Greater investment in science research, where Indigenous Australians are co-researchers alongside western science[xxiv].

A National Environmental Standard for best-practice Indigenous engagement is required to ensure that Indigenous Australians that speak for Country have had the proper opportunity to do so, and for their views to be explicitly considered in decisions. The proposed National Environmental Standard for best practice Indigenous engagement should be developed in close collaboration with Indigenous Australians. Specifically, an Indigenous Knowledge and Engagement Committee (discussed further in Chapter 5) should be responsible for leading the co-design process.

The Standard would be applied to all aspects of decision making under the EPBC Act, including the development of regional plans and environment impact assessment and approval decisions. Existing relevant Commonwealth and key agency guidelines including *Engage Early - Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*[xxv]could be used as a starting point for the development of the Standards (Box 4).

Box 4 Building blocks for National Standards for Engagement with Aboriginal and Torres Strait Islander people and communities

Two Commonwealth Government guidelines have been developed to assist stakeholders of the EPBC Act to understand their obligations for engaging with Aboriginal and Torres Strait Islander peoples on Indigenous heritage matters, Native title agreements and other relevant considerations. These guidelines provide a starting point for reforms on Indigenous engagement under the EPBC Act, and the development of National Standards:

- *Engage Early – Guidance for proponents on best practice Indigenous engagement for environmental assessments under the EPBC Act'* [xxvi]aims to improve how proponents engage and consult Indigenous peoples during the environmental assessment process under the EPBC Act. The guidance encourages proponents to think more broadly than just matters that impact Indigenous Heritage, including interactions with the *Native Title Act 1993* and engaging Indigenous Australians to manage offsets. The guidance outlines some specific considerations for parties, including allowing additional time before statutory processes to engage and seek consent, establishing meaningful relationships with communities, and identifying any Native title agreements in place on the land.
- *Ask First: A guide to respecting Indigenous heritage places and values* [xxvii] was developed by the Australian Heritage Council (then Commission) soon after the EPBC Act was written to address *'lack of familiarity or awareness in the wider community'* in Indigenous Heritage matters. It identifies the links between the landscape as a whole and Indigenous Heritage Values and outlines that Indigenous Australians need to give their consent at most stages before activities which involve Indigenous Heritage proceeds. The guidelines established early that *'consultation and negotiation with Indigenous stakeholders'* is not only best practice, but essential for strengthening the protection of Indigenous Heritage values. The document clearly outlines actions which professionals and organisations should take, and offers additional, non-mandatory guidance.

2.2.3 National level cultural heritage protections need comprehensive review

The current laws that protect Indigenous cultural heritage at the national level need comprehensive review. This review should consider both tangible and intangible cultural heritage (see Box 5).

Box 5 Intangible cultural heritage

The concept of intangible cultural heritage relates to knowledge of or expressions of traditions. Intangible Indigenous cultural heritage is defined in various Commonwealth and state laws in Australia

Victorian Aboriginal Heritage Act 2006

Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition ... and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.[xxviii]

Northern Territory Aboriginal Scared Sites Act 1989

Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

A sacred site means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.[xxix]

ATSIHP Act

...the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.[xxx]

Contributors to this Review [xxxi] have emphasised the intrinsic link between Indigenous peoples, land and water and their culture and wellbeing.

"For Indigenous Australians, Country owns people and every aspect of life is connected to it, it is much more than just a place. Inherent to Country are vistas, landforms, plants, animals, waterways, and humans. Country is loved, needed and cared for and Country loves, needs and cares for people. Country is family, culture and identity, Country is self." – Indigenous Working Group, Threatened Species Recovery Hub[xxxii]

These contributors have suggested that the EPBC Act could have a more expansive role to protect culturally important species, important cultural places that have intangible, ecological, environmental, and physical cultural assets.

There is a need for comprehensive review of national level Indigenous cultural heritage protection legislation. Reform should take into consideration processes currently underway that are looking to improve Indigenous cultural heritage protection outcomes.

The Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) has been working since 2018 to develop 'Best Practice Standards in Indigenous Cultural Heritage Management and Legislation'. This work is being done in partnership with Indigenous Heritage leaders. When finalised, the framework will provide a basis on which to comprehensively review how Indigenous heritage is protected by national laws in Australia, and how national laws should interact with state-based arrangements.

The goal of a national review would be to ensure that national laws provide best-practice protection of cultural heritage – tangible and intangible, and work in concert with protections afforded under state laws.

Given the intrinsic links between the environment, culture and wellbeing, and the objects of the EPBC Act, the Act could play a significant role in delivering more effective protections. This includes how Indigenous heritage is protected under the EPBC Act (e.g. places or culturally important, but common species) and how protections are given effect for example in regional planning processes, protected area management, or development assessment and approval processes.

However, the EPBC Act may not be best placed to protect all Indigenous cultural heritage (e.g. language, crafts) and that other laws or processes will need to work in concert with national environmental law to provide comprehensive, national level protections.

2.2.4 Combine Indigenous knowledge and western science in statutory advisory committees

The structure of the statutory advisory committees in the EPBC Act, and the lack of interaction between them engrains the cultural primacy of western science in the way that the Act operates.

The National Environmental Standard for best-practice Indigenous engagement is one mechanism to ensure that Indigenous Australians that speak for and have Traditional Knowledge of Country have had the proper opportunity to contribute to decisions made under the EPBC Act.

In addition to a substantial re-casting of the role of the Indigenous Advisory Committee, more needs to be done to enhance how Indigenous knowledge is considered alongside western science and information. This includes the following:

- Proposed reforms to the statutory advisory committees of the EPBC Act as set out in Chapter 5.
- Central to these reforms is the establishment of an Information and Knowledge Committee. The remit of this Committee should include the culturally appropriate use of Indigenous knowledge in decision making.
- The composition of the Information and Knowledge Committee should be such that scientific, economic, social and Traditional Knowledge required to underpin the operation of the EPBC Act are balanced.

2.2.5 Transition to Traditional Owners having more responsibility for managing their land

Traditional Owners of jointly managed parks have expressed their aspiration to have more responsibility and control over the management of their land and waters. Submissions received by the Review have highlighted opportunities to better support these aspirations. These include:

- Improved monitoring, compliance and review of joint management arrangements, to ensure the Director of National Parks (DNP) implements management activities in a manner consistent with agreed plans.

- Aspirations of genuine joint decision making, meaning that Boards accept the responsibilities and risks that are currently borne by the DNP.
- Improved employment opportunities, and through employment the opportunity to work on country and share knowledge of Country.
- Changes to the relationships between laws, to provide for greater local management and control.

The shared vision between Traditional Owners and the Australian Government on what they seek to achieve from their partnership in joint management, and how this builds toward the longer term aspirations of Traditional Owners is unclear.

A shared vision is essential for success. Without one, any change is likely to deliver unintended outcomes, diluted focus, or underinvestment in the transition needed to meet the aspirations of Traditional Owners. The first step is to reach consensus on the shared vision, and then co-design the policy, governance and transition arrangements needed to achieve it.

Any transition to greater responsibility for decision making by Traditional Owners will require support for owners to develop the capabilities to execute the legal and administrative responsibilities associated with managing Commonwealth parks. This includes responsibility for effective health and safety risks to Park staff and visitors, accountability for expending operating costs (between $7 million and $20 million per year) and for the effective management of capital works budgets[xxxiii]. The magnitude and significance of a transition to greater decision making for Traditional Owners should not be underestimated.

3 Legislative complexity

Key points

The EPBC Act is complex. Complex legislation makes it difficult, time-consuming and expensive for people to understand their legal rights and obligations. This leads to confusion and inconsistent decision-making, creating unnecessary regulatory burden for business, and restricts access to justice.

The key reasons the EPBC Act is complex are:

- The policy areas covered by the Act are inherently complex. Environmental approvals, Commonwealth reserves, wildlife trade, and the conservation and recovery of threatened species are complex policies. The way the different areas work together to deliver environmental outcomes is not always clear, and many areas operate in a largely siloed way.
- The EPBC Act relies heavily on detailed prescriptive processes that are convoluted and inflexible, meaning engaging with it is time consuming and costly. This is particularly the case for environmental impact assessment (EIA). Convoluted processes are made more complex by important terminology being poorly defined or not defined at all.
- The construction of the EPBC Act is archaic, and it does not meet best practice for modern regulation.

The key reform directions proposed by the Review are:

- In the short term, legislative amendments to the EPBC Act are required to address known inconsistencies, gaps, and conflicts in the Act.
- In the medium term, consideration should be given to dividing the EPBC Act, creating separate pieces of legislation for its key functional areas.
- In the longer term a comprehensive redrafting of the EPBC Act (or related Acts) is required. This should be done following the development of the key reforms proposed by this Review. This sequencing will ensure that legislation is developed in a way that supports the desired approach, rather than inadvertently hindering it.

3.1 The EPBC Act covers a wide range of complex policy areas

The original ambition of the EPBC Act for a 'joined up', comprehensive environmental framework—one that combined 5 pieces of legislation into one—has not been realised.

The complexity in the EPBC Act is in part driven by underlying policy complexity. The broad policy areas covered by the EPBC Act—environmental approvals, Commonwealth reserves, wildlife trade, and threatened species conservation and recovery—are complex in their own right.

Having multiple policy functions in the one Act makes it very challenging to understand how the requirements for these areas operate separately or together. This creates confusion and inconsistency in decisions, and limits the effectiveness of the compliance and enforcement function (see Box X for examples). The inter-relationships between the different parts of the

EPBC Act are often not clear, and there can be ambiguity when different parts of the Act are in operation.

Box X: Unclear linkages between the functional parts of the EPBC Act

Example 1: The link between recovery plans (Part 13) and approval decisions (Part 9)

It is administratively difficult to apply the current legislative requirement to "not act inconsistently with a recovery plan" made under Part 13, and an approval decision made under Part 9. There are commonly different opinions as to what practically amounts to an inconsistency. Recovery plans are written with a focus on protecting and enhancing species survival. Decisions made under Part 9 are generally applied in a way that minimises harm to the environment while facilitating development but do not aim to enhance species survival.

Example 2: The link between Permits (Part 13) and Approvals (Part 9) in a Commonwealth area

A Part 13 permit (to kill, injure, take, trade, keep or move a member of a listed species or ecological community in or on a Commonwealth area) is not required for actions that are covered by a Part 9 approval. However, where a Part 9 approval has not been granted (for example, where a 'not controlled action' decision or a 'particular manner' decision is made) a Part 13 permit is still required. This means that even when the same action is found not to have a significant impact on an MNES under one part of the Act, it could still be an offence under another.

3.2 Environmental impact assessment is a convoluted process, based on poorly defined key terms

The EPBC Act uses overly prescriptive processes. This means the effort of the regulator and the proponent is often focussed on completing the process as quickly as possible rather than achieving the outcome intended.

This is most visible for EIA, where the EPBC Act prescribes the:

- required, detailed steps for preparing content of relevant documents
- documents that must be provided
- way they must be considered by the decision maker (see Box X).

Box X: Complexity of EIA processes

Example 1: Part 9 decisions – approval of actions

The EPBC Act does not currently set out a clear standard for deciding whether to approve an action based on the acceptability or otherwise of the impacts (see Chapter 1).

The focus on process is at the expense of outcomes. The administrative overhead to manage the technicalities of prescriptive processes is significant and adds to delay and cost with no additional environmental benefit.

A decision-maker may approve an action if they follow the correct legal processes and have regard to all the relevant statutory considerations.

The statutory considerations a decision maker is required to apply differ depending on which information and documents need to be considered. For example, a decision maker may have to 'have regard to', 'take into account', 'consider', 'not act inconsistently with', 'not contravene', the relevant information or statutory document.

- This complexity must be reflected in the recommendation report and decision brief to meet all the requirements of the EPBC Act. Approval decisions have been overturned on technical grounds then remade with no change to the environmental outcomes.
- This has practical consequences. Where there is community concern arising from a decision, that decision is contested on technical grounds about the process rather than the environmental outcome (see Chapter 5).

Example 2: Poorly defined terms

Key terms in the EPBC Act lack clarity, which leads to confusion about obligations and inconsistent interpretation.

Terminology such as 'significant' (impact), 'action' or 'continuing use' means people, including departmental staff, aren't sure how the EPBC Act should apply.

Poorly defined terminology also leads to uncertainty about how to undertake self-assessment to determine if a referral is needed. This drives unnecessary referrals as proponents seek to manage risk by requesting a referral decision even if they don't think their action would trigger the EPBC Act.

The department has been inconsistent in its application and guidance about requirements under the EPBC Act, which has added to confusion and uncertainty. For example, whether to refer or not to refer, or whether something is a controlled action.

Example 3: There is uncertainty about the concept of 'controlled actions' and the controlling provisions in Part 3

The concept of controlled actions and controlling provisions is central to the referral and subsequent assessment and approval of an action but is unclear.

Before an assessment is carried out there is often insufficient information on MNES. At the referral stage, it is difficult for an assessment officer to identify all species by level of endangerment in order to identify with certainty which controlling provisions apply. If a controlling provision is not specified at the referral stage but is identified as relevant during the course of the assessment, the EPBC Act requires a reconsideration of the initial controlled action decision and the assessment process would need to begin again.

Example 4: There are legal uncertainties relating to condition-making powers

Usually, EIA approval decisions have conditions applied to them. There are uncertainties about how conditions are to be applied and what happens to them over time. For example, consent of an approval holder is required to apply conditions that are not 'reasonably related to an action', but it is unclear what this means.

Conditions relating to management plans are usually set early in the life of a project before impacts are fully understood making implementation and enforcement difficult. Changes in circumstances are also not well accommodated, meaning some conditions can cease to be appropriate or relevant but remain in force unless actively removed.

Example 5: There are inconsistent interactions between EIA and other parts of the EPBC Act

The EPBC Act seeks to simplify the operation of Part 10 (strategic assessments) by applying the Part 9 approval and post-approval processes to a strategic assessment approval. If a strategic assessment approval is in force, the EPBC Act applies several of the provisions of Part 9 to a strategic assessment approval (section 146D). This leads to potential legal inconsistencies as a Part 10 approval is quite different in practice to a Part 9 approval.

3.3 The construction of the EPBC Act is archaic

The EPBC Act does not meet Australian Government best practice guidance on minimising legislative complexity. The EPBC Act was drafted 20 years ago, and best practice legislative drafting has evolved since this time.

There is a general need to remove duplication, apply consistency and simplify the law where possible. An example of this is the distributed nature of compliance and enforcement provisions throughout the EPBC Act, rather than a broad set of compliance and enforcement tools that can be applied across it (see Chapter 9).

Many clauses in the EPBC Act are unnecessarily wordy and verbose, which makes them hard to read. For example, section 133(1):

> 'After receiving the assessment documentation relating to a controlled action, or the report of a commission that has conducted an inquiry relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action by a person'.

The inter-relationships between the EPBC Act and other laws (for example, the *Native Title Act 1993* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*) are not clear. This arises because definitions of terms, processes and outcomes set out in the EPBC Act do not always align or operate in conjunction with other legislation.

The level of detailed prescription in the EPBC Act is not consistent with the *Legislation Act 2003* or the *Acts Interpretation Act 1901.*

- The level of prescription in the EPBC Act on how an instrument is revoked or amended makes it difficult to amend that instrument where it is redundant or no longer has the intended effect.
- Instruments made under the EPBC Act can be amended by other instruments, leading to legal questions about its status. For example, heritage lists are published on the department's website, but can be amended by gazette notices (for inclusion), notifiable instruments or legislative instruments (for removal of places, depending on the reason for removal).

3.4 Key reform directions

Complexity of a policy area necessitates a degree of complexity in legislation. There is general acceptance that the core functions of the EPBC Act are all necessary to implement Australia's international obligations and to achieve national interest outcomes.

The key reform directions proposed by this Review, particularly those related to the hardwiring of the requirement for Ecologically Sustainable Development (ESD), the establishment of National Environmental Standards, and pursuing a regional planning approach, will all reduce the need for complexity in the law.

The controversial and contentious nature of some parts of the EPBC Act result in political sensitivity about the Act as a whole. Making administrative amendments or amendments to less controversial parts of the EPBC Act has proven difficult. Successive governments have been reluctant to propose amendments unless absolutely unavoidable, leading to a hesitation even

within the department to recommend amendments as such opportunities are seen as out of reach (when they should be a matter of routine). Largely uncontested changes to less-controversial parts of the EPBC Act (such as some related to wildlife trade or the management of Commonwealth reserves) have suffered from this unwillingness to amend the Act.

3.4.1 Make known improvements to the EPBC Act in its current form

In the short-term, legislative amendments to the EPBC Act are required to address known inconsistencies, gaps, and conflicts in the Act. Submissions to the Review have indicated this to be a priority[1].

Opportunities to reduce process prescription

Process prescription must be addressed both in how the EPBC Act is constructed as well as how it is implemented. Opportunities to reduce prescription include:

- reducing the number of statutory tests—many different statutory tests apply to a decision. For example, a decision maker may have to 'take into account', 'have regard to' and 'consider' different documents or requirements.
- clarifying the information that must be before the decision maker as part of a briefing (and the form in which it should be provided).
- removal of requirements for publication of notices in newspapers—these and similar reductions in process prescriptions affecting transparency should be offset by corresponding improvements in the accessibility of information and the use of alternative media to ensure the overall transparency of the EPBC Act is increased.

Resolving the connection between Part 9 and Part 10

Long-standing problems relating to the connection between approvals (Part 9) and strategic assessments (Part 10) should be addressed:

- The inability to vary a program once endorsed makes a Part 10 approval frozen in time and unable to respond to changes in information and circumstances. For example, strategic assessments are unable to deal with new listings. This means assessments that operate for long periods of time are unable to make adjustments to achieve the environmental outcomes envisaged.
- Where an agreed strategic assessment relies on an endorsed statutory regime (as is the case with the National Offshore Petroleum Safety and Environmental Management Authority) and these regimes are amended, there is a risk that future actions conducted consistent with the amended regime differ from those endorsed by the strategic assessment.
- Strategic assessments are made on a 'policy, plan or program', which commonly include commitments that must be fulfilled by different people. It is unclear whether a person can rely on a strategic assessment approval if a commitment has not been fulfilled. The consequences of a failure to implement a commitment in an endorsed 'policy, plan or program' are unclear.
- Strategic assessments give approval for many unidentified persons to undertake the approved action(s) or class of action. In most cases, there is no identified 'approval holder' for a Part 10 approval. This makes it difficult to vary the conditions of the strategic assessment approval where the consent of the approval holder is required, or to revoke or

suspend a Part 10 approval because there are legal difficulties in providing procedural fairness.

Other areas of amendment

Other chapters of this interim report highlight opportunities for amendments to the EPBC Act. These include:

- the need for a complete set of compliance and enforcement tools across the EPBC Act to harmonise monitoring, investigation, and enforcement powers (see Chapter 9). This could be done by referencing the *Regulatory Powers (Standard Provisions) Act 2014* (Cwlth) and providing necessary additional powers.
- amendments to align the EPBC Act with Australia's international obligations in relation to the protection of migratory species under the Bonn Convention and permits for wildlife trade to meet Australia's obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (see Chapter 4).

3.4.2 Split the EPBC Act into logical categories

In the medium-term, it may be prudent to divide the EPBC Act along functional or operational lines by creating separate legislation for some or all of the following functions:

- biodiversity and ecosystem management, to regulate the recovery of natural systems and nationally important biota (via national standards and regional planning)
- environment and heritage protection, to regulate EIA decision making in relation to MNES
- wildlife trade restrictions to meet CITES obligations
- protected areas management, to regulate Commonwealth reserves and heritage places and to administer Commonwealth reserves
- environmental data and reporting, to administer data coordination, and national and international reporting
- institutional arrangements, including those for compliance and enforcement
- national biodiversity markets.

Though separate legislative frameworks, any legislatively separate areas should be clearly integrated by:

- requiring decision making across relevant Acts to accord with regional planning requirements and national standards
- ensuring consistent data and reporting requirements, in line with proposed reforms for the monitoring, evaluation and reporting of the national system for environmental management.

3.4.3 Simplify the law

In the longer-term, comprehensive redrafting of the EPBC Act (or related Acts) is required. Redrafting should be framed around core principles for legislative drafting. For example, the *Fair Work Act 2009* was drafted using the principles[ii]:

- Policy simplification (where possible) should be carried out first.

- Material of most relevance to the reader should be placed upfront.
- Important concepts should be clearly defined.
- Language and sentence structure should follow guidance to reduce complexity.
- The overall structure of legislation and its provisions should be carefully constructed for readability.
- Only necessary detail should be included, and detail should be in the right place.

Plain English guidance material should also accompany legislation to aid interpretation and use and should be easily accessible and updated regularly.

Simplifying the legislation should follow the establishment of the proposed regulatory changes identified in this report, including the development of National Environmental Standards, regional planning, and improved data, information, and monitoring. This will ensure the legislation is developed in a way that supports the desired approach, rather than acting against it.

4 Efficiency

Key points

The Act is duplicative, inefficient and costly for the environment, business and the community.

The interaction between Commonwealth and state and territory laws and regulations leads to duplication. Despite efforts to streamline, significant overlap remains.

Past attempts to devolve decision making have been unsuccessful due to lack of defined outcomes and concerns that decisions would be inconsistent with the national interest.

Key reform directions to remove duplication between the EPBC Act and state and territory systems are:

- Devolve decisions to other jurisdictions, where they demonstrate National Environmental Standards can be met.
- Devolution should be based on sound accreditation, quality assurance and compliance, escalation (including step-in capability) and regular review.
- The reform directions proposed (National Environmental Standards, regional plans, information and data, modern regulatory systems) provide confidence for devolution, and will improve interoperability between the Commonwealth and jurisdictions.

Even with greater devolution, the Commonwealth is likely to have an ongoing role in directly assessing and approving some developments. It is therefore also important to address inefficiencies in Commonwealth-led project assessment and approval processes.

There is duplication with other Commonwealth regulations, and some activities are effectively regulated by others. The interplay between regulations is often more onerous than it needs to be.

The laws for permitting wildlife trade exceed international obligations. are inflexible and unnecessarily burdensome.

Key reform directions to further streamline the EPBC Act are:

- Assessment pathways should be rationalised and implemented with clear guidance, modern systems and appropriate cost recovery. Small investments can dramatically reduce cost and uncertainty and improve decision-making.
- These, and other reform directions proposed (National Environmental Standards, regional plans, information and data, modern regulatory systems) create opportunities for significant streamlining and efficiency, including where low risk actions will not require approval.
- Streamline provisions for permitting of wildlife trade and interactions with other environmental frameworks.

Regulation that protects the environment in the national interest is a reasonable expectation of Australians. As explored in Chapter 1, the way the EPBC Act operates does not effectively protect the environment in the national interest, and there is a high degree of mistrust in the community (Chapter 5).

It is reasonable for industry to expect governments to regulate efficiently, and wherever possible, harmonise regulation and ensure its interoperability. This reduces the costs of regulation to businesses that must comply with the law, and governments who administer it.

Suggested expansions to the remit of EPBC Act that intersect with state and territory responsibilities or other Commonwealth regulations are not supported by the Review (Chapter 1).

4.1 There is duplication with state and territory regulators

4.1.1 There have been efforts to streamline with the states and territories

The EPBC Act was drafted to include several tools to achieve streamlining and harmonisation between the Commonwealth and states and territories. Strategic assessments (see Chapter 1) have been one mechanism to do this. Others, including a common assessment method for listing threatened species, and bilateral assessment and approval agreements are explored further in this section.

The water trigger (Box 1) and nuclear trigger (Box 2) MNES are often cited as areas where streamlining is incomplete. The evidence presented to the Review suggests these areas have significant potential to be further streamlined, while ensuring that the national interests continues to be upheld.

Common assessment methods for threatened species listing

The Commonwealth and all state and territory governments have been working since 2015 to implement a common assessment method for listing threatened species and ecological communities. This work is formally underpinned by an intergovernmental memorandum of understanding.

Any jurisdiction can undertake a national assessment using the common assessment method, the outcome of which will be adopted by other jurisdictions where that species occurs, as well as the Commonwealth Government (under the EPBC Act). This means that a species is only assessed once and is listed in the same threatened category across all relevant jurisdictions.

This work is supported by the states and territories[i], and supports regulatory harmonisation, by aligning lists and providing consistent protections for regulation reducing confusion. Rather than a species being assessed numerous times, it can be considered once, with corresponding improvements in efficiency.

To date, 100 species listing decisions have been made under the EPBC Act based on state/territory-led assessments, and a further 47 are in progress. Consideration should be given to the benefits of moving to a single list of jurisdiction and national matters. The Commonwealth could maintain this list on behalf of all jurisdictions.

Bilateral assessment agreements

The EPBC Act allows for the accreditation of state laws and management systems where they provide appropriate protections for nationally protected matters. Under a bilateral assessment agreement, the Commonwealth retains responsibility for approvals, based on environmental impact assessments undertaken by the jurisdictions on nationally protected matters.

Assessment bilateral agreements are in place in all eight jurisdictions. However, recent changes to state and territory laws mean that some of these agreements are being re-made to make them fully operational. Where agreements are not fully operational, individual assessments are often undertaken jointly (known as accredited assessments) which

has the same effect as if a bilateral assessment agreement was in place. This ensures continued streamlining and reduced impact on projects but highlights the inherent fragility of the agreements.

Between July 2014 and June 2019, 37 per cent of proposals under the EPBC Act were assessed (or are being assessed) through either a bilateral assessment (25 per cent) or accredited assessment (12 per cent) arrangement with states and territories. Figure 1 shows the breakdown over this period.

Figure 1 Percentage of projects assessed under bilateral (orange) and accredited processes (grey) for all states and territories (1 July 2014 and 30 June 2019)

Source: Unpublished data, Department of Agriculture, Water and the Environment

There are significant shortcomings in the current arrangements. The requirements of the EPBC Act mean that even where they are in place, bilateral assessment agreements do not cover all development types. For example, where states do not actively assess certain development types (for example, code based developments) or where approvals are given by local councils under local planning laws these activities are unable to be accredited under the current inflexible bilateral provisions. For a single project, bilateral agreements may cover some aspects of the project, but not all. For example, not all clearing of habitat of nationally threatened species can be accredited due to the way state land clearing laws are constructed[ii].

Figure 2 provides the breakdown by jurisdictions and shows that approaches to streamline arrangements have had varied success between jurisdictions.

Figure 2 Percentage of projects assessed by bilateral (orange) and accredited processes (grey) for Australian states and territories (1 July 2014 to 30 June 2019)

Source: Unpublished data, Department of Agriculture, Water and the Environment.

Both proponents and regulators are supportive of bilateral assessment agreements and acknowledge the benefits they provide[iii]. Benefits for proponents include[iv]:

- Better communication between the parties, which translates to greater clarity for proponents.
- Cost savings for industry and government.
- Reduced administrative overheads, through production of a single set of assessment documentation.
- Greater alignment of approval conditions, including offsetting arrangements.
- As individual MNES are considered in the landscape context required by state arrangements, there are broader landscape scale benefits for the environment.

Similarly, as co-regulators with the Commonwealth, the States and Territories by and large support effective bilateral assessment agreements[v]. The benefits they see from harmonised assessments are:

- Increased cooperation, understanding and collaboration between assessment teams and proponents.
- Reduction in regulatory duplication in the assessment of proposals, including aligning conditions of approval where appropriate.
- Reduction in timeframes for project assessments.
  - For example, the NSW Government advises in their submission to the Review that since the commencement of the agreement in February 2015 '*6 projects (with a combined Capital Investment Value of $6.4 billion and the creation of up to 5,150 jobs) have been assessed through the streamlined process and has led to an overall reduction in timeframes for project assessments*'[vi].

Access to the same data and information is also important to promote efficiency in the conduct of joint assessments are efficient (see Chapter 6).

Box 1 The water trigger

The water trigger (section 24D) requires proposed coal seam gas and large coal mining developments likely to significantly impact on a water resource to be assessed and approved by the Commonwealth. The Parliament amended the EPBC Act in 2013 to include the water trigger, responding to community concern at the time of the perceived inadequacy of state-based water regulation of these types of activities. The 2013 EPBC Act amendments prohibit the Commonwealth devolving responsibility for water trigger approval decisions to the state.

Stakeholders have presented highly polarised views about the operation of the water trigger to the Review. Industry stakeholders argue that it duplicates state-based water regulatory frameworks and should be removed[vii]. Others call for an expansion of the trigger to cover activities such as shale or tight gas extraction, all hard rock mining, or indeed any action that may have a material impact on water resources[viii].

The operation of the water trigger suffers from insufficient definition of the water resources covered, or the scale of significance of the impact on these resources it is seeking to regulate. Further, it targets the activity of part of a specific sector, which seems to result in regulatory inconsistency. Only large coal mining and coal seam gas projects are regulated under the water trigger, when other activities may conceivably pose the same or greater risk of irreversible damage. Finally, the current construct of the

water trigger is inconsistent with the Commonwealth's agreed role in environmental and water resources management.

The states have constitutional responsibility for managing their water resources, and this responsibility is reflected in the National Water Initiative, the intergovernmental agreement that sets out the respective roles of jurisdictions in water management, and the water reform agenda they have collectively agreed to pursue.

The Review considers it is not the role of the EPBC Act to regulate impacts of projects on water resources more generally including impacts on other extractive water users such as towns or agricultural users. This is the responsibility of the states and territories, and they should be clearly accountable for the decisions they make. In its leadership role, the Commonwealth should continue to transparently report on the progress made by jurisdictions in advancing commitments to manage water under the National Water Initiative.

That said, the Commonwealth does have responsibility for protecting listed threatened or migratory species, wetlands of international importance (Ramsar wetlands), World Heritage sites and for leadership on cross-border issues. Proposals with the potential to impact protected matters as a result of direct or indirect changes to the water resources on which they rely have always triggered the Act and should continue to do so.

The Commonwealth should have the capacity to step in to protect water resources to adjudicate cross-border matters (for example on a water resource that spans jurisdictions such as the Great Artesian Basin). One state should not be able to unilaterally approve a project that risks irreversible damage to a water resources another relies on. The capacity to step in should be clearly linked to processes for development assessments and approvals.

The Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Developments (IESC) was established in part to provide technical advice to the Commonwealth and state and territory decision makers. The IESC has improved decision making and led to increased transparency and community confidence that cumulative impacts of proposals are assessed.

The Review proposes that the water trigger and IESC be retained but modified as follows:

- The trigger should be limited to consideration of any project that risks *irreversible depletion or contamination* of cross border water resources only. The argument that the trigger not be limited to large coal and coal seam gas projects is compelling, but any expansion of scope requires careful consideration to avoid duplication with other Commonwealth and State regulatory requirements.
- If state and territory laws meet Commonwealth standards, then they should be able to be accredited.
- The National Environment Standard for MNES should explicitly define key terms, including a cross-border water resource and *irreversible depletion or contamination* of the resource.
- If the water trigger is changed, the name and remit of the IESC should be adjusted to reflect any altered focus. The Minister (or devolved decision maker) must seek the advice of the Water Resource Science committee when considering a proposal against the National Environmental Standard. The expertise and advice of the Water Resource Science committee should be available to the states and territories at their request, subject to the capacity and priorities of the Committee.

Box 2 Nuclear activities

Nuclear activities are regulated under the EPBC Act in two ways. The first is section 140A, which prohibits the Minister from approving specific nuclear installations. This section reflects a policy choice of elected parliaments to ban specific nuclear activities in Australia, and any change in scope is similarly a policy

choice of elected parliaments. That said, should Australia's policy shift in relation to these types of nuclear activities, changes to s140A would be required.

The second way nuclear activities are regulated under the EPBC Act is the so-called 'nuclear trigger' (section 22(1)), whereby 'nuclear actions' that are likely to have a significant impact on the environment need to be assessed and approved by the Commonwealth Environment Minister. In practice, this trigger primarily captures:

- mining projects, including uranium mining, and rare earth and mineral sand mining, transport and milling activities that result in radioactive by-products that exceed the certain thresholds, and
- Commonwealth agencies undertaking nuclear transport, research or waste treatment.

For Commonwealth agencies, most referrals received do not require approval, as activities are conducted in accordance with the regulatory guidelines and protocols under the *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) and regulated by the Australian Radiation Protection and Nuclear Safety Authority (ARPANSA).

Uranium and other 'nuclear' mining projects that trigger the EPBC Act require a 'whole of environment' assessment. These expanded assessments cover impacts that the states and territories already regulate (such as air, noise and water quality), as well as duplicating state and territory regulation of mining projects. ARPANSA[ix] highlighted in its submission that if jurisdictions adopt relevant national codes developed under the ARPANS Act, then EPBC Act assessments can lead to 'substantially the same assessment activities being undertaken across multiple jurisdictions creating duplicative regulatory processes'.

To be able to ensure community confidence in these 'nuclear' activities, the Commonwealth should maintain the capacity to intervene. To achieve this, the key reform directions proposed by the Review are:

- The National Environmental Standard for MNES should include nuclear actions. To provide community confidence, the standard should reflect the regulatory guidelines and protocols of the all relevant national laws and requirements.
- Where states and territories can demonstrate their laws and management practices meet the National Environmental Standard, their arrangements should be able to be accredited under the proposed devolution model.
- Where arrangements are not accredited, projects should be assessed by the Commonwealth in accordance with the standard.

Bilateral approval agreements

Despite attempts by successive Commonwealth Governments, approval bilateral agreements have never been implemented. Under such an agreement, the Commonwealth would not apply the EPBC Act; instead relying on the state or territory decision to achieve an acceptable environmental outcome. As discussed above, at the time of its introduction the water trigger was prevented from being included in approval bilateral agreements (see Box 1).

Under the current settings, devolution is inherently fragile and amendments to the EPBC Act are required to make them stable and to work efficiently in practice. A suite of amendments[x] were pursued by the government in 2014 to support the implementation of its 'One Stop Shop' policy and to provide a more enduring framework for devolution. Particularly important amendments are needed to:

- enable the Commonwealth to complete assessment and approval if a state or territory is unable to, and
- ensure agreements can endure minor amendments to state and territory settings, rather than requiring the bilateral agreement to be remade (and consequently be subject to disallowance by the Australian Parliament on each occasion).

The government of the day was unable to secure the necessary Parliamentary support for the legislative changes required. Considerable community and stakeholder concern that environmental outcomes were not clearly defined and the states would not be able to uphold the national interest in protecting the environment, and a lack of clear environmental (as opposed to process) standards, fuelled political differences at the time.

This community concern remains. Submissions to the Review highlighted ongoing concern about the adequacy of state and territory laws, their ability to manage conflicts of interest, and increased environmental risks if the Commonwealth steps away[xi].

In their submissions to the Review, jurisdictions have expressed a range of views on this, including both an ongoing desire to pursue the devolution of approvals powers (e.g. Western Australian Government[xii] and South Australian Government[xiii]) as well as continue to improve existing arrangements (e.g. ACT Government[xiv], New South Wales Government[xv] and Northern Territory Government[xvi]).

4.1.2 Duplication with states and territories remains

Despite efforts to streamline, a key criticism of the EPBC Act from many proponents and their representatives is that the Act duplicates state and territory regulatory frameworks for development assessment and approval[xvii]. The Review has found that with a few exceptions, this is largely true.

The duplication that is evident does not mean, as suggested by some, that the EPBC Act is unnecessary and the Commonwealth should step out of the way. The Commonwealth has a clear role in Australia's system of environmental management (see Chapter 1). However, as the regulatory systems of the states and territories have matured over time, and with increasing jurisdictional cooperation, the regulatory gap filled by the EPBC Act has reduced, resulting in duplication. For example:

- Most states and territories have made changes to their environmental or planning laws to improve environmental assessment processes and laws to enable accreditation for bilateral agreements.
- Joined-up assessments mean that many EPBC Act project approvals mirror those given by the relevant state or territory. The EPBC Act Condition-setting Policy[xviii] currently aims to streamline approval conditions between jurisdictions, in circumstances where state or territory conditions are adequate to protect MNES.

There is no systematic way to determine the additional environmental benefits resulting from the EPBC Act. There are examples where the operation of the EPBC Act has led to demonstrably different environmental outcomes than those arising from state and territory processes. In some cases, states have used powers for state significant developments that effectively circumvent their impact assessment requirements, while the Commonwealth has maintained the importance of due process and undertaken EPBC Act assessment and approval. Submitters point

to examples such as the rejection of the state sponsored Traveston Dam in Queensland in 2009, and fast-tracked processes for state Significant Development in NSW as evidence of this[xix].

While far from perfect (see Chapter 1, Chapter 8) the EPBC Act policy for 'like for like' offsets exceeds requirements in some jurisdictions and results in additional or different conditions placed on projects that have better outcomes than would have otherwise been the case.

Contributions to the Review have highlighted that Commonwealth involvement should 'set the tone' and provide leadership as the Commonwealth is more at arms-length from the benefits that would arise from the project[xx]. While there is anecdotal evidence of this, there are also cases where the regulatory requirements of states are more stringent than those of the EPBC Act (for example Indigenous engagement requirements of Victoria and the Northern Territory[xxi]).

Frustration rightly arises when regulation under the EPBC Act does not, or does not tangibly, correspond to better environmental outcomes, given the additional costs to business of dual processes. Various estimates of the costs to industry and business of dual assessment and approval systems have been provided to the Review, including:

- Minerals Council of Australia[xxii] estimate delays can increase the cost up to $46 million per month for a major greenfield mining project (worth $3-4 billion) in Australia.
- Property Council of Australia[xxiii] estimate that delays in EPBC Act assessments can add up to $36,800 to the cost of new homes in some greenfield sites.
- The 2017 Independent Review of the Water Trigger Legislation[xxiv] estimated costs to industry of around $46.8 million per year.

Estimates of costs will invariably depend on the underpinning data, assumptions and the cost structures of projects. As the additional costs to business arising from the EPBC Act cannot always be clearly delineated from the impositions of other processes (such as costs associated with complying with state-based regulations), caution should be exercised. Nevertheless, the essential argument put forward by industry is undisputed, a reduction in time taken will reduce the cost of regulation.

As others have also done (e.g. Productivity Commission[xxv]), the Review finds there is regulatory duplication that should be addressed. There is a clear case for greater harmonisation, but to achieve this, states and territories must demonstrate they can effectively accommodate the national interest. It should not be a race to the bottom.

4.2 Key reform directions

The foundational intergovernmental agreements on the environment envisaged that jurisdictions would accommodate their respective responsibilities in each other's laws and regulatory systems, where possible. This is a sound ambition, and one the governments should continue to pursue.

Previous attempts to devolve decision making focussed too heavily on prescriptive processes and lacked clear expectations and thresholds for protecting the environment in the national interest. The National Environmental Standards proposed by this Review provide a legally binding pathway for greater devolution, while ensuring the national interest is upheld (Chapter 1).

Pursuing greater devolution does not mean that the Commonwealth 'gets out of the business' of environmental protection and biodiversity conservation. Rather, the reform directions proposed would result in a shift with a greater focus on accrediting and providing assurance oversight of the activities of other regulators and in ensuring national interest environmental outcomes are being achieved.

The devolution model proposed is not an 'all or nothing' concept. The Commonwealth would need to retain its capability to conduct assessments and approvals, where accredited arrangements are not in place (or cannot be used), at the request of a jurisdiction, when the Commonwealth exercises its ability to step in on national interest grounds, when the activity occurs on Commonwealth land, or when it is undertaken by a Commonwealth Agency outside a State or Territory's jurisdiction. Such capability is essential to ensure that EPBC Act requirements can continue to be upheld in circumstances where other regulators are, for whatever reason, unable to accommodate EPBC Act requirements in their processes. To weaken this capability would risk unnecessary delay for projects.

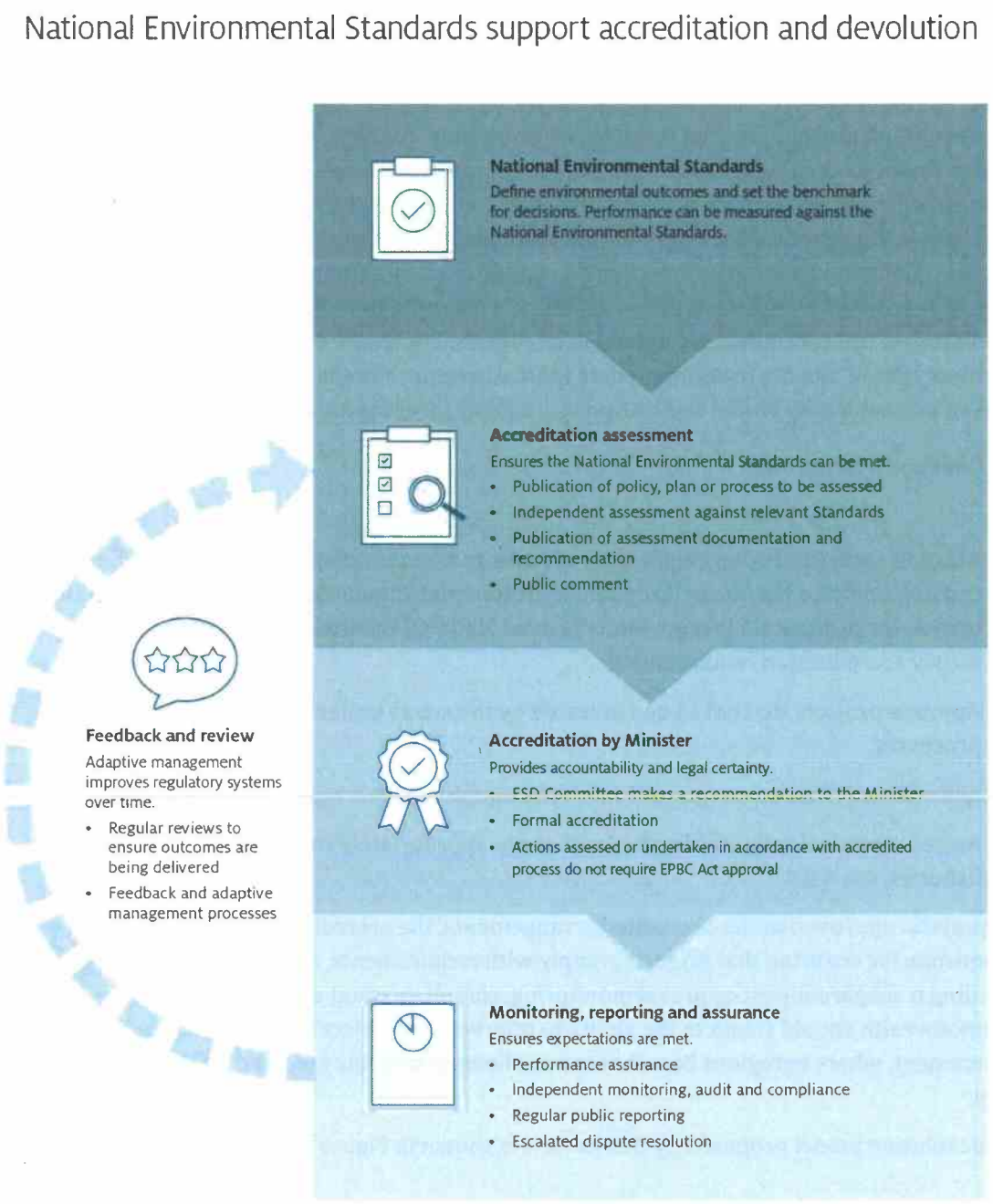
The Commonwealth could:

- Accredit state (and other regulatory) systems to assess and approve projects, where they can demonstrate they meet National Environmental Standards. This may require states and territories to adapt their regulations to meet National Environmental Standards and to satisfy accreditation requirements.
- Approve projects that have been assessed by the states under accredited assessment processes.
- Accredit activities on a regional basis, for example where a regional plan is in place.
- Accredit particular types of activities that are appropriately regulated by others (e.g. fisheries, see 4.2.4).

For projects approved under accredited arrangements, the accredited regulator would be responsible for ensuring that projects comply with requirements, across the whole project cycle including transparent post-approval monitoring, compliance and enforcement. The Commonwealth should retain to the ability to intervene in project level compliance and enforcement, where egregious breaches are not being effectively enforced by the accredited party.

The devolution model proposed by this Review is shown in Figure 3.

Figure 3 National Environmental Standards support accreditation and devolution



The proposed devolution model involves five key elements:

1) *National Environmental Standards* to set the benchmark for protecting the environment in the national interest and provide the ability to measure the outcomes of decisions.

2) *State or territory to demonstrate that their systems meet National Environmental Standards.* This element should include transparent assessment of the jurisdiction policy, plan or regulatory process against National Environmental Standards. It should include a formal check by the independent compliance and enforcement regulator, to give confidence that arrangements for monitoring and assurance of accredited arrangements are sound.

3) *Formal accreditation by the Commonwealth Minister.* This element provides accountability and legal certainty. The Minister should be required to seek the advice of the proposed Ecologically Sustainable Development Committee (Chapter 5), and this advice transparently provided as part of the accreditation process.

4) *A transparent assurance framework.* This element provides confidence that parties are implementing the processes and policies as agreed. It should include the mechanisms for the Commonwealth to step in when it is in the national interest to do so. The assurance framework should include:

- Governance, reporting and assurance arrangements.
- Independent monitoring, audit and compliance, to support public reporting on the operational and administrative performance of an accredited systems.
- Triggers for dispute resolution, to enable the Commonwealth to step in. These triggers should avoid any opportunity for gaming and unnecessary disruption to the whole regulatory system. Triggers could include:
  - Where the Commonwealth Minister deems a matter of such environmental significance that the Commonwealth should deal with it.
  - In an individual case if the National Environmental Standards are demonstrated not to have been met by the accredited party.
  - Where there is a systemic failure to meet National Environmental Standards leading to suspension (or ultimately revocation) of accreditation.

5) *Regular review and adaptive management* that ensures decision-making contributes to the objectives established in the National Environmental Standards.
  - Regular scheduled reviews of the accreditation system and whether the National Environmental Standards are delivering the outcomes intended.
  - Adaptive management over time, as data, information and knowledge improve, and regulatory systems mature.

As is the case now, where formal accreditation arrangements are not in place, Commonwealth and state collaboration (for example through the conduct of joint assessments) should continue to be pursued to facilitate streamlining and harmonisation.

4.3 Commonwealth-led assessment processes are inefficient

Assessment pathways provided by the EPBC Act are complex, inefficient and not supported by robust systems and processes. There is also duplication between the EPBC Act and the activities regulated by other Commonwealth laws and agencies. Strategic assessments and other approaches have resulted in some streamlining, but there are opportunities for further efficiency gains.

4.3.1 Multiple environmental approval pathways create unnecessary complexity and inefficiency

When a proposal is referred under the EPBC Act, the Minister determines if an action will, or is likely to have a significant impact. For those proponents where it is clear they will need to be assessed in detail, it creates an additional and time-consuming step in the process.

For some proponents, the lack of clarity on the requirements of the EPBC Act (for example key terms like 'significant impact'), means that they refer proposed actions for legal certainty. More than half of all referrals result in a decision that detailed assessment and approval is not required, or not required so long as it is carried out in a particular manner. Better guidance and clarity upfront on which impacts are acceptable, and those which will require assessment and approval, will enable the referral step to be avoided.

The EPBC Act contains five assessment pathways for environmental impact assessment:

1) Assessment on Referral Information
2) Preliminary Documentation, with or without further information
3) Public Environment Report
4) Environmental Impact Assessment, and
5) Public Inquiry

Each pathway has its own specific set of requirements, timeframes and processes set out in the EPBC Act. This increases the complexity of the regulatory framework, and the ability of the Department to clearly communicate regulatory requirements (see Chapter 8). The multiple pathways do not result in any additional environmental benefit or significantly change the assessment timeframes for the regulated community.

In practice the Assessment on Referral Information, Assessment on Public Environment Report and Assessment by Environmental Impact Statement pathways are rarely used, and the Public Inquiry pathway has never been used (see Table 1, below).

Table 1 Percentage of total assessment method decisions from 2014/15 – 2018/19 financial years[xxvi]

Assessment Approach	Per cent of total assessment method decisions
Accredited Process	25 %
Bilateral Process	12 %
Preliminary Documentation, with further information	58 %
Public Environment Report	2 %
Environmental Impact Assessment	2 %
Assessment on Referral Information	1 %
Preliminary Documentation, without further information	1 %
Public Inquiry	0 %

4.3.2 The systems that support the conduct of EIA are inefficient

The business and information systems that the Department uses for conducting EIA are antiquated and inefficient. File management systems used by assessment officers are cumbersome, information is handled, and double handed, throughout the process (see Chapter 6). Steps are missed or duplicated, interactions with proponents are not easily recorded, and project tracking is difficult, and often out of date.

There are inefficiencies arising from the way information is received from proponents. To determine if a 'valid' referral has been received, the Department conducts manual checks, rather

than a system saying that a referral isn't valid and not allowing a proponent to submit it. The EIS documentation provided by proponents are voluminous and can extend to more than 10,000 pages. These are provided in a form that is not word-searchable, and with data that cannot be interrogated.

There are inefficiencies in Department's procedures for conducting assessments. Precedent documents are not maintained and are not used to provide guidance to proponents about what they can expect, or to support consistent assessment and decision making. Relevant precedent projects are difficult to identify, and even if found, it is difficult to extract this information in a way that aids decision making. Where there is deviation from precedents, this is often not well explained.

4.3.3 Wildlife trade and permitting functions are unnecessarily prescriptive

The take, trade and movement of wildlife products (including live animals, plants and products) are regulated under Parts 13 and 13A of the EPBC Act. Part 13 includes permits to take, injure or kill protected matters in Commonwealth areas, including in Commonwealth waters. Part 13A is dedicated solely to the international movement of wildlife specimens and gives effect to Australia's obligations as a member of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) and the *Convention on the Conservation of Migratory Species* (Bonn Convention).

The EPBC Act goes beyond Australia's obligations under these international conventions. For example, the EPBC Act requires import permits to be issued for Appendix II CITES listed species, even though the exporting country has already conducted a sustainability assessment. This results in around 2,000 additional permits being issued each year, with costs to individuals, companies and the Department with no appreciable conservation benefit. Similarly, the movement of personal and household effects is overregulated. Australia requires permits for personal low-risk trade items such as tourist souvenirs, exceeding CITES requirements.

Prescription in these parts prevents flexibility and discretion, where this is warranted. Compliance breaches cannot be enforced in a proportionate manner. For example, the Minister must revoke an approval if a condition of a wildlife trade operation is not met, potentially resulting in businesses being shut down for months even for minor breaches.

Settings for the permitting of wildlife trade are inefficient and unnecessarily prescriptive. Long overdue amendments are required to reduce complexity and regulatory burden, without compromising the environmental or international standards.

have led to complexity and overlap

4.3.4 Efforts to recognise other environmental management frameworks

The EPBC Act provides mechanisms to recognise and [illegible] management frameworks, including the management of Commonwealth fisheries, Regional Forest Agreements (RFAs), offshore petroleum activities, and frameworks that regulate activities on Commonwealth land. Each of these are explored in turn below.

Commonwealth Fisheries

The Australian Fisheries Management Authority (AFMA) is responsible for the day-to-day management and compliance of Commonwealth fisheries. Assessments under the EPBC Act are conducted on the environmental performance of all export fisheries (Part 13A Assessments) and

all Commonwealth managed fisheries (Part 10 Strategic Assessments). These assessments ensure that, over time, fisheries are managed in an ecologically sustainable way.

EPBC Act assessments of fisheries are conducted against well established guidelines that assess the ecological sustainability of management arrangements[xxvii]. Lower risk fisheries are now assessed on 10 yearly rolling basis. Higher-risk fisheries, including those that interact with protected species such as dolphins, dugongs and sea lions are generally assessed every 3 years.

Parts 13 and 13A of the EPBC Act provide processes to assess impacts to protected marine species (including those protected under the Bonn Convention, see Box 1) and ensure compliance with export controls and international wildlife trade rules. These permitting processes are generally undertaken in parallel for Commonwealth managed fisheries and all export fisheries.

Box 3 The Bonn Convention

The Convention on the Conservation of Migratory Species (Bonn Convention) provides a global platform for the conservation and sustainable use of migratory animals and their habitats.

Under the Convention, only species listed under Appendix I need be afforded protected status. For species listed under Appendix II, the Convention encourages range states to enter into regional or global agreements to improve these species' conservation status.

Currently the EPBC Act requires the inclusion as a listed migratory species under the Act of any species listed under either of the Appendices to the Convention, making it an offence to catch, kill, injure, take, or move the species in Commonwealth waters without a permit issued under Part 13.

Listing is automatic and occurs without regard to the species' conservation status in Australia. For example, for some species included under Appendix II of the Convention, the Australian population is distinct from the global one and is sustainably harvested within Australia. Automatic inclusion under the provisions of the EPBC Act affords such species greater protection than is required under the Convention and is counter to the Convention's intent.

There are opportunities to streamline the multiple assessment and permitting processes needed to undertake commercial fishing operations in Commonwealth waters or jointly managed fisheries. Given the maturity of the fisheries management framework administered by AFMA, the Review is confident that further streamlining can be achieved while maintaining assurance in the outcomes. Opportunities for a more streamlined approach could include refining the process for strategic assessments of individual Commonwealth Fisheries or developing specific standards for marine areas and accrediting AFMA's regulatory framework against these standards.

Regional Forest Agreements

A regional forest agreement (RFA) is a regional plan, agreed between a state and the Commonwealth for management of native forests. RFAs balance economic, social and environmental demands on forests and seek to deliver ecologically sustainable forest management, certainty of resource access for the forest industry and protection of native forests as part of Australia's national reserve system.

The *Regional Forestry Agreement Act 2002* (RFA Act) is Commonwealth legislation under which RFAs are made. RFAs must have regard to a range of conditions, including those relevant to

MNES protected by the EPBC Act, such as endangered species and World Heritage Values (see Box 4).

Box 4 Conditions for RFAs that are relevant to the EPBC Act

The following are conditions for RFA's that are relevant to the EPBC Act.

The agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions[xxviii]:

- environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
- Indigenous heritage values;
- economic values of forested areas and forest industries;
- social values (including community needs);
- principles of ecologically sustainable management;
- the agreement provides for a comprehensive, adequate and representative reserve system;
- the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;

The EPBC Act recognises the RFA Act and EPBC Act assessment and approvals are not required for forestry activities conducted in accordance with an RFA (except where forestry operations are in a World Heritage property or a Ramsar wetland). These settings are colloquially referred to as the 'RFA exemption', which is somewhat of a misnomer.

The Review has received submissions from stakeholders concerned that the requirements of the EPBC Act are not sufficiently addressed in RFAs, and that compliance and enforcement activities are inadequate. During the course of this Review, the Federal Court found that an operator had breached the terms of the RFA and would therefore be subject to the ordinary controlling provisions of the EPBC Act.

Legal ambiguities in the relationship between EPBC Act and the RFA Act should be clarified, so that the Commonwealth's interests in protecting the environment interact with the RFA framework in a streamlined way.

Offshore Petroleum

The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is the Commonwealth regulator for offshore energy activities in Commonwealth waters. Since 2014, significant streamlining of the environmental regulation of offshore energy activities has been achieved by using a strategic assessment made under Part 10 of the EPBC Act.

The strategic assessment endorsed NOPSEMA's environmental management authorisation process. Activities undertaken in a way that is consistent with the authorisation process do not need to be separately referred, assessed and approved under the EPBC Act.

The current settings for strategic assessments have significant limitations (see Chapter 3), resulting in inflexibility in the streamlining arrangements in place with NOPSEMA. The strategic assessment endorsed NOPSEMA's arrangements that were in place at the point in time of the

agreement, in effect, freezing them in time, and invariably stifling continuous improvement, and further streamlining where there are opportunities to do so that do not lower environmental protections.

Activities on Commonwealth land

While a relatively small component of the broader regulatory system, the EPBC Act provides for streamlined assessments with other Commonwealth agencies in relation to airspace, airports, and foreign aid. Section 160 provides an alternative pathway for managing the environmental impacts of projects managed by other Commonwealth agencies (e.g. under the *Airports Act 1996*), based on advice from the Environment Minister.

While it is important that conflicts of interest be appropriately managed and situations of unconstrained self-regulation are avoided, the proposed National Environmental Standards outlined in Chapter 1 would support other Commonwealth regulators to accommodate EPBC Act requirements into their regulatory system, providing further opportunity to streamline processes within the Australian Government.

4.4 Key reform directions

4.4.1 Streamline environmental impact assessments conducted by the Commonwealth

The Commonwealth will continue to have a role undertaking environmental impact assessments and approvals for individual projects (see Box 5 – Pathways for a development proposal). To reduce the complexity of the regulatory process, the pathways for assessing proposals should be rationalised. Separate pathways should be provided for high and lower impact developments, so that the assessment is proportionate to the level of impact on MNES.

It is anticipated that with the proposed reform directions of this Review, the overall caseload of the Department will be reduced over time. National Environmental Standards and regional plans will set clear rules, meaning that proponents will be incentivised to develop projects with acceptable impacts, thereby streamlining, or indeed avoiding the need for any interaction with, the regulatory process. Lower-risk projects that still require assessment could receive approval with standard conditions (see Chapter 3, complex law), providing proponents with greater certainty.

Similarly, the proposed devolution model incentivises the states to enter into accredited arrangements with the Commonwealth, as the overall timeframe for project assessment and approval would be expedited.

Proposed reforms to information, data and regulatory systems will deliver further streamlining, by providing a single source of truth for environmental information, a modern interface for interactions on the EPBC Act, and an efficient system for case management (see Chapter 6).

Box 5 Pathways for a development proposal

Under the proposed reform directions, the pathways for a development proposal would be:

1. No Commonwealth assessment or approval required – a project can demonstrate it has been developed in accordance with the requirements of the Commonwealth standards and/or relevant regional planning requirements (noting a state approval may still be required). These projects should be self-registered and

include sufficient information to demonstrate due diligence that the scope and impacts of the proposal were consistent with the standard or regional plan.

2. No Commonwealth assessment (or approval) required –the project is assessed and/or approved under state or territory systems that are accredited by the Commonwealth under devolved decision-making arrangements.

3. Commonwealth assessment and approval required – a project cannot demonstrate it meets relevant standards or regional plans, state processes are not accredited.

4. Commonwealth assessment and approval required – a project occurs on Commonwealth land, or cannot demonstrate it has met standards and that conflicts of interest are managed.

5. Commonwealth assessment and approval required – a project is 'called in' by the Commonwealth Minister for assessment and approval (see devolution model).

6. Commonwealth assessment and approval required – a project is directly referred to the Minister for a decision by states, territories or another Commonwealth agency.

4.4.2 Improving the efficiency of wildlife permits and trade

The EPBC Act should be amended to clearly delineate between different international obligations arising from Appendix I and II Convention on Migratory Species listings. This would allow Australia to meet its international obligations under the Bonn Convention and continue to manage and protect migratory species domestically. To do this, Part 13 of the EPBC Act could be modified to allow the take of Appendix II listed species subject to all relevant management arrangements demonstrating that the take would not be detrimental to the survival of the species.

In the short-term, reforms to wildlife trade permitting arrangements should be made to align the EPBC Act with current CITES requirements. Long-overdue amendments to streamline permitting processes should also be pursued. In the longer term, wildlife trade provisions should be reformed to align regulatory effort proportionate to risk and conservation benefit.

5 Trust in the EPBC Act

Key points

The community and industry do not trust the EPBC Act and the regulatory system that underpins its implementation.

- A dominant theme in the 30,000 contributions received by the Review is that many in the community do not trust the Act to deliver for the environment.

The avenues for the community to substantively engage in decision making are limited. Poor transparency further erodes trust.

- The lack of trust is evident in high community interest in development applications, high-profile public campaigns, legal challenges to EPBC Act decisions, and a growing rate of both Freedom of Information (FOI) applications and requests for statements of reasons.
- The EPBC Act is not trusted by industry. They generally view it as cumbersome, pointing to duplication, slow decision making, and legal challenges being used as a tool to delay projects and drive up costs for business (often called 'lawfare') .

The key reform directions proposed by the Review are:

- Improve community participation in decision-making processes, and the transparency of both the information used and the reasons for decisions.
- Provide confidence that decision makers have access to the best available environmental, cultural, social and economic information.
- Amend the settings for legal review. While retaining extended standing, provide for limited merits review for development approvals. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

5.1 The community does not trust that the EPBC Act is delivering for the environment

The EPBC Act is broadly perceived as ineffective at protecting the environment. The lack of clear outcomes (Chapter 1), weak compliance and enforcement (Chapter 8) and ineffective monitoring and evaluation (Chapter 6), drive mistrust.

Limited access to information about decisions and the lack of opportunity to substantively engage in decision making under the EPBC Act adds to this mistrust. This drives the use of legal review to discover information, rather than its proper purpose to test and improve decision making.

5.1.1 Community participation is limited to process; they do not feel heard

The processes of the EPBC Act limit avenues for community participation in decision making. For example, participation in the process for listing species is largely limited to matters of scientific fact. There is no avenue in the process to raise concerns about the potential social and economic implications of listing additional species or ecological communities.

The experts who lead community engagement processes in EIA assessments highlight that "the levels of community outrage...increasingly reflect a greater community intolerance of

proponents who disregard community values...key stakeholders and communities are losing, or have lost, confidence in project development and government approval processes."[i]

The growth in community interest in environmental decisions is indicative of the degree of mistrust. People want to know why decisions are made and want to contribute to decisions that affect them and Australia's environment, especially when they believe those decisions are having negative consequences.

With limited trust in the effectiveness of the EPBC Act and no alternative avenue to participate, the community seeks information or influence through whatever means possible. The formal access options for both business and the community under the current arrangements are:

- FOI applications
- requesting statements of reasons
- judicial review
- merits review for Part 13A wildlife trade permit decisions (noting that merits review is not available for EIA decisions)
- public comment processes.

5.1.2 There is little transparency of the information and advice provided to decision makers, and how this is considered in decisions

A key theme in submissions is the lack of transparency of how information is collected and incorporated into decision-making processes. The public don't trust claims made by advocates or governments on the costs or benefits of a proposal, and they don't trust the effectiveness of compliance and enforcement activities. There are concerns that proponents themselves commission environmental consultants in the EIA process, but there are no professional standards or accreditation for these consultants, which further erodes trust in decision making.

Low transparency and a lack of early public engagement by some proponents means that it is often late in decision-making processes that community concerns are heightened, such as when a specific development application is being considered. This is the most likely point they will engage with the project impacts and the process.

Poor transparency encourages challenges to decisions. The growth in FOI requests is indicative of the degree of mistrust and the perceived lack of transparency and accountability for decision makers. People cannot understand how decisions to approval developments can be consistent with the laws that protect the environment, if overall environmental indicators are trending down.

This lack of visibility is exacerbated by the complexity of the EPBC Act and limitations in both the scope and transparency of information used for decision making, and to ensure compliance with the Act. There is a growing trend of 'post-approval arrangements', where specific environmental impacts and treatments are considered when proponent management plans are assessed. This happens without the opportunity for public comment.

The community also cannot see how allegations of non-compliance with the EPBC Act are investigated and resolved.

The EPBC Act and its processes focus on the provision of environmental information, yet the Minister can and must consider social and economic factors when making many decisions. The community can't see how these factors are weighed in EPBC Act decisions as under the current arrangements, there is no requirement for proponents to give fulsome information in relation to social and economic impacts of a project proposal, nor is there scope for the assessment process to test the veracity of that information.

The social and economic benefits and costs put forward by proponents are at the project scale, meaning decision making is not based on a complete nationally focussed economic or social analysis. The trade-offs and considerations of decision makers are not explicit, often happening behind closed doors, giving rise to allegations that proponents have undue influence on decision-makers and the environment loses out to other considerations.

The advice provided to support decisions is not always made publicly available. This promulgates concerns over the quality of the advice, or that government may have something to hide and shuns accountability for its decisions.

There is a lack of confidence in the quality of the advice provided, and views that decisions are biased towards competing imperatives other than protection of the environment. Many submissions to this Review have expressed a strong preference for decisions to be made by independent authorities or commissions, rather than democratically elected decision-makers and their delegates.

5.1.3 High-profile decisions are contested, as the community is dissatisfied with environmental outcomes

It is not clear how decisions explicitly contribute to environmental outcomes. Concerns raised in many contributions to the Review are that decisions made under the EPBC Act are out of step with the views and values of the community.

Where concerns arise about environmental outcomes associated with a decision – and with no other viable alternative for the community – public focus turns to challenging high profile decisions. These challenges can succeed on technical legal grounds rather than on environmental outcomes. For example, there is currently no avenue in the EPBC Act to challenge the merits of EIA decisions and consequently technical process compliance has become the focus.

In the Shree case[ii], the technicality was a failure to attach documents to a Ministerial decision brief. This legal challenge was on the basis of a failure to fulfil process obligations rather than questioning the outcomes resulting from the decision, which was remade with the same environmental outcome after legal proceedings were completed.

Where used, campaigns, protests and the use of the courts do slow down developments. These delays often result in no material change to the decision. Technical challenges result in delays and costs for industry and the economy with little, if any, benefit to the environment.

5.2 Industry perceives the EPBC Act to be cumbersome and prone to unnecessary delays

5.2.1 The complexity of the EPBC Act leads to uncertainty for business

The complexity of the EPBC Act leads to cumbersome processes, which are inefficient for both business and government. This adds to regulatory costs, without any associated environmental benefit (see Chapter 3, Chapter 7). For example, the EPBC Act does not allow decision makers to correct or adjust decisions that are faulty only on technical grounds. This leads to unnecessary process delays for industry, without necessarily changing the substance of the original decision.

Judicial review cases have driven a culture of risk-aversion 'box-ticking' within the department. This has led to fewer resources being dedicated to assisting proponents to improve outcomes for the environment and more on administering processes.

The information used to make a decision and how the decision is made based on that information is not always consistent or clear. This leads to uncertainty for proponents. Past decisions are not transparent. Industry cannot derive lessons from previous interactions with the Act, which would lead both to efficiency and improvements over time. This is in contrast to determinations made under tax law or competition law, which are public and searchable.

5.2.2 Duplicative processes and slow decisionmaking drive up costs

An underlying theme of industry mistrust in the EPBC Act relate to its perceived duplication with state and territory processes (see Chapter 4) and the length of time it takes to receive an approval. These are key reasons why industry is calling for a 'one-stop-shop' model to reduce duplication and assessment timeframes.

On average, resource projects can take nearly three years, or 1014 days to approve under the EPBC Act[iii], and this is too long. For business, time is money. On large projects time delays can result in significant additional costs (see Box X for timeframes related to resource projects). The recent provision of additional resources to conduct environmental impact assessments has improved performance from 19 per cent to 87 per cent of key decisions made on time.

There is also little accountability in the post-approval phase. There are no statutory timeframes for these decisions and this has led to increased uncertainty and delay for industry[iv].

Box X: Timeframes for assessment and approval of resource projects under the EPBC Act have increased over time

Since the commencement of the EPBC Act, the average time taken for large, complex resource projects to be assessed and approved has increased from 721 to 889 days (see Fig X). The time taken for the Commonwealth Environment Minister to make an approval decision on these projects also increased to an average of approximately 223 days.

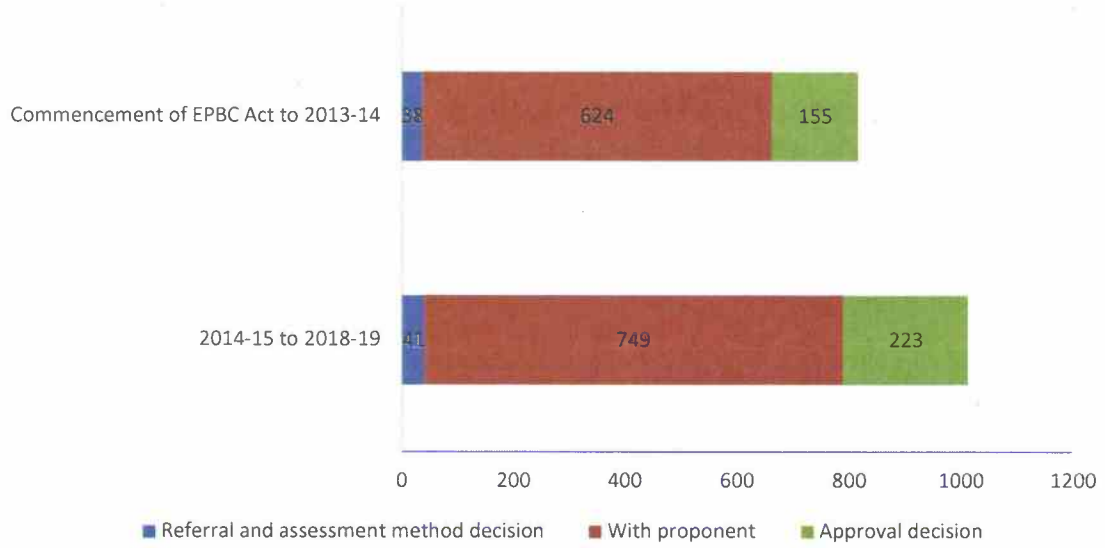


Figure X. Average number of days taken for approvals processes under the EPBC Act for resource projects[v]

These timeframes do not factor in time taken for post approval requirements, such as the development of management plans, which can be significant. They also do not factor in appeal timeframes.

Submissions have noted that businesses have experienced time delays due to statutory deadlines being missed by the regulator. The Minerals Council of Australia[vi] cited project examples of where it has taken seven months to make a controlled action decision with a 20 business day statutory timeframe (EPBC 2019/8534), and 87 business days to make an approval decision with a 40 business day statutory timeframe (EPBC 2017/7902).

Lengthy assessment and approval processes are not all the result of a 'slow' Commonwealth regulator. On average, the process is with the proponent for more than three quarters of the total assessment time (example in Figure X above). This includes the time required to collect required environmental information and collate necessary documentation, or when projects are shelved for periods of time for commercial reasons by proponents. In some instances, projects that require state and Commonwealth approvals can be held up by state or territory assessment and approval processes. In rare cases, Commonwealth approvals can be received years before a state or territory approval[vii].

5.2.3 Industry is concerned that legal challenges add further delays

Poor trust in the EPBC Act has played out in a lengthy public debate about 'green lawfare', with accusations that politically motivated environment groups utilise the courts to delay projects. The public discourse on legal challenges is focused on large projects, with considerable economic benefits that impact highly valued environmental areas[viii]. Pro-development groups argue that the 'extended' standing provisions (standing beyond a person directly affected by a decision) should be removed from the Act. Previous attempts have been made to remove these provisions[ix].

Highly conflicting evidence and viewpoints have been received by the Review about whether there is significant abuse or gaming of appeal mechanisms under the EPBC Act[x]. Generally, only a

small number of decisions have been challenged relative to the ~6500 projects referred under the EPBC Act (19 in the last five years).

Similarly, evidence from other jurisdictions indicates that open standing arrangements do not necessarily lead to excessive numbers of legal challenges. In NSW, less than two per cent of development applications are challenged via judicial or merits review[xi].

The focus should not be to limit the capacity of people to use legal review to challenge decisions in the public interest. Rather, the excessive process requirements as well as improving communication and transparency for the EPBC Act should be addressed as a matter of urgency to remove the most significant sources of delay and to increase certainty. This effort will minimise the drivers for legal challenge, particularly for litigation that is vexatious or without reasonable prospects of success.

5.3 Key reform directions

The national interest requires different objectives to be weighed and values reflected. This means that the EPBC Act will never satisfy all stakeholders all of the time. A key driver of low trust in the EPBC Act is lack of confidence that it is contributing to achieving environmental outcomes. The suite of reforms proposed by this Review is designed to work together to lift trust in the EPBC Act and its operation.

The setting of National Environmental Standards and the development of regional plans are key mechanisms to set the clear outcomes that the EPBC Act intends to achieve (Chapter 1). Many of the reform directions proposed in forthcoming chapters seek to provide greater confidence that decisions contribute to achieving these outcomes. These include a quantum change in the data and information that underpins the operation of the EPBC Act (Chapter 6), the development of effective frameworks for monitoring and evaluating the operation of the Act and the broader national environmental management system (Chapter 7), and effective, independent compliance and enforcement (Chapter 9).

Many of the reforms proposed will also reduce the time taken for regulatory decisions. Clear rules (Chapter 1), greater harmonisation with other regulators (Chapter 4) and better information, data and regulatory systems (Chapters 6 and 7) will speed up the time taken to receive environmental approval.

The aim of the key reform directions proposed in this chapter is to minimise the demand for formal review, while providing the necessary access to the law demanded of modern regulatory practice. They seek to address the reasons the community chooses legal challenge over other mechanisms, while allowing for improvements to be generated from effective scrutiny and testing of decision making through formal legal review.

5.3.1 Improve community participation in decision making and the transparency of information

A fundamental reform is to facilitate adequate time for the community to consider information and respond to it.

Improved community participation in processes can save time, by ensuring that the right information is surfaced at the right time and can be considered in the decision-making process. Best practice community consultative processes are well established[xii], and the National

Environmental Standard for transparent processes and robust decisions should include specific requirements for community consultation.

Better information management systems (see Chapter 6), that are interactive and digitally connected can improve community access to information about decisions, including greater transparency of the stage of the decision-making process, the opportunities for community participation, and the information that is being considered in the decision-making process.

Improving participation and transparency will mean that stakeholders will be less likely, and have less justification, to resort to legal challenge. The limited merits review model proposed below requires information to be introduced and sustained as part of the decision-making process. More complete information is therefore available to make the decision rather than being withheld for legal 'forum shopping'.

5.3.2 Strengthen independent advice to provide confidence that decision makers are using best available information

There is low trust that decisions are not subject to inappropriate political interference. Lack of trust is an underlying driver behind calls for greater independence of decision making[xiii].

This solution is not supported by the Review. It is entirely appropriate that elected representatives (and their delegates) make decisions that require competing values to be weighed and competing national objectives to be balanced. It is important that the law is clear and that core regulatory functions are carried out effectively, rather than decision making being 'independent'.

That said, community confidence and trust in the process could be enhanced by the provision of transparent, independent advice on the adequacy of information provided to a decision-maker. The statutory advisory committee structures in the EPBC Act should be recast. An Ecologically Sustainable Development (ESD) Committee should be established, comprising an independent chair and the chairs of the following committees:

- Information and knowledge (to advise on science, economic, social impacts and traditional knowledge).
- Indigenous knowledge and engagement (to advise on the co-design of reforms and the National Environmental Standard for Indigenous engagement).
- Threatened species science (to advise on the status of threatened species and ecological communities and actions needed to improve their condition in regional recovery plans).
- Australian Heritage Council (as established under the *Australian Heritage Council Act 2003* to provide advice on heritage matters).
- Water resource science (advising on impacts of relevant projects on cross border water resources and nationally protected matters).

The ESD Committee should provide transparent advice to the Minister to inform decisions on the making of National Environmental Standards, regional plans, and the accreditation of arrangements for devolving decision making. The Minister could request the Committee's advice on other issues or decisions where they have relevant expertise.

The ESD Committee should provide the Minister with transparent formal advice on:

- the adequacy of the information provided to inform the decision
- whether the processes that underpin the recommendation have been conducted in accordance with relevant standards (for example, for community or Indigenous engagement)
- whether the recommendation is consistent with the National Environmental Standards.

In making a decision, the Minister should be required to provide reasons as to how the advice of the ESD Committee was considered.

5.3.3 Retain standing with a refined, limited merits review mechanism

The legal review framework should not be the primary determinant for the performance of the EPBC Act. However, effective, efficient and transparent decisions based on clear outcomes should reduce the demand for legal review.

The Review is not yet convinced that the current standing provisions in the EPBC Act (section 487) should be removed, but adjustments to legal review provisions should be made to provide for limited merits review 'on the papers'. This form of review limits the considerations to those matters that were raised and maintained by the applicant during the due course of the regulatory decision or matters arising from a demonstrable material change in circumstances.

Standing

The Review is not convinced of the view that extended standing should be curtailed. Broad standing remains an important feature of environmental legislation, particularly given the presence of collective harm resulting from damage to environmental or heritage values. Individual loss is not always identifiable or quantifiable, reliance on which would result in restoration falling fully on the public purse.

The courts have the capacity to deal with baseless or vexatious litigation. Litigation with no reasonable prospect of success can be dismissed in the first instance. Both the Federal Court and the High Court have the capacity to maintain lists of vexatious litigants, who are prohibited from taking legal action without permission. This can also impact a litigant's ability to retain counsel.

The likely result in removing extended standing is that individuals with a direct interest in a project would be co-opted to join litigation driven by others or that courts would continue to grant standing to applicants in line with previous case law. It also means that hearings would be lengthened to consider arguments as to a person's standing before the substantive issues are considered.

Although the review also found no reason to broaden standing under the EPBC Act, even open standing (as opposed to extended standing as set out in section 487) is not likely to result in a deluge of cases. As highlighted in the submission from the Law Council of Australia[xiv], the case law supports a finding that standing is not interpreted broadly by the courts as it is aimed at protecting the public interest rather than private concerns.

Court time should be optimised by limiting vexatious litigation and litigation with no reasonable prospect of success. Reforms should focus on:

- improving transparency of decision making, to reduce the need to resort to court processes to discover information

- limiting legal challenges to matters of outcome not process, to reduce litigation that does not have a material impact on the outcome.

It may though be beneficial for the Act to require an applicant seeking to rely on the extended standing provisions to demonstrate that they have an arguable case, or that the case raises matters of exceptional public importance before the matter can proceed.

Form of legal review

Legal review processes are to ensure that decisions are:

- made correctly in accordance with the law (judicial review)
- 'preferable' such that, within the range of decisions possible under the law, the best decision is made based on the relevant facts (merits review)[xv].

In a mature regulatory framework, judicial and merits review mechanisms are complementary. They operate in concert to test and refine decision making over time to ensure that regulation achieves its objectives and is responsive to changing circumstances[xvi].

Whilst the existence of judicial review helps ensure legal processes are followed, there is a need for merits review to ensure decisions are meeting the intent of the legislation, not simply following processes.

Full merits review is not advised. The evidence in support of full merits review is limited and in fact indicates that it could lead to adverse consequences. Opening decisions, on appeal or review, to the admission of new documentation or materials for consideration delays decisions without necessarily improving outcomes. It can also result in the applicant receiving a substituted decision that is preferable or more complete in some way, leading to withholding of important information and forum shopping.

The proposal for limited merits review 'on the papers' has benefits in terms of:

- ensuring decisions are 'reasonable' given the material at the time of the decision
- contributing to ensuring decisions are of high quality — that is, transparent and consistent decisions; contested to a degree that is not detrimental to the effectiveness of regulation; and less open to gaming.

However, it must be carefully designed to minimise perverse outcomes.

- A focus on good, transparent decision making by the regulator is the primary consideration.
- Merits (and judicial) review should be a last resort to ensure correct decisions are being made.
- Limits on the ability to exercise merits review should be clear and in the interests of outcomes of the legislation.

The Review proposes merits review should be available for EIA decisions, but only:

- limited to specific decisions in the EIA process
- time limited in terms of when an action can be brought
- it is demonstrated that its application is in the interest of the desired outcomes.

6 Data, information and systems

Key points

Decision makers, proponents and the community do not have access to the best available data, information and science. This results in sub-optimal decision making, inefficiency and additional cost for business and poor transparency to the community. The key reasons why the EPBC Act is not using the best available information:

- The collection of data and information is fragmented and disparate. There is no single national source of truth that people can rely on.
- The right information is not available to inform decisions. Information is skewed towards western environmental science and does not adequately consider Indigenous knowledge of the environment, or social, economic and cultural information. This broader set of information is not clearly integrated to inform decisions that deliver ESD. Cumulative impacts and future challenges like climate change are not effectively considered.
- The Department's systems for information analysis and sharing are antiquated. Cases cannot be managed effectively across the full lifecycle of a project, the 'customer' experience is clunky and cumbersome for both proponents and members of the community interested in a project.

The key reform directions proposed by the Review are:

- A national 'supply chain' of information is required so that the right information is delivered at the right time to those who need it. This supply chain should be an easily accessible 'single source of truth' on which the public, proponents and Governments can rely.
- To deliver an efficient supply chain, a clear strategy is needed so that investments made build, deliver and improve the system over time.
- A custodian for the national environmental information supply chain is needed, and the Commonwealth should clearly assign responsibility for national level leadership and coordination. Adequate resources should be provided to develop the systems and capability that is needed to deliver the evidence base for Australia's national system of environmental management.
- A National Environmental Standard for information and data should set clear requirements for the provision of data and information in a way that facilitates transparency and sharing. The standard should apply to all sources of data and information, including that information collected by proponents.
- To apply granular standards to decision making, Government needs the capability to model the environment, including the probability of outcomes from proposals. To do this well, investment is required to improve knowledge of how ecosystems operate and develop the capability to model them. This requires a complete overhaul of the systems to enable improved information to be captured and incorporated into decision making.

6.1 There is no single source of truth for data and information

6.1.1 Data and information are hard to find, access and share

There is no single national source of truth that people can rely on.. This adds cost for business and government, as they collect and recollect the information they need. It also results in lower

community trust in the process, as they question the quality of information on which decisions are made, and the outcomes that result from them.

There are many sources of information on the environment. These are produced by a wide range of organisations including proponents, researchers, various Commonwealth agencies, state and territory governments, local governments and regional natural resource management organisations. Each organisation collects and manages information to suit their own needs.

There are many different portals, tools and datasets available, but there is no clear, authoritative source of environmental information, to help users identify and access information that is relevant. Department data sets including the Species Profile and Threats (SPRAT) Database and the Protected Matters Search Tool (PMST) do not refine and present data that provides useful information for proponents, assessment officers, decision makers or the general public. The Atlas of Living Australia attempts to bring disparate sources of data information together in one place, but even its custodian, CSIRO acknowledges its shortcomings (see Box 1 The Atlas of Living Australia).

Box 1 The Atlas of Living Australia

The Atlas of Living Australia (ALA) is a digital platform that pulls together Australian biodiversity data from multiple sources, making it accessible and reusable. It aims to support better decisions and on-ground actions and deliver efficiency gains for data management.

Launched in 2010, the ALA is hosted by CSIRO and funded under the National Collaborative Research Infrastructure Strategy. Further funding is secured out to 2023.

A wide range of organisations and individuals contribute data to the ALA, including universities, museums, governments, the CSIRO, Indigenous ecological knowledge holders, and conservation and community groups. The ALA provides the technology, expertise and standards to aggregate the data and make it available in a range of ways. The platform now contains over 85 million biodiversity occurrence records, covering over 111,000 species, including birds, mammals, insects, fish and plants.

The ALA provides a user-friendly, online interface that supports species information, data visualisation and mapping tools, download of data and access to more sophisticated analysis tools (https://www.ala.org.au/). Organisations can also build on the ALA's open IT infrastructure to enhance their own information services and products, for example the Department of Agriculture, Water and Environment's MERIT platform.

A recent review of the ALA[i] found that the ALA has 'pioneered a step-change' in the use of Australia's biodiversity data. However, the review noted some stakeholder concerns around the lack of controls and metrics around data quality and reliability, and data coverage and diversity. The report noted that minimal data is provided to the ALA by consultants and industry, which can represent a major source of biodiversity information. As well as not being a contributor, industry is not identified as a key user of the ALA, which appears to be a missed opportunity.

The issues identified by stakeholders in the ALA review highlight the overall lack of a strategic approach to delivering diverse, representative and comprehensive data to align with national needs, and consistent funding to do so.

Valuable data is often 'locked' in inaccessible formats. Valuable historical data is stored in paper reports. Information on listed species and communities, or assessment documents provided by proponents are usually in the form of individual PDF documents. To access this information, each document must be found, opened and read individually.

Large amounts of valuable environmental data collected are not shared within government, between governments, or made available for further use. Data collected by proponents to support environmental impact assessments or the acquisition and management of offsets is not provided in a way that is able to be shared or reused. It is often considered proprietary by proponents. Data is collected by the research community is often targeted for scientific publication and not always easily accessible for wider use. Regrettably, critical data and the opportunity to establish longitudinal data sets is lost over time as organisational priorities change, and the resources to maintain datasets are withdrawn.

The costs and frustrations of unclear requirements, limited access to shared data, duplication and lack of transparency in the environmental assessment process have been widely acknowledged. In November 2019, Environment Ministers from across Australia agreed to work together to digitally transform environmental assessment systems. In 2019 the Commonwealth and West Australian governments made financial commitments to the collaborative Digital Environmental Assessment Program. This will deliver a single online portal to submit an application across both tiers of Government and biodiversity database that will eventually be rolled out nationally[ii]. This is a good first step for the interface between proponents and regulators and the access and ease of use of information for environmental impact assessments.

6.1.2 No-one is responsible, and there is no clear strategy for environment information

Unlike other areas of national policy (such as the economy, the labor market, and health), environment and heritage policy does not have a comprehensive, well-governed and funded national information base. Efforts are duplicated, and as a nation, the most is not made of public investment in information and data. Multiple parties collect or purchase the same, or similar information, often because they aren't aware of other efforts. Similar systems and databases are built by multiple jurisdictions. It would be more efficient if they were shared or collectively developed.

A number of initiatives, funded by Governments, have sought to deliver greater coordination and standardisation of environmental data. This includes initiatives such as the National Environmental Information Infrastructure, the Terrestrial Ecosystem Research Network, the Atlas of Living Australia (see Box 1 The Atlas of Living Australia), the monitoring framework that underpins the Regional Land Partnerships Program, Digital Earth Australia and work of the Western Australia Biodiversity Science Institute.

Despite these efforts, governments often must resort to negotiating case-by-case data licensing and sharing, rather than having agreements on data and information sharing and the systems that can talk with each other. The collation of information on the impacts of the 2019-20 bushfires on the environment is an example of this.

There is no comprehensive long-term national strategy or coordination, and funding is often ad-hoc program-based investments, and therefore uncertain. There are custodians for some national level data and information (for example Geoscience Australia coordinates remotely sensed information, and GBRMPA information related to the Great Barrier Reef) but there are major gaps, particularly for terrestrial environments.

No single organisation has clear responsibility for stewardship and coordination across the breadth of national environmental information, let alone adequate and ongoing funding to do so. The lack of coordination drives higher costs and derives fewer benefits from the investments that are made in information collection and curation.

6.2 The right information is not available to inform decisions made under the EPBC Act

6.2.1 The current focus is on western scientific environmental information

To deliver ESD, decision-makers must weigh up this information on the long term environmental, economic, cultural and social impacts and benefits of their decisions.

The current focus of the EPBC Act is on western environmental science. There are currently clear structures and avenues for western scientific advice on the environment to be provided and considered, for example through the Threatened Species Scientific Committee for threatened species and communities listing and the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining (IESC) in relation to environmental impact assessments of large coal mining and coal seam gas proposals. There is no corresponding avenue or expectation for Indigenous environmental knowledge, nor economic or social information to be explicitly included or considered in statutory processes. Yet decision makers must weigh competing factors, yet the information they rely on to do so is not transparent.

The information base for development assessment decisions is heavily skewed to environmental information collected by the proponent. There is no requirement for the proponent to give fulsome information on social, economic or cultural impacts, or for the assessment process to examine the veracity of that information. The avenues to seek expert advice (beyond that provided by the IESC) in the development assessment process are limited, and rarely used in practice.

6.2.2 Cumulative impacts and future threats are not well considered

Environmental science and management have traditionally aimed to understand past environmental condition, how and why conditions have changed, and what needs to be done to 'return' the environment back to its 'past' health.

As highlighted in Chapter 1, a key shortcoming of the EPBC Act is the focus on project-by-project decisions. These decisions are largely based on project centric information, collected and collated for the purposes of conducting and environmental impact assessment. With limited exceptions (see, for example, Box 2), the cumulative impacts of decisions on the landscape are not well considered. This is a key shortcoming of the Act.

Box 2 Assessment of cumulative impacts of proposed coal seam gas or large coal mining developments

The analysis and advice provided by the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) is an example of a clear expectation and process for considering cumulative impacts in advice provided to the decision-maker.

The 'Information Guidelines for the Independent Expert Scientific Committee advice on coal seam gas and large coal mining development proposals'[iii] outline the definition and requirements for the consideration of cumulative impacts and provide advice on the scale and nature of assessment.