Independent review of
the **EPBC Act**

Interim Report

June 2020

Professor Graeme Samuel AC

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

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Foreword

I am pleased to present the Interim Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

My interim view is that the EPBC Act does not position the Commonwealth to protect the environment and Australia's iconic places in the national interest. The operation of the Act is dated and inefficient, and it is not fit to manage current or future environmental challenges, particularly in light of climate change.

The purpose of this Interim Report is to set out my preliminary views on the fundamental inadequacies of the EPBC Act and propose key reform directions that are needed to address these. It is not an exposition of all problems, nor does it reference in full depth the comprehensive information, including relevant past reviews, on which I have relied to form my view.

It is unlikely that everyone will agree on all problems or support all the proposed reform directions. Complete agreement by everyone would be a mission impossible. But I have attempted to deal with the issues that have been raised in submissions and flowing from my research in a manner that seeks to satisfy the fundamental objective of Australia having effective and efficient environment protection and biodiversity conservation.

In presenting this Interim Report, I would like to hear the views of interested stakeholders. What I have missed? How could the proposed reform directions be improved? Are there fundamental shortcomings that would require me to rethink? I will consider this feedback and other new information in the coming months.

The level of interest in the Review has been substantial, particularly given that during the course of the Review the summer bushfires and then COVID-19 have presented significant challenges for stakeholders. The Review received more than 3,000 unique submissions as well around 26,000 largely identical contributions. I would like to thank all those who have participated in the Review.

I also thank stakeholders who have been generous in sharing their knowledge of the EPBC Act—members of the Act's statutory committees, state and territory government departments, Indigenous groups and community leaders, the scientific community, environment and industry groups, and legal experts. I look forward to engaging further with stakeholders as I finalise the Review by October.

I have been greatly assisted by contributions from the Review Expert Panel—Mr Bruce Martin, Dr Erica Smyth AC, Dr Wendy Craik AM, and, until his appointment as Royal Commissioner, Professor Andrew Macintosh. I have valued their counsel, but take full responsibility for the views presented.

In closing, I acknowledge the work of the Review Secretariat. Despite the challenging times, their support to me has been unwavering.

I look forward to hearing your views.

Graeme Samuel

Professor Graeme Samuel AC

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The EPBC Act Review

The Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (the Review) commenced on 29 October 2019. The Minister for the Environment appointed Professor Graeme Samuel AC to conduct the Review.

The EPBC Act requires that an independent review be undertaken at least once every ten years. This review must examine the operation of the Act and the extent to which its objects have been achieved.

Information about the Review, including the Terms of Reference, is available on the Review website. This includes information about the extensive consultation that has occurred, and the thousands of submissions received on the Discussion Paper. This material has had a direct bearing on the findings of the Review.

The Final Report is due to be completed by the end of October 2020.

The Interim Report

This Interim Report sets out Professor Samuel's views on the fundamental inadequacies of the EPBC Act and proposes key reform directions to address them. It is not an exposition of all problems, nor does it reference in full depth the comprehensive information—including relevant past reviews—on which the Review has relied.

The Interim Report is structured around the key problems identified by the Reviewer and the proposed reforms to address these. Multiple issues with the way the EPBC Act operates contribute to the ultimate problems observed. The structure of the Interim Report—with summary points, an executive summary and key points at the start of each chapter—is intentionally repetitive to enable the reader to understand the overall message of the Review in as little or as much detail as they choose.

How to have your say

The Review would like to hear the views of stakeholders on the Interim Report and the key reform directions proposed. **What has been missed? How could the proposed reform directions be improved? Are there fundamental shortcomings that would require the Reviewer to rethink?**

The Review will continue to engage with stakeholders. Given the short time available, this will be done in a targeted way with the goal of testing and refining key reform proposals.

All interested parties are invited to visit the Have Your Say website to provide feedback via a survey. The survey is set out to focus your comments on the key reform directions proposed in the Interim Report. This is so the Review can quickly gauge views and target analysis to areas of critical concern. You are encouraged to complete the survey as early as possible to ensure adequate time for its consideration. Please refrain from resending material you have already provided to the Review.

To share your views about the Interim Report, please visit our Have Your Say website and complete the survey.

Summary points

Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The current environmental trajectory is unsustainable.

The construct of Australia's federation means that the management of the environment is a shared responsibility and jurisdictions need to work effectively together, and in partnership with the community.

The EPBC Act is ineffective. It does not enable the Commonwealth to play its role in protecting and conserving environmental matters that are important for the nation. It is not fit to address current or future environmental challenges.

Fundamental reform of national environmental law is required, and new, legally enforceable National Environmental Standards should be the foundation. Standards should be granular and measurable, providing flexibility for development, without compromising environmental sustainability.

National Environmental Standards should be regulatory instruments. The Commonwealth should make National Environmental Standards, in consultation with stakeholders, including the states and territories. The law must require the Standards to be applied, unless the decision-maker can demonstrate that the public interest and the national interest is best served otherwise.

Precise, quantitative standards, underpinned by quality data and information, will support faster and lower-cost assessments and approvals, including the capacity to automate consideration and approval of low-risk proposals.

The EPBC Act has failed to fulfil its objectives as they relate to Indigenous Australians. Indigenous Australians' traditional knowledge and views are not fully valued in decision-making, and the Act does not meet the aspirations of Traditional Owners for managing their land. A specific Standard for best practice Indigenous engagement is needed to ensure that Indigenous Australians that speak for, and have traditional knowledge of, Country have had the proper opportunity to contribute to decision-making.

Indigenous Australians seek, and are entitled to expect, stronger national-level protection of their cultural heritage. The suite of national-level laws that protect Indigenous cultural heritage in Australia needs comprehensive review. Cultural heritage protections must work effectively with the development assessment and approval processes of the EPBC Act.

Duplication exists between the EPBC Act and state and territory regulatory frameworks for development assessment and approval. Efforts have been made to harmonise and streamline with the states and territories, but these efforts have not gone far enough.

The proposed National Environmental Standards provide a clear pathway for greater devolution. Legally enforceable Standards, transparent accreditation of state and territory arrangements, and strong assurance are essential to provide community confidence in devolved arrangements. Greater devolution will deliver more streamlined regulation for business, while ensuring that environmental outcomes in the national interest are being achieved.

The community does not trust the EPBC Act to deliver effective protection of the environment and industry view it as cumbersome, duplicative and slow. Legal review is used to discover information and object to a decision, rather than to test and improve decision-making consistent with the law. Reforms should focus on improving transparency of decision-making to reduce the need to resort to court processes to discover information. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

Continued next page

Summary points (continued)

Decision-makers, proponents and the community do not have access to the best available data, information and knowledge. 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.

A national 'supply chain' of information is required so that the right information is delivered at the right time to those who need it. A transparent supply chain will build community confidence that decisions are made on comprehensive information and knowledge, and that decisions are contributing to intended outcomes.

A quantum shift is required in the quality of information, accessible data and information available to decision-makers so that decision-makers can comprehensively consider the environmental, economic, social and cultural factors. To apply granular standards to decision-making, stakeholders need the capability to better 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.

Given the state of decline of Australia's environment, restoration is required to enable future development to be sustainable. Available habitat needs to grow to be able to support both development and a healthy environment. The EPBC Act should require proponents to exhaust all reasonable options to avoid or mitigate impacts on the environment. Where this is not feasible, the remaining impacts of the development should be offset in a way that restores the environment.

The current collaborative approach to monitoring, compliance, enforcement and assurance is too weak. Serious enforcement actions are rarely used, indicating a limited regard for the benefits of using the full force of the law where it is warranted. When they are issued, penalties are not commensurate with the harm of damaging a public good of national interest. They do not provide an adequate deterrent.

A strong, independent cop on the beat is required. An independent compliance and enforcement regulator, that is not subject to actual or implied political direction from the Commonwealth Minister, should be established. The regulator should be responsible for monitoring compliance, enforcement and assurance. It should be properly resourced and have available to it a full toolkit of powers.

The operation of the EPBC Act is ineffective and inefficient. Reform is long overdue. It is impossible for the Review to satisfy the aspirations of every person with an interest in the environment or in business development. The proposed reforms provide a way forward that seeks to build community trust that the national environmental laws deliver effective protections, while regulating businesses efficiently. The Act in its current form achieves neither.

The proposed reforms are substantial, but the changes are necessary to set Australia on a path of ecologically sustainable development. This path will deliver long-term economic growth, environmental improvement and the effective protection of Australia's iconic places and heritage for the benefit of current and future generations.

Executive summary

Protection of Australia's environment and iconic places

Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The current environmental trajectory is unsustainable.

The overwhelming message received by the Review is that Australians care deeply about our iconic places and unique environment. Protecting and conserving them for the benefit of current and future generations is important for the nation.

The evidence received by the Review is compelling. Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The pressures on the environment are significant—including land-use change, habitat loss and degradation, and feral animal and invasive plant species. The impact of climate change on the environment is building, and will exacerbate pressures, contributing to further decline. Given its current state, the environment is not sufficiently resilient to withstand these threats. The current environmental trajectory is unsustainable.

The EPBC Act is ineffective. It does not enable the Commonwealth to effectively protect environmental matters that are important for the nation. It is not fit to address current or future environmental challenges.

The way the EPBC Act operates means that good outcomes for the environment cannot be achieved under the current laws. Significant efforts are made to assess and list threatened species. However, once listed, not enough is done to deliver improved outcomes for them.

In the main, decisions that determine environmental outcomes are made on a project-by-project basis, and only when impacts exceed a certain size. This means that cumulative impacts on the environment are not systematically considered, and the overall result is net environmental decline, rather than protection and conservation.

The EPBC Act does not facilitate the restoration of the environment. Given the state of decline of Australia's environment, restoration to improve the environment is required to enable future development to be sustainable.

Key threats to the environment are not effectively addressed under the EPBC Act. There is very limited use of comprehensive plans to adaptively manage the environment on a landscape or regional scale. Coordinated national action to address key threats—such as feral animals—are ad hoc, rather than a key national priority. Addressing the challenge of adapting to climate change is an implied, rather than a central consideration.

Fundamental reform of national environmental law is required, and National Environmental Standards should be the foundation

The EPBC Act has no comprehensive mechanism to describe the environmental outcomes it is seeking to achieve, or to ensure decisions are made in a way that contributes to them. Ecologically sustainable development (ESD) should be the overall outcome the Act seeks to achieve. ESD means that development to meet today's needs is undertaken in a way that ensures the environment, natural resources and heritage are maintained for the benefit of future generations.

Legally enforceable National Environmental Standards should be made to set the foundations for effective regulation, to ensure that decisions made under the EPBC Act clearly track towards ESD.

National Environmental Standards should be binding and enforceable regulations. The Commonwealth should make them, through a formal process set out in the EPBC Act. Standards should be developed in consultation with Indigenous, science, environmental and business stakeholders, and the community. Consultation with states and territories is essential. However, the process cannot be one of negotiated agreement with rules set at the lowest bar.

National Environmental Standards should prescribe how decisions made contribute to outcomes for the environment. They should also include the fundamentally important processes for sound and efficient decision-making. Standards should be concise, specific and focused on the requisite outcomes, with compliance focused on attaining the outcome. National Environmental Standards should *not* be highly prescriptive, where compliance is achieved by 'ticking the boxes' to fulfil a process.

As the centrepiece of regulation, National Environmental Standards should set clear rules for decision-making. Current arrangements, buried within hundreds of statutory documents, fail to provide clearly defined and specific rules, and they enable considerable discretion in decision-making. Instead, the law must require the Standards to be applied, unless the decision-maker can demonstrate that the public interest and the national interest is best served otherwise.

National Environmental Standards will clearly demarcate the objectives in managing the environment, and the outcomes sought. This is important to help the community know what they can expect from the EPBC Act. It is also important for business, who seek clear and consistent rules.

Interim Standards are recommended as a first step, to facilitate rapid reform and streamlining. These Interim Standards will need to define clear limits of impacts to protect nationally important environmental matters. Ultimately, Standards should be granular and measurable, and provide clarity as to where and how development can occur so as not to compromise environmental sustainability. A quantum shift will be required in the quality of accessible data and information, to increase the granularity of Standards.

Precise, quantitative Standards, underpinned by quality data and information, will provide for effective environment protection and biodiversity conservation and ensure that development is sustainable in the long-term. They will also support faster and lower-cost assessments and approvals, including the capacity to automate consideration of low-risk proposals.

The EPBC Act should focus on core Commonwealth responsibilities

The focus of the EPBC Act should be the Commonwealth's core responsibilities. The Act, and the National Environmental Standards that would underpin its operation, should focus on the places, flora and fauna that the Commonwealth is responsible for protecting and conserving in the national interest—including World and National Heritage, Ramsar wetlands, and nationally important species and ecological communities. Under the Act, these nationally important matters are called 'Matters of National Environmental Significance' or MNES.

Proposals have been made to remove the Commonwealth's role on regulating water impacts from coal and coal seam gas, and for nuclear activities. The Review considers the Commonwealth should maintain an ability to intervene where developments may result in the 'irreversible depletion or contamination' of cross-border water resources. Similarly, for community confidence, the Commonwealth should retain the capacity to ensure nuclear (radioactive) activities are managed effectively.

The Review does not support the many proposals received to broaden the environmental matters dealt with in the EPBC Act. To do so would result in muddled responsibilities, leading to poor accountability, duplication and inefficiency.

While climate change is a significant and increasing threat to Australia's environment, successive Commonwealth Governments have elected to adopt specific mechanisms and laws to implement their commitments to reduce greenhouse gas emissions.

The EPBC Act should not duplicate the Commonwealth's framework for regulating emissions. It should, however, require that development proposals explicitly consider the effectiveness of their actions to avoid or mitigate impacts on nationally protected matters under specified climate change scenarios.

This position is consistent with the foundational intergovernmental agreements. It was agreed that emissions would be dealt with by national-level strategies and programs, rather than the EPBC Act. The Review considers there is merit in mandating proposals required to be assessed and approved

under the Act (due to their impacts on nationally protected matters), to transparently disclose the full emissions profile of the development.

Planning at the national and regional (landscape) scale is needed to take action where it matters most and to support adaptive management

Regional (landscape) plans should be developed that support the management of threats at the right scale and to set clear rules to facilitate and manage competing land uses. These plans should prioritise investment in protection, conservation and restoration to where it is most needed, such as biodiversity hotspots, and where the environment will most benefit.

Ideally these plans would be developed in conjunction with states and territories. Where this cooperation is not possible, the Commonwealth should develop its own plans to manage threats on a landscape-scale, and cumulative impacts on MNES. The Commonwealth's regional planning efforts should be focused on those regions of highest pressure on MNES.

Strategic national plans should be developed for 'big-ticket', nationally pervasive issues such as the management of feral animals or adaptation of the environment to climate change. These plans should guide the national response and enable action and investment by all parties to be effectively targeted to where it delivers the greatest benefit. National-level plans will support a consistent approach to addressing issues in regional plans or inform activities in areas where there is no regional plan.

More needs to be done to restore the environment

The operation of the EPBC Act needs to shift from permitting gradual decline, to halting decline and restoring the environment, so that development can continue in a sustainable way. Active mechanisms are required to restore areas of degraded or lost habitat to achieve the net gain for the environment that is needed.

The proposed regional plans are key mechanisms that can set the priorities for restoration and adaptation and identify where investment will have the best returns for the environment. The Review has identified opportunities for national leadership outside the EPBC Act that should be considered. Existing markets, including the carbon market can be leveraged to help deliver restoration. There are also opportunities for greater collaboration between governments and the private sector, to invest in both in the environment directly, and in innovation to bring down the costs of environmental restoration activities.

National Environmental Standards and national and regional (landscape) plans will support greater harmonisation with the states and territories

The construct of Australia's federation means that the management of Australia's environment is a shared responsibility. The Commonwealth and states and territories need to work effectively together, and in partnership with the community, to manage Australia's environment and iconic places well.

Jurisdictions have agreed their respective roles and responsibilities for protecting the environment, and where possible, they have agreed that they will accommodate each other's laws and regulatory systems. This is a sound ambition, but more needs to be done to realise it.

The National Environmental Standards and improved planning frameworks aim to support greater cooperation and harmonisation between the Commonwealth, states and territories. Setting clear, legally enforceable rules means that decisions should be made consistently, regardless of who makes them, providing a pathway for the Commonwealth to recognise and accredit the regulatory processes of others. In pursuing greater harmonisation, the Commonwealth should retain the ability to step in to make decisions, where it is in the national interest to do so.

National Environmental Standards and national and regional plans will allow the Commonwealth to step up its focus to achieve nationally important environmental outcomes. They will also support a shift away from the current transactional focus of the EPBC Act, that can be duplicative, costly to business and result in little tangible benefit to the environment.

Indigenous culture and heritage

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

The Review considers that the EPBC Act is not fulfilling its objectives as they relate to the role of Indigenous Australians in protecting and conserving biodiversity and heritage, and promoting the respectful use of their knowledge.

Over the last decade, there has been a significant evolution in the way Indigenous knowledge, innovations and practices are incorporated into environmental management, for example through investment in Indigenous Rangers. The EPBC Act lags well behind leading practice.

Western science is heavily prioritised in the way the EPBC Act operates. 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.

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 contrasts to other statutory committees under the Act, which have clearly defined and formal roles at key points in statutory processes.

The Department has issued guidance on best practice Indigenous engagement. This sets out expectations for applicants for EPBC Act approval, but it is not required or enforceable. It is not transparent how the Commonwealth Minister factors in Indigenous matters in decision-making for EPBC Act assessments.

The proposed National Environmental Standards should include a specific standard on best practice Indigenous engagement. The purpose of the Standard is to ensure that Indigenous Australians who speak for and have traditional knowledge of Country have had the proper opportunity to contribute to decisions made under the EPBC Act.

The role of the IAC should be substantially recast. The EPBC Act should establish an Indigenous Knowledge and Engagement Committee, responsible for providing the Commonwealth Minister with advice on a Standard for Indigenous engagement. This should include the development and application of the Standard, and ensuring its effectiveness through monitoring, evaluation and review.

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 or World Heritage under the EPBC Act. 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 and Torres Strait Islander people to ask the Commonwealth Environment Minister 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.

Contributions to the Review have highlighted the importance of cultural heritage issues being dealt with early in a development assessment process. However, under the ATSIHP Act, the timing of a potential national intervention is late in the development assessment and approval process.

Indigenous Australians have emphasised to the Review the importance of the Commonwealth's ongoing role in Indigenous cultural heritage protection. Because the states and territories also play a key role in the legal framework for Indigenous heritage protection, the arrangements of the jurisdictions need to work well together to avoid duplication or regulatory gaps.

The current laws that protect Indigenous cultural heritage in Australia need comprehensive review. This review should explicitly consider the role of the EPBC Act in providing national-level protections. It should also consider how comprehensive national-level protections are given effect, for example how they interact with the development assessment and approval and regional planning processes of the Act.

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

The EPBC Act provides the legal framework for the joint management of three Commonwealth National Parks—Kakadu, Uluṟu-Kata Tjuṯa and Booderee. Traditional Owners lease their land to the Director of National Parks (DNP), a statutory position established under the Act. For each of these parks, a joint management board is established to work in conjunction with the DNP.

The structure of the DNP means that position is ultimately responsible for decisions made in relation to the management of national parks, and for the effective management of risks such as those relating to occupational health and safety. Given this responsibility, the DNP has made decisions contrary to the recommendations of joint boards or has made a decision when the joint board has been unable to reach a consensus view. The contributions to the Review from Traditional Owners and the Land Councils who support them, indicate that the current settings for joint management fall short of their aspirations for genuine joint decision-making or indeed sole management.

The first step is to reach consensus on the long-term goals for jointly managed parks, and the nature of the relationship between Traditional Owners and the Commonwealth. The policy, institutional and transition arrangements required to successfully achieve these goals should then be co-designed with Traditional Owners.

Reforms should be co-designed with Indigenous Australians

This Review has highlighted significant shortcomings in the way the views, aspirations, culture, values and knowledge of Indigenous Australians are supported by the EPBC Act.

The Australian Government has committed to recognising improved outcomes for Indigenous Australians through enabling co-design and policy implementation with them. This commitment is reflected in COAG's commitments in the Partnership Agreement on Closing the Gap 2019-2029. The proposed Indigenous Knowledge and Engagement committee should play a key leadership role in the co-design of reforms.

Legislative complexity

The EPBC Act is complex, its construction is archaic, and it does not meet best practice for modern regulation. 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 burdens for business, and restricting access to justice.

The policy areas covered by the EPBC Act are inherently complex. The way the different areas of the Act work together to deliver environmental outcomes is not always clear and many areas operate in a largely siloed way. There is a heavy reliance on detailed prescriptive processes that are convoluted and inflexible, meaning engaging with the Act is time-consuming and costly. This is particularly the case for environmental impact assessment. Convoluted processes are made more complex by key terminology being poorly defined or not defined at all.

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

Efficiency

A key criticism of the EPBC Act is that it duplicates state and territory regulatory frameworks for development assessment and approval. The Review has found that, with a few exceptions, this is largely true.

There is no systematic way to determine the additional environmental benefits resulting from the EPBC Act. There are examples where the Act has led to demonstrably different environmental outcomes than those arising from state and territory processes. While far from perfect, the EPBC Act requirement for 'like-for-like' offsets exceeds those in some jurisdictions and results in additional or different conditions placed on projects resulting in better outcomes than would have otherwise been the case.

Frustration rightly arises when Commonwealth regulation does not, or does not tangibly, correspond to better environmental outcomes, given the additional costs to business of dual processes.

Efforts made to harmonise and streamline with the states and territories have not gone far enough

The EPBC Act allows for the accreditation of state and territory laws and management systems for both assessments and approvals.

Under a bilateral assessment agreement, the Commonwealth retains responsibility for approvals, based on environmental impact assessments undertaken by the jurisdictions. For the 5-year period between July 2014 and June 2019, 37% of proposals under the EPBC Act were assessed (or are still being assessed) through either a bilateral assessment (25%) or accredited assessment (12%) arrangements with jurisdictions. The proportion of projects covered by an assessment bilateral agreement is limited, because not all state and territory processes can deliver an adequate assessment of matters that are protected under the EPBC Act.

Approval bilateral agreements have never been implemented. Under this type of agreement, the Commonwealth would devolve its approval decision-making powers to a state or territory decision-maker. Under the current settings, the mechanism to devolve approval decisions is inherently fragile. Particularly important amendments are needed to:

- enable the Commonwealth to complete an assessment and approval if a state or territory is unable to
- 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).

These and other necessary amendments have failed to garner support in the Australian Parliament. In 2015 the Parliament did not support these amendments, in response to significant community concerns about the ability of states and territories to uphold the national interest when applying discretion in approval decisions.

Legally enforceable National Environmental Standards provide a clear pathway for greater devolution

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 that governments should continue to pursue.

The National Environmental Standards proposed by the Review would provide a legally binding mechanism to provide confidence to support greater devolution. Accrediting an alternative regulator would be on an 'opt-in' basis, and they would need to demonstrate that their system can achieve the National Environmental Standard. This may require states and territories to adapt their regulations to meet National Environmental Standards and to satisfy accreditation requirements.

The proposed devolution model involves 5 key steps:

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 or other suitable authority to demonstrate that their systems meet National Environmental Standards—this element includes a formal check to give confidence that arrangements are sound.
3) Formal accreditation by the Commonwealth Minister—this element is intended to provide accountability and legal certainty, and the Commonwealth Minister should seek the advice of the proposed Ecologically Sustainable Development Committee prior to an accreditation decision.
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.
5) Regular review and adaptive management—this ensures decision-making contributes to the objectives established in the Standards.

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.

Commonwealth-led assessments and approvals should be further streamlined

The Commonwealth should retain its capability to assess and approve projects. Commonwealth assessments and approvals will be required 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 the activity is undertaken by a Commonwealth agency outside a state's jurisdiction.

The Review has identified opportunities to streamline environmental impact assessments and approvals conducted by the Commonwealth. The most significant gains will be realised by fundamental changes to the way the EPBC Act works. Reform proposals including the development of National Environmental Standards and regional plans, and improvements in the data, information and regulatory systems discussed further in this report are central to improving the quality and efficiency of Commonwealth-led processes.

Streamlining the assessment pathways available under the EPBC Act will reduce the complexity of and efficiencies in the current process. The first step in all assessment pathways is known as 'referral', where the decision-maker determines whether a proposal requires more detailed assessment. For proposals where the need for detailed assessment and the relevant environmental matters are obvious, the referral creates an additional, pointless step in the process.

For other proposals, the lack of clarity on the requirements of the EPBC Act means that proponents refer proposals 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. National Environmental Standards and regional plans will provide clarity on impacts that are acceptable, and those which will require assessment and approval, enabling the referral step to be avoided.

Other Commonwealth environmental management laws interact with the EPBC Act

The EPBC Act operates in a way that seeks to recognise other environmental regulatory and management frameworks, including the management of Commonwealth fisheries, Regional Forest Agreements (RFAs) and offshore petroleum activities. The interplay between the Act and these other frameworks is often more onerous than it needs to be.

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 and all Commonwealth-managed fisheries to ensure that fisheries are managed in an ecologically sustainable way. 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, and the improvement in environmental outcomes that have resulted, the Review is confident that further streamlining can be achieved while maintaining assurance in the outcomes.

An 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 EPBC Act recognises the *Regional Forest Agreements Act 2002* (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).

During the course of this Review, the Federal Court found that an operator had breached the terms of an RFA and should 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.

Increase the efficiency of the regulation of wildlife trade

The EPBC Act gives effect to Australia's obligations as a member of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), including the international movement of wildlife specimens. The requirements of the Act exceed Australia's obligations under CITES. Aspects of wildlife trade provisions in the Act result in administrative process and costs for individuals, business and government, while affording no additional protection to endangered species. The Act should be amended to align its requirements with CITES and to provide for a more efficient permitting process.

Trust in the EPBC Act

The community and industry distrust the EPBC Act, and there is merit in their concerns

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 EPBC Act to deliver for the environment. Limited access to information about decisions and the lack of opportunity to substantively engage in decision-making under the Act further erodes trust.

The EPBC Act and its processes focus on the provision of environmental information, yet the Commonwealth Minister can and should consider social and economic factors when making an approval decision. The community can't see how these factors are weighed in EPBC Act decisions. Under the current arrangements, this leads to concern that the environment loses out to other considerations as proponents have undue influence on decision-makers.

The EPBC Act is also 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').

An underlying theme of industry distrust in the EPBC Act relates to perceived duplication with state and territory processes and the length of time it takes to receive an approval. On average, complex resource sector projects can take nearly 3 years, or 1,013 days to assess and approve, and this is too long. Recent provision of additional resources has improved on-time approval decisions from 19% to 87% of key decisions made on time.

Lengthy assessment and approval processes are not all the result of a slow Commonwealth regulator. On average, the process is under the management of the proponent for more than three quarters of the total assessment time, indicative of the time taken to navigate current requirements and collect the necessary information for assessment documentation. For business, time is money. Delays, regardless of when they occur, can result in significant additional costs, particularly on large projects.

Legal standing and review

The Review has received highly conflicting evidence and viewpoints about the appeal mechanisms under the EPBC Act. Where concerns arise about environmental outcomes associated with a decision, public focus turns to challenging high profile decisions. Legal review is used to discover information and object to a decision, rather than its proper purpose to test and improve decision-making consistent with the law. Industry is very concerned about the delay to projects that can arise from politically-motivated legal challenges.

The public discourse on legal challenges is focused on large projects, with considerable economic benefits that are in highly valued environmental areas. Pro-development groups argue that the extended standing provisions (standing beyond a person directly affected by a decision) should be removed from the Act.

The Review is not yet convinced 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. The evidence suggests that standing has not been interpreted broadly by the courts. The courts have the capacity to deal with baseless or vexatious litigation and litigation with no reasonable prospect of success can be dismissed in the first instance. It may though be beneficial for the EPBC 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.

In a mature regulatory framework, judicial and merits review operate in concert. Judicial review helps ensure legal processes are followed, complemented by merits review to ensure decisions are meeting the intent of the legislation, not simply following processes.

Full merits review is not advised. Opening decisions on appeal or review to the admission of new documentation or materials for consideration delays decisions without necessarily improving outcomes. It also promotes forum shopping.

Reforms to the EPBC Act should focus on improving transparency of decision-making, to reduce the need to resort to court processes to discover information. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

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.

Transparent independent advice can improve trust in the EPBC Act

Low levels of trust are an underlying driver behind calls for independent institutions to be established to make decisions under the EPBC Act. 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.

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 these committees:

- Information and Knowledge (to advise on science, social impacts, economics 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 advise on heritage matters)
- A committee with water resources expertise (to advise on the impacts of projects subject to the water trigger).

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 Commonwealth Minister could ask for their advice on other decisions, where they had relevant expertise.

Data, information and systems

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 Department's systems for information analysis and sharing are antiquated. Cases cannot be managed effectively across the full lifecycle of a project, and the user experience is clunky and cumbersome for both proponents and members of the community interested in a project.

The collection of data and information is fragmented and disparate. 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.

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. 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 are needed to deliver the evidence base for Australia's national system of environmental management. The recent financial commitment from the Australian Government and the Western Australian Government to the collaborative Digital Environmental Assessment Program is a good first step in this direction. The program will deliver a single online portal for assessments and biodiversity databases.

In the short-term, the granularity of National Environmental Standards is limited by the information available to define and apply them to decision-making. A quantum shift in the quality of information is required to transform standards from qualitative indicators of outcomes to quantified measures of outcomes. To apply granular standards to decision-making, governments need 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 to 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.

Monitoring, evaluation and reporting

There is no effective framework to support a comprehensive, data-based evaluation of the EPBC Act, its effectiveness in achieving intended outcomes, and the efficiency of implementation activities. The Act includes some requirements for monitoring and reporting. These are not comprehensive, and follow-through is largely focused on bare minimum administrative reporting, rather than genuine monitoring and evaluation of outcomes to learn lessons, adapt and improve.

The development of a coherent framework to monitor and evaluate the effectiveness of the EPBC Act in achieving its outcomes and the efficiency of its implementation is needed. Key reforms proposed by this Review, particularly the establishment of National Environmental Standards and regional plans, provide a solid foundation for the development of a monitoring and evaluation framework for the Act as a whole. The framework must be backed in by commitment to its implementation.

The national State of the Environment (SoE) report is the established mechanism that seeks to 'tell the national story' on Australia's system of environmental management. While providing an important point in time overview, the report is an amalgam of insights and information, and does not generate a consistent data series across reports. It lacks a clear purpose and intent. There is no feedback loop, and as a nation there is no requirement to stop, review, and where necessary change course.

A revamp of SoE reporting is required. The national SoE report should examine the state and trends of Australia's environment, and the underlying drivers of these trends, including interventions that have been made. National environmental economic accounts will be a useful tool for tracking Australia's progress to achieve ESD. The SoE report should provide an outlook and the government should be required to formally respond, identifying priority areas for action, and the levers that will be used to act.

Efforts to finalise the development of these accounts should be accelerated, so that in time they can be a core input to SoE reporting.

Restoration

Given the state of decline of Australia's environment, restoration and adaptation are required to enable future development to be sustainable. Available habitat needs to grow to be able to support both development and a healthy environment.

Environmental offsets do not offset the impacts of developments

Under the current arrangements, as a condition of approval, developers can be required to protect areas similar to that which has been destroyed or damaged. This is known as an environmental offset.

Environmental offsets are often poorly designed and implemented, delivering an overall net loss for the environment. The stated intent of the offsets policy is to encourage proponents to exhaust reasonable options to avoid or mitigate impacts. In practice, offsets have become the default negotiating position, and a standard condition of approval, rather than only used to address residual impacts.

Offsets do not offset the impact of development, and overall there is a net loss of habitat. Proponents are permitted to clear habitat in return for protecting other areas of the same habitat from future development. It is generally not clear if the area set aside for the offset is at risk from future development.

Offsets need to include a greater focus on restoration and should be enshrined in the law. The EPBC Act should require that offsets only be considered when options to avoid and then mitigate impacts have been demonstrably exhausted. Where applied, offsets should deliver genuine restoration, avoiding a net loss of habitat.

There is an opportunity to incentivise early investment in restoration. If offsets were to be supported with greater certainty under the EPBC Act, then this could be the catalyst for a market response. Proponents are generally not in the business of managing habitats as their core business. There are, however, expert land managers and specialist project managers who deliver these services. The right policy and legal settings would provide certainty for these players to invest in landscapes, confident that proponents will be in the market to purchase offsets based on these investments down the track.

There are opportunities for restoration beyond the EPBC Act

There are opportunities beyond the EPBC Act that should be explored to accelerate investment in restoration.

The carbon market, which already delivers restoration, could be better leveraged to deliver improved biodiversity outcomes. The Australian Government has recently agreed to carbon market reforms that will increase the competitiveness of carbon-farming when compared to other land uses. More could be done if credit for biodiversity outcomes could be 'stacked' on top of carbon credits, with one area of land delivering both carbon and biodiversity outcomes.

There is an opportunity to provide the policy settings to better leverage private interest in investing in the environment as well as drive down the cost of restoration. Globally, there is growing interest from the philanthropic and private sectors to invest in a way that improves environmental outcomes. A biodiversity market is one destination for this capital, another is co-investment to bring down the cost of environmental restoration, growing the habitat available to support healthy systems. The merits of the application of these types of models for investing in environmental improvement will be further explored prior to the finalisation of the Review.

Compliance, enforcement and assurance

Monitoring, compliance, enforcement and assurance under the EPBC Act is ineffective

There has been limited activity to enforce the EPBC Act over the 20-year period it has been in effect, and the transparency of what has been done is low.

While the Department has improved its regulatory compliance and enforcement functions in recent years, it still relies on a collaborative approach to compliance and enforcement. This is too weak.

Serious enforcement actions are rarely used, indicating a limited regard for the benefits of using the full force of the law where it is warranted. When issued, penalties are not commensurate with the harm of damaging a public good of national interest. Since 2010, a total of 22 infringements have been issued for breaches of conditions of approval, with total fines less than $230,000. By way of contrast, individual local governments frequently issue more than this amount in paid parking fines annually.

The compliance and enforcement powers in the EPBC Act are outdated. Powers are restrictive and can only be applied in a piecemeal way across different parts of the Act due to the way it is constructed. The complexity of the legislation, impenetrable terminology and the infrequency with which many interact with the law, make both voluntary compliance and the pursuit of enforcement action difficult.

A strong, independent cop on the beat for monitoring, compliance and enforcement is required

An independent compliance and enforcement regulator that is not subject to actual or implied direction from the Commonwealth Minister should be established. The regulator should be responsible for monitoring compliance, enforcement, monitoring and assurance. It should be properly resourced and have available to it a full toolkit of powers.

Penalties and other remedies for non-compliance and breaches of the EPBC Act and the National Environmental Standards need to be adequate to ensure that compliance is regarded as mandatory not optional. The costs of non-compliance should not be regarded as simply a cost of doing business.

The Commonwealth Minister must retain responsibility for setting the rules (including making decisions and setting conditions for development approvals), but the regulator should be responsible for enforcing them.

The compliance and enforcement regulator must have a clear and strong regulatory stance. It remains important to be proportional, and to work with people where inadvertent non-compliance has occurred. However, the regulator needs to establish a culture that does not shy from firm action where needed.

An independent compliance and enforcement regulator will build public trust in the ability of the law to deliver environmental outcomes and that breaches of the law will be fairly, proactively and transparently managed. Strong compliance and enforcement activities protect the integrity of most of the regulated community—who spend time and money to comply with the law—with those who break the rules facing appropriate consequences.

Devolved decision-making needs strong assurance

The Review proposes reforms that will support greater devolution in decision-making. Clear, legally enforceable National Environmental Standards combined with strong assurance are essential to community confidence in these arrangements. The independent compliance and enforcement regulator should play a key role in providing assurance of devolved arrangements.

This will require a focus on oversight of these devolved and strategic arrangements, including auditing the performance of devolved decision-makers. The devolved decision-maker should remain primarily responsible for project-level monitoring, compliance, enforcement and assurance, and transparently report actions taken. The Commonwealth should also retain the ability to intervene in project-level compliance and enforcement, where egregious breaches are not being effectively enforced by the state or territory regulator.

The reform pathway

The EPBC Act is ineffective, and reform is long overdue. Past attempts at reform have been largely unsuccessful. Commitment to a clear pathway for reform is required. The reform agenda proposed is not one to 'set and forget'. Settings should be monitored and evaluated, and the path forward adjusted as lessons are learnt and new information and ways of doing things emerge.

Effective administration of a regulatory system is not cost free. The reforms proposed seek to improve the overall efficiency of the system. It is important to consider how to best fund the implementation of a reformed system, including the fair costs that should be recovered from proponents. In principle, government should pay for elements that are substantially public benefits (for example, the development of standards), while business should pay for those elements of the regulatory system required because they derive private benefits by impacting the environment (for example, approvals and monitoring, compliance and enforcement). There are elements of the regulatory system that have mixed benefits where costs should be shared (for example, data and information).

Immediate steps to start reform should be taken. In the first instance, amendments should be made to:

- fix duplication, inconsistencies, gaps and conflicts
- enable National Environmental Standards to be made
- improve the durability of the settings for devolved decision-making.

Interim National Environmental Standards should be made, to set clear rules for decision-making and to support greater devolution in decision-making.

Similarly, in the short-term, the conversation should focus on delivering complex reforms and the mechanisms to underpin continuous improvement so that the policy development and implementation plans can be finalised and resourcing commitments made. These reforms include:

- reforms to establish the framework for monitoring, reporting and evaluating the performance of the EPBC Act, with a key focus on the arrangements for National Environmental Standards
- starting the conversation with the states and territories about state and territory-led regional planning priorities and priorities for strategic national plans
- committing to sustained engagement with Indigenous Australians, to co-design reforms that are important to them—the culturally respectful use of their knowledge, effective national protections for their culture and heritage, and working with them to meet their aspirations to manage their land in partnership with the Commonwealth
- appointing a national data and information custodian, responsible for delivering an information supply chain and overhauling the systems needed to capture value from the supply chain
- establishing the mechanisms to better leverage investment, to deliver the scale of restoration required for future development in Australia to be sustainable.

Once the policy direction is settled, and key initiatives are underway, the final phase of reform should involve complete legislative overhaul to establish the remaining elements of reform and to focus on implementing the reformed system.

The proposed reforms seek to build community trust that the national environmental laws deliver effective protections and regulate businesses efficiently. It is impossible for the Review to satisfy the aspirations of every person with an interest in the environment or in business development. Rather, the Review has attempted to provide a way forward, to ensure effective environment protection and biodiversity conservation and efficient regulation of business. The EPBC Act in its current form achieves neither.

The proposed reforms are substantial, but the changes are necessary to set Australia on a path of ESD. This path will deliver long-term economic growth, environmental improvement and the effective protection of Australia's iconic places and heritage for the benefit of current and future generations.

1 National level protection and conservation of the environment and iconic places

Key points

The environment and our iconic places are in decline and under increasing threat. The EPBC Act does not enable the Commonwealth to effectively protect and conserve nationally important environmental matters. It is not fit for current or future environmental challenges.

The key reasons the operation of the EPBC Act does not effectively protect the environment are:

- The Act lacks clear national outcomes and effective mechanisms to address environmental decline. Ecologically sustainable development is a key principle of the Act, but it is not being applied or achieved.
- Decision-making is focused on processes and individual projects and does not adequately address cumulative impacts or emerging threats. Environmental offsets have serious shortcomings. They have become the default, rather than the exception after all practical options to avoid or mitigate impacts have been exhausted.
- The Act does not facilitate the restoration of the environment. The current settings cannot halt the trajectory of environmental decline, let alone reverse it. There is no comprehensive planning to manage key threats to the environment on a national or regional (landscape) scale.
- Opportunities for coordinated national action to address key environmental challenges—such as feral animals, habitat restoration and adapting to climate change—are ad hoc, rather than a key national priority.

The key reform directions proposed by the Review are:

- Legally enforceable National Environmental Standards should be the foundation for effective regulation. The Standards should focus on outcomes for matters of national environmental significance, and the fundamentally important processes for sound and efficient decision-making. Standards will provide certainty—in terms of the environmental outcomes the community can expect from the law, and the legal obligations of proponents.
- The goal of the EPBC Act should be to deliver ecologically sustainable development. The Act should require that National Environmental Standards are set and decisions are made in a way that ensures it is achieved. The Act should support a focus on protecting (avoiding impact), conserving (minimising impact) and restoring the environment.
- A greater focus on adaptive planning is required to deliver environmental outcomes. Regional plans should be developed that support the management of cumulative threats and set clear rules to manage competing land uses at the right scale.
- Strategic national plans should be developed for big-ticket, nationally pervasive issues such as the management of feral animals or adaptation of the environment to climate change. These plans should guide the national response and enable action and investment by all parties to be effectively targeted and efficient.

These proposed reforms, along with others presented in this Interim Report, combine to provide a more effective and efficient regime to protect Australia's unique environment and iconic places. They aim to foster greater cooperation and harmonisation between the Commonwealth, states and territories.

Protecting the environment and iconic places in the national interest is important for all Australians. Australia is recognised as a global biodiversity hotspot, with unique plants and animals found nowhere else in the world. Indigenous Australians have a deep connection to and knowledge of Country. They are the custodians of the oldest continuous culture in the world. As the nation's central piece of environmental law, the EPBC Act must ensure the environment, natural resources and Australia's rich heritage is maintained for the benefit of future generations.

A healthy environment is important to the quality of life and health and wellbeing of all Australians. The recent bushfire season provided us with a stark reminder of this. For Indigenous Australians, connection to healthy Country is their expression of culture. Many industries are reliant on the sustainable use of Australia's vast natural resource base. Their long-term productivity and profitability contribute to the continued vibrancy of regional areas and the nation. Many contributions to the Review have presented a strong view that nature has a right to exist for its intrinsic value, rather than simply being viewed as a resource.

The overwhelming message received from contributions to the Review is that Australians care immensely about the state, and future, of our unique and inspiring environment. They highlight a strong community expectation that the Commonwealth plays a key role in managing Australia's environment and maintaining effective national environment laws.

1.1 The environment and iconic places are in decline and under increasing threat

The evidence on the state of Australia's environment put forward by the scientific community to this Review is compelling. Overall, Australia's environment is in a state of decline and under increasing pressure. There are localised examples of good outcomes; however, the national outlook is one of decline and increasing threat to the quality of the environment. At best, the operation of the EPBC Act has contributed to slowing the overall rate of decline (see Box 1).

In contrast to the outcomes for biodiversity, contributions to the Review present a mixed view in relation to heritage. While the EPBC Act has strengthened Commonwealth obligations and enabled resources to be targeted towards protecting Australia's significant and outstanding heritage places, the World Heritage and National Heritage values of some iconic places have diminished, and the recognition of and funding for community and historic heritage has reduced[1].

Box 1 Trends in Australia's biodiversity, ecosystems and heritage

It is not the role of the Review to provide a comprehensive summary of the state of the environment. This Box provides a synopsis of the latest national State of the Environment report (2016)[2] and contributions to the Review from a range of experts[3].

Threatened species and biodiversity—Australia is losing biodiversity at an alarming rate and has one of the highest rates of extinction in the world. More than 10% of Australia's land mammals are now extinct, and another 21% are threatened and declining[4]. Populations of threatened birds, plants, fish and invertebrates are also continuing to decrease, and the list of threatened species is growing. Although there is evidence of population increases where targeted management actions are undertaken (such as controlling or excluding feral animals or implementing ecological fire management techniques), these are exceptions rather than a broad trend.

Since the EPBC Act was introduced, the threat status of species has deteriorated. Approximately 4 times more species have been listed as threatened than those that have shown an improvement. Over its 20-year operation, only 13 animal species have been removed from the Act's threatened species lists, and only one of these (Muir's Corella) is generally considered a case of genuine improvement[5].

Protected areas—The area of Australia that is protected from competing land uses, for example through national parks, marine reserves and Indigenous Protected Areas, has expanded. However, not all ecosystems or habitats are well represented, and their management is not delivering strong outcomes for threatened species. Consideration of future scenarios indicates that the reserve system is unlikely to provide adequate protection for species and communities in the face of future pressures such as climate change.

Oceans and marine—Aspects of Australia's marine environment are in good condition and there have been some management successes, but our oceans face significant current and future threats from climate change and human activity.

There have been some modest environmental successes such as an increase in humpback whale populations. However, submissions pointed to recent evidence of steep declines in habitats across Australia's marine ecosystems—including coral reefs in the Great Barrier Reef, saltmarshes on the east coast, mangroves in northern Australia, and kelp forests in Tasmania[6].

Heritage—The 2016 national State of the Environment report found that *'Australia's extraordinary and diverse natural and cultural heritage generally remains in good condition, despite some deterioration and emerging challenges since 2011'*. The International Union for Conservation of Nature (IUCN)[7] has indicated it has specific concerns for 3 of Australia's 20 World Heritage places. The loss of heritage values since the last EPBC Act Review is due to a range of factors, most recently the impact of the 2019/2020 bushfire events on World Heritage properties and National Heritage places.

The Australian environment faces significant future pressures, including land-use change, habitat fragmentation and degradation, and invasive species. Climate change continues to build as a pressure that will exacerbate these impacts and contribute to ongoing decline.

The current state of the environment means that it is unlikely to be sufficiently resilient to increasing future threats. The lack of long-term monitoring data limits the ability to understand the pace and extent of environmental decline, which actions to prioritise and whether previous interventions have been successful.

1.2 The EPBC Act does not enable the Commonwealth to play its part in managing Australia's environment

1.2.1 Managing Australia's environment is a shared responsibility

The construct of Australia's federation means that the management of Australia's environment is a shared responsibility, and jurisdictions need to work effectively together and in partnership with the community.

The Commonwealth, on behalf of the nation, has signed up to international agreements on the environment and has a responsibility to ensure they are implemented[8]. The Commonwealth's

responsibilities in managing the environment have been confirmed by High Court decisions over time and agreed in foundational intergovernmental agreements on the environment[9]. These agreements reflect the respective constitutional responsibilities of the Commonwealth and states and territories. The Commonwealth's interests are known as 'matters of national environmental significance' (MNES).

The EPBC Act implements the Commonwealth's responsibility for key MNES[10]. Changes over time, including to MNES, have contributed to a drift in the Commonwealth's role and introduced duplication with the role of the states and territories. This is particularly the case for MNES that focus on activities that give rise to threats or risks to the environment, rather than protection of the environmental matter itself.

Ultimately, Australia's system of environment and heritage protection management must recognise the respective roles of the Commonwealth and states and territories, and jurisdictions need to work together effectively. This was acknowledged in the foundational intergovernmental agreements, which committed to an intent of harmonised laws and regulatory systems, based on clear interests and where possible accommodating their respective responsibilities. This direction was embedded in the original design of the EPBC Act, but the implementation of the Act has failed to fulfil this ambition.

The EPBC Act is also the mechanism for the Commonwealth to regulate the environment on Commonwealth land and waters, and the environmental activities undertaken by the Commonwealth.

1.3 The EPBC Act does not enable the Commonwealth to effectively protect and conserve nationally important matters

1.3.1 The EPBC Act lacks clear outcomes for MNES

The EPBC Act is not clear on what environmental outcomes it seeks to achieve for MNES. The objects of the Act are written broadly which is appropriate for national legislation. However, the Act does not provide specific framing for how these objectives are to be interpreted and applied.

MNES underpin the implementation of environmental regulation in the EPBC Act, but this is not done in a consistent way across the Act. The Act lacks effective mechanisms to describe or measure the environmental outcomes it is seeking to achieve and to ensure decisions are made in a way that contributes to these outcomes. Key plans (such as recovery plans) and other management documents do not clearly link to national outcomes.

Ecologically sustainable development (ESD) is a key principle of the EPBC Act[11] is not being applied or achieved. ESD should be the overall outcome the Act seeks to achieve. ESD means that development to meet the needs of Australians today should be done in way that ensures the environment, natural resources and heritage are maintained for the benefit of future generations.

Although decisions under the EPBC Act are required to *consider* key principles like ESD and the precautionary principle (see Box 2), these are not given sufficient weight or prominence, particularly in development approvals. These principles underpin good environmental decision-making frameworks around the world and were agreed to by the Commonwealth and all states and territories in the Intergovernmental Agreement on the Environment in 1992[12].

Box 2 The precautionary principle

> The precautionary principle reminds us that if the impacts of a decision are not fully understood, then we should err on the side of caution, to avoid serious and irreversible consequences. Lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

1.3.2 The way the EPBC Act operates facilitates ongoing decline

Almost all of the ecological focus in environmental impact assessments is on specific, listed individual species and communities. Species and ecological communities are listed using a complex scientific

assessment based on internationally determined scientific criteria. After listing, a conservation advice is prepared for each listed species or community. The Environment Minister may also decide that a more comprehensive recovery plan is required.

Currently, there are 719 recovery plans in place for species and 27 in place for ecological communities (of 1,890 listed species and 84 listed communities)[13]. There is no requirement to implement a recovery plan, or report on progress or the outcomes achieved. Plans that are made are generally not backed by the necessary action to implement them. The way the EPBC Act currently operates implies that the goal is to list a species and prepare a plan, rather than achieve environmental outcomes. Under these arrangements it is not surprising that the list of threatened species and communities has increased over time and there have been very few species that have recovered to the point that they can be removed from the list.

Cumulative impacts on and threats to the environment are often not well managed under the current settings. Assessment and approval decisions are largely made on a project-by-project basis, with the assessment of impacts largely done in isolation of other current or anticipated projects. This approach underestimates the broadscale cumulative impacts that development can have on a species, ecosystem or region. Each individual development may have minimal impact on the national environment, but their combined impact can result in significant long-term damage.

Submissions to the Review have further pointed to the missed opportunity to incorporate Indigenous knowledge, including holistic land management practices, to protect the environment[14]. In its submission to the Review, the Central Land Council[15] state:

> *'The knowledge and understanding held by Indigenous peoples, accrued over tens of thousands of years, provides rich expertise that should be more appropriately valued and engaged in protecting and managing Australia's environment'.*

Although the objects of the EPBC Act include an intent to recognise the role of Indigenous people and promote the use of traditional knowledge, in practice this rarely occurs (see Chapter 2).

Provisions for more strategic approaches that can consider cumulative impacts, such as bioregional plans and strategic assessments, have a history of limited use. Administration of the EPBC Act has contracted to focus on core statutory requirements, such as approving projects.

This focus on project-based assessment and approvals sets the EPBC Act up to deliver managed decline, not sustainable maintenance or recovery. The impacts of development are not counter balanced with legislated recovery processes. This is exacerbated by an ineffective offsets policy. The decision-making hierarchy of 'avoid, minimise, and only then offset' is not being applied, with offsets too often used as a default measure not as a last resort (see Chapter 8).

The EPBC Act itself does little if anything to support environmental restoration. Stabilisation of decline let alone a net improvement in the state of the environment cannot be achieved under the current system. Given the state of decline of Australia's environment, restoration is required to enable future development to be sustainable.

1.3.3 Strategic, national-level opportunities are either poorly implemented or missed

When the EPBC Act was introduced it was intended to be part of a comprehensive package of initiatives, including the Natural Heritage Trust Reserve, which has a main objective *'to conserve, repair and replenish Australia's natural capital infrastructure'*[16]. The Act is limited in its ability to strategically conserve biodiversity, manage key threats or quickly respond to emerging threats such as bushfires, biosecurity incursions or other natural disasters.

Each MNES is separately described and managed through individual species or community recovery plans, and opportunities for more coordinated action are missed. MNES influence funding programs that encourage restoration and threat abatement (such the National Landcare Program or the Threatened Species Recovery Fund). However, funding is often scattergun, unreliable and short-term and funding cycles do not support an enduring, focused or prioritised approach.

Provision in the EPBC Act for managing threats—such as the listing of key threatening processes (KTPs) and the development and implementation of threat abatement plans—were designed to support a coordinated and strategic approach to dealing with the major threats that cause the majority of extinctions and declines in Australia. However, these mechanisms are not achieving their intent and many threats in Australia are worsening[17].

The current list of 21 KTPs is not comprehensive, as the process largely relies on the receipt of nominations from the public. The listing process is slow and subject to ministerial discretion. No new KTPs have been listed since 2014, and several major threats—such as inappropriate fire regimes—are not listed. There is a tendency to focus on immediate or existing threats where strong evidence is available, rather than emerging threats. This is despite evidence that early intervention on emerging threats is more cost effective and achieves better outcomes than responding to entrenched threats[18]. Persistent and emerging threats can have devastating impact on threatened species and can also lead to more common species becoming rarer.

Even once a KTP is listed, action to address the threat is not required. The decision to make and implement a threat abatement plan is discretionary. The Threatened Species Scientific Committee[19] noted in their submission to the Review:

> *'A Key Threatening Process listing has no statutory obligations. Thus, a listing is ineffectual unless a Threat Abatement Plan is made or adopted. This constraint means that Key Threatening Processes are not prioritised in a resource-constrained environment.'*

The threat abatement planning process is only up-to-date for 6 of the listed KTPs. The remainder are either not required, an alternative, non-statutory approach is used, or the plans have exceeded or are about to exceed the statutory 5-year review deadline[20].

The EPBC Act does not refer to climate change or explicitly require consideration of future pressures. There is no avenue for an emergency listing of newly threatened species in response to natural disasters such as the 2019/20 bushfires.

The administration of the EPBC Act has contracted to focus on core requirements. Pursuing strategic opportunities to improve outcomes in the national interest have become discretionary, particularly when resources are constrained. The Commonwealth has retreated to transactions, rather than 'leading' strategically in the national interest.

1.4 Proposed key reform directions

1.4.1 The EPBC Act should focus on Commonwealth responsibilities

The Review has received a wide range of views on the MNES that should be included in the EPBC Act (see Box 3). Many, including scientific stakeholders and environmental non-government organisations (ENGOs) express a view that triggers should be more expansive, extending the reach of the Commonwealth to deliver greater environmental protections. Others, particularly industry groups and advocates of streamlined and efficient regulation, argue that current triggers result in duplication with other regulators and should be removed (see Chapter 4).

Box 3 Stakeholder suggestions for changes to matters of national environmental significance[21]

Ecosystems, biodiversity and habitat—National Reserve System (national parks, marine protected areas, covenanted private lands and Indigenous Protected Areas); vulnerable ecological communities: ecosystems of national importance; areas of outstanding biodiversity value (e.g. climate refuges, biodiversity hotspots, critical habitats); wetlands of national significance and native vegetation.

Threats—Key threatening processes (e.g. significant land clearing, invasive species or disaster-related impacts).

Cultural—Mechanisms for including Indigenous values, priorities and places, or entities of particular significance and concern (e.g. species, populations, ecological communities, ecosystems, stories, songlines); tangible and intangible cultural heritage.

Climate Change—Significant greenhouse gas emissions; protection of the environment from climate change impacts (see section 1.4.1).

Water—Significant water resources (including surface and groundwater, rivers, wetlands, aquifers and their associated values), an expanded water trigger beyond coal seam gas and large coal mining; nationally significant river systems; ground water dependent ecosystems. Other stakeholders suggest removing or reducing the scope of the water trigger to remove duplication with state and territory regulations.

Nuclear—Expand limitations contained in s140A of the EPBC Act on approval of certain nuclear installations to include all uranium mining and milling actions. Other stakeholders suggest reducing the scope of the nuclear trigger to remove duplication with state, territory and other Commonwealth regulations.

Contributions to the Review have suggested that the EPBC Act should be expanded to include a climate trigger, which would seek to solve 2 apparent problems. The first view presented is that Australia's current emissions reduction policy settings are insufficient to meet our international commitments and more needs to be done. Advocates for a climate trigger suggest it would contribute to reducing Australia's emissions profile by reducing land clearing and regulating projects with large emission profiles. Successive Australian Governments have elected to adopt specific policy mechanisms to implement their commitments to reduce emissions. The Review agrees that these mechanisms, not the Act, are the appropriate vehicle for addressing greenhouse gas emissions. The Review considers there is merit in mandating proposals required to be assessed and approved under the Act (due to their impacts on nationally protected matters) to transparently disclose the full emissions profile of the development.

The second view is that the EPBC Act does not effectively support adaptive management that uses best available climate modelling and scenario forecasting to ensure the actions we take to protect matters are effective in a climate-changed world.

The EPBC Act should, however, require that development proposals explicitly consider the effectiveness of their actions to avoid or mitigate impacts on nationally protected matters under specified climate change scenarios. Many of the suggestions about the Commonwealth taking on a broader role reflect a lack of trust that states and territories will manage these elements well. The Review does not agree with suggestions that the environmental matters the Act deals with should be broadened. The remit of the Act should not be expanded to cover environmental matters that are state and territory responsibilities. To do so would result in muddled responsibilities, further duplication and inefficiency. Unclear responsibilities mean that the community is less able to hold governments to account.

The EPBC Act should focus on the places, flora and fauna that the Commonwealth is responsible for protecting and conserving in the national interest. This includes World and National Heritage, internationally important wetlands, migratory species and threatened species and ecological communities, as well as the environment of Commonwealth areas and actions by the Commonwealth.

The Review considers that the Commonwealth must maintain the ability to intervene where a project may result in the '*irreversible depletion or contamination*' of cross-border water resources. Similarly,

for community confidence, the Commonwealth should retain the capacity to ensure radioactive activities are managed effectively (see Chapter 4).

1.4.2 The EPBC Act should apply and deliver ecologically sustainable development

The objects of the EPBC Act are sufficiently broad to enable the Commonwealth to fulfil its role. The range of views on the objects of the Act received by the Review span from full support to a complete revamp. The broadness of the objects has been applauded for flexibility, criticised for carrying little clout and being 'uninspiring and perfunctory'[22].

The Review considers that amending the objects of the EPBC Act will not 'provide more clout' or deliver better outcomes unless other issues that diminish the effectiveness of the Act to protect the environment are addressed.

A fundamental shortcoming in the EPBC Act is that it does not clearly outline the outcomes it aims to achieve. Ecologically sustainable development (ESD) should remain the overall outcome that the Act seeks to achieve. To do this, the concept needs to be hardwired into the Act and the basis of the operation of the Act. This means that:

- the Act must require the Environment Minister to apply and deliver ESD, rather than just consider it
- decisions must be based on a comprehensive assessment of ESD, including transparent environmental, social, economic and cultural information (see Chapter 6).

Ideally, achieving ESD is a systems-based outcome rather than the outcome of every decision made. To support further development, the system needs flexibility to balance out impacts across landscapes space and timescales. This can be best achieved by adopting a regional planning approach.

To deliver ESD, the EPBC Act should support a focus on protecting (avoiding impact), conserving (minimising impact) and restoring the environment. Given the state of decline of Australia's environment, restoration is required to enable future development to be sustainable.

Key mechanisms are required to support restoration including regional plans to identify priorities (see 1.4.3) and investment in restoration through markets and direct investments (see Chapter 7).

1.4.3 Legally enforceable National Environmental Standards should be the foundation for effective regulation

National Environmental Standards

Legally enforceable National Environmental Standards (in the form of a regulatory instrument) are required to underpin the effective operation of the EPBC Act. The law must require that these Standards are applied, unless the decision-maker can demonstrate that the public interest and the national interest is best served otherwise.

National Environmental Standards serve 2 fundamental purposes: to improve the effectiveness and the efficiency of Australia's national environmental law. Strong, clear and nationally consistent Standards will improve outcomes for Australia's biodiversity and heritage, and ensure development is ecologically sustainable over the long-term. Improved certainty for all stakeholders will lead to a more efficient, accessible and transparent regulatory system, and enable faster and lower cost development assessments and approvals (see Chapter 4).

Biodiversity and environmental protection standards are increasingly used internationally, including to set sustainability targets for internationally traded commodities such as coffee, banana, cocoa and cotton[23]. There is strong support for National Environmental Standards amongst submitters—including the 10 Deserts Project[24], Australian Conservation Foundation[25], the Business Council of Australia[26], the Minerals Council of Australia[27], the Wentworth Group of Concerned Scientists[28] and the Western Australian Government[29].

The suite of National Environmental Standards should set the requirements for decision-making to deliver outcomes for the environment and clearly define the fundamental processes that ensure sound and effective decision-making. As a starting point, the suite of National Environmental Standards should include requirements relating to:

- ecologically sustainable development
- matters of national environmental significance
- transparent processes and robust decisions, including:
  - judicial review
  - community consultation
  - adequate assessment of impacts—including climate change impacts—on MNES
  - emissions-profile disclosure
- Indigenous engagement and involvement in environmental decision-making
- monitoring, compliance and enforcement
- data and information
- environmental monitoring and evaluation of outcomes
- restoration and recovery
- wildlife permits and trade.

The development of National Environmental Standards

The process for making National Environmental Standards should be set out in the EPBC Act. The Act should include requirements for regular monitoring and reporting, and periodic review and amendment as required, so that Standards remain contemporary and effectively deliver environmental outcomes.

The Environment Minister should set the National Environmental Standards. It cannot be a process of negotiation with the states and territories that ends in agreement on a 'lowest common denominator'.

Standards should be developed in consultation with science, Indigenous, environmental and business stakeholders, and the community. Although consultation with states and territories is essential, the process cannot be one of negotiated agreement between governments, with rules set at the lowest bar. It is important that this process not be unnecessarily drawn out or arduous. Stakeholders from these key groups should come together at an early stage to work on developing the suite of Standards, building on the constructive contributions that have already been provided to the Review.

Interim Standards are recommended as a first step, to facilitate rapid reform and streamlining. These Interim Standards will need to set out environmental outcomes in terms of clear limits that define acceptable impacts on nationally important environmental matters. They can and should evolve as soon as practicable into more specific, definitive and data-based Standards as information improves. As granularity in Standards is improved, more precise Standards will provide increased certainty for all stakeholders. Improvements in Standards will drive faster and lower-cost development assessments and approvals.

Ultimately, Standards should be granular and measurable—with targets that specify the intended outcomes—but without being overly prescriptive. This will provide flexibility without compromising the environment. A key problem with the administration of the current EPBC Act is that rules are buried in thousands of pages of hundreds of statutory documents that collectively fail to provide clear and specific guidance for decision-making.

A granular Standard for threatened species should be expressed in quantitative measures to support recovery over a specific time frame. Measures such as population size and trends, and the area and quality of habitat available across a landscape type (i.e. population numbers, hectares, threat management and years) should be developed. In time, and with better information and the capability to model ecosystem outcomes, these Standards could shift to measures of probable outcomes for species (such as the likelihood of survival or recovery).

The specification of standards for pollutants under the National Environment Protection (Ambient Air Quality) Measure, is an example of a granular standard that has been adopted across Australia.

In the short-term, the granularity of National Environmental Standards is limited by the information available to define them with certainty and effectively apply them to decision-making. A quantum shift will be required in the quality of accessible data and information to increase the granularity of Standards (see Chapter 6).

The Commonwealth has made past attempts to define some standards for the EPBC Act[30]. These attempts focused on clarifying important processes that were already set out in the Act and provide a useful foundation to build on in developing the full suite of National Environmental Standards. A key shortcoming of these is the absence of any clear articulation of the intended outcomes for, and acceptable impacts on, MNES. As a priority, an Interim Standard for MNESis needed to address ongoing environmental decline and to provide clear, consistent rules for decision-making.

A prototype Standard for MNES is provided in Appendix 1. An extract from this prototype is set out in Table 1. The prototype is a starting point to stimulate discussion. The Review acknowledges that further work is needed to test and refine the Standard. It is based on key principles such as prevention of environmental harm and non-regression, and has been developed using existing policy documents and legal requirements. The prototype shows that an Interim National Environmental Standard for MNES could be developed quickly and would immediately provide greater clarity and consistency for decision-making.

Table 1 Example of prototype Standard for MNES

Matter	Prototype standard
World and National Heritage	• No development incursion into a World or National Heritage area, unless it promotes the management and values of the property or place. • Actions must not cause or contribute to a detrimental change to the World or National Heritage values of a property or place. • Management arrangements must ensure World and National Heritage values are protected and conserved.
Threatened species and communities	For vulnerable species: • No net loss for vulnerable species habitat. • Actions must manage onsite impacts and threats, where these are not managed through alternative frameworks. For endangered species and communities: • No net loss for endangered species habitat and ecological community distribution. • No detrimental change to the listed critical habitat of a species or ecological community. • Actions must manage onsite impacts and threats, where these are not managed through alternative frameworks. For critically endangered species and communities: • Actions must deliver a net gain for critically endangered species habitat and ecological community distribution. • No detrimental change to listed critical habitat of a species or ecological community. • Actions must manage onsite impacts and threats, where these are not managed through alternative frameworks. Additional requirements in Commonwealth areas: • Actions must not kill, injure or take a listed threatened species or ecological community, except where an EPBC Act permit is issued.

Note: See Appendix 1 for further details.

1.4.4 Greater focus on adaptive planning required to deliver environmental outcomes

Adaptive regional planning approaches that reflect National Environmental Standards

To support decision-making, and to encourage greater cooperation between jurisdictions, the Commonwealth should adopt adaptive regional planning approaches that reflect National Environmental Standards.

Regional plans would take into account cumulative impacts, key threats and build environmental resilience in a changing climate by addressing cumulative risks at the landscape scale. Managing these threats to MNES at the regional scale will have flow-on benefits for more common species and biodiversity more broadly.

Regional plans should be developed that support the management of threats at the right scale, and to set clear rules to manage competing land uses. These plans should prioritise investment in protection, conservation and restoration to where it is most needed, and where the environment will most benefit.

Ideally, these plans would be developed in conjunction with states and territories and community organisations. However, where this is not possible, the Commonwealth should develop its own plans to manage threats and cumulative impacts on MNES. The regional planning efforts should be focused on those regions of highest pressure on MNES.

Three regional planning tools are proposed:

1) Regional recovery plans—developed by the Commonwealth for MNES
2) Bioregional plans—developed collaboratively between the Commonwealth and state and territory governments.
3) Strategic assessments—developed at the request of a proponent, in partnership with the Commonwealth and the relevant state or territory government.

Commonwealth-led regional recovery plans

A shift is required from recovery planning for an individual listed species or community, to the landscape scale with a focus on biodiversity conservation outcomes for listed threatened species and ecological communities. This drives efficiency, because many listed species in a region rely on the same habitat and suffer from the same threats. New listings in a region can be more easily incorporated, reducing the need for individual plans. Such landscape scale planning would also have benefits for more common species and contribute better to arresting the overall decline of the environment. Initial focus should be on Australia's unique biodiversity hotspots.

Regional recovery plans should provide for coordinated management of threats to listed species and communities in a region, and to consider the cumulative impacts of these threats. They should identify important populations or areas of critical habitat.

Regional recovery plans should incorporate local ecological knowledge including Indigenous knowledge and could draw from regional-scale plans that are already in place, including Healthy Country Plans or plans prepared by natural resource management groups.

Importantly, regional recovery plans should provide the basis for prioritising Commonwealth action and investment, including the direction of offset obligations arising from development. These plans should identify areas where protection, conservation and restoration are needed, and areas for investment that will deliver the greatest environmental benefit.

Bioregional plans developed in collaboration with states and territories

Ideally, the Commonwealth would work with the states and territories to develop and agree bioregional plans that accommodate their respective interests in the environment. These plans would be developed consistent with the National Environmental Standards (and, where in place, regional recovery plans) and address environmental, economic, cultural and social values.

Bioregional plans should be developed in collaboration with a state or territory, or a jurisdiction could propose its own plan to be considered and accepted by the Commonwealth as a bioregional plan.

Bioregional plans would set the clear rules to manage competing land uses to support regulatory streamlining. They would identify areas where development may be of lower or higher risk to the environment, including those areas where development assessment and approval is not required. The Environment Minister (or delegated decision-maker) should make decisions on development approvals in a way that is consistent with the provisions of the bioregional plan.

Strategic assessments

Part 10 of the EPBC Act already provides for landscape-scale assessments in the form of strategic assessments. The legal arrangements for strategic assessments are complex (see Chapter 3), but the strategic assessments that have been conducted have led to more streamlined regulatory arrangements. However, some have been criticised for not achieving their intended environmental outcomes[31].

The EPBC Act should continue to enable jurisdictions and/or proponents to enter into a strategic assessment with the Commonwealth for developments not covered by a bioregional plan. As is the case now, a strategic assessment would provide a single approval for a broad range of actions covering multiple projects to provide up-front certainty of permissible development areas and environmental outcomes.

A strategic assessment should be required to be developed in a manner that is consistent with the National Environmental Standards, and regional recovery plans where they are in place.

Strategic national plans

Not all issues or threats have a spatial lens. There are nationally pervasive issues that would benefit from strategic coordination.

Strategic plans for big-ticket items can provide a national framework to guide a national response, direct research (for example feral animal control methods), support prioritisation of investment (public and private) and enable shared goals and implementation across jurisdictions. National level plans can achieve efficiencies and provide a consistent approach that can be reflected in regional plans. They can also inform activities in those areas where a regional plan is not in place.

Specific opportunities that lend themselves to national strategic planning include:

- the delivery of a comprehensive, adequate and representative National Reserve System
- high-level and cross-border threats, such as biosecurity or feral animals
- the consideration of pressures and risks through forecasting and scenarios—for example how climate change scenarios should be used to support planning and decisions.

Table 2 provides a summary of the proposed adaptive planning tools.

Table 2 Proposed adaptive planning tools

Adaptive planning tool	Leadership, collaboration and approval	Scope	Intent	Spatial coverage
Regional recovery plans	Led by Commonwealth, approved by Commonwealth	Listed threatened species and ecological communities	• Coordinated threat management, consideration of cumulative impacts • Support prioritisation of Commonwealth action	Priority regions in the first instance
Bioregional plans	Collaborative process led by jurisdictions or jointly between jurisdictions and the Commonwealth. Approved or accredited by the Commonwealth	Biodiversity, economic, cultural and social values	• Consistent with the National Environmental Standards and regional recovery plans • Set clear rules to manage competing land uses	Priority regions in the first instance, or where proposed by a jurisdiction for accreditation
Strategic assessments	Led by proponents and approved by the Commonwealth	Biodiversity, economic, cultural and social values	• Consistent with the National Environmental Standards and regional recovery plans • Provide a single approval for a broad range of actions	Where instigated by proponent
Strategic national plans	Led by Commonwealth, approved by Commonwealth	Nationally pervasive issues such as high-level and cross-border threats	• Provide a national framework to guide a national response, direct research and support prioritisation • Enable shared goals and implementation across jurisdictions	Not spatially focused

1.4.5 Clear outcomes, National Environmental Standards and regional plans need to be underpinned by fundamental changes to the way the EPBC Act operates

Core reforms proposed by the Review, including National Environmental Standards and improved planning frameworks, aim to support greater cooperation and harmonisation between the Commonwealth, states and territories (see Chapter 4).

The proposed reforms will enable the Commonwealth to protect the environment in the national interest, rather than focus its efforts on transactional elements that can be duplicative, costly to business and result in little tangible benefit to the environment.

To achieve this, a quantum change in the sophistication of the information, data and regulatory systems (see Chapter 6) is required. Active mechanisms to restore areas of degraded or lost habitat are also needed to ensure Australia's environment is conserved for the future (see Chapter 7).

This must be accompanied by transparency, fundamental improvements in monitoring and evaluation (Chapter 8) and strong monitoring, compliance, enforcement, and assurance (Chapter 9).

The key reform directions proposed by the Review seek to build community trust that the national environmental law is effectively protecting our extraordinary environment and heritage in the national interest for future generations.

2 Indigenous culture and heritage

Key points

The Review considers that the EPBC Act is not fulfilling its objectives as they relate to the role of Indigenous Australians in protecting and conserving biodiversity, working in partnership with and promoting the respectful use of their knowledge.

The key reasons why the EPBC Act is not fulfilling its objectives are:

- There is a culture of tokenism and symbolism. Indigenous knowledge or views are not fully valued in decision-making. The EPBC Act prioritises the views of western science, and Indigenous knowledge and views are diluted in the formal provision of advice to decision-makers.
- Indigenous Australians are seeking stronger national protection of their cultural heritage. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) provides last-minute intervention and does not work effectively with the development assessment and approval processes of the EPBC Act. The national level arrangements are unsatisfactory.
- The EPBC Act does not meet the aspirations of Traditional Owners for managing their land. The settings for the Director of National Parks and the joint boards means that ultimately, decisions are made by the Director.

The key reform directions proposed by the Review are:

- The National Environmental Standards should include specific requirements relating to best practice Indigenous engagement, to enable Indigenous views and knowledge to be incorporated into regulatory processes.
- The national level settings for Indigenous cultural heritage protection need comprehensive review. This should explicitly consider the role of the EPBC Act in providing protections. It should also consider how comprehensive national level protections are given effect, including how they interact with the development assessment and approval process of the Act.
- Indigenous knowledge and western science should be considered on an equal footing in the provision of formal advice to the Environment Minister. The proposed Science and Information Committee should be responsible for ensuring advice incorporates the culturally appropriate use of Indigenous knowledge.
- Where aligned with their aspirations, transition to Traditional Owners having more responsibility for decision-making in jointly managed parks. For this to be successful in the long term there is a need to build capacity and capability, so that joint-boards can make decisions that effectively manage risks and discharge responsibilities.
- Improved outcomes for Indigenous Australians will be achieved by enabling co-design and policy implementation.
- The role of the Indigenous Advisory Committee should be substantially recast as the Indigenous Knowledge and Engagement Committee, whose role is to provide leadership in the co-design of reforms and advise the Environment Minister on the development and application of the National Environmental Standard for Indigenous engagement.

Over the last decade, there has been increased recognition of the value of incorporating Indigenous knowledge, innovations and practices into environmental management to deliver positive outcomes for the Australian environment. Indigenous Australians play a significant role in direct land and sea protection and management throughout Australia. These activities are supported by the Australian Government, but most support mechanisms sit outside the operation of the EPBC Act such as:

- Indigenous Land Use Agreements (ILUAs), Indigenous ranger programs, Indigenous Protected Areas (IPAs) and savanna burning carbon farming projects
- national investment in environmental research—for example through the National Environmental Science Program (NESP)—which also supports and facilitates the participation of Indigenous Australians in research and environmental management activities.

Within the operation of the EPBC Act, the participation of Indigenous Australians is formally focused on:

- an Indigenous Advisory Committee, whose remit is a broad advisory function and is not linked to specific decisions that are made
- the arrangements for joint management of Commonwealth reserves on land owned by Indigenous Australians
- the protection of some Indigenous heritage, including requirements for the Australian Heritage Council to consult with Indigenous people who have 'rights or interests' in the places that it is considering.

While world leading when first legislated, the EPBC Act is now dated and does not support leading practice for incorporating the rights of Indigenous people in decision-making processes. It lags behind leading practice within Australia, and furthermore, lags behind key international commitments Australia has signed (Box 4).

Box 4 International agreements relating to Indigenous peoples' rights

The **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** 'affirms the minimum standards for the survival, dignity, security and well-being of Indigenous peoples worldwide and enshrines Indigenous peoples' right to be different'[32]. It emphasises the right of Indigenous peoples to participate in the decision-making process for matters that affect them, the need for mechanisms for redress, and obliges signatory states to obtain free, prior and informed consent before taking actions that may impact Indigenous peoples, such as making laws or approving projects on Indigenous lands.

The **Convention on Biological Diversity (CBD)**[33] provides for the recognition of Indigenous peoples' inherent ecological knowledge and, with the free, prior and informed consent of Indigenous knowledge holders, promotion of the wider application of such knowledge. It requires signatories, subject to their national legislation, to respect, preserve and maintain Indigenous peoples' ecological knowledge and practices with respect to the conservation and sustainable use of biological diversity.

The **Aichi Biodiversity Targets** agreed under the CBD, include a specific target (Target 18) that 'by 2020, the traditional knowledge, innovations and practices of Indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of Indigenous and local communities, at all relevant levels.'[34]

The Nagoya Protocol[35] on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the Nagoya Protocol) is a global agreement that implements the access and benefit-sharing obligations of the CBD. The Nagoya Protocol establishes a framework that ensures the fair and equitable sharing of benefits that arise from the use of genetic resources. Indigenous communities 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 because the Act does not have the mechanisms to require explicit consideration of Indigenous community values and Indigenous knowledge in environmental and heritage management decisions. Although protocols and guidelines for involving Indigenous Australians have been developed[36], resourcing to implement them is insufficient, and they are not a requirement.

However, there are examples of species recovery being led by Indigenous communities for culturally important species using recovery planning tools within the EPBC Act (Box 5). 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.*'[37]

These examples are therefore the exception rather than the rule.

Box 5 Incorporating Indigenous knowledge into recovery plans

Draft Recovery Plan for the Greater Bilby [38]

Over 70% of naturally occurring bilby populations occur on Aboriginal lands, and the species continues to be culturally significant for many Indigenous 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, both 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)[39] demonstrates the value of Indigenous knowledge in recovering species, with the 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 that threaten the seed grasses the parrots feed on.

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)*[40] . 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 Environment Minister addresses Indigenous matters in decision-making for 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 Environment 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. Representatives 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[41] and Indigenous Land Councils[42].

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 and Torres Strait Islander people to ask the Environment Minister 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[43], have highlighted the potential for duplication. Others, such as the Tasmanian Aboriginal Centre[44], have noted the importance of the Commonwealth playing a role, where state and territory-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 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[45]. 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[46]. 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.*'[47]

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 of the EPBC Act) 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 Traditional Owners and the DNP
- 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 EPBC Act means that ultimately, that position is responsible for decisions made in relation to the management of national 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 national parks are employed by the Department, consistent with Australian Public Service (APS) requirements, and resourcing levels are subject to usual government budgetary processes.

Previous reports[48] 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 that support them, have indicated that the current settings in the EPBC Act for joint-management of Commonwealth parks fall short of their aspirations. Examples[49] 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 joint management boards, 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 joint-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[50].

2.2 Proposed 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 Council of Australian Governments (COAG) Commitments in the Partnership Agreement for Closing the Gap and supporting processes (see Box 6).

The pursuit of reforms would occur alongside other Australian Government 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 6 COAGs Closing the Gap Commitments

Key excerpts from the Agreement[51]

- 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[52]

- 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 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). The role of this Committee would be to:

- support the co-design of reforms (and the participation of Indigenous Australians in this process)
- 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, which 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
- link to 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[53] highlighted that the EPBC Act should more actively facilitate Indigenous participation in decision-making processes. Specifically, contributors called 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. 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 (for example, standards for proponents in conducting environmental impact assessment) or binding standards for consultation with Indigenous Australians[54]
- 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 scientific research, where Indigenous Australians are co-researchers alongside western science[55].

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 (see 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 environmental impact assessment and approval decisions. Existing relevant Australian Government 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)*[56]could be used as a starting point for the development of the Standards (Box 7).

Box 7 Building blocks for National Environmental 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 Act and the development of National Environmental Standards:

- *Engage Early – Guidance for proponents on best practice Indigenous engagement for environmental assessments under the EPBC Act'* [57]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* [58] 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 that 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 that 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 8).

Box 8 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 and territory 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.'[59]

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.

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