Report-Regulatory Maturity Project Final Report

APRIL 2016

Contents

GLOSSARY OF COMMONLY-USED TERMS

ANAO	The Australian National Audit Office
ATO	The Australian Taxation Office
The Department	The Australian Government Department of the Environment
EPBC Act	The *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
EPG	The Environment Standards Division and the Wildlife Heritage and Marine Divisions in the Environment Protection Group
ESD	The Environment Standards Division
FAS	First Assistant Secretary
ICT	Information and Communications Technology
NESTRA	National Environmental Significance Threat and Risk Assessment Tool
NGOs	Non-Government Organisations
NSW EPA	The New South Wales Environment Protection Authority
OECD	The Organisation for Economic Co-operation and Development
PAID	The Policy Analysis & Implementation Division
The Project	The Regulatory Maturity Project
SES	Senior Executive Service
Vic EPA	The Victorian Environment Protection Authority
WHaM	The Wildlife, Heritage and Marine Division
WiSTRA	Wildlife Strategic Threat and Risk Assessment Tool

EXECUTIVE SUMMARY

SCOPE

The Regulatory Maturity Project, led by Joe Woodward, assessed the maturity, capability and capacity of the Environment Protection Group (**EPG**) to fulfil its regulatory functions. The Project focused on the regulatory functions of the Environment Standards Division (**ESD**) and the Wildlife, Heritage and Marine Division (**WHaM**) (this Report uses 'EPG' to refer collectively to the two Divisions). The Project makes recommendations about how EPG can establish and maintain a position as a contemporary, mature and trusted regulator.

The Project was asked to address:

- The attributes of a 'best practice regulatory agency', taking into account experience and practice in like regulatory agencies at the Commonwealth and state levels and, if appropriate, internationally.

- Any changes required to ensure EPG's regulatory functions reflect those attributes.

In addressing these matters, the Project was asked to consider:

- The most appropriate institutional arrangements for a 'best practice regulatory agency', including organisational design and structure, designation of responsibilities, resourcing and opportunities for efficiencies.

- Organisational processes for identifying and managing regulatory risks.

- Staff capability, including regulatory knowledge and capacity.

- The adequacy of, and potential improvements to, business systems.

The full Terms of Reference for the Project are at **Appendix 1**.

APPROACH AND CONSULTATION

The Project included a literature review of best practice principles, experiences and lessons from a variety of national, state and international organisations and agencies. Key documents included reviews, audits, policies, and studies produced by the Department of Prime Minister and Cabinet, the Australian National Audit Office (**ANAO**), the Productivity Commission, the Organisation for Economic Co-operation and Development (**OECD**), the Australasian Environmental Law Enforcement and Regulators neTwork (**AELERT**), and a number of other state, national and international regulatory agencies. A bibliography of material considered by the Project is at **Appendix 2**.

The Project also consulted with a range of stakeholders, both internal and external to the Department.

Internal consultation focused on staff within ESD and WHaM. Staff at all levels of each Division were invited to interactive and collaborative workshops which sought direct feedback on EPG's regulatory performance and discussed the attributes of a mature, contemporary and trusted regulator. Further group and individual consultations were held with members of the ESD and WHaM Senior Executive Service, and Executive-level and APS-level staff on specific themes relevant to the Project.

The Project also met with staff from various lines areas outside of ESD and WHaM who have significant on-going linkages with these Divisions. These included the members of the Department's Executive Board, General Counsel, the Information Technology Branch, the Policy Analysis and Implementation Division and the then Engagement and Evaluation Branch.

The Project also met and liaised with the Functional and Efficiency Review team who were conducting a review with overlapping issues.

External to the Department, the Project met with a number of other regulatory agencies to draw upon their experience and insights. These included the Australian Taxation Office, the Clean Energy Regulator, the Department of Agriculture and Water Resources, the National Offshore Petroleum Safety and Environmental Management Authority, the NSW Department of Planning and Environment, the NSW Environment Protection Authority and the Victorian Environment Protection Authority.

The Project also met with peak industry bodies and NGOs with an interest in environmental regulation. These included the Waste Management Association of Australia, the Minerals Council of Australia, the Business Council of Australia, the NSW Environmental Defenders Office, and the Australian Conservation Foundation.

CONTEXT FOR THE PROJECT

A number of recent reviews and audits identified the need for the Department to build its capacity and maturity as a regulator. These reviews and audits include:

- The 2015 ANAO audit report on 'Managing Compliance with the Wildlife Trade Provisions (Part 13A) of the Environment Protection and Biodiversity Conservation Act 1999'.
- The 2015 House of Representatives Standing Committee on the Environment Inquiry into environmental regulation, green tape and one stop shops.
- The 2014 ANAO audit report on 'Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval.'
- The 2014 Senate Standing Committee on the Environment and Communications Inquiry into the history, appropriateness and effectiveness of the use of environmental offsets in Federal environmental approvals in Australia.
- The 2013 'Internal Audit – Final Report Review of Compliance and Enforcement Program Management.'

The setting aside of the approval for the Carmichael Coal and Rail project by the Federal Court in mid-2015 identified shortfalls in the Department's regulatory systems and was also a catalyst for the Project.

INTRODUCTION

There is no simple recipe for a best practice regulator, and all modern regulators face challenges in pursing regulatory maturity. Regulatory maturity is an ongoing objective that is reliant on a complex mix of knowledge, experience, human resources, business and IT systems, new information, feedback loops, risk management, good judgement, and continuous improvement. Balancing these elements with reduced budgets, increasing complexity, and Government and community expectations is a difficult task. As such, regulatory maturity should be seen as an ongoing pursuit that involves continuous evolution and improvement, rather than a specific end-point.

The Department's regulatory maturity must also be considered in the context of the current legislative regime, and the Project notes that best practice may not always be achievable where operational practices are dictated by prescriptive legislation. EPG actively administers 11 pieces of legislation with regulatory provisions. The majority of this legislation was passed by the Parliament prior to the year 2000. As such, the legislation may not reflect modern approaches to regulatory design.

The Australian Government is committed to improving the effectiveness and efficiency of its environmental regulation based on the advice of the Department. A number of Bills have been introduced into the Parliament in recent years to give effect to this. However, these reforms have generally not been supported by both Houses of Parliament. Nevertheless, by fostering a culture of innovation, EPG and the Department can continue moving towards best practice within the limitations of the current legislative framework while pursuing opportunities for legislative change when they arise.

The Project found that EPG and the Department's approach to regulation is sound, and consistent with many other regulators. However, within Australia and around the world, the regulatory craft has evolved over recent years to explore and utilise more innovative and flexible regulatory tools to achieve desired outcomes at least cost to all stakeholders (including to regulators). Some Commonwealth and State agencies, such as the Australian Taxation Office, the Clean Energy Regulator, and the NSW EPA have been following these developments closely and attempting to build them into their regulatory practice.

The Department has adopted some good new approaches, such as developing and using the National Environmental Significance Threat and Risk Assessment tool to embed risk management into planning and decision-making processes; and establishing a Regulatory Advisory Panel to provide greater consistency in regulatory activities. However, while the Senior Executive has a strong desire to continue to move the Department towards being a modern best practice regulator, it is fair to say that the Department is on the road to best practice but has not yet reached that goal. As discussed above, best practice is an ongoing journey of continual improvement, and the Project has identified several opportunities for further improvement.

In line with the terms of reference, the Project prepared a summary of the attributes of a best practice regulator that can be used as a reference document by the Department (at **Appendix 3**). This summary covers all aspects of regulation - including those where the Department does well, and others where improvements could be made.

The Project has also prepared a list of regulatory principles that relate to the areas where the Department should concentrate its efforts (refer to page 11). These principles do not include every desired attribute of a best practice regulator, but attempt to draw together the most important areas for the Department to concentrate on. As the Department evolves, these focus areas may change over time.

The Department-specific principles relate to the following areas:

- objectives and performance;
- approach to regulation;
- approach to risk;
- people;
- engagement with stakeholders;
- systems and tools; and

- approach to determinations, compliance and enforcement.

This list of principles should be adopted by the Department and promoted by the Senior Executive as its expectations in relation to how the Department should regulate. While the list is primarily for use by internal staff, it should also be publicly available.

For each of the above areas, this Report includes findings in relation to the current performance of EPG, and recommendations to improve performance.

KEY FINDINGS AND RECOMMENDATIONS BY CHAPTER

CHAPTER 1: OUR OBJECTIVES AND PERFORMANCE

A mature regulator has a clear understanding of the objectives of the regulatory regime in which it operates. A mature regulator articulates how it proposes to meet those objectives, the Government's expectations, and the way in which its performance will be evaluated and reported. This helps to determine internal priorities and processes, and improves transparency and accountability. A mature regulator also embeds a process for reviewing and improving its activities as part of a continuous improvement strategy.

The Project found that the Department does not have an overarching regulatory posture, which makes it difficult to ensure a consistent approach across the various regulatory activities. While both ESD and WHaM have business plans, their Key Performance Indicators could be made clearer and more measurable to allow better performance monitoring and evaluation. EPG has started to build in reviews to improve policies, but this needs to be done systematically across EPG. There are also opportunities to improve regulatory governance structures.

Chapter 1 makes a range of recommendations relating to EPG and the Department's objectives and performance management, including:

- development of a new Regulatory Framework;
- designing robust and measurable objectives and KPIs relating to regulatory activities;
- the establishment of an oversight body to consider the Department's regulatory policies and posture; and
- committing resources for systematic monitoring, analysis and improvement.

CHAPTER 2: OUR APPROACH TO REGULATION

A mature regulator builds a large regulatory toolbox and uses the most cost effective regulatory tools, makes it simple for regulated entities to comply, has sophisticated mechanisms for problem-solving, is transparent, and uses intelligence to guide its activities.

The Project found that EPG recognises the need for innovation in its approach to regulation and some initiatives are already underway. However, there are currently a number of barriers limiting EPG's regulatory capability, including culture, resourcing and legislative limitations, and inconsistency across EPG in the way regulatory activities are undertaken.

Chapter 2 makes a range of recommendations for aspects of EPG's assessment, conditioning, compliance and enforcement activities, including:

- enhancing problem solving and broadening the regulatory and compliance tools used by ESD;

- reducing reliance on management plans;

- helping regulated entities to comply with obligations;

- providing all stakeholders with more information about policies and decisions; and

- further developing its intelligence capability.

CHAPTER 3: OUR PEOPLE

REGULATORY SKILLS AND CAPABILITIES

A mature regulator ensures that its staff are well trained and supported by integrated business systems and tools, so that officers are proficient in regulatory processes and have a clear understanding of the judgement and analysis required at each step.

A mature regulator also recognises the importance of internal linkages. A mature regulator is concerned less about formal structures and more about identifying the most important problems and mobilising all relevant areas to work together to manage issues from an end-to-end perspective.

The Project notes that EPG is committed to transforming into a best practice regulatory agency, and staff are committed and capable. However, the transition to best practice is somewhat impeded by a lack of regulatory experience and expertise in EPG and the Department, including in the Senior Executive.

The Project found that recruitment and training has historically focused on subject matter expertise or generic government skills, rather than a good understanding of regulation and best practice. EPG lacks an integrated capability framework or training program to develop regulatory skills in relevant staff. There are also gaps in responsibility for the coordination of regulatory policy, guidance material, processes, IT, and training across EPG.

Chapter 3 also includes recommendations on:

- development of a Capability Framework for regulatory officers;

- establishment of formal and informal training and induction programs;

- adoption of a consistent approach with staff in times of change; and

- maintaining and enhancing support for innovation.

STRUCTURES AND LINKAGES

There is no perfect structure for a regulator, and the Project does not recommend major structural change. Nonetheless, there are some areas where changes to responsibilities and reporting arrangements would be beneficial without significant downside, including:

- centralising within EPG the responsibility for managing regulatory support activities;

- broadening the responsibilities of the Compliance and Enforcement Branch to include all compliance and enforcement functions from WHaM and ESD; and

- moving responsibility for review and approval of EPBC management plans from the Compliance and Enforcement Branch to the relevant EPBC assessment Branches.

CHAPTER 4: OUR SYSTEMS AND TOOLS

A mature regulator has well developed and maintained business systems and supporting tools that increase staff capacity and provide a high degree of confidence that decision making is legal, robust and predictable.

The Project notes that the regulatory activities managed by EPG are variable and complex, and require detailed knowledge about both environmental matters and statutory requirements.

The Project found that there is a vast number of policies and guidance material available to support the work of regulatory officers, but staff are overwhelmed by the volume of documents, the lack of appropriate linkages in these documents, and the disparate nature of their availability. Staff also indicated that many policies and guidance documents were out of date and difficult to understand or apply. As a result there is a low degree of confidence that policies and guidance documents are being applied consistently.

It is generally accepted within the Department that the current business and IT systems are inadequate to meet the Department's requirements. A key factor contributing to the error in the Carmichael case was a breakdown in the flow of information across different areas. Better business processes, including better coordination and a more mature IT system across the various work areas would have reduced the likelihood of the circumstances occurring that underpinned the Carmichael case.

The Department's IT systems are being enhanced, with some recent improvements implemented and more in development or in planning.

Chapter 4 makes recommendations for EPG regarding IT and business tools, including:

- developing an end-to-end IT system that manages projects from pre-referral through to compliance;

- creating a central support team to assist with the development and maintenance of business tools across EPG;

- increasing investment in IT systems as a high priority; and

- enhancing governance arrangements for the development and implementation of IT systems.

CHAPTER 5: OUR APPROACH TO RISK

A mature regulator has a well established and well understood risk framework which:

- articulates the regulator's risk culture and risk appetite;

- identifies the roles and responsibilities of staff, boards and committees in identifying and managing risks; and

- provides guidance and policies for risk management, including risk identification, analysis, prioritisation and treatment.

The Project notes that the Department has a range of tools for identifying and managing risks, but these are primarily applied to specific projects. There does not appear to be a systematic approach for identifying and managing risk across EPG's regulatory functions or across the Department.

The Department has recently appointed a Chief Risk Officer, which is a very positive initiative, to deepen the Department's understanding and engagement with risk and to assist Divisions with their management of risks.

Chapter 5 makes recommendations about EPG's approach to risk, including:

- reviewing the Risk Management Framework;

- analysing risk across the EPG's regulatory activities;

- systematically allocating resources proportionate to risk;

- utilising intelligence for gathering data and analysing risks; and

- improving external communication of risk.

CHAPTER 6: HOW WE ENGAGE

Best practice regulators adopt a strategic approach to engagement with their stakeholders, including regulated entities, other regulators and the broader community. Good engagement can improve regulatory design and implementation, build trust and increase compliance.

The Project consulted external stakeholders. Some stakeholders (particularly) requested more proactive engagement by the Department, particularly in relation to the development and implementation of new policies or other Departmental priorities or changes. Feedback from some stakeholders also suggested that some staff in EPG do not have a strong understanding of the operating environment of relevant regulated entities and the full range of factors that influence their behaviours.

Chapter 6 makes recommendations for improving EPG's maturity, including:

- increasing knowledge of regulated industries;

- reducing the burden of information requests;

- establishing and maintaining a single point of contact;

- speaking with a single voice; and

- improving engagement with community groups, co-regulators and communities of practice.

CONCLUSION

The Project found that EPG has committed and skilled staff with a desire to be a best practice regulator. EPG is making demonstrable progress towards this goal. However, there needs to be further investment in regulatory design and implementation. This Report identifies a number of opportunities for improvement. Some of these improvements will be achievable within existing resources; some may be offset by further efficiency gains; and others will rely on additional commitment of resources. Any further reduction in regulatory resourcing will significantly impede EPG and the Department's progression to best practice regulatory status.

EXPECTATIONS ABOUT HOW WE REGULATE

Our objectives and performance	• We use regulation as a tool for achieving environmental, economic and social outcomes. We work within the legislative framework and have regard to Government policy and priorities. • We communicate our objectives and priorities clearly and often, internally and externally. • We monitor our performance in meeting our objectives, communicate the results, and learn from the past.
Our approach to regulation	• We believe good regulation is valued because it protects the environment while providing a level playing field for industry and certainty for the regulated community and broader public. • We define regulation broadly as how we achieve the objectives of our legislation, in the context of government policy. We understand the interdependence of policy and regulation. • We aim to use the best mix of all the available regulatory tools to achieve the desired outcomes with least cost for everyone. • Our decisions are evidence based, transparent and predictable. • We focus on desired outcomes and we only increase our intervention when there are good reasons. • We assume that most people are compliant and we aim to avoid breaches and make it easy to comply. • We utilise intelligence to enhance our risk approach to compliance. • We take a proportional approach to enforcement with a focus on deterrence. • We communicate our compliance and enforcement approach and activities publicly, with a particular emphasis on our regulated communities.
Our approach to risk	• We analyse risks taking into account likelihood of failure and possible environmental, legal, economic, social and reputational consequences. • We risk manage so we can target our available resources to the most important issues. • We communicate our risk approach both internally and externally.
Our people	• We have knowledgeable and committed staff. We value both corporate knowledge and innovation. • We invest in our staff through ongoing training and support to help meet both corporate and personal goals. • We acknowledge community and government priorities and we embrace change while balancing speed of implementation, available resources and risk of failure. Importantly we also value the importance of our core business. • We work seamlessly across our formal structures because our work is multidisciplinary.
How we engage	• We try to understand the operating environment of our regulated communities so we can help them comply with our requirements. • We engage with all our stakeholders proactively and we are responsive to their feedback and views. • We provide a single point of contact and we speak with a single Departmental voice.
Our systems and tools	• We are working to modernise and integrate our IT systems and databases to streamline and track our work, so staff can focus on their core work. • Our policies and guidance material are current and easy to find and understand.

SUMMARY OF RECOMMENDATIONS

	Recommendation	Importance	Timing
	Chapter 1: Our Objectives and Performance		
1.1 Regulatory Framework	The Department should develop a new Regulatory Framework. In developing the Framework, the Department should have regard to contemporary Australian Government and international best practice regulatory frameworks, principles and policies. The new Regulatory Framework should: • outline a concise, contemporary regulatory posture; • define the Department's principles of best practice and indicators for performance evaluation; • articulate regulatory and legislative objectives and the framework for measuring and tracking performance.; • articulate relevant risk appetites; • include regular review and improvement timeframes; • be published and promoted internally and externally; and • inform the development and maintenance of all plans and strategies relating to regulatory activities within the Department.	1	1
1.2 Performance monitoring and communication	The Department and EPG should develop robust and measurable objectives and KPIs relating to its regulatory activities. These should be developed, published and monitored and included in performance agreements for relevant staff. The Department should communicate the results of monitoring to staff, with open discussion about lessons learned and opportunities for improvements. KPIs should be developed having regard to: • the problem they are addressing; • the desired outcome;	2	3

	• how the Department will know when they are achieved; • how, and how often, they will be monitored; • what milestones need to be met to know that the Department is on track; • how the Department will make corrections along the way; and • how, and how often, performance will be communicated internally and externally. The Department should clarify who has responsibility for monitoring KPIs and making any necessary adjustments. The Department and EPG should seek feedback from stakeholders on its performance, and use this feedback to make improvements. The Department should publicly report on its performance to address stakeholder concerns (see also the *Transparency and disclosure of information* section in Chapter 2, and the *Proactive engagement with community stakeholders* section in Chapter 6).		
1.3 Governance	The Department should establish an oversight body to consider the Department's regulatory policies and posture; and to have oversight of regulatory issues, policies, and major pieces of public guidance. This body could be referred to as the Regulatory Steering Committee, and should be chaired by the Deputy Secretary of EPG, and include First Assistant Secretaries from ESD and WHaM, and appropriate representation from other regulatory areas such as Parks Australia and the Australian Antarctic Division. Heads of the General Counsel Branch and the Compliance and Enforcement Branch, as well as the Chief Risk Officer, should also be involved in an advisory capacity. The Department should consider whether other portfolio regulators should be involved in the Committee.	1	1
	The Regulatory Advisory Panel should continue to operate as a sub-committee of the Regulatory Steering Committee with particular focus on specific compliance and enforcement matters.	2	1

	Consideration should be given to formalising the matters that should be brought to the Regulatory Advisory Panel and the Regulatory Steering Committee, and reflecting this in 'trigger points' in Standard Operating Procedures and guidelines.		
1.4 Continuous improvement	EPG should continue to develop and promote a culture of continuous improvement (see also *Recommendation 3.7 (Innovation)*). EPG should plan and allocate resources for systematic monitoring, analysis and improvement (where necessary) of all regulatory policies and initiatives in consultation with relevant specialist areas. EPG and the Department should support ongoing business improvement activities and performance assessments, including testing of changes to business systems (see also *Recommendation 3.6 (Change management)*).	2	ongoing

Chapter 2: Our Approach to Regulation

2.1 The value of good regulation	The Department and EPG should regularly communicate and emphasise the importance of good environmental regulation, both internally and externally (see also the *Value of Environmental Reregulation* section in the Introduction).	2	2 ongoing
2.2 Understanding regulation and using the right tools	EPG should use objectives, strategies and training to articulate that regulation is a broad suite of measures that should be used flexibly to achieve the objectives of the legislation. EPG should also acknowledge the continuum between policy and regulation, with constant two way communication between those developing policy and those implementing it. The Department should build and maintain a regulatory toolbox of legislative, policy, economic, informative, public reporting and other incentives or disincentives to achieve desired outcomes. The Department should look for opportunities, both within the current legislative framework and through future legislative amendments, to use innovative approaches to	1	2 ongoing

achieve the relevant objectives, such as self-certification, third party certification and co-regulation. The Department should however be cautious of relying on full self-regulation as this is often not accepted by the community and there are many examples of serious failures across regulatory agencies where this has been adopted. The Department should ensure that relevant staff are aware of all regulatory tools available to them, and the circumstances in which they should be considered.

Any future review of legislation should:

- include an analysis of all potentially available incentives and disincentives to achieve desired policy outcomes;
- provide flexibility in the legislation for the Department to adopt the most cost effective regulatory approach in each case;
- make greater use of regulations and other subordinate instruments to set out the detailed requirements. This can provide more flexibility of approaches to solve problems as it can be amended more readily to respond to new technology or information and changes in Government policy and priorities.

The Department should expand the problem-solving working groups established in ESD to cross-divisional working groups, coordinated by an SES officer, to explore innovative approaches to achieve desired legislative outcomes. These working groups should be multi-disciplinary and strive to analyse problems and devise creative and effective solutions. These groups should:

- be limited to the scope of the current legislation; and
- not be limited to compliance and enforcement, but include upfront incentives and disincentives.

The Senior Executive should build-in resources and time to properly analyse regulatory problems and explore innovative cost-effective responses.

| 2.3 Compliance and enforcement | The Department should develop, maintain, and communicate a renewed Compliance and Enforcement Strategy as part of the Regulatory Framework (see *Recommendation 1.1 (Regulatory Framework)*). The strategy should:

• use a risk-approach to allocation of resources (including consideration of proponent history and risks to the environment and the Department's reputation from non-compliance);
• identify all available legislative and non legislative compliance tools and provide guidance on their requirements and appropriate use;
• have graduated, proportionate responses to non-compliance;

• have clear criteria for using and escalating compliance responses up to and including prosecutions;
• potentially include an objective for the success rate for prosecutions (for example some regulatory agencies aim to achieve a 90% success rate) and articulate the circumstances in which the Department could reasonably not take compliance action.

This approach can then be tailored to each regulatory scheme, including those in EPG, reflecting their relative risks and available tools.

The Department should ensure that all relevant staff understand the strategy and the objective target and the reasons behind it. This will help staff to prioritise efforts and choose the most appropriate responses.

While it is appropriate to target the majority of compliance resources to the highest risk projects, EPG should continue to develop and communicate a regulatory response to low-risk activities so that they do not fall out of the system.

In developing the strategy, the Department should consult with the Clean Energy Regulator and the Australian Taxation Office, who have both developed tailored risk management approaches to compliance and communicated their approaches internally and externally. | 2 | 2

(after regulatory framework) |

	The Department should continue work in relation to the *Regulatory Powers (Standard Provisions) Act 2014*, and consider on a case-by-case basis whether it should be triggered under EPG legislation.		
2.4 Communicating compliance	EPG and the Department should communicate the compliance strategy developed under *Recommendation 2.3 (Compliance and Enforcement)* with its full range of stakeholders. EPG and the Department should provide targeted information about compliance and enforcement activities to the regulated community at key points in the process. EPG should consider mechanisms to better promote its regulatory role and compliance and enforcement activities. Potential mechanisms include: • providing information on the legislation EPG administers and what this means for the community. For example, publications developed for the launch of the EPBC Act were well received by stakeholders; • guidance material (such as self-check tools) to improve transparency and the ability for entities to comply; • regular updates on compliance and enforcement activities through the internet, including the Department's website and social media; • the publication of inspection reports and compliance ratings; and • 'good news' stories about regulatory activities (the US EPA's social media websites are a good example of this).	3	3
2.5 Outcomes focused conditions	EPG should reduce the reliance on management plans in EPBC Approvals. EPG should initiate a working group with Commonwealth, state and territory co regulators on this project.	1	1 ongoing

	Conditions should only require management plans where it is not practical to specify outcomes-based conditions that are measureable and enforceable, or where more detail is required to demonstrate that the desired outcome will be achieved. Outcomes in conditions should be time-bound, measurable and enforceable, and where an outcome cannot be specified adequately, the Department should consider specifying surrogate outcomes. Where there is uncertainty about the proponent's capacity or capability to achieve an outcome, EPG should consider using a contingent condition. For example, this could be achieved by specifying an action to achieve an outcome, but allowing the approval holder to use a different approach if they can demonstrate to the Department that the different approach will achieve the outcome.		
2.6 Consistent Conditions	EPG should develop model conditions (to be tailored to particular projects) for key areas of environmental regulation. Where possible, these conditions should be outcomes-based (see *Recommendation 2.5 (Consistent Outcomes Focused Conditions)*). Model conditions should be agreed by the relevant assessment and approval areas, the Compliance and Enforcement Branch and the General Counsel Branch. Model conditions should be publicly available with an explanation of how and when they will be used. ESD should continue to develop and implement training and support for staff on the conditions policies, with clear messaging about the reasons and need for adoption. ESD should monitor the implementation of the policies by reviewing approval decisions at regular intervals – for example, at six-month intervals until the Department is satisfied that policies have become common practice in the Department.	3	3
2.7 Responsibility for post-approvals	ESD should move the responsibility for EPBC post-approval work from the Compliance and Enforcement Branch to the relevant EPBC assessment branches (see also	2	1

functions for environmental impact approvals	*Recommendation 2.5 (Outcomes focused conditions)* on reducing EPG's reliance on management plans in EPBC approvals including the Commonwealth initiating a working group with States and Territories on this issue). ESD should monitor the timeframes for approving management plans, and if there is a significant increase consider setting and publishing target timeframes for this process. The ESD executive should also note the importance of maintaining strong linkages between the assessment branches and the compliance areas to ensure gaps between these areas are not created or exacerbated.		
2.8 Making it easier to comply	EPG should assist the regulated community to comply with requirements by: • understanding the entity's operating environment (e.g. through internal 'expert' officer knowledge); • making requirements clear; • only requesting information that is necessary; • clearly explaining the reasoning behind requirements; • maintaining relationships through a single point of contact during licensing, permitting, or assessment processes, where possible; • utilising behavioural insights and analysis to identify friction points and remove barriers to compliance; and • actively seeking feedback from the regulated community about what would make it easier to comply.	2	3
2.9 Transparency and disclosure of information	EPG should proactively provide more information about its decisions and processes. The Department should formalise and commit to this approach (see also the *Proactive Engagement with Community Stakeholders* section in Chapter 6). Subject to privacy and confidentiality requirements, EPG should routinely publish key documents used to support decisions to help stakeholders understand the reasons for those decisions (for example recommendation reports for environmental impact	2	1

	assessments) and/or fact sheets or statements of reasons for decisions that are likely to be high profile or have a large degree of community concern. To address community concerns about the time taken for FOI requests, a fact sheet should be prepared for communities that explain the FOI process, the types of documents that can and cannot be provided, and the likely timing for the process. This could be illustrated through a case study.		
2.10 Intelligence	The Department should work with other environmental regulators to develop an approach to strategic intelligence. The Department should consider recruiting specifically for strategic intelligence skills and experience to drive this approach. The Department should invest in IT tools for gathering and analysing intelligence, including data sharing with other agencies (see also the *IT Systems* section in Chapter *4*). The Department should formalise its relationships with co-regulators, including in relation to routine data sharing (see also the *Working with Other Regulators* section in Chapter 6).	2	1
<td colspan="3" align="center">**Chapter 3: Our People**</td>
3.1 Skills and training	EPG and the Department should identify the specific skills and capabilities necessary for regulatory activities and incorporate these into a Capability Framework for regulatory officers. • Completion of the audit recommended by NOUS Group and the development of a similar process in WHaM may be an appropriate first step. This process should build on work done by the Clean Energy Regulator and the NSW EPA, who have previously developed systematic approaches to regulatory capability and training.	1	2

	EPG should develop a formal induction and training program for all regulatory staff, with specific content for Senior Executives and officers exercising regulatory powers. All Senior Executives with regulatory responsibilities should also complete the Australian and New Zealand School of Government (ANZSOG) intensive course 'Managing Regulation Compliance and Enforcement' intensive program. The capability and training programs should be integrated into staff performance agreements and development plans. In addition to formal training, EPG should explore informal development opportunities such as brown bag lunches, communities of practice, seminars, invited speakers, and establishing a mentoring program. This will facilitate the sharing of knowledge and experience and build a sense of common purpose among regulatory officers.		
3.2 Consideration of economic and social impacts	The Senior Executive should promote a culture within the Department of viewing all problems and proposed solutions through the prism of environmental, economic and social impacts (where this is legally allowable). EPG should develop guidance materials to assist staff in identifying when economic and social impacts should be considered, and how to adequately consider them.	2	2
3.3 Centralised support	EPG should centralise responsibility for coordination of training, regulatory policy, guidance, processes, and IT across both ESD and WHaM, in a Regulation Reform and Support Branch. This Branch should work closely with the General Counsel Branch and the Department's Governance Branch. The governance of the Branch should ensure that it reports to both FASes. This Branch should have responsibility for the following functions in relation to EPG: • **Coordination of regulatory capability and training.** This Branch would not provide all the training, but would be responsible for working across EPG and with the Department's central training areas to: - articulate the necessary skills and capabilities;	1	1

- identify priorities for, and gaps in training; and
keep track of who requires, and who has completed, training.

- **Coordination of regulatory policy, guidance and processes.** This Branch would:
  - develop a cohesive structure for policies, guidance material, templates and other business tools;
  - work with line areas, the General Counsel Branch and the Governance Branch, to prioritise the creation, maintenance and review of user-focused policies, templates, standard operating procedures and other guidance material to support staff in their regulatory activities (see *Recommendation 4.1 (Policies and Guidance Material*).

- **Coordination of IT**. This Branch would provide a point of contact, and coordination of IT between EPG and the IT Branch, but would not necessarily be responsible for managing or maintaining systems or databases (see *Recommendation 4.3 (Governance for IT Systems)*).

- **Coordination of delegations.** This Branch would also develop guidance on how and when delegations should be exercised. A central register of delegations would also be managed by PAID (see *Recommendation 3.8 (Delegations and Accountability)*).

- **Coordination of risk management** (see *Recommendation 5.1 (Risk Management Framework)*).
- **Coordination of engagement** (see *Recommendation 6.6 (Speaking with a Single Voice)*).

- **Networking with other states and regulators about regulatory practice (**see *Recommendation 6.4 (Working with Other Regulators)*).

- **Coordination of staff secondments** (see Recommendation 3.5 (Linkages*)*).

- **Coordination of performance monitoring and reporting** (see *Recommendation 1.2 (Performance Monitoring and Communication)*).

	• **Innovation and continuous improvement practices** (see *Recommendation 1.4 (Continuous Improvement)* and *Recommendation 3.7 (Innovation)*). • **Coordination of the implementation of the recommendations in this Report.**		
3.4 Compliance functions	EPG should proceed with the establishment of the Office of Compliance and Enforcement, which should include all of EPG's compliance functions. Prior to consolidation, EPG should use working groups to develop a clear understanding of the appropriate compliance approach for each scheme and the division of informative programs and compliance activities between the subject matter area and the Office of Compliance and Enforcement. EPG should develop formal and informal mechanisms to maintain linkages between subject matter areas (such as wildlife trade) and the Office of Compliance and Enforcement. This should be done prior to implementation of this structural change. For recommendations on how these linkages can be established and maintained, see *Recommendation 3.5 (Linkages)*.	2	1
3.5 Linkages	EPG should develop formal and informal mechanisms to increase collaboration and understanding across the two Divisions. For example, EPG could: • establish a formal staff rotation or staff swap program within and between the two Divisions, and with other regulatory agencies; • establish hubs, forums, or communities of practice to provide an opportunity for staff to gain an understanding of the work and underpinning values of other areas of the Department; • seek opportunities to form short-term working groups to collaboratively solve problems; and • establish appropriate cross-Divisional meetings – such as the ESD-WHaM board meetings and the Regulatory Advisory Panel. These initiatives all require strong commitment from the Senior Executive.	1	2

	EPG should consider the impact of structural changes on linkages, and place particular emphasis on maintaining those connections which are not naturally supported by a chosen structure. EPG should work with the General Counsel Branch, the Compliance and Enforcement Branch, and other specialist areas to identify the circumstances in which specialist advice should be sought. This should be reflected in Standard Operating Procedures, templates and guidelines. EPG should map statutory timeframes to ensure that adequate time is built into the assessment process to obtain specialist advice where necessary. Consideration should be given to identifying the appropriate use of statutory powers to extend timeframes in order to ensure more robust decisions. EPG should request input from specialist areas at an early stage. Where appropriate, specialists should be included in a 'project team' for particularly high risk or sensitive projects. Where advice is not useful or acted on, prompt feedback should be provided to the relevant specialist.		
3.6 Change management	Senior Executive should adopt a more consistent approach to two-way engagement with staff in times of change. This needs to involve a consistent and clear message about vision and direction, as well as the reasons for the change. EPG Senior Executives should make the 'big decisions', but consult with staff about the best way to implement the details. EPG should allow more time and resources to support the implementation of new policies and approaches. This may require slowing down the rate of change to bed down existing policies. EPG should seek volunteers to act as change agents. These would be people who are willing to take on some additional responsibility, with appropriate training, to assist and	2	2

	guide their colleagues through change and be conduits between staff and management. This could be modelled on the approach taken by the Australian Taxation Office. If the changes in *Recommendation 2.7 (Responsibility for post-approvals functions for environmental impact approvals)*, *Recommendation 3.3 (Centralised support)* and *Recommendation 3.4 (Compliance functions*) are made, EPG should allow a reasonable time to bed them down and fully evaluate their effectiveness before further structural change.		
3.7 Innovation	EPG should continue to maintain a focus on innovation. EPG can enhance its support for innovation by: • further promoting a culture of innovation; • providing reference and guidance material to staff in relation to available regulatory responses and when they can be used; • establishing small, ad hoc cross-divisional working groups to solve regulatory problems or develop and implement new initiatives; and • learning from and working with other regulatory agencies (see also the *Working with other regulators* section in Chapter 6).	2	2
3.8 Delegations and accountability	The Department should establish a central registry of delegations, and allocate responsibility for its maintenance to one area (such as the Governance Branch in PAID). EPG should develop guidance on how and when delegations relevant to EPG should be exercised. EPG should determine appropriate review and clearance procedures for decision-making, minimising the points of review to avoid diluting accountability.	3	3
3.9 Regulatory capture	The Department should openly discuss the risk of corruption and regulatory capture. The importance of this should be reinforced by the Senior Executive. A formal program	2	2

	for rotation of staff (see *Recommendation 3.5 (Linkages)*) would assist with reducing potential for regulatory capture. The Department should consider appropriate oversight of regulatory decision making, to reduce the risk of regulatory capture. This would normally involve 'sign-off' by two people.		ongoing
Chapter 4: Our Systems and Tools			
4.1 Policies and guidance material	The responsibility for the coordination and management of all regulatory policies and guidance material across ESD and WHaM should be given to a single support team within the proposed new Regulation Reform and Support Branch in EPG (see also *Recommendation 3.3 (Centralised Support)*). This Branch should develop a cohesive structure for policies, guidance, templates and other business tools. The Branch should then work with line areas, the General Counsel Branch and the Governance Branch in PAID to prioritise the creation, maintenance and review of user-focused policies, templates, standard operating procedures and other guidance to support staff in their regulatory activities. These tools should be made available online in a single location that is kept up to date (and eventually should be linked to relevant workflow systems). As a high priority, the Branch should progress the review and updating of the environmental impact assessment manual, and publish it on the intranet.	1	1
4.2 IT systems	As a high priority, the Department should bring forward investment in an integrated end-to-end IT system to improve its reliability, effectiveness and efficiency. An ideal IT system for the Department's regulatory functions would include: • end-to-end workflow management (pre-referral to compliance); • automatic extraction of data from source databases;	1	1

	- quality assurance checks throughout the process, including trigger points for specialist advice and checks for appropriate delegations; - online links to relevant policies and guidance material and training at appropriate points in the process; - the ability to compile briefing material; - time management with prompts; - archival storage and access; - an ability to share and mine data using multiple search criteria (both internally and externally); and - better tools for intelligence gathering and data analytics. The Department should learn from systems developed by other regulators including the NSW and Victorian EPAs. The NSW EPA has offered to share its experiences to help incorporate lessons learnt into the Department's IT planning. The Clean Energy Regulator and the ATO have also offered to work with the Department to share their experiences.		
4.3 Governance for IT systems	The recommended Regulatory Reform and Support Branch (see *Recommendation 3.3 (Centralised Support)*) should have responsibility for coordinating the management of regulatory business systems and coordinating and providing input to the IT Branch. This Branch would not be responsible for developing or procuring IT systems, but would be a central point of contact for the IT Branch and line areas to ensure new systems meet business needs and are integrated with training and support materials. The Department should continue the use of the Environmental Regulation Capabilities Steering Committee as a senior body for resolving issues associated with development and implementation of regulatory IT systems. The Assistant Secretary of the proposed Regulation Reform and Support Branch should be a member of this Committee.	1	1
	Chapter 5: Our Approach to Risk		

5.1 Risk management framework	The Chief Risk Officer should: • review the Risk Management Framework, including supporting policies and tools; • consider adopting more adaptive and flexible tools and approaches to support risk assessments; • work with Divisions and Groups to help them develop meaningful and targeted risk appetites; and • communicate and provide training to ensure that staff understand their roles and obligations in relation to risk management. The Senior Executive should consistently communicate and reinforce risk management principles and appetites.	2	2
5.2 Risk assessment and resource allocation	The revised framework from Recommendation 5.1 (Risk management framework) should support consideration of risk across EPG and the Department, as well as managing the risks of individual projects. EPG should work with the Chief Risk Officer to continue to develop tools for systematically analysing risk between and across all of its regulatory activities. EPG should investigate opportunities to develop risk-based approaches to assessing and licensing activities for each regulatory function. This should include developing clear guidelines about the process for managing projects with each risk rating. The relevant assessment areas, the Compliance and Enforcement Branch, and the General Counsel Branch should develop these guidelines collaboratively, to ensure they are robust. The Chief Risk Officer should assist EPG and the Department to identify risk priorities and facilitate the allocation of resources proportionately. This includes allocation of resources across the Department, as well as within and between Divisions, Branches and Sections.	2	3 ongoing

5.3 Resource levels	The Department should strive to maintain or increase staffing levels within EPG. The Department should clearly communicate to the Government the risk of regulatory failure associated with any further staffing reductions. The Department should consider increasing resourcing for EPBC monitoring activities, or working with states and territories to pool resources so that a larger proportion of high risk projects can be actively monitored (see also Recommendation 2.3 (Compliance and enforcement) and Recommendation 6.4 (Working with other regulators)).	1	ongoing
5.4 External communication of risk	The Chief Risk Officer should consider how best to communicate the Department's risk approach externally. For example, it may be beneficial for a broader explanation of the Department's risk approach to be made publicly available and for tailored information to be provided for specific regulatory functions (such as risk-based allocation of resources for assessment and compliance functions). The Department should consider the approach taken by the Clean Energy Regulator and the ATO in developing this approach.	2	2
5.5 Intelligence	The Department should adopt intelligence gathering and analysis to inform its risk management approach.	2	3
Chapter 6: How We Engage			
6.1 Understanding regulated industries	EPG should establish a group of industry or stakeholder experts. Each 'expert' would be an internal source of information and intelligence on particular stakeholders or industries. This would be recognised in the work allocation for the officer. These officers could undertake a range of formal and informal training activities to improve in their	2	2 ongoing

	understanding of the operating context of key industries, as well as the broader regulatory, social and economic pressures they face.		
6.2 Reducing the burden of information requests	EPG should assist reduce the burden associated with information requests by: • making requirements and/or requests clear; • only requesting information that is necessary; • clearly explaining the reasoning behind requirements and/or requests; and • maintaining relationships through a single point of contact during licensing, permitting, or assessment processes, where possible. *Recommendation 2.8 (Making it easier to comply through consistent and proactive stakeholder engagement)* relates to improving the Department's programs that assist stakeholders to better understand the Department's requirements, including by using behavioural insights.	1	2
6.3 Proactive engagement with community stakeholders	EPG should ensure that it routinely engages with relevant stakeholders during all phases of the design and implementation of regulatory processes. This should be reflected in the relevant regulatory framework (see *Recommendation 1.1 (Regulatory Framework)*). EPG could improve stakeholder relations and trust by establishing a policy roundtable comprising NGOs, industry, professional organisations (e.g. EIANZ) and academics to co-identify and co-design policy initiatives. This roundtable would also be a useful mechanism to review and evaluate policies and further understand the operating environment of stakeholders. EPG should identify the purpose and desired outcome of each proposed consultation and make this clear to the stakeholder. For example, officers should be up front about whether they are explaining a new policy and its rationale, or whether there is scope for the stakeholder to influence the policy.	2	3 ongoing

6.4 Working with other regulators	The Department should increase engagement with other Commonwealth and state regulators to build its regulatory capability. This could include building stronger bilateral relationships with other regulators, for example through staff exchanges, secondments, or ad hoc or standing working groups. The Compliance and Enforcement Branch should continue working to develop more systematic arrangements with Border Force. These should be formalised through an updated MOU. The Department should develop similar arrangements with other co-regulators. The Department should develop a more consistent and systematic approach to appointing authorised officers from other state or Commonwealth agencies. EPG should work with relevant state and territory co-regulators to agree on cooperative approaches to monitoring and compliance activities for shared areas of responsibility. This should include sharing supporting information such as briefs etc. EPG should provide additional support and guidance to embedded officers working with state and territory governments, in particular: • clarify roles with the embedded officer and the relevant agency with respect to the amount of assistance provided on assessments; • monitor performance at regular intervals; and • facilitate regular meetings between the Department, the embedded officer and the relevant agency. EPG should routinely share key assessment documentation with co-regulators (such as state and territory agencies).	2	2
6.5 Engaging with communities of practice	The Department should increase engagement with relevant communities of practice to build its regulatory capability. This could include: • further engagement with Commonwealth forums (such as those managed by PM&C) and national forums such as AELERT and EIANZ; and	3	2

	• convening ad-hoc working groups with states and territories and/or other Commonwealth regulators to consider particular issues.		
6.6 Speaking with a single voice	EPG should work with the Policy and Communication Branch in PAID to develop a broad communication strategy for EPG. This should focus on identifying the most effective engagement options given limited resources. In the longer term, this policy should also map stakeholders across EPG and the Department to allow a more coordinated approach to engagement. EPG should record all relevant information about its interactions with stakeholders (i.e. meetings, phone calls, e-mails, inspections) and make this information available to all relevant officers to improve corporate memory, inform intelligence and analysis, support an accurate understanding of the operating environment of the regulated community, and support risk management (see also the *Strategic Risk Assessment* section and the *Resource Allocation* section in Chapter 5). In conjunction with intelligence, EPG should also use this information to target and prioritise stakeholder engagement and inform strategies.	3	2
	EPG should establish designated points of contact for key stakeholders (not necessarily the stakeholder expert from *Recommendation 6.1 (Understanding Regulated Industries)*). Those officers should: • be a first point of contact; • have a general understanding of the interests of the stakeholder; • advise the stakeholder about any relevant new policies or other information; • facilitate effective transfer to another person if more specific information is required; • proactively facilitate any proposed transfer of responsibility to another person; and • be a general problem solver for the stakeholder.	1	2

	EPG should endeavour to maintain single points of contact during licensing, permitting, and approvals processes to maintain and improve working relationships with proponents and state governments.		

BACKGROUND

WHAT IS REGULATION?

Regulation can be defined broadly as a means of achieving the Government's desired outcomes or more narrowly as rules set by a government authority where there is an expectation of compliance[1]. The Project prefers the broader definition as it encourages problems to be identified and understood from a broad perspective. It also allows consideration of the widest range of potential solutions, increasing the chance of success at least cost.

The purpose of regulation is to influence the behaviour of businesses and the community to achieve a desired outcome, whether it is to provide public safety, establish optimal conditions for productivity, or protect public goods from threatening processes which the market has failed to take into account. There can be many types of regulation, depending on the outcome and the appropriate tool, such as legislation, regulations, quasi-regulations (e.g. industry standards and codes of practice), industry and/or government agreements, accreditation schemes, and international treaties wherein the Australian Government is a signatory.

WHAT IS 'REGULATORY MATURITY' AND BEST PRACTICE?

Regulation has become a critical feature of contemporary economies and societies. As the OECD points out, regulation "underpins markets, protects the rights and safety of citizens, and their property, and assists the efficient and equitable delivery of goods and services."[2] In recent years there has been increased concern about poorly-implemented regulation. Where this occurs, unnecessary burden is placed upon businesses and the community. Where regimes are unnecessarily complex, duplicative or implemented poorly, the flow-on effects are felt by both the regulated community and the regulator.

Around the world, there is growing recognition of a regulatory craft and the need for regulatory maturity. Regulators and academics are developing a greater understanding principles and approaches to regulation that are more likely to achieve the desired outcome, reduce impacts on regulated communities and maintain the trust of the community. This requires a much greater understanding of the regulated communities and their operating context.

Becoming a mature regulator is an ongoing journey rather than an end point. A mature regulator:

- understands its operating environment and strives for continuous improvement;

- understands the complexity of regulation and strives to undertake its mandate in the most efficient and effective manner possible;

- embeds the principles of regulatory best practice in all of its activities;

- has clearly defined objectives and a defined regulatory philosophy and approach;

---

[1] Department of Prime Minister & Cabinet (2014). *The Australian Government Guide to Regulation*.

[2] OECD (2011). *Regulatory policy and governance: Supporting economic growth and serving the public interest*, http://www.oecd.org/gov/regulatory-policy/regulatorypolicyandgovernancesupportingeconomicgrowthandservingthepublicinterest.htm

- has a strong culture and leadership;

- builds and maintains a regulatory toolbox of a range of incentives and disincentives to achieve desired outcomes;

- has a problem-solving approach that utilises the best tools for the job at least cost;

- manages risk effectively;

- has a well-trained workforce;

- has the right businesses systems and processes to function efficiently and effectively;

- is a consistent and proactive two-way engager with stakeholders;

- is flexible and agile; and

- organises resources around problems and tasks rather than the traditional model of simply allocating tasks to particular work areas.

THE VALUE OF ENVIRONMENTAL REGULATION

In moving to become a mature regulator, it is important for the Department to develop a strong regulatory identity and to understand and promote internally and externally the role and benefits of the legislation it administers. This is particularly important where there are a range of community views about the relative priority of competing interests (such as biodiversity protection and development).

Environmental regulation is a contested and politically sensitive space, with members of the community holding a range of views about the appropriateness of, and necessity for, environmental regulation. While some areas of the community argue that current environmental regulation is an insufficient response to issues such as the complex and multi-faceted problem of biodiversity decline, other stakeholders argue that the costs imposed by environmental regulation outweigh the perceived benefits it achieves.

One traditional argument from economists is that export industries are put at a disadvantage to their foreign competitors[3] if the stringency of environmental policies differs between countries.[4] Such arguments have the potential to foster unproductive relationships between the Department and the regulated community, which can impede the ability of the Department to administer the Government's legislation effectively and efficiently. This can also lead to the lowest common denominator of environmental standards.

However, regulation, and government policy intervention more broadly, is very important in cases of market failure - where private costs and benefits differ from social costs and benefits. When market failures exist, regulation by government can lead to more efficient outcomes and can provide incentives to maximise the net benefit to society.

Market failure primarily results from poor definition of property rights, and is exacerbated by lack of data or information, lack of awareness, few available alternatives, and failure to cost and manage impacts such as environmental degradation.

---

[3] Grantham Research Institute (2014) *Impacts of Environmental Regulation*.
[4] Ibid.

All of these market failures are apparent in the area of environmental policy and it is clear that overall community benefits of sustainable management of the environment cannot be achieved without regulation.

In 2009, CSIRO estimated the value of Australia's ecosystems; its air, water, forests, flora and fauna at more than $1,300 billion per year. Environmental regulation plays a critical role in balancing the protection of that asset against other social and economic interests.

There is no doubt that poorly designed and implemented regulation can place unnecessary administrative burden onto both business and regulators. But well-designed and implemented environmental regulation can drive innovation, which can reduce costs for industry and business.

There is now significant evidence from international research that good environmental regulation does not impede overall competitiveness and economic development.[5] The costs of complying with environmental regulations represents a relatively small share of production value for most sectors,[6] and environmental regulations often create pressures that drive innovation and alerts business about resource inefficiencies and new opportunities.[7] This innovation can partially or even fully offset the costs of complying with regulations.[8]

A 2005 report by the Network of Heads of European Environment Protection Agencies[9] demonstrates that '*countries with high environmental standards often have market leading firms and record better economic performance than those with lower standards'* because those environmental standards stimulate innovation in the companies selling environmental solutions, and the companies needing to comply with regulations.

The Organisation for Economic Cooperation and Development has also asserted that strong environmental regulation has a positive impact on the competitiveness of export driven industries such as agriculture, mining and tourism, because those industries tend to rely on a positive environmental image internationally.[10]

Well-designed and implemented environmental regulation can also:

- Reduce business risk and increase the confidence of the investment markets and insurers.[11] When members of society are confident that the environmental impacts of a project are being appropriately managed, there is less likelihood that those projects will be the subject of community outrage or legal challenge;
- Improve the health of the workforce and the wider public.[12]
- Protect the natural resources on which business and the community depend.[13]

---

[5] Network of Heads of European Environment Protection Agencies (2005) *The Contribution of good environmental regulation to competitiveness.'*
[6] Grantham Research Institute (2014) *Impacts of Environmental Regulation.*
[7] Network of Heads of European Environment Protection Agencies (2005) *The Contribution of good environmental regulation to competitiveness'*
[8] Porter and Van der Linde (October 1995) *"Green and Competitive: An underlying logic links the environment, resource productivity, innovation, and competitiveness",* Harvard Business Review.
[9] Network of Heads of European Environment Protection Agencies (2005) *'The Contribution of good environmental regulation to competitiveness'*
[10] OECD (2014) *Empirical Evidence on the Effects of Environmental Policy Stringency on Productivity Growth.*
[11] Network of Heads of European Environment Protection Agencies (2005) *The Contribution of good environmental regulation to competitiveness'*
[12] Ibid.
[13] Ibid.

As is evident here, well-designed and well implemented environmental regulation has an important role to play in society, and the Department should embrace its regulatory functions.

By understanding and promoting the value of good environmental regulation, the Department may be able to garner greater 'buy-in' from the regulated and broader community, allowing the Department to more efficiently and effectively administer the Government's regulatory regime.

THE REGULATORY ROLES OF ESD AND WHAM

The Environment Standards Division (ESD)

ESD is a relatively new division in Department. It comprises two former divisions; Environment Assessment and Compliance (**EACD**) and the Environment Quality (**EQD**) divisions, which merged in mid-2015. ESD deals with the themes of air pollution, air quality, biotechnology, chemicals, conservation of materials, conservation of domestic water use, hazardous waste, Matters of National Environmental Significance (**MNES**) and sea dumping.

ESD's focus is on reducing risk to human health and the environment. It does this by reducing pollution through the implementation of national frameworks, standards, regulations, monitoring, and reporting for wastes, hazardous substances, air pollutants, ozone depleting substances and synthetic greenhouse gasses. It also conducts assessments of projects under the EPBC Act, including individual projects and Commonwealth strategic assessments. Other regulatory activities include various licensing and permitting, inspections, and compliance and enforcement under the EPBC Act.

In addition to its regulatory business, ESD also works on the development of strategic policy, is continuing the implementation of the Government's One Stop Shop policy, legislative development and divisional support units such as the Data and Information Management Section.

The Wildlife, Heritage & Marine Division (WHaM)

A significant part of WHaM's work involves the assessment and listing of various Matters of National Environmental Significance under the EPBC Act - ranging from heritage sites to threatened species and ecological communities. Other regulatory activities include preparing, implementing and reviewing recovery plans, managing Part 13A of the EPBC Act surrounding the international regulation of Wildlife Trade under the Convention on International Trade in Endangered Species (**CITES**), administration of the Historic Shipwrecks Act, assessing the performance and promoting ecologically sustainable management in Commonwealth and state and territory managed fisheries and finally case management and reform of the *Aboriginal and Torres Strait Islander Heritage Protection Act.*

In addition to CITES, WHaM also implements and manages a number of the Department's international obligations and programs, including the World Heritage Convention, the Kokoda Initiative, the International Whaling Commission, the Coral Triangle Initiative and other regional and international programs concerning heritage, ecosystem and marine issues.

WHaM is also responsible for leading environmental biosecurity policy, developing and implementing National and Commonwealth heritage policy and providing advice on MNES to assist with statutory decisions under the EPBC Act.

Key Linkages

ESD and WHaM have a number of critical linkages with each other. In particular WHaM is responsible for listing, and providing expert advice about, protected matters (such as listed species and heritage places) that are the subject of environmental impact assessments undertaken by ESD. In addition the Compliance and Enforcement Branch in ESD performs a range of compliance and enforcement functions across the Department, including for areas in WHaM.

Both ESD and WHAM have critical linkages with other areas of the Department in order to support their activities. These include, but are not limited to, the Environmental Resources Information Network (**ERIN**), the Office of Water Science (**OWS**), Parks Australia, the Biodiversity Conservation Division, as well as corporate support areas such as the General Counsel Branch, Policy Analysis and Implementation Division, Science Division and the Information Technology Branch.

Chapter 1: Our Objectives and Performance

<div style="border: 1px solid black;">

OVERVIEW

A best practice regulator has a clear understanding of the objectives of the regulatory regime in which it operates. A best practice regulator articulates how it proposes to meet those objectives, the Government's expectations, and the way in which its performance will be evaluated and reported. This helps to determine internal priorities and processes and improves transparency and accountability. A mature regulator also embeds a process for reviewing and improving its activities as part of a continuous improvement strategy.

The Project found that the Department does not have an overarching regulatory posture, which makes it difficult to ensure a consistent approach across the various regulatory activities. While both ESD and WHaM have business plans, their KPIs could be made clearer and more measurable to allow better performance monitoring and evaluation. EPG has started to build in reviews to improve policies, but this needs be done systematically across EPG. There are also opportunities to improve regulatory governance structures.

Chapter 1 makes recommendations relating to EPG and the Department's objectives and performance management, including:

- development of a new Regulatory Framework;
- designing robust and measurable objectives and KPIs relating to regulatory activities;
- the establishment of an oversight body to consider the Department's regulatory policies and posture; and
- allocating resources for systematic monitoring, analysis and improvement.

</div>

FINDINGS AND RECOMMENDATIONS

Regulatory Framework

A best practice regulator should have clarity around its role and functions, and the outcomes it is trying to achieve.[14] Unless clear objectives are specified, a regulator may not have sufficient context to establish priorities, processes, and boundaries for its work. In addition, clear objectives are needed so the broader community can understand why the regulator is undertaking its work, and can hold the regulator accountable for its performance.

Collectively, these objectives and the framework for achieving the desired regulatory outcomes is often referred to as the 'regulatory posture' of an agency – a high level, consistent position on the purpose of the regulator and its objectives, and the approach it will take to achieve those objectives. It is important for this 'posture' to be entrenched in all levels of a regulator – it should form the basis for all planning and priority setting, the allocation of resources, risk management, and communication with external parties.

The Project found that an entrenched regulatory posture is not present in EPG or the wider Department, and there is often an inconsistent understanding of how the work of individual areas contributes to the broader objectives of the Department. This has the potential to lead to the inappropriate allocation of resources to work that is a low priority for EPG and the

---

[14] OECD (2014). *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy.

Department, and uncertainty in the regulated community (if inconsistent or divergent approaches are being taken by different areas).

Some areas have developed plans, such as the *Compliance Monitoring Plan 2013-2014*, which outlines objectives and discusses a regulatory posture. However, these are not maintained as part of a cohesive structure of Departmental regulatory strategies.

In moving to become a best practice regulator, the Department should develop an overarching regulatory posture, and express this in a Regulatory Framework. Developing a regulatory posture will be challenging, because EPG administers a wide range of regulatory schemes with differing ages and approaches.

The Project has prepared a one-page list of behavioural principles to guide the Department's regulatory efforts (refer to page 11). This could form the basis of a regulatory framework, with other documents (such as the Department's compliance strategy) referring back to these principles.

The Regulatory Framework should be frequently and effectively communicated and promoted internally at all levels. All Division, Branch or Section plans and strategies should incorporate the Department's objectives and desired outcomes, and staff should not only be aware of how their individual work contributes to those strategic objectives, but the objectives and desired outcomes should also be incorporated into performance agreements for relevant staff.

> **Recommendation 1.1 (Regulatory Framework)**
>
> *Importance:* 1
>
> *Timing:* 1
>
> The Department should develop a new Regulatory Framework. In developing the Framework, the Department should have regard to contemporary Australian Government and international best practice regulatory frameworks, principles and policies. The new Regulatory Framework should:
>
> - outline a concise, contemporary regulatory posture;
> - define the Department's principles of best practice and indicators for performance evaluation;
> - articulate regulatory and legislative objectives and the framework for measuring and tracking performance.;
> - articulate relevant risk appetites;
> - include regular review and improvement timeframes;
> - be published and promoted internally and externally; and
> - inform the development and maintenance of all plans and strategies relating to regulatory activities within the Department.

Performance monitoring and communication

Central to a regulator's operational effectiveness is a sound performance management framework. A performance management framework not only facilitates effective internal management of a regulator, but also enables the regulator to demonstrate to stakeholders that its operations conform to legislative requirements, are cost-effective, and are achieving the desired regulatory outcomes.

The Australian Government's performance measurement and reporting framework requires regulators to measure, monitor and report on their performance. Performance information systems should be designed to inform internal and external stakeholders about the performance of regulators' activities including whether the regulation is achieving the Australian Government's stated policy objectives, the costs associated with administering the regulation and the cost of compliance for regulated entities. This is generally achieved through regulators' annual reporting to the Parliament.

To allow for this process, a best practice regulator should develop a comprehensive set of meaningful performance indicators, set with reference to the goals it is expected to achieve.

In addition to formal reporting to the Parliament, best practice regulators also tend to publish performance information more frequently on their websites. A clear description of what the regulator can and will do, with regular monitoring and reporting against established benchmarks may assist in managing stakeholders' expectations and assessing operational performance.

For example the Clean Energy Regulator includes a simple statement of its strategic direction on its website, with objectives, strategies and indicators for success.[15] The Victorian EPA has also published a five year plan, with high level principles and objectives and cascading priorities and strategies.[16]

The Project found that setting objectives and monitoring performance are carried out inconsistently within EPG. For example, there are very few well defined regulatory performance measures in the ESD and WHaM Division Plans, and milestones are also not sufficiently clear to enable effective monitoring review and correction over time if necessary. The Department's corporate plans also only contain limited references to regulatory objectives and performance measures.

Further, the Department does not compare well to other mature regulatory agencies in relation to communicating its performance.

In moving to become a mature regulator, it will be important for the Department to develop robust and measurable objectives and KPIs relating to its regulatory activities. These should be based on, and consistent with, the objectives and desired outcomes outlined in the Regulatory Framework (see *Recommendation 1.1 (Regulatory Framework)*). The new regulatory oversight body (see *Recommendation 1.3 (Governance)*) should have oversight of the development of regulatory KPIs, and the framework for measuring performance against them.

Recommendation 1.2 (Performance monitoring and communication)

Importance: 2

Timing: 3

The Department and EPG should develop robust and measurable objectives and KPIs relating to its regulatory activities. These should be developed, published and monitored, and included in performance agreements for relevant staff. The Department should

---

[15] http://www.cleanenergyregulator.gov.au/About/Our-strategic-direction
[16] http://www.epa.vic.gov.au/~/media/Publications/1403.pdf

communicate results of monitoring to staff, with open discussion about lessons learned and opportunities for improvements.

KPIs should be developed having regard to:

- the problem they are addressing;
- the desired outcome;
- how the Department will know when they are achieved;
- how, and how often, they will be monitored;
- what milestones need to be met to know that the Department is on track;
- how the Department will make corrections along the way; and
- how, and how often, performance will be communicated internally and externally.

The Department and EPG should clarify who has responsibility for monitoring KPIs and making any necessary adjustments.

The Department and EPG should seek feedback from stakeholders on its performance, and use this feedback to make improvements. The Department should publicly report on its performance to address stakeholder concerns (see also the *Transparency and disclosure of information* section in Chapter 2, and the *Proactive engagement with community stakeholders* section in Chapter 6).

Governance

Best practice regulators have clear governance structures to ensure that regulatory activities and policies are administered consistently and appropriately across the organisation.

The Project found that there is no standard process for developing or approving policy guidance within the Department. Further, beyond the decision-making processes in EPG, and the Department's Executive Board, the Department does not have a body for making strategic decisions about regulatory issues, policies and guidance at a Departmental level.

In May 2015, the Department established a Regulatory Advisory Panel which is made up of the Department's General Counsel, the Assistant Secretary of the Compliance and Enforcement Branch, and an external party (currently the Chief Risk Officer who recently replaced the Assistant Secretary of the Analysis Branch in PAID). While relevant branch heads from WHaM, ESD and other relevant areas of the Department have a standing invitation to participate in the Panel, in practice they rarely attend.

The Regulatory Advisory Panel is a useful tool for creating greater consistency in regulatory activities, but it is not a statutory decision-making body. It currently relies on the voluntary referral of relevant issues in a timely way, which is not consistently done. The Regulatory Advisory Panel's terms of reference include a broad range of regulatory issues, but it is currently highly operationally focused on compliance and enforcement issues.

To ensure greater consistency in the Department's strategic regulatory approach (as opposed to the operational approach overseen by the Regulatory Advisory Panel), the Department should consider forming a separate oversight body, a Regulatory Steering Committee, that can discuss and debate matters such as the Department's regulatory priorities and posture, and the appropriate allocation of resources. This body should also have oversight, including clearance, of regulatory policies and major pieces of public guidance.

Recommendation 1.3 (Governance)

Importance: 1

Timing: 1

The Department should establish an oversight body to consider the Department's regulatory policies and posture; and to have oversight of regulatory issues, policies and major pieces of public guidance. This body could be referred to as the Regulatory Steering Committee, and should be chaired by the Deputy Secretary of EPG, and include First Assistant Secretaries from ESD and WHaM, and appropriate representation from other regulatory areas such as Parks Australia, and the Australian Antarctic Division. Heads of the General Counsel Branch and the Compliance and Enforcement Branch, as well as the Chief Risk Officer, should also be involved in an advisory capacity. The Department should consider whether other portfolio regulators should be involved in the Committee.

Importance: 2

Timing: 1

The Regulatory Advisory Panel should continue to operate as a sub-committee of the Regulatory Steering Committee with particular focus on specific compliance and enforcement matters.

Consideration should be given to formalising the matters that should be brought to the Regulatory Advisory Panel and the Regulatory Steering Committee, and reflecting this in 'trigger points' in Standard Operating Procedures and guidelines.

Continuous improvement

Best practice regulators implement continuous improvement practices, including reviewing and improving new initiatives following implementation. Staff in EPG are generally aware of the relationship between policy and regulation, however the Project found that continuous monitoring, review and revision of specific policies was not historically common practice. As such, it has often been difficult to measure the impact and success or failure of specific policies. EPG has started to make improvements in this area in recent months, with policy and regulatory areas in ESD working more closely to review and adapt or improve specific policies as they are implemented.

The administrative problems with the Shree and then Carmichael approval decisions demonstrate that EPG did not initially adequately address the underlying problem with the Shree approval decision. The approach of using a cross divisional team to develop and test systematic improvements following the Carmichael decision is more comprehensive and robust, demonstrating a greater commitment to continuous improvement (although the new business system itself is still subject to human error, which will be reduced if, and as, the IT system is enhanced (see *Recommendation 4.2 (IT systems)*).

The Project notes that the Department is working to better embed evaluation and improvement into its work. The Evaluation Unit within PAID was established to provide advice, support, and

guidance on planning, designing and conducting evaluations; and to coordinate the Department's performance measures.

Recommendation 1.4 (Continuous improvement)

Importance: 2

Timing: ongoing

EPG should continue to develop and promote a culture of continuous improvement (see also *Recommendation 3.7 (Innovation)*).

EPG should plan and allocate resources for systematic monitoring, analysis and improvement (where necessary) of all regulatory policies and initiatives in consultation with relevant specialist areas.

EPG and the Department should support ongoing business improvement activities and performance assessments, including testing of changes to business systems (see also *Recommendation 3.6 (Change management)*).

Chapter 2: Our Approach to Regulation

OVERVIEW

A mature regulator uses the right regulatory tools, makes it simple for regulated entities to comply, has sophisticated mechanisms for problem-solving, is transparent, and uses intelligence to guide its activities.

EPG recognises the need for innovation in its approach to regulation and a number of initiatives are already underway. However, there are currently a number of barriers limiting EPG's regulatory capability, including resourcing and legislative limitations, and inconsistency across EPG in the way regulatory activities are undertaken.

Chapter 2 makes a range of recommendations for aspects of EPG's assessment, conditioning, compliance and enforcement activities, including:

- enhancing problem solving and broadening the regulatory and compliance tools used by EPG;

- reducing reliance on management plans;

- helping regulated entities to comply with obligations;

- publishing more information about policies and decisions; and

- further developing EPG's intelligence capability.

FINDINGS AND RECOMMENDATIONS

The value of good regulation

As discussed in the *Background Section*, best practice regulators have a clear understanding of the role and benefits of their regulatory regimes, and they communicate these effectively within and outside the organisation. This is particularly important where there are a range of community views about the relative priority of competing interests (such as biodiversity protection and development).

Internal and external feedback received during the Project revealed a shared perception that environmental regulation is undervalued in the Department and by some areas across the Government and broader community. For example, some staff in EPG noted that internal and external language focused significantly on 'deregulation' as opposed to 'better regulation', and this appears to have had a negative cultural and morale impact on staff in regulatory areas.

Several regulatory officers commented that they felt their regulatory work was not as valued by the Department as policy work. This has been underscored by reductions in staff and training in regulatory areas (though reductions in resourcing have occurred across the Department and the Australian Public Service). Staff noted that they felt that when the Department describes itself in corporate documents, such as the Department's strategic plan, it places greater emphasis on its policy and scientific roles than on its regulatory role.

The Project found that regulatory officers do not feel adequately equipped to best to manage seemingly competing pressures for best practice regulation, deregulation, efficiency gains, and

reduction in resources, while also improving environment protection, implementation of legislation, compliance and enforcement, stakeholder engagement and many other new initiatives and priorities. Recommendations throughout this Report will assist with balancing these priorities.

Recommendation 2.1 (The value of good regulation)

Importance: 2

Timing: 2 and ongoing

The Department and EPG should regularly communicate and emphasise the importance of good environmental regulation both internally and externally (see also the *Value of Environmental Reregulation* section in the Introduction).

Understanding regulation and using the right tools

Mature regulators take an expansive view of regulation, as a broad suite of measures used flexibly to achieve the relevant objective.

Mature regulators use a dynamic problem-solving approach to address identified problems. This involves having a clear and shared understanding of the problem to be solved, examining the causes and effects, analysing possible responses and identifying the best tool, or range of tools, to address it. Mature regulators build large 'toolboxes' of available regulatory responses, and ensure relevant staff are aware of all regulatory tools available for them to use. Mature regulators recognise the continuum between policy and implementation and maintain two-way communication with systematic monitoring of, and continuous improvement to, regulatory responses (see the *Performance Monitoring and Communication* section and the *Continuous Improvement* section in Chapter 1).Mature regulators recognise when a problem has been solved, and refocus resources on the next problem.

This approach, promoted by Dr Malcolm Sparrow[17], acknowledges that a 'one-size-fits-all approach' creates inefficiencies and can fail to deliver regulatory objectives. Regulators that use sophisticated problem-solving methods are more tactical, effective and resource-efficient. This approach requires an understanding of the full suite of potential regulatory responses and is significantly improved with the availability of robust data and intelligence (see the *Intelligence* section later in this chapter). Importantly, this also requires a flexible approach to the allocation of human and other resources to each task, noting that the appropriate resources will change with each new issue.

Consultation with staff across EPG revealed that officers do not have a shared understating of regulation, with many viewing it more narrowly as legislative licensing or permitting schemes.

There is recognition across EPG of the importance and benefit of creative problem-solving and regulatory innovation. Consistent with Government policy, the Department routinely develops Regulatory Impact Statements for new policies and initiatives with regulatory impacts. These statements require the Department to define the relevant problem, and they encourage staff to consider a range of policy options for addressing it. This encourages problem based policy

---

[17] See Sparrow, Malcolm (2008) *The Character of Harms* and; Sparrow, Malcolm (2000) *The Regulatory Craft.*

development and builds an understanding of the initiative's net benefit at the beginning of the policy process.

Despite this analysis, EPG uses a relatively limited range of regulatory tools, and in particular tends to use 'command and control' approaches.[18] Staff indicated that this is often due to legislative limitations. For example, much of the current legislation administered by EPG is prescriptive and lacks flexibility to adopt the most effective approach to achieving the objectives. Staff also noted that resourcing and time restrictions, and a lack of understanding of the full range of potential regulatory responses has limited analysis and creative responses to challenges. In moving to become a mature regulator, EPG and the Department should further expand its regulatory 'toolbox', and ensure that relevant staff are aware of all regulatory tools available to them, and the circumstances in which they should be considered. The Project has prepared a list of regulatory tools at **Appendix 4** that the Department should consider including in its 'toolbox' of available regulatory responses.

While there are a number of innovative approaches under development across EPG, EPG does not have a systematic approach for monitoring the effectiveness of its activities or identifying new issues and building innovative responses.

Recommendation 2.2 (Understanding regulation and using the right tools)

Importance: 1

Timing: 2 and ongoing

EPG should use objectives, strategies and training to articulate that regulation is a broad suite of measures that should be used flexibly to achieve the objectives of the legislation. EPG should also acknowledge the continuum between policy and regulation, with constant two way communication between those developing policy and those implementing it.

The Department should build and maintain a regulatory toolbox of legislative, policy, economic, informative, public reporting and other incentives or disincentives to achieve desired outcomes.

The Department should look for opportunities, both within the current legislative framework and through future legislative amendments, to use innovative approaches to achieve the relevant objectives, such as self-certification, third party certification and co-regulation. The Department should however be cautious of relying on full self-regulation as this is often not accepted by the community and there are many examples of serious failures across regulatory agencies where this has been adopted.

The Department should ensure that relevant staff are aware of all regulatory tools available to them, and the circumstances in which they should be considered.

Any future review of legislation should:

- include an analysis of all potentially available incentives and disincentives to achieve desired policy outcomes;
- provide flexibility in the legislation for the Department to adopt the most cost effective regulatory approach in each case;

---

[18] The direct regulation of an industry or activity by stating what is and is not permitted.

- make greater use of regulations and other subordinate instruments to set out the detailed requirements. This can provide more flexibility of approaches to solve problems as it can be amended more readily to respond to new technology or information and changes in Government policy and priorities.

The Department should expand the problem-solving working groups established in ESD to cross-divisional working groups, coordinated by an SES officer, to explore innovative approaches to achieve desired legislative outcomes. These working groups should be multi-disciplinary and strive to analyse problems and devise creative and effective solutions. These groups should:

- be limited to the scope of the current legislation; and
- not be limited to compliance and enforcement, but include upfront incentives and disincentives.

The Senior Executive should build-in resources and time to properly analyse regulatory problems and explore innovative cost-effective responses.

Compliance and Enforcement

Effective compliance and enforcement is an important component of regulation. When enforced consistently, regulation generates certainty for industry and the broader public, and creates a level playing field.[19] Best practice regulators understand that there are significant challenges in achieving compliance with regulation while simultaneously reducing unnecessary burden on both the agency and the regulated entities.

Best practice regulatory compliance and enforcement principles include:

- compliance activities are responsive and consider the profile and behaviour of specific businesses and industries;
- inspections and enforcement activities are evidence-based, risk-based and proportionate;
- inspections are coordinated and consolidated to reduce duplication and increase cost-effectiveness;
- regulatory strategies, risk assessments and compliance plans are informed by robust data and information, which is collected and shared with other appropriate regulators;
- the regulator is transparent and fair and clearly articulates rights and obligations for officials and regulated entities;
- the regulated community is supported through the availability of guidance, toolkits and checklists for regulated entities.

A best practice regulator continually builds its toolkit of compliance responses, and consciously chooses the most appropriate and effective tool to address a particular issue. Modern compliance responses include restorative justice tools, public accountability (e.g. name and shame), and administrative or civil tools such as orders, agreements, contracts and undertakings. An indicative list of compliance tools is at **Appendix 4.**

Best practice regulators undertake a range of activities to monitor compliance with, and enforce, legislation. Best practice regulators have compliance programs that account for both high and low risk incidents and entities, target industry sectors and geographic areas, and

---

[19] OECD (2014). *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy.

undertake both scheduled and unscheduled inspections. Best practice regulators also publish the details of planned inspections and the results of audits to increase transparency and encourage 'self-checks' by regulated entities. Targeted audits and/or studies of regulated communities are also often used by best practice regulators to assess the effectiveness of a regime while also increasing awareness of obligations. Best practice regulators also undertake unannounced compliance inspections to deter non-compliance and maintain regulatory credibility.

The Project found that EPG does not have an up to date, comprehensive and consistent compliance and enforcement strategy which covers all of its regulatory activities. The Department's overarching *Compliance and Enforcement Policy* was last substantively updated in December 2009, although some areas have more recent policies, such as the *EPBC Act Compliance and Enforcement Policy* (2013). Some external stakeholders expressed frustration at what they perceived to be a lack of consistency in compliance and enforcement actions. Stakeholders did not understand the reasons why some enforcement actions (e.g. a prosecution) was or was not taken. Staff do not have a clear framework for explaining how the Department makes choices about compliance and enforcement activities. Given the politically charged environment the Department is operating in, this can lead to a lack of trust in the Department's mandate and may encourage instances of non-compliance due to a perceived lack of enforcement action.

The recently established Regulatory Advisory Panel provides some centralised guidance on compliance activities, but not all compliance activities are referred to the Panel by regulatory areas (see the *Governance* section in Chapter 1). Further, the Regulatory Advisory Panel does not yet have the capacity to proactively set standards for commencing or escalating compliance activities, given the current limitations around its role.

There does not appear to be a mechanism for ensuring that compliance activities across EPG or the Department are consistent, proportionate and risk-based. While EPG has developed NESTRA for compliance monitoring and is in the process of developing a similar tool for wildlife trade activities, these tools identify priorities for resources within individual regulatory schemes but do not allow for the analysis of needs across the schemes. Consolidation of EPG's compliance functions (see *Recommendation 3.4 (Compliance Functions)*) should increase consistency of approach and facilitate the prioritisation of resources. This would be further enhanced by the development of a renewed compliance and enforcement strategy as part of the Regulatory Framework (see *Recommendation 1.1 (Regulatory Framework)*).

Building consistency across compliance activities in EPG and the Department is also difficult because the available compliance tools vary substantially across the regulation it administers. In addition, officers are not always aware of the full range of tools available to them, or their benefits or limitations. This can mean that officers inadvertently lose access to particular compliance and enforcement tools, for example because the timeframe for using an option has expired. The limited compliance and enforcement responses under some schemes also raises challenges. For example the legislation underpinning the regulation of hazardous waste significantly limits the compliance options available to the Department. To address these types of issues, a working group of policy, legal and compliance officers could be formed to identify the best compliance options under current legislation, as well as improvements to legislation to allow for better compliance and enforcement options in the future.

The *Regulatory Powers (Standard Provisions) Act 2014* creates a single set of standardised regulatory powers which could improve consistency in the Department's compliance activities.

The Department has done some preliminary work to understand the scope of that Act and the implications of using it for relevant regulatory schemes.

Recommendation 2.3 (Compliance and enforcement)

Importance: 2

Timing: 2

The Department should develop, maintain, and communicate a renewed Compliance and Enforcement Strategy as part of the Regulatory Framework (see *Recommendation 1.1 (Regulatory Framework)*). The strategy should:

- use a risk-approach to allocation of resources (including consideration of proponent history and risks to the environment and the Department's reputation from non-compliance);
- identify all available legislative and non legislative compliance tools and provide guidance on their requirements and appropriate use;
- have graduated, proportionate responses to non-compliance;
- have clear criteria for using and escalating compliance responses up to and including prosecutions;
- potentially include an objective for the success rate for prosecutions (for example some regulatory agencies aim to achieve a 90% success rate) and
- articulate the circumstances in which the Department could reasonably not take compliance action.

This approach can then be tailored to each regulatory scheme, including those in EPG, reflecting their relative risks and available tools.

The Department should ensure that all relevant staff understand the strategy and the objective target and the reasons behind it. This will help staff to prioritise efforts and choose the most appropriate responses.

While it is appropriate to target the majority of compliance resources to the highest risk projects, EPG should continue to develop and communicate a regulatory response to low-risk activities so that they do not fall out of the system.

In developing the strategy, the Department should consult with the Clean Energy Regulator and the Australian Taxation Office, who have both developed tailored risk management approaches to compliance and communicated their approaches internally and externally.

The Department should continue work in relation to the *Regulatory Powers (Standard Provisions) Act 2014*, and consider on a case-by-case basis whether it should be triggered under EPG legislation.

Communicating compliance

Best practice regulators communicate effectively with both the regulated and broader communities about their compliance activities. This builds confidence, creates certainty and stability and can improve compliance. For example, publishing an agency's priorities for inspections and monitoring can encourage industries to ensure they meet their obligations. Publicising compliance activities and inspection results can act as a strong deterrent both to individual entities (who lose social license) and the broader regulated community (who may

have an increased fear of detection). Mature regulators also use 'service standards' to articulate how they will communicate with regulated entities, avenues for complaints and appeals, and other advice around its compliance and enforcement activities. For example, the NSW EPA has published its compliance policy as well as the outcomes of compliance activities on its website.

EPG does promote some of its compliance and enforcement activities through policies such as the *EPBC Act Compliance and Enforcement Policy* (2013) and updates to the Department's website. The Department also publishes an annual Compliance Monitoring Program for Parts 7, 8 and 9 of the EPBC Act and for the Sea Dumping Act. This sets out achievements from the previous year, as well as objectives and priorities for the coming year. Documented plans for compliance activities and reports under other legislation administered by EPG are not current or publicly available.

While the Department sometimes publicises specific compliance activities, it does not routinely issue press releases or information about its compliance activities. The EPBC Case Judgements page of the Department's website has not been updated since November 2013, and the page is difficult to locate. The Department also lacks contemporary avenues for releasing information via social media. Mature regulators such as the US EPA regularly use websites like Facebook to promote good news stories about regulatory activities, as well as compliance information to act as a deterrent.

Increasing the visibility of EPG's regulatory activities would create greater community confidence that the Department is fulfilling its regulatory responsibilities, deter non-compliance by regulated entities, and create greater community awareness of regulatory obligations.

Recommendation 2.4 (Communicating compliance)

Importance: 3

Timing: 3

EPG and the Department should communicate the compliance strategy developed under *Recommendation 2.3 (Compliance and Enforcement)* with its full range of stakeholders.

EPG and the Department should provide targeted information about compliance and enforcement activities to the regulated community at key points in the process.

EPG should consider mechanisms to better promote its regulatory role and compliance and enforcement activities. Potential mechanisms include:

- providing information on the legislation EPG administers and what this means for the community. For example, publications developed for the launch of the EPBC Act were well received by stakeholders;
- guidance material (such as self-check tools) to improve transparency and the ability for entities to comply;
- regular updates on compliance and enforcement activities through the internet, including the Department's website and social media;
- the publication of inspection reports and compliance ratings; and
- 'good news' stories about regulatory activities.

Consistent Outcomes-Focused Conditions

Best practice regulators ensure that conditions attached to licenses and approvals are clear, enforceable, focussed on the desired outcome and allow the license holder to achieve that outcome in the most cost-effective way. They also ensure that conditions are applied consistently and are predictable. This allows regulated entities to build these requirements into their early planning.

ESD is actively developing policies to ensure that conditions are outcomes-focussed and do not unnecessarily duplicate other approval conditions. These policies are good and consistent with contemporary regulatory practice. They have been well received by industry bodies such as the Minerals Council of Australia and the Business Council of Australia, though they have also been criticised by environmental NGOs. Their success will rely on good implementation and ongoing monitoring and review.

Currently, EPBC approval conditions routinely rely on management plans which must be approved separately after the approval is granted. This is a common approach and also a common problem across many environmental regulators. As a result, a number of agencies are reviewing this approach. Management plans are often used because of time pressures, insufficient information, as a means of supporting adaptive management and due to a sense that management plans increase the Department's oversight of projects.

However, over-reliance on management plans creates risk for the Department because:

- management plans focus both industry and Departmental resources on processes rather than outcomes;
- the Department has more management plans to review than available resources (the Department estimates it approved approximately 100 management plans in the past 12 months);
- the delay in reviewing and approving management plans is effectively a delay in approval for the proponent;
- the lack of a response from the Department can be construed as an implied endorsement of the management plan; and
- management plans are written by proponents who often use unenforceable language and may try to minimise their commitments.

Requesting management plans when the Department does not have capacity to adequately review them exposes the Department to risk. Once approved, a proponent is entitled to assume that the measures in their management plan are adequate, whether or not they achieve the desired outcome.

The Department has recently developed draft policy and guidance for increasing the use of outcomes-based conditions. The policy aims to ensure conditions specify the relevant environmental outcome, without prescribing how that outcome should be achieved. The policy provides a useful framework for reducing reliance on management plans.

During consultation, the Minerals Council of Australia indicated that it would be interested in a reduction in the reliance on management plans, but would not want to see a delay in approvals as a result. Contingent conditions can be useful in this context, where information is not yet available, or best practice may change over time. This involves setting an appropriate

condition but allowing the approval holder to use a different approach if they can demonstrate to the Department that it will achieve the outcome.

Recommendation 2.5 (Outcomes Focused Conditions)

Importance: 1

Timing: 1 and ongoing

EPG should reduce the reliance on management plans in EPBC Approvals. EPG should initiate a working group with Commonwealth, state and territory co-regulators on this project.

Conditions should only require management plans where it is not practical to specify outcomes-based conditions that are measureable and enforceable, or where more detail is required to demonstrate that the desired outcome will be achieved.

Outcomes in conditions should be time-bound, measurable and enforceable, and where an outcome cannot be specified adequately, the Department should consider specifying surrogate outcomes.

Where there is uncertainty about the proponent's capacity or capability to achieve an outcome, EPG should consider using a contingent condition. For example, this could be achieved by specifying an action to achieve an outcome, but allowing the approval holder to use a different approach if they can demonstrate to the Department that the different approach will achieve the outcome.

Consistent Conditions

EPBC Part 9 approval conditions vary greatly in number and content. To some degree this reflects the wide variety of projects approved under the EPBC Act, but staff also indicated that some differences may be due to the understanding and approach taken by different officers. An inconsistent approach to conditioning is frustrating for stakeholders and creates potential problems with compliance and enforceability. To address this issue, ESD has developed template administrative conditions which are attached to most approvals. These are currently under review. ESD is also considering opportunities to develop further model conditions, and are currently focussing on developing model outcomes-based conditions. WHaM has developed standard and model conditions for particular categories of wildlife trade permits, though these are not publicly available.

Recommendation 2.6 (Consistent conditions)

Importance: 3

Timing: 3

EPG should develop model conditions (to be tailored to particular projects) for key areas of environmental regulation. Where possible, these conditions should be outcomes-based (see *Recommendation 2.5 (Consistent Outcomes Focused Conditions)*).

Model conditions should be agreed by the relevant assessment and approval areas, the Compliance and Enforcement Branch and the General Counsel Branch.

Model conditions should be publicly available with an explanation of how and when they will be used.

ESD should continue to develop and implement training and support for staff on the conditions policies, with clear messaging about the reasons and need for adoption. ESD should monitor the implementation of the policies by reviewing approval decisions at regular intervals - for example, at six-month intervals until the Department is satisfied that policies have become common practice in the Department.

Responsibility for post-approvals functions for environmental impact approvals

In ESD, the approval of management plans and the varying of approval conditions is not undertaken by the same area that sets the approval conditions and requires the management plans. This can create inefficiencies by requiring new officers to become familiar with the relevant project and approval holder, and to understand the intent of a required management plan.

To address this issue, ESD should move the responsibility for EPBC post-approval work from the Compliance and Enforcement Branch to the relevant EPBC assessment branches. This will establish and maintain a critical feedback loop that will allow officers in the assessment branches to better understand the post-approval process and incorporate lessons learnt. The workload associated with this function should reduce over time, as conditions become outcomes-focused (see *Recommendation 2.6 (Consistent conditions)*).

There is a risk that statutory timeframe pressures for assessment work may result in de-prioritising review and approval of management plans, causing greater delays. However, this could be managed by setting and reporting on timeframes for the approval of management plans.

Recommendation 2.7 (Responsibility for post-approvals functions for environmental impact approvals)

Importance: 2

Timing: 1

ESD should move the responsibility for EPBC post-approval work from the Compliance and Enforcement Branch to the relevant EPBC assessment branches ((see also *Recommendation 2.5 (Outcomes focused conditions)* on reducing EPG's reliance on management plans in EPBC approvals including the Commonwealth initiating a working group with States and Territories on this issue)
ESD should monitor the timeframes for approving management plans, and if there is a significant increase consider setting and publishing target timeframes for this process.

The ESD executive should also note the importance of maintaining strong linkages between the assessment branches and the compliance areas to ensure gaps between these areas are not created or exacerbated.

Making it easier to comply through consistent and proactive stakeholder engagement

Modern regulators recognise that the majority of the regulated community try to meet their legal obligations, but can find it difficult to do so for a number of reasons, including:

- uncertainty about regulatory requirements;
- a lack of understanding of the purpose of the requirements;
- not accepting the validity or reasonableness of some requirements; and
- complicated or unclear methods or tools for providing information (friction points).

This can lead to accidental non-compliance, disengagement, or active resistance to regulation. These are all issues encountered by EPG.

Best practice regulators work with regulated industries and entities to improve voluntary compliance. This includes ensuring regulatory requirements are clear and easy to understand, proactively providing information to relevant industries and groups about their obligations, and using tools such as behavioural insights to reduce friction points and influence behaviour. Officers across these agencies understand the need to consider the regulated entity's perspective and ensure requirements are clear and achievable.

During consultation, industry groups noted that Departmental officers are professional and dedicated, and attempt to work constructively with the regulated community throughout regulatory processes.

Some stakeholders noted that better access to information would increase voluntary compliance. For example, one industry group advised that it would be useful to be aware of potential future listings (e.g. protected species) that may impact on planned projects so that they can factor regulatory requirements into their plans. They suggested the Protected Matters Search Tool (PMST) could be a useful mechanism to draw information on future and imminent listings.

There is currently no area in EPG with clear responsibility for proactive engagement with the regulated community about requirements or helping approval holders comply with conditions, due in part to limited resources.

Officers from across the Department suggested that guidance material should be revised to be more clear and useful to its target audience. This would likely increase voluntary compliance. Additional training may also be necessary to equip officers to provide clear and useful guidance at all stages of the regulatory process.

Some areas of EPG have started using behavioural insights to improve levels of voluntary compliance. Behavioural insights seeks to find the most effective tools for influencing targeted behaviour. This could involve changing official correspondence to make it more user friendly, or sending reminders at key points in the process. EPG should continue to work with the behavioural insights team in PAID to explore opportunities for improvement within the bounds of existing legislative frameworks.

Case Study – Using behavioural insights to increase compliance

Behavioural insights is a discipline that uses research from behavioural economics, social psychology, and neuroscience to understand how humans behave and make decisions.

These critical insights can then be used to understand friction points and barriers that may influence how businesses and individuals comply with regulation.

Recently, the Ozone Protection and Synthetic Greenhouse Gases – International Section in ESD noted less than full compliance when it came to regulated entities' reporting requirements. The Section asked the Design and Analytics Section in PAID to investigate what could be done to achieve better compliance. Following a study and control trial, the Design and Analytics Section recommended a redesigned reminder email that was simpler and clearly specified the required action; as well as early and last-minute reminders.

Following the trial, new language and the timing of notifications were incorporated into the standard reporting procedures. The Section will continue to monitor compliance rates and consult with the Design and Analytics Section on opportunities to enhance the approach.

Recommendation 2.8 (Making it easier to comply through consistent and proactive stakeholder engagement)

Importance: 2

Timing: 3

EPG should assist the regulated community to comply with requirements by:

- understanding the entity's operating environment (e.g. through internal 'expert' officer knowledge);
- making requirements clear;
- only requesting information that is necessary;
- clearly explaining the reasoning behind requirements;
- maintaining relationships through a single point of contact during licensing, permitting, and assessment processes, where possible;
- utilising behavioural insights and analysis to identify friction points and remove barriers to compliance; and
- actively seeking feedback from the regulated community about what would make it easier to comply.

Transparency and disclosure of information

Best practice regulators are transparent about how they make decisions, and publish information about their policies, guidelines and, where appropriate, individual decisions. Publishing this information promotes transparency, consistency and fairness. It also allows regulated entities and the community to understand how environmental impacts have been considered and addressed, increasing trust in the regulator. Regulated entities can draw upon this information to improve their practices, better understand environmental impacts and ultimately improve their compliance with the regulatory system.

Consultations with NGOs revealed a relatively low level of trust in the Department and its regulatory decisions; an opinion which may also be shared by parts of the broader community. Some NGO stakeholders stated that they believe the Department is deliberately secretive about the reasons for decisions. Many stakeholders expressed frustration that reasons for decisions are not readily available. Industry bodies noted that regulated businesses did not

always understand why the Department had made a particular decision. For business, this confusion was primarily about process decisions (such as choosing an assessment approach) rather than final approval decisions. EPG has recently started to develop fact sheets and FAQs to help explain some decisions about particularly contentious projects. EPG does not, however, routinely publish recommendation reports or statements of reasons for environmental impact assessments and other regulatory decisions. Instead, these are only provided to individual parties upon request.

This is often due to a lack of resources, and the time-consuming nature of preparing legally-robust statements of reasons. As a result, NGOs, community members, and occasionally regulated entities rely on statutory rights to obtain this information. This can be a time-consuming process for both parties, which may be concerning to stakeholders particularly when a project or activity is about to, or has already, commenced. This situation is causing frustration, leading to a lack of community trust and reinforcing an adversarial standpoint.

While the centralised Freedom of Information (FOI) process and Departmental point of contact was viewed as a helpful function, there is a perception among some groups that the Department is reluctant to release documents, forces people to use FOI or other legal means to obtain access to information, and deliberately draws out the FOI process. The Project did not find any evidence that the Department inappropriately withholds information or deliberately draws out FOI processes. Legislative requirements are met for FOI requests.

Proponents, co-regulators, and the broader community all expressed a desire for more information about the status of projects undergoing assessment. For example, the Department's website gives limited information about the progress of applications. An improvement could be made wherein further detail is provided publicly via the Department's website regarding the application process. The NSW Department of Planning and Environment's website is a good example[20].

As noted above environmental regulation is highly contested and politically charged. This can result in somewhat adversarial relationships between the Department and stakeholders who strongly disagree with the Government's approach to regulation. Indeed the Department has noticed an increase litigation over regulatory decisions over the last few years, particularly in relation to EPBC Act approvals. The Department will need to carefully consider this context as it works to provide more information about its decisions.

Recommendation 2.9 (Transparency and disclosure of information)

Importance: 2

Timing: 1

EPG should proactively provide more information about its decisions and processes. The Department should formalise and commit to this approach (see also the *Proactive Engagement with Community Stakeholders* section in Chapter 6).

Subject to privacy and confidentiality requirements, EPG should routinely publish key documents used to support decisions to help stakeholders understand the reasons for those decisions (for example recommendation reports for environmental impact assessments)

---

[20] see http://majorprojects.planning.nsw.gov.au/index.pl?action=search&pac=1

and/or fact sheets or statements of reasons for decisions that are likely to be high profile or have a large degree of community concern.

To address community concerns about the time taken for FOI requests, a fact sheet should be prepared for communities that explain the FOI process, the types of documents that can and cannot be provided, and the likely timing for the process. This could be illustrated through a case study.

Intelligence

Best practice regulators use intelligence to guide their regulatory activities. Intelligence can be used to:

- identify emerging issues and trends by industry or other cohorts;
- inform risk assessments and analysis at both operational and organisational level;
- identify the most appropriate regulatory responses to influence behaviour;
- support the decision-making process with regard to policies, regulatory frameworks, objectives and activities; and
- guide compliance activities by supporting a targeted deployment of resources.

Large regulatory agencies such as the ATO and Border Force are proficient at using strategic intelligence to guide their operations, however this is still an emerging function for environmental regulators, including the Department. The Compliance and Enforcement Branch has a reasonably well established intelligence team with qualified officers providing tactical intelligence to support specific investigations. However, EPG does not have an appropriately skilled strategic intelligence team that can analyse data and insights across all of its regulatory functions to identify emerging issues, trends and risks. While the experience of the ATO and other regulators will be relevant to developing this strategic function, it is unlikely to be directly transferable to EPG because of differences of scale and Government priority. The Department will need to work with other environmental regulators to develop an approach to strategic intelligence that is workable in the environmental context.

The Department currently has limited tools, particularly with regards to IT, to move its intelligence functions toward full maturity. A recent compliance and intelligence capability study[21] noted that the current Compliance and Enforcement Management System (CEMS) is currently not fit-for-purpose (see also the *IT Systems* section in Chapter 4). In particular, the Department has limited capacity to share protected data with co-regulators and very limited tools for mining and analysing data.

In June 2014 the ANAO recommended that the Department develop and implement an annual program of compliance activities with respect to EPBC Part 9 approvals, having regard to a structured approach to collecting, retaining and regularly analysing compliance intelligence. In 2015 the ANAO found that the Department had not yet established an effective compliance intelligence strategy for wildlife trade regulation, and that this was significantly hampered by poor IT systems and fragmented risk assessment approaches. The ANAO recommended that the Department collect, retain and regularly analyse compliance information from its own and Border Force's holdings.

The Department is currently working on several projects to improve the Department's relationship with Border Force, including in relation to sharing data and intelligence. This is a

---

[21] Department of the Environment (2015) *Compliance, Enforcement and Investigations Capability Review – Intelligence Capability Report.*

positive step. This provides an opportunity to learn from Border Force which has a more sophisticated approach to intelligence.

See also the *Working with Other Regulators* section in Chapter 6.

Recommendation 2.10 (Intelligence)

Importance: 2

Timing: 1

The Department should work with other environmental regulators to develop an approach to strategic intelligence. The Department should consider recruiting specifically for strategic intelligence skills and experience to drive this approach.

The Department should invest in IT tools for gathering and analysing intelligence, including data sharing with other agencies (see also the *IT Systems* section in Chapter 4).

The Department should formalise its relationships with co-regulators, including in relation to routine data sharing (see also the *Working with Other Regulators* section in Chapter 6).

Chapter 3: Our People

<div style="border:1px solid black; background-color:#d9d9d9;">

OVERVIEW

A mature regulator has a clear understanding of its role and function, and the skills and capabilities required to achieve the Government's desired policy objectives. It uses this knowledge to shape its workforce planning, including the training, development and retention of its officers, and the targeted recruitment of people with necessary skills. A mature regulator integrates their business systems and tools with their training, so that officers are proficient in the process and have a clear understanding of the judgement and analysis required at each step. It also has a culture that fosters the combination of diverse expertise and skills to develop innovative solutions to identified problems.

EPG is highly committed to transforming into a best practice regulatory agency, and staff are committed and capable. However, the transition to best practice is somewhat impeded by a lack of regulatory experience and expertise in EPG and the Department, including in the Senior Executive. Historically, recruitment in EPG has focused on subject matter expertise or generic government skills, rather than a good understanding of regulation and best practice. EPG lacks an integrated capability framework or training program to develop regulatory skills in relevant staff. There are also gaps in responsibility for the coordination of regulatory policy, guidance material, processes, IT, and training across EPG.

Recommendations made in Chapter 3 for EPG include:

- development of a Capability Framework for regulatory officers;
- establishment of formal and informal training and induction programs;
- structural changes to improve the coordination of supporting processes across the group, as well as a consolidation of compliance and enforcement functions;
- adoption of a consistent approach with staff in times of change; and
- maintaining and enhancing support for innovation.

</div>

FINDINGS AND RECOMMENDATIONS

Regulatory skills and capability

Skills and training

People with the required skills, experience and approach are fundamental to successful regulatory administration.[22] Even the best designed policies will not achieve desired outcomes if staff do not have the right skills, or if the right culture is not present throughout a regulatory agency to implement the policy appropriately.[23] While business systems and tools are essential for providing efficiency and consistency, administration of complex regulation will always require professional judgement. There is growing recognition amongst regulators and academia of a professional regulatory craft including good decision making, risk management and stakeholder engagement in a regulatory context.

---

[22] ANAO (2014) *Administering Regulation – Achieving the Right Balance*

[23] Australian Government Productivity Commission (2013) *Regulator Engagement with Small Business*

Staff within EPG are generally very committed to, and competent in, understanding environmental issues. This is an asset for the Department. However, subject matter expertise is only one element of the skill-set required of a regulatory officer. Officers also need to have regulatory capabilities.[24]

Recruitment in the past has focused on subject matter expertise (e.g. chemicals, ecology etc.) or generic government skills, rather than a good understanding of regulation and best regulatory practice. While some staff have developed this knowledge (particularly in the Compliance and Enforcement Branch), this is not consistent across all officers or areas in EPG. In addition there is significant turnover in regulatory staff, with many staff moving through regulatory areas as part of gaining broader public service experience. The Department has not historically recognised or promoted a specialist regulatory career path.

The Department lacks comprehensive training programs to develop regulatory skills. Without these regulatory skills, it can be difficult for officers to perform their regulatory functions in a way that achieves the Government's desired policy objectives. During consultations, lack of training was a consistent theme in feedback from staff, with many staff expressing a lack of confidence in performing their duties.

This limited regulatory experience and expertise, including among Senior Executives, has somewhat limited the Department's transition to best practice. The Project notes, however, that the Senior Executive have demonstrated a strong commitment to transform the Department to be a best practice regulator. For instance, the Department has recently engaged a First Assistant Secretary for ESD with strong regulatory skills and experience.

Given the need for staff to develop broader regulatory skills, improving EPG's training and support systems will be critical to the effective operation of EPG. ESD has dedicated some resources to developing training and support for staff when new policies are introduced, but there is very little (or no) formal training for 'business as usual' work across the whole of EPG. Instead there is a high reliance on on-the-job learning for new or transferring staff.

While on-the-job training is a necessary component of induction, a heavy reliance on on-the-job training raises a number of concerns, including:

- Corporate knowledge can be lost with staff turnover. This leads to inefficiencies, inconsistencies, and increases the risk of repeating mistakes. Loss of corporate knowledge was raised as a concern by staff during consultations.
- A 'doing the same as we've previously done' approach does not promote innovation or test whether the approach is best practice.
- New practices or templates or legal requirements may be missed. This was raised as a particular issue in ESD, where staff tend to work from previous templates and often 'copy and paste' standard words between documents.

Neither the Department nor EPG has a specific capability framework for regulatory. This makes it difficult for EPG to effectively target workforce planning, recruitment, learning and development.

The ESD Change Plan prepared by Nous Group in 2015 recommended that a skills and capability audit be conducted within 6 months after establishing the new ESD to identify any gaps in skills and invest in targeted learning and development activities. The Change Plan

---

[24] ANAO (2014) *Administering Regulation – Achieving the Right Balance.*

recommended that the audit consider staff skills, qualifications and experience against the Divisional priorities as identified in the environment scan undertaken by NOUS Group, as well as new Departmental and Government priorities.

ESD has commenced a process of identifying the required skills and capabilities of regulatory officers, but this work is still in an early stage.

A number of other regulators have developed systematic approaches to regulatory capability and training, including the NSW EPA and the Clean Energy Regulator. These agencies have offered to share with the Department their experience in developing training. NSW EPA has previously provided regulatory training on a fee-for-service basis and has providing training to the Department. Alternatively, there are service providers who offer regulatory training, but these are often restricted to compliance and enforcement functions. Although this is important, broader regulatory training is also important.

Recommendation 3.1 (Skills and training)

Importance: 1

Timing: 2

EPG should identify the specific skills and capabilities necessary for regulatory activities and incorporate these into a Capability Framework for regulatory officers.

- Completion of the audit recommended by NOUS Group and the development of a similar process in WHaM may be an appropriate first step.
- This process should build on work done by the Clean Energy Regulator and the NSW EPA, who have previously developed systematic approaches to regulatory capability and training.

EPG should develop a formal induction and training program for all regulatory staff, with specific content for Senior Executives and officers exercising regulatory powers.

All Senior Executives with regulatory responsibilities should also complete the Australian and New Zealand School of Government (ANZSOG) intensive course 'Managing Regulation Compliance and Enforcement' intensive program.

The capability and training programs should be integrated into staff performance agreements and development plans.

In addition to formal training, EPG should explore informal development opportunities such as brown bag lunches, communities of practice, seminars, invited speakers, and establishing a mentoring program. This will facilitate the sharing of knowledge and experience and build a sense of common purpose among regulatory officers.

Consideration of economic and social impacts

As is often the case in environment agencies, economic and social impacts are not always fully considered or addressed by EPG officers during regulatory decision-making processes. This is often due to a lack of understanding and/or confidence in how and when to appropriately consider these matters. This is further complicated by the fact that some legislation prohibits consideration of these matters for certain decisions, for example listing

species as protected under the EPBC Act, while for other decisions it is mandatory, such as approving projects under the EPBC Act.

Failure to adequately address economic and social impacts where this is allowed for or required by legislation can result in loss of Government and community support, regardless of whether the decision is supported by sound science or well argued environmental objectives.

> **Recommendation 3.2 (Consideration of economic and social impacts)**
>
> *Importance:* 2
>
> *Timing:* 2
>
> The Senior Executive should promote a culture within the Department of viewing all problems and proposed solutions through the prism of environmental, economic and social impacts (where this is legally allowable).
>
> EPG should develop guidance materials to assist staff in identifying when economic and social impacts should be considered, and how to adequately consider them.

Structures and Linkages

There is no uniformly ideal structure for a regulator. Indeed, modern regulators are concerned less about formal structures and more about identifying the most important problems and mobilising all relevant areas to work together to manage issues from an end-to-end perspective.

The Project notes that there has been considerable structural change within the Department in recent years, and the transactional costs and impacts on staff are noticeable. The Project is therefore not recommending major structural change. Nonetheless, there are some areas where minor changes to responsibilities and reporting arrangements would be beneficial without significant downside. These are discussed below.

Centralised support

A best practice regulator should have an integrated approach to supporting and improving its business. By ensuring consistency in the provision and quality of its training, guidance material, business systems and IT support, a regulator can have confidence in its decisions and processes, and be better placed to effectively and efficiently meet its strategic objectives and deliver its desired regulatory outcomes.

Currently, there is no clear responsibility for supporting and improving regulatory functions in EPG. Staff expressed concern that there is little or no resourcing for supporting business-as-usual activities (for example through training and manuals). This Report discusses a number of support functions that would benefit from being centralised and resourced to ensure consistency and effective integration across EPG (see Recommendation 3.3 below for cross-references).

Recommendation 3.3 (Centralised support)

Importance: 1

Timing: 1

EPG should centralise responsibility for coordination of training, regulatory policy, guidance, processes, and IT across both ESD and WHaM, in a Regulation Reform and Support Branch. This Branch should work closely with the General Counsel Branch and the Department's Governance Branch. The governance of the Branch should ensure that it reports to both FASes.

This Branch should have responsibility for the following functions in relation to EPG:

- **Coordination of regulatory capability and training.** This Branch would not provide all the training, but would be responsible for working across EPG and with the Department's central training areas to:
  - articulate the necessary skills and capabilities;
  - identify priorities for, and gaps in training; and
    keep track of who requires, and who has completed, training.

- **Coordination of regulatory policy, guidance and processes.** This Branch would:
  - develop a cohesive structure for policies, guidance material, templates and other business tools;
  - work with line areas, the General Counsel Branch and the Governance Branch, to prioritise the creation, maintenance and review of user-focused policies, templates, standard operating procedures and other guidance material to support staff in their regulatory activities (see *Recommendation 4.1 (Policies and Guidance Material*).

- **Coordination of IT**. This Branch would provide a point of contact, and coordination of IT between EPG and the IT Branch, but would not necessarily be responsible for managing or maintaining systems or databases (see *Recommendation 4.3 (Governance for IT Systems)*).

- **Coordination of delegations.** This Branch would also develop guidance on how and when delegations should be exercised. A central register of delegations would also be managed by PAID (see *Recommendation 3.8 (Delegations and Accountability)*).

- **Coordination of risk management** (see *Recommendation 5.1 (Risk Management Framework)*).
- **Coordination of engagement** (see *Recommendation 6.6 (Speaking with a Single Voice)*).

- **Networking with other states and regulators about regulatory practice (**see *Recommendation 6.4 (Working with Other Regulators)*).

- **Coordination of staff secondments** (see Recommendation 3.5 (Linkages*)*).

- **Coordination of performance monitoring and reporting** (see *Recommendation 1.2 (Performance Monitoring and Communication)*).

- **Innovation and continuous improvement practices** (see *Recommendation 1.4 (Continuous Improvement)* and *Recommendation 3.7 (Innovation)*).

- **Coordination of the implementation of the recommendations in this Report.**

Compliance functions

Over recent years, the Department has made considerable effort to improve the maturity of its compliance and enforcement functions, following a number of internal and external reviews and audits. However, the Project found that some of EPG's compliance areas are not adequately supported to fulfil their functions, and the scattered locations of these areas has resulted in inconsistent approaches to compliance and enforcement across EPG.

The Department is considering establishing an Office of Compliance and Enforcement with direct reporting lines to the Deputy Secretary responsible for EPG, by transferring most of EPG's compliance and enforcement functions to this Office. This would enable a more integrated and strategic approach to compliance and enforcement. However, it could widen the gap between assessments and compliance and enforcement, resulting in less focus on assisting the regulated community to avoid breaches (see the *Making it easier to comply through consistent and proactive stakeholder engagement* section in Chapter 2).

On balance, the Project supports the proposed establishment of the Office of Compliance and Enforcement, but notes that additional effort will be necessary to establish and maintain important linkages with all other relevant regulatory areas in ESD and WHaM. The establishment of the proposed Regulatory Reform and Support Branch should provide some assistance with this (see *Recommendation 3.3 (Centralised support)* and *Recommendation 3.5 (Linkages)*).

Prior to consolidating compliance and enforcement functions, EPG should form working groups for each affected regulatory scheme, to identify the current approach and limitations for compliance, the best approach going forward, and an appropriate split of responsibilities. For example; because the product stewardship team is relatively new, compliance activities have focussed on improving voluntary compliance through information and assistance. Prior to moving these functions into the Office of Compliance and Enforcement, a working group of policy officers and compliance officers should identify when and how that approach should transition into using enforcement rather than information and assistance tools. They should also establish a clear understanding of the respective responsibilities for information and assistance functions between the two work areas.

The Department may wish to consider transferring other compliance functions from across the Department into the new Office.

Recommendation 3.4 (Compliance functions)

Importance: 2

Timing: 1

EPG should proceed with the establishment of the Office of Compliance and Enforcement, which should include all of EPG's compliance functions.

Prior to consolidation, EPG should use working groups to develop a clear understanding of the appropriate compliance approach for each scheme and the division of information and assistance activities, and compliance activities between the subject matter area and the Office of Compliance and Enforcement.

EPG should develop formal and informal mechanisms to maintain linkages between subject matter areas (such as wildlife trade) and the Office of Compliance and Enforcement. This

---

should be done prior to implementation of this structural change. For recommendations on how these linkages can be established and maintained, see *Recommendation 3.5 (Linkages)*.

Linkages

Currently, there are a number of silos within EPG and a feeling from staff that areas do not understand each other's work.

EPG executives have recognised the need to improve linkages between the two Divisions and have recently established monthly ESD-WHaM board meetings. There are also plans to hold similar meetings at Director and APS level. These meetings are likely to help build staff understanding of the different work across the two Divisions.

Although the Department has started establishing internal mobility processes, there is no formal movement within and between ESD and WHaM. It has been suggested that managers tend to focus on the loss of productivity in the short-term when it comes to rotating subject matter experts to other line areas. However, movement between areas can help staff to develop their knowledge and capability, build better linkages between work areas, and facilitate innovation and the sharing of new ideas. Formal exchanges with other regulators can also improve capability and performance through new networks and the sharing of experiences and insights. Such staff rotation or exchange programs will need to be driven by the Senior Executive to be successful. The most common reason for failure to proceed is that the timing is not convenient. In practice this is almost always the case, but the broader advantages need to be weighed up against short-term inconvenience.

Staff reported that collaboration between regulatory staff and specialists external to individual Sections (for example the General Counsel Branch or species experts) has improved over time. However, many staff remain generally unaware of the appropriate circumstances and processes for seeking specialist advice. As a result, there are inconsistencies in how and when advice is sought, making it difficult for specialists to provide timely and robust advice, which can reinforce negative perceptions about the necessity and adequacy of specialist advice, and lead some officers to avoid obtaining it. Specialists also noted that they do not receive feedback on whether their advice is useful or acted upon.

Recommendation 3.5 (Linkages)

Importance: 1

Timing: 2

EPG should develop formal and informal mechanisms to increase collaboration and understanding across the two Divisions. For example, EPG could:

- establish a formal staff rotation or staff swap program within and between the two Divisions, and with other regulatory agencies;
- establish hubs, forums, and/or communities of practice to provide an opportunity for staff to gain an understanding of the work and underpinning values of other areas of the Department;
- seek opportunities to form short-term working groups to collaboratively solve problems; and
- establish appropriate cross-Divisional meetings – such as the ESD-WHaM board meetings and the Regulatory Advisory Panel.

These initiatives all require strong commitment from the Senior Executive.

EPG should consider the impact of structural changes on linkages, and place particular emphasis on maintaining those connections which are not naturally supported by a chosen structure.

EPG should work with the General Counsel Branch, the Compliance and Enforcement Branch, and other specialist areas to identify the circumstances in which specialist advice should be sought. This should be reflected in Standard Operating Procedures, templates and guidelines.

EPG should map statutory timeframes to ensure that adequate time is built into the regulatory processes to obtain specialist advice where necessary. Consideration should be given to identifying the appropriate use of statutory powers to extend timeframes when necessary, in order to ensure more robust decisions.

EPG should request input from specialist areas at an early stage. Where appropriate, specialists should be included in a 'project team' for particularly high risk or sensitive projects.

Where advice is not useful or acted on, prompt feedback should be provided to the relevant specialist.

Change Management

There is a high degree of change fatigue within EPG. ESD and WHaM have each undergone significant restructures over the past three years, including the creation of both Divisions, significant restructuring of Branches and sections, significant staff reductions at all levels, and changes to Government which have resulted in new or altered policy approaches and priorities.

Staff often do not embrace change because:

- they are reluctant to learn something new;
- change is often associated with staff reductions;
- staff reductions tend to occur first, leaving areas under-resourced during the implementation period of the change;
- their workloads increase;
- they don't understand the reason for the change;
- they don't feel sufficiently supported to implement the change;
- they are concerned about the rate of change; and/or
- they feel that business-as-usual work will suffer and any reduction in work quality will reflect badly on them.

These concerns are applicable to structural changes, as well as the introduction of new policies, processes, and initiatives.

While there has been an active attempt by management within EPG to guide staff through change, this is not always consistently undertaken. Communication with staff during the establishment of ESD is a good example - staff were kept up-to-date with the progress of the change through regular e-mails and all-staff meetings, and forums were held where staff could raise, and collectively work through, any concerns they had about the change. This process

could be further improved by extending that engagement to interested areas outside the Division (for example General Counsel Branch).

The establishment of weekly 'stand-up' meetings with Division Heads and the Deputy Secretary of EPG was also a good initiative to allow staff to address any concerns they had about change. However, feedback from staff noted that a tendency to cancel or reschedule those meetings reduced their usefulness.

Recommendation 3.6 (Change management)

Importance: 2

Timing: 2

Senior Executive should adopt a more consistent approach to two-way engagement with staff in times of change. This needs to involve a consistent and clear message about vision and direction, as well as the reasons for the change.

EPG Senior Executives should make the 'big decisions', but consult with staff about the best way to implement the details.

EPG should allow more time and resources to support the implementation of new policies and approaches. This may require slowing down the rate of change to bed down existing policies.

EPG should seek volunteers to act as change agents. These would be people who are willing to take on some additional responsibility, with appropriate training, to assist and guide their colleagues through change and be conduits between staff and management. This could be modelled on the approach taken by the Australian Taxation Office.

If the changes in *Recommendation 2.7 (Responsibility for post-approvals functions for environmental impact approvals), Recommendation 3.3 (Centralised support)* and *Recommendation 3.4 (Compliance functions)* are made, EPG should allow a reasonable time to bed them down and fully evaluate their effectiveness before further structural change.

Innovation

As noted in OECD's 'Innovation Imperative', Governments are operating in a new landscape. The public sector faces economic, social and environmental challenges; technology is revolutionising how citizens interact with government; individuals and organisations across society are forming new kinds of partnerships; and citizens are more informed and connected than ever before. Together, these factors create opportunities for new ways of thinking about government and how it works.

The public sector is seeking to innovate. This requires a more open, collaborative, iterative and participatory work environment that supports staff to take risks, test new ideas and work in new ways.

The Department and the Australian Government is strongly committed to innovation, and there are innovative approaches being explored and implemented in some areas of EPG. Innovation

is, however, often limited by resources, the need to undertake core functions required by legislation and the need to manage new initiatives.

Case Study – Developing a Common Assessment Method

Federal, state and territory governments currently maintain separate statutory lists of threatened species, and in some cases ecological communities. Currently, a species or ecological community can be listed at different threat categories on different jurisdiction lists which can be confusing to business and the community. This can also add to regulatory burden, for example, by requiring separate assessment documentation to be prepared by regulated entities for a single project.

The Department has been working with all states and territories to develop a nationally consistent approach to assessing risks to species and ecological communities and assigning threat categories (a common assessment method). Implementation arrangements for this common assessment method are currently being developed by an inter-jurisdictional working group to ensure its application will improve listing efficiency and timeliness, reduce duplication of effort, and maintain effective protection for threatened species and communities.

Recommendation 3.7 (Innovation)

Importance: 2

Timing: 2

EPG should continue to maintain a focus on innovation. EPG can enhance its support for innovation by:

- further promoting a culture of innovation;
- providing reference and guidance material to staff in relation to available regulatory responses and when they can be used;
- establishing small, ad hoc cross-divisional working groups to solve regulatory problems or develop and implement new initiatives; and
- learning from and working with other regulatory agencies (see also the *Working with other regulators* section in Chapter 6).

Decision-making

Delegations and accountability

The management of delegations is crucial to a best practice regulator. Good management of delegations not only ensures that decisions are made only by the people who have the authority and expertise to do so, but also assists staff to identify the most appropriate decision-maker and risk-owner for their project.

The Project notes that there are statutory delegations for decision making within the Department, from both the Minister and the Secretary; however there is flexibility within the

Department and limited guidance as to who actually exercises the delegations for particular cases.

For example, the authority to make decisions on approval under Part 9 of the EPBC Act is held by the Minister, and this is delegated to a number of Departmental executive, including Assistant Secretaries in the Environment Assessment Branches of ESD, First Assistant Secretaries, Deputy Secretaries and the Secretary. While any of these senior executives may legally exercise their decision making power in relation to Part 9 of the EPBC Act, the chosen decision maker will generally depend on a number of factors including the type and location of the project, and the level of risk to the environment or reputational risk to the Department.

While delegates generally have a clear understanding of their delegated powers, the above discretion means that staff sometimes find it difficult to identify relevant delegates and the scope of their powers. This is in part due to there being no central registry of current delegations, no central responsibility for making sure delegations are current, and no guidance on how and when delegations should be exercised at particular levels.

This sometimes leads to multiple officers reviewing and clearing work, which has the potential to increase processes for little added value and to dilute accountability.

Recommendation 3.8 (Delegations and accountability)

Importance: 3

Timing: 3

The Department should establish a central registry of delegations, and allocate responsibility for its maintenance to one area (such as the Governance Branch in PAID).

EPG should develop guidance on how and when delegations relevant to EPG should be exercised.

EPG should determine appropriate review and clearance procedures for decision-making, minimising the points of review to avoid diluting accountability.

Regulatory capture

Regulatory capture is a form of corruption that occurs when a regulatory agency which was created to act in the public interest, instead advances the commercial or political concerns of special interest groups that dominate the industry or sector it is charged with regulating.

Regulatory capture is always a threat for any regulatory agency, and is of particular concern when regulatory staff deal with the same companies, industries or NGOs on a regular basis.

While the Project did not explicitly look into this issue, there was no evidence of corruption or regulatory capture within EPG, and staff were committed and professional.

Recommendation 3.9 (Regulatory capture)

Importance: 2

Timing: 2 and ongoing

The Department should openly discuss the risk of corruption and regulatory capture. The importance of this should be reinforced by the Senior Executive. A formal program for rotation of staff (see *Recommendation 3.5 (Linkages)*) would assist with reducing potential for regulatory capture.

The Department should consider appropriate oversight of regulatory decision making, to reduce the risk of regulatory capture. This would normally involve 'sign-off' by two people.

Chapter 4: Our Systems and Tools

OVERVIEW

A mature regulator has well developed and maintained business systems and supporting tools that increase staff capacity and provide a high degree of confidence that decision making is legal, robust and predictable.

Regulatory processes are complex and constantly changing. Staff need to be aware of and integrate a large volume and range of technical, policy and legal information when undertaking regulatory activities, as well as follow timelines and transfer responsibilities to different officers and across work areas. Business systems and supporting tools can simplify processes for officers, allowing them to focus on analysis and make consistent regulatory decisions.

The Department's IT systems are being enhanced, with some recent improvements implemented and more in development or planning. Limitations to achieving mature IT systems are largely due to the allocation of necessary resources to complete planned projects, and the time required to design, develop and implement new systems. Other tools such as policies and guidance material were found to be inconsistently developed and used across EPG.

This chapter makes recommendations for EPG regarding IT and business tools, including:

- the creation of a central support team to assist with the development and maintenance of business tools across EPG;

- increased investment in IT systems as a high priority; and

- maintaining enhanced governance arrangements for the development and implementation of IT systems.

FINDINGS AND RECOMMENDATIONS

Business Systems and supporting tools

Mature regulators have established business systems and supporting tools that are easily understood, accessible, up-dated when necessary, and consistently applied. Well developed and maintained business systems and supporting tools can increase staff capacity and provide a high degree of confidence that decision making is legal, robust and predictable. They are particularly important in times of constrained resources, and when there are high numbers of new or temporary employees. A mature regulator ensures business systems are developed with input from all relevant areas, including IT and business system specialists, subject matter experts, decision makers, compliance and enforcement areas and legal areas. Mature regulators also ensure that business systems can be adjusted when necessary to reflect changes in policy, law or science.

Within EPG, the development and maintenance of business systems, and the development of policies, templates, standard operating procedures and other guidance material is largely the responsibility of individual sections. Some areas have comprehensive and well established standard operating procedures. However, staff advised that many sections lack the necessary

time and capacity to develop and maintain these materials. A number of staff also raised concerns that when processes, guidance or tools are developed, not all relevant areas are consulted to ensure procedures are robust and legislatively compliant, including specialist areas such as the General Counsel Branch. As a result, there is a high degree of variation across EPG in the existence, quality and currency of policies, templates, Standard Operating Procedures and other guidance material.

During consultations, staff at all levels expressed concern that EPG officers are not aware of all policies, templates, Standard Operating Procedures and guidance material available to them. This includes a lack of clarity about where these tools are located, how they relate to each other, and whether they are mandatory and current. Staff also consistently raised concerns that this material can be unclear, incomplete, poorly-written or difficult to understand. In other cases, staff have been developing their own unofficial procedures or work-arounds, such as copying standard words from previous projects, to deal with gaps or deficiencies in agreed business processes. This requires extra vigilance by supervisors to ensure current policies and Standard Operating Procedures are being implemented.

These deficiencies lead to a strong reliance on the corporate knowledge of individual officers (which has reduced in recent years) and inconsistent approaches. This is a particular risk for environmental impact assessments under the EPBC Act, because of the number and spread of officers (including delegates) undertaking that work.

There have been recent efforts to improve the development of business systems and supporting tools. For example, a cross divisional team, including staff from ESD, WHaM and the General Counsel Branch has developed and stress-tested an interim business process to provide greater confidence that environmental impact approval decisions are supported by the correct statutory documentation. ESD has also commenced a project to review and update the environmental impact assessment manual.

EPG would benefit from having clear coordinated responsibility for developing cohesive business systems and supporting tools.

Further discussion, findings and recommendations are made regarding regulatory support in Chapter 1.

Recommendation 4.1 (Policies and guidance material)

Importance: 1

Timing: 1

The responsibility for the coordination and management of all regulatory policies and guidance material across ESD and WHaM should be given to a single support team within the proposed new Regulation Reform and Support Branch in EPG (see *Recommendation 3.3 (Centralised Support)*).

This Branch should develop a cohesive structure for policies, guidance, templates and other business tools. The Branch should then work with line areas, the General Counsel Branch and the Governance Branch in PAID to prioritise the creation, maintenance and review of user-focused policies, templates, standard operating procedures and other guidance to support

staff in their regulatory activities. These tools should be made available online in a single location that is kept up to date (and eventually should be linked to relevant workflow systems).

As a high priority, the Branch should progress the review and updating of the environmental impact assessment manual and publish it on the intranet.

IT Systems

All regulators face challenges in developing and maintaining integrated IT systems that support business processes. There is no one-size-fits-all IT system, and the Department will need to continue to consider its current IT capability and prioritise its IT requirements going forward in order to improve regulatory performance.

A mature regulator uses its IT systems to make it easier for staff, regulated entities, and the community to engage with regulatory processes. IT systems cannot address all of the inherent complexities in regulatory systems, nor can it replace the need for regulatory officers to understand the requirements of legislation when making decisions. However, an ideal IT system would automate the agreed process, allowing staff to focus on the analytical decision-making aspects of their work, rather than procedural and administrative tasks.

Good IT systems have the ability to provide fundamental support to the Department and regulated entities by:

- allowing on-line lodgement of applications;
- auto-filling and reproducing data (increasing productivity while reducing risks from human error);
- automating work flow procedures;
- storing and producing information critical to decisions;
- automating record management systems;
- supporting collaboration within the agency and with other agencies; and
- allowing for sophisticated analysis of data to identify emerging trends, issues and risks.

Staff at all levels provided feedback about the adequacy of EPG's existing IT systems. While some areas had effective IT systems, many staff felt that current IT systems (including both basic infrastructure and specialised systems) were limiting best practice and creating inefficiencies.

The Department has previously had a de-centralised approach to IT, with line areas determining their own IT needs and developing or procuring their own solutions. As a result, the Department has a large number of disjointed IT systems. Many officers work across multiple IT systems for their day-to-day work, with no end-to-end workflow system that allows staff to manage entire tasks - for example, processing a referral or permit from receipt to determination. Manual data entry is also often required several times during a single process, which creates significant duplication and inefficiencies, and increases risks relating to data accuracy and integrity. Some IT systems have become difficult to manage over time, which may make it difficult to retrieve historical data. There is also limited ability to share data within the Department, across government, and with other stakeholders.

In an effort to develop a more consistent and integrated approach to IT, the Department centralised responsibility for IT in 2014. The central IT Branch is developing a whole-of-Department architecture. This approach uses common tools and systems across the Department for similar business activities. Under this model, the Department is implementing a

central platform to support the business processes of each regulatory (or other program) activity. This approach will allow better integration between areas (for example by allowing regulatory officers to see previous compliance actions against a particular entity), while also making the system more flexible into the future.

The Department is pursuing a number of projects to improve IT systems for EPG (see **Appendix 5**). The Department is taking a staged approach to developing its integrated IT system, due to the wide range of IT needs and priorities, and limited funding and staff resources. As a result, some identified improvement work (such as improvements to the system used for compliance and enforcement) has not yet been progressed.

By 1 July 2016, the workflow system for environmental impact assessments will:

- allow project referrals to be processed within the system;
- check for appropriate authority (although this is not automatically linked to delegations instruments);
- automatically publish specific documents;
- allow officers to record file notes of meetings or inspections;
- provide time prompts and visibility of projects to supervisors;
- require proponents to lodge referrals online (which will automatically begin a case within the system);
- allow proponents to identify the spatial parameters of their project on–line; and
- integrate payment processes so that officers can see whether fees have been paid within a single system.

The Department is also progressing work to link source databases (for example those containing authoritative information about protected species and relevant recovery plans) to the environmental impact assessments workflow system. This would automate the identification of relevant protected matters and associated statutory documents, reducing human error and the risk that information is out of date. Although this work is being pursued as a matter of priority, it is likely that it will take some time due to the age and complexity of the source databases.

Opportunities for further improvement

There is significant scope to further improve IT systems so that they provide more support to regulatory officers and better quality assurance for regulatory activities. For example, the Department could:

- Develop IT workflow systems that automatically extract data from source databases and allow for the generation of reports and briefing packages that include the required attachments. This would assist in assessment processes, the maintenance of data integrity, and reduce administrative burden.
- Include live links to relevant policies and guidelines, templates and source data within the environmental impact assessments workflow system. This would create a 'single source of truth' for officers, reducing staff effort and increasing confidence and consistency in the process.
- Establish links between assessment and compliance systems. This would allow better end-to-end understanding of projects and proponents.
- Allow for the electronic submission of key documents to decision-makers. This would reduce the need to collate and produce lengthy decision packages (with the risk of missing critical documents).
- Increase the ability to efficiently gather and report on historical information about projects. This would assist with analysis and referencing for new assessments. For example,

current systems may list project numbers and dates, but do not contain information or direct links to data that allows users to see how decisions were arrived at.

Recommendation 4.2 (IT Systems)

Importance: 1

Timing: 1

As a high priority, the Department should bring forward investment in an integrated end-to-end IT system to improve its reliability, effectiveness and efficiency.

An ideal IT system for the Department's regulatory functions would include:

- end-to-end workflow management (pre-referral to compliance);

- automatic extraction of data from source databases;

- quality assurance checks throughout the process, including trigger points for specialist advice and checks for appropriate delegations;

- on-line links to relevant policies and guidance material and training at appropriate points in the process;

- the ability to compile briefing material;

- time management with prompts;

- archival storage and access;

- an ability to share and mine data using multiple search criteria (both internally and externally); and

- better tools for intelligence gathering and data analytics.

The Department should learn from systems developed by other regulators including the NSW and Victorian EPAs. The NSW EPA has offered to share its experiences to help incorporate lessons learnt into the Department's IT planning. The Clean Energy Regulator and the ATO have also offered to work with the Department to share their experiences.

Governance for IT Systems

It is common for agencies to experience tensions between IT officers and line areas over the development of IT systems, regardless of which area is responsible for overseeing the process. Mature regulators have governance models that recognise and attempt to manage the tensions between long-term integrated planning for IT and a need to adapt and adjust to line area business needs and changing Government priorities.

As noted above, the Department is moving towards a more centralised IT model, with development of new IT systems being managed by the IT Branch. The IT Branch has been working to develop a partnership approach to developing and implementing new systems. This has included having IT staff and contractors physically co-located with relevant line areas.

Feedback from the IT Branch and EPG officers about engagement and consultation was mixed. Many officers, particularly those directly in the Data Analysis and Information Management Section (DAIMS) in ESD and the Business Optimisation Section (BOS) in WHaM, advised that there had been significant improvements in the relationship between IT

and line area officers. Other officers felt they were not adequately consulted and expressed frustration about the design of new systems and responsiveness of IT officers to requests from line areas. There is still room to improve understanding and support between IT and line areas. In particular, line area officers may not understand the workload associated with seemingly minor IT requests and the volume of work the IT branch is managing across the Department. IT officers may not have a complete understanding of line areas' business needs and pressures.

Staff from both the IT Branch and ESD noted there were opportunities to learn from the development and implementation of the environmental impact assessment workflow system. In particular, many officers noted the importance of having a change management plan which is driven by the line area. This includes having integrated training and support materials to support officers in using the new system. Many officers also commented that design of the new system was made more difficult by the absence of clearly understood, consistent and documented business processes, and the lack of an area of the Division with clear authority and responsibility for making decisions about the underlying business process. The Department is integrating these lessons learned into the development of the new systems.

The IT Branch has established an Environmental Regulation Capabilities Steering Committee. This Committee will provide oversight of all Business Transformation Section projects relating to the development of environmental regulation capabilities. These include projects for a new hazardous waste permitting system and an international wildlife trade permitting system. The Committee membership includes relevant Assistant Secretaries, Directors and project officers from ESD, WHaM and the IT Branch. The Committee will provide senior level oversight of these projects, to ensure the systems meet business needs and expectations. The Committee also provides a senior level forum to resolve competing priorities or different opinions. This Committee is likely to be a useful governance mechanism for these projects.

The Department also has an ICT Committee which makes recommendations on investment and development to the Department's Executive Board. The ICT Committee has a Deputy Secretary sponsor and is comprised of First Assistant Secretaries and Assistant Secretaries from across the Department. Officers attend in their own right, rather than as representatives from their respective areas.

Recommendation 4.3 (Governance for IT systems)

Importance: 1

Timing: 1

The recommended Regulatory Reform and Support Branch (see *Recommendation 3.3 (Centralised Support)*) should have responsibility for coordinating the management of regulatory business systems and coordinating and providing input to the IT Branch. This Branch would not be responsible for developing or procuring IT systems, but would be a central point of contact for the IT Branch and line areas to ensure new systems meet business needs and are integrated with training and support materials.

The Department should continue the use of the Environmental Regulation Capabilities Steering Committee as a senior body for resolving issues associated with development and implementation of regulatory IT systems. The Assistant Secretary of the proposed Regulation Reform and Support Branch should be a member of this Committee.

Chapter 5: Our Approach to Risk

OVERVIEW

Unlike the private sector, which has a long history of risk management, governments have traditionally been risk averse. This is changing, with the Australian Government encouraging Commonwealth entities to strengthen their risk management practices (for example through its Risk Management Policy[25]).

The Department has a range of tools for identifying and managing risks, however these are primarily applied to specific projects. There does not appear to be a systematic approach to identifying and managing risk across EPG's regulatory functions or across the Department.

Chapter 5 makes recommendations about EPG's approach to risk, including:

- reviewing the Risk Management Framework;

- analysing risk across the EPG's regulatory activities;

- systematically allocating resources proportionate to risk;

- utilising intelligence for gathering data and analysing risks; and

- improving external communication of risk.

FINDINGS AND RECOMMENDATIONS

Risk management framework

A mature regulator has a well established and well understood risk framework which:

- articulates the regulator's risk culture and risk appetite;
- identifies the roles and responsibilities of staff, boards and committees in identifying and managing risks; and
- provides guidance and policies for risk management, including risk identification, analysis, prioritisation and treatment.

The Australian Government has a Risk Management Policy and the Department has a Risk Management Framework, including supporting risk management guidelines, a risk management policy and a risk management workbook. The Secretary has also issued instructions about accountability for managing risk.

Despite these policies, staff understanding of risk management in practice is mixed. During consultation, some staff expressed uncertainty about who makes risk decisions, who owns the risk, and who will be held responsible if things go wrong.

---

[25] http://www.finance.gov.au/sites/default/files/commonwealth-risk-management-policy.pdf

This uncertainty could be due in part to the fact that neither the Department nor EPG appear to have a well defined or communicated risk appetite. For example, the Department's Risk Management Policy defines 'risk appetite' as the amount of risk, on a broad level, that the Department is willing to take in pursuing the functions and responsibilities assigned to it by the Government. It provides that:

> "*the amount of risk that each division will take is dependent upon the unique context and objectives of the work being undertaken by the division, in consultation with the executive board and the expectations of the Minister. A differentiated, divisional approach to risk management is fundamental to the Department achieving its objectives. However, it reinforces the need for ongoing monitoring, reporting and oversight of risk.*"

There is however no clear development or communication of what the risk appetite(s) for the Department actually is.

Recommendation 5.1 (Risk Management Framework)

Importance: 2

Timing: 2

The Chief Risk Officer should:

- review the Risk Management Framework, including supporting policies and tools;
- consider adopting more adaptive and flexible tools and approaches to support risk assessments;
- work with Divisions and Groups to help them develop meaningful and targeted risk appetites; and
- communicate and provide training to ensure that staff understand their roles and obligations in relation to risk management.

The Senior Executive should consistently communicate and reinforce risk management principles and appetites.

Strategic Risk Assessment and Resource Allocation

Mature regulators have a systematic approach to risk management, which is linked to resource allocation and agency priorities. Mature regulators are able to assess the agency's activities to identify and manage the biggest strategic risks. Mature regulators use risk management to prioritise allocation of resources and effort. They ensure that effort and regulatory response are proportionate to the regulatory risk being addressed.

The Department's current risk management tools focus on identifying and addressing the specific risks of individual projects. There does not appear to be a strategic approach to assessing comparative risk across the Department or within or between Divisions, Branches and Sections.

The ANAO's 2014 audit of the effectiveness of the Department's regulation of proponents' compliance with Part 9 of the EPBC Act recommended that the Department develop and implement an annual program of compliance activities, including the identification and regular review of relevant risk factors for approved controlled actions. In 2015 the ANAO made similar recommendations in relation to wildlife trade compliance.

EPG has recently started developing tools to indentify and analyse risks across projects within particular regulatory activities. This began with the development of the NESTRA tool, which has been useful for systematically analysing risk to target monitoring resources across projects approved under the EPBC Act. EPG is now building on this work to develop a similar tool (WiSTRA) to identify and analyse risks and allocate resourcing for international wildlife trade compliance activities.

Case Study – the NESTRA Tool

EPG has recently started to embed risk management tools into its planning and decision-making processes. For example, ESD recently worked with CSIRO to develop the National Environmental Significance Threat and Risk Assessment (NESTRA) tool.

NESTRA ranks projects approved under the EPBC Act based on the relative risk of environmental impacts and the likelihood that approval conditions will be breached. Using these rankings, the Compliance and Enforcement Branch is able to focus its compliance monitoring activities on projects which pose the highest environmental risk. Officers use NESTRA to update the risk ranking as projects progress.

NESTRA is a transparent, rational and repeatable method for prioritising compliance monitoring and justifying these activities to external stakeholders and auditors. ESD is refining NESTRA over time by using outcomes from previous monitoring programs to refine the questions used to identify risk factors and calibrate the relative weightings of factors.

EPG is also exploring options for developing a risk-based approach to environmental impact assessments, building on the experience of developing NESTRA. Assessment staff have raised concerns that risk based approaches to assessments have historically focused on identifying high risk projects, with less time spent working through the appropriate processes to be used for projects at each risk rating.

Other areas in EPG have also developed scheme specific risk-based approaches. For example, the Fisheries Assessment Section has identified low-risk fisheries with good management histories. These low risk fisheries are eligible for longer approvals, reducing the workload for the Department and creating an incentive for other fisheries to improve their management.

There are a number of other areas across EPG which do not appear to have systematic tools for analysing risk. EPG and the Department are also lacking tools and processes to assess risk between regulatory functions (or between non-regulatory and regulatory functions). This makes it difficult for EPG and the Department to have confidence that their resources are allocated appropriately according to risk.

In developing new tools for assessing and analysing risk, as well as processes for assessing projects at each risk rating, EPG should ensure that the tools appropriately consider both environmental risk from regulated activities, and the reputational risk to the Department that may result if the regulation is administered ineffectively or inappropriately. The General Counsel Branch should be consulted to ensure that these risks are addressed consistently with legal requirements.

Recommendation 5.2 (Risk Assessment and Resource Allocation):

Importance: 2

Timing : 3 and ongoing

The revised framework from *Recommendation 5.1 (Risk management framework)* should support consideration of risk across EPG and the Department, as well as managing the risks of individual projects.

EPG should work with the Chief Risk Officer to continue to develop tools for systematically analysing risk between and across all of its regulatory activities.

EPG should investigate opportunities to develop risk-based approaches to assessing and licensing activities for each regulatory function. This should include developing clear guidelines about the process for managing projects with each risk rating. The relevant assessment areas, the Compliance and Enforcement Branch, and the General Counsel Branch should develop these guidelines collaboratively, to ensure they are robust.

The Chief Risk Officer should assist EPG and the Department to identify risk priorities and facilitate the allocation of resources proportionately. This includes allocation of resources across the Department, as well as within and between Divisions, Branches and Sections.

Resource Levels

No environmental regulator would claim to be adequately funded to meet the expectations of all stakeholders. The Project, however, has significant concerns regarding the capability of the EPG to perform its regulatory functions with the current level of resourcing. Any further reduction in resources will result in an increased risk in delivery of EPG's regulatory functions.

As with any regulatory agency, staff resources need to be allocated to:

- business as usual work;
- managing new initiatives (often externally driven); and
- innovating and making continuous improvements (usually internally driven).

When resources are limited, resourcing for innovation and continuous improvement are often the first to be reduced, as there are statutory requirements for the business as usual work and greater pressure for new initiatives. This is evident in EPG.

Budget reductions based on the One-Stop-Shop policy have resulted in significant staff reductions and a high reliance on contracted staff, without a corresponding reduction in workload (as enabling legislative amendments have not yet passed Parliament). During consultation, the Minerals Council of Australia noted that while EPG officers are committed and strive to be helpful, companies are noticing that EPBC assessment staff are under-resourced and that the rate of staff reductions and movement is impacting on service to proponents.

The General Counsel Branch has also noted an increase in its work relating to EPG's functions for both routine matters and strategic issues. This reflects both the volume of decision-making in recent times, and an increased awareness of, and concern about, potential exposure to decision-making failures, particularly in the wake of the Carmichael matter. As a

result, the Department will need to consider the appropriate level of legal resources required to support EPG's regulatory maturity.

Resources for the monitoring of environmental approvals currently only allows the Compliance and Enforcement Branch to target 20 percent of high risk projects. This is a significantly lower proportion of high risk projects than those targeted for inspection by other comparable regulatory agencies. The Compliance and Enforcement Branch also conducts random and opportunistic inspections to ensure that lower risk projects are not left outside the compliance scheme. For example, the Compliance and Enforcement Branch conducted 57 such inspections in 2015. EPG does not appear to conduct any proactive monitoring or inspections for projects within other regulatory schemes such as Hazardous Waste, due to statutory limitations and resource constraints.

Recommendation 5.3 (Resource Levels):

Importance: 1

Timing: Ongoing

The Department should strive to maintain or increase staffing levels within EPG.

The Department should clearly communicate to the Government the risk of regulatory failure associated with any further staffing reductions.

The Department should consider increasing resourcing for EPBC monitoring activities, or working with states and territories to pool resources so that a larger proportion of high risk projects can be actively monitored (see also *Recommendation 2.3 (Compliance and enforcement)* and *Recommendation 6.4 (Working with other regulators)*).

External Communication of Risk

Mature regulators clearly communicate their risk approach to interested stakeholders, including the Minister, other regulators, regulated entities and the community. This helps to manage expectations by improving stakeholder understanding of the regulator's need to consider and manage risk. For example, the Clean Energy Regulator's Compliance, Education and Enforcement Policy[26] includes a clear description of the way they consider risk when deciding what kind of compliance action is appropriate.

The Department does not appear to have communicated its risk approach externally.

Recommendation 5.4 (External communication of risk):

Importance: 2

Timing: 2

The Chief Risk Officer should consider how best to communicate the Department's risk approach externally. For example, it may be beneficial for a broader explanation of the Department's risk approach to be made publicly available and for tailored information to be provided for specific regulatory functions (such as risk-based allocation of resources for assessment and compliance functions).

---

[26] http://www.cleanenergyregulator.gov.au/About/Policies-and-publications/Compliance-education-and-enforcement-policy

The Department should consider the approach taken by the Clean Energy Regulator and the ATO in developing this approach.

Intelligence

Best practice regulators use strategic intelligence to inform risk assessments. This allows them to identify emerging risks and provide greater confidence that the Department's analysis of comparative risks is accurate.

In the long term, ESD's NESTRA tool will have the capacity to incorporate the actual risk outcomes of projects to refine the way the tool calculates risks for future projects. EPG intends to develop this functionality for WiSTRA as well. However, as noted in the *Intelligence* section in Chapter 2, the Department, like many environmental regulators, does not have an established strategic intelligence capability. As a result, risk assessments are not intelligence driven and may be missing important information that could assist risk management.

Recommendation 5.5 (Intelligence):

Importance: 2

Timing: 3

The Department should adopt intelligence gathering and analysis to inform its risk management approach.

Chapter 6: How We Engage

OVERVIEW

Best practice regulators adopt a strategic approach to engagement with their stakeholders, including regulated entities, other regulators and the broader community. Good engagement can improve regulatory design and implementation, build trust and increase compliance[27]. Mature regulators also have sophisticated mechanisms for interacting with stakeholders which ensures communication is user-focused and consistent, and engagement is two-way.

The Project consulted external stakeholders. Some Stakeholder (particularly NGOs) requested more proactive engagement by the Department, particularly in relation to the development and implementation of new policies or other Departmental policies or changed. Feedback from some stakeholders also suggested that some staff in EPG do not have a strong understanding of the operating environment of relevant regulated entities and the full range of factors that influence their behaviours.

Chapter 6 makes recommendations regarding EPG's approach to engagement, including:

- increasing knowledge of regulated industries;

- reducing the burden of information requests;

- establishing and maintaining a single point of contact;

- speaking with a single voice; and

- improving engagement with community groups, co-regulators and communities of practice.

FINDINGS AND RECOMMENDATIONS

Understanding regulated industries

Many regulated entities operate within a wider industry and share similar challenges, priorities and business practices. Effective two-way engagement with industries allows a regulator to develop and maintain a sophisticated understanding of the various operating environments of regulated entities. This allows regulators to assess and improve the design and implementation of regulatory schemes, including reducing regulatory burden. Strong relationships with, and understanding of, industry also helps regulators to identify and respond effectively to emerging threats and issues.

The Project found that some staff in EPG do not have a strong understanding of the operating environment of relevant regulated entities and the full range of factors that influence their behaviour. This may be due to the wide range of stakeholders and industries that can be

---

[27] OECD (2014). *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy.

impacted by regulation. It may also be caused by the high volume of staff turnover and movement.

Case study – understanding regulated entities

Licensed customs brokers are important allies in regulating the import of goods controlled by the Department. By working closely with customs brokers in recent years, the Department has made it easier for regulated entities to comply with import and export requirements.

Customs brokers are licensed by the Australian Border Force and need to maintain their knowledge of thousands of categories of goods in order to fulfil customs clearance requirements. Customs brokers need a clear process map to explain the steps in the clearance process to regulated entities, and a list of documentation their clients must provide.

Over the past two years, Departmental staff have provided training for customs brokers regarding the import and export of Ozone Depleting Substances and Synthetic Greenhouse Gases. The Department developed broker-focused training material and presented it at five regional conferences. Further information specifically created for customs brokers has also been published on the Department's website.

This work has raised customs brokers' awareness of licensing requirements and significantly reduced the number of delays in the customs clearance process. The number of unlicensed imports has also been reduced significantly.

This process has also been beneficial for Departmental staff as they have gained key insights into the role and information needs of custom brokers. The Department is also spending less time responding to urgent calls from customs brokers and clients, allowing the Department to re-direct resources to other priorities, such as compliance and enforcement. This work has also improved the Department's relationship with Border Force.

Recommendation 6.1 (Understanding regulated industries)

Importance: 2

Timing: 2 and ongoing

EPG should establish a group of industry or stakeholder experts. Each 'expert' would be an internal source of information and intelligence on particular stakeholders or industrie. This would be recognised in the work allocation for each officer. These officers could undertake a range of formal and informal training activities to improve in their understanding of the operating context of key industries, as well as the broader regulatory, social and economic pressures they face.

Reducing the burden of information requests

When regulated entities understand the requirements and expectations of legislation or a regulatory process, burden is significantly reduced for both the agency and the entity and compliance with these expectations is higher. Mature regulators have fit-for-purpose forms and

guidance for regulated entities to use during a determination processes, outlining informational requirements and expectations. Mature regulators only request information that is necessary for the relevant regulatory scheme. Mature regulators coordinate requests for information internally and with other regulators and, where possible, rely on information that is already available.

During consultation, industry groups advised that their members reported that Departmental officers are professional and dedicated, and attempt to work constructively with the regulated community throughout regulatory processes. However, the high rate of staff turnover in EPG has meant that businesses often have to repeat details and information about their projects several times, and can result in inconsistent requirements or advice. One industry representative noted that a proponent had to deal with eight primary assessment officers over a period of two years on a particular proposal. Industry groups advised that it would helpful to have a single and consistent point of contact or case manager throughout the assessment process.

Some stakeholders noted that their members do not always understand the Department's information requirements, or the purpose of particular requests. Departmental officers sometimes request information that is already available or has been previously provided. In other cases, broad terms of reference can mean that regulated entities are required to provide large amounts of information that is not relevant to the core issues under assessment. This may be due to a lack of training and experience (see the *Skills and Training* section in Chapter 3), and is compounded by staff turnover and movement.

Recommendation 6.2 (Reducing the burden of information requests)

Importance: 1

Timing: 2

EPG should reduce the burden associated with information requests by:

- making requirements and/or requests clear;
- only requesting information that is necessary;
- clearly explaining the reasoning behind requirements and/or requests; and
- maintaining relationships through a single point of contact during licensing, permitting, and assessment processes, where possible.

Recommendation 2.8 (Making it easier to comply through consistent and proactive stakeholder engagement) relates to improving the Department's programs that assist stakeholders to better understand the Department's requirements, including by using behavioural insights.

Proactive engagement with community stakeholders

All regulators are accountable to the broader community as well as the Government, and mature regulators publish information about expectations about regulatory performance (see the *Performance Monitoring and Communication* section in Chapter 1). Mature regulators use fit-for-purpose mechanisms to explain, and where appropriate seek feedback on regulatory approaches and policies, and they provide feedback on the outcomes of consultation to demonstrate that concerns were understood and addressed.

During consultation, some stakeholders (particularly NGOs) requested more proactive engagement by the Department, particularly in relation to the development and implementation of new policies or other Departmental priorities or changes. Some stakeholders suggested that earlier engagement on the development of new policies would allow a greater contribution to the policy development process. In some instances, stakeholders suggested that the public consultation and comment period for new policies is too late in the process to make a substantive contribution. It was also noted that on occasion the purpose of engagement was unclear to stakeholders. For example, stakeholders mentioned instances where they believed the purpose of a meeting was to seek feedback, but it was to actually explain a policy that had already been finalised.

Recommendation 6.3 (Proactive engagement with community stakeholders):

Importance: 2

Timing: 3 and ongoing

EPG should ensure that it routinely engages with relevant stakeholders during all phases of the design and implementation of regulatory processes. This should be reflected in the relevant regulatory framework (see *Recommendation 1.1 (Regulatory Framework)*).

EPG could improve stakeholder relations and trust by establishing a policy roundtable comprising NGOs, industry, professional organisations (e.g. EIANZ) and academics to co-identify and co-design policy initiatives. This roundtable would also be a useful mechanism to review and evaluate policies and further understand the operating environment of stakeholders.

EPG should identify the purpose and desired outcome of each proposed consultation and make this clear to the stakeholder. For example, officers should be up front about whether they are explaining a new policy and its rationale, or whether there is scope for the stakeholder to influence the policy.

Working with other regulators

Many regulators share similar objectives and challenges. Mature regulators establish networks with other regulators to share experiences and insights and help solve common problems and improve consistency of approaches. This allows agencies to improve their capability and performance. Mature regulators also have clear institutional arrangements to work with co-regulators to avoid duplication and maximise the outcome of their collective efforts. For example, coordinating inspection and monitoring activities increases an agency's oversight of compliance. Mature regulators also routinely share relevant information and data, which can be used for a number of planning, compliance and engagement activities.

Like the Department, many regulatory agencies, both at the Commonwealth and state level are looking for ways to improve their regulatory maturity. Increasing engagement with these agencies would allow EPG to learn from their experience. For example, the Department could benefit from work conducted by other agencies such as the Clean Energy Regulator and the NSW Environment Protection Authority in relation to their regulatory capability frameworks (see also *Recommendation 3.1 (Skills and training)*).

The Department also relies on other regulators to gather information and carry out monitoring activities. The Department has an established relationship with the International Criminal Police Organisation (INTERPOL), and the Australian Border Force monitors imports and exports of various items that the Department is responsible for regulating, such as wildlife trade products, ozone equipment and hazardous waste. State and territory environment and planning agencies, fisheries officers and the Australian Federal Police also provide assistance on a range of monitoring, compliance and enforcement activities.

Despite this heavy reliance, the Department does not have clear institutional arrangements for managing relationships with these agencies. For example, where they exist, Memorandums of Understanding (MOUs) are out of date or inadequate, and coordination with other agencies varies across EPG.

Most of the regulation administered by ESD either automatically appoints, or allows for the appointment of, officers from other agencies as authorised officers for the purpose of the regulatory schemes (for examples, customs officers authorised to enforce provisions of the EPBC Act). However, the facilitating provisions vary and the Department does not appear to have a coordinated approach to managing these appointments.

The Department has started to take steps to formalise its relationship with other regulators. For example, the Compliance and Enforcement Branch has been working to improve and standardise the Department's relationship with Border Force, including participating in the National Border Targeting Centre, identifying the requirements of all relevant areas of the Department and leveraging existing relationships between officers to build better formal and informal linkages across the two agencies.

EPG is also working with Border Force and the Digital Transformation Office on an IT project to automate information-sharing services between the two agencies, in relation to export seizures and permit acquittals relating to wildlife trade. A separate project between Border Force and EPG is addressing an issue raised by the recent ANAO audit around the two agencies' ability to share confidential and protected information digitally, which will assist with broader compliance and enforcement activities by the two agencies. Both projects are good steps towards improving the capability and efficiency of EPG.

During consultation, some staff commented that engagement with states and territories has decreased due to resourcing constraints, and relationships are not being maintained to an optimal standard. The Department has commenced embedding officers within state environment agencies to assist with the EPBC one-stop-shop process. This has been welcomed by state agencies, however there is some concern that roles have not been articulated clearly enough which is preventing full benefit from the program. State agencies also expressed a desire to have ac cess to reasons for decisions, to aid in their assessment of those projects which are assessed by states and territories as well as by the Department.

Recommendation 6.4 (Working with other regulators):

Importance: 2

Timing: 2

The Department should increase engagement with other Commonwealth and state regulators to build its regulatory capability. This could include building stronger bilateral

relationships with other regulators, for example through staff exchanges, secondments, or ad hoc or standing working groups.

The Compliance and Enforcement Branch should continue working to develop more systematic arrangements with Border Force. These should be formalised through an updated MOU. The Department should develop similar arrangements with other co-regulators.

The Department should develop a more consistent and systematic approach to appointing authorised officers from other state or Commonwealth agencies.

EPG should work with relevant state and territory co-regulators to agree on cooperative approaches to monitoring and compliance activities for shared areas of responsibility. This should include sharing supporting information such as briefs etc.

EPG should provide additional support and guidance to embedded officers working with state and territory governments, in particular:

- clarify roles with the embedded officer and the relevant agency with respect to the amount of assistance provided on assessments;
- monitor performance at regular intervals; and
- facilitate regular meetings between the Department, the embedded officer and the relevant agency.

EPG should routinely share key assessment documentation with co-regulators (such as state and territory agencies).

Engaging with communities of practice

Mature regulators use forums, ad hoc meetings, seminars and conferences to increase their knowledge of issues facing the community and build capability. Communities of practice are useful for exploring common issues, sharing lessons learnt and promoting best practice regulation.

The Project has found that some members of EPG positively engage in a number of communities of practice and forums such as the Australasian Environmental Law Enforcement and Regulators neTwork (AELERT) and the Environment Institute of Australia and New Zealand (EIANZ), although engagement with AELERT has largely been limited to officers from the Compliance and Enforcement Branch. EPG should look to extend its involvement with these networks and other communities such as the International Network for Environmental Compliance and Enforcement (INECE).

Feedback from state regulators and other stakeholders indicated that they look to the Department to be a national leader in environmental regulation. While the Department does work with states and territories on a number of issues and projects, such as the Common Assessment Method, further proactive engagement on environmental best practice would be beneficial for all parties. The Department should consider establishing ad-hoc or regular working groups and panels to discuss common risks and trends, environmental issues, regulatory best practice, and develop opportunities for further collaboration.

Recommendation 6.5 (Engaging with communities of practice)

Importance: 3

Timing: 2

The Department should increase engagement with relevant communities of practice to build its regulatory capability. This could include:

- further engagement with Commonwealth forums (such as those managed by PM&C) and national forums such AELERT and EIANZ;
- convening ad-hoc working groups with states and territories and/or other Commonwealth regulators to consider particular issues.

Speaking with a single voice

Best practice regulators have integrated communication strategies to ensure that messaging and advice is clear and consistent. This includes maintaining and sharing information about past and planned interactions with stakeholders. Mature regulators use this information to inform intelligence and analysis, to support an accurate understanding of the operating environment of the regulated community, and to support risk management.

The Project found that stakeholder engagement is conducted inconsistently across EPG. Strategies are not regularly coordinated across Sections and Branches, and staff are often unaware of previous or concurrent engagement with particular stakeholders. This can result in confusing and inconsistent advice or repetitive information requests from the Department.

The recording of stakeholder engagement is conducted in an ad hoc manner; predominantly through file notes and hand-written notation. This makes it difficult for stakeholder data to be incorporated into corporate memory for future use. This is of particular concern given the current resource restraints and high level of staff turnover in EPG.

During consultation, the Minerals Council of Australia noted that proponents often have to re-establish relationships and repeat explanations or discussions of issues over the life of an EPBC assessment, due to the high turnover of assessment officers. Separate stakeholders noted that the assessment process was more efficient and consistent when one assessment officer was responsible over the life of the assessment.

Recommendation 6.6 (Speaking with a single voice)

Importance: 3

Timing: 2

EPG should work with the Policy and Communication Branch in PAID to develop a broad communication strategy for EPG. This should focus on identifying the most effective engagement options given limited resources. In the longer term, this policy should also map stakeholders across EPG and the Department to allow a more coordinated approach to engagement.

EPG should record all relevant information about its interactions with stakeholders (i.e. meetings, phone calls, e-mails, inspections) and make this information available to all relevant officers to improve corporate memory, inform intelligence and analysis, support an accurate understanding of the operating environment of the regulated community, and support risk management (see also the *Strategic Risk Assessment* section and the

Resource Allocation section in Chapter 5). In conjunction with intelligence, EPG should also use this information to target and prioritise stakeholder engagement and inform strategies.

92

Importance: 1

Timing: 2

EPG should establish designated points of contact for key stakeholders (not necessarily the stakeholder expert from *Recommendation 6.1 (Understanding Regulated Industries)*).

Those officers should:

- be a first point of contact;
- have a general understanding of the interests of the stakeholder;
- advise the stakeholder about any relevant new policies or other information;
- facilitate effective transfer to another person if more specific information is required;
- proactively facilitate any proposed transfer of responsibility to another person; and
- be a general problem solver for the stakeholder.

EPG should endeavour to maintain single points of contact during licensing, permitting, and approvals processes to maintain and improve working relationships with proponents and state governments.

APPENDIX 1: TERMS OF REFERENCE

Towards Regulatory Maturity

a regulatory capability review of the Environment Protection Group

PURPOSE OF THE REVIEW

The review will assess the maturity, capability and capacity of the Environment Protection Group to fulfil its regulatory functions and provide recommendations on how the Department can establish and maintain a position as a contemporary, mature and trusted regulator.

SCOPE AND PARAMETERS

The review will focus on the regulatory activities of the Environment Protection Group related to the legislation listed at Attachment A.

The review will address:

- The attributes of a 'best practice regulatory agency', taking into account experience and practice in like regulatory agencies at the Commonwealth and state levels and, if appropriate, internationally

- Any changes required to ensure the Environment Protection Group's regulatory functions reflect those attributes.

In addressing the above requirements, the reviewer will consider:

- The most appropriate institutional arrangements for a 'best practice regulatory agency', including organisational design and structure, designation of responsibilities, resourcing and opportunities for efficiencies

- Organisational processes for identifying and managing regulatory risks

- Staff capability, including regulatory knowledge and capacity

- The adequacy of, and potential improvements to, business systems.

As discussed further under "Consultation," the review will contribute to the regulatory knowledge and capabilities of staff in the Environment Protection Group.

In undertaking the review, the reviewer will have regard for relevant Australian Government policies (including the Regulator Performance Framework) and the findings of recent past assessments of the Department's regulatory functions (e.g. ANAO performance audits).

The following matters are beyond the scope of the review:

- The regulatory functions of Portfolio agencies and other Departmental groups.

- Amendments to current legislation. However the reviewer may choose to highlight aspects of the legislation that create constraints to best practice regulatory performance.

DELIVERABLES

The reviewer will provide a report on their assessment of the regulatory capability and capacity of the Environment Protection Group, together with recommendations for moving towards best practice and positioning the Department as a contemporary, mature and trusted regulator.

A draft report will be provided for discussion prior to finalisation of the final report.

The reviewer will liaise with the Functional and Efficiency Review team to discuss early findings that may inform that process.

CONSULTATION

The review will engage staff in the Environment Standards Division and Wildlife, Heritage and Marine Division. The reviewer will draw on internal knowledge and experience, seeking staff views on current practices and potential improvements. Engagement will be structured to build the regulatory knowledge and capacity of staff, including through discussions about relevant best practice and possible directions for reform.

The review will include consultation with key stakeholders in the Commonwealth's environmental regulatory process, including: peak industry organisations; environmental organisations; regulatory agencies in other jurisdictions and Commonwealth agencies; and regulated parties.

The Review will consider the views of the regulated community on opportunities for the Department to improve its regulatory systems and stakeholder engagement.

The reviewer may engage with other Departmental divisions and Portfolio agencies as required.

GOVERNANCE

The review will be undertaken by an independent external reviewer, reporting to the Secretary and Deputy Secretary, Environment Protection Group. The reviewer will provide regular updates on progress to the Deputy Secretary, Environment Protection Group.

An Executive Advisory Panel will provide strategic advice and guidance to the reviewer. The panel will comprise:

- First Assistant Secretary, Policy Analysis and Implementation Division
- First Assistant Secretary, Environment Standards Division
- First Assistant Secretary, Wildlife, Heritage and Marine Division
- The Department's General Counsel.

The reviewer will be supported by a secretariat based in the Policy Analysis and Implementation Division.

TIMEFRAME

The reviewer will discuss early findings with the Functional and Efficiency Review team in mid-October.

A draft report will be presented to the Secretary and Deputy Secretary, Environment Protection Group within two months of the commencement of the review.

The final report will be delivered by 20 February 2016.

LEGISLATION WITHIN SCOPE OF THE REVIEW

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

- *Australian Heritage Council Act 2003*

- *Environment Protection and Biodiversity Conservation Act 1999*

- *Environment Protection (Sea Dumping) Act 1981*

- *Fuel Quality Standards Act 2000*

- *Hazardous Waste (Regulation of Exports and Imports) Act 1989*

- *Historic Shipwrecks Act 1976*

- *National Environment Protection Council Act 1994*

- *National Environment Protection Measures (Implementation) Act 1998*

- *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995*

- *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) (Transitional Provisions) Act 2014*

- *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*

- *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995*

- *Product Stewardship Act 2011*

- *Product Stewardship (Oil) Act 2000*

- *Wet Tropics of Queensland World Heritage Area Conservation Act 1994*

APPENDIX 2: BIBLIOGRAPHY

POLICIES & OTHER DOCUMENTS CONSIDERED BY THIS PROJECT

Department of the Environment (2014). *Compliance Monitoring Plan 2014-15*, Environment Protection and Biodiversity Conservation Act 1999 and the Environment Protection (Sea Dumping) Act 1981.

Department of the Environment (2013). *Regulatory Policy*.

Department of the Environment (2014). *Risk Management Policy*.

Department of Finance (2014). *Commonwealth Risk Management Policy*.

EPA SA (2013). *Review of South Australian Environment Protection Authority regulatory practice – tools and approaches*.

NSW EPA (2013). *Environment Protection Authority Compliancy Policy*.

AUDITS, REVIEWS & OTHER REPORTS

(2015). Functional & Efficiency Review

ANAO (2014). *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*.

ANAO (2015). *Managing Compliance with the Wildlife Trade Provisions of the Environment Protection and Biodiversity Conservation Act 1999*.

Department of the Environment (2014). *Internal Strategic Review Final Report*.

NOUS Group (2015). *Policy and Operations Review to Inform Creation of Environment Standards Division – Summary Report*.

PricewaterhouseCoopers (2013). *Internal Audit – Final Report – Review of Compliance and Enforcement Program Management*.

BEST PRACTICE REGULATION

ANAO (2014). *Administering Regulation: Achieving the Right Balance*.

Australasian Environmental Law Enforcement and Regulators Network (2015). *Modern Regulator Improvement Tool – MRIT*.

Department of Prime Minister & Cabinet (2014). *The Australian Government Guide to Regulation*.

OECD (2012). *Recommendation of the Council on Regulatory Policy and Governance*.

OECD (2014). *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy.

OECD (2014). *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy.

New Zealand Productivity Commission (2014). *Regulatory Institutions and Practices*.

Productivity Commission (2014). *Regulator Audit Framework*.

APPENDIX 3: PRINCIPLES OF BEST PRACTICE

A: PRINCIPLES OF ORGANISATIONAL BEST PRACTICE

Well defined outcomes	• The organisation adopts policies and institutional mechanisms on regulatory enforcement with clear objectives, optimises harmonisation with other relevant regulators and has a long-term roadmap. • The legislative and authorising environment is considered at all times and steps are taken to minimise the duplication of regulation. • The organisation achieves the intended outcomes of their regulations without unnecessarily restricting or imposing unnecessary burden on regulated entities.
Risk management	• The organisation promotes a risk management culture that supports an integrated approach to the identification and management of risk that informs activities and the design of strategies. • Risk assessments are balanced and implemented uniformly and impartially, while also being dynamic and open to scrutiny.
Staffing	• Staff training and recruitment are managed to ensure professionalism, integrity, consistency and transparency. • Performance management policies reflect the overall aims of enforcement activities, specific goals of the agency, and in particular the performance indicators for the agency.
Resourcing	• There are appropriate resources with a level of stability that allows for proper planning, professional development and long-term improvements. • Funding levels are adequate to enable the regulator, operating efficiently, to effectively fulfil the objectives set by government, including obligations imposed by other legislation.
Information management	• Information and communication technologies are used to maximise risk-focus, the collection and analysis of data, coordination and information-sharing. • The organisation shares resources with other agencies to satisfy accurate information needs that inform risk assessments and other activities.
Stakeholder engagement	• Mechanisms exist for ongoing, two-way engagement with regulated entities and the organisation strives wherever possible and appropriate to establish a cooperative approach. • There is a demonstrated understanding of the operating environment, the circumstances of individuals and the current and emerging issues that affect the sector. • Information, including expectations, is available to stakeholders and is easily accessible, streamlined and user-focused.
Transparency and accountability	• Governance structures and human resources policies for regulatory enforcement support transparency, professionalism, and results-oriented management. • Regulatory decisions and functions are timely and are conducted with the upmost integrity. They are made on an evidence-based, objective, impartial and consistent basis, without conflict of interest, bias or improper influence. Evidence is recorded and publicly available. • Regulated entities have access to complaints and appeal processes and systems. • Organisational objectives and risk frameworks are publicly available.
Performance monitoring and reporting	• The organisation's actions and their effectiveness are regularly evaluated against a set of well-defined indicators and based on reliable and trusted data. Reports are available to both internal and external stakeholders. • The organisation actively contributes to the continuous improvement of regulatory frameworks.

B: PRINCIPLES OF OPERATIONAL BEST PRACTICE

Advice and Guidance	• Tailored guidance and advice is provided where appropriate and cost-effective. Advice and guidance services take into account business size and industry. • Transparency and compliance is promoted through the appropriate use of instruments including toolkits and checklists (including self-check tools). • Advice, policies and guidance is widely available, accessible, clearly communicated, consistent and two-way engagement is promoted and harnessed.
Licensing & Approvals	• Licensing, registration, and other processes and requirements are simple and streamlined. There are a range of options for businesses to submit applications and provide data, at minimum cost to the applicant and regulator. • Policies and guidance - including decision timelines, eligibility and assessment criteria - are provided to applicants. • Applicants are provided with full-documented decisions that state the reasons for the decision and any conditions imposed. Advice is provided about relevant review or appeal mechanisms, where appropriate. • There are internal quality control and review processes, and officers assessing applications have the required knowledge, skills and experience to do so.
Monitoring & Compliance	• A risk-based and proportionate approach to monitoring and compliance is applied and takes into account the circumstance and operational needs of the regulated entity.

	• The organisation endeavours to communicate with regulated entities, where appropriate, such as prior to inspections and providing feedback. • The organisation allows businesses flexibility in how they meet their obligations, encourages self-regulation, utilises joint or coordinated inspections with other regulators and allows for a range of regulatory responses. • Positive incentives, cooperation from industry groups, and other means to encourage compliance are regularly used. • The frequency of information collection is minimised and coordinated. Information requests are tailored and only made when necessary to secure regulatory objectives. • Policies and practices for inspections and enforcement respect the legitimate rights of those subject to the enforcement, are designed to maximise the net public benefits through compliance and enforcement and avoid unnecessary burdens on those subject to inspections. • The organisation has a risk-based compliance monitoring strategy which includes the types of activities to be undertaken, the reasons for their selection, and the frequency of activities.
Enforcement	• A consistent, risk-based, graduated approach is used with tools that are suitable and proportionate to different types of non-compliance in accordance with published enforcement guidance. • The organisation makes businesses aware of the reasons why enforcement action is necessary and ensures they understand what is expected of them. • Regulatory enforcement is evidence-based and is evaluated regularly. • The frequency of inspections and the resources employed are proportional to the level of risk; enforcement actions aim to reduce the actual risk posed by infractions.

APPENDIX 4: LIST OF REGULATORY TOOLS

A. EXAMPLES OF REGULATORY TOOLS

Information	Information campaigns
	Disclosure
	Performance indicators
	Capability, advice, attitude change
	Monitoring schemes
	Accreditation rating schemes
	Capability, advice, attitude change
Assistance	Subsidies
	Tax concessions
	Stewardship payments
	Grants and Procurement
Regulation	Removal of perverse incentives
	Registration
	Certification
	Standards
	Codes of conduct or practice
	Guidelines, principles and policies
	Covenants
	Legal regulation
	Conditional licensing
	Permits
	Prohibition
	Legal sanctions
Market based	Emissions and effluent charges, taxes or levies
	Price regulation
	Product charges
	Clean up or restoration levies
	Performance bonds
	Tradeable quotas or permits
	Other economic incentives

B. EXAMPLES OF COMPLIANCE TOOLS

Mandatory audits

Compliance campaigns targeting specific industries, or geographical areas or activities.

Warnings and cautions

Improvement / prohibition notices

Remediation / clean up notice

Conservation agreement (e.g. s307A, EPBC Act)

Covenants

Forfeiture of bond

Repayment of Commonwealth costs

Enforceable undertaking

Infringement or penalty notices

| Suspension / variation / revocation of approval or licence |
| Suspension / stop notice / injunction |
| Disclosing information/adverse publicity |
| Seizure, forfeiture and destruction |
| Compensation orders |
| Restoration orders |
| Compliance programs |
| Proceeds of crime action |
| Directors' liability |
| Civil penalties |
| Criminal offence – imprisonment / fines |

APPENDIX 5: RECENT & PLANNED WORK ON REGULATORY IT SYSTEMS

A. ENVIRONMENTAL IMPACT ASSESSMENTS MODULE

One early module developed under the enterprise architecture is a workflow system for Environmental Impact Assessments under Part 9 of the EPBC Act. This system was launched in August 2015. The new module:

- allows project referrals to be processed within the system;

- checks for appropriate authority (but this is not automatically linked to delegations instruments);

- automatically publishes specific documents;

- allows officers to record file notes of meetings or inspections; and

- provides time prompts and visibility of projects to supervisors.

Future Environmental Impact Assessments

The Department is continuing to develop the environmental impact assessment workflow system so that by 1 July 2016 the system will:

- require proponents to lodge referrals online (with this automatically beginning a case within the system;

- allow proponents to identify the spacial parameters of their project on line and

- integrate payment processes so that officers can see whether fees have been paid within a single system.

The Department is also progressing work to directly link source databases (for example those containing authoritative information about protected species and relevant recovery plans) to the workflow system. This would automate the identification of relevant protected matters and associated statutory documents, reducing human error and the risk that information is out of date. While this work is being pursued as a matter of priority it is likely that it will take some time due to the age and complexity of the source databases.

B. WILDLIFE TRADE

The Department has commenced work on developing a module for international wildlife trade permits (similar to the environmental impact assessments module). This project is expected to be completed by July 2017.

C. COMPLIANCE AND ENFORCEMENT

The new environmental impact assessment tool is not yet linked to the compliance and enforcement IT system. The Department has done some work to analyse the IT requirements for compliance and enforcement, recognising that its current systems are insufficient. Capital bids are in preparation for this work to commence in July 2016.

D. HAZARDOUS WASTE PERMITTING

The Department has commenced work on developing a new permitting system to track and manage Hazardous Waste permits. The project is expected to be completed by the end of June 2016.

E. DATA ANALYSIS AND INTELLIGENCE

Data collation and analysis is important for gathering intelligence and informing risk assessments. Best practice regulators use specialist analytics programs with trained analysts to identify trends and issues within significant volumes of data. For example the ATO is developing programs to identify normal parameters in a range of tax returns. This will allow them to target review activities and to provide real time feedback to clients when entering data (prompting them to fix mistakes and discouraging fraud).

The ANAO found that the Department does not have sufficient IT systems to allow adequate data analysis. The Department's ability to collect and analyse data is limited by both the historic disjointed nature of IT systems and limits on its ability to share protected data with co-regulators.

The Department has funding to develop a data warehouse which will improve its ability to collect and collate data. The Department also intends to procure appropriate analytics tools but this is currently unfunded.

The Victorian EPA noted that when building their new IT system and analytics functions, it was difficult for staff to predict necessary data sets because they were inexperienced in managing and utilising data. To mitigate this, the Department should consult with experienced regulators, such as the Victorian and NSW EPAs when building their analytics capability.