



Submission to the second independent review of the Environment Protection and Biodiversity Conservation Act 1999

The Wilderness Society, April 2020

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Executive summary

The Wilderness Society welcomes this opportunity to provide a submission into the second independent review of the *Environment Protection and Biodiversity Conservation Act 1999* ('the EPBC Act' or 'the Act'), Australia's primary federal legislative mechanism for environment protection. We make a number of recommendations for priority areas of reform for the EPBC Act that will deliver maximum benefit for the environment, business and the community, whilst maintaining, and improving, environmental standards.

The Wilderness Society is an independent environmental advocacy organisation¹. We are membership-based, and we know that everyday Australians want governments to take action to protect nature and act on climate change. For over 40 years, we've engaged Commonwealth and state governments to ensure Australia's natural environment is healthy, biodiverse and resilient to the growing impacts of climate change.

As one of the world's most megadiverse countries, Australia's biodiversity is magnificent, unique and rightly treasured by Australians and the world. Many of Australia's species are only found here, and we are home to many iconic World Heritage Areas. Our unique animals and plants have cultural value to Australians of all backgrounds, especially for Aboriginal and Torres Strait Islander peoples, and are vital to supporting economic prosperity, wellbeing and community health. **Australia's national environment law must protect and safeguard this heritage.**

Australia's environment is under increasing pressure. Independent reporting shows all major indicators of environmental health have declined over the two decades the EPBC Act has been in force. Australia is worst in the world for mammal extinctions, second worst in the world for loss of diversity of life, and fourth in the world for overall plant and animal extinctions. Cumulative interactions between the major pressures impacting the environment—especially climate change—are amplifying the threat faced

¹ Our organisation's purpose is protecting, promoting and restoring wilderness and natural processes across Australia for the survival and ongoing evolution of life on Earth. More information about our organisation is available at www.wilderness.org.au

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by Australia's species and ecosystems. **This is why reform of the EPBC Act is so needed.**

In addition, it is clear that the 2019-2020 summer bushfires have changed the Australian landscape and its wildlife significantly. It will take many years and a significant amount of human, financial and legislative resources to recover. The same system of laws, regulations and institutions that have failed wildlife and ecosystems over decades and done little to mitigate the climate crisis is not and cannot be the system that is the solution. **Post-bushfires, and post-COVID, Australia must not return to business as usual on fossil fuels, climate change, vegetation management and biodiversity conservation.**

The Commonwealth has a fundamental obligation to ensure the protection of Australia's environment, especially for:

- Environmental values that cross state boundaries, including waterways and dispersed species;
- Nationally significant environmental values, such as threatened species, High Conservation Value or large, intact ecosystems, and the national reserve system; or
- Environmental values covered by our international treaty obligations, such as World Heritage sites, Ramsar wetlands and migratory species.

The EPBC Act has comprehensively failed to deliver on this Commonwealth obligation, and is in need of extensive reform. Significant design and implementation issues impede the effective operation of the EPBC Act and ensure the EPBC Act cannot achieve its objects. These design and implementation issues are listed below, and relate in particular, though not exclusively, to four of the 'Principles to guide future reform of the EPBC Act' identified in the 2019 Review Discussion Paper: *Effective protection of Australia's environment*; *Improving inclusion, trust, and transparency*; *Making decisions simpler*; and *Integrating planning* (though we note that simpler or integrated must not mean weaker).

Matters for reform of the Act therefore include:

- **Ambiguous objectives**—the Act does not *require* the protection of the environment or the conservation of biodiversity, only that the Government *provide* for that protection;

- **Approach to regulation**—the Act focuses on reactive assessment and mitigating the impacts of single projects without a framework for proactive protection of key environmental values;
- **Species-focussed**—in addition to retaining species protections, the Act requires substantive mechanisms to protect and sustain the natural landscapes and habitats on which species and communities rely;
- **No duty to protect key values**—the Minister has significant discretion regarding the rigour and manner with how the Act is applied, with minimal proactive protections for key environmental value;
- **No limits to destruction**—major exemptions in the Act such as the Regional Forest Agreements allow key threatening activities to happen without assessment/approval under the Act;
- **Traditional Custodian consent**—inadequate mechanisms to ensure principles of free prior and informed consent as the basis of participation by Traditional Custodians;
- **Limits meaningful participation**—the Act contains limited rights and responsibilities for communities, does not ensure early or adequate engagement and public participation in decision-making;
- **Lack of role clarity**—there is no one level of government responsible for ensuring environmental outcomes, setting national priorities, measuring environmental indicators and ensuring efficient and consistent regulation; and
- **Poor implementation**—the EPBC Act contains limited provision for ensuring effective implementation infrastructure (i.e. data and monitoring, cooperative interjurisdictional mechanisms, trusted and independent institutions) is in place.

In addition, the administration of the EPBC Act by the Environment Minister is one of the last remaining major regulatory functions at a Commonwealth level that is not undertaken by an independent statutory body with a dedicated framework for external or independent accountability and oversight.

The purpose of environmental legislation is to ensure Australia's environment is healthy and remains so into the future, and that this purpose should not be required to be balanced, or diluted, against the other mandates and responsibilities of the Commonwealth Government. To achieve this purpose, the Wilderness Society strongly recommends the following priority areas for reform:

1. **Reform the EPBC Act (or create a National Environment Act)** so that it:
 - a. has a clear and unambiguous objective to ensure that Australia's environment is healthy and remains so into the future;
 - b. prescribes clear and enforceable duties to protect and recover environmental values, and sets minimum standards of protection across jurisdictions;
 - c. contains clear and enforceable preventative measures against harmful activities and projects;
 - d. deals consistently with all types of environmental impact, regardless of the sector and land use causing those impacts; and
2. **Enshrine community rights and informed participation in decision-making** in all Commonwealth environmental legislation and regulation; and
3. Reform the EPBC Act (or create a National Environment Act) to provide key enabling infrastructure to ensure that the Act is implemented in line with its objects and principles, including:
 - a. Establishing independent and trusted institutions (a **National Environment Protection Authority and National Environment Commission**) to ensure transparent and consistent enforcement of the Act and provide oversight of and accountability around regulatory processes and decision-making;
 - b. Ensuring **full, timely and comprehensive data and monitoring** is publically available to support effective policy development and effective community participation in decision-making; and
 - c. Ensuring **sufficient resources** are invested to make certain that environmental values are maintained or enhanced.

More broadly, Australia's environmental laws across all jurisdictions and institutions cannot currently adequately deal with:

- The challenge of growing climate impacts;
- Recovery from the catastrophic impacts of the 2019-2020 summer bushfires; or
- The ongoing impacts of 200 years of clearing, mining, logging and inappropriate agriculture.

This independent review of the Act provides an opportunity to rethink Australia's national approach to environmental regulation and bring about Commonwealth leadership of a consistent and collaborative approach to environmental regulation,

backed by a strong and effective national environment act, to effectively address threats to species and biodiversity across the country.

Our recommendations for reform of the EPBC Act are set out immediately below, with further detail on each in the following pages developed in response to three key areas:

1. Whether the EPBC Act is delivering what was intended, the role of environmental legislation and the Commonwealth (from p.19);
2. Priority reforms required to ensure effective regulation of our environment, including objects, scope, provisions and implementation (from p.32); and
3. How effective the EPBC Act will be in addressing future challenges (from p.91).

For reference, a guide to the location of comments and recommendations relating to the 26 questions posed in the EPBC Act Review Discussion Paper can be found in [Appendix 1](#).

We thank you for taking the time to consider our views and recommendations, and we extend the reviewers and expert panel our very best wishes for the process.

Recommendations

Role of the Commonwealth in environmental protection

1. The Commonwealth should fundamentally reform the EPBC Act to create a National Environment Act that:
 - a. Prescribes clear and enforceable duties to recover environmental values, and sets minimum standards of protection across jurisdictions;
 - b. Contains clear and enforceable preventative measures against harmful activities and projects;
 - c. Deals consistently with all types of environmental impact, regardless of the sector and land use causing those impacts;
 - d. Enshrines community rights and informed participation in decision-making; and
 - e. Provides for key enabling infrastructure to ensure the above are implemented in line with the objects and principles of the Act.
2. The Commonwealth should urgently review and reform all reliant legislation and subsidiary regulatory instruments (e.g. Regional Forest Agreements, existing strategic assessments) that stem from the EPBC Act to ensure they implement the objects and principles of the EPBC Act and any successor legislation.
3. The Commonwealth should take primary responsibility for protection of the environment where Australia has specific international obligations, on Matters of National Environmental Significance (MNES) or in any case where an issue occurs across state boundaries.

4. The Commonwealth should take primary responsibility for ensuring the implementation of a comprehensive national environment regulatory framework of consistent and complementary laws, regulations, and policies (in all jurisdictional levels) that:
 - a. contains clear objectives and commitments for nature protection;
 - b. sets minimum standards of protection across jurisdictions; and
 - c. is consistent across tenures, jurisdictions and industries.

Objects, Principles and Scope of the EPBC Act

5. That Australia's national environmental legislation should contain clear objects to provide:
 - a. A clear and unambiguous objective to ensure Australia's environment is healthy and remains so into the future; and
 - b. Specific objects as required to define the desired outcomes of the Act in relation to international obligations, biophysical and societal outcomes and requirements of the Commonwealth Government.
6. That the existing EPBC Act principles be rewritten to better reflect the goal and objectives of ecologically sustainable development (ESD) and the role of Australia's national environment legislation in ensuring Australia's environment is healthy and remains so into the future.
7. That existing Matters of National Environmental Significance be retained, and additional MNES be adopted to provide strategic, coordinated and efficient regulation of major threats to Australia's ecological integrity.

Prescribing duties and actions necessary to ensure recovery

8. Australia's national environmental act should contain defined duties and responsibilities for decision makers, including requirements to:
 - a. maintain or enhance the environmental values and ecological character of protected matters under the Act;
 - b. ensure the actions they take, including those they fund or authorise, are not contradictory to the objects and principles of the Act;
 - c. ensure implementing instruments (e.g. list, registers, maps, plans and standards) are regularly updated based on science-based assessments; and
 - d. establish and maintain accurate, nationally consistent and publically available national environmental accounts.
9. That Australia's national environment act include:
 - a. Clear Commonwealth government responsibilities to maintain or enhance matters of national environmental significance;
 - b. Clear, science-based 'red lines' that prevent any destruction of critical environmental values; and
 - c. A requirement on proponents and the Commonwealth government to demonstrate that regulated activities will not have an adverse affect on MNES and are being undertaken in line with national environment plans and standards before approval is granted.
10. That the Commonwealth Government should be legislatively required to develop a national biodiversity conservation and climate mitigation strategy, which:

- a. Provides clear goals and measurable targets for biodiversity, threatened species and emissions reductions to be achieved by Federal, State and Territory and Local governments;
 - b. Outlines bioregional planning and targets;
 - c. Outlines funding commitments over the life of the strategy; and
 - d. Is updated and reviewed every five years.
11. The Commonwealth Government should set targeted and broad environmental standards to set a baseline for protection and work with other jurisdictions to ensure development of clear requirements, processes and oversight to integrate national environmental goals and standards into state and territory planning, environmental and NRM laws.
12. That the Commonwealth Government be required to develop science-based recovery plans for critically endangered and endangered species, all threatened species whose population has declined by 20% or more over a decade, or migratory threatened species or species of national significance;
13. On listing, a recovery plan or conservation advice must be prepared for all threatened species—for those currently listed species without either, a recovery plan or conservation advice must be in place in line with the above by 2022.
14. Recovery plans and conservation advices must be enforceable, binding, reassessed and updated every five years and require climate impact assessment for species and its critical habitat, and include emergency response plans and funding in the event of extreme events affecting habitat (such as fire).
15. Recovery plans and conservation advices must be resourced for population recovery, not just population stabilisation, and for maintenance and eventual recovery of existing critical habitat.
16. Recovery plans and conservation advices should be integrated with other legislation that may impact their implementation—including urban and regional planning and development legislation and codes—to proactively prevent conflict between the conservation of species and development plans.
17. The Commonwealth Government should significantly increase resources into recovery plan and threat abatement implementation, including establishing a Recovery Fund with an annual investment of \$200M to implement recovery plans.
18. That Australia's national environmental legislation should require:
 - a. Critical habitat to be identified, mapped and included in plans, advices and on a Critical Habitat Register, at the time a species or ecological community is listed;
 - b. Provisions stopping any destruction or degradation of critical habitat for critically endangered and endangered species, and critically endangered or endangered ecosystems or floristic communities; and
 - c. An updated definition of critical habitat that include those spatially explicit areas needed for a given species to avoid extinction and recover to the point it can be delisted, including those habitats presently occupied, and those habitats not yet occupied but which will be needed for the species to expand its populations so that it can recover.
19. Critical habitat provisions must protect habitats on all areas of land and sea, regardless of tenure—not just Commonwealth land.
20. That Australia's national environment act:
 - a. expressly protect World Heritage properties/areas as well as World Heritage values;

- b. require the Commonwealth Environment Minister to prepare and properly fund management plans for World Heritage properties/areas in line with Australia's obligations under the World Heritage Convention;
- c. ensure World Heritage management plans include long-term planning, resilience building, updating listings and provisions for major disaster prevention, mitigation and response; and
- d. require the Commonwealth to act consistently with management plans in planning, decision-making and regulation, including assessment and approval.

Preventing activities and projects that worsen the state of the environment

- 21. The national environment act and subsidiary instruments should:
 - a. adopt an 'adverse impact' test in place of 'significant impact' based on objective and measurable criteria;
 - b. require proponents and the Commonwealth to demonstrate that regulated activities will not have an adverse affect on MNES or that any adverse effect will be mitigated via world's best practice efforts; and
 - c. ensure consideration of cumulative impacts is integrated into National Environment Plans and related bioregional planning, as well as in strategic assessments and assessment processes.
- 22. That the Commonwealth:
 - a. Abandon the nation's ten existing Regional Forest Agreements (RFAs), and undertake full scientific assessments of RFA regions post the 2019-2020 summer bushfires, given the wood supply and conservation assumptions underpinning the existing RFAs are now invalid;
 - b. Require the states to put forward native forest logging plans to the Commonwealth Government for assessment, on a not less than 3-yearly basis, that include wood supply forecasts that take into account threatened species habitat requirements, climate and fire risk and a thorough and comprehensive assessment of the social, environmental and economic context of forest management;
 - c. Ensure Commonwealth assessment of logging plans:
 - i. only approves plans that are in line with national standards, plans and targets, including Conservation Advices and Recovery Plans for Nationally-listed threatened species;
 - ii. only approves plans subject to enforceable conditions tailored to protecting forest-dependant threatened species and their habitat;
 - iii. supports national and international standards for reductions in deforestation rates for native forests; and
 - iv. any coupe additions to such plans would require a further referral and assessment; and
 - d. Include 'major event' provisions to ensure significant events, such as up-listing of species or major bushfires, trigger suspension of any approved logging plans pending Commonwealth Government reassessment.

23. That the list of MNES be expanded include key forests and bushlands such as High Conservation Value forests and bushland (including all primary, old growth and remnant vegetation), vulnerable ecological communities and large, intact, functioning ecosystems (wilderness areas).
24. That the Commonwealth adopt a national goal of zero destruction of all:
 - a. primary, old growth and remnant vegetation;
 - b. regrowth vegetation where it meets one of the six criteria as defined by the High Conservation Value Network; and
 - c. critical habitat for critically endangered or endangered species; and that
 - d. that this goal is reflected in all legislation, national plans and standards.

Community rights and participation in decision-making for all

25. The Commonwealth Government should become a party to the Aarhus Convention; and enshrine community rights to information, participation and review in Australia's national environment act and all subsidiary instruments in line with the provisions of the Aarhus Convention.
26. Australia's national environmental act must enshrine:
 - a. strong public participation provisions, including early engagement and participation at all key stages of decision-making, to inform planning, decision-making and the development and implementation of subsidiary instruments under the Act;
 - b. community and NGO rights to easily accessible, timely and credible information on actions and decisions; and
 - c. a requirement on the Commonwealth Government to collect and make public all relevant information about a proposed action or a decision to support public participation in decision-making processes.
27. Australia's national environment laws must enshrine:
 - a. 'Open standing' provisions for any person to seek merits or judicial review of government decisions, or to enforce a breach, or anticipated breach, of environment law through third-party enforcement provisions in line with global best practice; and
 - b. Protection for costs in public interest legal proceedings including limiting upfront cost orders that deter the community exercising legal rights; improving clarity and certainty by allowing preliminary decisions on whether a matter is in the public interest; and use of public interest costs orders (i.e. protective costs orders) in those cases.

Key enabling infrastructure to support the implementation of the Act

28. The Commonwealth Government should establish an independent National Environment or Sustainability Commission to provide high-level oversight of Australia's environmental regulation; to give strategic advice to Ministers, agencies and the wider community on national plans, priorities and environmental standards; and provide regular State of the Environment and national environment account reports to Parliament.
29. The Commonwealth Government should establish an independent National Environment Protection Authority operating at arm's-length from government to:
 - a. Oversee the robust assessment of development proposals, ensure approvals comply with statutory plans under the Act and provide publically available, full reporting on decision processes and outcomes; and

- b. Investigate and prosecute lack of compliance with environmental laws and approval conditions, as well as damage to threatened species and their habitat under the national environment regulatory framework.
- 30. That a COAG Environment Council be established and given legislative standing within the new Environment Act;
- 31. That consideration should be given to incorporating climate adaptation in the COAG Environment Council remit; and
- 32. That consideration be given to a cross-jurisdictional audit of the implementation and discharge of the state and commonwealth responsibilities under the Inter-Governmental Agreement on the Environment.
- 33. The Commonwealth commit to implementing a national environmental accounting system that links federal, state and territory data on biodiversity, strategic planning and environmental impact assessment to provide full, timely and comprehensive data and monitoring of environmental values and outcomes.
- 34. The Commonwealth should establish a dedicated fund that maximises the restoration of threatened species habitat, the provision of climate refugia and the long-term sequestration of carbon, while supporting communities and businesses to take advantage of this economic opportunity.
- 35. The Commonwealth, through an independent environment institution, should audit and eliminate, phase out or reform economic incentives, including subsidies, that influence environmental behaviour; and ensure positive incentives for the conservation and sustainable use of biodiversity are developed and applied.
- 36. This system of subsidies should be reviewed by an independent panel every five years for effectiveness and outcomes.

Is the EPBC Act sufficient to address future challenges?

- 37. The Commonwealth Government should commit to:
 - a. Protection of Australia's existing terrestrial carbon stores, stocks and flows & ecosystems in line with the recommendations set out in 'Red line' protection for key environmental values and Deforestation above;
 - b. Ensure a credible land carbon policy is implemented as part of strong overall emissions reductions in line with science, ensures no direct offsetting of fossil fuel emissions with land carbon credits either domestically or internationally; and
 - c. Prioritise afforestation and regeneration of degraded landscapes and ecosystem corridors such that Australia becomes a resilient, biodiverse carbon sink, in line with national biodiversity conservation priorities.
- 38. The Commonwealth establishes a standing climate disaster recovery fund that can make rapid-post disaster funding allocations as required.
- 39. That the Commonwealth Government makes planning, response and recovery from major events a national priority in plans and the allocation of resources, particularly in the context of climate change.
- 40. That the Commonwealth considers the creation of a 'key natural assets' register comprising high value biodiversity assets sensitive to fire events to support coordination and prioritisation of fire planning and response with other jurisdictions during disaster events.

41. That the Commonwealth Government ensures that arrangements are in place and sufficiently resourced to limit damage to MNES in the case of major events, including key natural assets.
42. That the Commonwealth Minister provides formal and public advice about impending fire season risks to MNES to the Australasian Fire and Emergency Service Authorities Council (AFAC).
43. That the Commonwealth Government include regularly updated bushfire risk mapping and modelling in the development of National Environment and bioregional plans.
44. That Australia's national environment act be reformed to:
 - a. ensure the requirement maintain or enhance the environmental values and ecological character of protected matters under the Act includes bushfire mitigation and response, and other major events;
 - b. require regularly updated bushfire risk mapping and modelling for recovery plans, including identifying priority actions to mitigate bushfire risk as a result;
 - c. major event provisions that:
 - i. trigger full ecological audit of major event impacts on all MNES and related plans; and
 - ii. suspend existing activities and approvals that might affect bushfire-impacted MNES until assessment is complete.
45. Section 158 of the EPBC Act (or commensurate section in a new national environment act) should have strict limits on application including clear definition of what constitutes a major event / disaster, strict start and end times for exemptions from enforcement, and provisions to ensure appropriate interim protections for MNES.
46. That the review adopt the recommendations in this submission to help ensure and assess the success of a reformed national environment act for Australia.

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Introduction

The Wilderness Society welcomes the opportunity to provide this submission into the second independent review of Australia's primary national environmental law, the *Environment Protection and Biodiversity Conservation Act 1999* ('the EPBC Act' or 'the Act').

The Wilderness Society is an independent environmental advocacy organisation whose purpose is protecting, promoting and restoring wilderness and natural processes across Australia for the survival and ongoing evolution of life on Earth. We are a federated national organisation with centres in every Australian state², supported by over 100,000 active supporters, including around 30,000 members and 40 local Wilderness Society community groups.

Since 1976, we've stood at the forefront of some of the country's most historic campaigns, including the Franklin River, Fraser Island, James Price Point in the Kimberley, and the declaration of numerous World Heritage Areas.

Our interaction with federal environment law stretches from the Franklin Dam campaign and our core role in the Franklin Dam High Court case upholding the constitutional power of the Commonwealth to protect Australia's globally important ecosystems, through campaigning for the creation of a national environment act in the 1990s, to being a founding member of the Places You Love Alliance advocating for national environmental law reform to deliver national leadership, achieve environmental outcomes and enshrine community rights.

We also have interacted with the EPBC Act, and various statutory processes under it, for the 20 year life of the Act.

Over the last decade, we have stood side by side with local communities around Australia in winning protections for some of our globally important natural places. We are currently engaging a new generation of environmental leaders through a sophisticated community organising program in campaigns to safeguard important areas of terrestrial or marine biodiversity in every state around Australia, including the

² There are no Wilderness Society offices in the Australian Territories, including the NT and ACT.

Kimberley and the Great Western Woodlands in WA, the Tarkine/takanya forest in Tasmania, the Central Highlands and East Gippsland in Victoria, the Pilliga in NSW, the waters of the Great Australian Bight and Australia's High Conservation Value forests and natural biodiverse carbon sinks around the country. We also develop and undertake original research investigating failures of environmental regulation and protection around the country.

We know that everyday Australians want governments to take action to protect nature and act on climate change.

The ANU Australian Electoral Study shows that 53% of voters in the 2019 federal election ranked the environment and global warming as “extremely important when voting”³ with around 20% of voters identifying the environment as their top concern when voting⁴ (higher than any election since 1990). Social research undertaken by the Places You Love Alliance in March 2020 shows the majority of Australians are concerned about the state of Australia's nature, especially after the catastrophic 2019-2020 summer bushfires, with eighty-five per cent believing that the fires have resulted in unprecedented damage to Australia's natural landscapes. The same polling shows that Australians agree that more Commonwealth Government action is required to protect both Australia's wildlife (89%) and forests, bushlands and natural landscapes (88%).

In this submission, the Wilderness Society will comment on the operation of the EPBC Act and the extent to which its objects have been achieved, shaped around the following broad themes:

1. Whether the EPBC Act is delivering what was intended, the role of environmental legislation and the Commonwealth;
2. Priority reforms required to ensure effective regulation of our environment, including objects, scope, provisions and implementation; and
3. How effective the EPBC Act will be in addressing future challenges.

³ Cameron S & McAllister I (2019) Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2019, p46

<https://australianelectionstudy.org/wp-content/uploads/Trends-in-Australian-Political-Opinion-1987-2019.pdf>

⁴ The Longitudinal Australian Electoral Study 2019 Report,

<https://australianelectionstudy.org/wp-content/uploads/The-2019-Australian-Federal-Election-Results-from-the-Australian-Election-Study.pdf>

Traditional Custodian Rights and Interests

The Wilderness Society recognises the rights and interests of Traditional Custodians in all aspects of land and water management, as well as decision-making in relation to their traditional lands, regardless of current land tenure, and the Commonwealth must ensure an ongoing process of consultation and negotiation between governments and Traditional Custodians that recognises and supports Traditional Custodian decision-making processes across the spectrum of tenure and management arrangements.

The Wilderness Society further notes the need for culturally appropriate negotiation, agreement-making and consultation with Traditional Custodians as determined by Traditional Custodians, and believes that Australia's national environment act should enshrine the principles of free prior and informed consent as the basis of participation by Traditional Custodians.

The EPBC Act review involves matters of fundamental significance to Traditional Custodians and it is vital that appropriate processes for negotiation and consultation are established both during the review, and subsequently by the Commonwealth.

To our knowledge, the EPBC Act review has not explicitly stated the processes established for Traditional Custodians to engage in the review. Providing details of these processes to the public may not be appropriate but the public release of an overview would provide confidence for other stakeholders that dialogue is occurring.

In this submission, Wilderness Society has generally avoided suggesting specific mechanisms for the recognition of Traditional Custodian rights and interests within the Act, but is supportive of such mechanisms and believes these would properly be established by direct negotiation and consultation with Traditional Custodians.

The EPBC Act predates the Australian government's ratification of the UN Declaration of the Rights of Indigenous Peoples, and reform of the Act needs to be conducted within that context. Government protocols as well as the Act itself need to be developed to

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ensure free, prior and informed consent by Traditional Custodians, as consistent with the Declaration, for both mechanisms involving the protection of nationally significant places or values, as well as mechanisms relating to actions or activities that may impact those places or values.

A general perspective from the Wilderness Society in relation to the intersection between environmental protection and Traditional Custodian rights and interests is at [Appendix 2](#).

Submission Detail

Does the EPBC Act protect our environment & conserve our biodiversity?

Australia's environment and natural values are extraordinary. Protecting ecosystems and preventing species extinction is morally, ethically, intergenerationally and practically the right course of action. The decline of Australia's natural world is well-documented, and makes for sobering reading. Moreover, we fail to fulfill our obligations under international agreements. Our current system of laws, across jurisdictions, is not up to the task. Substantive reform of the EPBC Act is required. This review is the opportunity to deliver much-needed change to improve outcomes for Australia's environment, and for all Australians.

Australia's biodiversity is magnificent, unique and rightly treasured by Australians and the rest of the world. Australia is one of the world's megadiverse countries: we have around 10% of all the world's species. We have a very high level of endemism compared with other countries. For example, 46% of Australia's birds, 87% of mammals, and 93% of reptiles are only found here⁵.

Australians depend on thriving ecosystems for our wellbeing and prosperity.

Emerging research shows that the impacts of ecosystem degradation and diversity loss due to habitat destruction might be sufficiently large to rival the impacts of other global drivers of environmental change such as climate change—that is, diversity loss may have fundamental impacts on global life systems such as water exchange, nutrient cycling and climate⁶.

Our unique animals and plants have cultural value to Australians of all backgrounds—they form a fundamental part of Australia's identity. In particular

⁵ Cresswell D & Murphy H (2017) Australia state of the environment 2016: biodiversity Australian Government Department of the Environment and Energy, Canberra p4; Chapman, A. D. 2009 "Numbers of living species in Australia and the world" *Australian Biological Resources Study*, Canberra, Australia

⁶ Cardinale et al (2012) "Biodiversity loss and its impact on humanity" *Nature* 486: 59–67

Aboriginal and Torres Strait Islander peoples have strong connections with and obligations to biodiversity and all living things, arising from ancient connections to country, passed on through stories, songs and cultural practices over millennia. The Wilderness Society recognises that Traditional Custodians have inherent rights, including the right to self-determination and to participate effectively in decisions affecting their lands and resources.

Protecting Australia's ecosystems and preventing the extinction of Australia's species is the right thing to do for a number of reasons: morally, ethically, intergenerationally and practically.

Rather than simply protecting species, Australian society must look to something even better—to foster thriving ecosystems where threatened species can begin to thrive again. We must find ways for human activities to co-exist alongside the natural world so that both can flourish.

A multi-generational failure to protect Australia's environment

The cumulative legacy of 200 years of clearing, mining, logging and inappropriate agriculture has cleared or destroyed over 50 percent of Australia's original forests and bushland.⁷ Independent national reporting indicates that all major indicators of environmental health have declined over the past two decades.⁸

The Commonwealth Government's *State of the Environment* 2016 Report noted that Australia's environment is under increased pressure and that the 'condition of the environment in certain areas is... poor and/or deteriorating' especially in areas of high human pressure and use (i.e urban, coastal populated areas and the extensive land-use zone of southern and eastern Australia). The 2019 *OECD Environmental Performance Review for Australia* also found that the overall status of Australia's biodiversity is poor and worsening⁹.

⁷ Bradshaw C (2012) "Little left to lose: deforestation and forest degradation in Australia since European colonization" *Journal of Plant Ecology* 5(1) 109-120

⁸ Jackson WJ, Argent RM, Bax NJ, Clark GF, Coleman S, Cresswell ID, Emmerson KM, Evans K, Hibberd MF, Johnston EL, Keywood MD, Klekociuk A, Mackay R, Metcalfe D, Murphy H, Rankin A, Smith DC & Wienecke B (2017) *Australia state of the environment 2016: overview*.

⁹ OECD (2019), *OECD Environmental Performance Reviews: Australia 2019*, OECD Environmental Performance Reviews, OECD Publishing, Paris

This environmental degradation is driven by a complex mix of regulatory, economic and social drivers that occur across and within all jurisdictions. The 2016 *State of the Environment* Report found that the major pressures impacting the Australian environment (climate change, deforestation, habitat degradation and fragmentation and invasive species) had remained the same since the previous *State of the Environment* in 2011. There is no suggestion this has improved.

The Report noted that cumulative interactions between these pressures were amplifying the threat faced by Australia's environment; and that climate change is an increasingly important and pervasive pressure on all aspects of the Australian environment¹⁰. The 2019 OECD *Environmental Performance Review* concurred, concluding that more efforts are needed to improve coordination and guidance between levels of government¹¹.

There is a high level of agreement across sectors that Australia's environmental laws across all jurisdictions, including the EPBC Act, and institutions as they currently area, cannot adequately deal with the challenge we face¹².

The extraordinary decline of Australia's threatened species

One of the strongest indicators of an ongoing failure of Australia's environmental governance regimes is the status of our threatened species. Australia has one of the world's worst records for extinction and protection of animal species. Australia is ranked worst in the world for mammal extinctions¹³, second worst in the world for loss of diversity of life¹⁴, and fourth in the world for overall plant and animal extinctions¹⁵.

¹⁰ Jackson et al (2017) *Australia state of the environment 2016: overview* Australian Government Department of the Environment and Energy, Canberra p14

¹¹ OECD (2019), *OECD Environmental Performance Reviews: Australia 2019*, OECD Environmental Performance Reviews, OECD Publishing, Paris

¹² Australian Panel of Experts on Environmental Law (2017) *Blueprint for next Generation of Australian Environmental Law*

¹³ Woinarski et al (2015) "Ongoing unraveling of a continental fauna: decline and extinction of Australian mammals since European settlement" *Proceedings of the National Academy of Sciences* 112(5): 4531-4540

¹⁴ Waldron A et al (2017) "Reductions in global biodiversity loss predicted from conservation spending" *Nature* 551: 364-367.

Australia's extinction crisis is not simply historical:

- Since 2000, Australia's list of nationally threatened species and ecological communities has increased by more than 30%¹⁶.
- Deforestation and land clearing currently kill tens of millions of native mammals, birds and reptiles every year¹⁷.
- Six animals declared on the national list have become extinct since the list commenced in 2000¹⁸.
- At least three endemic animals have gone extinct in the last 10 years alone.
- A recent study found that unless management improves Australia's extinction rate will accelerate from a confirmed six extinctions in the 20 years to a probable 17 in the next 20¹⁹.
- Only two animals—Muir's Corella and the Tammar Wallaby—have been delisted because of positive conservation action²⁰.

The *State of the Environment 2016* Report also found that:

- Key drivers of species loss are well documented and include habitat clearing and fragmentation, invasive species, climate change, inappropriate fire regimes, disease, pollution and overexploitation; and
- Inadequate and failed environmental governance remains one of the top threats to species in Australia²¹.

¹⁵

<http://www.abc.net.au/news/2015-08-19/fact-check-does-australia-have-one-of-the-highest-extinction/6691026>

¹⁶ From 1,483 to 1,947 - as at 31 July 2018

¹⁷ Finn HC & Stephen, NS (2017) "The invisible harm: land clearing is an issue of animal welfare" *Wildlife Research* 44(5): p.4.

¹⁸ Only four are reflected in current EPBC Act list with the Christmas island Forest Skink and Christmas Island Pipistrelle still listed as endangered/critically endangered despite consensus around their extinction [Lake Pedder Earthworm, Lord Howe Long-eared Bat, Pedder Galaxias, Bramble Cays Melomys, Christmas island Forest Skink and Christmas Island Pipistrelle]

¹⁹ Gayle H et al (2018) "Quantifying extinction risk and forecasting the number of impending Australian bird and mammal extinctions" *Pacific Conservation Biology* 24:157-167

²⁰ Numbers from [EPBC Act List of Threatened Fauna](#). It must be noted that the national threatened species list is considered unreliable as a measure compared with other lists such as the IUCN Red List (see section "[Listing process and accuracy of EPBC Threatened Species List](#)")

²¹ Jackson et al (2017) *Australia state of the environment 2016: overview* Australian Government Department of the Environment and Energy, Canberra p14

Contrasting outcomes for Nature: United States vs Australia

The *United States Endangered Species Act* (US ESA) shows us that strong environmental laws work. Over 45 years, it has protected more than 1,600 threatened plants and animals, and has prevented 227 extinctions in that time. 100 species have almost completely recovered²².

The US ESA works because it has a clear, measurable goal: the recovery of endangered species. The ESA also contains strong, mandated protections for species and habitat critical to their survival and the government can be held accountable if required protections & recovery actions aren't put into place. Crucially, the US ESA also requires that US government actions can't negatively impact listed species, including through the granting of permits, and that government agencies must work together to ensure that outcomes are achieved under the Act.

By contrast to the US, Australia's EPBC Act manages over 1,800 threatened species but has listed only five critical habitats in 20 years and only two animals have been delisted because of conservation action. The EPBC Act does not guarantee protection from major threats like logging or deforestation.

International obligations

Australia has substantial international obligations to preserve its unique biodiversity and ecosystems under international agreements to which we are signatories.

These include but are not limited to the:

- Convention on Biological Diversity (CBD) under which sits the Aichi Biodiversity Targets
- Convention on Wetlands (Ramsar Convention)
- Conventions related to migratory wild species (Convention on the Conservation of Migratory Species of Wild Animals, JAMBA, CAMBA and ROKAMBA)

²² Center for Biological Diversity (2012) *On Time, On Target: How the Endangered Species Act Is Saving America's Wildlife* https://esasuccess.org/report_2012.html#_edn1

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- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention)
- United Nations Convention to Combat Desertification
- UN Framework Convention on Climate Change.

Australia has generally performed poorly in fulfilling our international environmental obligations. Australia's *Biodiversity Conservation Strategy 2010-2030* was the guiding national framework for biodiversity conservation and was developed to ensure Australia could fulfil its obligations under the various international agreements, including the CBD and actions towards the Aichi Biodiversity Targets²³, a number of which relate to the conservation of threatened species and their critical habitat.

Australia failed to meet all but one of those targets.

As a party to the CBD, the Commonwealth has an obligation to put in place national arrangements for emergency responses to major events like the 2019-2020 bushfires that "present a grave and imminent danger to biological diversity".

Currently the EPBC Act makes little provision for dealing with major natural events, such as major fire events, beyond allowing for listing changed fire regimes as a key threatening process limiting its usefulness as a framework for bushfire resilience planning, response and recovery.

Australia is also failing in relation to the Ramsar Convention and protection of migratory animal habitat under JAMBA, CAMBA and ROKAMBA. The *State of the Environment 2016* Report found that Australia's wetlands are either declining or stable, rather than improving, and that pressure from climate change and variability is a major threat to future viability²⁴. Some areas continue to be severely affected and in serious danger of collapse, such as the Murray Darling Basin where continued extraction of unsustainable amounts of water may lead to an extinction crisis in many

²³ Now currently under renegotiation, with a post 2020 Global Biodiversity Framework slated to be in place by 2021 (estimated).

²⁴ Argent R (2017) *Australia state of the environment 2016: inland water* Australian Government Department of the Environment and Energy, Canberra

of the Basin's Ramsar listed wetlands of international importance, such as the Lower Murray Lakes and Coorong estuary. Ramsar wetlands and wetlands of national significance cover significant tracts of Australia and perform important ecological and hydrological roles for threatened animal and plant species, as well as serving as a link to human interaction for millenia.

As the home to twelve natural World Heritage and five mixed cultural-natural World Heritage sites, Australia has considerable obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention). Our record in this area is mixed.

More resources are required to manage existing and assess new World Heritage Areas.

While World Heritage Areas are nominally protected under the EPBC Act, management plans are poorly resourced and there are many instances in which state and Commonwealth Governments have not followed their provisions or ensure plans are resourced to achieve their aims. The outlook for the Great Barrier Reef has been downgraded to "very poor" following multiple bleaching events and ongoing issues with water quality, inappropriate development and other threats. The Ningaloo Reef coastal World Heritage area, covering 604,500 hectares of land and sea, currently has an industrial development proposal looming which would see coral reefs blasted in the Exmouth Gulf to allow pipelines to be dragged through the World Heritage area²⁵, which is a sanctuary for Humpback Whales, endangered sea turtles and iconic Whale Sharks. Decisions are being made at local and state government level for a project which, if it goes ahead, will impact our global heritage.

The case for substantive reform of the EPBC Act

The Commonwealth government has a substantial capacity to make laws concerning the environment under section 51 of the Australian Constitution²⁶. Australia's primary

²⁵ Young, E. (Jan 21st, 2020) 'Cruising whale sharks could damage bid to industrialise Exmouth Gulf', SMH. <https://www.smh.com.au/national/cruising-whale-sharks-could-damage-bid-to-industrialise-exmouth-gulf-20200120-p53t2d.html> Last access: 14/4/20

²⁶ Australian Panel of Experts on Environmental Law (2017) *Environmental Governance* (Technical Paper 2), retrieved from <http://apeel.org.au/papers/>

existing legislative mechanism for faunal species conservation and for realising the international obligations outlined above is the EPBC Act.

However, the EPBC Act is simply not up to the task of preventing environmental decline and extinction of Australia's threatened species—amongst them some of Australia's most iconic wildlife.

Unfortunately, the overall approach manifested by the EPBC Act is to act as an ineffective handbrake on loss, not to prevent loss or ensure Australia's nature is healthy and resilient. This must change.

Assessments of the EPBC Act have found that its many documented failures extend from this fundamentally flawed approach, including:

- Being too narrowly focussed on reactive assessment and conditions to mitigate the impact of single projects without a framework for proactive protection of species and their habitat;
- Being too species-focussed with minimal substantive mechanisms to protect and sustain the natural landscapes and habitats on which species and communities rely;
- Containing major exemptions that allow key threatening activities, such as the Regional Forest Agreements which enable logging of High Conservation Value forests and threatened species habitat without assessment/approval under the Act;
- Containing limited rights and responsibilities for communities, excluding them from the planning process and denying avenues for recourse;
- Over-reliance on cooperative federalism with no one level of government responsible for recovering or measuring environmental indicators; and
- No provision for ensuring vital implementation infrastructure (data and monitoring, cooperative interjurisdictional mechanisms, trusted and independent institutions) are in place.

In the sections below, this submission outlines the significant reform to the EPBC Act required to rectify these failings. While some of the necessary reforms could be implemented through substantial amendment to the EPBC Act, given the scale of reform required, the Act would need to be largely rewritten.

In addition, the EPBC Act cannot be considered in isolation from the framework of reliant legislation and subsidiary instruments that stem from it, such as the Regional Forest Agreements, strategic assessments, assessment and approval bilaterals, recovery plans, threat abatement plans, and national environment plans. There is substantial evidence that the objects and principles of the EPBC Act are not being implemented through these subsidiary instruments, and many of these instruments do not contain any requirement of the implementing authority to successfully give effect to these objects and principles (see [Regional Forest Agreements](#)).

Consequently, the EPBC Act cannot be effectively reformed via amendments to existing provisions.

The Commonwealth Government should, in consultation with the community, design, develop and implement a new National Environment Act, designed in line with the recommendations set out in the following chapters.

The Commonwealth should urgently review and reform all environmental legislation and subsidiary instruments that stem from the EPBC Act to ensure that they implement the objects and principles of the EPBC Act and any successor legislation.

Role of environmental legislation

The purpose of Australia's national environmental legislation must be to ensure Australia's environment is healthy and remains so into the future, including resilience to the growing impacts of climate change.

Given the impact of major climate events like the 2019-2020 summer bushfires, the EPBC Act Review presents a key opportunity to ensure Australia's environmental legislation and regulation are fit for purpose and can take a proactive approach to ensuring Australia's nature is healthy and resilient in the face of the growing impacts of climate change.

This purpose should not be required to be balanced, or diluted, against the other mandates and responsibilities of the Commonwealth Government. This purpose should be reflected in both the objects, directing principles and provisions of the EPBC Act and

its integration and relationship with other federal legislation. The current EPBC Act does not adequately reflect that purpose, nor does it achieve it.

To ensure Australia's environment is healthy and resilient to the growing impacts of climate change, Australia's national environment act must:

- Prescribe actions necessary for ecosystems to maintain or return to healthy functioning and for species' populations to recover;
- Prohibit those threats to environmental values that would prevent the healthy functioning of ecosystems or prevent species populations from recovering;
- Enshrine community rights to judicial and merits reviews; community participation in decision-making; as well as third party enforcement rights for communities and non-government organisations; and
- Enable key infrastructure to ensure that the above principles are implemented, such as an independent watchdog to ensure enforcement, mechanisms and fora to ensure intra-jurisdictional cooperation and mechanisms to ensure data is accurate, up to date and publicly available.

Recommendations:

- 1. The Commonwealth should fundamentally reform the EPBC Act to create a National Environment Act that:**
 - a. Prescribes clear and enforceable duties to recover environmental values, and sets minimum standards of protection across jurisdictions;***
 - b. Contains clear and enforceable preventative measures against harmful activities and projects;***
 - c. Deals consistently with all types of environmental impact, regardless of the sector and land use causing those impacts;***
 - d. Enshrines community rights and informed participation in decision-making; and***
 - e. Provides for key enabling infrastructure to ensure the above are implemented in line with the objects and principles of the Act.***
- 2. The Commonwealth should urgently review and reform all reliant legislation and subsidiary regulatory instruments (e.g. Regional Forest Agreements, existing strategic assessments) that stem from the EPBC Act to ensure they implement the objects and principles of the EPBC Act and any successor legislation.**

Role of the Commonwealth in environmental protection

The Commonwealth has a fundamental responsibility to lead, coordinate, fund, monitor and enforce the protection of Australia's environment, especially in regulating matters that affect environmental resources that cross state boundaries or that are of national significance; and to ensure that Australia meets all international treaty obligations.

The *State of the Environment 2016* Report found that “(a)n overarching national policy that establishes a clear vision for the protection and sustainable management of Australia’s environment to the year 2050 is lacking” and that national leadership and collaboration is required to address threats to species and biodiversity²⁷.

In the absence of concerted Commonwealth leadership, there is little prospect of a coherent and effective continent wide governance framework comprising complementary legislation, policies and programs from all jurisdictions.

‘One stop shop’ approach

In 2014, the then Commonwealth Government announced its ‘one-stop shop’ policy, designed to delegate Commonwealth responsibilities in managing matters of national environmental significance (MNES)—including the protection of nationally threatened species—to state and territory authorities. This remains the public position of the Commonwealth Government.

It is inappropriate to leave state and territory governments as the sole regulatory authorities over the environment, as proposed via blanket assessment and approval bilaterals (the so-called “One Stop Shop” policy), for several reasons.

Firstly, state-based regulation is simply not equipped to assess, prevent and manage impacts across jurisdictional boundaries, meaning Commonwealth regulatory responsibilities can never be completely devolved to the states.

²⁷ OECD (2019), OECD Environmental Performance Reviews: Australia 2019, OECD Environmental Performance Reviews, OECD Publishing, Paris

Secondly, a 2014 report by the *Places You Love Alliance* found that no state or territory currently meets all the core requirements of best practice threatened species legislation, or even the standards of protection set by the EPBC Act²⁸. We note that other instances of devolution, for example that delivered to NOPSEMA under a strategic assessment, have also not resulted in core principles and objectives of the EPBC Act being mandated within the relevant legislation (ie. the OPGGS Act and regulations).

Thirdly, there is an inherent conflict of interest in designating the states and territories as main regulatory authorities for many categories of environmental issues, especially extractive activities, given the financial return that they receive from these projects through royalties. Machinery-of-government changes overseen by the states also have the potential to allow for close contact between regulatory and development responsibilities, further exacerbating the potential for real and/or perceived conflicts of interest.

A key example of conflicts of interest affecting MNES played out in Western Australia in 2013, when the Wilderness Society WA & Goolarabooloo Law Boss Richard Hunter took the WA Minister for Environment to the Supreme Court, successfully overturning the environmental approval of a gas hub at James Price Point. The Wilderness Society WA argued that the Chairman of the WA Environmental Protection Authority alone could not make a decision to recommend approval of the largest and most complex environmental assessment in the state's history, given that a majority of the then WA EPA Board (including recent past members) either owned shares in one of the project's proponents (Woodside, Shell, Chevron, BHP & BP), was an employee of one of the project's proponents, or was employed by the Department of State Development²⁹.

A significant conflict for which there was no legal opportunity to challenge was that the WA Premier and WA State Development Minister, Colin Barnett, was the lead proponent of the Browse LNG Precinct project. Mr Barnett drove the \$40 billion project and was simultaneously responsible for all of the environmental assessments in relation to it. MNES affected by the project included the proposed destruction of a globally significant National Heritage listed dinosaur trackway and cultural songline and a Humpback Whale nursery. This is a key example of why responsibility for national

²⁸ Australian Network of Environmental Defenders Offices [ANEDO] (2014) *Assessment of the adequacy of threatened species and planning laws* Places You Love Alliance, Sydney

²⁹ <https://thewest.com.au/news/wa/epa-conflict-bungle-forces-emergency-laws-ng-ya-254296>

environmental laws ought not be transferred to the States. As outlined in the Chief Justice's judgement³⁰, state governments often have a conflict of interest when it comes to major development and they cannot always be relied upon to look after nationally important assets.

The so-called 'One Stop Shop' approach is highly problematic and unlikely to achieve the desired efficiency owing to the difficulties of creating eight "one stop shops" and attempting to accredit state regimes that do not satisfy national standards.

The implementation of a consistent and complementary national environmental regulatory framework of state and federal laws, with clear national leadership, goals and minimum standards for protection, is the only way to achieve efficient and robust regulation which meets our international obligations and achieves environmental outcomes.

Recommendations:

- 3. The Commonwealth should take primary responsibility for protection of the environment where Australia has specific international obligations, on Matters of National Environmental Significance (MNES) or in any case where an issue occurs across state boundaries.**
- 4. The Commonwealth should take primary responsibility for ensuring the implementation of a comprehensive national environment regulatory framework of consistent and complementary laws, regulations, and policies (in all jurisdictional levels) that:**
 - a. contains clear objectives and commitments for nature protection;**
 - b. sets minimum standards of protection across jurisdictions; and**
 - c. is consistent across tenures, jurisdictions and industries.**

³⁰ Clayton Utz (Aug, 2013) James Price Point environmental approval knocked out - what does this mean for other proposals?

<https://www.claytonutz.com/knowledge/2013/august/james-price-point-environmental-approval-knocked-out-what-does-this-mean-for-other-proposals>

Objects, Principles and Scope of the EPBC Act

The existing objects, principles and scope of the EPBC Act do not adequately reflect the purpose of Australia's national environment act: ensuring Australia's environment is healthy and remains so into the future. Fundamental reform is needed to provide clarity of purpose, gives effect to the Commonwealth's commitment to ensure the principles of ecologically sustainable development are taken into account in policy and decision-making processes and ensures the EPBC Act clearly sets out the vital role of national leadership in protecting Australia's environment.

Objects of the EPBC Act

A key problem with the EPBC Act, which colours all its operations, is that the Act does not require the protection of the environment nor the conservation of biodiversity. This is evident in the formal objects of the Act.

Section 3 of the EPBC Act outlines the objects, including, crucially, to “provide for the protection of the environment...” [s3.1(a)] and to “provide for the protection and conservation of heritage” [s3.1(c)]. Similarly, s3(1) (b) and (c) set objects to “promote ecologically sustainable development...” and “to promote the conservation of biodiversity...”. This promotion does not require ecologically sustainable development or the conservation of biodiversity, just that they be promoted.

According to Section 3 of the EPBC Act, the Act promotes, provides for, assists, recognises, strengthens, adopts, enhances and includes various things, but does not actually protect or require protection of anything.

The EPBC Act should be reformed to have a clear set of objects that achieve its purpose of ensuring that Australia's environment is healthy and remains so into the future. We suggest the Commonwealth consider the following:

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

The EPBC Act should also be reformed to include secondary objects which further clarify the purpose of the Act, in line with the following:

- a) To enshrine national leadership and interjurisdictional partnership on the environment and sustainability, and to achieve ecologically sustainable development;
- b) To enshrine Commonwealth responsibilities to maintain or enhance MNES;
- c) To prevent the extinction or further endangerment of Australian plants, animals and their habitats, and to recover native species and ecosystems and increase their resilience to key threatening processes;
- d) To ensure fair and efficient decision-making; government accountability; early and ongoing community participation in decisions that affect the environment and future generations; and improved public transparency, understanding and oversight of such decisions and their outcomes;
- e) To recognise Aboriginal and Torres Strait Islander peoples' knowledge of Country, and stewardship of its landscapes, ecosystems, plants and animals; to recognise the rights and interests of Traditional Custodians in land and water use and management; and expand the ongoing and consensual use of Traditional Ecological Knowledge (TEK) across Australia's landscapes;
- f) To fulfil Australia's international environmental obligations and responsibilities;
- g) To recognise and promote the intrinsic importance of the environment and the value of ecosystem services to human society, intergenerational equity, individual health and wellbeing; and
- h) To ensure that the Minister and all agencies and persons involved in the administration of the Act must act consistent with, and seek to further, the objects of the Act.

Recommendation:

- 5. That Australia's national environmental legislation should contain clear objects to provide:**
 - a. A clear and unambiguous objective to ensure Australia's environment is healthy and remains so into the future; and**
 - b. Specific objects as required to define the desired outcomes of the Act in relation to international obligations, biophysical and societal outcomes and requirements of the Commonwealth Government.**

Principles of ecologically sustainable development

The existing principles set out in Section 3A of the EPBC Act (“Principles of ecologically sustainable development”) do not fully reflect the principle of ecologically sustainable development (ESD), and that additional directing principles are required to fully clarify the purpose of the Act.

Australia's National Strategy for Ecologically Sustainable Development (1992) defines the goal of ecologically sustainable development as “development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends” with the following core objectives:

1. To enhance individual and community wellbeing and welfare by following a path of economic development that safeguards the welfare of future generations;
2. To provide for equity within and between generations; and
3. To protect biological diversity and maintain essential ecological processes and life-support systems.

An effective ESD framework cannot be used simply as a ‘balance’ or ‘cost benefit analysis’ exercise. Rather it recognises that long term environmental and community health and socio-economic outcomes are deeply interconnected.

It is clear that the current operation of the EPBC Act does not achieve the above core objectives, as evidenced by ongoing biodiversity loss and ecosystem collapse.

The purpose of Australia’s national environmental legislation should be to ensure that Australia’s environment is healthy and remains so into the future, including resilience to the growing impacts of climate change. This purpose should be reflected in both the directing principles of the EPBC Act and its integration and relationship with other Commonwealth legislation.

This review of the EPBC Act provides an opportunity to embed a modernised set of principles to ensure that Commonwealth Government decision-making is consistent with maintaining and strengthening the environmental systems that operate on a local, regional, national or global level, including to support biodiversity.

The Wilderness Society recommends that the existing principles be rewritten to better reflect the goal and objectives of ESD. The new principles should include:

- Taking preventative actions against likely harm to the environment and human health (prevention of harm);
- Ensuring that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (precautionary principle);
- Ensuring that the present generation has an obligation to make certain that:
 - the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations (intergenerational equity), and
 - environmental costs, benefits and outcomes are borne equitably across society (intragenerational equity);
- Ensuring that the conservation of biodiversity and ecological integrity are a fundamental consideration in decision-making, including by preventing actions that contribute to the risk of extinction and ecosystem degradation (biodiversity principle);
- Ensuring that the true value of environmental values and their benefits are accounted for in decision-making—including intrinsic values, cultural values and the value of present and future ecosystem services provided to humans by nature (environmental values principle);
- That those responsible for generating waste or causing environmental degradation bear the costs of safely removing or disposing of that waste, or repairing that degradation (polluter pays principle).

The Wilderness Society supports the consideration and adoption of further ‘design’ principles, as recommended by the Australian Panel of Experts on Environmental Law (APEEL)³¹:

- Regulatory processes should aim to achieve high levels of environmental protection, including by requiring:
 - the use of best available conservation, scientific and commercial information;

³¹ Australian Panel of Experts on Environmental Law (2017) *Environmental Governance* (Technical Paper 2), idea 4 retrieved from <http://apeel.org.au/papers>

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- the continuous improvement of environmental standards, and
- the use of best available techniques for environmental management;
- A principle of non-regression in environmental goals, standards, laws, policies and protections (non-regression principle);
- Regulatory processes should seek to achieve the resilience of biodiversity and natural systems to climate change and other human-induced pressures on the environment (resilience principle);
- A principle of environmental democracy, as based on the so-called ‘three pillars’ that arise from the Aarhus Convention: access to information, public participation and access to justice (participation principle)³².

Recommendation:

- 6. That the existing EPBC Act principles be rewritten to better reflect the goal and objectives of ecologically sustainable development (ESD) and the role of Australia’s national environment legislation in ensuring Australia’s environment is healthy and remains so into the future.**

Cost benefit analysis

It is challenging and possibly flawed to undertake real and substantive cost benefit analyses in environmental decision-making, owing to the following inherent difficulties in such a process:

- Accounting for the intrinsic value of wildlife, species and ecosystems via a monetary benefit analysis. Similarly, the inherent difficulty in accounting for the cultural value of a place or species, especially given the difference in value accounting systems across Western and Aboriginal and Torres Strait Islander peoples. To date, environmental and cultural values and costs are not adequately represented in cost-benefit analysis.
- Accurately identifying what value a future generation will place on a particular species or ecosystem, ecosystem service or other aspect of the natural environment.
- Accounting for true environmental cost, given that environmental, cultural and heritage values tend to be irreplaceable compared with economic value which may be sourced elsewhere. The Commonwealth should consider the System of

³² Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

Environmental-Economic Accounting (SEEA) model, currently used by the United Nations and World Banks as a basis for doing so in line with international best practice.

Scope and Matters of National Environmental Significance

As noted above (see [Role of the Commonwealth](#)), the Commonwealth has a fundamental responsibility to legislate to ensure the protection of Australia's environment, especially in regulating matters that affect environmental processes, values and resources that cross state boundaries or that are of national significance; and to ensure that Australia meets all international treaty obligations.

The Wilderness Society strongly supports the existing list of MNES for which Commonwealth Government responsibility should be retained, but feels they are insufficient to achieve the above.

The Wilderness Society also proposes that the list of MNES be expanded to provide strategic, coordinated and efficient regulation of major threats to Australia's ecological integrity. These should include:

- the National Reserve System, encompassing terrestrial and marine protected areas, National and World Heritage areas;
- High Conservation Value forests and bushland. This includes all primary, old growth and remnant vegetation, and regrowth vegetation where it meets one of the six criteria as defined by the High Conservation Value Network³³;
- Significant water resources and wetlands of national significance;
- Vulnerable ecological communities;
- Large, intact, functioning ecosystems (such as wilderness areas); and
- Air quality.

Recommendation:

- 7. That existing Matters of National Environmental Significance be retained, and additional MNES be adopted to provide strategic, coordinated and efficient regulation of major threats to Australia's ecological integrity.**

³³ [See Appendix 3](#)

Prescribing duties and actions necessary to ensure recovery

It is essential that the EPBC Act or successor legislation achieves strong environmental outcomes, especially for biodiversity. Strong biodiversity outcomes will only be possible with a much greater emphasis on front-end goal setting and proactive protections for key environmental values, rather than a reliance on reactive assessment and mitigation of impacts.

Requirements on Government to protect the environment

A significant limitation of the current EPBC Act is the numerous places where the Minister or their representative has absolute discretion to *not* act to maintain or enhance environmental matters. For example:

- threshold-setting (what is a controlled action or a significant impact);
- decisions to approve significant impacts with conditions, or to refuse them;
- to develop a recovery plan or not; and
- prioritisation of resources (to keep lists up to date, to simplify regulation, to assess and approve applications, to issue licences or to monitor compliance).

For example, species recovery plans are one of the EPBC Act's major conservation tools. The EPBC Act mandates the circumstances where a plan "must" be established, then outlines the process that must be followed to establish the plan, and further mandates that the plan "must" be reviewed and "must" remain in force. The EPBC Act also mandates that the Commonwealth "must" implement the plan where it coincides with federal land or waters or that the Commonwealth "must" seek the cooperation of the states to implement the plan.

However, the plans are not always written, they are rarely reviewed, they are occasionally allowed to lapse and they are almost never implemented (see [National Recovery Plans and Conservation Advices](#) for detailed examples). The mandatory language of the EPBC Act around the Minister's or Commonwealth's obligations is ignored.

Each time a Minister or Government fails to make, review or implement a recovery plan they are in non-compliance with the Act. Furthermore, there are multiple occasions where recovery plans have been allowed to lapse unlawfully.

Despite the mandatory language within the Act, the preparation and implementation of recovery plans are considered as “imperfect obligations” for the Minister to acquit under law.

However, there is no recourse available to prevent what would be dozens, if not hundreds, of instances where the Commonwealth or the responsible Minister is in non-compliance with the Act outside a successful motion of no confidence in a Minister or Government in the House of Representatives or via “accountability at the ballot box”.

If the EPBC Act is to deliver on its objects, it must be redrafted so that mandatory provisions, such as recovery plan implementation, cannot be interpreted as “imperfect obligations” upon a Minister or Government. The imperfect must be made perfect or the accountability process made so much more tailored and stringent that it would make it unthinkable for a recovery plan to sit unimplemented.

One example of this failure is the extinction of the Bramble Cay Melomys. This species had a recovery plan in place. The plan outlined actions that if followed, in the most basic of ways, would have prevented this most preventable of extinctions.

High levels of discretion, and high levels of control and direction by ministers, mean there is often little the community (or the public service) can do to address poor implementation.

An example of such duties may be found in the *United States Endangered Species Act 1973* (US ESA). The US ESA places clear duties on the Secretary and federal agencies, such as requiring that critical habitat is designated at the time a species is listed; and that all federal agencies ensure the actions they take do not jeopardise the continued existence of any listed species. The public can bring court proceedings for failure to fulfil those duties.

A national environment act should require the Commonwealth Government to maintain or enhance the environmental values and ecological character of protected matters under the Act.

The Wilderness Society further believes that a national environment act should impose duties on ministers and all Commonwealth agencies to ensure the actions they take, including those they fund or authorise, are not contradictory to the objects and principles of the Act.

In addition the Act should include enforceable or ‘non-discretionary’ requirements to implement and apply the Act’s decision-making tools. Specific requirements would ensure key biodiversity protections are utilised, directed to achieve their aims, and are effective. The should include:

- requiring that lists of threatened species and ecological communities and mapping of High Conservation Value forests and bushland are kept up to date at least yearly, including by ensuring sufficient resources to listing Committees and relevant sections of the Environment Department;
- requiring that critical habitat is designated on a Critical Habitat Register at the time a species is listed;
- ensuring that mandatory recovery plans and threat abatement plans are established and implemented within legislative timeframes, maintained in force and up to date;
- requiring all threatened ecological communities to be identified and listed within five years of a new Environment Act’s commencement, and be kept up to date thereafter; and
- establishing and maintaining a system of accurate, nationally consistent and publically available national environmental accounts.

The Commonwealth Government should also consider enshrining in the Act more general duties on all regulated persons to avoid causing environmental harm and to repair and restore where environmental harm has been caused, as recommended by APEEL³⁴.

³⁴ Australian Panel of Experts on Environmental Law (2017) *Environmental Governance* (Technical Paper 2), idea 4 retrieved from <http://apeel.org.au/papers>

Recommendation:

- 8. Australia's national environmental act should contain defined duties and responsibilities for decision makers, including requirements to:**
- a. maintain or enhance the environmental values and ecological character of protected matters under the Act;**
 - b. ensure the actions they take, including those they fund or authorise, are not contradictory to the objects and principles of the Act;**
 - c. ensure implementing instruments (e.g. list, registers, maps, plans and standards) are regularly updated based on science-based assessments; and**
 - d. establish and maintain accurate, nationally consistent and publically available national environmental accounts.**

'Red line' protection for key environmental values

There are fundamental problems with the approach of the EPBC Act. Firstly, the focus on assessment and approval of one-off activities with the aim to mitigate the impact of those activities rather than ensure the protection of key environmental values. Secondly, the listing and protection of threatened species via single species recovery plans generally implies that those species are treated separately, rather than as part of an ecosystem, which may itself also require recovery.

However, the natural environment simply does not work that way. Conservation biology shows the connectedness of natural processes³⁵ and, given the extent of the global and our domestic biodiversity crisis (loss of habitat and species and cost of recovery), the Wilderness Society believes that protection of key environmental values and important natural places must be the bottom line.

It is important that protection and management focus on both key environmental values (such as species or sites) and on broader landscape protection.

In part, this may be achieved through the development and implementation of National Environment Plans that include clear goals, identify national priorities and set measurable targets to protect and restore key environmental matters such as climate,

³⁵ Jackson et al (2017) *Australia state of the environment 2016: overview* Australian Government Department of the Environment and Energy, Canberra pviii

native species and ecosystems, World and National heritage, protected areas, and High Conservation Value vegetation (see [National Environment Plans, Goals and Standards](#)).

However, to prevent the extinction or further endangerment or decline of Australian ecosystems, plants, animals and their habitats—and to recover populations to the point where they may be removed from the threatened ecosystem or species list—the Wilderness Society strongly believes that there are some ecosystem-scale environmental values of such key importance that hard protections preventing their destruction or degradation must be built into the EPBC Act or successor legislation.

To ensure the EPBC Act or successor legislation achieves strong environmental outcomes, especially for biodiversity, the Wilderness Society strongly believes that the removal, destruction and/or degradation of the following key environmental values should be prohibited.

Permission should only be granted by the Minister for low-scale, low-ecological impact activities or as a measure of last resort in the case of overriding necessity (protection of human life, important community infrastructure, or cultural and national heritage):

- All primary, old growth and remnant vegetation;
- Regrowth vegetation where it meets at least one of the six criteria as defined by the High Conservation Value Network³⁶;
- Critical habitat for critically endangered or endangered species;
- Gazetted Protected Areas and World Heritage and Ramsar sites; and
- Known sites of global rainforest, botanical or zoological significance.

For all other environmental values that fall into the category of the matters of national environmental significance, there should be a legislated requirement for the Commonwealth Government to enhance and maintain key values of these categories.

Assessment and decisions that may result impact any of these values must:

- demonstrate that the activity will have no significant impact on MNES or that they have applied sufficient world best practice mitigation to significantly moderate or avoid these impacts; and

³⁶ See [Appendix 3](#)

- be made in line with the objects of the EPBC Act or any successor Act and subsidiary regulatory instruments, such as five yearly National Environment Plans, national standards, recovery and management plans (see [National Environment Plans, Goals and Standards](#)).

The Commonwealth Government should prioritise areas containing or comprising matters of national environmental significance for protection via protected areas, other effective conservation measures (OECMs), and conservation agreements/conservation covenants with private landowners.

Recommendation:

9. That Australia's national environment act include:

- a. Clear Commonwealth government responsibilities to maintain or enhance matters of national environmental significance;***
- b. Clear, science-based 'red lines' that prevent any destruction of critical environmental values; and***
- c. A requirement on proponents and the Commonwealth government to demonstrate that regulated activities will not have an adverse affect on MNES and are being undertaken in line with national environment plans and standards before approval is granted.***

National Environment Plans, Goals and Standards

Australia's *Biodiversity Conservation Strategy 2010-2030* was the guiding national framework for biodiversity conservation in Australia. The Strategy set out 10 interim national targets for conserving Australia's vital and unique biodiversity and meeting our international obligations, with Australia only achieving one of these national targets over the past decade.

The Strategy has been replaced with *Australia's Strategy for Nature 2018-2030*, which was adopted by Australia's environment ministers in November 2019. While the replacement Strategy does partly acknowledge the extent of Australia's biodiversity crisis and rightfully looks to shift its focus from pure protection into adaptation and resilience, the Strategy itself is deeply inadequate. It contains no measurable goals or targets, and overlooks a substantial amount of relevant scientific evidence.

Continuing with the Strategy in its current form as our national framework for species conservation will leave Australia at substantial risk of failing our international obligations, and fail to conserve our biodiverse heritage.

The State of the Environment 2016 Report found that “(a)n overarching national policy that establishes a clear vision for the protection and sustainable management of Australia’s environment to the year 2050 is lacking” including:

- **specific policy actions to preserve and restore the natural environment;**
- **measures to ensure complementary policy and strengthened legislative frameworks at the national, state and territory levels; and**
- **a more strategic focus on planning for a sustainable future³⁷.**

The Wilderness Society believes that this is best achieved through the establishment of a five-yearly National Environment Plan to act as a national overarching plan for Australia’s environment. To be effective, this would need to include clear goals, identify national priorities and set measurable targets to protect and restore key environmental matters such as climate, native species and ecosystems, World and National heritage, protected areas, and High Conservation Value vegetation.

This ought to include non-MNES areas of national environmental significance where the Commonwealth would not directly regulate, but wants to ensure a high consistent level of protection is achieved across Australia, such as for air pollution, water quality and recycling and waste management. Commonwealth Government decision-makers and authorities should be required to act consistently with this Plan, including in the allocation of funding.

In addition, intergovernmental arrangements and the Act should give the Commonwealth Government power to set binding national standards, objectives and plans that all states must adhere to, in order to bring all states and territories up to higher and consistent national standards that are in line with the recommended National Environment Plan.

³⁷ Jackson et al (2017) *Australia state of the environment 2016: overview* Australian Government Department of the Environment and Energy, Canberra pviii

Such standards should be both targeted threshold based (e.g. National Air Quality Standards) or broad standards that set a baseline for protection (e.g. no destruction or degradation of High Conservation Value forests and bushlands). These standards would not preclude a jurisdiction instituting stricter protections, but act as a baseline to ensure a consistent national approach to protecting key environmental values.

Recommendations:

- 10. That the Commonwealth Government should be legislatively required to develop a national biodiversity conservation and climate mitigation strategy, which:**
 - a. Provides clear goals and measurable targets for biodiversity, threatened species and emissions reductions to be achieved by Federal, State and Territory and Local governments;**
 - b. Outlines bioregional planning and targets;**
 - c. Outlines funding commitments over the life of the strategy; and**
 - d. Is updated and reviewed every five years.**
- 11. That the Commonwealth Government should set targeted and broad environmental standards to set a baseline for protection and work with other jurisdictions to ensure development of clear requirements, processes and oversight to integrate national environmental goals and standards into state and territory planning, environmental and NRM laws.**

National Recovery Plans and Conservation Advices

Section 139 of the EPBC Act obliges the Australian Government to implement a recovery plan within a government area and seek the cooperation of the states and territories in implementing a plan, but there is no mechanism under the EPBC Act to enforce these obligations.

When the EPBC Act was first passed into law, the listing of a species as nationally threatened triggered a legal requirement for the development of a National Recovery Plan. In 2007, the EPBC Act was amended to allow the Minister to decide that a recovery plan is not required for individual listed species and that species without a recovery plan are now expected to have what is known as a conservation advice, which has no legal power to compel Australian governments to protect a species.

This has led to significant issues with the application of recovery plans, including:

- As of 2016-17, of the 1,885 listed threatened entities in Australia, just 712, or 38%, were covered by recovery plans that are current.
- The Koala (combined populations in Queensland, New South Wales and the Australian Capital Territory) is federally listed as vulnerable but has been identified as requiring a recovery plan since 2014. Current modelling estimates that over 70% of critical Koala populations were lost in the 2019-2020 summer bushfires³⁸—overall population loss is still being calculated.
- Only two of Australia's ten listed critically endangered mammals (Central Rock-rat, Western Ringtail Possum) have recovery plans that are up to date—others either have no plan or they are over 10 years old. One Critically endangered animal, the Christmas Island Pipistrelle, is presumed extinct.
- The conservation status of Swift Parrots has worsened from Vulnerable to Critically Endangered since its listing in 1999, despite having a recovery plan since 2002, owing to exemptions on logging of nesting habitat under the Tasmanian Regional Forest Agreement.
- The recovery plan for the Golden Shouldered Parrot is 14 years old, unenforced and unfunded. The main objective of the recovery plan was to convert the listing status of the Parrot from endangered to vulnerable: this has not happened in this time, and now Federal Department of the Environment briefing documents acknowledge the Parrot is at “very high risk of extinction in the wild in the near future”. There is currently an application to clear identified Golden Shouldered Parrot habitat at Kingvale Station (EPBC 2016/7751) in Queensland before the Federal Environment Minister³⁹.

There is also no requirement to identify critical habitat within recovery plans, to review them in light of major changes in the environment (e.g. the 2019-2020 summer bushfires) or require climate impact assessment for species and its critical habitat. This must be rectified.

³⁸

<https://www.abc.net.au/news/2020-03-07/koalas-losses-post-bushfires-bigger-than-modelled/12033834>

³⁹

<https://www.smh.com.au/politics/federal/parrot-on-verge-of-annihilation-poses-first-hurdle-for-new-environment-minister-20180903-p501fk.html>

Even for those species with a current and valid recovery plan or conservation advice, research shows that they seem to have little impact on the recovery or stabilisation of most species⁴⁰. These documents are not enforceable, are often poorly coordinated and the recovery actions set out within them are not automatically funded or implemented.

For example, the Leadbeater's Possum has a recovery plan dated 1997, while a newer version has remained in draft for years. The Leadbeater's Possum is Victoria's animal emblem and teeters on the brink of extinction, due to the loss of viable forest habitat for the animal to nest and breed in⁴¹.

In 2015, the Commonwealth Government elevated the status of the species to Critically Endangered and the Australian Threatened Species Scientific Committee has recommended that "the most effective way to prevent further decline and rebuild the population of Leadbeater's Possum is to cease timber harvesting within the montane ash [mountain] forests of the Central Highlands"⁴².

There is insufficient protected forest to ensure the long term survival of the Leadbeater's Possum⁴³, and experts recommend that the species' recovery requires the protection of all living and dead hollow-bearing trees and old-growth forest, and the end of clearfell logging within its habitat range⁴⁴.

The conservation status of the Leadbeater's Possum was reviewed in 2018, at the request of the then Agriculture Minister, Barnaby Joyce, as a result of agitation from the logging industry lobby. Draft advice from the Threatened Species Scientific Committee

⁴⁰ Bottrill M et al 2011 "Does recovery planning improve the status of threatened species?" *Biological Conservation* 144(5):1595-1601.

⁴¹ Lindenmayer, D (1996) *Wildlife and Woodchips: Leadbeater's Possum, a Test Case of Sustainable Forestry* UNSW Press, Sydney; Lindenmayer D and Meggs R (1996) "Use of den trees by Leadbeater's Possum" *Australian Journal of Zoology* 44(6) 625 - 638; Lindenmayer et al (2015) *Mountain Ash: Fire, Logging and the Future of Victoria's Giant Forests*, CSIRO Press, Melbourne

⁴² Commonwealth (2015) *Gymnobilideus leadbeateri: Conservation Advice*, p.33, available at: <http://www.environment.gov.au/biodiversity/threatened/species/pubs/273-conservation-advice.pdf>

⁴³ Department of Environment, Land, Water and Planning (2017) A review of the effectiveness and impact of establishing timber harvesting exclusion zones around Leadbeater's Possum colonies

⁴⁴ Lindenmayer D, Blair D, McBurney L and Banks S (2015) "Ignoring the science in failing to conserve a faunal icon - major political, policy and management problems in preventing the extinction of Leadbeater's possum" *Pacific Conservation Biology* 21(4) 257-265

observed that the Possum meets at least one criterion for listing as critically endangered, but the Environment Minister has yet to make a decision as of 17 April 2020. The summer 2019-2020 bushfires do not appear to have materially affected Leadbeater's Possum habitat, but it seems likely that their impacts will increase logging pressure in the Central Highlands, in the habitat of the Leadbeater's Possum.

Recommendations:

- 12. That the Commonwealth Government be required to develop science-based recovery plans for:**
 - a. critically endangered and endangered species, or**
 - b. all threatened species whose population has declined by 20% or more over a decade, or**
 - c. migratory threatened species or species of national significance;**
- 13. On listing, a recovery plan or conservation advice must be prepared for all threatened species;**
 - a. For those currently listed species without either, a recovery plan or conservation advice must be in place in line with the above by 2022;**
- 14. Recovery plans and conservation advices must be enforceable, binding, reassessed and updated every five years and require climate impact assessment for species and its critical habitat, and include emergency response plans and funding in the event of extreme events affecting habitat (such as fire);**
- 15. Recovery plans and conservation advices must be resourced for population recovery, not just population stabilisation, and for maintenance and eventual recovery of existing critical habitat;**
- 16. Recovery plans and conservation advices should be integrated with other legislation that may impact their implementation—including urban and regional planning and development legislation and codes—to proactively prevent conflict between the conservation of species and development plans;**
- 17. The Commonwealth Government should significantly increase resources into recovery plan and threat abatement implementation, including establishing a Recovery Fund with an annual investment of \$200M to implement recovery plans.**

Protection of critical habitat for endangered species

The *State of the Environment 2016* Report notes that habitat clearing, degradation and fragmentation are key drivers of species loss⁴⁵.

The protection of critical habitat—those specific geographic areas that contain features essential to the conservation of an endangered or threatened species—should form a fundamental part of any environmental protection regime and is essential to preventing extinctions. Yet there is little evidence that the EPBC Act effectively protects threatened species habitats⁴⁶.

The three primary failures of critical habitat protection under the EPBC Act have been:

- the lack of application of the law;
- the limitation of protections to Commonwealth land; and
- the limited definition of critical habitat under the EPBC Act.

Firstly, the EPBC Act has provisions to list 'critical habitat' (currently narrowly defined as habitat critical to the survival of a listed threatened species or ecological community), with the Minister afforded significant discretion under the EPBC regarding the rigour with and manner in which these provisions are applied.

However, only five critical habitat listings under the EPBC Act have been made in the last 20 years. Given the broad discretion that applies to the listing of critical habitat, it would appear that the lack of effective application of critical habitat laws in Australia is primarily due to a lack of political will rather than regulatory oversight.

Critical habitat is similarly unprotected under National Recovery Plans. A 2018 report found that, of all animals listed as endangered and critically endangered, only 55% had recovery plans, 45% had critical habitat clearly identified as essential to their survival and 10% had identified critical habitat that was wholly or partly located on

⁴⁵ Jackson et al (2017) *Australia state of the environment 2016: overview* Australian Government Department of the Environment and Energy, Canberra p14

⁴⁶ Australian Conservation Foundation, WWF and The Wilderness Society Australia (2018) *Fast-tracking Extinction: Australia's national environmental law* Available online at <https://www.acf.org.au/reports>

Commonwealth land. However, only two species (<1%) had habitat listed on the national critical habitat register⁴⁷.

The Western Ringtail Possum is a key example of a critically endangered species with a recovery plan for which no critical habitat has been identified and whose population has been reduced by 80% over the last decade⁴⁸ to a meagre 3,400 individuals. Urban development approved by local and state governments are the key drivers of Western Ringtail Possum habitat destruction.

Firstly, critical habitat for endangered and critically endangered species must be identified as a matter of urgency and listed on the critical habitat register⁴⁹.

Secondly, inclusion on the register only makes damaging critical habitat a criminal offence if that habitat is on Commonwealth land. Under the EPBC Act, environmental impacts and development assessments and approvals are tenure blind, yet the critical habitat register is tenure constrained. The majority of critical habitat locations lie outside Commonwealth land and thus provisions to list and protect critical habitat are in urgent need of reform to ensure they apply across all jurisdictions.

Thirdly, the existing EPBC Act definition of critical habitat—(*habitat critical to the survival of a listed threatened species or listed threatened ecological community*)—is overtly limited to survival, meaning there is no requirement to protect habitat critical to the recovery of a species. For example, the endangered Northern Hairy Nosed Wombat is found in only one location in the wild in Australia; Epping Forest National Park (Scientific) in Central Queensland. Their known habitat has been lost through clearing and land use change. Potential habitat for reintroduction has been identified in the species' recovery plan, but is currently unprotected from habitat loss and degradation.

⁴⁷ Australian Conservation Foundation (2018) *Australia's extinction crisis: Protecting critical habitat*. Available online at <https://www.acf.org.au/reports>

⁴⁸ Threatened Species Scientific Committee (2018). *Conservation Advice Pseudocheirus occidentalis Western ringtail possum*. Canberra: Department of the Environment and Energy. Available from: <http://www.environment.gov.au/biodiversity/threatened/species/pubs/25911-conservation-advice-11052018.pdf>. In effect under the EPBC Act from 11-May-2018.

⁴⁹ Any destruction or degradation of critical habitat for critically endangered and endangered species, and critically endangered or endangered ecosystems or floristic communities must not be allowed except in the case of low-scale, low-ecological impact clearing of overriding necessity (human life, protection of critical infrastructure, protection of cultural and national heritage) as a measure of last resort.

The Wilderness Society recommends that the definition of critical habitat should be reformed to include:

- spatially explicit areas needed for a given species to avoid extinction and recover to the point it can be delisted, including those habitats presently occupied, under restoration, or identified as future potential habitat; and
- those habitats not yet occupied but which will be needed for the species to expand its populations so that it can recover.

It is important to note that critical habitat may be degraded at present but nonetheless recoverable, and in any event critical for a species' survival.

Recommendations:

18. That Australia's national environmental legislation should require:

- a. Critical habitat to be identified, mapped and included in plans, advices and on a Critical Habitat Register, at the time a species or ecological community is listed;***
- b. Provisions stopping any destruction or degradation of critical habitat for critically endangered and endangered species, and critically endangered or endangered ecosystems or floristic communities; and***
- c. An updated definition of critical habitat that include those spatially explicit areas needed for a given species to avoid extinction and recover to the point it can be delisted, including those habitats presently occupied, and those habitats not yet occupied but which will be needed for the species to expand its populations so that it can recover.***

19. Critical habitat provisions must protect habitats on all areas of land and sea, regardless of tenure—not just Commonwealth land.

Protection of World Heritage

As a party to the Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention), the Commonwealth Government has substantial obligations to identify, protect and conserve World Heritage sites in Australia. As APEEL noted, the World Heritage Convention is among the most significant

treaties which the Commonwealth has the responsibility and power to implement via the external affairs power under section 51 of the Constitution⁵⁰.

As with World Heritage properties the world over, Australia's properties are at risk and under pressure. While the Commonwealth Government is responsible for their protection, failures of governance represent a key threat to these areas⁵¹ including:

- Support for 'development' or exploitation activities that will contribute—either individually or cumulatively—to the decline of the values of the World Heritage Areas, whether resource extraction or commercial tourism over protection or natural or World Heritage values;
- Mismanagement of responsibilities between tiers of government, especially where less well resourced state government agencies are tasked with protecting World Heritage 'areas on the ground'; and
- Ongoing failure to address key threats to World Heritage properties.

In 2010, the Commonwealth and Tasmanian Governments sought but ultimately failed to de-list 74,000 hectares of native forests from the Tasmanian Wilderness World Heritage Area⁵². In the same meeting of the World Heritage Committee, the Commonwealth Government was warned that the Great Barrier Reef could be placed on a list of threatened sites due to plans to dump up to three million cubic meters of dredge spoils inside the Great Barrier Reef World Heritage Area⁵³. Since that time the Unesco World Heritage Committee has placed the GBRWHA on the warning list for 'In Danger' status, in part owing to ongoing regulatory failure to mitigate threats such as deforestation-driven agricultural runoff.

The Operational Guidelines for the Implementation of the World Heritage Convention set out that "legislative and regulatory measures at national and local levels should assure the protection of the property from social, economic and other pressures or changes that might negatively impact the Outstanding Universal Value, including the integrity and/or authenticity of the property."

⁵⁰ Australian Panel of Experts on Environmental Law (2017) *Environmental Governance* (Technical Paper 2), retrieved from <http://apeel.org.au/papers/>

⁵¹ [Australia's World Heritage Areas under threat](#), EDO New South Wales, undated

⁵² [World Heritage Site Threatened By The Australian Government](#), The Wilderness Society, May 2014

⁵³

<https://www.sciencemag.org/news/2014/06/unesco-rejects-australias-bid-shrink-tasmanian-world-heritage-site#>

Australia's national environment act should prohibit the destruction and degradation of World Heritage sites⁵⁴. Any future environmental protection laws should require the Commonwealth Government to assess development applications inside wilderness areas and national parks.

The impacts of the 2016 and 2019-2020 bushfires also demonstrate the need for World Heritage management plans to be regularly updated and include resilience-building and provisions for major disaster response. For instance, the management plan for the Gondwana Rainforests of Australia site hasn't been updated since 2000 and the overarching strategic plan for the Greater Blue Mountains hasn't been updated since 2009.

The Operational Guidelines also note that site boundaries should include sufficient areas immediately adjacent to the area(s) of Outstanding Universal Value to protect the property's heritage values from human impacts⁵⁵.

Currently the EPBC Act provides protection only for the values for which World Heritage sites are listed, not the actual sites (properties/areas) themselves. This approach can be dangerously reductionist—for example, it would allow a mine in the centre of the Daintree Rainforest because the forest type where the mine site is proposed is not listed as part of the World Heritage nomination. It is the entirety of that place which makes it special and protecting its integrity is essential.

Australia's national environment act should reflect the obligations set out in the World Heritage convention and protect both the values which make these places special as well as the places themselves.

⁵⁴ Except as a measure of last resort in the case of overriding necessity (protection of human life, important community infrastructure, or cultural and national heritage).

⁵⁵ The Operational Guidelines for the Implementation of the World Heritage Convention, paragraphs 96-118.

Recommendation:

20. That Australia's national environment act:

- a. expressly protect World Heritage properties/areas as well as World Heritage values;***
- b. require the Commonwealth Environment Minister to prepare and properly fund management plans for World Heritage properties/areas in line with Australia's obligations under the World Heritage Convention;***
- c. ensure World Heritage management plans include long-term planning, resilience-building, updating listings and provisions for major disaster prevention, mitigation and response; and***
- d. require the Commonwealth to act consistently with management plans in planning, decision-making and regulation, including assessment and approval.***

Preventing activities and projects that worsen the state of the environment

Under the EPBC Act, there are limited mechanisms to constrain key threats to biodiversity, actions to limit key threatening processes are discretionary and major exemptions in the Act such as the Regional Forest Agreements allow key threatening activities to happen without assessment/approval under the Act. Strong biodiversity outcomes will only be possible with clear guidelines around what impacts should be limited and by prioritising dealing with the biggest threats.

Significant and cumulative impacts from regulated activities

Australia's national environment act should include clear 'red lines' that prevent any destruction of critical environmental values.

However, for activities that may affect a MNES but which do not fall into the above category, the EPBC Act allows too much ministerial discretion regarding whether a proposed action is likely to have a 'significant impact' on MNES, thus triggering an assessment.

A primary failure of the 'significant impact' threshold is the lack of any requirement to consider cumulative impacts, which hinders development of a coordinated approach to their management.

Individual actions or projects may be approved because on their own they do not exceed an existing unacceptable 'significant impact' threshold, however the cumulative impact can be devastating. For example, monitoring of the endangered Short-billed Black Cockatoo in a heavily fragmented landscape in multiple locations across Western Australia showed the population had low breeding success leading to local extinction. The fragmented bushland and consequential mosaiced habitat for the cockatoo was caused from gradual agricultural expansion and road development across bushland⁵⁶.

⁵⁶ Bennett, A.F. (1998, 2003) *Linkages in the Landscape: The Role of Corridors and Connectivity in Wildlife Conservation* IUCN, Gland, Switzerland and Cambridge,
<https://portals.iucn.org/library/efiles/documents/fr-021.pdf>

Similarly, over half a million hectares of endangered Southern Black-throated Finch habitat were cleared without being assessed under the EPBC Act, despite evidence that this once-widespread and common bird has disappeared from over 80% of its original range owing to habitat loss⁵⁷.

A clearer test for federal oversight could be achieved by replacing the ‘significant impact’ threshold with an ‘adverse impact’ threshold.

There should be a robust, objective and science-based definition of an ‘adverse impact’ relating to the degradation or destruction of an environmental value’s core characteristics—that is, the characteristic that makes the environmental value important to protect e.g. the specific geographic features in a mapped critical habitat that provide shelter, food, or breeding sites for a threatened species.

Proponents and the Commonwealth government should be required to demonstrate that regulated activities will:

- **not** have an adverse affect on MNES or that any adverse effect will be mitigated via world’s best practice efforts, and
- be undertaken in line with national environment plans and standards before approval is granted.

This should include a requirement to take into account cumulative impact considerations.

To ensure the effectiveness of cumulative impact assessment, especially for areas where multiple similar impacts may affect an environmental value (e.g. CSG exploration in the Surat and Bowen Basins in Queensland), there is an urgent need for up to date and comprehensive national environmental accounts, State of the Environment reports and other data. Assessment would also require consideration of cumulative impacts on biodiversity of an activity in combination with other past, present and likely future activities.

⁵⁷ Reside A et al (2019) “How to send a finch extinct” *Environmental Science & Policy* <https://doi.org/10.1016/j.envsci.2019.01.005>

National Environment Plans and bioregional planning will also improve the consistency of management and planning efforts across all jurisdictions and help to address cumulative impacts. Similarly the ability to list and protect local populations would also help address cumulative impacts.

Recommendation:

21. The national environment act and subsidiary instruments should:

- a. adopt an ‘adverse impact’ test in place of ‘significant impact’ based on objective and measurable criteria;***
- b. require proponents and the Commonwealth to demonstrate that regulated activities will not have an adverse affect on MNES or that any adverse effect will be mitigated via world’s best practice efforts; and***
- c. ensure consideration of cumulative impacts is integrated into National Environment Plans and related bioregional planning, as well as in strategic assessments and assessment processes.***

Preventing key threatening processes

Habitat destruction and degradation is the greatest threat to our native wildlife, closely followed by invasive pests like cats and foxes, and is listed as a key threatening process under the EPBC Act.

A 2018 University of Queensland study, commissioned by ACF, WWF and the Wilderness Society, found that since the EPBC Act came into effect, approximately 7.7 million hectares of threatened species habitat has been destroyed due to bulldozing or logging, an area of threatened species habitat larger than the state of Tasmania⁵⁸.

The loss and destruction of native bushland has serious implications for Australia’s flora and fauna.

The reality is that in addition to the many animals killed or maimed in the bulldozing of forest and woodland habitat, many more such as the Greater Glider and Swift Parrot are being pushed to extinction by the destruction of breeding, feeding and nesting sites.

⁵⁸ Australian Conservation Foundation, WWF and The Wilderness Society Australia (2018) *Fast-tracking Extinction: Australia’s national environmental law* Available online at <https://www.acf.org.au/reports>

See [Requirements on Government to protect the environment](#) and [‘Red line’ protection for key environmental values](#) for recommendations.

The overuse and mismanagement of Australia’s water resources is also a growing area of concern, especially given projected changes to Australia’s rainfall and weather patterns as a result of climate change. We refer the Reviewers to the April 2020 Submission to the 10 year review of the EPBC Act by the Environmental Defenders Office for substantive recommendations on reforms needed to Australia’s water regulation.

Regional Forest Agreements

Native forest logging continues to be a significant threatening process impacting the survival of threatened species.

All the documented inadequacies of the EPBC Act are compounded in relation to forests under the Regional Forest Agreements (RFAs).

Under the RFAs, the Commonwealth Government formally removes itself from any ongoing involvement in the assessment and approval of forest logging operations, via the so-called ‘RFA exemption’ clauses incorporated into the EPBC Act and the Regional Forest Agreement Act 2002 (RFA Act).

Although the RFAs were supposed to ‘balance’ the health of forest ecosystems and threatened species with the demands of the logging industry, the reality over the past 20 years has been that more and more forest-dwelling species have been newly listed as threatened or uplisted to a higher threat category. Forest wildlife species have undergone serious decline since the RFAs commenced:

- 48 federally listed threatened forest-dwelling vertebrate fauna species are impacted by logging operations, including logging-associated roading and burning, across Australia’s 11 Regional Forest Agreement (RFA) regions⁵⁹;
- 12 forest vertebrate fauna species have been up-listed to the ‘Endangered’ or ‘Critically Endangered’ categories since RFAs commenced;
- No threatened forest vertebrate species has been down-listed to a lower category of threat under the EPBC Act since the RFAs commenced;

⁵⁹ Robertson P, Young A & Milthorpe S (2019) *Abandoned: Australia’s forest wildlife in crisis* The Wilderness Society, Surry Hills Australia

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- More than one in four Federally-listed forest dependent species that were listed when the RFAs were signed are closer to extinction now than they were 20 years ago;
- 15 forest vertebrate fauna species have been listed for the first time as threatened in the 20 years since the RFAs were commenced;
- Logging operations have been officially recognised (e.g. in EPBC Act Recovery Plans) as a threat to 20 of the 24 Critically Endangered or Endangered species;
- 15 listed forest-dwelling fauna species have no EPBC Act Recovery Plan.

Although under the EPBC Act Ministers must not act inconsistently with a national threatened species recovery plan when approving developments, under the RFAs, there is nothing that legally compels state governments to actually implement the actions contained in the recovery plans. This is especially problematic given the close correlation between known and likely critical habitat for Critically Endangered species and the areas covered by Australia's 11 Regional Forest Agreement areas (see maps on page 61 which show the RFA regions, and important habitat for critically endangered species, respectively).

The result is that state governments are not required to secure forest species' survival and the Commonwealth Government has abrogated its responsibilities to protect them. The 'RFA exemption' from the EPBC Act means the Commonwealth Government appears to be unable, as well as unwilling, to intervene even when logging threatens the survival of threatened and endangered species like the Long Footed Potoroo, Spotted-tail Quoll, large forest owls, and Giant Freshwater Lobster.

In addition, it is important to note that:

- logging and logging-associated roading and burning also facilitate and exacerbate six out of 11 other documented "Threat Categories" such as weed invasion; introduction and spread of disease, e.g. phytophthora dieback; and predation by foxes and cats⁶⁰;
- logging and logging-associated roading and burning are one key threat that could be removed almost immediately, whereas other threats such as climate change or existing feral species invasion will take decades to reverse.

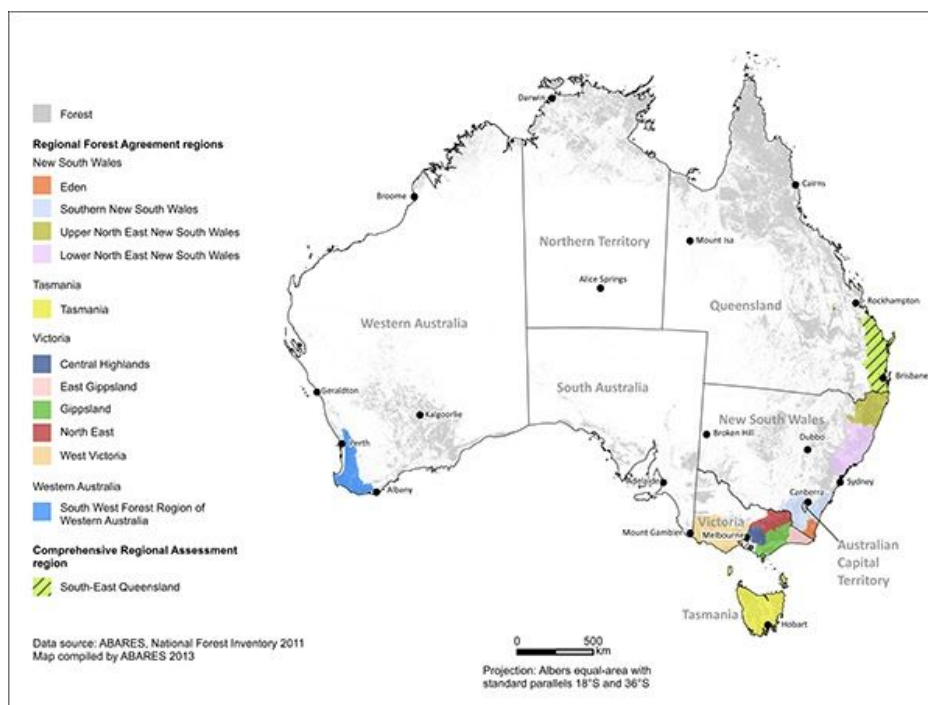
⁶⁰ Australia's State of the Forests Report 2018, Department of Agriculture, Water and the Environment <https://www.agriculture.gov.au/abares/forestsaustralia/sofr/sofr-2018>

Recommendation:

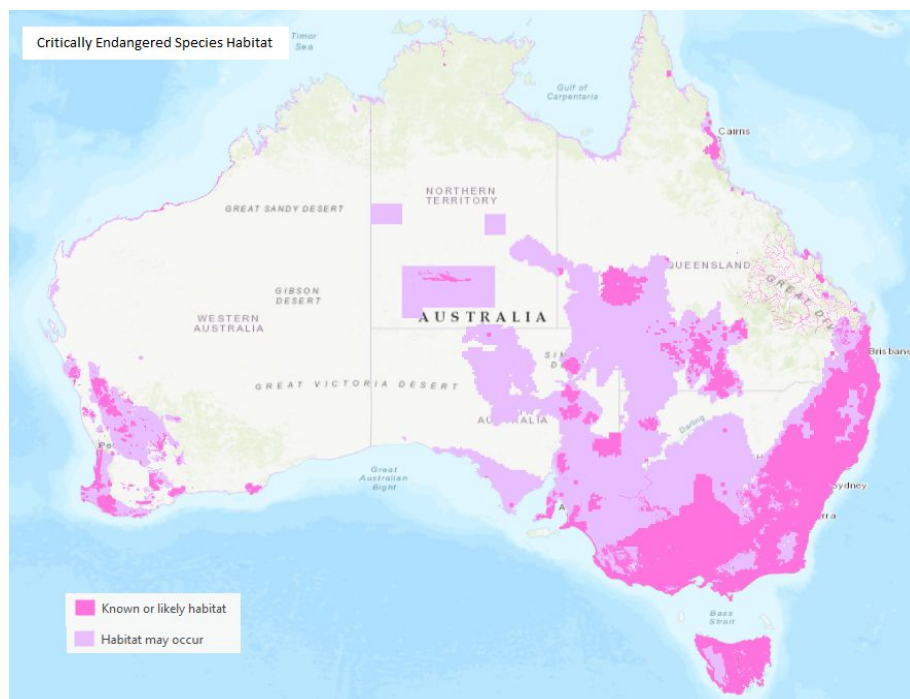
22. That the Commonwealth:

- a. Abandon the nation's ten existing Regional Forest Agreements (RFAs), and undertake full scientific assessments of RFA regions post the 2019-2020 summer bushfires, given the wood supply and conservation assumptions underpinning the existing RFAs are now invalid;**
- b. Require the states to put forward native forest logging plans to the Commonwealth Government for assessment, on a not less than 3-yearly basis, that include wood supply forecasts that take into account threatened species habitat requirements, climate and fire risk and a thorough and comprehensive assessment of the social, environmental and economic context of forest management;**
- c. Ensure Commonwealth assessment of logging plans:**
 - i. only approves plans that are in line with national standards, plans and targets, including Conservation Advices and Recovery Plans for Nationally-listed threatened species;**
 - ii. only approves plans subject to enforceable conditions tailored to protecting forest-dependant threatened species and their habitat;**
 - iii. supports national and international standards for reductions in deforestation rates for native forests; and**
 - iv. any coupe additions to such plans would require a further referral and assessment; and**
- d. Include 'major event' provisions to ensure significant events, such as up-listing of species or major bushfires, trigger suspension of any approved logging plans pending Commonwealth Government reassessment.**

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Map: Australia's 11 'Regional Forest Agreements' ([Department of Agriculture, Water and the Environment](#))



Map: Spatial distribution of known and likely critical habitat for critically endangered species
Map 2 data source: Australia—Species of National Environmental Significance Database (Public Grids) May 2018

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Deforestation

Since European colonisation, approximately 104 million hectares of native vegetation (44%) have been cleared. This level of clearing has been only marginally offset by regrowth of 2.9% of the original cleared area.

Australia is now on a list of global deforestation fronts, alongside the Amazon, the Congo and Borneo.⁶¹ The state of Queensland has the highest rates of deforestation and land clearing in Australia, with over 1.6 million hectares of forest and bushland cleared in Queensland alone in the last five years.⁶² At current clearing rates, a football field-sized area of forest and bushland is being bulldozed in Australia every two minutes.⁶³

Recently released figures show that clearing of native vegetation in NSW has increased 800% in three years, with land restoration levels at less than half the decadal average⁶⁴. Deforestation and land clearing kills tens of millions of native mammals, birds and reptiles every year. 50 million are killed in Queensland and NSW alone.⁶⁵

Deforestation and land clearing in Great Barrier Reef catchments also leads to erosion and runoff of sediment into the Great Barrier Reef World Heritage Area. In 2017, the Australian Department of the Environment and Energy predicted that carbon pollution from deforestation would equal approximately 10% of Australia's

⁶¹ WWF International (2018) Living planet report 'Deforestation fronts'. Grooten, M., Almond, R.E.A. (Eds) p.28. WWF: Gland, Switzerland. Accessed online at:

http://www.panda.org/knowledge_hub/all_publications/living_planet_report_2018/

⁶² Queensland Department of Environment and Science (2011-2018), *Statewide Landcover and Trees Study (SLATS) reports, 2011-12 (2013); 2012-13 (2014); 2013-14 (2015); 2014-15 (2016); 2015-16 (2017); 2016-17 (2018); 2017-18 (2018)*. DES, Queensland Government: Brisbane, Queensland.

⁶³ Calculations are based on a national average of 600,000 hectares of deforestation and native forest logging per year, 1,643 hectares per day, 68 hectares per hour, 1.14 hectares per minute. 1.14 hectares x 2 minutes = 2.28 = well over the 1.77 hectare area of the MCG. So this is a technically conservative figure.

⁶⁴

<https://www.theguardian.com/australia-news/2018/aug/04/clearing-of-native-vegetation-in-nsw-jumps-800-in-three-years>

⁶⁵ Finn HC & Stephen, NS (2017) "The invisible harm: land clearing is an issue of animal welfare" *Wildlife Research* 44(5): p.4.

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overall domestic emissions.⁶⁶

Despite the threat posed by deforestation and land clearing to MNES, few referrals for assessment of the impacts have been made⁶⁷. Furthermore, the consequences for illegal clearing that are meted out, often by state governments, are rarely sufficient to dissuade similar activities.

Recent analysis by WWF-Australia has found that 76% of Queensland properties undertaking land clearing are doing so without EPBC Act assessment, despite the report's analysis that that assessment is warranted.⁶⁸ The study found over half of the properties where MNES were potentially triggered fell in the catchment of the Great Barrier Reef. Further, a total of 106 threatened species (38 animals and 68 plants) were potentially affected through clearing of known and likely habitat.

As noted above, the Wilderness Society strongly believes that Australia's High Conservation Value forests and bushlands should be protected for biodiversity, climate and other values. The removal and/or destruction and degradation of key vegetation types should only be granted by the Minister for low-scale, low-ecological impact clearing or as a measure of last resort in the case of overriding necessity, and that for all other vegetation that falls into the category of the matters of national environmental significance there should be a legislated requirement for the Commonwealth Government to maintain and enhance key values in this category of vegetation (see ['Red line' protections for key environmental values](#) for more detail on this recommendation).

⁶⁶ Australian Government, Department of Environment and 22 Energy (2017) Australia's emission projections 2017—chart data. Commonwealth of Australia: Canberra, ACT. Accessed online at: <http://www.environment.gov.au/climate-change/publications/emissions-projections-2017>

⁶⁷ Australian Conservation Foundation, WWF and The Wilderness Society Australia (2018) *Fast-tracking Extinction: Australia's national environmental law* Available online at <https://www.acf.org.au/reports>

⁶⁸ WWF Australia (2017) *Pervasive inaction on national conservation law over tree-clearing law in Queensland 2013-16* Available online via <http://www.wwf.org.au/knowledge-centre/resource-library#gs.qD39tiE>

Recommendations:

- 23. That the list of MNES be expanded include key forests and bushlands such as High Conservation Value forests and bushland (including all primary, old growth and remnant vegetation), vulnerable ecological communities and large, intact, functioning ecosystems (wilderness areas).**
- 24. That the Commonwealth adopt a national goal of zero destruction of all:**
 - a. primary, old growth and remnant vegetation;**
 - b. regrowth vegetation where it meets one of the six criteria as defined by the High Conservation Value Network;**
 - c. critical habitat for critically endangered or endangered species; and**
 - d. that this goal is reflected in all legislation, national plans and standards.**

Community rights and participation in decision-making for all

The EPBC Act contains limited rights and responsibilities for communities, and does not ensure early or adequate engagement and public participation in decision-making. Communities have the right to expect strong democratic legal frameworks that empower and engage the community, including the right of review and access to information.

The health of Australia's environment impacts us all and Australia's citizens have a right and responsibility to be involved in decisions that will affect the use and health, and the state and benefit, of our environment.

The Wilderness Society fundamentally believes that:

- A functioning environment is an essential component of a functioning Australia and ongoing community health;
- Communities have a right to be meaningfully involved in decisions which impact the environmental systems that support them (i.e. planning, assessment and review), including open standing provisions, merits review of decisions, citizen-suit provisions and protections for costs associated with legal proceedings held in the public interest; and
- Communities should have free and comprehensive access to data and information about the environmental systems that support them and all information relevant to a government decision on an action which could harm the environment.

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) sets out public rights regarding access to information, public participation and access to justice, in governmental decision-making processes on matters concerning the local, national and transboundary environment. It focuses on interactions between the public and public authorities.

Australia is not currently a party to the Convention. However, the Convention provides a solid framework to establish strong and meaningful community rights

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in relation to environmental regulation and should be signed and ratified as soon as is practicable. Ratification of this convention would also provide a constitutional basis for the Commonwealth to ensure these rights are enacted consistently across jurisdictions (state and local).

Recommendation:

25. The Commonwealth Government should become a party to the Aarhus Convention; and enshrine community rights to information, participation and review in Australia's national environment act and all subsidiary instruments in line with the provisions of the Aarhus Convention.

Public participation in decision-making

Public participation includes a range of activities, both at the formative and implementation stages of decision-making processes (including the making of regulatory instruments). However, under the EPBC Act, reliant legislation and subsidiary instruments, national government agencies are not obligated to proactively seek public participation and they are only rarely required to account for public comments in environmental decision-making.

Public participation is most effective when communities and individuals are engaged early and consistently throughout regulatory processes (e.g. decision-making, planning), including to verify post-approval compliance.

There are significant benefits to be gained by having comprehensive participation and accountability provisions set out in law. They include better community understanding and buy-in when consulted at early stages of a planning process leading to reduced conflict at later stages; more robust assessment when a range of perspectives are considered; more robust and accountable decision-making due to the very existence of accountability and review measures in law (even though these are rarely exercised); and greater chance that environmental outcomes will be delivered as intended with both government and community oversight.

Community participation provisions must also recognise the important role ENGOs play in these processes, speaking on behalf of nature and their

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memberships. For example, instances in which the Wilderness Society has been properly consulted on offshore petroleum projects in the Great Australian Bight (under the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations have demonstrably led to more robust assessments by the regulator (NOPSEMA) and the adoption of additional and appropriate mitigation measures by proponents and approval conditions by the regulator (NOPSEMA). In contrast, instances in which offshore petroleum proponents have failed to consult ENGOs and other key stakeholders have clearly contributed to increased community opposition to projects and, ultimately, a lack of social licence for the industry in the region.

The Wilderness Society strongly believes that Australia's national environmental act must:

- enshrine strong public participation provisions, including early engagement and public participation provisions at all key stages to inform decisions under the Act,
- require that decisions are to be informed by community engagement, including taking all public submissions into account, providing statements of reasons for decisions, and demonstrating how public feedback affected the final outcome; and
- Properly recognise the important role ENGOs play in these processes, speaking on behalf of nature and their memberships.

To participate effectively in environmental affairs, information about the environment held by public and private authorities must be accessible in an open and transparent way.

For Australia's national environment law, this means that all relevant information about a proposed action or a decision must be transparent and readily available to the community. Examples include providing reasons for decisions; mandatory notice of decisions and appeals (or rights to appeal) to all interested parties; and avoiding information asymmetry between the community, development proponents and other stakeholders.

The Wilderness Society believes that the Commonwealth Government has a fundamental obligation to collect and publish information, facilitate public

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access and use of it, and maintain appropriate infrastructure to manage this duty consistent with the Aarhus principles.

Recommendation:

26. Australia's national environmental act must enshrine:

- a. strong public participation provisions, including early engagement and participation at all key stages of decision-making, to inform planning, decision-making and the development and implementation of subsidiary instruments under the Act;**
- b. community and NGO rights to easily accessible, timely and credible information on actions and decisions; and**
- c. a requirement on the Commonwealth Government to collect and make public all relevant information about a proposed action or a decision to support public participation in decision-making processes.**

Rights to review, challenge and enforce decisions

Community review and enforcement rights to uphold environmental laws are fundamental to the public interest. The experience in jurisdictions with these rights demonstrates that, overwhelmingly, merits review proceedings and enforcement rights initiated by members of the public to uphold public environmental laws are done so legitimately in the public interest and generate important public environmental benefits⁶⁹.

A new Act must include built-in mechanisms for the community to seek an arm's-length review of processes and potential breaches in Court, independent of the government or an appointed regulator.

Open standing for the public to seek judicial review of government decisions under the Act and Regulations, and the right to take environmental breaches to court, means that any person can ensure that key decisions impacting biodiversity and the environment are made according to the law.

⁶⁹ The Australia Institute, *Environmental Citizen Suits in the New South Wales Land and Environment Court: frequency, success rates and citizen suit subsidies* (unpublished paper), April 2016, p. 12.

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This ensures increased public confidence in decision-making and environmental outcomes, and independent oversight of government action improves decision-making, public accountability and deters corruption. Good third party enforcement rights has been cited as key to good recovery outcomes for threatened species in the United States.

Recommendation:

27. Australia's national environment laws must enshrine:

- a. 'Open standing' provisions for any person to seek merits or judicial review of government decisions, or to enforce a breach, or anticipated breach, of environment law through third-party enforcement provisions in line with global best practice; and***
- b. Protection for costs in public interest legal proceedings including limiting upfront cost orders that deter the community exercising legal rights; improving clarity and certainty by allowing preliminary decisions on whether a matter is in the public interest; and use of public interest costs orders (i.e. protective costs orders) in those cases.***

Key enabling infrastructure to support the implementation of the Act

Any piece of legislation is only as effective as its enforcement. Substantial failures of enforcement over the life of the EPBC Act, combined with fundamental issues in the drafting of the legislation, are major drivers of Australia's ongoing extinction crisis and environmental degradation. Independent and trusted institutions overseeing the transparent and accountable application of the Act are vital to ensuring regulatory outcomes and restoring community confidence in environmental regulation.

Independent and trusted institutions

Political interference in Australia's environment institutions has diminished its effectiveness, with a lack of clear protections and increased Ministerial discretion politicising environmental decision-making, thereby reducing trust in the community.

A key example of this was the decision by the Commonwealth Government to classify the proposal by Wild Drake Pty Ltd to construct and operate a small-scale helicopter-accessed "luxury" tourist operation on Halls Island, Lake Malbena, within the Walls of Jerusalem National Park [2018/8177] as "not a controlled action".

This decision was made by the Government despite the explicit written advice from statutory bodies the National Parks and Wildlife Advisory Council, Tasmanian Aboriginal Heritage Council and Australian Heritage Council that the project not be progressed, in part, because of the likely impact on the Outstanding Universal Value (OUV) of the Tasmanian Wilderness World Heritage Area (TWWHA).

Activities in, and the protection and conservation of, the TWWHA are regulated by the Tasmanian Wilderness World Heritage Area Management Plan (2016). This Management Plan was developed under Tasmania's *National Parks and Reserve Management Act 2002*, and is intended to meet the requirements of the EPBC Act with respect to management of plans for World and National Heritage properties.

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A management plan for the TWWHA is required by the Management Principles of the EPBC Act.

In 2019, the Wilderness Society successfully challenged the Commonwealth Government's decision in the Federal Court⁷⁰. In her decision, Justice Debbie Mortimer highlighted serial failures by the Commonwealth Government to adhere to the EPBC Act and fulfil Australia's World Heritage obligations, including that the "statutory purpose" of the EPBC Act was "frustrated" by the Commonwealth Government's failure to set out its finding based on "material questions of fact" and by reliance in making the decision on a Tasmanian State Government process called the Reserve Activity Assessment which was found to have "no status under the EPBC Act". In addition, the Court condemned discussions between the proponent and the Government that occurred "away from public scrutiny, by which some agreement can be reached as to a suite of mitigation and avoidance measures"⁷¹.

This case demonstrates that while the legislative protection frameworks that provide for the protection of environmental values such as OUV may appear robust and credible, their effectiveness is limited by discretionary application. This case underlines the importance of independent decision-making bodies bound by clear duties for decision-makers to empower and compel decision-makers to fulfil their responsibilities.

The administration of the EPBC Act by the Environment Minister is one of the last remaining major regulatory functions at a Commonwealth level that is not undertaken by an independent statutory body with a dedicated framework for external or independent accountability and oversight.

The EPBC Act sits across large areas of economic activity including mining, agriculture, transport and construction. Of the Government's major economic regulatory functions including The Australian Competition and Consumer

⁷⁰ The Wilderness Society (Tasmania) Inc v Minister for the Environment [2019] FCA 1842 <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca1842>

⁷¹ The Wilderness Society (Tasmania) Inc v Minister for the Environment [2019] FCA 1842 <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca1842>

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Commission (ACCC), the Australian Prudential Regulation Authority (APRA), Australian Securities and Investments Commission (ASIC), Australian Taxation Office (ATO), Reserve bank of Australia (RBA), IP Australia and Foreign Investment Review Board (FIRB), only the Foreign Investment Review Board is a non-statutory authority where the decision-making power rests with the Minister. In other areas of major Australian regulation, an independent authority is the norm. Examples include the Therapeutic Goods Administration, Food Standards Australia, the Australian Communications and Media Authority and the Australian Maritime Safety Authority.

Environmental administration and regulation at the Commonwealth level is too complicated to sit within a traditional framework of Responsible Government alone.

Even in policy areas of intense and increasing parliamentary scrutiny such as the oversight of financial advice, there has been a need to increase the independent oversight of the already independent regulatory authorities. In these areas there are specific parliamentary accountability bodies (Joint Standing Committees with oversight functions) yet the Hayne Royal Commission found the need for further oversight. The Australian Parliament lacks the capability or expertise to provide the necessary oversight to environmental decision-making under the EPBC Act in the same way that the Australian Parliament has been unable to provide effective oversight of financial regulation.

Two new statutory environmental authorities—a National Environment Protection Authority (EPA) and a National Sustainability Commission (Sustainability Commission)—should be established to ensure laws and subsidiary instruments are designed, enacted and enforced transparently and in line with the objects and principle of Australia’s national environment act.

The establishment and adequate resourcing of an independent national Environment Protection Authority that operates at arm’s-length from government is key to ensuring consistent and transparent enforcement of laws and regulations. As noted by the Productivity Commission in 2013: “Good regulatory

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practices can only go so far in promoting certainty and transparency. Changes to regulatory governance and institutional arrangements also have a role to play. In particular, public confidence, competitive neutrality and impartiality are more likely to be established through independent regulatory agencies. This is one of the lessons from jurisdictions that have already established such agencies”.⁷²

The lack of independence has led to a regulatory posture where the Environment Department is reluctant to use the full suite of regulatory tools available and only uses the sanctions available under the EPBC Act in the rarest of circumstances. The areas where sanctions continue to be applied are in the areas of wildlife trade and marine reserve breaches where the Department has outsourced the policing role to other agencies.

There appears to be no strategy for using the issuing of sanctions as a deterrence to prevent others committing environmental harm. Very often, where sanctions are issued, there is no public announcement beyond a listing of the sanction on the Department website. And unlike other regulatory bodies such as the ACCC or ASIC, the department does not publicly flag areas of regulatory focus in advance of a compliance push and then laud the sanctions given to send a message to the community that further misconduct will not be tolerated. The tone used when sanctions are given or the Department’s regulatory responsibilities are discussed publicly are often couched in terms that could be considered apologetic.

An independent Environment Protection Authority should:

- Be governed by an independent board and headed by a separate chief regulator;
- Have statutory duties to use powers and functions to achieve the Act’s aims and make decisions on clear criteria based on science;
- Undertake assessments and advise, review and report openly to the Minister on specific development projects to ensure approvals comply with statutory plans under the Act (e.g. recovery plans, threat abatement plans, bioregional plans);
- Enforce laws and regulations that affect environmental issues of national importance;

⁷² Productivity Commission (2013) *Major Project Development Assessment Processes* p18 <http://www.pc.gov.au/inquiries/completed/major-projects/report>

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- Undertake independent post-approval project and plan compliance, audits, monitoring and reporting;
- Undertake impact assessment and approval of actions on land and waters;
- Ensure publicly available, timely and full reporting on decision processes and outcomes; and
- Be adequately resourced.

However, as is widely acknowledged, structural arrangements are not always sufficient to ensure independent regulators consistently act free from undue influence. Central to a robust and effective national environment protection framework is the provision of independent public oversight of regulatory processes, planning and approval decisions and accountability for all actors through the timely collection and disclosure on issues of compliance.

The Wilderness Society supports the establishment of a National Environment or Sustainability Commission to provide such oversight, including the power to audit and provide regular public reporting on regulatory outcomes and performance. In this capacity, the Commission should also be tasked with providing regular State of the Environment and national environment account reports to Parliament to provide independent reporting on environmental trends, outcomes and impacts of Government decisions.

The Commission should also be charged with making public recommendations for regulatory or legislative reform, to call for an inquiry and to advise on policy design, including ongoing review and policy recommendations into National Environment Plans and other subsidiary instruments, and advising the government on goals and standards.

Recommendations:

28. The Commonwealth Government should establish an independent National Environment or Sustainability Commission to provide high-level oversight of Australia's environmental regulation; to give strategic advice to Ministers, agencies and the wider community on national plans, priorities and environmental standards; and provide regular State of the Environment and national environment account reports to Parliament.

29. The Commonwealth Government should establish an independent National Environment Protection Authority operating at arm's-length from government to:

- a. Oversee the robust assessment of development proposals, ensure approvals comply with statutory plans under the Act and provide publically available, full reporting on decision processes and outcomes; and**
- b. Investigate and prosecute lack of compliance with environmental laws and approval conditions, as well as damage to threatened species and their habitat under the national environment regulatory framework.**

Commonwealth, State and Local Government coordination

Multiple inquiries, government reports and reviews and independent analyses confirm that ongoing failure of state-Commonwealth cooperation to ensure consistent national regulatory frameworks and the EPBC Act's reliance on cooperative federalism to implement environmental outcomes are fundamental failings of Australia's environmental governance framework⁷³. In 2019, the OECD's Review of Australia Environmental Performance found that that significantly more efforts are needed to improve coordination and guidance between levels of government⁷⁴.

The 1992 Intergovernmental Agreement on the Environment and the subsequent 1998 Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment were meant to drive increasing state and Commonwealth cooperation on environmental regulation.

Yet since the implementation of the EPBC Act, the Commonwealth has increasingly withdrawn from its environmental responsibilities and systematically dismantled the fora supporting serious cooperation.

⁷³ See for example, Hawke A (2009) *The Australian Environment Act - Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* Australian Government Department of the Environment, Water, Heritage and the Arts; Australian Panel of Experts on Environmental Law (2017) *Blueprint for next Generation of Australian Environmental Law*; Wade, F Gale, B (2018) *Protecting the Future: Federal Leadership for Australia's Environment* Chifley Research Centre

⁷⁴ OECD (2019), *OECD Environmental Performance Reviews: Australia 2019*, OECD Environmental Performance Reviews, OECD Publishing, Paris

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In 2013, the Council of Australian Governments (COAG) Standing Council on Environment and Water was disbanded and replaced by the Meeting of Environment Ministers (MEM) when COAG reduced its working groups to only those representing “its highest priorities”. This did not include the environment. In the six years and four months since the COAG-level meeting was abandoned, the Meeting of Environment Ministers has convened only nine times.

The consequence of the demotion of inter-governmental meetings on the environment has been a decline in cooperation in policy reform, policy and program coordination and in accountability.

Recommendations:

- 30. That a COAG Environment Council be established and given legislative standing within the new Environment Act;**
- 31. That consideration should be given to incorporating climate adaptation in the COAG Environment Council remit; and**
- 32. That consideration be given to a cross-jurisdictional audit of the implementation and discharge of the state and commonwealth responsibilities under the Inter-Governmental Agreement on the Environment.**

Data and monitoring

Full, timely and comprehensive data and monitoring is the cornerstone of effective regulation, necessary for effective policy development and is a fundamental right of all Australian citizens.

Multiple reviews of Australia’s environmental governance have found that there is a severe lack of data and long-term monitoring in every aspect of environmental regulation, including to inform policy development, undertake assessment and listing processes, and measure impact or outcomes⁷⁵. The *State of the Environment 2016 Report* found that monitoring data for all species are largely inadequate to

⁷⁵ OECD Environmental Performance Reviews: Australia 2019; Jackson Australia state of the environment 2016: overview; Hawke A 2009 *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* Australian Government Department of the Environment, Water, Heritage and the Arts, Canberra

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assess the status of populations and trends. This lack of data is even more pronounced for amphibians, reptiles, and even more so for cryptic taxa such as freshwater fish, invertebrates and fungi, for which very little information is available to assess state and trends.

As a result of this paucity of data, Australia is unable to measure the effectiveness of most of our investments in biodiversity management or management of pressures. The *State of the Environment 2016 Report* noted that outcomes of management actions are rarely monitored and reported for long enough to clearly demonstrate effectiveness.

A prime example is that some states, such as Western Australia, have no comprehensive data system to monitor changes in the extent and quality of native vegetation including unique flora and threatened species. On a state level, assessments and approvals of large scale bushland clearing and deforestation is gutting habitat—some critical to the survival of endangered species, yet without a nationally consistent approach and monitoring system; we are undermining the opportunities to reverse the fate of our most endangered and species.

In the immediate term, Australia requires a major investment in monitoring and data collection on the state and trends of threatened species, as well as outcome-focussed monitoring of species conservation efforts and spending. There is an urgent need for up-to-date mapping of key environmental values (such as critical habitat, known sites of global rainforest, botanical or zoological significance and large, intact landscapes such as wilderness areas) to support their protection via legislation and regulation. Furthermore, we require a national commitment to an accounting system that links federal, state and territory data on biodiversity, strategic planning and environmental impact assessment to ensure strong biodiversity outcomes.

It is clear that current monitoring or mapping of key threatening processes such as land clearing across the country is inconsistent and patchy, which impedes the proper application of the EPBC Act.

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In the immediate term, the Wilderness Society recommends that the Commonwealth Government implement a consistent national vegetation monitoring program, taking the best elements from the current national greenhouse gas inventory, Queensland's "SLATs" and the latest remote sensing research to monitor all woody vegetation change and their associated emissions.

All the above data should be readily available to the public as soon as the data is scientifically validated (as opposed to release of a Government report), including interactive maps, GIS data, and detailed breakdown of impacts on habitat by land use / sector.

In the long term, the Wilderness Society recommends the Commonwealth establish a National Environmental Accounts framework, underpinned by a peer reviewed scientific method. National Environmental Accounts would assess the extent, condition and trends in key natural resources and environmental assets across Australia's states, territories and bioregions. Assets to be monitored would include landscape health (forests, grasslands, wetlands, estuaries etc), threatened and other biodiversity (terrestrial and aquatic), native vegetation cover and condition, urban and regional carbon footprints, estimated carbon storage and loss, salinity and soil health, and water quality. In designing the National Environmental Accounts, the Commonwealth should consider the System of Environmental-Economic Accounting (SEEA) model, already used by the United Nations and World Banks and a number of countries around the world.

This monitoring system could be integrated with, or exist alongside, regulatory instruments showing developers, farmers and others where they need to seek EPBC Act approval and 'no-go' zones for development outlined in National Recovery Plans or the National Environment Plan. National Environmental Accounts should be the responsibility of the National Environment or Sustainability Commission, to ensure independent oversight of environmental indicators.

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Recommendation:

- 33. The Commonwealth commit to implementing a national environmental accounting system that links federal, state and territory data on biodiversity, strategic planning and environmental impact assessment to provide full, timely and comprehensive data and monitoring of environmental values and outcomes.**

Resources

Federal funding for conservation is in significant decline, with spending for biodiversity programs expected to decrease by 45% on 2013 levels over the forward estimates⁷⁶.

The Federal Government has claimed it has spent more than \$270 million on threatened species projects, however this amount is aggregated from general environmental spending, and does not represent an accurate account of threatened species funding. There have been serious questions raised as to the accuracy of this figure, especially in light of reports of infrastructure projects being counted toward the threatened species figure.

The Commonwealth Government's current investments in biodiversity management are not keeping pace with the scale and magnitude of current pressures.

Resources for managing biodiversity and for limiting the impact of key pressures mostly appear inadequate to arrest the declining status of many species. In addition, the unprecedented impact of the 2019-2020 summer bushfires will require an unprecedented investment in recovery and developing resilience to increasing climate impacts.

The Wilderness Society supports the establishment of the Commonwealth developing its own investment vehicle, such as an environmental trust, to drive restoration of environmental function, leverage private investment in environmental projects and innovation in public and private environmental

⁷⁶ Australian Conservation Foundation 2019 Budget Submission 2019-20. Available online https://d3n8a8pro7vhmx.cloudfront.net/auscon/pages/10587/attachments/original/1548997463/2019-20_P re-Budget_Submission_Australian_Conservation_Foundation.pdf?1548997463

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practice. A multi-billion dollar environment investment vehicle could be used to support biodiversity conservation and biodiverse carbon storage projects.

However to ensure environmental outcomes and avoid unintended consequences, the dispersal of funding must meet the following strict conditions:

- **Precludes biodiversity offsets**—biodiversity offsets should not be allowed in accordance with the “avoiding leakage” principle set out below. In addition, they are often poorly monitored, it’s largely impossible to achieve “like-for-like” protection and there is little evidence of them delivering stated gains for biodiversity.
- **Measurability**—methods should set out clearly how benefits from each eligible activity should be measured and verified.
- **Additionality**—the regulator must be able to show with reasonable confidence that the biodiversity benefit or emissions reduction would not have occurred without the scheme.
- **Avoiding leakage**—benefit from a project should not lead to increasing emissions or biodiversity loss in response. For example, if one farmer reduced emissions by decreasing herd size and another farmer increased herd size to meet unchanged demand for meat or milk.
- **Permanence**—biodiverse carbon storage projects should result in permanent storage. If a tree-planting project is later cleared, the stored carbon could be released as carbon dioxide.
- **Robust compliance**—scheme regulators should enforce transparent rules with clear penalties, including how firms will make good if permanency arrangements are not met.

This funding should be managed by an independent board of governors to determine the necessary quantum and model of funding. Monies for this fund could come from consolidated revenue, diversion of royalties from resource extraction or subsidies currently directed towards fossil fuel projects, a sovereign endowment fund that gained returns from investing in renewables and sustainable industries, and/or from penalties or taxation on environmentally harmful activities.

Recommendation:

- 34. The Commonwealth should establish a dedicated fund that maximises the restoration of threatened species habitat, the provision of climate refugia and the long-term sequestration of carbon, while supporting communities and businesses to take advantage of this economic opportunity.**

Economic incentives

Under Aichi Target 3, Australia is required to “By 2020, at the latest, incentives, including subsidies, harmful to biodiversity are eliminated, phased out or reformed in order to minimize or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio economic conditions.” It is 2020.

Yet the Commonwealth Government continues to subsidise key threats to the health and resilience of Australia’s environment, including through support for native forest logging and fossil fuels, including through the \$30bn Fuel Tax Credit Scheme (FTCS) and tax breaks for fossil fuel exploration, production and consumption.

The Commonwealth Government should be required to ensure the actions they take, including those they fund or authorise, are not contradictory to the objects and principles of the national environment act.

Recommendations:

- 35. The Commonwealth, through an independent environment institution, should:**
- a. Undertake an audit of economic incentives, including subsidies, that influence environmental behaviour;**
 - b. Eliminate, phase out or reform those that are harmful to biodiversity and or prevent effective climate mitigation, such as fossil fuel subsidies or minerals exploration tax breaks; and**
 - c. Ensure positive incentives for the conservation and sustainable use of biodiversity are developed and applied, including a land carbon scheme, tax relief or direct payment for biodiverse restoration of degraded**

landscapes, R+D tax credits for novel systems and processes that improve a company's environmental performance.

36. This system of subsidies should be reviewed by an independent panel every five years for effectiveness and outcomes.

Is the EPBC Act sufficient to address future challenges?

Climate change is widely acknowledged as one of the largest systemic threats to biodiversity in Australia. The scale, frequency and magnitude of climate impacts on nature are increasing and expected to increase further. The categories of these events are largely familiar (bushfire, drought, tropical cyclone, flood, disease outbreaks, tree dieback, coral bleaching) but the timing and characteristics are evolving. Australia's national environment act must be responsive and adaptive in the face of increasing uncertainty, without straying from its core purpose.

Climate Change and Adaptation

Climate change is widely acknowledged as one of the largest systemic threats to biodiversity in Australia. Research predicts dramatic environmental change due to climate change, with the predicted disappearance of many ecosystems currently occupied by Australian biodiversity so significant that the magnitude of these changes will overcome species's ability to adapt by 2070⁷⁷.

The effects of climate change are already being seen in both heavily compromised systems (such as the Great Barrier Reef and Tasmanian Kelp Forests) and relatively pristine systems (such as the Tasmanian Cradle Mountain World Heritage Area), with a convergence of increasingly frequent extreme weather impacts and ongoing high temperatures compromising systems' ability to regenerate from this as well as human-caused damage. Climate change both directly causes and exacerbates degradation of our terrestrial and marine ecosystems.

⁷⁷ Dunlop et al (2012) *The Implications of Climate Change for Biodiversity, Conservation and the National Reserve System: Final Synthesis* CSIRO Climate Adaptation Flagship, Canberra

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Australia needs to adapt to the change that will come and have a credible emissions reduction plan, including drawing down as much carbon out of the atmosphere as we can. We should do both including by maintaining highly diverse and functioning ecosystems that act as climate refugia and sequester carbon.

In the context of the operation of the EPBC Act, Australia's ability to protect and restore biodiversity values in the context of growing climate impacts is severely limited by many of the inadequacies identified in this submission, including:

- Inadequate recovery planning and implementation, including not requiring assessment of existing climate and likely future impact;
- Permitting degrading activities within critical habitats already under pressure from climate change impacts;
- A lack of adaptive regulation and triggers for reassessment and iteration of planning;
- Inadequate independent data; and
- Inadequate cumulative impact assessments.

The adaptiveness required to protect biodiversity values under a changing climate is also poorly served by exemptions (in the case of RFAs) and class of action approvals (in the case of offshore petroleum developments) which operate over decade long time periods.

It is well acknowledged that effective land management can help minimise the scale of climate change by sequestering carbon in the landscape and also help landscapes adapt to the changing climate⁷⁸.

Protecting and restoring Australia's ecosystems will make an important contribution to limiting global warming to below 1.5 degrees, and will deliver biodiversity and other benefits for people and nature. Legislation that ends broad-scale land-clearing, deforestation and degradation of native forests is an essential part of protecting Australia's land carbon stores. Policies that

⁷⁸ For example, see <https://www.csiro.au/en/Research/LWF/Areas/Landscapes/Forests/Sequestering-carbon-in-soil-and-vegetation>

incentivise further sequestration in the land sector must be additional to these legislative protections.

Finally, it must also be acknowledged that the capacity of our national laws to protect and restore Australia's biodiversity values are fundamentally limited by our collective capacity to reduce global greenhouse gas emissions. It is our view that Australia's responsibility for the protection of our continent's unique environments, species and world heritage areas necessarily confers a significant national responsibility to take a global leadership role in addressing the climate crisis, reducing domestic and exported emissions and transitioning to a low carbon economic profile—more essential than ever before, post-the 2019-2020 bushfires, and in the context of COVID-19.

Recommendation:

37. The Commonwealth Government should commit to:

- a. Protection of Australia's existing terrestrial carbon stores, stocks and flows & ecosystems in line with the recommendations set out in ['Red line' protection for key environmental values](#) and [Deforestation](#) above;*
- b. Ensure a credible land carbon policy is implemented as part of strong overall emissions reductions in line with science, ensures no direct offsetting of fossil fuel emissions with land carbon credits either domestically or internationally; and*
- c. Prioritise afforestation and regeneration of degraded landscapes and ecosystem corridors such that Australia becomes a resilient, biodiverse carbon sink, in line with national biodiversity conservation priorities.*

Climate disaster recovery fund

While it is possible to forecast the increased risks associated from major climate events in general terms, it is not possible to envisage what event will occur when. And as such, we end up having to undertake recovery actions seemingly anew with each event.

We manage our economies through periods of external shock through various monetary and fiscal policy levers.

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Reserve Banks can reduce interest rates or increase money supply and governments can provide fiscal stimulus. We have automatic stabilisers in place to cushion the blow—the currency will deflate driving export growth, increased welfare payments will flow further maintaining retail spending.

However, when nature is impacted by an external shock, the automatic stabilisers are the inherent resilience of the natural system itself.

These include the capacity of the trees to resprout, of wildlife to recolonise an area, of the seedbank in the soil to regenerate. But with increasing climate impacts, on top of historic and continuing human pressures on the environment, the capacity for the natural system to recover is hugely diminished.

There is an increasing need for human intervention in post-climate disaster impact scenarios to help natural systems recover.

These include wildlife recovery, invasive species management, water management, assisted regeneration and revegetation works. There are no automatic stabilisers for nature that come from our policy framework that trigger such interventions.

Currently there is no such funding stream or government policy posture that facilitates an automatic government response to boost recovery efforts after such an event. There is also no such monitoring or alert process where such an event would even come to the Commonwealth Government's attention. This means that some events receive no Government response (e.g. Gulf of Carpentaria mangrove dieback, Southern Australia kelp forest collapse, [South-Eastern Australia eucalypt dieback](#)), others a belated government response (2019 bushfires in the Gondwana Rainforests of Australia), or simply no environmental specific response despite extensive social and economic policy response (2016 to 2019 Australia-wide drought).

Having no emergency funding pool to draw from means that groups such as NRM regional bodies are forced to choose between shifting existing long-term funding

from resilience-building activities to an emergency response, or to not carry out an emergency response at all.

There have been significant policy developments in dealing with the social and economic aspects of climate disasters including the Future Drought Fund and the Emergency Response Fund. While these funds articulate constitutional heads of powers that would allow them to address Matters of National Environmental Significance, this is not an area that they are currently allocating funding towards. There is an urgent need for an environmental version of these funds that is managed as part of the Commonwealth Environment portfolio.

Recommendation:

38. The Commonwealth establishes a standing climate disaster recovery fund that can make rapid-post disaster funding allocations as required.

Major events and the 2019-2020 summer bushfires

The 2019-2020 bushfires have had a significant impact on many of Australia's most important and biodiverse landscapes. More than 11 million hectares of land burned across the country over a period of about six months.

There have been significant impacts on matters for which the Commonwealth is responsible:

- 114 animals have more than 50% of their modelled likely or known habitat within the burnt areas⁷⁹;
- 21 nationally-listed endangered or critically endangered species have more than 80% of their modelled likely or known habitat within the burnt areas⁸⁰.
- Approximately 54% of the Gondwana World Heritage Rainforests of Australia, 81% of the Greater Blue Mountains Area and 99% of the Old Great North Road has been affected by fires;

⁷⁹ Provisional list of animals requiring urgent management intervention (20th January 2020) <http://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources>

⁸⁰ Provisional list of animals requiring urgent management intervention (20th January 2020) <http://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources>

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- Other World Heritage Areas (Budj Bim Cultural Landscape (Vic), Fraser Island (K'gari) (Qld), Wet Tropics (Qld) and Tasmanian Wilderness) have also been affected⁸¹;
- An initial assessment of the 84 listed threatened ecological communities indicates that 20 have more than 10% of their estimated distribution within the fire extent, and another 17 have been directly impacted⁸².

Ramsar listed wetlands, migratory species and many nationally-listed invertebrates are yet to be assessed. For some species, such as the Kangaroo Island Dunnart, it may be too late.

Although fires are natural in Australia, major fire events are now occurring with unprecedented frequency, severity and intensity, and affecting areas that, for millennia, did not burn⁸³. In 2014, the fifth IPCC report projected an increase in days of very high and extreme fire danger would be apparent by 2020, with further increases by 2050⁸⁴. Implications expected by the IPCC included:

- Fire season length to be extended in many high risk areas and reduced opportunities for planned burning;
- increased risk in southern Australia to life, property, infrastructure and ecosystems; and
- reductions in water yields and increased erosion risk to waterways with implications for water quality.

⁸¹ Provisional list of impact of fires on world heritage areas (13th February 2020) <http://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources>

⁸² Impact of fires on Threatened Ecological Communities (19th February) <http://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources>

⁸³ Bowman, D, Murphy, B., Neyland, D, Williamson, G and Prior, L (2014) "Abrupt fire regime change may cause landscape-wide loss of mature obligate seeder forests" *Global Change Biology* 20: 1008-1015. doi:10.1111/gcb.12433; Dunlop et al (2012) *The Implications of Climate Change for Biodiversity, Conservation and the National Reserve System: Final Synthesis* CSIRO Climate Adaptation Flagship, Canberra

⁸⁴ Lucas C, Hennessy K and Bathols J (2007) Bushfire Weather in Southeast Australia: Recent Trends and Projected Climate Change Impacts. Consultancy Report prepared for The Climate Institute of Australia by the Bushfire Cooperative Research Centre. Quoted in Reisinger A, Kitching R, Chiew F, Hughes L, Newton P, Schuster S, Tait A and Whetton P (2014) Australasia. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* pp. 1371-1438. See https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap25_FINAL.pdf

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The experience of cumulative and successive fire events in the first twenty years of this century is of particular concern in Victoria, where recovery processes for species and ecosystems are set back by repeated extreme fire events. It is clear current approaches to fire management are reaching their limits, and greater community understanding of those limits, changes to bushfire management—and action to address climate change—is required.

In addition to the Commonwealth Government's substantive obligation to protect MNES, as a party to the Convention on Biological Diversity (CBD) the Commonwealth is required to: "promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity" [Article 14.1(e)]⁸⁵.

To fulfil its obligations under the CBD, the Commonwealth Government should ensure that arrangements are in place to limit damage to MNES, either via direct intervention or by ensuring, resourcing and/or coordination with other jurisdictions to include protection of MNES in fire-fighting activities occurs.

The Environment Minister should be required to provide annual formal advice in advance of the fire season about the impending threats to MNES to the Australasian Fire and Emergency Service Authorities Council (AFAC). This advice should be considered as part of the wider consideration of resources required, including aerial firefighting assets to mitigate the risk of those threats. This advice should be made public.

The Commonwealth should also consider the creation of a 'key natural assets' register to support coordination and prioritisation of fire planning and defence with other jurisdictions. This register should comprise high value MNES for which regularly updated bushfire risk modelling shows a significant sensitivity to fire events, such as World Heritage Areas, rare and isolated plant communities (e.g. Wollemi Pines), Wilderness and Reference Areas or severely range-limited critically endangered species like the Kangaroo Island Dunnart. Investment may be required to better understand fire risk and mitigation requirements for nationally significant species and key natural assets. We also anticipate it may be appropriate for a similar or combined register to be established for Indigenous

⁸⁵ <https://www.cbd.int/convention/articles/?a=cbd-14>

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cultural heritage—but this would clearly be subject to Traditional Custodian approval.

Currently the EPBC Act makes no provision for dealing with major natural events, such as major fire events, beyond allowing for listing changed fire regimes as a key threatening process.

It is imperative that Australia has an adaptive legal and regulatory system that can cope with the inevitable major events yet to come, particularly in a climate change context. Australia's national environment act should include:

- proactive responsibilities to ensure bushfire risk mapping and modelling is an essential component of nationally significant values planning and assessment, including identifying priority actions to mitigate bushfire risk as a result;
- provisions to ensure decision-makers in fire planning and response have appropriate access to information (including mapping) of fire sensitive MNES and areas, sites and values on the proposed 'key cultural and natural assets' register;
- major event provisions that trigger full ecological audit of major event impacts on MNES and areas, sites and values on the proposed 'key cultural and natural assets' register, including the identification of habitat and systems required for environmental restoration; and
- provisions to suspend existing activities and approvals that might affect bushfire-impacted MNES, and areas, sites and values on the proposed 'key cultural and natural assets' register, such as logging (including RFA logging) or clearing applications, in case of a major event pending an impact assessment for those MNES or assets.

One reason the impacts of the 2019-2020 fires have been so destructive is Australia's wildlife was already pushed to breaking point by failed environmental regulation and protection.

Ensuring that Australia's national environment act supports healthy and resilient ecosystems and species is vital in the context of climate change, with fire

management across most of southern Australia already becoming increasingly challenging with hotter and drier conditions.

Recommendations:

- 39. That the Commonwealth Government makes planning, response and recovery from major events a national priority in plans and the allocation of resources, particularly in the context of climate change;**
- 40. That the Commonwealth considers the creation of a 'key natural assets' register comprising high value biodiversity assets sensitive to fire events to support coordination and prioritisation of fire planning and response with other jurisdictions during disaster events;**
- 41. That the Commonwealth Government ensures that arrangements are in place and sufficiently resourced to limit damage to MNES in the case of major events, including key natural assets.**
- 42. That the Commonwealth Minister provides formal and public advice about impending fire season risks to MNES to the Australasian Fire and Emergency Service Authorities Council (AFAC);**
- 43. That the Commonwealth Government include regularly updated bushfire risk mapping and modelling in the development of National Environment and bioregional plans**
- 44. That Australia's national environment act be reformed to:**
 - a. ensure the requirement maintain or enhance the environmental values and ecological character of protected matters under the Act includes bushfire mitigation and response, and other major events;**
 - b. require regularly updated bushfire risk mapping and modelling for recovery plans, including identifying priority actions to mitigate bushfire risk as a result;**
 - c. major event provisions that:**
 - i. trigger full ecological audit of major event impacts on all MNES and related plans; and**
 - ii. suspend existing activities and approvals that might affect bushfire-impacted MNES until assessment is complete.**
- 45. Section 158 of the EPBC Act (or commensurate section in a new national environment act) should have strict limits on application including clear definition of what constitutes a major event / disaster, strict start and end**

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times for exemptions from enforcement, and provisions to ensure appropriate interim protections for MNES.

How can we measure the success of Australia's environmental legislation?

The success of Australia's environmental governance and our national environment laws must be judged by its outcomes.

To be successful, our national environment laws and attendant governance framework must bring about the following results:

- Zero destruction of regrowth vegetation where it meets one of the six criteria as defined by the High Conservation Value Network.
- No more fauna or flora extinctions.
- Measurable recovery of numbers or extent and quality of threatened, endangered and critically endangered species and ecosystems.
- Measurable recovery of freshwater ecosystems, including the Murray-Darling Basin.
- Measurable protection and recovery of large, intact and functioning ecosystems (wilderness areas).
- Thirty percent (30%) of every terrestrial and marine bioregion in Australia are protected in a nationally coordinated and consistent system of conservation tenures.
- The Commonwealth Government leads the country in ensuring environmental indicators improve.
- Environmental regulation, planning and decision-making independent from political parties, adequately resourced to achieve outcomes, conducted transparently and fully enforced.
- Community has legislated rights to open standing, merits review and third-party enforcement rights under national environmental laws.
- Community and NGO sector have access to consistent, regularly updated and reliable government data on environmental values.

Recommendation:

46. That the review adopt the recommendations in this submission to help ensure and assess the success of a reformed national environment act for Australia.

Appendix 1: Location of comment and recommendations relating to Discussion Paper questions

While this submission is not structured around the 26 questions set out in the Independent Review of the EPBC Act Discussion Paper, November 2019 (Discussion Paper), specific recommendations are made throughout the submission in response to these questions, and other matters relating to the terms of reference for this review.

Question 1

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

Further reforms are required to ensure MNES and other assets are adequately protected and the Commonwealth's obligations to ensure these protection outcomes must be strengthened. See the following sections for further detail:

- [The case for substantive reform of the EPBC Act](#)
- [Role of the Commonwealth in environmental protection](#)
- [Scope and Matters of National Environmental Significance](#)

Question 2

How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC Act?

For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision-making?

Detail on reforms required to ensure the principles of ecologically sustainable development and other assets are adequately protected and the Commonwealth's obligations to ensure these protection outcomes must be strengthened may be found throughout the submission.

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Specific comments on the principles of ESD and the Act may be found in [Principles of ecologically sustainable development](#).

Question 3

Should the objects of the EPBC Act be more specific?

Yes. See the [Objects of the EPBC Act](#) for further detail.

Question 4

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

Yes. MNES should be augmented to include other key natural and cultural values, and any exemptions should be removed such that the Act applies equitably and equally across activities. See [Scope and Matters of National Environmental Significance](#) for further detail.

Question 5

Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

Priority areas for reform include the objects of the EPBC Act and the duties therein, introducing a proactive, rather than reactive assessment approach but not removing the need for regulation, the removal of inequities and exemptions, clarification of responsibilities, and ensuring strong and contemporary systems for infrastructure (including data and monitoring) in support of implementation. An outline of priority reforms can be found in the [executive summary](#) and [recommendations](#).

Question 6

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

The EPBC Act has failed to achieve its statutory objectives and this failure must be a major focus of review and recommended improvements. Recommendations relating to these questions may be found throughout this submission, however specific comments on the

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effectiveness of the EPBC Act may be found in [Does the EPBC Act protect our environment & conserve our biodiversity?](#)

Question 7

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

The Review should draw on supporting evidence related to the impact of the 2019-2020 bushfires on species and ecosystems, habitat requirements of threatened species and ecosystem health, and trends around credible environment-economic accounting, climate change, bushfire and other disasters. Specific comments relating to future trends may be found in [Is the EPBC Act sufficient to address future challenges?](#)

Question 8

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

Management through rigorous and accountable processes is an essential factor in effectively regulating (securing) environmental and heritage outcomes. See the following sections for further detail:

- [The case for substantive reform of the EPBC Act](#)
- [Prescribing duties and actions necessary to ensure recovery](#)
- [Prohibiting and preventing activities and projects that worsen the state of the environment](#)
- [Independent and trusted institutions](#)

Question 9

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

Yes. National coordination and oversight is required. See the following sections for further detail:

- [The case for substantive reform of the EPBC Act](#)
- [Role of the Commonwealth in environmental protection](#)
- [How can we measure the success of Australia's environmental legislation?](#)

Question 10

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

- Non-binding policy and strategies?

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

Yes. Minimum sets of standards are required across jurisdictions. Policy or strategy must be binding. The information required to develop and implement a broad set of environmental standards must be maintained contemporarily. See [National Environment Plans, Goals and Standards](#) and [Data and monitoring](#) for further detail.

Question 11

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

- Should the EPBC Act have a greater focus on restoration?
- Should the Act include incentives for proactive environmental protection?
- How will we know if we're successful?
- How should Indigenous land management practices be incorporated?

Biodiverse restoration is required for threatened species habitat and ecosystem function, and in Australia's degraded landscape both protection and restoration are required as a priority.

Question 12

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

Protection and management should be both place-based and values based. See ['Red line' protection for key environmental values](#) for further detail.

The EPBC Act must not simply 'represent' Indigenous culturally important places, rather it is vital that appropriate processes for negotiation and consultation are established both during the review, and subsequently by the Commonwealth in recognition of Traditional Owner rights and interests in all aspects of land and water management. See [Traditional Custodian Rights and Interests](#) for further detail.

Question 13

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

No—both should be used as appropriate to ensure effective regulation that secures environmental outcomes. While there may be a role for strategic assessments, they should not replace case-by-case assessments.

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Question 14

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

MNES should be augmented. See [Scope and Matters of National Environmental Significance](#) for further detail.

States should not be delegated to deliver EPBC Act outcomes subject to national standards—RFAs were designed to do this yet have comprehensively failed. Further delegation should not be entertained. See [Role of the Commonwealth in environmental protection](#) for further detail.

Question 15

Should low-risk projects receive automatic approval or be exempt in some way?

- How could data help support this approach?
- Should a national environmental database be developed?
- Should all data from environmental impact assessments be made publically available?

No. Australia's environment is so degraded, and in the face of climate change and other 'disasters', there is no such thing as a 'low-risk' project.

Question 16

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

No. Both are required. See ['Red line' protection for key environmental values](#) for further detail.

Question 17

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

No. National leadership on national issues is required. No existing state and territory meets all the core requirements of best practice threatened species legislation, nor even the standards of protection set by the EPBC Act. See [Role of the Commonwealth in environmental protection](#) for further detail.

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Question 18

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

No. A lack of concrete protections for key environmental values, up-to-date publicly reporting on environmental indicators and limited processes to ensure activities comply with EPBC Act provisions to engender confidence in self-regulation. Recent examples in Queensland and NSW involving state vegetation management regimes have demonstrated that increased self-regulation without the above results in significant regulatory failure and adverse outcomes.

Question 19

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

- How can we best engage with Indigenous Australians to best understand their needs and potential contributions?
- What mechanisms should be added to the Act to support the role of Indigenous Australians?

Culturally appropriate negotiation, agreement making and consultation with Traditional Custodians as determined by Traditional Custodians is required. The EPBC Act should enshrine the principles of free prior and informed consent as the basis of participation by Traditional Custodians. See [Traditional Custodian Rights and Interests](#) for further detail.

Question 20

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

Yes. Community decision-making and representation should be enshrined in the Act in all Commonwealth environmental legislation and regulation, and full, timely and comprehensive data monitoring should be publicly available. See [Community rights and participation in decision-making for all](#) for further detail.

Question 21

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

An outline of priority reforms can be found in the [executive summary](#) and [recommendations](#).

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Yes. Environment regulation is one of the last remaining major Commonwealth regulatory functions not undertaken by an independent statutory body with a dedicated framework for external or independent accountability and oversight. There needs to be a national EPA and a National Environment Commission to support the effective implementation of an improved Act. See [Independent and trusted institutions](#) for more details.

Question 22

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

Prohibition of exemptions from the Act would deliver immediate gains. See [Regional Forest Agreements](#) for more detail.

Establishing a national EPA, a National Environment Commission and a system of national environmental accounts would support the effective implementation of an improved Act and provide critical oversight and accountability. See [Independent and trusted institutions](#) for more details.

Establishing a 'key natural assets' register would support protection of key environmental values during major events like bushfires. See [Major events and the 2019-2020 summer bushfires](#) for more details.

Question 23

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

The Commonwealth should establish national environment accounts, and the Review should give deep consideration to recommending the SEEA method. Such accurate and full accounts would support new markets. See [Data and monitoring](#) for further detail.

Question 24

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

Offsetting should not be allowed under the Act on the principle that benefit from a project should not lead to increasing emissions or biodiversity loss in response. In addition, offsets are often poorly monitored, it's largely impossible to achieve "like-for-like" protection and there is little evidence of them delivering stated gains for biodiversity. It should be abandoned.

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Question 25

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

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

We refer the reviewers and the expert panel members to the submission by the Australian Environmental Grantmakers Network (AEGN) for the perspective of the philanthropic investment community.

Question 26

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

The EPBC Act Review presents a key opportunity to ensure Australia's environmental legislation and regulation can fulfil their fundamental purpose of ensuring Australia's nature is healthy and resilient in the face of the growing impacts of climate change.

Making decisions simpler, achieving efficiency, or streamlining planning, cannot and must not mean decisions or processes become weakened. Different stakeholders have different perspectives on whether a regulation is a burden or a loophole, and the Review must carefully consider these viewpoints and experiences.

Appendix 2: Traditional Custodians' rights and interests

Below is a general perspective from the Wilderness Society in relation to the intersection between environmental protection and Traditional Custodian rights and interests. These are not intended as a prescriptive list but rather to provide context for recommendations made in this submission.

Protected area legislation, formal and informal protections, management plans, partnership agreements established between Traditional Custodians and governments, and other protections should:

- Provide for the permanent preservation of the area or value's natural condition and the protection of the area's cultural resources and values, to the greatest possible extent;
- Provide for the management of the area or value, as far as practicable, in a way that is consistent with any Aboriginal and/or Torres Strait Islander tradition or custom applicable to the area or value, including any tradition or custom relating to activities;
- Where applicable, provide for the appropriate presentation of the area's cultural and natural resources and their values; and
- Ensure that any use of the area or value is ecologically sustainable and in accord with the previous priorities, recognising that as a result of the present state of the environment, and the climate change crisis, protections are required to meet urgent biodiversity objectives. In a context of new problems and new challenges (including vegetation clearance, habitat fragmentation, invasive pests and native species decline) management of protected areas and values should, as appropriate, include both traditional management and contemporary management methods, where the rights of Traditional Custodians are recognised in respect to traditional knowledge and management practices.

Appendix 3: Definition of High-Conservation Value forests and bushlands

There are six basic categories of HCVs under the international definitions. The standard definition comes from the HCV network⁸⁶.

The TWS definition takes this definition, and modifies to be relevant for the Australian context:

HCV 1

Concentrations of biological diversity including endemic species, and rare, threatened or endangered species, that are significant at global, regional or national levels.

HCV 2

Landscape-level ecosystems and mosaics. Intact natural landscapes and large landscape-level ecosystems and ecosystem mosaics that are significant at global, regional or national levels, and that contain viable populations of the great majority of the naturally occurring species in natural patterns of distribution and abundance.

HCV 3

Rare, threatened, or endangered ecosystems, habitats or refugia.

HCV 4

Basic ecosystem services in critical situations, including protection of water catchments and control of erosion of vulnerable soils and slopes.

HCV 5

Sites and resources fundamental for satisfying the basic necessities of indigenous peoples (for livelihoods, health, nutrition, water, etc...), identified through engagement with these communities or indigenous peoples.

HCV 6

Sites, resources, habitats and landscapes of global or national cultural, archaeological or historical significance, and/or of critical cultural, ecological, economic or religious/sacred importance for the traditional cultures indigenous peoples, identified through engagement with these indigenous peoples.

⁸⁶ <https://www.hcvnetwork.org/about-hcvf>

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