

SUBMISSION TO THE EPBC ACT REVIEW

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ACT GOVERNMENT SUBMISSION

Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*

Chief Minister, Treasury and
Economic Development

May 2020

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INDEPENDENT REVIEW OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999*

Introduction

The Australian Capital Territory (ACT) Government is pleased to make a submission to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

This submission is structured as follows:

- Part One provides background relevant to the submission.
- Part Two provides more detailed feedback on the EPBC Act.
- Part Three responds specifically to the questions raised by Professor Graeme Samuel AC in the discussion paper released for the independent review.

The ACT Government is committed to preserving and enhancing the environment in our region and supporting inter-jurisdictional, national and international approaches to make improvements. All levels of government in Australia have an enduring responsibility to protect Australia's environment and natural resources. Australia needs revised frameworks for truly national protection and management of natural resources and to confront threats such as climate change and loss of biodiversity.

Part One - Background

The 2009 Hawke Review did not lead to major reform

The EPBC Act stipulates that a statutory review must be undertaken every 10 years. The first of these reviews was undertaken by Dr Allan Hawke in 2009.¹

The Hawke Review made 71 recommendations to the Commonwealth Government. Recommendation 1 of the Hawke Review was that the EPBC Act should be repealed and replaced with a new Act which would:

- be restructured and drafted to modernise, clarify, simplify and streamline both language and process;
- reduce duplication of processes; and
- increase the focus on strategic approaches to environmental management.

The 2011 Australian Government Response to the Hawke Review stated that, although it agreed with the 'intent' of this recommendation, it intended to achieve that intent by amending the EPBC Act rather than drafting an entirely new Act.²

¹Dr Allan Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) (Hawke Review). Accessible at <https://environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008>

² Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (August 2011), p7 (Government Response). Accessible at <https://www.environment.gov.au/resource/australian-government-response-report-independent-review-environment-protection-and>

The main change made to the EPBC Act since the Hawke Review was in 2013, when a water trigger was added as a new matter of national environmental significance. The water trigger specifically relates to coal seam gas projects and large coal mining developments.³

In 2014, the Commonwealth appointed a Threatened Species Commissioner to 'bring national focus to threatened species'. The Commissioner leads the implementation of the Government's Threatened Species Strategy and its five-year Action Plan, but has no statutory powers and can only consult, target and coordinate.⁴

In 2015, the Commonwealth worked with jurisdictions to implement a 'Common Assessment Method' to align the assessment and listing of nationally threatened species across Australian jurisdictions. The Common Assessment Method is intended to provide a consistent approach to assessments, reducing duplication of effort and improving clarity for stakeholders.⁵

None of these changes have delivered on the Australian Government Response's stated intention to "...reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining appropriate and efficient environmental standards".⁶

Overall, the EPBC Act remains complex, hard to understand and burdensome to use.

Climate change is already impacting matters of national environmental significance

The impacts of climate change are already being felt across Australia and are accelerating. Bushfires in the ACT during the 2019-20 summer period resulted in one of the biggest ecological disasters in the ACT's history, burning through over 80% of Namadgi National Park (82,700 hectares) and 22% of Tidbinbilla Nature Reserve (1,444 hectares).⁷ In NSW, bushfires covered 5.4 million hectares (7% of the state) including 2.7 million hectares in national parks (37% of the NSW park system).⁸

Matters of national environmental significance under the EPBC Act are already being severely impacted by climate change. For example, the Australian Government's Biodiversity Vulnerability Assessment⁹ identified climate change as the greatest long-term threat to the Great Barrier Reef (a World Heritage Listed Site).

Climate change is also a significant risk for Australia's threatened species and ecological communities. A Senate Committee report in April 2019 noted that:

³ Department of the Environment and Energy, *Water resources - 2013 EPBC Amendment - Water trigger*, June 2013. Accessible at <https://www.environment.gov.au/epbc/what-is-protected/water-resources>

⁴ Department of the Environment and Energy, *Commissioner's Role*, December 2017. Accessible at <https://environment.gov.au/biodiversity/threatened/commissioner/role>

⁵ Department of the Environment and Energy, *Common Assessment Method*. Accessible at <https://www.environment.gov.au/biodiversity/threatened/cam>

⁶ Government Response, Preamble, p7

⁷ ACT Government, *Our Canberra - Experts guide ACT parks bushfire recovery*. Accessible at <https://www.act.gov.au/our-canberra/latest-news/2020/march/experts-guide-act-parks-bushfire-recovery>

⁸ NSW Department of Planning, Industry and Environment, *Understanding the effects of the 2019-20 fires*, 13 March 2020. Accessible at <https://www.environment.nsw.gov.au/topics/parks-reserves-and-protected-areas/fire/park-recovery-and-rehabilitation/recovering-from-2019-20-fires/understanding-the-impact-of-the-2019-20-fires>

⁹ Australian Government, *Australia's biodiversity and climate change - The Great Barrier Reef and climate change*. Accessible at <https://www.environment.gov.au/system/files/resources/eab369d6-76f9-46c8-beb4-aaae8ece112e/files/biodiversity-vulnerability-great-barrier-reef.pdf>

“...of the 450 listed animals in the EPBC Act, almost all of them are still declining, and there is a real risk also that these declines will be accelerated and exacerbated by climate change...”¹⁰

The Australian Bureau of Meteorology has reported that Australia’s mean temperature in 2019 was the warmest on record and 1.5°C above the 1961-1990 average.¹¹ The amount of rainfall, meanwhile, was 40 percent below the 1961-1990 average and at the lowest level since 1900. For at least a decade, climate models have accurately predicted worsening droughts and bushfires in Australia. As a result, the impacts of climate change on matters of national environmental significance are likely to become worse over time.

The risks associated with climate change for the Australian economy are already being realised and are projected to worsen. An indication of potential costs is provided by the following:

- At the macroscale, the Climate Council has indicated that direct macroeconomic shocks from climate change, including reduced agricultural yields, damage to property and infrastructure and commodity price hikes, are likely to lead to painful market corrections and could trigger serious financial instability in Australia and the region.¹²
- Australia’s property market could lose up to \$570 billion in value by 2030, and the accumulated loss of wealth due to reduced agricultural productivity and labour productivity could reach \$211 billion by 2050 and \$4 trillion by 2100.¹³
- Moody’s Economics has estimated that recent bushfires on Australia’s East Coast are likely to exceed the record \$4.4 billion cost of the 2009’s Black Saturday blazes and would “...further cripple Australia’s already anaemic consumer confidence”.¹⁴

The EPBC Act is not well placed to address the current and future impacts of climate change, and climate science is currently poorly accounted for when setting plans for matters of national environmental significance. The EPBC Act should be amended to deal with these new realities and look towards the future predicted by the Australian Bureau of Meteorology of further and continuing weather extremes.¹⁵

Reducing greenhouse gas emissions is crucial to reducing climate change impacts

Acting now to reduce emissions and prepare for climate change is the most responsible and cost-effective approach to limiting its long-term impacts on matters of national environmental significance under the EPBC Act.

¹⁰ Senate Environment and Communications Reference Committee, *Australia’s faunal extinction crisis*, Interim Report, April 2019, p37. Accessible at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2F4e294ee0-c0f3-4527-810a-0863c3d0a818%22>

¹¹ Bureau of Meteorology, *Annual Climate Statement 2019*, 9 January 2020. Accessible at www.bom.gov.au/climate/current/annual/aus/

¹² Climate Council, *Compound costs: how climate change is damaging Australia’s economy*, 14 May 2019. Accessible at <https://www.climatecouncil.org.au/wp-content/uploads/2019/05/costs-of-climate-change-report-v3.pdf>

¹³ Ibid.

¹⁴ Katrina Ell, Moody’s Economics, 8 January 2020, quoted in The Guardian, *Economic Impact of Australia’s bushfires set to exceed \$4.4b cost of Black Saturday*. Accessible at <https://www.theguardian.com/australia-news/2020/jan/08/economic-impact-of-australias-bushfires-set-to-exceed-44bn-cost-of-black-saturday>

¹⁵ Australian Government Bureau of Meteorology, *Climate outlooks and monitoring*. Accessible at www.bom.gov.au/climate/ahead/

Reducing greenhouse gas emissions and increasing resilience to climate change impacts requires Government investment. Such investment can increase economic gains for Australia (e.g. the ACT has secured over \$500 million of investment from adopting a formal policy of achieving 100% renewable electricity by 2020), generate increased property values, improve health savings, promote industry development and innovation and reduce government expenditure on climate adaptation.

The ACT is an example of how Australia can effectively reduce its emissions and limit climate change impacts:

- The ACT is a global leader on climate change action. We have some of the most ambitious emissions reduction targets in the world and are now powered by 100 percent renewable electricity.
- The *ACT Climate Change Strategy 2019-2025* (the Strategy)¹⁶ and *Canberra's Living Infrastructure Plan: Cooling the City* (Plan)¹⁷ set out the next stage of the ACT Government's approach to addressing climate change.
- The Strategy outlines the next steps the Canberra community, business and Government will take to reduce emissions by 50-60 percent (below 1990 levels) by 2025 and establish a pathway to achieving net zero emissions by 2045.

In May 2019, the ACT Legislative Assembly joined many other cities, states and territories around the world in declaring a state of climate emergency, acknowledging the need for urgent action across all levels of Government.¹⁸

¹⁶ ACT Government, Environment Planning and Sustainable Development Directorate, *ACT Climate Change Strategy*, 2019. Accessible at <https://www.environment.act.gov.au/cc/act-climate-change-strategy>

¹⁷ ACT Government, Environment Planning and Sustainable Development Directorate, *Keeping our city cool*, 2019. Accessible at <https://www.environment.act.gov.au/cc/act-climate-change-strategy/keeping-our-city-cool>

¹⁸ ACT Government, Environment Planning and Sustainable Development Directorate, *Climate emergency declaration*, May 2019. Accessible at <https://www.environment.act.gov.au/cc/act-climate-change-strategy/climate-emergency-declaration>

Part Two - Specific concerns relating to the EPBC Act

General comment

The EPBC Act has been criticised since its enactment 20 years ago for the limited list of matters classified as being of national environmental significance.¹⁹ There are also questions about whether the EPBC Act is achieving the objectives originally set out for it.

The EPBC Act is struggling to meet the scale of the challenge our environment currently faces - for example, the recent bushfires in NSW, the ACT, Victoria, Queensland, South Australia and Western Australia.

Climate risks

Threatened species and ecological communities

Although the Commonwealth and State and Territory Governments have taken steps to protect biodiversity, extinctions and declines in abundance have continued to occur. Declines in population size, geographic range and genetic diversity are being seen among a wide range of species across all groups of plants, animals and other forms of life in Australia²⁰, with the status of biodiversity generally considered to be poor and deteriorating²¹.

The drivers of this are complex and include the loss, degradation and fragmentation of habitat, the threats posed by invasive species and the effects of climate change. It is also clear that the cumulative impacts of these drivers are a major contributor to species decline, even if these impacts are notoriously difficult to quantify and address.

In January 2019, the Organisation for Economic Cooperation and Development noted that the pace and scale of progress by Australian governments has not been enough to improve the status and trends of ecosystems and species.²² Small initiatives and limited investment are insufficient to fully address a legacy of land clearing combined with growing pressure from population growth, expanding development, invasive species and climate change.

Climate change is recognised as having a severe impact on the survival of species across the globe. In Australia, it is seen as one of the major factors in biodiversity decline and species loss in both the terrestrial and marine environments.²³

The legislation from which many current ecological assessment procedures originate - including the EPBC Act - predate the recognition of climate change as a major threat to

¹⁹ See, for example, Australian Conservation Foundation, *Unfinished Business: Rehabilitating the Ranger Uranium Mine*, 7 May 2019. Accessible at https://www.acf.org.au/unfinished_business_rehabilitating_ranger

²⁰ Department of the Environment and Energy, *Fifth National Report to the Convention on Biological Diversity*, May 2014, p10 (Fifth National Report). Accessible at <https://www.environment.gov.au/biodiversity/international/fifth-national-biological-diversity-report>

²¹ Department of the Environment and Energy, *Australia State of the Environment 2016, Terrestrial plan and animal species* (2016). Accessible at <https://soe.environment.gov.au/theme/overview/framework/introduction>

²² Organisation for Economic Co-operation and Development, *OECD Environmental Performance Reviews: Australia 2019*, p3. Accessible at: <https://doi.org/10.1787/9789264310452-en>

²³ Senate Environment and Communications Reference Committee, *Australia's faunal extinction crisis*, Interim Report, April 2019, p37. Accessible at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalextingtion/Interim_report

biodiversity. Some legislation is more recent and does promote stronger collaboration across jurisdictions, including the ACT's *Nature Conservation Act 2014*.²⁴

It currently takes up to two years for threatened species to be listed under the EPBC Act. Species sensitive to the impacts of climate change may be on the brink of becoming threatened but not satisfy the requirements to be listed under the EPBC Act. A process for listing these species so they can be considered in ecological impact assessments is needed, but proactively, not reactively as the EPBC Act currently operates.

It is critical for the Commonwealth Government to act *before* it becomes too hard to provide for climate change adaptation. Currently, time and effort are expended on recovery plans, once species are listed as threatened or vulnerable, rather than implementing preventative measures.

Matters of national environmental significance in general

As discussed earlier in this submission, climate change is already impacting other matters of national environmental significance (e.g. the Great Barrier Reef Marine Park, the Australian Alps and the availability of water resources).

The EPBC Act does not directly address climate change, greenhouse gases, ozone depletion, air quality, soil salinity, desertification, inland water pollution by chemicals and/or sewerage, quarantine issues, water allocation issues, land degradation, land clearing or forest management. Because of this, there is a risk that the application of the EPBC Act is not adequately taking climate impacts into account at the approval stage.

In the past, there have been various proposals to create a 'greenhouse trigger' in the EPBC Act (i.e. projects that exceed a nominated threshold of emissions needing to seek approval). For example, the Hawke Review noted that the inclusion of a 'greenhouse trigger' in the EPBC Act would need to complement the Carbon Pollution Reduction Scheme as a market mechanism for reducing Australia's greenhouse gas emissions.²⁵

With the Carbon Pollution Reduction Scheme no longer being Commonwealth policy and climate change already significantly impacting matters of national environmental significance, now may be the time to reconsider whether the EPBC Act needs a 'greenhouse trigger'.

Recognition of cumulative impacts

The Commonwealth Department of the Environment and Energy's Fifth National Report to the Convention on Biological Diversity confirms Australia's biodiversity decline is largely due to the cumulative impacts of multiple pressures.²⁶ In particular, there has been a major decline in mammals in northern Australia, changes in species composition, loss of ecological integrity across a range of threatened ecological communities and degradation in native vegetation.

In its current form, the EPBC Act has no compulsory mechanism to address cumulative impacts.²⁷ The project-by-project assessment approach which dominates under the EPBC Act

²⁴ ACT Government, Environment Planning and Sustainable Development Directorate, *Review of the Nature Conservation Act 2014*. Accessible at

https://www.environment.act.gov.au/cpr/review_of_the_nature_conservation_act

²⁵ Hawke Review, p113-116.

²⁶ Fifth National Report, p2.

²⁷ Kathryn Pacey and Nicole Besgrove, Clayton Utz, 23 July 2015, *EPBC Act cumulative impacts under the microscope: latest Full Federal Court Decision*. Accessible at

<https://www.claytonutz.com/knowledge/2015/july/epbc-act-cumulative-impacts-under-the-microscope-latest-full-federal-court-decision>

also means that the cumulative impacts of developments are not fully considered. There is also no assessment of the overall impact of a series of unrelated developments on critical habitat for certain species or World Heritage values.²⁸ For example, if the effect of several developments on migratory birds are each assessed in isolation, it is difficult to prove that any one development will have a significant impact on a particular species. However, if considered cumulatively, there may be a clear significant impact.

The EPBC Act must provide for the assessment of the overall impact of a series of developments (separate to the strategic assessment process). At present, only impacts which are a direct or indirect consequence of the project being assessed are included as cumulative impacts.²⁹ Strategic assessments are a good model for taking a longer-term and broader approach to impacts but are not possible in all circumstances.

The EPBC Act offset scheme

Proposed developments in the ACT must comply with the provisions of the EPBC Act if the site contains matters of national environmental significance. In these cases, a referral must be made to the Department of the Environment and Energy, with the proponent required to comply with the conditions set out in approval decisions.

The ACT Government manages several environmental offset sites associated with existing development approvals, and future developments are likely to require additional offsets. The aim of these environmental offsets is to compensate for the residual adverse impacts of an action on the environment.³⁰ In the ACT, this is generally development of greenfield sites but can include development of infill parcels of land where remnant ecological values are protected under the EPBC Act.

Offsets are not cost-free and may require:

- restoration works when the offset includes targets to improve environmental values;
- riparian weed control, restoration works and planting where the offset includes a water path such as a creek;
- threatened species management;
- conservation of cultural heritage sites; and
- monitoring of the effectiveness of conservation works and compliance with the approval conditions.

Additional measures may need to be taken, including designating new nature reserves or putting in place additional conservation measures for existing reserves.

In light of the 2019-20 bushfire season and the devastating and ongoing impact on many areas within Australia, the ACT Government is concerned that an offset scheme designed over 20 years ago that does not take into account the changing climate and its impact would adversely affect not only existing approvals, but future offset areas.

²⁸ Australian Network of Environmental Defenders Office, *Possible New Matters of National Environmental Significance under the EPBC Act 1999*, 2 May 2005, p5. Accessible at http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/326/attachments/original/1380677924/EDO_NSW_Submissions.pdf?1380677924

²⁹ Pacey and Besgrove, 2015.

³⁰ ACT Government, Environment, Planning and Sustainable Development Directorate, *ACT Offsets Policy and Delivery Framework, Position Paper*. Accessible at <https://www.environment.act.gov.au/cpr/environmental-offsets-policy/act-offsets-policy-and-delivery-framework-position-paper>

These concerns stem from:

- A lack of identified potential offset areas within the ACT for future projects that have an impact on matters of national environmental significance. A current example in the ACT is Light Rail Stage 2 and the offset required for impacts on the endangered Golden Sun Moth.³¹
- A lack of mapping of fire affected areas across the country. Until such mapping is completed, the quality and quantity of suitable offset areas (particularly in NSW and Victoria) is unknown, which presents project related risks. This is a time when rebuilding will require new infrastructure and other permits to re-establish damaged infrastructure.
- The time taken to approve projects under the scheme can be up to five years. This can result in vulnerable flora and fauna areas being unmanaged for significant periods of time, even when they need protection the most.
- A perceived lack of personal or corporate responsibility (in other jurisdictions) for purchased offsets which means that many areas are 'set and forget' and therefore degrade over time (for example, through the introduction of grazing animals to vulnerable areas).³² In the ACT, significant investment has been made to ensure that offset areas and the values within them are managed in perpetuity, primarily by incorporating them into the Territory's conservation estate.
- Use of offset sites that meet current EPBC Act requirements may not consider climate change.

The EPBC Act review should include a review of current offset arrangements to:

- Provide greater clarity in the management and identification of offsets in relation to Commonwealth-managed land in the ACT (including consultation requirements with the Territory).
- Support jurisdictions to identify and assess potential offset sites to enable more strategic offset site selection.
- Better utilise advanced offsets.
- Ensure a focus on restoration efforts linked to advanced offsets and the ability to account for this when identifying offset options for projects.

More broadly, given the significant impact of recent bushfires on Australia's flora and fauna, it is timely to consider whether an offset model for environmental projects is serving its true purpose or simply creating unnecessary economic impacts.

Duplication of environmental and planning approval processes

Whilst not directly within the scope of the EPBC Act review, it is apparent that there is material overlap between the EPBC Act and the National Capital Authority's Works Approval process, particularly in relation to heritage matters.

In the ACT, the planning and environmental approval process is integrated and streamlined, and the Assessment Bilateral Agreement is in place between the ACT Government and the Commonwealth to streamline processes with the EPBC Act. However, where a differential overlay of "Designated Land" (covering parts of Commonwealth land and Territory land)

³¹ Australian Government: Department of Agriculture, Water and the Environment, *EPBC Act – Public Notices: (Filter by referral number 2019/8491 Commonwealth Park to Woden Light Rail and 2019/8582 City to Commonwealth Park Light Rail)*. Accessible at <http://epbcnotices.environment.gov.au/referralslist/>

³² Senate Standing Committee on Environment and Communications, *Inquiry into Environmental Offsets*, 2014. Accessible at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Environmental_Offsets

occurs, planning approval is also required from the National Capital Authority. This can be an issue for linear infrastructure in particular.

To illustrate, Light Rail Stage 2A from Alinga Street in the Canberra CBD to Commonwealth Park traverses only 1.7 kilometres of road reserve, yet the planning jurisdiction changes five times (from ACT to Commonwealth, and back again, and so forth).

The Light Rail Stage 2A project also passes in the vicinity of some Commonwealth listed and nominated heritage items. The Light Rail Stage 2A referral under the EPBC Act did not identify any potential for significant impacts to these heritage items. This was recognised when the Commonwealth later agreed that the assessment could be done using preliminary documentation because the effects of the development were localised and predictable. Despite this, heritage considerations must also be addressed separately as part of the National Capital Authority's Works Approval process.³³

Better integration of the Commonwealth planning and environmental process could be achieved in the following ways:

- Where a proponent completes an EPBC Referral with an outcome not determining any significant heritage impacts, it should not then become subject to additional heritage considerations through the Works Approval process under the *Australian Capital Territory (Planning and Land Management) Act 1998*, administered by the National Capital Authority.
- Where a project *is* determined to have a significant impact on a heritage matter through an EPBC Referral process, then issues relating to the assessment and determination of project impacts to that heritage matter should be resolved through the EPBC Act process without the need to also complete further assessments through the Works Approval process.

The existing parallel processes give rise to a potential for inconsistent conditions or approval limits which can prove difficult to implement, enforce or deliver, particularly for linear infrastructure projects that may involve narrow corridors of impact over wider geographic areas.

There could also be scope for changes to the bilateral agreements that provide streamlined assessment processes for public infrastructure projects that concurrently benefit Canberra and the national capital. For example, a single assessment process could be established for major public transport and road projects that receives input from Commonwealth and ACT regulators, rather than requiring two processes to be undertaken where outcomes and timeframes may differ.

These administrative changes would demonstrably enhance the certainty around timeframes and approval processes for major ACT Government infrastructure projects.

If the EPBC Act is to continue to apply to ACT Government projects, then consideration should be given to reducing duplication between the EPBC Act, the *Planning and Development Act 2007* and the *Australian Capital Territory (Planning and Land Management) Act 1988* to ensure one streamlined assessment process for all projects in the ACT.

³³ The National Capital Authority, *Works approval process*. Accessible at <https://www.nca.gov.au/planning-heritage/works-approval/works-approval-process>

Scope and reach of the EPBC Act assessment in the Canberra context

When a project is determined to be a “controlled action” under the EPBC Act, on account of impacts on Commonwealth land³⁴, the scope of the required assessment under the EPBC Act can broaden significantly beyond those areas of interaction with Commonwealth land. The required assessment can extend over potential project interactions on Territory land.

For example, Light Rail Stage 2B, from the north side of Lake Burley Griffin, around Parliament House, and then south over some 10km to Woden, traverses Commonwealth land and Territory land. Guidance published by the Commonwealth on the definition of “environment”, while not determinative, suggests that the impacts on the environment that should be considered for an action on Commonwealth land include areas not covering Commonwealth land.³⁵ In the case of Light Rail Stage 2B this would include Territory land.

Information published on the Department of Agriculture, Water and Environment’s website states:

“The whole of the environment [...] must be considered when activities take place [...] on Commonwealth land.”³⁶

However, the relevant significant impact guidelines do not identify a geographical restriction. Instead, the guidelines suggest:

“The key to determining whether an action is likely to have a significant impact on the environment is to understand the environment which will be impacted (the ‘environmental context’). When identifying the environmental context, you should consider both the site of the action and adjacent, surrounding, downstream, or downwind areas that may be directly or indirectly affected by the action (emphasis added).³⁷

This gives rise to a circumstance in which potential impacts from a major project such as Light Rail Stage 2B - for example, local traffic impacts in the Woden Town Centre - become subject to assessment and determination by the Commonwealth under the provisions of the EPBC Act.

Such issues are best placed to be considered and evaluated through the existing provisions under the ACT’s *Planning and Development Act 2007*. At a minimum, the expansive interpretation of the scope of EPBC Act assessment provisions should be clarified in order to provide greater certainty to proponents of major projects across the ACT.

³⁴ Federal Register of Legislation, *Section 26(1) of the Environment Protection and Biodiversity Conservation Act 1999*. Accessible at <https://www.legislation.gov.au/Series/C2004A00485>

³⁵ Australian Government: Department of Agriculture, Water and Environment, *EPBC Act Policy Statement - Definition of ‘Environment’ under section 528 of the EPBC Act*, Environment Protection and Biodiversity Conservation Act 1999. Accessible at <https://www.environment.gov.au/resource/epbc-act-policy-statement-definition-environment-under-section-528-epbc-act>

³⁶ Australian Government: Department of Agriculture, Water and Environment, *National environmental law: The basics - environmental impact assessments and approvals of projects*. Accessible at <https://www.environment.gov.au/resource/national-environment-law-basics-environmental-impact-assessments-and-approvals-projects>

³⁷ Australian Government: Department of Agriculture, Water and Environment, *Significant impact guidelines 1.2 - Actions on, or impacting upon, Commonwealth land and Actions by Commonwealth Agencies*. Accessible at <https://www.environment.gov.au/epbc/publications/significant-impact-guidelines-12-actions-or-impacting-upon-commonwealth-land-and-actions>

Inconsistent processes to deal with the same issues

An example of inconsistent environmental planning and approval regimes that apply in the ACT is that public infrastructure projects encountering matters of national environmental significance are subject to different approval regimes, depending on where they are located.

For example, a road upgrade interacting with habitat of an endangered species such as the Golden Sun Moth on Commonwealth land would be considered and determined in the manner prescribed by the EPBC Act.³⁸ Whereas, the same road upgrade on Territory land would be managed through the Assessment Bilateral Agreement under the ACT's *Planning and Development Act 2007*.

Around 23 percent of Golden Sun Moth habitat is situated on Commonwealth land in the ACT. This land is not subject to ACT environmental protection provisions and requires projects to gain approval from the Commonwealth under the EPBC Act. If the project is a linear infrastructure project, it will also require approval under ACT law, adding significant complexity when a major infrastructure project is being developed and procured. For example, Light Rail Stage 2B crosses Commonwealth land and requires a Commonwealth environmental impact statement, in addition to Commonwealth planning approval, Commonwealth Parliamentary approval and ACT planning approval.

The EPBC Act should not be applied uniformly to projects within the ACT where the ACT Government is the proponent and the provisions of the *Planning and Development Act 2007* cover relevant matters of consideration and one process is established across Territory land and Commonwealth land, noting existing bilateral process exist to achieve this end. The ACT Government's planning, environmental and heritage legislation and policies should apply to the entirety of projects in the ACT where the ACT Government is the proponent.

First Australians - heritage values, farming and regeneration practices

The discussion paper notes that places with Indigenous heritage can be protected and managed under the EPBC Act, and that Traditional Owners can be involved in the management of Commonwealth reserves.³⁹ The EPBC Act also expressly provides for the involvement of Indigenous people in the management of Commonwealth reserves through:

- Taking account of the interests of Traditional Owners of any Indigenous land within the reserve or Indigenous people with an interest in the reserve for management planning.
- Gaining agreement from the Traditional Owners of land within the reserve, or the relevant land council, for the establishment and composition of a board of management.
- Ensuring that the majority of members of a Board must be Indigenous people nominated by the Traditional Owners of the land where a Commonwealth reserve consists wholly or mostly of Indigenous peoples' land.

If Indigenous places under Commonwealth management in the ACT do not meet Commonwealth listing thresholds to become heritage listed, there are constraints on protection of heritage values for these places. Similarly, there is no incentive for Indigenous

³⁸ ACT Government: Environment, Planning and Sustainable Development Directorate – Environment, *Golden Sun Moth (Synemon plana)*. Accessible at https://www.environment.act.gov.au/cpr/conservation_and_ecological_communities/threatened_species_factsheets/factsheets2/golden-sun-moth2

³⁹ Independent Review of the EPBC Act, Discussion Paper, '*Indigenous Involvement*', 20 November 2019. Accessible at <https://epbcactreview.environment.gov.au/resources/indigenous-involvement>

land management practices and regeneration places to be a priority in restoring land offsets, even in policy guidance provided by the Commonwealth.⁴⁰

There should be greater engagement with Traditional Owners under the EPBC Act, and encouragement and promotion of Indigenous land management and regeneration practices should be a priority in restoration efforts on land offsets.

⁴⁰ Department of the Environment, *Engage Early – Guidance for proponents on best practice indigenous engagement for environmental assessments under the EPBC Act*, February 2016. Accessible at <http://www.environment.gov.au/system/files/resources/3201a986-88e8-40f3-8c15-6e659ed04006/files/engage-early-indigenous-engagement-guidelines.pdf>

Part Three - Discussion paper questions

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?

The EPBC Act does not provide a nationally coordinated approach to managing the environment nor for ongoing Commonwealth funding commitments. It also lacks management and Commonwealth funding initiatives to deal with environmental protection and its longevity.

For example, between September 2019 and February 2020, bushfires have impacted many areas of national environmental significance. Significant areas of habitat (as well as houses, businesses, wildlife and stock) have been destroyed in the bushfires. Some of this habitat may have been offsets under the EPBC Act.

The bushfires highlight the need for comprehensive management and Commonwealth funding criteria to be included in the EPBC Act. The EPBC Act should provide guidance to achieving ecologically sustainable development by covering the following matters:

- Restoration of habitat that, once destroyed, may never be replaced.
- Preservation of colonies of fauna taken to near extinction.
- Management procedures including where the costs of management and restoration from the bushfire events will fall.

Question 2

How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?

The following matters should be fundamental in ESD decision making:

- the precautionary principle;⁴¹
- intergenerational equity;⁴²
- conservation of biological diversity; and
- ecological integrity.⁴³

The EPBC Act review may wish to consider whether the EPBC Act should be redesigned to reverse the burden of proof for development assessments; that is, developments needing to demonstrate that they will enhance the state of relevant resources, not just limit any negative impacts. This would be consistent with the principles of intergenerational equity

⁴¹ United Nations Educational, Scientific and Cultural Organisation, World Commission on the Ethics of Scientific Knowledge and Technology, *The Precautionary Principle*, 2005. Accessible at <https://unesdoc.unesco.org/ark:/48223/pf0000139578>

⁴² London School of Economics, *Intergenerational Equity*. April 2013. Accessible at https://www.unicef.org/socialpolicy/files/LSE_Capstone_Intergenerational_Equity.pdf

⁴³ New South Wales Office of Environment and Heritage, *Measuring biodiversity and ecological integrity in NSW*, 2019, p5 referencing the *Biodiversity Conservation Act 2016* (NSW). Accessible at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/measuring-biodiversity-and-ecological-integrity-in-nsw-method-190132.pdf>

and the precautionary principle, given the irreversible changes currently being seen in key environmental resources.

In addition, broader consideration could be given to ecologically sustainable development where economic and social factors are assessed alongside environmental impacts. A form of cost benefit analysis would assist in balancing these factors in the assessment for EPBC Act applications. This would be consistent with the principles of conservation of biological diversity and ecological integrity.

Question 3

Should the objects of the EPBC Act be more specific?

As discussed above, climate change is a significant issue that is not addressed in the EPBC Act. An object that acknowledges the importance of managing matters of national environmental significance to proactively reduce the impacts of climate change could be appropriate.

Question 4

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

A major gap in the EPBC Act is its failure to incorporate climate change as one of the matters of national environmental significance. Climate change is the subject of numerous international agreements, has comprehensive links with all economic activity and affects a range of other environmental impacts including virtually all other matters of national environmental significance.

Currently, the word 'climate' appears only once in the EPBC Act and then only in reference to making regulations relating to a UN Convention on climate change.⁴⁴ There is no substantive reference or provision in the EPBC Act relating to climate change.

Given that climate change is widely recognised as a major threat to biodiversity and natural and cultural heritage conservation, a climate change trigger could be appropriate, particularly as climate change abatement needs not only a national but international approach. The trigger could be above a certain level of carbon emissions (for example, calculated through an area of vegetation clearance, or an amount of material processed over the life of the proposed development).

The recent Rocky Hill Mine decision⁴⁵ is indicative of the way that greenhouse gas emissions can be included in EPBC Act considerations. In that case the New South Wales Land and Environment Court ruled that construction of the mine should not go ahead as the mine '*...would be in the wrong place at the wrong time...*'⁴⁶ and that its greenhouse gas emissions would increase global total concentrations at a time when a rapid and deep decrease was needed.

⁴⁴ See the EPBC Act, s520. The Framework Convention on Climate Change was agreed in New York on 9 May 1992.

⁴⁵ See commentary by the Climate Council, '*What does the Rocky Hill Coal Mine Defeat Mean?*' Accessible at <https://www.climatecouncil.org.au/rocky-hill-coal-mine-defeat/>

⁴⁶ See paragraphs 688 to 692 of the Court's judgement at https://www.caselaw.nsw.gov.au/decision/5c59012ce4b02a5a800be47f#_Toc431221

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?

There are several elements of the EPBC Act that require reform.

Strategic assessments conducted under the EPBC Act have a lifespan of several decades and currently cannot be varied. This means that even fundamental errors in the original documentation cannot be corrected, leaving proponents in a difficult situation trying to deliver unrealistic outcomes.

Similarly, the application of 'adaptive management' within strategic assessments is unclear and the boundary between what constitutes adaptive management and what is a variation to the strategic assessment (which is not allowed under the EPBC Act) is not straightforward.

Variation provisions and clarification around adaptive management would assist in reducing this confusion and enable better outcomes to be achieved. Allowing variations (with criteria that must be met) could result in better environmental outcomes being achieved.

Variations could form part of periodic reviews (such as five year plan reviews), be a mechanism used when corrections are required and be a mechanism to update plans when detailed mapping is undertaken during development (for example, during detailed mapping for each stage of an estate development).

Case Study: Molonglo Valley

The Molonglo Valley strategic assessment was commenced in 2008 and completed in October 2011.⁴⁷ It requires the ACT Government to implement a wide range of commitments over a 30-year period. This strategic assessment was the first completed in Australia. The strategic assessment includes clearance budgets which are limits for how much of each protected matter can be impacted. These figures were negotiated as part of the overall package for the strategic assessment.

The figures included in the budgets were based on high level mapping undertaken at the time the strategic assessment was approved. As the area has been developed, more detailed mapping has been undertaken, showing some errors in the mapping with areas documented as meeting the definition of box gum woodland; for example, not actually meeting the definition. However, as these areas were mapped as box gum woodland and because strategic assessments cannot be varied, the ACT is required to protect the budget figure even if the woodland was not there in the first place.

In addition, all strategic assessments need to consider the impacts of climate change and its effects on the management of protected species and habitats. Management and key funding resources require identification in management plans prepared at the Commonwealth level

⁴⁷ ACT Government Environment, Planning and Sustainable Development Directorate, *Molonglo Valley Strategic Assessment*. Accessible at https://www.planning.act.gov.au/development_applications/da_assessment/strategic_environmental_assessment/molonglo_valley_strategic_assessment

and their implementation agreed at the State and Territory level. This process should include the identification of Commonwealth funding required to undertake the implementation and maintain it over a long period of time.

The plans should also be reviewed at regular intervals and any new benchmarks applied after agreement. These regular reviews could include the effects of climate change or seasonal fire events and be recast for the restoration of fire damaged species and habitats.

Finally, the EPBC Act needs stricter enforcement⁴⁸ and more effective compliance regimes. There are only a handful of prosecutions each year for breaches committed under the EPBC Act⁴⁹ and it is not immediately clear to the ACT Government why this is the case. If the paucity of prosecutions is a function of the EPBC Act as currently drafted, then this should be a reform priority.

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?

It is very difficult to determine the impact of the EPBC Act over its 20 years in operation. However, what is clear is that the EPBC Act is insufficient to protect and conserve the environment. Extreme and intense bushfires, for example, is an emerging threat not addressed in the EPBC Act.

More Commonwealth funding is required to implement and enforce the EPBC Act to contribute to its effectiveness and efficiency, as well as promoting education and understanding. There is little point imposing tough new conditions if no one is there to ensure they are met. Ensuring the EPBC Act is implemented demands the Commonwealth provide an ongoing sustainable funding base.

The ACT Government works with the Commonwealth Government to streamline assessments as much as possible. However, the requirement for Commonwealth approval under the EPBC Act in addition to approval under the ACT's *Planning and Development Act 2007* can result in time delays and economic costs to proponents. As discussed earlier, streamlining this would be appropriate.

Question 7

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

Additional future trends and supporting evidence for the EPBC Act review to call on should include studies on climate change and impacts on weather patterns. Given the 2019-20 bushfire season in Australia, this must include evidence of the effect of higher temperatures and lower than average rainfall on fire behaviour, and volatility in terms of extreme temperatures and low humidity and very low rainfall in south east Australia. Furthermore:

- regular updates on climate change projections and climate impacts should be used to inform the objectives and measures of the EPBC Act;

⁴⁸ See Annual Report 2018-19, Department of the Environment and Energy, at p248. Accessible at <https://www.awe.gov.au/sites/default/files/2020-01/annual-report-2018-19-environment-and-energy.pdf>

⁴⁹ Ibid p45

- the environmental consequences of climate change should be incorporated into every aspect of the EPBC Act, including impact assessment;
- the EPBC Act should support the development of a framework that guides decision-making on present and future maintenance of environmental services and biodiversity preservation (and/or adaptation) measures in the face of increasing warming, droughts and bushfires; and
- greenhouse gas accounting should be embedded in impact assessments.

Question 8

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

An outcomes-based approach may achieve better environmental outcomes and enable more adaptive management (e.g. by enabling changes over time to address climate change risks). A strong compliance and enforcement framework would also be needed to ensure outcomes are achieved.

As previously mentioned, the EPBC Act could be amended to be sensitive to 'local' Aboriginal heritage values. At present, if Aboriginal places under Commonwealth management do not meet Commonwealth/National listing thresholds, there is no protection of any kind.

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?

It is not considered essential for the Commonwealth to take a stronger role in delivering environmental and heritage outcomes. However, what it must consider is appropriate Commonwealth funding and support for the management of areas of national environmental significance, especially if the cumulative efforts of State or Territory agencies or individual land managers are not meeting the desired outcomes.

The Commonwealth could take on an evaluation role to measure whether the outcomes prescribed in the EPBC Act are being met. The States and Territories should be involved in such evaluations.

Question 10

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

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

The suggestion in the discussion paper of possibly amending the EPBC Act to move towards a national standard setting approach based on the best available science and closely linked to outcomes has merit.

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?*

The use of national environmental law is suggested in the discussion paper as a possible way to achieve more robust environmental outcomes. This approach is of doubtful value if the current settings are maintained - any amount of extra national environmental law within the current parameters of the EPBC Act is unlikely to achieve ecologically sustainable development in the future.

The discussion paper states that the estate managed for environmental outcomes is continuing to decline in quality and that this trend is expected to continue. This may be the case, but what is certain is that land management of the existing estate environment will suffer without resolving associated questions of funding. Those questions are not asked in the discussion paper.

Land management against the backdrop of climate change, rising temperatures and less rainfall is also not considered in the discussion paper. However, any mitigating solutions must be part of, or at least consistent with, the policy thrust and direction of the EPBC Act if effective action is to be taken on restoration of species and habitats.

The 2019-20 bushfire season arguably puts the EPBC Act in jeopardy for being out-of-date and unable to address the impacts of fire on nationally important species and habitats. Restoration of species such as koalas and habitats affected by the bushfires requires a new emphasis on land management and Commonwealth funding practices across all jurisdictions. This is where the Commonwealth should seek to offer implementable solutions.

The inclusion criteria for endangered ecological communities or a species habitat is typically based on current condition level rather than consideration of whether the vegetation or habitat is in a state where it could be restored to a functional state. A focus on restoration of what has been lost could be improved by the listing process also including poorer but restorable states of the community or habitat within the listed matters of national environmental significance. A sole focus on higher level condition vegetation or habitat inevitably results in further loss rather than ecological sustainability.

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?

More emphasis should be put on the use of conservation management plans for listed places. This could be equally applied to areas requiring environmental protection across the board and provides the opportunity for the Commonwealth to initiate this action. The ACT Government already implements this type of action under Territory legislation.

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?

There is an increasing recognition that environmental, social and economic issues are interrelated in complex ways. Therefore, the EPBC Act should consider how to not just accommodate strategic assessments but to address environmental concerns in a way that ensures systematic outcomes beyond the scope of individual projects.

Such a framework needs to be flexible to adjust, within established parameters, to changes in economic circumstances, environmental or social conditions that may evolve over time, and necessitate changes to project design or implementation.

Australia, for example, emits only a small portion of global emissions but joins international agreements recognising the need for each country to take strong action in a cooperative effort. In the same way, individual development applications must be assessed to ensure they are part of an effective national effort (for example to reduce emissions, protect the Great Barrier Reef or contribute to other strategic outcomes), not just on the basis of their specific individual impact.

The use of strategic assessments to replace case-by-case assessments may only work in some cases. In the ACT, there are limited areas left to do geographical strategic assessments and most proposals are scattered which requires project by project approvals. Strategic assessments also rely on a high level of project certainty around the size or extent of development proposals to complete environmental assessments. The current arrangements have effectively constrained the use of strategic assessments through a rigid system that does not allow for changes in project scope or respond to changes in environmental values.

Strategic assessments can also take a significant amount of resources and time, delaying important development works. Other limitations are discussed under question 5 above. If they were to be used as a primary mechanism for approvals then the provisions relating to strategic assessments would need to be reviewed carefully to ensure they are flexible enough to enable effective, adaptive implementation.

Given that strategic assessments are likely to lead to more strategic, certain and landscape-wide outcomes it is appropriate that those undertaking case-by-case assessments are encouraged to utilise this path where appropriate.

Question 14

Should the matters of national environmental 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?

In 2014-15, the ACT Government was negotiating with the Commonwealth Department of the Environment and Energy for a 'one-stop shop'. The purpose of the one-stop shop was to streamline Commonwealth and ACT environmental approvals where matters were protected under both ACT and Commonwealth law. A one-stop shop was ultimately not developed and only the Assessment Bilateral Agreement was updated. Consideration could be given to this approach again. Strong compliance and enforcement would need to be in place to ensure outcomes are achieved and community expectations are met.

The Assessment Bilateral Agreement between the ACT Government and the Commonwealth is currently limited to the assessment phase only, meaning the ACT Government and the Commonwealth both need to undertake their own approval, leading to increased time, and risk of inconsistency between approvals. Although a draft approvals bilateral agreement was

considered in 2014, there is no agreement currently in place. In any case, the provisions of the Assessment Bilateral Agreement do not apply for any project that traverses Commonwealth land.

The ACT includes several Commonwealth areas and some infrastructure crosses both jurisdictions. Currently, the EPBC Act does not allow bilateral assessments across Commonwealth land making assessment of cross jurisdictional projects complicated. It also extends the timeframe for assessment and adds additional costs for proponents.

A streamlined approach between the ACT Government, the National Capital Authority and the Department of Agriculture, Water and the Environment would help to fast track assessments and reduce regulatory burden on developers.

In addition, the EPBC Act should ensure that the Commonwealth retains powers to intercede where jurisdictions fail to meet obligations in relation to environment protection.

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 publicly available?*

Although low-risk project exemptions could save proponents a lot of time and money, clear/fixed criteria would need to be developed to ease implementation and compliance.

A national database that is accessible by State and Territory governments would assist in the assessment of projects and in monitoring and compliance. Information from environmental assessments should be made available in a format that is easily accessible (e.g. data could be included in a mapping system rather than reports simply being published).

If this approach was taken, consideration would need to be given to how that data would be made available as well as the financial and resource implications.

The discussion paper suggests that the information to support approvals under the EPBC Act, and those by States and Territories, are not easily accessible or transparent. This is not correct in the case of the ACT where environmental assessments and supportive information under ACT policies are fully available to the public.⁵⁰ EPBC submissions are also available for public consultation.⁵¹ Due to the methodology used by the ACT Government, information relating to Commonwealth and ACT legislation is included in original and subsequent submissions and is generally publicly available.

The question of determining what a low risk project is, and thus receiving automatic approval or exemption, could result in individual piecemeal approvals to “hide” the full impacts of development when considered at a wider scale. This is the argument to support strategic assessments in the first place.

⁵⁰ See ACT Government, Environment, Planning and Sustainable Development Directorate, ‘*Environment Impact Statements*’. Accessible at https://www.planning.act.gov.au/development_applications/assessment_of_dev/environmental_assessment/environmental_impact_statements

⁵¹ See for example ‘*Canberra Brickworks Precinct Access Road and Dudley Street Upgrade*’, March 2019. Accessible at https://www.planning.act.gov.au/_data/assets/pdf_file/0003/1349175/EIS-Exemption-Assessment-Report.pdf

The ACT Government has adopted an alternative approach in the Eastern Broadacre Area draft Strategic Assessment. This approach involves a strategic assessment for identified known development potential in the timeframe of the assessment, plus proposing a review for any further development that was not identified originally without the need to undertake a new strategic assessment.⁵²

Because ecosystems are dynamic, biotic survey data quickly becomes outdated. All data from assessments of impacts of national environmental significance should be made publicly available, especially data used in the offset calculator.

The ACT Government notes that one strength of the EPBC Act is that it is focused on the potential impact of a significant feature. The focus should be on the matter of national environmental significance and not a particular activity. For example, the Majura Spider Orchid (*Arachnorchis armata*) is an endemic ACT orchid listed as critically endangered and only found in one location.⁵³ Constructing stock fencing may generally be a low risk activity, but if a post hole was to be dug within this orchid's only known location then it could result in species extinction.

In summary, there is no such thing as low risk in the environmental space. All impacts on matters of national environmental significance should be investigated and assessed. Better data is always a good idea, but the use of previous data sources used in Commonwealth and ACT approvals by third parties can be problematic given the current "life" of data usability as well as the possibility of the material being used to justify land development projects that cannot be supported on land use grounds by government, or would otherwise fail an EPBC Act submission.

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?

Sustaining Australia's biodiversity is going to require both approaches.

It may generally be most effective to focus restoration and Commonwealth funding to projects that deliver habitat and connectivity improvements across the landscape and improve the conservation of many species. However, regulatory guidance, intervention and active conservation will still be required on a species-specific basis to avoid extinctions. There are many examples, such as the Yellow Bell Frog⁵⁴ or Tuggeranong Lignum⁵⁵ from the ACT region, where species down to a few individuals have been brought back from the brink.

The emphasis as suggested in the discussion paper on enabling better protection of matters of national environmental significance, longer-term streamlining of administrative decision-making and compliance and coordinated investment (including management) in protection and restoration is supported.

⁵² See 'ACT Eastern Broadacre Final Report', 3 February 2020. Accessible at <https://www.planning.act.gov.au/planning-our-city/planning-studies/eastern-broadacre-planning-project/act-eastern-broadacre-final-report>

⁵³ See 'Canberra Spider Orchid (*Arachnorchis Actensis*)'. Accessible at <https://www.environment.act.gov.au/cpr/conservation-and-ecological-communities/threatened-species-factsheets/factsheets2/canberra-spider-orchid-arachnorchis-actensis>

⁵⁴ See 'Nature Conservation (Yellow-spotted Bell Frog) Conservation Advice 2019), 10 May 2019. Accessible at <https://www.legislation.act.gov.au/ni/2019-241>

⁵⁵ See 'Tuggeranong Lignum (*Muehlenbeckia Tuggeranong*)'. Accessible at <https://www.environment.act.gov.au/cpr/conservation-and-ecological-communities/threatened-species-factsheets/factsheets2/tuggeranong-lignam>

There is a dilemma where multiple jurisdictions have a role to play. The ACT is a prime example where all land is Commonwealth land (owned by the Commonwealth) but the division into National Land and Territory Land covers the same relevant landscape elements in a number of cases. This leads to less than ideal approaches to land management responsibilities. It has also led to Commonwealth institutions on Territory Land or National Land taking a development opportunity through the Commonwealth processes even though there are significant impacts on the Territory that are not recognised in approvals given.

Question 17

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

Amending the EPBC Act to enable broader accreditation of state and territory, local and other processes could be a positive step.

Question 18

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

The ACT Government has no comment on this.

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?*

The ACT Government has no comment on this.

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?

The EPBC Act already contains substantial provisions for the engagement of the community at various stages throughout the assessment and determination phases. Although transparency in decision-making is essential, community consultation should not replace expert scientific assessment. Noting the comments contained earlier in the document relating to the complexity of assessing and approving linear infrastructure that impacts Commonwealth land, consideration should be given to unified community consultation activities where projects, particularly in the ACT, need to undergo assessment via both the EPBC Act and the ACT's *Planning and Development Act 2007*.

At the very least, guidance should be established by the Department of the Environment and Energy to affirm its commitment to enabling simpler consultation arrangements for projects that impact multiple jurisdictions, including for example:

- One consistent exhibition period (as opposed to differing durations depending on jurisdiction).
- Single point submission portals, rather than community submissions being required by either the Commonwealth or the ACT (or both).

- A simplified submissions reporting process, where proponents respond once to issues raised by the community.
- Simpler conditions and approval requirements that make it easy for the community to understand what has been approved and what conditions apply.

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?

The existing governance model in the EPBC Act involving the Commonwealth Minister for the Environment (or delegate) as the primary decision maker is supported.

However, the option of creating new advisory bodies to inform decisions on approvals is not supported. Any such changes to the governance arrangements, were they to be contemplated, would first need to be underpinned by comprehensive policy guidance and interpretation to enable more consistent decision-making with reference to published guidelines. It is noted that there are numerous independent environmental and planning approval decision-making bodies operating in other jurisdictions.

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?

Commonwealth funding and the commitment to address land management issues should be included and addressed in the EPBC Act review.

See also the response to Question 23 below relating to environmental offsets.

Question 23

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

A national market for trading offset credits could be beneficial, particularly for matters of national environmental significance that occur in multiple jurisdictions. This could also tie in with comments made in the discussion paper around needing to be more strategic about the location of offset sites (e.g. better connectivity) by allowing offset sites to be created in beneficial locations and then used by proponents who require them, rather than the current piecemeal approach of individual projects vying for individual offsets, with individual management plans and offset objectives.

Such an approach could also be considered in the context of broader reforms to the strategic assessment process discussed earlier. It would also assist with sourcing offset sites interstate, a particular issue in the ACT where certain values (for example protected grassland species and ecosystems) are locally rare in the ACT, but more abundant over the border in NSW.

While the current provisions of the EPBC Act do not exclude such offset arrangements, reforming the EPBC Act could see an approach to offsets streamlined and aligned more closely to whole of ecosystem outcomes, rather than the simplified approach of numerical offsets for individual projects.

Question 24

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

Offsetting in the ACT is challenging due to the small geographic area the jurisdiction covers. For a jurisdiction like the ACT, better environmental offsets could be achieved by looking at overall conservation gains from identifying more viable, connected offsets with benefits across a range of protected matters rather than species/community specific offsets.

In the ACT, a large proportion of land is already protected in the reserve network. The EPBC Act could allow for measures already taken to protect an area to be readily recognised in EPBC assessments, such as the establishment of a comprehensive parks and reserve system prior to the development of areas and EPBC referral. This would be in line with the advanced offsets policy approach; it would be useful for the EPBC Act review to consider this concept further.

Clearer rules and process requirements in relation to advanced offsets would also assist jurisdictions to establish advanced offsets with a clear understanding of their future benefits. An assessment process essentially exists already in the form of the offset calculator; what would be required is a framework including, for example, validity periods for banked offsets, reassessment intervals and conditions on how sites are managed.

The ACT Government notes that the Commonwealth does not contribute to funding for future management. Yet the cost of maintenance, protection and monitoring of the approval (or National Environmental Significance Plan) is passed onto the proponent, which can result in a 20 to 30-year funding imposition.

To provide real biodiversity benefits, offsets should rely principally on restoration. These should make up the majority of future offsets. To date there has been no overall evaluation of whether offsets are achieving, or are on a trajectory to achieve, their principal goal of overall no net loss for each threatened species or ecological community.

The EPBC Act review should also consider how climate change considerations can be incorporated in the implementation of offsets.

There should also be transparency in offset decisions and publicly accessible offset calculations for each offset site. It has recently been identified that there is an important distinction to be made between impacts that themselves are subject to the same regulations as the development for which the offset is sought and impacts that are not regulated. Impacts that themselves are subject to offsets incur no averted loss.

Because the clearing or development of the offset site would itself require its own offset, there is no biodiversity benefit in its protection alone as an offset. In practical terms, that means that if a threatened species is found at the development site, necessitating an offset, then if the threatened species is present at the offset site it cannot be claimed as an averted loss. The benefit of the offset must come from avoided decline and/or habitat restoration activities that would facilitate the threatened species at the site. If these types of offsets are to continue, greater transparency in their calculation and management is needed.

Another key opportunity is for the Commonwealth to support jurisdictions to develop future offset inventories to help jurisdictions make strategic decisions on offsets.

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?

Alternative financing approaches to deliver environmental outcomes are limited in the ACT. One example is the establishment of an environmental trust for the Ginninderry development at the western edge of urban development in the ACT. The trust is funded through an arrangement between the ACT Government and the developers of Ginninderry.

Question 26

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

Effective protection of Australia's environment

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

Making decisions simpler

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

Indigenous knowledge and experience

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

Improving inclusion, trust and transparency

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

Supporting partnerships and economic opportunity

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

Integrating planning

Streamlining and integrating planning to support ecologically sustainable development.

General Comments in response to Question 26

There are some key matters that the EPBC Act review could consider that are apparent from the operation of the EPBC Act within the ACT.

The obligations of the EPBC Act can be eluded by avoiding an impact on a feature of recognised national importance

A prime goal of the EPBC Act should be to direct development away from impacting on features of natural and cultural importance. It seems legitimate that proposals that cannot be planned to avoid impact are made to rigorously demonstrate why impacts cannot be avoided and that if the impact is unavoidable that all reasonable measures will be taken to minimise any impact.

Large projects where some impact is almost inevitable can utilise the strategic assessment approach, which enables landscape-wide and considered outcomes.

Strategic assessments have been utilised on four occasions when planning development occurred across ACT valley and river landscapes. They have proven to be an effective means of delivering sustainable development across large areas. Although the assessment is a long and complex process, they do replace the need for tens of individual referrals and allow for holistic planning. Variation processes need to be built into the EPBC Act to enable more effective implementation.

Outcomes from the process can ensure protection of key areas, connection across the landscape and contextual tailoring to the needs of specific significant species.

Based on the tone of the discussion paper, there is concern for dilution of the environmental focus of the EPBC Act, to the benefit of business and development. For example, the need to reduce “unnecessary regulatory burdens” is emphasised several times. It should be made clear that the purpose of the EPBC Act is to benefit the environment. The discussion paper also mentions that “the health of the Australian environment and its biodiversity has continued to decline”, which means the EPBC Act actually needs more and stricter regulation, not less.

The scale of development decisions that require EPBC Act approval is low in relation to the total level of development that occurs across a region

Most of the native vegetation remaining in the lowlands of the ACT is listed as of national environmental significance. If this is combined with the known habitat area of Commonwealth listed species such as the Pink-tailed Worm Lizard and Golden Sun Moth, then about 20% of the area outside of Namadgi National Park supports a feature of national environmental significance. Despite this large area, access to the EPBC referral notices⁵⁶ indicates that only 11 projects from within the ACT have been referred to the Commonwealth in the last 12 months. There have been several hundred development applications lodged within the ACT over the same period. This may reflect that a large proportion of ACT developments happen in already developed areas so don't hit any current EPBC Act triggers.

Ramsar wetlands provisions

We suggest that sections 333 and 334 of the EPBC Act should be changed to require the Commonwealth to provide financial support for preparation or review of Ramsar-listed wetland management plans. We also suggest changing section 336 to require the Commonwealth to give financial assistance for protection and conservation of Ramsar-listed wetlands and to allow for changes to ecological character descriptions of Ramsar-listed wetlands due to climate change without delisting or penury measures.

Common Assessment Method

In the discussion paper under ‘The Role of the EPBC Act’, the Common Assessment Method for listing assessments is referenced and has been a good outcome for cross-jurisdictional standards and co-operation. To fully implement the Common Assessment Method, there are some changes that need to be made to the EPBC Act as directed by the Department of the Environment and Energy.

⁵⁶ The referrals list is accessible at <http://epbcnotices.environment.gov.au/referralslist/>



Chief Minister, Treasury and Economic
Development

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