GOVERNMENT RESPONSE TO THE INDEPENDENT REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

REGULATION IMPACT STATEMENT

TABLE OF CONTENTS

Acronyms and Abbreviations

1997 Agreement	COAG Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment, 1997
APPEA	Australian Petroleum Production and Exploration Association
CAF	Council for the Australian Federation
COAG	Council of Australian Governments
CA	Controlled Action
ESD	Ecologically Sustainable Development
EIA	Environmental Impact Assessment
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999*
LNG	Liquid Natural Gas
NES	National Environmental Significance
NCA	Non-Controlled Action
NCA-PM	Non-Controlled Action Particular Manner
NPV	Net Present Value
NRMMC	Natural Resource Management Ministerial Council
RIS	Regulation Impact Statement
the department	Commonwealth Department of Sustainability, Environment, Water, Population and Communities
the minister	Commonwealth Environment Minister
the Report	The Australian Environment Act: Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*, October 2009
the Review	The Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*

1) BACKGROUND

1.1 History of Government Involvement in Environmental Issues

The environment provides for essential ecosystem services and underpins economic, social, cultural, spiritual, recreational and aesthetic values that are fundamental to our quality of life.

Ecosystem services provide life-sustaining benefits and maintain the conditions for life on earth. For example:

- green plants produce oxygen and remove carbon dioxide from the atmosphere;
- biodiversity supports economies, and forms the basis of our primary production industries and pharmaceutical industries;
- biodiversity provides many other important scientific, human and cultural services and is fundamental to the culture of Indigenous peoples; and
- parks, wilderness areas and open spaces offer scenic and peaceful places to relax and exercise, and provide a focal point for community gatherings and recreational activities.

Defining Ecosystem Services

Australia's Biodiversity Conservation Strategy 2010-2030 defines ecosystem services as:

> *'Ecosystem services are produced by the functions that occur in healthy ecosystems. These functions are supported by biodiversity and its attributes, including the number of individuals and species, and their relative abundance, composition and interactions. Ecosystem services can be divided into four groups:*
>
> *- provisioning services (e.g. food, fibre, fuel, fresh water)*
>
> *- cultural services (e.g. spiritual values, recreation and aesthetic values, knowledge systems)*
>
> *- supporting services (e.g. primary production, habitat provision, nutrient cycling, atmospheric oxygen production, soil formation and retention)*
>
> *- regulating services (e.g. pollination, seed dispersal, climate regulation, pest and disease regulation, water purification).'*

Despite significant effort and resources allocated to manage environment threats through conservation programs and natural resource management, biodiversity decline continues to be observed in Australia and other parts of the world.

A fundamental cause of environmental damage is that the environment has traditionally been considered as a 'free' resource and therefore the costs of using environmental resources have not been given adequate weighting in our decision-making.

Many environmental resources, ecosystem services and heritage places have a public good or common property quality. In the absence of clearly defined property rights, this can lead to over consumption or degradation, without consideration of broader societal impacts.

These issues have been recognised by governments for many years. The Australian states have been active for more than a century in matters such as soil conservation, land use planning, protection of rivers and beaches, and regulation of sewerage, water supply and industries such as mining, forestry and fishing. With the rise of the environmental movement in the 1970s and concomitant increases in public recognition of these issues by governments and the community, all governments have been, and continue to be, active in legislating to protect the environment and manage natural resources. This reflects the clear community view that government intervention, in the form of regulation, is one method by which environmental goods, ecosystem services and heritage places can be appropriately managed, and scarce resources allocated to their most valued function.

1.2 The Commonwealth Government's Role in Environmental Regulation

While the states and territories traditionally held responsibility for environmental issues in Australia, the Commonwealth has substantial power to make laws in relation to the environment. This arises from a number of heads of power in section 51 of the Constitution, primarily (but not limited to) the external affairs power (through the adoption of international treaties) and powers related to trade and commerce and trading corporations.

In relation to the external affairs power, Australia is a party to more than 60 treaties which relate to the protection of the environment. The full list is available at www.dfat.gov.au/treaties.

While the Commonwealth may rely on the states and territories in implementing those treaties, it is the primary responsibility of the Commonwealth, not state or territory jurisdictions, to meet Australia's international obligations under them. This is recognised in the Intergovernmental Agreement on the Environment (see 1.3 below) where all Australian jurisdictions recognise that entering into international agreements relating to the environment and ensuring that international obligations relating to the environment are met by Australia is a Commonwealth responsibility.

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the Australian Government's primary regulatory mechanism for protecting the environment. In particular, the Act regulates:

- matters of national environmental significance (NES);
- the environment and heritage generally in relation to Commonwealth actions and Commonwealth areas, including Commonwealth national parks and reserves; and
- international trade in wildlife.

These protections are afforded within the object of promoting ecologically sustainable development (ESD) and aiming to address over-consumption of common-property natural resources.

The EPBC Act also has a general object to promote the conservation of biodiversity. After more than ten years of the Act's operation, it has become increasingly clear that the 'old' approaches of concentrating on individual projects, individual matters of NES and individual species are failing that object. As many of the most significant threats to our environment, such as habitat loss, invasive species and climate change, operate at a landscape or national level, there is a need to move to more strategic, regional levels of protection and more ecosystem based approaches if conservation of our biodiversity is to be improved.

Another general object of the Act is to promote a cooperative approach to the protection and management of the environment involving governments, the community, landholders and indigenous peoples. The Act seeks to promote a partnership approach with all stakeholders using efficient and timely processes.

Different arrangements for the protection and management of the environment have, however, in some instances led to duplication between the Commonwealth, the states and territories with consequential inefficiencies in processes and, in the views of stakeholders, confusion about the different roles of different governments and a proliferation of red tape. There is a clear need to fine tune the role of the Commonwealth, to simplify its own processes and to harmonise them better with other levels of government if delays and inefficiencies in the current system are to be eliminated and more cooperative approaches among stakeholders are to be encouraged.

The EPBC Act is just one tool available to the Australian Government to achieve its objectives with respect to the environment. Other Commonwealth environmental regulation is contained in various pieces of legislation dealing with issues such as fuel quality standards, hazardous waste and national environment protection measures.

In addition to regulation, the Australian Government uses a mix of non-regulatory tools to achieve environment protection outcomes. The other tools include program initiatives such as the National Reserve System and Caring for our Country and market based approaches such as Environmental Stewardship. The Australian Government uses this range of approaches in a complementary mix, of which the EPBC Act is a part.

Under the Caring for our Country initiative, the Australian Government makes National Partnership payments to state and territory governments. These payments are not associated with the administration of the EPBC Act and are not addressed in this Regulation Impact Statement (RIS).

1.3 Respective Commonwealth and State Responsibilities

In 1992, the Council of Australian Governments (COAG) set out its agreement on the roles and responsibilities of each level of government in Australia in the Intergovernmental Agreement on the Environment. The agreed roles and responsibilities of the Commonwealth Government related to: matters of foreign policy relating to the environment; ensuring that the policies and practices of a state do not result in significant adverse effects in relation to the environment of another jurisdiction; facilitating the cooperative development of national standards and guidelines; and managing its own areas of responsibility.

In 1997 COAG initiated a major review of the environmental roles and responsibilities of all levels of government and the outcomes of this review were formally agreed in the Heads of Agreement on Commonwealth and State roles and responsibilities for the Environment (the

1997 Agreement). As noted in the 1997 Agreement, the Commonwealth environmental legislation was reformed in order to give effect to the Agreement, resulting in the commencement of the EPBC Act in 2000. The 1997 Agreement identified the matters of NES which are the foundation of Commonwealth involvement in environmental and heritage protection.

The initial matters of NES were:

- World Heritage properties;
- wetlands of international importance;
- listed threatened species and ecological communities;
- listed migratory species protected under international agreements;
- the Commonwealth marine environment; and
- nuclear actions.

Since the inception of the EPBC Act new matters of national environmental significance have been added:

- National Heritage places (2003), identified as an initial matter of NES in the 1997 Agreement but agreed at the time to be subject to further negotiation and development; and
- the Great Barrier Reef Marine Park (2009).

In accordance with the 1997 Agreement, the EPBC Act set out a new conceptual framework with clear roles for the different levels of government. However, while the Commonwealth Government deals with the matters of NES and the states and territories deal with matters of state, regional or local significance, obviously, on occasion, the matters coincide. Agreements and procedures exist to ensure cooperation in such matters but, as noted above, there is a general view that these arrangements can be improved.

1.4 Outline of the Environment Protection and Biodiversity Conservation Act 1999

The EPBC Act is the Australian Government's central piece of environmental legislation. As noted in section 1.2 above, it provides a legal framework to protect and manage Australia's environment, heritage and biodiversity, especially matters of NES. The EPBC Act also protects the environment in relation to Commonwealth land and Commonwealth actions, even if none of the eight matters of NES is likely to be significantly impacted.

These protections are primarily afforded by the EPBC Act through its environmental impact assessment provisions. However, the Act also has other regulatory elements namely in relation to international wildlife trade, the control of access to biological resources in Commonwealth areas, the establishment of the Australian Whale Sanctuary, the operation of national parks and other reserves and the control of use of protected species in Commonwealth areas.

The Act also has a comprehensive compliance and enforcement regime associated with these regulatory elements.

In addition to its regulatory role, the EPBC Act also performs a range of other important functions, such as:

- identification of the matters of NES;
- identification and management of World, National and Commonwealth heritage places, properties and values;
- identification and documentation of Australia's threatened species and ecological communities;
- declaration and management of Commonwealth national parks and other protected areas (terrestrial and marine); and
- development of conservation advice, threat abatement plans, recovery plans and wildlife conservation plans.

The majority of groups or individuals (including companies) most impacted by the EPBC Act are those involved in the environmental impact assessment regime whose actions may have a significant impact on a protected matter under the Act. This includes landowners, developers, industry, farmers, councils, state and territory agencies, and Commonwealth agencies.

Commonwealth agencies may also be affected if their activities are likely to have a significant impact on the environment.

The EPBC Act's environmental impact assessment regime comes into play when a proposal has the potential to have a significant impact on a protected matter. When a person (a 'proponent') wants to take such an action (often called a 'proposal' or 'project') he or she must refer the project to the Department of Sustainability, Environment, Water, Population and Communities (the department) for assessment of its environmental impacts under the EPBC Act. This 'referral' is then released to the public, as well as relevant state, territory and Commonwealth ministers, for comment on whether the project is likely to have a significant impact on matters of NES. The Commonwealth environment minister (the minister) or the minister's delegate will then decide whether the likely environmental impacts of the project are such that it should be assessed under the EPBC Act. Any relevant public comments are taken into consideration in making that decision.

There are five different levels of assessment, depending on the significance of the project and how much information is already available. Each level involves considering technical information assembled by the proponent and comments made by the public.

Other individuals, groups or companies affected by the EPBC Act include those requiring permits in relation to international trade in wildlife, access to biological resources, activities in protected areas or other activities regulated by the EPBC Act.

2) THE PROBLEM

2.1 The Report – Independent Review of the Environment Protection and Biodiversity Conservation Act 1999

As required under section 522A of the EPBC Act, the Minister commissioned an independent review of the operation of the EPBC Act and the achievement of its objectives on 31 October 2008. Dr Allan Hawke AC undertook the review supported by an independent panel of experts - the Honourable Paul Stein AM, Professor Mark Burgman, Professor Tim Bonyhady and Ms Rosemary Warnock. The panel provided expert advice on a range of issues, including law and the judicial system, environment and climate science, risk analysis, property rights, public participation in environmental approval processes, ethical standards, health, safety and industry knowledge.

In addition to the requirements set out in section 522A, the terms of reference for the review included:

> *'to reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining appropriate and efficient environmental standards in accordance with the Australian Government's deregulation agenda'*

The final report of the Independent Review was tabled in Parliament and publicly released on 21 December 2009. Dr Hawke's report (the Report) provided a comprehensive assessment and included recommendations for substantial improvements to the EPBC Act's operation and administration. The Report concluded that failure to implement improvements would be likely to have serious environmental, social and economic impacts for the country.

The government's response to the Report is the subject of this Regulation Impact Assessment. This RIS should be read in conjunction with the Report (http://www.environment.gov.au/epbc/review/publications/final-report.html) and the government response to the Report (http://www.environment.gov.au/epbc/reform/).

2.1.1 Consultation During the Review

An extensive public consultation process was undertaken during the review to ensure that the Report incorporated as wide a range of views as possible. Public participation began early in the review process. To promote accessibility and target as many stakeholders as possible various approaches to consultation, as outlined below, were used.

Public consultation was initially conducted by written submission. On 31 October 2008, Dr Hawke called for public input into the Review and encouraged all interested parties to make a written submission to the review. This coincided with the release of a discussion paper, which aimed to stimulate public discussion about the Review by providing an explanation of the main provisions of the EPBC Act, a summary of how the provisions had been implemented since the EPBC Act commenced in July 2000, and posing questions about the operation of the EPBC Act. This period for making written submissions closed on 19 December 2008 and 220 written submissions were received.

The second stage of the public consultation process was a series of face-to-face consultations with stakeholders in each Australian capital city. Dr Hawke held over 140

meetings. To ensure broad-based input into the Review, these meetings were targeted and sought input not only from people who had provided a written submission, but also from other stakeholders with a known interest in the EPBC Act.

The third stage of the public consultation process was through the release of an Interim Report. The Interim Report highlighted the key issues raised throughout the first two stages of the public consultation process. Written submissions were invited in response to the Interim Report. The period for making submissions closed on 3 August 2009, and a further 119 written comments were received.

While preparing the final report, Dr Hawke hosted a number of expert workshops to explore issues in greater detail with key sectoral stakeholders. Workshops held included the following groups:

- International Council on Monuments and Sites (Australia) Heritage;
- environmental non-government organisations; and
- academics.

Topic specific workshops were also held on:

- biodiversity; and
- infrastructure.

The submissions to the Review were received from a wide range of sectors. Out of the 339 written submissions, 32% of were from environmental non-government organisations. A significant number of submissions were received from other non-government organisations, such as industry bodies (21%), and individuals (21%). Submissions were also received from research groups or academics (8%) and the corporate sector (5%). Government bodies made 13% of submissions.

Some of the main issues recurring in submissions are briefly outlined below:

- concern that, despite the EPBC Act, Australia's biodiversity continues to decline;
- how the EPBC Act can better deal with cumulative and regional impacts of development, including through more strategic assessments and more landscape-scale and ecosystem based approaches;
- the transparency and accountability of current processes of the EPBC Act;
- the appropriate role for Commonwealth, state, territory and local governments;
- concern about the complexity of processes and the level of 'red tape' in the EPBC Act and the challenges for industry in compliance and the challenges for the community in trying to participate in such a complex process;
- concern about unnecessary duplication of processes under the EPBC Act with approvals required under other Commonwealth, state or territory legislation;

- concern about the duplication of, and inconsistencies between, processes and lists for threatened species and communities and heritage places in various jurisdictions;

- the possibility of expanding the matters of NES need to include matters such as climate change impacts or greenhouse gas emissions, land clearance and water use; and

- whether the exemption from the provisions of Part 9 of the EPBC Act for areas covered by a Regional Forest Agreement is appropriate.

The full set of submissions is available at:
http://www.environment.gov.au/epbc/review/submissions/index.html.

2.1.2 Consultation on the Government Response

The final Response reflects whole-of-government agreement and has incorporated the concerns and views of all relevant agencies from across the Australian Government.

After the Report was tabled in the Parliament, the Australian Government, through the department, consulted with states and territories regarding the recommendations in the Report. This consultative process was undertaken as many of the recommended approaches in the Report can only be implemented in cooperation with states and territories.

The department conducted a series of consultations with representatives from all first ministers' departments and other relevant state and territory agencies to discuss recommendations of importance to each state and territory. These meetings were held with all jurisdictions during March and April 2010. During these meetings states were invited to provide their written views on the Report.

In addition to consultations meeting with states and territories, the department also briefed the advisory committees under the EPBC Act: the Threatened Species Scientific Committee, the Indigenous Advisory Committee and the Australian Heritage Council. All advisory committees were invited to provide their written views on the final Report.

2.1.3 Future Consultation

The Australian Government is committed to extensive collaboration with state and territory governments and other stakeholders in implementing its response to the Report. This collaboration will include consultation on a number of the reform initiatives announced when the government released the response on 24 August 2011 (refer chapter 11). This will provide an important opportunity for a wide range of stakeholders to be fully informed during the next phase of the development of the amended Act and to provide comment.

A number of recommendations identified in the preferred option, including those outlined below, will be progressed through intergovernmental processes, including through COAG. These will be subject to COAG's regulatory impact assessment requirements.

2.2 Deficiencies of the Current Regulatory Framework

The Report notes that, while the EPBC Act has made a significant contribution to environmental regulation in Australia, it is a product of the late 1990s and environmental circumstances, science and policy have all changed significantly since then. The Report recommends reforms to modernise the legislation and reduce the regulatory burden while maintaining or enhancing the protections provided to the environment.

In particular, the Report concludes that emerging pressures demand adaptive responses and a rethinking of legislative frameworks. The Report also concludes that failure to adapt is likely to have serious environmental, social and economic impacts.

In particular, the Report found that the current EPBC Act is failing to maximise landscape scale and whole of ecosystem approaches to environmental management, a significant deficiency because increasing and cumulative threats to the environment, such as climate change and invasive species, cannot effectively be addressed at a single project level.

The Report also found failure of the Act's capacity to facilitate more co-operative development of national environmental standards and guidelines and to address the duplication, complexity and ineffectiveness of processes, including between different levels of government. The Report concluded that the current regulatory framework should be simplified and streamlined to eliminate these deficiencies.

2.2.1 Continuation of Environmental Degradation

Australia has the highest rate of biodiversity decline in the Organisation for Economic Cooperation and Development (OECD) countries. This reflects the conclusions of the Australia State of the Environment 2001 and 2006 reports. This decline in biodiversity has been measured in several ways, including the rate of species extinction, the increase in the number of threatened species and the loss of genetic diversity in many common plants and animals through reduced population sizes and localised extinctions. Further measures of the decline of biodiversity are the loss of extent of habitat, the degree of fragmentation and degradation of forests, rivers and other ecosystems, and declining populations of vertebrate animals.

Biodiversity decline (and other environmental harm) is directly caused by a range of threatening processes. In Australia, the major threats include habitat loss and invasive species. In marine and coastal environments key pressures include pollution and nutrient run-off, invasive species, by-catch and over-fishing. Many of these threats are being intensified by climate change.

These national threats are consistent with the internationally recognised main threats to biodiversity: climate change, habitat loss and invasive species.

Most attention at present is focused on reactively addressing the symptoms of biodiversity loss, instead of focusing on the underlying causes, such as the pressures that lead to loss of habitat and then by addressing these problems on a broad scale.

The economy is undermined as increasing costs are incurred and increased levels of public expenditure are required to compensate for diminishing 'ecosystem services', including provision of clean air and water, carbon sequestration, and pollination of crops. Invasive

species have substantial impacts on sectors including industry, agriculture and tourism. The emotional and spiritual well being of urban and rural communities, and of Indigenous peoples, is likely to diminish as the unique character of the Australian environment is lost.

In 2009, the Natural Resource Management Ministerial Council commissioned a report, *Australia's Biodiversity and Climate Change: A strategic assessment of the vulnerability of Australia's biodiversity to climate change* by the Biodiversity and Climate Change Expert Advisory Group. This report outlined that the magnitude and rate of change of climate change poses a particularly severe threat to natural ecosystems. The report found that the interaction of climate change and existing stressors means that significant change is required to Australia's policy and management frameworks, including a shift to a landscape approach to biodiversity conservation in order to effectively address current and emerging threats to biodiversity.

The Report notes that adoption of a landscape approach to biodiversity conservation involves taking a holistic approach to biodiversity management and recovery actions. While there is provision in the current EPBC Act to manage some areas on a whole of ecosystem scale, protection of biodiversity at an ecosystem level is at present limited to ecosystems that occur within areas protected for other reasons; that is, in World Heritage areas, National or Commonwealth heritage places, wetlands of international importance, Commonwealth marine areas or Commonwealth reserves.

In the *Australia's Biodiversity and Climate Change* (2009) report, the Biodiversity and Climate Change Expert Advisory Group advised that:

> *'biodiversity management objectives will need to be reoriented from preserving all species in their current locations to maintaining the provision of ecosystem services through a diversity of well functioning ecosystems. Concepts such as resilience provide positive, proactive avenues for reducing the vulnerability of biodiversity to climate change'.*

2.2.2 Duplicative and Inefficient Processes

Since states and territories traditionally have responsibility for land use planning and environment and heritage protection, Commonwealth legislation that regulates similar matters can create duplication and regulatory overlap. This duplication is currently addressed in the EPBC Act through the provision to accredit state and territory processes. However, the criteria for eligibility for accreditation are heavily focussed on the process of the state or territory legislation rather than the environmental outcomes it can deliver. This is an inflexible approach to accreditation which makes implementation problematic.

The EPBC provides for the creation of bilateral agreements between the Commonwealth and a state or territory government. These agreements allow for the accreditation of environmental assessment and approval processes. Assessment bilateral agreements are in place with all states and territories. There has only ever been one approvals bilateral agreement in place, with the New South Wales Government in relation to the Sydney Opera House despite such agreements having considerable capacity to reduce duplication between governments, reduce timeframes and avoid inconsistencies between government approvals.

In its submission to the Review, the New South Wales Government highlighted this issue stating that the implementation of bilateral agreements has been characterised by complexity

and delay. The New South Wales Government also notes that this complexity and delay has generated considerable uncertainty and unnecessary cost to business. The approvals bilateral for the Sydney Opera House expired in December 2010.

2.3 Potential Solutions

The Report outlines a number of areas where the operation of the EPBC Act could be improved. The key areas for regulatory improvement that the government has accepted for amendment in the proposed legislation are:

- moving the focus of the Australian Government's scale of assessment to landscape scale environmental impact assessments with greater use of strategic assessments and regional environment planning tools;

- taking a more proactive approach to individual project assessments to facilitate earlier engagement on projects, reducing the complexity of processes and remedying inconsistencies between the Commonwealth and state and territory environmental impact assessment systems; and

- providing a more flexible approach to planning – in particular by reducing the prescriptive nature of management planning for heritage and other protected areas and by allowing, where appropriate, greater use of regional and whole of ecosystem strategies for recovery plans and threat abatement plans.

2.3.1 Scale of Assessment

The Report recognises the need to shift management approaches to being preventative, proactive and targeted at a scale where they will be most effective. This means an increased focus on strategic approaches including regional environment planning and strategic assessments.

Since a class of actions can be approved under a strategic assessment, and that class of actions would cover a range of projects that would otherwise need to be individually referred under the EPBC Act, putting more strategic assessments in place will reduce the number of referrals that are required. This will result in significant cost savings for both business and government.

2.3.2 Project Assessment and Approval Processes

The Independent Review of the EPBC Act found that the Act was performing effectively and made 71 recommendations for further improvement. Of these recommendations 21 identified areas in which there were opportunities to strengthen outcomes, improve legislation to increase business certainty or take a more strategic approach.

The current environmental impact assessment regime under the EPBC Act is criticised as being duplicative, complex and resource intensive for business, government and the community. The process established under the current legislative framework is perceived as lacking transparency and can be difficult for stakeholders to meaningfully engage with. It also perceived that it does not always deliver expected outcomes for business, such as timely decisions or certainty, and nor does it necessarily deliver good environmental outcomes.

One of the major issues with the current environmental impact assessment regime is a lack of focus on early engagement between proponent and regulator, so that by the time a proponent or the department becomes aware that referral under the EPBC Act may be required, the planning process can be well advanced and incorporation of EPBC Act requirements may require costly project redesign.

2.3.3 Management and Other Plans

The EPBC Act provides for a range of management and other plans to be developed including management plans for heritage places, Commonwealth reserves and Ramsar sites and a range of other plans dealing with recovery actions for species. The Report found that the current provisions governing the preparation of these plans are too prescriptive and inflexible and, as a result, are sometimes inhibiting the most effective environmental outcomes.

The RIS will deal with each of these potential solutions in turn, including an analysis of the mechanisms by which they will be implemented as identified in the government response to the Report.

The RIS also examines other recommendations of the report that are not agreed in the government response, but have stakeholder interest, including recommendations relating to merits review and access to courts, and whole of environment assessments.

3) OBJECTIVE OF GOVERNMENT ACTION

The objective of substantial reform to the Commonwealth's current environmental legislation (as a response to the Report) is to improve the protection of Australia's environment, heritage and biodiversity while also promoting the most efficient, timely and cooperative approach to such protection, thereby minimising the regulatory burden on those individuals and groups affected by the legislation. Put another way, the government is seeking to maximise the extent to which the EPBC Act can meet its objects as set out by the Parliament for the national interest.

4) THIS REGULATION IMPACT STATEMENT – OVERVIEW

This RIS deals with the overall regulatory impact arising from the government response to the Report.

Individual assessment of the regulatory impact of each of the recommendations and findings accepted by the Australian Government is not considered practicable given the complex linkages and interdependence between many of the recommendations.

To allow a meaningful assessment of the regulatory impact of the government response to the Report, the recommendations and findings, accepted by the Australian Government, have been categorised in a manner that is consistent with the implementation of the proposed reform package. This categorisation follows the three themes identified in section 2.3 above as solutions to improve the current EPBC Act.

The RIS is supported by two economic reports that have modelled and analysed specific impacts of the proposed reforms associated with scale of assessment (strategic assessments – refer chapter 5 of the RIS) and the EPBC Act assessment and approval process (refer chapter 6 of the RIS). The reports are attached to the RIS and referenced throughout the analysis:

- Cost Benefit Analysis of EPBC Act Strategic Assessments (Access Economics, March 2011)

- Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the EPBC Act (Deloitte Access Economics, April 2011)

Many recommendations and findings are included in more than one category, which is a reflection of the complex linkages and interdependence between the recommendations and findings.

Many of the proposed changes relate to government processes, and will not have a regulatory impact on business or the not-for profit sector. Other changes are likely to have only a minor impact on the business and not-for-profit sectors.

Consistent with the Best Practice Regulation Handbook, this RIS examines those changes that are likely to have an impact on the business and not-for-profit sector, but which are not minor or machinery in nature or do not substantially alter existing arrangements. Details on the changes not covered explicitly in this RIS can be found in the government's response to the Report.

5) SCALE OF ASSESSMENT

Recommendations of the Report that are primarily analysed in chapter 5 of the RIS include:

Recommendation Number	Recommendation
4	EIA efficiency measures – strategic assessments only
6	Strategic assessments and bioregional planning.
8	Ecosystems of national significance.
19	Flexibility for key threatening processes.
20	Flexibility for threat abatement plans.

5.1 The Problem

The most significant threats to Australia's biodiversity – such as habitat loss, invasive species and climate change – operate at an ecosystem, landscape, continental and global scale. Yet, up until now, Australia's national environmental assessment regime has focussed almost entirely on individual projects and their impacts on individual threatened plants, animals, and ecological communities, without thorough assessment of the interconnected nature of species and their habitats with broader ecosystems and landscapes. We must change the scale at which our regulatory system operates if we are to better address the scale of challenges faced by Australia's declining biodiversity.

Ecosystem resilience is built by creating and maintaining connectivity between habitats, maximising the ability of ecosystems to maintain their functions and allowing species to migrate as conditions change. Australia's regulatory system needs to adapt so as to integrate consideration of ecosystem function, and to better promote key resilience-building strategies.

The current project by project environmental assessment regime, which applies a 'significant impact' test, does not adequately assess cumulative impacts on protected matters. That is, while small individual projects may not result in a significant impact on a protected matter, the cumulative impact of a number of small projects, implemented by different proponents, across a landscape may have a significant impact.

The project by project nature of the current environmental assessment regime is resulting in a rapidly increasing number of assessments. Often several projects are focused on particular geographic areas or are similar project types, and therefore there are opportunities to increase the efficiency of assessment processes by assessing multiple projects together using a strategic assessment approach.

The project by project approach also puts a considerable burden on the community in responding to a large number of often similar proposals through the public consultation processes of the Act.

Strategic early planning that considers development as well as ecological needs on a landscape scale has the potential to deliver regulatory efficiency, business certainty and better protection of matters of national environmental significance.

5.1.1 Current Project by Project Environmental Impact Assessment under the EPBC Act

As noted in sections 1.2 and 2.2 above, the EPBC Act comes into play when a proposal has the potential to have a significant impact on a protected matter. When a proponent wants to take such an action, he or she must refer the project to the department for assessment of its environmental impacts under the EPBC Act. After a public consultation process, the minister or the minister's delegate will then decide whether the likely environmental impacts of the project are such that it should be assessed under the EPBC Act as follows:

- **Controlled Action (CA):** Action is subject to the assessment and approval process under the EPBC Act
- **Non Controlled Action (NCA):** Approval is not required if the action is taken in accordance with the referral.
- **Non Controlled Action Particular Manner (NCA/PM):** Approval is not required if the action is taken in accordance with the manner specified
- **Clearly Unacceptable (CU):** The action is clearly unacceptable and is not approved to proceed under the EPBC Act

A simplified flow chart that outlines the referral, assessment and decision (whether to approve) process under the EPBC Act can be found at Attachment A to this RIS, or at the following web link: http://www.environment.gov.au/epbc/assessments/pubs/flow-chart.pdf

Table 5.1 below sets out the number of referrals received and decisions on those referrals from the commencement of the EPBC Act until March 2011.

Table 5.1: Referrals and determinations since the commencement of the EPBC Act

Determination	Total number	Percentage of total number of referrals (approx)
Total referrals received	3840	100
Controlled Action	955	25
Non-Controlled Action (Particular Manner)	718	18.5
Non-Controlled Action	1910	50
Clearly unacceptable	7	0.2

Note: Data is valid until March 2011, and referrals yet to receive a determination were not included in the above table – approximately 250 (6.5%)

Proposals determined likely to have a significant impact on matters of NES must undergo formal assessment and receive final approval before they can proceed. To March 2011, 955 (or 25% of all proposals referred) have had to undergo further assessment and receive approval under the EPBC Act before they could proceed.

5.1.2 Strategic approaches to environmental impact assessment

Strategic Approaches

In line with an overarching theme of the Report, the amended Act will result in an increase in the use of a range of strategic approaches. Strategic approaches are those mechanisms that

1. include comprehensive consideration of the principles of ecologically sustainable development; that is environmental, social and economic matters;
2. occur early in the planning stage of development and aim to approve classes of actions so as to remove the need for individual assessment of actions;
3. assess either a geographical region or a plan, policy or program and as such are on a broader scale than individual project assessments; and
4. will typically occur in close collaboration with states and territories so as to reduce duplication.

In this RIS the term 'strategic approaches' is used to describe strategic assessments of plans, policies or programs and regional environment plans. The term also covers conservation agreements where they have the characteristics outlined above.

A strategic assessment of a class of actions or a regional environment plan can better address the cumulative impacts associated with multiple and complex developments and, by providing the 'rules' by which future developments can proceed in an ecologically sustainable way, can significantly reduce the regulatory burden on industry. Provided future projects were designed in accordance with the approved arrangements, they would not need to be individually referred. A large number of future referrals would therefore be avoided.

Strategic approaches provide the opportunity to consider the conservation of matters of national environmental significance in the context of development planning at a landscape scale. Important ecosystem values and functions can be identified through these processes, however currently the Act does not provide specifically for their protection.

Strategic assessments can already be carried out under section 146 of the EPBC Act and regional environment planning provisions already exist under section 176 of the EPBC Act, currently referred to as 'bioregional' planning. The application of 'bioregional' planning to date has primarily focused on the marine environment. Bioregional planning is primarily conducted in Commonwealth areas, but can be undertaken in cooperation with states and territories for other areas as prescribed under section 176 (2).

While these provisions currently exist in the EPBC Act, they have been little used although, in the case of strategic assessments (see below), experience suggests significant capacity to resolve current problems.

The proposed changes build on amendments to the EPBC Act made by the Parliament in 2006, which came into operation in 2007. The 2006 amendments provided for the minister to use strategic assessments, bioregional plans and conservation agreements as the basis for approval of actions or classes of actions. The changes now proposed are designed to facilitate greater use of these strategic approaches for that purpose, enabling consideration of development planning and protected matters. Under the proposed changes, strategic approaches will also be utilised in order to provide for the timely identification and protection of nationally important ecosystem values and function at a landscape scale, informed by a thorough and transparent public process.

The example of development in the Western Sydney Growth Centres provides some perspective of the size and scope of issues that environmental regulators consider when conducting multiple project assessments in a single area and of the substantial savings such an approach can delivery across the economy.

Western Sydney Growth Centres (Access Economics)

'In late 2009 the Commonwealth and NSW governments signed an agreement to undertake a strategic assessment of the Western Sydney Growth Centres. These new growth centres are expected to provide 181,000 new homes and the strategic assessment will examine NSW Government proposals to manage and protect matters of national environmental significance as part of development planning and implementation. If approved, further approvals for individual developments under the EPBC Act will not be needed.'

Source: Access Economics analysis

The program in Western Sydney will endeavour to strike a balance between Sydney's growth and conservation of biodiversity on the 275,000 hectare Cumberland Plain. Sydney's growth is blocked to the north and south by Ku-ring-gai National Park and Heathcote and Royal National Parks respectively and to the west by the Blue Mountains National Park, leaving only Cumberland Plain for substantial development growth. About 140,000 hectares (50%) of the Cumberland Plain has already been lost to urban development. The new growth centre comprises 27,000 hectares or 10% of the total Cumberland Plain. The NSW Government predicts that the population of Sydney will grow to 6 million by 2036, creating demand for 770,000 new dwellings (NSW Department of Planning 2005). It is expected that approximately $7.5 billion will be spent on regional infrastructure over the next 30 years to support the 500,000 additional residents in the new growth centres.

The department estimates under a 'business as usual' scenario up to 510 referrals could be expected in the area over the 30 year life of the program. A key issue for the department in Western Sydney is protection of the Cumberland Plain Woodland, a listed critically endangered ecological community under the EPBC Act, only found in the Cumberland Plain. The original extent of this ecological community has been significantly reduced over time due to agricultural and urban uses. Nearly all remaining areas are regrowth. According to strategic assessment reports, about 10,703 hectares (9% of pre-1750 condition) remains in scattered remnants across the Cumberland Plain, and the majority of the remaining bushland is privately owned. The NSW Scientific Committee (2008) assessed the status of the NSW listed community in order to determine changes over a nine year period from 1998 to 2008, and it was found that the remaining extent of the ecological community had declined by 442 hectares or 5.2% of its distribution over that time period.

5.2 Objective of the Government Response in Relation to the Scale of Assessment

The primary objective of the government response in relation to the scale of assessment and approval is to enable more effective consideration of the broader landscape and more

effective ecosystem management in the Commonwealth's environmental impact assessment regime, while minimising duplication and providing greater certainty for business.

These are vital elements of the government's overall objective for its reform. Greater Commonwealth involvement at the landscape or regional level would lead to better environmental outcomes because more consideration would be given to natural areas (broader than specific project sites) that are important to ensure the resilience, health and productivity of ecosystems.

A broader landscape and ecosystem approach would also result in a reduced regulatory burden through greater upfront certainty of where development can occur and under what conditions. Further, this approach will result in less overlap with states and territories, by virtue of their involvement in the broader assessments.

5.3 Options

5.3.1 Status Quo – Option 1

Currently, proposals that may result in a significant impact on a matter of NES must be referred for assessment under the EPBC Act. If it is determined that a significant impact is likely, the proposal must undergo comprehensive assessment and cannot proceed until it has been approved by the minister.

Retaining the status quo would result in a continuing need for the referral of all proposals that are likely to have a significant impact on matters of NES. This would result in the continuation of the existing problems of unnecessary regulatory burden and limited environmental outcomes. Additionally, the number of projects being referred is likely to increase as environmental degradation and development pressures continue and as the total number of listed matters of NES also increases.

Retaining the status quo will also constrain our effectiveness in managing cumulative, detrimental environmental impacts resulting from multiple projects at an ecosystem or landscape scale. Lack of planning for the maintenance of ecosystem resilience has the potential to result in continued ecosystem degradation and loss of important ecosystem services such as the provision of clean air, clean water and healthy soil for food production.

5.3.2 Strategic Approaches: Strategic Assessments, Regional Environment Plans and Ecosystems of National Environmental Significance – Option 2

Implementation of the government response to the relevant Report recommendations will enhance the current provisions in the EPBC Act to support the Commonwealth's shift of effort and resourcing from project by project assessments to strategic approaches, and will provide for listing of ecosystems of national significance as a new matter of NES.

The shift to a more strategic approach to environmental regulation will comprise three levels of planning where the Commonwealth may be involved: regional environment planning, strategic assessments and project by project assessments, reformed in line with the government response.

The first level will be regional environment plans, which would, in partnership with state and territory governments, identify at a regional scale which types of development should occur where and which areas are environmentally important and should be managed accordingly. The bioregional plans currently provided for under the EPBC Act are primarily undertaken in Commonwealth areas. Regional planning arrangements under the amended Act will not be restricted to Commonwealth areas. They will be conducted in priority areas, which will be determined in partnership with state and territory governments. Such planning provides for a landscape scale approach to biodiversity conservation, including matters of national environmental significance. Regional environment plans will provide for approval of classes of actions so that where subsequent individual projects are in accordance with the broader classes of actions approved, they will be exempt from requiring individual referral and approval under the EPBC Act.

Strategic assessments will continue to apply to plans, policies and programs prepared by the states or territories or other parties. Like regional environment plans, strategic assessments will continue to provide for approval of broad classes of actions so that where subsequent individual projects are in accordance with the broader classes of actions approved, they will be exempt from requiring individual referral and approval under the EPBC Act.

Increased strategic approaches will be prioritised in those regions where there is intensive resource development planned, where there is increased tourism pressure in sensitive regions and in areas of planned residential growth over multiple years. In some cases, existing state level planning processes and outcomes may be adequate for national purposes and could be assessed and endorsed under the strategic assessment provisions of the amended Act. A regional environment plan would look at the whole of the landscape, identifying areas of high environmental value that warrant protection and/or management to ensure the resilience, health and productivity of natural ecosystems in the area.

Current experience delivering strategic assessments suggests that each new strategic assessment will take approximately two to three years to assess and complete. A regional environment plan is expected to take approximately three years to deliver initially, with increased efficiencies likely in the future following successful delivery of the first plans. Benefits in the form of industry certainty around future development in the relevant region will be delivered immediately following the completion of each strategic assessment or regional environment plan, as any activity undertaken in accordance with approved classes of actions under the endorsed plan, policy or program will not require further consideration under the EPBC Act.

An example of this more strategic approach to environmental impact assessment is the recently completed strategic assessment of the Melbourne Urban Growth Boundary, the only strategic assessment (apart from fisheries assessments) completed under the existing Act. This strategic landscape approach has achieved good environmental outcomes and a reduction in regulatory burden: see case study box below.

In addition to the completed Melbourne strategic assessment, strategic assessments are underway in all other jurisdictions except the Northern Territory. This follows recommendations from the COAG Business Regulation and Competition Working Group encouraging more strategic assessments under the EPBC Act as a way of reducing the regulatory burden on business.

The Melbourne Urban Growth Boundary Strategic Assessment

The Victorian Government, in partnership with the Australian Government, has recently completed a strategic assessment of plans to provide for Melbourne's population growth to 2030 (*Delivering Melbourne's Newest Sustainable Communities*). Four new growth precincts will be established within 24,615 hectares, including 284,000 new houses, to the west, north and south-east of the city.

The strategic assessment is the first to be completed under the Australian Government's flagship environment protection legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). A key outcome is the creation of a new 15,000 hectare Western Grassland Reserve to be established through developer offsets for clearing of native grasslands in allowed areas within the designated growth areas.

The outcomes are a quantum shift in sustainable planning and protection of native vegetation. Rather than requiring individual developers to set aside *ad hoc* fragments of native vegetation, often with limited long term conservation benefits, offset monies will be used to acquire the highest quality remnants of native grassland vegetation as part of a new consolidated reserve on the outskirts of the city. The reserve will be owned and managed by the Victorian Government under national park or similar status. The new reserve will ensure protection of 20% of remaining threatened native grasslands on the 2.4 million hectare Victorian Volcanic Plains Bioregion (compared to the current 2%) ensuring meaningful protection at a landscape and ecosystem scale.

Source: Access Economics analysis

An important element of the Commonwealth's proposed shift to a more strategic and proactive approach is implementation of the Report's recommendation in relation to ecosystems of national significance. Under the amended Act, ecosystems of national significance will be able to be identified and assessed under a strategic approach: a regional environment plan, strategic assessment, or a conservation agreement. Unlike other matters of NES, they will not be able to be nominated through a public process. Instead they will undergo robust scientific assessment and be considered in the context of development planning, together with social and economic factors.

The identification of ecosystems of national significance will enhance the environmental outcomes for all matters protected under the EPBC Act, particularly listed threatened species and ecological communities, as the whole of ecosystem approach to environmental management will allow effective consideration of emerging and broadscale threats, such as climate change and invasive species.

If a proposed action is likely to have a significant impact on a listed ecosystem of national significance, then it will need to be referred under the Act, in the same way as for existing triggers. However, the new trigger will not become a significant new impediment to development. As ecosystems of national significance will only be identified, assessed and listed through a strategic approach that incorporates development planning, these approaches will minimise uncertainty around what will and will not constitute a potentially significant impact on the listed ecosystem. This will provide certainty for acceptable actions to proceed without individual EPBC Act approval, and hence will reduce the overall regulatory burden for many businesses operating within the relevant regions.

By allowing one integrated assessment of an area, strategic approaches will also facilitate more effective utilisation of the range of other tools available to the government to manage

the environment, including funding through programs like Caring for our Country, threat abatement plans, recovery plans and other management plans.

Due to the fact that a shift to strategic approaches can be largely achieved through enhancement of existing processes, there is only a suite of relatively small regulatory change required to effectively implement this approach. Changes include the provision to identify ecosystems of national significance through strategic approaches and the extension of regional environment planning to all areas, rather than just Commonwealth areas.

In addition, new provisions will enable key threatening processes to be listed for other matters of NES, whereas currently key threatening processes can only be listed for threatened species and ecological communities under the EPBC Act. This will allow a transparent, coordinated and strategic approach to managing nationally significant elements of the environment for long term resilience and productivity. Threat abatement mechanisms, such as threat abatement plans, will continue to apply to address any new and established key threatening processes. Within 90 days of listing a key threatening process the minister can decide if a threat abatement plan should be made or adopted.

The proposed power to prepare regional environment plans unilaterally will only be able to be used as a last resort where all reasonable efforts to secure a joint approach with a state or territory have been unsuccessful. A variety of measures will be available to apply or accredit state and territory systems and processes that operate to deliver appropriate protection for matters of NES.

In cooperation with state and territory governments, the Australian Government will establish criteria to facilitate accreditation of existing state and territory planning processes where the accreditation criteria are met. Similarly, guidelines relating to the information requirements for strategic assessments will be developed to provide guidance for stakeholders during strategic assessments.

In some cases, individual projects will still require individual assessment because they do not fall into the class of actions approved under a strategic assessment or regional environment plan, or because the proponent elects to have their proposal assessed individually. As noted in section 6 below, the government is also proposing to enhance, simplify and streamline the processes for those projects that will require individual assessment and approval.

5.4 Impact Analysis

Noting that much of regulatory framework required to facilitate this shift to strategic approaches is in the current EPBC Act, this impact analysis considers the regulatory impact of the proposed changes beyond the status quo.

Impacts on Business:

> **Benefits**: With regional plans and strategic assessments in place, the requirement to refer individual projects will be negated for projects captured in the classes of actions approved under strategic assessments, with those classes of actions exempted from the need for individual referral. This will lead to reduced compliance costs, reduced delays and increased certainty for business.

By way of example, Access Economics (2011) estimates that the Melbourne Strategic Assessment, which was recently completed, has delivered cost savings in net present value in excess of $3.2 billion for the private sector over its lifetime to 2039. These savings flow from the result of reduced delay and bringing forward project approvals. The Melbourne Strategic Assessment has prevented the future referral of approximately 252 project referrals over this period (approximately 14 per year), and has also saved the substantial associated monitoring and compliance costs for those individual projects.

In its submission to the Review, the Australian Petroleum Production and Exploration Association modelled that a Liquid Natural Gas (LNG) project with a net present value of $2.7 billion would incur a delay cost of $300 million for each year the project was delayed. The individual projects required to develop a LNG project (such as exploration, extraction, transport and supporting infrastructure) could fall into the classes of actions approved under a strategic assessment, thus exempting the need for individual referral of each component of a LNG project. A strategic assessment of this type is currently underway in the West Kimberley region of Western Australia.

Since there will be clearer planning frameworks in place at a landscape scale relating to matters of NES, including protection of ecosystems of national significance, developers will have greater certainty generally about the compatibility of types of development and environmental values in areas where regional environment plans are in place. This information is vital for effective early project scoping and site selection processes.

The proposed changes will result in the addition of a new matter of NES, ecosystems of national significance. Like other matters of NES, this new trigger will have a significant impact test. However, because an ecosystem of national significance will only be identified, assessed and listed through a strategic approach, these approaches will provide up front guidance about acceptable actions. Only actions that are likely to have a significant impact on an ecosystem of national significance and that are not covered by a class of actions approved under the relevant strategic approaches would need to be referred under the Act. This is in line with the government's objective to maximise certainty for business, as well as reduce the need for individual assessments under the Act.

Overall the number of strategic approaches is likely to be small and so the number of actions needing to be referred because of the new trigger will also be low. Not all strategic approaches will necessarily result in the identification, assessment and listing of an ecosystem of national significance. For the small number of landholders who may have their development options restricted when their land is included in a listed ecosystem of national significance, the listing will bring new financial opportunities as the land will acquire a conservation value through the listing. The owner could for example receive a financial benefit by making the land available as an offset for development elsewhere in the assessed region, provided the land meets the offset criteria.

Costs: The increased use of strategic approaches is not likely to impose additional costs on proponents. To the contrary, Access Economics estimates that the seven current and completed strategic assessments undertaken under the Act will result in $5.92 billion in net present value benefit to the private sector, developers and proponents. This benefit results from the commercial benefits gained from reducing

uncertainty, risk and delays. Further, the identification of ecosystems of NES will include significant impact thresholds as are applied in a similar manner to other matters of NES. If a proponent does not wish to have their project considered as part of a strategic assessment, there will always remain the option to have the project individually assessed. The costs of referral will apply to the small number of proponents wishing to refer an action likely to have a significant impact on an ecosystem of national significance in the limited circumstances outlined above. The government notes that the EPBC Act contains provision for compensation if a restriction imposed under the Act amounts to an acquisition of property.

Notionally, the minister's ability to consider cumulative impacts in a strategic assessment may result in requirements on individual developers to take action to reduce their contribution to a cumulative impact that would not have otherwise been imposed on them by an individual approval under the EPBC Act. However, approval of a class of actions under a strategic assessment will typically make these conditions clear earlier in the development planning process.

States and territories ensuring that individual projects are undertaken in accordance with a strategic assessment may impose requirements through conditions of approval imposed under state or territory legislation. However, as state and territory governments may also consider these cumulative impacts through their current planning regimes, in most cases any requirements imposed on business to address cumulative impacts would not likely be a new impact on business. The collaborative nature of strategic assessments will ensure that the state or territory or Commonwealth requirements are dealt with in an integrated manner, rather than separately as they are now.

Impacts on the Community

Benefits: A recurring theme in community submissions to the Review was a concern about the continuing loss of biodiversity and the lack of capacity of the current EPBC Act to deal with cumulative impacts of habitat loss and broader thematic issues such as ecosystem resilience, provision of ecosystem services, and climate change. Another theme concerned the complexity of processes and the level of 'red tape' in the EPBC Act which militates against the community participating effectively in such a complex process.

A shift to more strategic approaches will benefit the community by enabling individuals and groups to engage more strategically in the broader issues they are most concerned about. By amending the Act to explicitly provide for the protection of ecosystems of national significance, the community can be assured that the most important national environmental assets will be protected through landscape-scale planning and Commonwealth regulation, thereby conserving them for future generations.

Costs: There will be no additional costs to the community in the more strategic approaches. Indeed, there should be reduced costs for the community in providing public comments on broader strategic assessments and regional environment plans than on numbers of individual projects.

Impacts on the Environment:

A shift to a more strategic approach will establish an increased capacity to achieve better environmental outcomes through addressing whole of ecosystem impacts at the landscape scale. The protection of existing matters of NES will be increasingly considered in the context of broader development planning at a landscape scale, thereby reducing cumulative impacts. The inclusion of ecosystems of national significance as a new trigger for the Act will result in better planning for ecosystem resilience and connectivity. Addressing impacts at this scale will allow effective, adaptive and preventative management of the causes of biodiversity loss and environmental degradation such as habitat loss, climate change and invasive species.

This approach will allow government resources to be invested more effectively in reducing environmental damage to iconic national assets, rather than waiting until ecosystems are damaged and then attempting high cost remediation with a low chance of success. The benefits of maintaining healthy ecosystems will flow through to both the economy and the community.

Impacts on Government

Commonwealth**:**

Benefits: A more strategic approach will enable the Commonwealth to deal more effectively with the most significant threats to our environment which operate at a landscape, regional and national level. Further, strategic approaches allow the Commonwealth to more effectively target spending in a cost-effective way in order to achieve protection of matters of national environmental significance and environmentally sustainable development. This will greatly assist the Commonwealth to meet Australia's international obligations under treaties like the Convention on Biological Diversity, which advocates an ecosystem approach to biodiversity conservation.

Over time, the increase in strategic approaches will result in less need for project by project assessments. There are significant savings to be realised through reductions in the number of project by project assessments that the Commonwealth conducts. Access Economics estimates that from the Melbourne Urban Growth Boundary Strategic Assessment, savings of $280,000 per year in net present value (NPV) for the Australian Government will be realised every year from 2012 to 2029 inclusive.

Costs: There will be resource implications for undertaking strategic approaches under the Act. The development of new guidance material, such as minimum information requirements for strategic assessments, will also require resourcing. Additional costs are likely for a transitional period as the Commonwealth moves to more strategic approaches while still being required to deal with continuing project by project proposals.

States and Territories**:**

Benefits: The states and territories will experience economic benefit from greater business certainty and reduced project delays. There are also expected beneficial tax implications for state and territory governments, as reducing the delay of major projects will increase tax revenues in present value terms.

The Hon Anna Bligh MP, Premier of Queensland, writing to Dr Hawke on behalf of all states and territories through the Council for the Australian Federation (CAF), supported the greater use of strategic assessments noting, among other things, that strategic assessments have the potential for improved integration of state and territory planning with Commonwealth assessments and for reduced delays in major projects. As noted in section 5.3.2 above, the COAG Business Regulation and Competition Working Group is also supportive of strategic assessments under the EPBC Act.

States and territories could consider amending their relevant planning legislation so that, where possible, their own strategic work addressing state and territory requirements could also be conducted with the Commonwealth to meet EPBC Act requirements, reducing resource requirements for further environmental impact assessments.

Costs: Conducting strategic assessments and regional environment plans in cooperation with the Commonwealth will have resource implications for states and territories but these are not expected to be great in comparison to existing expenditures on their own similar exercises. Indeed, the proposed arrangements will provide greater capacity for the Commonwealth to accredit existing state and territory regimes where they provide appropriate protection for matters of NES. In preparing its cost benefit analysis of all seven current strategic assessments under the existing Act, Access Economics concluded that state and territory governments would experience net costs in all years but that the total cost across all jurisdictions would total only $0.57 million in net present value over all years.

All the states and the Australian Capital Territory have experience with strategic assessments and their costs under the existing legislation. All jurisdictions have supported their greater use through CAF and the COAG Business Regulation and Competition Working Group. The government's conclusion is that, notwithstanding the modest net costs to states and territories, the benefits of a more integrated national system and the associated efficiencies are broadly seen as well worth the cost.

5.5 Consultation

The Report at page 78, states:

"A recurring theme in submissions and public consultations was that the [EPBC] Act and current administration:

- *do not deal well with general pressures on biodiversity and the environment;*
- *have difficulties dealing with cumulative impacts;*

- *are often triggered late in the development process and therefore only have a marginal success in protecting matters of NES;*

- *cause inefficiency for developers as the Act is applied toward the end of an often long state or territory planning process.*

This theme was supported by all sectors of the community. For example, the Minerals Council of Australia supported a shift to a landscape approach in environmental impact assessment because the current project by project model is problematic as did the Australian Conservation Foundation which also recommended a movement to landscape scale assessments to encourage more proactive mechanisms in the EPBC Act.

The government response to the Report addresses the issues raised in public submissions in relation to the scale of assessments and the problems caused by the current EIA regime relating to regulatory burden and poor environmental outcomes.

What will a regional environment plan mean for my area?

Most developed areas of Australia have a number of threatened species, threatening processes such as feral animals, and potentially a heritage or Ramsar site. In developing a regional environment plan, the Commonwealth will work with state and local government, local businesses and the community in order to plan the management of these sorts of environmental issues at a landscape scale. In considering the environmental assets of a region, an ecosystem of national significance may be identified and assessed, and the protection of that ecosystem would also then be built into the plan.

The plan will take into account social and economic factors, and will map a blueprint for ecologically sustainable development for the region. It will include mechanisms to provide business certainty and guide future development to better manage cumulative impacts in the region, including:

- identification and collection of information on matters of national environmental significance across a region; including identification, assessment and possible listing of ecosystems of national significance
- management planning for threatened species and threatening processes
- management planning for world and national heritage areas, Ramsar sites and Commonwealth land
- guidance about acceptable actions that can proceed without individual EPBC Act approval, including approved classes of actions where appropriate

Once the plan is completed it will be used to prioritise investment in Australian Government programs such as Wildlife Corridors and Caring for our Country, as well as prioritisation for investment in offsetting schemes to create positive conservation outcomes.

5.6 Conclusion

The implementation of the new and enhanced strategic approaches will allow the government to more effectively manage pressures on the environment and realise better environmental outcomes. At the same time, the approach will reduce the regulatory burden

on business by reducing duplicative processes, decreasing delays in project approvals and increasing certainty.

The introduction of ecosystems of national significance as a new matter of NES will be an important legislative recognition of the shift towards ecosystem and landscape-scale conservation approaches, consistent with current government policy and program directions. It will allow more effective Commonwealth investment in identified priorities, and will complement other government landscape-scale programs such as Wildlife Corridors and Caring for our Country. Further, the strategic identification and protection of ecosystems of national significance will assist in increasing community confidence in the Act and increase business certainty as to what development will be allowed under the Act.

The shift to enhanced strategic approaches will underpin the way all levels of government work together and will be a continuation of practices that have been available under the EPBC Act following amendments that were made in 2006, and commenced in 2007.

Costs will be incurred in implementing the new approach. However, Access Economics estimates the net present value of the net benefits for the seven strategic assessment programs to be $5.93 billon across all entities (Australian and state/territory governments, private sector/proponents/developers). The report demonstrates that, regardless of the parameters used, there are overall benefits to the economy. Costs incurred by industry under the strategic assessment model to date have been zero, except in Western Australia where they are modelled at approximately $47,500 due to a business partnership agreement with the WA Government to share costs. This arrangement was driven by the private sector seeking business certainty and reducing delays. The total cost of delays experienced by industry across the seven programs under standard project assessments (base case) is estimated to be $5.92 billion. This demonstrates a significant and positive net benefit for industry. Net costs experience by states and territories are also modest, totalling $0.57 million across jurisdictions over 30 years. The Commonwealth will incur costs, particularly in the transition period as it moves from primarily a project by project approach to the new strategic approaches. However, long-term savings are expected.

The provisions that relate to strategic assessments and regional environment planning will not restrict project proponents from choosing to have their project assessed through the referral process should they choose to do so.

The cost of strategic assessments and regional environment planning and the associated auditing process will essentially be borne by government. Some upfront costs may be passed on to proponents where they voluntarily instigate a strategic assessment or regional environment plan in recognition of its longer term financial benefits, rather than proceeding with a single project assessment, such as in the Western Australia case outlined above.

6) PROJECT PROCESSES

Recommendations of the Report that are primarily analysed in chapter 6 of the RIS include:

Recommendation Number	Recommendation
4	EIA efficiency measures - accreditation of state, territory and Commonwealth systems; streamlining assessment methods; and joint assessment panels.
5	Single national list for species and ecological communities.
26	Requesting alternatives to a project.
27	Clarification of EIA processes; early engagement; production of guidelines.

6.1 The Problem

While the proposed shift to more strategic, regional and proactive approaches is expected to reduce significantly the amount of Commonwealth environmental impact assessment carried out on a project by project basis, there will always be a continuing demand for individual project assessment.

Proposals which may have a significant impact on a matter of NES and which are not included in a class of actions approved under a strategic assessment or regional environment plan will continue to require referral as they would under the EPBC Act. If a significant impact is likely, those proposals will have to undergo further assessment and receive final approval from the minister before they can proceed, as explained in section 5.1 of this RIS.

The Report was clear that elements of the operation of the project by project environmental impact assessment regime need to be clarified to improve the functioning of the system and provide better outcomes for the public, proponents and regulators. This reflected a recurring concern in public submissions regarding transparency and accountability of the EPBC Act, the complexity of processes and the level of 'red tape'.

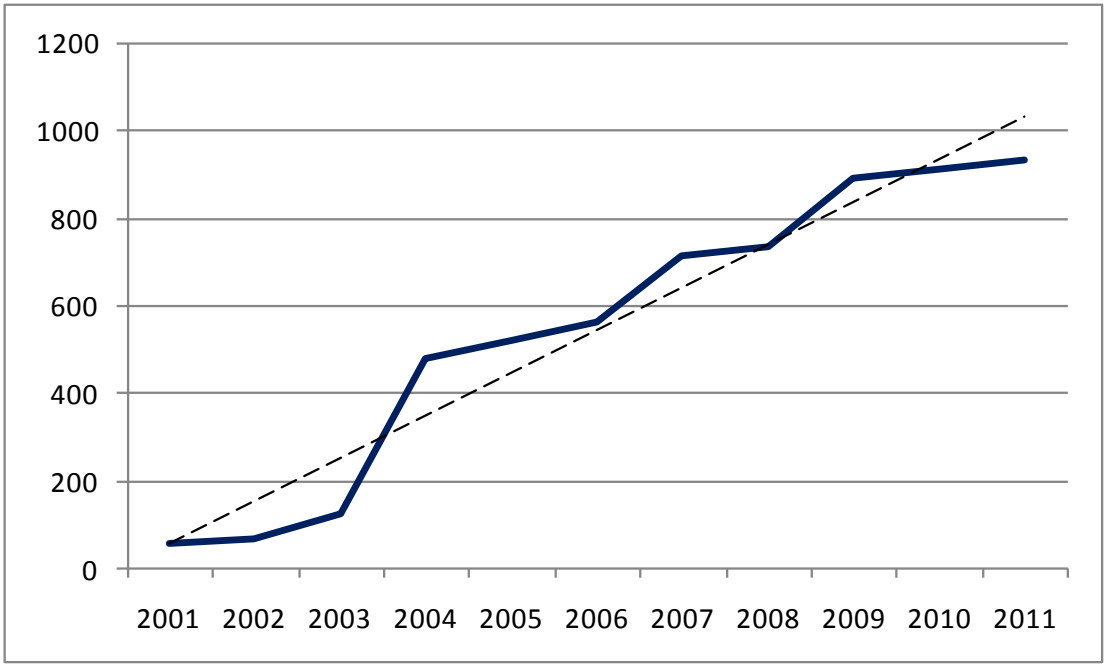
There is also a perception that, whilst state and Commonwealth environment regulation often protect different matters, the need for two approvals creates duplication. In regards to duplication, approvals and provision of reports under the EPBC Act, Nexus Energy noted in their submission to the Review *'...duplication adds unnecessary time to review documents which has the potential to unnecessarily delay project construction and significantly increase project costs.'*

One of the major issues with the current environmental impact assessment regime is a lack of early engagement between the proponent and the regulator. Often, by the time a proponent becomes aware that referral under the EPBC Act is required, the planning process, including state and territory approvals, may be well advanced and incorporation of EPBC Act requirements may require costly project redesign. This situation also makes the Commonwealth assessment process more complex as it may need to take account of decisions already taken under the state or territory process. States and territories do not have any statutory obligations with regard to timeframes for decisions making (unlike the Commonwealth), and this can lead to project delays.

Deloitte Access Economics found that since the commencement of the EPBC Act in 2000 there have been increasing matters of NES. At the same time, referrals have been increasing, with the department handling the increasing complexity of those referrals. This has led to increased costs and staffing pressure.

Chart 6.1 demonstrates the increase in matters of NES over time. There have been 932[1] protected matters of NES added to the list since 2001.

Chart 6.1: Increasing matters of NES: 2001 to 2011



Source: Deloitte Access Economics analysis.

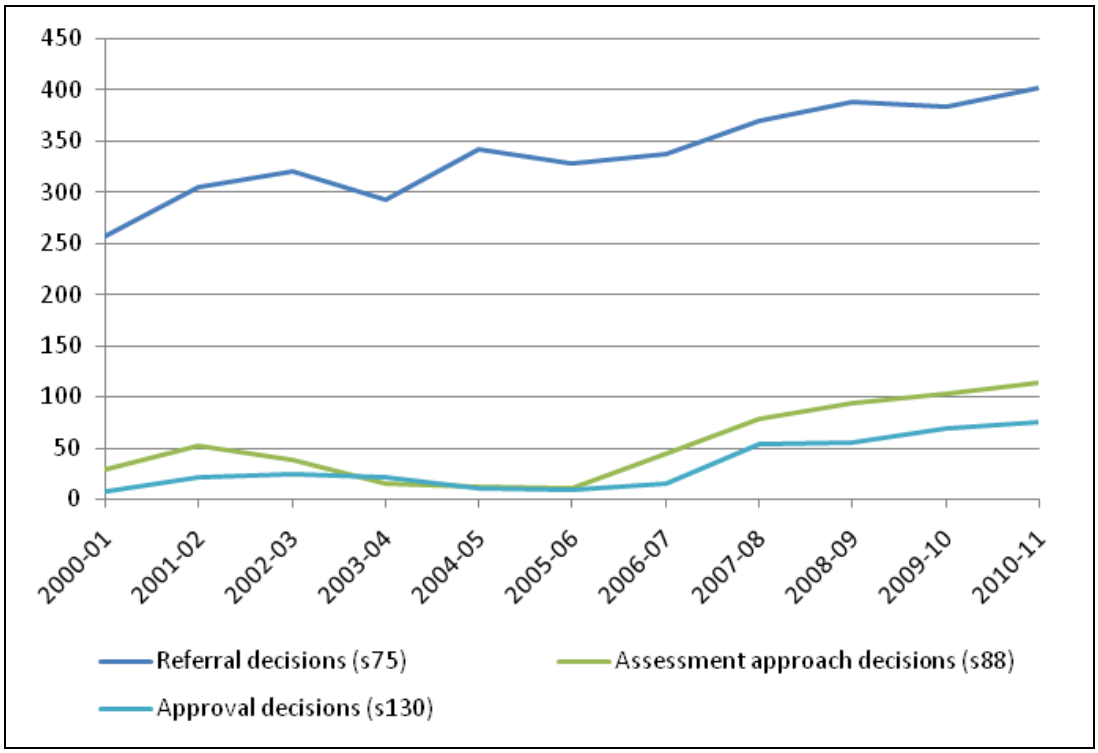
On average, 355 referrals were made to the department each year over the time considered in Chart 6.2. This chart demonstrates that there has been an upward trend in referrals since 2007-08.

One of the major issues faced by proponents with the current system is delay to project approvals. Deloitte Access Economics also found that in 2010 a total of 142 projects were delayed due to late decisions by the department. These delays ranged from only a day (10%) to over a year (1%), with an average delay of around one month (22.7 business days). It is generally not small projects that are delayed. For the 50 projects subject to approval decisions in 2009-10 and 2010-11 for which Deloitte Access Economics was able to find publicly available data, the average value was $1.32 billion (median of $278m / simple average of $799m[2]. The distribution of the value of projects is provided in Chart 6.3.

[1] Net of those removed from the list.

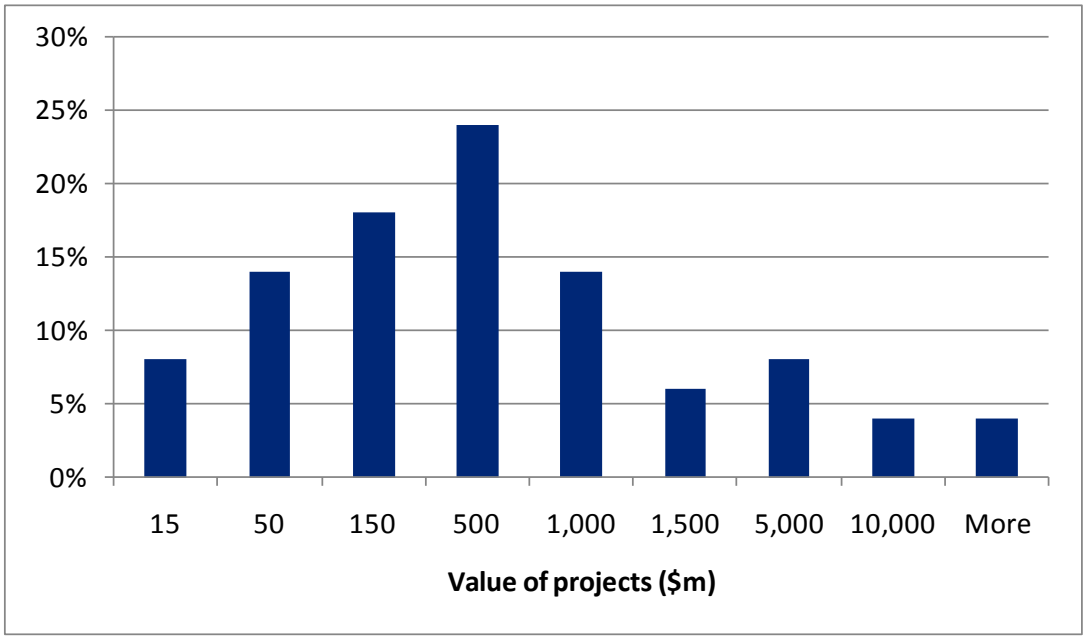
[2] There is a possible source of bias in that larger projects may be more likely to have their values available on the internet. Conversely, some large projects closely guard their commercial data, while smaller projects with regional or environmental significance attract media attention.

Chart 6.2: Referrals received by DSEWPAC by full financial year, 2000-01 to 2010-11



Source: Deloitte Access Economics analysis.

Chart 6.3: Value of projects subject to approval decisions, 2009-10 to 2010-11



Source: Deloitte Access Economics analysis.

6.2 Objective of the Government Response in Relation to the Assessment and Approval Process

The primary objective of the government response in relation to project by project environmental impact assessment is to produce better processes and certainty for the stakeholders (the community, states and territories and proponents) while enhancing outcomes for the environment.

6.3 Options

6.3.1 Status Quo – Option 1

Retaining the status quo in relation to individual project assessments will result in the continuation of existing problems identified by the Report. These include the complexity of processes, their duplication across jurisdictions, uncertainty for stakeholders and potential delay costs for major projects, all of which add an unnecessary regulatory burden on proponents. All of these problems also serve to limit the environmental outcomes that could be achieved. Additionally, these problems are likely to amplify as environmental degradation continues and the total listed number of matters of NES increases.

6.3.2 Greater Emphasis on Up-Front Discussion and Determination of Issues – Option 2

Many of the changes proposed in the government response to the Review will facilitate early and meaningful engagement between proponents and the Commonwealth at the project scoping stage. Simplifying and streamlining processes and clarifying the functioning of the system would make the system easier to interact with, leading to more productive engagement with stakeholders and better outcomes for the environment.

This early engagement will be facilitated primarily through the creation of the new assessment method of approval on referral information, as recommended by the Report. This method would combine the existing assessment by referral information and assessment by preliminary documentation and expand the definition of preliminary documentation to include information provided in the referral. Projects eligible for this process would notionally receive approval in 30 business days, as compared to existing assessment processes which can take between six months to two years. Eligibility for assessment on referral information would be conditional on meeting a requirement for early engagement with the department. Other requirements would include adequate information being available about the scale of impacts from the project, and demonstration that impacts on the environment have first been avoided where possible, mitigated if unavoidable and offset where impacts are not avoidable or able to be mitigated. Overall, the proposal would only proceed under this level of assessment if an acceptable environmental outcome could be demonstrated.

Such a new level of assessment would create an incentive for project proponents to engage early with the Commonwealth with considerable potential for reduction in assessment times and the provision of greater certainty for proponents at their planning stage. It would retain the period for public comment, which arguably should be more productive because of the greater information available about the proposal.

Another means of reducing uncertainty for stakeholders will be the continuing development of policy statements and guidelines for various industries and matters of NES. This would include improving the guidance about what constitutes a significant impact.

The creation of significant impact determinations would also allow the minister to establish particular classes of actions that are not likely to have a significant impact on matters of NES. These determinations would be legally binding legislative instruments providing legal certainty for proponents undertaking their action in accordance with the determination. This would allow proponents to provide the department with comprehensive self-assessments about the likely impact of their projects.

The ability for the minister to request additional information on prudent and feasible alternatives would also streamline the assessment and approvals process. Whilst there is a current requirement for proponents to provide information about alternatives in a referral form, the minister's ability to take into account alternatives is not enlivened until the approvals stage of the assessment. This can result in the referred option being assessed, often through a costly assessment process, but refused at the end of the assessment process in favour of an alternative which has a lesser environmental impact.

The ability to consider prudent and feasible alternatives at the beginning of the assessment process would reduce assessment costs and time delays and encourage proponents to engage with the Commonwealth at the early stage of project scoping and site selection. While not pre-empting approval, this proposed amendment should at least guarantee that the proposal eventually referred would be the most likely acceptable option in terms of environmental impacts and economic feasibility.

Other proposals to produce better processes for stakeholders in project by project assessments include enhanced co-operation with the states and territories. This includes proposals recommended by the Report such as the use of joint assessment panels, increased use of bilateral agreements, development of stronger administrative arrangements under bilateral agreements and accreditation of state and territory environmental management systems and more effective use of guidelines and determinations. All these proposals are strongly supported by states and territories.

A related issue is the process for listing of threatened species and ecological communities. At the moment, multiple lists exist in all jurisdictions which are misaligned in terms of listing eligibility and category, resulting in some species being listed differently at state/territory level and nationally.

As well as the Report, the Commonwealth Auditor-General has recommended that efforts be increased to improve the accuracy and completeness of lists, including establishment of an intergovernmental process to align them. Some work on this issue is already underway, with arrangements on species list alignment having been negotiated with all states and territories.

While this arrangement is helping to provide greater clarity and consistency between lists, the government agrees with the Report that a single list of threatened species and ecological communities would provide greater clarity to proponents. The list will comprise of eight separate parts, with part one being nationally threatened and a matter of national environmental significance under the EPBC Act, and other parts relating to other jurisdictions.

Accreditation of state and territory processes for listing threatened species and ecological communities where they meet national standards will minimise duplication of listing processes. This will require work with the states and territories to develop a process to automatically recognise the listing of state and territory endemic species and ecological communities, subject to agreed standards and listing processes.

To assist that process, the government will remove the existing EPBC Act anomaly to ensure that vulnerable ecological communities, like vulnerable species, are matters of national environmental significance protected under the Act. At present, there is only one ecological community listed as vulnerable under the EPBC Act.

6.4 Impact Analysis

This impact analysis refers to detailed findings of the Deloitte Access Economics report. This section aims to demonstrate the economic impacts of implementing the proposed reforms (Option 2), by estimating their Net Present Value (NPV) relative to the costs of not implementing reforms (Option 1).

The steps in the analysis (covered in chapters 4, 5 and 6 of the Deloitte Access Economics report) include:

- costs associated with resourcing impacts of the reforms, productivity gains, and benefits associated with a faster regulatory approval system that brings forward project income streams and reduces project delays realised through the preferred option
- estimates of the impacts on workload of introducing guidelines and self-assessment, early engagement and the improved outcomes from bilateral agreements;
- estimates of the impact of delays– including impacts on project cash flows, the value of lost taxation revenue to the Australian, state and territory governments and the impacts on the economy.

The analysis uses parameters that comply with the COAG Best Practice Regulation guidelines (October 2007). The analysis is based on NPVs over a ten year period (2011-12 to 2021-22). The discount rate is thus 7% per annum (real), with sensitivity analysis at 3% and 11%.

<u>Impacts on Business:</u>

Benefits: The main benefit realised through these improvements to the project by project assessment process would be a reduction in costs associated with project delays and assessments. Benefits to business/industry would come from greater certainty in project approvals and reduced delays, to the extent that these are created by resourcing, information gathering, and state/territory assessment processes.

Industry peak bodies such as the Minerals Council of Australia and the Australian Petroleum Production and Exploration Association (APPEA), in their submissions to the Review, were critical of the current environmental impact assessment regime because of the duplication of processes across jurisdictions, uncertainty for

stakeholders and potentially significant delay costs associated with seeking approvals under the EPBC Act.

Greater certainty would also benefit business through the development of guidelines which more clearly articulate when significant impacts on matters of NES are likely, and also when significant impacts are not considered likely. This would allow proponents to have greater certainty about the types of projects that should be referred, and whether they are likely to require assessment and approval prior to being able to proceed.

Significant impact determinations will provide additional certainty for business. When self-assessments based on those determinations indicate no likely significant impact and are referred to the department, proponents should gain sufficient legal certainty to avoid making unnecessary referrals. This would reduce the administrative burden both for proponents and the department, freeing up departmental resources to be allocated to greater priority activities. This would be an outcome in line with the recommendations of the Commonwealth Auditor-General who has pointed to the large number of referrals found not to be controlled actions as an undesirable feature of current administration of the Act.

Improving the bilateral approval processes across levels of government may also reduce compliance costs for businesses. Each of these measures would contribute to time saving across the entire regulatory process, including delays that are and are not measured under statutory timeframes (e.g. while the proponent gathers information).

Costs: More of the consultation, assessments and engagement with the Commonwealth would be shifted to the beginning of the process, to the pre-referral stage. This may result in the average cost of a referral increasing but, overall, there should be fewer referrals and fewer full assessments. Costs associated with assessment delays would also be reduced. There may be savings for the proponents in not submitting proposals that would formerly have resulted in NCA decisions, due to now having the guidelines, or reduced complexity in proposals submitted. On balance, the net effect of the proposed amendments and improvements would be a significant reduction in project costs and delays for business.

There would be benefits to project proponents, Australian, state and territory governments and the economy from reducing delays in the assessment process, however, there are not expected to be any workload costs or benefits for proponents. Uncertainty with regard to the legal status of projects, either during or following the approval process, may also have an impact on project cash flows and a proponent's profitability

Impacts on the Community

Benefits: Overall the economy (and the whole of society) would benefit from a more efficient and streamlined assessment process under the EPBC Act, which achieves the Australian Government's environmental objectives. In particular, allowing large-scale projects to go ahead without delay would bring forward employment and investment growth opportunities, with the associated indirect impacts on the economy (multiplier effects).

A recurring theme in community submissions to the Review was a concern about the complexity of processes and the level of 'red tape' in the EPBC Act.

Although there would be an increase in informal, early engagement between the Commonwealth and project proponents under these proposals, the opportunity for public comment on referrals will be retained. Furthermore, because the proposals being referred would be better thought out, with an increased quality of information relating to impacts on matters of NES, the community will be able to make better informed and more meaningful contributions to the environmental impact assessment process. In particular, the community would effectively have access to proposed approval conditions at the referral stage, currently not possible under the Act.

Costs: There will be no additional costs to the community. Indeed, there should be reduced costs for the community in providing public comments in a less complex system.

Impacts on the Environment:

Streamlined and less complex processes for project by project assessment under the EPBC Act will free up the department and stakeholders alike to concentrate more efficiently and effectively on the major environmental issues being considered as part of the environmental impact assessment. This will facilitate more effective management of the causes of biodiversity loss and environmental degradation.

Impacts on Government

Commonwealth**:**

Benefits: Implementing the reforms would impact on the Australian Government as both a cost and benefit. Initially, the reforms would require additional departmental resourcing, in particular for additional Full Time Equivalent (FTE) staff members – a cost. This would include FTEs to develop new sets of guidelines and enhanced bilateral assessment processes with the states and territories, and for early engagement with proponents. However, it is expected that these investments would lead to resources saved later in the process, due to avoiding some unnecessary referrals, simplifying some assessments and being able to better leverage state/territory reports under bilateral agreements for Australian Government assessments under the EPBC Act.

In terms of the projects themselves, reducing delays and improving certainty over approvals would reduce the risk of damaging project cash flows and bring forward project start dates; with a subsequent impact on taxes payable to the Australian Government. In turn, the project would create employment growth and investment, with multiplier effects on the economy (discussed in 'Impacts on the Community' below). These impacts would be significant in the case of large, high-value projects – for example in the mining industry.

There are significant administrative savings to be realised through reducing both the complexity of project by project assessment and the number of such assessments that the Commonwealth conducts. Additionally, of those assessments that are conducted,

most should be less resource intensive because of the early scoping work done up front.

A reduction in the number of referrals that currently are not controlled actions under the EPBC Act would also reduce administrative costs for the department. Even though such referrals do not lead to assessment, they still require consideration by the department in the 20 business day referral period.

The proposal to accredit state/territory processes so that they meet Australian Government statutory requirements is expected to save time and resourcing costs at Australian Government level, as well as reduce delays in CA assessments under bilateral agreements.

Production of guidelines would save staff time in assessing actions that would be determined NCA or NCA-PM, as the essential purpose of guidelines is to indicate to proponents whether or not their project would trigger the EPBC Act as a CA. A comprehensive set of guidelines around these activities could prevent proponents from referring projects to the department, particularly if they are supported by environmental stakeholder groups. This may reduce the likelihood of legal challenge, and thus give the proponent greater certainty in proceeding with the project. Deloitte Access calculates that the NPV of the net benefit of implementing guidelines in terms of departmental resourcing alone is calculated at $1.99 million.

Better processes under the Act (including enhanced co-operation between the Commonwealth, states and territories) would also result in a reduced regulatory burden through greater efficiency of the environmental impact assessment system and less duplication and overlap with states and territories.

Costs: There will be resource implications for increasing early engagement with proponents. The development of the Commonwealth guidance material, such as guidelines and determinations will also require resourcing. Nevertheless, it is expected that the proposed more proactive approach will lead to administrative savings overall as potential problems are identified earlier and dealt with more efficiently and effectively than currently.

States and Territories**:**

Benefits: State and territory agencies may require additional resourcing, in terms of FTEs, to improve and expand the reports made under bilateral agreements. The aim would be for the Australian Government to be able to use the reports generated by the relevant state or territory, with local connections to the area and project proponents, to meet its own statutory requirements under the EPBC Act. Thus, it may be surmised that any additional state/territory resources required would lead to reductions at the Australian Government level. There may be an additional benefit from greater efficiency when all investigations are undertaken at one level of government.

It is unlikely that state and territory governments will experience costs in the development of guidelines and earlier engagement processes, but they would likely enjoy the benefits that these processes would lead to in reduced resource costs processing referrals.

In relation to mining and other resource-based projects, state/territory governments would benefit from royalty payments being brought forward if project delays are reduced. As for the Australian Government, states/territories would also enjoy the impacts on local economies earlier, including employment and investment growth and associated multiplier effects, as described above. There may be associated revenue gains and bring forwards – e.g. payroll tax.

The proposal to accredit state/territory processes so that they meet Australian Government statutory requirements is expected to save time and resourcing costs at Australian Government level, as well as reduce delays in CA assessments under bilateral agreements. However, it would increase resourcing costs at state/territory level.

Costs: It is not expected that the overall proposed streamlining of assessment methods and processes will present any costs for the states and territories, however there may be some increase in resourcing costs at state/territory level through lifting accreditation standards, but the net benefits are still positive.

Data in Table 6.1 shows the costs and benefits of the preferred option for reform in NPV ($ million).

Table 6.1 Summary of costs & benefits, 1st round, Option 2 relative to Option 1, $m NPV

Reform	Australian Government (DSEWPAC)	State/territory governments	Proponents (primarily Business /Industry)	Rest of economy/society	Total
Additional Costs					
Bilateral agreements	0.19	2.25	0	None.	2.44
Guidelines	5.85	5.85	Not able to be estimated (small).	None.	11.71
Early engagement	14.94	14.94	14.94	None.	44.82
Total Costs	***20.98***	***23.04***	***14.94***	-	58.96
Additional Benefits					
Bilateral agreements	1.50	0	395.55	Not able to be estimated	397.05
Guidelines	39.23	39.23	395.55		474.02
Early engagement	2.38	2.38	395.55		400.31
Total Benefits	***43.12***	***41.62***	***1,186.64***	-	1,271.37
Net Benefits					
Bilateral agreements	1.31	(2.25)	395.55	-	394.61
Guidelines	33.38	33.38	395.55	-	462.31
Early engagement	(12.56)	(12.56)	380.61	-	355.49
	22.14	**18.57**	**1,171.70**	-	**1,212.42**

Source: Deloitte Access Economics analysis.

Summary of Deloitte Access Economics CBA of EIA Reforms

The benefits to proponents in the first round of effects (i.e. before tax and royalty allocations) were split equally between the bilateral agreements, guidelines and early engagement. The benefits from multiplier effects to the rest of the economy were not able to be estimated with confidence, as multipliers vary greatly depending on the industry of the project, and a robust breakdown by industry of projects likely to have delays reduced was not available.

Based on first round effects, in NPV terms over the decade:

- the Australian Government has net savings of $22.14 million, as the savings from guidelines more than offset the net workload costs from early engagement;
- the state and territory governments have net savings of $18.57 million, with net benefits only from the guidelines;
- proponents have net benefits of $1.172 billion, with costs only for early engagement;
- **overall, the net benefit is $1.212 billion of Option 2 compared to Option 1**.

6.5 Consultation

One of the most common concerns in public submissions to the Review was the complexity of processes under the EPBC act and the level of 'red tape' in project level assessment. As noted above, there is both industry and academic support for the notion that the current complexity is costing the economy significantly.

The proposals suggested for streamlining and simplifying project level environmental impact assessment under the EPBC Act are also supported by the Report. The Report recommended that the environmental impact assessment regime for individual projects be amended to ensure the provisions are as efficient as possible.

A group of companies were also consulted during the development of the Deloitte Access Economics CBA. Those interviewed, which included representatives from various sectors (energy, ports, petroleum) were generally supportive of the Review's proposed reforms.

6.6 Conclusion

The preferred option is to implement the government response to the Review recommendations because this will result in greater certainty for proponents and a streamlined assessment and approval regime for project by project assessments which fall outside of strategic planning processes.

The implementation of these recommended enhancements to the environmental impact assessment and approvals regime will reduce regulatory burden on individuals and business by reducing duplicative processes, decreasing project approval delays and increasing certainty. It will also make it easier for the community to participate in the regime in a more meaningful way than currently.

7. MANAGEMENT PLANS AND OTHER PLANS

Recommendations of the Report that are primarily analysed in chapter 7 of the RIS include:

Recommendation Number	Recommendation
31	Heritage management plans.
32	Protected areas management plans – outcomes focussed management plans.
33	Protected areas management plans – significant impact guidance; accreditation.

7.1 The Problem

The EPBC Act provides for a range of plans to be developed to guide action to protect and conserve the environment, heritage and biodiversity. These include management plans for heritage properties and places, management plans for Commonwealth reserves and conservation zones, management plans for Ramsar sites, and biosphere reserves. Management plan roles and responsibilities are described in Chapter 9 of the Report:

> *'Where a World Heritage property, National Heritage place or Ramsar wetland is within a State or Territory and not entirely within a Commonwealth area, the Commonwealth must use its best endeavours to ensure that a management plan consistent with relevant management principles or international obligations is prepared and implemented. The current approach under the Act relies on a cooperative approach with relevant owners and managers to make and implement management plans for places outside Commonwealth areas.'*
>
> *'Responsibility for Commonwealth reserves (including marine protected areas) and conservation zones lies with the Director of National Parks, a corporation established under the Act. Currently 35 Commonwealth reserves have been established under the Act – six national parks, two botanic gardens and 27 marine reserves.'*
>
> *'Australia currently has 14 Biosphere reserves within the World Network. The biosphere provisions of the Act establish a framework under which the Australian Government may co-operate with State and Territory governments to manage biosphere reserves through the preparation and implementation of management plans.'*

The Report found in all instances that the provisions governing the preparation of these plans are too prescriptive and inflexible and do not acknowledge that other formats might be more appropriate in certain cases. In effect, the Report found many of the existing requirements more about process than outcomes. In relation to recovery and threat abatement plans, in keeping with its recommendations for more strategic and regional approaches, the Report found a particular need for greater flexibility for plans to be developed at a regional scale.

Stakeholder views were aligned with the findings of the Report. Submissions reflected the view that that plans were too prescriptive and inflexible, and the focus of plans should be shifted to useful and practical management policies. For example, in their submission to the Review Heritage Management Consultants Pty Ltd noted that *'Regulation requirements introduced in 2003 were so prescriptive that none of the plans written before the regulations, and only three written subsequently, satisfied the requirements'.*

This RIS does not examine each of these types of plans separately. Rather, management plans for heritage places are dealt with in detail to demonstrate the sorts of difficulties provided by the current EPBC Act provisions related to all plans. Heritage plans are considered an appropriate 'case study', as they make up a significant portion of management plans made under the Act, and in general largely affect similar stakeholders, primarily the Commonwealth agencies and states and territories.

Heritage Places

The requirements for creating a management plan for a heritage place under the EPBC Act vary, depending on both the listing and ownership status of the place.

In essence, heritage places within Commonwealth Areas are required to have management plans produced by the minister or Commonwealth agency that satisfy a set of prescriptive requirements contained in the EPBC Regulations. Heritage places not within Commonwealth Areas are not required to have management plans, although the Commonwealth is required to use best endeavours to ensure that a management plan is prepared and implemented.

Management plans for all Commonwealth Heritage places are the responsibility of the Commonwealth agency that owns or controls the place. The Commonwealth agency preparing the plan must seek public comment and must also seek advice from the minister, who must consult with the Australian Heritage Council in preparing that advice.

Management plans are required for all World Heritage properties and National Heritage places entirely within a Commonwealth Area and are the responsibility of the minister, who must seek public comment in preparing management plans. The minister must also consult with the Australian Heritage Council in preparing management plans for National Heritage places. In practice, such plans are normally prepared by the Commonwealth agency that owns or controls the place, and submitted to the minister.

For World and National Heritage places and properties in a state or territory, the Commonwealth must use best endeavours to ensure that a management plan is prepared and implemented in co-operation with that state or territory.

All management plans for:

- National Heritage places entirely within a Commonwealth Area must not be inconsistent with the National Heritage management principles and are required to address criteria specified in the EPBC Regulations;

- Commonwealth Heritage places must not be inconsistent with the Commonwealth Heritage management principles and are required to address criteria specified in the EPBC Regulations.

- World Heritage properties entirely within a Commonwealth Area must not be inconsistent with Australia's obligations under the World Heritage Convention and the Australian World Heritage management principles.

Currently, only heritage places subject to a bilateral agreement between the Commonwealth and a state or territory can have a bilaterally accredited management arrangement or process under which an action can be carried out without an approval under Part 9 of the EPBC Act. In practice, the bilateral agreement process has not been well taken up, possibly due to the complex and lengthy processes involved. While the EPBC Act and Regulations

require reviews and monitoring of bilateral arrangements, these are not oriented to the performance or effectiveness of such arrangements.

Management plans prepared to satisfy EPBC Act requirements are prepared and assessed according to the prescriptive requirements of the Regulations (including the National and Commonwealth Heritage management principles and other criteria). However, the department's experience and feedback from place managers both suggest it is possible for a management plan to narrowly satisfy these requirements without demonstrating that it is appropriate to the particular management requirements of the place.

Further, the current process fails to recognise the possibility that satisfactory management arrangements might exist otherwise than through an EPBC Act management plan. For example, existing management arrangements that achieve satisfactory outcomes in practice can not be recognised without their full documentation and review in the form of an EPBC Act sanctioned management plan. The creation of a management plan where satisfactory alternative arrangements are in place can involve duplication of effort and potentially lead to negative heritage outcomes; for example, where the practical arrangements and the management plan prepared for the purpose of the EPBC Act are inconsistent, potentially leading to confused decision-making.

The cost of creating a management plan for a place on the Commonwealth Heritage List or National Heritage List generally ranges between $20,000 and $150,000, with some plans for natural heritage places costing in excess of $150,000. These costs only encompass fees paid to private heritage consultants engaged to create management plans Costs incurred internally by heritage place managers to brief consultants and to review the plans are an additional impost of money and human resources.

There are 92 places on the National Heritage List and 337 places on the Commonwealth Heritage List. There have been approximately 81 management plans created for National Heritage places, and approximately 107 management plans created for Commonwealth Heritage places. These include both plans that are complete and considered satisfactory according to the EPBC Act requirements and standards, and those which are complete and are either in draft form or are awaiting review against EPBC Act requirements and standards. It should be noted that some of the management plans included in these figures were created pursuant to legislative provisions other than the EPBC Act heritage provisions. For example, National Heritage places that are also Commonwealth Reserves and already have a management plan prepared for management as a Commonwealth Reserve are not required to have a separate management plan for the purposes of the heritage provisions of the EPBC Act. However, for the majority of the places included in the National and Commonwealth Heritage lists, inclusion in the list triggers a requirement for the preparation of a new management plan.

The period after the commencement of these lists generally saw a more intense period of inclusion of places on these lists, and the numbers of places included has slowed in recent years. However, recent nominations of groups of places (for example, over 60 historic post offices nominated for the Commonwealth Heritage List) could see a further rise in the number of inclusions in the lists.

7.2 Objective of the Government Response in Relation to Management Plans and Other Plans

The primary objective of the government response in relation to heritage place management plans is to for those plans to be more efficient and effective in enhancing the protection, conservation and presentation of heritage places.

7.3 Options

7.3.1 Status Quo – Option 1

Remaining with the status quo would maintain the slow and resource-intensive progress toward developing management plans for National and Commonwealth Heritage places. It is expected that there would be continued emphasis on and resources devoted to management plans satisfying prescriptive documentation requirements of the EPBC Act and Regulations, in the context of increasingly competitive resource demands on place managers (including Commonwealth agencies). There would unlikely be increased resources devoted to reviewing the outcomes or effectiveness of heritage management of places other than the mandatory review of each management plan at least once every five years. Increased recognition of alternative management arrangements would be unlikely except where this is already provided for under the EPBC Act, for example in the case of National Heritage places where there is an approvals bilateral agreement or an existing Commonwealth Reserve management plan in place.

7.3.2 Less Prescriptive, Outcomes Focussed Management Arrangements – Option 2

This option would involve the legal recognition of management arrangements which may include but are not restricted to management plans. This would involve legislative changes to decrease the prescriptive requirements that narrow the potential management options, and shift the focus to evaluation of how the proposed requirements would in fact achieve conservation outcomes particular to the place. This could include recognising existing arrangements under state and territory or traditional Indigenous management processes. To do so would generally achieve lower compliance costs for place managers, noting that the greatest reduction in compliance costs would be achieved where existing processes are recognised and accommodated. Greater emphasis may also need to be placed on monitoring outcomes and effectiveness of the management arrangements.

Provision will exist for management arrangements to vary according to different owner/manager circumstances, and be tailored to the level of complexity of the place. Providing greater flexibility in the way that the Commonwealth's required standards may be met will focus effort on delivering good heritage outcomes rather than on processes, and will reduce duplication of state and territory requirements. These measures will reduce red tape, and improve Heritage outcomes for listed heritage places in a more efficient and cost-effective manner.

This option would require an appropriate monitoring and review regime. The minister would need a power to impose a sanction should a place manager refuse to enter into management arrangements to adequately protect, conserve and present the heritage place. For example, the minister would have the power to name the management authority as non compliant and restrict or disqualify it from receiving funds under any program administered by the minister.

7.4 Impact Analysis

Impacts on Business

Benefits: Place managers would be able to consider a range of management options in achieving the objective of improved conservation outcomes. The approach can recognise and accommodate existing management arrangements and thus provide place managers with substantial opportunities to reduce costs in that EPBC Act management plans would be able to accommodate existing processes, removing unnecessary duplication and allowing innovative and customised approaches adapted to the needs of the particular place.

This is a key element of the government's overall objective for its reform as it relates directly to the objects of the Act. It is also expected to reduce the administrative burden for heritage place managers by directing management efforts and resources more efficiently at protection, conservation and presentation. Rather than seeing the creation of the management plan as simply the outcome of a process, more flexible arrangements would enable measurable conservation improvements to be the outcome.

Over half of existing National Heritage places, and approximately one-third of Commonwealth Heritage places, have management plans that guide the management of the place without having satisfied each and every step currently required under the EPBC Act. This recommendation would provide the means for these and other arrangements to be evaluated against a more flexible range of considerations designed to focus on conservation outcomes they would achieve in practice.

Although Commonwealth Heritage places must be owned or leased by the Commonwealth or a Commonwealth agency, there is private sector involvement in some of these places. For example, the physical buildings that comprise the Edmund Barton Offices in Barton, ACT are owned by a private entity, however it is a Commonwealth Heritage place because it is on National land ultimately owned by the Commonwealth.

A number of National Heritage places are owned and/or managed by the private or not for profit sectors, although not the majority.

Costs: No additional costs would be incurred by managers as they would only use the more flexible arrangements should they choose to do so. They would always have the option of preparing management plans according to the existing prescriptions of the EPBC Act should they consider additional costs would be involved.

Impacts on the Community

Benefits: Recognition of alternative management arrangements will benefit community interests by allowing approaches that better target conservation of heritage values that are directly relevant to the place in question and are the most valued by the community. For example, management arrangements would be more specifically adapted to the requirements of the place itself rather than to a prescriptive

management plan. Resultant savings of resources would be better directed to specific conservation outcomes supported by the community. Where a place is effectively managed by the community already (through local government or Indigenous governance arrangements, for example) the recommended approach would similarly provide greater flexibility potentially eliminating an additional layer of regulatory requirements that may otherwise unnecessarily complicate management.

Costs: There would be no costs for the community.

Impacts on the Environment

Environmental outcomes (including heritage as a part of the environment) are likely to be improved with greater focus on monitoring of outcomes and effectiveness rather than a focus on meeting process requirements. Better conservation of heritage places and their values would result from being able to recognise existing appropriate management arrangements and enable resources to be directed instead to implementation of such arrangements and specific conservation outcomes. The proposed arrangements should therefore allow more plans to be recognised with appropriate arrangements in place that are outcomes focused, which in turn should enable more plans to be completed.

Impacts on Government

Commonwealth

Benefits: The Commonwealth Government administers the Commonwealth heritage regime through the department. Together with its agencies, the Commonwealth Government is an owner or manager of a small number of National Heritage places and all Commonwealth Heritage places. State, territory and local governments are owners and managers of the largest proportion of National Heritage places.

As a place owner and manager, governments at all levels (Commonwealth, state, territory and local) would share proportionately in the same benefits as private owners and place managers, although to a greater degree because there are more places in government ownership and management.

Costs: From the perspective of administering the Commonwealth heritage regime, there would be some increase in cost for the department to adequately train department officers to recognise good heritage processes, outcomes and effectiveness, rather than simply evaluating against prescriptive criteria. There may be some additional costs incurred in travel to inspect places, or to pay consultants to do so. However, there is the potential for defraying some of these costs by using detailed questionnaires, requesting photographs, or to consider cooperative arrangements with state and territory heritage counterparts, particularly where places are recognised under both state, territory and Commonwealth regimes.

States and Territories:

Benefits: The states and territories are often the managers of places requiring management plans under the EPBC Act. The benefits accruing to them are the same as noted above for business.

Costs: The states and territories are often the managers of places requiring management plans under the EPBC Act. As such, like business, they would incur no additional costs as they could choose to prepare management plans according to the existing prescriptions of the EPBC Act.

7.5 Consultation

Consultation during the Review relevant to these recommendations included written submissions at each stage of consultation, face-to-face meetings and workshops, with particularly detailed involvement of peak heritage bodies and the Australian Heritage Council. All the views were strongly supportive of less prescriptive, outcomes focussed management arrangements. Examples of comments received in written submissions and consultation workshops included the suggestion from heritage consultants to replace Regulation requirements with more flexible guidelines. The International Council on Monuments and Sites (Australia) and Australian Council of National Trusts both suggested that the EPBC Act should focus on good heritage outcomes rather than prescribing a planning process. Similarly, the Australian Heritage Council noted that a flexible series of instruments focused on good outcomes is more desirable than the current focus on management planning as set out in the EPBC Act.

7.6 Conclusion

The preferred option is adoption of less prescriptive, more outcomes focussed management arrangements. This is preferred because evidence suggests it will lead to better conservation outcomes at lower overall cost to government and non-government place managers. The likely impacts on stakeholder groups are generally expected to be positive and no worse than neutral.

8. WHOLE OF ENVIONRMENT – CALL IN POWER

Recommendations of the Report that are primarily analysed in chapter 8 of this RIS include:

Recommendation Number	Recommendation
25	Whole of environment call in power / considerations.

8.1 The Problem

The EPBC Act does not protect the whole of environment, other than on Commonwealth land or in the Commonwealth marine environment, and for actions taken by Commonwealth agencies and nuclear actions. In all other cases it covers only a specific list of matters of national environmental significance and other protected matters. This often leads to a gap between a public expectation that the Commonwealth environment minister has a broad power of environmental regulation and the reality that the EPBC Act application is limited and therefore does not apply to many developments, particularly controversial ones. Where it does apply, the minister may still only consider the specific part of the environment covered by the Act.

The Report sets out an argument that the minister ought to consider the broader environment when making an approval decision. The basis of this argument is that when making an approval decision the minister must weigh up all of the social and economic matters associated with a project against only a limited set of environmental matters, that is, limited to significant impacts on matters protected under the Act. The Report outlines that this may be perceived as running contrary to the principles of ecologically sustainable development, which integrates all environmental, social, economic and equitable considerations

The Report makes reference to a perception that state and territory processes can fail to provide adequate protection for aspects of the environment which are not matters of NES. The Report does not go as far as to draw a conclusion as to the legitimacy of these concerns, but does suggest the whole of environment trigger as a means to address this issue. The Report notes that those opposed to state and territory decisions often look to the Australian Government to redress perceived state and territory failings.

Some submissions to the Review supported retention of the current scope of the Act, which is based on the subsidiarity principle, constitutional powers and intergovernmental agreements.

Other submissions argued for amendments such that once an action falls within the scope of the Act, the Commonwealth would assess impacts on the whole environment. This argument was based on the connectivity of the natural environment and general public expectations of the role of the minister.

8.2 Objective of the Government Response in Relation to Whole of Environment (Call-in Power)

The objective of the government response is to provide adequate and comprehensive assessment of the environmental impacts of proposals on the matters of NES and other

protected matters, while ensuring efficient regulation does not duplicate state or territory processes.

8.3 Options

8.3.1 Status Quo - Option 1

The EPBC Act currently provides for whole of environment assessments where the matter protected is the Commonwealth marine environment, or for actions taken on Commonwealth land, actions taken by the Commonwealth agencies or nuclear actions. In other circumstances, state or territory agencies undertake environmental impact assessments of projects with consideration for whole of environment impacts, with Commonwealth assessments being limited in scope to matters of national environmental significance.

The current regulatory scope of the Commonwealth and the states and territories is the result of an extensive review undertaken at the COAG level in 1996-7. The objectives of the Review were to more effectively implement the Intergovernmental Agreement on the Environment (1992), put in place Commonwealth environmental law, and to deliver better environmental outcomes. This resulted in the negotiation of the 1997 Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment. The 1997 Agreement was subsequently signed by all heads of governments and the Australian Local Government Association. The contents of the Agreement are reflected in the Explanatory Memorandum to the EPBC Act, and in the Act itself.

8.3.2 Introduction of power to consider a wider range of environmental considerations – Option 2

The three options suggested in the Report to expand the Commonwealth role to consider a wider range of environmental considerations include:

- the minister must consider the whole of the environment, that is, all environmental matters the project impacts upon;
- the minister may call in the impacts on the whole of the environment for assessment, if it is considered that the action is of ‘national importance’; or
- the minister may consider impacts on all protected matters affected by the project, including impacts that are not significant.

8.4 Impact Analysis

8.4.1 Status Quo - Option 1

<u>Impacts on Business</u>

Benefits: The status quo will retain clear regulatory roles at the state and Commonwealth level, and minimise duplication. This will provide greater certainty for proponents during the environmental impact assessment process while minimising delays in decision making, including how much assessment their action will require, and greater certainty on approval or the types of approval conditions to be imposed.

Costs: There will be no cost to business as there will be no change resulting from the government response to this recommendation.

Impacts on the Environment

There will be no impact on the environment from maintaining the status quo. The government is of the view that none of the three options proposed by the Review would result in increased protection for matters of national environmental significance.

Improving protection of matters of national environmental significance is addressed through other recommendations, particularly Recommendations 4, 6, 26 and 27 (refer section 5 and 6 of this RIS). This work will be prioritised to better achieve an appropriate regulatory model for whole of environment matters. The Commonwealth will encourage improvement in the standards of state and territory assessments through statutory determinations for EIA and offering potential accreditation to jurisdictions that can demonstrate they meet those standards.

This approach would require discussion with state and territory agencies through COAG. It would be consistent with the general aims of the government response to harmonise Commonwealth and state and territory processes, and with COAG's desire to see 'integrated assessment and approval process encompassing all statutory assessments and approvals by the three levels of government' (COAG 27 Communiqué, July 2009).

Impacts on Government

Commonwealth

Benefits: The Commonwealth will retain its current clear regulatory role in protecting matters of national environmental significance along with the whole of environment in specific circumstances, and will not need to increase its capacity to regulate broader environmental issues in a wide range of circumstances.

Costs: Retaining the status quo will not result in additional cost incurred by the Commonwealth.

States and Territories:

Benefits:

The states and territories will retain their current clear regulatory role in regulating for the environment generally, except for a limited number of circumstances in which the Commonwealth regulates for the whole of environment.

Costs: There will be no additional cost incurred by the states and territories.

8.4.2 Introduction of power to consider a wider range of environmental considerations – Option 2

Impacts on Business

Benefits: There will be few benefits for business resulting from this proposal

Costs: Industry and proponents would likely see an increase in regulatory uncertainty and duplication as a result of expanding the Commonwealth power to whole of environment consideration in some circumstances. Increasing uncertainty and potential regulatory duplication could in turn have unfavourable delay costs to proponents.

Impacts on the Environment

Environmental outcomes would be improved under this option to the extent that current state and territory assessment processes are deficient, or fail to consider inter-jurisdictional issues. However, little evidence of this was presented in submissions to the Review, or in the final Report.

Impacts on Government

Commonwealth

Benefits: Under Recommendation 25, Commonwealth power would be expanded to give more control over state and territory processes, which in theory could provide an appropriate governance arrangement for 'keeping tabs' on state and territory performance.

Costs: The government is of the view that this power would also be accompanied by unwanted public and political pressure for the minister to frequently 'step in' in an unknown number of situations, where it may not be appropriate, is very high. This could in turn divert attention and resources away from traditional project assessments and protection of matters of NES.

To expand the Commonwealth's regulatory scope would be contrary to elements of the 1992 Intergovernmental Agreement on the Environment. The government is of the view that its current regulatory scope encompassing matters of NES, along with whole of environment in specific circumstances such as where actions are taken wholly within the Commonwealth marine environment, is appropriate.

In addition, there would be significant resource implications for the Commonwealth to implement Recommendation 25. The Commonwealth currently utilises expertise and resources within state and territory agencies to address whole of environment issues in joint assessments. Under Recommendation 25, the Commonwealth would have to increase its skills base and technical capacity, or outsource at considerable cost, its assessment of whole of environment issues.

States and Territories:

Benefits: The options proposed in the report are not likely to have many benefits for state and territory governments — they would still be required to carry out assessments as required in their own jurisdictions.

Costs: The states and territories would not have been supportive of a call in power and implementation of the options proposed in the Report, which would have been contrary to harmonisation themes that have widespread support in the government response.

8.5 Consultation

The Report at page 197 states:

'*Some submissions supported retention of the current scope of the Act. As noted in Chapters 1 and 2, the Commonwealth has a specific role in regulating the environment. This is brought about by a combination of constitutional powers and intergovernmental agreements, and the recognition of the subsidiarity principle – 'that higher levels of government should not undertake what a lower level of government can do for itself'.*

Other submissions argued that the Act should be amended so that once an action falls within the scope of the Act (by having a likely significant impact on a protected matter), the Commonwealth would assess a broader range of the likely environmental impacts of the proposed action, that is, impacts on the whole environment, not just significant impacts on matters of NES.'

8.6 Conclusion

The government has considered the expansion of the scope of Commonwealth environmental impact assessments to incorporate a wider range of environmental considerations, and does not think it is feasible to determine a clear and defined set of circumstances where the whole of environment power could reasonably be applied without creating a range of issues for project proponents and assessing agencies. These issues include: the risks of creating uncertainty and delay in decision-making; the cost implications of additional Commonwealth assessments; and duplication with State and Territory assessments and approval conditions. Further, the government has considered the proposed options provided in recommendation 25 of the Report, and has found that none of the three options would improve protection for matters of national environmental significance. Improving protection of matters of national environmental significance is addressed through other recommendations, particularly Recommendations 4, 6, 26 and 27 (refer section 5 and 6 of this RIS).

Without a clear process to determine what elements the government would need to consider in a broader environmental assessment, there would be additional uncertainty upon referral, as proponents could not be certain how much assessment their action would require, the likelihood of approval or the types of approval conditions to be imposed. This would be contrary to the objectives of the government response, and would result in duplication of assessment, increased cost to business, and project delay and uncertainty.

As noted in the Report, *'To the extent that there are legitimate concerns regarding the quality of State and Territory assessments, it is questionable whether the Commonwealth Environment Minister should act as 'court of final appeal'. This may simply encourage blame shifting.'*

There is often an incorrect public perception and belief that the minister can assess all aspects of the environment when assessing a project. It can be argued that expanding the role of the Commonwealth, and the discretionary power of the minister, to call in the impacts of whole of environment assessments would create a undesirable circumstance where the minister would be pressured to act as a 'final court of appeal' in all environmental matters, even those outside the national interest.

In not agreeing to Recommendation 25 to increase the Commonwealth's regulatory scope, the status quo of Commonwealth, state and territory regulatory reach will be maintained. Hence there will be no increased regulatory role for the Commonwealth, no duplication of regulatory reach with the states and territories, and no increased regulatory burden or cost incurred by the business or community sectors.

9. ACCESS TO COURTS AND MERITS REVIEW

Recommendations of the Report that are primarily analysed in chapter 9 of this RIS include:

Recommendation Number	Recommendation
48	Merits review – wildlife trade decisions.
49	Merits review – impact assessment decisions.
50	Legal standing.
51	Undertaking as to damages.
52	Security for costs.
53	Public interest costs orders.

9.1 The Problem

Increased public awareness of environmental issues has accentuated public interest in environmental decision making and participation in decision making processes. Public submissions to the Report, primarily from environmental non-government organisations, raised concerns relating to the perceived barriers to public interest litigation and judicial review such as potentially costly court cases, and actual barriers to merits review of decisions made under the EPBC Act.

The Report recommends generally for greater access to 'merits review' and 'judicial review and access to courts' in respect of decisions taken by the minister and delegates. Supporting arguments contend that greater transparency and accountability for administrative decisions will be achieved by bringing greater public influence to the review of decisions processes. The Report also found that more meaningful public engagement, enabled by removing legal barriers to merits review, would result in improved confidence in the administration of the EPBC Act and the quality of the decisions made under it.

However, the Report notes that since the 2006 amendments to the Act, the Administrative Appeals Tribunal (AAT) has been asked to review a decision taken by a delegate of the minister on only two occasions. The thoroughness of administrative processes means that the Act is legislation that draws few judicial challenges to decisions. The Report highlights that those contentious decisions taken by the minister are the ones that, but for the bar to obtaining review of the minister's decisions, would be decisions about which review would be sought.

9.2 Objective of the Government Response in Relation to Access to Courts and Merits Review

The objective of the government response is to support public participation and awareness of the operation of the EPBC Act, while ensuring transparency and accountability in an efficient regulatory decision making process that is effective in meeting the objectives of the Act

9.3 Options

9.3.1 Status Quo – Option 1

Maintaining the status quo will ensure that decisions taken at all levels will be subject to accountability at the appropriate levels.

Currently, standing to seek judicial review and injunctive relief is very broad under the EPBC Act and a range of statutory decisions are eligible for judicial review. Standing for merits review is restricted to a narrow class of decisions and is subject to a general 'person aggrieved' test.

In public interest cases the court currently has the discretion to make costs orders, and may decide whether to require a party to give undertakings as to damages.

9.3.2 Extension of Merits Review and Access to Courts – Option 2

Controlled action decisions are preliminary administrative decisions that determine whether or not an action is likely to have a significant impact and therefore should be subject to further assessment and approval before it can proceed. If an action is determined to be a controlled action, then a decision is made on the level of assessment required to inform a final approval decision on the action. In many cases business uses the referral process to confirm their preliminary environmental assessment that the action is not likely to have a significant impact on matters of NES, but still wish to secure the business certainty of subjecting their project to public comment and a statutory determination.

Assessment approach decisions are made for all controlled actions. This decision determines the level of assessment and the timeframes for public comment on all controlled actions. This assessment approach determination is informed by the quality of the information provided by the proponent at the referral stage and the level of complexity and potential environmental impacts of the action. All assessment approaches include minimum periods of public comment and all retain the option of the Minister consulting on his proposed decision prior to making a final determination.

Option 2 proposes to allow for merits review of the initial administrative decisions as to whether or not an action is a controlled action, and in the cases of controlled action decisions, the level of assessment of those actions. The Review also made recommendations in relation to undertakings as to damages and security for costs which are also discussed below and in the impacts for Option 2.

The Review also makes recommendations in relation to undertakings as to damages and security for costs (recommendations 51 and 52):

51. The review recommends that a provision be inserted like the repeal of section 478 to the effect that the Federal Court is not to require an applicant to give an undertaking as to damages as a condition of granting an interim injunction.

52. The Review recommends that the Act be amended to prohibit the ordering of security costs in public interest proceedings.

9.4 Impact Analysis

9.4.1 Status Quo – Option 1

Impacts on Business

Benefits: Maintaining the status quo will ensure that business bears no greater regulatory burden and retain high levels of business certainty.

Costs: Business will bear no increase in cost as a consequence of the government rejecting these recommendations.

Impacts on the Community

Benefits: The government recognises that the EPBC Act has a higher degree of community interest and participation than most Commonwealth legislation, and that there is a significant degree of community interest in many of the decisions made under the Act. Existing broad legal standing provisions are justified due to the public interest nature of decisions made under the Act, and that only a small number of the processes for which merits review is available include a process for receiving public comments.

The government is of the view that to alter the current provisions governing administrative or judicial review of decisions as recommended in the Report would not improve environmental outcomes, accountability or transparency, but would create unnecessary uncertainty and delay.

Costs: The community will incur no additional cost under the status quo.

Impacts on the Environment

The environment will not be negatively impacted by the government not agreeing to these recommendations and by maintaining the status quo.

Impacts on Government

Commonwealth

Benefits: Maintaining the status quo will result in no changes to government. The benefits include continuing certainty in decision making for the Commonwealth and the ability to dedicate resources to effective administration of the Act rather than to management of an increased number of merit review cases.

Costs: Under the status quo, the Commonwealth will incur no additional cost.

States and Territories:

Benefits: State and territory governments will retain their current clear regulatory role in general environmental regulation.

The states' and territories' access to administrative and judicial review is unaltered by the government response to the Report recommendations. The consequential certainty thus provided will encourage community and business confidence and fortify local economies.

Costs: The states and territories will incur no additional cost, and will benefit from continuing certainty.

9.4.2 Extension of Merits Review and Access to Courts – Option 2

Impacts on Business

Benefits: Implementation of Option 2 would provide no discernable benefit for business and would potentially increase cost and uncertainty.

Approximately 68% of decisions made at the referral stage determine that the project is not likely to have a significant impact or is not likely to have a significant impact if implemented in a particular manner. The decision is informed by the results of 10 business days of public comment and departmental analysis of the action against protected matters in the project area. It could be reasonably expected that proponents would choose not to refer a project if there is an increased risk of subjecting the resulting determination to legal challenge, thereby reducing business certainty below the levels of regulatory certainty currently available.

Costs: Implementation of Option 2 would potentially increase the risk of project delays through litigation and the legal costs associated with defending a determination. There may also be additional costs under Option 2 in relation to undertakings as to damages (recommendation 51) and security for costs (recommendation 52). This would allow vexatious applications to be made without any risk of additional cost to the claimant. The government believes that the risk of incurring substantial costs, or being required to pay damages, if an application is determined to be unfounded or vexatious by the courts, should remain one of the considerations prior to commencing legal action.

Impacts on the Community

Benefits: The government recognises that the EPBC Act has a higher degree of community interest and participation than most Commonwealth legislation, and that there is a significant degree of community interest in many of the decisions made under the Act. Implementing Option 2 will increase the number of processes for which merits review is available, and may therefore increase the ability of such groups to challenge decisions under the Act.

Costs: Under Option 2, there is the potential for an increase in the number of vexatious claims made by individuals and community groups, particularly if undertakings as to damages (recommendation 51) and security for costs (recommendation 52) were also implemented. If there is no financial consequence for making a vexatious or unfounded application, there is a possibility that some groups would not fully utilise the existing provisions through which their views can be considered. Currently, all applications referred under the EPBC Act are published on the internet and public comment is sought for 10 business days. All public comments are considered by the decision maker when determining if the action is a controlled action and where relevant, the assessment approach.

Currently, when the determination is published, any party that believes the decision maker did not take into account all relevant information can request reconsideration under section 78 of the EPBC Act. In the request for their reconsideration, any new information that was not considered at the time of the original referral is included by the requesting party. This information is then published for 10 days of public comment

and a new controlled action determination is made taking into account the new information and any public comments received.

If Option 2 were to proceed it would not be unreasonable to believe that some individuals and community groups would not utilise the current public comment and reconsideration provisions available, and seek only to voice their opposition through judicial processes, particularly if the risk of incurring costs were reduced. The government believes that whilst some may view this as an advantage to communities, the long-term impact of reduced business certainty and potential for vexatious claims would in the long-term impose additional costs on communities.

Impacts on the Environment

If Option 2 were to proceed it is unlikely that there would be any improvement in environmental outcomes and possible that environmental outcomes could be negatively impacted. The current impact assessment process, while not subject to merits review, is subject to a high level of public scrutiny. As discussed in the section 'Impacts on Business' above, introducing merits review would be likely to act as a deterrent to proponents to refer actions under the Act, due to concerns by business that the assessment of their action may be subject to further review and therefore delayed.

If there is a reduction in the number of referrals, environmental outcomes could be diminished because some developments might proceed without assessment and the department would then have less data on the cumulative impact of multiple actions occurring in a particular location. The department would also be required to dedicate additional resources to enforcement and to managing merits review appeals, which would reduce the resources applied to proactive conservation activities.

Impacts on Government

Commonwealth

Benefits: No benefits to the Commonwealth have been identified that would justify the implementation of Option 2.

Costs: Under Option 2, the government would be liable for potentially significant resource costs and legal fees for managing and defending merits review of controlled action and assessment approach decisions in federal tribunals.

Delays in process also bring delays for the Commonwealth in receiving revenue from business activity.

Option 2 would also impose additional cost to government in that it would require all staff involved in administration of activities that could become the subject of a 'merits review' to receive new training and to develop and implement new procedures to reduce the risk of a successful challenge to a Commonwealth decision.

States and Territories:

Benefits: No benefits to states and territories have been identified.

Costs: The states and territories make up the single largest referring sector under the EPBC Act, primarily due to infrastructure and road projects. An increase in the

potential for legal challenge, as per Option 2, could increase costs to states and territories in defending new legal challenges.

9.5 Consultation

Submissions to the Report provided cogent arguments both in support of and against broadening access to the review mechanisms. The environmental non-government organisation sector generally raised concerns that the current processes of the EPBC Act lack transparency and an appropriate degree of accountability. The submissions on the interim report by non-government organisations argued that the operation of the Act would be improved by increasing the level of public participation in the Act's processes by, for example, extending public comment periods, raising the low level of awareness of the Act in the community and creating more opportunities for merits review of key decisions under the Act.

In contrast, industry groups expressed concerns that increasing the number of decisions subject to merits review would result in greater potential uncertainty for stakeholders. In its submission to the review, the Property Council of Australia noted *'Merit reviews are also likely to blow out assessment timeframes, which would cost proponents significant amounts of money, both directly and through opportunity costs. The more potential there is for additional review, the more likely it will be that vested interests could unreasonably obstruct and delay a project.'*

9.6 Conclusion

The government concludes that the current balance of merits review and judicial review for determinations under the Act is sound and should be maintained. The scope of the Commonwealth's regulatory impact will not be altered by the government not agreeing to recommendations 48-53. The business and community sectors will bear no increase in regulatory burden.

The government considered all views before deciding to not agree to the recommendations. In responding to the Report, the government supports meaningful public participation in the administration of the amended Act and increased transparency and accountability. The preferred option is to provide a framework for increased transparency and accountability, while maintaining appropriate safeguards against potential misuse of legal processes.

This will be achieved by improving the processes for public participation, including decision-making and the production of guidelines. Additionally, to further enhance transparency and accountability, information that was taken into account in making decisions under the amended Act will be made available at the time that decisions are published.

Recommendations 48-50

The decisions taken by the minister are generally of a character that involve considerations that require weighing complex and potentially competing considerations, including social and economic factors. The requirement for the minister to balance complex and competing issues, often of national significance, means that these decisions ought rightly be taken by an elected official who is accountable to the electorate and Parliament, and not by an unelected forum. The decisions made by the minister will remain subject to the scrutiny of the Parliament, and to review under Administrative Decisions Judicial Review.

Not all of the information provided to a decision maker is publicly available under current arrangements. However, implementation of recommendation 44-46 will improve public accessibility of information and thus address this issue as outlined in the government's response.

Transparency and accountability of decision making will also be improved by making new information available through laying the foundations for developing national environmental accounts (recommendation 67) and outlook reporting (recommendation 23). Also, as part of the reform package the minister will be publishing more information on a routine basis, such as the recommendation reports for all approval decisions made under the EPBC Act. This will provide detailed information and the department's analysis that informed decisions by the minister or a delegate.

In response to recommendation 50, the government view is that existing standing provisions are already sufficiently broad and therefore do not pose an unreasonable barrier to third party litigants.

Recommendations 51 and 52

In relation to recommendation 51, the government recognises that the Act has a higher degree of community interest and participation than most Commonwealth legislation. There is a significant degree of community interest in many of the decisions made under the Act, and public interest litigation plays an important role in maintaining the accountability of decision makers where there is a need to consider complex environmental, economic and social factors.

The government's view is that the Federal Court's discretion to not require undertakings as to damages when proceedings are commenced in the public interest is sufficient protection to ensure that people acting in the public interest are not discouraged from seeking an injunction by their financial circumstances.

In relation to recommendation 52, the government notes that the potential ordering of security for costs in proceedings that are instituted in the public interest can be an obstacle to litigation, particularly as many public interest litigants have limited funds to pay for what can be expensive proceedings.

The government notes that the law already provides some protections for public interest litigants, including established criteria governing the exercise of judicial discretion in relation to the making of orders for security for costs. Whether an application for security is oppressive – in the sense of denying a citizen or organisation with limited funds the right to litigate – is a factor that can weigh in favour of a decision to not make a costs order against an applicant.

Noting the breadth of potential considerations relevant to a judicial decision to order security for costs, the government considers that it would be inappropriate to prohibit the exercise of judicial discretion in connection with public interest matters.

The government does not support the differential treatment of public interest matters arising under the amended Act from that of public interest matters arising under other Commonwealth law.

10) OTHER MATTERS

As noted in section 4 above, there is a range of other matters not specifically examined in this RIS which are contained in the government's response to the Report. Most are matters of no regulatory impact. Those of a regulatory nature are minor or machinery in nature and do not substantially alter existing regulatory arrangements.

These proposed amendments include various proposals to improve public participation in the Act and information available to the community, streamlining the fisheries provisions under various parts of the Act, consolidating and rationalising the range of compliance and enforcement powers and responses under the Act (without changing policy) and the clarification of the roles of other ministers under the Act and the interactions with other pieces of Commonwealth legislation.

The Report also recommended greater cost recovery under the Act, to which the government has agreed in principle. This matter is not considered in this RIS because the government is yet to explore the available options in accordance with the Cost Recovery Guidelines to develop potential cost recovery models. If further cost recovery is pursued, the government will follow its standard procedures for development of the Cost Recovery Impact Statement, as outlined in the Cost Recovery Guidelines, including public consultation.

Specific details on these matters can be found in the government's response to the Report.

11) IMPLEMENTATION AND REVIEW

The Australian Government is committed to extensive collaboration with state and territory governments and other stakeholders in implementing its response to the Report. This collaboration will include consultation on a number of the reform initiatives announced when the government released the response on 24 August 2011, including:

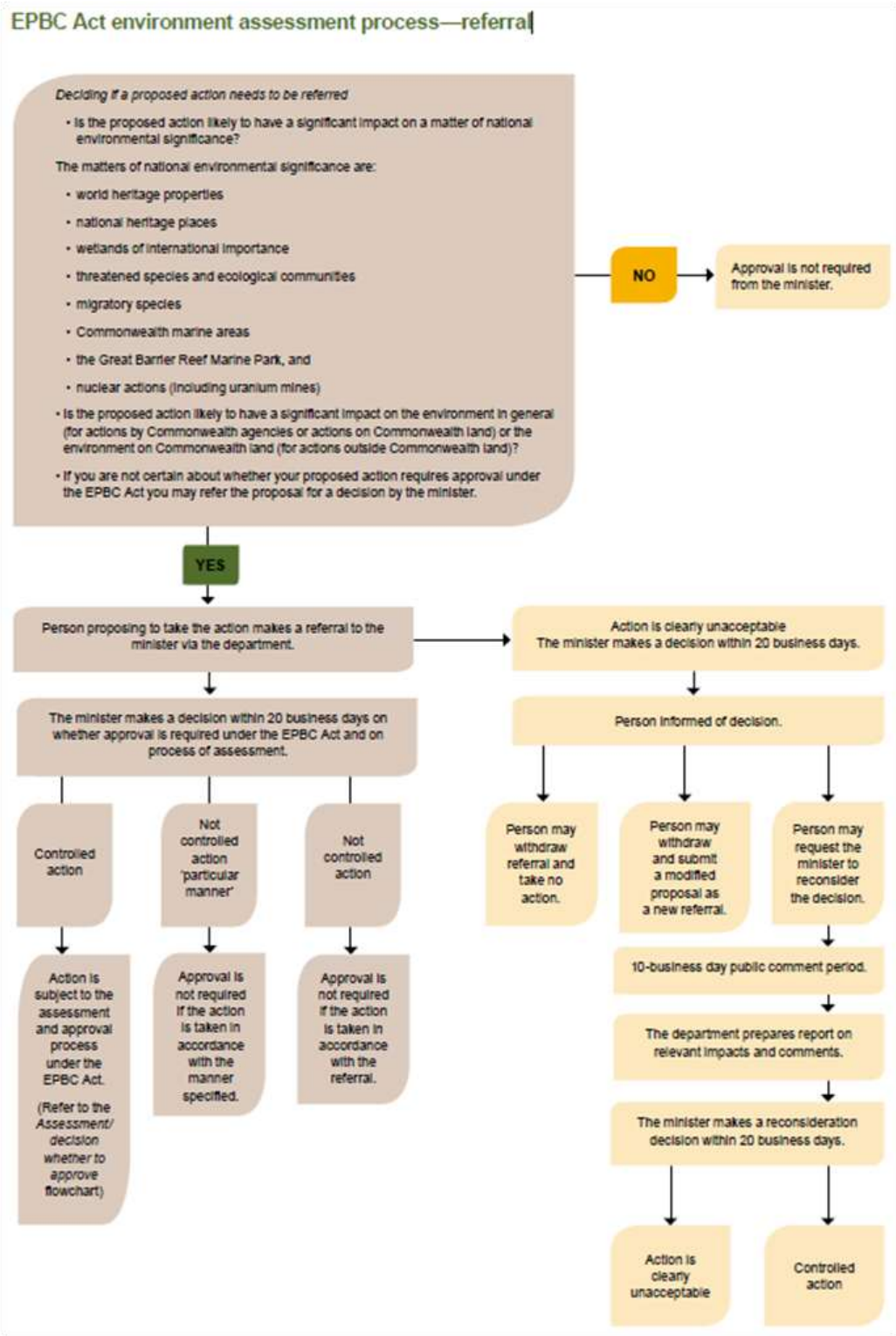
- Australian Government Biodiversity Policy – Consultation Draft
- Environmental Offsets Policy – Consultation Draft
- EPBC Act Cost Recovery Consultation Paper
- National Centre for Cooperation and Development

Where state and territory cooperation will be required to implement the government response (e.g. in relation to better harmonisation of environmental impact assessment, the development of national standards and harmonisation of threatened species lists), the government will put its proposals through the appropriate state and territory fora, including where relevant COAG. Detailed discussions with state and territory officials will also be pursued as necessary.

The government will also host workshops with other stakeholders in developing its implementation plan. This will ensure that the views of the community and industry are reflected in the processes and procedures developed to implement the amended legislation.

Current reporting and review arrangements will be retained including the requirement for an annual report on the operation of the Act to be tabled in the Parliament each year and the requirement for ten yearly independent reviews of the Act also to be tabled in the Parliament. The next independent review is scheduled for completion by July 2020.

Attachment A) EPBC Act environment Assessment process



EPBC Act environment assessment process—assessment/decision whether to approve