SUBMISSION TO THE EPBC ACT REVIEW

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Name

Peter Burnett

Areas of interest

The objects of the Act; Threatened species; International obligations; Indigenous Australians; Heritage; Matters of National Environmental Significance; Environmental Impact Assessments; Cumulative impacts; Climate change; Decision making; Public participation in decision making; Biodiversity; Conservation; Nuclear; Water

Attachment provided?

Yes

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SUBMISSION RESPONSES

This submission was provided as an attachment only. The attachment is provided on the following pages of this document.

Independent Review of the Environment Protection and Biodiversity Conservation Act 1999

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ABBREVIATIONS, ACRONYMS AND CONTRACTIONS	
COAG HoA	COAG Heads of Agreement on Environmental Roles and Responsibilities 1997
CBD	Convention on Biological Diversity
DAA	Development Assessment and Approval
EIA	Environmental Impact Assessment
EPBC	Environment Protection and Biodiversity Conservation Act
ESD	Ecologically Sustainable Development
IGAE	Intergovernmental Agreement on the Environment 1992
IUCN	International Union for the Conservation of Nature
MNES	Matter of National Environmental Significance
NEPC Acts	*National Environment Protection Act 1994* (Cth) and corresponding State and Territory Acts
NSESD	National Strategy on Ecologically Sustainable Development 1992
PEP	Principles of Environmental Policy
SEA	Strategic Environmental Assessment
States	States and Territories

Outline of Submission

- Most aspects of the Australian environment continue to decline and are projected to decline further,
  - while there is little information available on the effectiveness of the EPBC Act in achieving its objects, this decline shows that Australia's overall environmental effort, including effort under the Act, is clearly insufficient.
- Despite uncertainty as to exactly what the EPBC Act is intended to achieve, it is clearly *capable* of operating to deliver significant beneficial environmental outcomes
  - but it is not doing so in practice, for reasons that include insufficient direction to decision-makers and guidance to proponents; absent or insufficiently-strong statutory plans; and significant under-resourcing.
- For the Act to deliver the 'strong, clear and focused protections', referred to in the Terms of Reference while 'making decisions simpler', 'reducing unnecessary regulatory burdens', ' supporting partnerships', 'improving transparency' and 'streamlining and integrating planning', would require a major change of approach at all levels and a significant increase in effort.
- At a conceptual level, the Act needs to be built on a model that adopts a goal of sustainable use of nature and supports that goal with a coherent suite of principles concerning policy integration and participation; the maintenance of ecological function; adequate information and precaution; economic efficiency and environmental federalism.
- Implementing this model through the EPBC act would involve:
  - a statutory object of sustainable use of nature (defined as maintaining or enhancing natural wealth and ecosystem services for present and future generations) and a requirement that all decisions under the Act conform to this object;
  - a new Intergovernmental Agreement on the Environment, to endorse these goals and objectives as part of a national policy framework and to commit Commonwealth, State and local governments to the cooperation and coordination needed to deliver such outcomes under Australia's federal system;
  - a shift to integrated regional planning and land management, a proactive approach under which each significant environmental region or asset is managed as an entity, with desired environmental outcomes set through an integrated planning process, pursued through a coordinated suite of conservation and protection measures, and monitored comprehensively using environmental accounting;
  - appropriate application of Indigenous knowledge with respect to land use and land management with the free, prior and informed consent of the Indigenous peoples concerned;
  - a new focus for the Commonwealth on national and international policy; on conserving MNES through accreditation of, and investment in, State integrated regional plans; and on coordinating national-environmental services, e.g. biodiversity and ecosystem service monitoring and reporting;
  - specifically, a new approach to development assessment under which the Commonwealth would withdraw from most place-based environmental approval processes and instead endorse State/Territory regional plans on the basis first, that they meet its published conservation objectives for Matters of National

Environmental Significance on an ongoing basis and secondly, that State decision-makers must conform to the plans;

- a major increase in government expenditure on implementing the Act, an increase warranted by the far greater costs of restoring losses of natural capital and ecosystem services at a later time and the increased incidence of irreversible losses.

- As a transition to an integrated land use planning and land management approach would take some time, the Commonwealth could withdraw from place-based decisions in the interim by issuing detailed conservation policies and objectives for MNES and establishing an independent environment agency to endorse individual State development decisions, where not covered by an accredited plan, as conforming to them.

Preliminary Note on Concepts, Terminology and Approach

This submission makes arguments based on concepts of sustainability. Neither the concepts themselves, nor the terminology associated with them, have ever been standardised. Both concepts and terminology vary depending on whether they emerged from literature more oriented to science or economics; from Australian or international policy processes; or from sustainability debates of the early 1990s, rather than from the more recent literature on natural capital and ecosystem services paradigms.

Our general approach has been to start with the concepts associated with 'Ecological Sustainable Development' (ESD), an Australian concept developed and adopted through intergovernmental processes in the early 1990s. This is simply because ESD was agreed, through COAG, by all Australian governments at the time, and then incorporated into many policies and laws, even though different jurisdictions then used different terminology, and sometimes varying concepts, in translating ESD into their own law and policy.[1] ESD remains a significant concept in over 100 Australian laws, including the EPBC Act.

We have then sought to update those concepts by reference to more recent thought on natural capital and ecosystem services. These concepts, although dating from the early to mid 1990s (e.g. see El Serafy 1991; Daily 1997), did not achieve broad policy acceptance until the publication of the *Millennium Ecosystem Assessment* (MEA 2005) and thus they post-date the EPBC Act.

While we have endeavoured to be consistent in our use of concepts and terminology, our objective has been to advance the underlying ideas rather than to advocate for particular terms, and thus we are not wedded to the ones we have adopted. For example, the concept of maintaining 'ecological function' is much the same as maintaining 'ecological integrity' and both of these terms have a similar meaning to the economics-oriented concept of maintaining 'critical natural capital'. In each case the underlying idea that we are advancing is to maintain the essential attributes of nature so that nature can continue to do for society what it has always done: that is, support not only life itself, but quality of life, for present and future generations.

[1] In fact, COAG itself adopted inconsistent concepts in the same year, through the Intergovernmental Agreement on the Environment (IGAE) and the National Strategy on Ecological Sustainable Development (NSESD).

1) What the Future Looks Like

We start with evidence concerning trends and the future and draw the attention of the Review to several significant points, beyond those made in the Review Discussion Paper.

a) Commonality Between Major Reports on State of the Environment and Outlook

There is a very high degree of commonality in the findings of major international and domestic reports on the state of the environment and environmental outlook, to the effect that the environment, both globally and in Australia, is in serious and ongoing decline. Two recent major international reports, the sixth *Global Environment Outlook, GEO–6* (UNEP 2019) and *The Global Assessment Report on Biodiversity and Ecosystem Services* (IPBES 2019) are no exception. In its summary for policymakers, GEO–6 reports the ongoing degradation of the atmosphere, biodiversity, oceans, land and water resources. Of particular relevance to the EPBC Act, it finds that:

> A major species extinction event, compromising planetary integrity and Earth's capacity to meet human needs, is unfolding. (UNEP 2019, 8).

In a similar vein, IPBES concludes that:

> Nature across most of the globe has now been significantly altered by multiple human drivers, with the great majority of indicators of ecosystems and biodiversity showing rapid decline (IPBES 2019, 11).

Specifically, around 25% of species are threatened, suggesting that around one million species currently face extinction (IPBES 2019, 11-12).

Such conclusions are not confined to scientifically-oriented bodies. The *OECD Environmental Outlook to 2050* (OECD 2012) is subtitled 'the consequences of inaction'. It argues that the prospects to 2050 are:

> more alarming than the situation described in the previous edition [2008] and that urgent – and holistic – action is needed now to avoid the significant costs and consequences of inaction (OECD 2012, 19).

In his preface to the report, OECD Secretary General put it even more strongly:

> Progress on an incremental, piecemeal, business-as-usual basis in the coming decades will not be enough. The costs and consequences of inaction are colossal, both in economic and human terms. These projections highlight the urgent need for new thinking. Failing that, the erosion of our natural environmental capital will increase the risk of irreversible

> changes that could jeopardise two centuries of rising living standards. We are already witnessing the catastrophic collapse of some fisheries from overfishing, and severe water shortages damaging agriculture. However, these enormous environmental challenges cannot be addressed in isolation. They must be managed in the context of other global challenges, such as food and energy security, and poverty alleviation (OECD 2012, 3).

The Secretary General's last point emphasises the importance of addressing environmental issues in a whole-of-government context and points to the sheer complexity of the issues arising.

Most recently, *The Global Risks Report 2020*, a publication of the World Economic Forum, identified the top five risks (in terms of likelihood) facing the world as environment-related: extreme weather, climate action failure, natural disaster, biodiversity loss and human-made environmental disasters. (WEF 2020). If seen alternatively in terms of consequences rather than likelihood, four out of five of the top risks are environmental: climate action failure, biodiversity loss, extreme weather and water crises. Ten years earlier, and across the three years before that, none of the top five risks in either category was environmental.

b) Additional Australian Sources

In Australia, the *Great Barrier Reef Outlook Report 2019*, while of course only relating to a single matter of national environmental significance, provides substantial insights due to the size and significance of the reef. The report found that threats to the Reef were multiple, cumulative and increasing. Despite 'unprecedented investment' in management of the Reef and its catchment since 2014, it concluded that:

> Without additional local, national and global action on the greatest threats, the overall outlook for the Great Barrier Reef's ecosystem will remain very poor, with continuing consequences for its heritage values also. The window of opportunity to improve the Reef's long-term future is now. Strong and effective management actions are urgent at global, regional and local scales (GBRMPA 2019, vi).

While it is too early for evidence-based analysis, the unprecedented scale of the bushfire disasters this summer, driven in part by Australia's hottest year on record, marked by severe and protracted drought, is consistent with the trends and outlooks identified in the various major reports. Given what is at stake, it would certainly be prudent to act on the basis that a step-change in policy toward sustainability is required.

c) Social Attitudes to Environmental Concerns

Between 1994 and 2014 the ABS collected environmental information from people via a supplement to the monthly Labour Force Survey. The results were published in Environmental issues: People's Views and Practices (ABS cat. no. 4602.0) until 2007[2] and in three separate publications from 2008 covering energy (ABS cat.no. 4602.0.55.001), waste and transport (ABS cat.no. 4602.0.55.002), and water (ABS cat.no. 4602.0.55.003). The results show that concern for the environment rises and falls over time and varies between jurisdictions and theme (i.e. energy, waste, transport and water). The loss of the ABS survey means that there is no current information from the ABS[3].

Information is available from other sources however. The annual Scanlon Foundation Survey 2019 shows a significant jump in the environmental concern. The percentage of respondents ranking environmental issues as the most important increased from 10% to 19% in a telephone survey and from 5% to 17% in a written survey (Markus 2019, 31). We stress that this was in mid-2019, before the recent extended and unprecedented fire season.[4] Consistent with earlier ABS findings that public concern about environmental issues tends to wax and wane, an earlier Scanlon Survey (telephone) in 2013 had identified a significant drop in the proportion of respondents who ranked environmental issues as the most important, from 18% in 2011 to 5% in 2013 (Markus 2013, 20).

Differences in expressed levels of concern appear not to correlate with the condition of the environment generally, although they may correlate to particular events, such as the drought of the 2000's and the natural disasters of the recent summer. It is thus likely that the ever-more dire threat that environmental decline poses to society is not well-understood, making it essential that governments go beyond informing the public about the state of the environment and trends, to *educating* them about the implications for the future.

As a result, we argue that the statutory obligation to report on the state of the environment should be complemented by a statutory obligation to educate society about environmental trends and their implications. We recommend later that these roles be assigned to different bodies.

Submission One

Both the evidence and expert opinion is that environmental decline, both globally and nationally, is continuing and that its impacts are

[2] See https://www.abs.gov.au/AUSSTATS/abs@.nsf/productsbyCatalogue/989527F462991F5ECA2568A90013933E?OpenDocument

[3] It would be open to the ABS to reinstate the survey and hence retain a timeseries, albeit with a gap between 2015 and whenever it is resumed, which is likely to be useful to decision makers

[4] And of course before the COVID-19 crisis.

increasingly significant. The unprecedented bushfires and other natural disasters in Australia this recent summer of 2019-20 are consistent with both trends and predictions. These facts, together with the likely cost of inaction, point strongly to the need for:

a) **new thinking and holistic approaches to environmental policy and regulation, far beyond incremental improvements, and**

b) **an ongoing government commitment, not only to inform but to** *educate* **the public about environmental trends and their implications, on an ongoing basis.**

2) Performance and Outcomes of the EPBC Act

a) Limited information on performance

There is very little information on the performance of the Act. The EPBC Act Annual Report under s 516 is directed almost entirely to cataloguing activity, such as the number of plans or decisions made, or compliance with statutory timeframes. It does not, and, in the absence of baseline, evaluative or other contextual information, probably cannot, reveal much about the environmental outcomes attributable to the Act. In this regard we note that the Hawke Review of 2009 found 'a lack of benchmarks by which to measure the Act's performance' (Hawke 2009, 25).

Further, neither of the other two environmental reports produced under the Act reveal anything significant about the performance of the Act either. The State of the Environment Report is far too broad to address the performance of the Act other than in passing; this problem is exacerbated by inconsistency between State of the Environment reports over time. On the other hand, the agency-based ESD reports produced under s 516A of the Act have focused almost entirely on internal agency measures such as recycling of office wastes.[5]

b) Context: Policy Outcomes Internationally

GEO–6 also considered the effectiveness of environmental policies globally, concluding among other things that:

> Policy design is at least as important as the choice of policy instrument for policy

[5] In this regard, note the report of the Productivity Commission on the implementation of ESD by agencies, published prior to the passage of the EPBC Act: Productivity Commission, Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies, Report No 5, (PC 1999).

effectiveness (well established) (UNEP 2019, 17).

Relevant to the EPBC Act review, UNEP's findings on policy effectiveness also include views that:

- in many cases environmental policymaking does not reach its full potential, for example because no *ex ante* or *ex post* analysis is attempted, or clear and measurable targets are missing;

- despite considerable innovation and effort, policy efforts and effects remain insufficient, leaving a requirement for urgent action as resource depletion and growing emissions have a 'partially irreversible impact on ecosystems, human health and economic costs' (UNEP 2019, 18).

These findings suggest that a number of the issues that we raise in this submission concerning the EPBC Act are not unusual in an international context.

c) Is the Act well-administered?

In our view the issue here is not that the Act is not well-administered, but that is significantly under-resourced. When it commenced in 2000, the Act was a major new initiative, yet no new resources were allocated to its administration. Rather, resources were reallocated from within the environment portfolio. To our knowledge, there has only been one significant increase in resourcing, in 2007, following a report by the Auditor-General, *The Conservation and Protection of National Threatened Species and Ecological Communities* (ANAO 2007). In response to concerns raised by the ANAO about resourcing during this audit, the Department had advised that it had sought supplementary resourcing from government, unsuccessfully, on four occasions (ANAO 2007, 27). Despite the subsequent increase of resources in 2007, the general and ongoing pattern has been for the administration of the Act to be subject to annual efficiency dividend reductions, offset to a small degree by occasional one-off measures, the most recent being allocation of funding under the Government's 'congestion busting' initiative.

Under-resourcing has implications for service delivery, as is illustrated by a chart in a recent EPBC Act Annual Report (Figure 4). Although confined to one sector, the recent *Review of interactions between the EPBC Act and the agriculture sector* (Craik review) (Craik 2018) also highlights the limited availability of services.

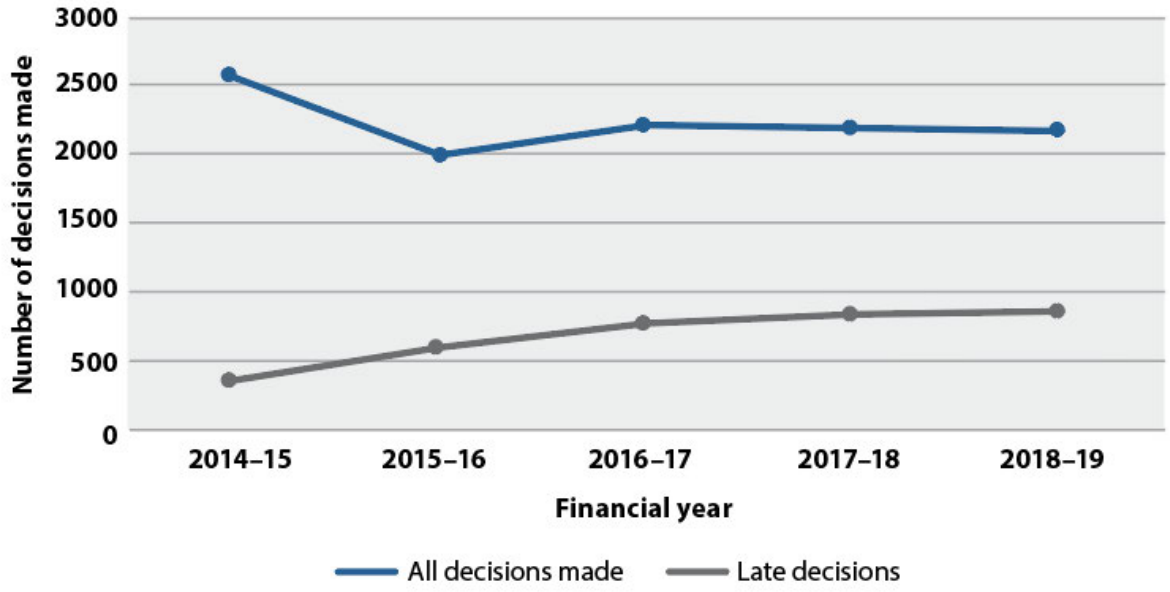

Figure 4: Number of EPBC Act statutory referral decisions versus late decisions, 2014–15 to 2018–19 (DEE figure 2.4) (DEE 2019, 33)

More significantly, lack of resourcing has meant that the Act has never been implemented in a manner commensurate with its potential. In particular, the extensive planning provisions of the Act have been under-utilised. This is most apparent in the fact that there are no bioregional plans in terrestrial areas and only four in marine areas. This contrasts with the original intention of government, set out in the original Consultation Paper on the Act that there should be 'early Commonwealth involvement in planning' and 'greater focus on early, strategic planning (Hill 1998). As a result, the Act has been designed for a proactive planning-oriented approach but never administered in this way. A key consequence is that EIA decisions are made in the absence of the comprehensive guidance and context that bioregional and certain plans could provide, with the result that there is no guarantee that individual decisions will maintain or enhance the condition of MNES over time. (This argument is developed further in 3d below).

Further, when plans *are* made, they are often not sufficiently resourced for implementation. This is a point made by the OECD in relation to threatened species and ecological communities in its most recent Environmental Performance Review of Australia (OECD 2019, 197). (See also section 6a, below.)

Submission 2

a) There is very limited information, official or otherwise, concerning the on-ground effectiveness of the act. The Act should be amended to require the keeping of sufficient information to allow its on-ground effectiveness to be evaluated.

b) The administration of the Act is significantly under-resourced. Indeed, it has never been funded fully. Once the Government has decided on any amendments to the Act, or even on a new scheme, it should conduct a full independent costing of implementation to ensure that the act is funded proportionately to the desired policy outcomes.

3) Existing Policy Model Underpinning the Act

a) Preliminary Matters

Review Discussion Paper Questions 2, 3 and 26, relating to the objects of the Act and the 'principles to guide future reform' set out in the Review Discussion Paper (reproduced in Box 1), raise not just the principles and objects of the Act, but the overall model on which the Act is based. We discuss the existing model in this section; in the next section we discuss the model we would propose. In doing so, except where the context requires otherwise, we use the policy term 'objectives' and the legislative term 'objects' interchangeably.

We raise another preliminary matter here, because it underlies our entire submission. We note that public policy is based on a paradigm of selection of goals and the means of achieving them (Jenkins 1978). In other words, policy conforms to a model in which government, on behalf of society, decides that it wishes to achieve a desired end (usually to address an identified problem) and then adopts certain means to achieve this end (the 'goals and means paradigm').

This is of particular importance in the present context because the problem being addressed, that of long-term biophysical decline, will only be solved if human responses are effective in removing the causes of that decline. In policy terms, this means that the policy underpinning the Act, and the Act itself, must meet two pre-conditions. First, the goal must be appropriately directed to halting the decline. Secondly, the means chosen to achieve the goal must be appropriate and adapted to achieving the goal. Should either of these elements be addressed inadequately, the environment will continue to decline (even if the rate of decline has been slowed) leaving an even more challenging task to future generations.

b) Existing Environmental Policy Goals and Objectives: General Comments

It is essential to consider not just the goals and objectives of the Act (Box 1), but the broader policy context in which the Act sits. Together these elements define the overall policy model that underpins the legislation.

Box 1 Extract from Section 3, Objects of the Act

(1) The objects of this Act are:

(a) to provide for the protection of the environment, especially [MNES] and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

(c) to promote the conservation of biodiversity; and

(ca) to provide for the protection and conservation of heritage; and

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and Indigenous peoples; and

(e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and

(f) to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and

(g) to promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

Objects clauses serve a limited function in Australian legislation, limited largely to assisting legal interpretation. This is partly because objects clauses do not have primacy: like any other legislative provision, they must be interpreted in context and are subject to being qualified by subsequent, more specific, provisions (see the discussion in Pearce 2019, at 2.21). As objects clauses are not simply statements of policy, but also conform to legislative drafting conventions, they do not necessarily take a form that is optimised for expressing policy intent. For example, the first object of the EPBC act, to 'provide for the protection of the environment', reveals, from a purely policy perspective, little more than an intention to address the topic of environmental protection. Further, because objects clauses do not take primacy over other provisions, they may not even influence, let alone determine, the manner in which a statutory discretion is exercised, unless the provision containing the discretion is drafted to achieve this outcome.

The implications of these points for the operation of the Act are twofold:

First, an objects clause is not a substitute for a formal and overarching statement of policy that can be used to guide to its administration (and possibly its

interpretation). Although the EPBC Act was preceded by a Consultation Paper (Hill 1998) and accompanied by the usual second reading speech and explanatory memorandum, there is no detailed and authoritative statement of what the Act is trying to achieve, nor a separate broader statement of the Australian Government's environmental policy objectives. This situation leaves it difficult to divine the environmental policy intent behind the EPBC Act and suggests that addressing this issue requires not just amendment of the objects clause, but the support of a broader non-statutory policy statement, at least pertaining to the objectives and administration of the Act itself but ideally for environmental policy as a whole, for example in the form of a white paper.

Secondly, it is inevitable in a regulatory scheme based substantially on development assessments, and the making of statutory plans, that such a scheme will involve the establishment of significant discretionary powers. Consistent with a goals and means paradigm, it is essential to ensure that such discretionary powers are exercised consistently with the policy intent. The current legislative model, under which the Minister is required to *consider* various sustainability-related matters, but is subject to very few constraints as to the *substance and outcome* of discretionary decisions (see below) is, from the perspective of achieving a specific policy goal or objectives, simply inadequate.

As a result, the arguments we make below, although addressed in the context of section 3 of the Act, are made on the basis that the policy behind the Act and any reforms to it should be articulated in the broadest possible non-statutory statement by government. The objects clause should then at least align closely with that statement, if not refer to it expressly or even incorporate this statement into the legislation.[6] Finally, each discretionary power in the Act should, in addition to listing relevant considerations in the usual way, require the minister to ensure that each discretionary decision he or she makes conforms to the objects of the Act.[7]

c) Existing Objects Clause: Specific Comments

In addition to the general points above, we have some specific comments on the existing objects clause in the EPBC Act. At this point we confine ourselves to the environmentally-substantive concepts of sustainability, environmental protection, and conservation. We deal with supporting objectives, such as federal state cooperation and Indigenous peoples' participation, in later sections.

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[6] See for example the *National Environmental Protection Act 1994* (Cth), which includes the IGAE in a schedule to the Act.

[7] Even where existing provisions do make express reference to the objects of the Act, e.g. s 271 concerning the making of threat abatement plans, they only require the minister to consider those objects. Once the minister has properly 'considered', as in s 271, the promotion of ESD through the ecologically sustainable use of natural resources, they can give as much or as little weight to that consideration as they wish.

i) Environment Protection

Section 3(1)(a) is directed to 'providing for' environment protection, especially MNES. This is not a substantive goal and it does no more than indicate that the Act contains provisions on this topic. A statement is required as to the nature and extent of the protection desired, e.g. to 'ensure that matters of national environmental significance maintain their physical and ecological integrity, so that they can continue to provide the ecosystem services for which they are significant'.

ii) Sustainability

Section 3(1)(b) is cast in terms of 'promoting' ESD through the conservation and ecologically sustainable use of natural resources. Ecologically sustainable use is defined in section 528 as:

> ***ecologically sustainable use*** *of natural resources means use of the natural resources within their capacity to sustain natural processes while maintaining the life support systems of nature and ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations.*

While somewhat wordy, this definition seems clearly directed to maintaining ecological function for the benefit of both present and future generations. This is a coherent approach conceptually, but it is not properly integrated with decision-making under the Act in two respects:

First, it does not *govern* decisions taken under the Act unless the relevant decision-making provisions make express reference to it. In the absence of such express references, this paragraph simply informs the reader that this is one of the ends to which the Act is directed, providing no more than the broadest context for decision-making.

Second, some major decision-making provisions of the Act, especially s 136 (about whether to approve development following assessment) direct the minister to consider, not the object of ecologically sustainable use under section 3(1)(b), but the 'principles of ESD' as set out in s 3A (see Box 2). These principles make no reference to ecologically sustainable use. Further, there are five 'principles' in s 3A, but no goal or objective. The principles are thus apparently independent; like the pieces of an unassembled jigsaw, the relationship between them is not clear. To compound this difficulty, the Federal Court in the *Blue Wedges case* held that the principles could be considered together, effectively as a 'job lot'.[8] In our view the Act should be amended to reverse the effect of this decision, which, we respectfully submit, is to conflate principles that are as inherently distinct as

[8] Blue Wedges Inc v Minister for Environment, Heritage and the Arts (2008) 157 LGERA 428.

ecological integrity and economic valuation.

Box 2 Principles of Ecologically Sustainable Development, EPBC Act, Section 3A

EPBC Act 3A Principles of ecologically sustainable development

The following principles are principles of ecologically sustainable development:

(a)decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c)the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(e)improved valuation, pricing and incentive mechanisms should be promoted.

If the Act is to promote or advance sustainability in substance, it will need to define the concept clearly and require that decisions conform to it.

iii) Conservation

In contrast with environment protection, which is inherently reactive, conservation is inherently proActive, requiring the investment of time and resources to maintain or enhance the condition of the relevant environmental assets. Paragraph 3(1)(c) currently states an object to ‘promote' the conservation of biodiversity. It does this primarily by providing for the making of various plans, but the act also provides in several sections for the granting of financial assistance for conservation purposes e.g. s 281 relating to threaten species recovery and s 324 relating to World Heritage properties. While various provisions for the making of plans require the minister to consider conservation-relevant matters to a greater or lesser degree, on the same 'goals and means’ rationale as we argued above, this model should be strengthened, including by making a specific link between planning and investment, for example along the following lines (for readability, the qualifying words in square brackets might appear elsewhere in a fully drafted objects clause):

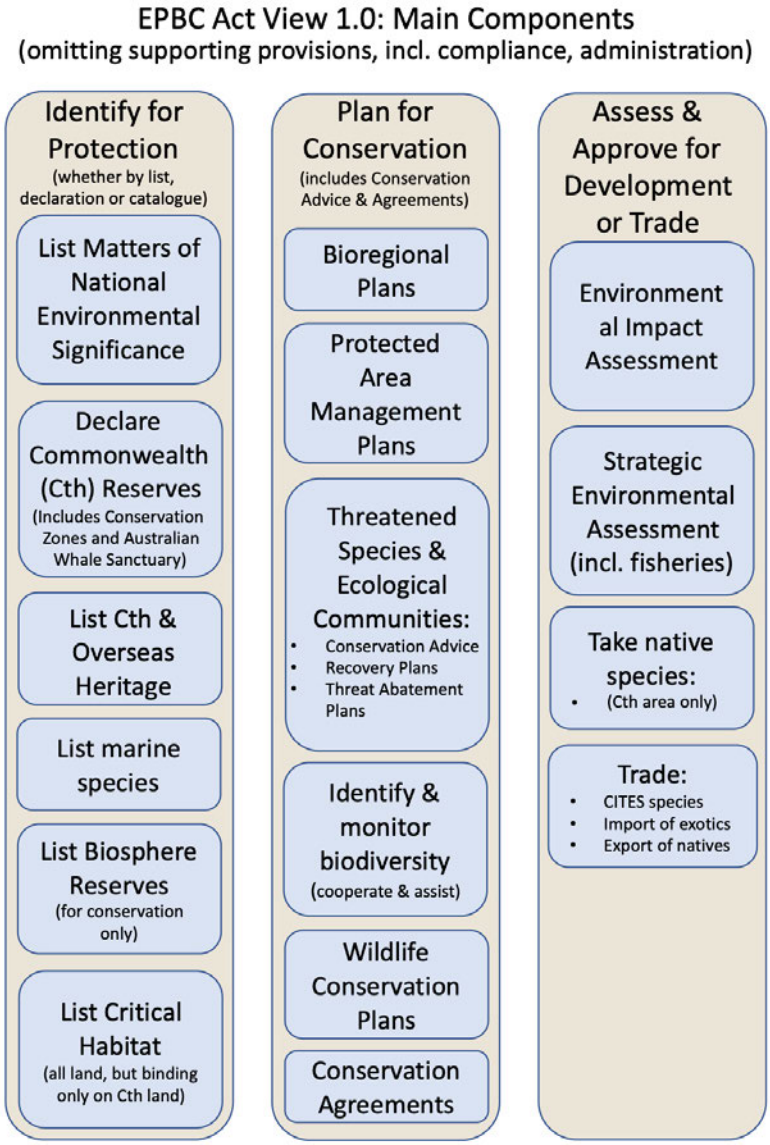
> To advance the conservation of biodiversity through conservation planning [in relation to matters of national environmental significance] and through investment in the implementation of those plans [in partnership with the relevant land managers].

d) Apparent Policy Ambition is Higher than the Act Achieves

The broad environmental objectives of the Act can be summarised as providing for environment protection, promoting ESD and conserving biodiversity. The Act provides for environment protection through the listing of MNES and by prohibiting development likely to have a significant impact on MNES, except where that development is approved by the Minister after environmental assessment. The Act promotes ESD mostly by requiring it to be considered in various decisions, while it promotes conservation by providing for various types of environmental planning.

These functions are represented in Figure 2.

Figure 2: Primary Functional Components of EPBC Act



Consistent with this, the primary environmental decisions under the Act are to:

- Identify various natural values for protection (mostly by listing them as MNES).

- Plan for conservation of biodiversity, MNES and Commonwealth areas, whether by making various types of plan, or for private land, by entering into conservation agreements with landholders or management bodies.

- Assess for development, individual projects (by EIA) or areas (by SEA), where development is likely to have a significant impact on MNES.

While there are certain environment-related requirements on the minister in making these various types of decisions. For example, to be satisfied that a conservation agreement results in a 'net benefit' for biodiversity conservation (s 305) or to consider the objects of the Act (e.g. s 186, concerning decisions to amend the threatened species list). Such provisions will usually not have the effect of requiring a specific outcome. In particular, in relation to the assessment of development actions, the minister can, after giving due consideration to these matters, take almost any decision he or she wishes, as explained in detail below. In other words, the Act does not require the policy means to be directed to achieving the apparent policy goals (and, as we now discuss, it is very limited in preventing the policy means from being *mis*-directed).

i. Analysis of EIA Decision Requirements

On its face, the object of promoting ESD through ecologically sustainable use in EIA decisions is met in part by prohibitions in Part 9 Division 1 (for project-based EIA) and Part 10 Division 1 (for strategic assessment), which appear to set minimum standards for the approval of a development. In practice however, these prohibitions place very few constraints on the what the minister can approve:

Sections 137 and 146G require the minister not to act inconsistently with Australia's obligations under the World Heritage Convention; or the Australian World Heritage management principles; or a plan that has been prepared for the management of a World Heritage property under ss 316 or 321 of the Act, but:

- The wording of both the Convention and the principles is so general as to exclude very little.
- The Minister has a significant degree of latitude in interpreting the World Heritage Convention, because the question of whether a decision would be consistent with Australia's obligations under the WHC is a subjective one for the minister, on proper legal grounds, not an objective one for a court: *ACF v*

Minister for the Environment.[9]

- Because there is no requirement under s316 or 321 to make or publish a formal declaration that a plan for a World Heritage place is a plan to which those sections apply - i.e. not every plan for a World Heritage place is a plan made or secured by the Minister under these provisions and, without examining departmental files, it is unclear whether there are any such plans.

Sections 137A and 146H require the minister not to act inconsistently with the National Heritage management principles; an agreement to which the Commonwealth is party in relation to a National Heritage place; or a plan that has been prepared for the management of a National Heritage place under ss 324S or 324X. Again:

- The National Heritage Management Principles are very general and exclude little; and
- Because the Act only refers to the preparation of plans for National Heritage places, but does not require the minister to make a statutory *determination* that a plan is a 'National Heritage plan' for the purposes of the Act, it is not clear that any plans for National Heritage properties are plans to which this section applies (i.e. even if the authority managing a National Heritage place has prepared a plan of management, there is no publicly available means of determining whether such a plan is a plan to which ss 324S or 324X apply).

Sections 138 and 146J require the minister not to act Australia's obligations under the Ramsar Convention:

- Again, these obligations are very broad, built around the concept of 'wise use', which would be for the minister to interpret.

Sections 139 and 146K in relation to threatened species or ecological communities, require that the minister not act inconsistently with Australia's obligations under the Biodiversity, Apia or CITES Conventions, or a recovery plan or threat abatement plan

- Once again, the Convention obligations are very broad and largely for the minister to interpret, e.g. the Convention on Biological Diversity contains objectives for the conservation of biological diversity and the sustainable use of its components and requires parties to develop policy responses to these.
- Recovery plans are usually couched in general language; for example the National Recovery Plan for the White Box – Yellow Box – Blakely's Red Gum Grassy Woodland and Derived Native Grassland (DSEWPaC

[9] (2016) 251 FCR 308, Griffith J.

2011) includes a specific objective of minimising the risk of extinction of the ecological community through achieving no net loss in extent and condition of the ecological community throughout its geographic distribution and includes (non-binding) advice that decision-makers should 'consider' various matters.

    - Although referring factually to land clearing as a significant threat to the woodland, the recovery plan does not actually advise decision-makers against approving land clearing, let alone state that clearing is inimical to recovery and is contrary to the plan, even though the woodland is critically endangered.
- Threat abatement plans tend to deal with natural factors that operate at a landscape, such as pests and diseases, and so are also likely to place minimal constraints on ministerial decisions concerning particular developments.

Sections 140 and 146L, in relation to migratory species, require that the minister not act inconsistently with Australia's obligations under relevant international agreements, but these too are couched in general language that is unlikely to constrain a particular decision, particularly given the fact it is largely for the minister to interpret this language:

- For example, the obligation under Article 4 of the Bonn Convention on Migratory Species that parties 'endeavour' to conserve habitats and to 'prevent ... or minimise, *as appropriate* ... adverse effects ... that seriously impede the migration of the species ...' (emphasis added).

Sections 140A and 146M prohibit the Minister from approving various nuclear installations.

Various provisions in the Act, for example s 286 in relation to wildlife management plans, specify that a Commonwealth agency (which is defined to include the minister) must have regard to or act in accordance with the various plans made under the Act:

- First, poor drafting means that it is unclear whether these obligations apply to decisions under Part 9 Division 1, because of the prohibition in s 136(5) on the Minister considering anything beyond that division.
- Because of the clear words of s 136(5), we think they probably do not, but the regular inclusion of discussion of bioregional plans by the department in its recommendation reports to the minister under Part 9 Division 1, suggests that it may have advice to the contrary.[10]
- Even if it were clear that the minister was bound to conform to these plans,

[10] See for example 'New Intercity Fleet Maintenance Facility', Kangy Angy, NSW (EPBC 2016/7681).

often they do not exist; in particular there are only four marine bioregional plans (under Part 14) and none for terrestrial areas.

At the end of the day, aside from the special case of the specific prohibition on nuclear installations, the *de facto* minimum standard for development projects under the Act therefore appears to be that the minister should not approve anything with an egregious impact on MNES, e.g. approve an impact on a World Heritage area so extensive that the approval could not, on any reasonable view, be said to be consistent with Australia's obligation to 'protect' or 'conserve' the property as required by the World Heritage Convention.

ii. Policy Implications of broad ministerial discretion

As a result of the narrow operation of the statutory provisions discussed above, in relation to development decisions, the Act as implemented aligns, except in the unlikely case of egregious decisions, to policy Tier 2 in Figure 3. Tier 2, 'very weak sustainability', gives effect to an intention (i.e. a goal) only that decision-makers should *consider* the environmental implications of proposed decisions, and perhaps strive to them what might seem to be an 'appropriate balance', but not that such a 'balance' should *achieve* any particular substantive environmental outcome or even be consistent with any previous decision.

Figure 3. Scale of Policy Ambition (Based on Burnett 2018)

Policy Approach	Environment Policy Ambition (colour indicates strength of ambition)	Underlying Values	Example: Public Native Forest
1. Case by Case	Reactive	Pragmatism	Constrain actions, eg clearing, if cause a significant problem, eg erosion or public outcry
First Threshold: from reactive to systematic approaches			
2. Policy Integration	Very Weak Sustainability	Rationalism	Consider all economic, social and environmental factors in assessing proposed uses (but the 'balance' remains open)
3a. Economic Efficiency	Mainstream Economics	Pareto Efficiency	Put forest to highest value use based on cost-benefit analysis (CBA)
3b.Environmental Standards	Mainstream Economics and Science	Affordable Quality of Life	Put forest to highest value use *within* scientific standards for maintaining forest ecological function, but subject to: . CBA of the standard . CBA of departure from std
Second Threshold: from mainstream systematic approaches to those based expressly on sustainability concepts			
4a. Green Growth	Partial Sustainability	Importance of natural capital to well being	Put forest to highest value use, expressly considering desirability of maintaining natural capital
4b. Capital Maintenance	Weak Sustainability	Intergenerational Equity	Put forest to highest value use while maintaining net capital (allows offset of capital loss with capital formation of any kind, incl human-made)
4c. Ecologically Sustainable Development	Strong Sustainability		Put forest to highest value use without compromising (or risking compromise to) ecological function
Third Threshold: from human-centric to ecocentric approaches			
5. Ecocentrism	Preservation	Inherent Natural Values	Protect & conserve all forests with significant natural values

The problem with this relatively low level of policy ambition is that it may or may not move development cumulatively towards sustainability, depending almost entirely on the views of individual ministers. In contrast, the Review Discussion Paper refers in section 1 to the need to maintain strong environmental standards. While the Act reflects strong *procedural* standards, for example the requirement in section 136 that the minister consider an extensive list of matters before making a decision, it does not reflect strong *outcome* standards.

If the desired outcome is to maintain ecological integrity, which is the minimum standard required to halt environmental decline, the Act needs to correspond to Policy Tier 4c, and should require for example that all decisions achieve the ecologically sustainable use of the relevant natural resources.

e) Comments on 'Principles to Guide Future Reform'

It will be clear from this submission that we favour the policy model that we develop in the next section. As a result, our primary comment on the principles suggested in the Review Discussion Paper is that they bear only a limited relationship to the established Australian principles of environmental policy, especially the principles of ESD. Nevertheless, we also provide the following particular comments on the principles suggested in the Review Discussion Paper, relating them to the principles which we propose, as appropriate.

i. Effective Protection of Australia's Environment

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

Comment: While we do not disagree with the general intent of this principle, particularly for the purposes of general discourse, words such as 'protecting', and 'focused' are not sufficiently precise to form the basis of substantive policy. For example, an objective of protection begs the question of 'how much protection?' Clearly only the most critical or valued environmental assets can be protected in an absolute sense. Properly defined and applied, the concept of sustainability supports a policy approach under which the current generation can make full use of nature's services, without depleting or degrading nature's capacity to continue providing the same services on an indefinite basis. This, we suggest, is the overarching goal of environmental policy.

ii. Making decisions simpler

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

Comment: Efficiency and certainty are, we suggest, universal regulatory policy objectives. They are clearly appropriate in a review such as this.

iii. Indigenous knowledge and experience

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

Comment: We agree that this principle is a priority area for attention. Indeed, given Australia's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples in 2009 and the release of the Uluru Statement from the Heart by delegates attending the First Nations National Constitutional Convention in 2017, Australia can no longer ignore its obligations towards Indigenous peoples.[11] The form of words that we have proposed below is similar in sentiment to those above, but is more detailed in proposing how Australia's Indigenous peoples should be involved in decisions that affect their rights and interests.

iv. Improving inclusion, trust and transparency

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

Comment: These are important general policy objectives which we have addressed below in terms broadly similar to those proposed in the Review Discussion Paper. We have linked transparency to participation, to emphasise that effective participation is not possible without the fullest possible access to information.

v. Supporting partnerships and economic opportunity

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

Comment: While we have no difficulty with the general concept that partnerships can be a useful means to achieving policy ends, including for the environment, in this submission we have couched this concept as primarily a principle of cooperation in the specific context of environmental federalism, to emphasise that partnerships and cooperation between levels of government are essential under a Constitution that shares responsibility for the environment between the Commonwealth and the States which also invests various environmentally-relevant powers in local government. Of course, partnerships can also be valuable in other contexts, as can be seen from the provision made in the EPBC act for conservation agreements.

Despite being generally supportive, it is also important to bear in mind that

[11] It is also relevant to note here the large area under Indigenous management in Australia - 76 Indigenous Protected Areas, totaling just over 67 million ha and just under 44% of the national reserve system. https://www.niaa.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas

cooperation has sometimes been over-sold as part of a 'win-win' rubric, to imply that environmental problems can be addressed wholly or primarily by voluntary action, when in fact they will often also necessitate difficult decisions involving regulatory or fiscal measures.

vi. Integrating planning

'Streamlining and integrating planning to support ecologically sustainable development.'

Comment: We agree with what this principle implies, which is first, that strategic planning, a proactive activity, is a more efficient and effective means of advancing ESD than regulation, a reactive and interventionist activity; and secondly that ESD is best approached through an integrated approach. We address this further below, through a proposed principle of 'a bias to conservation'.

f) A note on Cost Benefit Analysis (CBA)

Question 2 raises the issue of whether ESD might be better achieved through the inclusion of environmental, economic and social factors in CBA. This idea has superficial attraction, as in principle, CBA performs a strong policy integration function by quantifying and then summing all environmental, economic and social impacts. In this respect it corresponds to an increase in environmental policy ambition, from the simple 'balancing' of Policy Tier 2 in Figure 2, to the economic efficiency of Tier 3. However, there are a number of practical difficulties associated with applying CBA to the quantification of environmental factors:[12]

a) CBA relies on quantifying relevant factors in monetary terms. Many environmental values are not traded and not readily brought into a market. As a result, there are no revealed preferences with which to value these factors. On the other hand, stated preferences, e.g. through surveys, are hypothetical and not a reliable quantification for the purposes of decisions that may involve serious or even irreversible environmental impacts. Further, monetary estimates are not well adapted to decisions involving intangible or ethical values and scientific uncertainty, such as whether society should allow a species to become extinct.

b) Many environmental issues are long-term; this is why ESD rests on a value of intergenerational equity. To apply CBA to long-term decisions would require an assessment of costs and benefits well into the future. The estimation of future values, especially in the long term and particularly under scenarios of

[12] For a clear, if a little dated, outline of the limitations of CBA in relation to environmental decision-making, see Michael D Young, *For Our Children's Children: Practical Implications of Intra-Generational Equity and the Precautionary Principle* (Resources Assessment Commission 1993) 22-24.

> major and uncertain change arising from phenomena such as climate change, is both fraught and controversial, as the Stern Report on UK Climate Policy illustrates (see Stern 2007 and the extensive literature it generated). Even if future costs and benefits were known, CBA converts them into present values by applying a discount rate. There is significant disagreement among economists as to the appropriate discount rate; while this can be addressed in part by using declining discount rates and by government adopting a policy on the appropriate rate, these responses do not resolve the underlying problem, that the consequences of making an incorrect decision, due to the application of an inappropriate discount rate, may be significant and irreversible, and therefore unacceptable.[13]

In our view CBA is a useful tool for informing policy formulation and might for example inform any decision to amend or replace the EPBC Act; indeed the Government's policies on regulatory impact statements (RISs) requires this (PMC 2014). It is essential however to recognise the limitations of CBA and not use it in substitution for *qualitative* inputs to environmental policy decisions, such as judgements formed on the basis of values and long term strategic and integrated planning.

Submission 3

a) **The policy behind the Act and any reforms to it should be articulated in the broadest possible non-statutory statement by government, such as a White Paper, in a manner that makes the Government's level of policy ambition absolutely clear. The objects clause should then at least align closely with that statement, if not refer to it expressly or even incorporate this statement into the legislation (as the** *National Environment Protection Council Act 1994* **includes the IGAE in a schedule to the Act).**
b) **The objects clause should also avoid words that might create ambiguity as to policy intent, such as 'provide for', 'encourage' or 'promote'.**
c) **Each discretionary power in the Act should, in addition to listing relevant considerations in the usual way, require the minister to ensure that each discretionary decision he or she makes conforms to the objects of the act. Further, where there is a policy intent to otherwise constrain the exercise of discretion, for example to require the minister to consider certain principles or plans, or to conform to them, such constraints and considerations should be drafted in clear,**

[13] The Australian Government has recently adopted a declining rate for future environmental values: see PM&C [Department of the Prime Minister and Cabinet], Environmental Valuation, Guidance Note (PM&C 2020).

consistent and unambiguous terms and be capable of substantive operation when applied. Specifically, the apparent clash between s 136(5) on the one hand and planning related sections such as s 176(5) on the other, should be resolved.

d) In addition, to the extent that it remains relevant after the act is reviewed and reformed, the effect of the *Blue Wedges case* should be reversed, so that a minister exercising discretionary powers under the Act is required to give separate consideration to each of the principles or considerations listed or called up by the relevant section in relation to each matter protected.

4) Proposed Policy Model

We preface our proposals for a revised and fully articulated policy model to underpin the EPBC Act by drawing on the Sustainable Development Goals (SDGs) endorsed by the UN General Assembly, including Australia, in 2015.

In the Preamble to the resolution adopting the SDGs countries recognise 'that social and economic development depends on the sustainable management of our planet's natural resources' and state their determination to

> protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations (UNGA 2015).

The strength and ambition of this language reinforces our argument for adopting a revised framework of goals, values and principles, not only for environmental policy generally but also within the Act itself, as we take the view that the Act is not just about conservation, but is foundational to protecting and managing Australia's most vital national environmental assets.

The approach we propose aligns strongly with a number of specific SDG goals and targets, including those that follow. In that regard, we note that a number of targets refer to achievement by 2020, making the timing of this review particularly apposite:

> **Goal 12. Ensure sustainable consumption and production patterns**
> ...
> 12.2 By 2030, achieve the sustainable management and efficient use of natural resources
>
> **Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development**

...
14.2 By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans.

Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss

15.1 By 2020, ensure the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements
...
15.9 By 2020, integrate ecosystem and biodiversity values into national and local planning, development processes, poverty reduction strategies and accounts

Goal 17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development

17.19 By 2030, build on existing initiatives to develop measurements of progress on sustainable development that complement gross domestic product, and support statistical capacity-building in developing countries (UNGA 2015).

In relation to this last goal and target, we argue that for the environment at least, statistical capacity-building is needed in most if not all countries and certainly including Australia.

a) Policy Coherence

The environment is a complex set of natural systems, or, as Harris describes it, a system of systems (Harris 2009), functioning at multiple scales from the local to the global. These attributes alone, let alone other attributes of temporal scale, uncertainty, irreversibility, urgency, novelty and cumulation, place extraordinary demands on policy (Dovers 1997). Given these attributes and factors, it is essential not only that individual measures are effective, but also that measures together are aligned and mutually compatible, and can be adjusted or adapted in the light of experience, to keep them on a trajectory towards what may be a distant goal. The challenge of achieving this coherence has prompted the OECD make its Recommendation on Policy Coherence for Sustainable Development (RPCSD) (OECD 2019). Australia is an adherent to this recommendation and we adopt it here.

Although developed in the context of advancing the Sustainable Development Goals (SDGs) adopted by the United Nations in 2015, the recommendation is a modified version of a an earlier more general formal recommendation on policy coherence and

is equally applicable to the SDGs or any other environmental policy goals.[14] Related to Australia's domestic commitment to policy integration as an element of ESD, the RPCSD extends that concept by addressing not only the elements of policy integration, which tend to be concerned primarily with steps taken *before* a policy is adopted, but also by addressing policy implementation and impacts, i.e. issues that tend to arise *after* policies are adopted.

The RPCSD contains eight principles for promoting policy coherence, under three themes concerning vision and leadership; institutions and governance; and tools to anticipate, assess and address policy impact:

Vision and Leadership
1. Political commitment and leadership
2. Strategic long-term vision
3. Policy integration

Institutional and Governance Mechanisms to Address Policy Interactions
4. Whole of government coordination
5. Subnational engagement
6. *Stakeholder engagement*

Tools to Anticipate, Assess and Address Policy Impacts
7. [Assessing] policy and financial impacts
8. Monitoring, reporting and evaluation

The underlying point of these principles is that effective sustainability policy requires first, a strategic vision of a sustainability driven by political commitment; secondly that the policy be developed in a coordinated and fully-engaged manner, integrated both vertically and horizontally; and finally that it is essential to close the 'policy loop' through appropriate monitoring, reporting and evaluation. We have taken the RPCSD has a central element for the policy model which we described below, but have adapted it to reflect Australia's existing domestic ESD principles in preference to the international SDGs.

b) Overview of Proposed Model: Environmental Values, Goals and Principles

It follows from our analysis above that we see the development of a comprehensive and integrated set of goals and principles for environmental policy as fundamental, not only to the EPBC Act but to environmental policy more broadly. There was a significant amount of work done nationally in the early 1990s on ESD and formally at least, the goals and principles developed at this time largely remain in place, not only

[14] OECD, Recommendation of the Council on Regulatory Policy and Governance, which, though contains overlapping and consistent recommendations (OECD, 2012).

through more than 100 pieces of Commonwealth and State legislation, but also through intergovernmental agreements that, although very dated, have never lapsed, been terminated or replaced: see especially the IGAE (COAG 1992), but also the National Strategy on the Ecologically Sustainable Development (NSESD) (COAG 1992). In our view, despite their dated form and the inconsistency with which they are represented across various policy and legislative instruments, these principles remain coherent in substance.

We propose therefore that the principles be updated to reflect the development over the last 25 years of the natural capital and ecosystem services paradigms, which we treat here as a single 'natural capital/ecosystem services' paradigm. This paradigm was developed in an attempt to integrate scientific and economic thinking about the environment (see Daily 1997).

In brief, we propose that the goal of ESD should be replaced by a goal of 'sustainable use of nature', defined as maintaining or enhancing nature's wealth and services, for the benefit of current and future generations. The key implications of this goal are first, that we should maintain natural capital to a sufficient level (critical natural capital), and second that we should consume ecosystem services only to the point that consumption does not consume critical natural capital, thereby degrading ecosystem function (the latter approach parallels the economic concept of Hicksian income). The rationale for such a goal is that it will ensure that each generation passes a full and functioning set of ecosystems to the next, ensuring that each generation has at least the same opportunities to provide for their own well-being from nature as the previous generation. This is intergenerational equity, or, as we would style it, well-being for present and future generations.

The full set of goals, values and principles, including new principles and proposed revisions, along with reasons for those revisions, is set out in Appendix 1. For ease of reference, the goals, values and principles are summarised in Table 1.

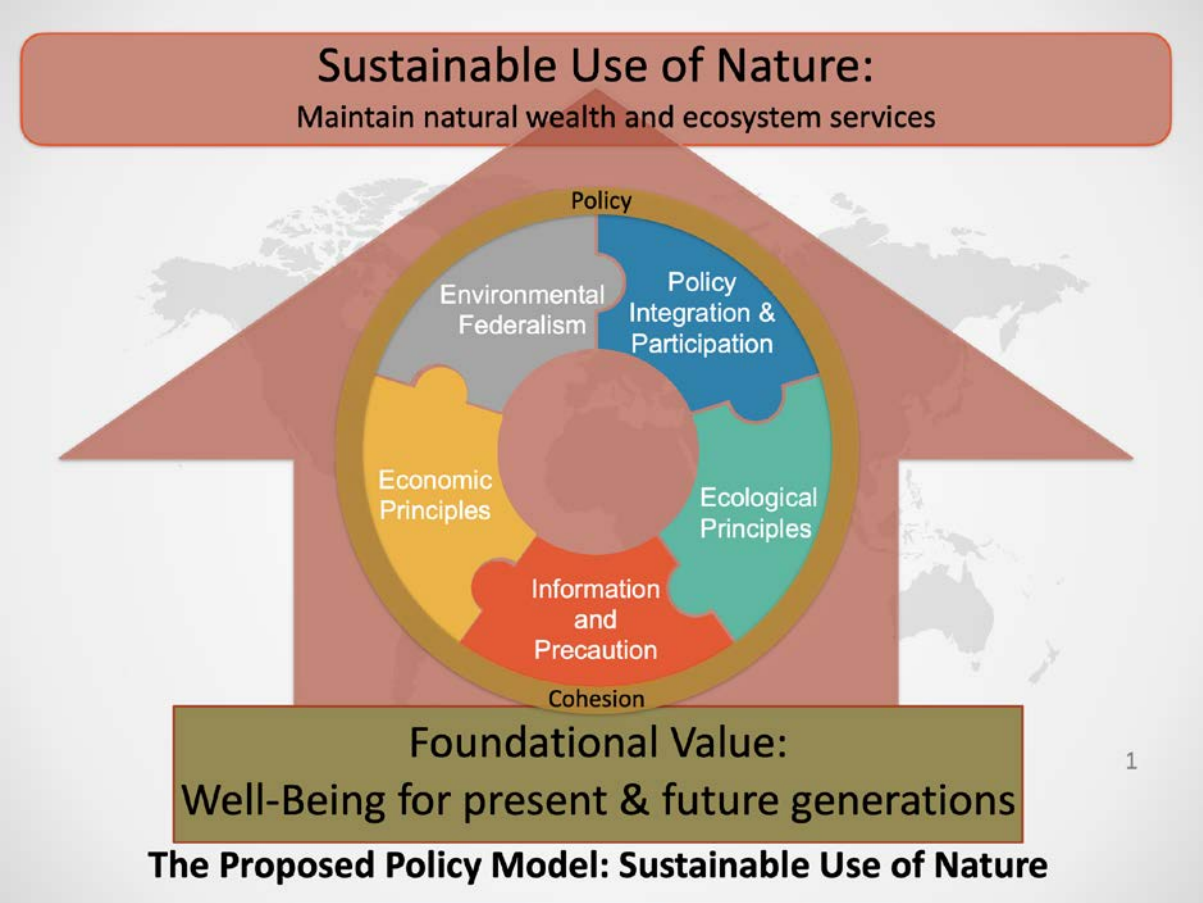
Current Policy Element	Proposed Policy Element
Goal of Environmental Policy	
Ecologically Sustainable Development (ESD):	Sustainable Use of Nature
Environmental Values	
Intergenerational Equity	Well-Being for present and future generations
Principles of Environmental Policy (grouped)	
Policy Integration and Participation	
Policy Integration	No Change
Indigenous Partnership and Knowledge	Indigenous Knowledge and Consultation
Public Participation	No Change
(New Principle)	Transparency is Essential to Participation
Ecological Principles	
Ecologically Sustainable Use	N/A (not required under goal of Sustainable Use of Nature)
Conservation of Biodiversity and Ecological Function	Conservation of Biodiversity and Ecological Function (with revisions)
(New Principle)	Bias to Conservation
Mitigation Hierarchy	No Change
Information and Precaution	
(New Principle)	Comprehensive Decision-Ready Information
Precautionary Approach	No Change
Economic Principles	
Economic Approaches	Economic Approaches (with revisions)
Polluter Pays and User Pays	No Change
Environmental Federalism	
Equivalent Protection	Equivalent Environmental Quality
Undistorted Markets	Undistorted Markets (revised)
New	Common Environmental Approaches
New	Environmental Scale Principle

Table 1: Summary of Existing and Proposed Elements of Environmental Policy

This set of goals, values and groupings of principles can be represented diagrammatically. In Figure 3, the underlying value of well-being for present and

future generations is placed at the base of an arrow, while the goal of using nature sustainably sits at the apex, indicating the intended direction of policy. The principles of environmental policy can be set inside the arrow; their groupings and overall coherence are represented by the use of a circular jigsaw. The principles within each 'piece' of the jigsaw are explained below, where we also elaborate on the implications of the principles for the EPBC Act.

Figure 4: Diagrammatic Representation of Proposed Goal and Principles of Environmental Policy



c) Policy Integration and Participation

i) Policy Integration

This established principle reflects a recognition that almost all government decisions have an environmental dimension, which should be addressed in taking those decisions. The principle is adequately reflected in existing requirements in the Act, such as s 131, that the minister consult other relevant ministers concerning a proposed decision. This requirement should apply to all significant decisions under

the act, e.g. to approve a bioregional plan under Part 12. Once this is done, the principle has been given effect and it need not be further considered as part of any individual discretionary decision under the Act.

It follows that the Act should be amended so that any requirement to consider the 'principles of ESD' or similar, as currently found in section 136, does not extend to policy integration. Note that we make this argument in respect of several other principles of ESD, that the principle is appropriately reflected in the processes of decision-making and therefore does not require further consideration as part of any individual decision.

ii) Indigenous Knowledge and Consultation

At present, the objects clause of the Act is couched in terms first, of 'promot[ing] a cooperative approach to the protection and management of the environment' involving various parties, including Indigenous peoples, and secondly, of 'promot[ing] the use of Indigenous people's knowledge of biodiversity with the involvement of and in cooperation with, the owners of the knowledge'. This intent is given effect through specific provisions, for example the requirement in section 368 that the Director of National Parks consult with Indigenous people in the preparation of a management plan for a Commonwealth reserve.

We propose that the principle of Indigenous knowledge and cooperation be amended to align with the UN Declaration on the Rights of Indigenous Peoples (2007) to which Australia is a signatory, specifically:

> Article 18
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 19
> 1. States shall consult and cooperate in good faith with the indigenous people's concerns through their own representative institutions in order to obtain their free, prior consent before adopting implementing legislative or administrative measures that may affect them.
> ...
> Article 31
> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual

property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 32
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Furthermore, the international community has recognized the close and traditional dependence of many and local communities on biological resources, notably in the preamble to the Convention on Biological Diversity. The Convention on Biological Diversity was ratified by Australia in 1993. Article 8(j) requires each signatory to, subject to its national legislation:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

We propose that the principle of Indigenous participation in environmental decision making be explicitly included in the Act to reflect these rights.:

First, by recognising Indigenous peoples' inherent ecological knowledge (often referred to as IEK), along the following lines:

In making environmental decisions, decision makers will recognise, support and where appropriate draw upon Indigenous ecological knowledge with their free, prior and informed consent.

Secondly, where Indigenous people have special interests over and above those of ordinary citizens (e.g. native title or statutory land rights grants or transfers under State statutory Aboriginal land rights schemes; or cultural heritage), by requiring special consultation arrangements, along the following lines:

Wherever Indigenous peoples have special interests in decisions, over and above their

> interest as citizens, for example in relation to native title rights and interests or their cultural heritage, decision makers should ensure first, that consultation arrangements address those special interests specifically & comprehensively; secondly, that Indigenous peoples are able to participate fully in the making of those decisions, through their own representatives or representative institutions; and thirdly that they obtain the free, prior consent of the Indigenous peoples before implementing any administrative measures that may affect those special interests.

Thirdly, by recognizing the right of Indigenous peoples to control the intellectual property in their inherent ecological knowledge and cultural heritage, along the lines below (Indigenous Cultural and Intellectual Property (ICIP) is not well protected in Australia):

> The right of Indigenous peoples to maintain, control, protect and develop their cultural and intellectual property over their inherent ecological knowledge and cultural heritage should be respected at all stages of environmental decision making.

Indeed, in relation to the protection of Indigenous Cultural and Intellectual Property we commend the True Tracks Framework developed by Terri Janke (2019) and which has been used very successfully in the arts, museums, archives and business sectors (see Figure 5).

Figure 5. True Tracks Principles Diagram (Janke 2019, Fig 10.1).

Of course, substantive provisions would be required to reflect these principles, including as proposed in 5 (b) below.

iii) Public Participation

The objects clause in the Act already reflects a commitment to promoting a cooperative approach to the protection and management of the environment and to involving the community in management planning. It gives effect to this commitment through requirements in the Act and regulations for public consultation in the course of various decision-making processes including EIA and the listing of threatened species.

While this position is generally satisfactory, it could be given more fulsome expression through the adoption in a policy statement and for subsequent inclusion in the Act of a specific principle of public consultation, along the lines of recognising that all Australians have the right to participate in decisions affecting MNES. All decision-making provisions should be reviewed to ensure that they conform appropriately to this principle.

iv) Transparency is Essential to Participation

Transparency is essential to full public participation in environmental decision-making, which because of the interconnections between environmental issues and between environmental economic, and social issues, affects all Australians. People will be disadvantaged in seeking to participate in decision-making if they do not know that certain information is available or that earlier decisions have been taken for particular reasons. While there are several provisions in the Act requiring public notification and reporting and a right under s 135A of the Act (i.e. over and above the ability to apply under the *Freedom of Information Act 1982* (Cth)) to seek copies of 'recommendation reports' concerning decisions about development projects, there is no general principle of transparency under the EPBC Act.

Given the importance of transparency to participation, we see value in government adopting a principle of transparency as part of a broader environmental policy. There are several aspects of the administration of the Act where information could then be made more readily available under such a principle. Specifically, section 135A should be amended to require the publication of recommendation reports concerning proposed developments on a routine basis; similar provisions should apply to other significant decisions under the act, including strategic assessments and decisions to endorse plans. More generally, the various plans and reports submitted by proponents under conditions of a development approval should also be published on a routine basis. Although provision should be retained for parties to apply to have information withheld on public interest grounds such as national security, to our knowledge existing provisions of this type have not been used and such exemptions will be rare. As a result, the grounds of exemption should be narrow and the onus should be on an applicant to demonstrate that there is a strong public interest in withholding information.

d) Ecological Principles

i) Conservation of Biodiversity and Ecological Function (Revised)

We propose this principle be revised from:

> The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making (s 3A)

to:

> Conservation of biodiversity and ecological function is fundamental to maintaining the capacity of nature to support our quality of life.

This revision removes the ambiguity associated with stipulating that something should be a 'fundamental consideration' without elaborating on the way in which being 'fundamental' affects the relative weight given to this factor. Note also that this principle is economic as well as scientific, and that the UK Government has commissioned an inquiry into the economics of biodiversity by the distinguished economist Sir Partha Dasgupta.[15]

ii) Bias to Conservation

We propose this as a new principle of environmental policy; the implication would be that government policy should, as far as possible, favour conservation over regulation or restoration, for the reasons that follow.

There are three broad means to ensure desired on-ground outcomes: conservation, regulation and restoration. As a means to the end of using nature sustainably, conservation is inherently proactive and anticipatory, seeking to retain what is valued while preventing undesirable losses. Conservation interventions can be expensive but they generate economic activity. Traditional regulation on the other hand is reactive and its interventions, for example through approval conditions, often constrain economic activity, whether physically or by increasing costs. (Internalising externalities through environmental pricing is likely to be both efficient and effective, but the various components of biodiversity and ecosystems function would be very difficult to price, and in any event experience with carbon pricing in Australia suggests that this approach is not likely to be acceptable politically). Finally, recovery is the least efficient intervention to maintain ecosystem services. It requires more radical interventions than conservation and is thus much more expensive, even when known to work: recovery of natural systems often involves significant uncertainties and is sometimes simply not possible.

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[15] See https://www.gov.uk/government/collections/the-economics-of-biodiversity-the-dasgupta-review.

iii) Mitigation Hierarchy

The emergence of the mitigation hierarchy of 'avoid, mitigate, offset' and its associated standard of ‘no net loss’ as an approach to environmental decision-making has occurred since the EPBC Act was passed. Originally applied to decisions concerning individual developments, this rubric is now suggested for much more general application, to the point of becoming the foundation of biodiversity policy itself (see Simmonds et al 2019; Bull et al 2019).

Although the hierarchy is thus not incorporated directly into the Act, aspects of it, specifically avoidance and mitigation, are included expressly or by implication in s 134, dealing with the setting of conditions on environmental approvals, and the hierarchy as a whole is consistent with that section, hence its use in the Department’s offsets policy (DSEWPaC 2012). We would recommend not only that s 134 be amended to make express reference to the hierarchy but also that the hierarchy be adopted as a principle of biodiversity policy. Note that the hierarchy is consistent with our proposed principle of a bias to conservation, as conservation is one means of avoiding loss.

e) Information and Precaution

i) Environmental Information

It is a truism good policy requires good information. This is especially true of the environment, where most of the objectives concern complex and often poorly understood biophysical phenomena, at scale. Moreover, this information needs to be gathered routinely and arranged in a way that supports decision-making: sometimes information is arranged to support the needs of researchers rather than decision-makers. Successive Australian governments over some four decades have adopted various environmental information initiatives, but almost all have been discontinued (see Burnett 2018). Current information is partial and there is no national program of basic environmental monitoring and in this regard we agree with the Hawke Review that:

> Comprehensive, accurate and consistent environmental information is needed to support decision-making and inform policy development, particularly in facing the risk of climate change, other emerging threats to the environment and growing demands on existing resources (Hawke 2009, 314).

This situation has not improved in the decade since the Hawke Review. The independent Moreton Tinney Review of Australian Government environmental information activity identified, and made recommendations in response to, a range of cultural, structural, funding, technical and legal obstacles to be effective and efficient use of the environmental information based across the Australian Government (Morton and Tinney 2012). The Government did not respond to the

review, with the Department of the Environment later advising a Parliamentary Committee that the report had simply 'helped shape' its approach.[16] Further, the most recent Australian SoER found that:

> [I]t is still widely acknowledged that there are a lack of data and evidence for assessing the effectiveness of most policies, programs and investments in environmental management in [17].

This point is also made by the OECD in its most recent Environmental Performance Review of Australia; the Report notes that the lack of a long-term, national scale monitoring programs for ecosystems and species limits the ability to comprehensively assess the status and trends of Australia's biodiversity (OECD 2019, 171).

In addition to the lack of basic environmental monitoring and compiling of information, there is no comprehensive system of arranging information to support environmental decisions, including by integrating environmental and economic information, although such a system is available in the form of the UN System of Environmental-Economic accounting (SEEA), which we discuss in section 5 below, along with several other specific proposals for amendment of the Act concerning environmental information.

We propose the inclusion in environment policy of a principle of 'comprehensive decision-ready information', recognising the need first, for comprehensive ongoing environmental information and monitoring and secondly to arrange the information in decision-ready form, through environmental accounts. Our recommendations about implementing this principle in the Act are in 5(c) below.

ii) Precautionary Approach

The precautionary approach (also referred to as the precautionary principle) continues to be appropriate. However, its application under the EPBC Act has been formal rather than substantial. Recommendation reports prepared under the Act discuss the principle but rarely recommend what it implies: that developments involving a significant risk of serious or irreversible environmental harm should not be approved, or should at least be subject to strong conditions that monitor developments closely and allow a project to be stopped if evidence emerges the points to such risks becoming reality. Sometimes the precautionary principle is

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[16] Senate Standing Committee on Environment and Communications Legislation Committee, Parliament of Australia, ' Answers to questions on notice: Environment Portfolio', Budget Estimates 2015–16 (May 2015), Question No 67).

[17] W.J. Jackson et al, 'Overview of challenges to effective management', in *Australia State of the Environment 2016*. (Department of the Environment and Energy 2017)

misapplied, for example to justify environmental offsets. Precaution is a reason for avoiding action in conditions of uncertainty, not for compensating for a known loss.

f) Economic Principles

The meaning of principle (e) in s 3A of the Act (setting out the principles of ESD) is unclear because it has been compressed; the full version in the IGAE (s 3.5.4) is clear but now out of date. There have been considerable developments since this principle was formulated in the early 1990s, especially the emergence of the concept of natural capital and the resulting recognition of the need to maintain the environmental 'balance sheet'. In addition, subsequent scholarship recognises that there are significant limitations to placing a market value on environmental impacts and that economic valuation should be used to complement rather than replace other forms of policy argument (Pascual et al 2010, 189; for a recent discussion see Victor, 2020). Finally, there have also been developments in technical guidance, for example by the issuing of supplementary guidance to the UK 'Green Book' on accounting for environmental impacts.[18]

Apart from issues of the meaning of the principle, it is clear from the long form in the IGAE that the principle is a broad one of policy; if addressed properly it should be reflected in the *provisions* of the EPBC Act rather than in the decisions taken *under* the Act. We therefore recommend that this principle not be a mandatory consideration in the EPBC Act, but be revised to reflect subsequent advances in knowledge, and included instead in any broader policy statement that the government might make and in a revised IGAE. It might read along the following lines:

Environmental policy-making can be enhanced through economic approaches that take full account of the environment and the need to maintain natural capital and ecosystem services. These approaches include:

> economic analysis that is informed by environmental-economic accounting and valuation of environmental assets and services where possible;
>
> polluter pays i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement
>
> the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the

[18] Note for example the guidance issued by Treasury in the UK on accounting for environmental impacts (HM Treasury, 2013) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/191500/Accounting_for_enviornomental_impacts.pdf).

ultimate disposal of any wastes

environmental goals, having been established, should be pursued in the most cost-effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

g) Principles of Environmental Federalism

In Australia's federal system, cooperative approaches are essential to maintaining ecological function as ecological systems conform to biophysical rather than political boundaries. Current intergovernmental cooperation is based, in theory at least, on long-outdated intergovernmental agreements from the 1990s, the IGAE and CoAG HoA. We propose four principles of environmental federalism. The first two are based on the objects of an existing national scheme, the *National Environment Protection Council Act 1994* and corresponding state laws, while the third and fourth principles derived from the trans-boundary nature of the environment and the idea of matching the scale of environmental action to the level of government:

Equivalent Environmental Benefits: People should enjoy the benefit of equivalent environmental quality, wherever they live in Australia.

Undistorted Markets: Economic and business decisions should not be distorted, nor markets fragmented, by unnecessary variations in environmental measures between jurisdictions.

Common Environmental Approaches: Shared environmental responsibilities under the Constitution and the transboundary nature of the environment make intergovernmental cooperation essential to policy effectiveness. Environmental measures are most effective when developed under common policy frameworks.

Environmental Scale Principle: Environmental measures are most efficient when implemented by the level of government closest to scale at which the policy or programmatic action operates.

In our view, these principles suggest that:

The Commonwealth should be responsible for international environmental policy, with state participation, (much as at present);

It should also be responsible for implementation of international commitments, although it might do this through a mixture of direct and facilitated measures;

The Commonwealth and States should develop national environmental goals and policies cooperatively, with the Commonwealth providing leadership and coordination;

Governments should also cooperate on common support services such as environmental information and research;

The States should have primary responsibility for environmental planning and land management, but with substantial financial support from the Commonwealth in relation to MNES.

As the entire approach is cooperative, in discharging the roles assigned to them, each level of government should consult the other levels appropriately. For example, the Commonwealth should consult the states fully in the development of international policy and States should consult the Commonwealth and local government in developing on-ground programs.

A new IGAE is needed to provide an up-to-date platform for cooperation. We expand on this in 5(b)(i) below, but broadly this new agreement would reflect these points. Overall, these principles could be called the 'principles of environmental federalism'.

Submission 4

The Government should adopt the policy model below as the basis for the Act and articulate that model in the policy statement recommended in submission three. (Ideally this model would be adopted nationally as part of a new IGAE. We make further recommendations below about a new IGAE.) The elements of the model are:

a) An environmental policy goal of the sustainable use of nature, defined as: Nature's wealth and services should be maintained or enhanced for the benefit of current and future generations.

b) The substantive principles of environmental policy, as described above and structured consistently with the OECD Recommendation on Policy Coherence for Sustainability 2019, noting that these principles may need to be applied in different ways - e.g. policy integration in designing the decision-making processes while precaution would be applied in individual decisions made under those processes.

c) The basic model of the EPBC Act would be as follows:

i) identify, protect and conserve biodiversity generally and MNES specifically, broadly as now;

ii) reflect a bias to conservation by providing for:

- **the endorsement of State integrated regional plans; and**
- **Commonwealth investment in the implementation of these plans**

d) The Act should be amended to replace requirements to consider the 'principles of ESD' or similar, as currently found for example in s 136, with a requirement that decisions under the Act should

i) conform to the object of the sustainable use of nature; and

ii) apply precaution according to its terms.

(Other principles e.g. policy integration should inform the provisions of the Act itself rather than be applied as considerations in individual decisions.)

e) That the government adopt, as policy and for making operational in the Act, a principle of Indigenous ecological knowledge and cooperation, couched, consistently with Articles 18, 19, 31 and 32 of the UN *Declaration on the Rights of Indigenous Peoples,* **to reflect**

(i) a recognition of Indigenous ecological knowledge;

(ii) where Indigenous people have special interests over and above those of ordinary citizens (e.g. native title; land rights grants or transfer; cultural heritage), to ensure first, that Indigenous peoples are able to participate fully in the making of decisions under the Act, through their own representatives or representative institutions; and secondly to obtain their free, prior consent before implementing any legislative and/or administrative measures that may affect their rights and interests. The Act should require this principle to be applied in all relevant processes and decisions under the Act.

(iii) the right of Indigenous peoples to control the intellectual property rights over their inherent ecological knowledge and cultural heritage. This principle could be implemented in part, as recommended in the Hawke Review, by 'promoting' from the regulations to the Act, existing provisions dealing with access to biological resources.

f) The principle of proper public consultation could be given more fulsome expression through the adoption in a policy statement (and in a new IGAE), for subsequent inclusion in the Act, of a specific principle of public participation, along the lines of recognising that all Australians have the right to participate in decisions affecting MNES. All decision-making provisions should reflect this principle appropriately.

g) Transparency is essential to participation in environmental decision-making and the government should adopt a principle of

transparency as part of a broader environmental policy:

i) Section 135A of the Act should be amended to require the publication of recommendation reports concerning proposed developments on a routine basis; similar provisions should apply to other significant decisions under the act, including strategic assessments and decisions to endorse plans.

ii) More generally, the various plans and reports submitted by proponents under conditions of a development approval should also be published on a routine basis.

iii) Provision should be retained for parties to apply to have information withheld on public interest grounds such as national security, but the grounds of exemption should be narrow and the onus should be on an applicant to demonstrate that there is a strong public interest in withholding information.

h) To remove ambiguity as to the meaning of 'fundamental consideration', principle of conservation of biodiversity and ecological integrity should be re-worded as follows: 'Conservation of biodiversity and ecological function is fundamental to sustaining human well-being for present and future generations.'

i) We propose a new principle of environmental policy, a 'bias to conservation', to convey the intent that government policy should, as far as possible, favour conservation over regulation or restoration.

j) Section 134, dealing with the setting of conditions of approval on developments, should be amended to make express reference to the mitigation hierarchy of 'avoid, mitigate, offset'. This principle should also be adopted as a principle of biodiversity policy.

k) We propose the inclusion in environment policy of a principle of 'comprehensive decision-ready information', recognising the need first, for comprehensive ongoing environmental information and monitoring' and secondly to arrange the information in decision-ready form, through environmental accounts, which can be prepared at national, regional and local levels as a nested set.

m) The principle in paragraph 3A(e) of the Act, concerning the promotion of valuation and pricing mechanisms, should be recognised as a principle of policy development rather than one to be applied in individual regulatory decisions under the EPBC Act.

We also recommend that for use outside the Act, eg a new IGAE, the wording of the principle be revised to reflect both the more fulsome wording of the IGAE and subsequent development of principles along the following lines:

Environmental policy-making can be enhanced through economic approaches that take full account of the environment and the need to maintain natural capital and ecosystem services. These approaches include:

economic analysis that is informed by environmental-economic accounting and valuation of environmental assets and services where possible;

polluter pays i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement

the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes

environmental goals, having been established, should be pursued in the most cost-effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

l) We propose four principles of environmental federalism, which would guide the amendment or redrafting of the Act:

Equivalent Environmental Benefits: **People should enjoy the benefit of equivalent environmental quality, wherever they live in Australia.**

Undistorted Markets: **Economic and business decisions should not be distorted, nor markets fragmented, by unnecessary variations in environmental measures between jurisdictions.**

Common Environmental Approaches: **Shared environmental responsibilities under the Constitution and the transboundary nature of the environment make intergovernmental cooperation essential to policy effectiveness. Environmental measures are**

most effective when developed under common policy frameworks.

Environmental Scale Principle: **Environmental measures are most efficient when implemented by the level of government closest to scale at which the policy or programmatic action operates.**

5) Implementing the Proposed Model: Elements of a Package

Building on the model and applying the principles described above, we propose the following substantive elements for an amended EPBC Act or its replacement.

a) A Bias to Conservation and Efficient Allocation of Roles and Responsibilities: Accreditation of State Plans or Policies

General Approach

The literature suggests that a sustainability goal can be achieved through one of two possible approaches (see for example Sadler 1996; George 1999; Pope et al 2017; and the overview of this literature in chapter seven of Burnett 2018). Each of these reflects a bias to conservation. The first is to prepare integrated and binding regional plans, while the second and alternative approach is to prepare comprehensive sets of policies ('policy-suites'), setting out the conservation objectives, supported by principles and binding decision rules. Given regional environmental differences, such policy-suites are likely to be region-specific. Each would need to include:

A description of the ecosystems including their key features and functioning;

A description of the ecosystem services produced; and

Policy guidance concerning the conservation measures required to achieve conservation objectives and the sorts of development that would be possible or not possible in or affecting the ecosystems concerned.

In either case, the relevant plans or policy-suites would then inform both conservation programs and environmental assessment laws; the latter would require conformity with these plans or policy suites as a prerequisite to environmental approvals.

Implementing this Approach

Given the division of responsibilities under Australia's federal system, and our proposed adoption of the principle that responsibilities be assigned to the level of government closest to the action required to implement any given function, we propose a model under which the States would prepare these plans or policy-suites, which the Commonwealth would then consider for endorsement as providing appropriately for the conservation of MNES under policies and standards that it would publish.

The effect of Commonwealth endorsement would be to 'turn off' any requirement for Commonwealth assessment and approval of development likely to have a significant impact on MNES. This is similar to an existing (but unused) mechanism in Part 4 Division 3 of the act providing for the making of declarations that actions taken in accordance with a bioregional plan do not need approval. There are two main differences. First, integrated regional plans or policy-suites may be wider in subject-matter scope than bioregional plans. More significantly, while bioregional plans within States (ie most terrestrial areas) must be prepared by the Commonwealth in cooperation with the States, we propose instead that regional plans be prepared by States or their instrumentalities and simply *accredited* by the Commonwealth. This removes the Commonwealth from unnecessary level involvement in the detail of local and regional planning issues and processes, many of which will not involve MNES. If a State failed to implement and ensure compliance with the accredited plan, the accreditation could be revoked.

States (and local government or other regional bodies, depending on arrangements in each State) would have primary responsibility for implementation of endorsed plans or policy-suites. This would include investment, but the Commonwealth would, consistent with its responsibilities for MNES, support implementation through its own significant investment in the conservation and restoration of MNES, consistent with the plans or policy-suites. For clarity and to give States certainty, we propose that the Commonwealth should, through a white paper or other policy statement, make a detailed policy statement about its commitment to investing in conservation of MNES (and in support of other Commonwealth environmental responsibilities such as national biodiversity monitoring).

The EPBC Act already provides for the Commonwealth to provide financial assistance for the identifying and monitoring of biodiversity (s 171); to assist states preparing bioregional plans (s 176) and for the protection or conservation of various MNES — through a threatened species recovery plan or threat abatement plan (s 286), wildlife conservation (s 296), assistance for World Heritage (s 324), National Heritage, (s 324ZB) a biosphere reserves (s 340) and Commonwealth heritage (s 341ZG); or to assist a party to a conservation agreement with the Commonwealth (s 306). However, these provisions overlap with the capacity of the environment and agriculture ministers to make grants from the Natural Heritage Trust under the *National Heritage Trust of Australia Act 1997*. It would be sensible to consolidate or link these provisions into an integrated set of provisions allowing the Commonwealth to invest in matters associated with its environmental responsibilities, especially the recovery and restoration of biodiversity and MNES.

b) Federal Roles, Responsibilities and Scope

Environmental responsibilities under Australia's Constitution are shared, but,

because the Constitution was drafted many decades before the environment became a significant area of government activity, this sharing is not achieved by any express provisions but by the indirect results of the operation of non-environmental powers, such as the Commonwealth external affairs power. As a result, Federal and state roles and responsibilities for the environment could, from a policy point of view, be somewhat haphazard. Fortunately, the Constitution accommodates various forms of intergovernmental co-operation. This has allowed governments to cooperate on environmental matters in a range of ways, most prominently through the major COAG-sponsored intergovernmental agreements of the 1990s, the IGAE, NSESD and COAG HoA.

The IGAE and COAG HoA, which can be regarded for current purposes as two parts of a single agreement, define a number of concepts foundational to the EPBC act, including the principles of the ESD and the MNES. Although these agreements are dated and have faded from view, the undivided nature of the environment and shared constitutional responsibilities make it essential to any major reform of the EPBC act that these agreements be replaced by modern documents covering much the same subject matter.

i) A New IGAE

We have explained above how we would update the principles of ESD and proposed that these revisions be adopted as part of a national environmental policy framework, through a new IGAE. This is essential for policy consistency and effectiveness. A new IGAE might also deal with the following matters essential to the effective operation of the Act:

a) Other elements of the common national policy framework that we have described above, including commitments to shared support services such as environmental information and accounts;

The allocation of roles and responsibilities according to the principle of allocating responsibilities to the jurisdiction closest to the action required; this would support the updating of MNES (see below).

The concomitant principle that each level of government should, in relation to its responsibilities, provide for the appropriate involvement of other levels of government. This would facilitate cooperation.

Commitments by the States to prepare the integrated regional plans that are essential if the Commonwealth is to withdraw permanently from environmental impact assessment;

Commitments by the Commonwealth to fund the conservation of MNES under such plans;

Recognition of the role of local government in these arrangements.

ii) Revised MNES

The COAG Heads of Agreement (1997) provided the foundation for the drafting of the EPBC Act. The agreement identified 30 MNES, of which it was agreed only the seven 'Part I matters' (plus Commonwealth actions and places) should be triggers for Commonwealth EIA. The Commonwealth has since added two further triggers unilaterally, one dealing with the GBR and the other with large coal and gas projects affecting water resources.

We proposed four principles of environmental federalism above. One implication of these was that the Commonwealth should be responsible for the implementation of international commitments, although it might do this through a mixture of direct and facilitated measures. One direct measure is protection under the EPBC Act. Having regard to this approach, of the nine MNES in the EPBC Act, we propose changes to three:

Threatened species and communities. The protection and conservation of threatened species and communities is but one dimension of maintaining biodiversity. The Convention on Biological Diversity (CBD) deals with biodiversity as a whole, including threatened species. Further, given the ongoing decline of biodiversity nationally and globally, and the increasing risks of serious and irreversible impacts and even regime shift (ecosystem collapse),[19] it is clear that the present regime requires strengthening. We would therefore expand the coverage of MNES to cover biodiversity as a whole.

Further, the CBD defines biodiversity by reference to 'ecosystems and ecological complexes', i.e. species and 'their non-living environment interacting as a functional unit' (CBD, definition of 'ecosystem') rather than ecological communities, i.e. assemblages of species alone: (s 528 EPBC Act). We propose therefore that this trigger refer to 'threatened species and ecosystems', for two reasons. This is consistent with our proposed policy goal of protecting ecological function, which may depend on non-living components of an ecosystem, such as its water supply, or mixed living and non-living components, such as soil. This is in contrast to the concept of an 'assemblage' of species, which places less emphasis on the functional interactions between species and ignores non-living ecosystem components that will usually be essential to the healthy functioning of the 'assemblage'.

Taking these two points together, we would redefine this trigger as 'biodiversity, including threatened species and ecosystems'. Consistent with articles 10 and 14 of the CBD, this would extend the Commonwealth's current responsibilities for biodiversity from conservation alone (as provided for in Chapter V of the EPBC Act) to protection, conservation *and* sustainable use. One benefit of this change

[19] For the latest research indicating that such risks are increasing, see G S Cooper, S Willcock and J A Dearing, 'Regime shifts occur disproportionately faster in larger ecosystems', *Nature Communications*, 11(1), 2020.

would be to remove the anomaly under which environmental impact assessments under the EPBC Act address impacts on threatened species and communities but pay no attention to other biodiversity impacts.

Large coal and gas projects affecting water resources. Australia is a party to the Desertification Convention, Article 4 of which requires parties to combat desertification and mitigate the effects of drought, including through legislation. Desertification is a potential result of excessive water abstraction at landscape scale in affected areas, which the Convention identifies as arid, semi-arid and/or dry sub-humid areas. The problem is exacerbated by climate change in the many parts of the Australian continent. The *Water Act 2007* (Cth) already implements the Desertification Convention by providing for the sustainable use of water resources in the Murray-Darling basin, but in other affected areas it is the Commonwealth's responsibility to address desertification.

The current water trigger is based on the nature and scale of the projects (i.e. inputs) rather than their potential impacts on water resources (i.e. outcomes); those impacts could be small. In light of Australia's obligations under the Convention, we propose redefining this trigger around impacts likely to increase the risk of desertification, along the lines of 'actions likely to have a significant impact on water resources in arid, semi-arid or dry sub-humid areas not forming part of the Murray-Darling basin'.

Nuclear actions. While the enormous potential impacts of nuclear actions on all aspects of the environment, along with the implications for national and international affairs, make this an appropriate trigger, we see no need for the ban on certain nuclear installations in s 140A. Any proposal to build such installations could be assessed in the normal way and, if involving unacceptable risks to the environment (which is defined to include people and communities, along with the social, cultural and economic aspects of the environment), refused.

Of the remaining 23 MNES identified in the COAG HoA ('Part II matters'), many, such as forests and genetically modified organisms, are the subject of separate legislation, while others, such as nationally significant feral animals and weeds, either do not need Commonwealth legislation or are addressed adequately by existing provisions, such as powers under the EPBC Act to make wildlife conservation and threat abatement plans, and so are not considered further here.

We do however agree with the recommendation 22 of the Hawke Review that the regulations concerning access to biological resources in Commonwealth areas substantive provisions properly located in the Act itself rather than in the regulations. We also agree with the other elements of recommendation 22, especially that benefit-sharing agreements with Indigenous people should be required to be 'equitable' rather than 'reasonable'; and that where Indigenous knowledge is accessed or used, this should only be with the free, prior and informed consent of the

relevant Indigenous people (consistent with the UN Declaration on the Rights of Indigenous Peoples, cited in section 4) and that use of Indigenous Ecological Knowledge (IEK) be given adequate protection from misuse, consistent with the True Tracks Framework developed by Terri Janke (2019).

c) Environmental Information and Reporting

The EPBC Act deals only with limited aspects of environmental information. It deals more comprehensively with environmental reporting, although we believe these provisions are dated and subject to some significant flaws, described below.

EPBC Act Annual Report

We noted the limitations of the EPBC Act annual report in section 2(a) above. While an annual report on the administration of the Act should be retained as a useful tool for transparency, accountability and review, technology now allows and current circumstances require a comprehensive regime of continuous disclosure. In this regard, the current EPBC Act website provides only limited information. In our view the following information could be posted to the EPBC Act website on a near real-time basis, at reasonable cost, with the Act amended to require that disclosure, and also to extend, to all substantive environmental decisions, the current requirements in Part 8 that the Secretary prepare 'recommendation reports' in relation to project-based environmental approvals:

- Environmental Impact Assessments prepared under Chapter 4 of the Act (these are published by proponents and are often 'taken down' once the minister takes a decision on whether to approve the project);
- All decisions taken under the Act and the associated recommendation reports or other formal advice, e.g. the advice of the Threatened Species Scientific Committee in relation the listing of a species as threatened;
- All instruments, plans, policies and programs approved under such decisions;
- Where approvals or other decisions require subsequent action, eg that environmental offsets be identified or implementation plans be prepared, or monitoring reports submitted, those subsequent documents.

As a result, in relation to any given decision, there would be a public audit trail consisting of decisions taken, together with significant pre- and post-decisional documents.

Agency Reporting

As to annual reports by agencies on their implementation of ESD under s 516A, we agree with the findings of the Hawke Review that these requirements are not being reported to the degree necessary for the government for the public to gauge how ESD

is being integrated into decision-making.[20] However, as Commonwealth agencies have been treating these reports as a 'box ticking' exercise for several decades, there is no point in continuing this requirement and it should be repealed. The apparent objective of the provision is to promote ESD in decision-making across government. If this objective remains current, a much more comprehensive approach, beyond the scope of the EPBC act, is required. Governments would need to amend all relevant legislation to entrench ESD decision-making requirements; it would also need to adopt detailed decision-making guidance for non-statutory decision-makers, such as Cabinet.

State of the Environment Reporting

There are two significant difficulties with the current requirement under s 516B to produce a five-yearly State of the Environment report. First, there are no requirements to ensure consistency; second, there is no requirement of the government to consider the report, let alone respond. State of the Environment reporting is a product of work in the OECD in the 1970s and is now a dated approach. It is too infrequent and there is no requirement for consistency over time.

A much more contemporary approach would be to adopt environmental-economic accounting consistent with the System of Environmental-Economic Accounts (SEEA) on an ongoing and comprehensive basis. This would allow the production of regular accounts, preferably annually. Consistent with the principle underlying the standard policy cycle, that policies should be reviewed and then adjusted to deal with problems identified, the production of annual environmental accounts, especially SEEA-compliant accounts, which are compatible with the SNA, would allow changes and emerging trends to be taken into account in each annual budget round. Ideally, the Government would make a policy commitment to this effect: As accounts are infinitely scalable and can be used for on-ground management as well as policy analysis,[21] they could also be used in conjunction with regional plans as a way of processing monitoring information and preparing plan the revisions.

Other Provisions Concerning Environmental Information

Part 12 Division 1 of the EPBC Act provides for the Commonwealth to cooperate with and give financial assistance to persons for the purposes of identifying and monitoring biodiversity. This part also allows the minister to prepare biodiversity-related inventories, but only on Commonwealth land, and to conduct biodiversity-related surveys, but only of Commonwealth marine areas. It is not clear to us whether grants have been or are being made or inventories and surveys conducted under these provisions, but we have not been able to find any evidence of this

[20] Hawke Review, 315.

[21] See Burnett, P., Vardon, M., Keith, H., King, S., Lindenmayer, D., 2020. Measuring net-positive outcomes for nature using accounting. 4 *Nature Ecology and Evolution*, 284.

occurring.

A Comprehensive Approach to Environmental Information
As the Hawke review noted, Australia does not have a comprehensive national environmental information system despite significant earlier efforts.[22] It recommended the establishment of national environmental accounts, a recommendation which we support but which remains unimplemented, despite the existence of a national strategy for environmental-economic accounting (DoE 2018).

We support this recommendation but would also note the importance of establishing an institution(s) to gather and hold the relevant data and produce the accounts. Part 7 of the *Water Act* offers a useful general precedent in this regard, conferring relevant functions on the Bureau of Meteorology (BoM) and providing for the collection of water information (by compulsion if necessary); the publication of water accounts; and for the promulgation of National Water Information Standards. The precedent is not perfect however as there is some overlap between the water accounts produced by BoM and those produced by the Australian Bureau of Statistics (ABS). To illustrate this point, the production of comprehensive water accounts for the ACT region required a three-way collaboration between the ACT, BoM and ABS (see ABS 2019). While we are agnostic as to whether this proposed role is conferred on an existing institution such as the ABS or BoM, or on a new body, the example of the ACT water accounts does illustrate the need for integrated arrangements.

We also agree with the point made in the Review Discussion Paper, that a substantial amount of the necessary information is already held by governments, industry and other stakeholders and so might be obtained on a cost-effective basis.

As implied by question 15 in the Review Discussion Paper, environmental information can, beyond supporting better-informed decision making, also support *more efficient* decision making, for example by informing policies that would identify categories of development that might be exempted from the need for approval. This is a point worth stressing: the benefits of better-informed decision making are not confined to decisions about individual developments, but apply equally to the adoption of plans, policies and programs. And having a comprehensive set of plans, policies and programs provides one of the few paths to a 'win-win' outcome in this field, leading not only to better-informed decisions, but to decisions that are both fewer in number and more predictable.

d) Project Approval: A Residual Role

[22] Hawke review, paragraphs 19.20 to 19.25. For a detailed history of national efforts concerning environmental information, see Burnett 2018.

If the approach above were adopted, any development project that complied with an endorsed state plan would no longer need approval under the EPBC Act. The Commonwealth would effectively have removed duplication of environmental approvals. The act would need to retain provision for project-based assessment and approval for a small number of residual circumstances:

> The Commonwealth will need to retain an approval process for its own projects, where no state approval is required, such as for projects on Defence land or in the Commonwealth marine area.
>
> A proponent may wish to seek approval for a development that is likely inconsistent with an endorsed plan and likely to have a significant impact on MNES; the minister should retain capacity to grant such an approval, but, to avoid this creating a 'loophole', it should only be available in exceptional cases.
>
> Although we advocate the use of a comprehensive suite of policies during a period of transition to the above approach, there might be cases during a transition period in which the proponent would prefer to use the current assessment-based approach.

Submission 6

a) We propose a model under which the States prepare and implement integrated regional plans; the Commonwealth would have power to endorse those plans if they protect and conserve biodiversity and MNES in accordance with Commonwealth policies and standards, provided that States are in turn bound by these plans. The effect of Commonwealth accreditation would be to 'turn off' any requirement for Commonwealth assessment and approval of development likely to have a significant impact on MNES. If a State failed to implement and ensure compliance with the accredited plan, the accreditation could be revoked.

b) The Commonwealth would retain protection and assessment provisions as necessary to support conservation provisions, including power to prosecute unauthorised development damaging MNES.

c) The Commonwealth should, through a white paper or other policy statement, commit itself to making significant and ongoing investment in the conservation and restoration of MNES and in support of other Commonwealth environmental responsibilities such as national biodiversity monitoring. It should also consolidate statutory provisions for the granting of financial assistance in relation to Commonwealth environmental responsibilities by linking, or even combining, the EPBC Act and the *Natural Heritage Trust of Australia Act 1997* **into a single set of provisions allowing the Commonwealth to invest in matters associated with those responsibilities, especially the recovery and**

restoration of biodiversity and MNES.

Submission 7

The government should negotiate a new IGAE through COAG, dealing with the following matters essential to the effective operation of the Act:

Other elements of the common national policy framework that we have described above, including commitments to shared support services such as environmental information and accounts;

The allocation of roles and responsibilities according to the principle of allocating responsibilities to the jurisdiction closest to the action required; this would support the updating of MNES (see below).

The concomitant principle that each level of government should, in relation to its responsibilities, provide for the appropriate involvement of other levels of government. This would facilitate cooperation.

Commitments by the States to prepare the integrated regional plans that are essential if the Commonwealth is to withdraw permanently from environmental impact assessment.

Commitments by the Commonwealth to fund the conservation of MNES under such plans.

Recognition of the role of local government in these arrangements.

Submission 8

The MNES in the EPBC Act should be revised as follows:

a) the threatened species trigger should address the Biodiversity Convention more generally, and thus be revised to cover biodiversity, including threatened species;

b) the water trigger should be based on impacts and implementation of the Desertification Convention, along the lines of 'surface and sub-surface water resources in arid, semi-arid or dry sub-humid areas not forming part of the Murray-Darling basin'; and

c) the provisions relating to nuclear actions should no longer prohibit certain installations; it is sufficient to rely on any significant environmental impacts being identified and dealt with in an environmental impact assessment of a proposed nuclear action.

Submission 9

Taking inspiration from the *Water Act 2007*, the EPBC Act should include a comprehensive regime for environmental information, including the following elements:

a) provision for the collection and maintenance of comprehensive national environmental information, in collaboration with States as appropriate;

b) provision for the production of annual national environmental accounts, linked to the existing national economic accounts, and to cooperate with states and others in the production of accounts at other levels, e.g. regional or ecosystem accounts;
c) establishment of an appropriate institution or institutions to implement these functions;
d) replace State of the Environment reporting with an annual Analysis of the National environmental accounts;
e) amend s 516 concerning the EPBC Act annual report to require that it assess and evaluate on-ground outcomes of regulatory actions; and
f) retain the capacity to undertake project specific EIA for Commonwealth actions and, in exceptional circumstances, for actions that do not conform to an accredited plan.

6) Innovation and Complementary Reforms: Entity-Based Management, Offsets and Markets

In addition to amending the act and negotiating a new IGAE, effective environmental outcomes require to further set of measures. The first relates to taking a holistic approach to managing MNES while a second relates to developing markets in environmental offsets.

a) Entity-Based Management

In our view, a major reason for the apparent lack of success in stemming the decline of many MNES is the fact that they are not actively managed for recovery, as entities in themselves and in a coordinated manner. We develop this argument by reference to the case study of one critically in danger and threatened ecological community, the White Box - Yellow Box - Blakely's Red Gum Grassy Woodland and Derived Native Grassland (Box Gum Grassy Woodlands for short, or BGGW), but this community is by no means atypical.[23]

Box Gum Grassy Woodland
This ecological community was listed under the EPBC Act in 2006 and a national recovery plan adopted in 2011. It is critically endangered, with less than 5% remaining, with very little of this remnant in near-original condition. This community is found along the Great Dividing Range from Queensland through New South Wales and Victoria, and possibly into South Australia. Although there was national cooperation in the preparation of the recovery plan, each jurisdiction takes its own approach to implementation, as outlined below. Although the plan represents

[23] Entity management is also relevant to making trade-offs between environmental and other entities in a given region. See Keith et al 2017 for an example of a region, the Central Highlands of Victoria, where the absence of environmental entity-management can be argued to have led to sub-optimal outcomes.

a common approach, at least in principle, no single organisation or group is tasked with coordination and there is no single reporting mechanism concerning its implementation, allocations to or expenditure of the budget in the plan, or to evaluating outcomes. Nor has the plan been updated, despite the fact that the plan itself calls for it to be reviewed in 2016. Some information is available about BGGW recovery actions, but only on a piecemeal basis; for example, some grants related to BGGW can be found in the Australian Government's online database, the Monitoring Evaluation Reporting and Improvement Tool (MERIT).[24]

NSW lists the White Box Yellow Box Blakely's Redgum Woodland as a Threatened Ecological Community (TEC) and has published recovery strategies.[25] It also produces annual 'report cards' for threatened species and ecological communities under the Saving Our Species program. However, there is only one such report card for BGGW, for 2017-18.[26] Searches for information on the NSW Environment website reveal isolated pieces of information about investments to assist BGGW recovery. For example, NSW acquired a property adjacent to Capertee National Park on which BGGW was present.[27]

Queensland also lists BGGW. A search of its website and most recent annual report did not reveal any current information about the status of BGGW.[28] However, its Environment Department is implementing recommendation by the Queensland Auditor General that it monitor and report on the population and trends of threatened species.[29] In fact, the Audit Office had been quite critical of the law of planning and accounting:

> The department does not systematically plan where to deploy its available resources to achieve the most effective balance of actions to protect habitats, mitigate threats and reduce species decline. It is not clear how much the department spends each year in total on threatened species management as it does not effectively track and account for funding used on specific activities.[30]

Victoria does not list BGGW as such, but it corresponds to certain Victorian

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[24] See https://fieldcapture.ala.org.au.
[25] https://www.environment.nsw.gov.au/threatenedSpeciesApp/profile.aspx?id=10837.
[26] https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/Report-cards/2017-2018/07-threatened-ecological-communities/white-box-yellow-box-blakelys-red-gum-woodland-2017-18.pdf.
[27] NSW Environmental Trust Annual Report 2018–19, (NSW Department of Planning, Industry and Environment, 2019) 7.
[28] des.gov.qld.au.
[29] Department of Environment and Science, Annual Report 2018–19 (Queensland Department of Environment and Science, 2019) 61.
[30] Queensland Audit Office, Conserving threatened species, Report 7: 2018–19, (Queensland Audit Office 2019) 7.

vegetation classes. A search of its current website plus annual reports for 2012-13 and 2018-19 did not reveal any mention of BGGW, including expenditure. [31]

The ACT lists BGGW as Yellow Box Blakely's Red Gum Grassy Woodland, for which it has an Endangered Ecological Community Action Plan.[32]A recent statutory progress report on woodland conservation, including BGGW, made no mention of expenditure.[33]

We could find no mention in South Australian records of any work to implement the recovery plan action to implement the recovery action of identifying the presence or otherwise of BGGW in SA (recovery action 1.3). There was no mention of this work in the annual reports of the SA Environment Department for the subsequent two reporting years and BGGW has not been listed subsequently.[34] Instead, a related community, the Grey Box Grassy Woodlands and Derived Native Grasslands of South-Eastern Australia has been listed nationally. The South Australian Environment Department website page for grey box links back to national documentation but does not contain any discrete information about recovery action or expenditure for that ecological community.[35]

Proposed Approach

Basic management principles suggest that if there are management objectives to be achieved in relation to a place or area (and there are many in the BGGW Recovery Plan) then then the place all area has to be managed as an entity, and actively so, towards the achievement of planned goals and objectives, with standard monitoring, reporting and review steps taken. The implication for MNES is that each one needs to be managed in this way. Some MNES are managed in this way; for example, most if not all World and National Heritage places are so managed, because typically they are national parks or other special sites or reserves. While some wetlands or habitat for threatened or migratory species might also be managed, most habitat areas, and

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[31] DoE, National Recovery Plan: White Box - Yellow Box - Blakely's Red Gum Grassy Woodland and Derived Native Grassland (DoE 2011) 4.

[32] ACT Government, 'Yellow Box Blakely's Red Gum Grassy Woodland Endangered Ecological Community Action Plan', in ACT Native Woodland Conservation Strategy and Action Plans (ACT Government, 2019). Available at: https://www.environment.act.gov.au/__data/assets/pdf_file/0008/576548/Woodland-Conservation-Strategy-Yellow-BoxBlakelys-Red-Gum-Grassy-Woodland.pdf

[33] Woodlands for Wildlife: ACT Lowland Woodlands Conservation Strategy, Progress Report 2018 (Environment, Planning and Sustainable Development Directorate, 2018).

[34] Department of Environment and Natural Resources, Annual Report 1 July 2011 to 30 June 2012 (DEWNR 2012) and Department of Environment, Water and Natural Resources, Annual Report 1 July 2012 to 30 June 2013 (DEWNR 2013).

[35] See https://www.environment.sa.gov.au/topics/plants-and-animals/Threatened_species_ecological_communities/threatened-ecological-communities/south-australia.

the threatened and migratory species themselves, are not. Nor are the Commonwealth marine area or marine native species managed as an entity or entities, although some areas, most notably the GBR Marine Park, are, as are some species, through fisheries management agencies.

Similarly, regions the subject of an accredited regional plan need to be managed as an entity, to ensure that agreed protections and recovery actions are delivered. This involves the establishment of a responsible management entity; preparation and implementation of plans; allocation of resources; and a mechanism for monitoring, reporting and evaluation and adjustment of policy. For regions, the establishment of a management entity could be a condition of Commonwealth accreditation and investment.

Submission 10
If MNES are to be protected and conserved, each one needs to be managed as an entity. Similarly, regions the subject of an accredited regional plan need to be managed as an entity, to ensure that agreed protections and recovery actions are delivered. This involves (for those MNES not already managed as entities) the establishment of a responsible management entity; preparation and implementation of plans; allocation of resources; and a mechanism for monitoring, reporting and evaluation and adjustment of policy. For regions, the identification or establishment of a management entity could be a condition of Commonwealth accreditation and investment.

Offsets and Markets

Biodiversity offsets have become increasingly important in development approval decisions under the EPBC Act. One of the authors of this submission undertook a case study of 14 projects approved in NSW and the ACT involving BGGW, by reviewing the 'recommendation reports', the statutory advice provided by the Environment Minister by his department. [36]This unpublished study found that in all

[36] Peter Burnett, Development Decisions Involving BGGW under the EPBC Act: a policy perspective', Presentation to Box Gum Grassy Woodlands Land Accounts Workshop, Fenner School of the Environment and Society, ANU, 7 November 2019. The 14 projects considered were: Moorlarben Coal Mine, via Mudgee (2007/3297); Moolarben Coal Project, Stage 1 modification (2013/6926) Ulan Coal Mine, via Mudgee (2009/5252); Charbon Coal, via Mudgee (2010/5498); Lynwood Quarry, Marulan NSW (2012/6560); Northparkes Copper-Gold Mine, via Parkes (2013/6788); Mt Arthur Coal open cut, Muswellbrook, NSW, (2014/7377); Hills Plain Subdivision, Tamworth, NSW (EPBC 2013/6812); Rosewood Estate via Tamworth Subdivision (2013/7060); Hume Highway Duplication near Tarcutta (2007/3330); Hume Highway, Woomargama Bypass (2009/5061); Hume Highway, Tarcutta Bypass

14 projects the offsets were the critical factor in the recommended decision; none of the other statutory considerations such as the ESD principles appeared to have directly influenced the recommended approval or the conditions that would attach to that approval. If the decisions considered in this study are representative, it appears that in many cases the question of whether to approve a development revolves around the questions of whether there are offsets available that comply with the Government's offsets policy.

Offsets policy is thus critical under current arrangements, but if the goal is, as we argue, to maintain both natural wealth and ecosystem services, which implies no net loss of ecosystem function or essential services in each ecosystem, then an offset must compensate for any loss of such function or services. To ensure that an offset does compensate for what is lost, in full and on an ongoing basis, an effective offsets policy must have certain attributes and be supported by administrative structures:

> The offset must compensate for the loss with a gain (additionality) that matches the quantum of loss. Averted losses, while having some value in themselves and thus a (limited) role to play, will not achieve this outcome. There must be a net overall gain to match the loss, not just a slowing of loss.
>
> The offset must be 'like for like'; a gain to a different ecosystem, or even a different element of ecosystem function, will not achieve the policy objective of maintaining ecosystem function. Like for like usually implies geographical proximity, but even if an offset in another place can compensate for loss of ecological function, note that it may not compensate for ecosystem services that are place-dependent, eg water supply filtration for a local community (admittedly not an MNES but relevant in the larger scheme of decision-making and to integrated approaches).
>
> The offset must be available *at the time of the impact* (advanced offset). While restoration can offset impacts after a delay, the effect of delay is often so significant as to substantially undermine the benefit of the offset (see Gibbons et al 2018).
>
> There must be legislative and administrative structures to register offsets publicly; monitor and enforce them on an enduring basis; and ensure that offset quality is maintained.

While the Government has established a Reef Trust that can accept financial contributions in lieu of physical offsets and then invest in offsets strategically; and has also endorsed the NSW Biodiversity Offset Scheme, thus enabling similar

(2009/5062); Kings Highway Deviation, Kowen ACT (2010/5501); Ilerton Drive extension, East Queanbeyan (2014/7304); Williamsdale ACT Electricity Supply(2008/4621).

payments for EPBC-assessed developments in NSW, these are exceptions rather than the rule and existing markets are very limited. A consistent national approach is needed. The Government might facilitate the establishment of markets of sufficient scale to deliver the necessary offsets nationally by:

Commissioning a study to identify opportunities for, and barriers to, markets in biodiversity offsets;

Funding research into techniques relevant to offsetting, e.g. environmental restoration;

Negotiating a nationally-consistent approach to offsets with the States, based on the principles above;

Subject to the outcomes of the study we propose, 'kick starting' markets by establishing a trust to operate nationally that would:

- invest in biodiversity offsets themselves, eg by paying landholders to establish or maintain habitat, which it could then sell directly to developers needing offsets (possibly according to a biodiversity credits scheme);
- invest in elements needed for a market, e.g. in land suitable for offset production that it could aggregate as appropriate and sell, over time, to providers of offsets.

Submission 11

It is essential that any offset scheme be based on principles of 'no net loss' and 'like for like' principles as and that it ensure that offsets are available at the time of impact. This is best achieved by the Government facilitating the establishment of a market of sufficient scale to deliver the necessary offsets by:

Commissioning a study to identify opportunities for, and barriers to, markets in biodiversity offsets;

Funding research into techniques relevant to offsetting, e.g. environmental restoration;

Negotiating a nationally-consistent approach to offsets with the States, based on the principles above; and

Subject to the outcomes of the study proposed above, 'kick starting' markets by establishing a trust at national scale that would invest in:

- **biodiversity offsets themselves, eg by paying landholders to**

establish or maintain habitat, which it could then sell directly to developers needing offsets (possibly according to a biodiversity credits scheme);

– invest in elements needed for a market, e.g. in land suitable for offset production that it could aggregate as appropriate and sell, over time, to providers of offsets.

It is also essential that an offset scheme be transparent and supported by the necessary legislative and administrative structures to ensure that offsets are implemented in full and on an ongoing basis.

7) Transitional Arrangements

A transition to the new model described above would take some time. The Commonwealth could facilitate early implementation of several elements, particularly its withdrawal from place-based decisions, by issuing detailed conservation policies and objectives for MNES and establishing an independent environment agency to certify individual State development decisions, where not covered by an accredited plan, as conforming (or not) to these policies. Certified decisions would be exempt from existing EPBC Act requirements. Decisions not certified could proceed to Commonwealth assessment under existing arrangements.

Submission 12

The Commonwealth could facilitate early implementation of elements of the model proposed in this submission, as described above.

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Existing and Proposed Goal, Values and Principles of Environmental Policy			
Current Element	**Current Description/Definition**	**Proposed Element**	**Description or Definition of Proposed Element (and/or Explanation for Change)**
Goal			
Ecologically Sustainable Development (ESD)	Development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (NSESD).	Sustainable Use of Nature (Could also be expressed for general communication as 'Use Nature Sustainably' or as 'A Healthy Environment for Present and Future Generations')	Nature's wealth and services should be maintained or enhanced for the benefit of current and future generations.
Environmental Values			
Intergenerational Equity	The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations (IGAE 3.5.2; EPBC Act s 3A)	Well-Being for present and future generations	(Change of name for clarity of expression.)

Substantive Principles of Environmental Policy			
Policy Integration and Participation			
Policy Integration	IGAE: ... the parties agree that environmental considerations will be integrated into Government decision making processes at all levels by, among other things: 1) ensuring that environmental issues associated with a proposed project, program or policy will be taken into consideration in the decision making process; 2) ensuring that there is a proper examination of matters which significantly affect the environment; and 3) ensuring that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed. (s 3.2) EPBC: Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations (s 3A)	Policy Integration	Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations. (No change, but the EPBC formulation is the more concise.)

Indigenous Participation	To achieve its objects, the Act: ... (g) promotes a partnership approach to environmental protection and biodiversity conservation through: ... (iii) recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity (EPBC Act s 3)	Indigenous Knowledge and Consultation	In making environmental decisions, decision makers will recognise, support and where appropriate draw upon Indigenous ecological knowledge with their free, prior and informed consent. Wherever Indigenous peoples have special interests in decisions, over and above their interest as citizens, for example in relation to native title rights and interests or their cultural heritage, decision makers should ensure first, that consultation arrangements address those special interests specifically & comprehensively; secondly, that Indigenous peoples are able to participate fully in the making of those decisions, through their own representatives or representative institutions; and thirdly that they obtain the free, prior consent of the Indigenous peoples before implementing any administrative measures that may affect those special interests. The right of Indigenous peoples to maintain, control, protect and develop their cultural and intellectual property over their inherent ecological knowledge and cultural

			heritage should be respected at all stages of environmental decision making. (Reflects UN Declaration on the Rights of Indigenous Peoples and Convention on Biological Diversity)

Public Participation	IGAE: 3. The parties agree that policy, legislative and administrative frameworks to determine the permissibility of land use, resource use or development proposals should provide for - ... 4. consultation with affected individuals, groups and organisations; And in respect of EIA: ... opportunities will be provided for appropriate and adequate public consultation on environmental aspects of proposals before the assessment process is complete. (s 3.3) EPBC: In order to achieve its objects, the Act ... (g) promotes a partnership approach to environmental protection and biodiversity conservation through: ... ... (iv) the involvement of the community in management planning (s 3)	Public Participation	All Australians have a stake in the environment, on which our way of life depends. They should thus have the opportunity to participate in any significant environmental decision that may affect them: • individually, eg a development project in close proximity to their home • collectively, eg a development affecting a MNES, or environmental plans for their region (Consultation on policies should follow normal standards of good consultation in the democratic process) (No change, in substance, but simpler expression.)
New	N/A	Transparency Brings Accountability	Transparency brings accountability by exposing decisions and their implementation to public view. (This is particular important in environmental decision-making, given that a healthy environment is essential to the quality of life of present and future generations.)

Ecological Principles			
Ecologically Sustainable Use	*ecologically sustainable use* of natural resources means use of the natural resources within their capacity to sustain natural processes while maintaining the life-support systems of nature and ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations. (EPBC Act ss 3, 528)	N/A	(No longer required as is similar to Sustainable Use of Nature.)
Conservation of Biodiversity and Ecological Function	The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making (s 3A EPBC Act; IGAE s 3.5.3)	Conservation of Biodiversity and Ecological Function	The conservation of biological diversity and ecological function is fundamental to maintaining the capacity of nature to support our quality of life. (Removes ambiguity concerning what is 'fundamental'; clarifies intent.)
New	N/A	A Bias to Conservation	Environmental policies and decisions should be biased to conservation over regulatory or recovery action. (Conservation is proactive and thus more effective than regulation and recovery).

Mitigation Hierarchy	To minimise environmental loss in approving development projects, first avoid impacts; mitigate what cannot be avoided and offset what cannot be mitigated. (incorporated in EPBC Offsets Policy)	Mitigation Hierarchy	(No change, but should be included in EPBC Act)
Information and Precaution			
New	N/A	Comprehensive Decision-Ready Information	The difficulties posed for environmental decision-making by environmental complexity and uncertainty can be reduced by: • gathering information on a comprehensive & systematic basis. • Arranging the information in a framework designed to support decision-making, eg environmental-economic accounts

Precautionary Approach	Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. [IGAE adds:] In the application of the precautionary principle, public and private decisions should be guided by: 1) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and 2) an assessment of the risk-weighted consequences of various options. (IGAE s 3.5.1; EPBC Act s 3A)	Precautionary Approach	(No change, but EPBC formulation is simpler)
Economic Principles			
Economic Approaches	IGAE: Improved valuation, pricing and incentive mechanisms - • environmental factors should be included in the valuation of assets and services. • polluter pays i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement • the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes	Economic Approaches	Environmental policy-making can be enhanced through economic approaches that take full account of the environment and the need to maintain natural capital and ecosystem services. These approaches include: • economic analysis that is informed by environmental-economic accounting and valuation of environmental assets and services where possible; • polluter pays i.e. those who generate pollution and waste

	• environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems. (IGAE s 3.5.4) EPBC:[I]mproved valuation, pricing and incentive mechanisms should be promoted (EPBC s 3A)		should bear the cost of containment, avoidance, or abatement • the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes • environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems. (Revised to reflect developments in understanding of environment-economy interactions since 1992)
Principles of Environmental Federalism			
Equivalent Protection	The object of this act is to ensure that ... (a) people enjoy the benefit of equivalent protection from air,	Equivalent Environmental Benefits	People should enjoy the benefit of equivalent environmental quality, wherever they live in Australia.

	water or soil pollution and from noise, wherever they live in Australia; (NEPC Acts s 3)		(Adapted to apply to environmental issues generally)
Undistorted Markets	The object of this act is to ensure that ... (a) decisions of the business community are not distorted, and markets are not fragmented, by variations between participating jurisdictions in relation to the adoption or implementation of major environment protection measures. (NEPC Acts s 3.)	Undistorted Markets	Economic and business decisions should not be distorted, nor markets fragmented, by unnecessary variations in environmental measures between jurisdictions. (Adapted to apply to environmental issues generally)
New	N/A	Common Environmental Approaches	Shared environmental responsibilities under the Constitution and the transboundary nature of the environment make intergovernmental cooperation essential to policy effectiveness. Environmental measures are most effective when developed under common policy frameworks
New	N/A	Environmental Scale Principle	Environmental measures are most efficient when implemented by the level of government closest to scale at which the policy or programatic action operates.