

National
Environmental Law
Association
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Submission to the 10 year review of the EPBC Act

Introduction

1. The National Environmental Law Association (**NELA**) welcomes the opportunity to contribute to the second 10 year statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act** or **Act**). The Act is now over 20 years old, and is in need of reform. NELA considers that the Act should be simplified, strengthened and modernised to better regulate environmental decision making and actions that impact on environmental matters of national and international importance. The primary goal of the Act's regulatory framework should be to deliver best practice environmental and conservation outcomes and protect biodiversity and heritage.

About NELA

2. NELA is Australia's only national, multi-disciplinary, member-based association focused on environmental law and sustainability. NELA serves the needs of practitioners in law, planning, natural resources and environmental science and management. NELA obtains and exchanges information on issues relevant to environmental law and policy.
3. One of NELA's objectives is to provide a forum for and otherwise assist in the discussion, consideration and advancement of environmental law among the legal profession and the wider community.
4. NELA's current board members are Jess Hamdorf (President), Hanna Jaireth (Vice President), Natasha Hammond (Secretary), Nadja Zimmermann (Treasurer), Tiphonie Acreman, Matthew Floro, Justine Bell-James and Michelle Lim. All board members have all contributed to and endorse this submission.

Executive Summary

5. This submission addresses selected questions (Questions 1, 2, 4, 6-9, 13, and 20) in the *Independent Review of the EPBC Act Discussion Paper, November 2019 (Discussion Paper)*, which NELA considers it is best placed to comment on.
6. NELA makes the following key recommendations for reform of the EPBC Act:
 - a. The current Matters of National Environmental Significance (**MNES**) should be retained, the ‘water trigger’ should be extended to any activity with an impact on significant water resources, and two new MNES should be added to regulate greenhouse gas emissions and significant land-clearing.
 - b. The definition of ‘sustainable development’ within the principles of ESD under the Act be expanded to: *“development that meets the needs of the present while safeguarding Earth’s life-support system, on which the welfare of current and future generations depend”*.
 - c. Section 134 of the Act be amended to prohibit conditions that defer decision-making on critical matters to post-approval.
 - d. A new Outcomes-based Conditions Policy be developed, mandating that environmental approvals are aimed at achieving environmental outcomes.
 - e. A Commonwealth Environment Protection Authority (**EPA**) should be established, with responsibility for administering the Commonwealth’s environmental assessment and approval system under the EPA Act, and enforcement and compliance under the Act.
 - f. With respect to strategic assessment, NELA endorses the recommendations of the Hawke Review and calls for the wording of s 146(1) to be clarified, strategic assessments to be conducted by the Department of Agriculture, Water and the Environment (**Department**) rather than the proponent, and strategic assessments and project-by-project assessments be subject to oversight by an independent EPA or Commission.
 - g. With respect to public participation, the current standing provisions in the EPBC Act should be extended to allow any person to seek judicial review of a decision, and also to allow any person to bring civil enforcement proceedings to enforce breaches of the EPBC Act. The Act should also be amended to broaden the right to seek merits review, which should be available for key decisions relating to the referral and assessment process, and nomination and listings processes.
 - h. Remove the exemption for Regional Forest Areas (**RFAs**) and repeal ss 38–41.

QUESTION 1: The scope of the matters of national environmental significance.

QUESTION 4: Should the matters of national environmental significance within the EPBC Act be changed? How?

New Greenhouse Gas Emission Trigger

7. Climate change is both a global and national issue which requires policy coordination at international, national and state levels. Long term changes to the global climate system caused by anthropogenic emissions such as CO₂ are predicted to persist.¹ With the CSIRO reporting an increase in extreme weather conditions including fire weather and the length of the fire season, rising sea-levels and a warming of Australia's climate and oceans by approximately 1°C since 1910,² Australia needs to ensure that its legislative and policy framework is positioned to address matters relating to climate change.
8. On 10 November 2016, Australia ratified the Paris Agreement. As a signatory to the Agreement, Australia committed to global efforts to limit warming to below 2 °C above pre-industrial levels and to reducing its 2005 emissions by 26-28% by 2030. Despite the ratification of the Paris Agreement, the United Nations Environment Programme's *Emissions Gap Report 2018* and a recent review by the Organisation for Economic Cooperation and Development (**OECD**) show that Australia is one of the most emissions-intensive of OECD countries and will fall short of its 2030 Paris Agreement targets.³
9. In the context of the serious global threat that climate change poses, and Australia's international commitments under the Paris Agreement, NELA submits that:
 - while it is commendable that sub-national jurisdictions are enacting or considering enacting legislation and implement policies to meet the commitments contained in the Paris Agreement, the Commonwealth should lead a national approach;
 - the most appropriate and effective way to ensure that Australia meets its commitments under the Paris Agreement is by way of national regulation; and
 - the EPBC Act should be amended to include the emission of significant greenhouse gases as a matter of MNES;
 - the EPBC Act should specify that significant greenhouse gas emissions are the emission of 100,000 tonnes of carbon dioxide equivalent emissions per annum or more.

¹ IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)].

² CSIRO & Australian Government Bureau of Metrology, 'State of the Climate: 2018' <<https://www.csiro.au/~media/OnA/Files/State-of-the-Climate-2018-CSIRO-BOM-Dec2018.pdf>>, 2.

³ OECD Environmental Performance Reviews: Australia 2019.

10. NELA submits that 100,000 tonnes of carbon dioxide equivalent emissions per annum is appropriate in the present context, primarily because it is consistent with the safeguard mechanism implemented under the *National Greenhouse Energy Reporting Act 2007*, which requires the operators of facilities with direct emissions in excess of 100,000 tonnes of carbon dioxide equivalent emissions per annum to measure, report and manage their emissions.
11. In making the above submission, NELA recognises previous submissions and recommendations to the same effect. Notably, NELA recognises that the Independent Review of the EPBC Act provided to the Australian Government on 30 October 2009 by Dr Allan Hawke⁴ (**Hawke Review**) recommended that the government implement an interim greenhouse trigger, to sunset upon commencement of the Carbon Pollution Reduction Scheme (**CPRS**).⁵ The proposed trigger threshold was 500,000 tonnes of carbon dioxide equivalent emissions per annum.⁶ It is noted that the CPRS was never enacted and currently, Australia does not have a prospective cap-and-trade emissions trading scheme.

Expansion of the 'Water Trigger'

12. NELA considers that, subject to its comments on the water trigger, the existing MNES are appropriate and should be retained.
13. Australia has historically experienced difficulties in managing its water resources, particularly in the Murray-Darling Basin where balancing the competing interests of the relevant States in respect of this finite resource has caused ongoing issues. In recent times of drought, the health of the rivers of the basin have suffered. Pressure on the Basin and water scarcity is predicted to worsen as a result of climate change. Further, in 2017 revelations of alleged water theft and systematic non-compliance and lack of enforcement of water regulations in NSW highlight the importance of rigorous regulation and enforcement and oversight at a national level.
14. Therefore, NELA endorses the call by others that consideration be given to expanding the water trigger to any activity that may have a significant impact on Australia's water resources.

Significant land-clearing trigger

15. One of the most significant threats to biodiversity is habitat loss as a result of land clearing, which also results in the release of significant carbon emissions, exacerbating climate change. NELA endorses the call by others that there should be a new trigger to regulate significant clearing of native vegetation. NELA endorses the submission to this review by the Environmental Defenders Office that a new land-clearing trigger should include three elements, scale, sensitivity and high conservation value.

⁴ Allan Hawke, Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, 2009).

⁵ *Carbon Pollution Reduction Scheme Bill 2010* (Cth).

⁶ Hawke, n 4 at 30.

QUESTION 2: How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC Act?

16. ESD is one of the key objects of the EPBC Act, however the Act does not explicitly define ESD (although s 3A sets out the principles to be considered to give effect to ESD). The review offers an opportunity for the Act to be amended to define ESD and to do so in a manner which is fit for purpose for the Anthropocene.
17. The Anthropocene refers to the most recent era in Earth's history where human activities have become a global force for change akin to a large meteorite. This submission emphasises the need to redefine ESD in light of the new realities and futures that the Anthropocene brings.
18. The 'Brundtland definition' remains the most widely utilised characterisation of sustainable development. The Brundtland Report, named after its lead author Gro Brundtland, defines sustainable development as:

"Development that meets the needs of present generations while not compromising the ability of future generations to meet their own needs".⁷

19. As indicated above, the EPBC Act does not explicitly define ESD although s 3A sets out the principles to be considered to give effect to ESD. When attempting to define ESD in Australia, reference is often made to Australia's *National Strategy for Ecologically Sustainable Development (1992)* which defines ESD as:

"using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased".

20. While largely embodying the spirit of the Brundtland definition, the Australian definition of ESD lives up to the additional 'Ecologically' in its name with a clear focus on the importance of human well-being depending on ecological processes now and into the future.
21. Given the impact of humans on the multiple processes across the earth system, there have been calls to redefine 'sustainable development' so that the concept retains its potency in the face of the uncertainty and surprise of contemporary global environmental change.⁸ Griggs et al draw on the planetary boundaries framework to recommend that the Brundtland definition of sustainable development be re-defined as:⁹

"development that meets the needs of the present while safeguarding Earth's life-support system, on which the welfare of current and future generations depend."

⁷ Report of the World Commission on Environment and Development (WCED), *Our Common Future*.

⁸ David Griggs et al. 'Policy: Sustainable development goals for people and planet.' (2013) 495 (7441) *Nature* 305.

⁹ See Johan Rockström et al. 'Planetary boundaries: exploring the safe operating space for humanity' (2009)14(2) *Ecology and Society*; Will Steffen et al. 'Planetary boundaries: Guiding human development on a changing planet' (2015) 347(6223) *Science* 1259855.

22. This re-definition stems from a recognition that a stable functioning earth system is fundamental to realising all other components of sustainable development. It harnesses understanding of environmental processes at the planetary level which have developed since the Brundtland report.
23. NELA recommends the incorporation of the Griggs et al. definition of sustainable development in the definition of ESD in the EPBC Act. Not only will this honour the 1992 Australian definition of ESD which already extends the Brundtland definition to emphasise that ecological processes underpin human quality of life. Adopting the Griggs et al. definition will also facilitate inclusion in Australian law cutting edge concepts of the earth system and planetary boundaries which recognise the globally interconnected components of social-ecological systems particularly under conditions of global change.
24. The current and future challenges for the environment, and humanity more broadly, are such that it is timely to reconsider what sustainable development should encompass in order to facilitate continued progress for human civilisations and the other living beings that share the planet.

QUESTION 6: What high level concerns should the review focus on?

25. NELA considers that a key issue that must be considered as part of the review is how the Act might better address strategic planning and decision making at the landscape and ecosystem scale. The assessment process should also consider environmental impacts and the extent of disturbance at the ecosystem and landscape scale. When assessing the impacts of a proposed activity, cumulative impacts must be a key consideration, to ensure that the capacity of an ecosystem to manage and adapt is assessed.

Adaptive management and deferred decision-making

26. Safeguards must be developed around the role of adaptive management and deferred decision making on crucial matters. Adaptive management has been adopted by the Australian Department of the Environment as the best practice approach for achieving environmental outcomes.¹⁰ Adaptive management emerged as a promising environmental management approach in the face of uncertainty as it ‘encourages the development of flexible institutions capable of monitoring, evaluating, and taking corrective action’.¹¹
27. However, concerns have been raised that adaptive management is being used improperly in Australian law. Slattery, using the Carmichael Coal Mine approval as a case study, argues that the approval failed to provide baseline conditions to ‘allow for a rigorous analysis of the potential consequences of a range of management options’.¹² Lee has also queried current use of adaptive

¹⁰ Australian Government Department of the Environment, *Outcomes-based conditions guidance* (July 2015) <<https://www.environment.gov.au/system/files/consultations/7c4a2b5b-2282-45c4-8e67-f0b5155ab12a/files/draft-outcomes-based-conditions-guidance.pdf>> 14.

¹¹ Rebecca J McLain and Robert G Lee, ‘Adaptive Management: Promises and Pitfalls’ (1996) 20(4) *Environmental Management* 437, 437.

¹² Christian Slattery, ‘Canary in the coal mine: why the approval conditions for the Carmichael Mine reveal the need to amend the EPBC Act to incorporate adaptive management principles’ (2016) 33 *EPLJ* 421, 442.

management in state level regimes, noting that it can be used to defer decision-making about important matters.¹³

28. There are a number of instances where actions are being approved under the EPBC Act prior to details of the action being finalised.
29. For example, with respect to Approval 2015/7585, Turtle Street Beach Resort, the proponent received approval to construct and operate a tourist resort. Condition Two required the approval holder to prepare and submit a Fauna Management Plan for the Minister's written approval, which must include measures to avoid, mitigate and manage impacts on MNES. The action must not commence until the Minister has approved it.
30. In this instance, the action has been approved prior to the Minister having complete information on the impacts of the proposed action on MNES. Whilst the Plan must be approved by the Minister, the Plan is not required to be publicly notified and scrutinised. Further, the Minister would have to take the step of revoking the approval if the Plan is not satisfactory.
31. The approval is problematic in that it presupposes that significant impacts on a MNES are capable of being addressed through a management plan. This amounts to a predetermination of an issue which is required to be determined under the Act and is a predetermination made in the absence of relevant evidence.
32. Whilst adaptive management can promote flexibility in achieving outcomes, it should not be used as a basis for granting approvals prior to all information being gathered and provided to the decision maker. It also should not be used in a matter that surreptitiously permits important decisions to be deferred, and for decisions to be removed from public scrutiny.
33. NELA submits that s 134 of the EPBC Act be amended to prohibit conditions which defer decision-making on critical matters to post-approval.

QUESTION 7: What additional future trends or supporting evidence should be drawn on to inform the review?

34. The Australian Panel of Experts on Environmental Law (**APEEL**) emphasise that the crisis-driven and reactive nature of current laws is a key contributor to unprecedented ecological decline.¹⁴ These characteristics of existing law are untenable given the increasing uncertainty and surprise manifesting within ecological systems.¹⁵ Planning in the context of uncertainty requires us to anticipate multiple possible futures while moving beyond grim projections.¹⁶

¹³ Jessica Lee, 'Theory to practice: adaptive management of the groundwater impacts of Australian mining projects' (2014) 31 *EPLJ* 251.

¹⁴ Rob Fowler et al., *The foundations of environmental law: goals, objects, principles and norms*, Australian Panel of Experts on Environmental Law, 2017.

¹⁵ Christopher Johnson et al. (2017) 'Biodiversity losses and conservation responses in the Anthropocene', 356 *Science* 270.

¹⁶ Elena Bennett et al. (2016) 'Bright spots: seeds of a good Anthropocene', 14 *Frontiers in Ecology and the Environment* 441.

35. NELA is concerned that the aim of the ‘What the Future Looks Like’ component of the Discussion Paper to ‘forecast the likely future operating context of the Act’ may be misguided. The context of the Anthropocene (discussed in our response to Question 2 above) requires today’s environmental governance mechanisms to be robust under multiple possible futures while steering towards desirable futures states. Attempts to forecast a singular future risk creating self-fulfilling prophecies as people orient their behaviour towards the future they think will eventuate.¹⁷
36. NELA’s response to this question proceeds as follows:
- first, NELA emphasises the need to reframe assumptions made in the Discussion Paper;
 - next, the response introduces scenario methods to suggest how just and sustainable laws capable of responding to the uncertainty and surprise of the Anthropocene could be formulated, and
 - finally, NELA’s response to Question 7 highlights the short-sightedness of the Discussion Paper in its focus on Commonwealth level reports.
 - In doing so, NELA recommends greater engagement with both intergovernmental and sub-national processes.

Reframing assumptions of ‘What the Future Looks Like’

37. NELA very much agrees with the Discussion Paper’s statement that recommendations of the EPBC Act Review need to be fit for the future. Recommendations for the future, however, also need to acknowledge the unprecedented challenges of global environmental, social and economic change characteristic of the Anthropocene – this era of Earth’s history defined by human-induced changes to the Earth system. This section highlights the need to move beyond attempts to forecast a single future and instead consider the development of responses which anticipate multiple plausible futures. Further, the section also emphasises the importance of comprehending the interconnected nature of social, ecological and economic systems both in the present and in understanding how these systems will continue to influence each other into the future.

Moving beyond forecasting

38. The onset of the Anthropocene means that the future will likely be characterised by abrupt and unexpected shifts across ecological systems. These impacts will cascade through economic and social systems. At the same time, avoiding the most catastrophic impacts of the Anthropocene requires transformative change within current social and economic systems.¹⁸ Therefore, this submission urges the EPBC Act review to move beyond attempts to forecast one possible future.

¹⁷ Ibid.

¹⁸ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) (2019) *Global Assessment report on biodiversity and ecosystem services*, IPBES Secretariat.

39. The Discussion Paper (released prior to the COVID-19 outbreak) focuses on a singular trajectory of continued global economic growth particularly in Asia. The Discussion Paper therefore anticipates economic opportunities that are underpinned by our natural assets and productive landscapes i.e. tourism and trade in Australian produce. COVID-19 underscores the need to envisage multiple plausible futures so as to avoid being blind-sided by unexpected events. The Anthropocene means that our histories can only provide some guidance to possible futures. Specific events, such as a global pandemic, may not be capable of being predicted with absolute accuracy. Nevertheless, it is certainly within our capacity to imagine plausible futures with differing social, economic and ecological trajectories and to harness understanding of multiple futures in the development of Australian law which is fit for purpose in this new era of Earth's history.

Recognising the interconnected nature of social, economic and ecological systems

40. ESD is an overarching principle of the EPBC Act.¹⁹ Yet, this seems to have been overlooked in the 'What the Future Looks Like' component of the Discussion Paper. This component of the Discussion Paper appears to treat economic, social and ecological aspects of the future as discrete issues. This stands in contrast with s 3A(a) of the EPBC Act which emphasises the need to: "effectively integrate both long-term and short-term economic, environmental, social and equitable considerations" in decision-making. Despite this the interconnections across ecosystems, climate, demography and economy are not drawn in this part of the Discussion Paper.
41. NELA therefore encourages further development of the Act to consider the multiple components of social-ecological systems as intrinsically interconnected while being cognisant of these relationships when considering multiple future iterations of these systems.
42. NELA is concerned that the Discussion Paper's identification of the United Nations Sustainable Development Goals (SDGs) as a 'common reference point' for all sectors to 'focus collective efforts' is ill-advised and fails to consider the multiple shortcomings of the SDGs.²⁰ Of particular relevance to the present discussion is that while the preamble to the 2030 Agenda claims that the SDGs are 'integrated and indivisible and balance the three pillars of sustainable development',²¹ the goals are largely compartmentalised into traditional sector based siloes.²²
43. Some targets incorporate subject matter which relates to other goals. However, there is no explicit cross-referencing to other goals or targets under any of the goals. There is little recognition of the interconnected nature of environmental issues with environment-related issues spread across five separate goals: Goal 13 is the climate change goal while energy is dealt

¹⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3A.

²⁰ See for e.g. Michelle Lim, Peter Sjøgaard Jørgensen, and Carina Wyborn. 'Reframing the sustainable development goals to achieve sustainable development in the Anthropocene—a systems approach' (2018) 23(3) *Ecology and Society*.

²¹ United Nations (2015) *Transforming Our World: The 2030 Agenda for Sustainable Development* A/RES/70/1.

²² Mans Nilsson and Bob Costanza. 2015. Overall framework for the Sustainable Development Goals. Pages 7-12 in ICSU, ISSC. 2015. *Review of the Sustainable Development Goals: The Science Perspective*. International Council of Science, Paris, France.

with separately in Goal 7. 'Life below water' (Goal 14) is in a separate goal to 'life on land' (Goal 15) while freshwater ecosystems are only included in the clean water and sanitation goal (Goal 6).²³ This thus reflects the existing institutional structures of multilateral environmental agreements²⁴ rather than the interconnected reality of environmental processes.

Scenarios and the Future We Want

44. NELA urges the EPBC Act review to engage with the literature on 'good Anthropocenes'.²⁵ A 'good Anthropocene' refers to a world that is "just, prosperous and ecologically diverse". Proponents of this concept encourage movement towards a 'good Anthropocene'. Such an approach requires us to imagine and explore inspirational visions of the future which remain grounded in reality.²⁶

The required shift in focus of the EPBC Review

45. A 'good Anthropocene' is likely radically different from the world we live.²⁷ To steer towards a 'good Anthropocene', or indeed good Anthropocenes (recognising the importance of engaging with a plurality of desirable future states) we need to anticipate possible futures while re-imagining legal systems and the ethics and values that underpin them.
46. Though we live in extraordinary times, responses to unprecedented biodiversity loss in Australia continue to reflect outdated understanding of novel challenges (for example, clearing of native vegetation in response to bushfire threats;²⁸ expansion of protected areas without tackling drivers of biodiversity loss such as climate change²⁹ or unsustainable production and consumption.³⁰
47. Scenarios are one of the key methods used in futures studies. They consist of alternative narratives of plausible future states and thus facilitate preparing for the future in thoughtful and creative ways.³¹ As the current pace of change challenges traditional planning methods, scenarios are increasingly used as a tool for strategic foresight in diverse fields ranging from financial services to health care.³² Articulation of visions of likely and possible futures provides a powerful

²³ Lim et al., above n **Error! Bookmark not defined.**

²⁴ Arild Underdahl and Rakhyun Kim, 'The Sustainable Development Goals and Multilateral Agreements' in Kanie and Biermann (eds), *Governing through goals: Sustainable Development Goals as governance innovation*. MIT Press, 2017.

²⁵ Bennett et al. (2016), above n 16.

²⁶ Ibid.

²⁷ Bennett et al., above n 16.

²⁸ Douglas Bardsley et al. (2015) 'Wildfire risk, biodiversity and peri-urban planning in the Mt Lofty Ranges, South Australia', 63 *Applied Geography* 155.

²⁹ Jan McDonald et al. (2018) 'Adaptation pathways for conservation law and policy', 10 *WIREs Climate Change* e555.

³⁰ IPBES, above n 18.

³¹ Peter Bishop et al. (2007) 'The current state of scenario development: an overview of techniques' 9 *Foresight* 5.

³² Gill Ringland (2010) 'The role of scenarios in strategic foresight' 22 *Technological Forecasting and Social Change* 1493.

tool for facilitating dialogue with stakeholders and decision-makers about alternative futures for nature and the pathways to achieve such futures.³³

48. Bennett et al. advocate a shift from focusing merely on plausible futures to amplifying hopeful elements of existing success stories to steer towards *desirable* futures. This submission therefore urges the inclusion of processes which facilitate development of plausible and desirable futures as an essential part of guiding the development of the EPBC Act. Such processes will enable the Act to anticipate and facilitate responses to unprecedented and novel challenges in an effective, efficient and just manner.

Drawing on Supporting Evidence and Knowledge at the Global, Regional and Sub-National Level

49. The Discussion Paper refers only to Commonwealth-level documents in its attempts to look to the future. NELA emphasises that to develop a comprehensive picture of the state of social-ecological systems there needs to be engagement on the one hand with the assessments of Intergovernmental bodies such as the IPCC and IPBES, and on the other with sub-national reports.

Global and Regional Knowledge Syntheses and Scenario Processes

50. As a starting point it is important to note how the knowledge syntheses processes of the IPCC and IPBES Assessments differ from those employed in generating the National reports cited in the Discussion Paper. While often referred to in the media as ‘reports’, intergovernmental assessments such as those of the IPCC and IPBES represent systematic reviews of the literature by teams comprised of hundreds of global experts. The findings of these assessments therefore represent critical syntheses of the literature. Results are therefore highly authoritative as they present a comprehensive overview of multiple studies. This not only allows clear statements to be made about the degree to which particular findings are widely supported. It also enables the identification of broader trends.
51. The IPCC and IPBES conduct extensive work on scenarios and models. At the bare minimum, the EPBC Review needs to engage with these processes in order to anticipate some of the plausible trends for climate and biodiversity and how these will impact social, economic and ecological processes in Australia.
52. NELA also highly recommends that the EPBC Review process is cognisant of the findings of IPCC and IPBES Assessments. Of particular relevance to the EPBC Review process are the IPCC’s *6th Assessment Report (AR6)* as well as its recent special reports: *1.5 Degrees Special Report (2018)*, *Ocean and Cryosphere (2019)*, *Climate Change and Land Special Report (2020)*, as well as the *IPBES Global Assessment (2019)* and the *IPBES Asia-Pacific Regional Assessment (2018)*.

Identifying national trends and local specificities by engaging with sub-national reports and processes

53. The Discussion Paper refers to the consultation of ‘key reports’. While the examples given are of Commonwealth documents, an understanding of state and local contexts is also vital to

³³ Isabel Rosa et al. (2017) ‘Multiscale scenarios for nature’s futures’ 1 *Nature Ecology and Evolution* 1416.

anticipating some of the novel challenges of future change and to inform national governance of Australia's natural assets. Coherence and coordination across state and national processes (e.g. in the compilation of State of Environment Reports) are important as is the aggregation of information to identify continental trends (where Australia wide coordination is required), opportunities for learning across jurisdictions and where and when local responses should be prioritised.

QUESTION 8: Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

54. NELA considers that focusing on outcomes rather than processes would arguably allow for better environmental outcomes under the Act. At present, actions and projects are permitted under the Act where correct processes are followed, without the need for a proponent to prove that any particular environmental outcome will be achieved.
55. A good example is a condition contained in the initial approval for capital dredging at Abbot Point. Under the approval, the proponent was required to offset the sedimentation caused by dredging and disposal of dredge spoil. Specifically, the proponent was required to offset 150% of the amount of sediments released by reducing the load of sediments entering the marine environment upstream in the Burdekin and Don catchments (referral 2011/6213). This condition focused on the action and the process, so provided that the sediment entering the water was reduced, there was no need for the proponent to prove an outcome – in this case, an actual improvement in water quality for ecosystems within the GBR region.³⁴ Further, research showed that to offset the amount of material dredged by 150%, the proponent would have to reduce agricultural discharge by at least 5 million tonnes. The total discharge from these catchments is only 6 million tonnes so, to meet the condition, the proponent would have to effectively restore these catchments to pre-European conditions and remove all agriculture from the area. It would also cost in excess of \$1 billion.³⁵
56. The need to focus on outcomes was also recognised by the development of a draft *EPBC Act Outcomes-based Conditions Policy* in 2015.³⁶ Under this draft policy, approval conditions would need to define an outcome to be achieved by a proponent, rather than a process to be followed. However, a final policy was never implemented.
57. NELA submits that a new Outcomes-based Conditions Policy be developed, mandating that environmental approvals are aimed at achieving environmental outcomes.

³⁴ Justine Bell, 'Implementing an outcomes-based approach to marine biodiversity offsets: lessons from the Great Barrier Reef' (2016) 23(3) *Australasian Journal of Environmental Management* 314-329.

³⁵ Brodie, J, 2014, 'Dredging the Great Barrier Reef: Use and misuse of science', *Estuarine, Coastal and Shelf Science*, vol.142, pp. 1-3.

³⁶ Australian Government Department of the Environment, *Outcomes-based conditions guidance* (2015) <<https://www.environment.gov.au/system/files/consultations/7c4a2b5b-2282-45c4-8e67-f0b5155ab12a/files/draft-outcomes-based-conditions-guidance.pdf>>.

QUESTION 9: Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?

58. NELA agrees with the recommendations of the Senate Environment and Communications References Committee inquiry into Australia’s faunal extinction crisis in August 2019 that an independent Environment Protection Agency be established ‘with sufficient powers and funding to oversee compliance with Australia’s environmental laws’.³⁷
59. NELA also endorses the technical papers that the APEEL released in 2017, that recommended that the Commonwealth provide national strategic leadership in relation to environmental matters, including through national standards in the form of Commonwealth Strategic Environmental Instruments (CSEIs) that states and territories would implement. These CSEIs would comprise ‘national environmental measures in the form of strategies, programs, standards and protocols and regional environmental plans comprising terrestrial, landscape-scale bio-regional plans and marine bioregional plans.’³⁸
60. The CSEIs would be developed with the engagement of scientists, legal experts, environment, industry and employer groups, Indigenous Australians and the broader Australian public with government policy-makers and regulators.³⁹
61. APEEL recommended that if a Commonwealth environmental auditor found that states and territories were not sufficiently complying with agreed implementation plans, the Commonwealth would override those jurisdictions by regulation.
62. NELA supports APEEL’s recommendation that the Commonwealth EPA be responsible for:
- administering the Commonwealth’s environmental assessment and approval system including where state and territory legislation is overridden
 - regulating activities undertaken by Commonwealth authorities and on Commonwealth land, and
 - other regulatory activities assigned to the EPA.
63. As well as assessment and approval powers, the Commonwealth EPA would also be tasked with compliance and enforcement of the Act, with appropriate investigative powers akin to those in the NSW *Protection of the Environment Operations Act 1997* and the *Environmental Planning and Assessment Act 1979*, for example.

³⁷ Australian Senate, above n 5, Rec 2, 63 [4.15].

³⁸ See Australian Panel of Experts on Environmental Law (APEEL), *Blueprint for the Next Generation of Australian Environmental Law*, 4 <<http://apeel.org.au/>>

³⁹ See APEEL’s Technical Paper 8 on Environmental Democracy.

QUESTION 13: Should the EPBC Act require the use of strategic assessments to replace case-by-case assessments? Who should lead or participate in strategic assessments?⁴⁰

64. Under s 146(1) of the EPBC Act, the Minister may agree in writing with a person responsible for the adoption or implementation of a policy, plan or program that an assessment be made of the impacts of actions under the policy, plan or program on a matter protected by a provision of Part 3 of the EPBC Act. This is known as a strategic assessment. Under s 146B, the Minister may approve the taking of an action or a class of actions in accordance with an endorsed policy, plan or program. Section 146D has the effect that actions in accordance with an endorsed policy, plan or program are taken to have been approved and do not need to be made the subject of project-by-project assessment.
65. “Strategic assessment” is also referred to in the literature as “strategic environmental assessment”.⁴¹ Koutsamanis states that strategic assessment is “the Environmental Assessment (EA) of the impacts of policies, plans and programs”.⁴² As the Discussion Paper notes, despite the availability of strategic assessments in the EPBC Act, “most projects are still being assessed on a case-by-case basis, with little differentiation for risk to the environment.”
66. Sadler and Veerheem provide the following definitions of policies, plans and programs:⁴³
- Policy: “A general course of action or proposed overall direction that a government is or will be pursuing and that guides ongoing decision making.”
 - Plan: “A purposeful forward looking strategy or design, often with coordinated priorities, options and measures that elaborate and implement policy.”
 - Program: “A coherent, organised agenda or schedule of commitments, proposals, instruments and/or activities that elaborate and implement policy.”
67. The Minister's discretion to agree with a person responsible for the adoption or implementation of a policy, plan or program that a strategic assessment be conducted, undermines the effectiveness of strategic assessments as an approval pathway. Whereas project-by-project assessment imposes a duty upon a person to refer an action that the person thinks may be a controlled action for the Minister's decision, strategic assessments (excluding fisheries assessments) are an optional mechanism as between the Minister and the proponent. This, in part, explains the low take-up of strategic assessments vis-à-vis project-by-project assessments. Moreover, the wording of s 146(1) is unclear. Strategic assessments do not assess the "impacts

⁴⁰ The below submission is based substantially on M Floro, UQ Environmental Law LLM research essay, 2015, with the permission of the author.

⁴¹ Simon Marsden, ‘A Critique of Australian Environmental Law Reform for Strategic Environmental Assessment’ (2014) 32(2) *The University of Tasmania Law Review* 277, 277, citing Thomas B Fischer, *Theory and Practice of Strategic Environmental Assessment* (Earthscan, 2007); Simon Marsden, *Strategic Environmental Assessment in International and European Law: A Practitioners’ Guide* (Earthscan, 2008).

⁴² Adam Koutsamanis, ‘The role of Strategic Environmental Assessment in Environmental Impact Assessment and the law’ (2011) 16 *Local Government Law Journal* 99, 99.

⁴³ *Ibid* 101.

of actions" under a policy, plan or program; rather, they assess the impacts of a policy, plan or program *itself*.⁴⁴

68. In relation to s 146D, Koutsamanis argues that once a strategic assessment covers "the interconnected environmental impacts of strategic and indistinct actions of [policies, plans and programs]", project EIAs can then assess site-specific issues.⁴⁵ In this way, Koutsamanis is arguing for the adoption of a more European approach to strategic assessment. In the European Union (EU), strategic assessment "is applied to plans and programmes for listed sectors which *set the framework for the future development consent of projects under EIA*".⁴⁶ This is different to the purpose of the strategic assessments under the EPBC Act, which, in light of s 146D, could be seen "as a mechanism for fast-tracking proposals".⁴⁷ Viewed in this way, there is a question as to whether strategic assessment can be effective in achieving the principles of ESD if its purpose is to hasten approvals. Moreover, there is a lack of independent oversight of the strategic assessment (or EIA) process.⁴⁸
69. The Hawke Review made a number of important recommendations for improving the effectiveness of strategic assessments.⁴⁹ The Hawke Review stated that "[w]hile it will be necessary to retain single project assessments, real efficiency and environmental benefits could be gained by moving to greater use of strategic assessments and regional planning tools".⁵⁰ This is in line with the views expressed by the COAG,⁵¹ although it has been argued that COAG's concerns are "predominantly based on reducing time and costs for development proponents", which is at odds with the principles of ESD.⁵²
70. Recommendation 6(2)(b) of the Hawke Review stated that the provisions of the EPBC Act relating to strategic assessment should be amended to:
- (i) *specify mandatory required information for strategic assessments;*
 - (ii) *insert an 'improve or maintain' test for the approval of a class of actions in accordance with an endorsed plan, policy or program;*

⁴⁴ Simon Marsden, 'A Critique of Australian Environmental Law Reform for Strategic Environmental Assessment' (2014) 32(2) *The University of Tasmania Law Review* 277, 282, Simon Marsden, 'Strategic Environmental Assessment in Australia - An Evaluation of Section 146 of the *Environment Protection and Biodiversity Conservation Act 1999*' (1999) 8(2) *Griffith Law Review* 394, 397.

⁴⁵ Adam Koutsamanis, 'The role of Strategic Environmental Assessment in Environmental Impact Assessment and the law' (2011) 16 *Local Government Law Journal* 99, 102.

⁴⁶ Simon Marsden, 'A Critique of Australian Environmental Law Reform for Strategic Environmental Assessment' (2014) 32(2) *The University of Tasmania Law Review* 277, 281-282 (footnotes omitted) (emphasis added).

⁴⁷ *Ibid*.

⁴⁸ Simon Marsden, 'Strategic Environmental Assessment in Australia - An Evaluation of Section 146 of the *Environment Protection and Biodiversity Conservation Act 1999*' (1999) 8(2) *Griffith Law Review* 394, 401.

⁴⁹ See Simon Marsden, 'A Critique of Australian Environmental Law Reform for Strategic Environmental Assessment' (2014) 32(2) *The University of Tasmania Law Review* 277, 282-284 for details of Hawke Review's mention on assessment at landscape or ecosystem scale.

⁵⁰ Hawke Review, 12; 28 (Recommendation 4(1)).

⁵¹ Simon Marsden, 'A Critique of Australian Environmental Law Reform for Strategic Environmental Assessment' (2014) 32(2) *The University of Tasmania Law Review* 277, 283 (footnotes omitted).

⁵² Rachel Walmsley, 'The future role of the Commonwealth in environmental assessment and approval in Australia? A public interest perspective' (2012) 28(1) *Australian Environment Review* 406, 408.

- (iii) *enhance provision for public engagement; and*
- (iv) *create a 'call in' power for plans, policies and programs likely to have a significant impact on matters of National Environmental Significance, and amending the term 'action' to incorporate these plans, policies or programs.*

71. NELA submits that:

- the recommendations of the Hawke Review in relation to strategic assessments be endorsed;
- the wording of s 146(1) be clarified;
- strategic assessments be conducted by the Department rather than the proponent;
- consideration be given as to whether, for more complex and environmentally sensitive projects, a strategic assessment should leave the door open for certain actions under the strategic assessment to require separate EPBC Act project-based consent, where appropriate; and
- strategic assessments and project-by-project assessments be subject to oversight by an independent Commonwealth EPA or Commission.

QUESTION 20: How should community involvement in decision-making under the EPBC Act be improved?

72. NELA considers that broad public participation is crucial to encourage greater inclusion of Australians in the protection and management of its environment and heritage. Increased community involvement will improve transparency, accountability, and decision-making under the EPBC Act and is significant in maintaining the rule of law.

Open Standing

73. Standing provisions contained in environmental laws that protect matters of national significant should be broad. Broad standing provides greater judicial oversight and increased accountability to the public with respect to the operation of the EPBC Act.

74. NELA submits that the current standing provisions in ss 475 and 487 of the EPBC Act should be extended to allow any person who wishes to seek review of a decision, to do so. This should also apply to civil enforcement mechanisms contained in the EPBC Act.

Merits appeal rights

75. The EPBC Act provides for only a limited number of decisions that may be referred to the Administrative Appeals Tribunal for merits review. Merits review of decisions ensures accountability and transparency and is an important check to ensure that decisions are independent and consistent.

76. NELA submits that the EPBC Act should be amended to increase the number of decisions subject to merits review.⁵³ In particular, merits review should be available for key decisions relating to the referral and assessment process, and nomination and listings processes.

Costs protection for public interest litigants

77. Public interest litigation is an important mechanism for enforcing environmental laws such as the EPBC Act. Public interest litigation is risky as it often involves test cases and complex legal issues. These risks act as a significant barrier for public participation and community engagement.
78. NELA submits that the EPBC Act should specifically provide for protection against costs orders, security for costs applications and/or undertakings as to damages, with respect to proceedings brought in the public interest.⁵⁴

Removal of the exemption for Regional Forestry Agreements

79. NELA is concerned about the lack of Commonwealth oversight of the logging of native forests under Regional Forestry Agreements. NELA calls for ss 38–41 of the EPBC Act to be repealed and a new MNES be added to regulate significant land clearing including the logging of public native forests.
80. Sections 38–41 provide that an approval under Part 9 of the EPBC Act is not required for a forestry operation undertaken in accordance with an RFA as defined in the *Regional Forest Agreements Act 2002* (Cth), or for forestry operations as defined in s 40(2) of the EPBC Act in regions not yet covered by regional forest agreements.
81. NELA considers that these provisions must be removed, to better protect the native forests that in Australia that cover about 134 million hectares or 17% of Australia’s land area.⁵⁵ This is essential to mitigate climate change, protect biodiversity habitat and the ecosystem services that forests provide, maintain the medicinal and nutritional library that native forests contain, and protect the educational, recreational, spiritual and non-extractive economic values of those forests.

Forests under threat

82. The 2019–20 bushfires in Australia exacerbated the threats that vulnerable species face across the country with 113 pushed closer to extinction, including ‘the Kangaroo Island dunnart, northern corroboree frog, Blue Mountains water skink, Kangaroo Island glossy black cockatoo, superb lyrebird, parma wallaby, mountain pygmy possum and brush-tailed rock wallaby.’⁵⁶ The

⁵³ An increase in decisions that are open to merits review was recommended in the 2009 Hawke Review of the EPBC Act (see recommendation 48 and 49).

⁵⁴ Costs protection for public interest litigation was recommended in the 2009 Hawke review of the EPBC Act (see recommendation 51-53).

⁵⁵ Australian Government, Department of Agriculture, Australian Bureau of Agricultural and Resource Economics (ABARES), ‘Australian Forest Profiles’, <www.agriculture.gov.au/abares/forestsaustralia/profiles>.

⁵⁶ M Foley, ‘113 animal species requiring urgent action after bushfires’, *Sydney Morning Herald* 11 Feb 2020, <www.smh.com.au/politics/federal/113-animal-species-requiring-urgent-action-after-bushfires-20200211-p53zsu.html>

bushfires impacted biodiversity severely, with more than a billion native animals estimated to have perished. This tragedy, exacerbated by climate change, requires in NELA's view that current governance arrangements for RFAs be suspended and the existing carve out for RFAs under the EPBC Act to be removed.

83. In August 2019, Professor David Lindenmayer AO, Fenner School of Environment of and Society, Australian National University, reported a 'rapid deterioration in populations of some threatened, forest-dependent species in the wet ash-type forests of the Central Highlands of Victoria'.⁵⁷ In November 2019 the Victorian Government released its 30-year transition plan for the Victorian forestry sector. It extended timber supply agreements until 2024, to be replaced by plantation timber supply by 2030. Logging in 96,000 hectares of forest was halted in accordance with the Greater Glider Action Statement.⁵⁸ This phase-out, while welcome, is likely to take too long to implement to ensure that threatened species do not become extinct.
84. In April 2019, the Senate Environment and Communications References Committee in its interim report for its inquiry into Australia's faunal extinction crisis noted that numerous stakeholders⁵⁹ had identified weaknesses in the protection offered by the EPBC Act for threatened species.
85. The Committee noted that the former Commonwealth Endangered Species Scientific Subcommittee's view that loss of habitat and land clearing had been the most significant processes threatening species since European settlement.⁶⁰ The Centre for Ecosystem Science, UNSW, provided the Committee with an overview of deforestation in Australia:
 - between 1972 and 2014, more than 7.2 million ha of primary forest was cleared across Australia, about 7 per cent of the available forest;
 - in 2015, Eastern Australia, including NSW, was identified as one of only 11 regions of the world undergoing high deforestation and the only one in a developed country;
 - deforestation has contributed to serious declines in woodland birds and reptiles. For example, it was estimated that about 100 million native birds, reptiles and mammals were killed because of destruction of their habitat in NSW between 1998 and 2005; and

⁵⁷ D Lindenmayer, 'Submission 2 to the Senate Environment and Communications References Committee inquiry: Australia's faunal extinction crisis', 6 August 2019.

⁵⁸ Victorian Government, Hon D Andrews, Premier, 'Media Release: Securing The Future For Forestry Industry Workers', 7 November 2019 <https://www.premier.vic.gov.au/wp-content/uploads/2019/11/191107-Securing-The-Future-For-Forestry-Industry-Workers-1.pdf>.

⁵⁹ Citing submissions from Doctors for the Environment; Northern Plains Conservation Management Network; Environmental Defenders Offices of Australia; Humane Society International; International Fund for Animal Welfare, Oceania Region; Birdlife Australia; Australian Conservation Foundation and Professor Frank Carrick: Australian Senate, Environment and Communications References Committee, *Australia's faunal extinction crisis: Interim Report*, April 2019, 43-45.

⁶⁰ Australian Senate, above n 5, [2.54]

- the loss of such habitat threatens the continent's biodiversity, affecting 60 percent of Australia's nearly 1700 threatened species.⁶¹
86. The Committee endorsed the recommendation made in the 2019 independent review of the EPBC Act chaired by Dr Allan Hawke, by recommending that the EPBC Act be repealed and replaced with a new Australian Environment Act.⁶² The Committee also recommended the establishment of an independent EPA with sufficient powers, resourcing and funding to assess activities, and ensure compliance and enforcement.⁶³
87. The 2016 Australian State of the Environment Report recognised the significant threat that timber harvesting presents to Australian species, including threatened species. It noted that timber harvesting placed four threatened mammals and three near-threatened mammals under pressure, *that* commercial logging practices in Victoria's wet forests was a major pressures on the critically endangered Leadbeater's possum (*Gymnobelideus leadbeateri*), and that timber harvesting is a significant pressure for a small number of hollow-nesting species, particularly those that require large hollows in which to breed, such as the masked owl in Tasmania (*Tyto novaehollandiae*) and the barking owl in southern Australia (*Ninox connivens*).⁶⁴
88. The repeal of the RFA exemption would enable more effective, adaptive and dynamic governance of Australia's native forests, particularly following the 2019–20 bushfires. NELA's view is that the governance of RFAs has failed to protect adequately, the diverse values of forests. They are insufficiently dynamic and lack ongoing transparency. Five-yearly reporting is inadequate given the rate of social, economic and political change. Scientists report declining numbers of vertebrate species, timber overharvesting, and forest instability.⁶⁵ Most five-yearly reviews have been late and have not considered adequately the impact of climate change, including bushfires, on the biodiversity values of forest areas. The Australian National Audit Office's performance audits find that compliance monitoring with the EPBC Act generally, is inadequate.⁶⁶

⁶¹ Centre for Ecosystem Science, UNSW, Submission 56 to the Australian Senate, Environment and Communications References Committee, *Australia's faunal extinction crisis: Interim Report*, April 2019, Centre for Ecosystem Science, UNSW, Submission 56, 6 as quoted in Australian Senate, Environment and Communications References Committee, *Australia's faunal extinction crisis: Interim Report*, April 2019, 35.

⁶² Australian Senate, above n 5, 12.

⁶³ Australian Senate, above n 5, 63 [4.14].

⁶⁴ ID Cresswell and H Murphy, 'Biodiversity: Consumption and extraction of natural resources', and WJ Jackson, 'Drivers' in *Australia State of the Environment 2016*, Australian Government Department of the Environment and Energy, Canberra, <https://soe.environment.gov.au/theme/biodiversity/topic/2016/consumption-and-extraction-natural-resources>, DOI 10.4226/94/58b65ac828812; <<https://soe.environment.gov.au/theme/biodiversity/topic/2016/consumption-and-extraction-natural-resources>& <<https://soe.environment.gov.au/sites/default/files/soe2016-drivers-launch-23feb17.pdf?v=1488793947>>.

⁶⁵ DB Lindenmayer, D Blair, L McBurney and SC Banks, 'The need for a comprehensive reassessment of the Regional Forest Agreements in Australia', *Pacific Conservation Biology* 15:24: 266–270.

⁶⁶ Australian National Audit Office (ANAO), ANAO Audit Report No 36 of 2016–17, *Monitoring Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit*, 2017; ANAO Audit Report No 7 2015–16, *Managing Compliance with the Wildlife Trade Provisions of the Environment Protection and Biodiversity Conservation Act 1999*, 2015; ANAO Report No. 43 2013–14, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*, 2014.

89. NELA's view is that the Comprehensive Regional Assessments compiled for each RFA, despite five-yearly reviews, are out of date, and are inadequately monitored and enforced. The devolution of governance responsibilities for native forest industries to the states and territories has been accompanied by inadequate compliance in that the five-yearly reviews have been either not done, or completed late.⁶⁷ NELA endorses other lawyers' calls for alternatives to the RFA regime,⁶⁸ including the national Environmental Defenders Office proposal that six new and expanded matters of national environmental significance be included in a new Commonwealth Environment Act, including a new classification and assessment triggers for 'Ecosystems of National Importance' and 'Significant Land-clearing'.⁶⁹
90. NELA also considers that significantly more forested areas need to be added to the Comprehensive, Adequate, and Representative' ('CAR') reserves in the National Reserve System, given the current and expects impacts of climate change. Regulatory statements that CAR reserves adequately protect Australia's biodiversity, as a device to thwart judicial review, ought not to prevent independent oversight of that protection.⁷⁰ Professor David Lindenmayer advised the Senate Environment and Communications References Committee in August 2019 that 'Our analysis shows unequivocally that the current reserve system does not meet Comprehensive, Adequate of (sic) Representative (CAR) criteria that are part of the specifications for reserves under the Regional forest Agreements... ongoing logging is impactingVictoria's 70 threatened forest-dependent species'.⁷¹ Professor Lindenmayer also noted that 'ongoing logging of ... the Thomson catchment – is having severe negative impacts on water security for Melbourne and many towns and agricultural business north of the Great Divide'.⁷²

⁶⁷ Tasmania completed the mandatory reviews but the Commonwealth and NSW rolled NSW's second and third reviews into one: New South Wales and Australian Governments 2017, *A report on progress with implementation of the New South Wales Regional Forest Agreements: Second and third five-yearly reviews July 2004 – June 2014*, <www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/forestagreements/17p0296-nsw-rfa-implementation-review-period-2-and-3-web.pdf?la=en&hash=BEF9F12E090F6CD65AF2FFB80ECDADCC5269E041>.

⁶⁸ D Jacobs, 'Regional Forest Agreements: limitations and current opportunities', *Australian Environment Review* July 2017:94–101, 97.

⁶⁹ Environmental Defenders Office, *The Independent Review of the EPBC Act: Response to the Discussion Paper: A summary for the community*, February 2020, 1–5.

⁷⁰ See *Tasmania v Brown* (2007) 167 FCR 34 where the Federal Court on appeal was required to interpret the RFA as amended that stated that CAR reserves do protect EPBC Act species in areas subject to forestry operations.

⁷¹ D Lindenmayer, above n 3, citing C Taylor and DB Lindenmayer, 'The adequacy of Victoria's protected areas for conserving its forest-dependent fauna' *Austral Ecology*, 2019 <<https://doi.org/10.1111/aec.12805>>.

⁷² D Lindenmayer, above n 3.

Please contact us if you have any questions in relation to the above submissions.

Yours sincerely,

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