

NELA Issues Paper for Commonwealth Environment Minister - EPBC Act Reforms

1. Executive Summary

The Australian Government has committed to comprehensive, meaningful reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), including in its Nature Positive Plan and through the Nature Repair Market Bill 2023. In this position paper, NELA highlights a number of important areas of environmental concern that should receive close attention as the Australian Government reforms are developed, including: streamlined assessment processes, connecting environmental ‘recovery’ with decision-making, improving compliance tools and making explicit the connection between climate change and biodiversity conservation.

2. Issues and Recommendations

2.1. Assessment and decision-making

The Samuel Review and a variety of stakeholders have recommended simplifying and clarifying referral and assessment processes under national environmental laws. For example, current impact thresholds have been identified as unclear and environmental impact assessments ‘have not demonstrably delivered environmental outcomes or efficiencies’.¹ Instead, EPBC Act assessment processes are inefficient, complex and unsupported by strong processes and systems. These processes also duplicate activities prescribed by other Commonwealth agencies and laws.²

NELA supports recommendations to simplify processes for referral and assessment provided these are coupled with improvements to those processes to achieve better environmental outcomes.

Alongside this emphasis on simplifying and enhancing outcomes under new legislation, NELA urges the Australian Government to design its new environmental laws in a way that facilitates environmental resilience and promotes biodiversity adaptation under changing environmental and climatic conditions. NELA’s recommendations about climate change are set out in detail below, at Part 2.6.

¹ Environmental Defenders Office, ‘Submission to the 10 year review of the EPBC Act’ (Discussion Paper, 2020) <<https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf>> (in relation to strategic impact assessments under Part 10 of the Act). See also Maitz, N. M., Taylor, M. F. J., Ward, M. S., & Possingham, H. P., ‘Assessing the impact of referred actions on protected matters under Australia’s national environmental legislation. *Conservation Science and Practice*’ (2023) 5(1), e12860. <<https://doi.org/10.1111/csp2.12860>> (finding that habitat of threatened species in QLD and NSW continues to be lost despite EPBC Act assessment processes), cited in Biodiversity Council, ‘New study finds EPBC Act assessment decisions are having little effect on reducing habitat loss for threatened species’ (2023) <https://biodiversitycouncil.org.au/media/uploads/2023_2/202302_factsheet_maitz_epbc_act_assessments_v1.pdf> . See also Law Council of Australia, ‘Submission to the EPBC Act review’ (2020) at pages 31-32 (with respect to the underuse of strategic impact assessments under Part 10 of the EPBC Act and deficiencies of project-based environmental impact assessments); Rebecca Nelson, ‘Breaking Backs and Boiling Frogs: Warnings from a Dialogue between Federal Water Law and Environmental Law’ (2019) 42(4) *UNSW Law Journal* 1179, 1190 (with respect to deficiencies in project-based environmental impact assessments).

² Independent Review of the EPBC Act, ‘Commonwealth-led assessment processes are inefficient’ (Interim Report, 2020) <<https://epbcactreview.environment.gov.au/resources/interim-report/chapter-4-efficiency/43-commonwealth-led-assessment-processes-are-inefficient>>.

Developing new National Environmental Standards and Regional Plans will be central to improving the efficiency and quality of Commonwealth-led assessment pathways under a new environmental legislative framework. Equally important is the need for improvements to information-gathering, data collation, storage and availability which underpin assessment processes, and to regulatory and enforcement systems which ensure post-assessment compliance. A thorough analysis of the various regulatory and enforcement systems that are relevant to environmental outcomes—across, for example, biosecurity, native forestry, protected areas and compliance arrangements for major national infrastructure projects—is required to resolve inconsistencies, gaps and conflicts to ensure integrity of these processes.

2.2. Recovering biodiversity to prevent extinction and promote healthy environments

Planning for recovery

Without achieving the recovery of threatened species and ecological communities, the EPBC Act cannot deliver on the Australian Government's nature positive goals, nor on its international commitments under the Global Biodiversity Framework. If species populations and ecological communities are not being recovered, ecosystems will continue to decline and threatened species lists will continue to expand, with all of the attendant costs and challenges of large bureaucratic lists. In addition to the costs and complexity of expanding bureaucratic lists, the broader effects of environmental decline will continue to grow. Ecosystem decline results in direct impacts on human communities, socially and economically. For example, degradation of Mountain Ash forests has tangible negative impacts on water flow in catchments which supply drinking water.³

In its present form, the EPBC Act has failed to prevent extinction, let alone facilitate species' recovery. While vulnerable species are protected under s 18(4) of the EPBC Act, vulnerable ecological communities are not protected from harm under the EPBC Act and are not included in the Act's offence provisions. Critically, while significant effort and resources are invested in assessing and listing threatened species, once listed, these resources and efforts are not sustained to deliver improved outcomes for biodiversity. This is despite the promotion of conservation of biodiversity being a specific objective of the EPBC Act.⁴

NELA proposes that there be a positive obligation that a recovery plan or conservation advice be presented, either by government or the Threatened Species Scientific Committee, at the same time as a species listing statement (that is, when a species is proposed to be listed for the first time), to ensure that a plan for recovering that species is part of the process of recognising that it is threatened. Recovery documents should include details of actions necessary to prevent the species from declining further, and development approvals should not be inconsistent with either the recovery plan or conservation advice (see further discussion under 'connect recovery with decision making', below). The Australian Government should also develop and publish a clear policy position that it will fund priority recovery actions—whether described in a recovery plan or conservation advice—or it should articulate other means by which recovery will be resourced (i.e. through competitive grant processes; by reverse auction; through government incentives for philanthropic investment or—perhaps most appropriately—through a rigorous, comprehensive and high-integrity combination of public funding and other means).

The development of Regional Plans, as foreshadowed by the Australian Government in its Nature Positive Plan, could have benefits for the recovery of threatened species and vulnerable ecological communities. The benefits of a regional planning approach include the ability for pre-emptive action to address species decline before a species becomes eligible for listing – including protecting abundant species that play important ecosystem roles including 'top order' predators

³ Taylor et al, 'Resource Conflict Across Melbourne's Largest Domestic Water Supply Catchment' (2018) Fenner School of Environment and Society, Australian National University, Canberra. <https://openresearch-repository.anu.edu.au/handle/1885/149441> . See also, Bergstrom et al, 'Combating ecosystem collapse from the tropics to the Antarctic' (2021) 27(9) *Global Change Biology* 1693 <https://onlinelibrary.wiley.com/doi/10.1111/gcb.15539>

⁴ EPBC Act, s 3(1)(c).

such as quolls, eagles and sharks, or ecosystem engineers such as bilbies and bettongs, lyrebirds and parrotfish. Regional planning also enables more effective and efficient research and management to restore habitat that supports vulnerable ecological communities and threatened species.

NELA strongly recommends that new Regional Plans specify priorities for threatened species and ecological communities, based on present threats and future climate projections, and list corresponding performance targets against which success can be measured, lessons can be articulated, and adjustments can be implemented.

NELA strongly supports the (ongoing) development of a Common Assessment Method for listing threatened species, ecological communities and ecosystems.⁵ In addition, NELA recommends:

- introducing a new, Independent Scientific Committee that is empowered to assess and directly list threatened species, ecological communities and ecosystems for national protection, with clear, statutory assessment timeframes to avoid delay;
- expanding emergency listing provisions to include threatened species, critical habitats, and ecological communities;⁶
- clarification in the EPBC Act that the national EPA must not approve adverse actions in areas of habitat that are critical for the survival of threatened species or ecological communities;
- new threat categories to reflect international standards, such as processes for listing threatened ecological communities, near-threatened species and data-deficient species;⁷ and
- development, implementation of, and investment in, recovery plans in a coordinated manner, Australia-wide.

NELA supports the recommendation made by the Environmental Defenders Office⁸ to extend assessment, authorisation and offence provisions of the EPBC Act to vulnerable ecological communities.

Connect recovery with decision-making

NELA submits that current statutory requirements which prescribe that when making a decision on an action, the Minister must 'have regard to' an approved Conservation Advice for a species or ecological community that is likely to be impacted by the action and 'must not act inconsistently' with a Recovery Plan⁹ fall short of ensuring that decision making is consistent with those documents. While a failure of the Minister to consider a relevant Conservation Advice *at all* may be fatal to the validity of a decision,¹⁰ if the Minister gives genuine consideration to the advice, a development that is inconsistent with preventing extinction of a species may be approved even in the absence of any conditions directed to mitigating impacts on the species.

NELA recommends more stringent statutory requirements to ensure that, when making a decision under the Act, the Minister must not act:

- (a) inconsistently with a recovery plan, conservation advice, threat abatement plan and international agreement;¹¹ or
- (b) in a way that will or is likely to cause a listed threatened species or ecological community to become extinct within a specified time period.

⁵ <https://www.dcceew.gov.au/environment/biodiversity/threatened/cam>

⁶ See e.g., *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 324JL.

⁷ See the International Union for the Conservation of Nature, 'Red List of Threatened Species' (Web Page) <www.iucnredlist.org/en#:~:text=The%20IUCN%20Red%20List%20Categories%20and%20Criteria%20are,Endangered%2C%20Critically%20Endangered%2C%20Extinct%20in%20the%20Wildand%20Extinct>.

⁸ Above n1.

⁹ EPBC Act, s 139.

¹⁰ See for example, *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694.

¹¹ Consistent with recommendations from the Environmental Defenders Office (n 1).

2.3. Reconnect Australia’s Ramsar obligations and climate change

Article 3.2 of the Ramsar Convention requires parties, including Australia, to monitor and report to the Ramsar Convention Secretariat if the ecological character of any Ramsar wetland has changed, is changing, or is likely to change, as a result of technological developments, pollution or other human interference.¹² More than a decade ago, the Australian government developed a National Guideline on the application of reporting obligations under Article 3.2¹³ The National Guideline states that a notification will not be made where climate change is the principal cause of identified ecological character change.¹⁴ This is not consistent with the spirit of decisions of the Conferences of the Parties to the Ramsar Convention, particularly Resolution X.24 on ‘Climate change and wetlands’, which emphasises the critical climate mitigation and adaptation benefits of wetlands, the vulnerability of wetlands to climate impacts and the importance, under the Convention, of protecting from climate change, restoring after climate impacts, and facilitating climate resilience for listed wetland ecosystems.¹⁵

Changes at a Ramsar site will typically arise from a combination of human activities and natural factors and, if the focus is on preventing the decline and loss of internationally significant wetlands across Australia, the implications of climate change should trigger obligations to report and actively recover those ecosystems.

The National Guideline was developed in 2009 and is in need of review and update. Reforms to the National Guideline on reporting are consistent with the broad aims of the Ramsar Convention, which is ‘the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world’,¹⁶ and with a ‘nature positive’ approach to environmental law.

2.4. Protect habitat

The current legal regime offers inadequate protection for species’ and communities’ habitats in Australia, despite habitat loss and conversion being a substantial threat to nearly half of Australia’s currently listed threatened species.¹⁷

Critical habitat is the habitat that a species needs to survive today and for at least the next 10 years. The habitat that a species needs to survive should be identified for all species in Australia that are listed as threatened with extinction, so that we have an opportunity to prevent that extinction. The Act should prohibit actions that will or are likely to have a significant impact on critical habitat for listed threatened species or ecological communities without a permit.¹⁸ Statutory protections should also extend beyond Commonwealth Areas, either by agreement with state or territory governments, or through the implementation of a National Standard that includes

¹² Article 3.2 of the Ramsar Convention 1971; see Department of Climate Change, Energy, the Environment and Water, ‘Notification of change in ecological character – Fact sheet’ (2012) <<https://www.dcceew.gov.au/water/wetlands/publications/factsheet-notification-change-ecological-character>>.

¹³ National Guidance on Notifying Change in Ecological Character of Australian Ramsar Wetlands (Article 3.2) (2009), Department of Environment, Water, Heritage and the Arts. <https://www.dcceew.gov.au/water/wetlands/publications/national-guidance-notifying-change-ecological-character-australias-ramsar-wetlands>

¹⁴ *Ibid*, p 8-9.

¹⁵ ‘Wetlands and Climate Change’, Decision of the 10th Conference of the Parties to the Convention on Wetlands (Changwon, Republic of Korea, 28 October-4 November 2008) Resolution X.24, https://www.ramsar.org/sites/default/files/documents/pdf/res/key_res_x_24_e.pdf; and see Resolution X.16 at the same Conference of the Parties, flowchart C on page 8, which indicates that a change in ecological character that is more than ‘to trivial to report’ should be the subject of a report to the Ramsar Secretariat under Article 3.2 – making no exception or qualification for changes that are exclusively as a result of climate change, see https://www.ramsar.org/sites/default/files/documents/pdf/res/key_res_x_16_e.pdf.

¹⁶ Department of Climate Change, Energy, the Environment and Water, ‘Australia’s obligations under the Ramsar Convention: Legislative support for wetlands – Fact sheet’ (2012) <<https://www.dcceew.gov.au/water/wetlands/publications/australias-obligations-under-ramsar-convention-legislative-support-wetlands-fact-sheet>>.

¹⁷ See Maitz, N. M., Taylor, M. F. J., Ward, M. S., & Possingham, H. P., ‘Assessing the impact of referred actions on protected matters under Australia’s national environmental legislation. Conservation Science and Practice’ (2023) 5(1), e12860. <<https://doi.org/10.1111/csp2.12860>> (finding that habitat of threatened species in QLD and NSW continues to be lost despite EPBC Act assessment processes).

¹⁸ Environmental Defenders Office (n 1).

critical habitat protection as a 'baseline' standard to which state and territory environmental laws must adhere.

2.5. Recommit to a comprehensive implementation of CITES through Australian laws

The Australian Government signed up to the Kunming-Montreal Global Biodiversity Framework in December 2022, which includes a goal of reducing new species invasions and the impact of invasive species on biodiversity. The two fundamental components of meeting that goal in Australia are to (a) prevent non-native species being imported and released into the wild in Australia; and (b) prevent non-native (particularly alien invasive) species being transported from one state or territory in Australia and released into another state or territory (and thus expand their range and the scope and scale of their impact).

At present, there are severe limitations in the connections between statutory and institutional arrangements for biosecurity and environmental management across Australia, including in the goals, implementation, monitoring and enforcement of these regimes. For example, some plant species that are listed as noxious weeds in northern Australia are still sold at plant nurseries for garden plantings in southern Australia, despite clear evidence that climate change over the coming decades will render the conditions in southern Australia ideal for those species to become rapidly environmentally destructive. While the Australian Government has a relatively well-resourced and effective biosecurity regime at national points of ingress, governed primarily under the *Biosecurity Act 2015* (Cth), the states and territories have wildly different capacities and track record on preventing the introduction and movement of non-native species. This is an area of law where closer integration and better communication between enforcement regimes could yield excellent co-benefits for industries such as agriculture, as well as for biodiversity conservation outcomes.

Australia is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**). Indeed, Part 13A of the EPBC Act implements Australia's obligations under CITES by regulating international movement of wildlife and wildlife products. In addition to improving the consistency and effectiveness of Australia's internal biosecurity arrangements, NELA recommends a tightening of these national legal provisions, listing and enforcement arrangements, and resourcing, implementation, and management of Australia's international obligations under CITES—particularly in relation to unregulated sections of the international pet trade into Australia.¹⁹ This will likely require both rationalisation, clarification and a closer interaction between national biosecurity and environmental legislation, and between these national laws and their state and territory equivalents. Tightening import and domestic, cross-border transport loopholes will help Australia to meet its Global Biodiversity Framework targets and reduce the extraordinary costs associated with new invasive species incursions to Australian natural environments and to Australian agriculture and other land management industries.

The EPBC Act currently requires permits for importation of Appendix II CITES listed species. This arrangement is costly and yields little conservation benefit, since, often, 'the exporting country has already conducted a sustainability assessment'.²⁰ NELA supports the recommendation of the Samuel Review, that permit requirements be removed where sustainability assessments have been executed before export. NELA also supports calls that have been made by experts over many years, including the Invasive Species Council, to adopt nationally consistent 'safe lists' (also referred to as 'permitted lists') or lists of species that are approved for transport across state and territory borders, as well as for import into Australia.²¹ Generally, the safe list approach

¹⁹ See, e.g. Lassaline and Cassey, 'Buying bugs and beetles, or shopping for scorpions and snails? Australia's pet trade includes hundreds of spineless species' (*The Conversation* 23 June 2023) <<https://theconversation.com/buying-bugs-and-beetles-or-shopping-for-scorpions-and-snails-australias-pet-trade-includes-hundreds-of-spineless-species-207932>>.

²⁰ Independent Review of the EPBC Act, 'Wildlife Trade and Permitting' (Final Report, 2020) <<https://epbcactreview.environment.gov.au/resources/final-report/chapter-6-commonwealth-decisions-and-interactions-other-commonwealth-laws/64-wildlife-trade-and-permitting>>.

²¹ See, e.g. Invasive Species Council, 'Stopping weed invasions: a 'white list' approach' (Fact Sheet, 2009) <https://invasives.org.au/wp-content/uploads/2014/02/fs_weedwhitelist.pdf>; Csurhes S, Randall R, Goninon C, Beilby A, Johnson S and Weiss J, 'Turn the tap off before you mop up the spill: Exploring a permitted-list approach to regulations over the sale

prohibits the transportation or import of any species unless it is listed on a safe list. This requires an assessment of a species that is proposed to be imported/transported and, once approved, it is added to the safe list and can be imported/transported in future. The safe list approach is preferred to the alternative (more common) 'deny list' approach where species can be imported/transported unless they are listed as prohibited. Invasive or harmful species can be listed but those lists always lag behind both the legal and illegal trade in wildlife and plant species, creating much greater risks for biosecurity breaches and new invasive species becoming established.²²

2.6. Make explicit the connection between climate change and biodiversity conservation

Climate change, and the related but distinct challenge of changing bushfire regimes, have already been recognised as 'key threatening processes' under the EPBC Act. However, the Australian Government has previously determined that management plans under the EPBC Act are not the most effective way to address those threats to Australian biodiversity.²³

NELA recommends that the Australian Government reconsider this position. Developing a management plan under the EPBC Act for the threatening process of climate change would allow the Australian Government to anticipate the kinds of reforms that may be necessary in a new Act, and begin the process of identifying, prioritising and resourcing critical climate adaptation and resilience goals for conserving Australian biodiversity across industries, jurisdictions and ecosystems. Drawing an explicit connection between climate change and biodiversity loss will also help to reconcile the Government's intentions across a host of its reporting obligations, including its Nature Positive Plan, legislated greenhouse gas emissions target, international commitment to implementing the Global Biodiversity Framework, and response to the State of the Environment 2021 report, along with its actions to meet the 'no species loss' target in its latest Threatened Species Action Plan.

An explicit connection between climate change and biodiversity conservation in national environmental laws will require clear and future-oriented statutory objects; legal mechanisms that account for rapidly changing and emerging threats to biodiversity, including anticipating and empowering 'emergency' conservation interventions; legal mechanisms that protect future biodiversity values such as climate refugia and adaptive capacity rather than only past values such as 'nateness' and 'wilderness'; and adaptation-oriented approaches to monitoring, approval-adjustments and enforcement.²⁴

Adaptive management has long been regarded as a crucial approach to environmental governance as the climate changes, but its implementation in environmental laws in Australia and around the world has been patchy, at best. McDonald and Styles have recommended five

and interstate movement of potentially invasive plants in the States and Territories Australia' (2006) Proceedings of the 15th Australian Weeds Conference. C Preston, JH Watts and ND Crossman, Weed Management Society of South Australia Inc, Adelaide: 95-98; Parliament of Victoria, Legislative Council, Environment and Planning Committee, 'Inquiry into ecosystem decline in Victoria: Volume 1' (Report, tabled 2 December 2021) recommendation 4 which recommended that the Victorian Government review the legislative framework for the management of invasive species, with this review to consider 'the merits of shifting to a permitted 'safe list' approach defining which taxa non-indigenous to Victoria can be introduced, sold, or kept in the State' (see page 88 – 91 and the submissions of the Victorian National Parks Association and Invasive Species Council cited therein) <https://www.parliament.vic.gov.au/epc-lc/article/4455>.

²² Parliament of Victoria, Legislative Council, Environment and Planning Committee, 'Inquiry into ecosystem decline in Victoria: Volume 1' (Report, tabled 2 December 2021) at page 88 citing evidence of the 'reactive' nature of listing restricted plant species.

²³ See Rebecca Nelson, 'Breaking Backs and Boiling Frogs: Warnings from a Dialogue between Federal Water Law and Environmental Law' (2019) 42(4) UNSW Law Journal 1179, 1190 (with respect to deficiencies in project-based environmental impact assessments for addressing cumulative effects such as those of climate change).

²⁴ See, for example, McCormack, 'The legislative challenge of facilitating climate change adaptation for biodiversity' (2018) 92(8) *Australian Law Journal* 546; McDonald and Styles, 'Legal strategies for adaptive management under climate change' (2014) 26(1) *Journal of Environmental Law* 25-53; McDonald et al, 'Adaptation pathways for conservation law and policy' (2019) *Wiley Interdisciplinary Reviews: Climate Change* e555; Woinarski et al 'Biodiversity and fire emergency decision making' (2023) *International Journal of Wildland Fire* (online early); Reside et al, *Climate change refugia for terrestrial biodiversity* (National Climate Change Adaptation Research Facility 2013) <<https://nccarf.edu.au/climate-change-refugia-terrestrial-biodiversity-defining-areas-promote-species-persistence/>>.

mechanisms for implementing adaptive management in law,²⁵ arguing that '[w]ider use of these flexibility mechanisms would enable environmental decision-making to respond to the impacts of climate change, while continuing to provide a level of legal certainty'.²⁶ We have briefly summarised these five mechanisms below. NELA supports the inclusion of the following mechanisms in new national environmental legislation:

1. **new statutory objectives** that expressly require planning for the impacts of climate change, recognising the importance of resilience and adaptive capacity as statutory goals that must be furthered or promoted in decision making under the Act;
2. requirements for **monitoring and evaluation of projects, plans and activities**, to ensure that decision makers are equipped to learn from both success and failure in past decisions ('[a]ny regulatory attempts at adaptive management which do not require feedback about actual versus projected impacts will lack the information necessary to modify practices to incorporate new knowledge'²⁷);
3. opportunities to undertake **staged and tiered approvals processes**, recognising that uncertainty about the impacts of a new activity can be mitigated by approving that activity, or undertaking a new project, in stages (whether spatial – i.e. gradually expanding the activity's physical 'footprint', or temporal, in which certain components are approved early, and others at a later date). These processes would ensure that further approvals will only be granted if 'mandatory monitoring and evaluation show the impacts of the first stage are acceptable'.²⁸ However, this approach should not allow decision makers to approve vague or poorly defined proposed projects with critical environmental assessments taking place after that approval is granted, nor should this allow decision makers to defer controversial decisions about a project or activity until after significant environmental impacts have already occurred;
4. empower decision-makers to impose **conditional approvals and statutory triggers** in clearly defined circumstances – which may, for example, allow conditions on an approval to 'be modified upon the occurrence of a specified event or environmental indicator... [such as] a decline in species or ecosystem health or other unfavourable environmental impact or trajectory';²⁹ and
5. implement **proportionate resource allocation** models, which take the form of a 'variable approach to natural resource exploitation under conditions of stock or resource uncertainty, or proportionate extraction rights that vary based on resource availability. Decisions follow pre-set management rules, based on environmental or ecological indicators or the currency of stock assessment data'.³⁰ This approach is currently used by the Australian Fisheries Management Authority (AFMA) in Australian fisheries but could be applied more broadly in, for example, Regional Forestry Agreements, water management across the Murray Darling Basin and other nationally-significant freshwater habitats such as Ramsar-listed wetlands. While not technically 'resource extraction', a similar evidence-based, precautionary approach could be applied to approvals that involve harming threatened species, ecological communities and their habitats. As climate change triggers sudden and unpredictable changes in populations of listed species and communities, including after catastrophic, continental-scale fires such as those experienced in 2019-2020, activities that harm listed species and their habitats take on greater significance, and may render it reasonable to revisit Australian Government approvals for those activities.

The detailed evidence that is now available about the impacts of climate change on Australia's biodiversity, including from independent reports commissioned by the Australian Government,³¹

²⁵ McDonald and Styles, 'Legal strategies for adaptive management under climate change' (2014) 26(1) *Journal of Environmental Law* 25-53.

²⁶ *Ibid.*

²⁷ *Ibid* at 42.

²⁸ *Ibid* at 44.

²⁹ *Ibid* at 45.

³⁰ *Ibid* at 50.

³¹ E.g. Steffen et al, *Australia's Biodiversity and Climate Change* (CSIRO and the Australian Government, 2009), <https://www.publish.csiro.au/book/6178/>.

and in the regional chapters published periodically by the IPCC, should also guide detailed reviews and revisions to Regional Forest Agreements (**RFAs**) in those states with RFAs that have not yet announced a transition away from native forest logging (specifically, New South Wales, Tasmania and Queensland). Current RFAs are outdated and have failed to adequately stem biodiversity losses and account for the implications of climate change in habitat conservation, industry sustainability and viability, and potential ecosystem collapse.³² The Victorian and Western Australian governments have recently announced rapid transitions away from native forestry and the remaining three states with native forestry industries may follow suit over coming decades. The Australian Government has an opportunity to support and equip state governments to ensure that former native forestry coupes are effectively managed over the long term, in a way that fosters ecological restoration and adaptation-oriented biodiversity conservation.

NELA also wishes to highlight the potential for the Australian Government – in its role as a party to every Australian RFA – to guide a more holistic and proactive approach to managing Australia’s native forests in those states that continue to support a native forestry industry, such that the native forestry industry is managed in a way that is more consistent with Australia’s national environmental goals and conservation priorities. The Australian Government could, for example, clarify that any statutory replacement to the EPBC Act *does* apply to the native forestry industry in its management and harvesting operations, in contexts where forestry activities do not meet national environmental standards (particularly in relation to biodiversity conservation and climate mitigation and adaptation). NELA recommends that the Australian Government take a proactive approach to native forestry, focusing on co-benefits for industry and environments, including by integrating a nature-positive and approach to native forest management.³³

2.7. Compliance tools

The EPBC Act in its current form lacks meaningful oversight and compliance mechanisms to ensure that the goals of the Act are achieved.³⁴ This represents a serious risk to the Australian Government’s efforts to reduce biodiversity loss, let alone achieve its policy goal of nature positive outcomes. NELA recommends simplifying existing compliance tools, and introducing a broader range of compliance tools that encompass information and incentives, directives and warnings such as infringement notices and directions orders, and strong compliance and enforcement tools.

NELA highlights the following operational recommendations to improve the oversight and successful achievement of national environmental standards:

- Introducing consistent, mandatory monitoring and reporting on the health of matters of national environmental significance, as a mechanism for (a) identifying successes, shortfalls and lessons from conservation projects as they are implemented; (b) enhancing the efficiency and effectiveness of implementation and resourcing, particularly for projects funded by the Australian Government; and (c) implementing continual and measurable improvement in conservation outcomes, as evidence of good environmental governance;
- Creating an online open access data, monitoring and reporting hub to facilitate comparative reporting and promote learning and information-sharing across conservation projects and

³² Professor David Lindenmayer, ‘Major issues associated with Regional Forest Agreement and links to EPBC Act Reforms’ (Submission to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020, 2021) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/RegionalForestAgreement/Submissions.

³³ See, e.g., the Environmental Defenders’ Office, ‘Inquiry into the Long Term Sustainability and Future of the Forest Products Industry’, available at <https://www.edo.org.au/publication/inquiry-into-the-long-term-sustainability-and-future-of-the-timber-and-forest-products-industry/>.

³⁴ See Law Council of Australia, ‘Submission to the EPBC Act review’ (2020) at page 5 (supporting more rigorous enforcement of the EPBC Act provisions).

jurisdictions, consistent with the Australian Government's commitment to more comprehensive and accessible environmental data;

- Establishing independent reporting vis-à-vis the 'State of the Environment' and 'National Sustainability Outcomes' with an aim of increasing public awareness, refining policy-making and implementation, and improving environmental performance;
- Introducing National Environmental Accounts, as a foundation for better understanding and improving over time, the extent, condition and threat status of natural assets – focusing at first on comprehensive coverage of matters of national environmental significance but expanding over time to a broader and more holistic approach to environmental accounting and ecosystem services; and
- Requiring a mandatory approach to learning from species extinctions, which may take the form of a National Environmental Coroner; an Environmental Ombudsman; a permanent 'Term of Reference' for a Standing Parliamentary or Senate Committee; or another body that can conduct inquiries in public, with powers to investigate, compel evidence and make findings of fact about a species extinction.³⁵

NELA supports two particular reforms that could readily improve compliance in the short-to-medium term. First, the government could enact new powers to issue warning notices and environmental protection notices – for minor or suspected breaches – to direct certain action. Second, the government could introduce a comprehensive definition of 'take' regarding animals, plants and fungi belonging to a threatened species or ecological community. The definition should expand on existing terms, 'harvest, catch, capture, trap and kill' to include actions to 'harass, harm or pursue' an animal or 'crush, cut, remove or destroy' a plant or fungus, or to attempt any of these actions. As noted above, Australia's environmental laws have consistently fallen short of protecting critical habitat. A broader and more effective definition of 'take' could include a prohibition related to habitat, for example, that a person must not: 'destroy, fragment, convert or otherwise harm habitat that is necessary for the survival of an organism or ecological community' (broader than listed, critical habitat and defined instead by reference to its significance for a species' persistence).

The Samuel Review recommended the establishment of a new position, viz, Environment Assurance Commissioner.³⁶ Acting independently and upon statutory appointment the Commissioner would be responsible for overseeing and auditing the performance and decision-making of both Commonwealth and accredited parties. The Government responded in its Nature Positive Plan that the position which the Review recommended the Environment Assurance Commissioner perform will be performed by the new national EPA, which will make decisions in accordance with National Environmental Standards and assure accredited parties and instruments apply the standards. NELA supports the integration of this assurance role within the national EPA, provided the EPA is given an explicit assurance function and the statutory powers and resourcing necessary to achieve it. Further, as discussed in NELA's Issues Paper on the National Independent EPA dated 11 July 2023, it would be appropriate to consider vesting independent oversight of the EPA's exercise of its own functions in another body, whether already existing (such as the Commonwealth Auditor-General) or a new body (such as an Environment Auditor).

National Environmental Law Association
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³⁵ First recommended by Woinarski et al, 'The contribution of policy, law, management, research, and advocacy failings to the recent extinctions of three Australian vertebrate species' (2017) 31(1) *Conservation Biology* 13.

³⁶ Independent Review of the EPBC Act, 'Accreditation, audit and independent oversight' (Final Report, 2020) <<https://epbcactreview.environment.gov.au/resources/final-report/chapter-7>>.