



South
Australian
Chamber
Of
Mines &
Energy

MINERALS COUNCIL OF AUSTRALIA
SUBMISSION TO THE INDEPENDENT REVIEW OF THE
ENVIRONMENT PROTECTION AND BIODIVERSITY
CONSERVATION ACT 1999

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EXECUTIVE SUMMARY

An opportunity to advance Australia’s environmental, social and economic objectives

The 20-year Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) presents an important opportunity to reform Australia’s centrepiece environmental legislation to achieve the shared outcomes sought by business, government and the community.

The Minerals Council of Australia supports integrated, consistent regulatory processes that provide business certainty, are completed within statutory timeframes and achieve the environmental outcomes sought by policy and regulation. Industry relevant reforms to the structure and operation of the EPBC Act should aim to:

- Eliminate or reduce duplication and enhance consistency between jurisdictions
- Reduce delays in assessment and approval processes
- Improve certainty for proponents, government and the community
- Ensure better, fit-for-purpose regulation – not lower environmental standards.

Sound environmental and business outcomes are complementary. Strategically focused and integrated regulatory processes (consistent with the objects of the Act), clear policy and regulatory responsibilities, targeted and efficient use of private and public resources and effective administration will deliver on both of these outcomes.

Since the review process began, Australia has faced an unprecedented economic and social threat from the COVID-19 pandemic. Pragmatic reforms to the EPBC Act will help reduce delays in project approval processes which in turn will stimulate minerals industry and other investment and bring forward the major projects needed to support a speedy economic recovery that will benefit all Australians.

This submission is supported by and has been developed in consultation with The Chamber of Minerals and Energy of Western Australia, the Queensland Resources Council, the South Australian Chamber of Mines and Energy, the New South Wales Minerals Council, the Tasmanian Minerals, Manufacturing and Energy Council and the MCA’s Northern Territory and Victorian divisions.

Industry contribution and commitment to sustainable development

The minerals industry is a key pillar of the Australian economy. The resources industry directly employs around 240,000 highly paid and highly skilled workers, mainly in remote and regional Australia, and more than 1.1 million indirect jobs in the mining supply chain.

In 2017-18 the industry paid \$18.6 billion in company tax and \$12 billion in royalties to state governments helping to fund essential services and infrastructure. The industry partners with host communities including Indigenous communities to support jobs, business growth and achievement of local aspirations.

MCA member companies are signatories to *Enduring Value – the Australian Minerals Industry Framework for Sustainable Development*, the principles of which are consistent with the United Nations’ Sustainable Development Goals.

The Australian minerals industry is committed to the protection of Australia’s unique environment. This includes upholding high standards of environmental protection based on the use of sound science and robust risk-based approaches. The industry actively seeks to enhance environmental, social and economic outcomes through voluntary conservation initiatives and partnerships with communities, non-governmental organisations and Indigenous organisations and communities.

The environmental and business imperative for reform

Regulatory complexity and duplication do not translate into improved biodiversity outcomes. Since the inception of the EPBC Act, environmental regulation has grown significantly across all levels of government. Yet the 2016 State of the Environment report – while noting data limitations – found ‘the status of biodiversity in Australia is generally considered poor and deteriorating’.

For business, regulatory inefficiency leads to delays that impact on investment, increases costs to business and slows or prevents the benefits from mining flowing to regional communities and the broader Australian economy. A one-year delay to a project can reduce the Net Present Value (NPV) by between 10 and 13 per cent. For large mining projects (of \$3 billion to \$4 billion), delay costs can be up to \$1 million per day.

The objects and institutional arrangements remain appropriate

The objects of the Act and the underpinning principle of Ecologically Sustainable Development remain relevant and appropriate. However the Act could be made more effective by clearly articulating the role of the Commonwealth and cooperative arrangements with other governments, including bilateral agreements and other approaches.

The Minister for the Environment should retain the role of decision maker - enabling ongoing consideration of social and economic factors. This may include accrediting state/territory processes and authorities. New institutions are not required. Instead community confidence can be enhanced under existing governance and institutional arrangements by improving the accessibility, integration, transparency and inclusiveness of EPBC Act processes.

A strategic role for the Commonwealth as standard setter, coordinator and monitor

The Commonwealth should take a strategic leadership role in environmental protection by setting broad national environmental standards for the protection of matters of national environmental significance with a focus on landscape-scale outcomes. States/territories should be accredited and supported to implement the standards within their own regulatory frameworks.

The Commonwealth’s role should also include collecting and integrating national environmental data to inform development and better decision making, monitoring and ensuring national environmental outcomes and administering national environmental resources and mechanisms.

Environmental assessment and approvals should be coordinated, consistent and rationalised

Commonwealth and state/territory environmental approval processes often overlap and are rarely synchronised. Different triggers, timeframes, reviews, requests for further information and a lack of efficient inter-agency coordination create unnecessary complexity, costs and delays. A 2014 analysis by the then Commonwealth Department of the Environment concluded that coordinating Commonwealth and state/territory environmental approval processes would save Australian businesses \$426 million annually.

The MCA recommends the harmonisation of Commonwealth and state/territory processes where practical and the implementation of comprehensive assessment bilateral agreements, aligning triggers, timeframes, conditioning and compliance.

Accrediting state/territory assessment and approval processes is consistent with the objects of the Act and would support rapid integration of Commonwealth and state/territory regulation. This approach could be tailored to the needs and capacity of each jurisdiction and include bilateral agreements, strategic assessments and endorsement of state and regionally-based plans or planning instruments.

Duplicative triggers and unscientific restrictions should be removed

The water trigger for coal seam gas and large coal mining development should be removed or at a minimum reformed to improve its efficiency. The trigger fully duplicates state processes and relies

upon the same expert advice. The 2017 statutory review found the water trigger costs industry \$46.8 million per year yet there is no evidence that the trigger has achieved its aims.

Uranium mining, milling, decommissioning and rehabilitation should be removed from the definition of nuclear actions. Maintaining uranium mining as part of the trigger wholly duplicates state-based environmental assessments and radiological risks are dealt with under other legislation. Should uranium mining continue to be captured, EPBC Act assessment should focus on radiological aspects only.

The trigger is also increasingly capturing non-uranium projects (e.g. mineral sands, rare earths and base metal) where incidental quantities of naturally occurring radioactive material may be present. Mineral sands are explicitly excluded in the EPBC Act Explanatory Memorandum. These projects are not part of the nuclear fuel cycle and as such should not be captured as a nuclear action.

The current prohibition on nuclear energy has no scientific basis and should be removed to allow all technologies to be considered in Australia's future energy mix.

Risk-based approaches can improve processes, outcomes and community engagement

Environmental impact assessment (EIA) requirements have proliferated over recent decades as governments in all jurisdictions are taking an increasingly risk-averse approach.

This has resulted in wide-ranging assessments that do not account for materiality/level of risk – which unnecessarily increases costs and timeframes and limits the community's ability to engage meaningfully.

The MCA recommends the following reforms to provide greater certainty:

- Improved guidance on the definition and application of the significant impact test
- Assessment pathways, including referrals, EIA processes and condition setting should be risk-based, providing simpler rapid pathways for low risk and well understood activities and environments (e.g. brownfield developments)
- The EIA process should be preceded by a comprehensive, risk-based scoping stage to map out and lock in exact information requirements and acceptable methodologies
- The use of 'stop the clock' mechanisms should be constrained and proponents should have the ability to contest the validity of these requests in part or in full
- Approval conditions should be risk-based and outcomes focused, with model conditions for low risk or well understood activities/environments and tailored conditions for complex or site-specific risks, or where the understanding of the impacts/environment is low. Consistency between Commonwealth and state/territory and conditions is critical.

Building greater certainty into post-approval processes

Post-approval processes can be as critical to the commencement of a project as the primary approval. However post-approval planning processes lack transparency, are increasingly burdensome and are not supported by statutory timeframes, creating further uncertainty and delay.

An option should therefore be provided to consider post-approval matters in the primary approval stage. Remaining post-approval matters should be supported by a set of assessment rules which outline procedures, timeframes and internal review rights.

The Act should include risk-based flexible pathways to vary approval conditions. A simple process to consider and vary an approval should be available where changes are determined not to be material to the environmental outcome. This would enable expansions to be considered without the need for a second full referral and assessment process.

Reforms to the legislation that focus on outcomes ahead of prescriptive processes would reduce the potential vulnerability of the approvals to unnecessary appeals, without affecting the environmental outcome. Administrative solutions should be available to the decision maker where there is no material environmental harm, for example when administrative errors are discovered.

Reforms to realise the potential of strategic assessments

Effective implementation of strategic assessments has the potential to reduce delays by eliminating the need for project-by-project approvals under the EPBC Act and supporting long-term management of regional environmental values.

Yet industry experience with strategic assessments has been mixed. Some assessments have not been endorsed despite years of negotiation and significant cost to proponents.

To realise the full potential of strategic assessments and encourage their use, the Act should be amended to better define the operation and processes required for strategic assessments. Reforms should also enable bilateral strategic assessments between the Commonwealth and state or territory governments to avoid two processes for proponents.

Amendments should also provide greater flexibility to enable the modification of programs where they are consistent with the overall plan objectives and approvals in the post-approval/validation stage.

Harmonised offset approaches to contribute to strategic environmental outcomes

More flexible approaches to offsets and improved policy and guidance would reduce delays and unexpected determinations that can put project viability at risk.

Policy and administrative changes to improve implementation and consistency of the offsets policy and enable the use of advanced offsets are an important temporary measure.

To maximise the environmental outcomes from industry investment in the long-term:

- Establishing a common framework for environmental offsets between Commonwealth and state/territory requirements so that offset requirements are mutually recognised and reinforced through a single requirement
- Enabling offsets to contribute to broader environmental outcomes through the removal of strict like-for-like requirements
- Establish a financial-based mechanism (e.g. a trust fund) for environmental offsets under the EPBC Act to prioritise and contribute to strategic environmental outcomes. The mechanism should align with and complement state and territory based financial offset arrangements, allowing these to administer funds where they meet Commonwealth requirements.

Effective service delivery is critical

Service delivery is a major driver of delay. Assessment officer turnover, capacity, resourcing, service quality and inconsistent interpretation of the Act all affect the cost and timeliness of assessment and approval processes. Regulators may have limited exposure to the regulated industry.

The MCA recognises and supports the Australian Government's recent move to bolster resources for the regulator. These additional resources have helped to improve service delivery.

Regulator performance could be enhanced through continued appropriate resourcing and supporting systems, training, improved guidance and industry-specific exposure to promote understanding.

Greater accountability is also needed. Timely and effective service delivery should be included in regulator key performance indicators. Consideration should also be given to other incentive mechanisms, including 'deemed decisions' where timeframes are not met.

Consolidated, robust data to inform decision making

Australia does not have a reliable and consistent environmental dataset to support national or regional scale planning, national reporting on environmental conditions, policy development or decision-making. The lack of this critical information is not only detrimental to government's capacity to make informed decisions, but also results in a considerable cost to industry.

An integrated environmental data platform would assist decision makers, improve transparency for communities and provide project proponents access to existing environmental data. The MCA recognises and supports the Prime Minister's November 2019 announcement to establish a biodiversity database with the Western Australian Government as an important first step.

Enhancing community understanding and confidence

The process of consultation required under the EPBC Act is complicated and difficult to navigate which can alienate communities. The growing volume of assessment documentation along with duplicate processes further increase the challenge for the community to meaningfully engage.

Community understanding and engagement can be improved through:

- Plain English information on assessment processes and early regulator engagement
- Access to national environmental data and establishing an online platform to track project approvals and clarify opportunities for community engagement
- Coordinated public consultation processes that meet both Commonwealth and state/territory requirements
- Simplified, accessible risk-based EIA documentation.

SUMMARY OF RECOMMENDATIONS

- The Commonwealth should take a strategic leadership role in environmental protection by setting broad national environmental standards for the protection of Matters of National Environmental Significance with a focus on landscape-scale outcomes. States and territories should be accredited and supported to implement the standards within their own regulatory frameworks
- The role of the Commonwealth and cooperative arrangements with other governments should be clearly defined. Mechanisms to achieve this include:
 - Improved provisions to accredit state and territory processes under bilateral agreements
 - Endorsement of regional based plans or planning instruments
 - Administrative alignment of triggers, timeframes and other processes.
- Duplicative triggers should be fully rationalised including removal or reform of the water trigger for coal seam gas and large coal mining development. The nuclear action trigger should be reformed to remove uranium mining and milling or at a minimum focus the assessment on radiological risks only. Non uranium mining should be explicitly excluded.
- The current prohibition on nuclear energy should be removed to allow all technologies to be considered in Australia's future energy mix
- Processes prescribed by the EPBC Act (and supporting policies and guidelines) should be outcomes focused and risk-based. This includes:
 - Assessment pathways, including referrals, Environmental Impact Assessment processes and condition setting – providing simpler, rapid pathways and model conditions for low risk, well understood activities and environments (e.g. brownfield developments)
 - EIA scoping that maps out exact information requirements and acceptable methodologies with a focus on matters of material risk, locking in these requirements at the outset of the project and avoiding changes during the assessment
 - Risk-based flexible pathways to vary approval conditions. A simple process to consider and vary an approval should be available avoiding the need for referral and full assessment where changes are not material to the environmental outcome.
- Improved guidance on the definition and application of the significant impact test should be developed
- 'Stop the clock' mechanisms such as information requests should be moderated, including the ability for proponents to contest the validity of these requests in part or in full
- An option should be provided to consider post-approval matters in the primary approval stage. Remaining post-approval matters should be supported by a set of assessment rules, setting out procedures, statutory timeframes and internal review rights
- To reduce the potential vulnerability of the approvals to unnecessary appeals, the decision maker should have access to administrative solutions where there is clearly no material environmental harm, for example when administrative errors are discovered
- The EPBC Act should be amended to better define the operation and processes required for strategic assessments, particularly in the post-approval/validation stage by allowing flexibility to modify approved programs where they are consistent with the overall plan objectives and approval

- Reforms should enable bilateral strategic assessments between the Commonwealth and state or territory governments to avoid two processes for the proponent
- Reforms required to improve implementation and consistency of the offsets policy include:
 - Enable offsets to contribute to strategic environmental outcomes through the removal of strict like-for-like requirements
 - Establish a common framework to harmonise Commonwealth and state/territory offset requirements
 - Changes to enable the use of advanced offsets
 - Establish a financial-based mechanism for environmental offsets under the EPBC Act to prioritise and contribute to strategic environmental outcomes.
- Regulator performance and service delivery should be enhanced through continued appropriate resourcing and supporting systems, the sharing of information, training and approaches between jurisdictions, secondment opportunities with industry and industry-specific training
- Service delivery (e.g. timely and effective service) should be included in regulator key performance indicators and consideration should be given to other incentive mechanisms, including 'deemed decisions' where timeframes are not met
- National environmental data should be consolidated, integrating all requirements and sources, updated regularly and be made available to governments, proponents and the community
- Community understanding and access to information can be improved through development of plain English information on assessment processes, early regulator engagement and the establishment of an online platform to track project approvals and clarify opportunities for community engagement
- Community consultation should be integrated to meet both Commonwealth and state requirements.

1. INTRODUCTION

The Minerals Council of Australia is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society.

The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, environmentally and socially responsible and attuned to community needs and expectations.

The 20-year review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) presents an important opportunity to reform Australia's central piece of environmental legislation and to achieve shared outcomes sought by business, government and the community.

In this submission, the minerals industry outlines an approach to creating a coordinated, integrated and consistent processes to meet national environmental objectives, create jobs and sustain regional communities through more efficient and less duplicated regulation.

Many of the reform proposals in this submission have been raised, recommended and reiterated many times through government reviews and inquiries for more than a decade.

Since the review process began, Australia has faced an unprecedented economic and social threat from the COVID-19 pandemic. Pragmatic reforms to the EPBC Act will help reduce delays in project approval processes which in turn will stimulate minerals industry and other investment and bring forward the major projects needed to support a speedy economic recovery that will benefit all Australians

This submission has been structured in the following manner:

- **Section 2 – Background** provides the context for the minerals industry in Australia, including its intersection with the EPBC Act
- **Section 3 – The reform imperative** outlines key concerns and the opportunity of reform
- **Section 4 – Priorities and Principles** articulates the outcomes sought by the minerals industry and principles to inform the reforms process
- **Section 5 – Objectives and structure of the Act** responds to key structural review questions, including the role of the Commonwealth and the overarching regulatory framework
- **Section 6 – Coordinated and rationalised regulation** outlines opportunities to better integrate regulatory decision-making within the existing framework
- **Sections 7-12** outline key opportunities for reforms to existing assessment and approval processes, key policy areas and administration of the Act should major structural reforms not be implemented.

References are also included with respect to relevant questions from the Discussion Paper released on 21 November 2020 by the Independent Reviewer.

While the MCA considers that the Act should be reviewed as a whole, the primary focus of this submission will be on key areas of intersection with the minerals industry. This includes major regulatory functions such as assessment and approval processes, and opportunities for enhanced 'strategic approaches' under the Act (**Q5**).

This submission is supported and has been developed in consultation with the Chamber of Minerals and Energy of Western Australia, the Queensland Resources Council, the South Australian Chamber of Mines and Energy, the New South Wales Minerals Council, the Tasmanian Minerals, Manufacturing and Energy Council and the MCA's Northern Territory and Victorian divisions which represent the coal, minerals, petroleum and gas and energy sectors.

2. BACKGROUND

- The resources sector has underpinned rising incomes across Australia and will continue to fuel national prosperity. Mining is Australia's largest source of export revenue, providing highly paid, highly skilled jobs for 240,000 direct and more than 1.1 million people and billions of dollars to governments in taxes and royalties each year.
- The Australian minerals industry is committed to the sustainable development of host communities through jobs, business growth, partnerships and social investment. Partnerships and agreements between the minerals industry and Indigenous Australians have delivered significant economic and social benefits and supported protection of cultural and environmental heritage.
- The minerals industry is a primary stakeholder of the EPBC Act and is subject to more regulatory requirements than most industries.

2.1. Mining's contribution to the Australian economy

The resources sector (including oil and gas) has been the largest contributor to economic growth in Australia over the 10 years to 2018-19. With significant expansion of the mining sector in Australia, the share of resources in Australia's Gross Domestic Product (GDP) increased from 6.0 per cent in 2002-03 to 8.5 per cent in 2018-19.¹

The minerals industry has a highly skilled and highly paid workforce with average earnings in the resources sector around \$140,000 a year, 58 per cent higher than the average for all industries.² From 2001 to 2019 the number of Australians employed directly in the resources sector grew from around 80,000 to 240,000.³ When indirect employment is considered, mining and its supply chains support 1.1 million jobs in Australia, representing 10 per cent of the workforce.⁴

The Australian minerals industry paid \$18.6 billion in company tax in 2017-18 alone, accounting for 22 per cent of all company tax paid that year despite comprising less than 1 per cent of all companies. In addition, the industry paid \$12 billion in royalties to state/territory governments, helping to fund essential services and infrastructure.⁵

International investment is vital to the minerals sector, facilitating transfers of technology, skills and capabilities, and access to global supply chains and export markets. Australia is usually a net importer of capital, requiring international investment to fill the gap between domestic saving and investment. International investment has met this capital shortfall, delivering on average 4 per cent of GDP over the past 40 years.⁶

2.2. Minerals industry commitment to sustainable development

The Australian minerals industry is committed to the protection of Australia's unique environment. This includes upholding high standards of environmental protection based on the use of sound

¹ Australian Bureau of Statistics, [Australian System of National Accounts, 2018-19](#), ABS cat. no. 5204, released 25 October 2019.

² Australian Bureau of Statistics, [Average Weekly Earnings, Nov 2019](#), ABS cat. no. 6302, released 20 February 2020; [Labour Force, Australia, Detailed, Quarterly, Aug 2019](#), ABS cat. no. 6291.0.55.003, released 26 September 2019; [Characteristics of Employment, Australia, August 2018](#), ABS cat. no. 6333, released 29 November 2018.

³ Australian Bureau of Statistics, [Labour Force, Australia, Detailed, Quarterly, Feb 2020](#), ABS cat. no. 6291.0.55.003, released 29 Mar 2018.

⁴ Deloitte Access Economics, [Mining and METS: engines of economic growth and prosperity for Australians](#), a report prepared for the Minerals Council of Australia, MCA, released 29 March 2017.

⁵ Deloitte Access Economics, [Estimates of royalties and company tax accrued in 2017-18](#), report commissioned by the Minerals Council of Australia, 26 March 2019.

⁶ A McKissack and J Xu, [Foreign investment into Australia](#), Treasury Working Paper, January 2016, released 18 February 2016.

science and robust risk-based approaches in the assessment and management of potential environmental impacts.

MCA member companies are signatories to *Enduring Value – the Australian Minerals Industry Framework for Sustainable Development*.⁷ Key framework principles relevant to biodiversity include:

- Principle 2 – Integrate sustainable development principles into company policies and practices
- Principle 4 – Implement risk management strategies based on valid data and sound science
- Principle 6 – Seek continual improvement of our environmental performance
- Principle 7 – Contribute to the conservation of biodiversity and integrated approaches to land use planning
- Principle 10 – Implement effective and transparent engagement, communications and independently verified reporting arrangements with stakeholders.

The principles of *Enduring Value* are consistent with the United Nations' Sustainable Development Goals (SDGs). The MCA and Cardno International Development prepared a comprehensive report on how the Australian minerals industry is supporting the achievement of the SDGs.⁸ This report, which was endorsed by the Global Compact Network Australia, confirmed that the industry has responded by identifying areas of alignment and tailoring programs to support social, economic and environmental outcomes.⁹

In line with the industry's commitment to continuous improvement, the MCA is moving to adopt other frameworks to enhance the industry's safety, environmental and social governance performance. This includes approaches to improve and verify site-level performance of *Enduring Value* commitments.

2.3. Working together

The industry actively seeks to enhance environmental, social and economic outcomes through voluntary conservation initiatives and partnerships with communities, non-governmental organisations (NGOs) and Indigenous organisations and communities.

Partnerships with Indigenous Australians

The Australian minerals industry recognises and respects the rights and interests of Aboriginal and Torres Strait Islander peoples and is proud to partner with Aboriginal and Torres Strait Islander groups and communities on exploration, development, operation and rehabilitation of projects across Australia.

Thousands of agreements have been negotiated with Traditional Owner groups over the past two decades, delivering economic and social benefits and supporting protection of cultural and environmental heritage.¹⁰ Partnerships are increasingly focused on supporting Indigenous Australians to preserve, strengthen and share culture within community and across generations whilst strengthening economic independence and self-determination for Indigenous Australians.

Education and training are often a shared priority, with many companies investing in employment and training programs, particularly in regional and remote communities.

⁷ Minerals Council of Australia, [Enduring Value Framework](#), 2015 Edition, MCA, Canberra, 2015.

⁸ Minerals Council of Australia, [Enduring Value Framework](#), MCA, viewed 24 September 2019 and Sustainability in Action:

⁹ Cardno International Development, [Sustainability in Action: Australian mining and the United Nations Sustainable Development Goals](#), prepared for the Minerals Council of Australia, October 2018.

¹⁰ Marcia Langton, ['No one has done more for Indigenous Australians than the mining industry'](#), *The Australian*, 26 July 2017.

The minerals industry also has a longstanding focus on Indigenous business engagement which has been integral to the growth of the Indigenous business sector, reflected in the significant growth of Indigenous business diversity and incomes during the mining investment phase.¹¹

Working with regional communities

Involvement in communities by mining companies starts with planning and extends beyond mine closure. In its report on *Transitioning Regional Economies*, the Productivity Commission (PC) concluded that the mining boom – despite some transitional pressures – has made regions in Australia ‘substantially better off in the short term and over the long term’.¹² The PC also observed that:

- Mining regions have generally had the highest rates of employment growth and mining employment is more than double what it was prior to the mining investment boom
- Incomes in mining regions grew rapidly during the investment phase of the mining boom and average personal income remains higher in mining regions than in non-mining areas
- The expansion of Australia’s mining industry has led to higher average incomes, larger profits and increased revenues for federal and state/territory governments.¹³

The minerals industry recognises its role and responsibility to contribute to the sustainable development of host communities, including a commitment to environmental stewardship and building strong relationships and partnering with landholders and communities.

Conservation initiatives

Examples of voluntary conservation initiatives include species conservation and recovery projects, habitat restoration and the establishment of conservation reserve. The resources sector also contributes to conservation through its commitment to sustainability through avoidance, mitigation measures and offsets.

To illustrate industry achievements, examples of leading practice biodiversity and conservation management are provided in Appendix A.

2.4. Minerals industry intersection with the EPBC Act

The minerals industry is a primary stakeholder of the EPBC Act. In 2018-19, of 22 sectors (including agriculture and forestry, and commercial and residential development), the mining industry accounted for nearly a quarter (23 per cent) of individual decisions requiring approval.¹⁴ The only sector that accounted for more approvals during that period was residential development (28 per cent).

EPBC Act approvals processes apply to both greenfield developments and most brownfield activities which include changes to existing operations, often even capturing environmental improvements. Certain operations such as coal mines are also specifically captured through the water trigger for coal seam gas and large coal mining developments and uranium mining under the nuclear actions trigger which wholly duplicate state-level processes.

The EPBC Act is only one part of the regulatory regime in which the industry operates. Mining is subject to more regulatory requirements than most other industries in Australia.¹⁵

¹¹ Department of Prime Minister and Cabinet, [Indigenous Business Sector Strategy](#), Australian Government, Canberra, December 2018, p. 22.

¹² Productivity Commission, [Transitioning Regional Economies: Study Report](#), 15 December 2017, p. 2.

¹³ Productivity Commission, [Transitioning Regional Economies: Study Report](#), 15 December 2017, pp. 79, 82, 85, 88, 94, 138.

¹⁴ Department of the Environment and Energy, *Annual Report 2018-19*, Table A4.A.3, Canberra, 2019.

¹⁵ URS, *Update of National Audit of Regulations Influencing Mining Exploration and Project Approval Processes*, report commissioned by the Minerals Council of Australia, 2013.

The recent PC draft report on Resources Sector Regulation concluded that ‘notwithstanding many recent initiatives, there is evidence that regulatory processes remain unduly complex, duplicative, lengthy and uncertain and may be becoming more so’.¹⁶

While intensively regulated under the EPBC Act, it is important to note that the impacts to the environment from mining activities are not proportionate. With respect to the mining industry, the 2016 State of the Environment Report found that:

The impacts of energy and resource extraction can be high, but most are spatially restricted (to areas less than 10 square kilometres)...

Direct effects of mining are a weak pressure at the national scale, since the areas affected are relatively small. However, cumulative impacts can be significant for states or territories with large mining industries.¹⁷

Also, as acknowledged in the *State of the Environment Report*, the mining (including extractive industries) and waste has a relatively small footprint – representing <0.1 per cent of Australia’s land mass and only 3.7 per cent of national water consumption.¹⁸ In effect, the Commonwealth is intensively regulating a very small part of the Australia’s landscape.

¹⁶ Productivity Commission, [Resources Sector Regulation: Draft Report](#), Canberra, released 24 March 2020, p. 2.

¹⁷ Department of Environment and Energy, *State of the Environment 2016*, [Energy and Resource Extraction and Processing](#).

¹⁸ Department of Environment and Energy, *State of the Environment 2016*, [Land Use and Management](#), Canberra, 2016 and Australian Bureau of Statistics, cat. no. 4610, [Water Account, Australia, 2016-17](#), released 12 February 2019.

3. THE REFORM IMPERATIVE

- Despite an increase in environmental regulation at all levels of government and growing assessment requirements for proponents, the state of Australia's biodiversity is in decline, highlighting a mismatch between the regulatory burden and environmental outcomes.
- The current delays and uncertainty in project approval processes caused by duplicative processes and inefficient regulation pose a significant risk to the industry's global competitiveness and create significant costs to business, impeding the flow of benefits from mining to regional communities and the broader Australian economy.
- Environmental and business reform objectives are complementary. An efficient and effective national regulatory framework will deliver better outcomes for both business and environment.

3.1. The environmental imperative for reform (Q6)

Effective environmental regulation is critical to protect heritage, biodiversity and other environmental values. Well-designed environmental regulation also helps ensure business and community confidence in Commonwealth and state/territory governance processes. Yet the EPBC Act is increasingly failing to meet these goals in an efficient and effective manner.

Central to the objects of the EPBC Act is providing 'for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance' (MNES).¹⁹ While recognising that the Commonwealth has specific responsibilities – largely linked to Australia's international obligations – and that general environmental protection sits primarily with states/territories, the EPBC Act remains a key pillar of the broader protection regime.

Despite the EPBC Act containing over 1000 pages of legislation and creating significant and often unnecessary regulatory burden to stakeholders, the *2016 State of the Environment Report* indicates that the health of Australia's biodiversity is, in fact declining:

The poor state and declining trend of Australia's biodiversity are an issue of particular concern. For instance, the number of species listed as threatened under the EPBC Act continues to rise. Since 2011, the number of species listed in the critically endangered category has increased by 31, and 2 species have been reported as likely extinct. Overall pressures on biodiversity have mostly increased since 2011, and the status of biodiversity has mostly decreased, but our information base remains inadequate to robustly assess state and trends.²⁰

This message is also reiterated at a state and territory level in their most recent State of the Environment reporting.²¹

Significant improvements to protecting the environment must include optimising and rationalising the roles of Commonwealth and state/territory regulators and ways to maximise outcomes from limited available resources to ensure that shared objectives are met.

3.2. The economic imperative for reform (Q6)

Future growth and the economic benefits delivered by the minerals industry for all Australians are not guaranteed.

¹⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s3(a).

²⁰ Department of Environment and Energy, *State of the Environment 2016*, 'Overview of state and trends of biodiversity.'

²¹ State of Queensland, Department of Environment and Science (2018) [State of the Environment 2017, Summary and management responses](#); and State of New South Wales, Environment Protection Authority, [NSW State of the Environment 2018](#); and State of Victoria, Commissioner for Environmental Sustainability, [Victorian State of the Environment 2018 Report – Summary Report](#); and State of South Australia, Environment Protection Authority, [South Australia State of the Environment Report 2018 – Summary](#).

The sector requires a constant flow of investment to sustain existing operations and is competing with many other minerals-producing jurisdictions for a fixed pool of capital that funds exploration and the development of new operations.

The importance of effective and efficient regulation

Approvals and assessment processes are a key factor affecting Australia’s competitiveness as an investment destination, influencing investors’ perceptions of Australia as a place to do business.

Although Australia enjoys a comparative advantage in minerals exports, its competitiveness must be continually defended by reducing costs, improving productivity and pursuing innovation across the full spectrum of the supply chain.

Investment attraction and international competitiveness

The Canada-based Fraser Institute conducts an annual survey of mining company executives on their perceptions of different mining regions around the world, rating the overall investment attractiveness of a region based on its geological attractiveness and perceptions of government policies that influence exploration investment.

Policy factors examined include uncertainty concerning the administration of current regulations, including environmental regulation and regulatory duplication and consistency.

While not specifically focused on Commonwealth regulatory processes, analysis of the survey scores underpinning the states’ policy perception rankings shows clear concern in the minerals industry over environmental regulations and regulatory processes that are undermining Australia’s investment potential (see Table 1).

For example, Australian states have generally ranked poorly on regulatory duplication and uncertainty concerning protected areas. In New South Wales only 26 per cent of respondents said regulatory duplication encouraged or did not deter investment, ranking the state 70th out of 83 mining jurisdictions. Victoria was rated only 1 place higher at 69 with 29 per cent. Both states ranked lower than less mature mining jurisdictions such as Papua New Guinea (68) and the Democratic Republic of the Congo (45).

Table 1: State and Territory rankings to individual survey questions

	Uncertainty concerning the administration, interpretation, and enforcement of existing regulations	Uncertainty concerning environmental regulations	Regulatory Duplication and Inconsistencies	Uncertainty concerning protected areas
New South Wales	70	76	70	69
Northern Territory	34	58	44	53
Queensland	39	49	48	56
South Australia	8	17	27	41
Tasmania	28	56	36	78
Victoria	60	70	69	70
Western Australia	4	5	6	24

Ranking out of 83 jurisdictions

Source: Stedman, A., Yunis, J., Aliakbari, E., [Annual Survey of Mining Companies](#), Fraser Institute, released 25 February 2020.

The economic impacts of unnecessary regulation on the minerals industry

Delays and uncertainty in project approval processes pose a significant risk to the industry’s global competitiveness.

The costs of delays for projects can be substantial. A one year delay to a project can reduce the Net Present Value (NPV) by between 10 and 13 per cent. For large mining projects (of \$3 billion to \$4 billion), delay costs can be up to \$1 million per day.²²

Additionally, there are costs for keeping engineering contractors, consultants, internal resources, and procurement in a 'holding pattern' while delays are being addressed. For a large project these costs can be up to \$16 million per month.²³

In total, delays can increase costs up to \$46 million per month for a major greenfield mining project in Australia.

Capital investment is mobile. Delays and uncertainty in regulatory processes increases business risk, making Australia less attractive for investment. For the minerals sector, this diverts investment offshore affecting the broader economy through reduced national output over the long term.

As the PC highlighted in the draft findings of the Resources Sector Regulation review, abrupt policy changes, policy inconsistency and uncertainty can undermine investor confidence and discourage investment.²⁴ Survey evidence from MCA member companies confirms the high cost of these inefficient processes (Box 1).

The impacts of inefficient regulation can flow on to the broader Australian economy. For example, a 2014 BAEconomics study found that reducing project delays by one year would improve the competitiveness of the Australian mining sector, add \$160 billion to national output by 2025 and create an additional 69,000 jobs across the economy.²⁵

Australian mining companies are increasingly shifting their investment focus overseas often citing growing regulatory barriers. For example, in the past twelve months several of Australia's highly successful mid-tier gold companies have expanded by acquiring mine sites overseas rather than invest in developing new greenfield sites in Australia.

Box 1: The high cost of inefficient approvals processes – evidence from minerals companies

'For new operations the approvals process can be challenging, complex and very time-consuming – not just the major approvals but all of the secondary approvals, which are ongoing even after production starts.'

'Unable to bring new mines into production to meet the market in appropriate timeframe (i.e. less than 2 years). The result is the market window has been missed.'

'Environmental requirements are limiting productivity where previous approvals impose conditions that are now less relevant and are directing effort to maintain compliance. This also impacts productivity of the regulator where ongoing reports are required to be reviewed and responded to. The other area where productivity is affected is where overlap remains in jurisdictional regulation and assessment.'

'The delay in processing time by the government has caused large inefficiencies and higher costs to be incurred by the proponent whilst waiting for a decision on the [mine] modification. Overall, the uncertainty of mine approval is also an extreme deterrent to any further investment in exploration for new projects as the prospects for achieving consent for a new greenfield site are questionable, no matter its quality.'

Source: Survey of MCA member companies (2016)

²² Productivity Commission, [Major Project Development Assessment Processes: Research Report](#), Canberra, released 10 December 2013, p.203.

²³ Based on MCA member calculations

²⁴ Productivity Commission, [Resources Sector Regulation: Draft Report](#), p. 48.

²⁵ BAEconomics, [The economic gains from streamlining the process of resource project approval](#), report commissioned by and prepared for the Minerals Council of Australia, Canberra, July 2014, pp. 1, 2.

4. PRIORITIES AND PRINCIPLES FOR REFORM

- The minerals industry supports integrated, consistent regulatory processes that provide business certainty, are completed within statutory timeframes and achieve the environmental outcomes sought by policy and regulation.
- Key priorities for the minerals industry are minimising duplication, reducing delays, enhancing certainty, defining and enforcing statutory timeframes and achieving better regulation without lowering environmental standards.
- The reform of the EPBC Act should be informed by a number of overarching principles aimed at achieving integrated, evidence-based processes that draw on leading practice regulatory design.

4.1. Outcomes sought by the minerals industry

The MCA supports integrated, consistent regulatory processes that provide business certainty, are completed within clear statutory timeframes and achieve the environmental outcomes sought by policy and regulation.

Fully realising the opportunity afforded by the sustainable development of Australia's mineral resources means addressing a range of unnecessary regulatory barriers. Accordingly, the minerals industry seeks reforms to the structure and operation of the EPBC Act to deliver the following outcomes:

- Eliminate or reduce duplication and ensure consistency between jurisdictions and processes
- Reduce delays in assessment and approval processes
- Improve certainty for proponents, government and the community
- Ensure better fit-for-purpose regulation, not lower environmental standards.

4.2. Principles for reform of the EPBC Act

The reforms should be informed by the following overarching principles:

- Processes for environmental regulation across different jurisdictions should be coordinated and consistent with assessment and approval processes aligned with common objectives. State and territory regulatory processes should be accredited to implement Commonwealth requirements to the extent practicable
- The role of the states, territories and the Commonwealth should be complementary and clearly defined, understood by stakeholders and reflected in environmental management, assessment and approval processes
- The Commonwealth should only seek to regulate to address 'gaps' where MNES are not managed under state/territory processes
- The Commonwealth's role should be strategic in nature and aim to build public confidence in the wider environmental approach for Australia, including:
 - Supporting states and territories to implement federal environmental requirements in a consistent manner
 - Supporting the achievement of national landscape-scale environmental outcomes
 - Setting and harmonising relevant standards
 - Collecting and integrating environmental data to build a robust national dataset and inform decisions

- Monitoring and ensuring national environmental outcomes and objectives and adjusting policy parameters
- Regular transparent reporting, such as the *State of the Environment* report
- Administering strategic national environmental mechanisms.
- Environmental assessment scope should be founded in sound science and be risk-based, with the most effort focused on those matters most material to the potential project impacts on MNES
- Assessment pathways should be informed by risk, providing simpler, rapid pathways for low risk, well understood activities and environments (e.g. brownfield developments)
- Environmental assessment should be merits-based, focusing on the potential for likely impacts on MNES and not the type of activity
- Environmental assessment and approval processes should be outcomes-focused, enabling proponents to meet these objectives in the most efficient manner
- Administrators/regulators should be accountable for adherence to timeframes and service delivery
- National environmental data should be consolidated, integrating all requirements and sources, updated regularly and be made available to governments, proponents and the community
- Access to data and information on regulatory processes to enhance community confidence in the evaluation of activities.

The following sections provide detailed analysis of key issues and opportunities to improve the operation of the EPBC Act aligned with the above principles.

5. OBJECTS AND STRUCTURE OF THE ACT

- The MCA is broadly supportive of the EPBC Act and does not consider the establishment of a replacement Act necessary. Ecologically Sustainable Development (ESD) remains an important supporting principle for the Act. The Minister for the Environment should retain the role of decision-maker to enable ongoing consideration of social and economic factors.
- The Commonwealth should take a strategic leadership role in environmental protection by setting broad national environmental standards for the protection of MNES with a focus on landscape-scale outcomes. States/territories should be accredited and supported to implement the standards within their own regulatory framework.
- The objects of the Act remain appropriate, however the role of the Commonwealth and cooperative arrangements with other governments should be clearly defined. Mechanisms to achieve this include through improved provisions to accredit state and territory processes, robust policies and guidelines, agreements endorsed through environment ministers at Council of Australian Governments (COAG) meetings or changes to the Inter-governmental Agreement on the Environment.
- New institutions are not required. Instead community confidence can be enhanced under existing governance and institutional arrangements by improving the accessibility, transparency and inclusiveness of assessment processes.

5.1. Broad support for the EPBC Act

The MCA broadly supports the EPBC Act and does not consider the replacement of the Act to be necessary.

The MCA strongly supports the principle of ESD together with an elected official (the Minister for the Environment) as the designated decision maker, recognising the importance of accountability in balancing environmental, social and economic aspects of development.

While the MCA does not consider that the Act needs to be replaced, its operation can be significantly improved by the Commonwealth driving a strategic approach to environmental protection, coordinated and consistent requirements and processes, clear roles and responsibilities, improved supplementary guidance and policies and more efficient administration.

In considering the operation of the EPBC Act it is also important to note that it is not only legislation and regulation that are critical to efficiency and effectiveness. A plethora of policies and standards – including those under the Act – all strongly influence environmental approvals and governance.

Unwritten processes and unpublished policies can also affect outcomes and add to delays. Departmental service delivery also materially influences the implementation of the Act and its environmental and business outcomes.

5.2. A strategic role for the Commonwealth (Q8, 9, 10, 14)

Moving away from a traditional rules-based regulation model which relies on processes to deliver desired outcomes enables the Commonwealth to take a more strategic role in managing the achievement of national environmental outcomes. This could be achieved through national standards and objectives set at a Commonwealth level supported by performance monitoring and reporting systems. This would allow states/territories to deliver on those commitments, within their own regulatory and administrative arrangements, in line with Commonwealth requirements.

The Commonwealth as standard-setter, coordinator and monitor

While states and territories have primary responsibility for management of the environment, the Commonwealth has both obligations to deliver on international environmental commitments and an increasingly important role to play in providing strategic leadership and coordination.

A useful reference is the 1992 Inter-governmental Agreement on the Environment (IGAE). The IGAE sets out roles, responsibilities and interests for each level of government. It describes the responsibilities and interest of the Commonwealth in safeguarding and accommodating MNES as matters of foreign policy relating to the environment, ensuring that the policies of states do not significantly affect the environment of other states and facilitating the co-operative development of national environmental standards and guidelines.²⁶

In line with the original commitments in the IGAE, the MCA supports the Commonwealth taking a more strategic role in the protection of the environment.

A national approach requires leadership at the Commonwealth level supported by establishment of broad environmental standards on MNES, together with providing appropriate authority and support for states/territories to implement them within their own policy and regulatory frameworks.

The environmental standards should be set by the Commonwealth in cooperation with state and territory governments and input from relevant experts and stakeholders. This would allow for the states and territories to maintain their own regulatory and administrative arrangements, but work within a general framework set by the Commonwealth.

This approach would maximise regulator resources and enable the Commonwealth to focus efforts on developing strategic national approaches to protecting MNES, including investing in the collection and collation of robust environmental and biodiversity data, identifying strategic environmental assets and implementing a rigorous monitoring and assurance system.

Any national standards should be outcomes-based and target critical gaps and matters of national interest. Mechanisms for achieving this could include:

- Improved provisions in the Act to support the accreditation of state and territory processes (e.g. under assessment and approval bilateral agreements or other mechanisms)
- Development of suitable agreements endorsed through environment ministers at COAG
- Changes to the IGAE.

Strategic landscape-scale habitat management (Q16)

A focus on landscape-scale management of identified habitat rather than specific species protection would align with a more strategic role for the Commonwealth. This approach could further inform regional-based management plans developed with and implemented by state/territory governments under approved or accredited arrangements.

In the longer-term, these landscape-scale approaches can inform strategic assessments and other regional planning approaches for development-intensive regions.

5.3. The objects of the Act (Q3)

The MCA considers that the objects of the Act remain broadly appropriate in reflecting a balance of support for ESD while enabling the Commonwealth to implement broad environmental policy outside of development approvals.

However, there is an opportunity to better define terms included in the objects of the Act. The MCA considers that an ancillary section within the Act could provide better guidance on the practical application of the objectives.

²⁶ Intergovernmental Agreement on the Environment, 1 May 1992, ss 2.2.1 (1-3).

Specifically, objects 3 (d) and (e) of the Act are:

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

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

Providing guidance on the 'co-operative' approach to the delivery of outcomes under the Act can help to address issues of duplication between the Commonwealth and states/territories. Accordingly, the following principles should underpin the definition of 'co-operative' approaches and implementation, particularly with state/territory governments. This should include reference to the role of the Commonwealth, including:

- Complementary, not duplicative Commonwealth and state/territory processes
- The Commonwealth should only regulate to address 'gaps' where MNES are not managed under state/territory processes
- The role of the Commonwealth is to support states/territories to deliver agreed outcomes.

Furthermore, greater clarity on the role of the Commonwealth would reduce confusion and the potential for scope creep.

5.4. Governance, certainty and accountability (Q21)

The MCA is broadly supportive of the governance settings and institutional arrangements that support the delivery of the EPBC Act.

Enhancing community confidence

Community confidence and accountability in EPBC Act processes can be enhanced under existing arrangements by improving the accessibility, transparency and inclusiveness of assessment and approval processes. This should include greater access to clear, simple and consistent information, robust community engagement and online project tracking.²⁷

Further opportunity to enhance community confidence in regulatory assessment and approval processes are discussed in detail in Section 12 of this submission.

Maintaining the minister as decision maker

The MCA notes recent proposals to establish a new decision-making body, such as a national Environment Protection Authority. The MCA considers the existing governance model in the EPBC Act which designates the Commonwealth Minister for the Environment as the primary decision maker is appropriate given the need to consider potentially competing environmental, social and economic factors, while remaining accountable to the community.

An elected official who has access to comprehensive information through government, input from cabinet colleagues and is accountable to the Australian people remains the appropriate decision-maker. However, this may also include accrediting state/territory processes and authorities.

If assessment bilateral agreements are in place and operating effectively, a separate Commonwealth assessment body would fail to serve any meaningful purpose, merely duplicating assessments led by states/territories and diverting resources and acting against the aims of the agreement.

5.5. Principles of Ecologically Sustainable Development (Q2)

The MCA considers that the principles of ESD as currently defined in Section 3A of the Act remain an appropriate foundation to the administration of the Act. As recognised by the United Nations SDGs, environmental protection and social and economic progress are not mutually exclusive objectives.

²⁷ The MCA recommends consideration of the project tracking platform implemented by the Chilean Government through its SERNAGEOMIN and SEIA Agencies. The SEIA platform is a public, open system and can be accessed: www.sea.gob.cl

Explicit consideration of social and economic issues in environmental decision-making is critical to balancing economic growth, social objectives and environmental protection. Undertaking the changes to approval processes and administration recommended in this submission would help to better reflect and affirm the principles of ESD.

In order to expand the existing principles of ESD to include a quantitative assessment component through cost benefit analysis, a well-developed alternative needs to be available. The MCA considers that existing mechanisms for environmental economic accounting are not yet sophisticated enough to guide a sound alternative approach to the assessment of ESD.

6. COORDINATED AND RATIONALISED REGULATION

- Commonwealth and state/territory environmental approval processes are responsible for different but related environmental values, yet processes are rarely synchronised. Different triggers, timeframes, reviews, requests for further information and a lack of efficient inter-agency coordination all contribute to additional costs and delays for the proponent.
- The integration and consistency of Commonwealth and state/territory processes is critical. This should be achieved by accrediting state/territory assessment and approval processes under bilateral agreements or endorsement of regional-based plans or planning instruments. Other options include administrative alignment of triggers, timeframes and other processes and the enhanced use of strategic assessments.
- Duplicative triggers should be fully rationalised including removal or reform of the water trigger for coal seam gas and large coal mining development. The nuclear action trigger should be reformed to remove uranium mining and milling or at a minimum focus the assessment on radiological risks only. Non uranium mining should be explicitly excluded.
- The current prohibition on nuclear energy should be removed to allow all technologies to be considered in Australia's future energy mix. Climate change should be addressed separately under relevant policy frameworks (e.g. Climate Solutions Fund, the Safeguard Mechanism and related policies).

6.1. Coordinated and consistent Commonwealth and state/territory processes (Q14)

Mining developments are subject to local, state and Commonwealth government regulation and planning regimes. This can result in many different approvals being required for an individual development. The overlap between Commonwealth and state/territory regulation which has increased over time is a serious and ongoing issue for project approvals for minerals development.

In principle, Commonwealth and state/territory environmental approval processes are responsible for different but related environmental values. However, there are several areas where these assessment and approval processes directly overlap, such as water (see Box 4 p. 29). This overlap will become more common for other matters such as flora and fauna as threatened species listing is harmonised across Australia.²⁸

Although regulatory overlap varies depending on the nature of the MNES, the water and nuclear actions triggers largely or wholly duplicate state assessments (see also Section 6.2).

While Commonwealth and state/territory assessments and approvals deal with many but not all of the same matters, these processes are generally equivalent (see Figure 1 below). While these processes should be synchronised, this is rarely the case.

The PC recently concluded in a draft finding that:

Resources projects typically require a range of assessments and approvals by multiple regulators within a jurisdiction...Lack of coordination can cause costly delays and liaising with multiple agencies can also give rise to significant compliance costs.²⁹

Failure by Commonwealth and state/territory regulators to coordinate and align approaches results in significant inconsistency, including:

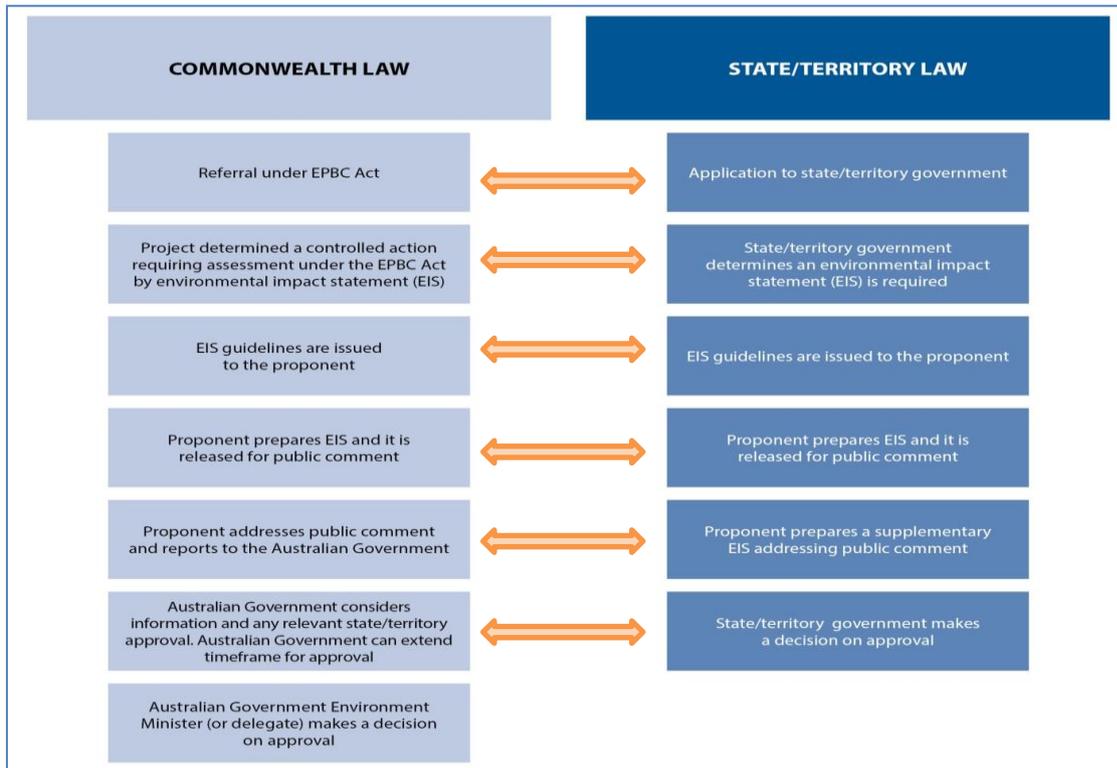
- Separate Commonwealth and state/territory assessment and approval requirements

²⁸ Department of Environment and Energy, [Common Assessment Method](#), viewed 30 June 2017.

²⁹ Productivity Commission, [Resources Sector Regulation: Draft Report](#), p. 45.

- Misaligned information requirements, resulting in multiple submissions of identical data in different formats
- Setting of duplicative and/or contradictory conditions
- Misaligned timeframes for assessment and approval
- Duplicated/misaligned monitoring and reporting timeframes and requirements.

Figure 1: Generalised Commonwealth and state/territory assessment and approval processes



Source: Department of the Environment, [Regulatory Cost savings under the one-stop shop](#), September 2014 (arrow notations added)

The benefits of coordinated project approvals are significant. A 2014 analysis by the then Department of the Environment concluded coordinating Commonwealth and state/territory environmental approval processes would save Australian businesses \$426 million annually.³⁰ In addition to large cost savings to industry, more efficient processes reduce government costs.

Given the overlap identified above, and significant potential common ground between state, territory and Commonwealth government process, there is a clear opportunity for improving integration, coordination and consistency between project environmental approvals.

This could be addressed through:

- Accrediting state assessment and approval processes under bilateral agreements or other mechanisms such as the approval of planning or development regimes at a regional or state-level. These would be supported by a set of national standards and assurances and a comprehensive monitoring and audit role undertaken by the Commonwealth

³⁰ Department of the Environment, [Regulatory cost savings under the one-stop shop for environmental approvals](#), Australian Government, Canberra, September 2014, p. 1.

- Fully functioning assessment bilateral agreements that integrate all project components and support a single set of conditions for approval. Assessment tasks should be allocated to Commonwealth or states/territories based on expertise, with states to lead and coordinate assessments
- Established processes for regular and coordinated engagement between Commonwealth and state/territory regulators (and with the proponent)
- Embedding more Commonwealth staff within relevant state agencies
- Systems to improve the communication of project assessment and approval processes to both the proponent and other stakeholders
- Fully recognising state processes that satisfy Commonwealth requirements
- Alignment of different triggers, timeframes and requests for further information
- Enhanced use of strategic assessments.

Accreditation of state and territory processes and planning regimes (Q17)

The MCA supports the accreditation of state and territory regulatory/planning regimes where they meet Commonwealth requirements. The approach taken to achieve this will depend on a range of factors, including regulator capacity, government willingness and the legislative framework in the partner jurisdiction. Regardless of the approach adopted, this should be supported by national standards and assurance/performance arrangements.

Assessment and approval bilateral agreements provide an existing pathway for integrating Commonwealth and state/territory requirements. Chapter 3 of the EPBC Act allows the Minister to enter into Assessment and Approval Bilateral Agreements to accredit state-based regulatory processes.

Assessment bilateral agreements are currently in place for some states/territories but not all. Proponents in states with active assessment agreements still report high levels of delay and duplication caused by lack of communication between governments and a perceived reluctance on the part of Commonwealth assessors to trust processes undertaken at a state level.

Box 2: Duplicative assessment under a bilateral agreement

An MCA member company was required to refer its project to the Western Australian Government and the Commonwealth Government for approval under the EPBC Act. The assessment was carried out under a bilateral assessment agreement, whereby the WA process was accredited by the Commonwealth.

Despite both state and Commonwealth agencies being involved in the assessment process, the then Commonwealth minister extended the timeframe for decision three times, requiring additional information on matters already addressed and conditioned by the state in its approval of the project. In response, the company was required to rewrite documents provided in the original environmental assessment for submission to the Commonwealth.

One aspect of the project involved designing a tailings storage facility and final landform, the proposal for which the WA Environmental Protection Authority and other competent authorities recommended approval.

The Commonwealth Government raised concerns about the design and requested further information, despite those same concerns already being addressed in the WA-approved proposal (which was concurrently assessed by both governments). The Commonwealth Government then recommended another review of the design and proposed an alternative design option which was inconsistent with Australian design standards and counter to the wishes of the local community.

After rewriting and re-submitting material the Commonwealth accepted the original WA-approved proposal on the condition that another review was conducted by a Commonwealth Government approved expert, ignoring both independent advice already provided and the role of the WA regulator. This process resulted in an eight-month delay after the WA Government had completed its assessment and approved the project at significant cost to the proponent.

A key factor in this case was the failure of the Commonwealth to recognise the requirements of the WA regulatory regime. Specifically, during the eight month delay by the Commonwealth in considering approval, recommendations for project conditions were made that duplicated and even contradicted WA approval conditions aimed at addressing the same issues. This occurred despite these concerns being raised by the WA Government and the proponent.

Approvals bilateral agreements can play a critical role in reducing delays and addressing duplication. The recent PC draft report on Resources Sector Regulation recognised that ‘bilateral approval agreements have the potential to simplify the approval process for proponents’ and recommended that the Act be amended to enable negotiation of bilateral approval agreements.³¹

The MCA recommends legislative amendments to ensure the stability of these agreements over the longer term. Accordingly, the EPBC Act should be amended in line with key aspects of the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth).

To ensure confidence in the process, the Act or supporting requirements should include a range of safeguards to provide assurance that the specified environmental outcomes are being achieved. Accordingly, the approvals bilateral should be supported by national environmental standards and assurance provisions for monitoring and auditing of state/territory processes and implementation.

A well-functioning and stable approvals bilateral agreement supported by enabling legislation and appropriate safeguards to ensure outcomes are met would provide an integrated environmental assessment and approvals process, without reducing environmental protection.

There are other options that could be considered as part of Commonwealth accreditation of state processes. For example, a renewed focus on landscape scale assessment and management may allow for the accreditation of collaborative regional plans that address cumulative impacts and/or multiple land use options (e.g. Joint Industry Framework – see Section 6.2). Other hybrid approaches to accrediting state-based processes should also be explored.

Regulatory or scope creep

Regulatory or scope creep occurs when the Commonwealth considers matters outside of its policy responsibility or when conditions and requirements imposed through regulatory administration proliferate over time, resulting in additional regulatory layers and complex documentation that is no longer fit for purpose.

Regulation has been increasingly used to address public concerns rather than an identified regulatory ‘gap’ and without consideration of other non-regulatory options (e.g. improving process transparency or co-regulatory initiatives such as industry adopted standards and frameworks). This results in even more duplication and regulations with poorly defined objectives and outcomes.

Examples of regulatory or scope creep include:

- The water trigger for coal seam gas and large coal mining developments

³¹ Productivity Commission (2020), [Resources Sector Regulation, Draft Report](#), March 2020, pp. 42 and 149

- Non-uranium projects being increasingly captured under the nuclear action trigger, despite the Act's Explanatory Memorandum explicitly stating the definition of uranium mining and milling does not include minerals sands or rare earths.

These are outlined further in Section 6.2. Other examples include requests for additional information and review, particularly late in the assessment process.

Box 3: Regulatory scope creep of project assessment requirements

An MCA member company was undertaking an EPBC Act approval process for a mining development in Queensland. As part of this process, an EIA was developed and reviewed by qualified environmental experts engaged by the company.

The (Commonwealth) regulator provided conditional approval for the project, requiring the development of a number of management plans. These plans were to be independently peer-reviewed before submission for approval.

The management plans were developed and peer-reviewed as specified and extensively reviewed by the regulator. The regulator subsequently introduced a further (second) independent peer review of the plans. This occurred despite the company having adhered to all specified regulatory requirements in development and review of the plans.

The focus of the additional peer review strayed back into material impact decisions of the primary impact assessment. The additional review undermined the initial peer review process, unnecessarily extended the approval process, and added no value to the quality or outcomes of the plan. The additional process also created community confusion and distrust.

The application of regulatory impact assessments to evaluate the merit of new regulations provide an existing pathway to addressing scope creep.

Furthermore, clear delineation between Commonwealth and state/territory responsibilities and implementation of mechanisms to control the proliferation of regulatory requirements is required. Options to achieve this are further outlined in Section 7 of this submission.

6.2. Rationalise unnecessary triggers and prohibitions under the EPBC Act (Q1, 4)

A focus should be given to ensuring the Act targets 'gaps' where MNES are not managed under state/territory processes. Triggers wholly duplicative of state requirements should be amended and unnecessary prohibitions removed.

Removal of the water trigger for coal seam gas and large coal mining development

The water trigger was introduced to the EPBC Act in 2013 despite state governments having constitutional responsibility for water and comprehensive existing state and territory regulation of water.

With the exception of nuclear actions, the EPBC water trigger is unlike other MNES as it focuses on a type of activity and not an environmental value. As a result, an activity could have a similar impact on a water resource, yet be excluded on the basis of the action undertaken.

Through the trigger, the Commonwealth Minister for the Environment needs to approve actions in relation to coal seam gas and large coal mining development that may have a significant impact on a water resource. In this respect, the Commonwealth can provide comment, request information and set conditions as part of the project approval, additional to state/territory processes.

Proponents need to undertake significant duplicated effort to fulfil the prescribed administrative scope under Commonwealth and state/territory requirements, even though the environmental matter assessed is identical or very similar, and both assessments rely upon the same Independent Expert Scientific Committee (IESC) advice.

This results in duplication of management plans which manage the same risks but have been subject to different requirements due to inconsistent expectations between the jurisdictions.

Furthermore, the trigger is poorly defined in capturing all coal seam gas and coal mining projects regardless of size and has also resulted in the Commonwealth's regulation of matters that are not MNES. Interpretation and application of the trigger is further confused when having regard to other sources, including:

- The related definition of a 'water resource' under the *Water Act 2007* (Water Act), which requires that ecosystems contribute to the physical state and environmental value of the water resource for consideration as MNES
- The *Significant Impact Guidelines, 1.3 Coal seam gas and large coal mining developments – impacts on water resources* which effectively extends the definition of water resource to components of the ecosystem that do not necessarily contribute to the environmental value of a water resource – despite the requirement in the Water Act – such as terrestrial groundwater-dependent ecosystems and industries extracting groundwater for commercial use
- Should regulator officers interpret 'any vegetation that uses groundwater' to be part of the nationally significant water resource, all vegetation including invasive species may be considered a 'user of water'.

Box 4: Duplication of the water trigger with state/territory processes

A Queensland open-cut coal expansion project has been required to have its groundwater studies assessed largely in a duplicative setting. The project has been subject to the water trigger under the EPBC Act in addition to the various state processes and requirements, including:

- *State Development and Public Works Organisation Act 1971* through the Office of the Coordinator-General under an Environmental Impact Statement process
- *Water Act 2000* through the Department of Natural Resources, Mines and Energy (DNRME) for an Associated Water Licence application
- *Environmental Protection Act 1994* through the Department of Environment and Science for conditions of an environmental authority.

In addition, the proponent's data has been considered and deemed appropriate as a key input to the Surat Cumulative Management Area underground water model and management framework developed and maintained by the Queensland Office of Groundwater Impact Assessment.

The proponent logically combined the ongoing requirements of these regulatory processes under a single Groundwater Monitoring and Management Plan submitted in March 2019. However, the process to obtain alignment and approval has been slow, excessive and costly. The Commonwealth has:

- Undertaken three detailed reviews of the plan (by multiple departmental officers) in addition to the state's assessment
- Referred the plan for further consideration and comment to Geoscience Australia
- Requested different requirements for additional bores, associated installation timeframes, and monitoring inconsistent with that proposed by DNRME
- Required annual groundwater model updates inconsistent with the two-year update proposed by DNRME (this misalignment remains outstanding).

With the extensive state processes providing sufficient scientific rigor, the added regulatory layer that the water trigger invokes is questionable regarding the environmental benefit that it provides.

In 2009, Dr Allan Hawke reviewed the EPBC Act and stated that:

Water extraction or use as a matter of NES under the Act is not the best mechanism for effectively managing water resources. The size of water resources and catchment areas, the scale of existing and predicted future pressures on these resources, and the environmental flow requirements of these resources vary dramatically across Australia. As with setting a threshold for a land clearance trigger, setting a threshold for a nationally significant level of extraction would be very difficult. Even if this threshold were determined, it would be almost impossible to accurately predict whether a particular water extraction pursuant to a water access entitlement would have a significant impact on the water resource over the longer term.³²

In 2013, following the introduction of the water trigger, the PC stated that the amendment:

Imposes an extra layer of regulation on affected proponents [in a situation where] it is not obvious that existing laws are deficient or that the particular legislative amendment adopted by the Australian Government is the best approach to deal with any identified gap in the regulatory framework.³³

Additionally, the Independent Review of the Water Trigger Legislation completed in 2017 found that despite a regulatory burden to industry of \$46.8 million per year, there was no evidence the trigger had achieved its aims.³⁴

In response to the Independent Review of the Water Trigger Legislation and its finding that the ‘the water trigger is an appropriate measure to address the regulatory gap that was identified at the time of its enactment’, the PC reiterated in 2020 that:

There is not strong evidence that the water trigger has filled a significant regulatory gap, but it has imposed considerable duplicated effort.³⁵

Given the evidence above, the MCA contends the water trigger remains unnecessary and should be removed from the EPBC Act. If a role for the Commonwealth is maintained, this should focus on strategic approaches to water management, an example of which is provided in Box 5 below:

Box 5: Joint Industry Framework – petroleum and gas sector approach

The petroleum and gas sector is driving such an approach through its Joint Industry Framework for the management of cumulative impacts to groundwater resources and resulting risks to MNES in the Surat Basin caused by coal seam gas developments. Developed in conjunction with the Queensland and Commonwealth governments, the Framework aims to deliver reforms to ensure that EPBC Act approvals are:

- Fully aligned with Queensland Government-led modelling funded by proponents
- Generally standardised, particularly with respect to model conditions and compliance
- Issued faster (decoupling assessment timeframes from that of the state).

Furthermore, a number of amendments should be made to improve its operation. These include:

- Removing the prohibition on accrediting state/territory approval processes
- Using a risk-based approach in applying the water trigger to target greenfield developments, and rationalise its application to brownfield sites (including modifications and extensions)
- Early and ongoing interaction between the regulator, proponent and the Office of Water Science and the ability to communicate directly with the IESC to provide information or ask questions to clarify the scope of advice.

³² A. Hawke (2009) *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, p.109, 110

³³ Productivity Commission, *Major Project Development Assessment Processes: Research Report*, Canberra, released 10 December 2013, p. 149.

³⁴ Independent Review of the Water Trigger Legislation, Stephen Hunter Canberra, released April 2017, p. 70.

³⁵ Productivity Commission, *Resources Sector Regulation: Draft Report*, Canberra, p. 16, 39, 161.

Nuclear actions – modifying the definition to remove uranium and other mining activities

Uranium mining and milling are captured under the nuclear trigger definition. The trigger discriminates against the mining of uranium ore, despite there being no scientific case that would justify default treatment of uranium mining related activities as an MNES.

Unlike other MNES (with the exception of actions on Commonwealth lands, marine waters and actions by Commonwealth agencies), the nuclear trigger requires ‘whole of environment’ impacts, thus fully duplicating state assessment and approval processes. This blanket trigger does not target radiological risks or consider whether the action has the any potential to significantly impact on the environment.

Uranium mining and milling can be conducted safely under existing state and Commonwealth regulations. The EPBC Act definition of nuclear actions includes specific reference to uranium mining and milling. A 2018 review of mining and the EPBC Act nuclear actions trigger commissioned by the MCA found:

The ‘nature of the material’ means that it carries two key risks: nuclear proliferation and radiation. The first of these is dealt with through a number of international agreements and legislation, most notably, the Nuclear Non–Proliferation (Safeguards) Act 1987. The nuclear action provisions in the EPBC Act are not needed nor are they appropriate to address this matter.

The second, radiation, is one of the most heavily regulated aspects of the mining industry where national guidance is developed by ARPANSA based on best international practice and state and territory governments regulate within well-established systems. Radiation exposure to workers and members of the public from uranium mines in Australia is consistently well below the required standard indicating that these risks are already well managed.³⁶

The 2016 South Australian Nuclear Fuel Cycle Royal Commission found that ‘existing regulatory approvals processes for new uranium mines are unnecessarily duplicative at the state and federal levels’ and recommended ‘that the South Australian Government pursue the simplification of state and federal mining approval requirements for radioactive ores, to deliver a single assessment and approvals process’.³⁷

Uranium mining and milling should be removed from the definition of nuclear actions. As provided above, maintaining uranium mining as part of the trigger wholly duplicates state-based environmental assessments and radiological risks are dealt with under other legislation.

Should uranium mining remain a nuclear action, the EPBC Act assessment should focus only on the ‘unique’ radiological aspects of the activity, and only where that aspect is likely to have a significant impact on defined environmental matters.

Furthermore, despite the Act’s Explanatory Memorandum explicitly stating the definition of uranium mining and milling does not include minerals sands or rare earths, non-uranium projects are increasingly being captured under the nuclear trigger, including mineral sands and base metals (copper).

Examples include the Fingerboards mineral sands project in Victoria (Kalbar Operations Pty Ltd) and Nolans Rare Earth Oxide and Phosphate Mine in the NT (Arafura Resources).

As noted by Wilkinson:

These projects were considered to include a large scale disposal/storage facility for radioactive waste as radiation resulting from the uranium and thorium content exceeded the activity values and activity concentration value specified in the EPBC Regulations. This interpretation could potentially capture a number of mineral sands, rare earth and other mining projects that have naturally occurring radioactive

³⁶ L Wilkinson, [Mining and the EPBC Act nuclear actions trigger](#), MCA Publication, October 2018, p. 34.

³⁷ Nuclear Fuel Cycle Royal Commission, Government of South Australia, [Nuclear Fuel Cycle Royal Commission Report](#), 2016, p.xiv.

material (NORM). It is somewhat incongruous to capture such activities as a 'nuclear action' given they have no relationship with the nuclear fuel cycle.³⁸

Radiation environmental and safety governance is provided by state and territories in accordance with guidance based on international best practice from ARPANSA. By focusing nuclear actions in the EPBC Act on activities related to non-Naturally Occurring Radioactive Minerals (NORM) related activities, the Act avoids duplication and discriminating between like activities such as various mineral mining activities, and management and transportation of low radioactivity materials and waste streams. These activities are already regulated effectively by the states and territories and the case that they are somehow matters of national environmental significance has never been made.

Removal of the prohibition on nuclear power

The EPBC Act prohibition on nuclear power was based on sentiment from four decades ago, preceding the mainstream understanding of the threat of climate change and potential mitigation solutions.

Removal of the legislated ban on nuclear energy in the EPBC Act is critical if Australia is to seriously embrace all technologies so our future energy mix is affordable, reliable and cleaner.³⁹ Removing these prohibitions would demonstrate that Australia – like the Intergovernmental Panel on Climate Change – recognises uranium-fuelled nuclear energy as a critical part of global efforts to reduce greenhouse emissions.

Amending the Act in this way would enable consideration of the one source of energy production which can meet industrial demand for affordable 24/7 power with zero emissions and open up the broad range of employment, research and investment opportunities provided by the high-tech nuclear sector.⁴⁰

6.3. Climate Change and the EPBC Act (Q7)

The MCA and its member companies support national action on climate change and a transition to a low emissions global economy in line with the Paris Agreement. Strong and practical climate action means reducing emissions in a meaningful, innovative and commercially responsible manner.

The MCA notes the current discussion on the EPBC Act as a mechanism for addressing greenhouse gas (GHG) emissions.

There are better mechanisms than the EPBC Act for regulating GHG, as addressing emissions on a project by project basis as part of the approvals process is inefficient and focuses efforts on a narrow set of point sources. An isolated approvals-based approach that is disconnected from broader government climate change and energy policy is not an efficient approach to managing GHG.

Such a trigger would also be unwieldy, likely capturing a large number of activities which would simply require more government, community and industry resources without addressing broader global concerns. It would also potentially duplicate other Commonwealth and state-based policies and requirements.

Given the multi-factor nature of climate change and GHG, climate change matters should be addressed through a fit-for-purpose national policy framework, such as the Australian Government's Climate Solutions Fund, Safeguard Mechanism and related policies.

Furthermore any changes to national policy approaches should be undertaken through a comprehensive, separate reform process and not be an arbitrary inclusion in the review of the EPBC Act.

³⁸ Wilkinson, p. 32.

³⁹ Minerals Council of Australia, [Submission to the House of Representatives Standing Committee on Environment and Energy's Inquiry into the prerequisites for nuclear energy in Australia](#), September 2019, p.10

⁴⁰ Wilkinson, p. 4

7. FIT FOR PURPOSE ASSESSMENT AND APPROVAL PROCESSES

- Increasing EIA information requirements that include all impacts, regardless of materiality/level of risk are resulting in unnecessary time and resource costs for both proponents and government and act as a barrier to community engagement.
- EIA processes should be supported by a comprehensive risk-based scoping stage that maps out exact information requirements and acceptable methodologies, locking in these requirements at the outset of the project and avoiding changes during the assessment.
- Assessment pathways, including referrals and EIA processes should be informed by risk, providing simpler rapid pathways for low-risk, well understood activities and environments (e.g. brownfield developments).
- ‘Stop the clock’ mechanisms such as information requests are not currently constrained. Proponents should also have the ability to contest the validity of these requests in part or in full.
- Project conditioning should be risk-based and outcomes-focused, with model conditions for low-risk or well understood activities/environments and tailored conditions, for complex or site-specific risks, or where understanding is less mature. Consistency between Commonwealth and state/territory conditions is critical.

7.1. The need for risk-based approaches

EIA requirements have proliferated over recent decades as governments in all jurisdictions are taking an increasingly risk-averse approach to EIA. Increasing EIA information requirements have resulted in wide-ranging assessments that do not account for materiality/level of risk and unnecessarily increase assessment timeframes.

Findings of the recent PC inquiry into Resources Sector Regulation draft report included:

Environmental impact assessments are often unduly broad in scope and do not focus on the issues that matter most. This comes with costs — the direct costs of undertaking studies and preparing documentation and the more significant cost of delay to project commencement. Disproportionate and unfocused environmental impact assessments are also of questionable value to decision makers and the community.⁴¹

One example of this is the EIA documents for the Macarthur River Mining (MRM) brownfields mine extension project in the Northern Territory which consisted of approximately 8,500 pages and weighed more than 43 kilograms of Commonwealth and territory approval documentation.

The current approach to EIA creates unnecessary cost and delays for both proponents and government. It also acts as a barrier to community engagement and understanding by overwhelming stakeholders with information, not all of which is relevant to the protection of MNES.

In support of risk-based approaches to EIA the recent PC draft report found that:

Leading-practice environmental impact assessment involves application of a risk-based approach, where the level and focus of investigations is aligned with the size and likelihood of environmental risks that projects create. In practice this means:

- Allocating different projects to different assessment tracks depending on their level of risk, which occurs throughout Australia
- Thorough scoping, including community consultation, to identify which matters need to be investigated more or less thoroughly
- Terms of reference that focus on projects’ biggest and most likely risks

⁴¹ Productivity Commission, [Resources Sector Regulation: Draft Report](#), Canberra, p. 38.

- Regulators that are empowered to focus on what matters most, for example through Statements of Expectations as occurs at National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)⁴².

The MCA supports these draft findings.

In line with the above, the EPBC Act should adopt a risk-based approach to assessment pathways and scope. This should include:

- More detailed referral guidance, including industry-specific guidance that accounts for a range of existing land use and regional contexts
- A tiered approach to assessment and approval pathways based on an understanding of the activity and the environment in which it takes place, including whether current management and regulatory arrangements are adequate
- A more detailed assessment scope that focuses on the most significant risks and sets out information requirements, data standards and acceptable methodologies
- A framework to support risk-based condition setting, including model conditions for low risk or well understood activities/environments and tailored conditions for any complex or site-specific risks, or where understanding is less mature.

Risk-based approaches help target resources both during the assessment process, but more broadly at the most material issues associated with impacts to MNES.

Adopting of formalised risk-based referral and assessment processes (Q15)

Currently the EPBC Act and its administrative implementation are focused on ‘any action that may have a significant impact’. This could be enhanced by consideration of the level of risk and whether current management and regulatory arrangements (e.g. state/territory based controls) are adequate.

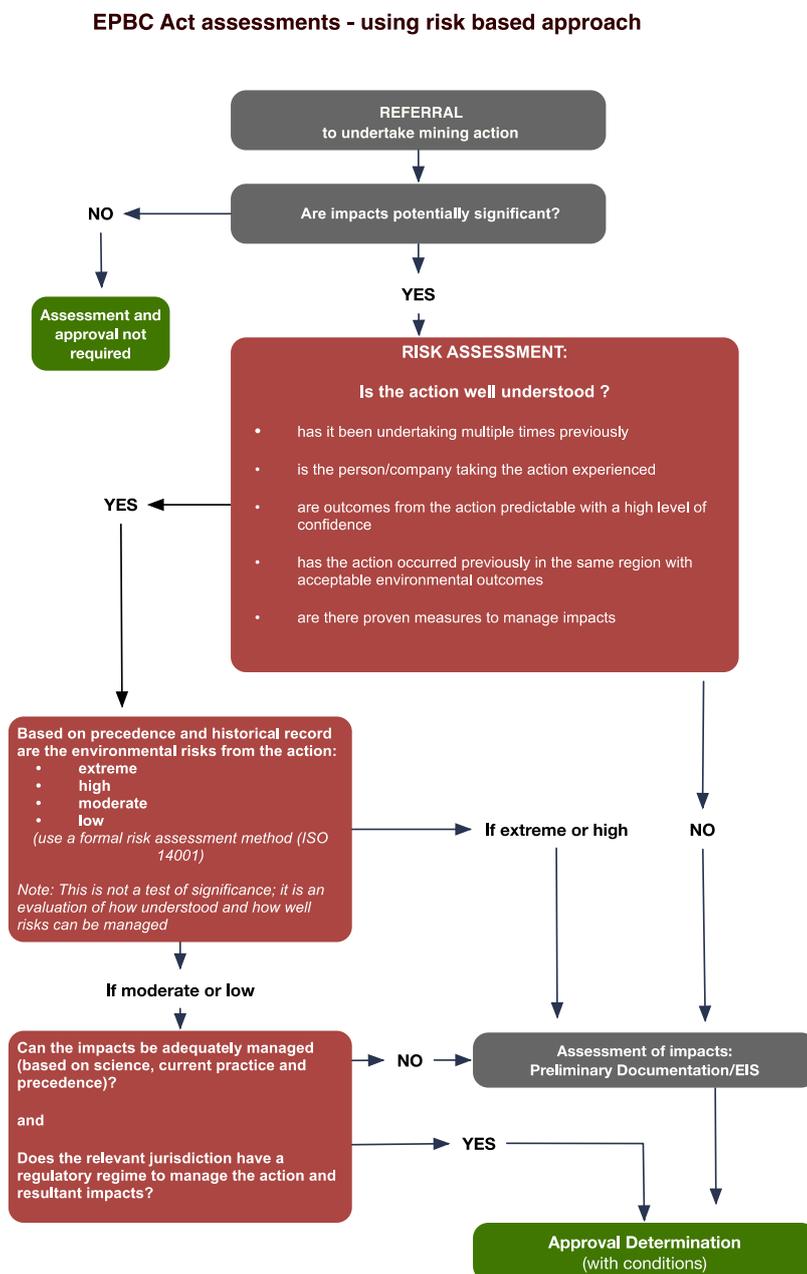
This would ideally refine the EPBC Act assessment and approval regime to focus on the higher risk exceptions, i.e. those projects that pose a high level of risk and where there is uncertainty in the appropriateness of current regulation or in the underlying science.

In the absence of accreditation of state assessment and approval processes under bilateral agreements or other mechanisms, state-based assessment, approval and regulatory schemes that are known to be suitable for managing risk should be recognised and acknowledged more formally at the referral stage. This should apply in particular to impacts on water, biodiversity and offsetting. The duplication in these areas reflects the inability of governments to work together and does little to improve environmental outcomes.

A risk-based approach could be applied that considers the risk of environmental harm and whether proven measures and appropriate regulatory protections are already in place. Figure 2 below sets out the basic steps and questions that could be considered in a risk-based approach potentially removing or greatly reducing the repetitive detailed assessment process to which standard mining projects are subjected.

⁴² Productivity Commission, [Resources Sector Regulation: Draft Report](#), Canberra, p. 38.

Figure 2: EPBC Act assessments – using a risk-based approach



The risks of many industries and actions could be accurately characterised based on historical experience. For example open pit or underground mining extensions to existing mines – particularly in well-developed mining regions (e.g. Hunter Valley, Bowen Basin or the Pilbara) – could be risk assessed based on previous referrals and assessments in those regions.

Companies also experience a lack of recognition of regional context and existing development by the regulator, leading to unnecessarily complex environmental assessments. An example of this is provided in Box 6 below.

Box 6: Lack of recognition of project context and risk

In 2017, an MCA member company made an application under the EPBC Act for an extension to an existing coal mine in Queensland. The proposed development was for a restart of an existing pit located between a number of other pits. The operation had 30 years of satisfactory environmental performance.

The development required the diversion of a creek, which was located immediately downstream to a very similar creek diversion project approved by the regulator in 2014. Creek diversion is common practice and a well-understood activity.

Due to the previous three decades of operation, there was a lot of existing information regarding potential impacts, which was provided in referral and further information and included an environmental risk assessment.

Despite the low-risk nature of the proposal and significant evidence that the company had managed the existing operations and similar recent extensions to an acceptable level, the project appeared to be treated by the regulator as a new greenfield project.

The assessment detail required did not necessarily improve environmental outcomes and the additional complexity delayed the approval of the project by more than 12 months.

This mine extension application presented a scenario where MNES values and impacts were well understood, providing an opportunity for the regulator to take a risk based approach to assessment and approval. This is discussed in more detail in Section 7.1. Following the project approval the regulator met with the proponent to explore opportunities for improvements to future processes.

Particular areas where risk-based approaches should be formally adopted include:

- Water resource assessments: the water trigger assessment process through the IESC is exhaustive, expensive and time consuming; this is appropriate in areas or projects of high risk of water resource impacts. However, many projects that are required to go through the process are brownfield, located on existing sites with known and well-managed water plans and regulation. Many of these assessments result in no material change to water impacts or management arrangements. Often conditions simply add additional reporting burden or have no water-related conditions imposed.
- A better risk-based adaptive management approach that looks at the context of the project, potential impacts, existing controls and probability of third party user impacts could be applied without the need for the extensive data-heavy IESC process.
- Brownfield projects: a risk-based approach could be adopted on existing sites where MNES values and impacts are well understood. Instead of a lengthy assessment process a set of model conditions could be applied that stipulate mitigation, management and offset requirements. The assessment could focus on whether the model conditions are adequate to address likely impacts based on a risk assessment and provide for a non-significant approvals process.
- Greenfield/full EIA situations: even in situations where a full EIA is needed, the focus should be on the assessment of key risks to MNES with other matters addressed through model conditions.

One hurdle to the application of a risk-based approach and the better use of shorter assessment/approval pathways such as 'particular manner' decisions is the inability to consider offsets at the referral stage of a project. This interpretation appears inconsistent given that measures that minimise or reduce impacts can be considered.

In considering risk-based approaches, 'particular manner' decisions are a significantly under-used existing pathway. 'Particular manner' provisions can reduce the number of controlled action assessments required. This rapid approval pathway would encourage projects to be designed to 'avoid or adequately mitigate impacts'.

Changes should also be made that recognise offsets as a form of mitigation and compensation at the referral stage, and as part of the risk-based approach. An additional item could be added to Figure 2 (above), to consider whether residual significant impacts could be adequately mitigated through the use of offsets or other compensatory measures.

A set of model conditions could be developed that can be applied as a 'particular manner' or a standard approval – either in whole or in part.

Integrating lessons and improvements in regulatory controls in the management of risks can be used to avoid the need for future projects to repeat the experience of current project proponents, whereby lengthy assessment processes lead to a known and expected outcome.

7.2. Better guidance and consistency on what needs to be referred

Currently there is significant ambiguity and inconsistency regarding which actions should be referred and what constitutes a significant impact on MNES.

Much of the guidance material available is generic and applies a highly precautionary approach. It is often worded as if all actions are greenfield and occurring in undisturbed landscapes. There are very few industry-specific guides and only some species or communities identified as MNES have useful guidance that set clear limits for significant impact.

In addition, most of the guidance available is theoretical and not informed by local or practical experience. This ambiguity has resulted in some proponents taking a precautionary approach and referring all actions, which is unnecessarily burdening the system.

The Regulatory Maturity Project, which examined the Environment Protection Group (EPG, including the then Department of Environment), found that:

...many policies and guidance documents were out of date and difficult to understand or apply. As a result there is a low degree of confidence that policies and guidance documents are being applied consistently.⁴³

Understandably, current guidance has been written with an untrained audience in mind, however most actions will be referred by organisations with qualified scientists either on staff or employed as consultants.

Accordingly, there needs to be guidance material produced that can help proponents advised by these professionals make informed decisions and judge whether a project needs referral.

Additionally, the regulator should consider the production of regional-based guidance in areas of development concentration. Regional guidance could then deal with MNES present in that region (or at least those frequently encountered) and the nature of impacts from industries frequently operating in the region.

Such guidance should be developed with experts and people familiar with the region, the MNES and the industries present.

7.3. More structured and detailed assessment scoping process

For actions that need to be assessed in detail (e.g. more complex or site-specific actions those with uncertain risks) a more detailed and thorough assessment scoping process is needed. Currently the regulator issues guidelines or a request for information on what the assessment should cover.

⁴³ J. Woodward (2016) [Regulatory Maturity Project Final Report](#), p. 10

Yet these guidelines or requests are often generic in content and do not specifically deal with the context of the action, the nature of the impacts or the levels or issues causing risk.

Most assessments result in further requests for information or re-analysis using modified methodologies, which could be avoided if the requirements and needs of the Commonwealth were made clear at the commencement of the assessment. These further requests often result in substantial delays and increased costs for the proponent.

A more comprehensive scoping stage would map the:

- Exact information requirements needed for assessment
- Data standards and detail needed
- Acceptable methodologies to be used
- Agreed issues causing risk and the MNES that may be affected.

This information should flow through from the risk assessment undertaken when assessing the referral.

The MCA considers the Western Australian model for impact assessment which includes a scoping document stage is a useful template for how this could operate. This is described on the WA Environment Protection Agency website as:

When additional assessment information is required, an Environmental Scoping Document is prepared by either the EPA or the proponent which defines the proposal specific requirements of the proponent's environmental review. The Environmental Scoping Document includes the preliminary key environmental factors that the proponent needs to address and the required work (including studies and investigations) that the proponent needs to carry out.⁴⁴

The complexity of the scoping document should match the complexity of the action and the level of assessment required and should 'lock in' the assessment requirements at the outset of the project, avoiding changes during the environmental assessment.

7.4. Existing uses and transitional arrangements

Provisions that were originally intended to 'grandfather' existing approvals and land uses (such as sections 43A and 43B of the EPBC Act) have been subsequently amended and interpreted so as to undermine the original intention. This is important because the scope of existing approvals sets the baseline for determining whether it is necessary to lodge a referral each time new triggers are added. State and territory planning legislation generally has clear and simple provisions about existing lawful uses and approvals, which could be adopted under the EPBC Act.

7.5. 'Significant impact' definition

The concept of a 'significant impact' is central to the Act in that any proposed action that will have or is likely to have a significant impact on a MNES requires approval from the Environment Minister. MCA members have observed the threshold for what the Commonwealth consider a significant impact has progressively lowered over time, capturing more and more actions. Neither does the significant impact 'test' account for pre-existing land use.

Investment in better policy advice and guidance would greatly increase efficiency in decision-making and certainty for developers. This could include improved guidance on what would constitute a significant impact against each MNES (in the context of national objectives) and how pre-existing land use is addressed.

In turn, this would provide confidence to proponents and ensure government and industry resources are targeted at those activities that may genuinely have a significant impact on MNES.

⁴⁴ Environment Protection Authority, Western Australia, [Step-by-step through the proposal assessment process](#), viewed 2 April 2020.

7.6. 'Stop the clock' mechanisms (information requests)

While statutory timeframes exist for approval decisions under the EPBC Act, there are mechanisms which enable regulators to 'stop the clock' on these timeframes.

One such mechanism is requests for further information. This mechanism is required if the proponent has not provided the science or information to enable the assessment. However there is a lack of policy and guidance resulting in unclear boundaries for applying the stop-the-clock mechanism.

These requests can occur late in the assessment process, leading to significant delay and additional costs. The Commonwealth is also not constrained in making these requests and it is not necessarily clear how critical this information is to the approval decision.

Box 7: Delays during the information request stage

An MCA member company referred a straight-forward extension of an existing operation in an established mining area under the EPBC Act. More than a year after a referral decision was made, the information request process is ongoing.

A referral decision was made in February 2019, accompanied by an initial request for information. The company responded to this request in full and received a second information request in November 2019. This request was also responded to in full.

The company then received a third request for information, including extensive comments and questions from the Office of Water Science, seeking detailed information in relation to groundwater and surface water modelling and assessment. The timing and extent of the comments from the Office of Water Science was at odds with the approach taken by the regulator in relation to recent, similar approved projects.

The review by the Office of Water Science and requests by the Independent Expert Scientific Committee were focused on a number of unlikely environmental outcomes that did not reflect the external expert advice sought by the company and decades of experience in managing mine subsidence.

Management measures proposed by the company were also consistent with the well-established processes required under the Queensland Environmental Authority conditions for the management of subsidence effects on surface drainage and the established and successful management measures implemented at a number of other company operations.

The Queensland Government approval process (completed in late 2019) included requests for additional information in relation to the full suite of project environmental issues. In contrast, the EPBC Act approval controlling provisions are limited to the consideration of water and ecology issues.

The consequences of further delays due to the information request process has the potential to prevent the timely finalisation of the approvals required for the project.

These delays can be addressed by agreeing and locking in requirements for the EIA upfront and limiting information requests to issues that are both material and relevant to the decision. The recent PC Resources Sector draft report found:

Leading-practice use of stop the clock provisions means placing limits on when they can be used — when matters emerge that were not contained in the terms of reference or could not have been reasonably anticipated — and transparency about why the clock is stopped.⁴⁵

⁴⁵ Productivity Commission, [Resources Sector Regulation: Draft Report](#), p. 40.

Other safeguards against potentially unnecessary additional information requests should also be considered in any proposed legislative amendments:

- Proponents should have the ability to contest the validity of information requests. One example of how this can be enacted is section 146 of the *Environmental Protection Act 1994* (Qld) which is applicable if certain types of applications have been lodged. This gives the applicant the right to refuse to respond to an information request in full or in part. The government then has to make a decision to assess the application on the information provided or declare that the information not provided was critical. The applicant can either accept the decision of the regulator or alternatively proceed with litigation. The ability to decline to answer irrelevant or immaterial information requests would assist in ensuring only essential information is requested.
- Only permitting one information request to be issued by the responsible agency, rather than multiple supplementary requests.
- Specifying a timeframe for the responsible agency to provide its information request, which should be an earlier time than the total period allowed for assessing the application. Section 89 of the EPBC Act sets out no timeframe. The only limitation is the total period allowed for deciding the assessment approach under section 88, which means the information request can be deferred until the penultimate day and then the clock is stopped. In this regard, the timeframe should not be too short to enable the agency to review the application properly, but should not be open-ended.

Decision timeframes

The EPBC Act prescribes timeframes for decision making, including the minister's decision on whether a referred proposal is a controlled action (section 75), the decision on an assessment approach (section 88) and approval decisions (section 130). However, the minerals industry has experienced delays due to statutory deadlines missed by the regulator.

Box 8: Poor performance in meeting decision timeframes and associated matters

Examples where statutory decision timeframes have not been met by the Commonwealth regulator include:

- Seven months (ongoing) taken to make a controlled action decision with a 20 business day statutory timeframe (EPBC 2019/8534)
- 87 business days taken to make an approval decision with a 40 business day statutory timeframe (EPBC 2017/7902).

In addition, and related to the above, the regulator has:

- Imposed non-statutory administrative requirements such as 'validation' of a referral application with timeframes of up to three weeks consuming approximately 75 per cent of the 20 business day statutory timeframe for a decision (EPBC 2019/8534)
- Published referrals on the department's website up to one month after submission. The EPBC Act requires that referrals are published on the department's website *as soon as practicable* after receiving a referral (EPBC 2019/8534).

The recommendations to simplify decision making (as stated above) and establishing greater accountability and improved service delivery within the Department (see Section 11) provide an opportunity to improve delays without compromising environmental protection.

7.7. Enhanced project approval conditions

MCA members have observed a trend towards greater prescription in interpreting the EPBC Act. This approach can limit the flexibility by which a proponent can deliver outcomes without regard to economic, operational or environmental considerations.

This move away from a risk-based and outcomes-focused approach often becomes apparent in the number and type of conditions imposed on a project through the EIA process and the length of management documentation.

Risk-based and outcomes-focused conditioning would address delays and better direct resources and efforts of proponents and the regulator. This should include:

- Model conditions for low risk or well understood activities (e.g. brownfield and commonly-considered MNES species)
- A mix of model conditions and tailored conditions for any complex or site-specific risks, or where understanding is less mature in a new resource area (e.g. greenfield developments and lesser considered MNES species).

A similar approach (model mining conditions) has been adopted by the Queensland Government and should be considered.⁴⁶

The MCA supports outcomes-based conditioning – as provided in the related EPBC Act policy and guidance – where agreed with the proponent. This is particularly important for post-approval management plans and monitoring which should be able to be adapted to achieve the outcomes. Further details on how this relates to offset management and monitoring of offsets is provided in Appendix B.

Another key concern is inconsistency in Commonwealth and state/territory conditions either at the commencement of a project or over time. This causes difficulties for proponents in determining how to implement conditions and is a key factor in project delays.

This reiterates the need for coordinated processes and requirements at the Commonwealth and state/territory level (as outlined in Section 6 of this submission).

⁴⁶ Queensland State Government's [Model Mining Conditions](#) under the *Environmental Protection Act 1994* (Qld) are leading practice and should be considered in the design of EPBC Act model conditions.

8. POST-APPROVAL PROCESSES

- Matters considered in the post-approval stage can be critical to the overall viability of a minerals development. Post-approval planning processes lack transparency, are increasingly burdensome and are not supported by statutory timeframes, causing significant delay and uncertainty for proponents.
- An option should be provided to consider post-approval matters in the primary approval stage. Remaining post-approval matters should be supported by a set of assessment rules, setting out procedures, timeframes and internal review rights.
- The Act should include risk-based flexible pathways to vary approval conditions. A simple process to consider and vary an approval should be available, avoiding the need for referral and full assessment where changes are not material to the environmental outcome.
- Minerals developments are increasingly subject to appeals. Reforms to the legislation to reduce process prescription and instead focus on outcomes would reduce the potential vulnerability of the approvals to unnecessary appeals without affecting environmental outcomes. Administrative solutions should be available to the decision maker where there is no material environmental harm, for example when administrative errors are discovered.

8.1. Improved post-approval processes

Post-approval processes under the EPBC Act – which lack transparency, are increasingly burdensome, duplicative and are not supported by statutory timeframes – can be a significant source of delay and cost for minerals industry proponents.

Many aspects of the approval process are undertaken following the primary approval (e.g. offsets determinations, approval of management plans etc.). This places time pressure on proponents as these ‘nested approvals’ are critical for project commencement.

There is a significant reliance on additional plans rather than a focus on outcomes and the specific measures needed to manage impacts. There have also been instances where proponents have been required to develop separate management plans for the same matter and undergo two separate approval processes for the Commonwealth and state or territory despite being almost identical.

For many of these ‘nested’ approvals, there are two significant risks:

- The matter that has been deferred for future consideration may be fundamental both to the approval and to the proponent’s investment decision, in which case it is a matter that should have been decided upfront
- There is no assessment framework for the post-approval plan or report, such as regulatory timeframes, criteria or appeal against refusal. There may be multiple information requests, with no way of closing out the process, preventing the operation (or construction) from starting.

A significant complication is that the assessment of a plan is often undertaken by assessment officers who are unfamiliar with the project and the primary assessment process, requiring re-learning and re-assessment of the project’s impacts as if from scratch. The primary and post-approval branches of the regulator can also interpret key components of an approval differently, creating uncertainty for the proponent.

Box 9: Delays in nested approvals

A Queensland open cut coal expansion project referred under the EPBC Act required the submission and approval of an Offset Management Plan (OMP). The lack of statutory timeframes for post-approval documents led to significant delays. The plan was lodged in November 2017 and approved in December 2019 – an assessment period of 26 months.

The delay was driven by a number of factors, including:

- Challenge of the weightings for habitat quality inconsistent with the Queensland method (as above)
- Requirement for additional data on the offset requested three months after the initial submission of the plan despite not being raised prior. This resulted in a further four to five-week delay
- Due to the extended passage of approvals time, older surveys were questioned for adequacy
- High staff turnover with five officers involved between 2017 and 2019 and consequently variable interpretation and application of the offset policy and calculator.

Guidelines detailing opportunities to deal with many of these matters during the assessment phase could generate significant efficiencies for some projects.

Approval conditions set for the development of management plans (in the post-approval stage) should allow for a focus on the desired outcome rather than the detailed means by which a proponent may deliver the outcome – the difference between prescriptive action-based and outcome-based conditioning.

For those technical matters of detail that can be addressed by post-approval plans or reports, a set of development assessment rules should set out procedures, timeframes and internal review rights. If the subject matter is standard, then benchmark criteria should also be included.

Alignment of Commonwealth and state/territory requirements for management plans would also be a significant improvement to the post-approval process. Even when Commonwealth and state/territory governments agree to the development of a single management plan to satisfy both jurisdictions' requirements, proponents have sometimes experienced a joint review process that is disjointed and poorly coordinated by agencies, both in timing and content. This complex approach can add significant delays to the planning process.

This can be improved through Commonwealth recognition of state management plans and implementation of the recommendations to better coordinate and rationalise regulation outlined in Section 6.1.

8.2. Improved variation pathways

Post-approval processes should be more flexible to allow changes and variations to projects and approval conditions. In particular, provisions of the Act that allow for variation of existing approvals could include flexible pathways to more appropriately consider minor or material changes based on their level of risk.

A simplified and rapid process should be made available to proponents to assess the proposed change and modify the primary approval without the need for a full referral and assessment process where changes are not significant.⁴⁷

⁴⁷ See *Environmental Protection Act 1986 (WA)* s 45C for an example of this.

This would enable projects to adapt, improve and respond to evolving circumstances while maintaining the environmental outcomes sought by the approval.

By their nature, mining operations and plans alter frequently. Whether driven by market forces, geology, access or climate (e.g. high rainfall and flood events) the specifics of a project can change unexpectedly.

Often the rate of production, footprint or need for supplementary infrastructure (e.g. roads, dams etc.) can evolve over time. These changes may be outside the referred footprint or differ from the project description that was assessed and approved. These projects are also often long-lived (multi-decade) with ongoing operations requiring additional exploration and brownfields expansions. Despite this, the underlying nature of the operation and its associated environmental considerations are typically common to the original proposal.

Many EPBC Act variation assessments for mining projects are limited to impacts on MNES, Threatened Ecological Communities and species habitats, and in coal mining and coal seam gas cases, the water trigger. The associated issues are not new or particularly complex and are unlikely to require detailed study.

In situations where the changes result in only minor impacts to MNES the post-approval variation process should address these as minor amendments, potentially through a simple process that confirms that existing management measures will apply and where relevant additional offsets based on previous calculations will be secured.

Where more significant changes are proposed, a rapid assessment process could determine if changes will result in materially different impacts to those originally assessed (e.g. whether additional MNES are likely to be impacted that were not considered in the initial assessment).

A variation to the approval should be possible in situations where changes are determined not to be material. This would enable expansions to be considered without the need for a second full referral and assessment process.

Variations to approvals should also be issued as a consolidated approval, making it simpler for the operator and regulator to administer and track the conditions.

8.3. Robust and efficient appeal processes

Approval decisions for minerals projects have been subject to increasing appeals, including judicial review under the EPBC Act. Judicial review processes are important to safeguard the rights and interests of affected individuals and to ensure development assessment and approval processes remain robust and are consistent with legislation.

The minerals industry supports the rule of law and the right of affected individuals to judicial access. However, legal uncertainty surrounding decisions under the EPBC Act discourages investment and creates community distrust.

While the most appeals are unsuccessful, they can delay projects many months or years, providing little environmental benefit but at substantial cost to the project proponent, government and the communities that would otherwise benefit from investment in minerals development.⁴⁸ For example, it has been estimated that since the inception of the EPBC Act, appeals to approval decisions have occupied over 10,000 days (28 years) of court time, potentially affecting \$65 billion of investment.⁴⁹

⁴⁸ Productivity Commission, [Major Project Development Assessment Processes: final research report](#), Canberra, released on 10 November 2013, p. 258.

⁴⁹ Institute of Public Affairs, [Section 487: How activists use red tape to stop development and jobs \(2020 update\)](#)

Unsuccessful appeals do not enhance the protection of the environment, yet come at significant time and resource cost for all parties involved. Furthermore, drawn-out court appeals over many years may undermine confidence as positions become entrenched and create community division.

Accordingly, it is important appeal processes are efficient and focus on those issues that are material to the environmental outcome.

Unnecessary prescription within the EPBC Act allows the minister's approval to be challenged on a technicality but not the substance of the decision can be addressed without weakening environmental outcomes.

This should be supported by a capacity for the decision maker to access administrative solutions where there is clearly no material environmental harm, for example when administrative errors are discovered.

9. STRATEGIC ASSESSMENTS

- Industry experience with strategic assessments has been mixed, with some assessments failing to be endorsed despite many years of negotiation and significant cost to industry proponents.
- The MCA supports well-designed and implemented strategic assessments to reduce the need for project by project approvals and support long-term management of regional environmental values where practical and with the support of proponents
- The EPBC Act should be amended to better define the operation and processes required for strategic assessments, particularly in the post-approval/validation stage by allowing flexibility to modify approved programs where they are consistent with the overall plan objectives and approval
- Reforms should enable bilateral strategic assessments between the Commonwealth and state or territory governments to avoid two processes for proponents.

Project-by-project assessment and approval processes can be costly, slow and do not always provide for optimal management of biodiversity pressures and the environment. Effective implementation of strategic assessments has the potential to reduce delays by eliminating the need for project-by-project approvals under the EPBC Act and supporting long-term management of regional environmental values.

Industry experience with strategic assessments has been mixed, with some assessments failing to be endorsed despite many years of negotiation and significant cost to industry proponents. Some of the limitations identified include:

- Insufficient guidance on how to conduct an assessment, including on what is in scope for the policy, plan or program and the level of data required at each stage
- Overreach in the extent of the area that can realistically be covered by a strategic assessment such that its findings are unable to be applied to individual project applications (e.g. the Great Barrier Reef Strategic Assessment)
- Given the number of parties that may be engaged in the development of a strategic assessment, politics can play a larger role in the process and outcome
- There can be discord between what was agreed and intended with the regulator in the approval phase and the interpretation and application by the post-approval unit
- There is no provision in the Act to modify a program. This means that when agreed, a program needs to be fit for purpose for many decades, resulting in a reluctance to include detail that would otherwise be beneficial to its operation.
- A lack of clarity around the process for dealing with newly-listed species over the life of a strategic assessment. Proponents need confidence that the continuity of their operations will not be less secure given the long-term nature of strategic assessments.

In some notable cases, strategic assessments have been abandoned by proponents due to issues such as the above, further eroding industry confidence to invest in and pursue a strategic assessment.

Despite the above issues, the MCA supports greater use of strategic assessments under the EPBC Act. If well-designed and executed, strategic assessments can provide a range of benefits, including:

- Increased capacity to achieve better environmental outcomes for MNES and address impacts at the landscape scale
- Greater certainty for local communities and developers over future development

- Reduced administrative burden for proponents and governments (removing the need for project-by-project level assessments)
- Ability to plan for the continued persistence of MNES within a region.

Key success factors from recent strategic assessments should be drawn on to inform future efforts. For example, the strategic assessment undertaken by BHP and the Commonwealth in the Pilbara highlighted the opportunity for single proponent assessments at a regional level. Central to the assessment's success was the fact that it was driven by a single highly proactive proponent.

A strategic assessment of mining activities in a region can accommodate likely future development activity and likely impacts while setting out environmental outcomes and goals to be delivered by minerals development.

One of the main attractions of the strategic assessment mechanism is that it allows the Commonwealth to assess and approve a plan, program or policy at a regional scale. Matters that could potentially be coordinated include:

- A mechanism to guide future development to areas of lower environmental impact to MNES, including setting the context in which development should occur and to manage cumulative impacts
- Better planning of where offsets and other conservation investments should be directed (e.g. pest animal and weed control in high biodiversity areas and unconstrained by numerical offset calculators that do not accommodate regional priorities)
- Identification of areas where MNES exist in a landscape
- Enabling strategic assessments to be conducted in relation to identified controlling provisions, for example threatened species, whilst allowing for specific projects to be referred in relation to other MNES that may be impacted (for example water resources).

Strategic assessment plans could also guide efforts on other issues, including climate change adaptation, water use and infrastructure planning.

To realise the full potential of strategic assessments and encourage their use, the Act should be amended to better define the operation and processes required and the effective geographical boundaries of their use.

Amendments should also provide greater flexibility to modify approved programs where they are consistent with the overall plan objectives and approval in the post-approval/validation stage.

Reforms should enable bilateral strategic assessments between the Commonwealth and state or territory governments to avoid two processes for proponents.

Like all assessment approaches, the use of strategic assessments should be fit-for-purpose, undertaken where practical and with the support of proponents. Project level assessments will remain an important assessment pathway for minerals and other types of development.

10. ENVIRONMENTAL OFFSETS

- Offsets are critical to timely approvals. Inconsistencies in offset determinations and a lack of integration with state/territory offset regimes have led to significant delays in project timelines and unexpected determinations that can affect the overall viability of a project.
- Policy and administrative changes to improve implementation and consistency of the offsets policy and enable the use of advanced offsets are an important temporary measure.
- Critical reforms needed include enabling offsets to contribute to strategic environmental outcomes through the removal of strict like-for-like requirements, establishing a common framework for Commonwealth and state/territory offset requirements and a financial-based mechanism (e.g. a trust fund) for environmental offsets under the EPBC Act to prioritise and contribute to strategic environmental outcomes.

Environmental offsets are an important mechanism for the minerals industry because project locations are determined by the location of the mineral resource. However, the application of the EPBC Act environmental offsets policy (the offsets policy) and its supporting tools is a major cause of unnecessary delay and cost to proponents. There is also scope for offsets to better contribute to strategic and enduring environmental outcomes.

10.1. Short-term reform priorities

Improved interpretation and application of the EPBC Act Offsets Policy

Inconsistency in offset determinations and a lack of integration with state and territory offset regimes has led to significant delays in project timelines and unexpected costs that can critically impact the overall viability of a project and may not result in the best possible environmental outcome.

There is an immediate opportunity to implement simple policy and administrative changes to improve policy implementation and consistency and address delays for proponents.

Detailed comments on administrative issues associated with the application of the offsets policy and calculator can be found at Appendix A. It includes recommendations to achieve:

- Consistent interpretation and implement of the offsets policy and calculator
- Clarity on data used and hierarchy of relevant information (listing advice, species recovery plans etc. – see also Section 11.3)
- Risk-based and outcomes-focused conditioning.

However, in order to drive meaningful changes to the administration of offsets, the Commonwealth must more generally:

- Adopt a risk-based, outcomes-focused assessment and conditioning approach (see Section 7)
- Develop and publish better guidance to support policies, systems and tools relevant to applicable audiences (see sections 7 and 11)
- Invest in its staff and improve its service delivery (see Section 11).

Advanced offsets

Advanced offsets are a supply of offsets for future use, transfer or sale by proponents or offset providers. Unlike conventional offsets, which are generally put in place to compensate for the residual adverse significant impacts of an action on MNES following approval, advanced offsets are put in place before any impact occurs.

The MCA supports the intent of the Advanced Environmental Offsets Policy Statement (the advanced offsets policy). The approval of an advanced offset is currently tied to the assessment stage when deciding whether to approve the action under the EPBC Act or at the post-approval stage where the advanced offset satisfies the requirements of a relevant approval condition.

Given this link to the action, the advanced offsets policy does not afford flexibility for proponents to 'bank' an advanced offset potentially years prior to making a commercial decision to proceed with a project.

When a proponent has secured land for an advanced offset and is taking measures to improve the condition of the ecosystem, there is no formal written recognition from the department that:

- The land can be considered an advanced offset
- The condition of the MNES at the time of acquisition (given it is to only be considered when deciding on an action).

For example, a proponent may secure land and stop routine tree clearing for farming, which improves the condition and quality of the MNES. However, if the starting condition, and hence the averted loss is not acknowledged by the regulator it cannot be reflected in the EPBC Act calculator in later years when progressing through the approvals pathway.

This in turn affects the 'Risk of Loss' factor and potentially increases the area of the offset required to be delivered. This does not provide the certainty needed for the proponent to make the initial investment in the property. Without this recognition, there is no incentive for a proponent to deliver an early environmental outcome as is the intent of an advanced offset, resulting in a missed opportunity.

The advanced offsets policy can be significantly improved by requiring formal recognition by the regulator that land can be considered an advanced offset upon the proponent securing the land and the condition of the MNES at the time of acquisition. The registration process for an advanced offset under the Queensland Environmental Offsets Policy (version 1.8) is a model example of how this recognition can be afforded. The Policy states that:

Once the advanced offset is identified to deliver a specific offset condition, the site and management of the site must satisfy all requirements in this policy, including those relating to offsets required by other legislation and authority requirements. In assessing the suitability of the advanced offset the administering agency must consider any conservation outcome achieved for the prescribed environmental matter/s from the date that the advanced offset was recorded in the offsets register⁵⁰.

10.2 Medium to long-term reform priorities

Recognition of broader environmental outcomes (Q24)

Restrictions on the type of offset and strict like-for-like provisions in the offsets policy require proponents to invest in environmental actions that address isolated MNES species or issues without considering the broader environmental implications or opportunities.

This often results in piecemeal biodiversity outcomes that do not take full advantage of the resources committed and do not contribute to regional/strategic environmental outcomes.

Environmental offsets provide a significant opportunity to contribute to strategic environmental outcomes. To maximise the environmental outcomes from industry investment, a more flexible approach to offsets is needed, specifically:

- *Complementing existing conservation initiatives* – enabling offsets to complement the range of government and non-government conservation activities taking place within a region, include state/territory based environmental offsets, catchment management and wildlife corridor development and support to improve the quality of the existing conservation estate

⁵⁰ State of Queensland, Department of Environment and Science, [Queensland Environmental Offsets Policy \(version 1.8\)](#), Appendix 5, 2020, p.59

- *Removal of strict like-for-like requirements* – where a suitable offset directly linked to the impacted MNES cannot be provided, an option to offset for another related matter should be made available to the proponent. An equivalent threat class should first be sought before considering other classes of threatened species or ecosystems. When aligned with national recovery plans and efforts to improve regional landscape-scale planning, this approach can result in a more strategic environmental outcome.

Establishing a common framework for Commonwealth, state and territory offsets

Duplication and inconsistency between Commonwealth and state/territory offset requirements is a critical issue. Commonwealth offset requirements should not be considered in isolation to state-based requirements – instead, these should be integrated and aligned resulting in a single offset requirement. A common framework for Commonwealth, state and territory offset requirements should be established to support this alignment.

Establish a financial-based offsets mechanism (Q23)

The MCA recommends the establishment of a financial-based mechanism for environmental offsets under the EPBC Act. This may include a trust fund or market-based mechanism administered by an independent body. Such a mechanism would facilitate coordinated and strategic landscape-scale investments that achieve habitat connectivity and long-term resilience of biodiversity.

Supported by a common offsets framework, the mechanism should align with and complement state and territory based financial offset arrangements and broader conservation initiatives. Rules should be established to enable interoperability with state-based mechanisms, allowing these to administer funds where they meet Commonwealth requirements.

Existing models that could be considered in the design of the mechanism include the Reef Trust and Biodiversity Conservation Trust in New South Wales and the Pilbara Environmental Offsets Fund.⁵¹

Key aspects of a financial-based offsets mechanism must include:

- Funds should be hypothecated, independently administered and subject to best practice governance requirements
- Subject to a transparent accountability and performance reporting regime (e.g. register of contributions and works, annual report on expenditure, works completed, rolling progress and how it is delivering on biodiversity outcomes) to ensure expenditure aligns with the mechanisms objectives and on-time and on-budget delivery.

In designing and implementing the financial-based offsets mechanism, the governing body should consider:

- Ensuring investment are strategic, complementing other Commonwealth, state and territory offset and conservation initiatives
- Enabling contributions to be disseminated as grants to not-for-profit organisations with a track record in conservation such as Birdlife Australia, Bush Heritage, the Nature Conservancy, Greening Australia etc. particularly where these organisations work with local communities, land holders and Traditional Owners
- Complementary opportunities for employment and stimulus in regional areas which may include supporting improved land management practices for land users in lieu of locking up land.

While the industry supports financial-based offsets mechanisms, their use should not be mandatory. Instead, proponents should be afforded flexibility to decide to either establish an offset independently, or contribute to the national financial approach.

⁵¹ Department of Agriculture, Water and the Environment, [The Reef Trust](#), Australian Government, Department of Planning, Industry and Environment, [Biodiversity Conservation Trust](#), New South Wales Government, Department of Water and Environmental Regulation, [The Pilbara Environmental Offsets Fund](#), Government of Western Australia, viewed 16 April 2020.

11. DELIVERY, SUPPORTING SYSTEMS AND DATA

- Service delivery (including capacity, resourcing, service quality and inconsistent interpretation of the Act) is a major driver of delay with assessment officers often not being familiar with the regulated industry and/or the environment being assessed.
- Regulator performance could be enhanced through continued appropriate resourcing and supporting systems, sharing of information, training and approaches between jurisdictions, secondment opportunities with industry and industry-specific training.
- Greater accountability is needed. Service delivery (e.g. timely and effective service) should be included in regulator key performance indicators and consideration given to other incentive mechanisms, including 'deemed decisions' where timeframes are not met.
- National environmental data should be consolidated, integrate all requirements and sources, updated regularly and made available to governments, proponents and the community. This would assist decision-makers, improve transparency for communities and provide project proponents access to existing environmental data.

11.1. Administration of the EPBC Act

Sound governance, competency, service delivery, capacity and resourcing of the regulator are critical to the Commonwealth successfully delivering services for proponent clients. For the minerals industry, these important factors can significantly impact project assessment and approval timeframes, environmental outcomes and costs.

The Regulatory Maturity Project found that:

...there are currently a number of barriers limiting EPG's regulatory capability, including culture, resourcing and legislative limitations, and inconsistency across EPG in the way regulatory activities are undertaken.

... the transition to best practice is somewhat impeded by a lack of regulatory experience and expertise in EPG and the Department, including in the Senior Executive. The Project found that recruitment and training has historically focused on subject matter expertise or generic government skills, rather than a good understanding of regulation and best practice. EPG lacks an integrated capability framework or training program to develop regulatory skills in relevant staff. There are also gaps in responsibility for the coordination of regulatory policy, guidance material, processes, IT, and training across EPG⁵².

Assessment officers may have limited experience, particularly in the industry they are responsible for regulating. Staff turnover is also a key issue, affecting the consistency with which the regulation and policy is interpreted and applied. This is particularly problematic for long assessment processes typical of resource projects and can result in constant re-learning by assessment officers and repeated requests for further information over the course of an assessment. Appendix B outlines examples of significant staff turnover with respect to offset management plans.

Insufficient resourcing can lead to stretched teams and contribute to staffing turnover, all of which affects timeframes for delivery and regulatory consistency. Delays can also be exacerbated by machinery of government changes which can result in disruptive changes to internal regulator systems and processes.

The *Department of the Environment and Energy Annual Report 2018-19* acknowledges high workloads as a key factor in the department not achieving targets to improve delays in approval timeframes:

⁵² J. Woodward (2016) [Regulatory Maturity Project Final Report](#), p. 8, 9

...fewer EPBC Act project decisions were made within the statutory timeframe in 2018–19, compared with 2017–18. Delays are due to high workloads and working with project proponents to obtain additional information.⁵³

The service approach taken by regulators can be a major driver of delay. Poor communication, unwillingness to engage with the proponent and a lack of responsiveness to inquiries all affect regulatory performance.

In consulting with external stakeholders, the lead of the Regulatory Maturity Project found that:

Some stakeholders (particularly) requested more proactive engagement by the Department, particularly in relation to the development and implementation of new policies or other Departmental priorities or changes. Feedback from some stakeholders also suggested that some staff in EPG do not have a strong understanding of the operating environment of relevant regulated entities and the full range of factors that influence their behaviours⁵⁴

MCA member companies have noted changes in the way individuals or units within the regulator interpret and apply the Act and supporting tools. These changes stifle opportunities for the productive use of mechanisms such as outcomes-focused decisions and variations and often results in greater levels of prescription.

This causes delays and significant uncertainty for the industry in relation to information required during the approvals process, operational delivery and broader investment.

Regulator capacity and service delivery could be enhanced through the sharing of information, training and approaches between jurisdictions (e.g. under the auspices of the COAG resources ministers forum). The early engagement of interagency expertise, if required, would also reduce process and decision making delays and create a more collaborative approach.

There is also benefit in regulators periodically engaging with industry including undertaking site visits to build understanding of the various sectors in addition to specific projects under assessment. There is also an opportunity to set up rotational secondments for regulator officers within industry, to improve awareness and understanding of site application of regulation.

Box 10: An approvals case manager

Existing resourcing could be improved under the EPBC Act by appointing a referrals manager and approvals case managers to projects.

A referrals manager should provide advice to proponents on referral requirements. The referrals manager must be sufficiently qualified and senior to provide proponents with formal advice that the projects do or do not need to be referred under the Act. The centralisation of referrals would also assist in ensuring consistency in decision-making within the department.

A single approvals case manager should be assigned to individual approval processes for controlled actions. Such a case manager should be:

- A single point of contact for both state/territory government and proponents (potentially located in the state/territory they support)
- Undertake a coordinating role for federal assessment and approval processes
- Responsible for process delivery within statutory timeframes
- Sufficiently qualified and senior to provide consistent and reliable advice to proponents.

Consideration should also be given to the supporting systems and platforms available to assessment officers to minimise transitional issues when there are changes to staff. Allocating senior departmental

⁵³ Department of the Environment and Energy, *Annual Report 2018-19*, Canberra, 2019.

⁵⁴ J. Woodward (2016) [Regulatory Maturity Project Final Report](#), p. 11

officers as case managers would also improve consistency, coordination and delivery, and reduce delays due to re-learning.

There would be significant value in the regulator considering elements of the NOPSEMA model for environmental assessment officers, outlined in Box 10 above. This includes placing value on industry experience, requiring relevant tertiary qualifications and substantial post-degree experience and employing short-term specialist contractors if capacity or capability gaps are identified. NOPSEMA also locate personnel within the regions that include the largest users of their regulatory services.

Box 11: NOPSEMA – ‘a highly skilled, professional and competent regulator’

As part of the 2019 Independent audit of NOPSEMA’s assessment of exploration in the Great Australian Bight, Chief Scientist Dr Alan Finkel AO considered the competency of the regulator workforce. The audit found NOPSEMA to be a ‘highly skilled, professional and competent regulator.’

The audit considered the technical proficiency and capability of environment staff, and found that ‘technical staff are highly qualified, typically with a Masters or PhD degree in their respective field and with substantial post-degree experience. Industry experience was especially valued by NOPSEMA’s management.’

A number of other factors that contribute to the proficiency of the environment division were considered and the audit found:

Staff recruited by NOPSEMA undertake extensive training to ensure they understand their job and the regulatory environment. New staff are supervised while they complete the required training and gain broad exposure to the regulatory setting and NOPSEMA’s processes. The audit team considered the training and induction processes sufficient to ensure staff know how to do their jobs.

The diverse experience, backgrounds and capabilities of the technical staff cover all the disciplines needed to assess environment plans. If particular experience or expertise is needed, independent external advice is sought, for example through NOPSEMA’s contract with the Australian Antarctic Division’s Australian Marine Mammal Centre.

All those interviewed as part of the audit demonstrated very strong technical experience and had a deep understanding of the Environment Regulations.

In responding to the audit, NOPSEMA outlined processes to mitigate the degree of subjectivity in any assessment. Measures included assessors having both technical qualifications and field-based experience and that for technically complex plans or activities with higher interest, assessment teams were bigger with more experts.

The above recommendations are consistent with those outlined for the Regulatory Maturity Project, including:

- Further developing the department’s intelligence capability
- Establishment of formal and informal training and induction programs
- Adoption of a consistent approach with staff in times of change
- Providing all stakeholders with more information about policies and decisions
- Increasing knowledge of regulated industries
- Establishing and maintaining a single point of contact
- Speaking with a single voice

- Improving engagement with community groups, co-regulators and communities of practice.⁵⁵

11.2. Enhancing regulator accountability

Departmental performance should have a higher level of accountability. There is no current incentive other than departmental reporting to ensure assessment and decision-making is undertaken within statutory timeframes.

The quality of the service – how effectively the regulator engages with the proponent – is not considered, despite being critical to a consistent and timely outcome and service costs being recovered from the proponent.

Greater accountability is needed. Many delays experienced by proponents are not accounted for or actively communicated by the regulator. Accordingly, service delivery (e.g. timely and effective service) should be included in regulator key performance indicators. Consideration should also be given to other incentive mechanisms, such as the ‘deemed decision’ approach identified as leading practice in the recent draft report of the PC review of resources sector regulation.⁵⁶

Specifically, a referral decision should be deemed to not be a controlled action, or a controlled action is deemed to be approved when statutory timeframes lapse without explanation and agreement with the proponent.

11.3. Consistent and robust national environmental data (Q15)

Australia does not have a reliable and consistent environmental dataset to support national or regional scale planning, national reporting on environmental conditions, policy development or decision making.

The absence of this critical information is not only detrimental to government’s capacity to make informed decisions; it also undermines the value and efficacy of cumulative impact assessment requirements under EIAs and results in a considerable cost to industry.

Because of the scale of environmental assessments and site-based and regional environmental monitoring programs, the industry is a steward of extensive data relating to a range of environmental values, including water and air quality and flora and fauna.

There is significant potential for this and other untapped data to be more broadly captured and shared to enhance knowledge and improve environmental decision-making.

A central repository of reliable and consistent environmental information would assist with:

- Project assessment and approval processes – ensuring regulators are making assessment and approval decisions based on the most up-to-date, consistent and credible information
- EIA processes – ensuring that proponents have access to existing environmental data, reducing the need to collect data multiple times
- Transparency – community can access environmental data and have confidence that decisions are being made on the best available information.

The Prime Minister’s November 2019 announcement to establish a biodiversity database with the Western Australian Government is an important first step.⁵⁷ The recognition by government of the need for improved data collection and sharing through the establishment of a national, publicly available integrated data platform to assist land use planning and decision makers is well aligned with

⁵⁵ J. Woodward (2016) [Regulatory Maturity Project Final Report](#), p. 9, 11

⁵⁶ Productivity Commission, [Resources Sector Regulation – Draft Report](#), Canberra, March 2020, p.40.

⁵⁷ www.pm.gov.au/media/new-measures-delivering-deregulation-australian-business

industry priorities.⁵⁸ This is outlined through key commitments made in the *Resources 2030 Taskforce Report*.⁵⁹

In designing an improved data program, the MCA supports Commonwealth consideration of the biodiversity data initiative led by the Western Australian Biodiversity Science Institute and the Western Australian Government. This initiative aims to capture data from EIA, government agencies, Natural Resource Management/catchment groups and the research community and establish common data standards, policies and incentives for data sharing while supporting data storage and archiving.

Data captured through this initiative is publicly available and will be curated and analysed, allowing it to be used as evidence to inform policy development and decision making. This will ultimately improve transparency, providing investment confidence and an informed community.⁶⁰

With the common platform in place, the MCA considers the Commonwealth should further invest in the collection of environmental data in partnership with state and territory governments. This data should be used to support State of the Environment reporting, assess key trends, opportunities for investment and inform development planning.

Data hierarchy

The Commonwealth has a range of general scientific information to draw on in assessing and approving a project referral under the EPBC Act. Given much of it is provided in the national context, it does not often recognise the regional variations across jurisdictions and changes over time. As such, it provides value as a default in the absence of any other site-specific information although its application is constrained.

However, there are a growing number of circumstances where site-specific technical studies and advice required by an EIA are not being well considered or are entirely disregarded in the Commonwealth's assessment. Often other out of date, inappropriately broad or unverified information is taking precedence. This is demonstrated by examples with respect to offsets in Appendix B.

Where site-specific studies undertaken for a project have been carried out in accordance with relevant methods agreed in writing upfront with the Commonwealth, these should always be recognised as the primary data source considered in the Commonwealth's assessment. Other sources should be considered by both proponents and Commonwealth subsequently in a hierarchy and outlined in supporting guidance material.

⁵⁸ Meeting of Environment Ministers, [Agreed Statement](#), Adelaide, 8 November 2019.

⁵⁹ Department of Industry, Science, Energy and Resources, [Resources 2030 Taskforce Report](#), Canberra, September 2018.

⁶⁰ Western Australia Biodiversity Science Institute, viewed 2 April 2020.

<https://wabsi.org.au/our-work/programs/biodiversity-data/>

12. ENHANCING COMMUNITY CONFIDENCE

- Consultation required under the EPBC Act is complicated and difficult to navigate. A lack of coordination between the EPBC Act and state/territory regulation often results in different timeframes and public consultation requirements, leading to duplicate consultation processes, confusion among stakeholders and community confidence being undermined.
- Community understanding and access to information can be improved through developing plain English information on assessment processes, access to national environmental data, early regulator engagement and establishing an online platform to track project approvals and clarify opportunities for community engagement.
- An integrated approach to community consultation would improve transparency of decision making and minimise objections and appeals. This can be supported by accessible risk-based and plain English EIA documentation.
- Community public consultation processes that meet both Commonwealth and state/territory requirements.

Effective community engagement underpins the acceptance of the mining industry across regional and remote Australia. This has evolved over past decades in line with improved understanding and the development of innovative approaches.

Consultation required under the EPBC Act is complicated and difficult to navigate, which can leave communities feeling alienated.

Complex assessment processes that often result in different timeframes and consultation requirements under the EPBC Act and state legislation mean that communities are often consulted twice on the same issue and exposed to processes that are unwieldy for consultants and engagement specialists let alone community members.

In addition, growing EIA requirements have resulted in thousands of pages of documentation which are often difficult to navigate and understand. This limits the ability for the community to understand the material risks posed by a given development and engage effectively in public consultation.

More than ever, interactions between companies, government and community that aim to increase understanding on all sides, build trust, and strengthen relationships are vital to both the approvals process and the long-term success of the project.

A comprehensive and integrated approach to community consultation would improve transparency of decision-making and minimise objections and appeals. Opportunities to improve community engagement include:

- Integrated public consultation processes encompassing Commonwealth and state requirements through one stream
- Risk-based EIA documentation focused on the most material risks
- Improved community access to plain English information on assessment processes, including clear guidance on when the community will be consulted, how to raise concerns, how concerns will be addressed and how to engage with companies to seek additional information
- Increased opportunity for community engagement by the regulator early in the assessment process
- More robust policy and guidance material that reduces complexity, makes processes more efficient and results in greater clarity for stakeholders
- Improved community access to environmental data to ensure an informed discussion

- Online platforms to track project approvals and provide clarity on opportunities for community engagement.

The Commonwealth should consider process pathway design tools such as those adopted by the NSW Government to communicate mining activity and decision making processes as an example of clear guidance to community on project assessment processes and opportunities for consultation.⁶¹

This should be supported by real-time project tracking to improve transparency for proponents and community and accountability for the regulator.

⁶¹ New South Wales Government, Planning and Environment, [Common Ground](https://commonground.nsw.gov.au), viewed 2 April 2020.
<<https://commonground.nsw.gov.au>>

APPENDIX A – INDUSTRY CONSERVATION INITIATIVES

Industry commitment to environmental conservation

The Australian minerals industry is committed to strong environmental performance, seeking to enhance environmental outcomes while maximising social and economic opportunity and community participation. This is shown by many conservation initiatives and partnerships with communities, non-governmental organisations (NGOs) and Indigenous organisations and communities.

Examples of conservation initiatives include species conservation and recovery projects, habitat restoration and the establishment of conservation reserves. They may be voluntary or aim to meet and exceed regulatory requirements. To illustrate industry achievements, examples of successful/leading practice in biodiversity and conservation management are provided below.

1. Conserving threatened species in the Western Australia desert (AngloGold Ashanti)

The Great Victoria Desert Biodiversity Trust was established as a condition of approval for the Tropicana Joint Venture gold mine under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999. While focusing on benefits to threatened species within the desert region, including sandhill dunnarts and malleefowl, the Trust also supports bioregional planning, facilitates priority research, funds on-ground land management initiatives, and enhances Traditional Owner involvement and capacity in land management activities.

Tropicana will contribute around \$4.4 million to the Trust over the life of the mine. A unique aspect of the initiative is its establishment as a Trust with the Public Trustee of Western Australia as the Trustee. A Technical Advisory Panel comprising representatives from environmental organisations, community and specialists advise the Trust. The governing body for the Trust includes a Management Panel comprising members from AngloGold Ashanti, the Regulator, and an independent Chair.

2. Management of ghost bats in the Pilbara (BHP)

Roosts for the ghost bat, Australia's largest carnivorous bat, were recorded in an area proposed for future mining disturbance in the Pilbara. Little was known about the bat's distribution and ecology, making it hard to assess potential impacts or management strategies.

Using new and modified technologies, the first population level study of the ghost bat in Australia using faecal DNA material was conducted. Roosts were mapped in three dimensions to develop and trial long-term artificial habitats to see if these could replace natural habitats. Study results will inform future environmental approvals for activities where impacts to ghost bats may occur. The results will also be made publicly available, as the techniques can be used for other species and locations.

Extensive collaboration helped the team address significant information gaps needed for biodiversity conservation and future environmental approvals, both of which could potentially constrain the mine plan. This collaboration has continued to build on the company's positive relationship with environmental regulators, research institutions and peers.

3. Five Rivers Reserve (BHP)

The Five Rivers Conservation Project in the remote Central Highlands of Tasmania is an innovative global partnership between Conservation International and BHP which has facilitated the conservation and ongoing management of 11,000 hectares of land by environmental NGO the Tasmanian Land Conservancy.

The Five Rivers Reserve incorporates open grassland valleys, old-growth forests and woodlands, native grasslands, cushion plants, endangered sphagnum moss beds and five natural river systems. It is habitat for endangered wildlife including the Tasmanian devil and Tasmanian wedge-tailed eagle and important species such as the Clarence galaxias fish not found in any other region on earth.

Substantial areas of the land are in or adjacent to the Tasmanian Wilderness World Heritage Area, and a neighbouring landscape-scale protected area is owned and managed by Tasmanian Aboriginal people for its natural and cultural values.

A critical component of the Five Rivers Conservation Project is the establishment of an efficient but effective long-term ecological monitoring program. This program has been designed to gather scientific data to inform conservation management using simple, repeatable and robust methodologies. In the future, the Five Rivers Reserve will become one of a network of national sites for long-term ecological monitoring across Australia.

This unique global partnership creates a world-class financially sustainable effective nature conservation management model at a landscape scale. During 2013 and 2014, the Five Rivers Conservation Project completed the design of its long-term financing mechanism, which has now been endowed. In addition to achieving formal conservation status, the project also sold its first carbon credits.

Conservation International and BHP provided critical expertise and financial support to protect the Five Rivers Reserve and the land is owned and managed by the Tasmanian Land Conservancy (TLC).

The TLC's vision is for Tasmania to be a global leader in nature conservation and sustainability. Its goal is to create a network of protected natural areas on private land that give long-term security for Tasmania's unique and threatened species and ecosystems.

TLC is a not for profit non-government science-based organisation established in 2001. TLC protects more than two per cent of Tasmania's private freehold land for nature.

4. Research partnership on subterranean fauna (Cameco, the Western Australian Biodiversity Science Institute and others)

Cameco has partnered with the Western Australian Biodiversity Science Institute (WABSI) to develop a research program into subterranean fauna (stygo fauna and troglotauna).

Assessment of subterranean environments have long been the cause of uncertainty and delays in environmental impact assessment processes, with the precautionary principle applied due to a lack of adequate species information.

Cameco undertook a protracted assessment process in 2015 for the development of a uranium mine in Western Australia. The process was complicated by a lack of information available on subterranean environments. Following project approval from the Western Australian Government, Cameco approached WABSI and proposed a research program to help close the knowledge gaps.

Since 2017, WABSI has been working with a range of partners including mining companies and government to address critical gaps in knowledge with a focus on:

- More accurate, efficient and consistent species identification processes to increase taxonomic certainty
- Improved sampling and survey protocols to optimise the efficiency of survey and monitoring
- Improved understanding of habitat requirements to better define distributions
- Improved understanding of resilience to disturbance to inform mitigation strategies
- Data discoverability and accessibility to provide spatial and temporal context.

The research program is a collaborative effort with expertise from multiple disciplines. In the medium to long term the outcomes of the work will be useful and significant for both the proponent and the regulator.

5. Northern Hairy Nose Wombat Recovery Project (Glencore)

Glencore volunteered to partner with the Queensland Department of Environment and Heritage Protection to airlift critically endangered northern hairy-nosed wombats from Epping Forest National Park to a new colony near St George in south-west Queensland.

The St George site was established with predator-proof fencing, starter wombat burrows, water and food stations, electrical and communication infrastructure, veterinary equipment, and predator, pest and weed removal. An environmentally sustainable ranger station was also constructed on site.

This dynamic reintroduction program is one of the most unique and important sustainable development projects in Australia's natural history.

The first northern hairy-nosed wombat joey was born in October 2011 and the current population is now around 200, up from 35 at its lowest point. With numbers slowly increasing, the establishment of further northern hairy-nosed wombat colonies will help to secure the survival of the species.

6. Freshwater Sawfish Monitoring – McArthur River Mine (Glencore)

Since 2007 McArthur River Mine (MRM) has conducted monitoring of the EPBC Act listed Freshwater Sawfish and other fish species occurring in the McArthur River and its tributaries.

Freshwater Sawfish monitoring began with conventional tagging and recapture methods, and since 2016 has gone beyond the conditional requirements with the addition of acoustic tagging and tracking – a leading practice within the industry. The acoustic monitoring has also been expanded to include Barramundi. Movement data for these species has improved significantly with real-time tracking of individuals now possible.

Results from recent monitoring programs include six tagged Freshwater Sawfish exhibiting a high degree of residency, generally remaining within the detection range of acoustic receivers within the McArthur River.

The results have provided invaluable insight into the temporal movements of the species, likely habitat and ability to migrate in the McArthur River including within the diverted section of the River.

Expert aquatic ecologist Dr Dean Thorburn of Indo-Pacific Environmental concludes in his recent monitoring report that 'migration of this individual upstream, and prolonged habitation within the modified section of the McArthur River, clearly indicates the environment created within the modified channel is conducive to survivorship and health of Freshwater Sawfish'.

7. Conservation and Land Management Program at McArthur River Mine (Glencore)

MRM's Conservation and Land Management (CALM) project is an initiative developed with the aim of providing local Indigenous employees with access to educational resources associated with land management.

The program is based around topics including weed management, water quality analysis and waterway health, native land regeneration and revegetation, seed collection, flora and fauna identification and safety within the workplace.

In 2018, MRM worked with staff and students of Borroloola High School to provide lessons and educational materials that aligned with Certificate I in Conservation and Land Management learning modules.

The program was facilitated by MRM through weekly staff visits to the school by members of the Environment Team who were able to draw upon their extensive environmental experience. In addition to the school visits, Borroloola High School students were invited to visit the mine site on multiple occasions. While on site, the students were able to experience hands on, real-world applications of what they were learning within the CALM program.

In 2019, MRM in collaboration with a local Indigenous ranger group the Garrawa Rangers developed a program to upskill local Indigenous trainees by providing pathways to complete a Certificate II in Conservation and Land Management through the Northern Territory Batchelor Institute of Indigenous Tertiary Education. Two local Indigenous people were chosen for the program, both of whom received extensive onsite training and attended group training workshops in Borroloola and a number of field excursions where Indigenous ranger groups were able to share their experience with the trainees. Both students were able to complete their studies and graduate with their Certificates.

The CALM program is designed to provide education and pathways for employment to the local Indigenous people of the Borroloola community. MRM is committed to the continuation and improvement of the program to provide further positive outcomes within the community.

8. Management of River Red Gums (*Eucalyptus camaldulensis*) through Fire Regimes Mount Isa Mines (Glencore)

River Red Gums (*Eucalyptus camaldulensis*) have a *Nature Conservation Act 1992* (Qld) status of 'endangered' and should not be burnt deliberately, but may be burnt in association with surrounding spinifex vegetation types.

In 2018 Mount Isa Mines (MIM) developed an updated fire management plan with a five-year cycle for ecosystem and asset management. MIM is implementing the five-year fire management plan and has identified land management zones to achieve ecological objectives. The burns are managed to ensure they are performed at appropriate intervals and intensity to maintain ecological function, mosaic of fuel ages and habitat types as part of an integrated weed management strategy.

In addition the fire management plan identifies strategic fire management zones as a control measure to reduce fuel load, therefore decreasing the intensity and rate of spread of a fire especially in areas closely aligned with assets and vehicle corridors. To mitigate against adverse impacts to biodiversity values due to frequent fires, strategic fire management zones should not be burnt more than once during the life of the fire management plan.

9. Restoring species-rich native grassy woodland in Eastern Gippsland (Kalbar)

Kalbar is in the pre-approval stage of an application for a mineral sands development in Victoria's Eastern Gippsland. As a voluntary commitment to go beyond regulatory restoration requirements, over the 15-20 year mine life, the company proposes to restore:

- 200 hectares of species-rich native Redgum Grassy Woodland at the Fingerboards site aiming for pre-European condition/state in an area that currently supports bluegum plantation forestry
- 350 hectares of slopes and gullies to complex native vegetation to increase faunal habitat value and improve stabilisation
- 700 hectares of grazing pasture to pre-mined condition, with the inclusion of native grasses to improve resilience to drought and fire.

Restoration will be supported by extensive faunal mitigation and landscape augmentation works to create habitat for recolonising or reintroduced faunal species. If the project is approved, this will be the single largest restoration of this type undertaken in Victoria and probably Australia, creating a major ecological asset for the region.

Although approval is still to be determined, Kalbar has supported restoration planning and action. This includes engaging a dedicated team focused on the restoration works. The team has undertaken one season of scouting the region for seed sources (remnant populations) and collection of small amounts of seed from more than 100 species which will be propagated and grown as seed production crops.

Establishment of a seed production facility is underway, which is intended to provide seed for a

second stage, 15 hectares seed production facility to be fully established within five years.

If successful, the seed production facility will be one of the largest and most complex in the country and will also be a key resource for community engagement (e.g. education and training).

This scale of restoration demonstrates a commitment to environmental values that goes well beyond regulatory or community expectations.

10. Eradicating a predator (Rio Tinto)

A unique environmental offset program established as part of Rio Tinto's US\$1.9 billion Amrun Project is returning positive results in protecting and preserving the region's endangered and vulnerable turtles by eradicating a major turtle nest predator.

Feral pigs specifically male boars are destructive to the early life cycle of marine turtle species that nest on the beaches near the Amrun Project in northern Australia. One male boar is capable of destroying up to ten turtle nests in just one night. With each turtle nest able to hold anywhere between 40 and 60 eggs, this predator is having a devastating impact on the local turtle population.

Before the project's feral pig management program began, up to 90 per cent of turtle hatchlings were lost to feral boars. The project has set itself a target of achieving a 70 per cent decrease in turtle nest destruction over three years, in a management program agreed to be implemented annually to 2063 for the life of the Amrun Mine.

The program includes aerial and ground-based shooting campaigns during peak turtle nesting periods and a year-long baiting program to support ongoing management of feral pig numbers. The management strategies are adaptive and used to safely and effectively eradicate the predators.

These activities are aimed at protecting and rebuilding the numbers of green, flatback, hawksbill and olive ridley turtle species, all of which are protected under the EPBC Act.

A Land & Sea management program has also been implemented as part of the project, which supports the local Wik-Waya Traditional Owners on whose land the Amrun project is being built to learn about and manage the impact of feral pig populations on turtles on the country.

11. Threatened species in the Western Cape (Rio Tinto)

Rio Tinto Alcan Weipa Pty Ltd (RTAW) are involved with a number of research projects on the threatened wildlife found throughout the Western Cape. RTAW develops, implements and manages dedicated research programs with guidance and support from universities, conservation groups, private landowners and consultants through formal and informal partnerships.

Red Goshawk

Rio Tinto, the University of Queensland, the Department of Environment and Science and the Australian Wildlife Conservancy have recently entered into a partnership with a full-time PhD student researching the Red Goshawk. The aim of this research is to gain an understanding of what's causing their range contraction, determine individual home range/ habitat selection (through GPS tracking) and establish breeding success (using in-nest cameras). This will help guide current and future operations through sustainable management practices with minimal impact to the species.

Palm Cockatoo

The Palm Cockatoo is Australia's largest parrot, renowned for the use of branches as tools and for drumming on the nesting hollows. These birds successfully breed around the active mines and broader mining leases, with over 15 monitored annually. RTAW has a dedicated Palm Cockatoo researcher investigating breeding success through nest monitoring, population monitoring through bio-acoustic recording and how to increase rehabilitation use with supplementary nesting hollow installation. The co-existence of mining operations and a viable Palm Cockatoo population forms the basis of RTAW's commitment to the species' conservation and management.

Northern Quoll

The Northern Quoll is a medium-sized carnivorous marsupial with a small population located at Trukpayn at Weipa. RTAW has monitored this population since its discovery in 2013 and now works in partnership with Charles Darwin University to continue the research. This includes a trapping, tagging and tracking study alongside intensive camera monitoring.

The RTAW mining lease plays host to one of only three known quoll populations left in Cape York. Their decline, initially caused by the introduction of cane toads to Queensland, is compounded by competition with introduced species and poor burning practices.

RTAW helps manage the species through the implementation of a cat culling program and prescribed early-season burns to reduce the effects of hotter, late season wildfires on den and food availability. This research program will gauge how effective the land management controls have been in preserving the population and to establish ways to predict habitat use by the species.

Black-footed Tree Rat

This is a large arboreal rat species found across northern Australia, with this subspecies found only in Cape York. Increased detection of this species across operational areas has led to a trapping and tagging study to better understand habitat use in both native and rehabilitated areas. This program is still in its infancy but will aim to deliver a similar management guidance as used at Rio Tinto Gove with a balance between protection and production.

A further detection program using local ecologists is being deployed across areas of the broader lease to establish presence and abundance. From this, an effective management program can be produced to help guide further development.

Speartooth Shark and Sawfish

RTAW, the University of Queensland and Sharks and Rays Australia have established a research partnership to improve current knowledge of the Speartooth Shark and sawfish usage of areas surrounding the Wenlock, Ducie and Skardon Rivers, Port Musgrave and the eastern Gulf of Carpentaria region.

Inshore Dolphins

As part of the Amrun project Commonwealth approval requirements an inshore dolphin research program has been implemented. Surveys have been undertaken in 2014 and from 2016 to 2019. There are a number of dolphin and whale species that have been identified during the surveys. This research is making a valuable contribution in understanding inshore dolphin habitat utilisation.

APPENDIX B – ENVIRONMENTAL OFFSETS ADMINISTRATION

1. Improved administration of the offsets policy

There are a number of administrative issues associated with the application of the EPBC Act offsets policy. These are outlined in Table 2 along with recommendations for improvement. However, in order to drive meaningful changes to the administration of offsets the Commonwealth should:

- Adopt a risk-based, outcomes-focused assessment and conditioning approach (see Section 7)
- Develop and publish better guidance to support policies, systems and tools relevant to applicable audiences (see sections 7 and 11)
- Investment to enhance regulator capability, capacity and service delivery (see Section 11).

Table 2: Recommended changes to administration of EPBC Act environmental offsets

Issue	Summary of issue	Recommendation
Inconsistency in the interpretation of the offsets policy	Different projects dealing with the same Matters of National Environmental Significance (MNES) have found different assessment officers interpret the policy differently which can lead to noticeably varying offset requirements. See case study in Box 14.	All core reform recommendations. Appoint a single high-level officer to be made responsible for coordinating and reviewing offset assessments.
Divergence in the determination of attribute requirements	Attribute requirements have been interpreted so strictly as to not allow for habitat improvements. This has left proponents with little choice but to lock up existing habitat, instead of restoring a potentially larger area of degraded habitat which may be more beneficial to the MNES and other environmental values in the longer term.	Adopt a risk-based, outcomes-focused assessment and conditioning approach. Develop and publish better guidance. Changes should be made to the policy to reflect the need for flexible offsets requirements that reflect the best possible environmental outcome, taking into account regional priorities and contribution to resilient ecosystems.
Contradictory information	Official data sources which support the determination of offset requirements can contain contradictory information. Specifically, information contained in listing advice, species recovery plans and the species profile and threats database can be inconsistent (e.g. habitat type or coverage). There is also no hierarchy of precedence for these documents, resulting in confusion for both proponents and regulators (see also Section 4 of this Appendix).	Official data sources should be reconciled to ensure consistency. A hierarchy of precedence for these documents should be determined. Develop and publish better guidance.
Unnecessary prescription	Unnecessary prescription in approvals and management plans is leading to restrictions and fewer cost effective outcomes.	Adopt a risk-based, outcomes-focused assessment and conditioning approach.
Minor modifications	Minor modifications to offset plans require a formal variation to the EPBC Approval. This creates unnecessary administrative burden on both departmental resources and proponents.	Flexibility is required to allow the Minister to approve minor modifications without needing to formally vary EPBC approval.
Lengthy timeframes for management plans approvals	Timeframes for approving management plans (after the primary approval) have been excessive. This can result in uncertainty for proponents.	Statutory timeframes for post-approval processes.

2. Application of the Offsets Calculator

In recent years, companies have experienced inconsistency in the regulator's interpretation and assessment of risk of loss (ROL), habitat descriptions and habitat quality and condition – all of which are highly influential inputs to the offsets calculator.

This shift has not been justified to proponents or included in any departmental guidance. It has also had significant impacts on the timeliness of processing applications/documents, driven larger offset quantum not founded in science (see also Section 4 of this Appendix) and resulted in increased costs.

Box 12: Case study – Habitat descriptions

Over recent years, the department has expanded on habitat descriptions for select species creating a marked shift from accepted science relied upon for previous approvals.

For the Squatter Pigeon, the department now considers foraging habitat to be within 3km of any permanent or seasonal water source, including first and second order streams, waterholes and artificial dams. Cattle troughs and plastic-lined dams are not considered to be seasonal or permanent water bodies.

This revised habitat description is a substantive shift from what was accepted in past approvals – grassy woodland habitat which is included within any Queensland Regional Ecosystem on Land Zone 3, 5, or 7, which is either within 1km of a permanent water body; or within 1km of a wetland or a ≥ 3 order stream (as mapped by the Queensland Government).

For the Ornamental Snake, the department now considers that dispersal corridors (i.e. any area, regardless of the presence of any important Ornamental Snake habitat or microhabitat features or preferred soil types, between impact areas) to support distribution need to be accounted for in addition to moist areas, cracking clay and gilgai habitat.

Again, this revised habitat description is a substantive shift from what was accepted in past approvals – woodland or open forest habitat which is included within any Queensland Regional Ecosystem on Land Zone 4 and supports gilgai (melon-hole) mounds and depressions; or woodland or open forest habitat which is included within any Queensland Regional Ecosystem on Land Zone 3 or 4, or an area of mapped regrowth on Land Zone 3 or 4, which is within 200m of a mapped wetland or a ≥ 4 order stream (as mapped by the Queensland Government) and supports an abundance of fallen logs (>30 cm in diameter) of >10 per 100 m x 100 m sample plot.

Continuing changes without sound scientific justification, and often during the assessment process are creating uncertainty and significantly affecting project timelines, resources, offset quantum and costs. As such, it is becoming a key factor undermining Australia's investment attractiveness.

Box 13: Case study – Risk of Loss (ROL)

Averting the loss of a protected matter or its habitat is considered to deliver a conservation gain where there is an immediate threat of destruction or degradation, and the ROL of that given site is averted by securing its future for conservation purposes (for example through a conservation covenant on the title of the land). In the *Offsets assessment guide*, considering future risks to a specific site in order to quantify averted loss is undertaken over either a 20-year timeframe or for the duration of the offset, whichever is the shorter period.

For many post-approval applications and preliminary documentation submitted since late 2017, the department has indicated that unless permanent removal of the habitat can be demonstrated (e.g. for infrastructure) a ROL of zero per cent will only be accepted for the respective offset area.

This is despite:

- The department recognising a high ROL (e.g. 90 or 100 per cent), where appropriate and relevant in approvals before late 2017
- The proponent demonstrating a high risk that the land will be re-cleared and not return to a threatened ecological community or habitat in a 20-year period by means of past landholder records, historic aerial imagery and land use information, and landholder statements demonstrating intent to continue clearing into the foreseeable future
- Existing use rights under both state/territory legislation and the EPBC Act.

In line with the concerns raised in Section 4 of this Appendix, site-specific information is being either disregarded or not well considered in the Commonwealth assessment. Instead, the department is proceeding with its own discretionary and risk-averse approach. This shift in interpretation and application remains unjustified and (as above) continues to impact on current applications and investments.

The calculator also fails to account for regional context when determining offset requirements which can lead to poor outcomes. A range of factors can improve the value of an offset such as placement, connectivity and size (consolidation of multiple offsets). Accounting for these features would enhance resilience and the potential for multiple environmental benefits while enabling the proponent to achieve better value for money.

The Regulatory Maturity Project, which examined the Environment Protection Group (EPG, including the then Department of Environment), found that:

...many policies and guidance documents were out of date and difficult to understand or apply. As a result there is a low degree of confidence that policies and guidance documents are being applied consistently.⁶²

From the resources sector's perspective this is relevant to both the offsets policy and calculator. The guidance materials for the offsets calculator should be improved, adding appropriate detail (where currently absent or unclear) to ensure consistency and predictability of outcomes.

Such guidance should be developed in consultation with the resources sector and other industries and published for transparency. Measures to improve the administration of the EPBC Act outlined in Section 1 of this appendix will also aid the use and assessment of the offsets calculator.

3. Conditioning

In line with Section 7.7 of this submission, there is a need for risk-based, outcomes-focused conditioning generally and for the management and monitoring of offsets.

Offsets are conditioned to be legally secured and managed and monitored by the proponent for the duration of the impact. However, this is not reflective of the outcomes delivered at the offset site, which occurs on a separate timeline. Rather, projects should have outcomes-focused conditioning.

This would mean that once the relevant outcome as agreed in completion criteria has been achieved and demonstrated, active management should cease unless monitoring indicates the need for spot remediation. This is consistent with the approach taken for rehabilitation at the impact site and is intended to test self-sustainability. Monitoring frequency should also remain adaptable in conditioning, particularly for restoration works as the upward rate of change in condition slows over time.

For staged and advanced offsets, where an offset site has been contractually secured for the purpose of delivering compensation in a stepped approach over time, there have been cases of varying management and monitoring conditions for the same or adjoining offset sites.

⁶² J. Woodward (2016) [Regulatory Maturity Project Final Report](#), p. 10

Box 14: Case study – Inconsistent conditioning of offsets

A Queensland open-cut coal project is undertaking a staged offset approach as its operations advance. Between November 2016 and February 2020, the proponent has submitted four Biodiversity Offset Management Plans (BOMPs) to the regulator for approval. All four BOMPs related to offsets adjacent to one another on the same property for the same matters.

Since submitting the first BOMP, each subsequent plan has been modelled off the previously approved plan. However, the department's assessing officers have had significantly different approaches to conditioning management actions, corrective triggers and monitoring for each plan, with the exception of the most recent submission. It should be noted that all four BOMPs have had different assessing officers and three have had different senior departmental oversight. This has resulted in significant variations in conditioning from one plan to the next.

The most significant changes to management action, corrective triggers and monitoring conditions occurred from the first BOMP approved in January 2017 to the second BOMP, which was submitted in November 2017. Monitoring was expanded significantly with the introduction of targeted species surveys and annual ecological assessments for the first five years of the offset. All monitoring periods were also extended to cover the life of the approval. It should be noted that from first submission to approval, the process took around 18 months.

The conditions for the third BOMP were changed again with expanded management actions, by including additional criteria, and more prescriptive corrective triggers.

Due to inconsistent administration from the department and staff turnover (outlined in Section 11.1 of this submission), the first three BOMPs for the project ended up with significantly different monitoring and management conditions for adjacent areas within the same offset property. This does not drive a strategic or holistic approach for the offset; instead, it creates on-ground implementation inefficiencies, added costs and misalignment in desired outcomes.

In order to deliver the best environmental outcome for the relevant matter/s, it is critical that the conditioning for management plans and monitoring actions be consistent for the whole of site.

4. Data hierarchy

As provided in Section 11.3 of this submission, the Commonwealth has a range of general scientific information to draw upon and consider in assessing and approving a project referral under the EPBC Act. For the assessment of ecology and the development of offsets, the following are frequently referred to:

- Register of Critical Habitat
- Species Profile and Threats Database (SPRAT)
- Conservation advice
- Recovery and threat abatement plans
- Species-specific guidelines.

Given much of it is provided in the national context, it does not often recognise the regional variations in species and communities across jurisdictions and changes over time. As such, it provides value as a default in the absence of any other site-specific information although its application is constrained.

However, studies of site-specific ecology or species undertaken by suitably qualified professionals (required by an EIA) are increasingly either disregarded or are not well considered in the Commonwealth's assessment. Other data which can be out of date, inappropriately broad or unverified will often take precedence.

Despite the availability of site-specific data determined by a qualified ecologist, the Commonwealth has disregarded this information to pursue a discretionary and potentially less reliable approach, including:

- Using their own desktop research to set habitat descriptions and extent
- Developing pre-determined inputs for the offsets calculator.

Box 15: Case Study – Failure to consider ecological advice

For a Queensland open-cut coal expansion project application submitted in March 2018, the Department of Environment and Energy required greater glider habitat to be expanded from riparian corridors to having the same definitions as applied to koalas.

The department suggested that regional ecosystems dominated by acacia, bullock and *micromyrtis* (a shrub) should also be classed as greater glider habitat in line with that of the koala. In applying this habitat description, it increased the proponent's predicted disturbance by 175%.

However, the Conservation Advice for the greater glider clearly states that the species' habitat is 'largely restricted to eucalypt forests and woodlands'. Eucalypt forests and woodlands are, by definition, dominated by eucalypts. It is difficult to see how woodlands or forests with eucalypts at low densities would contain suitable habitat for the species. In this instance, the department has disregarded its own Conservation Advice.

In addition, ecologists with over 25 years' experience have only seen the greater glider in Central Queensland associated with riparian vegetation.

Where site-specific ecology studies undertaken for a project have been carried out in accordance with relevant methods agreed upfront with the Commonwealth, these should always be recognised as the primary data source considered in the Commonwealth's assessment. Other sources should be subsequently considered by both proponents and Commonwealth in a hierarchy and outlined in supporting guidance material.

5. Contributing mine site rehabilitation as offsets

Currently, the offsets policy does not provide a flexible pathway to enable the consideration of rehabilitated areas in developing an offset proposal for the same or a different project.

In contrast, under the New South Wales *Biodiversity Conservation Act 2016* and the [Biodiversity Conservation Regulation 2017](#) (Part 6 Biodiversity Offsets Scheme), mining proponents can meet some or all of their offset requirements by providing site rehabilitation. In doing so, proponents have an obligation to undertake site ecological rehabilitation to offset or compensate for an impact that:

has the same credit value (determined in accordance with the ancillary rules) as the retirement for like-for-like biodiversity credits.

The ancillary rules:

set out the standards for the ecological rehabilitation of sites impacted by carrying out of mining under a mining lease and the credit value of any such rehabilitation.

The generation of credits or the value of the site ecological rehabilitation is undertaken in the same manner as is done at an offset site, except that the value of the start-point is zero, whereas a typical offset site will start with a low or high value depending on the condition of the biodiversity present. There is no cap on the use of site ecological rehabilitation, only that it will generate credits/value at a lower rate per hectare than a typical offset site.

Under the *Queensland Environmental Offsets Policy General Guide*:

land that has been rehabilitated as a result of an authority requirement for one project can be used as an offset for a different project once the rehabilitation works have been completed to the satisfaction of the authority condition.⁶³

By recognising land rehabilitated to a relevant vegetation community as an offset, it also ensures environmental values and outcomes including connectivity are maintained and secured locally (within the project boundary) as opposed to being delivered further afield.

This approach also has the potential to leave the land on which the activity occurred in a better condition than prior to disturbance. For example, if degraded farmland is mined and a post-mining native threatened ecological community is then established, this should be accounted for by establishing an offset (in part at least) for loss of similar vegetation elsewhere on the site.

Having regard to the existing government-accepted position that mine site rehabilitation can contribute as offsets in New South Wales and Queensland, the offsets policy should be amended to afford the same opportunity.

⁶³ State of Queensland, Department of Environment and Science, [Queensland Environmental Offsets Policy General Guide \(version 1.2\)](#), 2017, p.15