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## Independent Review of the EPBC Act 1999

The Port Phillip Emergency Climate Action Network (PECAN) was formed in September 2019. A number of environment and community groups in the municipality of Port Phillip joined together to form a network underpinned by the shared realization that we are indeed facing a climate emergency.

PECAN is a representative rather than membership based organization; the parent organizations have a collective membership and mailing list base of over 8,000 individuals.

At the time of PECAN's formation the bushfires which devastated so much of Australia had just started; they followed major floods in Queensland earlier in 2019, while drought continued across most of the continent. At the same time we witnessed the Murray Darling system in crisis, and now widespread coral bleaching is occurring in the Great Barrier Reef, extending into the Coral Sea.

We hope that this review will remain cognizant of the multiple adverse impacts climate change has brought to Australia in just the last 12 months, and that it will be able to respond positively by recommending legislative changes which will place climate change at the centre of the Act; we consider that legislation which is silent on the fundamental cause of so much environmental damage is inherently self-contradictory.

To address our major concern with the current Act more directly, we hope that at a minimum the review can include the following recommendations:

- Recognizing climate change as the overriding objective of the Act;

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- Listing climate change as a Matter of National Environmental Significance (NMES);
- Listing greenhouse gas emissions as a new trigger for assessment under the Act.

Our substantive arguments supporting these recommendations are presented in the detailed submission accompanying this cover letter.

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Question 1: Some have argued that past changes to the EPBC to add new matters of National Environmental Significance did not go far enough.

The current nine matters of national environmental significance have proved inadequate in dealing with extensive species loss and endangerment. Land clearing has reached critical levels, greenhouse gas emissions are rising at a rate inconsistent with Australia's obligations under the Paris agreement, and water management systems are incapable of preventing serious damage to key components of Australia's water resource.

In one of the key measures, species extinction, Australia's record since European settlement is possibly the worst in the world. 60 plant species and 50 animal species have become extinct, including 35% of global mammalian extinctions since 1500. Many of these extinctions have occurred in the last two decades. The respective roles of Commonwealth and States often lead to overlap and duplication and there is little emphasis on long-term planning through bioregional and strategic plans against which projects can be assessed. The cumulative impact of decisions made on a project-by-project basis is often problematic. Within this fragmented system the duplicated assessment roles of Commonwealth and States lead to increased costs and time delays. Without the development of measurable outcomes which the Act should require all parties to achieve, outcomes across major environmental indices (pests and weeds, native flora and fauna, soils and freshwater) are all worse than when the Commonwealth first adopted environmental legislation forty years ago. Vulnerable ecological communities receive no statutory protection while vulnerable species receive less protection than those that are endangered or critically endangered. The number of species listed as vulnerable when the Act commenced was 679; since then it has increased to 792 in July 2019, an increase of 17%, and 41 species have moved from vulnerable listing to endangered or critically endangered categories.

We therefore believe that the existing trigger for listed endangered or critically endangered ecological communities be extended to include vulnerable ecological communities.

#### **Land Clearing**

Australia's east coast is designated as a global deforestation hotspot; only 50% of Australia's forest and bushland remains intact. In addition to over 12million ha of critical forest and bush in the 2019/20 bushfires, over 500,000 ha are cleared in Australia annually. Over 480,000 ha has been cleared in the

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Great Barrier Reef river catchments, leading to increased sediment and fertilizer runoff and compounding the damage caused to coral formations by increased water temperatures. Apart from habitat loss, greenhouse emissions from agriculture, forestry and land clearing make up about 22% of global emissions; annual emissions from deforestation including logging native forests are equivalent to half the total of greenhouse gases derived from coal annually. Trees and other plants each year sequester about a third of all global emissions. Reforestation can have many benefits beyond carbon removal, such as improved soil fertility, habitat provision, flood mitigation and better air and water quality. Afforestation provides similar benefits.

At present, the EPBC Act is only concerned where it can be established that it impacts a directly protected entity such as a World Heritage area, Ramsar wetland, threatened species, ecological community or migratory species. Without this connection no environmental assessment can be made under the EPBC Act, meaning significant environmental damage is still permissible.

PECAN considers that it is imperative that the Act incorporates a land clearing trigger, in order to prevent the ongoing loss of forest and bush and particularly areas of High Conservation Value Vegetation. Incorporation of such a trigger would not only act to preserve natural biodiversity, but would also significantly reduce greenhouse emissions.

#### **Water Resources Trigger**

At present water resources are listed in the Act only in respect of the impact on them of coal mining and coal seam gas projects. It is not clear that the existing trigger is being adequately applied. Last year, the Federal Court found that the minister had erred in not giving due weight to water issues in relation to the Adani mine. Since then, the Minister has reaffirmed the decision not to apply the water trigger on the grounds that the North Galilee Water Scheme is not a 'coal mining activity' and therefore not subject to the water trigger. Despite this, leading hydroecologists have given evidence that there is a strong likelihood that Adani operations will have multiple adverse impacts on the Suttor River floodplain ecosystem and on the groundwater systems that farmers depend on. It is noteworthy that most of Australia's groundwater systems are considered to be in poor condition, and the interactions between surface and groundwater systems are in many cases not well understood.

The Minister's actions in exercising discretionary powers raise fundamental questions about the adequacy of the water trigger. Many decisions around coal mining and other forms of resource extraction are

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inevitably politically charged, and the Minister is placed under enormous pressure to ensure the project's approval. Critical decisions of this kind should not be made on a discretionary basis, and highlight the need for a new independent body. We believe that the Act's operation would be strengthened by the creation of an independent National Environment Commission reporting annually to the Parliament on the state of the environment and providing detailed assessments of the Act's operation over the preceding year. The Commission would require its own budget and staff and would not be subject to Ministerial direction. It would be responsible for developing national objectives, strategies and plans and standards, and be capable of dealing with the three tiers of government.

PECAN considers that the operation of the water trigger should be more broadly extended to assess significant impacts on important surface and groundwater systems. In addition we contend that the Act would be strengthened by the development of an independent National Environment Commission.

### **Greenhouse Gas Emissions**

The independent Hawke review of the EPBC Act in 2009 recommended that if the Carbon Pollution Reduction Scheme (CPRS) then envisaged was adopted, then a greenhouse trigger would not be required. Until such a scheme was introduced it recommended that the Government implement an interim greenhouse trigger under the Act, to be introduced as soon as possible by way of regulation, to sunset upon commencement of the CPRS.

No CPRS or equivalent is in operation, and the absence of any other protection in the Act against the most damaging cause of climate change and its impact on environmental systems represents the most fundamental gap in the current Act. Regardless of other provisions in the Act, the omission of a greenhouse trigger voids the intent and the objectives of the legislation.

Apart from the necessity of integrating a national emissions control measure with other measures in the Act, Australia's Kyoto and Paris commitments require that we must significantly reduce emissions if we are to avoid global temperature increase beyond 1.5C. While the Act cannot become the principal national mechanism used to avoid excessive emissions, a new EPBC trigger must link our carbon accounting and emissions reduction with assessment and development conditions mechanisms, applied to both strategic assessment and bioregional planning processes and also with individual project assessments.

We consider that the Act should be broadened by the addition of a greenhouse gas emissions trigger.

## Question 2: How could the principle of ecologically sustainable development be better reflected in the EPBC Act?

Ecologically sustainable development requires the integration of environmental, economic, social and equity issues, by use of the following key principles:

**Precautionary Principle:** Where a level of scientific uncertainty exists, approvals should not be given where significant irreversible harm could follow.

**Biodiversity principle:** ensuring that conservation of biodiversity and ecological integrity are central in decision making.

**Intergenerational equity:** the present generation should maintain the health diversity and productivity of the environment for the benefit of future generations.

**Effective valuation, pricing and incentive mechanisms:** ensuring that environmental benefits are properly accounted and valued in decision making, for both current and future generations, and that user-pays principles are applied where waste, degradation and pollution occur.

Additional ESD principles should be adopted, as follows:

**Best Practice in Environmental Protection** - better outcomes in environmental protection could be achieved by mandating best practice standards in environmental management, incorporating best scientific knowledge, and adopting a non-regression principle in respect of standards, goals and policies.

**Cost-benefit analysis** in the case of project developments which impact the environment is subject to a number of limitations. Given its reliance on monetization it is often difficult to effectively value, for example, the loss of particular species - a small fish species, or an insect population. The value placed on such losses is not equally shared across the population broadly, and there may be value within an ecological system at present not properly understood or recognized. The precautionary principle may be invoked in these cases. Secondly, many components of our energy and agricultural systems have developed over many years without the true costs becoming apparent until many years and even decades later – for example, fossil fuels' production of greenhouse gases, or irrigation's impact on riverine species

and associated ecosystems. To be really useful, it is essential that cost benefit analysis is able to properly value all costs both at current and future levels.

### Question 3: Should the objects of the EPBC Act be more specific?

As it stands, the objects of the EPBC Act are sufficient in their specificity. They cover a wide breadth of aspects of environmental governance and exist as important foundations upon which legislation can be built. There are, however, opportunities for the objects to be strengthened and expanded.

We argue that the primary object of the EPBC Act should emphasise the need *to conserve, protect and recover Australia's natural environment, with specific reference to natural and cultural heritage; biological diversity including genes, species and ecosystems; land and waters; and the life supporting functions of and benefits to Australian society that the environment provides.*

Further, to ensure the objects are well-rounded and extend to governing mechanisms of the EPBC Act, a range of secondary objects should be added. These may include:

- To provide national leadership on the environment;
- To recover, prevent the extinction or further endangerment of Australians plants and animals and their habitats;
- To recognise Aboriginal and Torres Strait Islander peoples' knowledge and stewardship of country, and foster the involvement of First Australians in land management, expanding ongoing and consensual use of traditional ecological knowledge;
- To advocate for ecologically sustainable development, with particular reference to climate change, reference to which is a notable and concerning absence of the existing legislation;
- To ensure fair and efficient decision making;
- To ensure decision making is fair and efficient, governments are accountable for their responsibilities to the environment, and decision making processes are transparent;
- To enable community participation in a meaningful and integrated manner; and
- To fulfil Australia's international environmental obligations and responsibilities.

#### Question 4: Should matters of National Environmental Significance within the EPBC Act be changed? How?

A number of new matters of national importance should be added to the Act. The current nine matters of national significance should be retained, but to be effective the scope of the Act needs to be broadened in a number of areas.

First, as stated in our response to Q1, we believe that significant greenhouse gas emissions control measures need to be added. Global emissions of greenhouse gases remain on an unsustainable trajectory, and Australia's own Paris commitment is manifestly inadequate. Increased global warming impacts every critical part of the Australian environment, and national environmental legislation which does not properly assess greenhouse emitting projects within its purview is fundamentally flawed.

The further measures we see as important are as follows:

The need for a land clearing trigger – please see our more detailed response under Q1

A water resources trigger – again, we have provided a more detailed response in Q1

Ecosystems of National Importance trigger – these may not be threatened at present but listing them would ensure their condition is not allowed to deteriorate.

Vulnerable Ecological Communities trigger – the existing trigger for endangered or critical communities should be extended to include vulnerable ecological communities.

National Parks and Reserves trigger – the National Reserve System is not currently recognized under the Act, and listing it could be accompanied by the development of a set of national goals to enable a comprehensive framework of Australia's marine and land based ecosystems.

#### Question 5: Which elements of the EPBC Act should be priorities for reform?

There are a number of areas requiring urgent prioritisation for reform. The most immediate priority must be the inclusion of considerations around climate change mitigation and adaptation in every relevant aspect of the EPBC Act. Climate change is already causing unprecedented destruction of ecosystems, the impact of which is set to intensify without urgent and transformative action. That climate change is almost entirely absent from Australia's national body of environmental legislation must change.

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In addition to reform to include provisions for climate change throughout the EPBC, further priorities can be divided into several broad areas. They are not listed here in any rank of importance, rather intended as broad areas of focus with equal weight for concurrent reform.

*Implement a National Environment Plan:* the Commonwealth must develop an overarching plan for Australia's environment. It should include national priorities, goals and metrics to protect and restore the environment. Central to this plan must be significant and urgent action on climate change.

*Redesign Environmental Impact Assessment procedure and expand protections for National Environment Matters:* redesign of regulatory and approvals processes to ensure efficiency, effectiveness, and consideration of cumulative impacts. Existing inefficiencies are one of the key factors preventing the EPBC Act from providing effective environmental protection and regulation, and redesigning the approvals processes and clearly defining responsibilities at various levels of government will help mitigate this issue. This should also include an expanded list of NEM for which the Commonwealth has regulatory responsibility.

*Implement specific environment plans:* the design of a number of different, distinct plans for various areas of the environment guiding how processes are to be conducted. For example, recovery plans, bioregional plans, and pollution abatement plans are all areas for which plans can be designed, outlining holistic governance for these particular areas of the environment. Plans should be interrelated and not completely isolated.

*Determine and implement national standards and targets:* identifying standards and targets where a plan is not created. Emphasis on a non-regression principle to prevent goals being weakened by states or successive governments, and state laws must not override or undermine national standards.

*Establish an independent regulatory body:* the establishment of an independent regulatory authority, such as a National Environment Commission, tasked with conducting approvals and assessment, tracking environmental indicators, data gathering and reporting. These results should be transparent and freely available, and open to community input.

Question 6: What high level concerns should the review focus on? For example should there be greater focus on better guidance on the EPBC Act, including clear environment standards? How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation? What have been the economic costs associated with the operation and administration of the EPBC Act?

### **High Level Concerns**

The role of the Commonwealth is unclear in terms of fundamental responsibility for environmental protection and biodiversity conservation and in fulfilling Australia's international obligations. "Cooperative Federalism" can be seen at its worst in the EPBC, with responsibilities distributed across the three levels of government, but no single entity in charge of coordinating and integrating an effective national response.

Dr Peter Burnett describes this situation as follows: "What are we trying to achieve? Neither the EPBC Act itself, nor the policy or explanatory documents that surrounded it, answer this question. The Act does include goals such as ecologically sustainable development, but expresses them in qualified language and leaves it open to decision-makers to simply pay lip service to them." We support the many organizations who have called for a new Act, rather than piecemeal attempts to add additional functions, objectives and mechanisms onto the existing legislation. A new Act must place environmental protection and biodiversity as the bedrock of the legislation and at a minimum must include a greenhouse gas trigger, land clearing trigger and a trigger or other mechanism to ensure that the cumulative effect of separate project applications and approvals can be properly assessed.

### **New Authorities**

Accompanying a new Act, we support the establishment of a new National Environment Commission and a National Environment Protection Authority, both bodies to be independent of Ministerial control. The Commission would be responsible for setting national objectives and standards, as well as national strategies and plans.

The EPA would be responsible for assessments, approvals and enforcement, and would operate independently of the government, and would advise the Minister on particular projects.

### **Community participation**

Community participation in decision making is important in maintaining accountability and transparency, but proponents of projects often complain that community and third -party intervention is inimical to efficient processing of applications. Available evidence suggests otherwise; evaluation of civilian actions between 2000 and 2015 suggest that the social costs were negligible, civilian actions were very infrequent, and the effect of successful actions was usually negated by subsequent executive action, and such actions generally caused minimal delays in project completion.

We strongly oppose the proposition that community and third party standing provisions under the Act should be wound back or subjected to any new restrictions.

### **Is the Act achieving its Statutory Objectives?**

It is apparent that the EPBC is failing to protect Australia's environment on many key indices. The Hawke review of 2009 made over 70 recommendations for improvements in the Act, but very few of them had been implemented before the demise of the Rudd/Gillard government. The incoming government put increasing emphasis on delegation to the States, the so-called one-stop-shop, regardless of the capacity within the States to carry out effective assessment and approval processes and leading to wide variations in standards between States and Territories. The next major review of the Act in 2016, the State of the Environment Report, described declining biodiversity, increased land clearing, pressures from coal mining and the coal seam gas industry, and habitat fragmentation and degradation. Between 2011 and 2016 the list of nationally threatened species and ecological communities increased with 30 new ecological communities listed, together with 44 animal species and 5 plant species.

ANU's annual report on Australia's Environment 2019 presents a devastating picture through its National Environmental Condition Score, at its lowest since 2000, decreasing from 3.1 out of 10 in 2018 to 0.8 last year, with declines in all States. To list some of these measures, the number of days with temperatures over 35 degrees increased by 35%, rainfall was down 40%, river flows decreased by 43%, soil moisture by 11%, plant growth by 17%, and the number of threatened species increased by 14%. Sea ice globally decreased by 7% against the 2000 – 2018 average; per capita greenhouse gas emissions at 20.8tCO<sub>2</sub>e were at levels 1.2 times those of the US. Australia had its lowest rainfall in 119 years and its hottest year on record. Bushfires destroyed 30% of the habitat of 191 species and killed an estimated 1billion vertebrates. Another 40 species were added to the Threatened Species list.

In a further measure of the Act's effectiveness, research linking Australia's forest and woodland data with the distributions of 1,638 threatened species and ecological communities showed that since the EPBC Act came into force land clearing had resulted in the loss of over 7.7million ha of potential habitat and communities in the period 2000 – 2017. Of this amount of land clearing, over 93% was not referred to the EPBC for assessment.

In short, the Act is not meeting its stated objectives, and does not address the fundamental issue of global warming, which is having a disproportionate impact on environmental conditions in Australia.

### **Economic costs**

Perhaps this issue can be addressed through the lens of false economies. Writing in Australasian Science, Dr Peter Burnett, a senior bureaucrat in the Dept of Environment from 2000 to 2013 and now teaching at the ANU, comments as follows:

“How do we ensure that the Act is funded so that it can meet its goals? The EPBC Act has never been properly funded, going right back to the time when its principal architect, Environment Minister Robert Hill, was unable to secure additional funding. This is one reason why several major mechanisms under the existing Act, including bioregional planning and grants for information-gathering, have been little used.”

In considering the loss and damage to so much of Australia's biodiversity and ecological assets, it is hard to avoid the conclusion that had the Act functioned effectively through adequate resourcing, as well as other necessary structural and administrative changes, much of this loss could have been avoided. It is not, and cannot be properly valued, within the scope of the present Act and the way it is administered.

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

The impacts of climate change on ecosystems will become only more frequent and more destructive in coming years. With this in mind, considerations for climate change must be firmly embedded at the core of all components of the EPBC.

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This may be facilitated through the implementation of a National Ecosystems Assessment initiative, such as modelled on the United Kingdom's legislation. This program would exist as a tool to inform planning and decision-making within the Act, with key elements including:

- Thorough and rapid initial assessment of the environment to identify areas under immediate and extreme threat;
- Supporting the Minister's management of Threatened Ecological Communities;
- Identification and governance of expanded matters of national environmental significance ;
- Thorough resourcing for mapping Australia's biodiversity and managing data;
- Better informed bioregional planning;
- Establishment of a national standard of environmental protection; and
- Promoting the concept of ecosystem services and emphasising the benefits of the natural environment for human society.

The assessment should have a mandate for review and reassessment at regular intervals to ensure ongoing effectiveness. In light of ongoing challenges facing Australia's environment - most recently, mass bleaching of the Great Barrier Reef and an unprecedented bushfire season - an assessment of this kind is vital to ensuring the most vulnerable ecosystems are protected, and that Australia's environment overall is adequately supported to thrive.

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

The EPBC Act should regulate both, as a dual regulatory approach ensures holistic and consistent environmental governance. Existing environmental and heritage outcomes must be strengthened, and legislation of processes must be sufficiently strong to enable environmental protection, yet flexible enough to allow for innovation and the incorporation of evolving best-practice methods

To strengthen outcomes for the environment, the Commonwealth must establish and implement a national standard of environmental protection. This measure sets the standard for stakeholders, and states and territories to adhere to when making decisions concerning the environment, and should be a binding agreement. Additionally, the Commonwealth should maintain primary responsibility for an expanded list of matters of NES, and primary responsibility for environmental impact assessments.

Delegation to states is undesirable, as this inhibits the effectiveness of a national standard. Where delegation must occur, it should occur under bilateral agreement, and states and territories should only be granted powers of assessment, completed by independent assessors. The power of approval must remain with the Commonwealth.

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

The Commonwealth must take stronger action in delivering environmental and heritage outcomes, as outlined in our responses to Questions 1 and 6. We believe that its role and objectives must be strengthened, that new authoritative bodies are required, and that the Commonwealth must take a stronger role in coordinating its actions with the responsibilities of the States and Territories.

The Act does not currently specify clear goals, objectives and outcomes and we consider that outcomes should be specified by the new National Environment Commission, in collaboration with Threatened Species Scientific Committees and other advisory bodies. The Act should require the preparation of long-term biodiversity goals, standards, indicators and reporting. Goals must be measurable and be set with relevant timelines, and the aggregated material needs to be publicly available online, including compliance and enforcement data.

The National Environment Commission should also be required to prepare an independent State of the Environment Report and a National Sustainability Outcomes report, to be presented to Parliament on a regular basis. Further, as recommended by the Hawke review, the Environment Commission should establish a system of National Environment Accounts, which would report conditions and trends across key natural resources and assets.

Question 10: Should there be a greater role for national environmental standards in achieving the outcomes the EPBC Act seeks to achieve? In our Federated system should they be prescribed through:

- Non-binding policy and strategies?
- Expansion of targeted Standards, similar to the approach to site contamination under the National Environment Protection Council, or water quality in the Great Barrier Reef catchments?
- The development of broad environmental standards with the Commonwealth taking a monitoring and assurance role? Does the information exist to do this?

Without operational national standards, goals and metrics it is impossible for the Act to set desirable outcomes. A new Act must establish these parameters through the development of National Plans, which would establish these standards and goals and require regular reporting to underpin policy setting and development. The Plans would include bioregional plans, recovery plans, threat abatement plans, pollution abatement plans and management plans for Ecosystems of National Importance. Goals should include biodiversity retention, focussing on species and ecosystem protection including recovery plans where necessary, and should use non-regression principles to set a requirement for positive outcomes – for example, improvements in the categorization of threatened species, no deterioration in the condition of the Great Barrier Reef, as determined by markers such as coral bleaching, water quality and agricultural runoff. The Act should specify how National Plans are developed and implemented and require that they should be regularly reviewed and updated to ensure their continued relevance and improvement.

We do not support any form of self regulation. In an environment where compliance is weakly enforced and given the numerous examples of the failure of self-regulation, it is hard to see any place for such a system in an area where strong standards and compliance measures are necessary.

## Question 11: How can environmental protection and environmental restoration be best achieved together?

Restoration is vital to the health of ecosystems and biodiversity. Damage done to the environment decades ago continues to impact affected ecosystems today. It is not enough to simply prevent damage; effective environmental protection entails prevention as well as restoration of degradation. Further, the EPBC Act has consistently failed to enforce meaningful restoration of the environment where it has been damaged or polluted by industrial and commercial activities, which must be addressed.

Recovery plans are the central tool through which the EPBC Act can provide better environmental restoration and recovery. The current EPBC Act details the development of recovery plans, but lacks enforcement, implementation, funding and review mechanisms, meaning recovery plans are often ineffective. The legislation around recovery plans must therefore be expanded to address these absent components. This expanded legislation should include mechanisms such as:

- Recovery plan development for threatened species and ecosystems informed by best available science;
- Identification and advanced protection of critical habitat;
- Better guidance for decision makers regarding the impact of projects on threatened species and ecosystems, including expanded research and monitoring capacity;
- Establishing a national recovery fund that invests directly in recovery plan implementation and priority actions; and
- Development of a framework to assess and monitor effectiveness of Recovery Plans, including mandated annual reporting and auditing of plan implementation and performance.

Though recovery planning is primarily an instrument of national legislation, states and territories must also be obliged to assist and/or lead on plan implementation. Recovery plans should be developed with consideration of environmental outcomes outlined by a national standard for environmental protection. This ensures the state of the environment in recovery can be measured.

Threat abatement planning must also be strengthened, and include detailed advice regarding threat abatement actions and mandatory obligations on parties. Underscoring threat abatement planning is the

need for greater investment in research: without sufficient data, threats cannot be adequately identified and responded to. This includes a consistent regime for monitoring and reporting. There should be an annual monitoring system and obligation for state and territory governments to implement plans.

Importantly, reviews must be conducted at greater frequency than five yearly. Ideally, annual reviews must be implemented to monitor the state of threatened ecosystems. Historically, five years has proven vastly too long, and there are a number of cases in which species have become extinct between review periods, as emerging threats were not identified.

Integrated within the legislation concerning environmental protection and recovery must be mechanisms for consultation with Aboriginal and Torres Strait Islander people. The advice from these consultations must occupy a primary position within the plans, operating in tandem with other expert information. It is also pertinent that First Nations people be involved in conducting the actions in the plan where relevant. The design of such a mechanism to include Aboriginal and Torres Strait Islander people requires extensive consideration and cooperation with First Nations people in order to be effective and ensure meaningful participation.

Question 12: Are heritage management plans and associated incentives sensible mechanisms to improve? How can the EPBC Act adequately represent Indigenous culturally important places? Should protection and management be place-based instead of values based?

Recognising and supporting the central role held by Aboriginal and Torres Strait Islander people in environmental stewardship is one of the EPBC Act's main objects and, therefore, must be prioritised and fully developed. Establishing mechanisms within the EPBC Act which enshrine Indigenous land management and consensual knowledge-sharing is an important action. These mechanisms must be designed in consultation with First Nations people, and may include:

- An Indigenous Land and Waters Commissioner, and an Indigenous Cultural Heritage Advisory Council;
- Requirements for free, prior and informed consent (FPIC); and

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- Formal legal recognition of Indigenous Protected Areas (IPAs) as a matter of national environmental significance, with guaranteed, long-term funding.

Place-based protection better acknowledges IPAs, which cover an extensive amount of the National Reserve System, and make a large contribution to Australia's international environmental obligations on protected areas.

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

Strategic assessments can provide more rigour for both Commonwealth and State governments in assessing environmental impacts on a broader scale than would apply to single project assessments, and to take account of the cumulative impact of numbers of single projects over time. Assessments of this kind, if able to meet stringent standards set by the Commonwealth, can be carried out by State governments without the requirement of a separate Commonwealth assessment, and can provide sound environmental outcomes and more certainty for business. Strategic assessments would not replace project assessments, but would provide comprehensive data about the particular region, set thresholds for project impacts, and provide clear rules against which single projects could be assessed.

Strategic assessments must be accompanied by rigorous and transparent outcome goals and targets based on best scientific knowledge, setting minimum standards and with requirements specifying the improvement or at least maintenance of existing environmental conditions, with clear rules and threshold requirements, and ongoing monitoring and evaluation. Strategic assessments would need to be accredited by the National Environment Commission, and would need to provide guidelines for the way in which the Commonwealth's assessment standards and principles should be integrated with State and Local government planning schemes. Community confidence should be ensured by enabling public participation at all stages of project assessments and approvals, as well as post-approval compliance stages.

Question 14: Should the matters of national significance be refined to remove duplication between different levels of government? Should states be delegated to deliver EPBC Act outcomes subject to national standards?

In Q13 we have discussed the way in which properly developed Strategic Assessments enable project assessments to be carried out by State governments, provided accreditation has been granted at Commonwealth level and the assessment is rigorously conducted within the parameters set by the Commonwealth.

Standards vary between States and a new Act should give the Commonwealth power to set new binding goals and standards for the States so that consistently higher standards are applied nationally.

We cannot support broad delegation of environmental approvals to the States and Territories. Bilateral agreements between Commonwealth and States can also be supported where the State's role is confined to the assessment process; all approvals for nationally significant matters should remain with the Commonwealth. With undisputed acknowledgement that widespread environmental degradation has been occurring and that urgent new measures are required at National level to reverse this process, any increased devolving of Commonwealth responsibilities to the States would inevitably lead to even worse outcomes than are occurring currently.

Question 15: Should low-risk projects receive automatic approval or be exempt in some way?

Allowing low-risk projects to proceed with automatic approval undermines the primary object of the EPBC Act to protect the environment, and does not enable cumulative assessment of environmental impact. There are a few solutions, however, that will dramatically improve the current assessment and approvals process.

A national environmental database is an invaluable tool for not only improving the efficiency of environmental impact assessments, but also for broad monitoring and management of the state of the environment. This data should be used to inform all decision-making, and should also be made available to the public. An absence of readily available and comprehensive data is at present a significant impediment for Australia's environmental laws.

Strengthening the guidelines around project assessment is another process that will improve environmental impact assessments. This relies on a comprehensive body of data, and subsequent actions including:

- Listing Ecosystems of National Importance;
- Five-yearly assessments of these ecosystems; and
- A new system of bioregional plans.

**Question 16: Should the Commonwealth's regulatory role under the EPBC Act focus on habitat management at a landscape scale rather than species-specific protections?**

The Commonwealth is able to make bioregional plans, but has not used them to date for land assessments. The basic elements of a bioregional plan are:

- A **map of critical biodiversity areas**, which are terrestrial and aquatic features critical for conserving biodiversity and maintaining ecosystem functioning, and which should thus remain in their natural state.
- **Accompanying land-use guidelines** for avoiding loss or degradation of natural habitat in critical biodiversity areas.

Bioregional plans should be used to provide practical guidelines for environmental protection at a regional level. They can inform land-use planning and decision-making by a range of sectors whose policies and decisions impact on biodiversity. This is done through providing a map of biodiversity priorities with accompanying land-use planning and decision-making guidelines. They would be integrated with urban and environmental planning at State and Territory levels. Significant assets like Ramsar wetlands, critical habitat and National Heritage places would receive much stronger protection by the use of bioregional plans, and stronger provisions within the Act could identify critical areas where development should not occur.

The Act should detail the essential components of bioregional plans, including non-regression principles, provision for community engagement, integration with other Commonwealth and State and Territory planning frameworks, and monitoring and evaluation requirements. The Act should clearly state the purpose of bioregional plans and the goals of obtaining positive biodiversity outcomes at national and regional scale. The

Environment Commission should have the responsibility of identifying the need for regional plans and coordinating their development with Commonwealth and State agencies.

### Question 17: Should the EPBC Act be amended to enable broader accreditation of state and territory, local and other processes?

We have addressed this in Q's 10,13 and 14, and throughout this response we have emphasized that Australia has one of the world's worst histories in terms of species extinction and both terrestrial and marine resource degradation.

In 2014 the Parliament passed legislation which established a one-stop-shop approval process accrediting State assessment and approval processes for nationally protected environmental matters.

We now effectively have a two-part system, with the Commonwealth responsible for matters of National Environmental Significance and the States responsible for environmental matters within their boundaries. The result is a mismatch, with no overriding authority at national level, and no effective coordination between Commonwealth and States, and no one in charge.

The failure of the current legislation can be seen in the extinction and land clearing figures, but the essential nature of these problems can be seen in the figures already cited for the clearing of potential habitat and communities of 7.7million ha up to 2017; 93% of this total area was not scrutinized by the Commonwealth for approval.

The need for national leadership and standard setting is urgent and unavoidable and has consistently been recognized by previous State of the Environment Reports. It is essential that the Act establishes a stronger role for the Commonwealth in standard setting, ensuring that positive environmental outcomes are achieved, and that Australia is meeting its international obligations.

We do not support any continuation of the present system involving delegation of approval processes to the States.

Question 18: Are there adequate incentives to give the community confidence in self-regulation?

No. The only circumstances where self regulation can work effectively is where the following measures are in place:

A strong legislative or regulatory system with high outcome requirements and where any exercise of discretion is prohibited;

Strong and universal compliance capacity;

Strong penalties which disincentivise any breaches.

Consistent with our responses to Questions 10, 13 and 14, we believe it is impossible in practice to administer a system with all of these properties, and in our view self regulation cannot be supported.

Question 19: How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management?

This question must be addressed in deep consultation with Aboriginal and Torres Strait Islander people. As an organisation with no members of Indigenous heritage, our commentary must only be supplementary to these consultations.

Similar to question 12, the EPBC Act should establish new mechanisms to enshrine the participation of First Nations people. These mechanisms are:

- An Indigenous Land and Waters Commissioner, and an Indigenous Cultural Heritage Advisory Council;
- Requirements for free, prior and informed consent (FPIC); and
- Formal legal recognition of Indigenous Protected Areas (IPAs) as a matter of national environmental significance, with guaranteed, long-term funding.

The systemic exclusion of Aboriginal and Torres Strait Islander people from government is a problem that extends beyond the reach of the EPBC Act. However, given the primacy of the relationship between Aboriginal and Torres Strait Islander people and the environment, the Act has the opportunity to set a high standard of participation upon which all government departments, industries and organisations can

model inclusion. This must include identifying and addressing barriers to engagement and ensuring that Indigenous representation is centralised within legislation.

Question 20: How should community involvement in decision-making under the EPBC Act be improved? For example, should community representation in environmental advisory and decision-making bodies be increased?

Community participation is a crucial component of strong democracy broadly. For environmental governance, it is especially important to ensure public trust and confidence in decision making, and to increase accountability and transparency of decisions made and those who make them. For the EPBC to provide for a high standard of public participation, the following safeguards must be implemented:

- Strong provisions for public participation;
- Merits review for key decisions;
- Easily accessible public information;
- Open standing to review legal errors and enforce non-compliance; and

### **Strong provisions for public participation**

Community involvement must be a central tenet of the Act, and facilitated at all stages of the decision making process. The Act should include a mandate that decisions are informed by community input, and community submissions should be considered on par with other sources of information. The Minister and/or Department should provide statements of reasons for decisions, to enable better dialogue with the community.

### **Merits review for key decisions**

A number of reviews recommend the provision of standing for the community to seek merits reviews of key decisions, particularly those with impacts on biodiversity. All decision makers involved in the given decision would need to be subject to the review, and all significant decisions must include a statement of reasons. The key purpose of a merits review is accountability, to ensure that decision makers are adhering

to protections enforced by the Act, and that appropriate redress is available where these protections are violated or the decision making process is conducted without appropriate consideration.

### **Accessible public information**

A significant barrier for community participation in environmental decision making is the absence of accessible, comprehensive information on actions, assessments and decisions. This information must be made available to preserve both community engagement and transparency in the decision making process. Public registers located online are likely to be the most efficient vehicle for delivering accessible information.

### **Open standing to review legal errors**

For community participation to be meaningful, the Act must enshrine processes for the public to seek review of legal errors or breaches of legislation. This is best achieved through open standing, which allows the public to seek review without the need to anticipate or mitigate barriers such as the significant cost of legal action. Further, open standing strengthens the integrity of the decision making process and ensures accountability.

A pervasive argument against expanding community participation mechanisms is the claim that such participation enables disruptive and time-consuming litigation. As aforementioned, this claim has been thoroughly debunked. In most instances of community initiated litigation, the legal and procedural barriers have been so extensive that the community has either abandoned its pursuit or had to settle for insufficient redress. This highlights the urgency with which community participation must be strengthened.

Question 21: What is the priority for reform to governance arrangements? The decision-making structures or the transparency of decisions? Should the decision makers under the EPBC Act be supported by different governance arrangements?

As stated throughout this submission, after 20 years of operation and numerous reviews specifying the areas in which the Act is failing, we believe that priority should be given to a new Act which will require new institutions, and new processes.

### **New Institutions**

The first requirement is the establishment of a National Environment Commission which would develop national goals, plans and standards, have oversight and advisory functions, would have its own staff and budget, and be independent of Ministerial and Departmental direction. It would negotiate with all levels of government and would be responsible for the development of National Environment Accounts, and other reporting mechanisms to ensure that environment conditions and trends are publicly disseminated.

Second, a National Environment Protection Authority, which would replace the current National Environmental Protection Measures with enforceable and integrated national standards. It would carry out environmental impact assessments of projects where matters of national environmental significance are concerned. It would be responsible for post-approval oversight of project implementation and compliance, and monitoring and reporting on project and plan outcomes.

### **Improved Decision Making**

The exercise of Ministerial discretion has been a problematic issue for many years. In the main, use of this discretion has been tipped towards support for mining and development projects, and its use does not facilitate community access to review of such decisions. Recent issues around the Adani coal mining development highlight the problems caused by discretionary decision making in a highly politicised situation.

The use of Ministerial discretion should be limited by changes in the Act to ensure that Ministerial actions must be consistent with meeting the Act's goals and objectives, incorporate the requirement that such decisions maintain or improve environmental values and ecological character of protected matters, and are also consistent with ESD principles.

The Act also needs to be strengthened to ensure that all decisions – not just those of the Minister – are consistent with meeting the Act's goals, and the Act must specify points at which major decisions have to be made and the criteria that must be applied to them– critical habitat identification, controlled threshold actions, listing decisions, recovery planning and bioregional planning.

### **Community rights**

Decision making around mining and resource extraction processes is an area where there is extensive public and community distrust about government decision making. Restoring community trust in these processes requires that public access to judicial review or independent tribunals is available. It is often claimed by industry groups that granting a public right to seek judicial review would be abused by community groups. In fact, development proponents use appeal rights more frequently than community groups.

Changes to the Act to ensure greater accountability and transparency would require provision of open standing for a person to seek review of government decisions, the extension of legal standing to merits review, protection for costs for cases brought in the public interest, and the right to seek court orders requiring performance of mandatory duties.

### **Adequate Resource Provision**

Together with the range of essential legislative changes discussed throughout this submission, adequate staffing and other resourcing is necessary in arresting the continuing process of environmental degradation, threatened species and species extinction recorded by successive reviews and State of the Environment reports, where recommendations have identified the need for greatly increased resources.

Question 22: What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?

In its current state, the EPBC Act is ill-equipped to deliver the intended outcomes of the Act. A number of new mechanisms and provisions are required to enable effective and meaningful environmental protection. These include the establishment of an independent, National Environmental Commission; the implementation of a clear national standard of environmental protection; an online monitoring and reporting hub; public inquiries, and; the enshrining of a non-regression principle. The former two have already been discussed in length, however the latter are novel suggestions for discussion here.

### **Online hub**

The absence of sufficient data is an issue with two problematic offshoots. Firstly, without sufficient and updated information, environmental decisions cannot be made effectively. Secondly, community participation is significantly inhibited without easily accessible information.

An online hub should be established as the 'go-to' location for environmental data and information on planning, assessments and decisions. It should consolidate a range of accessible, reliable and up to date information at both the Commonwealth and state and territory level.

### **Public inquiries**

One of the primary objects of the Act is to prevent threatened ecosystems and the extinction and endangerment of species. The performance of the EPBC Act on this object is deplorable, in that environmental outcomes have trended downward since the Act's inception. Where the Act fails to protect species from extinction, the Act should include provisions for formal inquiry akin to coronial inquests into human deaths. These inquiries should be conducted by a panel of experts to determine the factors which lead to extinction, and devise recommendations on future conservation management to prevent further extinctions.

### **Non-regression principle**

Environmental governance has been plagued by inconsistent, constantly changing decisions and standards. The principle of non-regression requires that environmental protection standards set by governments are not withdrawn by future governments. The principle would address the problem of inconsistency by ensuring that decisions are forward-binding and entail meaningful commitment to environmental protection. For effective implementation, it should be included as a component of a national standard of environmental protection.

Question 23: Should the Commonwealth establish new environmental markets?

Should the Commonwealth implement a trust fund for environmental outcomes?

Biodiversity offsetting of impacts on critical or threatened habitats, ecosystems and species should not be permitted under the Act. This acknowledges the necessity of limiting offsetting; some parts of the environment are too valuable, and impacts too unpredictable, to permit offsetting damage. This also operates under a preventative, rather than redressal, approach to environmental protection, which is a key principle in international environmental law. Restricting offsetting also compels actors to develop innovative means of preventing harm to the environment, where offsetting would otherwise be an easier option.

Where offsetting is permitted as a last resort option, it should be guided by a strict national offset policy that sets firm standards and restrictions for offsetting. Elements of the policy should include:

- Requirement that offsets are a last resort option;
- Offsets informed by science and in as near-identical an ecosystem as the one impacted;
- Offsets should be protected in perpetuity, and protection measures should be bound on a long-term basis rather than immediate or short term to ensure the integrity of the offset;
- Emphasis the precautionary principle;
- Mines should be exempt from offsetting permission, as there is little evidence supporting successful remediation; and
- Offsetting activities are in line with existing recovery plans for the area.

A trust fund is a worthwhile mechanism, in conjunction with a comprehensive strategy for its function and use. This may be outlined in a strategy plan that is integrated within the EPBC Act and national environment plans to ensure best use.

**Question 24: What do you see are the key opportunities to improve the current system of environmental offsetting under the EPBC Act?**

Environmental offsets are frequently proposed by environmental assessors employed by the development's proponents. They are not independent or committed to full scientific rigor in formulating offsets. The Act should not enable biodiversity offsets in cases of critical habitat, endangered or critically endangered species and ecological communities, in recognition of the issue that some resources are too important to be offset. Biodiversity offsets where proposed should be assessed against the precautionary principle, given the uncertainty about long-term outcomes. The Act should incorporate a National Offsets Policy based on established science and with nationally consistent standards, incorporating the following principles: like for like biodiversity principles and a maintain or improve standard for outcomes; in perpetuity protection; usage of offsets as a matter of last resort; and no use of offsets in cases of mine remediation, where there is no evidence that satisfactory outcomes can be achieved.

**Question 25: How could private sector and philanthropic investment in the environment be best supported by the EPBC Act?**

Establishing a financial program within the EPBC Act may support private sector and philanthropic investment in the environment. The Environmental Defenders Office refers to a Capital Funds Conservation Program, which would receive capital contributions and donations and forward this money to landholders to conduct restorative and protective activities. There should be clear guidelines around use of the program's funds, with priority given to threatened ecological communities, critical habitat management and other matters of national environmental significance. Financial support should be provided to initiate conservation activities and sustain them long-term.

A system of market mechanisms may also stimulate private and philanthropic investment in the environment. Central to this system should be the polluter pays principle, which imposes financial penalties on polluters. The system should be designed to promote environmental conservation, emissions reduction and other environmental priorities through rewarding innovation, to incentivise autonomous

action on behalf of landholders, companies and other actors. This should be balanced by a strong penalty system, to place fiscal responsibility (among other restorative and protective elements) on the actor responsible for negligence. Strong enforcement mechanisms must be implemented in tandem with this system to ensure its effectiveness.

Question 26: Do you have suggested improvements to the above principles? How should they be applied during the review and in future reform?

PECAN supports these broad principles as the foundation for the EPBC Act's review. For them to be successful, thorough detail for their application must be included in the legislation. The Act should also include reference to principles of international environmental law, including:

- Precautionary principles: precautionary actions against actions that could have serious impacts, even though the evidence is incomplete;
- Intragenerational and intergenerational equity: environment is preserved for the benefit of future generations, and environmental costs, benefits and outcomes are borne equally across society;
- Prevention of harm: prevention action against actions likely to harm the environment and human health;
- Environmental values principle: ensuring the true value of the environment is accounted for in decision making;
- Polluter pays: those responsible for environmental degradation must bear the costs of recovery; and
- Biodiversity principle: biodiversity and ecological integrity are central to decision making, with the primary aim of preventing extinction.

To support these, additional principles of non-regression and resilience should be considered.

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