Environmental Defenders Office

Submission on the draft Environmental Protection Regulations (Bilateral Agreements) Regulations 2021 (WA)

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About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Department of Water and Environmental Regulation (WA)

Sent via email only: bilateralregulations@dwer.wa.gov.au

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Draft Environmental Protection (Bilateral Agreements) Regulations 2021

The Environmental Defenders Office (**EDO**) welcomes the opportunity to provide comment on the draft *Environmental Protection (Bilateral Agreements) Regulations 2021.* We understand that the proposed regulations are a step in implementing the 2020 amendments to the *Environmental Protection Act 1986* (**EP Act**) to provide for a person to apply for a matter to be considered a 'bilateral matter' under a bilateral agreement. We note both general and specific concerns with this approach.

General concerns

We note that the proposed regulations are intended to apply to proposals that may come under the existing WA assessment bilateral agreement (2014) and any future approval bilateral agreement in WA. The overriding assumption is that assessment (and potentially approval) under the *Environment Protection & Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is not needed where impact assessment is done under accredited WA laws.

EDO has raised concerns with the proposed handover of environmental approval powers to states and territories including WA, both directly with the WA department, and through extensive engagement with the Independent Review of the EPBC Act in 2020 (**Samuel Review**). On behalf of the Places You Love alliance we have undertaken detailed legal analysis of WA laws to assess whether the current laws meet existing standards for matters of national environmental significance. It is our expert assessment that WA laws currently do not meet existing EPBC Act standards, and significant reform is needed at the state level before accreditation can be considered. The analysis is provided as an **Attachment**.[i] EDO will be making a detailed submission to this effect on any proposed approval bilateral agreement when exhibited for consultation.

In this respect, the proposed regulations are pre-empting passage of the necessary legislation at the federal level. The *EPBC Amendment (Streamlining Environmental Approvals) Bill 2020* and the *EPBC Amendment (Standards and Assurance) Bill 2021*, have not passed the Senate and have been subject to significant criticism through parliamentary inquiries due to concerns about environmental outcomes.[ii]

The regulations are also pre-empting finalisation of national environmental standards – the fundamental requirement recommended by the Samuel Review. Should WA proceed with negotiating an approval bilateral agreement based on the current settings of the EPBC Act (which the Samuel Review found to be vastly inadequate), it is likely that the agreement would be short-lived and require further and continued negotiations to ensure WA laws meet the agreed national environmental standards.

EDO recommends that regulations should be drafted and consulted upon when there is more clarity about the federal legislative framework for accreditation and legally enforceable national environmental standards have been made.

Specific Concerns

The proposed regulations are relatively brief and procedural, however, we raise the following concerns.

- **Reg 4 (3) and (4)** give discretion to accept late applications for potential bilateral matters. It is unclear how late in the assessment process a project could be declared a bilateral matter and effectively exempted from further federal assessment. The criteria for exercising this discretion is not clear or objective – it merely requires regard to be had to the extent of functions exercised. The Explanatory Memorandum states "This recognises that the later in the process that a bilateral application is received, the less likely it is that it will be accepted as the requirements of the bilateral agreement may no longer be able to be met, or it may not be reasonable or practicable to do so", but it is unclear where the line will be drawn. This provision also lacks transparency – there is no requirement for the relevant State Entity to publish the reasons for its decisions to accept late applications.

- **Reg 5** requires bilateral applications to be in writing in the approved form and contain any information required as indicated in the form. The Explanatory Memorandum for the regulations refers to the need to provide information about impacts on matters of national environmental significance, but it is unclear what level of detail is required. The Explanatory Memorandum simply states: "Examples of information that may be required on an approved form include: • Information about whether a matter fits within the scope of a relevant bilateral agreement • Information regarding potential impacts to matters of national environmental significance." The level of detail required in relation to potential impacts on MNES (and assessment undertaken) is absolutely critical.

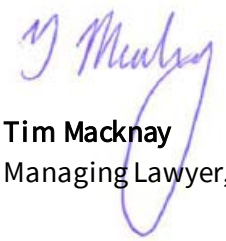
Further, it is unclear what is the legal status of a bilateral matter once the application is processed, and it is unclear what level of transparency and public scrutiny there will be for the proposed process. The proposed regulations are brief and missing important details.

In summary, EDO holds both general and specific concerns about the draft regulations as part of the proposed handover of federal environmental approval powers. We recommend that proposals to facilitate accreditation of WA laws should not pre-empt the development of robust and legally enforceable national environmental standards.

Devolution of approval powers based on existing EPBC Act requirements in the short term will not create durability or certainty for WA industry, business or community, as national environmental standards will not be finalised for at least 2 years based on the current proposed pathway, necessitating continual amendment of WA legislation and regulations.

EDO would be happy to discuss our concerns in further detail. If you require further information please contact tim.macknay@edo.org.au.

Yours sincerely,
Environmental Defenders Office



Tim Macknay
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Attachment:
Effectiveness of WA Environmental Protection Laws, EDO Analysis for the Places You Love Alliance, July 2021

[i] See also: Devolving Extinction: The risks of handing environmental responsibilities to state & territories - Environmental Defenders Office (edo.org.au)
[ii] See: Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 – Parliament of Australia (aph.gov.au) and Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 – Parliament of Australia (aph.gov.au).

Environmental Defenders Office

Effectiveness of WA Environmental Protection Laws

Analysis for the Places You Love Alliance, July 2021

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Executive Summary

Western Australia is home to biodiversity and cultural heritage found nowhere else. WA has three natural World Heritage properties, seventeen National Heritage places, twelve Ramsar wetland sites and 582 threatened species and 25 ecological communities that are listed under the federal *Environment Protection & Biodiversity Conservation Act 1999* (**EPBC Act**).

Many of these matters of national (and international) environmental and cultural significance are in declining health or under threat, including from habitat clearing[1], major project development, industrial pollution and climate change. For example, the Murujuga Cultural Landscape, a part of the Dampier Peninsula National Heritage Place and recently placed on the tentative list of the UNESCO World Heritage register, is experiencing deterioration due to air pollution from neighbouring industrial facilities.[2] Climate change has already caused a significant drying of south-west WA, placing "significant additional pressures on water resources, flora and fauna, marine environmental quality, and social surroundings."[3] An example is the declining condition of the Peel-Yalgorup Ramsar wetland site.[4] The destruction of 46,000 year old caves at the Juukan Gorge by Rio Tinto in the Pilbara region of Western Australia, with statutory approval, starkly demonstrates the current risks to Aboriginal cultural heritage in WA.

These environmental and cultural assets of national and international significance are not adequately protected by current WA laws.

A recent independent statutory review of the EPBC Act identified the need for significant reforms based on the strengthening of national environmental standards for environmental decision-makers and an associated suite of transparency, participation, accountability and data reforms.

Despite the Review findings and recommendations, the Commonwealth Government is proposing to devolve the power to approve actions under the EPBC Act to the states and territories based on current laws. The Western Australian Government has indicated its strong support for this proposal through the national cabinet process and bilaterally, however, neither government has undertaken any meaningful analysis of whether Western Australia's laws are fit for this purpose.

In this report, Environmental Defenders Office (**EDO**) assesses the adequacy of Western Australia's environment, planning laws and cultural heritage laws against the key requirements of the EPBC Act. We conclude that Western Australia's laws do not adequately meet these national requirements. For example, current WA laws:

- do not require decisions to be made consistently with Australia's international obligations under conventions such as those relating to World Heritage, biological diversity and wetlands, and treaties on migratory birds and other species;

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[1] Substantial areas of land continue to be cleared in WA, without adequate processes for reporting or monitoring the state and condition of native vegetation. The WA government's *Native Vegetation Issues Paper* acknowledges this, stating: *"In some local government areas, more than 93 per cent of the original vegetation is lost (DBCA 2018), including clearing of up to 97 per cent of some woodland areas (Bradshaw 2012). This situation has led to the State's Environmental Protection Authority identifying clearing and degradation of native vegetation as a key threat to Western Australia's biodiversity (e.g. EPA 2017)." See:* https://dwer.wa.gov.au/sites/default/files/NV_issues_paper_FINAL.pdf p 2.

[2] https://www.der.wa.gov.au/images/documents/our-work/consultation/Burrup-Rock-Art/Theoretical-effects-of-emissions-on-rock-art.Black-MacLeod-Smith.pdf

[3] Environmental Protection Authority (**EPA**), *Environmental Factor Guideline: Greenhouse Gas Emissions, see:* https://www.wa.gov.au/sites/default/files/2020-12/Western_Australian_Climate_Policy.pdf p 3.

[4] See also: https://www.water.wa.gov.au/water-topics/waterways/assessing-waterway-health/catchment-nutrient-reports; and https://peel-harvey.org.au/wp-content/uploads/2020/03/Baseline-Report-Card_final.pdf.

- do not require consideration of impacts on all federally listed threatened species and threatened vegetation communities;
- do not provide equivalent extended standing for third parties to seek the judicial review of project decisions;
- do not provide for merit review to an independent tribunal;
- do not require decisions on projects for which the Western Australian Government is the proponent to be made by an independent decision-maker; and
- do not effectively protect Aboriginal Cultural heritage.

This means that if the EPBC Act approvals functions are devolved to the Western Australia, the three World Heritage-listed properties, seventeen National Heritage places, twelve ten Ramsar wetlands, 582 threatened species and 25 threatened ecological communities, and immeasurable Aboriginal cultural heritage would not be adequately protected in line with our international obligations.

Further, while current WA laws do provide certain requirements for community participation, they do not incorporate the full suite of necessary assurance standards to provide transparency, accountability and access to justice available under the EPBC Act. This means it will be difficult to take action to ensure these iconic matters of national significance are effectively protected in WA.

This Report is prepared by EDO for the Places You Love alliance, and analyses current WA laws against seven factors: protection of matters of national environmental significance (**MNES**), protection of Aboriginal cultural heritage; enforcement, compliance and monitoring; community participation; reporting; resourcing; and data and information. The findings confirm that WA laws do not meet existing EPBC Act requirements and extensive reform of current WA laws, policies and assurance frameworks is required before accreditation through a WA approvals bilateral agreement can be considered.

Overarching findings

- The independent Review of the EPBC Act found that the current requirements of the Act have failed to protect matters of national environmental significance, and are inadequate for addressing future environmental challenges.
- WA wants to assume powers from the Federal Government to approve projects based on the existing inadequate requirements.
- This report identifies examples of where WA laws **do not meet** the existing inadequate EPBC Act requirements.
- The proposed model would proceed with devolving approval powers to WA in the absence of critical reforms relating to compliance, enforcement, regional planning, indigenous engagement, restoration, resourcing, community participation, and data and information.
- Extensive reform of WA laws, policies and assurance frameworks is required before accreditation through a WA approvals bilateral agreement can be considered.
- Devolution of approval powers based on existing EPBC Act requirements in the short term will not create durability or certainty for WA industry, business or community, as national environmental standards will not be finalised for at least 2 years based on the current proposed pathway, necessitating continual amendment of WA laws.

Introduction & context

Australia's national environmental protection legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), was recently subject to an independent statutory review. The Final Report of the independent 10 year statutory review of the EPBC Act was provided to the Minister by Professor Graeme Samuel AC in October 2020 (**Samuel Review**). It concluded that the EPBC Act is ineffective, inefficient and does not enable the Commonwealth to effectively protect environmental matters that are important to the nation. It also concluded that not only is the current law failing, it is not fit to address future environmental challenges.[5]

The Samuel Review recommended an overhaul of the Act and made 38 recommendations for three tranches of interrelated reforms. Building on twin foundations of new national environmental standards and assurance, Professor Samuel explicitly warns against cherry-picking those reforms focussing on devolving powers to states and territories in the absence of the full suite of necessary reforms.

The Commonwealth government has not yet formally responded to the 38 recommendations, but has instead introduced legislation to facilitate the hand-over of environmental approval powers for matters of national environmental significance (**MNES**) to state and territory governments, under the guise of COVID 19 economic recovery. The *Environment Protection and Biodiversity Conservation (Streamlining Environmental Approvals) Bill 2020* (**Devolution Bill**) proposes to give Federal approval powers for projects that will have a significant impact on the environment to the States and territories. The Bill proposes to allow the Commonwealth Minister to accredit a broader range of state and territory approval processes for the purposes of an approval bilateral agreement. In summary, the Devolution Bill seeks to facilitate the handing over of federal approval responsibilities under the EPBC Act to states and territories. **This is extremely problematic given state and territory legislation does not meet current standards under the EPBC Act** and, in some jurisdictions, the environmental protections have been weakened. This Bill was robustly critiqued in a parliamentary inquiry and has not progressed.[6]

The Commonwealth Government subsequently introduced the *EPBC Amendment (Standards and Assurance) Bill 2021* to garner support for the Devolution Bill, that was also heavily critiqued by a Senate Committee inquiry. [7] Both Bills are now before the Senate.

WA has an *assessment* bilateral agreement with the Commonwealth government which is currently in the process of being reviewed and replaced. While WA does not currently have an *approval* bilateral agreement with the Commonwealth government, on 27 November 2019 the McGowan Government announced that it had written to Prime Minister Scott Morrison to request him to urge the Commonwealth government to set up an approval bilateral agreement with WA to fast-track major project approvals.[8] On 10 August 2020, the WA Premier, Mark McGowan, and Minister for Environment, Stephen Dawson, announced that the Commonwealth government has confirmed its intention to enter into an approval bilateral agreement with the WA government regarding environmental approvals.[9] The WA Minister has advised that this process will involve drafting a new approval bilateral agreement with a period of public consultation (minimum of 28

[5] Professor Graeme Samuel AC, *Final Report: Independent Review of the EPBC Act* (June 2020) p. 24 ('**Final EPBC Act Review Report'**).
[6] See: Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 – Parliament of Australia (aph.gov.au)
[7] See: Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 – Parliament of Australia (aph.gov.au)
[8] https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/11/Commonwealth-urged-to-sign-agreement-to-fast-track-approvals.aspx
[9] https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/08/Agreement-to-streamline-environmental-approvals-given-green-light.aspx

days is required under the EPBC Act),[10] and that this process will likely run parallel to the process of replacing the assessment bilateral agreement announced in December 2019.

If a WA approval agreement is finalised, it will provide for the Commonwealth accreditation of certain WA processes for approving proposals such as mines, roads and developments in World Heritage areas. This would enable the WA Minister for Environment – and potentially other delegated decision-makers[11] - to approve proposals with impacts on MNES on behalf of the Commonwealth Minister for Environment. This would mean that certain proposals would be issued an approval with conditions by the WA Minister, covering both WA matters and MNES', and that Commonwealth approval of these proposals under the EPBC Act is not required.

There are numerous problems with handing over federal assessment and approval responsibilities to the WA EPA and Minister for Environment through a WA bilateral approval agreement. For example, it presents a serious risk of conflicts of interest arising where the WA Government is both the proponent and decision-maker for a proposal or has an interest (economic, political or otherwise) in a proposal. It is also uncertain if WA decision-makers and agencies will have adequate resources or capacity to effectively discharge federal responsibilities.

EDO and the Places You Love Alliance (**PYL**) do not consider that it is appropriate to hand federal approval powers over to state and territory governments under the current inadequate EPBC Act system. This Report highlights **WA environmental laws do meet the existing requirements of the EPBC Act.** It is critical that national environmental protection laws are fixed through a comprehensive reform process before any devolution of responsibilities to states or territories is considered. Australia and WA's environment and cultural heritage are too important to risk.

Scope of report

PYL has requested the EDO to prepare a Report which assesses the effectiveness and adequacy of relevant Western Australian laws, policies and processes to meet national standards under the EPBC Act relating to:

1. Effective protection of Matters of National Environmental Significance (**MNES**)
2. Effective protection of cultural heritage
3. Effective, independent and transparent enforcement, monitoring and compliance of delegated decision-making responsibilities
4. Effective community input into delegated decision making, including access to justice
5. Effective and regular reporting functions of delegated responsibilities to the Commonwealth government and Australian community
6. Resources and capacity available to effectively discharge delegated responsibilities
7. Reliable and high quality data is available to support delegated responsibilities

This Report builds on the '***Devolving Extinction?***' report prepared by EDO for PYL in October 2020 and highlights risks associated with the Commonwealth government handing over national environmental responsibilities to the Western Australian government. It has been developed to inform decision-making in regard to the reform of the EPBC Act, the proposed EPBC Amendment Bills and a potential WA approvals bilateral agreement.

[10] EPBC Act s 49A.

[11] The Devolution Bill provides for a broader range of accredited decision-makers and policies and processes that may be accredited, for example potentially including local government.

The key environmental protection legislation in WA with similar functions to the EPBC Act are the *Environmental Protection Act 1986* (WA) (**EP Act**) and the *Biodiversity Conservation Act 2016* (WA) (**BC Act**). This Report therefore focuses on the provisions in this legislation. In light of the approved destruction of the Juukan Caves in the Pilbara region in 2020, PYL has also requested that the Report address the adequacy of Western Australia's Aboriginal cultural heritage protection processes, as set out in the *Aboriginal Heritage 1972 (WA)* (**ACH Act**), and noting potential reforms.

Summary of key findings

This table summarises the extent to which WA laws meet current requirements of the EPBC Act and provides examples of gaps in WA laws.

A key finding is that the majority of existing requirements are not met and therefore extensive reform of WA laws and policies and assurance frameworks is required before accreditation through a WA approvals bilateral agreement can be considered.

Do WA environmental protection laws meet national standards for protection of **World Heritage properties**?	**No**	If federal responsibilities are handed over to WA decision-makers and agencies based on current WA laws, they will not be required to prepare and implement management plans to protect and manage World Heritage properties or obliged to act consistently with the World Heritage Convention, Australian World Heritage management principles or management plans. Without further legislative amendments or robust regulations being made specifically for World Heritage protection, accreditation of WA environmental protection laws will potentially diminish the level of protection provided to Shark Bay, Ningaloo Coast, Purnululu National park and any future World Heritage listings in WA.
Do WA environmental protection laws meet national standards for protection of **National Heritage places?**	**No**	If federal responsibilities are handed over to WA decision-makers and agencies based on current laws, they will not be required to prepare and implement management plans to protect and manage the seventeen WA National Heritage properties or obliged to act consistently with the Australian National Heritage management principles or management plans, unless the WA laws are amended to require this. Accordingly, accreditation of existing WA environmental protection laws is likely to weaken the level of protection provided to National Heritage places under the EPBC Act.
Do WA environmental protection laws meet national standards for protection of **Ramsar Wetlands?**	**No**	If federal responsibilities are handed over to WA decision-makers and agencies based on existing laws, they will not be required to prepare and implement management plans to manage Ramsar Wetlands or obliged to act consistently with the Ramsar Convention, Australian Ramsar management principles or management plans. Amendments and new regulations would be required for WA to meet existing EPBC Act requirements. In the absence of amendments and regulations, accreditation of WA environmental protection laws would diminish the level of protection provided to the twelve Ramsar wetlands sites in WA.
Do WA environmental protection laws meet national standards for protection of **threatened species and ecological communities?**	**No**	If federal responsibilities are handed over to WA decision-makers and agencies based on current laws, they will not be required to act consistently with recovery plans developed for threatened species and ecological communities. Damage to critical habitat will also not be directly subject to offence and penalty provisions under WA environmental laws. 169 species listed under the EPBC Act that are present in WA are not listed under the BC Act and therefore the level of protection for these 169 species will be reduced.
Do WA environmental protection laws meet national standards for	**No**	Based on current WA laws, if federal responsibilities are handed over to WA decision-makers and agencies, they will not be formally empowered to develop, or obliged to act in accordance with, wildlife conservation plans for listed migratory species.

protection of **migratory species?**		
Do WA environmental protection laws meet national standards for protection against **nuclear actions?**	**Partly**	Accreditation of current WA environmental protection laws will potentially reduce clarity around the formal level of protection provided to the environment against nuclear actions, as compared to the EPBC Act, although in practice the way in which nuclear actions are dealt with may not be substantially different. Implementing policy positions on uranium through conditions on mining leases is also less certain than codifying requirements, however certain kinds of nuclear actions are prohibited in WA under the *Nuclear Waste Storage and Transportation (Prohibition) Act 1999*.
Do WA environmental protection laws meet national standards for protection of **water resources against the impacts of large coal and coal seam gas projects?**	**No**	If federal responsibilities are handed over to WA decision-makers and agencies, while it is likely that impacts of large coal and coal seam gas projects on water resources will be assessed where such projects are proposed in WA, the discretionary nature of the assessment and the dependence on policy settings will introduce uncertainty regarding the adequacy of future assessments. Requirements for obtaining expert advice are not confirmed.
Do WA Aboriginal heritage laws meet national standards for protection of **Aboriginal cultural heritage?**	**No***	WA Aboriginal heritage laws do not effectively protect Aboriginal cultural heritage. **although both systems are inadequate*
Do WA environmental protection laws meet national standards relating to **independent** decision-making, particularly in relation to state or Commonwealth proposed projects?	**No**	While WA environmental protection laws have similar requirements to the EPBC Act relating to independent decision-making, they do not distinguish between private and state or Commonwealth proposed projects – ie, the WAS can self-assess and approve its own projects. Further, they allow decision-making to be delegated to Department of Mines, Industry Regulation and Safety DMIRS in certain circumstances, causing a direct conflict of interest.
Do WA environmental protection laws meet national standards relating to **transparent** enforcement, monitoring and compliance?	**Partly**	WA environmental protection laws require a broadly similar level of transparency of decision-making and enforcement to that provided under the EPBC Act, but there are significant differences in details. For example, the EPBC Act requires the Minister to provide reasons for a decision when approving a controlled action (to specific parties on request), but the EP Act does not require the WA Minister to give reasons for approving proposals. In other respects, WA environmental laws go further than the EPBC Act by requiring certain kinds of enforcement decisions to be published.
Do WA environmental protection laws meet national standards relating to **effective enforcement, monitoring and compliance**?	**Partly**	While WA environmental laws provide similar powers for monitoring and enforcement of compliance, they do not provide for injunctions to be sought for contravention of their provisions. There are also inadequacies regarding enforcement of conditions and compliance action for breaches that indicate the implementation of WA environmental protection laws does not meet national standards relating to effective enforcement, monitoring and compliance.
Do WA environmental protection laws meet national standards relating to effective **community input** into decision making,	**Partly**	While current WA laws do provide certain requirements for community participation, they do not incorporate the full suite of necessary assurance standards to provide transparency, accountability and access to justice available under the EPBC Act. In particular, WA environmental protection laws provide limited or no opportunities for the public to seek merits review of decision-making by an independent tribunal or court. They also make it much more difficult for

including **access to justice?**		third parties to seek judicial review of decision-making and provide no opportunities for them to seek injunctions to enforce compliance with, or stop contraventions of, environmental laws. This means that, if federal approval responsibilities are handed over to the WA government, current standards relating to community input and access to justice will be reduced.
Do WA environmental protection laws meet national standards relating to **effective and regular reporting** to the Commonwealth government?	**No**	If federal responsibilities are handed to WA decision-makers and agencies based on current laws, they will not be required to report to the Commonwealth government on the discharge of their responsibilities, unless required to do so by new legislative amendments and clauses agreed in an approval bilateral agreement. It is not clear what reporting requirements will be included in approval bilateral agreements, and whether reports will be public.
Do WA environmental protection laws meet national standards relating to **effective and regular reporting** to the Australian community?	**Partly**	Both national and WA laws provide for environmental agencies to prepare annual reports, which may include reporting on the environment in addition to departmental performance. However, while the EPBC Act provides for the preparation of 'state of the environment' reports, WA environmental laws do not.
Do the **resources and capacity** provided to WA decision-makers to effectively discharge delegated responsibilities meet those provided at the Commonwealth level?	**TBC**	Similar to the situation under the EPBC Act, WA decision-makers, regulators and agencies currently lack sufficient resources and capacity to effectively discharge their responsibilities. If Commonwealth approval powers are devolved to WA, then the EPA and DEWR would need additional resources to adequately implement an assessment and approval system for projects impacting MNES in WA and to ensure compliance with national standards. Information about additional funding for WA to assume additional Commonwealth approval functions is not publicly available or confirmed.
Is **reliable and high quality data** similar to that available at the Commonwealth level available in WA to support delegated responsibilities?	**Partly**	Gaps and barriers in data and information have been identified at both the national level and for WA, although noting some WA systems deliver efficiency benefits. WA decision-makers and agencies have a similar level of data and information available to the Commonwealth level to support their assessments and decision-making, so a handover of federal decision-making and approval powers to WA decision-makers and agencies is unlikely to substantially affect this, noting the need for significant reform and investment in new data and information systems at both the national and state levels.

Part A: Overview of existing state environmental protection laws and policies

The environmental protection regime in WA is governed by various pieces of legislation that are not effectively integrated or coordinated. This has resulted in WA's regulatory regime being fragmented and complex. WA's environmental protection laws include:

- *Environmental Protection Act 1986* (WA) (**EP Act**) and *Environmental Protection Amendment Act 2020* (**EP Amendment Act**)
- *Biodiversity Conservation Act 2016* (WA) (**BC Act**)
- *Aboriginal Heritage Act 1972* (WA) (**AH Act**)
- *Planning and Development Act 2005* (WA) (**PD Act**)
- *Land Administration Act 1997* (WA) (**LA Act**)
- *Conservation and Land Management Act 1984* (WA) (**CALM Act**)

WA's environmental protection policies include:

- *WA Environmental Offsets Guidelines 2014* (2014)
- *WA Environmental Offsets Policy 2011* (2011)

This Part provides a brief overview of the purpose and key elements of relevant WA legislation.

WA environmental protection laws

Environmental Protection Act 1986 (WA)

The EP Act provides a legislative framework for the prevention, control and abatement of pollution and environmental harm, and for the conservation, preservation, protection, enhancement and management of WA's environment.

It establishes the EPA as an independent body which conducts environmental impact assessment of significant proposals that are "likely, if implemented, to have a significant effect on the environment" and strategic assessments of proposals. The WA Minister for Environment is responsible for making the final decision on whether the proposal may be implemented.

The EP Act provides for native vegetation clearing controls through the requirement for clearing permits and the ability for the CEO of the Department of Water and Environmental Regulation (**DWER**) to apply for clearing injunctions. It also provides for the licensing of prescribed premises through works approvals and licences and the offences of pollution and environmental harm.

Environmental Protection Amendment Act 2020

The EP Amendment Act was enacted by the WA Parliament in November 2020. Introduction of the amendment Bill to Parliament followed a 12-week period of public consultation on the proposed amendments which were contained in an Exposure Draft Bill and a Discussion Paper entitled '*Modernising the Environmental Protection Act*'. The substantive changes to the Act have not yet entered into force, and are likely to await the finalisation of amendments to the accompanying regulations.[12] The predominant focus of the changes provided for in the EP Amendment Act is administrative efficiency, rather than enhanced environmental protection.

[12] We note that some provisions commenced on 3 Feb 2021 (s. 3, 5-8, 10, 13, 14, 24, 32, 35, 36, 37(1), 58, 73-76, 80-82, 93, 94, 96, 99, 101, 106(4)-(6), 107, 108(1)- (6) & (8)-(11), 110(4)-(6), 111, 115 & 118(1) & (3)), however, these provisions do not relate to the WA

The EP Amendment Act makes various procedural changes to the environmental impact assessment process, including to provide the EPA with the ability to amend[13] and withdraw referred proposals,[14] decide which decision-making authorities are relevant and must be consulted in relation to proposals,[15] divide or consolidate proposals and Ministerial Statements,[16] impose conditions for staged implementation of proposals,[17] and recover costs associated with environmental impact assessment and monitoring implementation of proposals.[18]

The Act also makes various amendments relating to bilateral agreements, intended to facilitate the handing over of federal approval responsibilities to the WA government. In particular, the EP Amendment Act provides the responsibility for implementing bilateral agreements to the WA Minister for Environment and DWER as well as the EPA, and enables matters to be dealt with as 'bilateral matters'. This means that performance of functions by a State entity in respect of the bilateral matter will or may have effect for the purposes of the EPBC Act.[19]

Biodiversity Conservation Act 2016 (WA)

The BC Act, which entered into force in 2018, provides for the conservation and protection of native flora and fauna, threatened ecological communities, threatening processes, critical habitats and environmental pests.

In particular, it provides for the listing of threatened species of flora and fauna and ecological communities by the WA Minister for Environment.[20] Following listing of the species or community, the BC Act has some potential to provide additional protection to threatened species and ecological communities through its offence and penalty provisions. For example, the BC Act provides that it is an offence to take threatened fauna or modify the occurrence of threatened ecological community.[21] The BC Act also provides for the preparation of recovery plans for listed threatened species and ecological communities.

The BC Act includes a controversial provision that expressly enables the Minister, with the consent of Parliament, to authorise a proposal involving disturbance to threatened species where the proposal could be expected to result in the **near-term extinction** of the species.

The Minister may also list habitat on a specified parcel of land as critical habitat[22] where it is determined to be 'critical to the survival of a threatened species or a threatened ecological community'[23] and such listing is otherwise in accordance with Ministerial Guidelines made under the BC Act.[24] Once habitat has been listed as critical habitat, the CEO of Biodiversity, Conservation and Attractions (**DBCA**) may issue habitat conservation notices that can requires a person to refrain from damaging, or to repair damage that has already been done, to that habitat. However,

environmental impact assessment process or regulation of pollution or environmental harm or clearing. Those key changes are unlikely to commence until later 2021/early 2022.

[13] *Environmental Protection Amendment Act 2020* s 38C
[14] Ibid s 38D.
[15] Ibid s 38G (1)(b)(iii).
[16] Ibid s 45D.
[17] Ibid s 45A(3).
[18] Ibid s 48AA.
[19] Ibid s 124E.
[20] *Biodiversity Conservation Act 2016* (WA ('BC Act') s 19(1); 13(1), 27(1).
[21] Ibid.
[22] Ibid s 54.
[23] Ibid s 55.
[24] Ibid.

we note that the definitions of critical habitat are so highly restrictive that nothing ever gets identified as critical habitat. For example, an intact tract of Salmon Gum Woodland near Ravensthorpe that supports over 100 breeding pairs of Endangered Carnaby's Black-Cockatoo is not listed as critical habitat because it only provides "critical" habitat for a proportion of the population. Consequently, this area is at risk of mining. This part of the Act therefore has questionable benefit in protecting habitat of MNES.

Aboriginal Heritage Act 1972 (WA)

The AH Act provides for the preservation of Aboriginal cultural heritage places and objects. It is administered by the Minister for Aboriginal Affairs and establishes the Aboriginal Cultural Material Committee (**ACMC**). It provides for the registration of places and sites in a Register (the Aboriginal Heritage Inquiry System) and provides for enforcement provisions, including penalties for offences.

While it is an offence under section 17 of the AH Act to excavate, destroy, damage, conceal or alter a registered Aboriginal heritage site or object, persons with certain property interests in land (including mining and petroleum tenements) can apply for consent of the Minister under section 18 of the AH Act to use land in a way that may cause impacts in breach of section 17 where such impacts are considered unavoidable. There is no statutory requirement for Aboriginal people to whom the relevant heritage belongs to have input to decisions made under section 18.

The AH Act is currently in the process of being reviewed. The WA Government has prepared a draft *Aboriginal Cultural Heritage Bill 2020* (**draft ACH Bill**) that is intended to replace the AH Act and "reset the relationship between land users and Traditional Owners and transform how Aboriginal cultural heritage is identified, managed and conserved".[25] It is expected that the draft ACH Bill will be introduced to the WA Parliament after the 2021 State election.

Planning and Development Act 2005 (WA)

The PD Act provides for the system of land use planning and development control in WA. In an environmental context, planning schemes prepared under the PD Act (including amendments to planning schemes) must be referred to the EPA for a decision as to whether environmental impact assessment of the scheme is required. After the EPA's decision and assessment (if necessary) is complete, the inclusion of environmental considerations in planning decisions by the Minister for Planning is highly discretionary.

Land Administration Act 1997 (WA)

The LA Act provides for the creation of conservation reserves on Crown land or waters for a public interest purpose such as a national park or conservation of flora and fauna[26] by an order of the Minister for Lands. It provides for three main types of conservation reserve tenure that can protect and conserve biodiversity and/or natural or cultural heritage values: nature reserves, national parks and conservation parks. The Minister for Lands may also provide additional and further protection to particularly high value reserves by giving classifying them as a "Class A" reserve under the LA Act.[27]

[25] https://www.dplh.wa.gov.au/aha-review
[26] *Land Administration Act 1997* (WA) ('LA Act') s 41.
[27] Ibid s 42.

Conservation and Land Management Act 1984 (WA)

The CALM Act provides for the use, protection and management of certain Crown and public land, waters and native flora and fauna on those lands or in the waters. In particular, it establishes the Conservation and Parks Commission (**CPC**) [28] to manage land that is vested in its care, control and management. This includes State forests, timber reserves, national parks, conservation parks, nature reserves, marine nature reserves, marine parks and marine management areas.[29] A management plan must be prepared for this land that is approved by the Minister for Environment.

WA environmental protection policies

Certain approval decisions given under the EP Act (for example, permits to clear native vegetation), may be subject to conditions requiring offsets. In relation to offsets, the WA government published the *WA Environmental Offsets Policy 2011* in September 2011 which it states provides "a framework for consistent application of environmental offsets to protect and conserve environmental and biodiversity values".[30] In particular, the Offsets Policy outlines principles which underpin environmental offset assessment and decision-making in WA, and provides for the preparation of environmental offset guidelines and the establishment of an environmental offset register. The *WA Environmental Offsets Guidelines 2014* were also published in August 2014 and complement the Offsets Policy.

EDO also notes that the WA government is in the process of finalising a State native vegetation policy which it states will "set the scene for bioregional tailoring… of native vegetation management, enabling unique or at-risk environmental values to be dealt with strategically, in the context of other regional priorities".[31] The possible policy approaches outlined in the *Native Vegetation Issues Paper*[32] include:

- Setting direction to clarify the government's intentions and priorities to apply across the State.
- Promoting a bioregional approach to setting objectives for native vegetation protection – enabling consideration of regional areas with unique or at-risk environmental values.
- Applying the same objectives consistently across all of the government's decision-making that affects native vegetation.

[28] *Conservation and Land Management Act 1984* (WA) ('CALM Act') s 56.
[29] Ibid s 6(3).
[30] https://www.der.wa.gov.au/your-environment/offsets
[31] https://dwer.wa.gov.au/sites/default/files/NV_issues_paper_FINAL.pdf p 8.
[32] Ibid.

Part B: Analysis of how effectively WA laws can meet the level of protection provided under the EPBC Act

This part of the Report analyses to what extent WA laws can effectively meet the level of protection provided under national laws, in particular the EPBC Act, across the following seven areas:

1. Effective protection of Matters of National Environmental Significance (MNES)
2. Effective protection of Aboriginal cultural heritage
3. Effective, independent and transparent enforcement, monitoring and compliance of delegated decision making responsibilities
4. Effective community input into delegated decision making, including access to justice
5. Effective and regular reporting functions of delegated responsibilities to the Commonwealth government and Australian community
6. Resources and capacity available to effectively discharge delegated responsibilities
7. Reliable and high quality data is available to support delegated responsibilities

(1) Effective protection of Matters of National Environmental Significance (MNES)

The EPBC Act identifies nine areas as critical to the nation's environment and cultural heritage. They are defined as MNES and protected under the EPBC Act for all Australians. They are:

- **World Heritage properties** - for example the Shark Bay and Ningaloo Coast World Heritage Area;
- **National Heritage place**s - for example the West Kimberley, the Dampier Archipelago (including Burrup Peninsula) and the Stirling Range National Park;
- **wetlands of international importance** - for example, Becher Point Wetlands and Eighty-mile Beach;
- **listed threatened species and ecological communities** - for example, Carnaby's Black Cockatoo;
- **migratory species** protected under international agreements - for example the Latham's snipe which travels over 8000 kilometres each year from Japan to Australia, the Humpback Whale and the Whale Shark;
- **nuclear actions** - including uranium mines);
- **Commonwealth marine areas** - ocean environments including the Rottnest Trench;
- **Great Barrier Reef Marine Park**
- **a water resource, in relation to coal seam gas development and large coal mining development**.

The EPBC Act protects MNES by requiring actions with a significant impact on MNES to be subject to assessment and approval.[33] It also provides for the conservation of biodiversity and heritage through listing of threatened species, ecological communities, key threatening processes, critical habitat and migratory species, preparation of bioregional plans, and recovery and management planning (through conservation advice, recovery plans, threat abatement plans and wildlife conservation plans).

Further, the EPBC Act implements Australia's international obligations under international conventions including the Biodiversity Convention, Ramsar Convention and World Heritage Convention.

[33] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') Ch 4.

The following case study demonstrates how state level assessments based on inadequate referral information fail to address impacts on MNES including migratory species, Ramsar wetlands and national heritage.

CASE STUDY: Shamrock station irrigation project – WA

The Argyle Cattle Company Pty Ltd (ACC) manages Shamrock Station, 64 km south of Broome in WA. On 5 October 2017, ACC referred the Shamrock Station Irrigation Project (the proposal) to the WA EPA under Part IV of the EP Act.

The proposal aims to produce fodder for station use and includes: clearing up to 650 ha, plus disturbance of an additional 550 ha for related infrastructure; construction of 12 circular irrigation pivots, each up to 42.5 ha; installation of 12 groundwater abstraction bores; and abstraction (in Stage 1) of up to 9.5 GL of groundwater annually from the Broome Sandstone Aquifer to supply the irrigation system. The proposal referred to the WA EPA was supported by a 2017 hydrogeological assessment report that, synthesising information available at the time, purported to model the number of bores that could be established without impacting existing users and sites of ecological and cultural importance.

On 21 November 2017, the WA EPA determined that the proposal should be assessed on the basis of referral information. The notice explaining that decision states "that the proponent has undertaken an appropriate hydrological assessment for the proposed 9.5 GL/annum abstraction".

The same proposal was later referred to the federal Minister under Part 7 of the EPBC Act. On 2 February 2018, the federal Minister's delegate found the proposal to be a controlled action.

However, far from accepting the proponent's 2017 hydrogeological assessment report, the delegate required that the assessment consider whether the 9.5 GL of groundwater abstraction will be of such magnitude as to impact: seagrass and intertidal mudflat communities at the coast, home to threatened and migratory species not considered in the modelling report; the ecological character of the Roebuck Bay Ramsar site; and the heritage values of the West Kimberley National Heritage area.

Despite the WA assessment not including any information about any of these possible impacts, the WA Minister approved the proposal in November 2018 (Ministerial Statement 1086).

During the assessment at the federal level, the Australian Conservation Foundation commented on other inadequacies in the assessment information, specifically on impacts to Greater Bilby and the proposed offset.

On 6 August 2020, a notice was published advising that a recommendation report has been finalised on the proposal. The project was approved on 10 September 2020 with conditions, including in relation to the Greater Bilby.

This case study demonstrates how state level assessments based on inadequate referral information fail to address impacts on MNES including migratory species, Ramsar wetlands and national heritage.

Similar examples relate to petroleum projects in WA. For example, in 2013 the Commonwealth refused a seismic survey for petroleum exploration by Apache just outside the Ningaloo Coast World Heritage property, consistent with its international obligations under the World Heritage Convention. This decision was sharply contrasted by the failure of the WA government to ensure the proposal would be subject to any form of assessment under Part IV of the EP Act. This failure apparently stemmed from policy guidance that deemed the proposal did not require environmental assessment.

World Heritage Properties

Three natural World Heritage properties are located in WA: the Shark Bay World Heritage Area, the Ningaloo Coast World Heritage Area and the Purnululu National Park World Heritage Area.

Figure 1: Map of World Heritage Properties in WA; https://whc.unesco.org/en/statesparties/au

EPBC Act

The EPBC Act requires approval for an activity that has, will have, or is likely to have, a significant impact on the world heritage values of a declared World Heritage property. Further, it requires the Commonwealth Minister for Environment to make written plans to manage listed World Heritage properties in Commonwealth areas.[34] These plans must be consistent with Australia's obligations under the World Heritage Convention and the Australian World Heritage management principles.[35] Those obligations, which are also specified in the management principles (which are set out in regulations), are to "identify, protect, conserve, present, transmit to future generations and, if appropriate, rehabilitate the World Heritage values of the property". The Commonwealth and Commonwealth agencies must not contravene these plans.[36]

In relation to World Heritage areas that are not entirely within a Commonwealth area – ie in a state or territory - the Commonwealth must use its best endeavours to ensure a management plan that is not inconsistent with Australia's obligations under the World Heritage Convention or the Australian World Heritage management principles is prepared and implemented in co-operation with the State or Territory.[37] Further, the Commonwealth and each Commonwealth agency must

[34] Ibid s 316-319.
[35] Ibid s 323.
[36] Ibid s 318.
[37] Ibid s 321.

take all reasonable steps to ensure it exercises its powers and performs its functions in relation to the property in a way that is not inconsistent with the World Heritage Convention; the Australian World Heritage management principles and any relevant management plan.[38]

WA environmental protection laws

Schedule 1 of the BC Act provides that regulations may be made for the conservation, protection and management of natural heritage of any declared World Heritage property in WA in a way that is consistent with the Australian World Heritage management principles and any management plan for the property.[39] The EP Act does not refer to World Heritage places or the World Heritage Convention.

Neither the BC Act or the EP Act provide for management plans to be made to protect and manage World Heritage properties or require WA agencies to exercise their powers in a way that is not inconsistent with the World Heritage Convention, the Australian World Heritage management principles or any relevant management plan.

World Heritage in WA – key finding

If federal responsibilities are handed over to WA decision-makers and agencies based on current WA laws, they will not be required to prepare and implement management plans to protect and manage World Heritage properties or obliged to act consistently with the World Heritage Convention, Australian World Heritage management principles or management plans.

Without further legislative amendments or robust regulations being made specifically for World Heritage protection, accreditation of WA environmental protection laws will potentially diminish the level of protection provided to Shark Bay, Ningaloo Coast, Purnululu National park and any future World Heritage listings in WA.

National Heritage Places

Seventeen National Heritage places are located in WA:

- Batavia Shipwreck Site and Survivor Camps Area 1629 - Houtman Abrolhos
- Cheetup Rock Shelter
- Dampier Archipelago (including Burrup Peninsula)
- Dirk Hartog Landing Site 1616 - Cape Inscription Area
- Erawondoo Hill
- Fitzgerald River National Park
- Fremantle Prison (Former)
- HMAS Sydney II and HSK Kormoran
- Lesueur National Park
- Porongurup National Park
- Purnululu National Park
- Shark Bay, Western Australia
- Stirling Range National Park

[38] Ibid s 322.
[39] BC Act sch 1, cl 13.

- The Goldfields Water Supply Scheme
- The Ningaloo Coast
- The West Kimberley
- Wilgie Mia Aboriginal Ochre Mine

Figure 2: Map of National Heritage places in WA[40]

EPBC Act

The EPBC Act requires approval for any activity that has, will have, or is likely to have, a significant impact on the national heritage values of a National Heritage place. In particular, it requires the Commonwealth Minister for Environment to keep a National Heritage List[41] that may include National Heritage places if they have National Heritage values, those values are under threat of a significant adverse impact and the threat is both likely and imminent.[42] The Minister must request and consider assessments provided by the Australian Heritage Council and public comments.[43] Within 12 months after including a place in the National Heritage List, the Minister must decide whether the place should remain listed.[44] Further, the Minister must review the National Heritage List every 5 years.[45]

The EPBC Act also requires the Minister to make written management plans to protect and manage National Heritage places in Commonwealth areas.[46] These plans must not be inconsistent with the Australian National Heritage management principles.[47] Commonwealth and Commonwealth agencies must not contravene these plans.[48]

[40] See: https://www.environment.gov.au/system/files/resources/d7623ca2-590f-47ff-9cd5-93c61a1cd82d/files/national-heritage-places-map.pdf
[41] EPBC Act s 324C.
[42] Ibid s 324J.
[43] Ibid s 324M.
[44] Ibid s 324JQ.
[45] Ibid s 324ZC.
[46] Ibid s 324S.
[47] Ibid.
[48] Ibid s 324U.

In relation to National Heritage places that are not entirely within a Commonwealth area, the Commonwealth must use its best endeavours to ensure a management plan that is not inconsistent with the Australian National Heritage management principles is prepared and implemented in co-operation with the State or Territory.[49]

Further, the Commonwealth and each Commonwealth agency must take all reasonable steps to ensure it exercises its powers and performs its functions in relation to the property in a way that is not inconsistent with the Australian National Heritage management principles and any relevant management plan.[50]

WA environmental protection laws

Schedule 1 of the BC Act provides that regulations may be made for the conservation, protection and management of the natural heritage of any National Heritage place in WA in a way that is consistent with the National Heritage management principles and any management plan for the place. The EP Act does not refer to national heritage.

Neither the BC Act or the EP Act provide for management plans to be made or implemented to protect and manage National Heritage properties or require WA agencies to exercise their powers in a way that is not inconsistent with the Australian National Heritage management principles or any relevant management plan.

National Heritage – key finding

If federal responsibilities are handed over to WA decision-makers and agencies, they will not be required to prepare and implement management plans to protect and manage the seventeen WA National Heritage properties or obliged to act consistently with the Australian National Heritage management principles or management plans, unless the WA laws are amended to require this.

Accordingly, accreditation of existing WA environmental protection laws is likely to weaken the level of protection provided to National Heritage places under the EPBC Act.

Wetlands of International Importance (Ramsar Wetlands)

Twelve Ramsar wetland sites are located in WA including:

- Becher Point Wetlands
- Eighty-mile Beach
- Forrestdale and Thomsons Lakes
- Lake Gore
- Lake Warden System
- Lakes Argyle and Kununurra
- Muir - Byenup System
- Ord River Floodplain
- Peel-Yalgorup System
- Roebuck Bay

[49] Ibid s 324X.
[50] Ibid.

- Toolibin Lake (also known as Lake Toolibin)
- Vasse-Wonnerup System

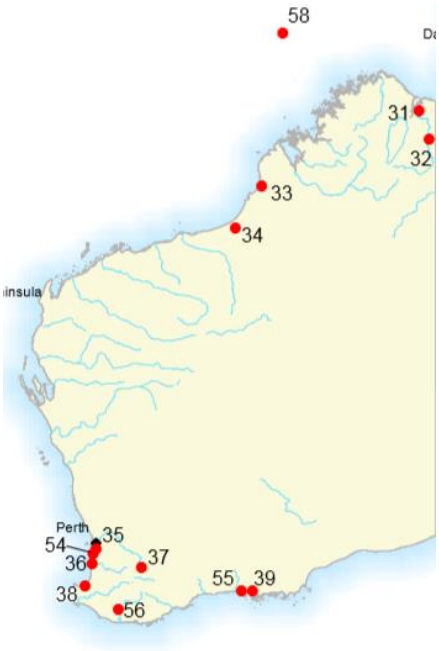

Figure 3:Map of Ramsar Wetlands in WA[51]

EPBC Act

The EPBC Act requires approval for an activity that has, will have, or is likely to have, a significant impact on the ecological character of a declared Ramsar wetland. In particular, it provides that the Commonwealth Minister for Environment may designate a wetland for inclusion in the List of Wetlands of International Importance under the Ramsar Convention after the Commonwealth has used its best endeavours to reach agreement with other persons (the land-holder) and States or Territories (where the wetland is located in a State or Territory).[52]

The EPBC Act also requires the Commonwealth Minister for Environment to make written plans for managing listed wetlands in Commonwealth areas as soon as practicable after the wetland is included in the List.[53] These plans must not be inconsistent with Australia's obligations under the Ramsar Convention and the Australian Ramsar management principles. Commonwealth and Commonwealth agencies must not contravene these plans.[54]

In relation to wetlands that are not entirely within a Commonwealth area, the Commonwealth must use its best endeavours to ensure a management plan that is not inconsistent with the Australia's obligations under the Ramsar Convention and the Australian Ramsar management principles is prepared and implemented in co-operation with the State or Territory.[55]

Further, the Commonwealth and each Commonwealth agency must take all reasonable steps to ensure it exercises its powers and performs its functions in relation to the property in a way that is

[51] See: https://www.environment.gov.au/system/files/pages/d3389750-50fc-4ed3-9e2a-0652b74913f8/files/ramsar-sites-australia.pdf
[52] EPBC Act 1999, s 326.
[53] Ibid s 328.
[54] Ibid s 330.
[55] Ibid s 333.

not inconsistent with the Ramsar Convention, the Australian Ramsar management principles and any relevant management plan.[56]

WA environmental protection laws

No provisions in the EP Act itself refer to Ramsar wetlands. Schedule 1 of the BC Act provides that regulations may be made for the conservation, protection and management of the ecological character of any declared Ramsar wetland in WA in a way that is consistent with the Australian Ramsar management principles and any management plan for the wetland. No regulations have been made for Ramsar wetlands in WA yet.

Further, neither the BC Act or the EP Act provide for management plans to be made to manage Ramsar wetlands or require WA agencies to exercise their powers in a way that is not inconsistent with the Ramsar Convention, the Australian Ramsar management principles or any relevant management plan.

Ramsar wetlands - Key finding

If federal responsibilities are handed over to WA decision-makers and agencies based on existing laws, they will not be required to prepare and implement management plans to manage Ramsar Wetlands or obliged to act consistently with the Ramsar Convention, Australian Ramsar management principles or management plans. Amendments and new regulations would be required for WA to meet existing EPBC Act requirements.

In the absence of amendments and regulations, accreditation of WA environmental protection laws would diminish the level of protection provided to the twelve Ramsar wetlands sites in WA.

Listed threatened species and ecological communities

There are 582 species and 25 ecological communities listed under the EPBC Act are located in WA. These include iconic species such as Carnaby's Cockatoo, quokka, bilby, night parrot, numbat, northern and western quolls, loggerhead turtle, whale shark, Gilbert's potoroo, mallee fowl and the woylie.[57]

EPBC Act

The EPBC Act requires approval for activities that has, will have, or is likely to have, a significant impact on listed threatened species or ecological communities. It requires the Commonwealth Minister for Environment to establish, by legislative instrument, lists of threatened species and ecological communities.

The EPBC Act establishes the Threatened Species Scientific Committee to provide advice to the Minister in relation to listing, recovery plans and other matters, which the Commonwealth Minister for Environment must consider.[58] The Minister must decide whether to have a recovery plan for listed threatened species and ecological communities within 90 days of the species or community

[56] Ibid s 334.
[57] See: Threatened species & communities - Parks and Wildlife Service (dpaw.wa.gov.au)
[58] Ibid s 502-503.

being listed. The Minister may, at any other time, decide whether to make or adopt a recovery plan for a species or community. Recovery plans may be made jointly with states and territories. Where recovery plans are made, they are binding on Commonwealth agencies, which must not contravene these plans.[59] The Commonwealth Minister for Environment must also ensure that there is approved conservation advice for each listed threatened species and ecological communities while they are listed.[60]

The EPBC Act also requires the Commonwealth Minister for Environment to establish a critical habitat register[61] which has been established.[62] It is an offence under the EPBC Act to knowingly damage critical habitat and penalties apply.[63]

WA environmental protection laws

The BC Act provides for the listing of native species and ecological communities by the WA Minister for Environment following advice from the WA Threatened Species Scientific Committee (**TSSC)** and Threatened Ecological Communities Scientific Committee (**TECSC)**. In particular, section 17 provides for the listing of species that are the subject to international agreements that bind the Commonwealth.

Prior to the BC Act – since 1994, the Minister for Environment previously listed ecological communities as threatened through a non-statutory process if the community was presumed to be totally destroyed or at risk of becoming totally destroyed. The WA Minister for Environment has endorsed 69 ecological communities as threatened in the following categories: 20 critically endangered, 17 endangered, 28 vulnerable, 4 presumed totally destroyed. As noted, 25 of these are listed under the EPBC Act. As at July 2021, an additional 390 ecological communities (community types and sub-types) with insufficient information available to be considered a TEC, or which are rare but not currently threatened, have been placed on the Priority list and referred to as priority ecological communities (PECs).[64]

In October 2018 the WA Minister for Environment signed the *Intergovernmental Memorandum Of Understanding - Agreement On A Common Assessment Method For Listing Of Threatened Species And Threatened Ecological Communities* (**Common Assessment Method MOU**) which seeks to develop a common method for assessing and listing threatened species and to "develop a consistent list of nationally threatened species in all Australian jurisdictions".[65] This enables the WA Minister for Environment to adopt the outcome of assessments of species conducted at the Commonwealth level or in other states or territories when making listing decisions under the BC Act. Despite this, **169 threatened species present in WA and listed under the EPBC Act are not listed under the BC Act.**

If a threatened species or ecological community is listed under the BC Act, a person cannot take[66]the species or community without lawful authority under the BC Act and significant penalties apply.

[59] Ibid s 268.
[60] Ibid s 266B.
[61] Ibid s 207A.
[62] https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl
[63] EPBC Act s 207B.
[64] See: Threatened ecological communities - Parks and Wildlife Service (dpaw.wa.gov.au)
[65] https://www.dpaw.wa.gov.au/images/documents/plants-animals/threatened-species/Listings/Ministerial%20Guidelines%202_Threatened%20species%20listing%20criteria.pdf Appendix 4.
[66] In relation to fauna means injure, harvest or capture; in relation to flora means gather, pluck, cut, pull up, destroy, dig up, remove, harvest or damage.

Similar to the EPBC Act, the BC Act provides processes for DBCA to prepare,[67] and the WA Minister for Environment to approve or adopt, recovery plans and interim recovery plans for threatened species and ecological communities.[68] Section 97 requires the WA Minister for Environment to consider Australia's obligations under international agreements relevant to the threatened species or ecological communities when considering whether to approve or adopt a recovery plan for that species or community. However, **recovery plans under the BC Act have limited legal effect, with public authorities only being required to "have regard" to recovery plans in performing relevant functions.[69] WA decision-makers and agencies are not restricted from acting inconsistently with recovery plans and there are no offence or civil penalty provisions in the BC Act for non-compliance with recovery plans**.

The BC Act also provides for the listing of critical habitat in a publicly available Critical Habitat Register.[70] However, listing of critical habitat under the BC Act has limited legal effect compared to the EPBC Act, with it not being an offence to knowingly damage critical habitat and no penalties applying under WA laws.[71] While the CEO may issue habitat conservation notices under the BC Act to require a person to ensure that further damage to critical habitat does not occur and repair any existing damage, penalties do not apply unless and until such a notice is issued.

Threatened species and ecological communities – key findings

If federal responsibilities are handed over to WA decision-makers and agencies based on current laws, they will not be required to act consistently with recovery plans developed for threatened species and ecological communities. Damage to critical habitat will also not be directly subject to offence and penalty provisions under WA environmental laws. 169 species listed under the EPBC Act that are present in WA are not listed under the BC Act. The level of protection for these 169 species will be reduced.

Listed migratory species

It is estimated that around September, hundreds of thousands of migratory waterbirds begin to arrive and inhabit wetlands of Western Australia's north- and south-west, feeding mostly on the invertebrates that live in shallow water in drying wetlands, tidal flats and salt marshes. Common species include the red-necked stint, curlew sandpiper, sharp-tailed sandpiper, bar-tailed godwit and greenshank. Four Western Australia Ramsar Sites provide important habitat for migratory birds.[72]

EPBC Act

The EPBC Act provides that approval is required for an activity that has, will have, or is likely to have, a significant impact on a listed migratory species. It requires the Commonwealth Minister for Environment to establish, by legislative instrument, a list of migratory species[73] that must include

[67] EPBC Act s 83.
[68] Ibid s 89.
[69] Ibid s 103.
[70] Habitat that is 'critical to the survival of a threatened species or a threatened ecological community'; BC Act s 55.
[71] https://www.dpaw.wa.gov.au/images/documents/plants-animals/threatened-species/Listings/MG%20No%205%20Critical%20habitat%20listing%20process.pdf
[72] These are Thomsons Lake, Parry Lagoons Nature Reserve (Ord River Floodplain), Eighty Mile Beach Marine Park and Roebuck Bay Marine Park. See: Migratory waterbirds - Parks and Wildlife Service (dpaw.wa.gov.au)
[73] EPBC Act s 209.

all migratory species that are native species, from time to time are included in the appendices or annexes to the Convention on the Conservation of Migratory Species of Wild Animals (**Bonn Convention**), Japan-Australia Migratory Bird Agreement (**JAMBA**), China-Australia Migratory Bird Agreement (**CAMBA**), or from time to time are identified in a list established under, or an instrument made under, an international agreement approved by the Minister.

Section 285 provides that the Commonwealth Minister for Environment may make and implement wildlife conservation plans to protect, conserve and manage listed migratory species. A Commonwealth agency must take all reasonable steps to act in accordance with a wildlife conservation plan, such as the *Wildlife Conservation Plan for Migratory Shorebirds*.[74]

WA environmental protection laws

The BC Act provides for the listing of migratory species. In particular, section 15 provides that native species are eligible for listing as migratory species if they are the subject of an international agreement that relates to the protection of migratory species and binds the Commonwealth. This is an implicit reference to the Bonn Convention, JAMBA, CAMBA, and the Republic of Korea-Australia Migratory Bird Agreement (**ROKAMBA**).

However, the BC Act does not provide for wildlife conservation plans to be made to protect, conserve or manage migratory species or require WA agencies to act in accordance with these plans.

Migratory species – key finding

Based on current WA laws, if federal responsibilities are handed over to WA decision-makers and agencies, they will not be formally empowered to develop, or obliged to act in accordance with, wildlife conservation plans for listed migratory species.

Protection of the environment from nuclear actions

EPBC Act

The EPBC Act provides that a constitutional corporation, the Commonwealth, Commonwealth agency or person (for the purposes of trade or commerce) must not take a nuclear action that has, will have or is likely to have a significant impact on the environment without assessment and approval. 'Nuclear action' is defined broadly and includes "mining or milling or uranium ore".[75]

Section 140A also prohibits the Commonwealth Minister for Environment from approving an action consisting of, or involving the construction or operation of, a nuclear fuel fabrication plant, nuclear power plant, enrichment plant or a reprocessing facility.

WA environmental protection laws

There is a limited degree of legal protection from nuclear actions in WA. The *Nuclear Waste Storage and Transportation (Prohibition) Act 1999* (WA) prohibits the construction or operation for storage

[74] Ibid s 286. See also: Wildlife Conservation Plan for Migratory Shorebirds (environment.gov.au)
[75] Ibid s 22.

facilities for waste from nuclear power plants or nuclear weapons manufacturing in WA and the transport of such waste within the State. While the current WA government has implemented a ban on uranium mining since 2017 by imposing a 'no uranium' condition on all future mining leases granted under the Mining Act,[76] **this ban is not codified in any legislation**. This means that the ban could be removed by a change of government.

While uranium projects have generally been subject to assessment and approval under the EP Act, no provisions of the EP Act expressly require assessment and approval of uranium actions. In contrast, the EPBC Act clearly defines nuclear action to include uranium mining.[77]

Nuclear actions – key finding

Accreditation of current WA environmental protection laws will potentially reduce clarity around the formal level of protection provided to the environment against nuclear actions, as compared to the EPBC Act, although in practice the way in which nuclear actions are dealt with may not be substantially different. Implementing policy positions on uranium through conditions on mining leases is also less certain than codifying requirements.

Protection of water resources from coal seam gas and large coal mining development

To date, CSG has not been demonstrated as prospective in Western Australia, however WA has examined impacts of fracking for unconventional petroleum resources such as shale oil and gas, tight oil and gas.[78] There are only two coal projects listed in the Commonwealth register of coal and CSG projects that have received advice from the IESC.[79]

EPBC Act

The EPBC Act requires approval for an action if it involves coal seam gas development or large coal mining development and the action has, will have or is likely to have a significant impact on a water resource. It establishes the Independent Expert Scientific Committee on Coal Seam Gas (**IESC**) and Large Coal Mining Development to provide scientific advice to the Commonwealth Minister for Environment in relation to the impacts of coal seam gas and large coal mining development on water resources.[80] The Commonwealth Minister for Environment must consider this advice.[81]

WA environmental protection laws

No WA environmental laws refer to or assess the impacts of large coal and coal seam gas projects on water resources. While the Devolution Bill provides that a WA approval bilateral agreement must include an undertaking that the WA Minister for Environment will obtain the advice of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development if an activity is likely to have a significant impact on water resources, no current WA laws refer to the Committee or require its advice to be considered.

[76] http://dmp.wa.gov.au/Uranium-1459.aspx
[77] EPBC Act 1999, s21 requires that uranium mining as a nuclear action requires approval.
[78] Duchess Paradise project and Muja South Extension, see: About Hydraulic Fracture Stimulation | Scientific Inquiry into Fracking in Western Australia (frackinginquiry.wa.gov.au)
[79] See: Coal and coal seam gas projects | Department of Agriculture, Water and the Environment
[80] EPBC Act s 505C-E.
[81] Ibid s 131AB.

The EPA includes terrestrial waters among the environmental factors that it may identify for assessment under Part IV of the EP Act. Whether, and to what extent, impacts on terrestrial waters will be considered falls within the EPA's discretion in carrying out environmental impact assessment. The EPA includes waters in its assessment policy documentation. However, reliance on policy documentation does not provide certainty in terms of implementing environmental protection standards in WA. Despite its nominal independence, the EPA has at times modified its policies in response to explicit or implicit pressure from government (for example, its greenhouse gas emissions guideline).[82]

It is important context to note that the WA mining industry has publicly called for devolution of federal EPBC Act powers to the state government prior to the completion of the independent review[83], and mineral industry groups more broadly have called for devolution of water trigger responsibilities.[84]

Water trigger – key finding

If federal responsibilities are handed over to WA decision-makers and agencies, while it is likely that impacts of large coal and coal seam gas projects on water resources will be assessed where such projects are proposed in WA, the discretionary nature of the assessment and the dependence on policy settings will introduce uncertainty regarding the adequacy of future assessments.

(2) Protection of Cultural Heritage

Aboriginal heritage legislation operates such that the state and territory legislation is the main source of day-to-day regulation of cultural heritage. At a national level, cultural heritage may have some limited protected provided by the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) and the EPBC Act. [85] The WA legislation is therefore critical and we note this section notes the proposed reforms in this area.

ATSHIP Act

The ATSIHP Act is a short piece of legislation that predominantly deals with declarations that can be made by the Commonwealth Minister for Environment to protect 'significant Aboriginal areas and objects'. As noted by the then Justice French in *Tickner v Bropho*: "Informing [the ATSIHP Act's] enactment however, was the idea that it would be used as a protective mechanism of last resort where State or Territory legislation was ineffective or inadequate to protect heritage areas or objects".

[82] For example, see: Government of Western Australia Environmental Protection Authority, 'Further consultation on Environmental Protection Authority greenhouse gas guidance recognised' (Media Release, 14 March 2019).
[83] See: Lisa Cox, 'Letter reveals Rio Tinto urged transfer of powers to WA ahead of environment law review', *The Guardian* (online, 2 October 2020) <https://www.theguardian.com/environment/2020/oct/02/rio-tinto-made-early-call-for-morrison-to-transfer-environmental-approval-powers-to-wa>.
[84] See submissions to the inquiry into the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 – Parliament of Australia (aph.gov.au)
[85] (1993) 40 FCR 183, 211.

Section 13(2) ATSIHP Act provides that the Commonwealth Minister for Environment shall not make a declaration in relation to an area 'unless he or she has consulted with the appropriate Minister of that State or Territory as to whether there is, under a law of that State or Territory, effective protection of the area…from the threat of injury or desecration'.

We note it is difficult to determine where declarations have been made. We have found case studies of two declarations in WA that have been revoked or overturned, including on the basis of undertakings from the WA government to implement WA laws.[86]

EPBC Act

The EPBC Act establishes a National Heritage List (as noted above) and this includes places of Indigenous heritage value.[87] The EPBC Act then contains a provision such that a person must not take an action that will or may have a significant impact on National Heritage values, to the extent that they are Indigenous heritage values, of a National Heritage place.[88] If an action would otherwise be prohibited through this provision, an application can be made for a controlled action.

More generally, as noted in the Final Report of the Samuel Review '[c]ultural heritage matters are not required to be broadly or specifically considered by the Commonwealth in conjunction with assessment and approval processes under Part 9 of the [EPBC] Act'.[89]

AH Act

Section 17 and 18 of the AH Act are the operative provisions relating to permission to damage or destroy heritage. Section 17 prohibits destroying or damaging a heritage site. Section 18 then provides a way to apply to the WA Minister for Aboriginal Affairs to destroy, damage, alter etc a heritage site.

A section 18 application is made to the ACMC and then the ACMC makes a recommendation to the WA Minister for Aboriginal Affairs.[90] Although the ACMC does currently have some Aboriginal members, there is no statutory requirement to have Aboriginal members on the ACMC.[91] Further, there is no statutory process or obligations under the AH Act for the ACMC to engage with Traditional Owners when section 18 applications are received.

The ACMC is also responsible for evaluating heritage sites 'on behalf of the community'.[92] The legislation outlines the criteria the ACMC must consider in 'evaluating the importance of places and objects'.[93] There is no statutory detail in the AH Act as to how Traditional Owners should apply to register sacred sites and there is no specified role for Traditional Owners in decision-making about sites.

[86] See: Broome Crocodile Farm – s 10, No. S 124, Wednesday, 6 April, 1994 (WA); overturned by *Minister for Aboriginal and Torres Strait Islander Affairs v Douglas* [1996] FCA 395; and The old Swan Brewery site was registered as an Aboriginal Site under *Aboriginal Heritage Act 1972* (WA). The ATSIHP Act declaration was withdrawn after the Commonwealth Minister received undertakings from the WA premier to be bound by the state legislation. – Answer to question on notice 16 December 1992. Old Swan Brewery – s 10, No. S 203, Wednesday 21 June 1989 (WA); revoked July 1989, Old Swan Brewery s 9, No. S133, 14 April 1989.
[87] EPBC Act s528.
[88] Ibids15B(4).
[89] Final EPBC Act Review Report p. 67.
[90] AH Act s18(3).
[91] Ibid s28(2)-(4).
[92] Ibid s39.
[93] Ibid s39(2).

CASE STUDY: Protection of Aboriginal and Torres Strait Islander heritage – Juukan Caves WA

As demonstrated by the devastating destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia, several jurisdictions have Indigenous heritage laws that are not adequate. The Section 18 approval granted to Rio Tinto allowed for that destruction to legally occur. Section 18 approvals are in effect, approvals to destroy, damage, alter etc a heritage site. Only a few days prior to the Rio Tinto incident, the Minister representing the Minister for Aboriginal Affairs was asked in the WA Legislative Council how many section 18 applications for land described as a mining lease were brought before the ACMC [Aboriginal Cultural Materials Committee] since 1 July 2010 and how many of these applications had been declined? The relevant Minister replied that there had been 463 applications and none of them had been declined. The relevant Minister added that: 'This confirms what I have consistently highlighted, the obligations under the Aboriginal Heritage Act 1972 are not an impediment to the effective operations of the mining industry, particularly where mining companies enter into positive consultations with Traditional Owners.' This statement failed to consider that having had no applications denied in nearly ten years is an indication that the system is not operating adequately for the protection of cultural heritage.

This case study has attracted international attention and condemnation of the fact that Australian state laws permit destruction of unique Indigenous cultural heritage of international significance by private proponents, without the free prior informed consent of the Traditional Owners, the Puutu Kunti Kurrama and Pinikura peoples. This clearly demonstrates the need for comprehensive reform and national leadership.

Draft ACH Bill

It is proposed that the draft ACH Bill will replace the AH Act. It was announced in mid-November that changes were being made and that the finalised bill would not be introduced until the next WA Parliament (which was elected in March 2021).[94]

As currently drafted, the ACH Bill would establish Protected Areas, Aboriginal Cultural Heritage (ACH) Permits for actions that have a low impact on heritage and ACH Management Plans for low or medium-high impact activities. The ACH Bill would also establish an ACH Council. The chairperson of the ACH Council must be Aboriginal, and 'as far as practicable, preference is given to appointing Aboriginal people as members of the ACH Council'.[95]

An application could be made by a knowledge holder for an area to be declared a protected area.[96] The area must be of 'outstanding significance', which means: that the cultural heritage is of outstanding significance to Aboriginal people including to an individual, community or group; and that the significance is recognised through social, spiritual, historical, scientific or aesthetic perspectives (including contemporary perspectives).[97] An application is made to the ACH Council and the ACH Council may recommend to the Minister that the area be declared or that it not be declared.[98] If the ACH Council makes a recommendation to the WA Minister for Aboriginal Affairs,

[94] The Hon Ben Wyatt (WA Minister for Aboriginal Affairs), 'Path forward for historic reform of WA Aboriginal heritage laws' (Media Statement, 18 November 2020) <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/11/Path-forward-for-historic-reform-of-WA-Aboriginal-heritage-laws.aspx>.
[95] ACH Bill s17.
[96] Ibid s65.
[97] ibid ss63 and 65.
[98] Ibid s72(2).

the Minister then may decide that a declaration should be made, or a declaration should not be made.[99] The Minister's decision is based on whether the statutory criteria are satisfied and what is in 'the interests of the State'.[100]

The ACH Council will determine applications for ACH Permits. If the ACH Council refuses an ACH Permit, the proponent can object to the WA Minister for Aboriginal Affairs.[101] This decision is to be based on whether the Minister is satisfied that the statutory requirements are made out and what is in 'the interests of the State'.[102]

With respect to ACH Management Plans, if the proponent and the Aboriginal party agree an application for approval is made to the ACH Council.[103] Where the proponent and the Aboriginal party do not agree, the proponent applies for 'authorisation' of a ACH Management Plan.[104] The WA Minister for Aboriginal Affairs may authorise the ACH Management Plan as set out in the recommendation, authorise another ACH Management Plan or refuse to authorise an ACH Management Plan.[105] This decision is to be based on whether the Minister is satisfied that the statutory requirements are made out and what is in 'the interests of the State'.[106]

Aboriginal cultural heritage – key findings

Existing WA Aboriginal heritage laws do not effectively protect Aboriginal cultural heritage. While the draft ACH Bill offers some positive improvements, there are also areas of concern that will need to be addressed in the next round of amendments.

The Final Report of the Independent Review identified the need for significant reform including a recommendation to establish a National Standard for Indigenous Engagement and Participation in Environmental Decision-making.[107] The current EPBC Amendment package does not include this.

Accreditation of WA laws must not be considered until WA law reforms have been enacted and a national standard has been established at the Commonwealth level.

[99] Ibid s74(1).
[100] Ibid s74(2).
[101] Ibid s121.
[102] Ibid s121(6).
[103] Ibid s128.
[104] Ibid s140(1).
[105] Ibid s147(1).
[106] Ibid s147(2)
[107] See: Chapter 2 - Indigenous culture and heritage | Independent review of the EPBC Act (environment.gov.au) and Appendix B2 - Recommended National Environmental Standard for Indigenous Engagement and Participation in Decision-Making | Independent review of the EPBC Act

(3) Independent and Transparent Enforcement, Monitoring and Compliance of Delegated Decision-Making Responsibilities

Independent decision-making and enforcement

EPBC Act

Under the EPBC Act, the Commonwealth Minister for Environment is the primary decision-maker. The Commonwealth Minister for Environment and Department of the Environment and Energy (**DoEE**) are responsible for monitoring and enforcing compliance with the EPBC Act. As a branch of the Commonwealth government, the Department is subject to actual or implied political direction from the Commonwealth Minister for Environment, and therefore is not independent.[108]

The EPBC makes a distinction between the assessment and approval of private proposals and proposals that involve Commonwealth agencies.[109] In particular, section 28 provides that approval is required for activities of Commonwealth agencies that significantly affect the environment.

WA environmental protection laws

EP Act

The WA Minister for Environment is responsible for deciding whether proposals can be implemented under the EP Act and depending on the circumstances, may make this decision in conjunction with other WA Government Ministers. The CEO of DWER is the principal decision-maker in relation to clearing permits, works approvals and licences. As DWER is a specialist government agency, decision-making under Part V of the EP Act is less directly linked to political imperatives than Ministerial decisions under Part IV. However, the CEO of DWER is still subject to actual or implied political direction from the WA Minister for Environment.

Under the EP Act, the CEO of the Department of Mines, Industry Regulation and Safety (**DMIRS**) can be delegated decision-making responsibilities in relation to clearing permits connected with mining and petroleum proposals. As DMIRS is an agency responsible for administering the Mining Act and the PAGER Act (legislation that is designed to facilitate resource development), a direct conflict of interest exists in these circumstances.

The CEO of DWER (and any delegated authorised officer including inspectors) and the WA Minister for Environment have powers to monitor and enforce compliance with the EP Act. The CEO of DWER has discretion to initiate prosecutions for offences against the Act, and to issue regulatory notices such as environmental protection notices[110]. The CEO must report certain proposed enforcement actions to the WA Minister for Environment, meaning these powers are not exercised independently. The Minister can then exercise powers to enforce compliance with the EP Act where he or she is not satisfied with the monitoring or enforcement action taken by the CEO.[111]

The EP Act makes no distinction between the assessment or approval of private proposals and state-proposed proposals.

[108] Final EPBC Act Review Report, p 2.
[109] EPBC Act, ch 2, pt 2, div 2.
[110] For example, see *Environmental Protection Act 1986* (WA) ('EP Act') s 65.
[111] Ibid s 48(3).

BC Act

The WA Minister for Environment is responsible for deciding whether to list threatened species, ecological communities, key threatening processes and critical habitat under the BC Act. The BC Act provides the CEO of DBCA with the power to enforce and ensure compliance with its provisions, for example by taking remedial action[112] or issuing habitat conservation notices.[113] As the CEO of DBCA is subject to actual or implied political direction from the WA Minister for Environment, enforcement is not independent.

AH Act

The WA Minister for Aboriginal Affairs is responsible for registering sites and granting consent for activities that may destroy or destruct Aboriginal cultural heritage sites and objects under the AH Act. The Department of Planning, Land and Heritage's (**DPLH**) is responsible for enforcing compliance with the AH Act and the draft ACH Bill. As DPLH is subject to actual or implied political direction from the WA Minister for Aboriginal Affairs, it is not independent.

Independent decision-making & enforcement - Key finding

While WA environmental protection laws have similar requirements in the EPBC Act relating to independent decision-making, they do not distinguish between private and state or Commonwealth proposed projects. Further, they allow decision-making to be delegated to DMIRS in certain circumstances, causing a direct conflict of interest.

Transparent decision-making and enforcement

EPBC Act

The EPBC Act requires referrals of actions, decisions on controlled actions and the appropriate assessment approach, recommendation reports, and decisions in relation to the approval of controlled actions to be published.[114] Invitations to nominate threatened species and communities for listing, finalised lists and listing decisions are also required to be published.[115]

Further, the Commonwealth Minister for Environment is required to publish reasons for decisions relating to recovery plans and threat abatement plans, the removal of a place or National Heritage values from the National Heritage List and the removal of a place or Commonwealth Heritage values from the Commonwealth Heritage List. However, the Minister is not required to publish reasons for decisions relating to controlled actions or listing, although those reasons must be provided to certain persons on request. Records of monitoring or enforcement action taken are also not required to be published under the EPBC Act.

WA environmental protection laws

EP Act

[112] Ibid s 217.
[113] Ibid s 59.
[114] EPBC Act s 170A.
[115] Ibid ss 194E; 194L; 194Q(7) 194R(8).

The EP Act requires the EPA to keep a public record of all referrals, assessment reports and decisions in relation to proposals on its website. Similarly to the EPBC Act, the EP Act does not require the WA Minister for Environment to publish reasons for its decision in relation to proposals, nor is the WA Minister required to prepare or provide reasons for decisions on proposals.

DWER is required to publish records of clearing permits, works approvals and licences that are granted[116] and any environmental notices and directions that it issues to enforce the EP Act.[117] This aspect contrasts with the EPBC Act, which does not require records of enforcement action to be published.

BC Act

Nominations for listing of threatened species, ecological communities and key threatening processes and the WA Minister for Environment's decisions on nominations for listing are published on DBCA's website. The Minister must also publish his or her reasons for decisions not to list items or to amend or repeal lists.[118] This is an improvement to the EPBC situation, which does not require reasons for listing decisions to be published.

AH Act and ACH Bill

Applications for consent under section 18 of the AH Act and decisions of the WA Minister for Aboriginal Affairs in relation to these applications are published on DPLH's website.[119] However, the ACMC's recommendations to the Minister are not made publicly available. Further, neither the AH Act or the draft ACH Bill require the WA Minister for Aboriginal Affairs to publish his or her reasons for decisions to grant or refuse approval under section 18.

Transparent decision-making – key findings

WA environmental protection laws are broadly comparable, and in some respects go further than, the requirements in the EPBC Act relating to transparent enforcement, monitoring and compliance. However, there are significant weaknesses in WA laws, most notably the lack if any requirement for the Minister for Environment to provide reasons for decisions relating to proposals.

Effective monitoring, compliance and enforcement

EPBC Act

The EPBC Act provides powers of entry, search, arrest, seizure and forfeiture of things. It also provides the Commonwealth Minister for Environment with the power to issue conservation orders prohibiting or restricting activities or requiring specified actions to be taken to protect listed threatened species or ecological communities.[120] Failure to comply with conservation orders

[116] Ibid ss 51Q and 63A.
[117] Ibid ss 64A and 71.
[118] BC Act s 39(3).
[119] https://www.dplh.wa.gov.au/getmedia/4a33d274-2ef9-4092-9989-46087641a54c/Ministerial-Decisions-as-at-October-2020
[120] EPBC Act s 464.

is an offence.[121] Further, the Commonwealth Minister for Environment or an interested person can seek an injunction from the Federal Court for contraventions of the EPBC Act.[122]

The Final Report on the Independent Review of the EPBC Act highlights that serious enforcement powers under the EPBC Act are rarely used and that, when they are issued, penalties are not commensurate with the harm that has occurred and do not provide an adequate deterrent.[123]

WA environmental protection laws

EP Act

Similar to the EPBC Act, the EP Act provides powers of entry, seizure and forfeiture of things. However, it does not provide for powers for arrest where there is a contravention of the EP Act. The EP Act also provides the CEO of DWER with the power to issue environmental protection notices where it suspects that a person is doing or is likely to do an act that will cause pollution or environmental harm.[124] These notices can require the person to investigate, prepare a plan or take such measures as it considers necessary to prevent, control or abate the emission, pollution or environmental harm. It is an offence for a person to not comply with a requirement in an environmental protection notice.[125]

Unlike the broad injunction power under the EPBC Act, the EP Act only provides that the CEO of DWER can seek injunctions for unauthorised clearing.[126] The EP Amendment Act also inserts a new Part VIA Division 5 that provides the CEO with the ability to apply to the Supreme Court for conduct injunctions to prevent improper conduct, (meaning an act or omission that constitutes a contravention of the EP Act including offences).[127]

As discussed further below, there are no opportunities for third party enforcement of compliance with the EP Act, meaning the burden falls entirely on DWER and the Minister. EDO's experience is that the enforcement powers under the EP Act are not often exercised by the Minister or DWER, even when requests are made by concerned organisations or individuals.

BC Act

The BC Act provides powers to enter, inspect and seize items. DBCA can also issue habitat conservation notices if it reasonably believes that habitat damage is, has or is likely to occur.[128] These notices can require the person to take measures to, inter alia, repair habitat damage or re-establish and maintain critical habitat. While contravention of habitat conservation notices is not an offence, penalties apply. There are no powers to seek injunctions for contraventions of the BC Act.

AH Act and ACH Bill

[121] Ibid s 470.
[122] Ibid s 475.
[123] Final EPBC Act Review Report, p 21.
[124] Ibid s65.
[125] Ibid s 65 (5).
[126] Ibid s 51S.
[127] EP Amendment Bill s 99ZC.
[128] BC Act s59.

The AH Act provides DPLH and honorary wardens to enter places and inspect items, and forfeit objects. The ACH Bill also provides inspectors with powers to enter places, inspect and to seize things relevant to offences.

The AH Act provides no enforcement powers. The ACH Bill provides the Minister with the power to issue stop activity orders[129] and prohibition orders[130] to protect Aboriginal cultural heritage from harm posed by unauthorised activities. These orders must be complied with.

Neither the AH Act or ACH Bill provide for injunctions to be sought for contraventions of their provisions.

The WA Auditor General's Report on 'Ensuring Compliance with Conditions on Mining' concluded that the now-DPLH 'has not effectively monitored or enforced compliance with conditions [on s 18 consents]. As a result, heritage sites may have been lost or damaged without the State knowing or acting'.[131] The destruction of the sacred sites of the Malarngowem peoples provides an example of the AH Act not being effectively enforced by the WA Minister for Aboriginal Affairs. While the Minister declined the mining company's application for consent under section 18, this did not prevent damage being done to the site and no further enforcement action was taken by the Minister, despite requests by the Kimberley Land Council.

The failures of enforcement in relation to conditions and breaches is illustrated by the following case study.

CASE STUDY: Gorgon Gas Project, Western Australia

The Gorgon Gas Development is a liquified natural gas (LNG) plant operated by Chevron Pty Ltd (Chevron) located on Barrow Island in northern WA. Barrow Island is a class A nature reserve (the highest level of protection in the WA statutory reserve system) that is recognised for its high terrestrial and marine conservation values. The project extracts gas from the Gorgon offshore gas field, which has particularly high levels of reservoir CO2.

In WA, the Environmental Protection Authority conducts assessments under the Environmental Protection Act 1986 (WA) (EP Act) and provides its report on environmental considerations to the Minister for Environment for a final decision on approval (which is reached in conjunction with other relevant government Ministers and decision-making authorities).

The EPA published its report on the project on 6 June 2006.[132] The report found that the project was environmentally unacceptable due to risks of impacts to flatback turtle populations, impacts on the marine ecosystem from dredging, risk of introduction of non-indigenous species and potential loss of subterranean and short-range endemic invertebrates species. The EPA also found that the project would be environmentally unacceptable if it did not include a scheme to inject or otherwise abate reservoir CO2 vented to the atmosphere. This report was then provided to the State government.

[129] ACH Bill s 176.
[130] Ibid s 181.
[131] https://audit.wa.gov.au/wp-content/uploads/2013/05/report2011_08.pdf p 22.
[132] EPA Bulletin 1221 https://epa.wa.gov.au/sites/default/files/EPA_Report/B1221.pdf

Despite the report, the WA Minister for Environment approved the project on 6 September 2007.[133] *In a subsequent announcement the WA government stated that the project would "boost the Australian economy and provide thousands of jobs for Western Australians" and that the State government had "worked tirelessly to facilitate major developments, particularly the massive Gorgon project".*[134]

Under the EPBC Act, the federal Minister for the Environment approved a modified version of the project on 26 August 2009.[135]

Under Condition 26 of the WA statutory approval instrument for the project (Ministerial Statement 800 (MS800)) Chevron is required to design, construct and implement a Reservoir Carbon Dioxide Injection System (CO2 Injection System). Condition 26 requires Chevron to:

> *→ design and construct CO2 Injection System infrastructure that is capable of disposing by underground injection, 100% of the volume of reservoir*
> *CO2 to be removed during operations that would otherwise be vented to the atmosphere;*
> *→ implement all practicable means to inject all reservoir CO2; and*
> *→ ensure 80% of reservoir CO2 is injected on a 5 year rolling average.*

The commissioning of the CO2 Injection System was substantially delayed due to technical problems.[136] *Accordingly, no reservoir CO2 was injected in 2016, 2017 or 2018. When the CO2 Injection System commenced operation on 8 August 2019, the project had been venting reservoir CO2, without injection, for approximately 3 years, resulting in an excess of approximately 6.2 million tonnes of reservoir CO2 being vented as at 2018.*[137] *Overall, the delays have resulted in more than 8 million tonnes of reservoir CO2 being removed (and therefore vented) without injection,*[138] *since the project commenced operation.*

The venting of this quantity of CO2 has caused Chevron to breach various obligations in Condition 26. Further, the venting has contributed to global greenhouse gas emissions and the likelihood of adverse impacts of climate change, therefore has arguably caused environmental harm and/or pollution, which are offences under the EP Act.

It appears that to date no enforcement action has been taken in response by the CEO of the Department of Water and Environmental Regulation (DWER) or the Minister for Environment despite them both having enforcement powers under the EP Act which would enable them to, for example, require Chevron to abate the impact of the emissions by obtaining offsets.

This case study demonstrates the lack of adequate enforcement action that is taken by environmental regulatory bodies in Western Australia. Without enforcement, there is little incentive for industry to comply with Ministerial conditions or reduce their greenhouse gas emissions.

[133] https://epa.wa.gov.au/sites/default/files/Ministerial_Statement/000748_0.pdf
[134] WA Government media statement 14 September 2009 https://www.mediastatements.wa.gov.au/Pages/Barnett/2009/09/Gorgon-set-to-take-Western-Australia-to-new-heights-in-oil-and-gas-industry.aspx
[135] http://www.environment.gov.au/system/files/pages/dcd6650f-0e0b-4ab4-bd84-2b519e26f9cb/files/variation-decision.pdf
[136] Chevron, 2017 Environmental Performance Report, p 54.
[137] Kathryn Diss, 'How the Gorgon gas plant could wipe out a year's worth of Australia's solar emissions savings', 21 June 2018, *ABC News* <https://www.abc.net.au/news/2018-06-21/gorgon-gas-plant-wiping-out-a-year-of-solar-emission-savings/9890386>.
[138] Chevron, 2016 Environmental Performance Report, p 49; 2017 Environmental Performance Report, p 53; 2018 Environmental Performance Report, p 47; and 2019 Environmental Performance Report, p 40.

Effective monitoring, compliance and enforcement – key findings

While WA environmental laws provide similar powers for monitoring and enforcement of compliance, they do not provide for injunctions to be sought for contravention of their provisions. There are also inadequacies regarding enforcement of conditions and compliance action for breaches that indicate the implementation of WA environmental protection laws does not meet national standards relating to effective enforcement, monitoring and compliance.

(4) Community Input into Delegated Decision Making, including Access to Justice

Community input

EPBC Act

Third parties have various opportunities to make comments under the EPBC Act. For example, there are opportunities for the public to comment on referrals of proposals; environmental documentation (if the level of assessment is by Public Environmental Report or Environmental Impact Statement); the listing of threatened species, communities and threatening processes; the listing of National Heritage places; draft management plans; draft recovery plans; and draft threat abatement plans. The public can also nominate threatened species, ecological communities or threatening processes and National Heritage places for listing.

WA environmental protection laws

EP Act

The EP Act provides that any person can refer proposals to the EPA for assessment. It also provides opportunities for the public to comment on referrals of proposals and on environmental document (if the EPA selects 'public environmental review' (**PER**) or 'Assessment on referral information (with public review)' as the level of assessment which is similar to the EIS and PER level under the EPBC Act). The EP Act also provides the public with opportunities to comment on applications for works approvals and licences for industrial facilities, and applications for permits to clear native vegetation.

BC Act

Any person can nominate a native species, ecological community or threatening process to be listed as threatened under the BC Act.[139] However, the BC Act does not require nominations to be published or subject to public consultation. Despite this, as the WA government is a signatory to the Common Assessment Method MOU discussed above, and this requires public consultation to be undertaken on assessments that relate to amending lists of nationally threatened species and ecological communities, nominations are published on the DBCA's website and subject to public

[139] Ibid s 38.

consultation up to 10 days before their consideration by the TSSC or TECSC.[140] The BC Act also provides the public with opportunities to comment on draft recovery plans.

AH Act and ACH Bill

The AH Act provides the public with the opportunity to report the existence of an Aboriginal cultural heritage site or object to the Registrar for potential registration.[141] Otherwise, the public do not have any input in the registration or protection of Aboriginal cultural heritage.

Rights to apply for review of decision-making

EPBC Act

Third parties can apply to the Administrative Appeals Tribunal for merits review of the following decisions of the Commonwealth Minister for Environment under the EPBC Act:

- decisions relating to permits including for listed threatened species and ecological communities and migratory species; and
- advice on whether a proposed action would contravene a conservation order.

The EPBC Act also provides extended standing to third parties to seek judicial review of decision-making.[142] In particular, it provides that an individual is taken to have standing to apply for judicial review if they are an Australian citizen or ordinarily resident in Australia or an external Territory; and at any time in the 2 years immediately before the decision, failure or conduct they have engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment.

WA environmental protection laws

EP Act

The EP Act provides the public with the ability to appeal for merits review of decisions made by the EPA (including decisions not to assess referred proposals[143] and the content of, or recommendations in, the EPA's report to the Minister following environmental impact assessment,) under the Part IV of the EP Act. The public can also seek merits review of decisions of DWER under Part V of the EP Act relating to the amendment of and conditions in clearing permits[144] and amendment of and conditions in licences and works approvals. However, only the proponent may apply for merits review of the conditions imposed by the Minister on the implementation of a proposal meaning the public cannot appeal against the Minister's decision to allow implementation of a proposal.

Decision-making under the EP Act is subject to a diluted form of merit review which is not conducted in an independent court or tribunal as is the case under the EPBC Act and in many other Australian jurisdictions. Merits appeals are instead decided by the Minister for Environment following advice and recommendations from the Appeals Convenor. The Appeals Convenor is a

[140] https://www.dpaw.wa.gov.au/plants-and-animals/threatened-species-and-communities/118-call-for-public-nominations-for-listing-and-delisting-of-threatened-plants-and-animals
[141] AH Act s 15.
[142] EPBC Act s 487.
[143] Ibid s100 (d).
[144] EP Act s101A.

statutory position appointed in accordance with the EP Act.[145] When considering an appeal the Appeals Convenor will consult with the relevant decision-maker, the appellant and any person who the Appeals Convenor deems necessary.[146] Following the consultation process, the Appeals Convenor will provide the Minister with a report which details the Appeals Convenor's recommendations in relation to the appeal.[147] Appeals Convenor proceedings are conducted in an informal way, which ensures that they are low cost and facilitative to members of the public. However, issues that are addressed in proceedings are often complex and require legal assistance.

The Appeals Convenor has a very broad discretion as to how she conducts inquiries. This has attracted significant criticism as the proceedings are conducted behind closed doors, parties to an appeal are not given responses from other appellants or stakeholders and must instead rely on the correspondence being relayed, often orally, during a meeting with the Appeals Convenor. This denies appellants the opportunity to test evidence and prepare responses (compared to if such information was circulated to all parties as part of a pre-trial process). A review by EDO of recent published decisions by the Appeals Convenor, did not identify any examples of the Appeals Convenor preferring the arguments of the appellant over the Government decision-maker.

The WA merits review system has been criticised for compromising public confidence, lacking transparency, not providing a system of precedent and being unpredictable and confusing for both the public and practitioners. In some circumstances the Minister for Environment is responsible for determining appeals of his own decisions to impose conditions on the approval of projects.[148] While an appeals committee must be appointed in those circumstances and the Minister is required to make a decision "in accordance with" the committee's advice, these decisions lack genuine independence. Further, while the Minister determines appeals on the advice and recommendations of Appeals Convenor, the Convenor is a Ministerial appointee.

The EP Act also **does not provide extended standing** for judicial review proceedings, meaning the common law 'special interest' test will apply. This standard is higher than the EPBC Act standard, and requires evidence that the third party has an interest in the proceedings that is more than the interests of the general public and a mere emotional or intellectual concern.

BC Act

The BC Act provides limited rights to 'persons affected' to apply to the State Administrative Tribunal for review of decisions of DBCA in relation to licences.[149] Third parties have no ability to seek merits review of decisions made under the BC Act. The BC Act also does not provide extended standing for judicial review proceedings, meaning the common law 'special interest' test will apply.

AH Act and ACH Bill

The AH Act only provides the owner of land (i.e. the person who applies for consent under section 18) with the ability to apply to the State Administrative Tribunal for a review of the Minister's decision to decline to grant section 18 consent.[150] There is no avenue for merits review for third

[145] The Appeals Convenor is appointed in accordance with 107A of the EP Act, with its functions set out at section 107B.
[146] EP Act ss 109(1)(a)(i), 109(1)(a)(iii) and 109(1)(aa).
[147] Ibid ss 109(1)(a)(i), 109(1)(a)(iii) and 109(1)(aa).
[148] Ibid pt VII. A more detailed analysis is also provided below.
[149] Biodiversity Conservation Regulations 2018 r 89.
[150] AH Act s 18(5).

parties or Traditional Owners and, therefore, their only option would be to commence a judicial review.

The draft ACH includes new merits appeal rights to the State Administrative Tribunal for Aboriginal parties and proponents in respect of the WA Minister for Aboriginal Affair's decision to authorise or refuse a ACH Management Plan.[151] While this is an improvement to the situation under the AH Act, third parties still do not have any merits review rights in relation to decisions made under the ACH Bill.

Neither the AH Act or the ACH Bill provide extended standing for judicial review proceedings, meaning the common law 'special interest' test will apply.

Third party enforcement

EPBC Act

Interested third parties can seek injunctions for contraventions of the EPBC Act.[152] 'Interested persons' is defined broadly. An individual is an 'interested person' if they are an Australian citizen or ordinarily resident in Australia or an external Territory, and:

> (a) the individual's interests have been, are or would be affected by the conduct or proposed conduct; or
>
> (b) the individual engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before:
>
> (i) the conduct; or
>
> (ii) in the case of proposed conduct—making the application for the injunction.

WA environmental protection laws

EP Act

There are no provisions that enable third parties to enforce compliance with the EP Act. In particular, the current system of enforcement under the EP Act does not contemplate third parties initiating proceedings for breach of the provisions of the EP Act and environmental offences, despite these offences concerning injury to the environment and natural resources of WA which are public assets. Further, there are no provisions for third parties to seek injunctions for contraventions of the EP Act. This means that the power (and obligation) to enforce the EP Act falls entirely on the WA government.

EDO often experiences and witnesses the frustration of clients, with evidence to establish an arguable case and who are prepared to undertake enforcement proceedings (including bearing the costs risks of litigation) in the public interest, in being unable to bring court proceedings where proponents have breached the EP Act or committed an offence and decision-making authorities responsible for compliance and enforcement, such as DWER, fail or refuse to act.

BC Act

[151] Ibid s258.
[152] EPBC Act s 475.

Under the BC Act only the Department of Biodiversity, Conservation and Attractions (**DBCA**) can commence prosecution for an offence under the legislation.[153] There are no provisions for other parties to enforce the BC Act.

AH Act and ACH Bill

While Department of Planning, Lands and Heritage (**DPLH**) encourages members of the public to report to them if they suspect or discover an offence under the AH Act,[154] neither the AH Act and draft ACH Bill provide third parties with the ability to enforce their provisions.

Community participation and access to justice – key findings

In summary, while current WA laws do provide certain requirements for community participation, they do not incorporate the full suite of necessary assurance standards to provide transparency, accountability and access to justice available under the EPBC Act.

In particular, WA environmental protection laws provide limited or no opportunities for the public to seek merits review of decision-making by an independent tribunal or court.[155] They also make it much more difficult for third parties to seek judicial review of decision-making and provide no opportunities for them to seek injunctions to enforce compliance with, or stop contraventions of, environmental laws.

This means that, if federal approval responsibilities are handed over to the WA government, current standards relating to community input and access to justice will be reduced.

(5) Regular Reporting Functions of Delegated Responsibilities to the Commonwealth government and Australian Community

Reporting to the Commonwealth Government

EPBC Act

The DAWE provides annual reports on the operation of the EPBC Act to the Commonwealth Minister for Environment.[156] The Department must also report on whether the controlled action should be approved and recommended conditions.

WA environmental protection laws

EP Act

There are no provisions in the EP Act that expressly require reporting to the Commonwealth government. However, where a project is assessed by accredited assessment under EP Act, the WA EPA must submit an assessment report to the Commonwealth Minister for Environment. The

[153] BC Act s 232.
[154] https://www.dplh.wa.gov.au/information-and-services/aboriginal-heritage/aboriginal-site-preservation
[155] We note that while avenues for merits review are limited under the EPBC Act, review is available by an independent court or tribunal.
[156] EPBC Act s 516.

Commonwealth Minister will rely on the WA EPA's report for the purpose of its decision whether or not to approve projects that are likely to have a significant impact on a MNES under the EPBC Act.

BC Act

There are no requirements under the BC Act for the WA Minister for Environment or DBCA to report to the Commonwealth government.

AH Act and ACH Bill

Neither the AH Act or the draft ACH Bill require the WA Minister for Aboriginal Affairs or DPLH to report to the Commonwealth government.

Therefore, if federal responsibilities are handed to WA decision-makers and agencies based on current laws, they will not be required to report to the Commonwealth government on the discharge of their responsibilities, unless required to do so by new legislative amendments and clauses agreed in an approval bilateral agreement. It is not clear what reporting requirements will be included in approval bilateral agreements, and whether reports will be public.

Reporting to the Australian community

EPBC Act

EPBC Act requirements to publish information are addressed above in relation to transparency of decision-making and enforcement. The EPBC Act also requires the Minister to prepare state of the environment reports.[157] While these are not expressly required to be published, they are published online and accessible to the Australian public.[158] Similarly, while the EPBC Act does not require DoEE's annual reports on the operation of the Act to be published, they are published online.[159]

WA environmental laws

EP Act

EP Act provisions relating to publishing of information are addressed above in the context of transparency. The EP Act also requires the EPA to make annual reports to the WA Minister on its activities during the year and environmental matters generally.[160] While the EP Act does not require these reports to be published, they are published on the EPA's website (similar to State of Environment reports under the EPBC Act).

This means that, if federal responsibilities are handed to WA decision-makers and agencies, they will be subject to similar requirements to report to the Australian public.

[157] Ibid s 516B.
[158] https://soe.environment.gov.au/
[159] https://www.transparency.gov.au/annual-reports/department-agriculture-water-and-environment/reporting-year/2019-20-28
[160] EP Act s 21.

Reporting to the Commonwealth and the Australian public – key findings

Therefore, if federal responsibilities are handed to WA decision-makers and agencies based on current laws, they will not be required to report to the Commonwealth government on the discharge of their responsibilities, unless required to do so by new legislative amendments and clauses agreed in an approval bilateral agreement. It is not clear what reporting requirements will be included in approval bilateral agreements, and whether reports will be public.

If federal responsibilities are handed to WA decision-makers and agencies, they will be subject to similar requirements to report to the Australian public.

(6) Resources and Capacity to Effectively Discharge Delegated Responsibilities

Commonwealth resources and capacity

The Final Report of the Independent Review of the EPBC Act concludes that monitoring, compliance and enforcement activities under the EPBC Act are significantly under-resourced[161] and that the Department lacks the capacity to follow-up activities that are not conducted.[162] A 2020 Audit Office Report found the Department of Agriculture, Water and the Environment's administration of referrals, assessments and approvals of controlled actions under the EPBC Act is not effective or efficient.[163] The department response refers to a prioritisation of resources to address the identified gaps, but no reference to increased resources. There are cost recovery mechanisms under the EPBC Act that have been subject to reviews.[164]

We note that the 2021 budget, as summarised by the Environment Minister, allocated: $9 million to fund the establishment and operation of an independent Environment Assurance Commissioner, and $2.7 million to support the development of a 'pilot' regional plan for a priority development region in partnership with a willing state or territory; a further $0.5 million to "support the Minister's commitment to stakeholder engagement for modernising and strengthening the protection of Indigenous cultural heritage" and $17.1 million to "be allocated for additional resourcing to continue improved assessment and approval times under the existing EPBC Act."[165]

WA resources and capacity

EDO's experience has been that WA environmental departments and regulatory bodies such as the EPA and DWER are not adequately resourced to effectively monitor and enforce compliance with environmental laws. However, the EP Amendment Act also contains provisions for recovery of costs associated with assessment and implementation of proposals which may increase the resources and capacity to enforce the EP Act, however this provision has not commenced yet.[166]

[161] Final EPBC Act Review Report, p 149.
[162] Ibid p 176.
[163] Available at: Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999 | Australian National Audit Office (anao.gov.au)
[164] Cost Recovery under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) | Department of Agriculture, Water and the Environment
[165] Budget 2021-22: Supporting oceans, recycling, biodiversity and climate resilience | Ministers (awe.gov.au)
[166] See section 48A.

It is unclear how much funding WA may receive (if any) from the federal environment budget allocations noted above. Information regarding specific resourcing to support approval bilateral agreement implementation is not publicly available.

At both the WA and national level, resourcing is an issue. However we note that if Commonwealth approval powers are devolved to WA, then the EPA and DEWR would need additional resources to adequately implement an assessment and approval system for projects impacting MNES in WA and to ensure compliance with national standards.

Resourcing – Key finding

Similar to the situation under the EPBC Act, WA decision-makers, regulators and agencies currently lack sufficient resources and capacity to effectively discharge their responsibilities. If Commonwealth approval powers are devolved to WA, then the EPA and DEWR would need additional resources to adequately implement an assessment and approval system for projects impacting MNES in WA and to ensure compliance with national standards.

(7) Reliable and High Quality Data to Support Delegated Responsibilities

Commonwealth data

At the Commonwealth level, there are various databases and tools available that provide reliable and high quality data to support assessments and decision-making.[167] These include:

- Protected Matters Search Tool[168] – demonstrates whether MNES or other protected matters under the EPBC Act are likely to occur in an area of interest;
- Species Profile and Threats Database[169] - provides information about threatened species and ecological communities listed under the EPBC Act including their population and distribution, habitat, movements, feeding, reproduction and taxonomic comments;
- Flora of Australia Online[170] -provides descriptions of Australian plants;
- National Vegetation Information System[171] – provides comprehensive information on the extent and distributions of vegetation types in Australian landscapes;
- Critical Habitat Register[172] - identifies critical habitat for threatened species;
- Australian Wetlands Database - provides information on the values of wetlands;[173]
- Australian Heritage Database[174] -contains information about natural, historic and Indigenous places (including places in the World Heritage List, National heritage List and Commonwealth Heritage List).

[167] https://www.environment.gov.au/about-us/environmental-information-data/databases-applications
[168] https://www.environment.gov.au/epbc/protected-matters-search-tool
[169] https://www.environment.gov.au/cgi-bin/sprat/public/sprat.pl
[170] https://www.environment.gov.au/science/abrs/online-resources/flora-of-australia-online
[171] https://www.environment.gov.au/land/native-vegetation/national-vegetation-information-system
[172] https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl
[173] http://www.environment.gov.au/water/wetlands/australian-wetlands-database
[174] http://www.environment.gov.au/cgi-bin/ahdb/search.pl

Notwithstanding these resources, we note that the Final Report of the Independent Review found significant gaps and barriers in current information systems and recommended a "quantum shift" in terms of significant data and information reforms.[175]

WA data

At the state level, the WA government has various databases and datasets that support assessments and decision-making. For example, it has:

- Threatened and Priority Flora and Fauna databases – contains information on threatened and priority flora and fauna populations in WA;
- FloraBase[176] - provides information on WA flora;
- Native Vegetation Extent dataset – provides information on vegetation extent from mapping of remnant vegetation in WA;
- Ramsar Sites dataset[177] - describes the boundaries of the Ramsar wetlands in WA;
- inHerit[178] and the Aboriginal Heritage Inquiry System - provide a dataset of registered Aboriginal Heritage sites;[179]
- Index of Biodiversity Surveys for Assessments[180] – provides an index of land-based biodiversity surveys conducted in WA;
- Environmental Offsets Register[181] – provides a record of all offset agreements and offsets required under the EP Act.

However, as noted above, there is are data gaps for certain ecological communities preventing them from being listed as Threatened ecological communities.[182]

The Final Report on the EPBC Act also refers to the Western Australian Biodiversity Science Institute's 2019 Digitally Transforming Environmental Impact Assessment report, which it states "identified significant financial benefits to proponents and the government from developing systems to improve the flow of information into the environmental assessment process (WABSI 2019)".[183]

Reliable & high quality data – Key finding

Gaps and barriers in data and information have been identified at both the national level and for WA, although noting some WA systems deliver efficiency benefits. WA decision-makers and agencies have a similar level of data and information available at the Commonwealth level to support their assessments and decision-making, so a handover of federal decision-making and approval powers to WA decision-makers and agencies is unlikely to substantially affect this, noting the need for significant reform and investment in new data and information systems at both the national and state levels.

[175] See: Chapter 10 - Data, information and systems | Independent review of the EPBC Act (environment.gov.au)
[176] https://florabase.dpaw.wa.gov.au/
[177] https://catalogue.data.wa.gov.au/dataset/ramsar-sites
[178] http://inherit.stateheritage.wa.gov.au/
[179] https://www.dplh.wa.gov.au/ahis
[180] https://www.wa.gov.au/service/environment/environmental-impact-assessment/program-index-of-biodiversity-surveys-assessments
[181] https://www.offsetsregister.wa.gov.au/public/home/
[182] See: See: Threatened ecological communities - Parks and Wildlife Service (dpaw.wa.gov.au)
[183] Final EPBC Act Review Report, p 163.