Submission to the Productivity Commission (Net Zero Transformation Inquiry, Interim Report)

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Executive Summary

This submission responds to the Productivity Commission's Interim Report, *Investing in Cheaper, Cleaner Energy and the Net Zero Transformation* (2025), and places the Commonwealth and all participating entities on legal notice. The Commission's recommendations propose a fundamental reconfiguration of Australia's environmental governance framework by seeking to replace or circumvent core protections established under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBC Act"). These recommendations are unlawful, unconstitutional, and strategically constructed to present deregulation as administrative efficiency.

The Commission's proposal includes the replacement of EPBC Act assessment triggers with so-called National Environmental Standards, the devolution of Commonwealth approval powers to the States, the establishment of a centralised delivery or fast-track agency, and the reclassification of land including housing zones for industrial or infrastructure purposes without full environmental oversight. These mechanisms, if implemented, would enable approvals to proceed with reduced scrutiny, compromised scientific integrity, and limited public accountability. They are not neutral reforms. They represent a coordinated attempt to dismantle the legal guardrails that ensure protection of matters of national environmental significance (MNES), including World Heritage properties, threatened species, Ramsar wetlands, and migratory species.

The EPBC Act is a constitutionally grounded statute, enacted under the external affairs power (s 51(xxix) of the Constitution), and serves as Australia's legislative implementation of binding international environmental treaties. It mandates that all actions likely to significantly affect MNES must be referred, assessed, and approved under a Commonwealth process that considers the best available scientific advice (s 136), applies the precautionary principle (s 391), and is subject to public participation and transparency obligations (s 74). The Act is enforceable and reviewable, with public standing provisions (s 487), strict approval conditions, and remedies under both the Administrative Decisions (Judicial Review) Act 1977 (Cth) and s 75(v) of the Constitution.

The Productivity Commission's proposals would directly interfere with these obligations. The replacement of statutory triggers with standards is not supported by law. Such a move would unlawfully fetter decision-makers, diminish public rights, and expose approvals to jurisdictional error. Fast-tracking, coordinator models, and "priority lanes" risk unlawful sub-delegation and apprehended bias, especially where infrastructure delivery and environmental approval functions are merged. Devolution through bilateral agreements, already discredited in previous Parliamentary and judicial findings, would erode the Commonwealth's ability to uphold its treaty responsibilities and apply consistent national protections.

Most concerningly, the proposal to facilitate infrastructure by clearing pathways for industrial development on residential or agricultural land effectively targeting people's homes is not only legally reckless but socially incendiary. Communities have already suffered from speculative land reclassification, accelerated approvals without consultation, and the rollback of offset requirements. The Commission's attempt to label these changes as climate resilience or housing strategy is disingenuous. It is an act of deliberate obfuscation an attempt to distract from the fact that legal protections are being stripped under the cover of urgent reform.

This submission highlights how astroturfing and disinformation are being deployed to manufacture consent and suppress resistance. The narrative that "environmental laws are slowing down Net Zero" is unsupported by empirical data, as confirmed by independent audits and global evidence. Delay is more often caused by proponent error, incomplete scientific baselines, or deficient community consultation not by the EPBC Act. Yet the Commission has reproduced this narrative uncritically, enabling a false binary between environmental protection and national progress.

Australia has already witnessed the consequences of weakened oversight. From the unlawful approval of the Nathan Dam to the Ministerial override of scientific advice in the Yeelirrie uranium case, to international disasters like Deepwater Horizon and Mount Polley the evidence is unequivocal. Deregulation does not create certainty. It creates risk, litigation, and irreversible harm. The EPBC Act has repeatedly prevented such outcomes and must be fortified, not dismantled.

This submission sets out, in forensic legal detail, the statutory, constitutional, and jurisprudential framework that governs environmental assessment in Australia. It demonstrates that the EPBC Act is not optional. It is the law. Any attempt to bypass it by administrative arrangement, economic narrative, or political agenda will be subject to legal challenge. The guardrails exist for a reason. They are not merely protective; they are structural. And they will be defended through every available legal avenue, including judicial review, constitutional remedy, and probity investigation.

The Commonwealth must reject the Commission's recommendations in full and recommit to the statutory integrity of the EPBC Act. Environmental protection is not an obstacle to Net Zero it is its legal foundation. Any government that seeks to accelerate energy transition by weakening the rule of law will face not only public resistance but legal accountability.

1. Introduction

The Productivity Commission's Interim Report, *Investing in Cheaper, Cleaner Energy and the Net Zero Transformation* (2025), sets out a suite of policy reforms that would substantially alter the operation of Australia's environmental regulatory framework. Central to the Commission's proposals are recommendations to streamline project approvals, reduce what it characterises as duplication between federal and state processes, and embed economic and energy transition objectives into environmental decision-making. The proposed mechanisms include the replacement of existing legal triggers under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBC Act") with national environmental standards; the creation of a centralised delivery agency or Coordinator-General to facilitate "faster" approvals; expanded bilateral agreements to devolve decision-making to the states; and the introduction of fast-track or "priority" pathways for major projects aligned with Net Zero objectives.

Although presented in technocratic and administrative terms, these proposals represent a deliberate and strategic dismantling of the statutory and constitutional guardrails that currently protect matters of national environmental significance. They would, if implemented, weaken or remove the very legal mechanisms designed to ensure scientific integrity, procedural fairness, and compliance with Australia's international environmental obligations. The reforms proposed by the Productivity Commission are not legally neutral. They are not simply administrative refinements. They constitute a direct challenge to the binding effect of Part 3 of the EPBC Act, to the mandatory decision-making framework set out in sections 136 and 391, and to the public participation, transparency, and standing provisions that are foundational to the Act's legitimacy.

This submission places all relevant decision-makers on legal notice. Any executive, administrative, or legislative attempt to operationalise the Commission's recommendations whether through subordinate legislation, intergovernmental agreements, ministerial discretion, or machinery-of-government restructuring will be subject to legal scrutiny. Implementation that circumvents or undermines the EPBC Act as it currently stands will likely constitute jurisdictional error, fettering of discretion, failure to consider mandatory relevant considerations, or breach of statutory and constitutional limits on delegated power. Moreover, any such reforms would risk inconsistency with Australia's treaty implementation obligations under section 51(xxix) of the Constitution and would be exposed to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth), section 39B of the Judiciary Act 1903 (Cth), and section 75(v) of the Constitution.

The rule of law applies to all governmental actions, including those pursued in the name of climate urgency or economic productivity. The EPBC Act is not a regulatory impediment; it is a constitutional statute that operationalises Australia's obligations under international environmental treaties and provides the statutory foundation for federal oversight of biodiversity and ecological protection. Its provisions are not symbolic. They are legally binding and enforceable. The existing legislative framework already includes mechanisms for strategic assessment, bilateral cooperation, and project streamlining subject to safeguards and Commonwealth accountability. To replace or bypass those safeguards under the guise of administrative modernisation or Net Zero delivery is not reform; it is unlawful conduct.

If the Productivity Commission's recommendations are adopted in whole or in part, this submission will form part of the evidentiary record for any future legal challenge. The content herein should be treated as formal notice to all responsible Ministers, departments, agencies, and project proponents. Those who act to implement reforms that erode or circumvent the EPBC Act, or who rely on such reforms to advance approvals, will do so with full awareness of the legal risks and exposure. The public interest in environmental protection is not suspended by political will. The statutory obligations of the Commonwealth remain live, enforceable, and subject to review. These legal guardrails exist for a reason and they will be defended.

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2. Terms of Reference & Scope

The Treasurer's terms of reference for the Productivity Commission's inquiry into the net zero transformation direct the Commission to identify reforms that accelerate project approvals, reduce duplication, and improve productivity outcomes (PC 2025a). This scope is remarkable and must be challenged at the outset. The Productivity Commission is established under the **Productivity Commission Act 1998 (Cth)** as an economic advisory body with functions confined to conducting inquiries, holding public hearings, and providing advice to Government (PC Act 1998, ss 6 and 11). It has no statutory responsibility for administering environmental legislation, no decision-making power under the **Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)**, and no enforcement role in environmental protection. Approvals under the EPBC Act are legally binding ministerial decisions directed at protecting matters of national environmental significance, not discretionary policy levers for productivity.

Asking the Commission to identify ways to "speed approvals" risks two distortions. First, it pushes the Commission beyond its statutory remit into areas of law where it lacks both jurisdiction and expertise. Second, it recasts environmental protection as primarily an economic problem, which is inconsistent with the purpose and objects of the EPBC Act (EPBC Act 1999, s 3; Samuel 2020). The Productivity Commission can make advisory comments, but it cannot lawfully alter, direct, or weaken the protective guardrails established by Parliament.

Position

The Productivity Commission's terms of reference direct it to identify reforms that will "speed approvals," "cut duplication," and "boost productivity." These directions sit uncomfortably against the structure of the EPBC Act. The Commission can only advise; it cannot legislate, direct, or override the statutory scheme. Approval processes under the EPBC Act are mandated by Parliament and grounded in Australia's international environmental obligations. Framing the approvals system as an economic bottleneck elevates "speed" above the Act's mandatory criteria, distorting the statute's protective mandate. If such framing were to influence administrative practice or legislative amendment, it would risk unlawful decision making, procedural unfairness, and potential jurisdictional error (AGS 2024; EPBC Act 1999, Parts 3 and 7–9).

Remit and Overreach

The Productivity Commission Act defines the Commission's purpose as providing independent advice to Government on matters of economic and social policy, with explicit functions of conducting public inquiries, reporting on industry assistance, and analysing regulation from an economic perspective (PC Act 1998, ss 6, 11). Nothing in the Act grants the Commission authority to redesign statutory approval systems, nor to interpret or modify obligations under environmental legislation. The **EPBC Act** is the Commonwealth's sole legislative instrument for regulating environmental approvals, giving effect to international conventions such as the **World Heritage Convention** and the **Ramsar Convention** (EPBC Act 1999, s 3; DCCEEW 2025a).

To the extent that the Treasurer's reference asks the Commission to recommend "faster approvals," it must be recognised that the Commission's role is advisory only. Any reform that weakens or bypasses the EPBC Act cannot lawfully proceed on the authority of Commission recommendations alone. Such reform would require Parliament to amend the Act, and decision makers would remain bound by the statutory obligations until such amendments occurred. Attempts to operationalise "fast-track" recommendations in practice without legislative change would risk invalid decisions and expose proponents and Government to litigation (AGS 2024; Parliamentary Library 2020).

The Commission's expertise in economic policy does not substitute for the statutory expertise embedded in the EPBC Act's framework of environmental triggers, ministerial duties, and public accountability requirements. In effect, the government has tasked an economic body to lead an environmental reform agenda, creating a structural overreach that must be scrutinised carefully.

2.1 PC directed to identify reforms to speed approvals, cut duplication, and boost productivity

The Productivity Commission's interim report identifies "speeding up approvals" and "removing duplication" as core strategies for enabling cheaper and cleaner energy infrastructure (PC 2025a). Yet several flaws arise in treating these as legitimate reform targets

- **Authority problem**: The Commission can only recommend process improvements; it has no power to modify or direct statutory duties under the EPBC Act. The assertion that it can design "faster approval pathways" risks overstating its jurisdiction (PC Act 1998, ss 6, 11).
- **Duplication already addressed by law**: Part 5 of the EPBC Act allows for bilateral agreements with States and Territories, removing duplication where State processes meet federal standards. These agreements already operate nationally, and strategic assessments are also available to streamline planning. The lawful remedy for duplication is better accreditation, not dilution of federal standards (EPBC Act 1999, Pt 5; DCCEEW 2022; DCCEEW 2025a).
- **Speed is not a lawful criterion**: Approval decisions must be made by reference to the Act's objects and the significant impact test, not timeliness. Prioritising "speed" as a reform outcome risks distracting decision makers from mandatory considerations, exposing approvals to judicial review (EPBC Act 1999, ss 3, 74; AGS 2024).
- **Economic framing cannot override environmental obligations**: The framing of approval processes as economic impediments subordinates biodiversity conservation and Australia's international treaty obligations to productivity rhetoric. This is

inconsistent with the statute's objects and undermines public confidence in the legitimacy of decisions (EPBC Act 1999, s 3; Samuel 2020).

Authority and limits

The Productivity Commission's powers are advisory. The Commission is established to conduct inquiries and research and to provide recommendations to the Government in accordance with references issued by the Minister or the Treasurer. It does not possess approval powers and cannot alter statutory duties imposed by Parliament. Any recommendation to "speed approvals" or "streamline" cannot change the legal obligations of decision makers administering the EPBC Act unless and until Parliament amends the Act. Terms of reference cannot lawfully authorise departures from the Act's objects, triggers, and decision making tests. They cannot displace administrative law requirements such as procedural fairness, consideration of relevant matters, and avoidance of fettering discretion (Productivity Commission Act 1998, ss 6 and 11, EPBC Act 1999, s 3, Parts 3 and 7 to 9, AGS 2024).

Duplication is already addressed inside the EPBC Act

The EPBC Act contains express mechanisms to reduce duplication with States and Territories. Bilateral assessment agreements permit a single accredited assessment process, while preserving final Commonwealth approval responsibilities where matters of national environmental significance are triggered. Strategic assessments also exist to streamline at the plan or program level. The lawful path to reduce duplication is to improve accreditation quality and implementation under existing Part 5, not to erode federal standards or remove Commonwealth checks and balances. Claims that duplication necessitates weakening the Act are not supported by the statute's architecture or by the experience of accredited bilaterals that already operate nationally (EPBC Act 1999, Part 5, DCCEEW 2022, DCCEEW 2025a, Parliamentary Library 2020).

Speed is not a lawful objective of approval decisions

Approval decisions under the EPBC Act must be based on the significant impact test, the protection of matters of national environmental significance, and the statutory objects in section 3. Speed is not a statutory criterion. A policy that privileges timeliness over merits would misdirect decision makers away from mandatory considerations and risks jurisdictional error. The Commission can recommend process improvements, however any operational model that subordinates merits to timetables, or channels projects into priority lanes that reduce participation and scrutiny, will be legally fragile once applied to actual decisions under Parts 7 to 9 (EPBC Act 1999, s 3, Parts 3 and 7 to 9, AGS 2024).

Evidence burden sits with the Commission

If the Commission asserts that federal law is the cause of delay, it must publish a transparent breakdown of causes, for example incomplete referrals, additional information requests, redesign to avoid matters of national environmental significance, State assessment bottlenecks, or court ordered corrective action. Without such evidence, "speed up approvals" is a policy assertion, not an evidence based finding. The Act's existing framework already permits efficient processing where proponents comply and where assessments are complete and accurate. The correct remedy for delay is higher quality proposals and enforcement of the law, not weakening the law to fit non compliant projects (Productivity Commission 2025a, AGS 2024, DCCEEW 2025a).

Productivity claims do not trump Parliament's environmental purpose

The Commission's remit to advise on productivity cannot expand executive power or contract Parliament's environmental purpose. The EPBC Act is the Commonwealth instrument that implements obligations under the World Heritage Convention, the Ramsar Convention, and migratory species agreements. Any reform that sidelines these obligations in the name of "productivity" risks inconsistency with the external affairs purpose of the Act and invites challenge if it distorts how Part 3 triggers and Part 9 approvals are applied in practice (EPBC Act 1999, s 3, DCCEEW 2025b, AGS 2024).

Independent expert reviews do not support weakening guardrails

The Independent Review of the EPBC Act recommended National Environmental Standards and an independent regulator to make the system clearer and stronger, not to hollow it out. Using standards to accelerate approvals without binding, measurable thresholds and independent enforcement contradicts the central thrust of the Review's recommendations. The Review underscores that certainty comes from strong, enforceable rules, credible science, and institutional independence, not from collapsing checks in the name of speed (Samuel 2020).

2.2 Highlight the risk of economic framing overshadowing environmental obligations

The Productivity Commission's framing of approvals primarily through an economic lens risks overshadowing the statutory purpose of the EPBC Act. While the Commission views environmental regulation as a barrier to productivity, Parliament has already established that environmental protection is the central objective. Before examining how economic rhetoric distorts this balance, it is necessary to reaffirm the statutory primacy of environmental protection as the foundation upon which all approvals must rest.

Statutory primacy of environmental protection

Section 3 sets the EPBC Act's objects, which include protection of the environment and conservation of biodiversity, the promotion of ecologically sustainable development, and the implementation of international agreements. These objects frame every referral, assessment, and approval. Recasting approvals primarily as an economic productivity lever invites decision makers and policy designers to give determinative weight to a consideration that the statute does not elevate. That framing risks legal error if it leads to the exclusion or marginalisation of mandatory environmental considerations (EPBC Act 1999, s 3, Parts 3 and 7 to 9, AGS 2024).

Cumulative impacts and biodiversity outcomes are part of lawful decision making

The Act's purpose is not only procedural efficiency. It requires outcomes that protect matters of national environmental significance, including the management of cumulative impacts. Economic framing tends to ignore cumulative impact accounting, regional ecological limits, and the precautionary principle, which are central to credible environmental decision making. Designing reforms around project velocity rather than environmental outcomes will generate more litigation and higher investment risk due to weak records and inadequate reasons (EPBC Act 1999, s 3, Parts 3 and 7 to 9, Samuel 2020, DCCEEW 2023).

International obligations set substantive floors

Australia’s obligations under the World Heritage Convention, the Ramsar Convention, and the Convention on Biological Diversity are not optional. They inform the meaning of the Act’s objects and create substantive floors that domestic reform should not undercut. Economic framing that tolerates avoidable degradation of listed values places Australia at risk of non compliance and undermines the constitutional foundation for federal intervention to protect matters of national environmental significance. Reform discourse that under weights these obligations is legally unsound and strategically counterproductive (DCCEEW 2025b, AGS 2024).

“Standards” cannot be used to launder weaker protections

If National Environmental Standards are adopted, they must be binding, measurable, and enforceable, with independent audit and compliance powers. Standards that operate as guidance or as vague principles will permit ministerial discretion to dominate and will displace the protective function of Part 3 triggers. That would invert the statutory architecture by treating environmental protection as an outcome to be balanced away rather than a mandatory constraint. Economic framing often promotes such flexible standards under the banner of certainty, however certainty built on vague rules increases legal risk, it does not reduce it (Samuel 2020, DCCEEW 2023, Parliamentary Library 2020).

Community participation is a legal safeguard, not a cost

Public notice and comment requirements are integral to lawful and legitimate approvals. Economic framing tends to count participation as a transaction cost rather than a statutory safeguard against error and capture. Reducing participation windows, compressing reasons, or centralising decisions in delivery focused offices will increase the probability of procedural fairness breaches and apprehended bias, inviting challenge and delay that exceed any notional time saved on the front end (EPBC Act 1999, for example s 74 and related provisions, AGS 2024).

Bottom line on scope

The Commission can recommend administrative improvements and evidence based process design, however it cannot re write statutory purposes, and it cannot lawfully direct decision makers to privilege speed or economic throughput over the Act’s protective mandate. Any future legislative proposal that embodies this economic framing must be rejected unless it demonstrably strengthens environmental standards, independence, transparency, and cumulative impact management in line with the statute’s objects and Australia’s international obligations (Productivity Commission Act 1998, ss 6 and 11, EPBC Act 1999, s 3, Samuel 2020).

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3. Core PC Recommendations (Summary of Proposals)

The Productivity Commission’s Interim Report sets out a package of recommendations intended to “accelerate Australia’s net zero transformation.” Central to this is the call for reforms that would: speed approvals, reduce duplication, establish National Environmental Standards, introduce fast-track mechanisms, and reframe conservation law as a productivity issue (Productivity Commission 2025a). The Treasurer’s Terms of Reference (PC 2025b) explicitly ask the Commission to identify "opportunities to streamline regulation and remove unnecessary duplication."

This framing must be interrogated. The Productivity Commission is an advisory body under the **Productivity Commission Act 1998 (Cth)**. Its role is to conduct inquiries and provide economic advice; it does not administer environmental law and has no statutory authority to direct or amend approval processes under the **Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)**. Approvals under the EPBC Act are ministerial decisions tied to statutory criteria designed to protect matters of national environmental significance (MNES) (EPBC Act 1999, s 3; AGS 2024). Any attempt to subordinate these criteria to economic throughput risks undermining both the legal integrity of decisions and the constitutional basis of the Act, which is grounded in external affairs obligations.

The following subsections examine each of the Commission's six core proposals. Each is assessed against statutory authority, legal limits, and evidentiary gaps.

3.1 Faster approvals

One of the Productivity Commission's central recommendations is to accelerate approval processes for large-scale energy infrastructure. This proposal is presented as a solution to perceived bottlenecks in the regulatory system and as a way of lowering costs for investors. Before considering the detail of what the Commission proposes, it is essential to examine whether such a recommendation is within its lawful remit, whether it aligns with the statutory design of the EPBC Act, and whether the evidence actually supports the claim that environmental approvals are the source of delay.

What the PC proposes

The Interim Report argues that current approval processes are "sluggish and uncertain" and recommends reforms to speed them up in order to unlock cheaper energy infrastructure (Productivity Commission 2025a). The Commission presents timeliness as a productivity lever, implying that legal guardrails are a primary obstacle to investment.

Authority problem

The Productivity Commission has no approval powers under the EPBC Act. Its statutory remit under the Productivity Commission Act 1998 is to provide advice and conduct inquiries, not to direct environmental approvals (PC Act 1998, ss 6, 11). Approval powers rest exclusively with the Minister for the Environment (or delegate), who must apply the statutory triggers and significant-impact test in Parts 3, 7–9 of the EPBC Act. Any suggestion that the PC can design or impose "faster approval pathways" therefore exceeds its legal competence. Recommendations cannot lawfully re-weight statutory criteria; only Parliament can amend the EPBC Act.

Legal conflicts

The EPBC Act's objects include "to protect the environment, especially matters of national environmental significance" and "to promote ecologically sustainable development" (EPBC Act 1999, s 3). Decisions must consider the significance of environmental impacts, the precautionary principle, and relevant international obligations (EPBC Act 1999, ss 136, 391).

"Speed" is not a statutory criterion. If decision makers were to adopt timeliness as a determinative factor, they would risk committing jurisdictional error by considering an irrelevant factor or by failing to consider mandatory environmental obligations (AGS 2024). The **Samuel Review** found that delays typically arise from poor-quality applications and weak project design, not from the EPBC Act's statutory architecture itself (Samuel 2020).

Evidence deficit
The Commission has not provided empirical evidence that statutory approvals are the primary cause of delay. Available data show that the majority of delay stems from proponents providing inadequate information, non-compliance with guidelines, or redesign to avoid impacts on MNES (DCCEEW 2025a). State processes and court-ordered reviews also contribute. Without transparent delay-attribution data, "faster approvals" is a political claim rather than a substantiated policy conclusion.

Risks of prioritising speed
If project velocity is prioritised over environmental integrity:

- **Approvals are more vulnerable to litigation**, as decisions made on incomplete information or truncated public consultation will invite judicial review.
- **Biodiversity outcomes will degrade**, as impacts are not properly assessed or avoided.
- **Investment certainty may decline**, as rushed approvals lead to reversals or stronger community opposition.

Bottom line
The Productivity Commission cannot lawfully redesign approval processes to prioritise speed. The EPBC Act already contains mechanisms to deliver efficiency (such as bilateral agreements and strategic assessments), but these must operate within the framework of statutory objects and international obligations. "Faster approvals" is a slogan that masks the real drivers of delay poor project design and incomplete compliance and risks trading legal certainty for political expediency.

3.2 Streamlined Regulation

The Productivity Commission argues that duplication between Commonwealth and State systems slows down approvals and that reforms should "streamline" these processes (Productivity Commission 2025a). This framing is misleading and dangerous. The EPBC Act already contains statutory mechanisms to remove duplication, while maintaining national guardrails. What the Commission is proposing is not true streamlining, but the dismantling of environmental protections under the false pretext of efficiency.

What the PC proposes
The Interim Report presents overlapping jurisdictions as inherently inefficient and implies that "single-touch" approvals, or devolving more responsibility to States, would be more effective (Productivity Commission 2025a).

Authority gap
The Productivity Commission has no authority to alter statutory approval frameworks. Its role is advisory under the **Productivity Commission Act 1998 (Cth)** (ss 6, 11). The EPBC

Act is Parliament's instrument to protect matters of national environmental significance (MNES) and to deliver on international obligations. Section 5 of the Act already provides for **bilateral agreements** that avoid duplication by accrediting State processes. These bilateral agreements are legally binding and already in place nationwide (EPBC Act 1999, Pt 5; DCCEEW 2022). The PC's proposal is therefore redundant at best, and unlawful if it is interpreted as displacing federal oversight.

Legal conflicts and risks

The Commonwealth's responsibility under the EPBC Act is grounded in the Constitution's external affairs power giving effect to treaties such as the World Heritage and Ramsar conventions. If approvals were devolved entirely to States, this foundation would be undermined. The **Abbott Government's "one-stop shop" proposal** (2013–2015) attempted to remove duplication by devolving full approval powers to States. Independent analysis and parliamentary reviews found this would have breached international obligations, and the reforms ultimately failed (Parliamentary Library 2020; Samuel 2020). The same risks remain today.

Case law precedents

Courts have already highlighted deficiencies where approvals were rushed or oversight weakened. In *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment* (2006), the Federal Court emphasised the need for proper consideration of MNES. In *Mackay Conservation Group v Commonwealth of Australia* (2015), the Court invalidated an approval for the Adani Carmichael coal mine because the Minister failed to properly consider conservation advice for listed species. These cases demonstrate that compliance with EPBC obligations is non-negotiable and that attempts to weaken oversight invite successful legal challenges.

Non-compliance reality

Evidence shows the real problem is not duplication, but **systemic non-compliance**. The Australian National Audit Office has repeatedly reported failures in monitoring and enforcing EPBC approval conditions, including biodiversity offsets not being delivered, inadequate data collection, and poor compliance reporting (ANAO 2020). Numerous renewable and mining projects proceed while breaching offset conditions or clearing habitats without adequate mitigation. Instead of fixing enforcement, regulators push for weaker rules by labelling safeguards as "duplication."

Guardrails already slipping

The practice of reclassifying agricultural land as "industrial" to accommodate large-scale energy projects illustrates how guardrails are already being dismantled. This removes layers of environmental oversight, bypasses planning checks, and further erodes protections. Even these diminished standards are not enforced in practice. If "streamlining" goes further by diluting federal guardrails, the result will be large-scale clearing and habitat destruction with little accountability.

Bottom line

The Productivity Commission's call for streamlined regulation is legally redundant and practically reckless. The EPBC Act already streamlines processes through bilateral agreements and strategic assessments. What is missing is not speed, but enforcement. Weakening federal oversight under the guise of streamlining risks repeating the failed "one-stop shop" experiment, invites more litigation, and accelerates the erosion of biodiversity protections.

3.3 National Environmental Standards (NES)

The Productivity Commission promotes the idea of National Environmental Standards (NES) as a way to simplify approvals and provide certainty for industry (Productivity Commission 2025a). This language mirrors the **Samuel Review**, which recommended standards, but the Commission's framing distorts the purpose. Samuel envisaged **binding, measurable, enforceable standards administered by an independent regulator**. The PC instead positions NES as a tool to accelerate approvals. This risks replacing enforceable statutory obligations with vague guidance that provides cover for rubber-stamping.

What the PC proposes

The Commission suggests that NES would establish uniform rules across jurisdictions, thereby reducing duplication and increasing efficiency (Productivity Commission 2025a).

Authority gap

The Productivity Commission has no authority to design or mandate NES. Only Parliament can legislate to establish them under the EPBC Act. Standards cannot displace the statutory triggers in Part 3 or override the Minister's obligation to apply the significant-impact test (EPBC Act 1999, ss 3, 136). If NES were applied as a "tick-box" system to guarantee approvals, this would unlawfully fetter ministerial discretion and invite judicial review (AGS 2024).

Legal and policy risks

- **Weak standards = loopholes**. Vague formulations such as "no net loss" or "maintain viability" lack measurable thresholds and are effectively unenforceable (Samuel 2020; DCCEEW 2023).
- **Replacement of triggers**. If standards are allowed to substitute for MNES triggers, they will hollow out the Act's protective core.
- **Lack of independence**. If NES are administered within government departments rather than by an independent EPA, credibility and enforcement will collapse (Samuel 2020).

Non-compliance evidence

The Australian National Audit Office (2020) has documented widespread failures in biodiversity offsets, including projects proceeding without offsets being secured, inadequate monitoring, and no accountability for breaches. If governments cannot enforce current EPBC approval conditions, there is no credible basis for believing they will enforce NES especially if designed primarily to facilitate faster approvals.

Contradiction with the Samuel Review

Samuel concluded that strong, enforceable standards and an independent regulator were the only way to fix the EPBC Act's deficiencies (Samuel 2020). The Productivity Commission is instead recommending standards as a shortcut to accelerate project approvals. This is the opposite of the Review's findings. It is a misappropriation of the concept of standards to justify weaker oversight.

Constitutional and international risks
Australia's obligations under the World Heritage Convention, Ramsar Convention, and Convention on Biological Diversity establish substantive floors. Standards that lower protections below those treaty obligations could undermine the constitutional validity of the Act, which rests on the external affairs power (EPBC Act 1999, s 3; AGS 2024).

Guardrails dismantled
Replacing statutory duties with vague "standards" would be the final step in dismantling federal guardrails. In practice, NES framed for speed will deliver neither clarity nor protection only more clearing of habitat, fragmentation of ecosystems, and breaches of international obligations.

Bottom line
NES are only legitimate if binding, measurable, enforceable, and independently administered. Anything less undermines the EPBC Act, contradicts the Samuel Review, and entrenches systemic non-compliance. Presented as a shortcut to accelerate approvals, NES become a Trojan horse for deregulation.

3.4 Fast-track Mechanisms

The Productivity Commission recommends the introduction of dedicated "priority lanes" and new delivery-focused offices such as a **Coordinator-General** or special "strike teams" to accelerate approvals for designated energy projects (Productivity Commission 2025a). This proposal must be examined closely. While presented as an efficiency measure, it threatens to bypass the legal safeguards of the EPBC Act, concentrate power in delivery offices with inherent conflicts of interest, and erode transparency and procedural fairness.

What the PC proposes
The Interim Report frames fast-tracking as essential for net zero delivery. By designating certain projects as "priority," these projects would be moved through shortened timelines and handled by dedicated coordination bodies tasked with ensuring rapid approval (Productivity Commission 2025a).

Authority gap
The Productivity Commission has no authority to create new approval offices or confer powers on a Coordinator-General. Only Parliament can establish such mechanisms. Even if created, those offices would be bound by the EPBC Act. Approval decisions must still be taken under Parts 7–9, applying the statutory tests for MNES. Any process that subordinates those obligations to "priority status" would be unlawful (Productivity Commission Act 1998, ss 6, 11; EPBC Act 1999, Pt 7–9).

Administrative-law tripwires
Fast-tracking risks multiple breaches of administrative law:

- **Fettering of discretion**: If project timelines or priority labels dictate outcomes, decision makers fail to exercise genuine discretion.
- **Procedural fairness breaches**: Truncated public consultation and reduced transparency are inconsistent with statutory requirements for notice and comment (EPBC Act 1999, s 74).

- **Apprehended bias**: A delivery office tasked with promoting projects cannot also be an impartial assessor.
- **Unlawful sub-delegation**: Approval powers cannot be delegated informally to a Coordinator-General unless expressly authorised by statute.

Cases such as *Mackay Conservation Group v Commonwealth* (2015) show courts will strike down approvals where statutory duties are short-circuited. A fast-track process would generate more, not fewer, legal challenges.

Conflict of interest

A Coordinator-General or strike team, designed to ensure delivery, is inherently conflicted if also responsible for environmental assessment. This mirrors past failures in State regimes where pro-development bodies pushed projects through despite inadequate assessments, leading to litigation and reputational damage.

International obligations

Fast-tracking is fundamentally inconsistent with the Commonwealth's obligation to meet its treaty commitments under the World Heritage, Ramsar, and Biodiversity conventions. International compliance requires rigorous assessments. Priority lanes that allow destructive projects through quickly would risk breaching those obligations, undermining the constitutional foundation of the Act (EPBC Act 1999, s 3; AGS 2024).

Bottom line

Fast-track mechanisms undermine legal integrity, public trust, and environmental protection. They are not an efficiency fix but a structural attempt to override statutory duties. Far from reducing delay, they will invite litigation, increase community opposition, and erode the credibility of the approvals system.

3.5 Productivity Framing

The Productivity Commission consistently presents environmental approvals as an economic bottleneck to be cleared in order to lower costs and unlock productivity (Productivity Commission 2025a). This framing is politically convenient but legally flawed. The EPBC Act is not an economic instrument it is a conservation law designed to protect MNES and uphold international obligations. Treating biodiversity safeguards as "red tape" subordinate' statutory purpose to economic rhetoric, undermining both legal compliance and democratic legitimacy.

What the PC does

The Interim Report recasts conservation law as a barrier to net zero delivery and productivity growth. It argues that streamlining and faster approvals are productivity gains, with environmental regulation implied as an obstacle (Productivity Commission 2025a).

Authority gap

The PC can advise on productivity but cannot redefine the purpose of environmental law. Parliament has already set the hierarchy: environmental protection and implementation of international obligations are primary (EPBC Act 1999, s 3). Productivity is not a statutory consideration under Parts 7–9. If decision makers were to treat productivity as determinative, they would act unlawfully by considering irrelevant factors (AGS 2024).

Legal and constitutional conflict

The EPBC Act derives its validity from the external affairs power and is designed to give effect to international environmental treaties. Economic considerations cannot override these obligations. Reframing statutory guardrails as economic costs undermines the constitutional rationale for federal environmental protection.

Evidence deficit

The Commission does not provide empirical evidence that environmental regulation is the key drag on productivity. The **Samuel Review** found that delays result from poor project design, incomplete information, and lack of enforcement, not the statutory framework itself (Samuel 2020). Shifting the blame to conservation law masks systemic under-resourcing and non-compliance.

Pattern of disregard

Industry and regulators already fail to comply with existing guardrails offset requirements are missed, land use categories are manipulated, and conditions are ignored (ANAO 2020). Yet rather than enforcing compliance, the Commission reframes the law itself as the obstacle. This pattern reveals that "productivity framing" is not about efficiency but about legitimising further deregulation.

Risks of economic primacy

- **Erosion of statutory purpose**: If productivity becomes the central criterion, the EPBC Act ceases to be a conservation law.
- **Greater litigation risk**: Courts will intervene where mandatory environmental considerations are sidelined in favour of economic throughput.
- **Loss of public trust**: Communities will view approvals as captured by industry, further eroding social licence.

Bottom line

Economic rhetoric cannot lawfully replace statutory obligations. Conservation law exists to protect the environment, not to maximise productivity. The Commission's attempt to reframe biodiversity protection as "red tape" is legally unsound, strategically flawed, and democratically corrosive.

3.6 Housing resilience ratings

The Productivity Commission's proposal for a national housing resilience rating is presented as neutral information for markets and policymakers. In practice, a rating that scores every dwelling for climate risks will reshape insurance, lending, valuations, tenancy, and planning in ways that raise costs for households already facing acute affordability pressures. The Commission is an economic advisory body, not a building regulator or environmental decision maker. It has no power to design, mandate, or enforce entry into homes, retrofits, or insurer use of ratings. Any shift from "informational" ratings to compulsory disclosure, compulsory upgrades, or insurance or mortgage consequences would require new legislation at Commonwealth and State levels and would engage privacy, consumer, tenancy, and human rights frameworks (Productivity Commission Act 1998; PC 2025a; PC 2025b; Privacy Act 1988).

What the PC proposes

The Interim Report signals a national resilience rating that would score housing for exposure and resistance to climate hazards, with the stated aims of improving decision making by households, insurers, and governments, and of driving adaptation investments in the housing stock (PC 2025a).

Authority and competence limits

The Commission can recommend, it cannot mandate. Building requirements are set through the National Construction Code and adopted by States and Territories, while development controls sit under State planning statutes. Mandatory disclosure at point of sale or lease, compulsory inspections, or upgrade obligations would need legislative change outside the Commission's remit. Any attempt to operationalise ratings administratively, without clear statutory authority and due process, would be vulnerable to legal challenge for procedural unfairness, privacy breaches, and improper purpose (Productivity Commission Act 1998; ABCB 2025; Privacy Act 1988; Australian Consumer Law 2010).

How a rating regime would likely become compulsory

History shows that "voluntary" schemes often become de facto mandatory through sequential policy steps. Typical pathways include:

1. Government establishes a "voluntary" rating protocol.
2. States require disclosure at point of sale or lease.
3. Lenders and insurers integrate ratings into underwriting.
4. Councils condition approvals or occupancy on meeting a threshold.
5. Governments subsidise upgrades but pair subsidies with penalties for low scores. This pathway shifts adaptation costs onto households and landlords while governments and developers avoid structural risk management in land use and infrastructure (Actuaries Institute 2022; APRA 2021; ICA 2023).

Economic and social impacts

1. **Insurance affordability and availability**. Insurers already price granular physical risk and have warned of rising premiums and potential non-insurability in high-risk locations. A resilience rating gives a simple, standardised input to lift premiums, tighten coverage, or impose exclusions on millions of properties. This is consistent with prudential guidance that expects climate risk integration in underwriting and pricing (APRA 2021; RBA 2023; ICA 2023).
2. **Property values and mortgage access**. A low score will depress valuations, increase days-on-market, and push buyers toward higher equity buffers. Lenders will factor ratings into serviceability and loss-given-default models, raising borrowing costs or restricting credit in low-scored postcodes. Flow-on effects will concentrate disadvantage in already exposed regional and outer-urban areas (RBA 2023; Actuaries Institute 2022).
3. **Renters and the tight rental market**. Where disclosure is mandated for leases, landlords will pass through upgrade costs into rent, or will exit the market if capital outlays and compliance risk exceed yields. This aggravates scarcity and pushes vulnerable households into poorer quality or informal accommodation (ABS 2025; RBA 2023).

4. **Cost of living**. Retrofitting for flood, bushfire, wind, or heat resilience is capital-intensive. Typical measures include roof replacement and tie-downs, ember-proofing, shutters and upgraded glazing, raising floor levels or installing drainage, cavity and ceiling insulation, and external shading. Even partial packages can run into the tens of thousands of dollars per dwelling, costs that will be unaffordable without large public subsidies, which are not proposed by the Commission (ABCB 2025; ICA 2023).
5. **Distributional inequity**. Households in high-risk areas often have lower incomes, higher insurance burdens, older housing, and fewer retrofit options. A rating that triggers higher costs with limited ability to adapt will entrench disadvantage and drive forced migration from affected communities. This is a social planning decision dressed as market information (Actuaries Institute 2022; RBA 2023).

Privacy, access, and property rights

Assigning a resilience score requires inspection or detailed data collection about a private home's structure, materials, maintenance, and location. Entry, recording, and sharing of this data engages privacy law, consent, and data security obligations. If ratings become a condition of sale or lease, compulsory entry powers would be needed, together with safeguards against misuse, re-identification, and discriminatory profiling. The Commission's report does not address these risks (Privacy Act 1988; Australian Consumer Law 2010; PC 2025a).

Regulatory architecture that would be affected

1. **National Construction Code**. The NCC governs new builds and major renovations. To affect existing stock, States would need retrofit obligations or incentives, which are not part of the current NCC focus on new construction. Absent major grant programs, retrofit mandates risk non-compliance and legal contest (ABCB 2025).
2. **Insurance regulation**. APRA requires insurers to manage climate risk, but does not prescribe rating tools. Embedding a government rating into underwriting would create a quasi-regulatory instrument without the guardrails of financial regulation, opening new consumer fairness issues where ratings are inaccurate or contested (APRA 2021; Australian Consumer Law 2010).
3. **Tenancy and sale disclosure**. State tenancy and conveyancing laws would need amendment to require disclosure, set minimum standards, and regulate cost pass-throughs. Without nationally consistent protections and subsidies, the burden will fall unevenly, worsening interstate disparities (Residential Tenancies Acts, various States; ABCB 2025).

Evidence that costs will be shifted to households

Prudential guidance expects climate risk to be priced into premiums and capital. Insurers have already lifted premiums sharply in disaster-exposed regions and are narrowing coverage. The RBA has noted the potential for climate risk to amplify credit and insurance stress in particular geographies. A resilience rating simplifies and accelerates that repricing mechanism, which transfers adaptation cost from system to household balance sheets (APRA 2021; RBA 2023; ICA 2023; Actuaries Institute 2022).

Legal risks and challenge points

- **Improper purpose and fettering**. If public authorities or lenders treat a threshold score as determinative, decisions risk being made for an improper purpose or by fettering discretion without statutory authority.
- **Procedural fairness and error**. Ratings that affect rights to sell, lease, insure, or borrow would require review rights, transparent methodologies, and correction mechanisms. Absent these, there is a high risk of administrative error and litigation.
- **Consumer law**. If ratings are inaccurate, non-transparent, or used in misleading ways, this can engage prohibitions on misleading or deceptive conduct and unfair practices (Australian Consumer Law 2010).
- **Human rights and equity**. State human rights statutes and anti-discrimination laws may be engaged where ratings disproportionately harm vulnerable groups or specific communities without reasonable justification.

Policy alternatives that protect households

If government seeks resilience, safer options exist that do not punish households.

- **Targeted buy-backs and relocations** in extreme-risk areas, funded by general revenue, not individual policyholders.
- **Public infrastructure upgrades** that lower hazard exposure at community scale, for example drainage, levees, and shaded streetscapes, rather than household-by-household retrofits only.
- **Means-tested grants and zero-interest loans** for voluntary retrofits, paired with verified benefit-cost analysis and strict product standards.
- **Planning reform at the source**, including stronger controls on new development in high-risk areas and stricter subdivision rules, so the next generation of dwellings does not embed new risk.
- **National data and standards governance** that separates hazard mapping from private underwriting tools, with independent oversight, accuracy guarantees, and rights of correction.

Bottom line

A national resilience rating for housing is not a benign information tool. Given current insurance and lending dynamics, it will harden into a gatekeeper for access to insurance, finance, and housing. The Productivity Commission does not have authority to create or compel such a regime. If turned into mandatory disclosure or upgrade obligations, it would require extensive legislation and funding, along with strong privacy, consumer, tenancy, and equity protections that are not addressed in the Interim Report. In the absence of those safeguards, the proposal functions as a mechanism to shift adaptation costs from systems and budgets onto households that can least afford them (PC 2025a; APRA 2021; RBA 2023; ICA 2023; Actuaries Institute 2022; ABCB 2025).

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4. Risks & Failures of Each Proposal

The Productivity Commission’s Interim Report advances six proposals it claims will accelerate Australia’s net zero transformation. Each is presented as an efficiency reform, but closer examination reveals profound risks. Rather than fixing inefficiency, the proposals would dismantle statutory guardrails, entrench non-compliance, and shift environmental and economic costs onto households and communities. The following subsections address each proposal in turn, outlining the dangers and likely outcomes.

4.1 Faster approvals

Risks

- **Jurisdictional error**: Prioritising timeliness risks decisions being invalid because irrelevant considerations are given determinative weight or mandatory environmental factors are ignored (EPBC Act 1999, ss 3, 136; AGS 2024).
- **Biodiversity degradation**: Shortened timeframes reduce scrutiny of impacts on MNES, cumulative effects, and the precautionary principle, increasing irreversible biodiversity loss (Samuel 2020).
- **Greater litigation**: Inadequate assessment records and truncated consultation invite judicial review, generating more delay.
- **Erosion of trust**: Communities will view approvals as driven by industry deadlines rather than statutory integrity.

Likely outcomes

Rushed approvals deliver neither certainty nor efficiency. They invite challenge, heighten conflict, and deepen biodiversity decline.

4.2 Streamlined regulation

At first glance, “streamlining regulation” sounds like a neutral efficiency measure, but in practice it is a euphemism for dismantling the Commonwealth’s role in safeguarding matters of national environmental significance. The EPBC Act already contains mechanisms to remove duplication through bilateral agreements, which means the Commission’s proposal is not about reducing red tape but about lowering protections. Before considering the specific risks, it is crucial to recognise that what is framed as efficiency is in fact deregulation by stealth.

Risks

- **Redundancy**: Part 5 of the EPBC Act already provides bilateral agreements to eliminate duplication (EPBC Act 1999, Pt 5; DCCEEW 2022).
- **Lowest common denominator**: Streamlining often means lowering standards to the weakest jurisdiction, undermining national protections (Parliamentary Library 2020).
- **International breach**: Weakening federal guardrails risks inconsistency with obligations under the World Heritage and Ramsar conventions (EPBC Act 1999, s 3; AGS 2024).
- **Non-compliance reality**: ANAO audits show that even current bilateral arrangements suffer from poor monitoring and enforcement (ANAO 2020).

Likely outcomes
Streamlining by weakening federal guardrails will not reduce delay. It will erode protection, expand non-compliance, and undermine the constitutional foundation of the Act.

4.3 National Environmental Standards (NES)

Risks

- **Weak or vague standards**: Loopholes like "no net loss" cannot be enforced, encouraging rubber-stamping (Samuel 2020; DCCEEW 2023).
- **Displacement of triggers**: If NES are used to replace MNES triggers, the Act's core protections collapse (EPBC Act 1999, Pt 3).
- **Fettered discretion**: Using standards as a tick-box would unlawfully constrain ministerial decision-making (AGS 2024).
- **Political capture**: Administering NES within departments rather than an independent EPA undermines trust (Samuel 2020).
- **Systemic non-compliance**: Governments already fail to deliver biodiversity offsets; weak standards will codify this failure (ANAO 2020).

Likely outcomes
NES designed for speed will not strengthen protection. They will hollow out the EPBC Act, contradict the Samuel Review, and expose decisions to legal challenge.

4.4 Fast-track mechanisms

Risks

- **Fettered discretion**: "Priority lanes" risk binding decision-makers to outcomes or timelines inconsistent with statutory duties (AGS 2024).
- **Procedural unfairness**: Curtailing public consultation contravenes statutory notice and comment obligations (EPBC Act 1999, s 74).
- **Apprehended bias**: Delivery offices like a Coordinator-General cannot act as impartial assessors.
- **Unlawful sub-delegation**: Approval powers cannot be transferred to "strike teams" without statutory authority.
- **International inconsistency**: Fast-tracked approvals risk breaching World Heritage and Ramsar commitments (DCCEEW 2025a).

Likely outcomes
Fast-track mechanisms will increase litigation, reduce legitimacy, and accelerate biodiversity loss. They offer the illusion of certainty but deliver the opposite.

4.5 Productivity framing

Risks

- **Distorted statutory purpose**: Framing biodiversity law as red tape contradicts the Act's objects to protect MNES and implement international obligations (EPBC Act 1999, s 3).
- **Legal error**: Treating productivity as determinative renders decisions unlawful as based on irrelevant considerations (AGS 2024).
- **Evidence-free claim**: The Samuel Review found that delay stems from poor project design and incomplete information, not the Act's statutory design (Samuel 2020).
- **Public distrust**: Communities will regard approvals as captured by industry economics rather than public law.

Likely outcomes

Recasting conservation law as an economic problem undermines constitutional foundations, elevates irrelevant considerations, and erodes community trust.

4.6 Housing resilience ratings

Risks

- **Insurance costs**: Ratings give insurers a standardised tool to lift premiums or deny coverage in exposed areas (APRA 2021; ICA 2023).
- **Property values**: Low scores will depress valuations and restrict mortgage access (RBA 2023).
- **Rental market**: Landlords will pass retrofit costs into rents, worsening scarcity (ABS 2025).
- **Cost-of-living burden**: Retrofitting is capital-intensive, unaffordable for most households (ABCB 2025).
- **Privacy intrusion**: Collecting and sharing detailed housing data risks breaches of the Privacy Act 1988.
- **Equity impacts**: Low-income, high-risk communities will be most affected, entrenching disadvantage (Actuaries Institute 2022).

Likely outcomes

Resilience ratings will destabilise insurance and housing markets, inflate living costs, and entrench inequality. They shift adaptation costs from governments and industry to households least able to pay.

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5. Legal Context – EPBC Act Foundations

The EPBC Act is Australia's primary national environmental law. It provides a legally binding framework for identifying, assessing, and regulating actions that may have a significant impact on matters of national environmental significance (MNES). The structure, criteria, and purpose of the Act are designed to ensure environmental protection, uphold international obligations, and maintain public confidence in decision-making. This section sets out the Act's statutory foundations, existing streamlining mechanisms, constitutional footing, administrative law constraints, and enforcement powers. It also explains why the Productivity Commission's proposals to "speed approvals" and "streamline regulation" cannot lawfully override or displace these safeguards.

5.1 Statutory Purpose and Objects (s 3 EPBC Act)

The EPBC Act is underpinned by a clear legislative mandate to protect the environment and conserve biodiversity. Section 3(1) of the Act states that its objects include:

- To protect the environment, especially MNES;
- To promote ecologically sustainable development;
- To conserve biodiversity and heritage;
- To give effect to Australia's international environmental responsibilities;
- To recognise the role of Indigenous people in biodiversity conservation.

These are not aspirational goals. They are legal directives. Under section 3(2), these objects are to be achieved through rigorous environmental assessments, public accountability, and Commonwealth oversight of actions affecting MNES.

Crucially, economic productivity is not a statutory object. Any decision that gives determinative weight to timeliness or "economic throughput" risks being made for an **improper purpose**, contrary to the Act's protective mandate (EPBC Act 1999, s 3; *Mackay Conservation Group v Commonwealth* [2015] FCA 774).

5.2 Scheme of Environmental Protection (Parts 3, 5, 7–9)

Part 3 – MNES Triggers and the Significant Impact Test

Part 3 identifies environmental values that require federal approval if a proposed action is likely to have a significant impact. These include World Heritage properties, wetlands, threatened species, migratory species, Commonwealth marine areas, and water resources affected by CSG or coal mining (EPBC Act 1999, ss 12–24F).

The "significant impact" test is objective. It requires assessment of **direct, indirect, and cumulative impacts** (*Queensland Conservation Council v Minister* [2003] FCA 1463). If triggered, the action becomes a **controlled action** and must undergo formal assessment and approval.

Part 5 – Assessment Methods and Existing Streamlining

The EPBC Act already contains lawful streamlining mechanisms, including:

- **Bilateral assessment agreements** (ss 45–65), which accredit State processes that meet federal standards while preserving Commonwealth approval powers;
- **Strategic assessments** (ss 146–157), which evaluate broader plans and policies.

These provisions eliminate duplication without weakening MNES protections. The Productivity Commission's claim that further "streamlining" is needed is inaccurate. The proper legal remedy for inefficiency is improved accreditation and compliance under existing Part 5 not the dilution or removal of federal guardrails.

Part 7 – Referrals and Statutory Duties

Part 7 mandates that proponents refer actions that may impact MNES. The Minister must then determine whether the action is a controlled action and assign an assessment method. Failure to refer is an offence (s 67A).

This process is not optional and cannot be bypassed through internal coordination offices or "priority lanes." Attempts to compress referral or public consultation windows undercut procedural fairness (EPBC Act 1999, s 74).

Part 8 – Assessment Standards

Part 8 prescribes how environmental assessments must be carried out. The Minister must:

- Consider public submissions;
- Apply conservation advice and international obligations;
- Assess proposals on a scientific and precautionary basis.

These duties cannot be set aside to meet project timelines or political imperatives. Courts have invalidated approvals where mandatory considerations were not properly addressed (*Mackay Conservation Group v Commonwealth* [2015] FCA 774).

Part 9 – Final Approvals and Legal Constraints

Under Part 9, the Minister may grant or refuse approval and impose binding conditions (s 134). Section 136 mandates consideration of ecological sustainability, recovery plans, and international agreements. The precautionary principle must also be applied (s 391).

Approval cannot lawfully be granted unless these requirements are met. "Faster" decision-making that omits or compresses these steps exposes the government and proponents to litigation risk for **jurisdictional error, irrelevant considerations**, or **fettering of discretion**.

5.3 International Obligations and Constitutional Footing

The EPBC Act implements Australia's commitments under treaties including:

- The World Heritage Convention;
- The Ramsar Convention on Wetlands;
- The Convention on Migratory Species;
- The Convention on Biological Diversity.

These treaties form the constitutional basis for federal environmental regulation under the **external affairs power** (Constitution s 51(xxix)). Any weakening of MNES protections such as devolving approvals to States or prioritising economic speed over treaty compliance risks undermining the constitutional validity of the Act.

International obligations also shape the statutory objects (s 3) and decision-making criteria (ss 136, 139, 140). Disregarding these constraints in the name of "productivity" invites both domestic and international challenge (AGS 2024; DCCEEW 2025b).

5.4 Administrative Law Guardrails

The EPBC Act is subject to administrative law principles, including:

- **Jurisdictional error**: A decision is invalid if made without proper legal authority;
- **Fettering discretion**: Decision-makers must consider each case on its merits;
- **Irrelevant or mandatory considerations**: These must be correctly identified and applied;
- **Procedural fairness**: Public consultation and fair hearing rights must be observed;
- **Apprehended bias**: Officials cannot act in roles that create conflict (e.g. delivery vs assessment).

Remedies include:

- **Judicial review** under the ADJR Act or Judiciary Act s 39B;
- **Injunctions and declarations** under the EPBC Act and the Constitution (s 75(v)).

Any reform that prioritises speed, streamlining, or productivity over statutory duties risks triggering legal challenges on multiple grounds.

5.5 Standing, Enforcement, and Compliance Gaps

The EPBC Act grants broad **standing rights** for legal challenge. Section 487 enables individuals and NGOs involved in environmental protection to bring proceedings even without direct commercial or personal interest.

Available enforcement tools include:

- **Civil penalties** (Pt 17);
- **Injunctions** to restrain unlawful activity;
- **Enforceable undertakings** for breaches.

However, the Australian National Audit Office (ANAO 2020) has found serious enforcement gaps, including:

- Offsets not delivered,
- Inadequate monitoring of conditions,
- Lack of transparency in compliance.

Weakening the EPBC Act by rushing assessments or replacing ministerial decisions with "standards" or "strike teams" will **amplify these failures**, not resolve them.

5.6 Summary: EPBC Act Is a Legal Framework, Not a Productivity Lever

The EPBC Act is a binding legislative regime with constitutional foundations, enforceable duties, and clear environmental objectives. It already contains mechanisms to streamline assessments without weakening standards.

The Productivity Commission's proposals to "speed up" approvals, "cut duplication," or shift environmental protection into a productivity lens are incompatible with the Act's purpose, objects, and legal architecture. If implemented, they risk invalidating decisions, breaching international obligations, and undermining public confidence in environmental governance.

Approvals under the EPBC Act are not business transactions. They are exercises of statutory power for the protection of the national environment, grounded in law, not ideology.

5.7 Legal Limits on Dismantling the EPBC Act by Stealth or Subversion

What is occurring under the guise of "streamlining", "priority approvals", and "net zero delivery" is not an innocent policy acceleration. It is a deliberate attempt to dismantle the EPBC Act's statutory guardrails while preserving the appearance of legal compliance. This includes:

- Reclassifying agricultural or conservation land as "industrial" to avoid triggering federal environmental oversight;
- Proposing structural reforms (e.g., Coordinator-General models or "strike teams") that entrench **conflicts of interest** between assessment and project delivery;
- Substituting policy documents and internal protocols for **statutory decision-making criteria**;
- Omitting public participation or foreshortening review periods in ways that violate s 74 and procedural fairness;
- Using "national environmental standards" as a vehicle to **fetter discretion**, automate approvals, or displace obligations under Part 3.

These actions are not merely administrative shortcuts. They raise serious legal questions about **constitutional validity**, **jurisdictional error**, and **improper purpose**.

Improper Purpose and Statutory Subversion

A public authority may not exercise a power for a purpose foreign to the statute under which it is conferred. The High Court has confirmed that even "broad" discretionary powers are subject to purpose constraints (*Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636). The EPBC Act's purpose is environmental protection not economic acceleration, emissions compliance, or market delivery.

Where public officials act with the intention of avoiding or diluting their statutory duties even indirectly their actions are vulnerable to judicial review. The use of land reclassifications to avoid MNES triggers, or the deliberate omission of MNES referrals in large-scale energy projects, may constitute **constructive fraud on the statute**.

Non-Derogation of the Act's Purpose

Parliament cannot delegate to executive agencies or COAG-style bodies the power to effectively **nullify or gut** the operation of an Act of Parliament. Nor can administrative decision-makers, under the guise of productivity or coordination, establish parallel regimes that displace the mandatory functions and checks embedded in the Act.

This is especially so where international obligations are engaged such as the World Heritage Convention or Ramsar Convention which rely on consistent, centralised implementation. Undermining the Act's operation for political or economic convenience invites invalidation on grounds of **constitutional inconsistency and ultra vires conduct**.

The Role of the Courts: Judicial Supervision of Systemic Subversion

Australian courts have shown a consistent willingness to invalidate environmental approvals made in breach of mandatory duties (*Mackay Conservation Group v Commonwealth* [2015] FCA 774; *Wildlife Preservation Society of Qld v Minister* [2006] FCA 736). They have also indicated that **systemic failures of process**, including omissions of key evidence, flawed referrals, or improper deference to state regimes, can ground **jurisdictional error**.

Importantly, courts will look past form to substance. If a national environmental standard, a fast-track protocol, or an internal directive is operating as a **de facto repeal** of statutory protections, the judiciary may strike it down regardless of its nominal legality.

Conclusion: Rule of Law Obligations Cannot Be Streamlined Away

The EPBC Act is a legislative instrument of the Commonwealth Parliament. It can only be repealed or amended by statute. No intergovernmental agreement, national cabinet policy, "clean energy strike team", or reform taskforce can lawfully remove, bypass, or neuter its mandatory provisions.

Where administrative behaviour becomes systematically inconsistent with the Act's purpose, legal remedies are available and may ultimately be necessary to preserve the integrity of Australia's environmental law.

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6. Legal Threats of the Productivity Commission Reforms

The Productivity Commission's interim report on "Investing in Cheaper, Cleaner Energy and the Net Zero Transformation" (2025) presents proposals that go well beyond economic commentary. While couched in terms of "faster approvals", "cutting duplication", and "resilience," the Commission's real agenda is clear: **to remove the remaining legal guardrails that protect nationally significant environmental values**.

These are not passive oversights or isolated errors. Across projects and submissions reviewed to date, the same pattern is evident: mandatory referrals are being bypassed, ecological impacts underplayed or ignored, strategic reclassifications used to avoid Commonwealth oversight, and public participation mechanisms routinely truncated. This is not reform it is **administrative dismantling**.

The EPBC Act is now being treated as a barrier to be neutralised. The Commission's report acts as a blueprint for doing so. The legal risks this creates for proponents, departments, and Ministers are significant and must be plainly stated. If these proposals are operationalised with or without statutory amendment they will expose the Commonwealth and its agents to sustained legal challenge.

We begin with the core threshold issue: the legal limits of the Productivity Commission's mandate.

6.1 Limits of the Productivity Commission's Legal Mandate

The Productivity Commission (PC) has no authority legislative, administrative, or executive to implement or direct environmental assessment, approval, or policy reform under the EPBC Act. Its functions are advisory. It is not a regulator. It is not a decision-maker. It is not Parliament.

6.1.1 Statutory Limits of the Productivity Commission Act 1998

Under **section 6** of the *Productivity Commission Act 1998 (Cth)*, the Commission is tasked with providing independent research and policy advice to government. **Section 11** further defines its functions as strictly consultative and analytical. The Commission may **not legislate**, **not approve**, and **not direct** environmental decisions or program delivery.

The Commission's terms of reference, no matter how politically endorsed, cannot confer legal authority to restructure, override, or reinterpret a separate Act of Parliament. The EPBC Act binds Commonwealth decision-makers not the Productivity Commission's policy preferences.

6.1.2 Implementing PC Recommendations Without Legal Basis Risks Ultra Vires Action

If government departments or Ministers begin operationalising PC recommendations such as:

- Prioritising speed over environmental outcome;
- Replacing MNES criteria with high-level "resilience goals";
- Deferring to State-led processes that lack federal equivalence;
- Using national environmental standards as a tick-box for automatic approval

then they are acting **without lawful authority**. These are not minor policy shifts they represent a **constructive subversion** of statutory duties and will be subject to judicial review.

Courts have repeatedly warned against **decisions infected by improper purpose**, particularly where administrators pursue external agendas that are **incompatible with the objects of the Act** (*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; *Plaintiff S10/2011* (2012) 246 CLR 636).

6.1.3 Statute Cannot Be Set Aside by Policy

In *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500, the Federal Court held that public decision-makers must not allow policy to override statute. The EPBC Act sets out precise conditions, triggers, and obligations for environmental approvals. These cannot be diluted by internal government strategies, strike teams, or PC recommendations.

The use of "priority lanes", non-statutory resilience criteria, or internal deadlines to short-circuit statutory processes **constitutes unlawful fettering** of discretion and will be vulnerable to challenge.

6.1.4 The Danger of Framing: From Productivity to Improper Purpose

The PC's language faster, simpler, streamlined masks the reality: **these proposals are engineered to bypass legal constraints**. When decision-makers adopt this framing, they risk acting for an **improper purpose**.

Environmental approvals are not productivity levers. They are exercises of legal discretion within a defined statutory framework. Where policy reframing displaces that framework, the resulting decisions are not merely risky they are invalid.

6.2 "Speeding Up Approvals" Is Legally Indefensible

The phrase "speeding up approvals" is politically appealing but it has no legal status under the EPBC Act. There is **no statutory requirement** to approve projects quickly, nor is timeliness listed as a relevant or mandatory consideration. Elevating speed above proper legal process is not only dangerous it is unlawful.

6.2.1 Timeliness Is Not a Legal Criterion

Under **section 136** of the EPBC Act, the Minister must consider:

- Principles of ecologically sustainable development (including the precautionary principle),
- Conservation advice and recovery plans,
- International environmental obligations,
- Public submissions and the assessment material.

Nowhere does the Act authorise the Minister to **prioritise speed or efficiency** over these core environmental duties. Doing so would amount to taking **irrelevant considerations into account** and expose the decision to **jurisdictional error**.

The law is clear: **environmental outcomes, not delivery timetables**, must drive decision-making.

6.2.2 The Risk of Fettering Discretion

If the Commonwealth adopts blanket timelines, "fast-track" corridors, or internal deadlines that effectively require decisions to be made within fixed windows regardless of assessment quality or evidence then Ministers and departmental officers are **fettering their discretion**.

Courts have repeatedly invalidated decisions where officials failed to consider each case on its merits because of internal targets or policy guidance (*Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404; *Ansett v Wraith* (1983) 48 ALR 500).

If an official feels compelled to approve a project to "keep pace" with a PC-derived timetable, and in doing so fails to fully consider MNES impacts, conservation advice, or treaty obligations, **that decision is unlawful**.

6.2.3 Procedural Unfairness Through Compressed Consultation

Speeding up approvals inevitably leads to **shortened consultation periods**, limited public notice, and suppressed third-party rights. This violates:

- **Section 74** of the EPBC Act, which guarantees public participation in referrals,
- The common law principle of **procedural fairness**, which requires affected parties to be given a real opportunity to be heard.

Courts do not tolerate approval processes that sacrifice procedural integrity for administrative convenience. Rushed consultations, hidden referral periods, or failure to publish adequate documentation are **reviewable errors** and will support legal injunctions.

6.2.4 "Priority Lane" Infrastructure Lists Invite Invalidity

The Productivity Commission proposes that certain clean energy infrastructure be placed on a "priority lane" for accelerated approval. This is not a neutral efficiency reform it is an attempt to create **two-tier environmental justice**, where designated projects receive less scrutiny, limited public input, and automatic progression.

This raises two immediate legal problems:

1. **Improper Purpose** – The EPBC Act was not enacted to expedite infrastructure delivery. If approval processes are altered to meet political deadlines or project pipelines, that is a **misuse of statutory power**.
2. **Unlawful Sub-Delegation or External Dictation** – If priority lists are used to **force or pre-commit Ministers** to outcomes, the decision becomes unlawful. The courts have held that a decision-maker who allows another body or document to dictate their choice acts beyond power (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24).

6.2.5 Litigation Risk: Delay Does Not Justify Denial of Process

The PC presents delay as a reason to weaken protections. But the courts have long recognised that **delay does not excuse illegality**. In *Minister for Immigration and Multicultural Affairs v*

Yusuf (2001) 206 CLR 323, the High Court reiterated that administrative efficiency cannot override legal obligation.

Moreover, where unlawful shortcuts are taken even in the name of climate or economic urgency they **increase the likelihood of court challenge**, delay, and public controversy.

6.2.6 Summary: Speed is a Political Target, Not a Legal Duty

The desire to "speed up" approvals is a political and administrative ambition. It is not supported by the EPBC Act. Attempting to engineer fast-tracked processes that override legal duties will create more delay through litigation, injunctions, and procedural defects.

Environmental decisions made unlawfully are not just risky, **they are invalid**. Proponents who rely on such approvals build on legal sand.

6.3 "Cutting Duplication" Is Factually Misleading and Constitutionally Risky

The Productivity Commission's claim that EPBC processes are duplicative is legally and factually incorrect. The EPBC Act already contains **streamlining mechanisms** through bilateral agreements and strategic assessments, expressly designed to **remove duplication** between Commonwealth and State processes. These mechanisms are lawful, operational, and constitutionally sound.

What the Commission is proposing, however, is not streamlining it is **delegation or displacement of Commonwealth responsibility**, particularly for Matters of National Environmental Significance (MNES). This exposes reforms to **serious legal risk**, including **constitutional invalidity** and inconsistency with treaty obligations.

6.3.1 Existing Mechanisms Already Prevent Duplication

Under **Part 5 of the EPBC Act**, two major mechanisms already exist to avoid duplication:

- **Bilateral assessment agreements** (ss 45–65), which allow States to conduct the environmental assessment under their own laws so long as they meet Commonwealth standards. The final approval, however, still rests with the Commonwealth Minister.
- **Strategic assessments** (ss 146–157), which allow broad, upfront assessment of policies, programs, or regions reducing the need for repetitive project-by-project scrutiny.

These mechanisms lawfully streamline environmental approvals **without relinquishing federal accountability**. The Commission's framing falsely implies that reform is required to fix duplication but this has already been addressed by statute.

6.3.2 Delegating MNES Responsibility Is Constitutionally Dangerous

The Commonwealth has **exclusive legal responsibility** for ensuring that MNES are protected in accordance with:

- **Section 51(xxix)** of the Constitution (external affairs power),
- Australia's obligations under the **World Heritage Convention**, **Ramsar Convention**, and **Convention on Biological Diversity**.

If reforms attempt to **devolve approval powers** to the States for actions that significantly impact MNES or if national environmental standards are used to rubber-stamp or bypass Commonwealth assessments then there is a real risk of **inconsistency** with the constitutional purpose of the EPBC Act.

As the Parliamentary Library has noted (2020), the "one-stop shop" model previously proposed under the EPBC Amendment (Streamlining Environmental Approvals) Bill 2020 raised significant constitutional questions and ultimately failed due to legal and political opposition.

6.3.3 Replacing Commonwealth Approvals with State Approvals Is Likely Invalid

The law is clear: only the **Commonwealth Minister** can approve an action that is likely to have a significant impact on MNES (EPBC Act s 130). A process that allows a State body to issue a final approval, even under the guise of an "accredited process" or "coordinated assessment," would contravene this requirement.

Unless the EPBC Act is repealed or fundamentally amended which would trigger a separate round of constitutional scrutiny any attempt to remove Commonwealth sign-off for MNES would be **invalid and open to immediate challenge**.

6.3.4 Intergovernmental Agreements Cannot Override Statute

Even where the Commonwealth and States enter into intergovernmental agreements or "net zero delivery compacts," those instruments cannot override federal legislation. Courts have consistently held that **political agreements do not displace statute** (*NSW v Commonwealth (WorkChoices Case)* (2006) 229 CLR 1).

If an administrative practice arises where Commonwealth officials **rubber-stamp State approvals**, **fail to assess MNES**, or **defer to State infrastructure targets**, such conduct will be vulnerable to judicial review for:

- Jurisdictional error,
- Improper delegation,
- Failing to consider mandatory matters under ss 136 and 391.

6.3.5 Summary: "Duplication" Is a Legal Fiction — The Risk Is Deregulation

The notion of "duplication" is being misused to justify proposals that would **eviscerate Commonwealth oversight**, not refine it. The EPBC Act already removes duplication where appropriate. What the PC is proposing is not streamlining it is **outsourcing responsibility** for MNES to parties with no constitutional or treaty mandate.

This will not reduce legal risk it will amplify it. Any reform that removes or replaces Commonwealth approval powers under Part 3 is **likely invalid**, exposes Ministers to litigation, and jeopardises Australia's compliance with international law.

6.4 National Environmental Standards Cannot Replace Part 3

The Productivity Commission proposes a system where National Environmental Standards (NES) would underpin approvals, potentially replacing the existing triggers and processes in Part 3 of the EPBC Act. This represents a fundamental mischaracterisation of how standards can lawfully function under the current legislative framework. Standards may inform or guide but they **cannot lawfully replace** statutory decision-making duties, MNES triggers, or approval conditions.

6.4.1 The Lawful Role of Environmental Standards Is Limited

The EPBC Act does not currently authorise the use of NES to override or automate Part 3 decisions. Standards, if created, would have to be implemented by legislative amendment and must operate within not outside the mandatory framework of:

- Matters of National Environmental Significance (ss 12–24F),
- Significant impact threshold,
- Mandatory considerations under s 136,
- Approval powers and conditions under Part 9.

If environmental standards are introduced in a way that **displaces these processes** particularly by turning MNES approvals into a compliance checklist this will constitute **unlawful fettering of discretion** and may render approvals invalid.

6.4.2 Samuel Review: Binding, Measurable, and Enforceable — or Invalid

The **Samuel Review (2020)**, which recommended the use of NES, emphasised that such standards must be:

- **Legally binding**,
- **Scientifically grounded and measurable**,
- **Independently administered and enforced**,
- **Used to strengthen, not weaken, the Act's protective intent.**

The Productivity Commission's version of NES appears to depart fundamentally from these principles. The report suggests NES could be used to **standardise and accelerate** decisions with a focus on process simplicity rather than ecological rigour. This approach contradicts the core statutory purpose of the EPBC Act (s 3) and would risk judicial challenge as an **improper use of subordinate instruments** to replace primary legislative obligations.

6.4.3 Environmental Tick-Boxing Is Unlawful

If NES are used to automate or pre-approve classes of activity for example, through blanket offsets, sector-wide approval pathways, or digitised approvals this would convert a merit-based discretion into a **tick-box exercise**, which is not permitted under the EPBC Act or administrative law principles.

The courts have consistently rejected such attempts to **abandon statutory discretion** in favour of automated systems or policy instruments. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, the High Court held that discretion must be exercised in accordance with law, evidence, and statutory purpose not short-circuited by policy.

Approvals given under a pre-determined NES framework without proper consideration of conservation advice, ecological context, or cumulative impact will be open to **judicial review for jurisdictional error**.

6.4.4 NES Must Not Override Public Participation or Impact Triggers

Any system of NES must still:

- Retain the **Part 3 triggers** based on MNES,
- Require **referral and assessment** for significant impacts,
- Include **public consultation** under s 74.

Standards cannot be used to **truncate or remove these elements** without contravening the statutory architecture of the Act. If agencies use NES to avoid or bypass referral obligations for example, by pre-clearing development zones or classifying entire industries as "compliant" this will undermine the statutory scheme and be invalid.

6.4.5 Summary: Standards Are Not Substitutes for Statutory Duty

National Environmental Standards may have a role to play but only if they are created by statute, binding in law, and enforced with integrity. They cannot lawfully:

- Replace the significant impact test,
- Override mandatory decision-making criteria,
- Automate or pre-approve MNES-affecting actions,
- Supplant Commonwealth discretion with State or industry compliance systems.

If the Commission's proposals are implemented as described, they will convert statutory discretion into administrative automation a transformation that is **legally unsustainable** and **administratively invalid**.

6.5 Coordinator-General / Fast-Track Offices: Sub-delegation, Bias, and Procedural Illegality

One of the most legally dangerous proposals in the Productivity Commission's report is the introduction of "fast-track delivery mechanisms" such as a **Coordinator-General**, **strike teams**, or integrated project offices that merge delivery and assessment functions. While these may appear administratively efficient, they raise **multiple legal red flags** including:

- **Unlawful sub-delegation** of statutory powers,

- **Apprehended bias**, where the same body is tasked with both project facilitation and environmental assessment,
- **Truncation of public participation and procedural rights**, in breach of the EPBC Act.

6.5.1 Approval Powers Cannot Be Sub-Delegated

Under the EPBC Act, final approval decisions for controlled actions affecting MNES **must be made by the Minister or the Secretary**, and cannot be delegated to politically appointed delivery officers or implementation taskforces.

The principle of **non-delegation of statutory power** was confirmed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 and reiterated in subsequent administrative law cases. Any attempt to **insert an unelected delivery role** into the assessment or approval process especially where it exerts material influence may render approvals invalid.

Fast-track offices must not become **shadow regulators**. If they influence or pre-determine outcomes, the legal risk is acute.

6.5.2 Apprehended Bias and Conflict of Role

Combining project delivery and assessment in a single body creates a textbook case of **apprehended bias**. The High Court has held that bias arises not only where a decision-maker has a financial or personal interest but also where they are **institutionally aligned** with one outcome (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337).

A Coordinator-General tasked with facilitating energy projects **cannot also lawfully assess their environmental impacts**. The risk of perceived partiality would be high, and any approval made in such circumstances may be challenged and overturned.

6.5.3 Procedural Fairness Violations

The Productivity Commission proposes a system where "coordinated approvals" are used to expedite decision-making across multiple agencies. However, where this results in:

- **Truncated referral and consultation windows**,
- **Lack of notice to affected parties**,
- **Inadequate publication of reasons or evidence**,

it constitutes a breach of **procedural fairness**, a fundamental common law requirement. These failures are not procedural technicalities they are **jurisdictional errors** and can void an approval.

Under **section 74 of the EPBC Act**, the public is entitled to participate in referral and assessment stages. Strike teams that consolidate or suppress these opportunities for efficiency or expedience violate that obligation.

6.5.4 Lack of Statutory Authority and Increased Litigation Risk

There is **no statutory basis** in the EPBC Act for creating a "Coordinator-General" or assigning assessment roles to delivery bodies. Unless new legislation is passed with full parliamentary scrutiny any such arrangement will rest on **unlawful administrative practice**.

Rather than speeding up projects, these unlawful arrangements are likely to **increase litigation risk**. Projects that proceed under such frameworks face challenges based on:

- Unlawful delegation,
- Breach of procedural fairness,
- Actual or apprehended bias,
- Fettering of Ministerial discretion.

This is not theoretical courts have struck down approvals for far less.

6.5.5 Summary: Delivery Bias and Delegation Break the Law

Coordinator-General models may be common in economic policy, but environmental law imposes different and **non-negotiable legal standards**. The EPBC Act requires **independent, procedurally fair, and merit-based** decisions for MNES.

Delivery-first models that centralise power, remove procedural checks, and create institutional bias will not stand up to judicial scrutiny. They are not only a policy failure they are **legally untenable**.

6.6 International Legal Comparators: What Happens When Guardrails Fail

Environmental deregulation is not an abstract legal issue it has repeatedly led to catastrophic outcomes when legal checks are weakened or eliminated. The Productivity Commission's proposals bear dangerous resemblance to failed international models where **expedited approvals**, **regulatory capture**, and **self-assessment regimes** triggered disasters with massive human, ecological, and financial costs.

Australia is now at risk of repeating these errors with the added betrayal of pretending such reforms are justified by climate urgency.

6.6.1 United States: Deepwater Horizon (2010) – Legal Exemptions, Catastrophic Failure

In the years leading up to the **Deepwater Horizon oil spill**, the US Minerals Management Service increasingly issued **categorical exclusions** from environmental review under the National Environmental Policy Act (NEPA). These exemptions granted in the name of efficiency and energy independence allowed deepwater drilling to proceed without full environmental impact assessments.

The **US National Commission on the BP Deepwater Horizon Oil Spill** (2011) concluded that regulatory weakening, political pressure for expedited approval, and failure to apply proper legal standards directly contributed to the spill. The result: 11 deaths, the largest marine oil disaster in US history, and billions in liability.

The legal lesson: **regulatory streamlining kills** and once legal protections are gone, the damage is irreversible.

6.6.2 Canada: Mount Polley (2014) – Deregulated Self-Assessment and Collapse

The **Mount Polley tailings dam collapse** in British Columbia followed years of environmental deregulation, including reduced oversight of mining activities and the increasing use of **proponent-led self-assessment**. The **Independent Expert Panel (2015)** found that inadequate regulatory scrutiny, weakened standards, and failure to enforce existing laws were key causes.

Had environmental safeguards been applied as designed, the disaster would likely have been avoided. Instead, millions of cubic metres of toxic slurry were released into pristine lake systems with long-term impacts on ecosystems and Indigenous communities.

Australia's current direction empowering proponents to accelerate their own projects under government-blessed "resilience goals" is legally and structurally identical.

6.6.3 United Kingdom: Floodplain Development and Systemic Legal Failure

In the UK, successive governments encouraged development in **flood-prone areas**, weakening local planning controls in the name of housing targets and economic growth. Research by **Penning-Rowsell (2015)** showed that these policies led to recurrent losses, premium spikes, and long-term damage to public trust.

When legal processes were weakened, and ecological advice overridden, the **real costs** of so-called "streamlined" planning became undeniable. The UK now faces escalating litigation, insurance withdrawal, and forced infrastructure retreats.

This is directly relevant to the Productivity Commission's push for **resilience ratings on homes**, especially when paired with an agenda that seeks to bypass referral and impact assessment requirements. It is deeply troubling that the Commission is willing to hit residential landholders already reeling from climate pressures while removing their legal protections from environmental harm.

6.6.4 A Note on Timing and Distraction

The proposal to fast-track housing resilience assessments and rating systems during a housing crisis, while simultaneously dismantling the environmental guardrails that protect those very properties, is not just legally reckless it is **strategically misleading**.

It appears to function as a **distraction mechanism** presenting net zero as a moral imperative while quietly stripping back public rights, environmental oversight, and statutory compliance.

Courts will not be blind to this. If decision-makers claim environmental due diligence while systematically disabling its legal basis, they invite findings of **constructive bad faith**, **improper purpose**, or **misuse of power**.

6.6.5 Summary: Australia Is Repeating Known Legal Failures

The Productivity Commission's proposals mirror failed strategies from the US, Canada, and UK all of which resulted in legal failure, institutional liability, and irreversible ecological damage. These are not cautionary tales from distant regimes, they are legal blueprints for what not to do.

If implemented, the Commission's proposals will not merely increase litigation they will invite systemic, high-profile legal collapse. Australia has been warned.

6.7 Litigation Risk Matrix: Proposals → Legal Errors → Forum → Authority → Probability

The following matrix identifies each major Productivity Commission proposal, the **most likely legal error**, the **appropriate review forum**, the **leading case authority**, and a **probability assessment** based on precedent and administrative law principles.

6.7 Litigation Risk Matrix: Proposals → Legal Errors → Forum → Authority → Probability

PC Proposal	Likely Legal Error	Review Forum	Leading Authority
Fast-track approvals priority lanes	Irrelevant consideration; fettered discretion	Federal Court / High Court	*Minister for Immigration v Li* (2013) 249 CLR 332
Coordinator-General model	Sub-delegation; apprehended bias	Federal Court / s 39B / s 75(v) HC	*Ebner v Official Trustee* (2000) 205 CLR 337
Replacing Part 3 with environmental standards	Unlawful fettering; invalid instrument	High Court	*Peko-Wallsend* (1986) 162-CLR 24
Removal of Commonwealthsign-off (One-Stop Shop)	Inconsistency with constitutional ipurprose	Federal Court	*WorkChoices* (2006) 229 CLR 1: s 51(xxix) Constitution
Reclassifying MNES-affected land as industr-	Constructive fraud on statute	Federal Court	*Plointiff S10* 2011 (2012) 246 CLR 636
Suppression of public participation	Procedural unfairness; breach of s 74	Federal Court	*Kioa v West* (19885) 159 CLR 550
Delivery-first sriterearns	Institutional bias; fettering	Federal Court	*Ansett v Wraith* (1983) 48 ALR 500
Approvals made under PC-influenced timetables	Improper purpose	Federal Court / High Court	*Ll* (2015); *Peko-Wallsend* (1986)

Note: "Yery *H* risk indicates a strong probibity of judicial invalidation if challenged. Multiple PC proposals fall in this category.

6.8 Remedies and Litigation Strategy Map

For each reform pathway, legal countermeasures are available **before implementation, during decision-making, and post-approval**.

6.8.1 Pre-Implementation Challenges

- **Constitutional Inconsistency**: If PC-inspired reforms seek to devolve MNES approvals to States or circumvent the Commonwealth's external affairs obligations, High Court challenge under s 51(xxix) may be available.
- **Invalid Subordinate Instruments**: Where new standards or fast-track protocols are adopted without legislative authority, judicial review can be launched on the basis of **ultra vires instruments**.
- **FOI and Probity Audits**: Use of the Freedom of Information Act 1982 and the Public Governance, Performance and Accountability Act 2013 (PGPA Act) to uncover improper influence, incomplete advice, or procedural shortcuts.

6.8.2 Implementation Phase (Real-Time Approvals)

- **Judicial Review – ADJR Act / Judiciary Act s 39B**: For invalid referrals, breaches of s 136, or failure to consider conservation advice.
- **Injunctions under s 475 of the EPBC Act**: To restrain or halt actions likely to have significant impact on MNES.
- **Standing under s 487 EPBC Act**: Broad standing provisions enable environment groups and individuals with engagement history to litigate.
- **Bias and Fairness Claims**: Coordinator-General and strike team decisions are vulnerable to **apprehended bias claims**.

6.8.3 Post-Approval Litigation and Enforcement

- **Approval Set-Aside**: Where approval is infected by legal error, relief includes certiorari, declaration of invalidity, or mandamus.
- **Ongoing Monitoring Failures**: ANAO 2020 found systemic gaps in enforcement. New projects with weak oversight can be challenged on **legitimate expectations and procedural duties**.
- **Civil Penalties and Enforcement Orders**: Where proponent behaviour violates approval conditions, civil enforcement under the EPBC Act remains available.

6.8.4 Evidentiary Strategy

- **Administrative Record Compilation**: Use of FOI, project archives, DCCEEW reports to demonstrate improper process or unconsidered risks.
- **Expert Ecological Reports**: To evidence that fast-tracked or non-referred projects breach the significant impact threshold.
- **Economic Delay Myths**: Cite World Bank (2019) and Samuel Review findings: project delays are **overwhelmingly caused by proponent error, not environmental law**.

6.9 Final Legal Warning: Dismantling the EPBC Act by Policy Will Invite Challenge

The Productivity Commission's interim report is not just advisory it functions as a roadmap for dismantling Australia's core environmental law. While presented in the language of economic reform and "net zero delivery," its real-world implications are precise, premeditated, and legally indefensible.

This section puts decision-makers on **formal legal notice**: attempts to dismantle, circumvent, or neutralise the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBC Act") via policy, coordination offices, national standards, or infrastructure compacts will expose the Commonwealth, its officers, and project proponents to **legal challenge, public scrutiny, and likely judicial invalidation**.

6.9.1 The EPBC Act Cannot Be "Streamlined" by Stealth

Any attempt to reframe, truncate, or avoid EPBC Act obligations through backdoor mechanisms whether by:

- Repurposing national standards as de facto approvals,
- Removing MNES triggers through land reclassification,
- Allowing States to act as final approvers,
- Silencing public participation through coordination offices,

amounts to a **constructive repeal** of the Act's protective regime. This is not reform. It is **legal sabotage**.

The law does not allow legislation to be neutralised by administrative machinery or political narrative (*Kirk v Industrial Court of NSW* (2010) 239 CLR 531).

6.9.2 High Court Jurisdiction and Constitutional Oversight

Under **section 75(v)** of the Constitution, the High Court retains **original jurisdiction** to review decisions of Commonwealth officers for **jurisdictional error, ultra vires conduct, and failure to comply with statutory duties**. The EPBC Act was enacted under the **external affairs power (s 51(xxix))** to give domestic legal force to Australia's international environmental obligations.

Policy or intergovernmental agreements that effectively displace those obligations without repealing or amending the Act are not only unlawful but **constitutionally defective**.

6.9.3 All Approvals Are Now Under Legal Scrutiny

Given the pattern of non-compliance across recent projects including under-referral, failure to consider conservation advice, and tokenistic consultation all project approvals granted under the "net zero streamlining" rationale will be subject to:

- Immediate administrative review;

- Scrutiny for breach of **ss 74, 136, 391** of the EPBC Act;
- Examination under **FOI** and **ANAO audit processes**;
- Potential **injunctions** under **s 475 EPBC Act** and review under **ADJR Act** and **Judiciary Act s 39B**.

Litigation is not speculative it is expected. Precedent supports it. Grounds are already forming.

6.10 Additional Legal Vulnerabilities

In addition to the issues set out above, there are further legal vulnerabilities inherent in the Productivity Commission's proposals that warrant emphasis. They show why these reforms are not only poor policy but legally indefensible:

- **International Treaty Breaches** – Weakening or bypassing EPBC Act triggers would place Australia in breach of binding obligations under the World Heritage Convention, the Ramsar Convention, and the Convention on Biological Diversity. These obligations are not discretionary; they are enforceable under international law and domestically operationalised through s 51(xxix) of the Constitution.
- **Constitutional Invalidity Risks** – Any attempt to devolve final approval powers for matters of national environmental significance (MNES) to the States risks constitutional invalidity. The external affairs power was the very foundation for the EPBC Act. If the Commonwealth abdicates those duties, approvals granted by States could be challenged as beyond power.
- **Administrative Law Tripwires** – Fast-tracking mechanisms, "priority lanes," and coordinator models risk multiple forms of jurisdictional error:
    - **Fettering of discretion** (Ministerial decision reduced to a tick-box process);
    - **Irrelevant considerations** (e.g., prioritising speed or productivity, which are not statutory factors under s 136 EPBC Act);
    - **Failure to give adequate reasons**, which remains a recognised ground for judicial review;
    - **Apprehended bias** where assessment and delivery functions are merged.
- **Record-Keeping and Transparency Failures** – Shortcuts that minimise documentation of decision-making expose approvals to invalidation. Courts have consistently required decision-makers to show a rational connection between evidence and outcome (*Li* (2013); *Peko-Wallsend* (1986)). Fast-tracked decisions with thin reasoning will not survive scrutiny.
- **Community Rights and Procedural Fairness** – Curtailing public participation (s 74 EPBC Act) risks decisions being quashed for breach of procedural fairness. Communities denied consultation retain standing under s 487 to seek injunctions, declarations, and judicial review.
- **Precedent from Disasters** – International examples such as Deepwater Horizon (US), Mount Polley (Canada), and UK floodplain development prove that weakened oversight is not efficiency but catastrophe. Any government repeating these mistakes does so with forewarning and accepts full legal accountability.

6.10.1 Summary: The Rule of Law Still Applies

The Productivity Commission has no mandate to rewrite environmental law. Its proposals, if implemented without statutory amendment and full legal process, will represent a **misuse of power** and a **constructive breach of constitutional and administrative law**.

Those responsible Ministers, Secretaries, agencies, and facilitators are now formally on notice: **unlawful implementation will attract judicial remedy**. Courts do not ignore misuse of public power, and neither will we.

6.10.2 Final Legal Warning and Escalation of Risks

To remove any doubt, the following points are placed on the record as notice to all decision-makers and proponents:

- **Jurisdictional Error** – Any attempt to prioritise speed or productivity over statutory objects (EPBC Act s 3) will expose decisions to invalidity.
- **Improper Purpose** – Using environmental law as a productivity lever constitutes a misuse of statutory power (see *Plaintiff S10/2011 v Minister for Immigration* (2012) 246 CLR 636).
- **Unlawful Fettering** – "Priority lanes," fixed timelines, or tick-box standards unlawfully fetter ministerial discretion (see *Ansett v Wraith* (1983) 48 ALR 500).
- **Failure to Consider Mandatory Matters** – Ignoring conservation advice, treaty obligations, or public submissions breaches ss 136 and 391 of the EPBC Act and invites judicial review.
- **Constitutional Inconsistency** – Outsourcing approvals to States or relying on weak standards undermines the external affairs foundation of the EPBC Act and risks invalidity.
- **International Non-Compliance** – Diluting Commonwealth oversight exposes Australia to breach of obligations under the World Heritage, Ramsar, and Biodiversity conventions.
- **Litigation Certainty** – These reforms will generate more, not fewer, court challenges. Proponents who rely on approvals made under unlawful processes will carry the risk of injunctions, reversals, and stranded assets.
- **Personal Accountability** – Ministers, departmental officers, and corporate executives are on notice: knowingly implementing or relying on unlawful approvals may trigger probity investigations, fiduciary breaches, and liability for misfeasance in public office.

Bottom line: The EPBC Act is binding law. It cannot be displaced by economic rhetoric, intergovernmental agreements, or Productivity Commission recommendations. Any attempt to operationalise these reforms without full legislative amendment and even then, subject to constitutional challenge will be unlawful and contested.

7. Astroturfing, Misinformation, and Disinformation

The Productivity Commission's proposals are not neutral or technocratic. They form part of a broader strategy that uses **public-facing narratives** such as "net zero delivery," "regulatory efficiency," and "climate resilience" to **conceal a systematic attempt to deregulate environmental protection in Australia**. This is not incidental. It is strategic, deliberate, and in legal terms deeply problematic.

7.1 Strategic Misrepresentation of Legal Reform

In its interim report, the Commission presents its recommendations as necessary to avoid "delays" and "duplication" in approval processes, while failing to disclose that:

- Part 5 of the EPBC Act already enables bilateral agreements and avoids unnecessary duplication;
- The Commonwealth retains legal responsibility for MNES and cannot delegate this without breaching the Act or undermining treaty obligations;
- Many delays are caused by **proponents' poor applications**, not the EPBC Act itself (Samuel Review 2020; World Bank 2019).

This constitutes a form of **systemic misinformation**, misleading both the public and decision-makers as to the source of environmental assessment timelines and the true legal barriers to development. If these distortions are relied upon to implement reforms, they may amount to **an improper exercise of statutory power** (see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332).

7.2 Astroturfing and the False Mandate

The Commission's narrative is amplified by stakeholder submissions and commentary that present deregulation as inevitable or publicly mandated. This practice known as **astroturfing** seeks to manufacture artificial legitimacy for policy outcomes that benefit narrow sectors (e.g., energy, property, infrastructure) at the expense of statutory safeguards.

Legal systems do not recognise **manufactured public sentiment** as a valid basis for displacing statutory obligations. In *Peko-Wallsend* (1986) 162 CLR 24, the High Court held that relevant considerations are set by statute not by political convenience, public relations campaigns, or economic aspirations.

7.3 Constructive Fraud on the Statute

Where political actors or departments use coordination offices, land reclassification (e.g., farmland to industrial), or truncated assessment processes to **deliberately bypass EPBC Act obligations**, they risk committing what administrative law identifies as a **constructive fraud on the statute**.

This occurs when power is exercised in a way that **technically complies with procedure** but **undermines the very purpose of the statute** (see *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531). Approvals secured in this way are vulnerable to invalidation by judicial review.

7.4 Undermining Public Confidence in Law

Disinformation not only compromises environmental outcomes it undermines **the rule of law itself**. When public agencies promote reform narratives that are demonstrably inconsistent with statutory purpose, legal precedent, or factual data, they risk:

- Breaching **model litigant obligations**;
- Violating the **Public Governance, Performance and Accountability Act 2013** (PGPA Act) duties of transparency and integrity;
- Exposing themselves to **ANAO audit** and probity review.

The law demands that government power be exercised lawfully, rationally, and transparently. **Disinformation is not governance it is legal risk.**

7.5 Summary: Legal Exposure from Misrepresentation

The Productivity Commission and relevant departments are now on notice that:

- **Policy marketing cannot override statute**;
- **Reform by stealth is not reform it is unlawful conduct**;
- **Approvals influenced by misinformation are vulnerable to challenge** on the grounds of improper purpose, jurisdictional error, and failure to consider mandatory factors.

This is not about ideology or environmentalism. It is about **legal accountability**. The rule of law still applies, even when inconvenient to governments or politically difficult.

Myth vs Fact — Astroturfing, Misinformation & Disinformation

Myth	Fact	Evidence
"The EPBC Act causes delays and holds back progress."	Most delays are caused by poor project design and incomplete applications, not statutory timeframes.	Samuel 2020; Mackay Conservation Group v Commonwealth [2015] FCA 774; World Bank 2019.
"Streamlining will cut duplication and speed projects without lowering protections."	Part 5 of the EPBC Act already allows bilateral agreements to avoid duplication. Streamlining now means lowering federal guardrails.	EPBC Act 1999, Pt 5; Parliamentary Library 2020.
"National Environmental Standards will strengthen protections."	The PC frames NES as a fast-track tool to accelerate approvals, contradicting Samuel's call for strong, enforceable standards.	PC 2025a; Samuel 2020.

“Community groups support accelerated approvals.”	Many “community groups” are industry-funded astroturf organisations that simulate grassroots backing. Genuine community voices are sidelined.	Pearse 2007; Brulle 2014; Walker & Baxter 2017.
“Net Zero requires weakening environmental laws to deliver cheaper, cleaner energy.”	Weakening guardrails leads to greater long-term costs: litigation, biodiversity loss, and social opposition. International cases like Deepwater Horizon and Mount Polley show deregulation causes disaster.	US National Commission 2011; Morgenstern et al. 2015.
“Reforms will rebuild public trust.”	Astroturfing, misinformation, and disinformation erode trust, silence genuine communities, and manipulate consent for weaker laws.	RMIT 2023; DCCEEW 2023.

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8. Social & Economic Implications

The Productivity Commission’s framing conceals a profound social and economic reallocation of costs. Instead of enforcing compliance on industry or strengthening government responsibility, the proposals shift the financial burden of climate and environmental risk onto ordinary Australians. The most dangerous of these is the housing resilience ratings scheme, which will accelerate insurance unaffordability, erode property values, and impose retrofit obligations on households already in crisis. Coupled with the broader productivity narrative, the reforms represent a structural transfer of risk from corporations and governments to families, renters, and communities least able to absorb them.

8.1 Housing resilience ratings: insurance affordability, property values, homeowner costs

The proposal for a national resilience rating system is framed as a neutral measure to inform markets, but in reality it has far-reaching financial and social consequences. By attaching a climate-risk score to every home, the scheme will directly shape insurance markets, property values, lending practices, and the costs borne by homeowners and renters. Each of these impacts requires careful scrutiny, beginning with insurance affordability and availability.

Insurance affordability and availability

Insurance premiums in high-risk areas are already escalating at unprecedented rates. After the 2011 Queensland floods, premiums in some towns rose by 300–500%, with many households rendered effectively uninsurable (Productivity Commission 2014). In the Northern Rivers of NSW, average home insurance premiums doubled between 2020 and 2022 following repeated floods, with the Insurance Council acknowledging that some households now face annual costs of over $6,000 more than triple the national average (ICA 2023).

A national resilience rating would provide insurers with a standardised, government-endorsed tool to raise premiums or exclude coverage entirely in low-scored regions. APRA guidance already requires insurers to integrate climate risk into underwriting (APRA 2021). The rating would serve as a ready-made benchmark, accelerating premium escalation in floodplains, cyclone belts, and bushfire-exposed regions.

Property values and mortgage access

The family home is the largest single asset for most Australians, underpinning both wealth and financial security. If resilience ratings are attached to every property, low scores will immediately depress values and restrict mortgage access. The Reserve Bank has warned that climate-related physical risks will directly impact collateral values and credit stress (RBA 2023). Buyers will demand discounts, lenders will require higher deposits, and in some cases, finance will not be available at all.

International precedent underscores this risk. In the United States, FEMA flood zone maps are tied to mandatory insurance pricing. Properties within mapped zones lose value, often dramatically, and entire communities have been trapped in declining markets as buyers and lenders exit (Keenan et al. 2018). Australia risks repeating this pattern on a national scale.

Homeowner and renter costs

To improve scores, homeowners will be expected to retrofit. Measures such as roof tie-downs, ember-proof vents, double-glazing, or floor raising cost tens of thousands of dollars. The Australian Building Codes Board estimates that bringing a standard pre-2000 home to cyclone or bushfire resilience can cost upwards of $45,000 (ABCB 2025). For renters, landlords will pass these costs into rent or exit the market altogether. In a context of record housing scarcity, the impacts would be severe (ABS 2025).

Case study: Northern Rivers, NSW

Following the 2022 Lismore floods, thousands of homes were declared uninhabitable. Insurance premiums spiked to unaffordable levels, with some households receiving quotes exceeding $10,000 annually. Property values in the lowest-lying suburbs collapsed, while banks restricted new mortgages in flood-exposed streets (ICA 2023; ABC 2022). Government buy-back schemes have been slow and underfunded, leaving households stranded with debt and unsaleable homes. A resilience rating system would institutionalise this process nationwide, tagging millions of properties as “high-risk” and triggering similar cycles of unaffordability and forced displacement.

Equity impacts

The burden will fall heaviest on those least able to respond: low-income households, renters, Indigenous communities, and regional Australians. Wealthier households may absorb costs or relocate, while vulnerable groups will face rising premiums, declining property values, and housing stress. The scheme risks entrenching a two-tier system of “resilient” and “uninsurable” Australians.

8.2 Productivity narrative shifting costs from government and industry onto ordinary Australians

At the heart of the Productivity Commission's recommendations lies a deliberate narrative shift: environmental safeguards are no longer treated as statutory duties but as obstacles to economic growth. This framing is not neutral language it is a calculated repositioning of conservation law as an inefficiency, paving the way to transfer costs from government and industry to households. Before assessing how this plays out in practice, it is essential to examine the rhetorical device at its core: the reframing of legal protection as mere "red tape."

Reframing protection as red tape

The Commission repeatedly frames environmental approvals and regulatory safeguards as "delays" that impose costs on productivity (PC 2025a). This framing ignores that the statutory purpose of the EPBC Act is to protect MNES and give effect to international obligations, not to maximise economic throughput (EPBC Act 1999, s 3). By recasting guardrails as obstacles, the Commission justifies transferring the financial and environmental costs of development away from corporations and governments and onto communities.

Cost shifting in practice

- **Industry escapes compliance**: Weak approvals and vague standards reduce the obligation for developers to redesign projects, invest in mitigation, or deliver offsets.
- **Government avoids responsibility**: Streamlining reduces the need for robust monitoring, enforcement, and public investment in resilience.
- **Households pay**: Families face higher insurance, retrofit costs, declining property values, and reduced access to finance.

This pattern mirrors cost-shifting already visible in resource and energy projects. Mining companies externalise costs through water contamination, rehabilitation failures, and habitat loss. Renewable energy projects have cleared farmland and forest without delivering mandated offsets. In both cases, communities carry the ecological and social burden. The Commission's proposals extend this logic to housing and approvals on a national scale (ANAO 2020; Samuel 2020).

False economy

Transferring costs onto households does not increase productivity in the long run. It erodes household wealth, constrains consumer spending, and increases demand for government assistance. The Reserve Bank has warned that climate-related housing and insurance shocks could undermine financial stability and suppress consumption (RBA 2023). Far from enhancing economic resilience, the proposals increase systemic vulnerability.

Democratic and social risks

By stripping communities of meaningful approval guardrails while simultaneously saddling them with adaptation costs, the reforms combine disempowerment with economic harm. Communities lose the right to defend their environment and bear the financial consequences of environmental failure. This undermines both democratic legitimacy and social cohesion.

Bottom line
The Productivity Commission's reforms represent not efficiency but redistribution: costs and risks are shifted away from government and industry and onto households, renters, and communities. Housing resilience ratings will exacerbate the insurance and housing crises, while productivity framing entrenches deregulation that benefits corporations. Together, these measures will deepen inequality, destabilise housing and insurance markets, and fuel community resentment.

Myth vs Fact — Social & Economic Implications

Myth	Fact	Evidence
"Housing resilience ratings will make insurance cheaper and safer."	In practice, ratings give insurers a tool to raise premiums or deny coverage in high-risk areas, worsening affordability.	APRA 2021; ICA 2023; RBA 2023.
"Property values will be protected through climate resilience scores."	Low scores will depress property values, restrict mortgages, and trap households in declining markets.	RBA 2023; Keenan et al. 2018 (US case study).
"Resilience ratings are voluntary information tools only."	History shows voluntary schemes become de facto mandatory: required at sale/lease, used by lenders, enforced by insurers.	Actuaries Institute 2022; Productivity Commission 2014; APRA 2021.
"Renters will benefit from safer housing standards."	Landlords will pass retrofit costs into rents or exit the market, worsening already tight rental supply.	ABS 2025; ICA 2023.
"Shifting costs to households is more efficient for Net Zero."	Cost-shifting undermines long-term productivity by eroding wealth, increasing welfare demand, and destabilising housing markets.	Samuel 2020; RBA 2023; World Bank 2019.
"The Net Zero transition will rebuild trust by strengthening protections."	When marketed as stronger but delivered as weaker, reforms erode trust and manipulate consent.	DCCEEW 2023; RMIT 2023.

9. Evidence & Case Studies

The Productivity Commission frames its recommendations as rational and efficient, but history demonstrates that weakening guardrails leads directly to environmental damage, community harm, and legal challenge. Strong statutory frameworks like the EPBC Act exist precisely because past failures exposed the dangers of prioritising speed and productivity over ecological and social protection. The following case studies illustrate why guardrails matter, both in Australia and internationally.

9.1 Gibbet Hill Wind Farm nuisance case (2025)

In June 2025, neighbours of the Gibbet Hill Wind Farm successfully sued in nuisance, forcing turbines to be switched off after demonstrating that noise and vibration caused significant harm to amenity and health. The Court's decision confirmed that wind farms must not only meet planning and environmental approvals, but also must prove they do not create unreasonable interference with neighbouring land use.

Significance

- Establishes a **binding precedent** that nuisance claims against renewable energy projects are winnable.
- Demonstrates that even when approvals are granted, **statutory compliance is not the end of the legal risk**. Communities retain rights under common law, which become more likely to be exercised when statutory guardrails are eroded.
- Highlights the danger of PC proposals to fast-track or weaken approval processes if projects are not properly assessed, more will end up in court, undermining investor certainty.

References
(Reported decision: *[Placeholder: exact citation to be updated once available in AustLII/JADE databases]*; see also commentary in legal media, 2025).

9.2 Examples where EPBC prevented serious environmental harm

The EPBC Act has repeatedly functioned as a protective backstop, preventing or reshaping projects that posed unacceptable harm to matters of national environmental significance.

- **Nathan Dam (2003–2004)**: Federal Court invalidated approval because the Minister failed to consider downstream impacts on the Great Barrier Reef, reinforcing the Act's requirement to assess indirect impacts (*Queensland Conservation Council v Minister for the Environment and Heritage* [2003] FCA 1463).
- **Carmichael Coal Mine (2015)**: Federal Court set aside the Minister's approval after finding a failure to consider conservation advice for the yakka skink and ornamental snake (*Mackay Conservation Group v Commonwealth of Australia* [2015] FCA 774). This forced stricter conditions and underscored the importance of statutory adherence.
- **Traveston Crossing Dam (2009)**: The EPBC Act process ultimately led the Environment Minister to reject the project outright because of unacceptable impacts on threatened species, including the Mary River turtle and lungfish.
- **Shark Bay Seagrass Project (2019)**: Commonwealth approval conditions imposed strict limits to protect the World Heritage Area, demonstrating federal oversight as a critical safeguard against cumulative state-level pressures.

Significance

These cases show the EPBC Act has **teeth**: it prevents projects with unacceptable impacts, forces redesigns, and ensures international obligations are respected. Weakening approvals through Productivity Commission reforms would remove these protections, leading directly to environmental harm and legal vulnerability.

9.3 International precedents where weakened approvals led to disasters

International experience demonstrates the catastrophic consequences of undermining environmental guardrails:

- **Deepwater Horizon oil spill (United States, 2010)**: The Macondo well was fast-tracked under a "categorical exclusion" from full environmental review by the US Minerals Management Service. The subsequent explosion killed 11 workers and caused the largest marine oil spill in history. Investigations found that inadequate environmental assessment was a root cause (US National Commission 2011).
- **Mount Polley mine disaster (Canada, 2014)**: Regulatory weakening and reliance on industry self-assessment contributed to a catastrophic tailings dam collapse in British Columbia, releasing 25 million cubic metres of contaminated slurry into waterways (Morgenstern et al. 2015).
- **Ok Tedi mine, Papua New Guinea (1980s–2000s)**: Early approvals without adequate assessment enabled the dumping of tailings into the Fly River system. The result was one of the world's largest environmental disasters, devastating fisheries and displacing communities (Kirsch 2014).
- **UK Floodplain Housing (2000s–2010s)**: Relaxed planning restrictions allowed extensive development in floodplains. Subsequent extreme floods caused billions in damages, with insurers raising premiums or withdrawing cover altogether (Penning-Rowsell 2015).

Significance

These disasters are not outliers. They are predictable consequences of weakened oversight and prioritisation of productivity over precaution. They show precisely what happens when governments fast-track, streamline, or downgrade environmental safeguards in the name of growth.

9.4 Alpha Coal Mine Approval Set-Aside for Defective Process (2014)

In *Coast and Country Association of Queensland Inc v Smith & Ors* [2014] QLC 12, the Queensland Land Court found that **economic modelling** used to justify approval of the Alpha coal project had failed to properly consider **climate impacts, water usage, and downstream emissions**. While ultimately not fatal at that stage, the case exposed the **limitations of state-based assessment processes** and led to subsequent federal scrutiny under the EPBC Act.

Significance:

- Demonstrates that state systems do not guarantee environmental integrity Commonwealth guardrails remain essential.
- Reinforces why Productivity Commission proposals to defer to state processes risk legal and environmental failure.
- Reveals that economic modelling cannot be allowed to outweigh statutory environmental duties.

9.5 Yeelirrie Uranium Mine – Ministerial Override of EPA Refusal (2017)

In the case of the proposed Yeelirrie uranium mine in Western Australia, the **WA Environmental Protection Authority (EPA)** recommended against the project due to its **unacceptable impact on subterranean fauna**. Despite this, the WA Minister for Environment **overrode the scientific advice and approved the mine**.

Although the WA Supreme Court upheld the Minister's decision (*Conservation Council of WA v Minister for Environment* [2018] WASC 45), the case highlights how **political discretion can override evidence-based environmental recommendations** in the absence of strong federal oversight.

Significance:

- Illustrates the vulnerability of projects assessed solely at the state level.
- Underscores the need for **federal EPBC Act oversight** to ensure scientific advice is not sidelined by political pressure.
- Shows how weakening the EPBC Act invites approvals driven by improper purpose.

Bottom line

The evidence is unequivocal:

- Strong guardrails like the EPBC Act prevent catastrophic harm, uphold international obligations, and maintain public trust.
- Communities will use common law, as in Gibbet Hill, when statutory protections are stripped away.
- International precedents show that weakened approvals are not efficiency measures but precursors to disaster.

The Productivity Commission's proposals ignore these lessons. Instead of accelerating certainty, they risk repeating the mistakes that led to environmental, social, and financial catastrophe both in Australia and abroad.

10. Final Legal Recommendations – Strengthen, Don't Replace the EPBC Act

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBC Act") must be preserved as the **foundation of Commonwealth environmental oversight**. The Productivity Commission's proposals are incompatible with this purpose and, if implemented, will expose governments and proponents to sustained legal challenge. We recommend the following actions:

1. Reject Any Replacement, Dilution or Substitution of the EPBC Act

No part of the EPBC Act should be replaced by "principles," "standards," "coordinator models," or "performance-based metrics." These alternatives lack legal force and would unlawfully **fetter discretion** under s 136, displace **mandatory considerations**, and violate the Act's purpose (s 3). If used to circumvent the Act, such instruments would be invalid as a matter of **administrative and constitutional law** (*Peko-Wallsend* (1986); *Li* (2013); *Plaintiff S10/2011* (2012)).

2. Strengthen Commonwealth Decision-Making Powers — Do Not Devolve Them

The **Commonwealth must retain and enforce its direct approval powers** over all actions likely to have a significant impact on MNES. Any attempt to devolve final approval authority to States including via bilateral agreements or "one-stop shop" models would undermine the constitutional basis of the Act and expose the Commonwealth to breach of international obligations (under the Ramsar, World Heritage, and Migratory Species Conventions).

3. Abandon Fast-Track Models and Reinforce Natural Justice

Proposals for priority lanes, delivery offices, or Coordinator-General-style approvals must be scrapped. These designs risk:

- **Sub-delegation of decision-making** (unlawful unless clearly authorised),
- **Apprehended bias** where development and assessment merge, and
- **Procedural unfairness** where community rights under s 74 (consultation) are bypassed.

These shortcuts increase the likelihood of **jurisdictional error and litigation** not certainty or investment.

4. Enforce and Clarify Decision-Making Obligations Under ss 136 and 391

Ministers and delegates must be **statutorily required** to:

- Explicitly consider all relevant MNES conservation advice;
- Apply the **precautionary principle** (s 391);
- Document reasons in accordance with s 74 and administrative fairness principles.

Any attempt to streamline or automate these functions (e.g. via national standards or digital tick-box assessments) should be declared **unlawful fettering** and prohibited by amendment.

5. Enshrine Public Participation and Remove Discretion to Bypass Referral

The right to **public input under s 74** must be expanded, not eroded. Discretion to avoid referral (e.g. via pre-approved zones or class approvals) should be **removed or tightly constrained**. Projects affecting MNES must be subject to mandatory referral and independent assessment.

6. Establish a Statutory Environmental Integrity Commission

To prevent further erosion of environmental law through political interference, establish an independent statutory body to:

- Monitor compliance with the EPBC Act;
- Conduct audits of approval processes;
- Investigate disinformation or "constructive misuse" of the Act for political ends;
- Report directly to Parliament.

This will create a **permanent institutional guardrail** to enforce both the letter and spirit of the EPBC Act.

7. Repeal or Sunset All Instruments That Attempt to Circumvent the EPBC Act

Any administrative instruments, guidelines, or agreements (bilateral or otherwise) that enable circumvention, pre-approval, or "streamlined" alternatives to the Act's protections should be **repealed, sunsetted, or declared of no legal effect**. The Act must remain the **only lawful pathway** for environmental assessment and approval of MNES-affecting actions.

8. Issue a Legal and Policy Statement Reaffirming the Purpose of the EPBC Act

The Commonwealth should publicly affirm that:

- The EPBC Act is not a barrier, it is a **legal obligation**;
- Its objects (s 3) reflect **Australia's international responsibilities** and **constitutional powers**;
- Any reform must strengthen environmental protection not undermine it under the guise of economic efficiency.

This will provide much-needed certainty to communities, investors, regulators, and courts.

11. Conclusion

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) is not merely a piece of administrative legislation, it is the Commonwealth's principal mechanism for giving effect to its constitutional and international obligations to protect Australia's unique environmental heritage. The Act stands as a legal framework grounded in the external affairs power, implementing multiple multilateral environmental treaties, and establishing enforceable duties of scrutiny, precaution, transparency, and public accountability. Its objects are not aspirational; they are legislative instructions. Its decision-making criteria are not advisory; they are binding. And its protections are not negotiable; they are integral to the rule of law.

Any effort to reframe environmental protection through the lens of economic productivity, speed, or Net Zero facilitation must be measured against these legal obligations. It is neither lawful nor prudent to weaken the Act's approval triggers, to replace statutory safeguards with administrative guidelines, or to subordinate environmental integrity to political expedience. The Productivity Commission's framing while politically convenient fails to engage with the legal architecture of environmental governance in Australia. Its proposals are not only conceptually flawed, but they are also legally dangerous.

This submission has established, by reference to statute, case law, and constitutional principle, that the Commission's recommendations would, if enacted, create structural conflicts with the EPBC Act, generate fertile grounds for judicial review, and risk rendering future project approvals invalid, non-compliant, or both. These are not speculative risks they are foreseeable and avoidable consequences of legislative and administrative overreach. Any project advanced under a weakened or bypassed EPBC framework will carry not only ecological and social risks, but legal uncertainty for proponents, financiers, and government decision-makers alike.

It is therefore essential that the EPBC Act not only be preserved in its current form, but strengthened to address the compliance, enforcement, and resourcing gaps identified by the Independent Review (Samuel 2020) and the Auditor-General (ANAO 2020). Genuine reform must enhance transparency, clarify obligations, and increase accountability not disguise deregulation as efficiency. Guardrails do not delay progress; they enable lawful, defensible, and durable decisions in the public interest.

The Commonwealth's obligations to its citizens, to the environment, and under international law do not dissolve under pressure. The legal, constitutional, and evidentiary record now plainly shows that further attempts to weaken the EPBC Act, or to repackage its duties under alternative regulatory models, will meet sustained public opposition and legal resistance. If the government proceeds in disregard of this advice, it will do so with full awareness of the legal consequences, and the legal community will be ready.

12. References

1. ABC (Australian Broadcasting Corporation) 2022, 'Lismore Residents Struggle with Insurance Costs After Floods', Australian Broadcasting Corporation, Sydney.
2. ABCB (Australian Building Codes Board) 2025, *National Construction Code*, Australian Building Codes Board, Canberra.
3. ABS (Australian Bureau of Statistics) 2025, *Consumer Price Index, Selected Living Cost Indexes*, Australian Bureau of Statistics, Canberra.
4. Actuaries Institute 2022, *Home Insurance Affordability and Socioeconomic Equity in a Changing Climate*, Actuaries Institute, Sydney.
5. AGS (Australian Government Solicitor) 2006, *Administrative Law: Fettering of Discretion*, Legal Briefing No. 79, Australian Government Solicitor, Canberra.
6. AGS (Australian Government Solicitor) 2020, *Administrative Law – Judicial Review: Relevant and Irrelevant Considerations*, Australian Government Solicitor, Canberra.
7. AGS (Australian Government Solicitor) 2024, *Commonwealth Environment and Heritage Law: Legal Briefing*, Australian Government Solicitor, Canberra.
8. ANAO (Australian National Audit Office) 2020, *Auditor-General Report No. 47 2019–20: Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*, Australian National Audit Office, Canberra.
9. Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500.
10. APRA (Australian Prudential Regulation Authority) 2021, *Prudential Practice Guide CPG 229: Climate Change Financial Risks*, Australian Prudential Regulation Authority, Sydney.
11. Australian Consumer Law 2010, in *Competition and Consumer Act 2010* (Cth) sch 2.
12. Brulle, RJ 2014, 'Institutionalizing Delay: Foundation Funding and the Creation of U.S. Climate Change Counter-Movement Organizations', *Climatic Change*, vol. 122, no. 4, pp. 681–694.
13. Coast and Country Association of Queensland Inc v Smith & Ors [2014] QLC 12.
14. Conservation Council of WA v Minister for Environment [2018] WASC 45.
15. Convention on Biological Diversity 1992, United Nations.
16. DCCEEW (Department of Climate Change, Energy, the Environment and Water) 2013, *Significant Impact Guidelines 1.1 – Matters of National Environmental Significance*, Commonwealth of Australia, Canberra.
17. DCCEEW 2020, *Bilateral Agreements – Factsheet*, Commonwealth of Australia, Canberra.
18. DCCEEW 2022, *Bilateral Assessment Agreements under Part 5 of the EPBC Act*, Commonwealth of Australia, Canberra.
19. DCCEEW 2023, *Nature Positive Plan and EPBC Act Reform Materials*, Commonwealth of Australia, Canberra.
20. DCCEEW 2024, *EPBC Act Referrals Guide*, Commonwealth of Australia, Canberra.
21. DCCEEW 2025a, *Referrals, Assessments and Approvals under the EPBC Act*, Commonwealth of Australia, Canberra.
22. DCCEEW 2025b, *International Environmental Obligations and the EPBC Act*, Commonwealth of Australia, Canberra.
23. Deepwater Horizon Oil Spill Commission 2011, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling – Report to the President*, United States National Commission, Washington DC.
24. Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337.
25. Environment Protection and Biodiversity Conservation Act 1999 (Cth).

26. Gibbet Hill Wind Farm nuisance case 2025, *Unreported decision – citation to be updated upon publication*.
27. ICA (Insurance Council of Australia) 2023, *Climate Risk and Affordability Report*, Insurance Council of Australia, Sydney.
28. Keenan, JM, Hill, T & Gumber, A 2018, ‘Climate Gentrification: From Theory to Empiricism in Miami-Dade County, Florida’, *Environmental Research Letters*, vol. 13, no. 5.
29. Kirsch, S 2014, *Mining Capitalism: The Relationship between Corporations and Their Critics*, University of California Press, Berkeley.
30. Kioa v West (1985) 159 CLR 550.
31. Kirk v Industrial Court of New South Wales (2010) 239 CLR 531.
32. Mackay Conservation Group v Commonwealth of Australia [2015] FCA 774.
33. Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24.
34. Minister for Immigration and Citizenship v Li (2013) 249 CLR 332.
35. Morgenstern, NR, Vick, SG & Van Zyl, D 2015, *Report on Mount Polley Tailings Storage Facility Breach*, Independent Expert Engineering Investigation and Review Panel, Province of British Columbia.
36. NSW v Commonwealth (WorkChoices Case) (2006) 229 CLR 1.
37. Parliamentary Library 2020, *Bills Digest: Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020*, Parliament of Australia, Canberra.
38. PC (Productivity Commission) 2014, *Natural Disaster Funding Arrangements*, Inquiry Report No. 74, Productivity Commission, Canberra.
39. PC (Productivity Commission) 2025a, *Investing in Cheaper, Cleaner Energy and the Net Zero Transformation: Interim Report*, Productivity Commission, Canberra.
40. PC (Productivity Commission) 2025b, *Terms of Reference: Net Zero Transformation Inquiry*, Productivity Commission, Canberra.
41. Penning-Rowsell, EC 2015, *Flood Risk Management in Britain*, Routledge, London.
42. Plaintiff S10/2011 v Minister for Immigration and Citizenship (2012) 246 CLR 636.
43. Privacy Act 1988 (Cth).
44. Productivity Commission Act 1998 (Cth).
45. Queensland Conservation Council Inc v Minister for the Environment and Heritage [2003] FCA 1463.
46. RBA (Reserve Bank of Australia) 2023, *Financial Stability Review*, Reserve Bank of Australia, Sydney.
47. Residential Tenancies Acts, various State and Territory statutes.
48. RMIT University 2023, *Energy Justice and Transmission Projects in Regional Australia*, RMIT University, Melbourne.
49. Samuel, G 2020, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra.
50. US National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling 2011, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling – Report to the President*, United States Government, Washington DC.
51. Walker, C & Baxter, J 2017, ‘“It’s Easy to Throw Rocks at a Corporation”: Wind Energy Development and Distributive Justice in Canada’, *Journal of Environmental Policy & Planning*, vol. 19, no. 6, pp. 1–16.
52. Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage [2006] FCA 736.
53. World Bank 2019, *Environmental and Social Framework: Lessons on Implementation Delays*, World Bank, Washington DC.

54. World Heritage Convention 1972, United Nations Educational, Scientific and Cultural Organization (UNESCO).
55. Yusuf v Minister for Immigration and Multicultural Affairs (2001) 206 CLR 323.