
1 Intro, compliance and offsets – ANAO and EPBC Review evidence

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Synthesised changes

Compliance

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[Effective] monitoring, evaluation and reporting of the EPBC Act, and of the broader national environmental system is essential to achieve improved environmental outcomes. It is also central to improving and maintaining public trust in the regulatory system. If the community, and the regulated community don't have visibility of the outcomes arising from regulatory intervention, then they question whether it is worthwhile.

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The EPBC Act includes some requirements for monitoring and reporting on activities and outcomes. However, these do not span the operation of the Act and follow-through is poor. Resourcing constraints mean that the focus is on reporting to meet the bare minimum requirements, rather than monitoring and evaluation driving adaptive improvements over time.

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Offsets

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ANAO report

- **Conclusion 11:** The department is unable to demonstrate that conditions of approval are appropriate. The implementation of conditions is not assessed with rigour. The absence of effective monitoring, reporting and evaluation arrangements limit the department's ability to measure its contribution to the objectives of the EPBC Act.

Governance

- **12** Arrangements for collecting and managing information on compliance with the EPBC Act are not appropriate. The department does not have an appropriate strategy to manage its compliance intelligence, limiting its access to the regulatory information necessary for complete and accurate compliance risk assessments. Key limitations include poor linkages between sources of regulatory information and a lack of formal relationships to receive external information.

Arrangements between co-regulators

2.11 Bilateral agreements with states and territories contain provisions to support information sharing. Each agreement contains commitments to cooperate in

monitoring compliance with conditions of approval, including through establishing complementary arrangements. However, complementary arrangements have not been established. In addition, only one agreement commits to a regular schedule for the provision of compliance information.²⁷

2.12 In the absence of agreed and structured information sharing arrangements, information received from co-regulators will be reactive, issue-based and dependent on personal relationships. As a consequence, compliance information may be incomplete and limited in value for strategic planning.

Management of information

2.13 Once regulatory information is obtained, it should be managed in a way that enables it to efficiently inform compliance intelligence. The department stores regulatory information in multiple systems maintained by different business areas (Table 2.1). However, the department has not established a procedure to extract all relevant compliance information from each of these different systems. There is no system to store and risk assess open source information, develop custom risk profiles for regulated entities, or undertake projects to gather intelligence.²⁸

2.16 Without implementing these improvements, the department's ability to utilise information from internal business systems and develop a comprehensive view of the regulatory landscape is limited. Key internal systems do not provide for a consistent, accurate and holistic view of regulated entities. This has resulted in staff checking multiple systems and re-entering information already stored elsewhere.

Intelligence gathering

2.29 *The EPBC Act — a horizon scan, November 2017* was the first strategic intelligence assessment produced by the Office of Compliance. Its purpose was to

identify potential sources of non-compliance with referral requirements and conditions of approval, to support strategic and operational planning.

2.30 The assessment identified key compliance risks by sector and included considerations such as the basis of the analysis, assumptions, information gaps, and likelihood, consequence and risk ratings. Key risks identified included high volumes of land clearing for agriculture without referral or approval, non-compliance in residential development projects and continued non-compliance in the mining sector.

2.31 Proposed actions in response to the assessment were considered in September 2018.³³ The division of the department responsible for referrals, assessments and approvals noted in October 2018 that it 'will look to progress many of the draft actions as part of the upcoming review of the EPBC Act, or as part of its normal business operations during 2018–19'. The department's records do not indicate work has been undertaken on those actions.

Approval conditions

- 19. Departmental documentation does not demonstrate that conditions of approval are aligned with risk to the environment. Of the approvals examined, 79 per cent contained conditions that were non-compliant with procedural guidance or contained clerical or administrative errors, reducing the department's ability to monitor the condition or achieve the intended environmental outcome.

4.9 A sample of 43 approvals issued between 1 July 2015 and 30 June 2019³⁴ identified 34 (79 per cent) with at least one condition that was either non-compliant with the department's guidelines or contained clerical or administrative errors.³⁵ A targeted search located an additional 20 approvals that inappropriately used the word 'should' (the department's guidelines note the term is ambiguous and not to be used).

4.10 Furthermore, 15 of 39³⁶ approvals (38 per cent) had either not included all required standard administrative conditions or had altered them in a way that impacted their effectiveness. Examples include approvals missing a requirement

for the regulated entity to notify the department when they commence actions (required to be incorporated in all approvals) and the alteration of terms in the standard condition without altering the corresponding definitions.

4.11 Poorly written or non-compliant conditions may impact the ability of the condition to be monitored or protect matters of national environmental significance. The poor quality of conditions was noted in a previous ANAO audit⁹⁷ and raised in a departmental report on compliance with conditions of approval in August 2018. The report found a number of approvals 'contain poorly written conditions that included spelling and grammatical errors', noting that 'there would be merit in checking and enhancing quality assurance processes at the EPBC Act approval stage'.

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4.13 The quality assurance process for conditions of approval involves the submission of draft conditions to the Office of Compliance before submission to the relevant manager. The department does not have a structured process for sampling approved conditions to provide assurance on their quality.

Alignment with risk

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4.16 In the period September 2015 to October 2018, a document specifying the desired environmental outcomes and a description of how the proposed conditions met those outcomes was required to be included in each decision brief. Of the 26 approvals issued between September 2015 and October 2018 examined by the ANAO, 23 did not have this document on file. After October 2018, there were no requirements to document the desired environmental outcomes or how the proposed conditions aligned with them.⁹⁸

4.17 The recommendation report required for each approval establishes the rationale for proposed conditions, but only to the extent of stating that the condition reduces an unacceptable risk to matters of national environmental significance to an acceptable risk.

Pre-commencement conditions (environmental management and offset plans)

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- 20. The department has not established appropriate arrangements to monitor the implementation of pre-commencement conditions of approval. The department's systems for monitoring commencement of actions are inaccurate. The absence of procedural guidance for reviewing documents submitted as part of pre-commencement conditions leaves the department poorly positioned to prevent adverse environmental outcomes.

Environmental management plans

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4.27 While each management plan will vary depending on the nature of the action, a standard plan requires specification of: environmental objectives; commitments to achieve those objectives; risks to achieving the environmental objectives; impact avoidance, mitigation or repair measures; a monitoring program; and reporting and review mechanisms.

4.28 There is no additional guidance for reviewing environmental management plans or a structured quality assurance process over approved plans. Without these controls, the department lacks assurance that management plans were assessed in accordance with the conditions of approval, the *Environmental Management Plan Guidelines 2014* and the objectives of the EPBC Act.

4.30 The assessed briefing packages did not contain any consideration of relevant statutory documents under the EPBC Act, such as conservation advice or recovery plans.¹⁰⁴ These documents establish the Commonwealth's strategy to maximise the long-term survival of the relevant matter of national environmental significance. Considering these documents would provide assurance that the department is not contravening a plan and that activities in approved plans are those that best contribute to the conservation of matters of national environmental significance.

Offset plans

4.34 The absence of guidance and quality control in offset assessment has resulted in realised risks. For example, two offsets described in approval briefs as 'lack[ing] consistency with the offset policy' were approved to maintain consistency with previous approvals (one of these is examined in Case study 4). Other issues relating to the absence of guidance and quality control have been raised within the department, primarily relating to risk of loss assessment, mapping of offsets and unavailability of proposed offsets.

Risk of loss

4.37 Four papers demonstrating inconsistencies in the department's assessments of risk of loss have been submitted to the Environmental Standards Division (ESD) board, including a research paper funded by the department's National Environmental Science Program. For example, one paper presented to the board in December 2018 highlighted two approved offsets for the same project at the same property, with differing risk of loss scores of 100 per cent and 0 per cent.

4.38 While these papers noted that inconsistent risk of loss assessments were 'impacting the department's reputation and making it difficult to negotiate appropriate offset outcomes', the department determined not to take further action.¹⁰⁵ Case study 4 examines an instance where inconsistency in offset assessment impacted the department's ability to negotiate offset outcomes.

Mapping of offsets

4.39 The offsets policy states that spatial information on offsets will be recorded and made public where available. This is designed to ensure that land proposed as an offset is 'available and suitable for use as an offset', and would reduce the risk of offsets being cleared or a site being inappropriately registered as an offset for multiple actions.

4.40 Despite this policy requirement, the department has not established an appropriate system to map offsets for internal or external use. Risks relating to this were raised internally in an Office of Compliance report, which noted that gaps in offset record-keeping make it possible for land already protected as an offset to be accepted as a new offset site.

4.41 Three internal projects were commenced to implement an offset mapping system, but were ultimately discontinued due to changes in resourcing priorities. At the discontinuation of the last project in May 2017, the department was unable to find offset spatial data for 174 of 903 assessed projects, with a further 167 offsets yet to be assessed. Of those with spatial data, only 142 offsets were confirmed to have been mapped.

4.42 While the department informed the ANAO that issues with the offsets database have been periodically addressed since this date, no comprehensive assessment of the completeness and accuracy of the database has been conducted. Issues with the completeness and accuracy of the offsets database were compounded in July 2019, when the department ceased loading offset location data into its databases altogether.

Availability

4.43 Departmental staff have indicated that offsets for some matters of national environmental significance are becoming increasingly unavailable due to a lack of available locations where the matter is present or a lack of data on suitable offset sites. This has resulted in regulated entities having difficulty satisfying offset conditions.

4.44 The inability to satisfy conditions due to offset unavailability has resulted in variations or extensions to offset conditions, and the acceptance of a higher proportion of indirect offsets (offsets that do not result in a measurable

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conservation gain for the affected matter of national environmental significance¹⁰⁶) than specified in the offsets policy.¹⁰⁷ This increases the risk that the desired environmental gains will not be achieved.

4.45 Timeframe extensions create increased risks due to the delay in achieving the conservation gain of the offset, while other variations may change the offset from what was intended at approval. Indirect offsets, as noted in the offset policy, are less likely to result in a conservation gain for a protected matter and have been found to have an increased risk of non-compliance.

4.46 While the absence of guidance for dealing with issues of offset unavailability has been raised with the ESD board, proposed actions to address the issue have been discontinued, postponed or not supported by the department.

Monitoring of compliance with pre-commencement

4.49 The department's records of project commencement are subject to completeness and integrity issues. The department has recorded 151 projects as commencing between 1 July 2015 and 28 August 2019. There were a number of discrepancies with these records, including:

- Ninety eight commencements were only found in either the spreadsheet or EIAS, and six of the 53 projects recorded in both sources had different commencement dates.
- Thirty nine projects were recorded as 'commenced' or 'completed' but had no recorded date of commencement.¹⁰⁸
- Fifty five projects that had reported on their post-commencement activities in annual compliance reports¹⁰⁹ to the department since 1 June 2018¹¹⁰ were not recorded as having commenced.

Evaluating impact/effectiveness of regulation

- **21.** Appropriate monitoring, evaluation and reporting arrangements have not been established. Performance measurement and evaluation activities do not

assess the contribution of referrals, assessments and approvals to the objectives of the EPBC Act.

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Monitoring and reporting on activities and performance

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4.72 The department does not monitor or report, internally or externally, on the effectiveness or efficiency of its regulation of referrals, assessments and approvals. As indicated in paragraphs 2.76 and 4.60, the department has not undertaken evaluations or established outcome-level performance measures relating to the effectiveness and efficiency of its administration of referrals, assessments and approvals.

4.73 Where effectiveness information is unavailable, input, activity and output measures may be used as proxies, with an explanation of why they are suitable proxies. The department reports on input, output and activity measures, both internally and externally (paragraphs 4.68–4.69). However, it does not indicate that these should be used as proxies for effectiveness.

High level results

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4.75 For EPBC-listed threatened species, 98 species have had their conservation status upgraded (become more threatened) since the commencement of the EPBC Act, compared to 18 species that have been downgraded.¹¹⁴ Further information published by the department's National Environmental Science Program in 2018 stated that for EPBC-listed animal species with recent population information, 174 have declining populations, compared to three that are increasing.

4.77 The department's absence of monitoring, reporting and evaluation arrangements leave it, and external stakeholders, without information on the impact of its regulation on the status of matters of national environmental significance. The department is unable to separate the effect of its regulation from other factors, such as local, state and territory government activities, other government programs, and factors such as introduced species and extreme weather events. Without this information, the department is unable to provide assurance that its administration of referrals, assessments and approvals is efficient, effective or contributing to the objectives of the EPBC Act.

EPBC Review

National level protection

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The key reasons the operation of the EPBC Act does not effectively protect the environment are:

- The Act lacks **clear national outcomes** and effective mechanisms to address environmental decline. Ecologically sustainable development is a key principle of the Act, but it is not being applied or achieved.
- **Decision-making is focused on processes and individual projects and does not adequately address cumulative impacts or emerging threats.** Environmental offsets have serious shortcomings. They have become the default, rather than the exception after all practical options to avoid or mitigate impacts have been exhausted.
- The Act **does not facilitate the restoration** of the environment. The current settings cannot halt the trajectory of environmental decline, let alone reverse it. There is **no comprehensive planning to manage key threats to the environment on a national or regional (landscape) scale.**
- **Opportunities for coordinated national action** to address key environmental challenges—such as feral animals, habitat restoration and adapting to climate change—are **ad hoc, rather than a key national priority.**

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Outcomes

The Act **lacks effective mechanisms to describe or measure the environmental outcomes it is seeking to achieve** and to ensure decisions are made in a way that

contributes to these outcomes. Key plans (such as recovery plans) and other management documents do not clearly link to national outcomes.

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3 - Legislative complexity

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Long-standing problems relating to the connection between approvals (Part 9) and strategic assessments (Part 10) should be addressed:

- The inability to vary a program once endorsed makes a Part 10 approval frozen in time and unable to respond to changes in information and circumstances. For example, strategic assessments are unable to deal with new listings. This means assessments that operate for long periods of time are unable to make adjustments to achieve the environmental outcomes envisaged.

5 – Trust in the Act

A key theme in submissions is the lack of transparency of how information is collected and incorporated into decision-making processes. The public don't trust claims made by advocates or governments on the costs or benefits of a proposal, and they don't trust the effectiveness of compliance and enforcement activities.

There are concerns that proponents themselves commission environmental consultants in the EIA process, but there are no professional standards or accreditation for these consultants, which further erodes trust in decision-making.

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6 - Data, info and systems

Decision-makers, proponents and the community do not have access to the best available data, information and science. This results in suboptimal decision-making, inefficiency and additional cost for business, and poor transparency to the community. The key reasons why the EPBC Act is not using the best available information are:

- The collection of data and information is fragmented and disparate. There is no single national source of truth that people can rely on.
- The right information is not available to inform decisions. Information is skewed towards western environmental science and does not adequately

consider Indigenous knowledge of the environment, or social, economic and cultural information. This broader set of information is not clearly integrated to inform decisions that deliver ecologically sustainable development (ESD). Cumulative impacts and future challenges like climate change are not effectively considered.

- The Department's systems for information analysis and sharing are antiquated. Cases cannot be managed effectively across the full life cycle of a project, and the user experience is clunky and cumbersome for both proponents and members of the community interested in a project.

Data and info are hard to find, access and share

There are many different portals, tools and datasets available, but there is no clear, authoritative source of environmental information to help users identify and access information that is relevant. Department datasets, including the Species Profile and Threats (SPRAT) Database and the Protected Matters Search Tool (PMST), do not refine and present data in a way that is useful for proponents, assessment officers, decision-makers or the general public.

Valuable data is often 'locked' in inaccessible formats. Valuable historical data is stored in paper reports. Information on listed species and communities, and assessment documents provided by proponents, are usually in PDF form. To access this information, each document must be found, opened and read individually.

The right info isn't there to inform decisions

The current focus of the EPBC Act is on western environmental science. There are currently clear structures and avenues for western scientific advice on the environment to be provided and considered. For example, the Act establishes the Threatened Species Scientific Committee for threatened species and communities listing advice and the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) for advice. There is no corresponding avenue or expectation for Indigenous environmental knowledge, or economic or social information, to be explicitly included or considered in statutory processes. Decision-makers must weigh competing factors, yet the information they rely on to do so is not comprehensive or transparent.

The information base for development assessment decisions is heavily skewed to environmental information collected by the proponent. There is no requirement for the proponent to give comprehensive information on social, economic or cultural impacts, or for the assessment process to examine the veracity of that information. The avenues to seek expert advice (beyond that provided by the IESC) in the development assessment process are limited, and rarely used in practice.

Due to climate change, the past will no longer be a useful guide to the future. Key threats to the environment, including biosecurity incursions and altered fire regimes, will be compounded by climate change. While considering cumulative impacts is important now, this becomes increasingly so as the predicted widespread and substantial changes to the environment arising from climate change manifest.

The technologies to analyse and gain insights from diverse and very large datasets are not broadly used, but these insights are essential to develop and refine predictive models. This contrasts to other areas of national policy such as the economy and health, where predictive modelling is a mainstream and widespread tool used to inform decision-making.

Antiquated info management

The online systems that support the EPBC Act are cumbersome, duplicative and slow, and do not meet expectations for an easy, tailored, digital experience. The Department's systems for managing assessment documentation result in the need to manually handle (and double handle) files, leading to mistakes and delays. Interactions with proponents are not easily recorded, resulting in duplication and a lack of structure.

There is no system for efficient case management, and it is not easy for the Department, the proponent or the community to determine the status of a proposal in the assessment process or track a project after an approval has been granted. Departmental systems do not link with state and territory systems, and there is no single user portal.

Proposed reforms

6.4.1 - A national environmental information supply chain, roadmap and custodian

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The Department's information management systems need to be overhauled to provide a modern interface for interactions on the EPBC Act and to embed within systems the key decision-making frameworks that harness information and knowledge.

A modern interface includes:

- a case-management system that supports the full project lifecycle, from application through assessment, approval, to compliance and enforcement
- the capacity to link with others—so that information can be provided once and shared many times (for example with the supply chain custodian or other regulators)
- the ability to record, share and search information related to EPBC Act decisions in a way that is accessible to both the public and proponents
- the ability to readily communicate decisions using modern communication channels, rather than relying on newspaper advertisements and the Government Notices Gazette.

7 - Monitoring, eval and reporting

Effective monitoring, evaluation and reporting of the EPBC Act, and of the broader national environmental system is essential to achieve improved environmental outcomes. It is also central to improving and maintaining public trust in the regulatory system. If the community, and the regulated community don't have visibility of the outcomes arising from regulatory intervention, then they question whether it is worthwhile.

The EPBC Act includes some requirements for monitoring and reporting on activities and outcomes. However, these do not span the operation of the Act and follow-through is poor. Resourcing constraints mean that the focus is on reporting to meet the bare minimum requirements, rather than monitoring and evaluation driving adaptive improvements over time.

For listed threatened species and ecological communities, requirements for monitoring are limited in scope. Recovery plans for threatened species are required to include details on how progress will be monitored, but there is no

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requirement to implement monitoring activities and report on whether outcomes are being achieved. This means that efforts to monitor and report are a rare exception, rather than common practice.

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Conservation advices for listed threatened species and ecological communities have no detail on monitoring requirements. Most mandated 5-yearly reviews of threat abatement plans are either well behind schedule or haven't occurred¹¹⁷.

8 - Offsets

Central to the proposed reform agenda is a commitment to monitoring and evaluating progress made

This is in part because the proponent's decision to develop a particular site (or on a specific footprint within a site) has generally already been made before a referral is made under the EPBC Act. This limits real consideration of broadscale avoidance. Project cost and difficulty drives final decisions about siting of projects, rather than environmental considerations.

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Once a proposal is referred, assessment officers have limited scope and time to work with proponents to avoid and mitigate impacts. This becomes a 'nice to do', rather than a core focus of their efforts. An offset has become an expected condition of approval, rather than an exception.

Advanced offsets are difficult to deliver under the current settings. There is no guarantee that the Environment Minister will accept an advanced offset, nor is it possible to accurately determine the area of offset required before an approval is granted. This makes investing in an advanced offset a risky proposition, and so proponents focus on protecting what is left rather than promoting restoration. This means that over time, the policy permits continued loss and ongoing decline,

rather than realising a gain (or at least no net loss) to offset expected environmental impacts, let alone improve them.

Offset requirements are a condition of approval. As with other conditions (see [Chapter 9](#)), offset conditions are not adequately monitored and efforts to enforce compliance are weak. There is no transparency of the location, quality or quantity of offsets. There is no 'register of offsets' and, in the absence of such a tool it may well be possible that the same area of land has been 'protected' more than once.

Because most offsets are averted loss offsets, the offset policy in its current form delivers little other than weak protection of remnant habitats of MNES that may have never been at risk of development. It requires fundamental review.

Proposed reforms

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9 - Compliance

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Not forceful

The Department has improved its regulatory compliance and enforcement functions in recent years but it does not have a strong compliance culture. Progress has included the establishment of a dedicated Office of Compliance, the development of a regulatory framework and new compliance policies that identify priority areas for focus.

While these were small steps forward, the foundations of the Department's regulatory posture focus heavily on supporting a voluntary approach to compliance. The Department has positioned itself as a collaborative regulator, working to reach agreement with the regulated community.

The Department's compliance policy describes its approach as 'fair, reasonable, respectful, reliable'¹³⁰. This stance comes from good intentions of recognising that the majority work to be compliant. However, it is a passive approach that has contributed to a culture that has **limited regard for the benefits of using the full force of the law where it is warranted**.

There is **limited evidence of proactive compliance effort**, and the compliance posture of the Department is reactionary. Enforcement efforts often **rely on a tip off from the public, rather than active surveillance driving enforcement activities**. There is **little active monitoring** to provide assurance that conditions of approval are being met. **Assurance to confirm that environmental offsets have been secured and are delivering intended outcomes is limited** (see [Chapter 8](#)). There are insufficient resources dedicated to proactive compliance.

Inadequate transparency

Monitoring, compliance, enforcement and assurance reporting is limited to Departmental annual reports. Some activities are reported online, but the lack of a mandatory requirement to do so under the EPBC Act results in incomplete reporting and the use of different approaches over time.

Submissions received by the Review indicate that the lack of transparency of current compliance arrangements is contributing to low public trust that appropriate action is taken. In the absence of that line-of-sight, submitters to the Review highlighted their view that compliance actions may be subject to political interference.

Most modern regulators have clear logs that include investigation of potential breaches and comprehensively list even minor notices that have been issued. The lack of thorough reporting for the EPBC Act makes it hard to find information. This fails to provide any disincentive to others not to breach the Act or clear assurance to the community that matters are followed-up.

Under-resourcing

The available resources for monitoring, compliance, enforcement and assurance constrain the ability of the Department to deliver credible functions.

These functions of the EPBC Act are not supported by cost recovery arrangements. Compliance and enforcement staff also undertake compliance and enforcement of other Commonwealth environment laws, constraining the pool of resources dedicated to delivering EPBC Act compliance and enforcement. The resources available for monitoring, compliance, enforcement and assurance are insufficient and the caseload continues to increase, as more projects are approved.

A move toward risk-based regulation is far from complete and the full investment needed to deliver efficiency by the use of modern risk-based systems and analytics has not yet been made.

Reforms

transparency

The regulator should have improved transparency, publishing all actions taken in a timely manner. It should publish on its website the directions, prohibition notices and improvement notices it makes and provide follow up when they have been met. The regulator should also publish a clear set of compliance priorities and should report against an annual compliance plan.

Better provisions

The monitoring, compliance, enforcement and assurance powers in the EPBC Act should be overhauled. The *Regulatory Powers (Standard Provisions) Act 2014* provides a standardised approach to setting out such powers, and these should be bolstered with specific arrangements to ensure that monitoring, compliance, enforcement and assurance powers in the EPBC Act are fit for purpose. The regulator should have a full 'tool-kit' available to it, so that fair, consistent and proportionate action can be taken across different scenarios.

Changes to the monitoring, compliance, enforcement and assurance provisions of the EPBC Act should include, but not be limited to:

- standardised powers to delegate authorised officers to undertake EPBC compliance, including to states and territories

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- incorporation of modern information sharing provisions—supporting collaboration with other regulators
 - improvements to coercive powers under the Act to facilitate greater intelligence capability, including using surveillance warrants.

Penalties must be sufficient to be an active deterrent, rather than a cost of doing business. A review of the adequacy of penalties and provisions should consider, but not be limited to:

- ensuring penalties across the EPBC Act align with the potential harm or benefit and provide a reasonable deterrence
- ensuring remediation orders that deliver restoration are used when monetary penalties are unlikely to provide adequate disincentive, due to the potential significant financial benefit from some areas of non-compliance
- ensuring appropriate use of criminal prosecutions in serious cases of egregious and irreparable damage.