WENTWORTH GROUP OF CONCERNED SCIENTISTS

Attachment A – summary of the positive, negative and missing elements of proposed national environmental law reforms

Note: the below tables do not provide an exhaustive list of proposed reform components, nor do they capture the entirety of the Wentworth Group's recommended enhancements to proposed new national environmental laws. Instead, the tables provide a high-level overview of our assessment to date.

Positive elements of the proposed reforms

Description	Positive if… (i.e., Better than EPBC if…)	But could be undermined by….
Legally binding **National Environmental Standards** (NES)	• Standards are clear, strong and enforceable AND underpinned by a principle of non-regression • Decision-makers must act consistently with the standards • Standards are outcomes-focussed and include clear guidance on how to measure and evaluate the achievement of stated outcomes. • Key requirements in NES (e.g., addressing of cumulative impacts, delivery of a net positive outcome for all affected protected matters etc.) are reflected explicitly in all relevant decision-making requirements throughout the Act	• The ability for a Minister to easily vary (weaken) or revoke NES, or potential for NES not to be made following enactment of the Act. • The ability for a Minister to easily vary the rules determining when/where NES apply • Loose definitions and internal contradictions • Exceptions to, or overriding of, MNES standards by other standards
Clearly defined **unacceptable impacts** that would result in a quick no for development proposals	• The definition of unacceptable impacts is practical, workable and likely to result in positive environmental outcomes	• An unrealistically high bar for demonstrating unacceptable impacts • Ministerial call-in powers that could facilitate approval of unacceptable impacts other than in exceptional circumstances • Lack of mandatory protection statements in recovery strategies (and lack of requirement to define critical protection areas, where they exist, in protection statements) • Critical protection areas determined based on anything other than scientific advice

Development of **recovery strategies** for all threatened species and ecological communities	• The legislative test currently applied to recovery plans (i.e., must not act inconsistently with) is applied to recovery strategies • Sufficient detail is provided in the recovery strategies to inform the entities protection and recovery	• The ability of a Minister or the CEO of the EPA to Act inconsistently with a recovery strategy • The lack of a mandatory requirement to include protection statement and recovery statement modules in all recovery strategies • Failure to adequately resource the process of listing TS/TECs • Continued exclusion of Vulnerable TECs as MNES
Requirement for relevant decisions to deliver a **net positive outcome** for each protected matter that is an MNES (embedded in the NES for MNES)	• Relevant decisions are taken to include all assessment and approval decisions (at the level of individual assessments, strategic assessments and regional plans), all conservation planning decisions (e.g., decisions pertaining to listings and recovery strategies etc.) and all other relevant wildlife management decisions. • The net positive requirement is explicitly embedded in the Act everywhere that a relevant decision has been identified • Net positive outcomes are based on measurable and quantifiable impacts and benefits to the affected protected matter, not subjective notions of 'better overall environmental outcomes'	• The ability for a Minister to easily weaken or revoke the NES for MNES • The ability for a Minister to easily change the rules that determine which decisions the NES for MNES is applicable to • The ability for beneficial actions beyond the control of the proponent of an action to be taken into account in determining whether an outcome is likely to be net positive • Unclear, lax or inappropriate definition of a net gain outcome (noting that a net gain outcome relative to business as usual can still be a decline, and not consistent with nature positive) • *The ability for a restoration contribution to be expended on a different threatened species or ecological community, rather than directly invested in like-for-like compensation for the affected entity.*
Identification of **critical protection areas** for threatened species and ecological communities	• There is mandatory consideration of whether critical protection areas are likely to exist at the time of listing or transitioning an entity to a recovery strategy AND • A mandatory requirement to include information about any critical protection areas identified in the entity's recovery strategy • Definition of critical protection areas includes all areas necessary for the entity's survival and recovery	• A lack of information/data on the protection needs of an entity • The restrictive definition of a critical protection area (i.e., must be irreplaceable and necessary for a species or ecological community to persist in the wild), sets an unrealistically high bar.

Data and information provisions	• The principles of ensuring data are discoverable, accessible, reusable, reliable and ethical are upheld. • There are robust and ethical processes for the collection of First Nations data, knowledge and information	• Lack of mandatory data sharing provisions (e.g., for information collected for assessment and approvals purposes and through post approval monitoring, and environmental information gathered through Commonwealth funded research programs). • Lack of adequate funding for data collection, analysis and reporting • Antiquated data storage systems
Environment Protection Australia	• The EPA is genuinely independent with clear separation of politic and regulatory roles and responsibilities. • The EPA includes a skills-based governance board with responsibility for appointing a CEO • The EPA is fully funded and resourced to ensure they are equipped to carry out their functions, including compliance and enforcement.	• The proposal to give the Minister for the Environment both the power to be the primary decision maker regarding the suitability of a person for appointment to the role of CEO of the EPA and the power to provide a statement of expectations/intent to the appointed CEO. • Unfettered Ministerial call-in powers, which allow a Minister to take responsibility for decision making an any time during an assessment process for any reason, and not be held to the same decision-making standards as the CEO of the EPA.
Strengthened **compliance and enforcement** powers	• Supported by adequate resourcing to deploy the strengthened powers	• Reliance on self-referral of proponents • Failure to proactively regulate all actions that will or are likely to have significant impacts on MNES

Negative elements of the proposed reforms (the Bad)

Description	Negative because…. (i.e., worse than EPBC because…)	But could be fixed by….
Introduction of a **restoration contribution** pathway that waives the requirements for like-for-like offsetting of impacts to threatened species and ecological communities	• Significant problems identified in similar schemes in NSW and Qld • Waives mandatory like-for-like compensation, could contribute to further extinctions • Risks allowing impacts to occur that are not offsetable or for which offsets are extremely scarce, exacerbating existing problems of post-approval offset scarcity	• Implementing a strict like-for-like requirement • Requiring identification of available offsets prior to Fund/Trust accepting payments • Establishing time limits for commencing offset • Establishing safeguard mechanisms so that if an offset is unable to be commenced in the statutory timeframe, that entity is put on a list of un-offsetable matters and further payments are prohibited
Weakening the role of **environmental impact assessments** in the assessments and approvals framework	• Apparent removal of early regulatory oversight of the environmental impact assessment process in favour of a proponent's self-assessment prior to application, and heavy reliance on Government-held data. • Any move towards a more simplified assessment process that dispensed with site-specific, on-ground investigation would represent a reduction in safeguards compared to the current legislation.	• Maintaining the role of robust environmental impact assessments in the assessment and approvals process, with regulator guidance and oversight of the process, and appropriate field assessment. • Clearly defining the evidentiary burden that would be placed upon the proponent to demonstrate that all reasonable steps had been taken to avoid and mitigate impacts.
Low impact pathway for individual assessments and approvals	• Potential over-use of this pathway by proponents whose action is likely to have significant impacts could create additional administrative burden for the EPA.	• Removal of the low impact pathway OR • Applying a timeframe to the decision, whereby if the action hasn't commenced/progressed to x extent/or been completed within a specific time limit, the decision no longer stands. • Ensuring the decision is reviewable under specified circumstances, such as in response to significant new information or catastrophic events that impact any of the protected matters identified in the application documentation.

		• Ensuring low-impact pathway applications can be identified as requiring full assessment with comprehensive environmental assessment
Extensive and almost unfettered **Ministerial call-in powers**	• Minister can call-in application at any time (before final decision made) for any reason • Can approve unacceptable impacts • Doesn't have to act consistently with standards, threat mitigation statements or protection statements • Can consider social and economic matters	• Clear limitations and conditions on the use of call-in powers, embedded in legislation. • The 'have regard to' legislative test should be upgraded to 'must comply with', unless clearly defined exceptional circumstances can be demonstrated, for relevant NES, recovery strategies and threat abatement plans. • If the Minister chooses to act inconsistently with a relevant NES, recovery strategy or threat abatement plan, the exceptional circumstances which facilitated this choice must be documented in the Minister's published statement of reasons.
Regional planning focussed on facilitating development not increasing protection and addressing key threats.	• Lack of any mechanism to ensure that any residual impacts of priority actions are more than offset through regional restoration measures • Absence of safeguard mechanisms to stop priority actions that could be contributing to unacceptable impacts, failure of plan to deliver net positive outcomes etc. • The unfettered ability of the Minister to grant exemptions to allow restricted actions to be undertaken in conservation zones	• Refocus regional planning to be a tool for holistic consideration of cumulative environmental impacts and climate risks, and enabling environmental protection and restoration at scale. • Develop nationally consistent, evidence-based rules (set out in legislation) for the allocation of areas into Conservation Zones and Development Zones, which are consistent with NES requirements for net positive/net gain outcomes • Include a strict legislative requirement for all impacts allowed to occur in Development Zones to be more than offset with like-for-like compensation measures within the same region. • Implement safeguard mechanisms to stop/phase out priority actions in response to plan variations or revocations • Ensure a meaningful timeframe for consultation
Proponent-led **community engagement and consultation**	• Transfers responsibility for undertaking community consultation from the regulator to the proponent	• Reinstate regulator-led consultation for applications for both a decision that approval is not required AND approval of an action. • Ensure meaningful timelines for consultation

	• Likely to result in considerable disparity between individual consultation events, limit the number of people engaging with the consultation process and restrict the regulator and Minister's understanding of public views on a proposed action.	
Accreditation of approvals	• Facilitates accreditation of states and territories, and other Commonwealth agencies, to undertake approval decisions under new national environmental laws. • Undermine the creation of an independent national environment protection agency to act as a strong, independent cop on the beat.	• Removal in full of the provisions which allow accreditation of states, territories and other Commonwealth agencies for the purpose of making environmental approval decisions under new national environmental legislation.
Strategic assessments	• Framework largely mirrors current provisions under the EPBC Act, it fails to strengthen existing provisions • Public consultation requirements are weakened. • There is a lack of detail regarding impact assessment requirements	• Include cumulative impacts and climate change as mandatory components of the impact assessment undertaken to inform an approval decision for an action or class of actions. • Remove all subjective language (such as the CEO must be satisfied) from key legislative tests for endorsing plans and approving classes of actions. • Ensure regulator-led public consultation for strategic plans and strategic assessments.
Weakened language applied to key decision-making tests	• Repeated use of weak language within key legislative tests applied to different decisions and decision-makers. • Represents a step back from current wording in the EPBC Act in many instances (e.g., from "must not act inconsistently with" to "is satisfied that approval is not inconsistent with" or "must have regard to")	• Throughout the Act, provisions that give effect to material decisions should be framed in a clear, reviewable and objective manner (e.g., "must comply with", "must be consistent with", "meets the requirements of" etc)

The missing pieces (the Absent)

Description	Why it is a problem	But could be fixed by….
Lack of meaningful provisions to address **cumulative impacts**	• Cumulative impacts are causing death by a thousand cuts to MNES, often resulting in significant, often irreparable damage. • The Samuel Review and the State of the Environment 2021 both recognise the failure of the EPBC Act to address cumulative impacts. • The new draft legislation also lacks any mechanisms to recognise and address cumulative impacts.	• Introducing provisions requiring the assessment of cumulative impacts as a part of all impact assessments (e.g., project level, strategic assessments, regional planning) • Including cumulative impacts in the lists of decision-making criteria for both the EPA and the Minister, including the lists of mandatory considerations for both the low impact pathway and standard pathway under the proposed assessment and approvals framework.
Lack of meaningful provisions to address **climate change**	• Climate change poses a significant threat to the viability and persistence of MNES and is one of the greatest threats to our environment more broadly. • Failure to consider climate change is widely identified as a major gap in the EPBC Act. • The new draft legislation also lacks any mechanisms to recognise and address this threat.	• Introducing specific provisions requiring the consideration of climate change impacts (both cumulative and directly related to a projects emissions footprint) as a part of all levels of impact assessment (e.g., project level, strategic assessments, regional planning) • Introducing provisions to trigger increased protection of MNES in the face of unfolding disasters, at minimum until the full impacts of a disaster are known (e.g., provisional/emergency listings and stop the clock on assessments of actions that may impact affected MNES).

Lack of meaningful avenues for **First Nations participation in decision making**	• First Nations communities hold wisdom and knowledge of Australia's unique environment gathered over tens of thousands of years of caring for country. • The indigenous estate represents >50% of MNES habitat • First Nations people have goals, aspirations and obligations for caring for country which are being restricted • They have been marginalised, pushed aside and preventing from a playing a role in decision making.	• In partnership with the Indigenous Advisory Committee and key indigenous peak bodies, develop an effective framework for Aboriginal and Torres Strait Islander peoples' engagement and participation in decision making for matters which would affect their rights, for incorporation into the new Act, in a manner consistent with Article 18 of the UNDRIP • Implement provisions to embed the principle of free, prior and informed consent, in a manner consistent with Article 19 of the UNDRIP, into all relevant sections of the Act. • Amend the definition of indigenous heritage value to recognise Aboriginal and Torres Strait Islander peoples' holistic concept of heritage (including cultural and natural heritage). • Develop a robust framework for the mandatory incorporation of traditional knowledge into the protection and management of the environment under the Act, • Establish a statutory position for an Indigenous land and sea commissioner to provide advice on targets for equitable participation of Indigenous Australians in conservation and representation of the Indigenous Estate in funding allocations • Extend compliance powers to Indigenous rangers
Lack of an investment plan to fund the	• Chronic underspending on protected matter recovery and threat abatement has meant that	• Develop legislative provisions to require the Government to develop and implement a whole-of-portfolio Investment Plan.

recovery of listed protected matters	the majority of MNES have continued to decline, even when robust recovery plans, (heritage) management plans and threat abatement plans have been developed. • Further existing funding is often ad-hoc, short-term and not rolled-out in a coordinated manner, reducing the overall effectiveness of the investment.	• Establish a mechanism for ongoing Government funding for protected matter recovery and threat abatement.