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By email: resources@pc.gov.au

BirdLife Australia submission to the Productivity Commission's inquiry into Resource Sector Regulation (the Inquiry)

BirdLife Australia is an independent science-based bird conservation organisation with over 145,000 supporters throughout Australia. We are recognised as a leading authority on the ecology and conservation of Australia's native birds.

Thank you for the opportunity to provide a submission to the Inquiry.

BirdLife Australia is a strong advocate for science-based decision making. Thanks to the efforts of thousands of volunteers, we hold one of Australia's largest biological databases. We regularly use this data to provide input into processes that regulate resource sector activities including assessment and approvals processes, and offsetting strategies where these meet our offsets policy¹. We also make recommendations for threatened species listings and contribute to reporting on the state of Australia's birds².

Thousands of species are now threatened with extinction, and successive national State of the Environment reports indicate that threats to Australia's biodiversity continue to worsen. It is therefore critical that the Inquiry does not assume that current regulations are meeting their environmental objectives; that so-called 'green tape' is an unnecessary and expendable impediment to industry.

The Inquiry must place a strong emphasis on identifying best-practice regulation that strengthens environmental protections, including meeting the objectives of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Our report, *Restoring the Balance*³, highlights the systemic failure of the EPBC Act to protect Australia's threatened birds and their habitats. While many of the case studies in the report do not specifically relate to resource projects, they highlight failures that are relevant to resource sector regulation under the EPBC Act.

Key regulatory failures include an allowance for ministerial discretion that makes decisions vulnerable to political influence, and a range of loopholes and industry exemptions. These weaknesses are compounded by administrative and legislative processes that lack transparency, contain significant barriers to community participation and are heavily skewed towards the protection of business and economic interests. Chronic underfunding of assessment and compliance functions

¹ <http://birdlife.org.au/documents/POL-Offsets-Policy.pdf>

² <https://birdlife.org.au/education-publications/publications/state-of-australias-birds>

³ <http://birdlife.org.au/documents/OTHPUB-Restoring-the-Balance-Report.pdf>



within state and Federal environment and planning departments further exacerbates these failures.

Restoring the Balance puts forward four policy recommendation to underpin the reform of Australia's failed environmental laws:

1. Create national environment laws that genuinely protect Australia's natural and cultural heritage. The Federal Government must retain responsibility for Matters of National Environmental Significance and protect them effectively.
2. Establish an independent National Sustainability Commission to set national environmental standards, undertake strategic regional planning and report on national environmental performance.
3. Establish an independent National Environmental Protection Authority that operates at arm's length from government to conduct transparent environmental assessments and inquiries, as well as undertake monitoring, compliance and enforcement actions.
4. Guarantee community rights and participation in environmental decision making, including open standing provisions, open access to information about decision making and environmental trends, review of decisions based on their merits, third-party enforcement provisions and protections for costs in the public interest.

These recommendations are supported by over fifty environmental organisations within the Places You Love Alliance. We believe these four recommendations are essential to ensuring effective environmental regulation of the resources sector.

Yours sincerely

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Further information

Inadequacy of existing compliance and enforcement processes in resource sector regulation

Compliance with the EPBC Act has historically been poorly monitored and enforced. The Australian National Audit Office (ANAO) Report, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*, which examined Environment's monitoring of compliance was damning in relation to the Commonwealth Environment Department's management of compliance with conditions under the Act. It concluded that:

"Environment had limited assurance regarding approval holders' compliance with approval conditions and was generally passive in its approach to managing non-compliance with EPBC Act conditions of approval".

Findings of the follow up *Audit, Monitoring Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit*, released in 2017 suggests that the Department has made progress in improving compliance mechanisms.

However, it notes that:

"performance information reported externally by Environment does not currently provide stakeholders with sufficient insights into the extent to which compliance monitoring activities have been effective in protecting the environment from significant impacts".

Whilst recent progress may have been made in improving regulatory 'maturity', conditions imposed on developments are often difficult to monitor, do not provide adequate data regarding the impacts (or planned controlling provisions) on threatened species likely to be affected, and do not have adequate safeguards if developments exceed stated impact thresholds after approval.

Clearly further improvements are needed to ensure conditions placed on developments which affect threatened species are having the stated effects. For example, conditions on projects that are likely to have significant impact on threatened species or deemed high risk should receive independent scientific review.

Greater investment must be made into improving the quality of conditions to ensure that they both benefit the target threatened species and that compliance can readily be monitored in a manner that makes compliance easy to assess and enforce. The use of novel technologies such as remote sensing, automated recording for example, should be explored. This may require some research to develop efficient automated data analysis and reporting to enforcement agencies, but such research will then establish approaches to monitoring compliance that can be built into conditions. Indeed, improvements need to begin at the earliest phase of project planning.



Environmental Impact Assessments should be completed by consultants from a certified pool of competent suppliers and selected by the government not the developer. This would promote removal of the commercial dependency between consultants and proponents to ensure the best possible advice was provided regarding avoiding and/or mitigating projects impacts on threatened species.

Consideration should be given to the ⁴APEEL suggestion that a team is set up within the Australian National Audit Office to monitor and report on the performance of Commonwealth environmental agencies, and to advise the National Sustainability Commission on improvements required.

Recommendation:

- Establish an independent National Sustainability Commission to set enforceable national environmental standards and report on national environmental performance.
- Establish an independent National Environmental Protection Authority that operates at arm's-length from Government to conduct transparent environmental assessments and inquiries as well as undertake monitoring, compliance and enforcement actions.
- Empower the community to ensure compliance by providing citizens the ability to question and challenge decisions, ensure outcomes are enforced and hold decision makers to account, including through broad standing provisions, merits review and third-party enforcement rights and protections for costs in the public interest.

Offsetting

Offsets are an increasingly popular regulatory tool, despite the efficacy of offsetting being unproven. BirdLife maintains that offsets are rarely an appropriate response to proposed biodiversity loss. To effectively compensate for development impacts, a biodiversity offset must deliver the same amount of the same biodiversity values as are to be lost, and despite the Australian Government having an Environmental Offsets Policy, the Commonwealth regularly approves developments with 'offset' packages that do not align with its own policy.

Recommendation:

- A national review of offsets policies that examines the efficacy and effectiveness of offsets in mitigating environmental impacts.

Inadequacy of baseline ecological monitoring in resource sector regulation

⁴Australian Panel of Experts on Environmental Law (2017) [Blueprint for the Next Generation of Australian Environmental Law](#).



Australia has multiple continental scale systems for monitoring elements of our environment, from the climate, atmosphere, water and oceans, to earthquakes, vegetation and land cover. These environmental monitoring systems allow the Australian Government to make informed continental-scale decisions, and they support many industries including maritime, aviation and agriculture.

The same cannot be said for Australia's biodiversity; we do not have a long-term continental scale monitoring and reporting program to support national decision-making about conserving biodiversity. We do not even have a consistent, comprehensive system for monitoring priority species such as threatened or flagship species. This impedes Australia's capacity to set national priorities, manage threats and understand the effectiveness of our actions to conserve threatened species. An effective national biological monitoring program would increase certainty around likely impacts of projects and greatly improve community and industry confidence in decision making, monitoring of compliance and enforcement, and in assessing the efficacy of mitigation strategies.

Recommendation:

- The Inquiry assess how poor baseline knowledge of the ecology and distribution of species contributes to uncertainty in resource sector regulation.