

Reflections on a national EPA

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1. By way of background, the Commonwealth Environment Protection Agency was established in 1992 and ceased to operate as a separate agency in 1996, its functions being folded back into the Commonwealth Department of the Arts, Sport and Environment as it was then known. That agency did not have the legal standing or enforcement powers of an independent environment protection authority such as now exist in most Australian states and territories. The Commonwealth environmental legislation then in force was the Environment Protection (Impact of Proposals) Act 1974.
2. The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) was passed and commenced in 1999. The environmental assessment functions of the Commonwealth Government regulated by the EPBC Act continued to be administered within the relevant department of the Commonwealth government. These functions are presently administered by the Department of Climate Change, Energy, the Environment and Water (DCCEEW).
3. This presentation reflects on what has been committed to by the Commonwealth Government in its response released in December 2022 to the Independent Review of the EPBC Act – Final Report.¹ Part of that response included the announcement that legislation to establish a national EPA will be introduced into the Commonwealth Parliament this year.
4. I will reflect particularly on:
 - (i) The role and function of an independent national EPA; and
 - (ii) Compliance and enforcement challenges.

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¹ Professor Graeme Samuel, Department of Agriculture, Water and the Environment, *Independent Review of the EPBC Act – Final Report* (October 2020) (Independent Review).

Independent Review of the EPBC Act Final report October 2020

5. The Independent Review which published a final report in October 2020 proposed major reforms to the EPBC Act in most areas of the Act's operation.
6. Considering the enforcement and monitoring powers in particular, the 10 year review dedicated a whole chapter to the problem of weak and inefficient enforcement of the EPBC Act, identified to have ineffective and obsolete powers.² A lack of resources has also had a detrimental effect on the ability of the relevant authorities to enforce provisions of the EPBC Act. The EPBC Act was described as not user-friendly due to its complexity which in turn greatly inhibited the pursuit of enforcement.³
7. The Independent Review recommended the Commonwealth government should immediately increase the independence of and enhance Commonwealth government compliance and enforcement by simplifying laws and a full suite of modern regulatory surveillance, compliance and enforcement tools in legislation.⁴
8. In terms of institutional reform the Independent Review recommended:
 - (i) the establishment of a statutory body the Environment Assurance Commissioner (rec 23) with responsibility to oversee/audit decision-making by the Commonwealth government under the EPBC Act, including the Office of Compliance and Enforcement (see rec 30);⁵
 - (ii) the Commonwealth government should immediately establish a new independent Office of Compliance and Enforcement within the Department of Agriculture, Water and the Environment, with modern regulatory powers and tools to enable it to deliver compliance and enforcement of Commonwealth approvals, consistent with a new National Environmental Standard for compliance and enforcement developed by the Review.⁶

² Ibid ch 9.

³ Ibid 148.

⁴ Ibid 33.

⁵ Ibid 31.

⁶ Ibid 33.

Commonwealth Government Response to Independent Review

11. The Commonwealth Government published a response to the Independent Review on 8 December 2022 called *Nature Positive Plan: better for environment, better for business*.⁷

Institutional reform – proposal for National EPA

12. The Commonwealth Government committed to establishing an independent national Environment Protection Agency. The Commonwealth Government Response states that the role of the Environment Assurance Commissioner recommended by the Independent Review will be undertaken by the proposed national EPA.⁸

13. The EPA will undertake regulatory and implementation functions under the EPBC Act and other relevant Commonwealth laws.⁹ Carrying out these functions includes:

- (i) assessing and making decisions about development proposals, including approval conditions;
- (ii) issuing permits and licenses; and
- (iii) undertaking compliance and enforcement activities.

14. Of note, the proposed national EPA is likely to be far more independent than the Office of Compliance and Enforcement recommended (rec 30) by the Independent Review. An enforcement function which remains embedded in a government department is not legally independent without more. The EPA will be an independent statutory Commonwealth entity with its own budget led by a Chief Executive Officer. The Chief Executive Officer will be appointed for a fixed term and must have the skills and qualifications to be set out in legislation. The Chief Executive Officer can only be removed in specified circumstances, for example ill health or misconduct.¹⁰

⁷ Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: better for environment, better for business* (4 December 2022) (Commonwealth Government Response).

⁸ *Ibid* 42.

⁹ *Ibid* 28.

¹⁰ *Ibid*.

15. To increase accountability and trust, the EPA will report publicly on its performance and the Data Division (see par 54 below) will report on whether the EPA is delivering on national environmental goals and objectives.¹¹

Powers of the Minister

16. While the EPA is to be independent of the Commonwealth government in its operations, the Minister can issue a public Statement of Expectations to the EPA. That statement is not binding.¹² The Minister cannot otherwise direct the EPA in its functions.

17. The Minister can 'call in' decisions that the EPA would otherwise make. The EPA will advise the Minister on decisions called in and publish their advice. The Minister must provide reasons for their decisions on matters that are called in.

18. The Minister also has the power to approve development proposals that have an unavoidable negative impact on matters of national environmental significance. This power is limited to development proposals that are in the national interest, which is to be strictly defined in future legislation.

19. The Commonwealth Government Response states, 'Given the Minister's role in sensitive environmental decision making the EPA will not have a statutorily appointed board.'¹³ As I identify below all other Environment Protection Authorities in Australia are constituted by a board or similar, which I suggest aids in governance of the independent body.

20. The perceived level of authority of the national EPA will depend in part on the extent to which the Minister exercises the proposed 'call in' power. The level of transparency of decision making proposed, with the new EPA to publish its advice to the Minister publicly and the Minister to provide reasons for any decision made in exercising the call in power will influence that perception.

¹¹ Ibid 29, such as the Commonwealth government's commitment to protect 30% of lands and waters by 2030.

¹² Ibid 28.

¹³ Ibid 29.

Names Matter

21. The EPA is described as an independent national Environment Protection Agency in the Commonwealth Government Response.¹⁴ A couple of issues spring to mind in considering what such a body should be called.

- National or Commonwealth?

22. While either National or Commonwealth is a descriptor that is clearly available, given the scope of the EPBC Act applying around the whole of Australia National would seem to better reflect the wide scope of that Act and the Commonwealth government's role.

- Agency or Authority?

23. Curiously the Commonwealth Government Response refers to the creation of an agency. I would argue the word 'authority' more accurately reflects what is intended in establishing a separate independent body by legislation. That is the word used by other jurisdictions where such a body has been established by statute, as I discuss next.

EPAs in Australian state and territory jurisdictions

24. All states and territories have an Environmental Protection Authority established by legislation,¹⁵ except Queensland. The Queensland Government undertook a consultation process on the establishment of an independent QLD Environment Protection Authority in 2022.¹⁶ The outcomes of the consultation process are yet to be released.

¹⁴ Ibid 28.

¹⁵ NSW Environment Protection Authority, *About the NSW EPA* (Web Page, 5 August 2022) <<https://www.epa.nsw.gov.au/about-us/our-organisation/about-nsw-epa>>; Environment Protection Authority Victoria, *About EPA* (Web Page, 9 May 2022) <<https://www.epa.vic.gov.au/about-epa>>; Environment Protection Authority South Australia, *About Us* (Web Page, 14 February 2023) <https://www.epa.sa.gov.au/about_us>; Environmental Protection Authority Western Australia, *About the Environmental Protection Authority* (Web Page) <<https://www.epa.wa.gov.au/about-environmental-protection-authority>>; Environment Protection Authority Tasmania, *About Us* (Web Page) <<https://epa.tas.gov.au/about-the-epa>>; Northern Territory Environment Protection Authority, *About us* (Web Page, 15 December 2022) <<https://ntepa.nt.gov.au/about-us>>; Environment Protection Agency ACT, *Overview* (Web Page) <<https://www.accesscanberra.act.gov.au/s/article/environment-protection-tab-overview>>.

¹⁶ Department of Environment and Science, *Independent Environmental Protection Agency (EPA) Consultation* (Web Page, 9 August 2022) <<https://environment.des.qld.gov.au/management/epa-consultation>>.

25. All state EPAs are independent statutory entities in their respective jurisdictions.¹⁷ Similar to the proposed national EPA, the Minister may issue a Statement of Expectations to a state EPA in some jurisdictions.

26. All state EPAs are governed by a board (or other member group) appointed by the relevant Minister (noting the WA EPA is comprised of 5 members who are not described as a board). The national EPA will not have a statutorily appointed board.

27. The regulatory functions of EPAs vary between Australian jurisdictions.¹⁸

EPAs in Overseas Jurisdictions

28. Canada has no federal EPA. The Canadian Environment Protection Act is administered by the Minister for the Environment and the Minister for Health. Each province has different arrangements for environmental regulation.

29. New Zealand has an independent EPA governed by a board appointed by the relevant Minister who issues a letter of expectations.¹⁹

30. The United States Environment Protections Agency is led by an administrator nominated by the President of the USA.²⁰

31. These varying arrangements of course reflect different constitutional arrangements to those that exist in Australia. It is nevertheless instructive to

¹⁷ NSW Environment Protection Authority, *About the NSW EPA* (Web Page, 5 August 2022) <<https://www.epa.nsw.gov.au/about-us/our-organisation/about-nsw-epa>>; Environment Protection Authority Victoria, *About EPA* (Web Page, 9 May 2022) <<https://www.epa.vic.gov.au/about-epa>>; Environment Protection Authority South Australia, *About Us* (Web Page, 14 February 2023) <https://www.epa.sa.gov.au/about_us>; Environmental Protection Authority Western Australia, *About the Environmental Protection Authority* (Web Page) <<https://www.epa.wa.gov.au/about-environmental-protection-authority>>; Environment Protection Authority Tasmania, *About Us* (Web Page) <<https://epa.tas.gov.au/about-the-epa>>.

¹⁸ For example, Environmental Protection Authority Western Australia, *About the Environmental Protection Authority* (Web Page) <<https://www.epa.wa.gov.au/about-environmental-protection-authority>>; The functions of EPA WA include conducting/ preparing environmental impact assessments, statutory policies for environmental protection, guidelines for managing environmental impacts and strategic advice to the Minister for Environment. The EPA WA shares regulatory functions with the WA Department of Water and Environmental Regulation.

¹⁹ Environment Protection Authority Te Mana Rauhi Taiao, *Statement of Intent 2022 to 2026* (June 2022).

²⁰ United States Environmental Protection Agency, *About EPA* (Web Page, 27 January 2023) <<https://www.epa.gov/aboutepa>>.

see what exists elsewhere in terms of what the proposed national EPA may, or may not, have in common in broad terms.

Jurisdiction of national EPA

32. The Commonwealth Government Response states that the national EPA will be responsible for regulatory and implementation functions under the EPBC Act, especially to protect Matters of National Environmental Significance and to prevent illegal wildlife trade.²¹ As already identified above (see par 13) regulatory functions include: compliance and enforcement, project assessments, decisions and post-approvals, and assurance of the operations of state, territories and other Commonwealth decision-makers.²²

33. Importantly, the national EPA will undertake regulatory and implementation functions for other Commonwealth laws. The Commonwealth Government Response identifies laws regulating sea dumping, hazardous waste, ozone protection and synthetic greenhouse gas management, product emissions standards, recycling and waste reduction and underwater cultural heritage as part of the EPA's remit.²³ These laws are currently administered by the DCCEEW regarding pollution and climate change inter alia. The regulatory responsibilities will vary for each act including different types of authorisations, compliance and enforcement regimes.

34. Most of the acts relate to Australia's international obligations. Areas of responsibility specified relate to the following acts:

- *Environment Protection (Sea Dumping) Act 1981*:²⁴ regulates the loading and dumping of waste at sea and the creation of artificial reefs in Australian waters (low-water mark out to 200 nautical miles – excludes State/ Territory waters); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (London Convention).

²¹ Commonwealth Government Response (n 7) 28.

²² Ibid.

²³ Ibid.

²⁴ See also Department of Climate Change, Energy, the Environment and Water, *Sea Dumping* (Web Page, 16 January 2023) <<https://www.dcceew.gov.au/environment/marine/sea-dumping>>.

- *Hazardous Waste (Regulations of Exports and Imports) Act 1989*:²⁵ regulates the export, import and transit of hazardous waste. A permit is required to export or import hazardous waste from Australia; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (Basel Convention).
- *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*:²⁶ controls the manufacture, import, export, use and disposal of ozone depleting substances and synthetic greenhouse gases and products containing these gases; Vienna Convention for the Protection of the Ozone Layer 1985 (Vienna Convention), Montreal Protocol on Substances that Deplete the Ozone Layer 1987 (Montreal Protocol), UNFCCC and its Kyoto Protocol 1997.
- *Product Emissions Standards Act 2017*:²⁷ allows the Minister to proscribe emission-controlled products and make rules relating to these products. Offences relate to the import and supply of emissions-controlled products in Australia if they have not been certified as meeting a standard, or are not marked in accordance with the relevant standard.²⁸
- *Recycling and Waste Reduction Act 2020*:²⁹ regulates the export of waste glass, plastic (including processed engineering fuel), tyres and paper. Approach to compliance includes audits, monitoring and responding to reports of non-compliance; Basel Convention.

²⁵ See also Department of Climate Change, Energy, the Environment and Water, *Exporting, importing or transiting hazardous waste* (Web Page, 5 October 2022)

<<https://www.dcceew.gov.au/environment/protection/hazardous-waste/about>>.

²⁶ See also Department of Climate Change, Energy, the Environment and Water, *Ozone Depleting Substances and Synthetic Greenhouse Gases* (Web Page, 17 February 2023)

<<https://www.dcceew.gov.au/environment/protection/ozone/legislation>>.

²⁷ See also Department of Climate Change, Energy, the Environment and Water, *Product emissions standards* (Web Page, 21 December 2021) <<https://www.dcceew.gov.au/environment/protection/emissions-standards/legislative-framework>>.

²⁸ The Explanatory Memorandum to the *Product Emissions Standards Bill 2017* refers to the United Nations Framework Convention on Climate Change 1994, the Kyoto Protocol 1997 and the Paris Agreement 2016 within the Climate Change Conventions.

²⁹ See also Department of Climate Change, Energy, the Environment and Water, *Waste exports and the law* (Web Page, 22 March 2022) <<https://www.dcceew.gov.au/environment/protection/waste/exports/waste-exports-and-the-law>>.

- *Underwater Cultural Heritage Act 2018*:³⁰ (replacing *Historic Shipwrecks Act 1976*) protects Australia's shipwrecks, sunken aircraft and other types of underwater cultural heritage including Aboriginal and Torres Strait Islander heritage; UNESCO Convention on the Protection of Underwater Cultural Heritage 2001.

Compliance and Enforcement Challenges

35. As already noted above the Independent Review strongly criticised compliance and enforcement of the EPBC Act. The Independent Review stated:

'The [EPBC] Act lacks contemporary powers needed to monitor and address breaches of the law. This includes powers for information sharing and tracking.'³¹

'There is limited evidence of a proactive compliance effort and the compliance posture of the Department [of Agriculture, Water and the Environment] is reactionary... There is little active surveillance.'³²

36. The Independent Review identified that as there is no requirement to record enforcement and compliance under the EPBC Act leading to lack of communication and resources that can be used to ease confusion surrounding the functioning of the Act. Enforcement is more often than not reliant on tip offs from the general public when someone is not complying with the EPBC Act. Overall, the EPBC Act lacks adequate enforcement of its provision due to a number of contributors resulting in a low number of breaches being recorded or even acknowledged.

37. At the time of the Independent Review, 41 breaches of the EPBC Act had been subject to compliance outcomes. Of these 31 related to requirements for environmental approvals, 10 breaches of the wildlife trade provisions.³³

³⁰ See also Department of Climate Change, Energy, the Environment and Water, *Underwater Cultural Heritage Act 2018* (Web Page, 10 March 2022) <https://www.dcceew.gov.au/parks-heritage/heritage/underwater-heritage/underwater-cultural-heritage-act>.

³¹ Independent Review (n 1) 149.

³² Ibid 150.

³³ Ibid. 148

'Since 2010 a total of 22 infringement notices have been issued by the regulator for breach of conditions of approval granted under Part 9, with the total fines amounting to less than \$230,000.'³⁴

Some regional councils receive approximately this total amount in parking fines each year.³⁵

38. The key reforms recommended by the Independent Review were:

- (i) A new National Environmental Standard for compliance and enforcement should be implemented to ensure a robust and consistent approach to compliance and enforcement of the EPBC Act or accredited arrangements. Commonwealth compliance and enforcement and accredited parties would have to demonstrate they meet the Standard.
- (ii) While accredited parties would be responsible for enforcing their decisions, the Commonwealth should retain the ability to intervene in project-level compliance and enforcement, where parties are not effectively dealing with egregious breaches.
- (iii) The Commonwealth should immediately assign independent powers for Commonwealth compliance and enforcement to the Secretary of the Department of Agriculture, Water and the Environment. The Department's compliance functions should be consolidated into an Office of Compliance and Enforcement.
- (iv) The Office of Compliance and Enforcement should be provided with a full suite of modern regulatory powers and tools, and adequate resourcing. This will enable the Commonwealth to deliver compliance and enforcement consistent with the National Environmental Standard and provide confidence that the law is being enforced.³⁶

39. The Independent Review describes modern regulation as risk-based enabling 'fair, consistent and proportionate action.'³⁷ The regulator has to have a 'full

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid 147.

³⁷ Ibid 150.

toolkit of powers and systems.³⁸ The toolkit must include active surveillance, information sharing and tracking, and ‘targeted stakeholder resources to build understanding and voluntary compliance.’³⁹

40. The Independent Review noted the EPBC Act limited the types of enforcement mechanisms that can be used for specific contraventions of that act. For example, an infringement notice could only be issued when approval conditions were breached. If a person did not have approval, the only course available to the regulator is pursuing court or other actions.⁴⁰ The Independent Review highlights the Regulatory Powers (Standard Provisions) Act (2014) can provide a standardised approach for the powers that should be considered and bolstered to be fit for purpose for the EPBC Act.⁴¹

41. Surveillance is used to monitor compliance with project approval conditions and of illegal activities that have not been subject to approval.⁴² Information sharing supports collaboration with other parties.⁴³

42. Capabilities and systems must be developed for surveillance (monitor compliance with project approval conditions and unauthorised illegal activities), investigations, deterrence (including prosecution) and transparent public reporting.⁴⁴

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

- standardised powers to delegate authorised officers to undertake compliance, including to accredited parties
- incorporation of modern information sharing provisions – supporting collaboration with other parties

³⁸ Ibid 21.

³⁹ Ibid 153.

⁴⁰ Ibid 149.

⁴¹ Ibid 150.

⁴² Ibid 147.

⁴³ Ibid 153.

⁴⁴ Ibid 147.

- improvements to coercive powers under the Act to facilitate greater intelligence capability, including using surveillance warrants.⁴⁵

48. Administrative penalties should be an active deterrent and reflect the potential harm or benefit of the behaviour, rather than a 'cost of doing business.'⁴⁶ Remediation orders should also be used if monetary penalties fail to disincentivise parties that may financially benefit from non-compliance. Criminal prosecution in serious cases of egregious and irreparable damage should be used.

Commonwealth Government Response on compliance and enforcement

49. The Commonwealth Government has promised a National Environmental Standard for Compliance and Enforcement.⁴⁷ This standard will be developed after the national EPA and Data Division have been established. The EPA will also create a compliance and enforcement policy that will be published.⁴⁸

50. The EPA will also provide assurance and advice on whether accredited parties and instruments under the EPBC Act apply the proposed national environment standard. The EPA, through the assurance function, appears to implement recommendation 23 of the Independent Review regarding the Environment Assurance Commissioner.⁴⁹

51. There are certainly challenges for a Canberra based entity which has responsibility across Australia in conducting an effective monitoring and enforcement regime. Implementation of practical enforcement programs which address the shortcomings identified in the Independent Review summarized above will be important in establishing an effective national EPA.

⁴⁵ Ibid 150

⁴⁶ Ibid 21, 150.

⁴⁷ Commonwealth Government Response (n 7) 12.

⁴⁸ Ibid 28.

⁴⁹ Ibid 42.

Adequate Information Advice and Data

52. The establishment of the Data Division as the Commonwealth Government Response proposes is potentially significant for the improved effectiveness of the EPBC Act.

53. Access to quality data underpinned by national standards for data and information, collection and retention is essential for compliance and enforcement.⁵⁰

54. There is wide scope for the Commonwealth Government to consider how best the proposed national EPA can be informed of relevant matters. Two examples of other sources of advice which caught my eye are:

(i) The EPA Victoria has a statutory Chief Environment Scientist who gives advice to senior decisions makers, including the EPA's leadership team, the related Minister and Victoria's Chief Health Officer.⁵¹

(ii) The NZ EPA has a statutory Māori Advisory Committee.⁵²

55. Committees play an important role in several State EPAs. In NSW, the EPA 'Community committees' serve to develop relations and provide information to residents with regard to environmental impacts of industries, as well as to obtain insight into issues such as air quality, dust deposition, lead exposure experiences by members of those affected areas.⁵³

Culture of compliance and enforcement essential

49. As important as having the necessary legal structure and powers to operate as an independent statutory authority is an effective compliance and enforcement culture within the authority.⁵⁴ An authority must be prepared to use its independence effectively. It must be adequately resourced and staffed with

⁵⁰ Ibid 5.

⁵¹ Environment Protection Authority Victoria, *Victoria's Chief Environmental Scientist* (Web Page, 29 July 2021) <<https://www.epa.vic.gov.au/about-epa/governance/chief-environmental-scientist>>.

⁵² Environment Protection Authority Te Mana Rauhi Taiao (n 30) 11.

⁵³ NSW Environment Protection Authority, *Community committees* (Web Page, 25 August 2022) <<https://www.epa.nsw.gov.au/working-together/community-engagement/community-committees>>.

⁵⁴ Nicola Pain, 'Conceptualising a Commonwealth Environment Protection Authority' (2021) 36(4) *Australian Environment Review* 78, 81.

appropriately skilled staff. Regulating and enforcing laws is a quite different skill set to developing policies.

50. Where there is such a commitment circumstances can change relatively quickly. A good example is provided by the Natural Resource Access Regulator in NSW, established by statute in 2017.⁵⁵ Far more robust enforcement of NSW water legislation has occurred since its establishment, including a substantial increase in prosecutions in the Land and Environment Court of NSW. The NRAR was established after a Four Corners program in July 2017 which highlighted the inadequate enforcement of NSW water laws.⁵⁶

51. The Independent Review identified that compliance and enforcement action should be proportional but a culture where firm action is not shied away must be embedded in the regulators.⁵⁷

52. Independent Review noted the compliance and enforcement functions for the EPBC are not supported by cost recovery arrangements leading to insufficient resources for an increasing caseload.⁵⁸ The Commonwealth Government seeks to pursue cost recovery for EPA-administered regulatory functions.⁵⁹

How will the Commonwealth retain the ability to prosecute environmental breaches where accreditation of state processes takes place?

53. The Commonwealth Government Response refers to the accreditation of state government assessment processes.⁶⁰ On the assumption this will be accrediting State government processes to achieve Commonwealth government outcomes through statutory environmental assessment processes, how enforcement will work legally is an interesting question. Doing so is potentially legally complex. To that end it is instructive to refer to the powers of

⁵⁵ *Natural Resources Access Regulator Act 2017* (NSW).

⁵⁶ 'Pumped', *Four Corners* (Australian Broadcasting Corporation, 2017) < <https://www.abc.net.au/news/2017-07-24/pumped/8727826>>; Nicola Pain, Georgia Pick 'The Murray-Darling Basin in court: Administering water policy in the eastern states of Australia - administrative and other challenges' (2020) 37/3 *Environmental and Planning Law Journal* 301-321.

⁵⁷ Independent Review (n 1) 21.

⁵⁸ *Ibid* 149.

⁵⁹ Commonwealth Government Response (n 7) 4.

⁶⁰ *Ibid* 18.

the Inspector-General of Water Compliance under the Water Act 2007 (Cth) which relates to the management of the Murray Darling Basin.

Statutory office of Inspector General of Water Compliance

54. The relatively new statutory office of the Inspector General of Water Compliance came into effect on 5 August 2021 with major amendments to the Water Act 2007 (Cth) introducing Part 9A.⁶¹ Substantial new enforcement powers for the Inspector General of Water Compliance have been created. The constitutional basis for the statutory office referred to in the Water Act includes the Ramsar Convention, the Biodiversity Convention, constitutional corporations power, and the trade and commerce power *inter alia*.⁶²
55. Compliance oversight and enforcement powers are created including the transfer of the compliance functions of the Murray Darling Basin Authority.⁶³ The Inspector-General will monitor and provide independent oversight of Commonwealth water agencies' functions under the Basin Plan and water resource plans which are made under state legislation.⁶⁴
56. The Inspector General has power to issue guidelines and standards, and undertake audits.⁶⁵ Interestingly new criminal offences are specified whereby a Commonwealth offence of taking water from a water resource in breach of a water resource plan can result in prosecution in the Federal Court of Australia if a state water agency does not take enforcement action in relation to a breach. Complex offence provisions are specified in s 73A (basic contravention) and s 73B (aggravated contravention).

⁶¹ *Water Act 2007* (Cth) pt 9A (Water Act) introduced by *Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Act 2021* (Cth) sch 1 pt 2. 3

⁶² *Water Act 2007* (Cth) s 9; *Australian Constitution* ss 51(i), (v), (viii), (xi), (xv), (xx), (xxix), (xxxix), 121.

⁶³ *Water Act 2007* (Cth) pt 10AA.

⁶⁴ *Ibid* s 215C.

⁶⁵ *Ibid* ss 73L, 215V.

Division 3A Water Act 2007 (Cth)

57. In the Water Act (Cth) Subdivision A identifies

- Criminal offences of taking water from a water resource, if state water agency does not take enforcement action
- Complex offence provisions
- s 73A taking water when not permitted under State law – basic contravention
- s 73B taking water when not permitted under State law – aggravated contravention

58. The legal powers of the Inspector General to oversight State agency enforcement of State water legislation in Basin States is unprecedented in the environmental area. Given the recent creation of the new statutory role it is too early to know the extent to which recourse to these offence provisions will be made.

Regulating Commonwealth owned land and activities

59. I also raise whether an independent national EPA should regulate Commonwealth government activities including on Commonwealth government owned land, not a topic referred to in the Commonwealth Government Response to the Independent Review.

60. Public and private entities are generally subject to the same environmental protection legislation in state jurisdictions.

61. The EPBC Act requires assessment of proposed actions on, or impacting on, Commonwealth land and actions by Commonwealth agencies. A legal role for a national EPA could arise in relation to the regulation of Commonwealth owned land and/or Commonwealth activities beyond environmental impact assessment. Given the absence of national laws concerning contamination and pollution control for example at the Commonwealth government level establishing a national EPA alone is not sufficient. A suite of laws may well be required.

62. The Department of Defence is one of the largest occupiers of Commonwealth government land. While subject to environmental impact assessment under the EPBC Act in relation to activities conducted on land controlled by it,⁶⁶ it is otherwise unregulated when compared to other public entities subject to State environmental regulation. This is seen most acutely in relation to land and groundwater contamination both on-site and off-site. Contamination near Department of Defence bases in several locations around Australia has occurred due to fire-fighting activities using foam with PFAS. One location is Williamtown in NSW.⁶⁷ The off-site contamination in groundwater has led to extensive negotiation between the three levels of government on the appropriate response, a class action by hundreds of residents of Williamtown settled in February 2020 for \$86 million without admission of liability by the Commonwealth government and on-going management of various health, environmental and financial issues for the affected communities.⁶⁸ Compared to what would occur if contamination resulted on land subject to state law in NSW, for example through issuing a mandatory clean up notice, the absence of regulation is stark.

63. The Department of Defence adopts a 'good neighbour' policy whereby it endeavours to comply with State laws where it is operating, while stating that it is not 'technically' liable to state laws.⁶⁹ From the point of view of neighbours of Defence Department land, they are legally much less protected than if activity was occurring on land over which State environmental protection laws administered by a State EPA applied.

⁶⁶ *Environment Protection Biodiversity and Conservation Act 1999* (Cth) ss 26-28.

⁶⁷ NSW EPA, *Williamtown PFAS Investigation - update Information for local residents and businesses* (Fact sheet, November 2017)

⁶⁸ R Legg 'A legal geography of the regulation of contaminated land in Williamtown, New South Wales' (2020) 59(2) *Geographical Research* 242, 250.

⁶⁹ Department of Defence, *Environmental Policy* (Statement, June 2016)

<www.defence.gov.au/estatemangement/governance/policy/environment/Policy/EnvironmentalPolicy2016.PDF> (accessed 27 September 2021).

In conclusion

64. The recent Commonwealth Government Response to the Independent Review is significant in scope. The proposal for a national EPA is a far stronger regulatory response than the Independent Review identified as necessary institutional reform. Implementation will potentially enhance the enforcement of Commonwealth environmental laws if matched with effective enforcement policies, powers and actions underpinned by adequate resources and an effective enforcement culture, as identified extensively in the Independent Review. A strong National Standard for Compliance and Enforcement and effective Data Division also have the potential to substantially enhance the effectiveness of Commonwealth environmental laws coupled with an independent national EPA.