

Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999

Department of Agriculture, Water and the Environment

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Canberra ACT
25 June 2020

Dear Mr President
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Department of Agriculture, Water and the Environment. The report is titled *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely



Grant Hehir
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Audit snapshot

Auditor-General Report No.47 2019–20

Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999



Why did we do this audit?

- ▶ The EPBC Act requires all actions that may significantly impact matters of national environmental significance ('controlled actions') to be referred to the Minister for assessment and approval.
- ▶ Effective administration of referrals, assessments and approvals reduces impacts on the environment while facilitating economic development.



Key facts

- ▶ Nine matters of national environmental significance are established in the EPBC Act.
- ▶ 6253 actions have been referred for assessment and approval since the commencement of the EPBC Act, with 1846 determined to be controlled actions.
- ▶ The EPBC Act requires referral, assessment and approval decisions to be made within specified timeframes.



What did we find?

- ▶ The Department of Agriculture, Water and the Environment's (the department's) administration of referrals, assessments and approvals of controlled actions under the EPBC Act is not effective.
- ▶ The department's regulatory approach is not proportionate to environmental risk.
- ▶ The administration of referrals and assessments is not effective or efficient.
- ▶ Conditions of approval are not assessed with rigour, are non-compliant with procedural guidance and contain clerical or administrative errors.
- ▶ The department is not well positioned to measure its contribution to the objectives of the EPBC Act.



What did we recommend?

- ▶ The Auditor-General made 8 recommendations to the department.
- ▶ The department agreed to all 8 recommendations.

116 days

Average overrun of statutory timeframes for approval decisions in 2018–19.

1034

Controlled actions approved with conditions since the commencement of the EPBC Act.

79%

Approvals assessed as containing conditions that were non-compliant with procedural guidance or contained clerical or administrative errors.

Summary and recommendations

Background

1. The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is Australia's primary national environmental legislation. It provides for the protection of the environment, in particular those aspects of the environment that are matters of national environmental significance. The EPBC Act defines nine matters of national environmental significance, which are:

- world heritage properties;
- national heritage places;
- wetlands of international importance;
- listed threatened species and ecological communities;
- listed migratory species;
- protection of the environment from nuclear actions;
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park; and
- protection of water resources from coal seam gas development and large coal mining development.

2. Under the EPBC Act, all actions which may have a significant impact on matters of national environmental significance (defined as 'controlled actions') must receive prior approval from the Minister for the Environment (the Minister). This approval is received through an environmental assessment process, administered by the Department of Agriculture, Water and the Environment (the department). The process is comprised of the following three stages.

- Referral — the action is referred to the Minister to determine whether it is a controlled action and requires approval.
- Assessment — the Minister determines the method of assessing the potential impacts of the controlled action, and the assessment is carried out.
- Approval — the Minister decides whether to approve the action and any conditions to attach to an approval.

3. From the commencement of the EPBC Act to 30 June 2019, 6253 proposed actions have been referred to the Minister, with 5088 of those actions approved and 21 actions not approved.¹ Referred actions include small-scale agricultural grazing, residential and tourism developments, and the construction of large mining developments worth over \$1 billion.

1 Actions approved includes actions deemed to be not controlled actions, actions approved without conditions, and actions approved with conditions. Actions not approved include actions that were not approved or were found to be clearly unacceptable.

Rationale for undertaking the audit

4. Effective administration of referrals, assessments and approvals of controlled actions under the EPBC Act reduces impacts on the environment and facilitates economic development. Previous ANAO audits have identified shortcomings in the department's administration of regulation under the EPBC Act in relation to the timeliness, consistency and effectiveness of regulatory actions.

5. The audit topic was listed in the ANAO Annual Audit Work Program in 2018–19 and 2019–20. The Joint Committee of Public Accounts and Audit identified the topic as an audit priority of the Parliament for 2019–20. The department requested that the ANAO commence the audit in July 2019 to inform the second statutory review of the EPBC Act, currently underway. The audit will provide an independent and up-to-date perspective on the department's administration of referrals, assessments and approvals of controlled actions and complement the statutory review of the Act.

Audit objective and criteria

6. The audit objective was to assess the effectiveness of the Department of Agriculture, Water and the Environment's administration of referrals, assessments and approvals of controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999*.

7. To form a conclusion against the objective, the ANAO adopted the following three high-level audit criteria.

- Are governance arrangements sound?
- Is the administration of referrals and assessments effective and efficient?
- Are conditions of approval appropriate and assessed with rigour?

Conclusion

8. Despite being subject to multiple reviews, audits and parliamentary inquiries since the commencement of the Act, the Department of Agriculture, Water and the Environment's administration of referrals, assessments and approvals of controlled actions under the EPBC Act is not effective.

9. Governance arrangements to support the administration of referrals, assessments and approvals of controlled actions are not sound. The department has not established a risk-based approach to its regulation, implemented effective oversight arrangements, or established appropriate performance measures.

10. Referrals and assessments are not administered effectively or efficiently. Regulation is not supported by appropriate systems and processes, including an appropriate quality assurance framework. The department has not implemented arrangements to measure or improve its efficiency.

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.

Supporting findings

Governance arrangements

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.

13. The regulatory approach to referrals, assessments and approvals has not been informed by an assessment of compliance risk. Strategic compliance risk assessments do not inform regulatory plans. In one instance, the department's activities to promote voluntary compliance were aligned with an identified risk of inadvertent non-compliance in the New South Wales agriculture sector. The approach to individual referrals, assessments and approvals is not tailored to compliance risk.

14. While the department has established sound oversight structures, they have not been effectively implemented. Procedures for oversight of referrals, assessments and approvals by governance committees are not consistently implemented. Conflicts of interest are not managed.

15. The department has not established appropriate performance measures relating to the effectiveness or efficiency of its administration of referrals, assessments and approvals. All relevant performance measures in the department's corporate plan were removed in 2019–20, and no internal performance measures relating to effectiveness or efficiency have been established. The department's reporting under the regulator performance framework in 2017–18 was largely reliable.

Referrals and assessments

16. Systems and processes for referrals and assessments do not fully support the achievement of requirements under the EPBC Act. Procedural guidance does not fully represent the requirements of the EPBC Act and lacks appropriate arrangements for review and update. Information systems do not meet business needs and contain inaccurate data. Staff training is not supported by arrangements to ensure completion of mandatory requirements. There is no framework to prioritise work.

17. Referrals and assessments are not undertaken in full accordance with procedural guidance. Decisions have been overturned in court due to non-compliance with the EPBC Act and key documentation for decisions is not consistently stored on file. There is no quality assurance framework to assure the department that procedural guidance is implemented.

18. Proxy efficiency indicators developed by the ANAO indicate the efficiency of referrals and assessments has not improved over recent years. The department has no arrangements to measure its efficiency and the implementation of proposed efficiency improvement measures has not been appropriately tracked. Most referral, assessment method and approval decisions are not made within statutory timeframes.

Conditions of approval

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.

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.

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.

Recommendations

Recommendation no.1 The Department of Agriculture, Water and the Environment develop and implement a plan to collect and use regulatory information, and address gaps and limitations in information management, to better enable compliance information to be used to inform regulatory strategy and decision-making.
Paragraph 2.18

Department of Agriculture, Water and the Environment response:
Agreed.

Recommendation no.2 The Department of Agriculture, Water and the Environment conduct an up-to-date risk assessment of non-compliance across its environmental regulatory regimes and develop and implement arrangements to prioritise its strategic compliance assessments.
Paragraph 2.27

Department of Agriculture, Water and the Environment response:
Agreed.

Recommendation no.3 The Department of Agriculture, Water and the Environment ensure that its oversight of referrals, assessments and approvals is conducted in accordance with procedures, and conflict-of-interest risks are identified and treated.
Paragraph 2.62

Department of Agriculture, Water and the Environment response:
Agreed.

Recommendation no.4 The Department of Agriculture, Water and the Environment establish internal and external performance measures on the effectiveness and efficiency of its regulation of referrals, assessments and approvals.
Paragraph 2.78

Department of Agriculture, Water and the Environment response:
Agreed.

Recommendation no.5 The Department of Agriculture, Water and the Environment establish and implement a quality assurance framework to assure itself that its procedural guidance is implemented consistently and that the quality of decision-making is appropriate.
Paragraph 3.59

Department of Agriculture, Water and the Environment response:
Agreed.

Recommendation no.6 The Department of Agriculture, Water and the Environment establish efficiency indicators to assist in meeting legislative timeframes for referrals, assessments and approvals.
Paragraph 3.83

Department of Agriculture, Water and the Environment response:
Agreed.

Recommendation no.7 The Department of Agriculture, Water and the Environment improve its quality controls to ensure conditions of approval are enforceable, appropriate for monitoring, compliant with internal procedures and aligned with risk to the environment.
Paragraph 4.18

Department of Agriculture, Water and the Environment response:
Agreed.

Recommendation no.8 The Department of Agriculture, Water and the Environment develop guidance and quality controls to assure itself that pre-commencement conditions of approval are implemented and assessed consistently to protect matters of national environmental significance.
Paragraph 4.53

Department of Agriculture, Water and the Environment response:
Agreed.

Summary of entity response

The Department of Agriculture, Water and the Environment (the Department) agrees to implement all recommendations in the report and is committed to the continuous improvement of its processes and procedures. It will establish (where required) and strengthen (where already in place) sound governance arrangements to ensure successful implementation of improvements. This will support the efficient and effective administration of referrals, assessments and approvals of controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

In fully implementing all recommendations, the Department will prioritise its resources to ensure that its response is flexible to any changes to the regulatory system as a result of the EPBC Act

Review. Where improvements can be made in the short to medium term, the Department is committed to doing so in a timely manner. Where there is the potential for future systemic changes, the Department will design frameworks that are flexible to adapt to a new regulatory environment over the longer term.

Key messages from this audit for all Australian Government entities

22. Below is a summary of key messages, including instances of good practice, which have been identified in this audit that may be relevant for the operations of other Australian Government entities.

Governance and risk management

- For regulatory activities to have the greatest impact on desired objectives, entities should target their efforts in proportion to compliance risk, based on an assessment of regulatory intelligence.
- Ongoing oversight and accountability for the implementation of recommendations from past inquiries, reviews and audits is necessary to realise the desired improvements.

Program implementation

- Regulators should implement an appropriate quality assurance framework over their activities to provide assurance that their regulation is consistent, legally valid and contributes to the desired regulatory outcomes.
- Appropriate IT systems support regulators to be efficient, effective and make better use of collected regulatory intelligence.

Performance and impact measurement

- To facilitate a meaningful assessment of progress and achievement, entities should ensure they are monitoring, evaluating and reporting on their effectiveness at achieving their objectives.
- The establishment of appropriate efficiency measures will better position regulators to identify and address the reasons for declining performance.

Audit findings

1. Background

Introduction

1.1 The ability of Australian governments to effectively conserve the environment while facilitating economic development requires well-coordinated and risk-targeted regulatory activities. Intergovernmental agreements developed in the 1990s² provide a framework for cooperation and integration of Commonwealth, state and territory environmental regulation.³

1.2 The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) was designed to establish a new legislative framework for environmental regulation consistent with the intergovernmental agreements. The EPBC Act, which commenced in July 2000, replaced five previous Commonwealth Acts: the *Environment Protection (Impact of Proposals) Act 1974*, the *Endangered Species Protection Act 1992*, the *National Parks and Wildlife Conservation Act 1975*, the *Whale Protection Act 1980* and the *World Heritage Properties Conservation Act 1983*.

The Environment Protection and Biodiversity Conservation Act 1999

1.3 The first objective of the EPBC Act, administered by the Department of Agriculture, Water and the Environment (the department), is to provide for the protection of the environment, particularly those aspects that are matters of national environmental significance. The Act defines nine matters of national environmental significance, which are:

- world heritage properties;
- national heritage places (added in 2003);
- wetlands of international importance (listed under the Ramsar Convention on Wetlands of International Importance);
- EPBC-listed threatened species and ecological communities;
- migratory species listed in international agreements⁴;
- protection of the environment from nuclear actions (such as uranium mines);
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park (added in 2009); and
- protection of water resources from coal seam gas development and large coal mining development (added in 2013).

2 Council of Australian Governments' Intergovernmental Agreement on the Environment 1992. Heads of agreement on Commonwealth and State roles and responsibilities for the Environment 1997.

3 The *Constitution of Australia* does not explicitly enable the Commonwealth Parliament to make laws with respect to the environment. Until the 1970s regulation of most environmental matters was primarily managed by states and territories with limited Commonwealth involvement. In the 1980s the authority of the Commonwealth to legislate in relation to environmental matters was recognised under a range of indirect constitutional powers, including the external affairs and corporations power.

4 These include the Convention of the Conservation of Migratory Species of Wild Animals and the China–Australia, Japan–Australia, and Republic of Korea–Australia Migratory Bird Agreements.

1.4 To achieve this objective, the EPBC Act provides for ‘an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed’.⁵ Under this process, any person or entity (regulated entity) proposing to take an action⁶ that may significantly impact matters of national environmental significance (defined as ‘controlled actions’) must receive approval from the Minister for the Environment (the Minister).

1.5 Under the EPBC Act it is the regulated entity’s responsibility to determine if their action may be a controlled action. This includes determining whether the action is likely to have an impact on a matter of national environmental significance, whether the impact of the action will be significant, and whether the action is exempt from approval requirements.

1.6 Where an action may be a controlled action, it is required to be referred to the Minister (via the department) to undergo an environmental assessment process. The process is comprised of the following three stages, with the Minister (or a departmental official who has been delegated the responsibility under the Act)⁷ making a decision at each stage.

- Referral — the action is referred to the Minister to determine whether it is a controlled action and requires approval. The Minister may decide that the action is a controlled action, not a controlled action or is clearly unacceptable.
- Assessment — where actions are determined to be a controlled action and require approval, the Minister determines the method of assessing the potential impacts of the action, and the assessment is carried out.
- Approval — the Minister decides whether to approve the controlled action and decides on any conditions to attach to an approval, including any conditions that are to be met prior to the commencement of actions.

1.7 Bilateral agreements established with each state or territory accredit state or territory assessment processes under the EPBC Act. Where actions are covered by a bilateral agreement, the state or territory conducts the assessment and provides a report to the Minister, who then determines whether to approve the action.

1.8 The department is responsible for enforcing compliance with conditions attached to approvals and with the requirement not to undertake controlled actions without approval by the Minister. The department is also responsible for approving any documents required to be submitted before the action may commence, as part of the conditions of approval.

1.9 In the 19 years from the commencement of the EPBC Act to 30 June 2019, 6253 proposed actions were referred to the Minister. These included small-scale agricultural grazing activities, residential developments and large mining developments with expected investments of over \$1 billion. Of these actions, 5088 have been approved⁸, with 21 actions rejected (Figure 1.1).

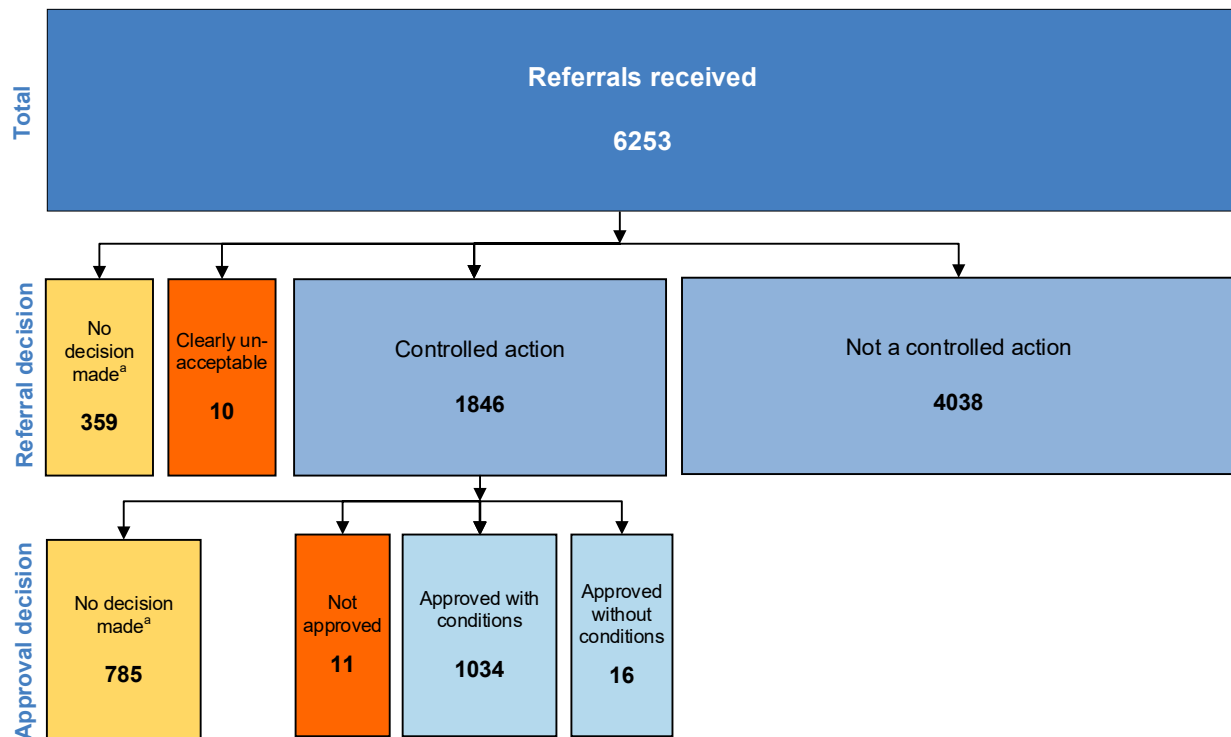
5 EPBC Act, paragraph 3(2)(d).

6 An ‘action’ is broadly defined to include a project, a development, an undertaking, and an activity or series of activities.

7 Throughout this audit, the term Minister will include any delegate thereof.

8 This includes actions that were determined not to be controlled actions as well as controlled actions that were approved.

Figure 1.1: Outcomes for all referrals received under the EPBC Act to 30 June 2019



Note a: Cases where no decision has been made may be due to the referral lapsing or being withdrawn, assessment ceasing while waiting for information from the proponent, or the assessment still being undertaken.

Source: ANAO based on Department of Agriculture, Water and the Environment data.

1.10 Decisions on referrals, assessments and approvals and related administrative actions must be made within timeframes specified in the EPBC Act. The department's performance against these timeframes is published in its annual report. For the three key decisions (referral, assessment method and approval decisions), the department made only five per cent within statutory timeframes in 2018–19 (20 out of 368 decisions).

1.11 Referrals, assessments and approvals were part of Outcome 1, Program 1.5 (Environmental Regulation) of the Department of the Environment and Energy.⁹ In the department's 2019–20 Portfolio Budget Statements¹⁰, Program 1.5 (which includes other environmental regulation) was allocated \$50.2 million.¹¹

1.12 As part of the Mid-Year Economic and Fiscal Outlook 2019–20, the government announced \$25 million over two years 'to reduce unnecessary delays' in environmental assessments and approvals. The additional funding was designed to address the backlog of environmental approval

⁹ During fieldwork for this audit, the former Department of the Environment and Energy was responsible for regulation under the EPBC Act. Responsibility transferred to the Department of Agriculture, Water and the Environment in February 2020.

¹⁰ Australian Government, Portfolio Budget Statements 2019-20: Budget Related Paper No. 1.6, Commonwealth of Australia, Canberra, 2019, p. 41.

¹¹ Referrals, assessments and approvals are also subject to cost-recovery arrangements, with the department's records indicating that \$3.5 million was cost-recovered in 2018–19.

applications, with a focus on major projects.¹² The department informed the ANAO that the budget for referrals, assessments and approvals in 2019–20, including this additional funding, was \$20.3 million. As at February 2020, a total of 141 staff are allocated to referral, assessment and approval related work.¹³

Previous reviews

Parliamentary inquiries

1.13 The Parliament has conducted multiple inquiries into aspects of environmental regulation under the EPBC Act in recent years, including the:

- Senate Environment and Communications References Committee inquiry into Australia’s faunal extinction crisis¹⁴;
- Senate Select Committee on Red Tape, inquiry into the Effect of red tape on environmental assessment and approvals¹⁵;
- Senate Environment and Communications References Committee inquiry into the Continuation of construction of the Perth Freight Link in the face of significant environmental breaches¹⁶; and
- Joint Committee of Public Accounts and Audit inquiry, which included Auditor-General Report No. 43 2013–14, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*.¹⁷

Previous Auditor-General reports

1.14 Previous ANAO performance audits have examined elements of the department’s regulation under the EPBC Act in 2002–03, 2006–07, 2013–14, 2015–16 and 2016–17.¹⁸ Several weaknesses have been noted, including:

-
- 12 Australian Government, *Mid-Year Economic and Fiscal Outlook 2019–20*, December 2019, p. 216.
 - 13 The number of staff allocated to referral, assessment and approval related work has increased since the additional funding was allocated in December 2019.
 - 14 Senate Environment and Communications References Committee, *Inquiry into Australia’s faunal extinction crisis*, Interim reports, 4 April 2019; December 2019. The inquiry was extended with the final report due in September 2020.
 - 15 Senate Select Committee on Red Tape, *Effect of red tape on environmental assessment and approvals*, Interim report, October 2017; Final report December 2018.
 - 16 Senate Environment and Communications References Committee, *Continuation of construction of the Perth Freight Link in the face of significant environmental breaches*, Final Report, March 2017.
 - 17 Joint Committee of Public Accounts and Audit, *Review of Auditor-General Report No. 43, Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*, Report 447, 2015.
 - 18 Auditor-General Report No.38 2002–03 *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*; Auditor-General Report No.31 2006–07 *The Conservation and Protection of National Threatened Species and Ecological Communities*; Auditor-General Report No.43 2013–14 *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*; Auditor-General Report No.7 2015–16 *Managing Compliance with the Wildlife Trade Provisions of the Environment Protection and Biodiversity Conservation Act 1999*; Auditor-General Report No.31 2016–17 *Monitoring compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit*.

- a low likelihood of receiving referrals on all actions that may significantly impact matters of national environmental significance;
- delays in meeting statutory timeframes under the EPBC Act; and
- deficiencies in compliance monitoring and enforcement arrangements, relating to procedural guidance, risk-based compliance monitoring strategies, IT support systems and compliance intelligence capabilities.

1.15 The 2016–17 ANAO audit followed up the department’s progress in addressing the recommendations of the 2013–14 report on managing compliance with conditions of approval. While progress had been made against all five recommendations, limited progress had been made in implementing broader initiatives to strengthen the department’s regulatory performance.

Other reviews

1.16 Other major reviews of functions relating to referrals, assessments and approvals of controlled actions are outlined in Table 1.1.

Table 1.1: Major reviews relating to referrals, assessments and approvals

| Date | Description of review | Outcome |
|--------------|---|---|
| October 2008 | First independent review of the EPBC Act, ^a by Dr Allan Hawke ^b | Found that the EPBC Act was repetitive, complex and overly prescriptive, suggested that it be repealed, redrafted and replaced, and made 71 recommendations. The government generally agreed with the principles of the report but did not implement the reform package, choosing instead to amend and refine the existing Act. |
| October 2015 | Review of the department’s regulatory maturity, by Mr Joe Woodward ^c | Found the department’s approach to regulation was sound but lacked many elements of a mature regulator including overarching regulatory posture and clear performance measures. The government accepted the findings and established a project to implement the recommendations. |
| March 2018 | Review of interactions between the EPBC Act and the agriculture sector, by Dr Wendy Craik AM ^d | Recommended a more proactive and strategic approach to protecting the environment and improving interactions between farmers and the department. The government acknowledged the report and committed to work with the sector, drawing on the recommendations of the report. |
| August 2019 | Productivity Commission study into resource sector regulation | The final report is expected to be provided to the government by August 2020. |
| October 2019 | Second independent review of the EPBC Act, ^a led by Professor Graeme Samuel AC | The final report is expected to be provided to the government by October 2020. |

Note a: The EPBC Act Section 522A requires there be an independent review at least once every 10 years.

Note b: Hawke, A. *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, 2009.

Note c: Woodward, J. *Regulatory Maturity Project Final Report*, 2016.

Note d: Craik, W. *Review of interactions between the EPBC Act and the agriculture sector. Independent report prepared for the Commonwealth Department of the Environment and Energy*, 2018.

Source: ANAO based on public documents.

Rationale for undertaking the audit

1.17 Effective administration of referrals, assessments and approvals of controlled actions under the EPBC Act reduces impacts on the environment and facilitates economic development. Previous ANAO audits have identified shortcomings in the department's administration of regulation under the EPBC Act in relation to the timeliness, consistency and effectiveness of regulatory actions.

1.18 The audit topic was listed in the ANAO Annual Audit Work Program in 2018–19 and 2019–20. The Joint Committee of Public Accounts and Audit identified the topic as an audit priority of the Parliament for 2019–20. The department requested that the ANAO commence the audit in July 2019 to inform the second statutory review of the EPBC Act, currently underway. The audit will provide an independent and up-to-date perspective on the administration of referrals, assessments and approvals of controlled actions and complement the statutory review of the Act.

Audit approach

Audit objective, criteria and scope

1.19 The audit objective was to assess the effectiveness of the Department of Agriculture, Water and the Environment's administration of referrals, assessments and approvals of controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999*.

1.20 To form a conclusion against the objective, the ANAO adopted the following three high-level audit criteria.

- Are governance arrangements sound?
- Is the administration of referrals and assessments effective and efficient?
- Are conditions of approval appropriate and assessed with rigour?

1.21 The audit scope included: use of compliance intelligence to inform regulatory activities; conduct and oversight of referrals, assessments and approvals; timeliness and efficiency in administering referrals and assessments; monitoring of pre-commencement conditions of approval; and performance measurement, monitoring and evaluation.¹⁹ It did not include monitoring of compliance with post-commencement conditions of approval or strategic assessments under the EPBC Act.

Audit methodology

1.22 To conduct this audit, the ANAO examined departmental documentation, analysed IT system data, tested samples of decisions, interviewed departmental staff and received public submissions.

1.23 The audit was conducted in accordance with the ANAO auditing standards at a cost to the ANAO of \$419,156.

1.24 The team members for this audit were Mark Rodrigues, Isaac Gravolin, Se Eun Lee, Sam Khaw, Thiago Gomes and Michael White.

19 Compliance intelligence refers to the collection, linking and analysis of internal and externally sourced regulatory related information, including incidence of suspected non-compliance, which is used to assess the risk of non-compliance of regulated entities.

2. Governance arrangements

Areas examined

This Chapter examines whether the Department of Agriculture, Water and the Environment (the department) has established sound governance arrangements to support its administration of referrals, assessments and approvals of controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Conclusion

The department has not implemented sound governance arrangements to support its administration of referrals, assessments and approvals of controlled actions.

Areas for improvement

The ANAO made four recommendations aimed at developing a compliance intelligence strategy, assessing compliance risk across regulatory regimes, improving governance oversight arrangements and developing appropriate performance measures. It also suggested that the department prioritise investment in IT capability.

2.1 Sound governance arrangements support effective and efficient regulation. This includes the establishment of frameworks to ensure that efforts are targeted to the level of risk, decisions are made consistently and objectively, and regulators are accountable for achieving their objectives. To determine whether the department has established sound governance arrangements, the ANAO examined whether:

- appropriate arrangements are in place to gather and manage compliance intelligence;
- regulation is informed by an assessment of compliance risk;
- sound oversight has been established; and
- appropriate performance measures have been established.

Are appropriate arrangements in place to gather and manage compliance intelligence?

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.

2.2 Understanding how and where non-compliance is likely to occur allows regulators to target their activities to those areas with an elevated risk of non-compliance. Appropriate arrangements to collect and manage compliance intelligence are necessary for regulators to be able to understand where non-compliance may occur.

2.3 In 2016, the department's *Regulatory Maturity Project Final Report* (Regulatory Maturity Review) found that the department 'does not have an established strategic intelligence capability', limiting its ability to assess the risk of non-compliance with the Act. The review recommended

improving the approach to compliance intelligence by working with co-regulators and enhancing IT capabilities, which was accepted by the department.²⁰

2.4 The department has implemented a range of measures to strengthen its compliance intelligence capability.²¹ This includes the establishment of a departmental Office of Compliance and Chief Compliance Officer in July 2017 to consolidate environmental compliance intelligence and enforcement functions, new positions within the Office of Compliance responsible for strategic intelligence, and new compliance procedures and plans.²²

2.5 The ANAO examined whether these measures supported an improved compliance intelligence capability with appropriate arrangements to gather and manage regulatory information.

Collection of regulatory information

2.6 Collecting regulatory information from a range of reliable sources assists regulators to ensure their information is complete and accurate. As the department operates within a network of environmental regulators, it should have arrangements to collect information from those sources as well as its own activities.

2.7 The department stores information from its own activities in multiple business systems across the department.²³ It has also implemented measures to support internal information sharing, including establishing the Office of Compliance to oversee all compliance activities, iterative restructures to internal business committees, and establishing communities of practice.

2.8 To receive information from external sources, the department has established connections with a range of co-regulators:

- the department's Chief Compliance Officer is vice-chair of the Australasian Environmental Law Enforcement and Regulators Network (AELERT)²⁴;
- the department participates in joint site inspections with co-regulators²⁵ and receives information about compliance with approval conditions;

20 The Regulatory Maturity Review recommended that the department should: work with other environmental regulators to develop an approach to strategic intelligence; consider recruiting specifically for strategic intelligence skills and experience to drive this approach; formalise its relationships with co-regulators, including in relation to routine data sharing; invest in IT tools for gathering and analysing intelligence, including data sharing with other agencies; and adopt intelligence gathering and analysis to inform its risk management approach.

21 Compliance intelligence capability refers to the ability of the department to collect, link and analyse a range of internally and externally sourced regulatory related information, including incidences of suspected non-compliance, which is used to assess the risk of non-compliance of regulated entities.

22 Key compliance planning documents are discussed at paragraph 2.37.

23 See paragraphs 2.13–2.14 for information on how this data is stored and managed.

24 AELERT comprises local, state and Commonwealth government entities and non-government organisations who implement and administer environmental legislation.

25 Other entities the department has worked with include the Australian Federal Police, the Australian Border Force, the Department of Foreign Affairs and Trade, state and territory environment regulators, state and territory policing agencies, the United States Fish and Wildlife Service and the United States Environmental Protection Authority.

- departmental officers engage with states on assessments and approvals that require both Commonwealth and state approval; and
- the department has an officer embedded in the Department of Home Affairs Border Intelligence Fusion Centre.

Arrangements between co-regulators

2.9 In 2016, the Regulatory Maturity Review noted that the department's arrangements for managing relationships with other regulators were 'out of date or inadequate', recommending that it 'formalise its relationships... including in relation to routine data sharing'.²⁶

2.10 The department's response to the recommendation was grouped with other recommendations, to be addressed by a single project. However, the scope of the project did not include the establishment of formal relationships with co-regulators and documentation (including the finalisation report) does not indicate that the recommendation was implemented.

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 regulatory 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

26 Sharing arrangements may include, for example, common data standards and agreed exchange protocols.

27 The New South Wales agreement commits to annual provision of information relating to monitoring of compliance for the purpose of the department's annual reporting obligations under the Act. These reports are not required to be provided if the information is otherwise publicly available. The department informed the ANAO that it does not receive reports from New South Wales in addition to what is published on the New South Wales Department of Planning, Industry and Environment website.

28 An example of a regulator with effective systems and processes (the Clean Energy Regulator) was identified in Auditor-General Report No. 18 2018–19, *Administration of the Renewable Energy Target*, pp. 43–48.

Table 2.1: Systems containing regulatory information

| Information | System/application | Business use |
|--------------------------------------|---|--|
| Reports of suspected non-compliance | Spreadsheets | Management of allegations |
| Other intelligence information | Target Knowledge Base | Management of unstructured intelligence information |
| Compliance case management | Compliance and Enforcement Management System and spreadsheets | Case management and intelligence |
| Referrals, assessments and approvals | Environment Impact Assessment System and spreadsheets | Management of referrals and assessments information and workflows |
| Spatial data | Environment Matters Mapping Application, Protected Matters Search Tool and Wylie ^a | Spatial data on the distribution of matters of national environmental significance |
| Species data | Species Profile and Threats Database | Records threatened species and ecological communities, key threatening processes and critical habitats |
| Wildlife trade | Wildlife Trade System | Management of seizure-related data and workflows |

Note a: Wylie is a mapping tool that displays matters of national environmental significance at a chosen location.

Source: ANAO based on Department of Agriculture, Water and the Environment information.

2.14 The ability of the department to bring together information from these systems to support regulatory objectives is limited by a lack of linkages between systems and data management issues. In 2017, a departmental strategic intelligence report summarised these limitations, including:

- compliance data being stored in multiple locations, with no location containing all relevant information for a case;
- tracking sheets being updated as cases progressed, leading to the loss of previous data;
- poor quality data entry, hampering bulk data analysis²⁹;
- data lacking necessary information for timely and accurate identification of trends³⁰; and
- anecdotal information that does not constitute an incident or breach (but which may indicate a broader trend or issue)³¹ not being effectively captured.

IT system improvement projects

2.15 The department has commenced multiple projects to improve the identified issues with its business systems and management of regulatory information. However, as at January 2020, none of these projects have been completed (Table 2.2).

29 Less than half of the 2016 compliance cases relating to an EPBC project had a completed 'EPBC Number' field, and where an 'industry' was recorded, it often differed between business systems.

30 For example, data lacks structured information on the type and impact of non-compliance, the compliance activity taken, and likely drivers of the non-compliance.

31 This includes observations, insights or informal information received by the department.

Table 2.2: Outcome of projects to improve management of regulatory information

| Year | Project | Description | Outcome |
|------|---|---|---|
| 2015 | Intelligence Capability Project | Project to map regulatory information requirements and develop a solutions architecture to establish links between systems. | Became part of the ICT Regulatory Maturity Program. |
| 2017 | ICT Regulatory Maturity Program | IT process to support regulatory maturity through integrated IT systems in response to the Regulatory Maturity Review. ^a | A range of IT database modernisation and remediation projects and business application work commenced under this process. None of those projects addressed compliance intelligence capability. |
| 2017 | Regulatory Compliance System Improvements Roadmap | Component projects included developing standardised regulatory compliance system processes, migrating compliance data from existing systems and developing a client incident reporting service. | These projects did not commence. |
| 2018 | ICT capital investment process | Departmental process to catalogue the ICT systems, risks and development needs of each division to inform the development of a consolidated plan for ICT capital investment. | In 2018–19, 29 ICT capital projects were selected for commencement at a cost of \$13.9 million. Of the 7 business application and information management projects selected, 1 related to the development of a business case for intelligence and analytics capability. This project was not included in the 2019–20 ICT work program. |

Note a: The Regulatory Maturity Review recommended that as ‘a high priority, the department should bring forward investment in an integrated end-to-end IT system to improve its reliability, effectiveness and efficiency’.

Source: ANAO based on Department of Agriculture, Water and the Environment information.

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.

2.17 These limitations increase the risk that the department’s view of regulated entities and compliance risks is not complete and accurate. To address this, the department should prioritise ICT system improvement projects to improve its compliance intelligence capability. In addition, it should develop a compliance intelligence plan that includes: its approach to compliance information collection; data access arrangements; interdependencies with co-regulators; and actions to address gaps and limitations until long-term solutions are implemented.

Recommendation no.1

2.18 The Department of Agriculture, Water and the Environment develop and implement a plan to collect and use regulatory information, and address gaps and limitations in information management, to better enable compliance information to be used to inform regulatory strategy and decision-making.

Department of Agriculture, Water and the Environment response: *Agreed.*

2.19 *The Department recognises the importance of collecting and managing regulatory information to inform regulatory decision making. The Department acknowledges that the existing processes require improvement.*

2.20 *Building on the Department's existing Compliance Framework, the Department will develop and implement a plan to strengthen the processes for collection and use of regulatory information, including compliance intelligence. The Department will implement other necessary actions to support information sharing, including system improvements, in the context of the EPBC Act Review. This will enhance governance and result in improved efficiencies of our current approach and practices.*

Is the regulatory approach to referrals, assessments and approvals informed by an assessment of compliance risk?

The regulatory approach to referrals, assessments and approvals has not been informed by an assessment of compliance risk. Strategic compliance risk assessments do not inform regulatory plans. In one instance, the department's activities to promote voluntary compliance were aligned with an identified risk of inadvertent non-compliance in the New South Wales agriculture sector. The approach to individual referrals, assessments and approvals is not tailored to compliance risk.

2.21 Regulators that assess the risk of non-compliance are better positioned to target regulatory activities towards areas of greatest impact. Strategic risk assessments can inform the design of regulatory approaches, including the allocation of resources between regulatory activities (such as promoting voluntary compliance, individual assessments and approvals, and compliance monitoring functions). Operational and tactical risk assessments may be used to inform decision-making on individual actions.

2.22 This audit reviewed the department's compliance risk assessments and the extent to which they influenced the regulatory approach to referrals, assessments and approvals. This included an examination of:

- whether the department was assessing compliance risk across all of its regulatory responsibilities;
- the department's strategic intelligence assessments;
- alignment of regulatory plans with strategic intelligence assessments; and
- whether the approach to individual referrals, assessments and approvals was targeted at the level of risk.

Assessment of compliance risk across regulatory responsibilities

2.23 Regulators are better positioned to target their effort if they consider compliance risk across all of their regulatory responsibilities. The department's environmental responsibilities also include regulation of wildlife permits, hazardous waste, ozone protection and synthetic greenhouse gas management.

2.24 No assessment of compliance risk across all of the department's environmental regulatory responsibilities has been completed. As part of its regulatory maturity project in 2019, the department began planning an overarching compliance risk assessment, which is scheduled to commence in 2020–21.

2.25 The department has not established arrangements to prioritise its assessments of compliance risk between its environmental regulatory responsibilities. It has commenced drafting a schedule for future compliance risk assessments across each piece of legislation it administers.³²

2.26 Without an overarching assessment of compliance risk across its regulatory responsibilities or a process to prioritise its assessments, the department is not well positioned to develop a complete view of compliance risk. This weakens the basis of its strategic risk assessments and limits its ability to align regulatory functions and resources to the risk of non-compliance.

Recommendation no.2

2.27 The Department of Agriculture, Water and the Environment conduct an up-to-date risk assessment of non-compliance across its environmental regulatory regimes and develop and implement arrangements to prioritise its strategic compliance assessment.

Department of Agriculture, Water and the Environment response: Agreed.

2.28 *The Department acknowledges that it is important to use current risk assessments of non-compliance to appropriately target its regulatory activities. The Department will build on its Compliance Framework, including work already underway, to conduct an up-to-date risk assessment of non-compliance across the range of environmental legislation administered by the Department. In completing this work, the Department will prioritise the strategic compliance assessments.*

Strategic intelligence assessments

The EPBC Act — a horizon scan

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

32 As at November 2019, the draft schedule contained planned intelligence products for five out of the 24 pieces of legislation for which the former Department of the Environment and Energy was responsible.

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.

State of Compliance 2018–19

2.32 In 2019, the Office of Compliance completed the *State of Compliance 2018–19 — Strategic Intelligence Assessment*. The report included compliance assessments across sectors including agriculture, residential development and hazardous waste. The report drew on data stored in internal business systems, open source information and stakeholder input.

2.33 The report stated that despite the substantial impact of agriculture on the environment, agricultural development is rarely referred to the department. It noted that compliance risks are likely to increase as 'new, expanded or intensified agricultural activity becomes more common', and that 'ongoing hardships' are likely to drive non-compliance in smaller agricultural landholders.

2.34 Findings from the report aligned with existing pre-referral awareness activities which commenced in 2017 with the New South Wales Department of Primary Industries (NSW DPI), including training NSW DPI staff and piloting draft guidelines for referring agricultural development in New South Wales.³⁴ The *Review of interactions between the EPBC Act and the agriculture sector* noted these activities as a model for closer cooperation between states and territories and the department.³⁵

2.35 The provision of improved guidance to regulated entities at risk of non-compliance may assist the submission and quality of referrals. However, as the department has not established a plan for increased engagement with the New South Wales agricultural sector, it is not well placed to assess the impact of those activities.

Alignment of regulatory plans with strategic intelligence assessments

2.36 The department's approach to environmental regulation is established in its regulatory framework, which sets out the way the department develops and administers regulation.³⁶ The framework outlines a model of regulation with responses proportionate to the behaviour of regulated entities, based on risk of harm, as shown in Figure 2.1.

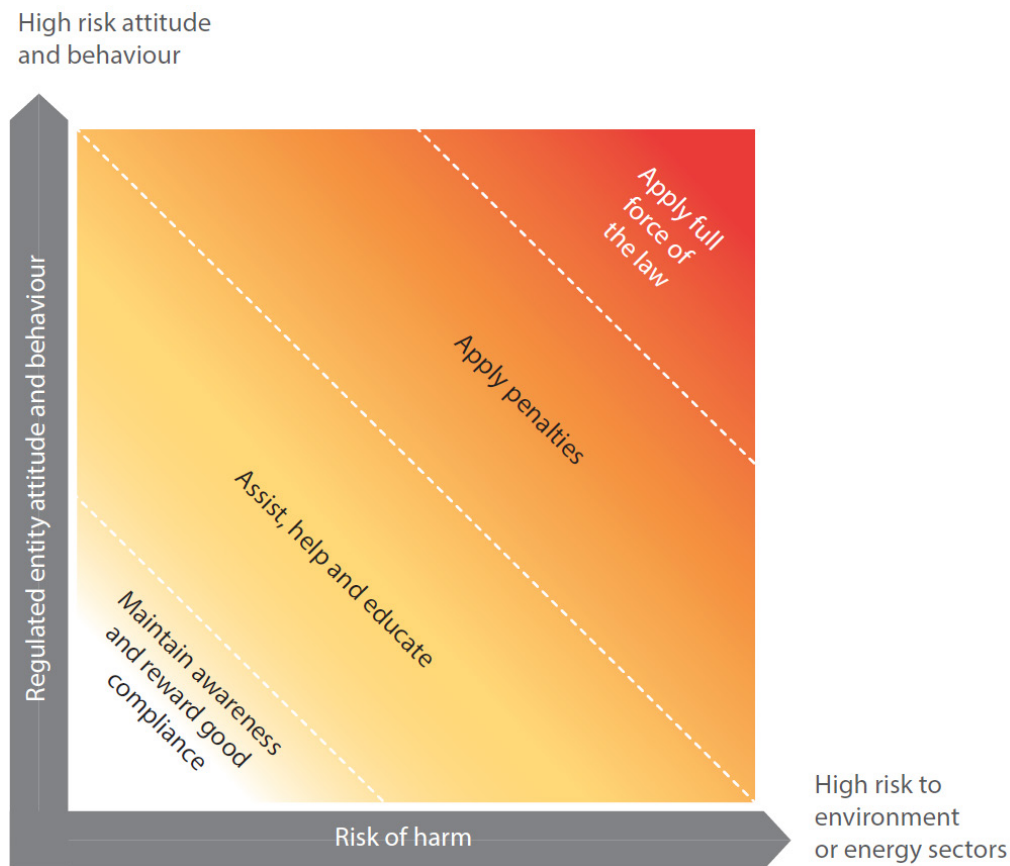
33 Actions included 'review compliance issues resulting from the trade-off between setting robust conditions compared with the need for quick EPBC Act approval' and 'engage the local government sector in encouraging residential developers to consider the EPBC Act'.

34 Since the commencement of the EPBC Act there have not been any agricultural sector referrals in NSW. Previous NSW legislation had largely restricted the amount of native vegetation clearing for agricultural activities. In 2017 native vegetation management laws in NSW were changed. This increased the risk of NSW land owners inadvertently contravening national environmental law.

35 Craik, W. *Review of interactions between the EPBC Act and the agriculture sector. Independent report prepared for the Commonwealth Department of the Environment and Energy*, 2018.

36 Department of the Environment and Energy, *Regulatory Framework*, October 2017.

Figure 2.1: Department's risk-based regulatory approach



Source: Department of Agriculture, Water and the Environment.

2.37 The regulatory framework is supported by a high-level compliance policy and an annual compliance plan. Of the five compliance outcomes listed in the 2019 compliance plan, one specifically refers to increasing compliance with the EPBC Act. Under this outcome, three compliance focuses are listed, including:

- supporting landowners, in partnership with state based regulators, to consider state and national environmental laws in parallel when planning agricultural development;
- monitoring compliance with approval conditions; and
- collaborating with domestic and international partners to detect and disrupt illegal wildlife trade.

2.38 Of these three compliance focuses, the first addresses a key risk identified in the department's *State of Compliance 2018–19 — Strategic Intelligence Assessment*. The other two focuses are business-as-usual activities and do not reflect insights from the department's strategic compliance assessments. Without addressing the other risks identified in strategic assessments (see paragraph 2.30), the department has limited assurance that its regulation is targeted to the areas of greatest risk.

Individual referrals, assessments and approvals

2.39 By tailoring the approach to individual referrals, assessments and approvals to the risk of each proposed action, effort can be targeted to the areas that will have the greatest impact on regulatory objectives. This would also reduce the administrative burden on entities proposing low-risk actions.

2.40 The administration of referrals, assessments and approvals under the EPBC Act inherently involves a consideration of the environmental risk of each proposed action. However, the department has not established a framework to target its efforts based on an assessment of the risk of each individual action. While risk is discussed generally in the department's procedural guidance, prompting officers to consider environmental, legal, reputational and compliance risks, it does not indicate how risk assessments should be conducted or establish how the assessment should inform the level of regulatory effort applied.

2.41 The department has attempted to implement risk-based approaches to individual referrals, assessments and approvals. This includes recent efforts to reduce delays in referrals, assessments and approvals following the \$25 million allocated to the department in December 2019 (paragraph 1.12). The key strategy in these efforts was a triage process whereby resources would be allocated to assessments and plans in proportion to the level of assessed risk. This was not implemented at the time of fieldwork.³⁷

Have sound oversight arrangements been established to support regulatory activities?

While the department has established sound oversight structures, they have not been effectively implemented. Procedures for oversight of referrals, assessments and approvals by governance committees are not consistently implemented. Conflicts of interest are not managed.

2.42 Sound oversight arrangements are important to ensure that the administration of referrals, assessments and approvals under the EPBC Act is conducted efficiently, effectively and in accordance with the Act. Sound oversight arrangements enable management to: monitor regulatory performance; monitor progress against objectives and plans; and respond to emerging issues.

2.43 The ANAO examined whether the department had established sound governance arrangements to oversee the administration of referrals, assessments and approvals, including whether:

- the department's governance framework supports effective oversight;

³⁷ An approach proposed to the executive board in September 2018 (see Table 3.3) in which referrals would be assigned a risk rating and corresponding assessment procedures would be developed was not implemented. An approach to assessing environmental management plans (see paragraph 4.26) based on an assigned risk level proposed in July 2018 had commenced implementation at the time of fieldwork, but no procedures had been developed for 'low' rated plans. As at April 2020, a triage approach to referrals, assessments and approvals was being drafted as part of the department's actions to improve its efficiency following the \$25 million it was allocated in December 2019.

- activities were conducted in accordance with the governance framework;
- project reporting arrangements were effective; and
- conflicts of interest were identified and managed appropriately.

Governance framework

2.44 While the accountable authority is ultimately responsible for oversight of the department, operational oversight of referrals, assessments and approvals was the responsibility of the management committee known as the Environment Standards Division board (ESD board). The ESD board was established to provide strategic direction, determine objectives and manage performance. The ESD board existed from July 2015 to August 2019, after which point the responsibility transferred to the Environment Approvals Division (EAD) board.³⁸

Terms of reference

2.45 The ESD board's terms of reference included requirements for meeting weekly, twelve monthly review of the terms of reference, monitoring risks and progress against the business plan, and undertaking regular performance self-assessments.



2.46 The terms of reference do not specify the ESD board's accountabilities or authority, as required under the department's committee management policy. The terms of reference could also have been improved by including performance monitoring and reporting requirements, and timelines and mechanisms for performance self-assessments and oversight of risk and business plans.

2.47 The ESD board's responsibilities did not include oversight of individual referral, assessment and approval decisions. In the absence of appropriate quality controls over these decisions (see paragraphs 3.49–3.51), the absence of oversight on key regulatory decisions limits the department's assurance that its decisions are appropriate and aligned with regulatory objectives.

Conduct of board activities

2.48 The ANAO examined the papers of all ESD board meetings³⁹ and found that its oversight was not conducted in accordance with its terms of reference (Table 2.3).

Table 2.3: Implementation of terms of reference

| Terms of reference requirement | ANAO assessment | |
|--|---|---|
| Monitoring progress of key business as usual areas within the division against the divisional business plan and annual operating plans |  | There are no records in ESD board minutes or papers of any monitoring of progress against the divisional business plan. |
| Undertaking regular self-assessment regarding key achievements, outcomes met and areas of improvement |  | A self-assessment of governance arrangements was conducted as part of a 2016 review, resulting in proposed changes to ESD's arrangements that were not fully implemented. The self-assessment did not |

38 The ANAO did not assess EAD board oversight arrangements, as these arrangements were not established at the time of audit fieldwork.

39 This included all meetings from the establishment of the ESD board in July 2015 to its final meeting in August 2019.

| Terms of reference requirement | ANAO assessment | |
|--|-----------------|--|
| | | document consideration of ESD's 'key achievements, outcomes met and areas of improvement'. |
| Meeting weekly | ■ | The average time between meetings increased from 7.3 days in 2015 to 60.5 days in 2019. ^a |
| Reviewing the terms of reference every 12 months | ■ | Only 1 review of the terms of reference was documented in ESD board papers. |

Note a: The decrease in meeting frequency can partially attributed to a change from weekly to monthly scheduled meetings, agreed to by the ESD board in February 2017 but never incorporated into the terms of reference. However, the average time between ESD board meetings in 2018 and 2019 was 55 days, approximately half as often as the proposed monthly schedule.

Legend: ◆ appropriately implemented; ▲ partially implemented; ■ not implemented

Source: ANAO analysis based on Department of Agriculture, Water and the Environment documentation.

2.49 The shortcomings summarised in Table 2.3 limit the ability of a management committee such as the ESD board to provide effective oversight of the administration of referrals, assessments and approvals. The absence of comprehensive self-assessments, reviews of progress against business plans and reviews of the terms of reference reduces assurance that oversight arrangements are effective. Furthermore, the ESD board's lack of adherence to the established meeting frequency limits its ability to respond to emerging issues.

Oversight of projects

2.50 The ESD board also served as the divisional project board, to provide oversight through a recurring meeting agenda item in which it received reporting on the status of projects.

2.51 The procedures for project management reporting to the ESD board contained requirements for how often the board should receive reporting and what the reporting should contain. However, they did not include eight of the 14 project board roles and responsibilities recommended for inclusion by the department's project management framework. These include endorsement of individual project plans, appointment and endorsement of project sponsors and managers, and recommending the engagement of independent assurance as required.

Compliance with procedures

2.52 Project management reporting to the board was inaccurate and non-compliant with procedures. Examination of all project reports, which include a high-level summary of all projects (including 'traffic light' reporting against different factors⁴⁰) and individual project reports (required to be submitted for projects of high complexity or risk), identified that:

- 34 individual project reports were not submitted, out of a total of 176 required reports;
- 55 out of 93 'schedule' traffic lights were not calculated in accordance with the procedures;
- 21 projects were removed from the high-level summary without being moved to the closed section or otherwise noted as closed in the report or board papers; and

40 Project factors reported on using traffic lights are: budget/resources, schedule, scope, overall health and risks and issues.

- only one project report was submitted to the ESD board from December 2017 onwards, despite the procedure requiring reporting 'approximately every quarter'.⁴¹

2.53 Of the 24 projects relating to referrals, assessments and approvals that were closed by the last project management report⁴², only nine were fully successful, with another nine never finalised.⁴³ Projects that were not finalised or successful were often significant in the context of the department's regulation. Examples include a project to streamline the assessment and approval process and provide greater consistency when applying final conditions to approved actions, and a project to assist the department assure itself of the quality of assessments conducted by state and territories under bilateral agreements.

2.54 Improved procedures for project oversight, with more accurate project reporting, will better enable the board to identify and address emerging project issues, contributing to improved project outcomes and therefore regulatory outcomes in future.

Oversight of probity risk

2.55 Under Commonwealth legislation, departmental staff are required to take reasonable steps to avoid real or apparent conflicts of interest and disclose any relevant material personal interests.⁴⁴ As regulators of environmentally sensitive, high-value and often contentious development proposals, appropriate arrangements to manage conflicts of interest are particularly important for building public confidence in the department as a trusted regulator.

2.56 Conflicts of interest may arise through the personal interests of staff and their engagement with regulated entities, industry bodies and environmental organisations. The department has supported leave without pay for a staff member to work in an industry body (Minerals Council of Australia) and has pursued a potential secondment for a staff member to an environmental group (World Wildlife Fund). If not appropriately managed, such actions may give rise to conflicts of interest.

Conflict of interest policies

2.57 The department has established a conflict of interest policy that complies with Commonwealth legislation. It requires employees to regularly assess and review their personal interests, take reasonable steps to avoid conflicts, complete a declaration where conflicts are identified, take measures to manage any identified conflicts and record declarations on the department's record management system.

41 An additional project management report was compiled in March 2018, but there is no record of it being presented to the board.

42 This includes projects marked as closed in the dossier and those removed from the project dossier without explanation.

43 The ANAO assessed a project as fully successful if it met more than 90 per cent of its initial project outcomes and outputs.

44 PGPA Act section 29, PGPA Rule sections 12 to 16D, and *Public Service Act 1999*, subsection 13(7).

2.58 The department's committee management policy requires committees to have a standing agenda item requiring members to 'disclose any actual or perceived conflicts of interest'.⁴⁵ Records did not identify any agenda item on conflict of interest for the first 80 meetings⁴⁶ of the ESD board. The next 17 meetings from April 2017 until the last meeting all included conflict of interest declarations on the agenda.⁴⁷ No conflicts were declared.

Assessment and treatment of conflict of interest risks

2.59 The 2015–17 ESD fraud risk plan⁴⁸ included multiple risk sources relating to conflicts of interest⁴⁹ for referrals, assessments and approvals, resulting in two 'high' rated risks.⁵⁰ It included three treatments for these risks: a conflict of interest register, fraud training to be completed by 90 per cent of staff, and half yearly reviews of the fraud risk plan. The department stated that it has not established a conflict of interest register as it has not identified any conflicts of interest, and was unable to provide evidence the other treatments had been completed.

2.60 The 2017–19 ESD fraud risk plan included one risk source relating to conflict of interest⁵¹, associated with one medium rated risk.⁵² No treatments for this risk were established.⁵³

2.61 The division has not established a fraud risk plan for 2019–20 onwards. Without an active fraud plan to identify and treat potential conflicts of interests, there is an elevated risk of the regulation of referrals, assessments and approvals being influenced by conflicts of interest.

45 Including such a standing agenda item has been identified as better practice by the Auditor-General; Australian National Audit Office, *Audit insights — board governance* [Internet], ANAO, Australia, 2019, available from <https://www.anao.gov.au/work/audit-insights/board-governance> [accessed 01 February 2020].

46 Agenda papers were unavailable for 22 of these meetings.

47 An agenda was not produced for the final ESD board meeting.

48 The Commonwealth Fraud Control Framework requires entities to conduct regular fraud risk assessments. Guidance encourages fraud risk assessments at least every two years, noting that entities with a high fraud risk, such as those exercising regulatory authority, may wish to assess more frequently. Under the department's fraud risk guidance, risk assessments are to be conducted as part of two-year fraud risk plans.

49 Relevant risk sources include: 'Officer deliberately works with external parties to collude and defraud the Commonwealth'; 'Failure to scrutinise information, or deliberate acceptance of false or inadequate information'; and 'Staff member develops lack of objectivity, lacks the ability to stay apolitical or have independence'.

50 'Misuse of policies, processes or procedures', and 'perversion of assessment and compliance activities'.

51 'Employee undertakes an assessment or grants an approval where they have a conflict of interest'.

52 'A departmental employee inappropriately influences the assessment of a proposal, or gives an inappropriate approval or permit, to obtain a benefit or provide a benefit to a third party'.

53 The department's guidelines do not require a treatment plan for medium risks.

Recommendation no.3

2.62 The Department of Agriculture, Water and the Environment ensure that its oversight of referrals, assessments and approvals is conducted in accordance with procedures, and conflict-of-interest risks are identified and treated.

Department of Agriculture, Water and the Environment response: *Agreed.*

2.63 *The Department agrees that it is important to ensure that procedures for the oversight of administration of referrals, assessments and approvals are consistently implemented. Implementation of the Government's congestion busting agenda has supported business improvements and policy reforms to lift performance against statutory timeframes, including more focused oversight arrangements. The Department will refine and update existing arrangements for ongoing management committee oversight for referrals, assessments and approvals under the EPBC Act to ensure they are conducted in accordance with procedures.*

2.64 *The Department is committed to the effective management of conflicts of interest in its administration of regulatory functions. A revised Conflict of Interest policy and system to support declarations will be rolled out Department wide in 2020. The Department also is currently consolidating the Fraud and Corruption Control Plans and associated risk assessments of the legacy Departments, to reflect the current risk landscape and ensure effective strategies are in place to control fraud and corruption risks.*

Have appropriate performance measures been established?

The department has not established appropriate performance measures relating to the effectiveness or efficiency of its administration of referrals, assessments and approvals. All relevant performance measures in the department's corporate plan were removed in 2019–20, and no internal performance measures relating to effectiveness or efficiency have been established. The department's reporting under the regulator performance framework in 2017–18 was largely reliable.

2.65 A key element of regulatory governance is the establishment of appropriate performance measures that allow internal and external stakeholders to determine whether the regulator is achieving its intended results. The ANAO assessed the department's external performance measures relating to referrals, assessments and approvals (reported under both the Commonwealth performance framework and the regulator performance framework) and its relevant internal performance measures.

Commonwealth performance framework

2.66 Commonwealth entities are subject to performance measurement and reporting requirements under the *Public Governance, Performance and Accountability Act 2013*, the *Public Governance, Performance and Accountability Rule 2014* and accompanying guidance issued by the Department of Finance. These are collectively referred to as the Commonwealth performance framework.

2.67 Under the framework, entities must publish corporate plans for each financial year. Corporate plans must set out the entity's purpose and provide performance measures that will measure the entity's performance in achieving its purpose. Results against these performance measures are required to be provided in the entity's annual performance statements, to provide accountability information to the Parliament and the public.

2.68 In 2018, the ANAO examined the department's⁵⁴ 2016–17 performance measures, including those relating to referrals, assessments and approvals.⁵⁵ The measures were found to be largely relevant and partially reliable, with their completeness unable to be determined. No efficiency measures were included. The ANAO also found that results and analysis in the performance statements contained inaccuracies, were not supported by suitable records, or both.

2.69 The department's performance measures were updated for 2017–18 and 2018–19. This audit assessed the 2017–18 and 2018–19 performance measures relevant to referrals, assessments and approvals and found that they were largely relevant but not reliable. Reliability was largely limited by a lack of information on the methods of assessment and data sources used. No efficiency measures were included.

2.70 For 2019–20, no performance measures specifically relating to the administration of referrals, assessments and approvals were included in the corporate plan. Departmental documents indicated that no measures were proposed because the department could not find any relevant 'outcome-based' performance measures, as their impact was 'masked by the cumulative contributions' of other areas of the department.

2.71 The absence of performance measures relating to the administration of referrals, assessments and approvals inhibits accountability and transparency. Where outcome-level performance measures relating to the effectiveness of regulation are unavailable, do not exist or are too costly to collect, performance measures should include input, activity and output measures as proxies for effectiveness.⁵⁶ In addition, the department should provide performance measures relating to the efficiency of its regulation.

Regulator performance framework

2.72 The regulator performance framework was released in October 2014 as part of a government commitment to reduce the cost of unnecessary or inefficient regulation imposed on individuals, business and community organisations.⁵⁷ The framework requires regulators to publish

54 This refers to the former Department of Environment and Energy, which was responsible for the administration of referrals, assessments and approvals until February 2020. After this date, these functions were transferred to the Department of Agriculture, Water and the Environment.

55 Auditor-General Report No. 33 2017–18 *Implementation of the Annual Performance Statements 2016–17*.

56 Department of Finance, *Resource Management Guide No. 131: Developing Good Performance Information*, April 2015, p. 35.

57 Department of the Prime Minister and Cabinet, *Regulator Performance Framework* [Internet], October 2014, available from <https://www.pmc.gov.au/resource-centre/regulation/regulator-performance-framework> [accessed 01 December 2019].

annual self-assessments on their performance against six performance indicators.⁵⁸ As at March 2020, the department has released self-assessments for 2015–16 and 2017–18.⁵⁹

2.73 The ANAO examined the reporting in the 2017–18 self-assessment, in which the department adopted a different set of outcomes to those in the framework (see Appendix 1). The self-assessment, which was based on the results of surveys to stakeholders and departmental staff, was largely reliable. The report clearly presented the results against each survey question and provided a high level of detail about the methodology used to generate the results. Reliability could be further improved by explaining how external stakeholders were chosen to participate in the survey and how the results for individual questions determined the overall result for each outcome.

2.74 However, the ANAO identified three areas where the reporting was not compliant with the regulator performance framework (Table 2.4).

Table 2.4: Areas where the department’s 2017–18 regulator performance assessment was not fully compliant with the regulator performance framework

| Regulator performance framework requirement | ANAO assessment |
|---|--|
| Where other performance measures are used in self-assessments, they must clearly articulate how they demonstrate performance against measures in the framework. | Performance was only able to be clearly identified for 1 of the 6 measures in the regulator performance framework. 3 regulator performance measures were identifiable in the department’s outcomes but performance against the specific regulator performance measure was unable to be separated from other aspects of the outcome. More information is available in Appendix 1. |
| A range of evidence from different sources should be used. | Results were based solely on survey data, with 4 out of 6 outcomes using both the stakeholder and staff surveys, and 2 using only the stakeholder survey. |
| Self-assessment must be timely. | The self-assessment was published in September 2019 (14 months after the end of the period it was measuring) and the survey was undertaken between December 2018 and January 2019 (6 months after the period it was measuring). |

Source: ANAO based on Department of Agriculture, Water and the Environment documents.

Internal performance measures

2.75 Internal monitoring of performance using well defined indicators or measures of effectiveness, efficiency and cost can be an invaluable source of information for a regulator on its strategies and areas for improvement. This is acknowledged in the department’s *Evaluation Policy 2015–20*, which requires ‘significant interventions’⁶⁰ to develop performance measures addressing output, quality, impact and long-term outcomes.

2.76 The department has not established internal performance measures for the quality, impacts and long-term outcomes of its administration of referrals, assessments and approvals. It has

58 Reducing regulatory burden, communication, risk-based approaches, streamlined and coordinated monitoring, transparency, and continuous improvement.

59 The department was given an exemption for the 2016–17 regulator performance self-assessment.

60 Significant interventions are defined as interventions with a regulatory burden measure costing of over \$2 million.

established a number of output-level indicators, such as the number of statutory decisions made and the proportion of these decisions made within statutory timeframes. However, these do not provide any information on the effectiveness of the department's regulation.

2.77 The department has highlighted the absence of appropriate internal performance measures and attempted to develop them on multiple occasions. These are summarised in Table 2.5.

Table 2.5: Attempts to develop appropriate performance measures relating to the administration referrals, assessments and approvals

| Date | Description of attempt | Outcome |
|---------------|--|---|
| December 2015 | Development commenced on a set of output, quality, impact, and long-term performance measures. | Document not completed. |
| April 2016 | Contracted re-development of ESD's governance arrangements, including an outcome to develop a 'rigorous approach to monitoring performance'. | A suite of suggested internal reporting requirements were produced but not accepted. |
| November 2016 | Paper to ESD board notes 'the need to improve our performance reporting', proposing new section to be responsible for the division's administrative and performance reporting responsibilities. | New section established, performance indicators developed for output-level information. |
| June 2017 | New section informs ESD board that it is shifting its effort to 'development of key performance indicators' to tell a 'coherent and persuasive performance narrative'. One proposed method was a 'divisional performance reporting framework'. | Not completed. |

Source: ANAO based on Department of Agriculture, Water and the Environment documents.

Recommendation no.4

2.78 The Department of Agriculture, Water and the Environment establish internal and external performance measures on the effectiveness and efficiency of its regulation of referrals, assessments and approvals.

Department of Agriculture, Water and the Environment response: Agreed.

2.79 *The Department recognises the importance of establishing clear and appropriate performance measures so that the regulated community and the broader community can understand how the agency is achieving efficient and effective regulation. Implementation of the Government's congestion busting agenda has seen the Department increase focus on improving measurement of performance against statutory timeframes and will look to build on this work.*

2.80 *The Department will build on existing internal and external performance measures with consideration to be given to the outcomes of the statutory review of the EPBC Act, and in line with Departmental corporate planning and reporting processes and the Commonwealth Regulator Performance Framework.*

3. Referrals and assessments

Areas examined

This chapter examines whether the Department of Agriculture, Water and the Environment's (the department's) administration of referrals and assessments is effective and efficient.

Conclusion

The department's administration of referrals and assessments is not effective and efficient.

Areas for improvement

The ANAO made two recommendations aimed at establishing a quality assurance framework and efficiency benchmarks for referrals and assessments. The ANAO also suggested that the department consider more detailed guidance for complex decisions, prioritise investment in IT capability enhancements, establish a framework for prioritising its work and implement arrangements to ensure that staff complete mandatory training.

3.1 The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) requires entities to be governed in a way that promotes the proper use and management of public resources. Proper use, as defined in the PGPA Act, is efficient, effective, economical and ethical.

3.2 Effective and efficient administration of referrals, assessments and approvals under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) enables the achievement of the Act's objectives while minimising the use of public resources. To assess whether the department's administration of referrals and assessments is effective and efficient, the ANAO examined whether:

- systems and processes for referrals and assessments support the achievement of requirements under the EPBC Act;
- referrals and assessments are undertaken in accordance with procedural guidance; and
- referrals and assessments are being undertaken efficiently.

Do systems and processes for referrals and assessments support the achievements of requirements under the EPBC Act?

Systems and processes for referrals and assessments do not fully support the achievement of requirements under the EPBC Act. Procedural guidance does not fully represent the requirements of the EPBC Act and lacks appropriate arrangements for review and update. Information systems do not meet business needs and contain inaccurate data. Staff training is not supported by arrangements to ensure completion of mandatory requirements. There is no framework to prioritise work.

3.3 For the department's administration of referrals and assessments to be effective and efficient, it must be supported by appropriate systems and processes. Systems and processes should provide staff with the information and resources necessary to make informed decisions that are consistent with the objectives and requirements of the EPBC Act.

3.4 The ANAO assessed the department's systems and processes in place to support its regulation under the EPBC Act. Specifically, the ANAO examined whether:

- procedures for referrals, assessments and approvals are appropriate and aligned with the EPBC Act;
- supporting business and information systems are fit-for-purpose;
- regulation is supported by appropriate staff training arrangements; and
- an appropriate framework has been established to prioritise and allocate work.

Procedures for referrals and assessments

3.5 Well-defined procedures assist consistency in regulatory decision-making. Procedures should cover all major decision points, clearly define roles and responsibilities for decision-making and be consistent with relevant legislative requirements.

3.6 The primary source of procedural guidance for the administration of referrals, assessments and approvals is the *Environment Assessment Manual* (the manual). The manual was established in stages from June 2018, as previous guidance was out-of-date and inconsistent with internal procedures. The manual is supported by other documents and templates, which provide supplementary information and guidance.

3.7 The ANAO examined whether the department's procedural guidance was complete, consistent with the EPBC Act and appropriately maintained.

Completeness

3.8 The department's procedural guidance is clearly written, clearly defines roles and responsibilities for decision-making and covers all major decision points up to the approval of actions. However, there is no procedural guidance for many key decisions following approval, including for approving documents submitted as part of conditions of approval (see paragraphs 4.28 and 4.33) and revoking or transferring approvals.

3.9 The majority of the procedural guidance is focused on compliance with the (primarily administrative) requirements of the EPBC Act. It provides limited guidance on more complex decisions, such as recommending whether an action will have an unacceptable impact on matters of national environmental significance. In these cases, the guidance is not detailed and often only states what factors should be considered. In some cases, such as recommending a refusal, it states the officer should discuss with their supervisor.

3.10 Given the high diversity and complexity of matters that may be involved in assessing referrals, assessments and approvals, more detailed guidance for complex decisions should be considered. The absence of detailed guidance increases the importance of other forms of quality assurance to ensure decisions are consistent and support the protection of matters of national environmental significance (see paragraphs 3.49–3.51).

Consistency with the EPBC Act

3.11 To ensure that decisions are legally valid, the department's procedures must be consistent with the requirements of the EPBC Act. The ANAO assessed whether subsections of the Act relevant

to referral, assessment method and approval decisions were captured in the procedural guidance (Table 3.1).

Table 3.1: ANAO assessment of whether relevant sections of the Act were captured in procedural guidance

| Relevant decision | Fully consistent | Partially found | Not found | Inconsistent | Total subsections |
|-------------------|------------------|-----------------|-----------|--------------|-------------------|
| Referral | 88 | 5 | 8 | 1 | 102 |
| Assessment method | 106 | 3 | 9 | – | 118 |
| Approval | 34 | – | 8 | – | 42 |
| Total | 228 | 8 | 25 | 1 | 262 |

Source: ANAO based on assessment of Department of Agriculture, Water and the Environment documents.

3.12 While the majority of relevant subsections were included, 32 relevant subsections were not found or not fully captured in the procedures.⁶¹ These subsections, which primarily related to less frequently used provisions of the Act, included:

- when information can or must be excluded from publication;
- statutory timeframes for some minor decisions and the ability to suspend timeframes in certain circumstances; and
- elements prohibited from consideration or inclusion in an approval of an action.

3.13 The department's procedures were also inconsistent with one provision in the EPBC Act. The manual stated that there is 'not ... a time limit' for processing requests to reconsider a referral decision, while the Act states that the Minister must reconsider a referral decision within 20 business days of receiving a request from a state or territory Minister.⁶²

3.14 This inconsistency leaves the Minister at risk of not meeting statutory timeframes when reconsidering decisions at the request of state or territory Ministers. The omission of some subsections of the EPBC Act also increases the risk of inadvertent non-compliance with the Act.

Maintenance

3.15 Structured arrangements to update and review procedural guidance allow regulators to ensure their procedures remain appropriate over time. However, there are no established, ongoing arrangements for the review or update of procedures relating to referrals, assessments and approvals. As a result, it is not clear whether procedures are up to date, when they should be updated, or who is responsible for their approval and maintenance.

⁶¹ Legislative requirements not represented in the procedural guidance were section 140A and subsections 74(1A), 74(1B), 74(3B), 75(4), 75(7), 78(5), 78(6), 78(7), 88(5), 93(3B), 97(3), 108(2), 170BA(4), 170BA(5), 130(4A), 131AA(5), 132A(3), 133(4), 134A(1), 135(2) and 136(5) of the EPBC Act, and subsections 16.02(1), 16.04A(3) and schedule 1 subsection 3(3.01) of the EPBC Regulations. Requirements not fully represented were section 73 and subsections 74(3A), 74D(4), 74D(5), 79(2), 87(3), 93(3A) and 108(1) of the EPBC Act.

⁶² EPBC Act, subsection 79(3).

3.16 The department has commenced a project to review and update its templates and create a strategy for ongoing maintenance of all templates.⁶³ This project was designed to address identified issues with incorrect, out-of-date, missing and unused templates. Its scope does not include guidance documents, the manual, or policy documents.⁶⁴

Business and information systems

3.17 Effective and efficient regulation relies on appropriate business and information systems to support the work of staff. These should meet the regulator's specific requirements and provide access to accurate information to inform decision-making.

3.18 The primary business system designed to support the administration of referrals, assessments and approvals is the Environmental Impact Assessment System (EIAS). EIAS was implemented in 2015 to replace multiple existing systems and allow staff to 'focus on the thinking aspects rather than the administrative aspects of their work'. However, the ANAO found that EIAS was not fit-for-purpose, as it did not meet some of its functional requirements and contained inaccurate data.

Functional requirements

3.19 The initial design documents for EIAS established 13 high-level functional requirements. The ANAO assessed EIAS against these functional requirements and found that five were not fully met. Requirements not met primarily related to integration with other systems and ease-of-use.

3.20 EIAS was intended to be a 'one-stop-shop' that integrates information from other systems as well as workflow, customer relationship management and document management functions. However, EIAS does not function as a workflow system, with many aspects of referrals, assessments and approvals conducted outside of EIAS. This has resulted in workarounds and retrospective updates after work has been completed.⁶⁵

3.21 Work completed outside of EIAS includes document management, compliance monitoring, and assessment and tracking of documents submitted to satisfy conditions of approval (see paragraph 4.48). The latter two functions are completed using spreadsheets, which lack change and version controls, increasing the risk of data integrity errors. The weaknesses of using spreadsheets to handle business information have been noted in previous ANAO audits.⁶⁶

3.22 The inability of EIAS to provide an integrated workflow system has contributed to its failure to meet functional requirements relating to usability. Departmental staff describe EIAS as 'unintuitive, overwhelming and very difficult to use', with a survey of 37 staff in 2018 stating that

63 This project is scheduled to end in December 2020.

64 The department informed the ANAO that maintenance strategies for the remaining tools and procedures are being developed.

65 For example, a departmental document noted that 'many assessment officers work outside EIAS and then add data into the system after the assessment has been undertaken'.

66 Auditor-General Report No. 20 2018–19, *2017–18 Major Projects Report*, p. 30; Auditor-General Report No. 33 2017–18, *Implementation of the Annual Performance Statements Requirements 2016–17*, p. 64; Auditor-General Report No. 17 2018–19, *Implementation of the Annual Performance Statements Requirements 2017–18*, p. 67; Auditor-General Report No. 49 2018–19, *Management of Commonwealth National Parks*, p. 26.

76 per cent found EIAS either difficult or very difficult to use. This has impacted the ability of staff to utilise EIAS functionality, reducing the effectiveness and efficiency of their work.

3.23 The department's *Regulatory Maturity Project Final Report* (Regulatory Maturity Review) recommended in 2016 that the department improve its regulatory IT systems, stating nine desired functionalities for the system.⁶⁷ Despite accepting the recommendation, the department has not implemented these functionalities.

Accuracy of information

3.24 Data inaccuracies in EIAS limit its ability to provide reliable information and increase the department's reliance on manual data collection. This impacts the department's effectiveness and efficiency.

3.25 Data migrated from previous systems is incomplete or inaccurate, including the matters of national environmental significance affected by actions, jurisdictions of actions, conditions attached to actions and contact details of regulated entities. These issues have been identified by the department, with plans to address them not successfully completed. Other issues identified by the ANAO include not all impacted threatened species or ecological communities being recorded for each action, and information on recovered costs differing significantly from records maintained by finance officers.

3.26 As per paragraph 2.17, the department should prioritise IT capability investment to support its administration of referrals, assessments and approvals.

Staff training

3.27 Appropriate implementation of procedures and systems relies on maintaining capability through targeted staff training. The ANAO reviewed the department's arrangements for identifying training needs, and planning and implementing training.

Analysis of training needs

3.28 In its October 2016 response to the Regulatory Maturity Review, the department committed to develop a regulatory professional capability framework, implement a formal training program for all regulatory staff and require all senior executives with regulatory responsibilities to undertake high level intensive training. Prior to this, there was no consolidated training program for assessment officers.⁶⁸

3.29 The regulatory professional capability framework was not completed. In the absence of a completed capability framework, the department is not well positioned to design and target its training programs in a way that best meets its needs.

67 Desired functionalities were: end-to-end workflow management (pre-referral to compliance); automatic extraction of data from source databases; quality assurance checks throughout the process; on-line links to relevant policies and guidance material and training at appropriate points in the process; the ability to compile briefing material; time management with prompts; archival storage and access; an ability to share and mine data using multiple search criteria (both internally and externally); and better tools for intelligence gathering and data analytics.

68 In 2016, general departmental training was available to assessment staff as well as Environmental Impact Assessment System training and legal training.

Training plan

3.30 In 2016–17, the department engaged a consultant to assist in the development of ‘a training program that outlines the skills and knowledge required to undertake the work of an EPBC assessment officer’. The project delivered training materials consisting of 16 modules covering the referral and assessment process, matters of national environmental significance and other related topics.

3.31 An implementation strategy and schedule for the training was considered by the ESD board in June 2017.⁶⁹ The board was advised that ‘core’ training modules (fundamental to the administration of referrals, assessments and approvals, such as writing conditions and conducting assessments) should be delivered every six months. The board agreed that training should be mandatory for all assessment officers and that tailored training should be developed for senior executives and high-level managers.

Implementation of planned training

3.32 Records indicate that the training has been delivered and that the six core training modules were provided twice a year. Of the 252 individual registrations since 2016–17, training records show that only 16 staff have completed all six core modules, indicating that the target of delivering mandatory training for all staff in the division has not been achieved.⁷⁰ Training for senior executives on the implementation of the EPBC Act, as recommended in the Regulatory Maturity Review and agreed to by the department, was not provided.⁷¹

3.33 To ensure the completion of mandatory training, the department should specify when mandatory training should be completed and establish arrangements to identify and follow up with staff who have not completed required training. This is particularly important as workloads increase to reduce the backlog of assessments.

Work prioritisation

3.34 While the EPBC Act specifies timeframes for the completion of referrals, assessments and approvals, it is the department’s responsibility to determine priorities and allocate its resources.

3.35 Proposed actions are allocated to different sections of the department based on geographical area. No other criteria, framework or records have been established to support the department’s allocation of resources and priorities. The department informed the ANAO that, in practice, priorities are identified and managed by its executive team based on its resources and in consideration of any nationally important projects being referred.

3.36 Priorities are also informed through engagement with the Minister. Each fortnight the department provides summary information on its referrals and assessments and meets with the Minister. Past priorities have included energy projects and New South Wales dam projects, with the department making a commitment to the Minister to adhere to the statutory timeframes for these

69 The minutes of the meeting do not indicate whether the training schedule was endorsed.

70 As noted at paragraph 1.12, at February 2020 there were 141 staff allocated to the referrals, assessments and approvals functions.

71 The department informed the ANAO that, at February 2020, a draft self-guided module targeting all delegates, which includes SES staff, was close to finalisation.

projects.⁷² The department informed the ANAO that there is no agenda for these meetings and meeting notes are not recorded.

3.37 There is scope for the department to establish a prioritisation framework. In the absence of one, there is no structured and defensible process to support resourcing decisions. The lack of agreed records regarding priorities (including any directions from the Minister) limits transparency and accountability in decision-making, and can inhibit the effective implementation of priorities.

Are referrals and assessments undertaken in accordance with procedural guidance?

Referrals and assessments are not undertaken in full accordance with procedural guidance. Decisions have been overturned in court due to non-compliance with the EPBC Act and key documentation for decisions is not consistently stored on file. There is no quality assurance framework to assure the department that procedural guidance is implemented.

3.38 For the administration of referrals, assessments and approvals to be effective, it must be conducted in line with procedures and the EPBC Act. Failure to do so increases the risk of decisions being set aside in court, inconsistency in decision-making and of not achieving the objectives of the EPBC Act.

3.39 The ANAO assessed whether the department's regulation was consistent with its procedures and the EPBC Act. Specifically, the ANAO examined:

- the outcomes of court challenges to referral, assessment and approval decisions;
- whether referral, assessment and approval decisions were conducted in line with procedures; and
- if the department has established an appropriate quality assurance framework to assure itself of compliance with procedures and the EPBC Act.

Legal action

3.40 Decisions made on referrals, assessments and approvals may be subject to legal challenge through judicial review⁷³ by any person aggrieved by the decision.⁷⁴ If the court finds that the decision is not compliant with the EPBC Act or otherwise subject to legal error, it can set the decision aside and require it to be reassessed. This result is costly for the department (which must conduct the assessment again) and the regulated entity (which loses certainty of approval and must delay any action until reassessment).

72 As noted at paragraph 3.68, most approvals are finalised well beyond statutory timeframes.

73 Under judicial review the court does not examine the merits of the decision, but only whether there has been an error of law, or a breach of procedural fairness.

74 Under the *Administrative Decisions (Judicial Review) Act 1977* a person aggrieved by a decision includes persons whose interests are adversely affected by the decision. EPBC Act Section 487 extends this to include individuals and organisations who engage in environmental protection or conservation activities.

3.41 In the period 1 July 2015 to 1 February 2020, the Federal Court has judged five⁷⁵ referral, assessment and approval decisions to be subject to legal error.⁷⁶ In one additional case, the Minister and the appellant settled, with the Minister agreeing to alter the conditions of approval. The ANAO examined the department's procedural guidance with respect to these legal errors and found that if the guidance was followed, the error would not have been made. The legal errors were therefore caused by the department's non-compliance with its procedural guidance.

Implementation of procedural guidance

3.42 Ongoing compliance with procedures is essential for the department to reduce its risk of legal overturn, ensure decisions are made consistently, demonstrate that its regulation is contributing to the objectives of the EPBC Act and build public confidence in its decisions.

3.43 To determine whether the department's regulation was compliant with procedures, briefing packages for 88 referral decisions, 77 assessment method decisions and 90 approval decisions were randomly sampled from all decisions made between 1 July 2015 and 30 June 2019. In all but three of these decisions, the decision-maker agreed with the recommendation.⁷⁷ Where decision briefs were available, they were largely in accordance with procedural guidance and aligned with the supporting evidence (Table 3.2).

3.44 As the department's procedural guidance is primarily concerned with administrative requirements, including the requirements of the EPBC Act (see paragraph 3.9), this analysis provides assurance over these administrative requirements and not the overall quality of recommendations.

Table 3.2: ANAO assessment of the department's compliance with procedures for administering referrals, assessments and approvals

| Requirement | |
|--|---|
| All decisions | |
| Brief signed by correct delegate | ◆ |
| Referral decision | |
| Discussed the action's potential impacts on all matters of national environmental significance | ◆ |
| Recommendations align with the supporting evidence | ◆ |
| Comments from public and relevant Ministers considered | ◆ |

75 A total of 18 challenges to referral, assessment and approval decisions were made to the Federal Court and Administrative Appeals Tribunal during this period.

76 Reasons for these legal findings include: uncertainty over how conditions attached to the approval could be complied with; failure to satisfy conditions required under the EPBC regulations when deciding to assess the impacts of an action based on referral information; not being able to demonstrate that all required public comments had been considered; not specifying that an action was not a controlled action only if it was undertaken in a particular manner, and including all aspects of that 'particular manner' in the decision notice; and failure to consider whether an action was part of a larger action.

77 For one approval decision, the decision-maker did not approve the action as recommended. In an additional approval decision, the decision-maker did not agree to attach the recommended conditions. One referral decision brief did not make a recommendation, with the decision-maker determining the action was 'clearly unacceptable'.

| Requirement | |
|---|---|
| Assessment method decision | |
| Comments from public and relevant Ministers considered | ◆ |
| Recommendations align with the supporting evidence | ▲ |
| Approval decision | |
| Recommends whether the action should be approved and any conditions that should be attached | ◆ |
| Proponent's environmental history considered | ◆ |
| Comments from public and relevant Ministers considered | ▲ |
| Recommendations align with the reasons and supporting evidence | ◆ |

Legend: ◆ fully met; ▲ partially met; ■ not met.

Source: ANAO based on assessment of Department of Agriculture, Water and the Environment documents.

3.45 There is scope to better ensure that the justification for the recommended assessment method aligns with the supporting evidence, with the ANAO considering that the justification in four briefs was inconsistent with other parts of the brief. For example, one brief justified its recommendation of 'assessment on preliminary documentation' by stating that the 'referral has provided sufficient information regarding ... proposed mitigation'. However, other sections of the brief stated that mitigating measures for several threatened species were either not proposed or would not result in any mitigation for the species.

3.46 In addition, while most briefs included a consideration of public and ministerial comments, two briefs only attached the comments without including any evidence of further consideration in the brief. This limits the decision-maker's assurance that comments received have been considered and addressed.

Record keeping

3.47 Key documents relating to decisions were not available in the department's record management system. Of the sampled decisions, 13 briefs and recommendation reports and 16 other documents required by procedure⁷⁸ were not found. This issue was noted in an internal audit in 2018 that found 'inconsistent practices occurring for the storage of key decision-making evidence'.

3.48 Failure to create and maintain accurate records of regulation impacts the department's accountability and transparency, and exposes it to further risks of legal overturn. For example, a referral decision was set aside in 2019 following a court challenge that found the department was unable to demonstrate all public submissions had been considered (Case study 1).

⁷⁸ Nine checklists to verify a referral is valid under the Act were missing, as well as evidence for seven payments that are required to be made by the proponent under the Act before the referral or approval decision can be processed.

Case study 1. Record keeping

The North Galilee Water Scheme was referred on 18 April 2018 and deemed a controlled action on 17 September 2018.

Internal reporting shows that the department was aware of significant public interest. It received approximately 4300 public submissions during the ten-day comment period in June 2018, and had received six requests for Statements of Reasons for the referral decision and four Freedom of Information requests by November 2018.

The Australian Conservation Foundation commenced proceedings to challenge the referral decision in December 2018, amending its application to include missing submissions in February 2019. The referral decision was set aside by the Federal Court in June 2019, after the department acknowledged it could not confirm the number of submissions received and was unable to demonstrate the decision-maker had considered all public submissions required by the EPBC Act. The referral decision was ordered to be remade.

The referral was withdrawn following the decision, with a modified referral (the North Galilee Water Scheme Water Infrastructure Project) submitted on 5 August 2019. The modified referral was determined to be a controlled action on 9 December 2019.

Quality assurance

3.49 The limited procedural guidance available for complex decisions, alongside the ongoing risk of legal overturn, increases the importance of obtaining appropriate quality assurance.

3.50 The department has not established a quality assurance framework despite agreeing to do so in an internal audit recommendation in 2018. The department informed its audit committee in March 2020 that the item was 'not being progressed' as it had been 'overtaken by a shift in focus to improve [its] performance against statutory timeframes in line with the Australian Government's congestion busting agenda'.

3.51 The absence of a quality assurance framework leaves the department without appropriate assurance over its regulation of referrals, assessments and approvals, including: compliance with the EPBC Act, quality and consistency of decision-making, and accuracy of externally-provided information. Other quality assurance arrangements over these elements either do not exist or have not been properly implemented.

Assurance over compliance with the EPBC Act

3.52 Following court decisions to set aside approvals in July 2013 and August 2015 due to a failure to include documents required by the EPBC Act in the briefing package⁷⁹, the department implemented mandatory checklists for all referral and approval briefs from November 2015. The checklists contain a list of requirements to be checked to ensure that the decision will be legally valid.

⁷⁹ The court judged that the Minister failed to consider approved conservation advice for affected EPBC-listed species, as required by the EPBC Act, in both cases.

3.53 However, quality assurance checklists were not completed or could not be located for 88 of 203 referral and final decision briefs (43 per cent) examined by the ANAO. Failure to complete these checklists as required by procedure limits the department's assurance that all required elements under the EPBC Act have been included and increases the risk of future legal overturn.

Assurance over quality of regulatory decision-making

3.54 As noted in paragraph 3.9, the department's procedures provide limited guidance for more complex decisions. This increases the importance of establishing other methods of quality assurance for those decisions.

3.55 The review process for referral, assessment and approval decisions includes review of the briefing package by a supervisor and the relevant manager before it is submitted to the decision-maker. There are no further documented processes for obtaining assurance over the quality of decision-making, such as sampling previously approved briefing packages and recommendations for review.

3.56 As noted in an internal audit on the consistency of decisions made under the EPBC Act, presented to the department's audit committee in June 2018, the absence of quality assurance processes (such as sampling previous decisions) 'increases the risk of non-compliance with legislative and departmental requirements, inefficient and inconsistent processes and inability to pursue better practice initiatives'.

Assurance over external information

3.57 The majority of information used in the administration of referrals, assessments and approvals is provided by external sources, including the regulated entity. As this is the primary information on which decisions are made, there should be an appropriate level of assurance over the accuracy of this information.

3.58 However, there are no procedures for when and how externally-provided information should be validated. This was noted in an internal audit presented to the department's audit committee in June 2018. The internal audit stated that there is 'limited guidance and clarity around what is required and expected in validating the accuracy and authenticity of third party information. As a result, this is done at the discretion and judgement of individual assessment officers with strong reliance on corporate knowledge and past experiences'.

Recommendation no.5

3.59 The Department of Agriculture, Water and the Environment establish and implement a quality assurance framework to assure itself that its procedural guidance is implemented consistently and that the quality of decision-making is appropriate.

Department of Agriculture, Water and the Environment response: Agreed.

3.60 *Adequate systems and processes are required to support efficient and effective regulation. The Department acknowledges that improvements to its quality controls for regulation are required and agrees that assurance processes are important to support consistent decision making in accordance with requirements of the EPBC Act. The Government's congestion busting agenda has supported work to improve quality controls and processes, including the development of additional guidance materials.*

3.61 *Building on the existing processes and procedures for development of approval conditions, including internal review by Compliance, the Department will prepare and implement a Quality Assurance Framework that can adapt to changes in legislation that may result from the EPBC Act Review. Work will commence in the short term to design the architecture of the framework, with any further work considered in the context of the EPBC Act Review.*

3.62 *To further embed consistency across decision making under the EPBC Act, the Department will also build on substantial work already underway to establish a Regulatory Professional Framework.*

Are referrals and assessments being undertaken efficiently?

Proxy efficiency indicators developed by the ANAO indicate the efficiency of referrals and assessments has not improved over recent years. The department has no arrangements to measure its efficiency and the implementation of proposed efficiency improvement measures has not been appropriately tracked. Most referral, assessment method and approval decisions are not made within statutory timeframes.

3.63 As noted in paragraph 3.1, the PGPA Act requires entities to be governed in a way that promotes the proper use and management of public resources. Proper use is defined as efficient, effective, economical and ethical.

3.64 The Auditing and Assurance Standards Board defines efficiency as the 'performance principle relating to the minimisation of inputs employed to deliver the intended outputs in terms of quality, quantity and timing'.⁸⁰ Efficient use of public resources enables regulators to maximise outcomes for government and the community, reduce demands on the Australian Government budget and promote financial sustainability. The efficiency of the regulation of referrals, assessments and approvals also impacts on the timeliness of decisions, which impacts regulated entities.

80 Auditing and Assurance Standards Board, *Standard on Assurance Engagements ASAE 3500 Performance Engagements*, 2017.

3.65 The ANAO examined the efficiency of the department's regulation of referrals, assessments and approvals. This included an examination of:

- performance against statutory timeframes;
- available efficiency measures;
- changes in staffing and the number of referrals, assessments and approvals processed; and
- actions taken by the department to support efficiency.

Performance against statutory timeframes

3.66 The time taken to process referral, assessment and approval decisions is a key part of the impact on the regulated entity. The longer a decision takes, the longer it is until the entity can commence the action. Delays can have significant costs for regulated entities, with the Productivity Commission estimating in 2013 that a one-year delay to a major offshore liquefied natural gas project could cost between \$500 million and \$2 billion.⁸¹

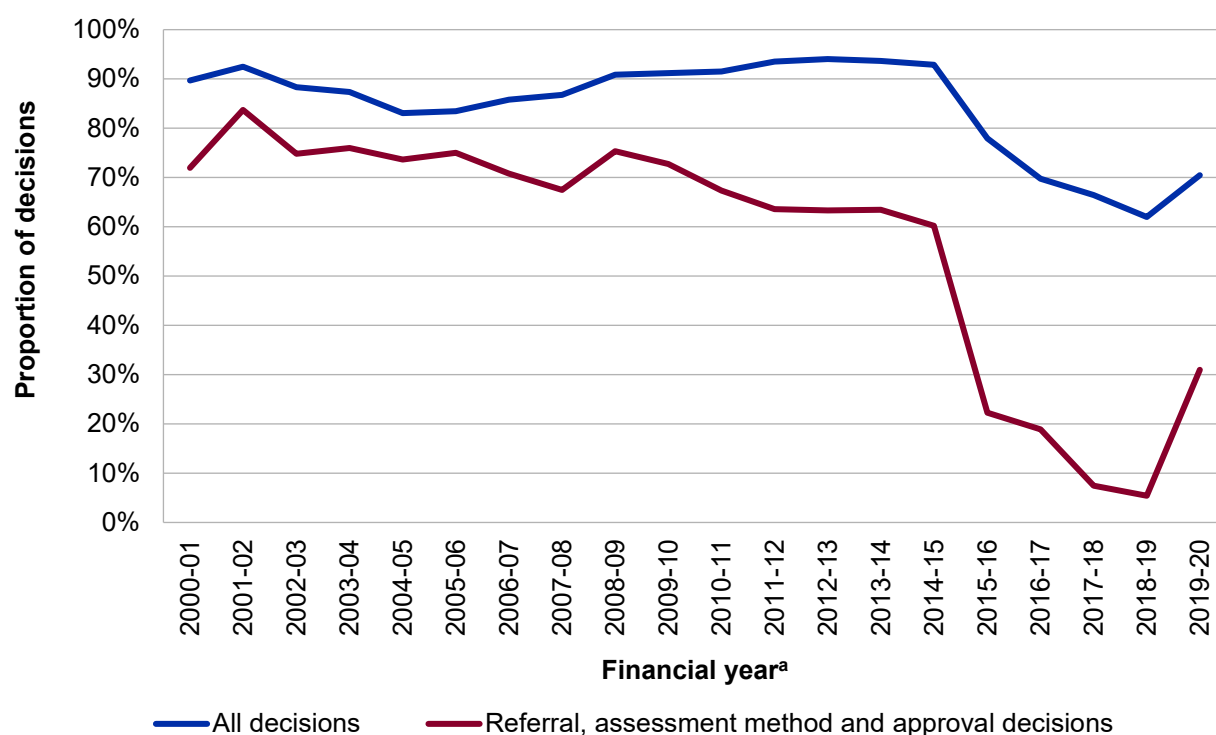
3.67 The EPBC Act requires referral, assessment method and approval decisions and other related administrative decisions to be completed within specific timeframes. Referral and assessment method decisions must be made within 20 days of receiving the referral. Timeframes for the department to provide assessment information to the decision-maker and the timeframes for the approval decision vary depending on how the impacts of the action are assessed.⁸²

3.68 Compliance with statutory timeframes has decreased since the commencement of the EPBC Act (Figure 3.1). This decrease was most pronounced from 2014–15 to 2018–19, with the proportion of referral, assessment method and approval decisions made within statutory timeframes decreasing from 60 per cent in 2014–15 to five per cent in 2018–19. The average time taken for approval decisions increased from 19 days over the statutory timeframe in 2014–15 to 116 days over the statutory timeframe in 2018–19.

3.69 As at 30 April, the proportion of decisions that were made within statutory timeframes in 2019–20 has increased to 31 per cent. This is primarily due to an increase in timeliness following the \$25 million allocated to the department in December 2019 to reduce the backlog in environmental assessments (paragraph 1.12).

81 Productivity Commission, *Major Project Development Assessment Processes*, 2013, p. 201.

82 The EPBC Act also includes provisions for referral, assessment and approval timeframes to be extended, including where the Minister has requested further information from the person proposing to take the action.

Figure 3.1: Proportion of decisions made within statutory timeframes by financial year

Note a: Data for 2019–20 is as at 29 April 2020.

Note: Results presented in this graph may differ from the department's reporting due to differences in methodology (for example, see paragraph 4.70).

Source: ANAO based on Department of Agriculture, Water and Environment data.

3.70 Reasons for exceeding statutory timeframes vary and may include: the department not considering that it has satisfactory information to assess the proposed action, administrative delays, disagreement between the department and the regulated entity over proposed conditions, and delays in state or territory approvals where actions are also subject to state or territory approval requirements. The department does not systematically record or report on the reasons for delays.

3.71 The three approval decisions since 1 July 2015 that overran their statutory due date by the greatest amount⁸³ are examined in Case study 2.

83 As determined by the statutory due date and decision date recorded in the department's systems.

Case study 2. Three approval decisions that exceeded statutory timeframes

A residential and tourism project in Northern Queensland was referred in August 2006 and deemed a controlled action in September 2006. The action was initially approved in February 2011, but the errors in the approval notice, identified by the department in May 2015, made it invalid. The errors included ambiguous wording of the action, the wrong annexure being attached and a different person being specified in the approval and referral notices.

A new approval was issued in August 2015, 1852 days past the statutory due date. The department noted in the new approval brief that the delay may impact the approval holder financially, due to the 'increasing financial constraints ... of not having a legally valid approval in place'.

A proposal to reopen an existing gold mine in the Northern Territory (NT) was referred in May 2011 and determined to be a controlled action in June 2011. In April 2013, it was decided to be assessed under 'accredited assessment' by the NT.

The department, NT and the regulated entity were unable to agree on the conditions to be applied to the approval, primarily regarding survey methodology and criteria that must be met to protect the environment. The department stated in a meeting in June 2017 that 'the project has become locked in a state of [federal/NT] comments looping with no resolution'.

To resolve the problem, the department adopted an approach of specifying environmental outcomes to be achieved instead of specifying how the work must be conducted. Under this approach the action was approved in January 2018, 1257 days past the statutory due date.

A proposal to expand an open cut gold mine in North Queensland was referred in August 2011 and deemed a controlled action in September 2011, to be assessed by bilateral agreement.

The department received the assessment report from the Queensland Government (Queensland) in June 2014, which stated that Queensland required additional information to make its decision. While the department considered that the proposal met EPBC Act requirements, it did not approve the action as Queensland had not issued its approval. The department informed the ANAO that this is done to ensure the department's conditions of approval are not inconsistent with state conditions. In addition, a departmental email stated that a federal approval may have resulted in the regulated entity pressuring Queensland to make a decision.

The regulated entity submitted a variation in November 2016 to meet Queensland's concerns. The department approved the action in March 2017, 959 days after the statutory due date.

Measurement of efficiency

3.72 The department's deteriorating performance against statutory timeframes for referrals, assessments and approvals further increases the importance of measuring its efficiency. Establishing measures to do so enables the department and external stakeholders to understand changes in performance, target areas for improvement and monitor changes over time.

3.73 The department has not established arrangements to measure its efficiency or use of resources with regard to its administration of referrals, assessments and approvals. EIAS has the capability to record staff time spent on tasks, but this functionality is not used.

3.74 In the absence of departmental efficiency indicators, the ANAO examined whether the cost recovery arrangements for referrals, assessments and approvals could be used to create a proxy efficiency indicator.⁸⁴ The department's cost recovery arrangements are designed to capture the total efficient costs of administering each referral, assessment and approval.⁸⁵ However, this index was unable to be created due to limitations in the department's records and its application of its cost recovery arrangements.

3.75 As an alternative, the ANAO calculated the ratio between the number of full-time-equivalent (FTE) staff working on referrals, assessments and approvals⁸⁶ (as an indicative input) and the number of proposed actions processed by the department⁸⁷ (as a corresponding output). Under this metric, the number of proposed actions processed per FTE staff has remained relatively consistent from 2011–12 to 2018–19 (Figure 3.2).

Figure 3.2: Number of proposed actions processed per FTE staff since 2011–12



Note: Staffing data was not available for 2013–14.

Source: ANAO based on Department of Agriculture, Water and the Environment data.

3.76 As complexity of decisions or quality of referrals is not consistently recorded in the department's business systems⁸⁸, this metric does not account for potential changes in these

84 A similar index was used in Auditor-General Report No.56 2016–16, *Pesticide and Veterinary Medicine Regulatory Reform*.

85 Department of the Environment and Energy, *Cost Recovery Implementation Statement – Cost recovery for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 – 2016–17*, 2016, p. 18.

86 The number of staff working on referrals, assessments and approvals was determined from point-in-time figures. These figures were taken in December each year except 2012–13, which were taken in August.

87 A proposed action was considered processed when the Minister had either determined whether it could be undertaken, or the referral had been withdrawn or lapsed. This includes actions that were withdrawn, lapsed, determined to be not a controlled action, or had an approval decision made.

88 Fifty one per cent of cases completed since 1 July 2014 do not have a recorded complexity, while quality of referral is not recorded at all.

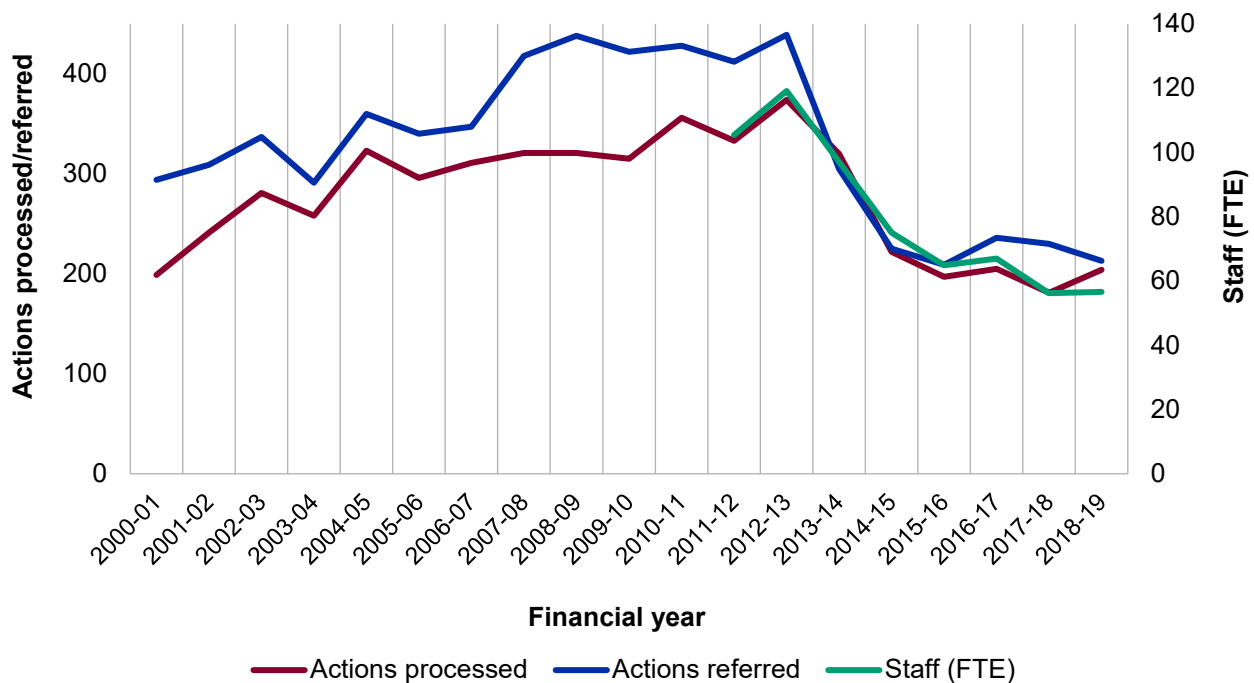
factors (which may impact the time taken to process an action). In addition, as actions can be processed over multiple years, the number of actions processed per year is dependent on work undertaken in previous years. This means that changes in efficiency may not be reflected until subsequent years.

Staffing and number of referrals, assessments and approvals processed

3.77 Following the introduction of the *One-Stop Shop Policy*⁸⁹, the number of staff was reduced.⁹⁰ This reduction correlated with a decrease in the number of proposed actions processed by the department. While the *One-Stop Shop Policy* was not fully implemented, the number of referrals received also decreased from this point (Figure 3.3).

3.78 At 1 July 2011, the department had 762 proposed actions that it was yet to fully process. While the number of referrals received reduced in line with staffing from that point onwards, the total number of actions the department was working on at a given time did not reduce (Figure 3.4). The decrease in staffing during this period was, therefore, associated with an increased overall workload, with the number of actions being processed increasing to 999 on 1 July 2019.

Figure 3.3: Number of proposed actions referred to and processed by the department per financial year, with staffing levels

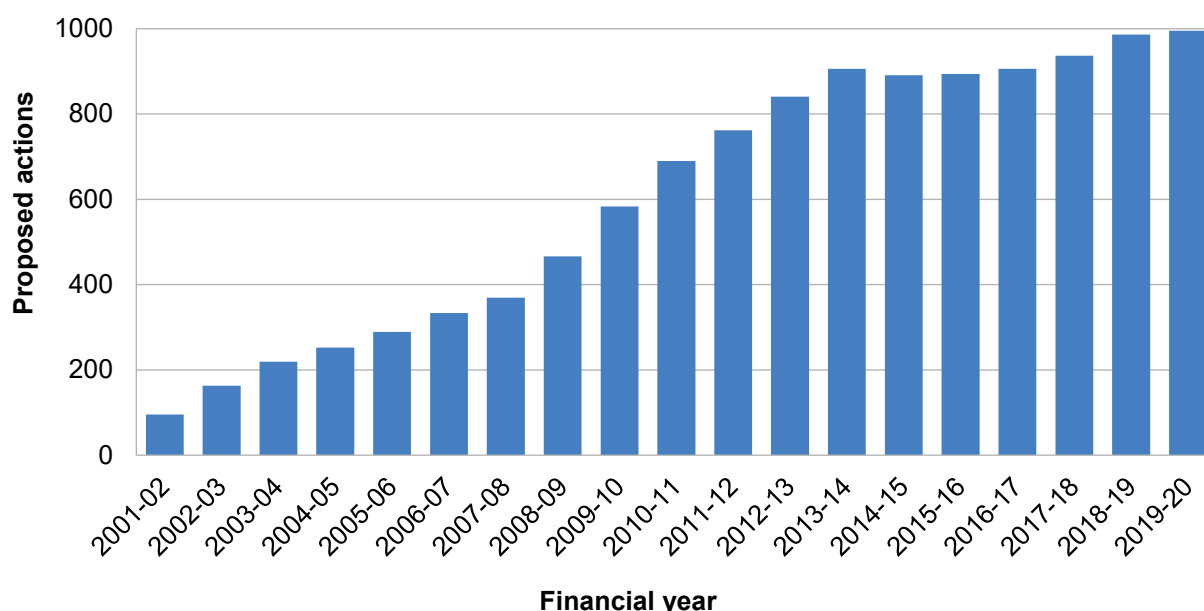


Note a: Staffing data was not available for 2013–14.

Source: ANAO based on Department of Agriculture, Water and the Environment data.

89 Department of Agriculture, Water and the Environment, *One-Stop Shop for environmental approvals* [Internet], available from <https://www.environment.gov.au/epbc/one-stop-shop> [accessed 04 May 2020].

90 The bilateral agreements intended to be implemented under the *One-Stop-Shop Policy* would allow a state or territory to conduct a single assessment and approval process that satisfies both Australian Government and state or territory requirements.

Figure 3.4: Incomplete work at the commencement of each financial year

Source: ANAO based on Department of Agriculture, Water and the Environment data.

Support of efficiency by the department

3.79 The department is aware of its deteriorating compliance with statutory timeframes for referrals, assessments and approvals. To stabilise its performance, it has proposed actions to increase its efficiency. However, without assessing efficiency, resource use, work quality or complexity of referred actions (paragraphs 3.73 and 3.76), it is not well positioned to demonstrate that these actions are appropriately targeted or effective.

3.80 In September 2018, a paper submitted to the department's executive board proposed an approach to improve the efficiency of the administration of referrals, assessments and approvals. This approach included actions to be implemented immediately, and actions to be scoped further. The approach was supported by the board. However, there were no arrangements to monitor or track its implementation. Table 3.3 provides an assessment of the implementation of each action.

Table 3.3: Implementation of proposed efficiency actions

| Action | Approach | ANAO assessment of implementation | |
|--|--------------------------|-----------------------------------|------------------------------------|
| No longer make 'not a controlled action if undertaken in a particular manner' decisions on referrals | Immediate implementation | ▲ | No update to procedural guidance |
| Accept informal variations for actions, where the variation is to reduce the footprint or scope of an action | Immediate implementation | ▲ | No update to procedural guidance |
| Devolve responsibility for preparation of briefing materials to proponent through updated referral forms/templates | Further scoping | ■ | Not implemented |
| Streamline/refine briefing processes to focus on legal robustness | Further scoping | ▲ | No documentation of implementation |

| Action | Approach | ANAO assessment of implementation | |
|--|-----------------|-----------------------------------|-----------------|
| Implement a triage process for referrals that characterise actions as 'major projects', 'high risk/sensitive projects' and 'low risk projects' and develop processes for assessing each category | Further scoping | ■ | Not implemented |

Legend: ◆ appropriately implemented; ▲ partially implemented; ■ not implemented.

Source: ANAO based on Department of Agriculture, Water and the Environment documents.

3.81 Actions to improve efficiency were again proposed in early 2020, following the \$25 million allocated to the department in December 2019 (paragraph 1.12). These include a triage process, streamlining and reviewing procedures, and the identification of nationally-significant 'major projects' to be assessed at a higher level of resourcing. Planning had commenced for the implementation of these actions at the completion of audit fieldwork in February 2020.

3.82 It is particularly important for the department to establish efficiency indicators and implement efficiency initiatives if it is to deliver increased outputs in the future, including after the funding to reduce the backlog of assessments expires (paragraph 1.12). Without this, the department is poorly positioned to improve its efficiency and therefore its compliance with statutory timeframes. Efficiency indicators would also better position the department to ensure its cost recovery arrangements are appropriate.

Recommendation no.6

3.83 The Department of Agriculture, Water and the Environment establish efficiency indicators to assist in meeting legislative timeframes for referrals, assessments and approvals.

Department of Agriculture, Water and the Environment response: Agreed.

3.84 *The Department agrees that it is important to measure its efficiency in order to drive improvements in the administration of referrals, assessments and approvals under the EPBC Act. It is acknowledged that data capture and management is critical to measuring and implementing efficiency and this will be a focus of digital transformation work currently underway supported by the Government's congestion busting agenda.*

3.85 *Building on existing annual reporting procedures, the Department will establish indicators to measure efficiency of referral, assessment and approval decisions under the EPBC Act and consider any additional data requirements.*

4. Conditions of approval

Areas examined

This Chapter examines whether conditions of approval are appropriate and whether the completion of pre-commencement conditions is rigorously assessed prior to the commencement of actions. It also examines whether monitoring, evaluation and reporting arrangements demonstrate the impact of the department's regulation of referrals, assessments and approvals.

Conclusion

The department is unable to demonstrate that conditions of approval are appropriate. The implementation of pre-commencement 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.

Areas for improvement

The ANAO made two recommendations relating to establishing quality controls for conditions of approval, and developing systems and guidance to support the assessment of conditions. The ANAO also suggested that the department publically report on average timeframes for decisions and implement a monitoring, evaluation and reporting framework on the effectiveness of its regulation.

4.1 If an action referred to the department under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is approved, it may include a range of conditions with which the regulated entity must comply. These conditions (conditions of approval) are the main mechanism to avoid, mitigate or offset any unacceptable impacts to matters of national environmental significance that may be caused by the action.

4.2 Examples of conditions may include: restriction of actions to a certain area, requirements to translocate affected matters of national environmental significance to a new area, requirements to monitor and report on the impacts of the action, and requirements to produce and implement plans that further establish how the action will be taken and how its impacts will be limited.

4.3 To ensure that conditions of approval are effective at preventing unacceptable impacts, it is important that they are appropriate and their implementation is rigorously assessed. The ANAO examined the department's arrangements for setting and assessing compliance with conditions of approval, specifically whether:

- conditions of approval are appropriate and aligned with the risk to the environment;
- arrangements are in place to monitor the implementation of pre-commencement conditions of approval; and
- monitoring, evaluation and reporting demonstrates the impact of the department's regulation under the EPBC Act.

Are conditions of approval aligned with risk to the environment and appropriate for monitoring?

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.

4.4 For conditions of approval to prevent unacceptable risks to the environment, they need to address the identified environmental risks and be written in a way that allows them to be monitored and enforced. To assess whether the department's condition-setting arrangements resulted in conditions that met these criteria, the ANAO examined whether:

- procedural guidance for setting conditions of approval is aligned with the EPBC Act;
- conditions are aligned with procedural guidance, enforceable and appropriate for monitoring; and
- conditions are aligned with risk to the environment.

Alignment of procedural guidance with the EPBC Act

4.5 The EPBC Act contains requirements for setting and varying conditions. These include what must be considered when setting a condition, when a condition can be attached to an approval and what types of conditions can be attached. To ensure conditions are legally valid, it is important that the department's procedures are consistent with these requirements.

4.6 Procedural guidance for setting and varying conditions is largely consistent with the EPBC Act. However, two subsections of the Act relating to what can be included in conditions⁹¹ or considered when setting them⁹² were not captured in the guidance. In addition, the guidance was inconsistent with one subsection⁹³, stating that the Minister can add or vary a condition in a circumstance not included in the Act. These omissions and inconsistencies increase the risk of approving, varying or adding a condition where not permitted by the Act.

Contents of conditions of approval

4.7 The department's guidance for condition-setting includes not only the specific requirements of the EPBC Act, but also guidance to ensure conditions can be enforced and monitored. Given the

91 EPBC Act, subsection 135(2) — 'The Minister must not grant the approval, or attach a condition to the approval, that has the effect of giving preference (within the meaning of section 99 of the Constitution) to one State or part of a State over another State or part of a State'.

92 EPBC Act, subsection 136(5) — 'In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must not consider any matters that the Minister is not required or permitted by this Division to consider'.

93 EPBC Act, subsection 143(2) — 'The Minister may, by written instrument, revoke any condition (other than the condition referred to in subsection 134(1A)) attached to an approval under this Part of an action if the Minister is satisfied that the condition is not needed to protect any matter protected by a provision of Part 3 for which the approval has effect'.

broad nature of conditions that can be set and types of actions that can be referred, this guidance takes a range of different forms. These include:

- general principles for condition-setting, designed to ensure compliance with the Act and achievement of environmental objectives;
- specific requirements to be applied to each condition to ensure it is legally enforceable and achieves the desired outcome; and
- standard administrative conditions that are to be included in each approval to ensure it can be monitored and enforced.

4.8 These guidelines for writing approval conditions aim to increase the chances of achieving the desired outcomes of an approval, improve consistency in and enforceability of conditions, streamline audit and compliance actions, and reduce legal risk to the department.

4.9 A sample of 43 approvals issued between 1 July 2015 and 30 June 2019⁹⁴ 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.⁹⁵ 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 39⁹⁶ 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'.

4.12 An approval with poorly written conditions is examined in Case study 3.

94 Approvals were randomly selected from 246 actions that were approved with conditions between 1 July 2015 and 30 June 2019.

95 Examples of these errors include: failure to specify when a condition must be completed by; referencing other conditions by the incorrect number; not requiring submitted plans to be implemented; and typographical errors impacting the meaning of the condition.

96 This excludes four of the 43 examined approvals, as they were completed before standard administrative conditions were required to be included.

97 Auditor-General Report No.43 2013–14 *Managing Compliance with EPBC Act 1999 Conditions of Approval*.

Case study 3. Approval conditions — tourism and residential development

In May 2017, a tourism and residential development in Cairns, Queensland was approved. It was determined to have a likely significant impact on the EPBC-listed Spectacled Flying-fox due to disturbance during construction and the removal of roost trees.

To reduce the impacts on the Spectacled Flying-fox, the department attached a number of conditions to the approval. These included restrictions on how vegetation can be cleared, prohibition of construction when the flying-foxes were vulnerable and requirements to monitor the impacts. However, a number of conditions were non-compliant with procedural guidance or contained clerical or administrative errors. Examples include:

- multiple conditions that did not specify who was responsible for implementation;
- requirements to schedule 'rest days' without any definition of what that entailed;
- requirements to ensure no 'significant increase' in abortion or abandonment of juvenile flying-foxes, with 'significant increase' only defined as 'an increase which is important, notable, or of consequence, having regard to its context or intensity';
- requirements to develop community engagement strategies and plans for handling flying-foxes found on site, but without a date they must be developed by;
- not including standard administrative conditions requiring the publication of plans and strategies, despite being required under the department's procedural guidance; and
- conditions that were intended to require the approval holder to report on (and prepare plans to prevent) adverse events as defined in another condition, but which did not reference the correct number for that condition.^a

The department received multiple allegations of non-compliance with the conditions, including the wildlife carers who attended the site reporting that they had found 426 abandoned juvenile and 334 dead flying-foxes. The Commonwealth Scientific and Industrial Research Organisation advised the department that the number of deaths was 'significantly higher than previous years' and there were 'no reports or evidence of similar impacts occurring at other roost sites'.

Determination of non-compliance was limited by the poorly drafted conditions. An internal departmental briefing noted that the 'main issue' was determining whether a 'significant increase' in the abortion or abandonment of juvenile flying-foxes had occurred, as per the conditions. It also noted that 'a number of other conditions may also impact upon a compliance determination'.

Following a site visit, the department did not find evidence that the mortalities and abandonment of juveniles could be directly attributed to the development.

Note a: This error was pointed out by a 'concerned citizen' in June 2018, and amended in a subsequent variation under the Act in July 2018.

Quality control

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.

Auditor-General Report No.47 2019–20

Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999

4.14 Since the Office of Compliance began keeping records of its feedback on conditions of approval in July 2016, it has only recorded providing feedback for 174 of the 197 actions (88 per cent) approved with conditions during that time. Of the approvals that the Office of Compliance provided feedback on, 23 were those identified by the ANAO as containing errors (paragraphs 4.9–4.10).

Alignment with risk to the environment

4.15 The department's guidance states that during the development of conditions, desired environmental outcomes should be set to determine the level of acceptable environmental impact. Conditions should be developed where they are necessary to reach the desired outcomes. This requirement provides an objective measure of what is an acceptable impact, ensures that conditions are aligned to the risk posed by the impacts and ensures conditions are only applied where necessary. Despite this requirement, the department does not consistently record desired environmental outcomes and how the conditions meet them.

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. No recommendation report from a sample of 71 approval decisions made between 1 July 2015 and 30 June 2019 identified an unacceptable risk without proposing a condition to reduce it to an acceptable level. However, without documentation of the desired environmental outcomes, the department is unable to provide assurance that conditions are proportionate to the level of environment risk.

98 The department informed the ANAO that these documents were no longer used as they were 'replaced by content in the new assessment manual chapters'.

Recommendation no.7

4.18 The Department of Agriculture, Water and the Environment improve its quality controls to ensure conditions of approval are enforceable, appropriate for monitoring, compliant with internal procedures and aligned with risk to the environment.

Department of Agriculture, Water and the Environment response: *Agreed.*

4.19 *Ensuring conditions of approval are enforceable, appropriate for monitoring, consistent with internal procedures and aligned with risk to the environment is critical to regulation under the EPBC Act.*

4.20 *The Department will build on current quality control procedures in place for the development of approval conditions under the EPBC Act to target improvements and strengthen quality controls to ensure approvals are robust and prepared in accordance with procedures.*

4.21 *The Department will also build on existing processes and procedures, and establish new ones where necessary, to better align conditions of approval with risk to the environment. Work will commence in the short-term and be finalised in the context of the government response to the EPBC Act Review.*

Are appropriate arrangements in place to monitor the implementation of pre-commencement conditions of approval?

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.

4.22 For conditions of approval to be effective at reducing impacts on matters of national environmental significance, they must be fully implemented in line with the original approval. It is therefore important that appropriate arrangements are in place to monitor the implementation of conditions of approval.

4.23 The ANAO previously examined the department's arrangements to monitor the implementation of EPBC Act conditions of approval in 2013–14⁹⁹ and 2016–17.¹⁰⁰ The 2013–14 audit found that the department had limited assurance over compliance with conditions of approval, making five recommendations. The 2016–17 audit found that while the department had implemented three of these recommendations and partially implemented the remaining two, limited progress had been made in implementing broader initiatives to strengthen the department's regulatory performance.

99 Auditor-General Report No.43 2013–14 *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval.*

100 Auditor-General Report No.36 2016–17 *Monitoring compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit.*

4.24 Given the previous coverage of the department's monitoring of conditions of approval, this audit has focused on the department's arrangements to monitor the implementation of pre-commencement conditions of approval. In particular, whether:

- key documents submitted as part of pre-commencement conditions are appropriately reviewed; and
- compliance with pre-commencement conditions of approval is appropriately monitored.

Review of key documents

4.25 Documents submitted for approval as part of pre-commencement conditions fall into two primary categories: environmental management and environmental offset plans. These documents determine the approach that will be taken to limit the impacts of the action. It is important, therefore, that they are appropriately reviewed, to ensure that the conditions act as intended to prevent unacceptable impacts on matters of national environmental significance.

Environmental management plans

4.26 Environmental management plans are designed to provide further information on the potential impacts of an action and establish measures to avoid or mitigate these impacts. The department's *Environmental Management Plan Guidelines 2014* specify the format of environmental management plans and what they should include. Management plans must also meet any requirements in the conditions of approval.

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.

4.29 Examination of 36 briefing packages for the approval of management plans in 2019¹⁰¹ found that while all demonstrated how the plan met the relevant conditions of approval, 28 did not demonstrate how the plan met the requirements of the *Environmental Management Plan Guidelines 2014*.¹⁰² The ANAO made similar findings in 2014, stating that 'the format and quality of departmental assessments supporting the decision briefs ... was inconsistent'.¹⁰³

101 The ANAO assessed the briefing packages for all environmental management plans contained within the department's records in 2019 that could have their decision brief located.

102 Four briefing packages stated that the plan was compliant with the guidelines but provided no further evidence, with the remaining 24 packages containing no evidence of assessment against the guidelines.

103 Auditor-General Report No.43 2013–14 *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*.

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.

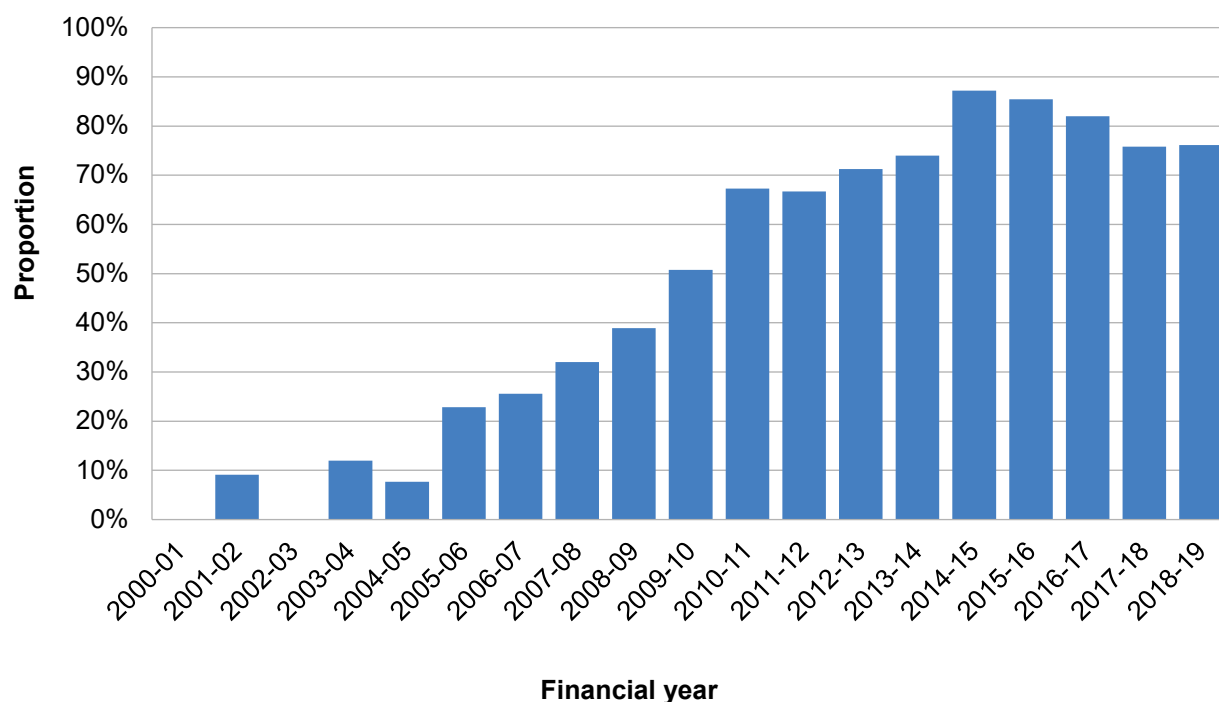
Environmental offset plans

4.31 Offsets are measures that compensate for adverse impacts to matters of national environmental significance by providing other benefits to the affected matter, resulting in net improvement or maintenance of their viability. This is primarily accomplished by legally securing an area of land for conservation purposes and arranging for its protection and maintenance. For example, an action that will have a likely impact on Tasmanian devils may be offset by securing and maintaining a different area of Tasmanian devil habitat — improving the quality of the habitat and protecting it from future impacts.

4.32 Environmental offsets were not well established as a method of compensating for the potential impacts of an action when the EPBC Act commenced. Since then, the use of offsets has increased significantly (Figure 4.1). The department has established external requirements for the use of environmental offsets through the department's *Environmental Offsets Policy 2012* (offset policy) and the supporting *Offsets Assessments Guide* (offset guide).

104 The EPBC Act provides for the creation of statutory documents such as recovery plans and conservation advice for EPBC-listed threatened species or communities. Commonwealth agencies must not take any action that contravenes a recovery plan. The Minister must have regard for any relevant conservation advice when approving an action, and the approval must not be inconsistent with a recovery plan.

Figure 4.1: Change in the proportion of approvals with an offset condition since the commencement of the EPBC Act



Source: ANAO based on Department of Agriculture, Water and the Environment data.

4.33 The department has not established internal guidance for reviewing environmental offsets beyond the offset policy and guide. Further guidance intended to be developed after the offset policy was established has not been completed. In addition, there is no quality assurance process for sampling or reviewing approved offset plans. Without these controls, the department lacks assurance that offsets are assessed consistently, in line with the offset policy and in a way that achieves the objectives of the EPBC Act.

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

4.35 When calculating the benefits of a proposed offset, one input is the risk that the biodiversity at the proposed offset site would be lost if not for the offset. This averted risk, known as the 'risk of loss', contributes to the conservation gain of the offset.

4.36 Risk of loss estimates must be accurate to ensure that the conservation gain delivered by the offset is correctly calculated and that the conservation gain is ultimately greater than or equal to the negative impact. However, there is no agreed method for estimating 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.

Case study 4. Offset policy implementation and risk of loss assessment

A regulated entity referred two separate projects in the same Queensland development area, which were approved in December 2015 and January 2018. In both cases, offsets were proposed to reduce the impacts on the koala. The regulated entity and the department went through multiple rounds of negotiation regarding the suitability of both proposed offsets.

The 2015 offset was initially assessed by the department to not adequately compensate for the impacts on the koala, as it was not consistent with the offset policy and the risk of loss had not been correctly calculated. Following extensive negotiations and engagement with the Minister's office, the department accepted the offset. Departmental notes stated that the regulated entity knew of the department's 'inconsistent application of the ... offset policy' and used it to support its proposal.

The 2018 offset was once again subject to extensive negotiations, with the department initially assessing the offset as inadequate and inconsistent with the offset policy. The regulated entity argued that it should be accepted as it was consistent with what the department had approved for the 2015 offset. The department agreed to accept a modified version of the offset, despite stating that it was inconsistent with the offset policy, 'to maintain consistency in decision-making with the previously approved ... offset'. The approval brief noted that the offset would deliver 'a conservation outcome', but also that the risk of loss was 'potentially overstated' and the habitat quality assessments were potentially inaccurate.

In the approval brief, the department recommended writing to the regulated entity to inform it that future offsets should be consistent with the offset policy. This letter was subsequently drafted. The department informed the ANAO that it was not sent.

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.

105 The department resolved to postpone any changes until, or after, the statutory review of the EPBC Act.

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 of offsets

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 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 conditions

4.47 For pre-commencement conditions of approval to effectively prevent unacceptable impacts on matters of national environmental significance, the department must ensure they are fully implemented before project activities commence. This requires appropriate monitoring of both commencement of actions and implementation of pre-commencement conditions.

Commencement of actions

4.48 Under a standard condition of approval, the department requires notification when any approved actions commence. When these notifications are received by the department, the

106 Examples of indirect offsets include funding for research or educational programs.

107 The offset policy limits the use of indirect offsets to 10 per cent of the total offset requirement, except where it can demonstrate a 'greater benefit to the protected matter' or 'scientific uncertainty is so high that it isn't possible to determine a direct offset that is likely to benefit the protected matter'.

department's procedures require the date of commencement to be recorded in a compliance tracking spreadsheet and the Environmental Impact Assessment System (EIAS).

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.

4.50 These issues with data completeness and accuracy limit the department's ability to determine when projects have commenced and therefore its ability to monitor whether pre-commencement conditions of approval have been implemented.

Implementation of pre-commencement conditions of approval

4.51 Standard conditions of approval require the department to be notified when pre-commencement conditions are completed, as well as when the project commences. However, the department does not have a procedure to verify the completion of pre-commencement conditions (including checking whether it has received notification of all pre-commencement conditions being completed) when it is notified of project commencement. It has not assessed the risk of not systematically verifying the implementation of pre-commencement conditions when notified of project commencement.

4.52 The department's general post-commencement compliance activities can also include verifying the implementation of pre-commencement conditions of approval, such as following an allegation of non-compliance. These general compliance activities were previously examined in Auditor-General reports in 2013–14 and 2016–17 (paragraph 4.23). As such, they were not included in the scope of this audit.

108 These projects were excluded from further analysis.

109 Annual compliance reports are to be submitted each year after commencement, providing details of compliance with their conditions of approval. They are required under a standard administrative condition that is to be attached to all approvals.

110 The receipt of annual compliance reports was first recorded in the department's spreadsheets on 1 June 2018.

Recommendation no.8

4.53 The Department of Agriculture, Water and the Environment develop guidance and quality controls to assure itself that pre-commencement conditions of approval are implemented and assessed consistently to protect matters of national environmental significance.

Department of Agriculture, Water and the Environment response: *Agreed.*

4.54 *The Department agrees that appropriate procedures and processes are required to support assessment and monitoring of pre-commencement requirements of approvals under the EPBC Act.*

4.55 *The Department will update existing guidance materials, including for the post approval phase of the EPBC Assessment Manual, improve quality controls and implement new systems and processes where required to ensure that pre-commencement conditions of approval are implemented and assessed consistently.*

Does monitoring, evaluation and reporting demonstrate the impact of the department's regulation under the EPBC Act?

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.

4.56 To ensure that regulation is meeting objectives and delivered efficiently, regulators should monitor, evaluate and report on the effectiveness and efficiency of their regulation. This provides regulators with the information necessary to continuously improve their performance. The department has committed to this process under its regulatory framework¹¹¹, which states that the department will 'monitor, review and report' on its effectiveness.

4.57 This audit assessed whether the department is evaluating the effectiveness and efficiency of its regulation, monitoring and reporting on its activities and performance, and if the results of these activities demonstrate that the department's regulation is effective and efficient.

Evaluation of effectiveness and efficiency

4.58 The department's regulatory framework states that it will have a 'planned and transparent evaluation program'. This commitment is further supported by the department's Evaluation Policy 2015–20, which requires 'significant interventions'¹¹² (including referrals, assessments and approvals under the EPBC Act) to have monitoring and evaluation plans. Monitoring and evaluation plans are required to schedule periodic evaluations to systematically assess efficiency, effectiveness, impact and the achievement of intended outcomes.

4.59 In 2015, drafting commenced for a monitoring and evaluation plan relating to referrals, assessments and approvals. However, the plan was not finalised, and the department has not

¹¹¹ Department of the Environment and Energy, *Regulatory Framework*, 2017.

¹¹² Interventions with a regulatory burden measure costing of over \$2 million.

established any other plan or strategy to coordinate evaluations of its administration of referrals, assessments and approvals.

4.60 The department has not conducted formal reviews or evaluations of the effectiveness or efficiency of its regulation of referrals, assessments and approvals. Elements of its regulation have been reviewed individually or included in broader departmental reviews. However, none addressed the department's effectiveness or efficiency in achieving the objectives of the EPBC Act through its administration of referrals, assessments and approvals.

Evaluation of new policies

4.61 The department's approach to administering referrals, assessments and approvals changes over time, due to new information and changing regulatory practice. New approaches to regulation are given effect through the release of new policies by either the government or the department. Periodic review and evaluation of these policies is necessary to determine if they are effective in achieving their aims and contributing to the achievement of the objectives of the Act.

4.62 The department has three active policies in relation to referrals, assessments and approvals under the EPBC Act: the *EPBC Act Condition-setting policy*; the *EPBC Act environmental offsets policy*; and the *Outcomes-based conditions policy*. In addition, the department was responsible for implementing the government's *One-Stop Shop policy*.

4.63 Two of the department's policies include commitments to undertake evaluations. The *One-Stop Shop policy* does not explicitly commit to evaluations, but involved implementing bilateral agreements, which are required to be reviewed under the EPBC Act. Despite these commitments, no reviews or evaluations of the policies have been completed (Table 4.1).

Table 4.1: Evaluation of policies for referrals, assessments and approvals

| Policy | Year | Stated evaluation commitment | Progress on evaluations |
|---------------------------------------|------|--|---|
| EPBC Act environmental offsets policy | 2012 | The policy commits to a technical review after 1 year (2013), with subsequent reviews every 5 years. | The department commenced the first technical review in 2015. A consultation paper was produced but not approved by the Minister, who requested 'more time to consider'. No further work has been completed. |
| One-Stop Shop policy | 2013 | The policy does not contain requirements for evaluation, but involved establishing 8 new bilateral agreements. Active bilateral agreements are required to be reviewed at least once every 5 years under the EPBC Act. | The department has not commenced statutory reviews for any of the bilateral agreements, despite all being in effect for more than 5 years. ^a |
| EPBC Act Condition-setting policy | 2016 | No commitment. | Planning commenced in June 2016, but the review was not undertaken. |

| Policy | Year | Stated evaluation commitment | Progress on evaluations |
|----------------------------------|------|--|---|
| Outcomes-based conditions policy | 2016 | The policy commits to evaluation, but does not specify when. | Planning commenced in June 2016, but the review was not undertaken. |

Note a: The NSW bilateral agreement has been subject to a 'non-statutory transitional review'.

Source: ANAO based on Department of Agriculture, Water and the Environment documents and information.

Monitoring and reporting on activities and performance

4.64 Structured monitoring and reporting assists in the oversight of entity performance and enhances accountability. Appropriate reporting arrangements enable decision-makers to identify where plans and objectives are not being met and take action accordingly. In addition, external reporting provides the Parliament and the public with assurance that the entity is achieving required outcomes.

4.65 The ANAO assessed whether the department has established appropriate monitoring and reporting arrangements, including reporting on:

- progress against internal plans;
- operational and tactical level information; and
- the effectiveness and efficiency of its regulation.

Reporting against plans and strategies

4.66 Under the Commonwealth performance framework, the corporate plan is the department's primary planning document. Supporting the corporate plan are divisional business plans, which specify what each division of the department will do to contribute to the purpose and activities outlined in the corporate plan.

4.67 To allow decision-makers to make informed decisions, they should receive reporting on progress against relevant sections of divisional business plans and the corporate plan. However, the Environment Standards Division (ESD) and Environment Approvals Division (EAD) boards¹¹³ (as key operational decision-makers) have not received reporting on progress against their divisional business plans or relevant sections of the corporate plan.

Operational and tactical information

4.68 Internal monitoring and reporting of operational and tactical measures such as inputs, activities and outputs can provide important information to support decision-making. Since June 2017, the ESD or EAD board has received reporting at each meeting on operational and tactical information, such as the number of statutory decisions made on referrals, assessments and approvals and compliance with statutory decision-making timeframes.

4.69 The department reports externally on some output measures, including the number of decisions made within statutory timeframes and the number of different types of statutory decisions made. There would be merit in reporting average decision times to provide regulated

113 Operational oversight of referrals, assessments and approvals was the responsibility of the ESD board from July 2015 to August 2019, after which point the responsibility for this oversight transferred to the EAD board as part of a divisional restructure.

entities information about how long decisions take. This should include timeframes for approving documents submitted as part of conditions of approval (such as environmental management or offset plans), which do not have statutory timeframes.

4.70 Reporting on compliance with statutory decision-making timeframes is not consistent with the EPBC Act. The Act does not require assessment method decisions to be made for actions covered by bilateral agreements — however, these have been included in calculations as decisions made on time. This has resulted in inaccurate reporting, with the department reporting internally that it made 12 per cent of referral, assessment method and approval decisions on time in 2018–19, when the actual figure was five per cent.

4.71 Reporting on operational and tactical information has also been limited by data unavailability. This has left the department unable to report on some metrics, including progress in releasing statements of reason for decisions made under the EPBC Act. Even where data is available for some areas, the department has been limited in what it can report on — for example, it was only able to report on the number of Freedom of Information requests it received, and not how long it took in responding to them.

Effectiveness and efficiency of regulation

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.

Results from monitoring, reporting and evaluation

4.74 As noted at paragraph 1.3, the first objective of the EPBC Act is to ‘provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance’. Where data exists, the status of the environment and matters of national environmental significance are generally reported to be in decline.

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.

4.76 In relation to national and international heritage, the most recent State of the Environment report stated that while heritage places generally remain in good condition, there have been

114 From the department’s Species Profile and Threats Database. These figures do not include 18 species that were rediscovered after having previously been listed as extinct.

‘significant impacts’ on natural heritage values and ‘substantial impacts’ on Indigenous and historic heritage, including the destruction of significant sites through resource extraction or development.¹¹⁵

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.

4.78 When establishing performance measures on the effectiveness and efficiency of its regulation (Recommendation no.4; paragraph 2.78), the department should ensure they are incorporated into an appropriate monitoring, reporting and evaluation framework that provides assurance over its achievement of the objectives of the EPBC Act.



Grant Hehir
Auditor-General

Canberra ACT
25 June 2020

115 Department of the Environment and Energy, *State of the Environment 2016 — Overview of state and trends of heritage* [Internet], 2016, available from <https://soe.environment.gov.au/theme/overview/heritage/topic/overview-state-and-trends-heritage> [accessed 01 February 2020].

Appendices

Appendix 1 Entity response



Australian Government
Department of Agriculture,
Water and the Environment

ANDREW METCALFE AO
SECRETARY

10 June 2020

Mr Grant Hehir
Auditor General
Australian National Audit Office
GPO Box 707
Canberra ACT 2600

Dear Mr Hehir

Thank you for your correspondence of 14 May 2020 and the opportunity to respond to the Australian National Audit Office's (ANAO's) proposed report on *Referrals, assessments and approvals of controlled actions under the Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The EPBC Act is currently undergoing an independent statutory review led by Professor Graeme Samuel AC. The review will consider how the EPBC Act has been operating, and any changes needed for Australia to support ecologically sustainable development into the future. At a time when governments look to navigate a path out of the COVID-19 crisis, improvements to national environmental law will be more important than ever in rebuilding the economy and protecting the environment.

The EPBC Act is complex and difficult to administer, and many of the decisions made are contested. It is anticipated that the review recommendations will result in significant changes to the EPBC Act. As noted in the ANAO's report, the findings of the audit will help inform the review of the EPBC Act and I welcome the ANAO's recommendations. It is clear that improvements are needed in the areas of governance and risk management for the administration of referrals, assessments and approvals under the EPBC Act. The Department agrees to implement the ANAO's recommendations, building on our current policies and practices, to improve our efficiency and effectiveness in administering the EPBC Act.

Thank you for working with my Department regarding the concerns we have raised in relation to the proposed audit report. We are grateful that you have listened to those issues we have raised and worked with us to ensure that the report reasonably reflects our current performance and areas to be improved. A summary of these issues and proposed amendments to the audit report, as discussed with your staff, are enclosed.

In December 2019 the Government committed \$25 million for the 2019-21 financial years to reduce unnecessary delays in environmental assessments and approvals under

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the EPBC Act. I note the Department has recently embarked on a series of improvement projects as part of its congestion busting measures that will support implementation of the audit recommendations.

This funding recognises the important role the Department plays in assessing the environmental impacts of projects that bring significant investment into the national economy while maintaining environmental protections. These additional resources have seen a rapid improvement in meeting statutory timeframes and reaffirms the Department as an effective regulator.

The congestion busting measures have seen a remarkable lift in our performance. For example, in the first quarter of 2020 the Department was able meet statutory timeframes for key decisions in 87 per cent of cases (up from 19 per cent in Q4 2019) and the backlog of overdue project assessments has reduced by 43 per cent since December 2019.

The Department has also entered into a partnership with the Western Australian Government on a national digital transformation program to streamline environmental assessment processes at both tiers of government and to provide access to a single database of biodiversity information. This will help underpin our future efficiency and effectiveness.

Enclosed is the Department's detailed response to the recommendations of the ANAO report. They are provided within the context of both the review of the EPBC Act and the congestion busting investment. The Department will commence work in the short term to address the audit recommendations and ensure improvements are delivered in a timely and flexible manner to accommodate potential changes to the EPBC Act. In some instances, this work will be completed after the Government has responded to the review findings.

I would like to thank the ANAO audit team for the cooperative and professional manner they have adopted in working with the Department on this matter.

Yours sincerely



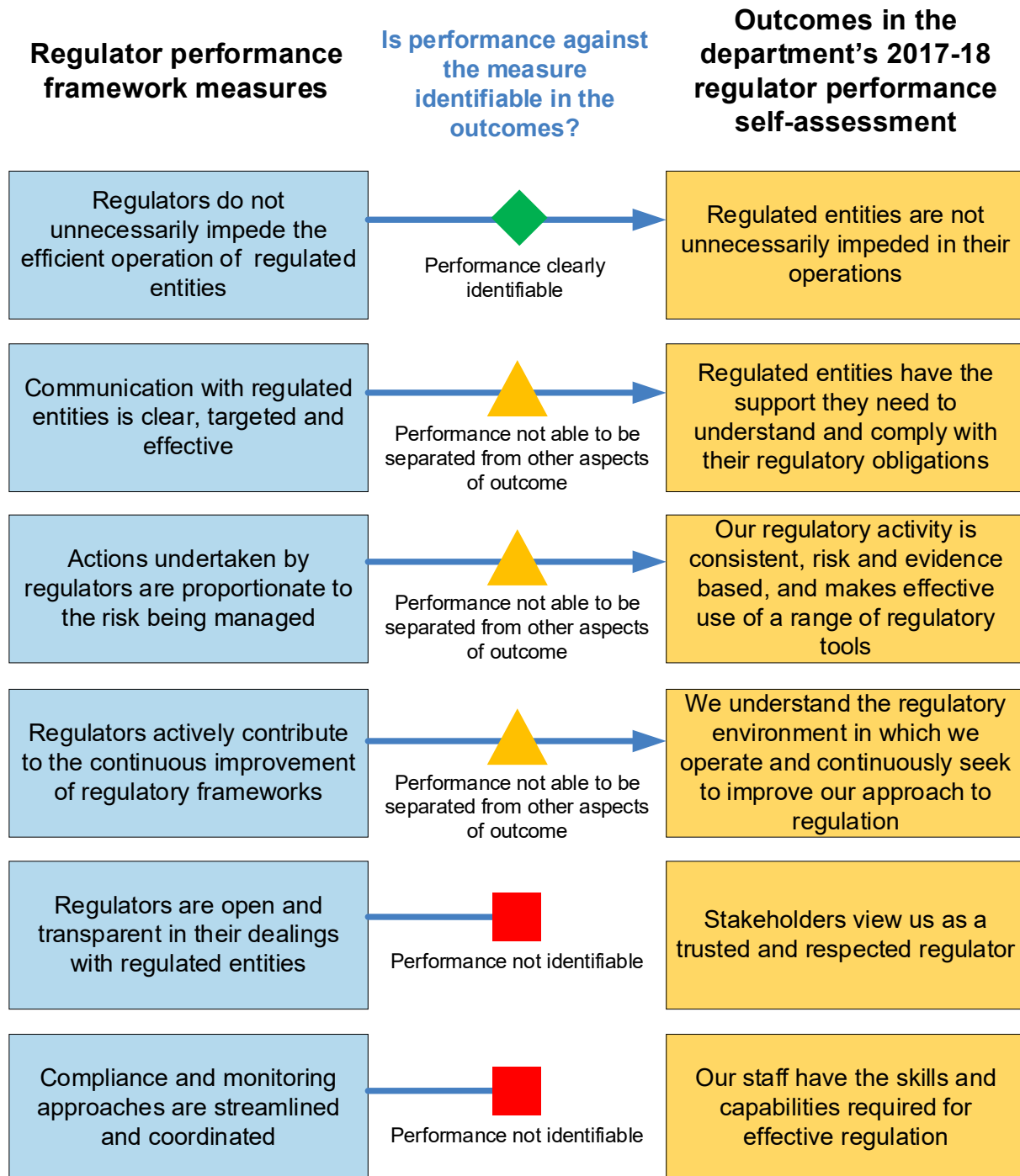
Andrew Metcalfe AO

Enc 1 – Proposed amendments

Enc 2 – Department response to s.19 Proposed Report

Appendix 2 Alignment between regulator performance framework measures and the department's 2017–18 regulator performance self-assessment outcomes

Figure A.1: Alignment between regulator performance framework measures and the department's 2017–18 regulator performance self-assessment outcomes



Source: ANAO based on Department of Agriculture, Water and the Environment and Department of the Prime Minister and Cabinet documents.