

## Chapter 2. Environmental governance and management

*This chapter evaluates the environmental governance and management of Australia since the last OECD Environmental Performance Review. It provides an overview of the institutional framework, then discusses the regulatory framework and briefly summarises key developments in specific areas such as air quality, water and waste management. The chapter examines the Australian approach to environmental permitting, compliance and enforcement before discussing environmental democracy, public participation and access to justice.*

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The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

## 2.1. Introduction

Australia is a federal country in which environmental responsibilities are shared between the Commonwealth (federal) government, six states and two territories, and over 560 local governments. Political cycles in Australia are relatively short, as the term of Parliament is three years, compared to four or five in most other countries. This results in less time for the government to complete its programme, along with higher volatility and short-term decision making. The state of New South Wales introduced four-year parliamentary terms in 1995, and over the years there have been proposals to extend the cycle at the federal level, a change that would require amending the Constitution.

Australia has moved from a system of complete decentralisation of environmental policy to one in which the Commonwealth government has constitutional authority to issue environmental laws on what are referred to as “matters of national environmental significance”. Any action that could potentially affect such matters must be assessed at the federal level.

The states and territories have a wide and varied range of responsibilities. They develop environmental policies and regulations that cover all issues not regulated at the federal level, i.e. land use planning, site contamination, environmental monitoring and education. The Commonwealth can enter bilateral agreements with states and territories to delegate environmental assessment. These agreements have addressed some issues of overlapping environmental responsibilities across levels of government; nevertheless, more efforts are needed to streamline vertical co-ordination. Good practices on strategic and environmental impact assessment, consolidated permitting, enforcement tools and compliance promotion are emerging at the subnational level and could be shared with other jurisdictions.

## 2.2. Institutional framework for environmental governance

The federal government has traditionally exercised its environmental powers through “co-operative federalism”, established in the 1992 Intergovernmental Agreement on the Environment, which defines federal, state and local roles and responsibilities in the sector. The Commonwealth is responsible for matters of national significance, including flora, fauna, ecological communities<sup>1</sup> and heritage places needing national-level protection. It ensures that Australia meets its international commitments, such as the Nationally Determined Contribution under the 2015 Paris Agreement, as well as agreements related to, for instance, wetlands and international movements of wildlife.

Each state and territory has its own legislative framework and related institutions. Constitutional responsibility for local government lies with state and territory governments, which means local authorities’ roles and responsibilities differ by state. Vertical co-ordination mechanisms aim at streamlining the division of responsibilities and avoiding overlaps. Local governments are in charge of land use planning and development, including granting permits within their jurisdiction. To varying degrees they are responsible for water management, coastal zone management, waste management, control of weeds and alien plants, and air quality and noise management (Standing Committee on the Environment, 2014).

The role of Indigenous communities in environmental management is recognised in Australia’s statement of support for the United Nations Declaration on the Rights of Indigenous Peoples, which sets out principles for building a solid partnership on

environmental matters among the Commonwealth, the community and Indigenous Australians. In addition, in 2017 Indigenous leaders issued the “Uluru Statement from the Heart”, asking for their environmental rights to be strengthened, for example through the establishment of a legal and political platform to raise issues of concern. The government has also received other proposals on how to strengthen Indigenous’ rights (Box 2.1).

#### **Box 2.1. A panel of experts to strengthen Indigenous rights**

In 2017, 14 experts on environmental law from academia, civil society and the private sector developed a blueprint for the next generation of environmental regulations that recognises the role of Indigenous communities in cultural heritage protection and access to resources. The panel put forward proposals to enhance Indigenous rights, especially as regards involving Indigenous communities more systematically and effectively in strategic land and marine planning, adopting stronger governance models for areas managed or co-managed by Indigenous groups and ensuring that Indigenous representatives have access to all information related to the management of areas and resources for which they are responsible.

*Source: Bates et al. (2017) Blueprint for the Next Generation of Australian Environmental Law.*

#### **2.2.1. National institutions and horizontal co-ordination**

At the national level, the government’s key role is fulfilling Australia’s international responsibilities on environmental protection, including climate change. The key law is the Environment Protection and Biodiversity Conservation (EPBC) Act, which defines matters of national significance: World Heritage properties, Ramsar wetlands, national heritage places (the list includes natural, historic and Indigenous landmarks), listed threatened species and ecological communities, listed migratory species and Commonwealth marine areas, as well as protection of the environment from nuclear risks.

The Department of the Environment and Energy (DEE), established in 2016, took over the responsibilities of the former (2013-16) Department of the Environment. It is the lead federal agency responsible for environmental protection, climate change mitigation and adaptation policy, and energy policy, including energy efficiency and development of renewable sources.

Other departments and offices that have responsibilities for, and provide input to, environmental management include the:

- Prime Minister’s office, for Indigenous affairs.
- Department of Industry, Innovation and Science, regarding minerals and offshore resources and management of specific waste streams.
- Department of Agriculture and Water Resources, concerning farming, biosecurity, trade and water policy, forestry and fisheries.
- Department of Health, regarding chemicals management.
- Department of Foreign Affairs and Trade, for climate change and trade.
- Department of Infrastructure, Regional Development and Cities, on transport issues.
- Australian Border Force and Federal Police, regarding seizures of environmental goods and investigations at the subnational level and internationally.

Environment and energy agencies that contribute to achievement of federal environmental objectives are the Australian Renewable Energy Agency, Bureau of Meteorology, Clean Energy Finance Corporation, Clean Energy Regulator, Climate Change Authority, Director of National Parks, Great Barrier Reef Marine Park Authority and Sydney Harbour Federation Trust.<sup>2</sup>

The only formal horizontal co-ordination body on environmental matters in the federal government is the Natural Heritage Ministerial Board, made up of the environment and agriculture ministers. It oversees the National Landcare Program, Reef Plan 2050 and the Indigenous Protected Areas programme. It is advised by a committee that meets twice a year (Australian Government, 2017b). Australia could consider strengthening federal horizontal co-ordination by setting up co-operation mechanisms to include climate change and energy issues and avoid overlap across federal government departments and agencies. In Canada, for example, the prime minister issues public mandate letters encouraging ministers to fulfil specific policy objectives and work closely with other ministries and subnational governments. This practice has proved successful in strengthening interagency collaboration (OECD, 2017a).

In practice, most horizontal co-ordination mechanisms in Australia are at state/territory level. Almost every state has mechanisms to ensure horizontal co-ordination across the government, though most are focused on specific issues. For example, in Western Australia, the Kimberley Science and Conservation Strategy brings together the cabinet of the premier and seven state government agencies to discuss protected areas, Indigenous communities and marine issues (Australian Government, 2017a). The Australian Local Government Association represents 560 councils and provides a forum for horizontal co-ordination across local governments to guide the policy development.

The Australasian Environmental Law Enforcement and Regulators neTwork is a special co-ordination mechanism. Established in 2004 (Lehane, J., Pink, 2011), it was one of the world's first networks of regulators and has since been replicated in some other OECD countries (Spain and Sweden, for example). It brings together environmental regulators from Australia and New Zealand to exchange resources, information and experience, foster capacity building across the network, and identify best practices. It includes a high-level forum for the heads of environment protection regulatory bodies (AELERT, 2017).

### ***2.2.2. Subnational institutions and vertical co-ordination***

The states of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, along with the Australian Capital Territory and the Northern Territory, have comprehensive sets of policies and legislation to regulate and manage the environment and local environmental issues. They vary quite significantly by jurisdiction.

To reduce disputes over responsibility for environmental protection that were pending for two decades, the Commonwealth, state and territory governments signed the Intergovernmental Agreement on the Environment in 1992. It sets out the roles and responsibilities of each level of government. States oversee all issues that are not under the remit of the Commonwealth. They are also responsible for managing living and non-living resources within the state, addressing international issues that affect the state, and participating in developing environmental policy at the federal level.

Australia has several general and environment-specific vertical co-operation mechanisms:

- The Council of Australian Governments (COAG) was established in 1992 to manage matters of national significance and co-ordinate actions among all levels of government. Its members are the federal prime minister, state and territory premiers and president of the Australian Local Government Association. It meets two to three times a year. COAG is supported by inter-jurisdiction, ministerial-level councils, including the Transport and Infrastructure Council, the Energy Council and the Health Council (Australian Government, 2017a).
- The Meeting of Environment Ministers brings together the Commonwealth minister for the environment and energy and the environment ministers of each state and territory. They meet as needed. Recent meetings have focused on threatened species protection, human health and climate change. Each meeting ends with an “agreed statement” with details on what ministers discussed and concluded (DEE, 2017).
- The National Environment Protection Council (NEPC) brings together federal and state environment ministers. There are committees of the council in each state and territory. The NEPC establishes National Environment Protection Measures (NEPMs) - environmental standards and protocols related to air, water, noise, site contamination, hazardous waste and recycling - and reports on their implementation in subnational jurisdictions (NEPC, 2017). Its activities are close to those of the Canadian Council of Ministers of the Environment, which harmonises federal and provincial regulations.

In line with a recommendation of the 2007 OECD Environmental Performance Review (EPR), Australia continues to improve co-operation between Commonwealth and state/territory governments. To harmonise and streamline regulations and reduce duplication, the government has committed to a “one-stop shop” policy for environmental approvals in the form of bilateral agreements between the Commonwealth and state/territory governments (Section 2.3.3; Australian Government, 2015).

Vertical co-ordination needs to be further strengthened. In some cases, federal, state and territory laws are inconsistent, overlap or leave gaps. For example, all levels undertake management of national heritage places, with considerable overlap and lack of clarity about the roles of each level. Coastal zone management is carried out through a multilevel approach that leaves important issues such as climate change risk without proper vertical co-ordination. Vertical co-ordination could also better integrate local governments, in particular large cities and metropolitan areas. The need of reinforcing vertical co-ordination mechanisms is at the core of the OECD Council Recommendation on Effective Public Investment across Levels of Government.<sup>3</sup>

Area-specific initiatives include cross-state and vertical co-ordination in the Murray-Darling Basin (Box 2.2) and the Great Barrier Reef Ministerial Forum, which was created to implement the 2009 intergovernmental agreement between the federal government and Queensland to protect the Great Barrier Reef from its main pressures: climate change, water pollution and coastal development (DEE, 2017).

### **Box 2.2. Governance of the Murray-Darling Basin: the challenge of multi-jurisdiction co-operation**

Implementation of Basin Plan 2012 is an example of multilevel governance across the Commonwealth, the Australian Capital Territory, New South Wales, Queensland, South Australia and Victoria. The aim is to strike a balance between competing water end users without compromising key environmental functions of the basin.

In 2013, an intergovernmental agreement between the federal government and the five subnational authorities came into force. As part of the agreement, the federal government committed funding to the states through a National Partnership Agreement on water reform in the basin, which allocated some AUD 174 million for water management initiatives. Additional multi- and bilateral intergovernmental agreements commit parties to implementing the basin plan.

The Murray-Darling Basin Authority (MDBA) is an independent body responsible for ensuring sustainable and integrated management of water resources throughout the basin. It does so in co-operation with the Murray-Darling Basin Ministerial Council, which oversees major policy issues related to water management. Made up of water ministers from each basin state, the council is chaired by the Commonwealth government. The authority works with the council, territory governments and local communities to prepare the Basin Plan. Annual reports issued by the authority track progress on implementation of the plan, which will be revised in 2019.

Since the plan was agreed, there has been a shift in governance from the MDBA to basin governments, which have taken a more central role. However, it is unclear who is responsible for leading implementation of the plan. The 2017 MDBA Basin Plan Evaluation noted implementation gaps due to confusion about institutional roles in water governance. According to the Productivity Commission's five-year draft assessment in 2018, there are major shortcomings in the current institutional and governance arrangements. Basin governments should take joint responsibility in managing the plan. Enforcement in the basin could also be strengthened (Section 2.4.2). In June 2018, the ministerial council agreed to review the joint governance arrangements to streamline decision-making and improve clarity of roles and responsibilities.

*Source: Australian Government (2017), Response to the Questionnaire for the OECD Environmental Performance Review of Australia; OECD (2011), Water Governance in OECD Countries; Productivity Commission (2018), Murray-Darling Basin Plan: Five-year Assessment Draft Report.*

## **2.3. Regulatory requirements**

The EPBC Act is a key piece of Commonwealth legislation which provides a nationwide framework for environment and heritage protection and biodiversity conservation. It governs a variety of activities falling within federal jurisdiction, such as environmental impact assessment (EIA), international wildlife movements and sustainable use of natural resources. The act contains provisions on the role of Indigenous peoples in the conservation and use of land and biodiversity. It was amended in 2013 to make water resources related to energy development a matter of national significance. It does not, however, contain provisions on climate protection and large-scale land clearing.

DEE, along with the agencies under its aegis, is responsible for implementing the EPBC Act, as well as 50 other pieces of legislation on topics ranging from environment and heritage protection to biodiversity conservation, Antarctic ecosystems, climate change, renewables and energy markets. In 2016, it commissioned an assessment of its maturity and capacity to perform its regulatory functions. The report found that DEE had difficulty ensuring a consistent approach across its regulatory activities (DEE, 2016a).

### ***2.3.1. Regulatory and policy evaluation***

According to the Australian Government Guide to Regulation (2014), the Office of Best Practice Regulation conducts a preliminary assessment of all draft policy and regulatory measures to determine if they require a regulation impact statement (RIS). The RIS can be short, standard or long, depending on the expected impact. Cost-benefit analysis of economic, social and environmental effects is mandatory for long RISes, recommended for standard ones and not required for short versions. A government cost-benefit analysis guidance note can be applied in the development of RISes in any sector, including energy and transport (WPIEEP, 2016). Recent examples of long RISes include regulations on hydrofluorocarbons (2016) and reducing emissions from small engines (2016). Standard and long RISes are available to the public online.

Approaches to performing regulatory impact assessment vary by state/territory. For example, in the Australian Capital Territory, a Triple Bottom Line Assessment complements the regulatory impact one by identifying and integrating social, environmental and economic factors, as well as the impact on gender and poverty, into decision making on policies and legislation. In addition, infrastructure projects undergo assessment of vulnerability to climate change (Australian Government, 2017a).

Strategic environmental assessment (SEA) at the national level, introduced in the EPBC Act, is undertaken for large-scale plans related to land use, such as housing and infrastructure development, plans related to resource management and policies that concern the industry sector. In the one-stop shop approach, SEA takes the form of an agreement between the federal government and the entity responsible for implementing a policy, plan or programme (e.g. state/territory government, local council, industry group, aboriginal land council). The latter can choose to undergo EIA (Section 2.3.3), i.e. a project-by-project assessment, or SEA, in which individual projects need no further approval. SEA thus helps increase regulatory efficiency but at the same time could jeopardise thorough scrutiny of individual projects. The DEE website provides detailed information on how to decide whether a plan requires SEA, and instructions on what documentation and supporting information must be submitted (DEE, 2017).

Federal government agencies undertake post-implementation reviews (PIRs) for changes to legislation that are bound to have a significant impact on the economy. The review covers the economic, social and environmental impact and how stakeholders are affected. PIRs are carried out for new regulation, as well as amendments that do not go through a RIS. The 2013 amendment of the EPBC Act underwent a PIR to assess the implementation of the water trigger (Australian Government, 2017a).

Ten acts, including the EPBC Act, require a yearly operational report to be presented to Parliament outlining activities carried out to implement the acts and the administrative arrangements in place. In addition, every ten years the environment and energy minister commissions an independent review, for presentation to Parliament, on how the EPBC Act has met its objectives. The next review will take place in 2019. In addition, the

Australian National Audit Office undertakes reviews of the administration of the government's policies, programmes and regulatory activities.

### ***2.3.2. Key regulatory requirements***

This section provides a brief overview of environmental standards related to air, water, waste and products. Regulatory instruments related to biodiversity are addressed in Chapter 4.

#### *Air quality management*

Air quality is regulated at the state level, while the Commonwealth provides a framework for monitoring and reporting on ambient and toxic air pollutants. The 2015 Clean Air Agreement provides a framework for air quality management across jurisdictions. The NEPC developed a NEPM for ambient air quality and air toxics (the Air NEPM), which is the main regulatory framework at the national level. It was established in 1998 by the federal government in consultation with health professionals, environmental groups and the community, and was last revised in 2016.

The Air NEPM sets standards for carbon monoxide, lead, nitrogen dioxide, ozone, sulphur dioxide and particulate matter (PM<sub>10</sub>, plus advisory standards for PM<sub>2.5</sub>). It also sets mandatory monitoring and reporting requirements. The standards are aligned with those of the World Health Organization's Air Quality Guidelines, except for nitrogen dioxide, for which the Australian standards are slightly lower (Sealey and Shepherd, 2017). The NEPM also provides for the generation of comparable information on the levels of five toxic air pollutants at certain sites where concentrations are expected to be high (e.g. near industrial sites, major roads) (Rivers, 2014).

States and territories are responsible for monitoring and enforcing NEPMs within their jurisdiction. However, there are no sanctions if they do not properly implement Air NEPMs. They can adopt more stringent air quality standards if they wish, as Victoria has done for PM<sub>10</sub>. Jurisdictions can employ the Air NEPM framework to assess air toxics within their territory (Sealey and Shepherd, 2017).

With respect to mobile sources, Australian vehicle emission and fuel standards compare unfavourably to international best practices. The federal government has introduced emission standards for new vehicles through the Australian Design Rules, which regulate certain pollutants from light and heavy vehicles, among other things. There are no CO<sub>2</sub> emission standards. Euro 5 standards were introduced in Australia in 2016 for light vehicles. A separate NEPM exists for diesel engines, which are a significant source of nitrogen dioxide and PM pollution (Rivers, 2014). The Product Emissions Standards Act (2017) regulates emissions from certain products (e.g. non-road engines) by setting emission standards for them.

Fuel quality standards can vary. Leaded petrol has been phased out since 2002. Sulphur standards for petrol are less stringent than international best practices. Fuel standards, in general, need to be updated (IEA, 2018). The Australian Institute of Petroleum has set higher fuel quality standards, which can be adopted voluntarily. The Ministerial Forum on Vehicle Emissions is undertaking a review on tightening fuel quality and emission standards, among other measures (IEA, 2018).

Australia does not set industry-specific emission standards at the federal level. Environmental protection authorities in each state impose emission limits and set permit conditions within their jurisdiction (DEE, 2017). Industry-specific emission limits are



sometimes higher than those in Europe, the United States and China for similar facilities (Slezak, 2017). Any industry that emits over a certain level of air pollutants is required to seek approval before construction. Some jurisdictions, such as Victoria, have commissioned studies and put in place frameworks to reduce pollution in certain sectors or regions (Keyword, Emmerson and Hibbard, 2016).

### *Water management*

Federal responsibility for water policy and resources lies with the Department of Agriculture and Water Resources, which administers two key pieces of legislation: the 2007 Water Act (amended in 2014) and the 2005 Water Efficiency Labelling and Standards Act. The independent Murray-Darling Basin Authority (Box 2.2) was established under the Water Act to ensure sustainable management of water resources in the country's largest basin. In addition, the Water Act regulates water-related information provision managed by the Bureau of Meteorology. It also gives the Productivity Commission responsibility for assessing the effectiveness of Basin Plan implementation every five years (DAWR, 2017).

Water pollution is primarily regulated by states and territories, which establish their own water legislation. Municipalities oversee water supply and wastewater treatment, including operating and maintaining water and wastewater infrastructure, along with metering and billing. States and territories are responsible for monitoring water quality and use.

States do not always set effluent standards. In Western Australia, facilities likely to cause environmental harm are listed in the Environmental Protection Regulations and require environmental and operational permits that specify conditions to ensure compliance with the Environmental Protection Act (1986) and best practice for specific industries. Conditions may include regular audits, monitoring and reporting or compliance with a standard or code of practice (Sealey and Shepherd, 2017). South Australia sets discharge limits for declared activities, in this case covering only farming, in the 2015 Water Quality Policy. Discharges from septic tanks and vessels must also meet specific standards (South Australia, 2016).

States and territories have worked to improve water provision for the environment through water plans and by acquiring entitlements. However, additional progress should be made regarding water quality, habitat restoration and pest species management, which can be improved through better co-ordination and bottom-up integration of planning responsibilities to remove duplication (Productivity Commission, 2017).

### *Waste management*

Waste management is primarily the responsibility of state and territory governments, while the federal government issues strategies and policy frameworks, mostly focused on international obligations. The 2009 National Waste Policy includes provisions for reduction and sound disposal of waste, including hazardous waste, in line with the international agreements Australia has ratified.<sup>4</sup> Other national waste legislation includes two NEPMs: on waste movements across states and on packaging materials.

Local governments are in charge of planning waste management within their jurisdiction and carrying out waste reduction, collection, recycling, storage and treatment, as well as managing and operating landfills, providing and maintaining waste infrastructure and carrying out education and awareness programmes. State environmental regulators issue

detailed guidance to businesses and households on regulation and licensing of waste transport and managing different types of waste. All states have their own waste classification systems, so it is difficult to compare data across jurisdictions.

### *2.3.3. Environmental impact assessment*

In line with the OECD acquis, the EPBC Act requires any project likely to have a significant environmental impact on matters of national significance to undergo a federal EIA. Examples of recent assessments are infrastructure projects in the Great Barrier Reef, coal mine expansion projects, gas field development projects and large transport projects.

A project is first screened by DEE to confirm that it triggers a matter of national significance. If its potential environmental effects are expected to be significant, it is classified as a “controlled action”, making it subject to further assessment and approval. Screening criteria are specified in 2013 guidelines to help people assess whether their project may be referred to the minister. The judgement on the potential significance of impact remains at the minister’s discretion. Projects and actions are defined broadly in the EPBC Act, and the impact on climate change has not been systematically integrated.

If a project becomes a “controlled action”, the assessment can be simple or may require a full Environmental impact statement (EIS), a public environment report (PER) or a public inquiry. An EIS is an extensive report that undergoes several stages before it is submitted to the minister. Under a PER, the minister prepares guidelines for the developer, which prepares a draft PER that is made available for public comment. The public inquiry, rarely used, investigates the environmental and other impacts of the proposed project and is conducted by a commissioner appointed by the minister for the environment and energy. Following the assessment, the minister decides whether to approve the project and what constraints to assign to it. The approval takes the form of a development permit, which includes environmental conditions. DEE monitors approved projects to ensure they comply with the conditions (Australian Government, 2017a; DEE, 2017).

The EPBC Act authorises the Commonwealth to delegate assessment and approval functions to states and territories. This is done through bilateral agreements, which can be of two types: assessment or approval. A state that has entered into an assessment bilateral agreement is authorised to carry out environmental assessments, but the proposal requires federal approval, with the federal minister basing the decision on reports prepared at the state level. Under approval bilateral agreements, the Commonwealth delegates the responsibility for approving or rejecting the proposal to the subnational institution, with no further action required at the federal level. Approval bilateral agreements include monitoring and auditing provisions (Standing Committee on the Environment, 2014).

This system helps reduce the regulatory burden on businesses, increase the efficiency of decision making, enhance investment and maintain high environmental standards. The policy also aims at avoiding overlap between the federal and state/territory levels. The economic benefits of the policy have been quantified in regulatory savings to business at around AUD 426 million a year, resulting from reduced costs associated with delays of project approvals (Australian Government, 2017a).

For matters that fall outside the scope of the EPBC Act (such as landfills, contaminated sites and some energy infrastructure), each state or territory has its own system, with significant differences. In New South Wales, for example, EIA for projects with expected significant impact is carried out with wide public participation and monitoring of compliance with conditions: at the time of writing, a review of the EIA system was under

way, with the aim of developing new guidelines to better define construction and operating conditions and introduce assessment of cumulative impacts. In Victoria, EIA is not always binding. In most jurisdictions, EIA processes are administered by the planning authority, while in Western Australia the Environmental Protection Authority (EPA) is responsible for all stages of the assessment.

#### **2.3.4. Permitting**

Environmental permitting at the federal level is required for activities related to threatened, migratory or marine species in a Commonwealth area; activities in the Antarctic; those aimed at obtaining biological resources for research; activities in protected areas; disposal of substances at sea; wildlife trade; and import and export of hazardous waste (DEE, 2017). Permits covering specific environmental issues such as air, water, waste and noise are issued at the state/territory level.

Overall, Australia does not have a fully integrated permitting regime, although some states and territories have introduced forms of integrated permitting. South Australia's "environmental licence", administered by its EPA, sets conditions that cover multiple environmental impacts: water, waste, noise, air emissions and heat production. Emissions or discharges that exceed the limits set in the licence may require the development of an environment improvement programme, in which the polluter commits to comply with the licence conditions over a set period. Queensland's Department of Environment and Heritage Protection applies a consolidated permitting regime based on common conditions that cover noise, waste and water.

In general, however, even when forms of integrated permitting exist, the integration is mostly procedural and does not provide for holistic management of environmental impacts through the application of best available techniques (EPA South Australia, 2017a; Queensland Government, 2017). Victoria represents a positive exception in integrating environmental conditions: its EPA issues "work approvals" covering air and noise emissions and discharges to land and water, and it checks conformity with best design and operational practices. However, once the permit is issued, it is valid for the life of the project, which can be a problem if major alterations are carried out.

Several states and territories diversify their regulatory regimes according to the level of potential risk of regulated activities. In Queensland, simplified permits are issued for low-impact activities through an online portal in which permits are granted automatically if the applicant meets certain criteria and conditions (Australian Government, 2017a).

Some states and territories set permit fees based on risk factors. In 2015, New South Wales, for example, introduced differentiation of permitting requirements based on risk for all activities that require environmental permits under the 1997 Protection of the Environment Operations Act. The system allows the EPA to better target regulatory efforts towards high- and low-risk activities. The regulatory framework takes into account environmental performance when establishing annual permit fees, thus providing a financial incentive to improve performance (Australian Government, 2015). Queensland, South Australia and Victoria also have annual risk-based fees linked to permits. This is a good practice, carried out in other OECD countries, such as the United Kingdom, the United States, Japan and Finland, with permit fees differentiated depending on the complexity and risk of the permitted activity (OECD, 2009).

### 2.3.5. Land use planning

The Australian Constitution establishes that states and territories have principal responsibility for planning and land management, on which they work in co-operation with local governments. COAG deals with land use and development planning related to major infrastructure. In 2013, the federal government issued a framework on land use to resolve land conflicts and provide guidance to state, regional and local communities to sustainably manage their land. The framework sets out principles and technical solutions, which include environmental assessments of land use plans (SCER, 2013).

All states and territories have dedicated laws and departments to regulate land use. In New South Wales, the Environmental Planning and Assessment Act establishes state environmental planning policies and local environmental plans. Both instruments are developed through public consultation, in line with a recommendation of the 2007 EPR.

In South Australia, different planning instruments are designed to regulate specific areas and sectors, such as coastal zones, biodiversity and transport. Other states have a general planning policy and regional or territorial plans, which are binding instruments in development assessments and approvals. Most states have local plans, which provide detailed directions for land use management of local areas (Australian Government, 2017a).

In New South Wales, the most populous state in Australia, the two land planning instruments have some elements of SEA. Reliance on SEA elements is evident in current metropolitan and regional planning initiatives. For example, the Metropolitan Plan for Sydney to 2036 will be implemented through detailed subregional strategies, for which environmental assessment will be carried out. The impact on biodiversity, for example, will be evaluated through a conservation plan (Kelly, Jackson and Williams, 2012).

City Deals are agreements among federal, state and local governments to co-ordinate urban planning. The first City Deal was signed for Townsville, Queensland in December 2016. The government intends to establish City Deals in all state and territory capitals (Australian Government, 2017a).

Since the 2007 EPR recommendation to improve integration of Indigenous peoples in natural resource management programmes, much progress has been made. One hundred and twenty three Indigenous ranger groups, as well as some state/territory-funded groups, are engaged in patrolling, managing and monitoring aboriginal land areas. There is also a growing trend to engage Indigenous communities in management of areas that are not under Indigenous ownership, such as national parks and marine parks. Such initiatives show the government's commitment to and understanding of Indigenous rights (Metcalfe and Bui, 2017).

Five new management plans for 44 marine parks covering some 2.4 million km<sup>2</sup> were recently developed (Chapter 4) on the basis of extensive consultation with Indigenous people. Parks Australia applied the Indigenous Engagement Framework for the Preparation of Management Plans for Commonwealth Marine Reserves (2016). More specifically, Parks Australia engaged with native title representative bodies, negotiated collaborative agreements, and supported regional workshops, among other initiatives.

The National Landcare Program, established in 2014, invests in projects in partnership with Indigenous communities. The aim is to have them participate in land and sea management on projects related to biodiversity and sustainable agriculture. The programme delivers on the federal commitment to “close the gap on Indigenous

disadvantage” by providing opportunities for stronger participation in land use. The first phase of the programme, in 2014-18, entailed government investment of AUD 1 billion, with more to be allocated in the next phase (Australian Government, 2017b).

## 2.4. Compliance assurance

Compliance assurance covers the promotion, monitoring and enforcement of compliance, as well as liability for environmental damage. Australia has made progress in implementing a recommendation of the 2007 EPR to strengthen enforcement. In 2009, the federal environment department developed a policy, updated in 2010, outlining the objectives and guiding principles of the compliance and enforcement system. Annual compliance monitoring programmes inform the regulated community about compliance activities. The programmes are based on OECD best practices (OECD, 2014) and the Australian National Audit Office Better Practice Guide on Administering Regulation (ANAO, 2014). In addition, the 2016 regulatory maturity assessment made a range of recommendations on compliance and enforcement activities (Section 2.3).

### 2.4.1. Environmental inspections and compliance monitoring

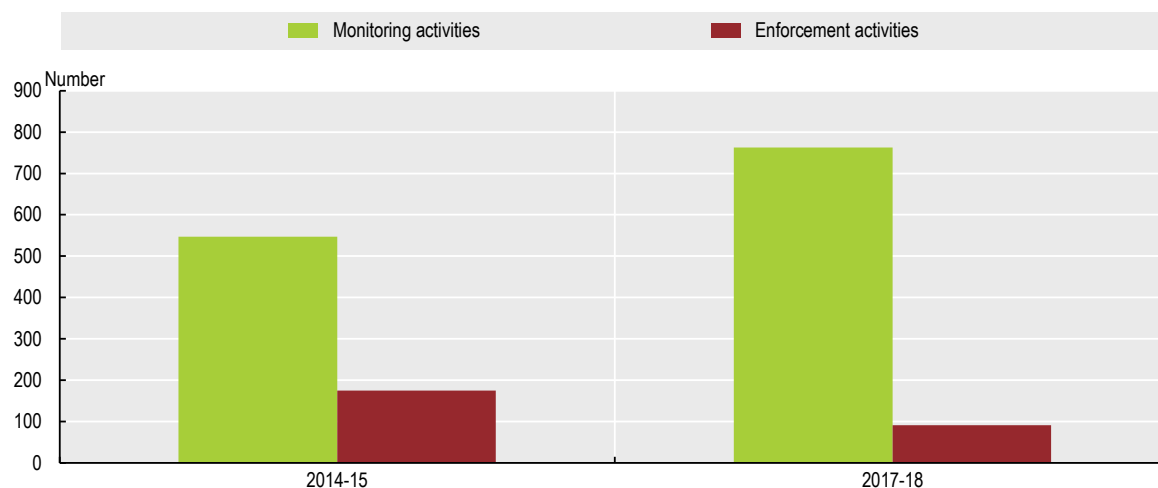
DEE is responsible for compliance monitoring of activities regulated under federal legislation. Compliance monitoring typically begins as soon as an activity is approved. It initially takes the form of analysis of audits (inspection of the activity’s records) and other relevant documentation, which can be followed by site inspections.

Environmental inspection planning is based on risk assessment. DEE uses a risk-based approach to plan environmental inspections at the national level. The tool ranks projects approved under the EPBC Act on the basis of the relative risk of environmental impacts and the likelihood that approval conditions will be met. The risk level is reflected in compliance monitoring plans. The Commonwealth government plans to increase the number of inspections undertaken jointly with state/territory authorities.

Investigations into serious suspected violations are also informed by a risk-based model that follows the practice of the Australian Crime Commission. Information collected during inspections and investigations is used to update the risk profile of the facility. Risk-based inspections are also conducted under laws related to sea dumping activities, fuel standards, and ozone protection and synthetic greenhouse gas management (DEE, 2016b; Australian Government, 2015).

States and territories are responsible for monitoring compliance with regulation under their jurisdiction. Some, like New South Wales, Victoria, and Western Australia, use risk-based targeting to inform environmental inspections, and all states/territories have policies and reports on compliance monitoring and enforcement activities. Victoria’s EPA uses a risk-based matrix to guide its audits and inspections (Australian Government, 2017a).

New South Wales has expanded its compliance monitoring activities by including reviews of compliance documentation. Latest reports show that enforcement activities have decreased since 2014-15, which may indicate improved compliance across the regulated community<sup>5</sup> (Figure 2.1; NSW Government, 2017).

**Figure 2.1. Compliance monitoring appears effective in New South Wales**

Source: NSW Government (2017), *Compliance reports*.

StatLink  <https://doi.org/10.1787/888933889666>

#### 2.4.2. Enforcement tools

The EPBC Act provides for administrative, civil and criminal enforcement mechanisms. Administrative measures are notices, written warnings, letters, on-the-spot small fines for minor offences, and suspension of environmental approvals. Civil enforcement covers a range of measures, including directed audits, remediation orders and other injunctions, and enforceable undertakings, as well as fines. Civil enforcement fines are typically higher than criminal ones. Criminal enforcement is the action of last resort in response to very serious cases or when administrative and civil enforcement has not secured compliance.

States and territories apply different enforcement tools. In New South Wales, for example, compliance with environmental protection legislation is typically enforced through criminal rather than civil prosecution. In addition, New South Wales and Victoria's EPAs developed a method to calculate economic benefits arising from the breach of an act. New South Wales is planning to release detailed guidelines on how to employ the tool, which is used in other jurisdictions as well. South Australia has applied it to the waste management sector, in which avoided lawful disposal costs can outweigh penalties available for breach of the relevant act. The EPA can ask the Environment Resources and Development Court to order a party that has contravened the act to pay back the equivalent of the economic benefit acquired by the breach, in addition to a penalty (EPA South Australia, 2017b). This is best practice, used by the US Environmental Protection Agency for over 30 years.

Criminal enforcement is undertaken by the authority responsible for administering the legislation in question at the federal, state or local level. State or local governments enforce planning and building laws, environmental agencies enforce environmental laws, and national park and wildlife agencies enforce protected area and threatened species laws. The police enforce certain laws, such as those against noise pollution or littering. Private citizens can also initiate prosecution. Under the EPBC Act, the minister or an interested person or organisation (they need to demonstrate affected interest) can petition the Federal Court for an injunction (Preston, 2011).

The MDBA is responsible for enforcing the Murray-Darling Basin Plan. A 2017 review noted that the authority did not carry out this task effectively, notably by not responding to allegations of breaches. The review recommended that each jurisdiction concerned should reassess its enforcement arrangements by clearly assigning responsibilities, encouraging a stronger compliance culture and committing to transparency. In addition, penalties should be aligned across the states. The review noted that full compliance could be achieved only by relying on sound data and water meters, which are not yet in use. It also emphasised enforcement resources, which need to be set in accordance with the Basin Plan requirements (MDBA, 2017). The 2018 Productivity Commission draft assessment also recommends that the MDBA clarify compliance obligations of states. The MDBA has raised 16 instances of potential non-compliance with the trading rules, ten of which remain unresolved (Productivity Commission, 2018).

Alternatives to prosecution to make polluters comply with environmental law include “enforceable undertakings”, which have been introduced at the federal level and in some states. In Victoria, enterprises may choose to accept an enforceable undertaking rather than go through prosecution, as the latter may result in increased time, legal costs, penalties and reputational damage (Thorn, 2011). Queensland has introduced enforceable undertakings as well. They can be suggested either by the environment department or voluntarily applied by a person or company in case of breaches of the environment protection act (Williamson Meianz, 2016). This good practice is also applied, sometimes in different forms, in several other OECD countries, including the United Kingdom and the United States.

### *2.4.3. Environmental liability*

Land contamination and degradation caused by the mining industry before the 1970s is a serious problem in Australia. Some 50 000 abandoned mines on public and private land need rehabilitation, but resources are insufficient (Metcalf and Bui, 2017). The issue of resources could be tackled by establishing a special fund to address sites that pose a risk to human health and the environment, a practice undertaken by some OECD countries, such as New Zealand and Switzerland.

The EPBC Act regulates liability in matters of national significance, which includes injury to threatened species. The Commonwealth can issue orders to prevent, mitigate and remediate damage to the environment. The act establishes that the federal minister may require financial security (bonds, guarantees, cash deposits) to be attached to an environmental approval to cover any liability for damage to the environment. Approvals, however, do not contain clear conditions for post-operation remediation, which often ends up unfunded. A 2017 Senate inquiry shows that mine decommissioning reform is needed. Some submissions propose that states implement rules on decommissioning within a national framework, which should include adequate and secure financial instruments and cover social and environmental risks (Senate Standing Committees on Environment and Communications, 2017).

In Queensland, the regulator imposes notices and orders, outlining the timetable for remediation and clean-up specifications. In addition, there are cost recovery notices that claim costs incurred by the state government in performing clean-ups, emergency actions or monitoring compliance. Similarly, in South Australia the 2009 Environment Protection Act contains provisions for clean-up orders and implementation reporting requirements (Thorn, 2011).

Liability insurance is available in every state on a voluntary basis. Most insurance programmes include some sort of coverage for environmental liabilities, but these are limited to third-party property damage and injury arising from sudden and accidental pollution. To cover gaps under existing insurance, environmental impairment liability insurance accounts for liability resulting from gradual or pre-existing pollution, and land and water clean-up costs, among other things. Premiums are based on the operator's risk of exposure to environmental liability. In addition, there are different types of policies available for specific activities, such as waste treatment services (Heyligers, 2014).

Past contamination is generally the responsibility of states and territories. Provisions for investigation and remediation of contaminated land can vary by jurisdiction. In most cases, both investigation and remediation are the responsibility of the polluter or the current site owner. Not all states and territories hold comprehensive registers of contaminated sites or have remediation standards. In Victoria, a recent independent inquiry recommended that the EPA develop a database of contaminated sites and related remediation requirements.

The Commonwealth has developed a NEPM to establish a nationally consistent approach to the assessment of site contamination. It includes general principles and a recommended process for carrying out the assessment. It also provides guidelines on investigating levels of contamination to soil, and water (NEPC, 2017). In addition, in August 2018 the COAG Energy Council endorsed seven principles for proper rehabilitation of mining sites. These aim at ensuring a level playing field with robust financial provisions to make sure that companies meet their closure and rehabilitation obligations (COAG Energy Council, 2018).

In Western Australia, the Department of Water and Environmental Regulation enforces the Contaminated Sites Act and Contaminated Sites Regulations of 2006. Its task includes classifying sites (in consultation with the Department of Health) and making information on contaminated sites available to the public. The act establishes a hierarchy of responsibility for remediation that is based on the polluter-pays principle. This means that in most cases the party that caused the contamination is responsible for implementing and paying for the assessment and any subsequent management, containment or clean-up. This includes meeting the costs of, and undertaking communication with, the affected community. Failure to report contamination can cost up to AUD 1.25 million in one-off fines, in addition to possible daily fines (Government of Western Australia, 2017).

#### ***2.4.4. Promotion of compliance and green practices***

Government promotion of compliance and green practices can reduce costs for businesses by allowing them to achieve and maintain compliance as efficiently as possible. It may also reduce regulatory costs by increasing the efficiency of compliance monitoring and enforcement. Providing advice and guidance is particularly effective when targeted at small and medium-sized enterprises (SMEs).

DEE has applied some innovative ways to improve compliance reporting among regulated entities through behavioural techniques. In 2014-15, it ran an experiment in which several activities with a permit to import equipment containing ozone-depleting substances and synthetic greenhouse gases were required to submit quarterly reports. The objective was to increase compliance reporting through reminder notifications. The notifications were messages reaffirming that reporting was mandatory and providing links and simple steps to follow. The result was a 26% increase in compliance among participating entities (OECD, 2017b).



In Victoria, written advice to businesses is regularly used to promote compliance. The EPA provides it when harm to the environment has not yet occurred or is minimal, or when breaches of approvals, permits or regulations have had no material impact, especially if the non-compliance can be corrected in the presence of an inspector (EPA Victoria, 2011). In addition, the EPA website has tips for improving resource efficiency. The guidance aims at improving the environmental performance of businesses while reducing production costs (EPA Victoria, 2017). Similarly, the New South Wales Office of Environment and Heritage regularly presents compliance-related issues at industry forums and organises workshops on managing contaminated land.

### *Voluntary agreements*

As the 2007 EPR recommended, some progress has been made in expanding voluntary agreements with industry, including on biodiversity (Chapter 4). The National Carbon Offset Standard, introduced in 2010, helps businesses and organisations measure, reduce, offset and report greenhouse gas emissions. It also provides a framework to credibly claim to be, or be certified as, carbon neutral. Membership is diverse and includes banks, airlines, legal firms, councils, property groups, SMEs and not-for-profit entities. The Packaging Covenant has successfully reduced the environmental impact of consumer packaging since 1999. There is a range of voluntary sustainability initiatives across agricultural industries. Many centre on supporting farmers in adoption of whole-of-business best management practices (Australian Government, 2017a). The Australian Capital Territory uses environmental protection agreements between the regulator and an activity manager. They can include any provision related to environmental management, such as conditions to progressively achieve higher standards (ACT Government, 2017).

A voluntary programme assists Indigenous communities in entering into agreements with the Commonwealth to protect land or sea areas under their administration. Indigenous Protected Areas (IPAs) are areas of land or sea owned or managed by Indigenous groups for biodiversity conservation through an agreement with the Commonwealth. IPAs are recognised as protected areas, and all are included in the National Reserve System. Most IPAs are listed in International Union for Conservation of Nature Categories V and VI (Chapter 1), promoting a balance between conservation and other sustainable uses to deliver social, cultural and economic benefits. IPAs are supported through multi-year funding agreements with the Commonwealth, which can include provisions for technical support (such as scientists and land managers), as well as employment, education and training opportunities for local Indigenous communities. As of 2017, 75 IPAs were established, covering around 70 million ha, or 45% of the National Reserve System and 9% of Australia's land area (PM&C, 2017).

### *Greening public procurement*

Little progress has been made at the federal level on the 2007 EPR recommendation to continue integrating environmental objectives into public procurement. The 2013 Public Governance, Performance and Accountability Act (PGPA Act) is the key law governing Commonwealth procurement, providing for Commonwealth Procurement Rules (CPRs) to be issued. CPRs require tenders to be evaluated based on relevant financial and non-financial costs and benefits, which include environmental sustainability characteristics of the proposed goods and services, such as energy efficiency and environmental impact (use of recycled products). Despite the relatively solid legislative framework, there appear to be inconsistent interpretation and implementation of procurement rules across Commonwealth departments and agencies. Providing clearer guidance for officials and

stronger accountability and transparency of environmental, social and economic provisions, as well as consistent performance information, would help ensure that all organisations and businesses follow best procurement practices (Joint Select Committee on Government Procurement, 2017).

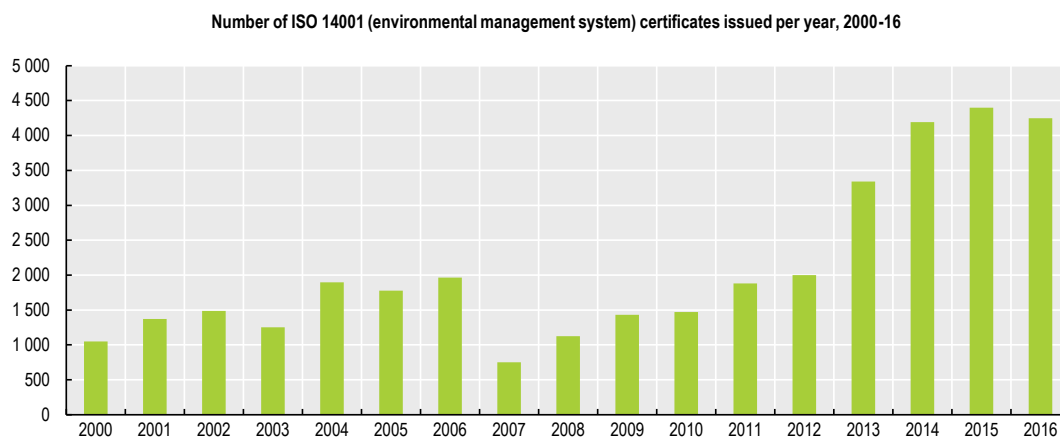
State governments actively apply green public procurement. In South Australia, government agencies must address sustainability criteria in public procurement of goods and services. There is a Sustainable Procurement Guideline and a sustainability impact analysis tool. The New South Wales 2014 Government Resource Efficiency Policy establishes minimum standards for buildings and appliances as well as a 6% minimum purchase obligation of renewable energy (NSW/OEH, 2014). The Northern Territory has not developed specific guidelines, but the local government association issued policy statements encouraging purchasing sustainably. Victoria's Municipal Association delivers procurement training for councils. It has contracts with providers across 32 key areas, including electricity (green power) and energy efficient street lighting. In addition, Victoria is developing a sustainable procurement framework. In Queensland, the Local Government Regulation (2012) requires all councils to adopt a procurement policy (Zeppel, 2014).

### *Environmental certifications and labels*

Standards Australia is an independent organisation that co-ordinates standardisation activities and works with government, industry and the community. The Good Environmental Choice Australia (GECA) ecolabel was the first to be recognised by the Green Building Council of Australia. It applies to buildings and building products through stringent auditing procedures and standards that show that the product is better for the environment, has a lower impact on human health and has been ethically fabricated. Many GECA-certified products are recognised abroad, in New Zealand and South Africa (GECA, 2017).

Adoption of environmental management systems by Australian businesses has been growing rapidly. The number of ISO 14001 certificates more than quadrupled over 2000-16, with a 2007-08 dip due to the economic crisis (Figure 2.2). Four states offer ISO 14001 certification incentives, such as permit fee reductions and longer permit validity periods (Crosthwaite, 2015). This is a welcome policy, rarely applied in other OECD countries. Australia could consider expanding this practice to all states.

Australia introduced labels showing energy and water consumption data on certain equipment and appliances to help consumers make informed purchasing decisions. Labelling programmes are mandated under the Greenhouse and Energy Minimum Standards Act (2012) and the Water Efficiency Labelling and Standards Act (2005). A review of the latter found that that it was effective in encouraging uptake of water-saving technologies (DEE, 2017).

**Figure 2.2. More businesses voluntarily adopt environmental management systems**

Source: ISO (2017), "ISO survey".

StatLink  <https://doi.org/10.1787/888933889685>

## 2.5. Promoting environmental democracy

Australia's combined score on the Environmental Democracy Index (EDI) on access to information, public participation and access to justice is equivalent to the world average. It shows Australia has incorporated some aspects of Principle 10 of the Aarhus Convention and the UNEP Bali Guidelines into federal environmental laws, but many aspects of public participation and access to information and justice do not conform to international best practice (World Resources Institute, 2015).

### 2.5.1. Public participation in environmental decision making

The EDI assessment shows that public participation in environmental decision making could be strengthened by providing broader opportunities for stakeholders. This would also improve compliance with the OECD Recommendation on Open Government,<sup>6</sup> which states that all stakeholders should be granted equal and fair opportunities to engage in all phases of the policy cycle. For example, non-government organisations (NGOs) and business associations assert that three bills aimed at regulating foreign interference in the electoral process (presented to Parliament in December 2017) would restrict public participation by constraining comments and advocacy on policies with a claim they represent electoral campaigning. Under existing legislation, organisations are not allowed to promote or oppose political parties, or donate to campaigns. One of the proposed bills, in particular, includes a new broad definition of political activity that would pose a risk of qualifying any comment on government policy, including participating in the drafting of legislation, as a political activity. Organisations have asked the government to conduct RISes on the bills.

A number of activities under the EPBC Act require public participation. For example, the public is involved in the EIA process, in the phase when the proposed project is referred to the minister to establish if it concerns a matter of national significance. However, if the minister determines that the project represents a "controlled action" and is thus subject to further assessment, the public is not involved in every type of possible assessment (Section 2.3.3). Public participation is assured when a full assessment is required, but not in simple assessments.

When RISes are conducted on draft policies and regulations, public consultation is required in the development phase. When final, RISes are made public. The Office of Best Practice Regulation ensures that public consultation is thorough and that the government takes comments received into consideration before reaching a decision (Section 2.3.1; World Resources Institute, 2015).

SEAs are also open to public participation. Authorities must consult with a wide array of stakeholders, including local communities, environmental experts, NGOs, landowners and industry representatives.

Indigenous participation in environmental decision making could be improved. Some states actively engage with Indigenous communities on their territory. New South Wales, for example, involves them in the management of national parks, regional forest agreements, land use and spatial planning. In early 2018, it developed a draft Aboriginal Cultural Heritage Bill to establish effective processes for conserving and managing Indigenous cultural heritage. Queensland's government attends and provides inputs to meetings of the Northern Basin Aboriginal Nations Board on water quality and management. It is also looking at opportunities to increase the participation of traditional owners in the quality assessment processes for water catchments (Australian Government, 2017a). Some innovative approaches on public participation are emerging at the state level (Box 2.3).

**Box 2.3. Queensland and South Australia have developed innovative approaches to assess and improve public participation**

Queensland recently undertook a survey to assess the effectiveness of public participation in EIA. It looked at how project proponents took on board comments received from the public and how this affected the quality of the EIA. This was done for five randomly selected case studies (greenfield and brownfield mining projects).

The results showed that 73% of proponents amended the EIS as a result of public participation, while the remainder indicated that the additional information requested was already present in the study or was beyond its scope. The conclusion was that public participation was generally effective in improving EIA quality.

In South Australia, the government established the Better Together programme in 2013 to improve the quality and frequency of stakeholder engagement. One notable initiative in the programme was a “jury” on the nuclear fuel cycle – a group of 50 randomly selected citizens who met together for two weeks to discuss the role of the nuclear industry in their state. Another initiative was to conduct a comprehensive review of open government measures to assess the situation and promote measures to improve direct access to decision making, reduce red tape and increase public bodies' accountability.

*Source:* Australian Government (2017), *Response to the Questionnaire for the OECD Environmental Performance Review of Australia*.

### **2.5.2. Access to environmental information**

The Freedom of Information Act (1982) recognises that information held by the government is a national resource. Therefore, citizens and residents have a right to get access to it. This right is reinforced by the Australian Information Commissioner Act (2010) and the Open Government Declaration (2010), which restate the government's

commitment to open government and better access to, and use of, government-held information.

The EPBC Act requires publication of all documents related to EIA and respective bilateral agreements. It covers decisions that the matter referred to the minister concerns an issue of national significance, the type of assessment chosen, draft and final assessments, notices of government intention to enter into bilateral agreements with states or territories, and draft agreements. Depending on the nature and purpose of the information, the act requires it to be published online, in newspapers and in the official journal, and to make it physically available at DEE and in public libraries.

State of the Environment (SoE) reporting is conducted at both the national and state/territory levels. The national report is released every five years and is a comprehensive publication that covers all main environmental issues. It follows the pressure-state-response framework for environmental assessment, which is in line with OECD best practice. It is available online on a dedicated web page that is easy to navigate. The 2016 edition includes information on the methodology and evidence used to make the assessment. Another key innovation is the interactive digital platform, which allows researchers and the public greater flexibility in access to information, including data underlying graphs and maps.

SoE reports are also prepared by states and territories. They differ in length and content and are often not harmonised with the national report. Australia could consider establishing common indicators and reporting mechanisms to ensure better coherence across the country. This would also help implement the 2007 EPR recommendation on harmonising the collection and reporting of key statistics across states and territories to facilitate reporting at the national level.

States and territories conduct monitoring and grant access to environmental information on specific issues within their jurisdiction. For example, the Australian Capital Territory government monitors air pollutants and reports on compliance with national standards and on pollutants' health effects. All the information is available on the environment and health department website (World Resources Institute, 2015).

Australia has established a National Environment Protection Measure for the National Pollutant Inventory (NPI NEPM) – a pollutant register reporting on 93 substances emitted by industrial facilities across Australia. Although Australia was one of the first OECD countries to develop a pollutant release and transfer register, its NPI is outdated and would need to be revised, including to reflect the OECD Recommendation on Pollutant Release and Transfer Registers<sup>7</sup> (Chapter 5).

### *2.5.3. Access to justice*

Under the EPBC Act, citizens and organisations have a right to bring environmental matters before courts. Common law principles require applicants to demonstrate special interest to claim legal standing. However, recent cases have moved to a broader interpretation of standing. Between 2000 and 2015, NGOs were granted legal standing by national courts in several environmental cases of public interest. Respondents (the minister and/or project proponent) seldom disputed these groups' standing. Box 2.4 presents examples of NGOs that successfully brought environmental cases to court.

#### Box 2.4. Environmental law cases show an increased role of NGOs

The Brown Mountain Logging case (2009) was brought to court by Environment East Gippsland Inc. (EEG), a conservation group, to restrain logging at Brown Mountain, 300 km east of Melbourne.

EEG established that proposed logging by VicForests, a government-owned corporation operated by the Victorian government, was unlawful. Standing was granted to EEG on the grounds that it represented the public interest and that the suit considered obligations imposed by state law on the company. The matter proceeded to trial, and the Supreme Court granted a permanent injunction restraining the logging.

The Kevin's Corner Coal Mine case (2009) concerned a mega-mine development proposal in Queensland. The mine was assessed under a bilateral agreement and approved by the Commonwealth minister in 2013. Objections were received by graziers around the mine area, as well as conservation groups worried about the impact on groundwater and climate change. At the time of writing, the application from the developer had not been withdrawn, but the development permit had not yet been issued.

*Source:* Environmental Law Australia (2017), *Case Studies*, <http://envlaw.com.au/category/case-studies>.

The EPBC Act provides two ways in which a person can seek review or reconsideration of an administrative decision: merit review and judicial review. A merit review considers all evidence about the merits of a decision and concludes whether a correct and preferable decision should be made, while a judicial review is a proceeding in which a court looks at the lawfulness of the decision-making process (EDONT, 2017).

Some states have dedicated environmental courts. Queensland has two: the Planning and Environmental Court and the Land Court. The former hears matters related to planning and to protection of the environment and coasts; the latter rules on matters related to natural resources and mining and has gained jurisdiction over what was previously dealt with by the Land and Resources Tribunal (Queensland Courts, 2017). In New South Wales, the Land and Environment Court, established in 1980, has first-instance jurisdiction over merit review, judicial review, civil and criminal prosecution about environmental matters, land planning, and mining. It also hears criminal appeals against convictions and sentences for environmental offences by local courts (NSW Land and Environment Court, 2017). In South Australia, the Environment, Resources and Development Court, established in 1993, is a specialist court dealing with disputes and enforcement of laws related to land management and natural resources (Courts SA, 2018).

The substantive and procedural legality of decisions that affect the environment and are subject to public participation, such as permits and approvals, can be challenged before the Federal Court or the Federal Circuit Court of Australia. Constitutional appeals are held before the High Court of Australia. Appeals against decisions to refuse or deny environmental information are regulated by the Freedom of Information Act, which stipulates an initial review by the information commissioner, followed by appeals to the Administrative Appeals Tribunal and the Federal Court. These mechanisms are sequential, which means if a person or an organisation is unsuccessful in challenging a decision to deny disclosure of environmental information before the information commissioner, they can appeal to the tribunal and then the Federal Court.

There are limited mechanisms to reduce financial barriers to justice on environmental matters. Environmental Defender's Offices, present in all states and territories, provide free legal assistance. In some states, such as South Australia, the office receives funding from the government. In general, however, support is discretionary and very limited, especially since the Commonwealth government stopped its financial support to the offices. Normally, civil society organisations rely on voluntary, pro-bono assistance from lawyers, scientists and other experts on an ad hoc basis. Australia should consider providing financial support to NGOs to help them make the case for environmental protection before the courts. New Zealand, for example, has an Environmental Legal Assistance Fund that covers the costs of legal representation for NGOs defending the public interest in environment-related cases (World Resources Institute, 2015).

#### *2.5.4. Environmental education*

Education in Australia is primarily the responsibility of states and territories. At the federal level, the Early Years Learning Framework and the Framework for School Age Care provide national guidance for educators to include teachings on environmental protection and socially responsible behaviour. The Australian Capital Territory, Tasmania and Victoria approved similar frameworks in their jurisdictions.

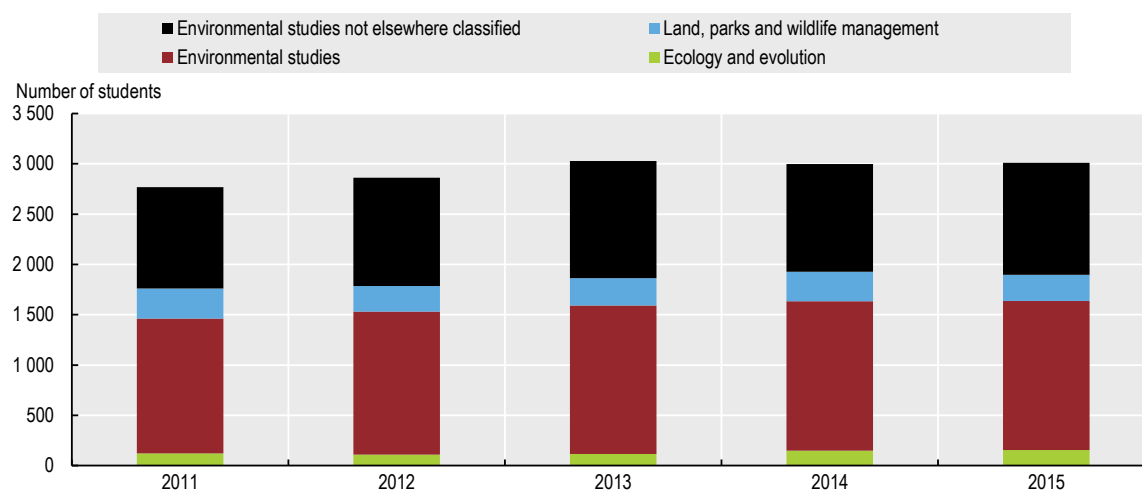
Most states and territories support environmental education in schools with funding coming from federal, state and local governments, NGOs and businesses. New South Wales has an environmental policy for public schools from kindergarten to the end of primary school. Sustainability is one of the three mandatory cross-curriculum priorities. In addition, there are environmental education centres throughout the state. Detailed online guidance lays out steps to apply for grants and participate in competitions. In South Australia, environmental education is enshrined in curricula from early years until middle school. South Australia's environmental agency, supports school and preschool education programmes to provide students with opportunities to improve the local environment. It has even developed core indicators to track schools' progress in environmental education. Victoria's Department of Environment, Land, Water and Planning provides grants to schools through specialised funds. All the information is available online, and the department informs stakeholders through emails and newsletters. In Western Australia, many schools have successfully implemented the Waste Wise programme from primary schools to colleges, aimed at applying the 3R (reduce, reuse, recycle) policy. Case studies published online allow schools to share their best practices both in teaching and carrying out waste reduction initiatives.

New South Wales has put in place a Connected Communities programme, implemented by the Department of Education and Communities in 15 schools to improve aboriginal students' education outcomes. Key features include increasing cultural awareness on the part of school staff, introducing teachings on sustainability as well as aboriginal language and culture, establishing personalised learning plans and mentoring, and partnering with the state's aboriginal community and universities.

In the vocational education and training sector, 4 400 nationally recognised qualifications were awarded in environment-related programmes in 2014. All levels were covered, from the first certificate to advanced diplomas in industry sectors such as land management, forestry, environmental management and sustainability, and water operations. This is important for matching skills with demand on the labour market (Chapter 3). As the 2007 EPR recommended, there are ongoing reviews to ensure that such programmes develop the competences and skills required by industry, including with regard to environmental

regulation and policies. The overall number of students that completed environmental-related education grew by 8% over 2011-15, with most students choosing environmental studies (Australian Government, 2017a; Figure 2.3). In New South Wales, special schools train judges of the Land and Environment Court.

**Figure 2.3. More students are choosing environment-related university programmes**



Source: Australian Government (2017), VOCSTATS (database).

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## Notes

<sup>1</sup> An ecological community is a naturally occurring group of native plants, animals and other organisms that interact in a unique habitat. Its structure, composition and distribution are determined by environmental factors such as soil type, position in the landscape, altitude, climate and water availability (DEE, 2017).

<sup>2</sup> The Sydney Harbour Federation Trust, created by the federal government, is responsible for planning and management of Sydney Harbour sites, including islands, bays and animal sanctuaries.

<sup>3</sup> Recommendation of the Council on Effective Public Investment Across Levels of Government, OECD/LEGAL/0402.

<sup>4</sup> Australia is party to, among other agreements, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1992), the Stockholm Convention on Persistent Organic Pollutants (2004), the Rotterdam Convention on the Prior Informed Consent Procedure for Hazardous Chemicals and Pesticides in International Trade (2004), the Montreal Protocol on Substances that Deplete the Ozone Layer (1989), and the Minamata Convention on Mercury (2013).

<sup>5</sup> Monitoring activities include inspections, investigations and review of documentation. Enforcement activities include orders, penalties and prosecutions.

<sup>6</sup> Recommendation of the Council on Open Government, OECD/LEGAL/0438.

<sup>7</sup> Recommendation of the Council on Establishing and Implementing Pollutant Release and Transfer Registers (PRTRs), OECD/LEGAL/0440.



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