



Law Council
OF AUSTRALIA

Survey on the Interim Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

Independent Reviewer, Professor Graeme Samuel AC

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Law Society of New South Wales and its Australian Environment & Planning Law Group of the Legal Practice Section in the preparation of this submission.

Introduction

1. The Law Council of Australia welcomes the opportunity to provide formal comment on the Interim Report of the Review of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*.
2. While the Law Council is providing input to the EPBC Act Review process through the Consultative Group that has been convened by Professor Graeme Samuel AC, the Law Council also provides its response to the specific questions set out below. These responses have been prepared by the Australian Environment and Planning Law Group of the Legal Practice Section, with additional input from the Law Council's constituent bodies, particularly the Law Society of New South Wales.

Part A. National level protection and conservation of the environment and iconic places

3. The environment and our iconic places are in decline and under increasing threat. The EPBC Act does not enable the Commonwealth to effectively protect and conserve nationally important environmental matters. It is not fit for current or future environmental challenges.

Do you agree with the following key reform directions proposed by the Review?

4. Legally enforceable National Environmental Standards should be the foundation for effective regulation. The Standards should focus on outcomes for matters of national environmental significance, and the fundamentally important processes for sound and efficient decision-making. Standards will provide certainty—in terms of the environmental outcomes the community can expect from the law, and the legal obligations of proponents.
 - ***Strongly agree. The Law Council also notes that if National Environmental Standards are to be the foundation for regulation moving forward, then the utmost care must be taken to ensure that the Standards be drafted clearly – to ensure that proponents and the public can understand how they are applied – and, for those Standards focused on Matters of National Environmental Significance themselves, drafted to reflect and deliver upon the objectives of the EPBC Act and to reverse the current downward trajectory. Further, the Standards must be given legislative effect so they are publicly enforceable and not just enforceable by the Commonwealth Government in its oversight role in the devolved decision making model.***
5. The goal of the EPBC Act should be to deliver ecologically sustainable development. The Act should require that National Environmental Standards are set and decisions are made in a way that ensures it is achieved. The Act should support a focus on protecting (avoiding impact), conserving (minimising impact) and restoring the environment.
 - ***Strongly agree***
6. A greater focus on adaptive planning is required to deliver environmental outcomes. Regional plans should be developed that support the management of cumulative threats and set clear rules to manage competing land uses at the right scale.

- **Strongly agree**
7. Strategic national plans should be developed for big-ticket, nationally pervasive issues such as the management of feral animals or adaptation of the environment to climate change. These plans should guide the national response and enable action and investment by all parties to be effectively targeted and efficient.
- **Strongly agree**

Part B. Indigenous culture and heritage

8. The Review considers that the EPBC Act is not fulfilling its objectives as they relate to the role of Indigenous Australians in protecting and conserving biodiversity, working in partnership with and promoting the respectful use of their knowledge.

Do you agree with the following key reform directions proposed by the Review?

9. The National Environmental Standards should include specific requirements relating to best practice Indigenous engagement, to enable Indigenous views and knowledge to be incorporated into regulatory processes.

- **Strongly agree**

10. The national level settings for Indigenous cultural heritage protection need comprehensive review. This should explicitly consider the role of the EPBC Act in providing protections. It should also consider how comprehensive national level protections are given effect, including how they interact with the development assessment and approval process of the Act.

- **Strongly agree. The Law Council also notes the current Parliamentary Inquiry into Indigenous Cultural Heritage protection and suggests that the submissions to and report from that Inquiry should also be considered going forward.**

11. Indigenous knowledge and western science should be considered on an equal footing in the provision of formal advice to the Environment Minister. The proposed Science and Information Committee should be responsible for ensuring advice incorporates the culturally appropriate use of Indigenous knowledge.

- **Strongly agree**

12. Where aligned with their aspirations, transition to Traditional Owners having more responsibility for decision-making in jointly managed parks. For this to be successful in the long term there is a need to build capacity and capability, so that joint-boards can make decisions that effectively manage risks and discharge responsibilities.

- **Strongly agree**

13. Improved outcomes for Indigenous Australians will be achieved by enabling co-design and policy implementation.

- **Strongly agree**

14. The role of the Indigenous Advisory Committee should be substantially recast as the Indigenous Knowledge and Engagement Committee, whose role is to provide leadership in the co-design of reforms and advise the Environment Minister on the development and application of the National Environmental Standard for Indigenous engagement.

- **Strongly agree**

Part C. Legislative complexity

15. The EPBC Act is complex. Complex legislation makes it difficult, time-consuming and expensive for people to understand their legal rights and obligations. This leads to confusion and inconsistent decision-making, creating unnecessary regulatory burden for business, and restricts access to justice.

Do you agree with the following key reform directions proposed by the Review?

16. In the short-term, legislative amendments to the EPBC Act are required to address known inconsistencies, gaps, and conflicts in the Act.

- **Strongly agree**

17. In the longer-term, a comprehensive redrafting of the Act (or related Acts) is required. This should be done following the development of the key reforms proposed by this Review. This sequencing will ensure that legislation is developed in a way that supports the desired approach, rather than inadvertently hindering it.

- ***Strongly agree. The Law Council stresses the importance of ensuring that all phases of reform process need to be completed if proper change is to be achieved. Implementation of “interim” National Environmental Standards as a short term measure (Phase 1 of reform set out in the Interim Report) without a commitment to Phase 2 and Phase 3 will potentially leave the environment in a worse position than it is today.***

18. Redrafting could include consideration of dividing the Act—such as creating separate pieces of legislation for its key functional areas.

- **Agree**

Part D. Efficiency - removing duplication

19. The EPBC Act is duplicative, inefficient and costly for the environment, business and the community.

20. The interaction between Commonwealth and state and territory laws and regulations leads to duplication. Despite efforts to streamline, significant overlap remains.

21. Past attempts to devolve decision-making have been unsuccessful due to lack of defined outcomes and concerns that decisions would be inconsistent with the national interest.

Do you agree with the following key reform directions proposed by the Review to remove duplication between the EPBC Act and state and territory systems?

22. Devolve decisions to other jurisdictions, where they demonstrate National Environmental Standards can be met.
- **Agree. However, the Law Council again stresses the importance of two fundamental mechanisms to ensure Standards are met. First, the Commonwealth must maintain a strong and active oversight role to ensure that those other jurisdictions continue to meet National Environmental Standards on an ongoing basis and that if a jurisdiction is not meeting those Standards that the Commonwealth takes action to suspend the devolved decision making model in that jurisdiction until the failures are addressed. The failure of the Regional Forest Agreement model to protect threatened species and ecosystems, as demonstrated by the recent decision of the Federal Court in *Friends of Leadbeater's Possum Inc v Vic Forests (No 4)* [2020] FCA 704, illustrates the Law Council's concern in this regard. Secondly, the obligation to meet National Environmental Standards must be enshrined in legislation so that the obligations are publicly enforceable.**
23. To base devolution on sound accreditation, quality assurance and compliance, escalation (including step-in capability) and regular review.
- **Strongly agree. The Law Council notes that in order for these functions to be maintained by the Commonwealth, then adequate human and financial resourcing must be provided on an ongoing basis.**

Part E. Efficiency - streamlining the EPBC Act

24. The reform directions proposed (National Environmental Standards, regional plans, information and data, modern regulatory systems) provide confidence for devolution, and will improve interoperability between the Commonwealth and jurisdictions.
25. Even with greater devolution, the Commonwealth is likely to have an ongoing role in directly assessing and approving some developments. Therefore, it is also important to address inefficiencies in Commonwealth-led project assessment and approval processes.
26. There is duplication with other Commonwealth regulations, and some activities are effectively regulated by others. The interplay between regulations is often more onerous than it needs to be.
27. The laws for permitting wildlife trade exceed international obligations, are inflexible and unnecessarily burdensome.

Do you agree with the following key reform directions proposed by the Review to further streamline the EPBC Act?

28. Assessment pathways should be rationalised and implemented with clear guidance, modern systems and appropriate cost recovery. Small investments can dramatically reduce cost and uncertainty and improve decision-making.

- **Strongly agree**
29. These, and other reform directions proposed (National Environmental Standards, regional plans, information and data, modern regulatory systems) create opportunities for significant streamlining and efficiency, including where low risk actions will not require approval.
- **Agree**
30. Streamline provisions for permitting of wildlife trade and interactions with other environmental frameworks.
- **Not applicable – The Law Council expresses no view on this reform proposal but notes the comments in the Interim Report about ensuring that EPBC Act requirements and arrangements should align with current CITES requirements.**

Part F. Trust in the EPBC Act

31. The community and industry do not trust the EPBC Act and the regulatory system that underpins its implementation. A dominant theme in the 30,000 contributions received by the Review is that many in the community do not trust the Act to deliver for the environment.
32. The avenues for the community to substantively engage in decision-making are limited. Poor transparency further erodes trust.
33. The lack of trust is evident in high community interest in development applications, high-profile public campaigns, legal challenges to EPBC Act decisions, and a growing rate of both Freedom of Information (**FOI**) applications and requests for statements of reasons.
34. The EPBC Act is not trusted by industry. They generally view it as cumbersome, pointing to duplication, slow decision-making, and legal challenges being used as a tool to delay projects and drive up costs for business (often called ‘lawfare’).

Do you agree with the following key reform directions proposed by the Review?

35. Improve community participation in decision-making processes, and the transparency of both the information used and the reasons for decisions.
- ***Strongly agree. This includes transparency in the development of National Environmental Standards and the assumptions and data underpinning the modelling used in decision making processes.***
36. Provide confidence that decision-makers have access to the best available environmental, cultural, social and economic information.
- ***Strongly agree. The Law Council notes, and is supportive of, the proposals in the Interim Report in relation to data and information. In any development assessment, it is important that adequate baseline studies have been carried out and that information is made available so that assessment of the cumulative impact of a development can be***

undertaken. Assessment of environmental impact on a standalone basis has failed.

37. Amend the settings for legal review. While retaining extended standing, provide for limited merits review for development approvals. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

- **Agree. To be clear, the Law Council does not support the any amendment of settings for legal review that would remove the current rights of review that exist in the Act, including the right to seek judicial review. For example, the Minister must have regard to the impact on a listed threatened species. Failing to do so undermines the system of protection. It is wrong to characterize these types of challenges to process as “technical” or frivolous. It is fundamental to ensure that the public has the right to ensure that government adheres to its legal obligations. Ensuring that the decision making process itself is more transparent is the better way to address concerns about litigation on matters of process that ultimately do change the outcome for the environment.**

Part G. Data, information and systems

38. Decision-makers, proponents and the community do not have access to the best available data, information and science. This results in suboptimal decision-making, inefficiency and additional cost for business, and poor transparency to the community.

Do you agree with the following key reform directions proposed by the Review?

39. A national ‘supply chain’ of information is required so that the right information is delivered at the right time to those who need it. This supply chain should be an easily accessible ‘single source of truth’ on which the public, proponents and governments can rely.

- **Strongly agree although the Law Council notes that delivery of such a supply chain is likely to involve cost – which will need to be funded.**

40. To deliver an efficient supply chain, a clear strategy is needed so that each investment made contributes to building and improving the system over time.

- **Agree**

41. A custodian for the national environmental information supply chain is needed. The Commonwealth should clearly assign responsibility for national level leadership and coordination. Adequate resources should be provided to develop the systems and capability that is needed to deliver the evidence base for Australia’s national system of environmental management.

- **Agree**

42. A National Environmental Standard for information and data should set clear requirements for the provision of data and information in a way that facilitates transparency and sharing. The standard should apply to all sources of data and information, including information collected by proponents.

- **Strongly agree. Clear requirements for data should include clarity around assumptions and, where appropriate, the use of standardized assumptions in like models.**

43. To apply granular standards to decision-making, Government needs the capability to model the environment, including the probability of outcomes from proposals. To do this well, investment is required to improve knowledge of how ecosystems operate and develop the capability to model them. This requires a complete overhaul of existing systems to enable improved information to be captured and incorporated into decision-making.

- **Agree**

Part H. Monitoring, evaluation and reporting

44. There is no effective framework to support a comprehensive, data-based evaluation of the EPBC Act, its effectiveness in achieving intended outcomes and the efficiency of implementation activities.

45. The EPBC Act includes some requirements for monitoring and reporting on activities and outcomes. However, these do not span the operation of the Act. Activities that are done lack a clear overall purpose, coordination and intent. There is a focus on 'bare minimum' administrative reporting, rather than genuine monitoring and evaluation of outcomes to learn lessons, adapt and improve.

46. The national State of the Environment (**SoE**) report is the established mechanism that seeks to 'tell the national story' on Australia's system of environmental management. Although it provides an important point-in-time overview, it is an amalgam of insights and information, and does not generate a consistent data series across reports. It lacks a clear purpose and intent. There is no feedback loop, and as a nation no requirement to stop, review and where necessary change course.

47. Combined, these issues make it extremely difficult, if not impossible, to assess the relative effectiveness of the levers governments individually and collectively pull to manage Australia's environment.

Do you agree with the following key reform directions proposed by the Review?

48. A coherent framework to monitor and evaluate the effectiveness of the EPBC Act in achieving its outcomes and the efficiency of its implementation should be developed. The framework must be backed by a commitment to its implementation.

- **Strongly agree**

49. A revamp of national SoE reporting should incorporate trend analysis and address future outlooks to provide the foundation for national leadership on the environment.

- **Strongly agree**

50. National environmental economic accounts will be a useful tool for tracking Australia's progress to achieve ecologically sustainable development (**ESD**). Efforts to finalise the development of these accounts should be accelerated, so they can be a core input to SoE reporting.

- **Strongly agree. The Law Council notes that principles of environmental accounting need to be adopted in developing these accounts.**

Part I. Restoration

51. To deliver ecologically sustainable development, the EPBC Act must encourage restoration. Given the state of decline of Australia's environment, restoration is required to enable future development to be sustainable. Available habitat needs to grow to be able to support both development and a healthy environment. The current settings of the Act do not support effective or efficient restoration.
52. Environmental offsets are poorly designed and implemented, delivering an overall net loss for the environment.
53. The stated intent of the offsets policy, to only be used once proponents have exhausted all reasonable options to avoid or mitigate impacts on Matters of National Environmental Significance, is not occurring. In practice, offsets have become the default negotiating position, and a normal condition of approval, rather than the exception.
54. Offsets do not currently offset the impact of development. Proponents are allowed to clear or otherwise impact habitat by purchasing and improving other land with the same habitat and protecting it from future development. It's generally not clearly established that the area set aside for the offset is at risk from future development, and overall there is a net loss of habitat.

Do you agree with the following key reform directions proposed by the Review?

55. The EPBC Act should require offsets to be considered only when options to avoid and then mitigate impacts have been actively considered, and demonstrably exhausted.
 - **Strongly agree. The Law Council notes that there must be a greater emphasis on the provision of an offset being the last resort for the anticipated impact on the relevant matter of national environmental significance. Offsets should not be justified on the basis of providing some other community benefit or non-environmental reason and not adequately addressing the anticipated impact.**
56. The EPBC Act should require offsets, where they are applied, to deliver protection and restoration that genuinely offsets the impacts of the development, avoiding a net loss of habitat.
 - **Strongly agree**
57. The EPBC Act should incentivise investment in restoration, by requiring decision-makers to accept robust restoration offsets, and create the market mechanisms to underpin the supply of restoration offsets.
 - **Strongly agree**

58. There are opportunities for government to explore policy mechanisms to accelerate environmental restoration including those to leverage the carbon market, which already delivers restoration, to deliver improved biodiversity in suitable habitat types.
- **Agree. The Law Council notes that in some areas the provision of adequate offsets will become impossible moving forward and so restoration of the environment will be the only option if a proposed development is to be capable of approval. Any leveraging of the carbon market to accommodate biodiversity objectives should not be done at the expense of the robustness of the current scheme for the creation of Australian Carbon Credit Units.**
59. There are opportunities for government to explore policy mechanisms to accelerate environmental restoration including those to co-invest with the philanthropic and private sectors, including funding innovation to bring down the cost of environmental restoration, growing the habitat available to support healthy systems.
- **Agree**

Part J. Compliance, enforcement and assurance

60. Monitoring, compliance, enforcement and assurance under the EPBC Act is ineffective. There has been limited activity to enforce the Act over the period of 20-years it has been in effect, and the transparency of what has been done is limited.
61. The culture of monitoring, compliance, enforcement and assurance is not forceful. This erodes public trust in the ability of the law to deliver environmental outcomes.
62. There is broad consensus from the regulated community and the experts that advise them that it is not easy to comply with the EPBC Act. Similarly, for the Department, the complexity of the Act impedes compliance, enforcement and assurance.
63. The monitoring, compliance, enforcement and assurance powers in the EPBC Act are outdated. Powers are restrictive and can only be applied in a piecemeal way across different parts of the Act due to the way it is constructed.
64. Monitoring, compliance, enforcement and assurance activities are significantly under-resourced.

Do you agree with the following key reform directions proposed by the Review?

65. Establish a modern, independent regulator responsible for monitoring, compliance, enforcement and assurance to be a strong cop on the beat.
- **Strongly agree. The Law Council notes that establishment of a “strong cop on the beat” requires the Commonwealth to commit to adequate funding and retention of suitably qualified staff.**
66. Increase the transparency of activities.
- **Strongly agree. The Law Council notes that greater transparency in the decision making process should be matched by transparency of the monitoring and enforcement process.**

67. Effectively draw on Standards, simplified law, and better systems to increase compliance and simplify enforcement and assurance.

- **Agree**

68. Shift focus toward assurance of devolved decision-making and monitoring, compliance and enforcement of national strategic plans, regional plans, offsets and regeneration.

- **Agree. However, the Law Council notes that the assurance role requires adequate funding and retention of suitably qualified staff at the Commonwealth level.**

69. Provide the regulator with a full suite of modern regulatory monitoring, compliance, enforcement and assurance tools and adequate funding.

- **Strongly agree**

Part K. Proposed reform pathway

70. The EPBC Act is ineffective and reform is long overdue. Past attempts to do so have been largely unsuccessful. Commitment to a clear pathway for reform is required.

71. Immediate steps to start reform should be taken, focusing on:

- reducing points of clear duplication, inconsistencies, gaps and conflicts in the EPBC Act;
- improving the settings for devolved decision-making, including issuing Interim National Environmental Standards to provide confidence that outcomes will be delivered; and
- building the foundations to provide a solid base for longer-term reform.

72. Similarly, in the short-term, the conversation to deliver complex reforms and the mechanisms to underpin continuous improvement should commence so that policy development and implementation plans can be finalised, and resourcing commitments made.

73. Once these steps are taken, reform should focus on comprehensively fixing the problems with the EPBC Act, with this phase of reform focused on:

- developing a full suite of National Environmental Standards, refined from the lessons learned from implementing the Interim Standards, and armed with improved data and information;
- redrafting the Act to simplify, clarify and strengthen it; and
- embedding changes to governance arrangements.

Do you broadly agree with the phased approach proposed by the Review?

- **Agree**

Part L. Broader views

74. The Review would like to hear the views of stakeholders on the Interim Report and the key reform directions proposed. What has been missed? How could the proposed reform directions be improved? Are there fundamental shortcomings that would require the Reviewer to rethink?

What has been missed?

75. The Law Council has not identified any major omissions in the Interim Report.

How could the proposed reform directions be improved?

76. Given the proposed National Environmental Standards are intended to be the foundation of a new Commonwealth approach, the Interim Report does not provide sufficient detail about:

- the scope of the Standards and what they are intended to encompass,
- how the Standards would work with or replace existing assessment and decision making tools that have been developed under the EPBC Act,
- how the Standards would be applied to regional planning and assessment processes, as well as project level assessments;
- how the Standards are to be developed and what level of transparency and stakeholder engagement (including Indigenous peoples and the broader community) is required;
- how and when Standards will be reviewed, including the incorporation of new scientific data or information and how climate change and adaptation issues should be addressed; and
- how the Standards should be enforced by the Commonwealth in the context of the devolution of EPBC Act approval processes to the State and Territories, and if the Commonwealth does not take action to enforce the Standards, how the Standards will be able to be enforced by the public.

77. The Final Report of the Review would benefit from a more detailed consideration of these issues and the inclusion of one or more diagrams to illustrate how the Standards would link into the existing architecture of the EPBC Act (ie during Phase 1 of the reform process) and then evolve with the major redrafting and restructuring of the EPBC Act contemplated by Phase 3.

Are there fundamental shortcomings that would require the Reviewer to rethink?

78. The Law Council has not identified any fundamental shortcomings in the Interim Report.