THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Margery Nicoll
Acting Chief Executive Officer
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By email: mike.clayton@lawcouncil.asn.au

Dear Ms Nicoll,

Independent *Review of the Environment Protection and Biodiversity Conservation Act 1999* (Cth)

The Law Society of NSW appreciates the opportunity to provide its comments to the Law Council of Australia ("LCA") on the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act"). The Law Society's Environmental Planning and Development and Indigenous Issues Committees contributed to this submission.

Introduction

We acknowledge the comments in the Discussion Paper that factors such as changing land use, invasive pests and weeds, a changing climate, more frequent extreme weather events and fires continue to put pressure on Australia's environment and heritage.[1] The EPBC Act needs revision and amendment to satisfactorily respond to these changes. It is vital that Australia's primary national environmental law is well placed to deliver better outcomes for Australia's environment, by addressing matters of national environmental significance and providing a nationally co-ordinated approach to protecting the environment and meeting Australia's international commitments.

A substantial majority of the recommendations made in the first statutory review of the EPBC Act conducted by Dr Allan Hawke in 2009 ('Hawke Review"), have not been implemented, despite many being accepted in whole or in part by the government of the day. Many of these recommendations remain relevant today. It is therefore important, in our view, to concentrate on reforms that are capable of producing tangible environmental benefits and working towards meaningful reforms that can be put into effect without delay.

[1] Discussion Paper, 2.

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Our approach

The Discussion Paper states that with broad terms of reference, a key early step in the review process will be to identify those areas of reform that will deliver the greatest benefit for the environment, business and the community, while maintaining strong environmental standards.[2] Our comments focus on some areas that we have identified as fundamental to that process.

How could the principles of ESD be better reflected in the EPBC Act?

Ecologically sustainable development ("ESD")

Section 3(1)(b) of the EPBC Act provides that one of the objects of the Act is to: "promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources".

Section 3A of the EPBC Act sets out the principles of ESD as follows:

a. decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
b. if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation [being the precautionary principle];
c. the principle of intergenerational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
d. the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making;
e. improved valuation, pricing and incentive mechanisms should be promoted.

<u>Ecologically sustainable development principles</u>

Achieving ESD requires the effective integration of short and long-term environmental, economic, social, and equitable considerations, including through the principles of ESD in public sector decision-making.

In 2006, Chief Judge Preston of the NSW Land and Environment Court considered the meaning of "ecologically sustainable development" in *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133. His Honour relied on the 1987 United Nations Commission on Environment and Development definition being "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". His Honour continued his definition by saying:

> "[m]ore particularly, ecologically sustainable development involves a cluster of elements or principles. Six of these are worth highlighting[3]:
>
> First, from the very name itself comes the principle of sustainable use - the aim of exploiting natural resources in a manner which is "sustainable" or "prudent" or "rational" or "wise" or "appropriate" … The concept of sustainability applies not merely to development but to the environment. …
>
> Secondly, ecologically sustainable development requires the effective integration of economic and environmental considerations in the decision making process … This is the principle of integration it was the philosophical underpinning of the report Our Common Future. That report recognised that the ecologically harmful cycle caused

[2] Discussion Paper, 5.
[3] *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 [109].

by economic development without regard to and at the cost of the environment could only be broken by integrating environmental concerns with economic goals.…

The principle has been refined in recent times to add social development to economic development and environmental protection. …

Thirdly, there is the precautionary principle. There are numerous formulations of the precautionary principle but the most widely employed formulation adopted in Australia is that stated in s 6(2)(a) of the Protection of the Environment Administration Act 1991 (NSW). This provides:

"…If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequence of various options".

…

Fourthly, there are principles of equity. There is a need for intergenerational equity - the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations …

There is also a need for intra-generational equity. This involves considerations of equity within the present generation, such as use of natural resources by one nation-state (or sector or class within a nation-state) needing to take account of the needs of other nation-states (or sectors or classes within a nation-state) … It involves people within the present generation having equal rights to benefit from the exploitation of resources and from the enjoyment of a clean and healthy environment …

Fifthly, there is the principle that conservation of biological diversity and ecological integrity should be a fundamental consideration …

Sixthly, ecologically sustainable development involves the internalization of environmental costs into decision-making for economic and other development plans, programmes and projects likely to affect the environment. This is the principle of the internalisation of environmental costs. The principle requires accounting for both the short-term and the long-term external environmental costs. …

These principles do not exhaustively describe the full ambit of the concept of ecologically sustainable development, but they do afford guidance in most situations. These principles, if adequately implemented, may ultimately realise a paradigm shift from a world in which the development of the environment takes place without regard to environmental consequences, to one where a culture of sustainability extends to institutions, private development interests, communities and individuals

Chief Judge Preston's description of the principles above has been quoted and relied on in the majority of cases concerning sustainable development since 2006. It has been applied in the

Victorian Supreme Court,[4] cited or approved in the New South Wales Court of Appeal[5] and in the Supreme Court of South Australia[6], the Supreme Court of Queensland[7] and the State Administrative Tribunal of Western Australia.[8] It has also been cited in the Federal Court of Australia. [9]

Section 3A of the EPBC Act incorporates these principles at subsections (a), (b) and (d) and as far as intergenerational equity is concerned at subsection (c).

We support the existing principles of ESD and suggest the principles could be expanded to take into account the developments referred to below.

Reconsideration of the principles of ESD

The environment and human rights

The definition of ESD in the EPBC Act, which commenced in 2000, fails to take account of developments in the global dimension of ESD concepts and the environmental impact of actions and policies. The global dimension of ESD and the interdependence of human rights and the environment is reflected in the work done by the UN Special Rapporteur on Human Rights and the Environment, culminating in the "Framework principles on Human Rights and the Environment" released in 2018. The first two principles state[10]:

- States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.
- States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.

The protection and promotion of human rights is included in paragraph 3 of the 2030 Agenda for Sustainable Development and Sustainable Development Goals. The Law Society suggests that the current review of the EPBC Act represents an opportunity to consider whether to incorporate adopted frameworks including the UN Sustainable Development 2030 Development Agenda, particularly the principles for "life on land" (Goal 15), "climate change" (Goal 13), "life below water" (Goal 14), "affordable and clean energy" (Goal 7) and "partnerships to achieve the goals" (Goal 17).

Should the objects of the EPBC Act be more specific?

In our view, the language of the objects should be clearer and more prescriptive. We consider that the objects, as currently drafted, fail to deliver the requisite protection required to meet one

[4] *MyEnvironment Inc v VicForests* [2012] VSC 91; *Rozen v Macedon Ranges Shire Council* [2010] VSC 583; *Environment East Gippsland Inc v VicForests* [2010] VSC 335; *Hoskin v Greater Bendigo City Council* [2015] VSCA 350.
[5] *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102; *Minister for Planning v Walker* [2008] NSWCA 224; *Davis v Gosford Council* [2014] NSWCA 343.
[6] *Rowe and Lindner (No 2)* [2007] SASC 189.
[7] *New Acland Coal Pty Ltd v Paul Anthony Smith, Member for the Land Court of Queensland* (2018) 230 LGERA 88.
[8] *Moore River Company Pty Ltd v Western Australian Planning Commission* [2007] WASAT 98; *WA Developments Pty Ltd v Western Australian Planning Commission* [2008] WASAT 260.
[9] *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042; *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCA 330; *Wyong-Gosford Progressive Community Radio Inc v Australian Communications Media Authority* [2006] FCA 1691.
[10] Special Rapporteur on Human Rights and the Environment, *Framework Principles on Human Rights and the Environment* (Report, 2018) 5-6, Principles 1-2. Available at: <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx>.

of the principles guiding the review[11], as the Commonwealth is merely to "promote", "provide for" and "assist in" matters specified within the objects of the EPBC.[12] Stronger language such as "requiring", "must" or "shall" is essential. In *Forestry Tasmania v Brown*[13] Marshall J[14] stated:

> An agreement to 'protect' means exactly what it says. It is not an agreement to attempt to protect, or to consider the possibility of protecting, a threatened species.

There must also be provisions to ensure that the objects are effectively put into operation. Ministers and agencies must be required to exercise their powers and functions under the Act to achieve its objects. There should be a greater focus on and effort to promote transparency of decision-making under the EPBC Act with the development of measurable outcomes to demonstrate progress.

Matters of National Environmental Significance ("MNES")

The Law Society supports retaining and strengthening the protections for the existing matters of national environmental significance set out in sections 12 to 24 of the EPBC Act. These matters comprise:

- world heritage
- national heritage
- wetlands of international importance (listed under the Ramsar Convention)
- listed threatened species and communities
- listed migratory species
- protection of the environment from nuclear actions
- marine environment
- The Great Barrier Reef Marine Park
- protection of water resources from coal seam gas development and large coal mining development.

Integration of climate change mitigation considerations

Some stakeholders have suggested adding 'significant greenhouse gas emissions' as a MNES to trigger the protections of the EPBC Act.[15]

We note that this issue is contentious and suggest that there needs to be careful consideration of the interaction of any EPBC Act trigger with existing policy tools.
We do consider, however, that consideration of climate change mitigation must be more clearly delineated in the implementation of proposals and its impacts on MNES under the Act and supporting policy.

[11] See the Terms of Reference: 3) The review will be guided by the principles of: "a. protecting Australia's unique environment through strong, clear and focused protections".
[12] *Environment Protection and Biodiversity Conservation Act 1999 (*Cth*)* s.3.
[13] *Forestry Tasmania v Brown [2007] FCAFC 186; see also Brown v Forestry Tasmania (No 4*) [2006] FCA 1729.
[14] Ibid at [17]
[15] See the EDO submission above (n 15) and Department of the Environment, Water, Heritage and the Arts, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, October 2009) 21-22 [154]-[156].

High level concerns

The Act's effectiveness

To determine where reform is most urgently required, it is instructive to examine how effectively the Act is currently operating. The most recent State of the Environment Report (2016) confirms that many elements of Australia's environment are in decline. For example, in relation to biodiversity, the report concluded:

> Australia's biodiversity is under increased threat and has, overall, continued to decline. All levels of Australian government have enacted legislation to protect biodiversity... However, many species and communities suffer from the cumulative impacts of multiple pressures. Most jurisdictions consider the status of threatened species to be poor and the trend to be declining…[16]

A similar prognosis is forecast for other environmental indicators. The 2016 State of the Environment Report outlines six key barriers to effective national management of the environment:

- lack of an overarching national policy that establishes a clear vision for the protection and sustainable management of Australia's environment to the year 2050;
- poor collaboration and coordination of policies, decisions and management arrangements across sectors and between managers (public and private);
- a lack of follow-though from policy to action;
- inadequacy of data and long-term monitoring;
- insufficient resources for environmental management and restoration; and
- inadequate understanding and capacity to identify and measure cumulative impacts.[17]

The EPBC Act will need to be amended with a focus on meeting these challenges. This once in a decade review is an opportunity to ensure that the EPBC Act is fit for the future.

Priorities for reform

<u>General</u>

While amending some parts of the Act may have more impact than others, an evidence-based comprehensive review of the strengths and weaknesses of the whole Act is required to ensure effective provisions are retained and resourced, and ineffective provisions are replaced.

We consider legislation needs both incentive mechanisms as well as regulatory controls. We suggest that to achieve the best result applies the appropriate tool or mechanism best fitted for delivering the desired outcome.

<u>Implementation of relevant agreements between the Commonwealth, State and Territories</u>

The EPBC Act Review provides a timely opportunity to consider the effectiveness and efficiency of bilateral agreements between the Commonwealth, State and Territories.

Given that approval bilateral agreements may declare that environmental actions approved by States do not require the Commonwealth Government's approval, pursuant to Part 9 of the Act, we urge caution be taken with policy which avoids Commonwealth oversight under the EPBC

[16] Ian Cresswell and Helen Murphy, *Australia State of Environment 2016: Biodiversity* (Report, 2016) v.
[17] William Jackson et al, *Australia State of the Environment 2016: Overview* (Report, 2016) vii.

Act.[18] If, as a matter of agreement, the States take over responsibility for approvals, we would support the Commonwealth retaining "step-in" rights, such as in cases where the State would otherwise be proponent and approver.

We also question the effectiveness of approval bilateral agreements in achieving the objects of the Act, particularly the obligation to protect biodiversity under international treaties and agreements in s3(1)(d), and suggest consideration be given to the effect of approval bilateral agreements on the supervisory function of the Commonwealth under the EPBC Act.

Cumulative impacts

We consider that cumulative impacts are not adequately considered under the current Act. We are concerned with cumulative impact assessments and note that these issues were raised in the Hawke Review,[19] which identified problems regarding the extent of Ministerial discretion and the limited scope under the Act to review or appeal the Minister's decision.

The Hawke Review interim report[20] emphasises the limited requirements at law for consideration of cumulative effects upon the environment, despite the wide discretion to consider these impacts throughout the assessment and approval processes throughout the Act. While individual approvals might be appropriate, without assessment of cumulative impacts, the result may still be an unsustainable outcome.

Minister's discretion

We support the concerns raised in the LCA's submission on Australia's Faunal Extinction Crisis,[21] about the Minister's wide discretionary powers and identified lack of oversight to ensure ministerial decisions are effectively implemented. More specifically, we endorse the LCA's position for legislation to 'demand particular outcomes',[22] rather than just requiring an assessment process that can be overlooked by the Minister in exercising their discretion under the Act.

The State of the Environment Report in 2016[23] confirmed that the decline in biodiversity is largely caused by the cumulative impact of environmental pressures. The Report highlighted the inadequacy of obligations imposed on the Minister to consider this consequence when making decisions under the Act. The Act must include prescriptive obligations on the Minister to consider cumulative impacts holistically, by considering adverse environmental impacts and the interaction between approvals of actions, developments and activities that negatively impact biodiversity conservation.

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[18] Chis McGrath, 'A Critical Evaluation of the One-Stop Shop Policy', *Environment and Climate Change Law Library* (2014). Available at: <https://www.nela.org.au/NELA/Documents/A_Critical_Evaluation_of_the_One- Stop_Shop_Policy.pdf>.

[19] Department of the Environment, Water, Heritage and the Arts, *Independent Review of the Environmental Protection and Biodiversity Conservation Act 1999: Interim Report* (2009) 323, accessed at <https://www.environment.gov.au/system/files/resources/5d70283b-3777-442e-b395-b0a22ba1b273/files/20-review.pdf>.

[20] Ibid 86.

[21] Law Council of Australia, Australia's Faunal Extinction Crisis, Submission 121 to the Parliamentary Senate Standing Committees on Environment and Communications. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=c188a66e-40f7-4d8d-8d83-f5335c38aa8b&subId=659964>.

[22] Senate Standing Committee on Environment and Communications, *Australia's Faunal Extinction Crisis: Interim Report* [3.15]. Available at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalextinction/Interim%20report/c03>.

[23] Ian Cresswell and Helen Murphy, *Australia State of Environment 2016: Biodiversity* (Report, 2016).

Strategic assessments could be utilised to complement cumulative impact assessments, by taking into consideration a landscape level approach[24] to reflect the size and nature of the strategic assessment area, rather than limiting the assessment to a site level.[25]

Standing provision

The Law Society strongly supports the maintenance of third-party judicial review provisions and extended standing under ss 475 and 487 of the EPBC Act. The 2009 EPBC Act Review concluded that s 487 had operated effectively, had not opened the floodgates to litigation and should be maintained.[26]

Since the repeal of s 478 of the EPBC Act in 2006, an applicant may be exposed to the payment of potential damages when seeking an interim or interlocutory injunction. This further reduces the likelihood of vexatious litigation or the opening of the floodgates as courts may order an applicant to give an undertaking for damages (and, therefore, compensate the person who may have been adversely affected by the operation of the interim injunction at the conclusion of the judicial review proceedings).[27]

In addition, public interest litigation plays a vital role in the effective administration of the Act. Many of the public interest cases,[28] initiated since the commencement of the Act, illustrate the importance of public interest litigation in providing access to justice for individuals and organisations engaged in environmental protection. Public interest litigation also plays a role in ensuring ministerial accountability, noting that statistically, a very low percentage of matters submitted to the Department of the Environment and Energy for assessment of its impact on MNES are refused or deemed unacceptable by the Minister.[29]

The Law Society maintains that the EPBC Act should continue to provide opportunities for interested members of the public to fully engage in the protection of the environment. Accordingly, the Law Society supports the continuation of extended standing for judicial review under the EPBC Act, noting that existing standing provisions are limited, in any event to judicial review (as opposed to merits review).

Review mechanism

The Law Society considers that judicial review (without the opportunity for merits review) may be adequate where there has been a high level of transparency and consultation in the process leading to the decision. However, the assessment approach decision does not currently provide for any public participation in the decision-making process. As a result, there is a lack of transparency and trust in the decision-making process.

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[24] Department of Sustainability, Environment, Water, Population and Communities, 'A guide to undertaking strategic assessments (2013) 7. Available at: <https://www.environment.gov.au/system/files/resources/0896f6de-4473-4c0e-bb2a-1ceeae34867c/files/strategic-assessment-guide_1.pdf>.

[25] Ibid 26.

[26] Australian Government, Department of Environment Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Report, 2009), Chapter 15, [15.81]-[15.84].

[27] The Hawke Review recommended that a provision be inserted in the Act like the repealed s 478, to the effect that the Federal Court is not to require an applicant to give an undertaking as to damages as a condition of granting an interim injunction: Rec 51. The review also recommended that the Act be amended to prohibit the ordering of security for costs in public interest proceedings: Rec 52.

[28] See for example, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3; *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 99; *Booth v Yardley & Anor* [2008] QPEC 100; *Booth v Bosworth* [2001] 114 FCR 39.

[29] The Department of the Environment and Energy, *Annual Report 2018-19* (Report, 30 June 2019) appendix 4A: eleven referrals have been refused as opposed to 1049 approved.

We suggest that there is scope for providing for merits review, in addition to judicial review at least in circumstances where it is in the public interest to do so.

Compliance and enforcement culture

The existing governance model of the EPBC Act involves the Commonwealth Minister for the Environment as the primary decision maker. Some stakeholders have proposed structural changes in governance. It has been suggested that a separate, statutory authority could become the decision maker under the Act or that a new advisory body could be established to inform decisions on approvals. A different model could be the creation of a single statutory office holder to determine environmental approvals.[30]

We acknowledge that the level of funding will be crucial in determining the governance model adopted. We consider that, subject to funding considerations, the suggestion of a separate statutory authority has merit. It would be important to ensure that any independent authority is constituted by persons appointed based on demonstrated professional expertise and without political affiliations.

Engagement of indigenous people and knowledge

The suggestion that Indigenous Australians and their knowledge should have a greater role in the Act is strongly endorsed. The recent catastrophic bushfire season has underscored the importance of incorporating Indigenous land management knowledge into mainstream environmental stewardship practices, in respect of fire, water and harvesting management.

In our view, this requires a legislative framework that facilitates and promotes a whole-of-process change in approach. The legislation might, for example, require that Indigenous people with the relevant expertise are members of relevant advisory or steering committees. Indigenous advice and knowledge should be embedded throughout the process, such that the integration of Indigenous people, knowledge and practices issue is part of "business as usual" rather than a retrofitted afterthought.

This requires a commitment by government to consult comprehensively to, at the first instance, identify and connect with existing expertise. Government must further commit to working in partnership with Indigenous people, to ensure that Indigenous views and decision-making genuinely informs the wider policy and practice. This might be legislatively implemented through, for example, requiring the agreement of Indigenous peoples in the relevant areas before actions are taken that affect their lands. Further, bilateral agreements with states allow states to conduct certain types of activities without having to obtain EPBC approval from the Commonwealth in all instances. In our view, the latest version of the bilateral agreement between the Commonwealth and NSW from 2015 has broad and poorly defined measures for consulting with Indigenous peoples at clause 8.1.[31] Should this review result in reforms to how the Commonwealth engages with and incorporates Indigenous people and knowledge, bilateral agreements should be amended to ensure that the processes followed by Commonwealth and states are consistent.

Ensuring that legislation actively incorporates Indigenous people and knowledge within governing arrangements should be considered a fundamental part of the process. Flowing on from this should be an approach to programming and funding that allows for effective

[30] Discussion Paper, 31.
[31] Bilateral agreement made under section 45 of the *Environment Protection and Biodiversity Act 1999* (Cth) relating to environmental assessment between the Commonwealth of Australia and the State of New South Wales, available here: https://www.environment.gov.au/system/files/pages/43badfb2-b8be-4a10-a5b9-feab2d38a5d2/files/nsw-bilateral-agreement-assessment-2015.pdf

implementation of Indigenous knowledge. This requires knowledge sharing and skill and capacity building for land management staff, as well as for community education. In our view, there should be periodic regional workshops to both build and share land management knowledge and expertise as a change in cultural approach should be supported at all levels. Consideration might be given to including some aspect of Indigenous land management knowledge in every relevant employee's key performance indicators. Finally, there must be sufficient resourcing to support implementation efforts, including to support an increase in the capacity of management programs to operate throughout the year.

Principles to guide future reform

We note concerns that the EPBC Act is complex, very lengthy and cumbersome. However, the suggestion in the Discussion Paper[32] that the Act could be substantially simplified through greater use of subordinate legislation, rules and guidelines should be viewed with caution. It is important that the Act itself, as Australia's primary national environmental law, provides a robust and workable framework to deliver better outcomes for Australia's environment - by addressing matters of national environmental significance and providing a nationally co-ordinated approach to managing our environment and meeting our international commitments. Regulations and guidelines are necessary to support the framework established in the Act but these can be amended more easily and with less scrutiny.

Making decisions "simpler" is problematic; administrative complexity in processes is not the only reason for delay. Increased development pressure means increased environmental impact which means decisions are harder to make. The aim should be for better regulation based on better decisions, which are themselves based on better scientific data, taking account of overarching policy and regional and cumulative impact assessment.

If you have any questions in relation to this letter, please contact Liza Booth, Principal Policy Lawyer on (02) 9926 0202 or by email: liza.booth@lawsociety.com.au.

Yours sincerely,

Richard Harvey
President

[32] Ibid 25.