



THE LAW SOCIETY
OF NEW SOUTH WALES

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11 August 2020

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: alex.kershaw@lawcouncil.asn.au

Dear Mr Tidball,

Interim Report of the 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 Interim Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”). The Law Society’s Environmental Planning and Development Committee contributed to this submission.

General comments

The Interim Report acknowledges the fundamental inadequacies of the EPBC Act. The Report concludes that the EPBC Act is not fit to meet current or future environmental challenges. It does not position the Commonwealth to protect the environment and Australia’s iconic places in the national interest.¹

We welcome the Interim Report and endorse the findings of the Review. In particular, we recognise that regulators are under-resourced, offsets are inadequate for providing the required habitat restoration, duplication between State / Territory legislation is hindering the objectives of the EPBC Act and that the EPBC Act has failed to fulfil its obligations as they relate to Indigenous Australians and their cultural heritage.

We support the development of National Environmental Standards. We also support the suggested improvements to the administration of the EPBC Act to enable it to be better utilised to protect and enhance Australia’s unique environment.

¹ Professor Graeme Samuel AC, Interim Report of the Independent *Review of the Environment Protection and Biodiversity Conservation Act 1999* (Cth), June 2020, iii available at: < <https://epbcactreview.environment.gov.au/resources/interim-report/foreword> >

We acknowledge that the level of funding will be crucial in determining the governance model adopted. We support, subject to funding considerations, the establishment of a separate regulator responsible for monitoring, compliance, enforcement and assurance.

We consider that additional and ongoing funding is urgently required to deal with the challenges identified in the Interim Report. Legislative reform, guided by the Review, alone, is not sufficient to meet the challenge of protecting the environment and Australia's iconic places in the national interest.

Survey questions

Our views in relation to some of the survey questions are highlighted in 'Attachment A' to this letter.

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

ATTACHMENT A

EPBC Act – Survey on the Interim Report

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

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?

1. 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**

2. 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**

3. 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**

4. 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

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?

5. 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**

6. 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**

Part C. Legislative complexity

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?

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

- **Strongly agree**

12. 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**

Part D. Efficiency - removing duplication

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

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

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?

14. Devolve decisions to other jurisdictions, where they demonstrate National Environmental Standards can be met.

- **Agree**

15. To base devolution on sound accreditation, quality assurance and compliance, escalation (including step-in capability) and regular review.

- **Strongly agree**

Part E. Efficiency - streamlining the EPBC Act

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.

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.

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.

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?

16. 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**

17. 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**

Part F. Trust in the EPBC Act

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.

The avenues for the community to substantively engage in decision-making are limited. Poor transparency further erodes trust.

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.

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?

19. Improve community participation in decision-making processes, and the transparency of both the information used and the reasons for decisions.

- **Strongly agree**

20. Provide confidence that decision-makers have access to the best available environmental, cultural, social and economic information.

- **Strongly agree**

Part H. Monitoring, evaluation and reporting

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.

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.

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.

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?

27. 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**

28. 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**

29. 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**

Part I. Restoration

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.

Environmental offsets are poorly designed and implemented, delivering an overall net loss for the environment.

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.

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?

30. 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**

31. 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**

32. 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**

33. 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.

- **Strongly agree**

34. 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

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.

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.

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. Likewise for the Department, the complexity of the Act impedes compliance, enforcement and assurance.

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.

Monitoring, compliance, enforcement and assurance activities are significantly under-resourced.

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

35. Establish a modern, independent regulator responsible for monitoring, compliance, enforcement and assurance to be a strong cop on the beat.

- **Strongly agree**

36. Increase the transparency of activities.

- **Strongly agree**

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

- **Strongly agree**

39. 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

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.

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
- building the foundations to provide a solid base for longer-term reform.

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.

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
- embedding changes to governance arrangements.

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

- **Agree**