

COVER SHEET FOR SUBMISSIONS

OVERVIEW

The independent review of the *Environment Protection and Conservation Act 1999* (EPBC Act) welcomes your submissions in response to the discussion paper.

SUBMISSIONS INSTRUCTIONS

- Submissions are due by **5pm (AEST) Friday 17 April 2020**. Please contact the EPBC Act Review Secretariat regarding late submissions.
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- All submissions that include this cover sheet will be considered by the review. You are required to answer Question 1, all other questions are optional.
- Submissions should be sent to:
 - Email: epbcreview@environment.gov.au
 - Post: GPO Box 787
Canberra ACT 2601
Australia

PUBLISHING SUBMISSIONS AND PRIVACY (REQUIRED)

Unless you indicate that your contribution is confidential, or the review considers that your contribution is offensive, potentially defamatory or includes irrelevant or personal information, your contribution will be published on the review website along with your name or organisation. Your submission may be referred to, or quoted from in review reports.

Before making a submission, please read the information on how your privacy will be protected and how the information that you provide will be treated. The Department of Environment and Energy's Privacy Policy (www.environment.gov.au/privacy-policy) contains information about how to access or correct your personal information or make a complaint about a breach of the Australian Privacy Principles.

The review is committed to treating confidential information responsibly and in accordance with the law. In some circumstances, the review may be legally required to produce confidential information. Any request made under the Freedom of Information Act 1982 for access to a submission marked confidential will be determined in accordance with that Act. Please read the [Submissions Guidelines](#) on the review website for more information on how your submission will be handled.

1. Do you give permission for your submission to be published? **(Required)**

Yes – with my name and organisation (if applicable)

Yes – anonymously

No – please keep my submission confidential

ABOUT YOU (OPTIONAL)

First name Areeb

Last name Rizvi

2. Are you making this submission as an individual or on behalf of an organisation?

Individual Organisation

Organisation name: Victorian Environmental Law Students Network

3. If an organisation, what is its scope?

Local State National International

4. What sector best represents you or your organisation?

Agriculture Environment Legal Services Transport

Academia and Research Financial and Professional Services Manufacturing Other

Please describe:

Construction Forestry and Fishing Mining **Student run environmental group**

Education Government Scientific and Technical Services

Electricity, Gas, Water and Waste Services Health Care and Social Services Tourism

5. Where are you from?

ACT NSW NT QLD TAS

VIC SA WA Outside Australia

6. Do you identify as Aboriginal or Torres Strait Islander?

We collect this information so that we can observe levels of engagement with Aboriginal and Torres Strait Islander people and organisations during the review, and to assess whether we need to alter our processes to encourage greater engagement.

The Reviewer of the EPBC Act, the Expert Panel and staff from the Department of the Environment and Energy working on the review will be permitted access to this information. Information about individual participants' Indigenous origin status will not be disclosed or published for any reason. However, we may publish the final total numbers or proportions of Indigenous engagement in the review.

You can seek access to our records of this information, and ask us to correct the information we hold about you, at any time. For more information, see the Privacy Policy of the Department of the Environment and Energy (www.environment.gov.au/privacy-policy).

Yes No Prefer not to disclose

7. What are your key areas of interest in the EPBC Act?

- | | | | |
|---|--|----------------------------------|--|
| <input checked="" type="checkbox"/> The objects of the Act | Threatened species | International obligations | <input checked="" type="checkbox"/> Indigenous Australians |
| <input type="checkbox"/> Heritage | <input checked="" type="checkbox"/> Matters of National Environmental Significance | Environmental Impact Assessments | <input type="checkbox"/> Great Barrier Reef |
| <input checked="" type="checkbox"/> Cumulative impacts | <input checked="" type="checkbox"/> Climate Change | Compliance and enforcement | <input checked="" type="checkbox"/> Decision making |
| <input checked="" type="checkbox"/> Public participation in decision making | Biodiversity | Conservation | <input type="checkbox"/> Wildlife trade |
| <input type="checkbox"/> Commonwealth National parks | <input type="checkbox"/> Nuclear | <input type="checkbox"/> Water | |

8. Can the EPBC Act Review Secretariat contact you about your submission?

Yes If Yes, please enter your email: **president@velsn.org**
 No

LIABILITY

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The review acknowledges the Traditional Owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

Contact EPBC Act Review at: GPO Box 787 Canberra ACT 2601 | Telephone 1800 803 772 |
Web www.epbcactreview.environment.gov.au



Submission to the Independent review of the Environment Protection and Biodiversity Conservation Act 1999.

Recommendations to the Independent review in response to the ideas and questions set out in the discussion paper.

Victorian Environmental Law Student Network

17 April 2020

We acknowledge the Traditional Custodians of the land on which we work and live, and recognise their continuing connection to land, water and community. This submission was developed and written on the stolen lands of the Wurundjeri people of the Kulin Nations. Their Sovereignty was never ceded.

Victorian Environmental Law Students Network

Submission to the Independent review of the Environment Protection and Biodiversity Conservation Act 1999

17 April 2020

Professor Graeme Samuel AC

Independent Reviewer

Dear Professor Samuel and Expert Panel members,

The Victorian Environmental Law Student Network (VELSN) would like to make this submission in response to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Established in January 2016, VELSN comprises of passionate law school students, interested in the many diverse areas of environmental law. From our base at Melbourne Law School our aim is to connect students with interests in environmental issues and law the from whilst also providing a platform for action on such issues.

OUR CONCERNS

The Victorian Environmental Law Student Network (VELSN) was founded in January 2016. We aim to build connections between law students who are interested in and passionate about environmental and planning law, animal law, sustainability and business law, international environmental law and other related areas of law. We aim to provide a platform for the discussion of present and developing issues in the above areas of law, and connect students interested in those areas.

Australia is in the midst of a pollution and extinction crisis. This summer's catastrophic fires saw many lose their homes and lives, and an estimated one billion of our wildlife dead. We saw what the future looks like in our country without urgent action.

Strong environmental laws are critical for the ongoing protection and restoration of Australia's environment. They are what protect our precious water, land, native species and air from overuse, overdevelopment and pollution.

Currently, the EPBC Act is not providing anywhere near adequate protection of Australia's environment, and is not able to cope with increased challenges we face with species extinction and climate extinction.

The review of the *Environment Protection and Biodiversity Conservation Act 1999* should take into consideration the following:

- The Act should be improved to make sure it can deliver a healthy and resilient environment, reverse the extinction trend and reduce Australia's greenhouse gas emissions. The Act must consider climate change as a factor in decision-making in order to do this.
- The Act must protect our native forests and vegetation. It must reduce the amount of discretion that decision-makers have and instead require decisions that protect our land, water, air and native species.
- The Act should be expanded to include the power to make binding national standards for air, water and plastic pollutions, to have a greenhouse gas trigger, to guard against invasive species, and to prevent land clearing.
- There should be increased legal recognition of Indigenous knowledge and rights in the Act, and requirements for the government to seek Indigenous involvement in decision-making.
- The Act should be administered by trusted and independent institutions – a National Environmental Protection Agency and a National Sustainability Commission to set evidence-based standards and targets, assess the impacts of projects and enforce the law.
- There should be a central role for communities in decision making, including merits review of government decisions, rights to citizen enforcement of breaches, citizen suits when government is failing to fulfil its duties under the Act, and protection from costs orders for public interest cases.

Our submission to the review provides recommendations on what changes can realistically be implemented and aims to assist the Reviewer better understand the needs of the community in regard to environmental action. We address several key areas that the EPBC Act can improve upon through its second review.

Overview of Recommendations

- I. The expanding of “New Matters of National Environmental Significance” (in response to questions 1 and 4 of the Discussion Paper) (page 12);
- II. Providing a modernised framework for “Ecologically Sustainable Development (ESD)” (in response to question 2) (page 16);
- III. The achievement of both Environmental Protection or Restoration? (in response to question 11) (page 18);
- IV. Areas of Concern with the Current Framework (in response to questions 5, 6 and 7) (page 20);
- V. Proposed Solutions, Priorities for Reform and Approaches to Delivering Better Outcomes (in response to questions 9, 20, 21 and 22) (page 25);
- VI. Indigenous Engagement (in response to question 19) (page 30).

With a new generation of environment laws and independent organisations to govern them, the places and wildlife we love can thrive.

Yours Sincerely,

Areeb Rizvi

President

VELSN

(On Behalf of VELSN members and Executive Committee)

“Just fifty years ago, we finally ventured to the Moon. Since then, the human population has more than doubled”.¹ For the very first time, we literally surpassed our planetary boundaries and escaped the **natural checks and balances**. Now, we must replace those natural checks and balances (or natural laws) with new human-made balances: positive laws.

The EPBC Act is the starting point for those checks and balances to take place, thus ensuring our **sustainable development** into the future. This is particularly essential as we are still incredibly ignorant about the intricacies of the web of life and are yet to comprehend the full magnitude of the consequences of environmental harms such as those listed below.

At this point in time, the human race is rapidly evolving and technological progress is empowering humanity to defeat (or perhaps, amend) the natural laws of biology, and therefore create new ‘super-crops’ and move consciousness beyond the realm of the biological matter.

However, as humanity gains powers of ‘creation’, previously unique to Nature, it also gains formidable powers of destruction. In many cases our progress has been at the expense of the remainder of the natural world. We must not forget that all creatures on Earth share equal rights to life. We have a duty to protect and preserve our planet for them, for ourselves and for the future generations.

In the past we believed that Earth’s resources were inexhaustible, which is perhaps why our Constitution contains no mention of the natural environment. We now realise that this belief was misconceived. Not only are we exhausting our Earth’s resources but we are also destroying many natural wonders in the process. Furthermore, the science is overwhelmingly clear that our industrial activities and intensive use of fossil fuels are causing anthropogenic global warming leading to global climate change.

In the name of progress, we are currently witnessing the following (and many more) issues:

1. Globally, the rate of extinction is so high that we are in the midst of the **6th mass extinction, with Australia leading the world on mammal extinction**. We have experienced three animal extinctions since 2009, including the first made extinct by climate change (the Bramble Cay Melomys).²
2. Australia is the only developed nation identified as **global deforestation hotspot**.²
3. The 2016 State of Environment report highlighted that the outlook for **Australia’s biodiversity is “poor and worsening”**.³
4. Plastic pollution in the oceans is expected to outweigh the total biomass of all fishes by the middle of this century, and the number of microplastic particles has already outnumbered the stars in our galaxy.

¹ Sir David Attenborough in “The Living Planet”.

² [Australia’s Faunal Extinction Crisis Inquiry Interim Report](#).

³ [WWF 2018 Living Planet Report](#).

5. The Great Barrier Reef is currently experiencing the **third wave of mass bleaching** in five years.
6. Our **emissions continue to rise**, and we are failing to take sufficient action on climate change to meet our Paris targets.⁴

Weighing strong competing interests in the use of natural resources is a difficult exercise. Decision-makers must be accountable and value transparency, open discussion, reliance on expertise and scientific data, and democracy. To guide progress and development in the right direction (i.e. **ecologically sustainable development** - creation, rather than destruction), a new generation of strong environmental laws and institutions are required in order to genuinely protect our biodiversity, regulate pollution, and defend our climate, rivers, reefs, forests and wildlife.

I hope that this submission to the Independent Review will help to reveal what must be done to preserve the natural wonders that remain.

⁴ [ACF Background Brief: National Greenhouse Gas Inventory.](#)

I. New Matters of National Environmental Significance

Questions 1 and 4

Q 1: Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?

Q 4: Should the matters of national environmental significance within the EPBC Act be changed? How?

Expanding the Matters of National Environmental Significance

VELSN is of the position that past changes to the EPBC Act have not gone far enough and that matters of national environmental significance should be expanded to respond to new issues affecting Australia's environment. The EPBC Act's focus "is on protecting matters of national environmental significance".⁵ Actions which have or are likely to have a significant impact on a matter of national environmental significance require approval from the Minister. Thus, it is very important to consider and expand upon what are considered to be matters of national environmental significance.

Currently, the EPBC Act protects the following nine matters:⁶

1. World heritage properties
2. National heritage properties
3. Wetlands of international importance
4. Listed threatened species and ecological communities
5. Migratory species protected under international agreements
6. Commonwealth marine areas
7. The Great Barrier Reef Marine Park
8. Nuclear actions (including uranium mines)
9. A water resource, in relation to coal seam gas development and large coal mining development

We strongly agree with the position of the Environmental Defenders Office, who suggest the inclusion of six new triggers:

1. **Ecosystems of National Importance** (including High Conservation Value Vegetation, Key Biodiversity Areas and wetlands of national importance);
2. The **National Reserve System** (terrestrial and marine protected areas);

⁵ First Independent review of the Environment Protection and Biodiversity Conservation Act 1999 (2009) ('Hawke Review').

⁶ Department of Agriculture, Water and the Environment, 'What is protected under the EPBC Act?' <https://www.environment.gov.au/epbc/what-is-protected>.

3. **Vulnerable Ecological Communities** (alongside other threatened species and ecological communities);
4. Significant land-clearing activities;
5. Significant greenhouse gas emissions; and
6. Significant **water resources**, expanding beyond coal seam gas and mining development, to include other water intensive industries such as agriculture.

Additionally, we believe that the EPBC Act should also be expanded to include

7. Schemes of **waste reduction** in order to achieve a more “**circular economy**”.

Greenhouse Gas Emissions

In particular, we would like to draw attention to the proposed trigger relating to significant greenhouse gas (GHG) emissions.

The EPBC Act review from 2010 recommended that there be included an interim greenhouse trigger with a threshold of at most 500,000 tonnes of carbon dioxide equivalent emissions.⁷ The report also called for the Act to be amended to include a “requirement to consider cost-effective climate change mitigation opportunities” during strategic assessment and bio-regional planning processes.⁸ This was reflected by the recommendation by the Climate Change Authority (2012) that Australia adopt a national emissions budget of 10.1 billion tonnes CO₂-e for the period 2013 to 2050.⁹

The Australian Government’s response to the *Hawke Review* cited their commitment to introducing a carbon price in order to reduce the nation’s emissions.¹⁰ It seems that the Government-at-the-time did not believe that a greenhouse trigger would be necessary due to their commitment for a carbon price. In the following years the Government changed, and the carbon price was dismantled under the Abbott Government. Thus, the Australian Government’s response is no longer relevant, and this issue should be re-considered.

In the 10 years since the *Hawke Review*, Australia has seen the worsening impacts of climate change firsthand. This year alone we saw the worst bushfires in Australian history, which were contributed to by the extreme drought and high temperatures brought on by anthropogenic climate change.¹¹ Australia’s iconic Great Barrier Reef is experiencing its third coral bleaching event in just five years. The 2020 bleaching is severe, and more widespread than earlier

⁷ First Independent review of the Environment Protection and Biodiversity Conservation Act 1999 (2009) (*‘Hawke Review’*).

⁸ *Hawke Review*.

⁹ *Climate Change Authority*, ‘Renewable Energy Target Review’.

¹⁰ Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (2011), 27.

¹¹ *Climate Council*, ‘This Is Not Normal’, <https://www.climatecouncil.org.au/not-normal-climate-change-bushfire-web/>.

events.¹² Furthermore, in Australia nine of the ten warmest years on record have occurred since 2005.¹³

As a signatory to the Paris Agreement, Australia has obligations to reduce emissions by a reduction of 26-28% below 2005 levels by 2030. While the Australian government has suggested that the country is on track to meet this target “in a canter”, the modelling shows a very different story. Data from the Department of the Environment and Energy itself suggests that Australia is not on track to meet its Paris target. Australia has been buoying up emissions reduction data through use of carryover credits gained from the Kyoto protocol, a move that has been opposed by nations such as Germany, New Zealand, Japan and Great Britain.¹⁴ Further, there is little evidence to suggest that these carryover credits can be legally carried into the Paris Agreement from the Kyoto Accord.¹⁵

But it is not only international obligations requiring a curb to GHG emissions. Pursuant to Part II s 8 of Attachment 1 - Matters of National Environmental Significance of the Heads of agreement on Commonwealth and State roles and responsibilities for the Environment, (Council of Australian Governments 1997), Australia has a commitment to:¹⁶

“8. Reducing emissions of greenhouse gases and protecting and enhancing greenhouse sinks

The Commonwealth has a responsibility and an interest in relation to meeting the obligations under the United Nations Framework Convention on Climate Change, in co-operation with the States, through specific programmes and the development and implementation of national strategies to reduce emissions of greenhouse gases, and to protect and enhance greenhouse sinks”.

Now, more than ever, action is required to contain anthropogenic climate change, because of its impacts on every aspect of our natural environment, including ALL of the EPBC’s matters of national environmental significance. The time has come to mention “anthropogenic climate change” in the EPBC Act, and to include a greenhouse gas trigger to the Act in order to pursue its aims of environmental protection. This review presents a convenient opportunity for the Australian Government to take action on anthropogenic climate change through the creation of a significant greenhouse gas emissions trigger.

12 ARC Centre of Excellence for Coral Reef Studies, <https://www.coralcoe.org.au/media-releases/climate-change-triggers-great-barrier-reef-bleaching>.

13 Bureau of Meteorology, <http://www.bom.gov.au/climate/change/#tabs=Tracker&tracker=timeseries>.

14 ‘UN climate talks: Australia accused of ‘cheating’ and thwarting global deal,’ *The Guardian*, <https://www.theguardian.com/environment/2019/dec/16/un-climate-talks-australia-accused-of-cheating-and-thwarting-global-deal>.

15 *The Australia Institute*, <https://www.tai.org.au/content/no-legal-basis-australia-s-use-kyoto-credits>.

16 ‘Heads of agreement on Commonwealth and State roles and responsibilities for the Environment’, <https://www.environment.gov.au/resource/heads-agreement-commonwealth-and-state-roles-and-responsibilities-environment>.

We support the EDO's proposal for a two-limbed 'trigger' for significant greenhouse gas emissions:¹⁷

- Requiring decision-makers to consider climate change mitigation and adaptation opportunities in strategic assessments and bioregional planning processes.
- A requirement for the federal government to assess projects with major greenhouse gas footprints, reject unacceptable climate impacts, and apply conditions and limits on other assessable projects.

Waste Reduction

Waste, in any of its forms, is one of the major issues of our times. Indeed, the true problem of any organised society is not how much is produced, but rather, how much is wasted. The concept of 'waste' is unique to modern human society – in nature, nothing goes to 'waste'. Taking coral reefs and tropical rain forests as examples, these are two of the poorest ecosystems in terms of resources (i.e. nutrients) available; however, waste minimisation and niche specialisation allow these to be the richest ecosystems in terms of biodiversity and biomass.

Hence, the Act should aim at preventing waste production in the first place, and, where that were not possible, at encouraging waste up-cycling. Some of the principles of Ecologically Sustainable Development (ESD) outlined below in our answer to question 2, such as the "*polluter pays principle*" and the "*prevention of harm principle*", as well as the example from the Victorian *Environment Protection Act 1970* may be useful guidelines for waste reduction in the new EPBC Act.

¹⁷ Environmental Defenders Office, <https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf>.

II. Ecologically Sustainable Development (ESD)

Q 2: How could the principle of ESD be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision-making?

VELSN strongly agrees with the EDO that the Act should provide a modernised definition and framework for Ecologically Sustainable Development (ESD).

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

- *Prevention of harm*: Taking preventative actions against likely harm to the environment and human health.
- *Precautionary principle*: Taking precautionary actions against harm that would be serious or irreversible where scientific uncertainty remains about the likelihood of that harm; and engaging transparently with the risks of potential alternatives.
- *Intra-generational equity*: The present generation has an obligation to ensure that environmental costs, benefits and outcomes are borne equitably across society.
- *Inter-generational equity*: The present generation has an obligation to ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.
- *Biodiversity principle*: Ensuring that biodiversity and ecological integrity are fundamental considerations in decision-making, including by preventing, avoiding and minimising actions that contribute to the risk of extinction.
- *Environmental values principle*: Ensuring that the true value of environmental assets is accounted for in decision-making –including intrinsic values, cultural values and the value of present and future ecosystem services provided to humans by nature.
- *Polluter pays principle*: Those responsible for generating waste or causing environmental degradation should bear the costs of safely removing or disposing of that waste or repairing that degradation. That should include appliances and domestic waste.

Additionally, we recommend the implementation of a criminally enforceable “**general environmental duty**” (GED), whereby any person engaging in an activity that may give rise to risk of harm to human health or the environment from pollution or waste must minimise those risks, so far as reasonably practicable.

A leading example in Australia of how some of these principles have been codified into statute is the recent amendment to the Victorian *Environment Protection Act 1970*, which introduced the general environmental duty (GED) and “**Environmental Reference Standards**” (ERS). These ERSs set out the environmental threshold values for “best practice” in the various industries, thus setting the example of what is “reasonable practicable” in an industry.

Thanks to broad definitions of waste and pollution, greenhouse gasses are covered by the Victorian Act. Additionally, the Victorian Act encourages the up-cycling and recycling of waste material by excluding reused materials from the definition of 'waste'. This encourages waste reduction by placing reused material out of the reach of the general environmental duty and its liability.

III. Environmental Protection or Restoration?

Q 11: How can environmental protection and environmental restoration be best achieved together? Should the EPBC Act have a greater focus on restoration? Should the Act include incentives for proactive environmental protection? How will we know if we're successful?

Measures of Success

Biodiversity Conservation and Environmental Protection can be measured in terms of the number of lives spared from the devastating impact of a development project. A project is environmentally “successful” if life, in all its forms, is preserved. From corals bleaching due to thermal stress, to endangered birds, koalas and gliders, amphibians, fish and insects, the EPBC Act may be said to be successful only if it ensures that development today does not come at the economically unquantifiable loss that comes with environmental degradation in any of its forms. Species extinction is not simply “one less species in the flora and fauna anthology”; it is a missing link in the incredibly complex and poorly understood web of life, which may lead to unforeseeable negative consequences on the long term.

In this light, **Proactive Environmental Protection** is, truly, the lofty target to which the *Act* should strive to aim. Although Nature can (and will) recover—and recovery will be faster if efforts are made to restore it—the true objective should be that of managing human activities *before* they become a problem. The role of the law should be the establishment of limits and the declaring of punishments so that people are deterred from causing harm to others (including other species). Although this principle may not always be the prevailing one in the decision-making process, it should nevertheless be always held with high regard.

Protection or Restoration?

Protecting the environment means restoring the environment. Simple examples of this are the recent observations of wildlife roaming in deserted cities due to the Covid-19 pandemic: deer in Madrid; fish, swans and dolphins in Venice. Similarly, the numbers of whales and other marine organisms are rapidly increasing in those areas which have been closed off to commercial exploitation such as natural reserves. Those (and there are many others) are clear examples of how conservation efforts can still make a difference.

Therefore, the main question should not be whether to restore or to protect - they are two faces of a same coin. The main focus, or answer, should be to reduce our impacts in the first place. Nature has been a great force on this planet from well before human existence, and it would be ridiculous to believe that humans could ever ‘destroy’ nature. Rather, a more accurate description of human industry is that it is ignorantly destroying nature’s beauty, uniqueness and preciousness. Therefore, past a certain threshold, many environments may never be the same again, especially in critical habitats where keeping endangered species and biodiversity is of the utmost importance.

The EPBC Act therefore needs to be strict and clear about the criteria and limits within which ecosystems may be managed, used or developed. In areas where restoration is needed, thorough protocols should be put in place to ensure monitoring and success. The costs for

restoration would be mostly covered by government or industry, while conservation techniques driven through incentives can prove to be far more successful and cost-effective. The government may offer agreements to landowners to act within certain guidelines and incentivise through monetary rewards to increase ongoing proactive conservation guidelines and initial recovery actions.

This decade (2021-2030) has been declared the **“New UN Decade on Ecosystem Restoration’ to inspire bold UN Environment Assembly decisions”**.¹⁸ Discussions by Member States and other entities in the week prior to the Assembly will focus on the following areas specifically relating to ecosystems:

- Innovations on biodiversity and land degradation
- Protection of the marine environment from land-based activities
- Protecting the ecological balance of food chains by conserving and sustainably using mangrove ecosystems
- Sustainable coral reefs management
- Deforestation and agricultural commodity supply chains
- Sustainable nitrogen management
- Rangelands and pastoralism
- Sustainable blue economy
- Sustainable peatland management for tackling climate change involving the recently established International Tropical Peatland Center

The EPBC Act review must not fail to take into consideration these international discussions, or Australia will become a taillight, rather than a World-Class leading example.

¹⁸ UN Environment Programme <https://www.unenvironment.org/news-and-stories/story/new-un-decade-ecosystem-restoration-inspire-bold-un-environment-assembly>.

IV. Areas of Concern with the Current Framework

Questions 5, 6 and 7

Q 5: Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

Biodiversity Conservation

The focus of the *Environment Protection and **Biodiversity Conservation** Act* should be on biodiversity conservation specifically. *How* that is achieved, is a secondary matter. Hence, the reform should make all recommendations in light of this primary focus. All assessments and approval processes must be made whilst keeping in mind the paramount necessity of protecting, so far as reasonably possible, the environment and preserving biodiversity. The weighing exercise of deciding what, between economic development and environmental protection, needs to be prioritised may at times be extremely hard. That is why **strong, clear and transparent** environmental guidelines need to be defined. Only by knowing exactly where the line lays, may one know how not to cross it.

Q 6: What high level concerns should the review focus on? For example, should there be greater focus on better guidance on the EPBC Act, including clear environmental standards? How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation? What have been the economic costs associated with the operation and administration of the EPBC Act?

High Level Concerns

The new national environment act should provide the federal government with all the powers it needs to actively protect and manage Australia's environment. This includes giving the federal government power to set binding national standards and objectives that all states must comply with.

Therefore, VELSN agrees with the following high-level priority areas for reform identified by the EDO:

1. Scope and national leadership

- The Act must elevate environmental protection and biodiversity conservation as the primary aim of the Act, consistent with Australia's international obligations.
- The Act must include clear duties on decision-makers to exercise their powers to *achieve* the Act's aims.

- The Act must effectively address the most significant environmental challenges: climate change, land clearing, waste reduction and cumulative impacts with new triggers in the Act where required.

2. Governance and Accountability

- Two new statutory environmental authorities should be established – a National Sustainability Commission and a National Environment Protection Authority.
- There should be accountability mechanisms to hold the regulator and decision-makers to account including:
 - Access to information and data disclosure provisions to ensure greater transparency;
 - Public participation in decision-making and planning; and
 - Third party review rights (including merits review).
- Greater emphasis should be placed on Indigenous leadership and rights (including free prior informed consent requirements), land management and biodiversity stewardship, and formal legal recognition of Indigenous Protected Areas.

3. Outcomes and Efficiency

National standards should be enacted to drive best practice including:

- a clear process for accreditation of assessment processes that meet strict national standards (e.g. biodiversity offsets), with retention of Commonwealth approval and call-in powers;
- clear upfront guidance on assessment requirements (including red lights) to improve certainty;
- clear objective decision-making criteria set out in legislation;
- strengthened strategic assessment and bioregional planning provisions; and
- independently appointed and accredited consultants to improve environmental assessment quality and information.

The Act's Effectiveness

VELSN is concerned that the EPBC Act has been ineffective at confronting challenges currently being faced by Australia's environment and biodiversity.

The 2016 State of the Environment Report concluded that many elements of Australia's environment are not being managed sustainably and, without reforms, a business-as-usual approach will lead to poor outcomes for Australia's environment.

If we do not reform our current business-as-usual approach, Australia's 2050 environmental outlook will be characterised by:

- negative impacts of failing to bring greenhouse gas concentrations to pre-industrial levels including
 - hotter days and longer periods of hot weather, leading to increased bushfire frequency and severity
 - continuing sea level rises leading to coastal damage

- reduced average rainfall in parts of Australia leading to increased drought frequency and severity, as well as increased frequency and severity of extreme rainfall events
- ecosystem changes, including
 - declining quality of ecosystems in the south-east, south-west and coastal areas that are close to population centres and other development pressures (e.g. port and mine expansion)
 - continued loss of biodiversity, including habitat loss and extinction of many species of plants and animals
 - ongoing clearing of native vegetation, particularly of regrowth, leading to further habitat fragmentation, loss of connectivity, increased habitat for invasive species, declines in native species and reduced landscape resilience
 - changes to the marine environment, including ocean acidification, that will have a significant impact on organisms that form the base of marine food webs, such as phytoplankton and zooplankton; these changes will have flow-on effects throughout marine ecosystems, especially on dependent predators such as seabirds, seals and whales
 - changes to the distribution of species and ecological communities as those adapted to warmer climates either expand or shift their distributions south as the climate changes. Organisms will either have to adapt or will disappear. The most likely candidates to vanish in the long term are those that have adapted to live within very narrow environmental limits, or do not have the capacity to move or adapt as fast as the climate is changing
 - increased pollution of marine and coastal areas from plastics, with greater impacts on species that become entangled or ingest debris
 - continued or increased erosion in some coastal locations because of increased damage from inundation, extreme weather and storm events
 - increased construction along the coast, sandmining and sand addition, leading to modification and loss of foreshore and nearshore shallow-water habitats
- and ongoing challenges, including
 - increasing threats to the environment (both land and aquatic), agricultural production and potentially human health from invasive species, fires and disease
 - ongoing conflicts about land use, with mining and the resources sector, farming and forestry systems, carbon sequestration, urban and infrastructure development, land for offsets and buffers all competing for space with conservation and heritage values
 - ongoing incremental damage to, and loss of, areas with natural, historic and Indigenous heritage value.

The 2016 State of the Environment Report outlines six key barriers to effective national management of the environment:

1. 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;
2. poor collaboration and coordination of policies, decisions and management arrangements across sectors and between managers (public and private);
3. a lack of follow-through from policy to action;
4. inadequacy of data and long-term monitoring;
5. insufficient resources for environmental management and restoration; and
6. inadequate understanding and capacity to identify and measure cumulative impacts.

VELSN calls for The EPBC Act to be substantially amended or re-written to confront these challenges head-on and to avoid and repair the further deterioration of Australia's environment.

Economic Cost

The review of the EPBC Act should provide precise predictions on the economic, social and opportunity cost of failing to meet the objectives listed in the Act. VELSN believes that discussion of the EPBC Act should involve a more holistic consideration of environmental externalities and values over medium and long term.

Taking bushfire relief as an example, Deloitte Access Economics estimates that the total economic cost of natural disasters in Australia is growing and will reach \$39 billion per year by 2050.¹⁹ The physical damage and ongoing ecological and biodiversity impacts are vast and include losses of environmental assets without dollar values. In addition to these costs are significant, and often long-term, social impacts, including injury and loss of human life, lost employment, disrupted education and community networks, and impacts to mental health and wellbeing.

It is crucial to ensure the private sector participates in tackling environmental issues and achieving the objectives listed in the EPBC Act. Private sector bodies including companies in the mining, construction and agricultural industries are significant polluters and consumers of natural resources. These industries have a vital impact on biodiversity, carbon emissions and water resources.

The review of the EPBC Act should ask whether current assessment reports adequately consider the medium- and long-term costs of allowing high polluting and energy-consuming companies to fail to reduce their emissions to sustainable levels. The review must consider the economic cost the State of Environment Report's projected environmental declines if the EPBC Act's objectives fail to be met.

¹⁹ Insurance Australia Group Limited 'Roundtable Research Report' <https://www.iag.com.au/natural-disaster-costs-reach-39-billion-year-2050>.

Q 7: What additional future trends or supporting evidence should be drawn on to inform the review?

We recommend that the review commission to conduct scenario analysis on future trend in environmental protections and biodiversity. The scenario analysis will provide an insight on the possibilities and practicality of achieving the current-set goals. Questions to be asked may be:

- Are these objectives too out-to-dated?
- What if the objectives are not able to be achieved? For example, the possibility of remaining within the 1.5 degrees by 2030 in accordance with the Paris Agreement has been suggested as impossible.²⁰ It is important to decide the strategy now so that we are able to counter the uncertainty of future environmental conditions.

²⁰ UN Environment Programme, <https://www.unenvironment.org/news-and-stories/press-release/keeping-warming-15c-impossible-without-reducing-short-lived-climate>.

V. Proposed Solutions, Priorities for Reform and Approaches to Delivering Better Outcomes

Questions 9, 20, 21 and 22.

Q 9: Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?

To realise environmental change on a Federal level, the Commonwealth government needs the proper tools. With funding in the hands of the Federal government, the States cannot implement the changes that the Commonwealth government is capable of. To do this there needs to be a clear outline in place, showing how such change can be brought into effect. In this regard we support the EDO's call for a new *Australian Environment Act* with the primary aim of biodiversity conservation and environmental protection. A lot has changed since 1999 when the current EPBC Act was introduced. Thus, to facilitate the changing environmental landscape a new approach on a national level is necessary.

There would also need to be regulatory bodies established that can help police the provisions of the new act. This is missing in the current EPBC Act. Consequently, there has been a failure to mitigate land clearing and biodiversity protection as per its initial aim. A consolidation of the State Environmental Protection Agencies (EPAs) into a Federal body should be considered. Australia is a notable exception amongst Western democracies to lack a National Environmental Protection Agency, an issue which must be addressed. This **National EPA**, separate and independent from the current Department of Environment, would focus on delivering evidence-based advice on environmental policy, to be defined by a **National Sustainability Commission (NSC)**. The NCS would collect data from a nationally coordinated system as well as monitor, audit and report environmental inquiries.

These two new institutions armed with a new *Australian Environmental Act* would significantly help the national effort in tackling environmental problems and help Australia achieve its Environmental targets.

Q 20: How should community involvement in decision-making under the EPBC Act be improved? For example, should community representation in environmental advisory and decision-making bodies be increased?

VELSN strongly agrees with EDO's proposition that the *Act* must include a range of key safeguards to ensure public participation, transparency, accountability and access to justice. In particular:

- Strong public participation provisions;
- Merits review for key decisions;
- Easily accessible, timely public information on actions and decisions;
- Open standing to review legal errors and enforce breaches; and
- Protective costs orders.

Increasing Community Involvement

The Environment is anyone's and everyone's. Increasing the capacity for community involvement under the EPBC Act will allow for greater individual and localised awareness of how global and national environmental issues affect people's everyday lives and communities. This will assist in ensuring that those empowered to make decisions under the EPBC Act are held to account. This would also ensure that there is continued pressure on decision-making under the Act to be transparent and efficient.

Merits Review Tribunal

The EPBC Act currently prescribes that "in addition to considering potential impacts on matters of national environmental significance, in making a decision the minister also considers the social and economic impact of the project".²¹ The merits of such decision must be reviewable.

We agree with the EDO's submission that provision for **mechanisms for legal and merits review** would support this increased community involvement. Often cases that are litigated on environmental grounds are cases related to private property. Introducing **open standing and protective costs** orders will send a message to the community that they are able to legally challenge any violation of the EPBC Act.

However, in conjunction with the EDO's submissions, we note that there is a real risk of overwhelming the system with judicial challenges from community groups and individual people, and that therefore it is important to create a safeguard to ensure that resources which could be directed at implementing environmental protection policies and procedures are not divested towards defending potential litigation or continuous external review.

Establishing a tribunal uniquely placed to deal with issues regarding decisions made under the EPBC Act and making it a merits review style rather than judicial review, would guard against this threat of overwhelming litigation. A Tribunal with specific and expert knowledge of environmental issues vested with the power to conduct a review on the merits of the case would give the community an opportunity to voice their concerns, while keeping decision-makers accountable. Furthermore, if compared to a Court of law, this specialised tribunal would allow a fast and efficient dispute resolution, slimming the decision-making use of resources.

²¹ Department of Agriculture, Water and the Environment, 'EPBC Act – Frequently Asked Questions', <https://www.environment.gov.au/epbc/publications/factsheet-epbc-act-frequently-asked-questions>.

Q 21: What is the priority for reform to governance arrangements? The decision-making structures or the transparency of decisions? Should the decision-makers under the EPBC Act be supported by different governance arrangements?

In order for the EPBC Act to be implemented as effectively as possible, it is crucial that there are secure and reliable governance arrangements in place which guide decision-making at all levels. Governance includes the ways in which the bodies making decisions pursuant to the EPBC Act are directed, controlled and held to account. While the current governance scheme of the EPBC Act, which sees the Commonwealth Minister for the Environment as the primary decision maker, has merit, we believe that certain changes and additional governance elements will significantly enhance public trust in the government's integrity and ability to carry out the objectives of the EPBC Act.

The EDO has recommended the following five elements for effective governance in relation to the EPBC Act:

1. Duties on decision-makers
2. Clear decision-making criteria and accountability
3. Independent, trusted institutions
4. National environmental goals, plans and standards
5. Adequate resourcing

We support the implementation of these five elements and would recommend the following additional elements.

Transparency

While the EDO recommendation mentions this element briefly as part of their accountability component, we believe that transparency should be greater emphasised to constitute its own separate element. In any governance scheme, but especially those within a democracy, transparency should be prioritised as it ensures that those who are interested in and affected by a decision are able to understand what is being decided and why.²² This is especially crucial in relation to environmental decisions as they affect widespread public health and safety and can have long-term consequences. Drawing on research from the United States,²³ transparency in environmental decision-making could be enhanced in the following ways:

²² Organisation for Economic Co-Operation and Development, 'Openness and Transparency – Pillars for Democracy, Trust and Progress', (Publication), <https://www.oecd.org/unitedstates/opennessandtransparency-pillarsfordemocracytrustandprogress.htm>

²³ Christina H Drew and Timothy L Nyerges, 'Transparency of Environmental Decision Making: A Case Study of Soil Cleanup Inside the Hanford 100 Area' (2004) 7(1) Journal of Risk Research 33.

Clarifying the decision-making process

There are several ways to effectively communicate how certain decisions are being made, and by whom such decisions have been authorised. Some suggestions include providing graphics of value trees, decision paths and other simple visuals and tables that are publicly available.²⁴

Improving accessibility

Accessibility can be enhanced through improving the ability of citizens to request and receive documents in relation to decisions made under the EPBC Act and the promotion of two-way information access, that is, stakeholders have access to government process and decisions and the government has access to stakeholder values.²⁵ Citizens should be able to access documents physically, electronically and through citations on Internet sites in order to maximise accessibility.

Consensus-oriented

Environmental issues and how to solve them can be deeply polarising. There are inevitably several competing viewpoints held by different individuals or groups in society about the best way to approach certain issues. Good governance requires effective mediation of several competing interests in order to reach a broad consensus on what is in the interest of the community and the nation at large, and how this can be achieved.²⁶ We believe that the way in which this element can be better incorporated into governance schemes relating to the EPBC Act is through increased community participation and involvement. We believe that developing new public involvement activities, coupled with transparency-enhancing mechanisms will greatly increase community participation and strengthen communication between different interest groups in society. Ultimately, greater communication will assist in reaching a consensus more effectively and efficiently.

Q 22: What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?

- VELSN believes that the environment should be lifted above politics, and that decision-making should be entrusted to independent science-based institutions like a National Environment Commission.

²⁴ Ibid 57.

²⁵ Ibid 43.

²⁶ Brian Coffey, 'Towards Good Environment Governance? Assessing the Evolution of Victoria's Environmental Portfolio', Parliament of Victoria Publications & Research (Research Paper, March 2019), <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13889-towards-good-environmental-governance-assessing-the-evolution-of-victoria-s-environment-portfolio>.

- VELSN also believes that the EPBC Act should establish mandatory public inquiries into the extinction of threatened species.

The objects of the Act must aim to prevent extinction and ensure recovery of threatened species. This is a key outcome to be achieved. Where these aims have not been met and extinction does occur, the Act should include a process of formal inquiry that is analogous to coronial inquests into human deaths. Inquiries into extinction would be conducted by a panel of qualified experts to determine the (likely multiple) causes of extinction, make recommendations on future conservation management, policy or law reform, and identify lessons to be learned to prevent future extinctions.

VI. Indigenous Engagement

Q 19: How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management? How can we best engage with Indigenous Australians to best understand their needs and potential contributions? What mechanisms should be added to the Act to support the role of Indigenous Australians?

How should Indigenous land management practices be incorporated?

Engaging with Indigenous Australians to further the management of heritage and environment is a remedy which will have multiple successful outcomes.

By believing in a sacred connection with nature, Indigenous people exercise great sustainable practices that can inspire communities to have a greater appreciation for the environment. The EPBC Act should include Indigenous representatives' input in new provisions. These can be incorporated to have better environmental conservation and restoration outcomes.

Engagement should be firstly understood from its root, meaning from those Indigenous Australians who have been doing so for years. This means to set up programs where those people are reached out and then provided a platform to educate others on techniques and underlying issues which specifically affect the environment.

Whilst the government has programs in place to engage with the Indigenous community, the point at which community consultation begins needs to be further investigated.

It has been proposed that a program could be put in place which engages with industry to create a code of practice to support early engagement of the community in environmental approval applications. This ensures that decision-making becomes an effort in which the community is involved but also that the topical issues of that community are taken into consideration when decisions are made, resulting in fairer and more widely accepted decisions. This will also encourage greater transparency among decision-makers.

A key issue to keep in mind is the administrative delay, another aspect pointed out by the Discussion Paper. It proposes that if mass information were published by the decision-makers it would mean that individual responses would not need to be given. Whilst this is a great proposal, it could be further strengthened by creating a more accessible online platform. Although community discussion and interest groups are effective in engaging those who are passionate and wish to be involved, these approaches give accessible enough access to Indigenous and other communities who are either rural or do not have the time to be involved. A simple, well-designed website specifically for environmental management would ensure accessibility and engagement, and provide a platform to inform, spread information or voice concerns.

VELSN also supports the EDO's recommendation of formal legal recognition of Indigenous Protected Areas as matters of national environmental significance, with long-term funding.

Thank you for considering our submission.

Yours sincerely,

The Victorian Environmental Law Student Network.