

17 April 2020

Professor Graeme Samuel AC
Chair of EPBC Act Review Expert Panel
Dept Agriculture, Water and the Environment
Canberra ACT 2601

Dear Professor Samuel,

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

Thank you for the opportunity to provide input to the review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and for an initial discussion with you and your staff in December 2019.

The Australian Local Government Association (ALGA) is the voice of Local Government in Australia, representing 537 councils across the nation. In structure, ALGA is a federation of State and Territory Local Government Associations. The comments provided here should be read in conjunction with any separate comments received from State and Territory Associations, as well as individual councils.

ALGA understands from our Associations that the level of engagement from local governments to this review has been below what could be expected during normal feedback periods. The impact of COVID-19, bushfires and drought on many local governments has meant that staff resources have been directed to these priority areas. There may be further opportunities later in the year to re-engage with local governments through targeted meetings, a roundtable with our Associations or surveys for example and ALGA is willing to assist with this process.

Local government interests with the EPBC Act generally aligns with the following principles:

- Local government values Matters of National Environmental Significance (MNES) for cultural, environmental, economic and social reasons;
- Local government supports a more strategic approach to the protection of MNES and better integration between Federal and State/Territory environmental legislation; and
- An efficient and effective EPBC Act requires clarity in the Act's requirements, transparency in its application and consistency in its approach.

These are the general principles. The scope of individual local government engagement with environmental protection and management varies widely across Australia. It is influenced by State and Territory Government environment and planning legislation and policy requirements, individual local government's resources and priorities, and the environmental and planning issues operating within and adjoining the given local-government area.

The 2016 State of the Environment Report noted the condition of the environment is poor and/or deteriorating including in the more populated coastal areas and some of the growth areas within urban environments, where human pressure is greatest (particularly in south-eastern Australia).

This report also identified a number of key challenges to the effective management of the environment. Many of these are relevant to the EPBC Act review and some of these issues are discussed in more detail in our submission:

- An overarching national policy that establishes a clear vision for the protection and sustainable management of Australia's environment to the year 2050 is lacking. Such a program needs to be supported by
 - specific action programs and policy to preserve and, where necessary, restore natural capital and our unique environments, taking into account the need to adapt to climate change
 - complementary policy and strengthened legislative frameworks at the national, state and territory levels
 - efficient, collaborative and complementary planning and decision-making processes across all levels of government, with clear lines of accountability.
- Poor collaboration and coordination of policies, decisions and management arrangements exists across sectors and between different managers (public and private).
- Follow-through from policy to action is lacking.
- Data and long-term monitoring are inadequate.
- Resources for environmental management and restoration are insufficient.
- The understanding of, and capacity to identify and measure, cumulative impacts is inadequate, which reduces the potential for coordinated approaches to their management.

The first statutory review of the EPBC Act was completed in 2009 by Alan Hawke (the Hawke Review) and it made 71 recommendations. The Federal Government's 2011 response to the 2009 Review was framed around four key themes:

- a shift from individual project approvals to strategic approaches including new regional environment plans;
- streamlined assessment and approval processes;
- better identification of national environmental assets, including through provision to list 'ecosystems of national significance' as a matter of national environmental significance under the EPBC Act; and
- cooperative national standards and guidelines to harmonise approaches between jurisdictions and foster cooperation with all stakeholders.

It is regrettable, however, that the amendments to the EPBC Act needed to implement the Government's response were never considered by the Parliament. Most of the recommendations of the Hawke Review and the Government's response are still relevant in 2020. ALGA recommends that a priority for this current review should be to re-examine these recommendations and assess their applicability in 2020.

Local governments across the nation own \$124billion in land assets. Local government stewardship of the environment is carried out, however, in a constrained financial context. While local governments are responsible for 33% of public infrastructure, including 75% of roads by length, they only raise 3.4% of Australia's taxes. Further investment by the Federal Government in environmental protection,

implementation and monitoring is required and was also identified as an issue in the 2016 State of the Environment Report.

As acknowledged in your media release on 16th January 2020, the recent bushfires and continuing long term drought have had a devastating impact on the natural environment. As well as the loss of significant bio-diversity habitats, this loss will also be felt in the regional tourism and local business communities, which are dependent on natural and built environment experiences. Recovery and restoration will be a focus for many communities for years.

In light of these recent and ongoing events, one of ALGA's recommendations is that the recognition and assessment of climate change impacts be strengthened in the EPBC Act. At the 2019 National General Assembly of Local Government there were a number of motions passed that called on stronger national action for climate change by the Federal Government, including to establish a consistent framework and provide guidance on measures (including planning controls and asset protection) to be taken by all levels of Government with respect to climate-change.

We would be happy to elaborate further on this submission and please contact Liz de Chastel, Senior Policy Adviser on liz.dechastel@alga.asn.au

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Adrian Beresford-Wylie', written in a cursive style.

Adrian Beresford-Wylie
Chief Executive



AUSTRALIAN
LOCAL GOVERNMENT
ASSOCIATION

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

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Table of Contents

1. Overview	6
1.1 Local government and environmental planning	6
1.2 Local government and the EPBC Act	7
2. Local government environmental skills	7
Recommendations	8
3. Harmonise state/territory and federal environment protection regulations	8
Recommendations	9
4. Provide a greater focus on strategic assessments	9
Recommendations	10
5. Increase transparency in the decision-making processes	11
Recommendations	11
6. Increase community education and awareness	11
Recommendation:	12
7. Address climate change impacts	12
Recommendation:	12

1.Overview

1.1 Local government and environmental planning

Councils work closely with their local communities to plan and manage development in order to foster economic growth and, particularly in regional areas, expand and retain resident numbers to maintain dynamic communities. Identification and protection of biodiversity is paramount to maintaining a healthy ecosystem for current and future generations.

In both regional and metropolitan areas there are increasing community expectations around environmental sustainability. In addition, in many areas the viability of local tourist businesses depends on natural and built-environment experiences. Regional local governments in particular appreciate that biodiversity and heritage values are fundamental to the liveability of a community and play a contributing role in efforts to stop a historical drift of residents to metropolitan centres. Green belts, wildlife corridors, parks, biodiverse roadside verges and heritage properties can influence whether residents stay or prospective newcomers arrive.

The scope of individual local government engagement with environmental protection and management varies widely across Australia. It is influenced by federal and state/territory government legislation and policy requirements, individual Council's resources and priorities, and the environmental issues operating within particular local-government areas.

In this context, Councils generally undertake a range of activities in order to protect and enhance their local environment, including:

- land-use planning identifying future growth areas and assessing new development proposals;
- strategic assessments and the protection of significant biodiversity assets, in order to support future growth and attract and retain residents;
- coastal management, including managing the impacts of sea level rise and coastal flooding through protection of native coastal vegetation and assessment of development proposals;
- environmental asset protection, including management of council reserves, environmental regulation compliance, soil and water quality monitoring and regulation, and management of roadside weeds and pests;
- participating in assessments under the EPBC Act, including compliance with development conditions;
- management and protection of cultural and built-heritage sites; and
- promoting tourism associated with natural and biodiversity assets.

Local governments can grant development approval, grant approval with conditions, or refuse an application. Environmental considerations increasingly play a significant part in such decisions. Council approval processes include the regulation of open space, and in high growth areas, formal regional planning processes may also be put in place.

To deliver on its environmental responsibilities, local governments often undertake community and stakeholder engagement and education, such as working closely with indigenous communities, the farming community, business community, volunteer land care groups, state governments and adjoining local governments.

1.2 Local government and the EPBC Act

Local government must seek approval for its own activities under the EPBC Act where required. These are usually proposals for new developments that might impact MNES. This may include new roads or widening of existing roads, infrastructure development or vegetation clearing. Councils have to comply with conditions set by approvals, including providing offsets when required.

There are a range of other areas that are not statutory requirements for local government, but can be undertaken by local governments to enhance the objectives of the EPBC Act nonetheless. These include threatened species research and identification, species assessment and protection, and species management and monitoring. Furthermore:

- local government can incorporate provisions/requirements of the EPBC Act into strategic planning documents to minimise impacts on MNES;
- local government officials can advise applicants of the need to address the requirements of the EPBC Act in situations where a development proposal may have an impact on an MNES or on Commonwealth land¹; and
- local government, as the level of government closest to the community, can provide on-the-ground threatened species knowledge and access to community, business and indigenous organisations for whom biodiversity protection is an issue.

The above functions all require a high level of cooperation and information-sharing across the three levels of government.

The following discussion enumerates eight areas of improvement from which the *EPBC Act* would benefit. The discussion and recommendations in the next sections are covered under the following themes:

- Local government environmental skills;
- Harmonise state/territory and federal environment protection regulations;
- Provide a greater focus on strategic assessments;
- Increase transparency in the decision-making processes;
- Increase community education and awareness; and
- Address climate change impacts.

2. Local government environmental skills

Local government environment officers are experienced and qualified professionals who understand their local environment and work closely with environment stakeholders. They undertake strategic environmental planning and environmental protection and management and have relationships with State and Federal counterparts. Their expertise and knowledge should be viewed as an asset for the implementation of the EPBC Act.

However, there are a number of key workforce challenges for local government that include an environmental-skill deficit, in particular in regional and remote areas. The environmental responsibilities

¹ Department of Environment and Energy [How the *Environment Protection and Biodiversity Conservation Act 1999* may apply to local governments and their employees](#) accessed 20th January 2020

of smaller councils are often met by staff not designated as ‘environmental planners’. These include urban and town planners, engineers, asset managers, development assessors, strategic planners, tourism and events managers, environmental health officers and community engagement staff. Engineers, urban and town planners and environmental health officers were among the top four professional groups found to have skill shortages².

As well, it should be noted that local governments can be proponents for actions impacting on MNES, and many local governments, especially the smaller regional ones, find the Commonwealth assessment process both confusing and cumbersome. Having a single assessment process through finalised bilaterals for assessments and approvals would alleviate this problem.

Case Study: *Bundaberg Regional Council, Qld. Protecting significant turtle breeding areas from light spill.*

The Bundaberg Regional Council was one of the Councils that the Federal Department of Environment and Energy worked with to develop the Draft *National Light Pollution Guidelines for Wildlife*³. Turtle breeding in the Mon Repos Conservation Park is a significant tourism drawcard to the Bundaberg Region and the Park has the largest concentration of endangered (and EPBC listed) loggerhead marine turtles on the Australian mainland. The Guidelines aim to assist council staff manage light pollution from the development of planning schemes, the design, approval and execution of individual developments or activities, through to retrofitting of light fixtures and management of existing light pollution. Councils are generally not in the position to employ specialist lighting experts. Therefore, these guidelines will assist technical staff in relevant Councils, properly mitigate the lighting impacts of surrounding developments and infrastructure on endangered animals. This potentially results in more sustainable management of wildlife and the local economy.

Recommendations

- 2.1 Options be considered to improve communication with, and access to, Federal Environment Departmental officers to support local government officers and other environmental stakeholders and proponents. This could include increasing the regional presence of the Department. Such arrangements would help to ensure that assessments are both effective and efficient in protecting MNES, more likely take into account local knowledge, and help in addressing any local concerns in a timely and comprehensive manner. A local/regional presence could also assist with compliance and enforcement.

3. Harmonise state/territory and federal environment protection regulations

An important, ongoing concern raised by local government is a perceived duplication of state/territory and federal government environment legislation. A lack of clarity around responsibilities, processes and listings arises where the EPBC Act exists alongside state and territory conservation legislation with similar

² ALGA 2018 [Local Government Workforce and Future Skills Report Australia](#)

³ Department of the Environment and Energy 2019 [Draft National Light Pollution Guidelines for Wildlife](#) accessed 21st January 2020

aims. This leads to confusion around appropriate local approaches to both biodiversity conservation and vegetation management. A duplication of permitting processes leads to developers and community members complaining of too much 'green tape', and questioning conservation goals.

A key initiative which would help streamline the assessment process and avoid confusion over assessment would be to increase joint assessments and approvals under bilateral agreements with State/Territory Governments. In recent years there have been some improvements, with some states reviewing their environment legislation and additional new bilateral agreements in place in some states.

Offsets are another area where there are different applications across federal and state environmental legislation. Having a consistent approach would provide more certainty and clarity for decision makers. In general, local governments believe that the use of offsets is a last resort and only used in cases where avoidance of MNES is not possible.

The case study below provides an example of a local government that has by necessity combined and incorporated federal, state and local environmental regulations into its operations.

Case Study: *Blue Mountains City Council, NSW. Managing a World Heritage listed drinking water catchment.*

As well as being surrounded by a World Heritage Area, the Blue Mountains is within the Sydney drinking water catchment, which services 1.7 million people. The integration of federal and state environmental protection requirements occurs across council operations, including the development planning for future growth areas, tourism, weed management, and selection of suitable tree species.

Recommendations

- 3.1 Increase the use of joint assessments and approvals under bilateral agreements with State/Territory Governments; and
- 3.2 A single national offsetting policy and process should be developed, and any bilateral agreement between the federal and state governments should work towards a single offsets approach noting that offsets should only be used as last resort.

4. Provide a greater focus on strategic assessments

A major concern for local government is that quite often environmental impact assessments made by the Federal Government are undertaken very late in the planning process, mostly at subdivision stage when an 'action' as defined under the EPBC Act is about to occur. Unfortunately, by this time major land allocation decisions have already been made. On occasions this has required land use planning decisions to be revisited to accommodate changes, which has been costly and time consuming. A greater use of strategic assessments would avoid such outcomes.

The Hawke Review⁴ recommended a greater use of strategic assessments in order to provide a more streamlined approvals process, avoid assessments at later stages of the planning process and provide greater certainty to developers and planners. Local government supports changes to the EPBC Act to:

⁴ Hawke, 2009, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* Australian Government

1. strengthen the process for creating strategic plans and undertaking these assessments, so they are more substantial and robust;
2. amend Section 146 of the EPBC Act relating to strategic assessments to allow the Minister to compel assessment of impacts on MNES via a strategic assessment in particular circumstances, projects or areas; and
3. specify required information for strategic assessments and make supplying it mandatory.

While local government calls for a greater use of strategic planning how they are funded is an issue. The Hawke Review found that applying a cost recovery model to strategic assessments would act as a disincentive to their greater use. Local government is concerned that there could be a potential cost shift to councils to undertake the assessments.

It is worth highlighting that the 2018 Craik Report⁵ also recommended a greater use of strategic approaches rather than case by case assessments. It described a need for a more proactive approach to protecting MNES in regions where agricultural development does or will impact upon MNES health. Reactive assessment and approval of multiple individual actions in a single area impacts the viability of agriculture without guaranteeing positive conservation outcomes.

A related issue is cumulative impacts, that is, the approval of many small developments including land clearing that have small impacts individually but when taken together have a significant combined impact. There is the great potential for proponents to use staged referrals to circumvent the objects of the Act. Staged referrals should not be permitted.

ALGA supports the greater use of bioregional planning and the involvement of local governments in the development of these plans. Bioregional planning is the most appropriate mechanism to address cumulative impacts and key threatening processes, and to begin the process of reversing environmental decline in key areas. Whilst such plans have no legislative status at present, it is noted that Section 176 (5) of the EPBC Act requires the Minister to have regard to a bioregional plan in making any decision under this Act to which the plan is relevant.

Recommendation 6 of the Hawke Review supported an expanded role for and use of bioregional plans. Section 176 (2) of the EPBC Act allows the Minister, with the cooperation of the relevant stakeholders, to prepare a bioregional plan for any region, whether it covers a Commonwealth area or not. Section 176 (3) allows the Minister to provide funds for the preparation of a bioregional plan, but the Act does not currently allow the Minister to provide funds for the implementation of an approved plan.

Implementation will likely require cooperation between all levels of government and all relevant stakeholders, and providing adequate funding will be a critical factor in ensuring the success of a plan.

Recommendations

- 4.1 The review should investigate barriers to the more widespread use of strategic assessments and make recommendations as to how these can be addressed. This could include consideration of amendments to Section 146 of the EPBC Act relating to strategic assessments to allow the Minister to compel assessment of impacts on MNES via a strategic assessment in particular circumstances, projects or areas;

⁵ Craik, W, 2018, *Review of the interactions of the EPBC Act with the agriculture sector* Australian Government

- 4.2 Support the greater use of bioregional planning in the EPBC Act;
- 4.3 A clause should be added that allows the Minister to provide funds for the implementation of an approved plan;
- 4.4 The Act should be amended to prohibit staged referrals where they could have been made before.

5. Increase transparency in the decision-making processes

The EPBC Act assessment and decision-making process should be transparent, in the same way local decision-making processes undertaken by local governments are. Local government has many concerns in this regard, including that:

1. proponent assessments are adequately vetted for bias;
2. scientific committee assessments are not secretive;
3. public interest litigants are not charged punitive costs;
4. there is sufficient public consultation around conditions attached to approvals;
5. referral information is always published, for public scrutiny;
6. commercial and in confidence provisions apply to referral and assessment information;
7. recovery plan reviews are completed;
8. the scope for appeals against ministerial decisions are sufficiently broad; and
9. the period for public comment is adequate.

Recommendations

- 5.1 The EPBC Act should be amended to provide for an independent agency/board to carry out assessments, oversee the implementation of the Act and to provide independent advice to the Minister as required (Hawke Review recommendation 71).
- 5.2 A greater range of information should be published, in particular:
 - advice and reports provided to the Minister in support of decisions made;
 - clear statement of reasons for all decision making made under the EPBC Act; and
 - compliance audit reports;
- 5.3 The period for public comment should be lengthened;
- 5.4 Third party rights need to be improved: to challenge referrals, assessments and approvals and proposed conditions; and
- 5.5 Public litigant protections from punitive costs need to be stronger.

6. Increase community education and awareness

The EPBC Act and its implications are sometimes not well communicated to local governments and their communities. Many local governments work closely with their communities and engage in conversations and actions to better manage the local environment. Whilst this is often focussed on local and regional matters of environmental significance, it is important that there be a better understanding of matters of national environmental significance, the federal regulations that seek to protect them and their integration with local actions. The following example highlights the potential for effective partnerships between local governments, community groups and state governments:

Case Study: *Tweed Shire Council. Working with the Indigenous community to manage environment.*

The Tweed region supports one of the highest concentrations of threatened plants and animals in Australia. As of June 2015, this included 120 animal species (birds, mammals, reptiles, frogs, fish and invertebrates) of which 25 are listed as endangered and five critically endangered⁶. The Council undertakes a range of community awareness and biodiversity programs, such as educating the local community on biodiversity values, providing a point of contact for the community and providing incentives and support for on-ground works on public and private land. Within this context the Tweed Shire Council in consultation with the local Aboriginal community through the Tweed Aboriginal Advisory Committee and the Tweed Byron Local Aboriginal Land Council and with assistance of the NSW Department of Environment and Heritage prepared an Aboriginal Cultural Heritage Management Plan (ACHMP) to promote awareness and protection of Aboriginal cultural heritage⁷.

Recommendation:

6.1 The Federal Department of Agriculture, Water and Environment should:

- have a regional presence, to ensure assessments are effectively protecting MNES;
- commit adequate resources and staff on the ground; and
- develop a service-delivery model that consolidates Federal and Local Government ties and better uses local government knowledge and expertise.

7. Address climate change impacts

Many local governments are concerned that the Act does not adequately account for the impact of climate change on threatened species, heritage and communities. The local government sector regards the threat posed by climate change as scientifically demonstrated, and maintains that there is a need for strong action.

Recommendation:

- 7.1 The Act should acknowledge climate change and its potential and current impacts on biodiversity and heritage; and
- 7.2 The Act should reference Australian climate change commitments and obligations under international treaties.

⁶ Tweed Shire Council 2017 [Biodiversity and Habitat Management](#) – Draft for Consultation P16 accessed 21st January 2019

⁷ Tweed Shire Council 2018 [Aboriginal Cultural Heritage Management Plan 2018](#) accessed 21st January 2020.