

Draft Submission to the independent review of the *Environment Protection and Biodiversity Conservation Act 1999*

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW welcomes the opportunity to provide input to the independent review of the Australian Government's *Environment Protection and Biodiversity Act 1999* (EPBC Act).

This is the second independent review of the Act, with the previous 2009 review referred to as the Hawke Review. The Australian Government's response to the Hawke Review made further recommendations which remain relevant and these should be revisited during this review process. LGNSW provided a submission to the earlier review and a number of issues raised are reflected in this report.

This submission has been developed with input from councils in NSW. It is a draft submission awaiting review by LGNSW's Board, and any amendments will be forwarded in due course.

Summary of Recommendations

This submission makes the following recommendations for amendments to the Act and associated processes:

1. To recognise the role of local government in contributing to the protection of matters of national significance and strategic biodiversity planning within the EPBC Act.
2. Formalise a referral pathway for local government on EPBC matters which are identified through council's assessment and approval processes.
3. Streamline listings of species across jurisdictions to create a single list of species and ecological communities with consistent descriptions and management actions.
4. Commonwealth to invest in priority strategic assessments developed in a clear and transparent way, incorporating accurate and comprehensive data, stakeholder involvement and independent review.
5. Amend the Act to enable a flexible approach to bio-regional planning that reflects the needs and approaches taken in different states and territories, and that the Commonwealth commit to investing in the implementation of these plans.
6. Support greater transparency in decision making through the creation of independent decision making processes and develop an appropriate accreditation scheme of environmental consultants.
7. Guidance material for local government and proponents needs to be targeted to meet their specific needs and could include the development of specific guidelines, digital tools and readily available and up to date data.
8. Include a climate change trigger in the Act as a mechanism to regulate developments with high greenhouse gas emissions.
9. Support the design and development of a national data portal to capture environmental assessment data in a national database, accessible to all jurisdictions.

Background

Local government's role in biodiversity protection

Local Government has an important role in biodiversity management. Councils have key responsibilities as a consent authority for local development, as an active land manager, through strategic planning and in influencing future development and planning decisions.

NSW legislation requires local government to consider the principles of Ecologically Sustainable Development in their decision making responsibility as defined in the *Local Government Act 1993 (LG Act)*, Section 8A (2) (d) *Councils should consider the principles of ecologically sustainable development.* The Act defines these principles in the following way '*...ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes.*' One of these considerations is '*conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration*'

The Act also refers to the precautionary principle '*...that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*' It also refers to applying the precautionary principle in guiding public and private decisions.

NSW councils have a clear legislative role in the protection and management of biodiversity and in the consideration of ESD principles in their decision making processes. Aside from legislative responsibilities to manage and protect biodiversity through decision making, councils take a holistic approach to managing their local biodiversity values through their strategic planning processes and direct management actions and community programs.

Many councils have developed their own Biodiversity Strategies which not only identify priority areas for protection, but also key activities to promote biodiversity management across their council and their community. These plans have been instrumental in seeking investment commitments to undertake activities, providing a framework for reporting on the progress made, communicating biodiversity messages as well as undertaking on-ground biodiversity works across their Local Government Area (LGA).

Councils also identify key biodiversity outcomes and objectives in their Community Strategic Plans (CSP), which form an important direction setting role for councils under the Local Government Act's requirement to undertake Integrated Planning and Reporting. Objectives in a CSP receive priority in a council's annual operational plan, delivery plan and resourcing strategy, which allocates budget to work towards achieving those objectives. Progress is reported back to the community through annual reports ensuring that biodiversity outcomes, projects and activities are well integrated into council operations.

Councils undertake on-ground biodiversity works including bushland management and regeneration programs, bushfire management, weed and pest management, erosion and sediment control, stormwater management, coastal and estuary management, riparian restoration works, roadside vegetation management, environmental monitoring, evaluation and reporting. Other direct actions include community engagement and awareness raising activities; volunteer programs such as bushcare groups, community nurseries, school education programs etc.

One of the key challenges for local government are the inconsistencies between state and Commonwealth legislation, and the duplication in processes between jurisdictions which are explored further in this submission.

EPBC Act objectives

The EPBC Act aims to protect and conserve Australia's environment, biodiversity and heritage, and promote ecologically sustainable development through the conservation and sustainable use of natural resources. It focuses Australian Government interests on the protection of matters of national environmental significance. The states have responsibility for matters of state and local significance, together with local government.

Twenty years on, the objectives of the Act are still valid and supported however the operational elements of the legislation need review. Section 522a of the EPBC Act requires the statutory review of the Act to determine if the Act's objectives are being achieved. Given that a key objective is 'to promote the conservation of biodiversity' and 'promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources', this review should closely examine if this has been achieved.

The 2016 State of the Environment (SOE) Report identifies further decline of Australia's biodiversity. As identified in the SOE Report '*Australia's biodiversity is under increased threat and has, overall, continued to decline*'. This combined with extensive bushfires across NSW has contributed to a significant impact on species and habitat across the NSW environment. Indications are that the combination of local, state and Commonwealth biodiversity protections have not been adequate to prevent continued decline in biodiversity.

The Act has been effective in the identification and listing of species and communities requiring protection, and identifying areas of national environmental significance, however the Act has had much less success in enabling strategic approaches to management and undertaking clear and transparent assessment processes to achieve the objectives of the legislation.

NSW biodiversity context

Recent bushfires in NSW occurring in late 2019 and early 2020 have had a devastating impact on the natural environment and community. The impact has been felt across the community, with lives lost and thousands of homes destroyed or damaged, as well as severely impacting the natural environment. The bushfires have burned more than 5.3 million hectares across the state, including more than 2.7 million hectares of national park estate.

While the magnitude of impact is still being assessed, the loss of habitat and impact on wildlife, including vulnerable species is significant. The NSW Government is working towards producing a NSW wildlife and conservation bushfire recovery plan which would include:

- Mapping and analysis to identify biodiversity impacts and priority on-ground actions
- Bolster breeding programs, consider relocation and translocation of species impacted
- Habitat restoration
- Expand conservation fencing to protect recovering eco-systems
- Additional fire management to protect unburnt areas

NSW Government's immediate response is available in this report: [Wildlife and Conservation Bushfire Recovery, Immediate Response January 2020, Department of Planning, Industry and Environment](#). This report broadly identifies the extent of impact on wildlife and conservation in NSW. Some immediate recovery actions are identified and include:

- Supplementary food, water and shelter
- Seed banking and insurance populations
- Feral animal and weed control
- An inventory of fire impacts on animals and plants is being prepared with on-ground surveys underway and remote cameras tracking animal movements
- Supporting wildlife carers

More detail on the ecological impact is in '[Understanding the impact of the 2019-20 fires](#)' which summarises the ecological impact as determined to date. The Saving our Species Program is also considering its response to the impact on endangered species and on many of their projects that were underway.

Reports are emerging of excessive clearing of vegetation post bushfires, which is a further concern for remaining biodiversity that needs close review and clear guidance to ensure ecosystems can rehabilitate and remaining species in some areas receive adequate protections.

2009 Review of the EPBC Act: the Hawke Review

The ten year review of the EPBC Act, referred to as the Hawke Review, made a number of recommendations which were supported by local government. Issues raised by LGNSW during that review process related to the use of strategic assessments and the streamlining of approvals, streamlining of listings across jurisdictions, climate change objectives, cumulative impacts, compliance, awareness of the legislation, electronic systems to manage applications, referrals and data. Ten years on most of these issues have not been resolved despite the Hawke Review's recommendations at the time.

Response

Local government and the EPBC Act

The EPBC Act does not specifically recognise local government and its role in contributing to the protection of matters of national environmental significance. This could be facilitated by revisiting and updating the National Local Government Biodiversity Strategy 1999 which provided some clarity around local government's role in managing biodiversity. Specific reference could be made to:

- EPBC Act acknowledgement that local government plays an important role in protecting and managing matters of national environmental significance.
- Support for local government strategic biodiversity planning programs at the local level for matters of national environmental significance, for example koalas and threatened ecological communities.
- Funding programs to assist local government in the ecological restoration of natural areas,
- Additional focus on ecological restoration and management of natural areas, especially in regional Australia.

Recommendation 1: *To recognise the role of local government in contributing to the protection of matters of national significance and strategic biodiversity planning within the EPBC Act.*

Referrals

The EPBC Act requires proponents to obtain Commonwealth approval if an action is likely to have a significant impact on matters of national environmental significance. It does not replace the need for proponents to obtain local government approvals such as development approvals. As the responsibility for referring an action lies with the person proposing to take the action, local government has no role in referring actions for development applications but must ensure any of their own proposed actions are referred if necessary.

Council staff should have an awareness of the Act however they are not required to provide any advice to proponents in relation to EPBC Act matters. The proponent must ensure they have met these obligations. On a practical level, councils may be well placed to identify a potential need for a project referral. Concerns have arisen around a low rate of referrals for proposals.

Councils have raised the issue that there is no formal requirement under the Act for local government to refer a matter to the Commonwealth in instances where assessments submitted to them raise concerns of a potentially significant impact to a matter of national significance.

Recommendation 2: *Formalise a referral pathway for local government on EPBC matters which are identified through council's assessment and approval processes.*

Streamlining of listings

A consistent issue raised by councils is the need to simplify processes and avoid conflicting requirements and different standards of state and Commonwealth legislation. One area for improvement is the creation of a single species and ecological communities list which is consistent across jurisdictions. This would remove the inconsistencies in listings, their descriptions and management actions. An example in NSW is Cumberland Plain which has inconsistent detail in its NSW and EPBC Act listing.

Recommendation 3: *Streamline listings of species across jurisdictions to create a single list of species and ecological communities with consistent descriptions and management actions.*

Strategic assessments

LGNSW supports the intent of strategic assessments in identifying impacts early on in the planning process to achieve a landscape outcome to avoid and minimise impact on biodiversity. A more strategic approach to ecosystem health, connectivity and resilience is needed in managing and protecting biodiversity. Greater clarity and certainty for both protecting biodiversity value and identifying development opportunity in a strategic way is supported. Strategic processes while eminently sensible can be challenging to deliver for a number of reasons including:

- Upfront data requirements demanding additional research, surveys, ground truthing etc.
- Extensive engagement and participation of stakeholders is necessary, but can be challenging and contentious
- Costly to undertake the detailed processes needed

- Long lead time to develop and deliver.

While the benefits of strategic approaches to assessment and planning are clear, the experience to date is that these are challenging to deliver and have not been effectively administered or adequately resourced. It may also be necessary to maintain some individual project assessment to complement the strategic assessment approach.

Sensitive planning and project design can minimise the need for Australian Government regulation of local projects. Where significant impacts on nationally protected matters are avoided through local planning processes, there is unlikely to be a role for the Australian Government in regulating projects. Similarly, projects that are designed from the ground up to avoid impacts on nationally protected matters will rarely need Australian Government approval.

Strategic assessments should be focussed on areas where better biodiversity outcomes can be achieved through avoiding case by case assessment. A further concern raised with the current approach to individual project assessment is the cumulative impact of development and approvals. Cumulative impacts and losses could be better managed through strategic approaches to planning and assessment.

While councils support the use of more strategic assessments a significant investment is required in their development, and a clear and transparent process required to ensure rigour in their approval. Once strategic assessments are complete and agreed, further decisions could be managed through state legislation pathways.

Recommendation 4: Commonwealth to invest in priority strategic assessments developed in a clear and transparent way, incorporating accurate and comprehensive data, stakeholder involvement and independent review.

Bio-regional planning

LGNSW supports the development of regional scale plans, or bio-regional plans as a mechanism to manage and protect biodiversity. The development of such plans should be undertaken in collaboration with local government and provide a strategic focus which can be implemented at a local level. The format of a bio-regional plan should retain flexibility to reflect the difference in each states' regional planning process while meeting Australian Government guidelines. They create an opportunity to identify 'no-go' areas and key threatening processes and to address cumulative impact, however bio-regional plans should be reflective of each state's regional natural resource management approaches and not duplicate existing regional plans.

Successful implementation of regional plans requires commitment and involvement of all stakeholders, and coordination and investment in their delivery.

Recommendation 5: Amend the Act to enable a flexible approach to bio-regional planning that reflects the needs and approaches taken in different states and territories, and that the Commonwealth commit to investing in the implementation of these plans.

Remove duplication of assessments

Attempts to simplify and avoid duplication across jurisdictions is supported. Duplication creates inefficiencies in time, costs, uncertainty, confusion and inconsistencies in approvals and compliance obligations.

The NSW Government has reached an agreement regarding the use of their biodiversity offset scheme to meet any Commonwealth requirements for offsetting under the EPBC Act. This bilateral agreement will minimise duplication in NSW in the assessment process. This is an example of an improvement in efficiency between state and Commonwealth legislation and the creation of a more streamlined process.

Transparency in decision making

The Commonwealth can further support transparency in decision making through a requirement that information in relation to assessments, decisions, external advice and offsets be made publicly available and be captured in databases which are easily accessible by all.

Transparent processes and independence of decision making should feature in the future administration of the Act. This should include clear guidance on decision making and criteria to support decisions, which are detailed in legislation.

The qualifications and suitability of independent consultants undertaking environmental assessments should be assured through an independent accredited scheme, such as the one introduced through the NSW *Biodiversity Conservation Act 2016*.

Recommendation 6: Support greater transparency in decision making through the creation of independent decision making processes and develop an appropriate accreditation scheme of environmental consultants.

Guidance and support to implement the Act

Improved support and guidance material for both local government and proponents in understanding obligations under the Act has been identified as an area of improvement in the administration of the Act. Such guidance material must enable proponents to clearly understand their obligations and manage any potential liabilities through the provision of appropriately targeted resources, and access to expertise and data.

Recommendation 7: Guidance material for local government and proponents needs to be targeted to meet their specific needs and could include the development of specific guidelines, digital tools and readily available and up to date data.

Climate change

The addition of a carbon emissions trigger in the Act would provide a mechanism to regulate developments with high greenhouse gas emissions, including native vegetation clearing but also development proposals for actions which emit greenhouse gases. Such an amendment would provide consideration of the emissions impact to assist in meeting emission reductions targets, and international obligations.

Recommendation 8: *Include a climate change trigger in the Act as a mechanism to regulate developments with high greenhouse gas emissions.*

Compliance

Clarity around Act compliance is needed as there is often confusion in this regard. Local government supports a data-driven approach to identifying non-compliance with information captured digitally and made publicly available. More certainty is sought through this review on compliance responsibilities.

Information exchange

Considerable environmental management data is collected through environmental impact assessment processes occurring at all levels of government. Capturing this data would assist in building a more coherent and comprehensive dataset of environmental information which could be applied in future planning and development decisions.

Local government supports a process to capture data from individual project assessment reports and contribute this to a data portal, or national database to ensure openly accessible natural resource management data is available to all jurisdictions. Local government seeks involvement in the design and delivery of such a system which facilitates data sharing, reduces duplication and ensures that the best available information is contributing to future decision making processes.

Recommendation 9: *Support the design and development of a national data portal to capture environmental assessment data in a national database, accessible to all jurisdictions.*

Conclusion

LGNSW welcomes the review of the EPBC Act, which provides an opportunity to reflect on the implementation of the legislation and its progress in achieving its objectives. Twenty years on it is clear that the administration of the Act has been challenging, and while substantial progress has been made around identifying priority species and matters of national environmental significance, the protection and management of these remains challenging.

It is timely to respond to the need for a more strategic approach to the management and protection of biodiversity and avoid the impact of case by case decision making processes and cumulative impacts. Collaboration between jurisdictions at Commonwealth, state and local levels is needed to achieve common biodiversity management goals. A more efficient and streamlined process will benefit all; from proponents grappling with a complex myriad of environmental legislation, through to state and local governments assessment and planning processes which may lead to unnecessary duplication.

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