

Professor Graeme Samuel  
Independent Review of the Environment Protection and Biodiversity Conservation Act  
By email to: <https://epbcactreview.environment.gov.au/resources/cover-page-written-submissions>

Dear Professor Samuel,

**RE: Independent review of the *Environment Protection and Biodiversity Conservation Act***

**Introduction**

The National Parks Association of NSW (NPA) was formed in 1957 and sixty-two years later we have 15 branches, 4,000 members and over 20,000 supporters. NPA's mission is to protect nature through community action. We believe that caring about nature springs from our individual experiences in nature, and we create those connections by delivering more than a thousand bushwalks, community events, bio-blitz surveys and restoration projects each year.

We are vigorous advocates for nature, developing new reserve proposals, contributing to park planning, scrutinising development proposals and conducting conservation campaigns across NSW. Our strengths include state-wide reach, deep local knowledge and evidence-based approach to conservation advocacy. Throughout these diverse endeavours NPA is firmly focused on the protection and promotion of our state's parks and reserves.

NPA appreciates the opportunity to comment on this ten-yearly review of the *Environment Protection and Biodiversity Conservation Act* (EPBC Act). Our responses to the prompts in 2019 Discussion Paper are provided below.

**Question 1 Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough.**

In the lead-up to the current fire inquiries many commentators have argued that implementing the recommendations of previous investigations should be governments' first priority. In similar fashion, NPA would urge you to detail your evaluation of Dr Hawke's recommendations from the 2009 review of the EPBC Act, identifying those which have not be addressed to date, the reasons why they were not adopted and those that remain important priorities.

NPA's view is that Dr Hawke's report provided a sound basis for the revitalisation of the EPBC Act. It is disappointing that many of his most important recommendations have not been implemented. We draw your attention to the following recommendations from 2009 which remain highly relevant to the current Inquiry.

*EPBC Review 2009 Recommendation 1*, replacement of the EPBC Act with a new *Australian Environment Act*.

In our view, this proposal has even more currency than in 2009. The Commonwealth's primary environmental legislation should provide a platform for the integration of protective mechanisms for biodiversity values and places of natural and cultural significance along with broader environmental commitments at the landscape, bioregional, national and global level, including such matters as greenhouse gas emissions and broad-scale land clearance. The artificial statutory boundaries between biodiversity, climate and large-scale environmental transformations have led to an increasingly dangerous separation between the Commonwealth's responsibilities to protect individual places and those to take action to mitigate climate change.

*EPBC Review 2009 Recommendation 2(3)*, emphasising that 'the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making'.

NPA considered this recommendation an important pathway to addressing a fundamental weakness of the EPBC, that is, the lack of an effective framework for considering cumulative impacts. The ongoing decline in our nation's biodiversity is in no small part attributable to the failure to consider the cumulative impact of individual proposals.

*EPBC Review 2009 Recommendation 8*, the inclusion of 'ecosystems of national significance', including refugia from climate change.

The need for strong legal mechanisms to protect climate change refugia has been dramatically demonstrated by the devastation of fire sensitive habitats over the 2019/20 fire season, including vast areas of rainforest and alpine communities. The lack of explicit legislative protection for climate change refugia is a major omission in the nation's environmental protection framework.

*EPBC Review 2009 Recommendation 26*, the power to request information on alternatives for projects.

A robust system for evaluating the availability of lower impact alternatives is a fundamental requirement of any credible environmental protection framework. In the NSW context, the consideration of alternatives is mandated under the *Environmental Planning and Assessment Act*, however case law has eroded this requirement to an extent that renders it ineffective. In situations where there is potential for a significant impact on a matter of national environmental significance, proponents should be required to demonstrate that there is no means of achieving a similar community benefit at a lower environmental cost.

*Recommendation 49*, availability of merits appeals.

In NPA's view it is imperative that the administration of legislation and the justification of decisions under legislation should be subject to judicial review. It is only through the availability of such review that the community can have confidence in the consistency and quality of decision making. Our expectation is that such review rights would inhibit inappropriate actions such as the finalisation of major approvals in the final moments before caretaker periods.

**Recommendations:**

- ***That the Inquiry report include a detailed assessment of each of the recommendations from the 2009 review of the EPBC Act***
- ***That the Inquiry report reiterate the importance of the 2009 Recommendations 1, 2, 8, 26 and 49 as described above.***

***Question 2 How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC Act?***

The EPBC Act should embody best practice in the definition and adoption of ESD principles. NPA would encourage the Inquiry to look beyond Australian jurisdictions in considering what constitutes best practice ESD.

Bhutan provides a refreshing example of such best practice. They have introduced wise policies to resolve the conflicts between economic development and environmental conservation, including constitutional obligations to preserve the environment, conserve its rich biodiversity and prevent ecological degradation. This far-sighted constitutional pledge is intended to ensure long term sustainable use of natural resources in a manner that not only benefits present and future Bhutanese generations, but also contributes to global environmental health.

Development goals in Bhutan emphasise the mainstreaming of environmental concerns into all arenas of development, with development projects required to both protect and regenerate the natural environment.

The Butanese approach to the integration of ESD principles across all aspects of national life offers a potential pathway into resolving some of the intractable environmental challenges facing Australia, including such deforestation, excessive clearance of native vegetation, profoundly compromised inland rivers and the continuing loss of irreplaceable biodiversity. Our challenge is not simply to stop loss, but is Bhutan, to find means of redressing past losses and regenerate sustainable ecosystems.

## **Recommendation**

- ***That the Inquiry review the international standards for best practice ESD.***
- ***That a broader definition of ESD, incorporating a commitment to environmental restoration and regeneration, be developed for introduction into Australian statute through the EPBC Act.***

### ***Question 3 Should the objects of the EPBC Act be more specific?***

The conservation of biodiversity is a core objective of the EPBC Act. However, while the EPBC Act contains provisions for the protection of threatened species and communities, in NPA's view the broad term biodiversity should be complemented by a new objective for the prevention of extinction events.

Furthermore, given the extreme gravity of species extinction, particularly in the case of taxa that are unique to the Australian continent, the EPBC Act should prohibit the Minister from issuing any approvals for proposals that are likely to render a species extinct. Any such approvals should require the assent of both Houses of the Commonwealth Parliament. The requirement for parliamentary rather than ministerial approval is warranted given the irrevocable nature of extinction, and falls in line with matters of similar environmental consequence such as the revocation of conservation reserves.

## **Recommendation**

- ***The prevention of species extinction events be expressly listed as an objective of the EPBC Act.***
- ***The EPBC Act prohibit the Minister from approving a proposal that involves a significant probability of making a species or ecological community extinct. Approvals for such matters should be subject to the assent of both houses of parliament.***

### ***Question 4 Should the matters of national environmental significance within the EPBC Act be changed?***

NPA proposes a major change to the list of Matters of National Environmental Significance (MNES), namely the inclusion of all lands in the National Reserve System (NRS) that have been gazetted as national park, nature reserve or marine park.

The NRS system, as administered by the Commonwealth, uses the IUCN system of Protected Area Categories to define the characteristics and management objectives for different types of conservation reserve. The NRS is the primary mechanism through which Australia meets its obligations as a signatory to the Convention of Biological Diversity. In this context, NPA considers it imperative that our nation's Protected Areas, especially those that conform with IUCN categories 1 and 2 (i.e. Nature Reserves, Wilderness Areas and National Parks), be considered as MNES.

An important feature of the NRS that is not captured by the existing MNES is the role of reserves in protecting biodiversity through the retention of natural ecosystem processes. The 'whole of landscape' approach to conservation management is an essential complement to threatened species management, ensuring that species persist at the bioregional scale and reducing the likelihood that abundant species will decline towards threatened status. The link between the ongoing survival of abundant native species and the NRS was dramatically demonstrated over the 2019/20 fire season, which the post fire assessments by the Commonwealth's Threatened Species Recovery Hub determined has pushed many previously secure species to the point of extinction.

Moreover, our collective knowledge of the status of individual species is far from complete, especially in respect to the mega-diverse but poorly sampled invertebrate fauna. There is no prospect that every species that is at risk of extinction can be subject to a threatened species declaration and recovery plan. The NRS, by ensuring the protection of a Comprehensive, Adequate and Representative network of natural landscapes, offers the only feasible means of the securing the majority of our nation's biodiversity.

Finally, but most importantly, is the act of declaring an area as a conservation reserve. Australia has played a central role in the development of the national park concept, with Royal and Ku-ring-gai Chase National the second and third oldest parks in the world. National Parks are not just landscapes that contain a collection of threatened species and cultural sites- the act of declaring a conservation reserve represents a commitment to future generations, a legally binding pledge to maintain these places in as good or better a condition as is enjoyed by the present. The strength of the idea that declarations are in perpetuity is reflected in the consistently non-partisan approach of successive governments to the protection of the NRS. The only major exception has been in respect to marine parks, where changes to the levels of protection remain a blight on our international reputation.

The current lack of recognition of national parks, nature reserves and wilderness areas as foremost amongst the MNES represents a serious shortcoming of the EPBC. The result has been that the Commonwealth's consideration of adverse impacts on reserves has largely been constrained to

threatened species or cultural sites issues, with limited or no capacity to consider impacts on natural ecosystem processes or the integrity of the NRS.

We acknowledge that the National Heritage List (NHL) currently includes some reserves, however the listing of individual parks is incomplete and has been largely driven by proposals for future World Heritage nominations. NPA does not consider NHL listings to provide an appropriate mechanism for addressing the NRS, largely because they rely upon the specific values of individual reserves, rather than the international obligations, broad ecosystem processes and commitments to future generations that are embedded in the declaration of a national park or nature reserve.

### **Recommendation**

- ***That all Nature Reserves, Wilderness Areas and National Parks be included as Matters of National Environmental Significance, with an accompanying obligation for the Minister to consider the potential impacts of proposals on both natural ecosystems processes and the integrity of the National Reserve System.***

### ***Question 6 What high level concerns should the review focus on?***

NPA is not aware of any analysis that demonstrates that the EPBC Act has exerted a significant positive influence on the continuing declines in vegetation cover, forest condition, inland rivers or other elements of national biodiversity. What is beyond dispute is that the state of our environment has deteriorated since the commencement of the EPBC Act.

Accordingly, while this submission is largely concerned with suggesting improvements to the existing EPBC Act, NPA's view is that a major program of legislative reform is required to enable the Commonwealth to assume an appropriate level of leadership in environmental protection. In that context, we commend to the Inquiry the reform agendas proposed by the Environmental Defenders Office (*Next Generation Biodiversity Laws: Best practice elements for a new Environment Act*), the Australian Panel of Experts on Environmental Law (*Blueprint for the Next Generation of Australian Environmental Law*) and the Ecological Society of Australia (*Ecological Society of Australia Bulletin*, 49/2, 2019).

NPA would welcome a forward-looking overview of the national framework of environmental laws and trusts that the present review will provide a bridge towards that outcome.

## **Recommendation**

- ***That the Inquiry's recommendations include draft Terms of Reference for major reform of the national environmental planning framework.***
- ***That the draft Terms of Reference be presented to the 2021 meeting of the Council of Australian Governments.***

### ***Question 7 What additional future trends or supporting evidence should be drawn on to inform the review?***

The EPBC Act operates on the underlying assumption that MNES are essentially static entities that are relatively unaffected by regional or global factors such as the large-scale loss of adjoining habitats, global heating or 'natural' disasters. The EPBC Act will not meet its legislative objectives in the absence of a detailed understanding of the dynamic influences on the condition and resilience of our nation's environmental assets. These national and global factors require a shift from the current reductionist approach to the assessment of impacts within a development footprint to consideration of the cumulative impacts of development at the landscape scale. This review offers the opportunity for the Commonwealth to demonstrate genuine leadership in environmental planning by actively confronting linked issues of a deteriorating environment and the ravages of cumulative loss of environmental values across the landscape.

## **Recommendation**

- ***The Inquiry devise mechanisms to assess the implications of large scale environmental change and the cumulative impacts of historic land use practices in the EPBC framework.***

### ***Question 9 Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system?***

NPA considers the EPBC Act as a critical element of the checks and balances in the national environmental planning framework, complementing rather than replacing State and Local Government assessment processes. It is entirely proper that the Commonwealth brings a national perspective to environmental planning, thereby ensuring that proposals are considered in terms of their potential impact at local, regional and national scales.

NPA would draw the Inquiry's attention to certain circumstances where the EPBC Act does not act in concert with State or Local Government assessment processes, including airports, military lands,

Commonwealth National Parks and lands managed by the Sydney Harbour Federation Trust. The problem with development in these select situations is that the EPBC Act is designed to protect MNES, not to fulfil all of the functions of State and Local Government environmental planning legislation. This has led to poor outcomes including uses that are inconsistent with adjoining land uses, inadequate controls over pollution and adverse impacts on regionally significant conservation assets.

#### **Recommendation**

- ***That the Inquiry identify legal mechanisms to ensure that developments by the Commonwealth meet best practice environmental outcomes.***

#### ***Question 15 Should low-risk projects receive automatic approval or be exempt in some way?***

The core purpose of Environmental Impact Assessment (EIA) processes is to determine the level of environmental risk associated with a development proposal. Accordingly, NPA does not support any proposal that exempts development from a form of EIA that is calibrated to the context and potential impacts of the proposed activity.

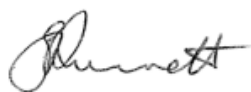
A growing international concern about the capacity of existing EIA processes to protect biodiversity was articulated Intergovernmental Science-Policy Platform on Biodiversity & Ecosystem Services Report of 2019. The expansion of exemptions risks intensifying these trends.

#### **Recommendation**

- ***That the requirement for assessment of potential impacts on Matters of National Environmental Significance should not be subject to automatic approvals or exemptions.***

NPA would welcome the opportunity to discuss these matters with the Inquiry. We can be contacted at [garyd@npansw.org.au](mailto:garyd@npansw.org.au).

Yours sincerely,



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**National Parks Association of NSW**  
*protecting nature through community action*