

Professor Graeme Samuel AC
Independent Reviewer

Independent Review of the EPBC Act 1999

Lighter Footprints Inc welcomes this opportunity to contribute to the second review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). This review is timely given the environmental crisis that has struck Australia in recent times. We encourage you to see the review as a response to that crisis and a necessary step in ensuring Australia has robust environmental legislation in place that is capable of meeting this existential challenge.

Our desire to see stronger national environmental legislation has been heightened by the bushfires and other extreme weather events which struck much of Australia this extended summer season, wreaking enormous loss and destruction and bringing trauma and grief. Record setting high temperatures, prolonged droughts and significant changes in weather patterns have all contributed to a lengthy and catastrophic fire season. An estimated one billion wildlife have been killed and many species are now extinct or likely pushed towards extinction. The Act as it stands at the moment does not have the scope or the authority to deal with the causes of such a crisis as this.

Apart from the legislative requirement that this review be carried out every ten years, we believe that the Commonwealth Government has a strong political and moral responsibility to all Australian citizens to address this growing environmental crisis and develop a clear strategy and legislative authority to respond to the existential threat that climate change represents.

In recognition of our belief that climate change should be the central driving force behind all Commonwealth environmental legislation, the principal recommendations we want to see coming out of your review include:

- the primary and overarching objective of the EPBC Act to become the need to address climate change;
- status being given to climate change as a Matter of National Environmental Significance (MNES);
- listing of greenhouse gas emissions as a trigger for assessment under the Act;
- precise and clear articulation of principles that give priority to the climate crisis in all assessments and policy making; and
- allocation of significantly greater resources to the administration of this Act.

We would welcome the chance to speak further to you about our views. In the first instance, please contact Carolyn Ingvarson by phone at 0411 115 186.

Carolyn Ingvarson
Convenor
Lighter Footprints Inc
17 April 2020

Who is Lighter Footprints?

This submission is by Lighter Footprints Inc, a community group with a membership and supporter base of around 2000 residents from Boroondara and Whitehorse municipalities in Melbourne. The group came together in 2006 to see what we could do to encourage a stronger response by governments to the serious challenge of climate change. We have become increasingly impatient for action that takes seriously the body of international longitudinal scientific evidence, such as successive reports from the Intergovernmental Panel on Climate Change (IPCC). These have provided compelling evidence that the climate is warming faster than first predicted.

The Environment Protection and Biodiversity Conservation Act 1999

The EPBC Act is considered the centrepiece of the Commonwealth's environmental legislation. As such, we see that it serves two main purposes:

- to provide legislative authority for the Federal Government to fulfil the environmental obligations inherent in a range of international treaties and national agreements; and
- to put in place a mechanism for assessing and approving projects that may impact on so-called Matters of National Environmental Significance.

Our Position

We consider that the EPBC Act has major shortcomings and does not provide the authority necessary to address the environmental crises confronting our country. The Act needs significant and comprehensive updating to ensure it has the scope and powers to fully address the threats posed to our environment and biodiversity by climate change.

We believe that many of these shortcomings go back to the genesis of the legislation when the clash of prevailing interests led to limitations being placed on the way basic concepts underpinning this Act are applied. The debate that was taking place at that time between industry and environmental interests is apparent in the Explanatory Memorandum to the Act. Much of the statement is characterised by a degree of restraint which even at that stage would not have reflected the level of concern and warnings that climate scientists and environmental policy advisers were expressing at the time.

The Explanatory Memorandum to the Act states:

... the Act was created to redress several problems, including that: Many of the benefits provided by the environment are used free of charge, and often access cannot be denied. Without government involvement, free access and use can result in adverse effects on the environment. Any use of environmental resources may involve some loss of environmental quality. If the users of environmental resources do not pay for the use of those

resources, or are not otherwise made responsible, the resources will be used excessively, and impose losses not only on those currently alive, but also on those yet to be born. Governments can intervene to correct this failure. ...

This statement demonstrates not just a restrained level of ambition but also a reliance on a limited vision that sees the environment as primarily a supplier of resources for economic purposes. This has resulted in large gaps in the scope of the Act, and allowed the Commonwealth to give priority to shorter term economic considerations to the detriment of the long term health and sustainability of life on this planet. It has resulted in the neglect of an array of related matters such as greenhouse gas emissions, land degradation and misuse of water; created a national lack of leadership; and caused confusion and ambiguity at the State level over how to manage Australia's response to climate change.

This downplaying of the complex interconnection of the environment and a good life for all has seen an erosion of people's ability to value the natural environment for its centrality to all aspects of their existence. Too often, the environment is seen just as an economic resource to be harnessed for wealth generation and material consumption.

Our preferred stance

We would prefer to see the Commonwealth develop a completely new national Climate Change Act than try to patch up the existing EPBC Act.

A new Act designed to protect Australia's environment and biodiversity would put climate change, its causes and consequences at its centre and thereby give this threat the prominence and attention it warrants. It would provide a mechanism for establishing the necessary legislative authority for the Commonwealth to respond to the emergency we are now facing.

This approach is also necessary in order to give legal recognition to our obligations under the 2016 Paris Agreement and create a framework for Australia's efforts to address the global nature of the threat.

There are a number of models that the Commonwealth could use as a basis for developing an Act with the principal function of addressing the climate crisis. The United Kingdom passed the Climate Change Act in 2008 which is seen by some as an effective guide to institutional action and to have cut emissions while promoting economic growth¹.

The Victorian Climate Change Act 2017 is considered to be one of the first pieces of legislation in the world modelled on the Paris Agreement. It requires the Government to

¹ <https://theconversation.com/the-uk-has-a-national-climate-change-act-why-dont-we-115230>

... endeavour to ensure that any decision made by the Government and any policy, program or process developed or implemented by the Government appropriately takes account of climate change if it is relevant by having regard to the policy objectives and the guiding principles.

The objectives of the Victorian Act include

- reducing the State's greenhouse gas emissions consistently with a long-term emissions reduction target and interim emissions reduction targets;
- building resilience through effective adaptation and disaster preparedness actions;
- managing the State's natural resources, ecosystems and biodiversity to promote their resilience;
- promoting and supporting the State's regions, industries and communities to adjust to the changes involved in the transition to a net zero greenhouse gas emissions economy; and
- supporting vulnerable communities and promoting social justice and intergenerational equity.

The principles to guide all decision making under the Victorian Act include:

- informed decision making based on a comprehensive analysis of the best practicably available information;
- integration of the competing long-term, medium-term and short-term environmental, economic, health and other social considerations relating to climate change;
- risk management based on careful evaluation of the best practicably available information, assessment of the consequences of the risks to achieve best practice; and not relying on a lack of full scientific certainty as a reason to postpone appropriate measures;
- equity including intergenerational and intragenerational;
- community engagement especially for members of vulnerable or marginalised communities, and
- compatibility directed at coherence and cohesion with the work of other States or Territories; the Commonwealth; other countries; and international bodies and organisations.

We also draw your attention to two pieces of work which we consider give a thorough analysis of the EPBC Act and a useful guide to the content and structure of a new Act:

- In 2017, The Australian Panel of Experts on Environment Law (APEEL) published its *Blueprint for the Next Generation of Environment Law*. This blueprint and supporting Technical Papers are based on thorough research and provide important insights on drafting a high quality climate change act. ²
- In 2018, the Environment Defenders Office NSW produced a paper for the Humane Society International Australia (HIS) entitled *Next Generation Biodiversity Laws – Best Practice Elements for a New Commonwealth*

² <http://apeel.org.au/>

*Environmental Law*³. This paper focuses on biodiversity but also gives many more general insights on developing the next generation of environmental law.

In its Blueprint, APEEL makes what we consider is a significant statement on the format for new environmental laws:

*The next generation of environmental laws will need to recognise explicitly the role of humanity as a trustee of the environment and its common resources, requiring both care and engagement on behalf of future generations.*⁴

A second best option: update and revise the existing EPBC Act

In recognition that the focus of your inquiry is to review this specific piece of legislation, we recommend that the Commonwealth Government update and revise the EPBC Act as the centrepiece of its environmental legislation so that it:

- better reflects the climate change emergency that is impacting so forcefully on our unique and wonderful environment;
- gives legislative recognition to the obligations that we took on ourselves to the rest of the world when we signed and ratified the Paris Agreement in 2016;
- clarifies the legal authority for the Commonwealth to legislate on the environment and:
 - facilitates the development of a more modern interpretation of the concept of ‘cooperative federalism’ beyond the narrow view that currently prevails on the constitutional split of powers between the Commonwealth and States;
 - gives recognition to the leadership role that our national government should play in cooperation with the States and Territories to address climate change;
- implements an approval process based on a more appropriate definition of Ecologically Sustainable Development (ESD) by:
 - acknowledging that a prosperous economy and flourishing society is highly dependent upon a healthy environment;
 - decoupling development from concepts of economic growth based on financial measures and exploitation of natural resources;
- includes explicitly stated principles and criteria for the development of policy responses and to assess project applications;
- respects the role of regulation in a properly functioning economy and society to manage conflicts of interest and imbalances of power and information; to ensure preference is given to longer term, more equitable outcomes; and to provide greater predictability and certainty;
- is supported by adequate resources to administer the legislation, including helping proponents fully understand its provisions, monitoring and reporting on its application and providing administrators with the skills, expertise and

³ <https://hsi.org.au/campaign/law-and-policy-general/new-environment-laws-for-australia>

⁴ <https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/59bb6fe3f43b55b154728d29/1505456149104/APEEL+Blueprint+for+environmental+laws.pdf>

opportunity to ensure all potential projects are captured by the legislation and that assessments can be fully and independently evaluated.

Specific recommendations relating to the design of a revised and updated Act are discussed below. These recommendations cover two basic aspects:

- expanding the scope and strengthening the objectives of the Act to give the Commonwealth a leadership role in mitigating and adapting to climate change; and
- strengthening national processes for administering this legislation including clarifying and enhancing the Commonwealth's role in managing our response to climate change and establishing an explicit set of principles and criteria.

The EPBC Act is no longer fit for purpose

We consider that the EPBC Act is totally inadequate for the circumstances that apply in 2020 where we face an existential threat to life on this planet unless we take immediate and extensive action to address climate change:

- The objectives of the Act make no mention of climate change or its link to greenhouse gas emissions.
- The two concepts underlying the Act, MNES and ESD, have acquired meanings that characterised the thinking behind much environmental policy making in the latter part of the 20th century.

The EPBC Act came into operation 20 years ago in 2000 and has remained little changed in essence over that time. It lists five principle objects including:

*'... to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;
and
...to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources'*

We are disappointed that what is the central piece of environmental legislation in Australia fails to include any goals or objectives that relate to climate change and its impact on our natural environment.

This lack of acknowledgement of the most serious threat to our environment reflects a total policy failure by our national Government. This is despite a significant decline in and degradation of Australia's natural environment over this period; and a growing realisation in all parts of society and the business community that climate change is creating an environmental crisis which requires a comprehensive and coordinated emergency response.

In the 1120 pages of this two volume piece of legislation, the only time the phrase 'climate change' is used is in Section 520 Regulations. Listed there are various agreements that can be given effect by regulation under this Act. The only specifically

climate change agreement listed is the Framework Convention on Climate Change done at New York in May 1992.

However, since the passage of this legislation, Australia has signed and ratified two significant international agreements relating to climate change. Neither agreement has been given legislative recognition here or elsewhere in Australian law. Ratification for both these agreements involved tabling in Parliament, consideration by the Parliamentary Joint Standing Committee on Treaties and the subsequent public announcement of ratification.

The first of these, the Kyoto Protocol resulted from the Third Session of the Conference of Parties to the Framework Convention on Climate Change in December 1997. Australia signed the Kyoto Protocol in 1998 but did not ratify it until 2007.

The Paris Agreement was tabled in Federal Parliament on 31 August 2016. Following consideration by the Parliamentary Joint Standing Committee on Treaties, which recommended that Australia ratify the Agreement, Australia announced ratification on 10 November 2016. As part of this process, Australia submitted its first Nationally Determined Contribution (NDC) that included a very modest target of reducing emissions to 26 to 28% below 2005 levels by 2030.

The EPBC Act 1999 is a creature of its time and no longer appropriate in 2020

In the 1990s, when the EPBC Act was being developed, threats to the environment were seen as locally based, single factor problems such as pollution of the air or water supplies or threats to a particular locality or specific form of life. The role of governments was seen primarily as fostering society's wellbeing through economic growth centred on the exploitation of natural resources, population growth and increased monetary wealth.

The question of what powers the Commonwealth has to legislate and regulate with respect to the environment was considered by a Senate Committee just prior to the development of the EPBC Act 1999.⁵ In its report on Commonwealth environment powers, the Senate Environment, Communications, Information Technology and the Arts Committees made an observation that we consider would still apply if a similar inquiry was held today:

The large number of submissions (367) received by this inquiry highlight the importance attached by many citizens to the role of the Commonwealth in environmental management in Australia. However, the majority of those submissions deplored the recurrent lack of political will and leadership on the part of all Commonwealth Governments to employ the extensive power they possess

⁵ https://www.aph.gov.au/parliamentary_business/committees/senate/environment_and_communications/completed_inquiries/1999-02/enviropowers/report/c02

in order to protect and conserve the environment which is every Australian's common legacy.

The Senate Committee expressed the view that:

... the Commonwealth Government has the Constitutional power to regulate, including by legislation, most, if not all, matters of major environmental significance anywhere within the territory of Australia. The panoply of existing Constitutional heads of power confers on the Commonwealth extensive legislative competence with respect to environmental matters.

In its report, the Committee was strongly critical of the 'narrow approach' adopted by the Government in the Environment Protection and Biodiversity Conservation Bill 1998 where:

'...only six of the 30 matters listed in the Council of Australian Governments (COAG) Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment are 'matters of national environmental significance' which act as triggers for Commonwealth environmental assessment and approvals'.

The Committee made a number of prescient observations about the design of the Bill that subsequently became law in 1999. For example, it was strongly critical of the adoption of the concept of 'matters of national environmental significance' as it limited the capacity of the Commonwealth to adopt a 'pro-active' role and '*... also expressly limiting the wide-ranging environmental powers the courts and Constitution have conferred*'. The Committee saw this as '*...a deliberate attempt to constrain the environmental powers of the Commonwealth, which cannot be justified*' and recommended that it be abandoned.

A new and overarching objective based on climate change is required

The principal elements that we would want to see in the objectives for a stronger national Act would be an acknowledgement that:

- humanity is confronting an existential threat for which the primary cause is human activity and particularly greenhouse gas emissions resulting from our use of fossil fuels,
- this threat has reached crisis proportions requiring an emergency response on the part of our national Government;
- there is a growing realisation in both the Australian society generally and the Australian business community of the need for collective and immediate action to address this crisis; and
- our national Government has both the power and obligation to protect the Australian community from this threat and to provide active leadership for action to mitigate and adapt to the impact of climate change.

In recognition of the leadership role that the Commonwealth can and should adopt, we suggest that careful attention be paid to the language and mode of expression used in describing objectives. The use of terms 'to provide for' or 'promote' suggests that government's obligation to act is confined to establishing a system rather than a more pro-active leadership role by the Commonwealth. A more direct statement of the objectives would also remove some of the ambiguity that currently exists with respect to the Commonwealth's role as opposed to that of the States.

Strengthen the EPBC Act as a tool for assessing projects that have an environmental impact

An important function of the EPBC Act is to assess actions, approve projects and issue permits for projects as part of its objective to '*... provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance*'.

We consider that the Act does not adequately fulfil this function. Many potentially damaging proposals are being allowed to proceed without sufficient assessment of their long term and far reaching impact on our environment and our climate. Many other actions fall outside the scope of the Act and are not assessed at all.

We live in an interconnected world whereby the actions we take here will have significant impact on distant areas and regions and in ways that are difficult to identify in the short term. This interconnection and long term nature of impacts need to be seen as basic elements in all assessments.

Matters of National Environmental Significance should be extended to include climate change and to eliminate other gaps in current coverage

The current EPBC Act lists nine matters of national environmental significance (MNES), derived either from Australia's responsibilities under international agreements dealing with environment protection or from certain Commonwealth State agreements. These nine matters include world heritage, national heritage, wetlands, threatened species, migratory birds, the Great Barrier Reef, marine areas, nuclear actions, water resources in relation to coal seam gas and large coal mining development.

We consider the current list of MNES and its application inadequate especially since it fails to make any recognition of the most significant environmental threat that Australia faces, climate change.

In particular, we are concerned that:

- many important environmental matters are not covered by this list, the most significant being climate change and our international obligations with respect to the Paris Agreement;

- other important issues not covered by MNES include land clearing, ecosystems, water resources generally, air pollution including greenhouse gas emissions, and protected areas such as national parks.

Should the Act also cover already existing actions and how?

In general, the EPBC Act only covers the assessment of new actions and only becomes involved in existing projects if major change is being proposed.

This limitation highlights the many things that we as a society already do that have uncontrolled detrimental effects on the environment and contribute to climate change especially in terms of their greenhouse gas emissions. Many go unnoticed, unregulated or are covered by weak regulation or standards that ignore their climate consequences.

Examples include the inadequacy of fuel emissions standards for new cars and other forms of transport; the lack of emissions monitoring for vehicles already on the road; feral animals and invasive weeds as threats to biodiversity and ecological degradation; pesticide and pharmaceutical use; packaging and waste management; mining operations and the level of emissions generated at the mine site.

A significant omission both for new and existing projects is 'Scope 3' emissions, defined by the Clean Energy Regulator as:

... indirect greenhouse gas emissions other than scope 2 emissions that are generated in the wider economy. They occur as a consequence of the activities of a facility, but from sources not owned or controlled by that facility's business.⁶

At present, these indirect emissions are not reported by the National Greenhouse and Energy Reporting program. If they were counted, especially those resulting from our coal exports, Australia would need to acknowledge that our contribution to global greenhouse gas emissions is significantly higher than what we currently claim.

Many such actions may already be managed at the State or Federal level but none is likely to be monitored or assessed on the basis of their contribution to climate change or the production of greenhouse gas emissions. It may be appropriate that the EPBC Act include the establishment of a nationally based agency that can identify these gaps and has the authority to direct the appropriate body to act on these threats to the climate.

Include a new set of obligations in the Act relating to climate change

⁶ <http://www.cleanenergyregulator.gov.au/NGER/About-the-National-Greenhouse-and-Energy-Reporting-scheme/Greenhouse-gases-and-energy#n1>

As part of extending the scope of the EPBC Act to cover climate change, we recommend the establishment of a further range of obligations on policy developers and decision makers operating within the bounds of this law. These obligations should facilitate the monitoring and regular review of the effectiveness of the Act and associated regulation, to ensure the legislation can cope with the changing and dire circumstances of climate change

At present, the Act outlines reporting requirements for administrators of the Act. These include an annual report on the operation of the Act to be tabled in Parliament. This report is required to cover the application of the ESD principles and how the permitted activities contribute to ESD. Every five years, the Minister must also require the preparation and tabling of a State of the Environment report to cover matters specified in the regulations. It also stipulates that the Act be reviewed every 10 years.

As a corollary to our recommendation that the scope of the Act be extended to cover climate change, we recommend that new provisions be included in the Act to underpin this. These include:

- a requirement that the Minister urgently develop a strategy or action plan to cover all initiatives at the Commonwealth level in response to the threat of climate change;
- a requirement that procedures be put in place immediately to set interim and final targets for reduction of all greenhouse gas emissions and regular reviews of those targets,
- procedures for continuous dialogue with the States to ensure consistency in outcomes and processes; to remove any source of ambiguity or contradiction; and to engage the expertise available at all levels of government and the general community; and
- creation of frequent opportunities for the scientific community and the Australian population to contribute to timely and regular assessments of the Act's success in protecting the natural environment.

Setting of targets under the EPBC Acts should be based on the best possible scientific evidence available; be within the context of our obligations under the Paris Agreement; and should reflect the highest level of ambition required by the scientific evidence. Targets should not be treated as a compromise calculation but recognise the fact that climate change is an existential threat to life on earth as we know it. In contrast, there are always ways that we can repair any setbacks and damage caused to an economy when we give priority to the environment.

Community consultation is an essential part of ensuring this legislation remains up to date and capable of dealing with rapidly changing circumstances. At present, the voice of the ordinary citizen or those afraid of the consequences of climate change is being drowned out by that of vested interest groups. A particularly telling example is the very visible access the mining industry through its lobby group the Minerals Council of Australia gets to decision makers and the influence it wields over the political processes and environmental policy development.

Establish better ways to manage the functions of protecting the environment under the EPBC Act

The current application of the EPBC Act is determined to a large degree by the following factors:

- the concept of ‘cooperative federalism’ which has developed over time to manage the split in roles and responsibilities between the Commonwealth and States and has led to the establishment of mechanisms such as the Council of Australian Governments (COAG);
- the consequent limitation of Commonwealth environmental responsibilities to matters covered by international agreements or treaties or to specific Commonwealth/State Agreements and exceptions for ‘actions’ confined to one State only;
- a focus on new projects and a reliance on ‘self-assessment’ and ‘self-referral’ as to whether an ‘action’ requires approval and whether it will have a ‘significant impact’;
- enforcement being ‘risk based’. Because of the limited resources available to the regulator, only the more serious offences will be enforced through the courts, leaving the vast majority of breaches to be dealt with by penalty notices.

Particular issues that concern us about the current operation of the Act include the following:

- the potential for many possibly risky and damaging projects and actions to go unnoticed and unassessed because of a reliance on self-reporting and selfassessment;
- the potential for inconsistency in the treatment by State regulatory regimes of similar projects;
- the lack of recognition in the Act of the Paris Agreement and the principles embodied in that Agreement that should influence assessment processes;
- the lack of triggers to cover greenhouse gas emissions, land clearing, and water management generally;
- the concept of environment as comprising a specific locality or ecosystem and its constituent parts;
- the lack of sufficient resources for the regulator to undertake assessments in a timely manner or to independently review the evidence provided by project proponents or State regulators.

We recommend that the following changes be made to the way the EPBC Act is applied.

Renegotiate the current Heads of Agreement between the Commonwealth and State Governments to develop a more appropriate basis for national environmental legislation

Renegotiation of the Heads of Agreement would provide an opportunity to:

- rethink and modernise the concepts behind the various pieces of environmental legislation at the Commonwealth and State levels of government;
- develop greater harmony between their objectives and remove the ambiguity and inconsistency that currently exists between the different regimes at national and State levels.
- acknowledge that many environmental issues require a nationally coordinated response, especially projects that cross state borders, where impacts are felt far from the local surrounds or cause distress because of their effect on matters to which all Australians have a strong attachment.

Introduce new triggers

Triggers or Matters of National Environmental Significance that require project proponents to seek approval to undertake specific actions are set out in Part 3 of the Act. As previously discussed, there are nine matters of national environmental significance (MNES), which derive either from Australia's responsibilities under international agreements dealing with environment protection or from certain Commonwealth State agreements

The inclusion of a new trigger to cover greenhouse gas emissions would recognise the major factor that drives climate change.

This new trigger may need to be supported by an extension to the meaning of terms such as 'environment' and 'impact' to remove their local focus. 'Environment' is currently defined in the Act as including ecosystems and their constituent parts amongst other things. No definition is given of 'ecosystem'.

Ecosystem is commonly understood to be '*... the complex of living organisms, their physical environment, and all their interrelationships in a particular unit of space*⁷'. An 'impact' is taken to occur when an event or circumstance is of direct consequence of an action or if an indirect consequence, a substantial cause.

The Act should also recognise land clearing and water management more generally as triggers for seeking approvals and permits.

Each of these matters can be shown to have a significant impact way beyond their local manifestation and should be treated as a trigger because:

- consistency in the treatment of projects regardless of where they occur is essential;
- an action's impact can cover both State and international borders; and
- these impacts can raise concerns for all Australians not just those in the immediate area of the action.

⁷ <https://www.britannica.com/science/ecosystem>

The proposed Adani Coal Mine and the damage it is likely to inflict on the Great Artesian Basin and the Great Barrier Reef is an example of how far an action's impact can extend and how this can affect populations who are distant from the local site of the mine. This damage will extend beyond the immediate vicinity of the mine to include that done to a national icon that most Australians would see as a precious part of our natural heritage.

Ecologically Sustainable Development

The central concept driving policy development and assessment of applications is Ecologically Sustainable Development (ESD).

We consider that the concept and principles of ESB as currently enunciated in the EPBC Act are no longer adequate for assessing actions for their environmental impact.

The ESD concept was first articulated when the World Commission on Environment and Development published a report in 1987 that came to be known as the Brundtland Report. This document adopted a definition and developed guiding principles for sustainable development as it is generally understood today. Ecologically sustainable development was defined in this report as '*... development that meets the needs of the present without compromising the ability of future generations to meet their own needs*'.

In 1992, the Ecologically Sustainable Committee of COAG prepared a National Strategy for Ecologically Sustainable Development for endorsement by COAG. ESD was defined for the purposes of this strategy as:

.... Development which aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations. To do this, we need to develop ways of using those environmental resources which form the basis of our economy in a way which maintains and, where possible, improves their range, variety and quality. At the same time we need to utilise those resources to develop industry and generate employment.

The concept was incorporated into environmental policy development at both the State and national levels in 1992 under the Intergovernmental Agreement on the Environment 1992. This agreement was built upon and expanded in 1997 by the signing of a Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment to develop a framework for intergovernmental relations on the environment

The most striking aspect of this definition is the focus on the environment as a source of resources for use by industry for economic purposes and job creation.

The ESD concept and associated principles need to be updated

The EPBC Act identifies a number of principles to guide decision makers in the application of the concept of ESD. These include integration of long term and short term considerations, the use of the precautionary principle, inter-generational equity, conservation of biodiversity and ecological integrity and promotion of valuation, pricing and incentive mechanisms; and by implication, sustainable use, intra-generational equity and the internalisation of external environmental costs.

While ESD has served as a useful concept, its effectiveness has been constrained by interpretations that favour economic values and outcomes.

Factors favouring economic outcomes include:

- application of the specific ESD principle of integration;
- a confusion over what is meant by development; and
- failure to give scientific evidence sufficient recognition in the assessment of applications.

In applying the ESD principle of integration, decision makers have generally taken this to mean achieving an equal balance of economic, social and environmental considerations. An alternative and preferable approach would be to see integration as bringing together and assessing the evidence available on each aspect in order to achieve the best possible outcome for the environment; an outcome that best fulfils the objectives of the Act.

The pursuit of balance ignores the fact that you cannot have a resilient economy or a flourishing society over the long term unless you have a healthy environment. It is essential that recognition be given to the inter-connectedness that exists between the environment, economy and society over time and the essential priority of a fair and just transition that leads to a safe and healthy environment for all living beings.

Balance also fails to take into account the difficulty in putting a precise quantitative measure on environmental costs and benefits that can form the basis of fair and like for like comparisons. At present, much of the value placed on the environment can only be expressed in qualitative or statistical terms. This is in contrast to economic matters which can generally be given a precise and much more readily understood financial or monetary value.

This point is made very precisely in the following statement by the European Protection Agency in 2010:

Many economists believe that the core problem is that no markets or property rights regimes exist for many of the services that nature provides. Since we don't pay for the services, their value isn't reflected in our decision-making. Judgments about whether to alter the environment focus only on the private benefits, not the more broadly dispersed costs.⁸

⁸ <https://www.eea.europa.eu/highlights/putting-a-value-on-nature>

Decision makers too often operate on the implicit assumption that development is inherently about economic growth, particularly over the short term; measured in terms of Gross Domestic Product; and based on a view of productivity that is directed at exploiting resources to get the greatest return in the shortest possible time frame.

Development is much more than economic growth. The link with economic growth grew out of the economic theories of the 1980s and 1990s with their emphasis on the free market, deregulation, privatisation and aspirational politics that measured personal and society wide success as a function of increasing monetary wealth and financial assets. This interpretation led to the view amongst many that the primary purpose of a government is to manage and grow the economy. A stable society and a sustainable environment were seen as subsidiary considerations that would be achieved and function effectively as long as the economy was growing.

In more recent times, this pursuit of economic growth as a good in itself and for its own ends is being increasingly questioned as social trust breaks down and dysfunction and inequality rapidly rises. Other ways to understand development include seeing it as improvement, transition, alteration, reform or merely movement from one state or condition to another.

We have previously discussed the need to revisit the Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment that was signed in 1992 to develop a more appropriate basis for national environmental legislation. This exercise would also provide an opportunity to redefine the principles influencing the application of ESD so that development is not seen as equivalent to economic growth and the protection of the natural environment is given priority.

Include in an updated version of the EPBC Act an explicit set of principles and criteria to guide policy and decision makers for both the assessment of applications and the development of policy and regulation that are comprehensive, accessible, relevant to climate change and less open to interpretation or judgement

Nowhere in the Act or associated guidelines is there a sufficiently comprehensive or clearly articulated statement of the principles that should guide the application of the Act or the specific factors should be taken into account when assessing the environmental impact of an action. As a consequence, many matters that we would consider to have a perverse impact on the environment are either excluded from consideration or open to broad interpretation.

We see significant value in providing applicants with a set of criteria that clearly describes what standards need to be met for approval:

- A clear statement of the grounds for identifying and measuring an impact will remove much of the opacity and vagueness present in the current approach and should make the preparation of an environmental impact assessment less onerous.

- There will be less room for interpretation and subjective judgement which should lead to better quality and more acceptable decisions.
- There will be greater predictability and consistency in outcomes.

Furthermore, we expect that, as the impact of climate change becomes more devastating, companies will be open to litigation over their duty of care to the Australian people, the global community and their customers. Criteria that clearly articulate the standards to be met will provide precise pointers to the values and obligations that a company must abide by to gain de jure permission for a project and a measure of their capacity to elicit community trust and a 'social licence to operate'.

A stronger emphasis on the importance of scientific evidence is needed

The ESD principles outlined in the EPBC Act give some recognition of the contribution scientific evidence should make to decision making as follows:

'... 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'⁹

We believe that the legislation should include a much more assertive statement regarding the role and value of scientific evidence in the application of ESD. Scientific evidence is capable of providing meaningful measures of the nature of environmental impacts of a project and the probability that they will occur and should be much more integral to the assessment process.

We recommend this principle should be expanded to adopt the approach taken in the Victorian Climate Change Act. That Act requires that assessment should include:

'... careful evaluation of the best practicably available information, assessment of the consequences of the risks to achieve best practice; and not relying on a lack of full scientific certainty as a reason to postpone appropriate measures.'

Restate and expand the values and principles currently included in the EPBC Act

The EPBC Act outlines a number of principles to guide decision makers when applying the ESD concept. We believe these should be made mandatory for the consideration of any and all proposals and actions. In particular, they should be made more explicit and/or reframed to cover the extension of the Act to climate change.

The principles currently identified in the Act include:

- integration of long term and short term considerations,
- the use of the precautionary principle,
- inter-generational equity,
- conservation of biodiversity and ecological integrity

⁹ EPBC Act Section 3A. Principles of ecologically sustainable development.

- promotion of valuation, pricing and incentive mechanisms.
- sustainable use,
- intra-generational equity and
- the internalisation of external environmental costs.

In addition to the above, other important principles as identified by APEEL¹⁰ that we consider should be recognised in the EPBC Act include:

- prevention of harm;
- achieving a high level of environment protection; and
- applying Best Available Techniques.

We believe that all principles in the Act should be accompanied either within the Act or in related regulation by unequivocal directions as to how these principles should be interpreted and applied. A useful guide on how this can be done is given in various considerations by Judge of the NSW Land and Environment Court, Justice Brian Preston.

For example, in 2006, as part of the case *Telstra Corporation Limited v Hornsby Shire Council*, Justice Preston, gave a detailed consideration of the principles of ESD and, in particular, the precautionary principle¹¹. He summarised ESD as:

... development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

In Justice Preston's discussion of the principles underlying ESD, he detailed how the precautionary principle would be triggered:

... the application of the precautionary principle and the need to take precautionary measures is triggered by the satisfaction of two conditions precedent:

- *a threat of serious or irreversible environmental damage; and*
- *scientific uncertainty as to the nature and scope of the threat of environmental damage.*

When both of these conditions have been satisfied, a precautionary measure should be taken but it must be proportionate to the level of the threat.

Recognition of the Paris Agreement principles and obligations in the Act

The Paris Agreement aims¹² to:

- strengthen the global response to the threat of climate change by keeping the global temperature rise this century well below 2°C above pre-industrial levels;

¹⁰ <https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/59bb6fe3f43b55b154728d29/1505456149104/APEEL+Blueprint+for+environmental+laws.pdf>

¹¹ <https://www.claytonutz.com/knowledge/2006/july/getting-connected-with-the-precautionary-principle>

¹² <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement>

- pursue efforts to limit the temperature increase even further to 1.5°C;
- increase the ability of countries to deal with the impacts of climate change.

The Agreement establishes a range of obligations for signatories. They include:

- taking both adaptation and mitigation action to achieve the identified targets; and
- submitting and implementing a nationally determined climate action plan, backed by a binding requirement to assess and review progress on this plan to continuously upgrade commitments with no backtracking.

Principles inherent in the obligations contained in the Paris Agreement that we believe should be spelt out in the Act include the following:

- climate change is a common concern of all humankind, that requires respect, promotion and consideration of human rights obligations including those relating to health, indigenous people, local communities, migrants, children, people with disabilities, people in vulnerable situations, gender equality, empowerment of women and intergenerational equity;
- recognition of the common but differentiated responsibilities and respective capacities, in the light of different national circumstances;
- design and implementation of the action plan to be based on a signatory putting forward its best efforts;
- all responses to be based on the best available scientific knowledge; and
- efforts should be directed at a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities.

The terms Action and Impact need to be redefined

An important factor affecting assessments under this Act are definitions of the specific types of things covered. In deciding whether a particular project falls within the ambit of the law and an application be made, the planner must ask the question as to whether their project is an action as specified in the Act and whether it will have a significant direct or indirect impact on the environment.

According to the legislation, an action is defined broadly to include a project, a development, an undertaking, an activity or a series of activities, or an alteration of any of these things.

The Act and guidelines draw narrow boundaries around what is considered to be the impact of an action. Only those actions considered likely to have a significant impact on an MNES in the area around the proposal need to be submitted for assessment and approval. The Department of Environment's website defines 'significant impact' as:

... an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is

*impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.*¹³

Factors that can be excluded on the basis of this definition and other parts of the Act include impacts that are

- not manifested in the local area around the action;
- not considered sufficiently significant (important, notable, or of consequence, having regard to context or intensity);
- if indirect, are not sufficiently close to the proposed action to be reasonably seen to be a consequence;
- confined to the boundaries of a specific State;
- falls outside the constitutional powers of the Commonwealth; or
- of consequence only outside national borders.

Examples of specific things that would consequently not be taken into account during an assessment include:

- land clearing which is treated as a State matter despite the possibility that its impact will be of significant consequence to other matters covered by the Act or causing environmental damage beyond the local boundaries of the action;
- the establishment of new or expansion of existing coal mines for export where the carbon emissions occur in places where the coal is burnt not at the point where it is mined;
- water usage where the impact stretches way beyond the local area such as that which will be caused by the Adani Coal Mine on the Great Artesian Basin; and
- air pollution which is treated primarily as a State matter under air quality standards that focus on the local impact of such things as air borne pollutants, or gases such as ozone and sulphur dioxide. Greenhouse gas emissions are not treated as a source of air pollution even though they represent the most significant pollutant and deadly challenge to the health of all life over the long term.

Australia's global obligations

We believe Australia, as one of the wealthiest countries and largest emitters per capita of greenhouse gases, has the capacity and the duty to reflect these principles in its environmental policy development and decision making. We are a developed country with a highly educated workforce, sophisticated infrastructure and a diverse range of economic opportunities, many of which are as yet unexploited. This abundance gives us the capacity to respond to the challenge of climate change more easily than many other countries. The recent bushfire crisis has also reinforced how much more we have to lose than most.

We recommend that the EPBC Act be amended to give legal recognition to:

¹³ <https://www.environment.gov.au/epbc/about/glossary#significant>

- the international obligations that we took on by signing and ratifying the Paris Agreement;
- the moral responsibility we have because of our great fortune; and
- the very real imperative we face to prevent existential damage to our natural environment, and the reality that we are much more vulnerable to this threat than most others.

This will allow Australia to demonstrate to the rest of the world that it takes these obligations seriously.

Provision of adequate resources to regulators to enable a more pro-active, independent and timely approval process

We strongly resist the calls by vested interests such as the mining industry for deregulation of the approvals process. The claims that valuable economic development is being retarded because of regulation are being pushed by those who are seeking short term economic returns at the expense of the longer term benefit of a sustainable natural environment. The hollowness of these claims is demonstrated by the low number of projects that are not permitted to proceed and the relative ease with which companies can comply with the conditions identified in an approval.

The principal reasons for any delay are the complexities of the issues to be assessed and the lack of adequate resources - including scientific capability within the regulator - to carry out the task of issuing permits in an efficient and timely way. This lack inhibits the ability of the regulator to properly educate business on their obligations under the law and to assist them to comply. Inadequate resources also hinder its ability to adequately assess claims made by proponents or to collect independent evidence to test these claims. This lack has been made worse by the Government's budgetary cutbacks to the environment department over recent years.

Recommendations

Lighter Footprints considers this review as a significant opportunity to respond to the growing community demand that Australia adopt a strong, nationally coordinated approach to the protection of our environment.

This response should be built around the principle that Australia has a duty to do its best to meet the challenge of climate change. This duty must cover both our domestic carbon emissions and that which results from our actions internationally including exports of coal, gas and other sources of carbon emissions.

The review should also recognise that this is a global emergency and that urgent, immediate action is needed. Australia is a wealthy country with a long tradition for international leadership in many fields. We have a duty to future generations of Australians and all human beings to commit to sharing the burden of meeting this challenge.

This commitment should be based on our capacity to contribute to solving the problem as well as a recognition that currently we are one of the highest sources per capita of carbon emissions. We should not shirk from this task because we perceive that others are more to blame than us. The fact that Australia has more to lose than most other places in the world and our comparative wealth makes it imperative that we lift the level of our contribution.

We remind you of the statement by APEEL on the format for new environmental laws:

The next generation of environmental laws will need to recognise explicitly the role of humanity as a trustee of the environment and its common resources, requiring both care and engagement on behalf of future generations.¹⁴

Listed below are specific recommended actions that Lighter Footprints would want to see the Commonwealth Government take to update and revise the EPBC Act. We believe these changes will establish the authority required for a nation-wide, consistent, timely and effective response to the climate crisis that is manageable economically.

1. Introduce a new and overarching objective that covers climate change including legislative recognition to the Paris Agreement and the global obligations we have incurred as a consequence of signing and ratifying this agreement.
2. Modernise and expand the concept of Environmentally Sustainable Development (ESD) so that:
 - a. the integration principle will be applied in ways that recognise the overriding importance of the environment to the economy and society;
 - b. the concept of development is decoupled from that of economic growth;
 - c. scientific evidence is integral to the assessment of environment values and outcomes and given a positive and primary role in the application of ESD.
3. Expand the list of Matters of National Environmental Significance (MNES) to:
 - a. include climate change, land clearing, ecosystems, water resources generally, air pollution including greenhouse gas emissions, and protected areas such as national parks;
 - b. make provision for the identification of new MNES in the future;
 - c. provide the authority for new triggers, the most important of which would be to enable action on greenhouse gas emissions.
4. Increase the authority of the regulator to enable the examination of matters beyond those classed as MNES.

¹⁴ <https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/59bb6fe3f43b55b154728d29/1505456149104/APEEL+Blueprint+for+environmental+laws.pdf>

5. Establish a further range of obligations on regulators to monitor and regularly review the effectiveness of the Act and regulation, to cover:
 - a. development of a strategy or action plan to address the climate crisis;
 - b. setting interim and final targets for reduction of all greenhouse gas emissions and regular reviews of those targets in recognition of our obligations under the Paris Agreement;
 - c. conducting a continuous and cooperative dialogue with the States and Territories on all matters relating to climate change;
 - d. providing regular opportunities for the scientific community and the Australian population to contribute to timely and regular assessments of the Act's success in protecting the natural environment
6. Provide legal recognition of the leadership role the Commonwealth should have in responding to the environmental crisis that climate change is presenting. This will include:
 - a. renegotiating the Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment to develop a new framework for intergovernmental relations on the environment;
 - b. ensuring this leadership role is exercised in a cooperative and consultative manner with all States and Territories; and
 - c. using proactive and direct language in the legislation to describe the Commonwealth's duties and actions.
7. Establish a requirement within the Act that the Minister's decisions are to be guided by the principles and obligations contained in the Paris Agreement including:
 - a. providing a clear statement of these principles and obligations in the Act; and
 - b. granting legal recognition of the Paris Agreement, including it as a matter on which the Commonwealth can make regulations.
8. Establish a nationally based agency that can to monitor the operation of the Act and identify gaps in responses to the climate crisis and has the authority to direct the appropriate body to act on threats to the climate
9. Provide a more comprehensive and unambiguous statement of principles and criteria that policy makers, regulators and decision makers must apply in the development of policy and regulation and the assessment of proposals.
10. Redefine the terms action and impact to remove the limitation to the local area surrounding a project
11. Ensure scientific evidence regarding the nature and probability of risk is an integral part of all assessments

12. Increase the level of funding to the regulating agency to ensure it has adequate resources to undertake a more pro-active, independent and timely approval process

Thank you for this opportunity to contribute to your review. We would welcome the opportunity to participate in any further consultations you may conduct.

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