

Tasmanian Independent Science Council

Submission to EPBC Act Review 17 April 2020

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General questions

27. Is the EPBC Act delivering what was intended in an efficient and effective manner?

As the Discussion paper acknowledges, repeated State of the Environment Reports (2016 and previous reports) have found that during the life of the EPBC Act the health of the Australian environment and its biodiversity has continued to decline. The Independent Science Council of Tasmania (ISCT) recommends strengthening key aspects of the Act, as we have outlined in our responses to specific questions.

The ISCT supports and has highlighted in our submission, several recommendations from the previous EPBC Act Review (the Hawke Review, 2009) and other expert bodies.

28. How well is the EPBC Act being administered?

The Independent Science Council notes that there has been a progressive reduction in the number of people employed by the Commonwealth on matters relevant to the EPBC Act over the last two decades. The recent tendency has been to declare referrals to be 'not matters of interest' in situations in which this determination is clearly strongly arguable. There cannot be appropriate administration of the Act when there is inadequate staffing.

29. Is the EPBC Act sufficient to address future challenges? Why?

The Independent Science Council of Tasmania (ISCT) does not consider the Act in its current form to be sufficient to adequately address the future challenges facing Australia's environment. There are critical gaps in the Act which must be addressed, including:

1. Because of the overwhelming impacts on the natural environment and biodiversity (as well as other aspects), Australia needs to urgently increase efforts to meet the Paris Agreement with standalone climate change legislation, a carbon budget and economy-wide policies, consistent with limiting global temperature warming to 1.5 degrees. A new significant greenhouse gas emissions trigger in the EPBC Act would link such economy wide measures with an individual proposal's impact assessment and development conditions.
2. There must be a greater focus on better guidance in the EPBC Act, including clear environmental standards and defined limits for impacts.
3. Elevate environmental protection and biodiversity conservation as the primary aim of the Act, consistent with Australia's international obligations.
4. Strengthen the power and accountability role of Ministers and agencies by requiring that they exercise their powers under the Act to achieve its objects.

30. What are the priority areas for reform?

The Independent Science Council of Tasmania (ISCT) considers the following to be the priority areas for reform:

1. There must be a greater focus on better guidance in the EPBC Act, including clear environmental standards and defined limits for impacts.
2. Elevate environmental protection, biodiversity conservation, and ecological restoration as the primary aims of the Act, consistent with Australia's international obligations.
3. The Act must effectively address Australia's most significant environmental challenges: climate change, native vegetation clearing, biodiversity loss, degradation of marine and freshwater ecosystems, and cumulative impacts in these and other domains.
4. Strengthen the role of Ministers and agencies in that they should be required to exercise their powers under the Act to achieve its objects.
5. Greater emphasis should be placed on First Nations Australians' leadership and rights, land management and biodiversity stewardship, and formal legal recognition of Indigenous Protected Areas.
6. Improve funding for community groups and public interest watchdogs in order to enhance community oversight of the implementation of and compliance with the Act.
7. Remove loopholes and exemptions from the Act, including the Regional Forest Agreements in which some do not currently offer protection for threatened species. Furthermore, 'national interest' exemptions should be removed.

31. What changes are needed to the EPBC Act? Why?

Our responses to other questions address this.

32. Is there anything else of importance to you that you would like the review to consider?

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. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?

The Independent Science Council of Tasmania (ISCT) supports new and expanded matters of national environmental significance, including:

1. significant greenhouse gas emissions;
 - Because of the overwhelming impacts on the natural environment and biodiversity (as well as other aspects), Australia needs to urgently increase efforts to meet the Paris Agreement with standalone climate change legislation, a carbon budget and economy-wide policies, consistent with limiting global temperature warming to 1.5 degrees.
 - A new EPBC Act trigger would link carbon accounting and emissions reduction targets with impact assessment and development conditions.
 - Each project, including any land clearing or logging of mature or old growth native forest, should be assessed for its contribution to Australia's carbon budget and emitting above a certain amount would trigger EPBC Act assessment.
2. Ecosystems of National Importance (such as high conservation value vegetation, key biodiversity areas and wetlands of national importance);
 - Aim to identify and protect exceptional concentrations of biodiversity before it becomes threatened.
3. the National Reserve System (terrestrial and marine protected areas, Indigenous and private protected areas);
 - For actions affecting Indigenous Protected Areas, Traditional Owners and/or Indigenous land managers could be prescribed as the approving authority.

- The Act should also set national goals and targets to complete the National Reserve System to be comprehensive, adequate and representative of Australia's biodiversity.
- 4. vulnerable ecological communities (alongside other threatened species and ecological communities);
 - To be consistent with a precautionary approach, the existing trigger for other listed threatened ecological communities should be extended.
- 5. significant land-clearing activities;
 - The Act needs to adopt a trigger to regulate significant land-clearing. Sensitive areas, such as high-conservation value vegetation, should be off-limits to clearing other than for emergency management purposes.
 - Logging of old growth or regenerating native forests and woodlands to trigger application of the Act.
- 6. significant water resources
 - To be expanded beyond existing focus on coal and gas impacts to cover all significant water resources, and in particular those that cross State / Territory borders

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

The Independent Science Council of Tasmania (ISCT) considers that ESD principles would benefit from being updated and strengthened to better reflect current science and societal expectations which underpin these principles. Further, the relative importance of the ESD principles must be ranked to promote more consistent and transparent decision-making, with priority to be given to section 3A(d) on 'conservation of biological diversity and ecological integrity'. For instance, as with recent judicial interpretation of the equivalent principles in New Zealand's Resource Management Act 1992, and statements in the early Australian ESD documents, the notion of ESD should explicitly state that social and economic considerations are matters of relevance so long as ecological and biological values are not compromised.

Further, we support the sentiment and articulation contained in the Environmental Defenders Office submission to the EPBC Act Review, which include:

- **Prevention of harm**: preventative actions against likely harm to environmental and human health.
 - Intergenerational equity: that the present generation ***has an obligation to*** ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.
 - **Intra-generational equity**: The present generation has an obligation to ensure that environmental costs, benefits and outcomes are borne equitably across society.
 - **Biodiversity principle**: Ensuring that biodiversity and ecological integrity are a fundamental consideration in decision-making, including by preventing, avoiding and minimising actions that contribute to the risk of extinction.
 - **Environmental values principle**: Ensuring that the true value of environmental assets is accounted for in decision-making – including intrinsic values, cultural values and the value of present and future ecosystem services provided to humans by nature.
- **Polluter pays principle**: Those responsible for generating waste or causing environmental degradation should bear the costs of safely removing or disposing of that waste, or repairing that degradation.
- **Environmental protection**: Achieving high levels of environmental protection, including by requiring:

- the use of best available scientific information;
- continuous improvement of environmental standards, and
- the use of best available techniques for environmental management.
- **Non-regression principle**: Non-regression in environmental goals, standards, laws, policies and protections.
- **Resilience principle**: Strengthening the resilience of biodiversity and natural systems to climate change and other human-induced pressures on the environment.

The ISCT would add a requirement to follow the precautionary principle, which is often stated but rarely followed in environmental legislation.

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

The Independent Science Council of Tasmania (ISCT) considers that the objects of the Act must be more specific, prioritised and strengthened to elevate the protection of the environment as the primary object of the Act and to help ensure that biodiversity and ecological integrity are prioritised in decision-making under the Act. Social, economic and equitability issues should continue to be taken into account but as secondary considerations. This recommendation is consistent with recommendations of the previous independent review of the EPBC Act in 2009 (the Hawke Review).

The Act should also strengthen the role of Ministers and agencies in that they should be required to exercise their powers and functions under the Act to achieve the objects of the Act.

One precedent of a statutory formula that could help achieve this goal is provided in the Canada National Parks Act, which provides in section 8(2) that: "Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the **first priority** of the Minister when considering all aspects of the management of parks".

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

Please refer to our response to question 1.

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

The Independent Science Council of Tasmania (ISCT) considers the following elements should be priorities for reform:

1. There must be a greater focus on better guidance in the EPBC Act, including clear environmental standards and defined limits for impacts.
2. The EPBC Act should incorporate outcomes based standards, such as maintenance or enhancement of specific biodiversity and ecological indicators, which the Minister must achieve,
3. Elevate environmental protection, biodiversity conservation, and ecological restoration as the primary aims of the Act, consistent with Australia's international obligations.

4. The Act must effectively address Australia's most significant environmental challenges: climate change, native vegetation clearing, biodiversity loss, degradation of marine and freshwater ecosystems, and cumulative impacts in these domains.
5. Strengthen the role of Ministers and agencies in that they should be required to exercise their powers under the Act to achieve its objects.
6. Greater emphasis should be placed on First Nations Australians leadership and rights, land management and biodiversity stewardship, and formal legal recognition of Indigenous Protected Areas.
7. More incentives and support for other, private landholders to conserve and restore ecological and biological values on their properties.
8. Remove exemptions from the Act, including the Regional Forest Agreements in which some do not currently offer protection for threatened species. For example, the Tasmanian Regional Forest Agreement allows for the logging of swift parrot habitat, a critically endangered species which is likely to go extinct in 20 years' time. Furthermore, 'national interest' exemptions should be removed.

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

Please see our response to question 5, above.

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

Whilst most think of the environment in terms of either natural values or economic values, or both, the Independent Science Council of Tasmania (ISCT) considers the environment to have a third equally important value, namely resilience against harm to humanity. Increasingly, unstable ecosystems are leading to unpredictable and dangerous outcomes: for example, climate-related firestorms, drought-related food insecurity, jellyfish- and toxic algae-related marine ecosystem phase shifts, and the bat-related COVID-19 pandemic.

We urge the EPBC to include a provision in the Act to emphasize the importance of conservation as an essential strategy for resilience against pathogens, pests, and deprivation.

Question 8: Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

The Independent Science Council of Tasmania (ISCT) considers the current EPBC Act lacks clear goals and does not clearly articulate desired outcomes or limits to environmental impacts. The Act is currently all about process - proposals likely to incur significant impacts trigger the assessment process, however there is no clarity around what level of impacts are or are not allowed. Defined limits and measurable outcomes should be articulated in the Act, such as: recovery of threatened species, preventing further extinctions of native flora and fauna, and net zero emissions. Clarifying the primary object of the Act is to achieve strong environmental outcomes would help, as would improving monitoring and reporting systems.

We welcome recent developments by the Australian Government to develop "outcomes-based conditions" that specify the environmental outcomes that a project approval holder must achieve without prescribing how that outcome should be achieved. Likewise, we wish to see the same outcomes-based perspective apply to how the Government itself should achieve the objects of the Act, whilst retaining the assessment and approval processes that are so vital for providing for scientific analysis and public participation in decisions under the Act, and thereby enhancing legal accountability.

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

Please see our response to question 8, above.

Question 10: Should there be a greater role for national environmental standards in achieving the outcomes the EPBC Act seeks to achieve? In our federated system should they be prescribed through:

- Non-binding policy and strategies?
- Expansion of targeted standards, similar to the approach to site contamination under the National Environment Protection Council, or water quality in the Great Barrier Reef catchments?
- The development of broad environmental standards with the Commonwealth taking a monitoring and assurance role? Does the information exist to do this?

The Independent Science Council of Tasmania (ISCT) considers a fundamental gap in the EPBC Act is the lack of clear and consistent national environmental standards. We consider this is a major barrier to effective environmental decision-making in Australia. The Act should require the establishment of broad national environmental standards to achieve positive environmental outcomes. The proposed new National EPA should have the monitoring and evaluation role.

Question 11: How can environmental protection and environmental restoration be best achieved together?

- Should the EPBC Act have a greater focus on restoration?
- Should the Act include incentives for proactive environmental protection?
- How will we know if we're successful?
- How should Indigenous land management practices be incorporated?

The Independent Science Council of Tasmania (ISCT) supports ecological restoration in conditions in which it is cost-effective in maintaining native biodiversity or geodiversity. We note, however, that prevention is better (and cheaper) than cure. Strongly addressing land-clearing under the act will prevent the need for restoration in the future.

The Commonwealth should be proactive in delivering actions that are part of recovery plans, rather than leaving the work, which is usually not done, to the States and Territories. It could also expand the national commitment to ecological restoration, in line with the goals of the United Nations Decade on Ecosystem Restoration (2021-2030) and the Aichi Targets formulated under the Convention on Biological Diversity 1992. Ecological restoration should be informed by best practice such as the standards set by the Society of Ecological Restoration Australasia: <https://www.seraustralasia.org/>

Improved monitoring and reporting is required at both the landscape and species level. While some of this information is included in the national 5-yearly State of Environment Reports, state reporting is inconsistent, and may not provide a robust basis for assessment. In particular, Tasmania has not published a State of Environment Report since 2009. Monitoring and reporting should also include progress on the development and implementation of recovery plans, as well as a review of actions undertaken as conditions of project-specific assessments and approvals.

Question 12: Are heritage management plans and associated incentives sensible mechanisms to improve? How can the EPBC Act adequately represent Indigenous culturally important places? Should protection and management be place-based instead of values based?

The Independent Science Council of Tasmania (ISCT) supports values-based, rather than place-based protection and management, but notes that values can be destroyed if places are changed. Thus, protection of places is necessary to protect values.

Question 13: Should the EPBC Act require the use of strategic assessments to replace case-by-case assessments? Who should lead or participate in strategic assessments?

A major failure of the present Act is the lack of a mechanism to recognise incremental effects on protected values. The Commonwealth bureaucracy and advisory committees would be necessarily the providers of advice to the Minister, given that most values transcend State and Territory boundaries.

Question 14: Should the matters of national significance be refined to remove duplication of responsibilities between different levels of government? Should states be delegated to deliver EPBC Act outcomes subject to national standards?

The Independent Science Council of Tasmania (ISCT) considers there is no justification for divesting Commonwealth powers under the EPBC Act to the states. This is in accordance with the advice of the Wentworth Group of Concerned Scientists, and the Australian Panel of Experts on Environmental Law, among other experts:

- <https://wentworthgroup.org/2012/09/statement-on-changes-to-commonwealth-powers-to-protect-australias-environment/2012/>.
- <http://apeel.org.au/papers>

The Environmental Defenders Office has undertaken repeated and extensive analysis of state and territory biodiversity and planning laws, and its consistent finding is that State and Territory laws do not meet the full suite of national standards. In some cases there are significant environmental problems that transcend the borders of the states and territories (notably in regard to the Murray Darling Basin). Furthermore, cumulative environmental impacts cannot be effectively addressed at the level of individual states and territories. Commonwealth leadership is also indispensable for effective management of marine environments (Australia has jurisdiction some 8.2 million sq km of marine space, an area larger than its terrestrial land mass of 7.69 million sq km)

The Commonwealth has an extensive portfolio of powers under the Australian Constitution (eg on external affairs, corporations, and trade and commerce) that enable it to provide national leadership on protecting Australia's environments.

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

- How could data help support this approach?
- Should a national environmental database be developed?
- Should all data from environmental impact assessments be made publically available?

The Independent Science Council of Tasmania (ISCT) does not support automatic approvals or exemptions. We consider it would be better to improve up front guidance on limits and whether proposals should be considered for assessment.

We do support the idea of a national environmental database being developed and data from environmental impact assessments being made publically available.

We also support the concept of National Environmental Accounts, as articulated by the Wentworth Group of Concerned Scientists, to underpin the EPBC Act and inform decision-making (<https://wentworthgroup.org/programs/environmental-accounts/>).

Question 16: Should the Commonwealth's regulatory role under the EPBC Act focus on habitat management at a landscape-scale rather than species-specific protections?

A focus on landscape scale conservation will inevitably lead to the extinction of species, whereas, if species survive, their habitats survive by definition. If our goal is to ensure the future of our native species, we need to concentrate on the requirements of those that are in danger of extinction. In doing so, we find that many of our most threatened species require highly unnatural habitats to survive and have their most viable populations in cultural landscapes. Moreover, different threatened species have different requirements, even when they have overlapping geographic distributions. Managing habitats at a landscape scale concentrates on maintaining the common elements of biodiversity in a highly notional concept of 'natural'. Our environments today are very different to those of 1789 and can never revert to their earlier state. Neither can we restore them to a 'natural' state. We have lost keystone species, we have gained exotic species, the climate is different, the soils and hydrology have changed and we do not know the species composition and process dynamics of the pre-European-invasion times.

Landscape scale conservation should be a response, if appropriate, to problems with conservation of elements of biodiversity, but not a prime goal in itself. Conserving and restoring natural landscapes does not help in conserving many threatened species, which require quite 'unnatural' habitats that can be destroyed by restoration. The ISCT consider we should conserve species first. We will lose biodiversity if we concentrate purely on landscapes.

Question 17: Should the EPBC Act be amended to enable broader accreditation of state and territory, local and other processes?

The Independent Science Council of Tasmania (ISCT) does not support broader accreditation of state and territory, local and other processes under the EPBC Act.

Question 18: Are there adequate incentives to give the community confidence in self-regulation?

The Independent Science Council of Tasmania (ISCT) does not support self-regulation and does not consider there are adequate incentives to give the community confidence in this

regard. Considerable academic research highlights that the private sector is subject to conflicts of interest that can undermine the integrity of environmental self-regulation.

We support more opportunities for the private sector, individual landholders, First Nations Australians, community groups and other nongovernment actors to play a larger role in environmental decision-making under the auspices of the EPBC Act. We support collaborative and participating decision making, within the context of national leadership provided by the Commonwealth.

QUESTION 19: How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management?

- How can we best engage with Indigenous Australians to best understand their needs and potential contributions?

- What mechanisms should be added to the Act to support the role of Indigenous Australians?

The Independent Science Council of Tasmania (ISCT) acknowledges First Nations Australians, who continue to walk this land as they always have, with a deep spiritual and practical connection to land, water and ecology. The ISCT offers respect to Elders past, present and emerging who have sacrificed much to ensure the continuation of connection to Country, through one of the world's oldest cultures. Through ancient and dynamic sustainable practices First Nations Australians have not just survived here but thrived for thousands of generations. By acknowledging multigenerational successes and powerful knowledge systems, the ISCT stands for a future that respects First Nations perspectives, cultures, languages and histories in a continued and collaborative effort to fight for both First Nations and environmental justice, for the benefit of all Australians and beyond.

The ISCT acknowledges the deep wrongs committed against First Nations Australians in the name of science and is committed to working together to seek true collaboration between Western and Southern knowledge systems that exist in Australia, for the benefit of us all, including through supporting understanding and adaption to climate change impacts.

The Act should acknowledge these considerations and aspirations, and establish new mechanisms, in accordance with its objects, to better recognise and promote First Nations rights, environmental management and consensual knowledge-sharing.

In particular, we support statutory requirements to consider relevant First Nations' environmental knowledge and expertise in decisions that affect First Nations' lands and waters; to provide for formal legal recognition of Indigenous Protected Areas; and to build linkages between the EPBC Act and outcomes under the Native Title Act such as Indigenous Land Use Agreements where appropriate to help achieve the goals of the EPBC Act.

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

The Independent Science Council of Tasmania (ISCT) supports measures to ensure and improve public participation, transparency, accountability and access to justice. The proposed National EPA would be one such measure.

We also support merits reviews for EPBC Act decisions, such as those that are undertaken in some states. These would provide an opportunity for anyone who has made a submission on a proposal to appeal the decision in the Federal Administrative Appeals Tribunal. This proposal is in keeping with various expert reviews and recommendations.

We strongly support improved funding for community groups and public interest watchdogs in order to enhance public oversight of the implementation of and compliance with the Act. The standing requirements under the Act (section 487) should not be diluted; it is essential that public interest groups and concerned individuals have generous access to judicial review of decisions made under the EPBC Act,

Furthermore, the ISCT offers that there may be potential for meaningful public engagement and awareness through a network of local committees in rural and remote areas, such as the Great Barrier Reef Marine Park Authority uses for its system of Local Marine Advisory Committees (LMAC).

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

The Independent Science Council of Tasmania (ISCT) supports the establishment and adequate resourcing of a new National Environment Protection Agency as well as the continuation of independent scientific and heritage committees and advisory councils and expert taskforces to achieve effective implementation and administration of the Act.

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

Please see our response to question 8, above.

Question 23: Should the Commonwealth establish new environmental markets? Should the Commonwealth implement a trust fund for environmental outcomes?

Question 24: What do you see are the key opportunities to improve the current system of environmental offsetting under the EPBC Act?

The Independent Science Council of Tasmania (ISCT) does not generally support reliance on environmental offsets as part of the approval of projects. Considerable academic research confirms that offsets can involve unacceptable environmental trade-offs and lack integrity. For example, it is impossible to offset a loss of a threatened species population by 'conserving' another, especially when the newly 'conserved' population could be offset in the future, yet most offsetting is of this kind. Environmental offsets however could be useful when used in conjunction with a national strategy for ecosystem restoration, in which they are used not for "offsetting" impacts elsewhere but for delivering net gains for the environment. Environmental offsets could also be useful as a penalty for violations of the Act where environmental damage has occurred that cannot in any practical way be reversed in situ.

Question 25: How could private sector and philanthropic investment in the environment be best supported by the EPBC Act?

- Could public sector financing be used to increase these investments?
- What are the benefits, costs or risks with the Commonwealth developing a public investment vehicle to coordinate EPBC Act offset funds?

The risk lies in having an offset fund at all.

Question 26: Do you have suggested improvements to the suggested principles? How should they be applied during the Review and in future reform?

The Independent Science Council of Tasmania (ISCT) supports the intent of the suggested guiding principles, noting that they are not scientific principles. The principles could use stronger wording such as to “ensure” rather than just “support” ESD, and “elevating” the role of Indigenous Australians. The first principle could refer to achieving environmental outcomes. We have also recommended strengthening the principles of ESD in our response to question 2.