



Independent review of the EPBC Act

Submission

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Contents

1.0	About us	4
2.0	WALGA's overall comments	4
3.0	Specific comments	5
3.1	Addressing environmental decline and the effectiveness of the EPBC Act.....	5
3.2	The 2009 Hawke Review and the role of Local Government.....	6
3.3	Bioregional planning	7
3.4	Strategic assessments.....	8
3.5	Assessment of actions, involving MNES	9
3.6	Improving transparency to ensure better use of information, accountability and trust in the system (Review guiding principle d).....	10
3.7	Streamlining and integrating planning to support ecologically sustainable development (Review guiding principle e)	11
3.8	Additional matters	11
3.8.1	Climate Change	11
3.8.2	Land Clearing	12
4.0	Conclusion	12

1.0 About us

The Western Australian Local Government Association (WALGA) is the peak industry body for Local Government in Western Australia. WALGA is an independent, membership-based organisation representing and supporting the work and interests of 138 Local Governments in Western Australia.

WALGA provides an essential voice for approximately 1,222 Elected Members and approximately 22,000 Local Government employees as well as over 2.5 million constituents of Local Governments in Western Australia. WALGA also provides professional advice and offers services that provide financial benefits to the Local Governments and the communities they serve.

WALGA's governance structure is comprised of WALGA State Council, the decision making representative body of all Member Councils, responsible for sector-wide policy making and strategic planning on behalf of Local Government, and Zones, (5 metropolitan and 12 country), groups of geographically aligned Member Councils responsible for direct elections of State Councillors, providing input into policy formulation and providing advice on various matters.

2.0 WALGA's overall comments

WALGA welcomes the opportunity to comment on the Independent Review of the EPBC Act Discussion Paper. [Local Governments have been consulted in the development of this submission and it has been endorsed by WALGA State Council].

Local Governments have significant environmental management responsibilities, as recognised in the 1997 *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment*, of which the Australian Local Government Association was a signatory along with the Commonwealth and all States and Territories and which provided the basis for the EPBC Act.

The specific responsibility of Western Australian Local Governments in this area is spelt out in the *Local Government Act 1995*, which requires that:

In carrying out its functions a local government is to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity. (S 1.3 (3))

Local Governments in Western Australia have significant interaction with environmental legislation at both the State and Commonwealth level in relation to their land use planning responsibilities and in their role as land owners and managers.

WALGA notes that the discussion paper is intended as the first step in the review process where the review panel is seeking to "identify those areas where reform will deliver the greatest benefit for the environment, business, and the community, while maintaining strong environmental standards." (p3). This submission will, therefore, address high level matters of concern to Local Governments in WA.

WALGA would welcome the opportunity to meet with Professor Samuel AC and the Expert Panel as the review progresses.

3.0 Specific comments

3.1 Addressing environmental decline and the effectiveness of the EPBC Act

The Discussion Paper refers to the overall decline in the natural environment in Australia, notably,

The 2016 State of the Environment Report identifies changing land use, habitat fragmentation and degradation, climate change and invasive species as key pressures on Australia's environment. Many Australian species and habitats are in decline and the rate of this decline does not appear to be slowing. There have been permanent changes for some species and habitats as a result of past activities and ongoing impacts from invasive and feral animals and plants. While some ecosystems — such as oceans — are considered to be in good condition, further declines in habitat and biodiversity are expected. (p13)

Since the beginning of the Act, there have been some clear improvements in some areas, including substantial expansion to the network of parks and protected areas. However, many parts of Australia's environment and heritage continue to decline. (p16)

It is acknowledged that there are many factors that have led to this on-going decline in our natural environment, including policies and actions of all levels of government, including Local Government, and the actions of business and individuals. However, decisions made under the EPBC Act, including the different priorities given to different parts of the Act, have had a role to play.

Considerable effort and departmental resources have gone into the environmental assessment and approvals of actions, with relatively little effort going into strategic assessments and bioregional planning, both of which are provided for under the EPBC Act. However, it is generally accepted in the literature on impact assessment that assessment at the level of individual actions can rarely address the broader issues of cumulative impacts, regional losses of biodiversity and overall threatening processes. WALGA recommends that regional planning and strategic assessments be utilised to address these broader issues. This is discussed further later in this submission.

WALGA considers that the EPBC Act is flawed in this regard because actions that could have impacts on Matters of National Environmental Significance (MNES) are required to be referred to the Minister, whereas strategic assessments and bioregional planning can only be carried out with the agreement and cooperation of the relevant authorities. Whilst it is acknowledged that effective strategic assessment and bioregional planning requires the cooperation of the key agencies and stakeholders, WALGA recommends that the EPBC Act should be strengthened to allow the Commonwealth Minister and the Department to give more attention to these parts of the Act.

It is noted that Section 522A of the EPBC Act requires that the statutory review examine “the extent to which the Objects of the Act have been achieved.” Two of the existing Objects of the Act are:

- b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources, and*
- c) to promote the conservation of biodiversity*

Given the ongoing decline in the natural environment and loss of biodiversity, it is difficult to conclude that these Objects are being met, and that a continued emphasis on assessment of actions will not address the ongoing decline. As noted above, WALGA recommends that the EPBC Act be strengthened to better facilitate strategic assessment and bioregional planning.

More detailed discussion of both strategic assessment and bioregional planning is provided below.

It is also important to recognise that the implementation of the EPBC Act has never been properly funded. WALGA recommends that a long term plan for funding important mechanisms under the EPBC Act be established, such as bioregional plans and for gathering data needed to inform decision making.

3.2 The 2009 Hawke Review and the role of Local Government

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

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

It is regrettable that the amendments to the EPBC Act needed to implement the Government’s response were never considered by the Australian Parliament and there has been little in the way of EPBC Act reform (despite a subsequent Australian Government commitment to create a ‘one-stop-shop’ for environmental approvals).

Most of the recommendations of the Hawke Review and the Government’s response are still relevant in 2019. WALGA recommends that a priority for this current review should be to re-examine these recommendations and assess their applicability in 2019.

A number of these are relevant to Local Government.

First, the Hawke Review recommended that the Objects of the Act be re-cast taking into account several factors, including that the Minister should “promote co-operation with State, Territory and Local Government in environmental protection and management” (*Recommendation 3, p17*). WALGA supports greater cooperation between Local Government and the Commonwealth on environmental matters and recommends that the Objects of the EPBC Act be revised to give effect to this recommendation.

Second, the Review examined Section 516 of the Act, which requires Commonwealth agencies to report on progress towards ecologically sustainable development (ESD), and the Department to prepare State of the Environment (SoE) reports every 5 years. Whilst the Hawke Review endorsed the value of both these reporting requirements and called for a set of National Environmental Accounts to be developed, it noted deficiencies in implementation largely related to a significant lack of data. The Review concluded that Local Governments should be involved in any upgraded data collection process which would also have a secondary benefit of “strengthening the capacity of Local Government land-use planning decision-making.” (*Recommendation 67, p320*). WALGA supports greater involvement in any expanded data collection in support of national environmental auditing and SoE reporting, and supports changes to the EPBC Act and its operation to give effect to this recommendation.

3.3 Bioregional planning

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

The Act does not constrain the scope of a bioregional plan to only MNES, and allows broader issues of biodiversity to be considered. This is a key strength of these plans and would allow the broad issue of biodiversity loss to be addressed at a strategic level and in a cooperative manner.

The Hawke Review recommended an expanded role and use of bioregional plans:

Recommendation 6

1. *The Review recommends that the Australian Government:*
 - a. *expand the role of strategic assessments and bio-regional plans so that they are used more often, and*
 - b. *strengthen the process for creating these plans and undertaking these assessments, so they are more substantial and robust.*
2. *The Review further recommends that the Act be amended to provide:*
 - a. *for bio-regional plans to –*
 1. *change the terminology from ‘bio-regional plans’ to ‘regional plans’*
 2. *allow the Commonwealth to unilaterally develop regional plans, and*
 3. *ensure that the process for delineating a region for the purpose of the Act is flexible.*

Section 176 (2) allows the Minister, with the cooperation of the relevant stakeholders, to prepare a bioregional plan for any region, whether it covers a Commonwealth area or not. Section 176 (3) allows the Minister to provide funds for the preparation of a bioregional plan, but the Act does not currently allow the Minister to provide funds for the implementation of an approved plan. Implementation will likely require cooperation between all levels of government and all relevant stakeholders, and providing adequate funding will be a critical factor in ensuring the success of a plan. WALGA recommends that a clause be added to this part of the Act that allows the Minister to provide funds for the implementation of an approved plan.

The WA Government recently released an Issues Paper on native vegetation, and it proposed to adopt a bioregional approach to the management of and decision making about native vegetation. Bioregional planning by the Commonwealth could readily be complementary with the WA approach. Local Government would be a key contributor in any bioregional planning.

3.4 Strategic assessments

A key concern for Local Governments' statutory land use planning responsibilities is that many environmental impact assessments by the Commonwealth happen late in the planning process, mostly at subdivision stage (at the time when an 'action' as defined under the EPBC Act is about to occur), when all of the major upstream decisions on land allocation have already been made. Some outcomes of these assessments have required broad land use planning decisions to be revisited to accommodate those changes, which is both costly and time consuming. To this end, WALGA recommends the greater use of strategic assessments to avoid these problems. It is noted that the Hawke Review also recommended the greater use of strategic assessments, in part, to provide for a more streamlined approvals process as it would avoid assessments at later stages of the planning process and provide greater certainty for developers and planners:

Recommendation 4

The Review recommends that the Commonwealth work with the States and Territories as appropriate to improve the efficiency of the Environmental Impact Assessment (EIA) regime under the Act, including, through:

1. *greater use of strategic assessments.*

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 3. *ensure that the process for delineating a region for the purpose of the Act is flexible.*
 - b. *for strategic assessments to –*

- i. specify mandatory required information for strategic assessments
- ii. insert an 'improve or maintain' test for the approval of a class of actions in accordance with an endorsed plan, policy or program
- iii. enhance provision for public engagement, and
- iv. create a 'call in' power for plans, policies and programs likely to have a significant impact on matters of National Environmental Significance, and amending the term 'action' to incorporate these plans, policies or programs.

Local Governments would welcome the greater use of strategic planning and would support changes to legislation that would facilitate this. However, given the current cost recovery model used by the Commonwealth for assessments, WALGA supports the finding of the Hawke Review that applying cost recovery for strategic assessments would act as a disincentive to the greater use of strategic assessments.

It is also worth highlighting that the 2018 Review of the interactions between the EPBC Act and the agriculture sector also noted the need for strategic approaches rather than case by case assessments. The 2018 Review noted that:

The need for a more proactive approach to protecting MNES in regions where agricultural development does or will impact upon MNES health was a recurring theme in consultations undertaken for this Review. Reactive assessment and approval of multiple individual actions in a single area is unlikely to be an appropriate strategy to ensure the long-term viability of agriculture in that region, nor will it necessarily result in the conservation outcomes sought through the EPBC Act (p 63-64)

Of particular concern is that the Act itself, and hence the approach to its implementation, cannot adequately account for the cumulative impacts of multiple individual projects, and so is driving isolated decision making rather than landscape-scale decision making (p64)

Notwithstanding these recommendations, the uptake of strategic assessments has remained relatively low. WALGA recommends that the review should, therefore, investigate barriers to the use of strategic assessments and make recommendations as to how these can be addressed. This could include consideration of amendments to Section 146 of the EPBC Act relating to strategic assessments to allow the Minister to compel assessment of impacts on MNES via a strategic assessment in particular circumstances, projects or areas.

3.5 Assessment of actions, involving MNES

Local Governments can be proponents for assessments under the EPBC Act mostly for actions involving clearing of native vegetation for its infrastructure needs, notably roads, and for certain proposals within World Heritage areas or areas subject to International Treaties (for example Ramsar wetlands). As well, Local Governments have a significant role to play in land use planning, which can be impacted by decisions related to assessments of MNES on subdivisions or developments.

With respect to Local Governments as proponents of action impacting on MNES, many Local Governments, especially the smaller regional ones, find the Commonwealth assessment process both confusing and cumbersome. In most of these assessments, the action would also be subject to an assessment under the WA *Environmental Protection Act (1986)* (WA EP

Act). Joint assessments under a bilateral agreement with the State Government can reduce this complexity for Local Governments. WALGA supports recent calls by the WA State Government for the implementation of bilateral agreements for both assessment and approvals, which would be facilitated by proposed changes to the WA EP Act.

Irrespective of whether an approval bilateral is agreed to or not, policies related to MNES will have a strong influence on the outcomes of any assessment of MNES, and WALGA recommends that the provisions of these policies and their implications are communicated to all stakeholders in WA, including Local Governments. In addition, WALGA recommends these policies be developed with a clear understanding of the local context in WA.

In this regard WALGA recommends that options be considered to improve communication with and access to Commonwealth Environment Departmental officers. This could include increasing the regional presence of the Department, including through the placement of officers in WA or establishing dedicated service units for each State and Territory within the Department in Canberra. Such arrangements would help to ensure that assessments are both effective and efficient in protecting MNES, more likely take into account local knowledge, and help in addressing any local concerns in a timely and comprehensive manner. A local presence could also assist with compliance and enforcement.

3.6 Improving transparency to ensure better use of information, accountability and trust in the system (Review guiding principle d)

A key way to improve the transparency of assessments under the EPBC Act, and environmental protection in general, and to improve trust in the system, is to introduce a greater level of independence in the administration of the Act. One of the strengths of the WA EP Act is having an independent agency carrying out the key purposes of the Act, WALGA recommends that the EPBC Act be amended to provide for an independent agency/board to carry out assessments, oversee the implementation of the Act and to provide independent advice to the Minister as required. The Hawke Review made a similar recommendation (71):

The Review recommends that an independent National Environmental Commissioner and National Environment Commission be established under the Act and supported by DEWHA.

Transparency would also be improved with the publication of a greater range of information, in particular:

- advice and reports provided to the Minister in support of decisions made
- clear statement of reasons for all decision making made under the EPBC Act, and
- compliance audit reports.

The Hawke Review also made several other recommendations specifically about transparency of process and public participation which are still relevant in 2019 (44-46).

3.7 Streamlining and integrating planning to support ecologically sustainable development (Review guiding principle e)

In addition to the matters raised above about developing bilateral agreements, the Commonwealth Environment Department increasing its regional presence and local knowledge and the greater use of strategic assessments and bioregional planning, there are several other changes that could be made to streamline the assessment process, notably, WALGA recommends that:

- the Australian, State and Territory Governments move to a single national list of threatened species, and ecological communities
- the development of a single national offsetting policy and process, or that any bilateral agreement between a State Government and the Commonwealth facilitates a single offsets approach
- strengthening the processes by both the Department and proponents for early engagement with stakeholders, including with indigenous groups and Local Governments, and
- the development of key performance indicators for the assessment process and the publication of performance against these indicators.

3.8 Additional matters

3.8.1 Climate Change

Climate change is a key issue for Local Governments that has implications across almost all aspects of their operations and responsibilities. In Western Australia, Local Governments have been the most proactive level of government on climate change, actively pursuing a range of emissions reduction and adaptation actions, including ambitious corporate and community-wide energy efficiency, renewable energy and emissions reductions strategies, along with programs and policies to encourage residents to reduce their carbon footprint.

The importance with which the Local Government sector regards the threat posed by climate change and need for strong action is recognised in the *WALGA Climate Change Policy Statement* (the Climate Change Statement), endorsed by State Council in July 2018. The Climate Change Statement was the result of extensive consultation across the Local Government Sector, and represents the consolidated position of Western Australian Local Governments:

Local Government acknowledges:

- I. The science is clear: climate change is occurring and greenhouse gas emissions from human activities are the dominant cause.
- II. Climate change threatens human societies and the Earth's ecosystems.
- III. Urgent action is required to reduce emissions, and to adapt to the impacts from climate change that are now unavoidable.
- IV. A failure to adequately address this climate change emergency places an unacceptable burden on future generations.

Local Government is committed to addressing climate change.

Local Government is calling for:

- I. Strong climate change action, leadership and coordination at all levels of government.
- II. Effective and adequately funded Commonwealth and State Government climate change policies and programs.

WALGA Climate Change Policy Statement (2018), p3.

WALGA generally supports the recommendations of the Hawke Review in relation to the introduction of a 'greenhouse trigger' and the Government's response, which was premised on having a price on carbon. WALGA recommends that a broad based market mechanism to reduce Australia's greenhouse gas emissions be introduced as this is the most efficient and effective means of reducing Australia's greenhouse gas emissions and meeting our international obligations at least cost. However in the absence of such a mechanism, WALGA recommends that a trigger for large scale emissions of greenhouse gas emissions be considered for inclusion in the EPBC Act.

3.8.2 Land Clearing

Land clearing is only regulated under the EPBC Act where it impacts a directly protected entity such as a World Heritage area, Ramsar wetland, threatened species, threatened ecological community, or migratory species. However it is clear that excessive land clearing is a key threat to biodiversity and increases greenhouse gas emissions.

WALGA recognises the challenges of regulating land clearing at a national level and the difficulties in operationalising a land clearing trigger as an MNES under the EPBC Act. Nonetheless, WALGA recommends that options to address this issue be considered as part of the review.

4.0 Conclusion

WALGA considers the review of the EPBC Act an important opportunity to examine both the effectiveness of the Act in protecting Australia's environment and its efficiency in doing so.

A key concern for Local Governments with the current operation of, and interaction between, the EPBC Act and the WA EP Act, is confusion over different requirements, policies, standards

and processes of assessments. WALGA supports changes to legislation and associated processes, for example through the greater use of bilateral agreements that would facilitate a single assessment and approvals process, and the development of a single set of standards, triggers and policies for the assessment process.

It has been argued here that the existing administration of the EPBC Act, with an emphasis on assessment of actions, has not adequately addressed the ongoing decline in the natural environment and loss of biodiversity. WALGA recommends that Amendments be made to the Act which would facilitate the greater use of bioregional planning and strategic assessments, which would better address this decline and loss. Such changes would lead to a more efficient and streamlined assessment process for proponents and better environmental outcomes.

WALGA appreciates the opportunity to comment on the Discussion Paper and looks forward to later opportunities to provide input into the review.