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**SUBMISSION TO THE  
SURVEY ON THE  
INDEPENDENT REVIEW  
OF THE EPBC ACT  
INTERIM REPORT**

# GreenLaw

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The Australian National University GreenLaw Law Reform and Social Justice Project (GreenLaw) welcomes the opportunity to provide a submission in response to the release of the Interim Report for the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act').

The ANU Law Reform and Social Justice (LRSJ) is a program at the ANU College of Law that supports the integration of law reform and principles of social justice into teaching, research and study across the College. LRSJ provides opportunities for students to explore and interrogate the complex role of law in society, and the part that law and lawyers play in promoting change and stability.

GreenLaw is a student research and policy reform group formed within the LRSJ program. GreenLaw draws on academic support from the ANU College of Law including the supervisory support of Associate Professor Vivien Holmes and Dr Peter Burnett.

This submission reflects the views of GreenLaw researchers and is not intended to be institutional submission by of The Australian National University nor is it intended to represent the views of our respective employers.

GreenLaw's original submission to the Review can be accessed [here](#). The research underpinning that submission has been accepted and published in the peer-reviewed [Environment and Planning Law Journal](#).

If it would be of assistance, we are happy to be contacted for further comments, please email: [green\\_law@outlook.com](mailto:green_law@outlook.com).

# Introduction

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We welcome the opportunity to make a submission to the survey of the Interim Report of the Independent Review of the *EPBC Act*. Our submission provides general commentary on the broad themes of the Interim Report as well as detailed feedback and recommendations on the Report's reform agenda for standing under the *EPBC Act* (notably amendment to s 487 or lack thereof).

The Interim Report, and the Independent Review's agenda for reform, represents a critical opportunity to update and streamline the *EPBC Act*, whilst also refocusing the *EPBC Act*'s object of ensuring substantive environmental outcomes. We welcome the recommendation for the creation of National Environmental Standards, an independent compliance and monitoring body and the aims of reducing regulatory complexity. However, such reforms must be balanced. Merely cutting down regulatory complexity without also imposing stringent environmental standards will not generate net positives nor reverse Australia's ongoing biodiversity decline.

We support the Review's findings that s 487, relating to extended standing, should not be repealed. However, we are concerned that the Review has signalled concerns for ongoing "green lawfare" under the *EPBC Act*, in the absence of any empirical evidence of extended standing being abused by vexatious or unmeritorious litigants. An evidence-based debate is crucial to ensuring best outcomes for industry, the community and the environment. Extended standing within the *EPBC Act* plays a crucial public accountability role and reflects the public's legitimate involvement in environmental decision-making. For these reasons, we recommend the Review be explicit about the evidence it relies on when making recommendations related to extended standing under the *EPBC Act*.

## Summary of Recommendations

### Recommendation 1

*The Independent Reviewer ensures the reform agenda for the EPBC Act balances reducing regulatory complexity with implementing more stringent environmental standards.*

### Recommendation 2

*The Independent Reviewer proposes that information-sharing and transparency measures for EPBC decision-making are implemented in legislation rather than at a Departmental policy level.*

### Recommendation 3

*The Independent Reviewer explicitly rejects calls for the repeal or amendment of s 487 and standing requirements more generally under the EPBC Act.*

# Protection of Australia's Environment

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The Interim Report highlights the need for significant reform to the *EPBC Act* and a clear roadmap for such a legislative overhaul. Although our original submission addressed the narrower issue of public involvement and accountability, we support the general findings of the Independent Review. In particular we support the finding that Australia's environment and iconic places are 'in decline and under increasing threat'.<sup>1</sup> This finding is echoed in other major government inquiries into Australia's environment. *Australia's Biodiversity Conservation Strategy 2010-2030* also highlighted that 'biodiversity continues to decline', emphasising the role of unsustainable development, changing fire regimes and climate change.<sup>2</sup>

The Independent Review's long-term reform agenda to develop National Environmental Standards is welcome. The *EPBC Act* is a highly complex piece of legislation with internal inconsistencies, which has proven to be individualistic in its assessments of major developments.<sup>3</sup> The Commonwealth should not perform the role of primary environmental regulator, rather the Commonwealth should seek to coordinate State activities and ensure national outcomes are met. National Environmental Standards are critical to such aspirations.

Additionally, the recommendation for an "independent cop" to ensure proper monitoring, compliance and enforcement of the *EPBC Act* and approval conditions is supported. In our research on public interest litigation, it was apparent that the public have grave concerns for ongoing environmental decline due to poor compliance with environmental approval conditions.<sup>4</sup> An independent cop at the compliance stage will not increase the complexities of the approval process, or harm development opportunities. Rather, such an institution will be well-suited to the ongoing integrity of the *EPBC Act* and ensure environmental outcomes are achieved alongside the economic and social benefits of major projects.

However, we have concerns for how the reform agenda has been outlined in the Interim Report. The *EPBC Act* undoubtedly requires simplification, reductions in duplication of State processes and amendment to address regulatory gaps. But merely cutting "green-tape"<sup>5</sup> without the accompanying implementation of other recommended reforms, including more stringent environmental standards will not produce positive environmental outcomes or improve public trust in the *EPBC Act*. The Independent Review should focus on avenues for improving environmental outcomes as a first priority. Investment and development incentives are better handled by other government legislation and programs. The primary object of the *EPBC Act* is

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<sup>1</sup> Graeme Samuel, Parliament of Australia, *Independent Review of the EPBC Act* (Interim Report, June 2020) 25 ('Interim Report').

<sup>2</sup> National Biodiversity Strategy Review Task Group, Parliament of Australia, *Australia's Biodiversity Conservation Strategy 2010-2030* (Report, 2010) 3.

<sup>3</sup> Interim Report (n 1) 7; see also Peter Burnett, 'Australia's National Approach to 'Ecologically Sustainable Development': Success in Principle, Failure in Policy, Still in Prospect' (PhD Thesis, ANU, 2018) 328.

<sup>4</sup> See eg *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2015] FCA 1275.

<sup>5</sup> David Crowe, 'PM shifts attack on Labor to 'green tape' he says costs Australian jobs', *Sydney Morning Herald* (online, 7 May 2019) <<https://www.smh.com.au/federal-election-2019/pm-shifts-attack-on-labor-to-green-tape-he-says-costs-australian-jobs-20190507-p51ky0.html>>.

environmental protection, as acknowledged by the Independent Review,<sup>6</sup> and thus the reform agenda should be informed by this purpose.

## Trust in the EPBC Act

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The Interim Report's findings regarding public and industry trust in the *EPBC Act* reflect the findings contained in our original submission regarding public interest litigation and perceptions of government transparency, decision-making and corruption.<sup>7</sup> Trends in public interest litigation highlight that the public do not trust the operation of the *EPBC Act* and its capacity to contribute to positive environmental outcomes, as noted by the Review.<sup>8</sup>

The lack of transparency in decision-making and limitations on public accountability mechanisms in the *EPBC Act* carry the risk of exacerbating public, industry and investor's perception of corruption.<sup>9</sup> We found:

*There are real economic costs to proponents when Australia's regulatory system is perceived as opaque, which has a chilling effect on the development of future projects.*<sup>10</sup>

Additionally, the current decision-making model under the *EPBC Act* is failing to uphold the Act's objects and Australia's international obligations.<sup>11</sup> Information sharing and public involvement in decision-making should not be viewed as a regulatory hurdle or a "green-tape" exercise that must be met as a matter of form rather than substance. The *EPBC Act* is about balancing the interests of all stakeholders in Australia's most significant ecosystems and places, further public involvement is critical to achieving this outcome, as well as meeting Australia's international obligations.<sup>12</sup>

Overall, we support the Independent Review's recommendations regarding transparency, information sharing and increased public involvement in decision-making.<sup>13</sup> We also support the Review's recommendation to improve community participation in decision-making, especially through better information management systems, and utilising best-practice community consultative processes.<sup>14</sup> However, these recommendations would be strengthened by being integrated into legislative reform, rather than just Department policy and could form part of a clear agenda to increase public and industry trust in the *EPBC Act*.

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<sup>6</sup> See, eg, Interim Report (n 1) 96.

<sup>7</sup> GreenLaw, Submission No ANON-K57V-XQXR-Z Parliament of Australia, *Independent Review of the EPBC Act* (17 April 2020) ('GreenLaw Submission').

<sup>8</sup> Interim Report (n 1) 10, ch 5. See also GreenLaw Submission (n 7).

<sup>9</sup> GreenLaw Submission (n 7). 30-32.

<sup>10</sup> *Ibid* 32.

<sup>11</sup> Annika Reynolds, Andrew Ray and Shelby O'Connor, 'Green Lawfare: Does the Evidence Match the Allegations? – An Empirical Evaluation of Public Interest Litigation Under the EPBC Act from 2009 to 2019' (2020) 37(4) *Environmental and Planning Law Journal* 497, 511.

<sup>12</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), arts 13, 14(1)(a).

<sup>13</sup> Interim Report (n 1) 64

<sup>14</sup> *Ibid* 68.

# Standing Provisions in the EPBC Act

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We support the Independent Review’s current recommendation not to repeal the extended standing provisions in s 487. However, it is concerning that the Review continues to signal that ‘green lawfare’ is an issue under the *EPBC Act*. As stated in the Interim Report:

*[Industry] generally view [the EPBC Act] as cumbersome, pointing to duplication, slow decision-making, and legal challenges being used as a tool to delay projects and drive up costs for business (often called ‘lawfare’).*<sup>15</sup>

In the three instances that the Report discusses “lawfare”,<sup>16</sup> the Review has not pointed to empirical evidence of lawfare. Instead, at most, the Review has referred to previous attempts to repeal s 487 based on lawfare allegations.<sup>17</sup> We would encourage the Review to explicitly indicate what empirical evidence it is basing its assessment of “lawfare” on. The highly politicised nature of the *EPBC Act* and public involvement in environmental decision-making means it is critical the Review privileges an evidence-based debate to ensure the best outcomes for industry, community and the environment more broadly.

Our research, which has been peer-reviewed and published in the *Environment and Planning Law Journal*, found that lawfare is not occurring under the *EPBC Act*.<sup>18</sup> Our central finding was:

*[This study] demonstrates that lawfare is not occurring and as such calls to weaken the EPBC Act standing provisions are not justifiable. Weakening the standing provisions would be contrary to the purpose of the Act and Australia’s international obligations and principles of representative and responsible government.*<sup>19</sup>

We are concerned that the Independent Review has not sufficiently dismissed allegations of “green lawfare”. Issues of lawfare are intertwined with the question of whether the public have a legitimate place in environmental decision-making practices. Given the objects of the *EPBC Act* and the fact it aims to meet Australia’s international obligations,<sup>20</sup> we urge the Independent Review to emphasise the importance of public accountability through s 487 rather than being distracted by claims of lawfare, insofar as such claims are not supported by verifiable, independent and peer-reviewed research.

Moreover, we have concerns that the Review’s reform agenda may include additional hurdle requirements for public interest litigants to meet standing tests. As noted in the Interim Report:

*It may be beneficial for the EPBC Act to require an applicant seeking to rely on the extended standing provisions to demonstrate that they have an arguable case, or that the case raises matters of exceptional public importance before the matter can proceed.*<sup>21</sup>

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<sup>15</sup> Interim Report (n 1) 11.

<sup>16</sup> Ibid 11, 63, 67

<sup>17</sup> Ibid 67.

<sup>18</sup> See Reynolds, Ray and O’Connor (n 11) 505–10.

<sup>19</sup> Ibid 515.

<sup>20</sup> Ibid 511–3.

<sup>21</sup> Interim Report (n 1) 69.

If this reform strategy was to be adopted, standing under the *EPBC Act* would, in practice, require the same special interest test of general judicial review.<sup>22</sup> However, the combination of retaining s 487 whilst also adding special interest requirements would likely require extended judicial analysis and interpretation, contributing to longer and more complex legal challenges.<sup>23</sup> Alternatively, if the additional requirements were in a form similar to seeking special leave to the High Court,<sup>24</sup> the same complications arise. Such a requirement would also increase the complexity and length of *EPBC Act* cases.

Moreover, any additional standing requirements would make the *EPBC Act* an outlier in federal legislation that contains extended standing provisions. For example, the *Competition and Consumer Act 2010* (Cth), where applicants are not required to meet additional special interest tests. The *EPBC Act* explicitly recognises that public involvement is necessary to recognising the Act's objects,<sup>25</sup> it would undermine the Act's purpose if public interest litigants were forced to jump through arbitrary hurdles.

In our original submission to the Independent Review we highlighted that limiting standing under the *EPBC Act* is unlikely to prevent public interest challenges (alleged “lawfare”) and contribute to an array of secondary issues with litigation under the *EPBC Act*. Notably, changes to standing are likely to increase trial lengths, contributing to costs to government and industry.

Additionally, extended standing has a range of benefits—it bolsters perceptions of accountability within the Commonwealth's environmental regulatory system, and it allows people indirectly impacted by developments to be represented, largely through the challenges made by non-government organisations.<sup>26</sup>

Removing standing, or otherwise increasing the complexity of standing under the *EPBC Act*, will not address the underlying public distrust that is contributing to *genuine* public interest litigation. Instead, increasing transparency and information-sharing as well as establishing other avenues for public engagement will be crucial to steer people away from complex and expensive legal challenges.

We recommend the Independent Review focuses on increasing public trust through involvement in decision-making processes, information transparency and in the development of National Environmental Standards; rather than removing or weakening standing provisions that serve to increase government accountability.

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<sup>22</sup> *Administrative Decisions Judicial Review Act 1977* (Cth) s 5(1).

<sup>23</sup> For further detail see GreenLaw Submission (n 7) 33–34.

<sup>24</sup> See *High Court Rules 2004* (Cth) pt 41.

<sup>25</sup> *EPBC Act* s 3(2)(g).

<sup>26</sup> For further details see *Ibid* 34–5.