Queensland Law Society

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[redacted]

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
GPO Box 1989
CANBERRA ACT 2601

Attention: Mike Clayton, Senior Policy Lawyer

By email: [redacted]

Dear Ms Nicoll

**Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)**

Thank you for the opportunity to provide comments to the Law Council's submission to the Independent Review of the *Environment Protection and Biodiversity Conservation Act* (**EPBC Act Review**) and in particular to the Independent Review's Discussion Paper (**the Discussion Paper**). The Queensland Law Society (**QLS**) appreciates being consulted during this important process.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of members from the Planning and Environmental Law, First Nations and Mining and Resources Law Committees.

Our responses to some of the questions posed in the discussion paper are as set out below:

**How well is the EPBC Act being administered?**

The day to day administration of the EPBC Act by those operating under it (outside of the administrator), has been the biggest issue experienced. The administration of the EPBC Act in recent years has manifested in inconsistency, delay and expense.

***Delay and timeframes***

Having liaised with a number of proponents of actions requiring referral and/or assessment under the EPBC Act, it is likely that a part of the problem is a lack of adequate budgeting and resources.

Section 518 of the EPBC Act, which is set out below, may also be a relevant factor:

> ***518 Non-compliance with time limits***
>
> *(1) Anything done by the Commonwealth, the Minister or the Secretary under this Act or the regulations is not invalid merely because it was not done within the period required by this Act or the regulations.*
>
> *(2) If, during a financial year, one or more things required to be done under this Act or the regulations were not done within the period required by this Act or the regulations, the Minister must:*
>
> *(a) cause to be prepared a statement setting out the reasons why each of those things was not done within the period required by this Act or the regulations; and*
>
> *(b) cause a copy of the statement to be laid before each House of the Parliament as soon as practicable after the end of the financial year.*
>
> *(3) Subsection (1) does not reduce or remove an obligation under this Act or the regulations to do a thing within a particular period.*

The intent of the section is reasonably clear, given the EPBC Act provides expanded standing for judicial review. In the absence of section 518(1), the Commonwealth would be exposed to greater numbers of Court challenges in the event that timeframes are inadvertently missed.

Arguably, in practice this provision has effectively allowed the administering department to disregard timeframes for decision-making placed upon it under the EPBC Act. This has been a recurring problem over several years, and we understand that it has reached the point where it is very much the exception, rather than the rule, that private proponents receive decisions under the EPBC Act within the statutory timeframes. This causes uncertainty and expense for proponents across a wide range of industries. It can also be problematic where a State assessment process is attempting to run concurrently as timeframes under the EPBC Act are not achieved with any regularity.

Alongside the general delays in decision-making and the elongation of statutory timeframes, a further factor impacting the administration of the Act is that involvement of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (established by section 505C), is often perceived to:

- slow down the statutory process;
- cut across State legislative requirements; and
- require provision of excessively high levels of detail, which can be cumbersome or at times unachievable (such that this can become a limiting factor in progressing proposed development).

This review itself is also being conducted late, in that it has started and will conclude more than 10 years after the previous review.

***Inconsistency in administration***

There have been increasing complaints in recent years from proponents of inconsistency in the administration of the EPBC Act. In particular, proponents operating across various State and territory jurisdictions have highlighted significantly different approaches between assessing officers and offices.

Many proponents of larger projects, which are generally subject to longer application and assessment pathways, also complain of inconsistency of contact within the administering department. A frequent concern is that the officer responsible for delivering the assessment of a project can easily change 5 or more times throughout the assessment process, which leads to a significant waste of resources as each new officer familiarises itself with the project, only to depart before the assessment is concluded. Proponents also expend significant resources in engaging with each new officer, feeling as though they are starting from scratch, and report sometimes receiving different feedback and approaches when responsibility changes. In addition, there is often inconsistencies in condition drafting between approvals, which can lead to difficulties in interpreting conditions which may be intended to require the same outcome but are differently worded.

There are also a number of proponents who have repeatedly expressed concerns that the administering department acts contrary to robust scientific advice during assessment processes, both in terms of (formally or informally) requiring information and frequently in drafting and imposing conditions on approvals. Such an approach is concerning given the objectives of the EPBC Act and the high environmental standards the Commonwealth, and indeed this Review, are plainly keen to achieve and maintain.

Each of the inconsistencies described above creates inherent uncertainty and, often, leads to unfavourable views on the legislation and/or its administration which is entirely separated from whether or not it is in fact achieving its intended outcomes. Inconsistent treatment of different individuals and entities engaged with the EPBC Act for reasons unrelated to the legislation and its objectives is also inherently unfair.

***Administrative errors***

The department administering the EPBC Act also does not always act consistently with the requirements of the Act and subordinate instruments when attempting to administer it and fulfil its functions. In particular, there have been a number of notable Federal Court challenges since the previous review which have highlighted erroneous administration of the Act, including in terms of failing to have regard to documents explicitly specified as being relevant when making decisions.

When decisions made under the EPBC Act are set aside because the administrative processes supporting decision-making have not been appropriately carried out, it leads to wasted resources for Courts and all involved, notwithstanding these matters are often resolved by consent.

***Specific questions from discussion paper***

**Question 1 – past changes to the EPBC Act**

A theme raised by our members with respect to regulation under the EPBC Act is the potential for Federal legislation to overlap and in some cases, conflict with State-based legislation governing the same projects or development.

Inconsistency can arise as a result of conditions of multiple approvals covering the same subject matters, both under the EPBC Act and the State-based approvals. Where there is duplication in conditions of approval and in assessment processes, and where these issues are adequately covered by State-based conditions of approval, the EPBC Act approvals should cross-refer and rely upon those conditions. The implementation of bilateral approval agreements, which is permitted under the EPBC Act, would also achieve these efficiencies and avoid inconsistency.

The introduction of the 'water trigger' into the EPBC Act was a problematic period from a legal perspective, particularly in terms of both drafting of the provisions and the administration of the EPBC Act during the proposed reforms process. Some of our members have raised concerns about the inclusion of the 'water trigger' as a matter of national environmental significance (**MNES**), because the 'water trigger' operates as a restriction upon a particular industry rather than as a true protection of an environmental matter or feature. In terms of drafting, the 'water trigger' applies only to coal seam gas activities and 'large coal mining' which, in the case of the provisions as drafted, is in fact any coal mining. This approach means that the 'water trigger' is inconsistent with other MNES, and arguably, the objectives of the EPBC Act.

More alarmingly, is that while a Bill was prepared and progressed through the legislative process, the administering department dealt with ongoing assessments as though the Bill as drafted had already been passed and had the force of law. In particular, the department required proposals which were being progressed through assessment to go to an 'Interim' committee which had no formal existence under any legislation, to consider water-related impacts, which was beyond the scope of the EPBC Act as in force at the time. This meant that the department was acting not only without any actual jurisdiction or legislative standing, but also impermissibly pre-supposing the outcome of the parliamentary process which is pivotal to Australia's systems of law and governance.

Any future changes to the EPBC Act to add new MNES should be careful to avoid similarities to these problems which occurred with the introduction of the 'water trigger'.

Some members have expressed support for expanded regulation of water use in the EPBC Act, across all industries, and consider the absence of the Great Artesian Basin as a matter of MNES to be a significant defect in the EPBC Act. Access to potable and/or suitable water is critical in supporting the needs of regional and remote communities and a national oversight of that national resource is seen as highly desirable.

**Question 2 – Ecologically sustainable development**

The concept of ecologically sustainable development (**ESD**) is already well reflected in the EPBC Act. The principles of ESD as set out in section 3A of the EPBC Act are in keeping with the key international treaties and conventions on environmental protection.

Cost benefit analysis is simply one tool or assessment mechanism which can be used in making balanced decisions having regard to ecologically sustainable development. It is not necessarily the best or preferable tool in all scenarios. There is no reason to think that adding specific reference to cost benefit analysis will enhance section 3A, particularly given the existing section 3A(e), or enhance the recognition of the concept of ecologically sustainable development throughout the EPBC Act.

**Question 8 – Regulating outcomes**

There is a careful balance to be struck between the primary and subordinate legislation. The governing Act and its intentions must be clearly understood but not so unduly detailed as to

lead to inflexibility, and its associated regulations should not be so capacious that there is a risk of them being effectively laws made in a way which circumvents the legislative process.

In this context, given the nature of this legislation and its intentions, it may be ineffective to mandate particular specific outcomes through primary legislation. Amending the EPBC Act itself is time consuming and uncertain, as amendments need to go through the parliamentary legislative process and will only be successful with the requisite level of support.

Prescribing specific outcomes in primary legislation is therefore inflexible, and in this context, leads to a real risk of legislated outcomes failing to keep pace with scientific developments and societal expectations, given the nature of the legislative process. Given this, there seems to be a benefit in using subordinate legislation and instruments, as well as policy documents, to give effect to specific, point-in-time outcomes in keeping with best practice. The primary legislation can specifically allow for the making of such non-legislative documents perhaps also providing guidance by identifying factors to be taken into account when developing subordinate legislation for this purpose.

Moreover, it would be an enormous task to attempt to prescribe specific environmental and heritage outcomes that cover the full ambit of matters which are assessed, approved and otherwise regulated under the EPBC Act. The EPBC Act governs all types of activities and industries, including government, commercial and individual, from resource projects, to agriculture, residential development and infrastructure provision in addition to the varying licensing regimes it applies to.

It is difficult to conceive how specific outcomes could be developed which can be appropriately applied across this broad array of activities. Environmentally, it is likely preferable that specific proposals continue to be considered on an individual basis, given that at the core of ecologically sustainable development is a notion that development can and should occur so long as it is properly managed.

To the extent that the EPBC Act might seek to regulate outcomes or processes, consideration must be given to appropriately engaging with Traditional Owner groups and/or prescribed bodies corporate, to ensure that any cultural requirements are addressed.

**Question 11 – Environmental restoration**

Practically speaking, increased regulation of environmental restoration projects will need to be funded, most likely by the projects and proponents themselves. Outside of environmental restoration activities which are undertaken as conditioned on existing approvals, most restoration projects are undertaken on a voluntary basis. Accordingly, adding to the regulatory and administrative burden for environmental restoration activities will likely only deplete the resources available for restoration.

To ensure any expanded regulatory functions are conducted effectively, additional resources and funding must be provided. In doing so, appropriate resources will also need to be allocated to support Traditional Owner Groups involved in these processes. In particular, where court-ordered restoration compensation is awarded in favour of Traditional Owner groups, further funding is required to enable Traditional Owners to obtain appropriate independent advice with respect to monitoring the implementation of the process and any commercial and/or governance issues which arise in dealing with third parties.

It is our understanding that the department administering the EPBC Act also already administers a range of funds and grants for projects with environmental and heritage benefits. It is also important to remember that the EPBC Act must be appropriately grounded in the

legislative powers of the Commonwealth as set out in the Constitution and consistent with the legislative framework set out in the *Native Title Act 1993* (Cth).

**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?**

There are a number of State and Commonwealth laws which seek to protect culturally significant places. In Queensland for example, there is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Qld), the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Aboriginal Heritage Act 2006* (Qld). Federal and State legislation should be complementary in cultural heritage and general heritage protections. Care should be taken so as to avoid further regulating these matters under the EPBC Act and duplicating existing legislation which would only serve to create uncertainty.

**Question 13 – Strategic assessments**

Strategic assessments are only useful in limited scenarios. Replacing case by case assessments with strategic assessments would not allow for the broad range of activities currently covered by the legislation to be properly addressed for particular projects. In addition, it is difficult to see how the assessments would be appropriately funded (in terms of fees and cost recovery).

**Question 14 – Delegation to States**

The EPBC Act has long been drafted to effectively allow for the delegation of delivery of outcomes under the EPBC Act to the States, under approved bilateral agreements. However, while some agreements have at times been proposed or partially progressed, these have not been properly implemented. This leads to increased overall regulatory burden and duplication between jurisdictions. However, we suggest this is perhaps an administrative failure rather than a legislative one. If it is the intent of the legislature to override aspects of State oversight, it is imperative that the arrangements are constitutionally sound and that the lines of demarcation be clearly stated to avoid duplication and inconsistency.

**Question 15 – Simpler and clearer interactions with government**

There is a point to be made that if low-risk projects were to receive automatic approval or were exempt it may have the effective of streamlining processes and reducing duplication. A further step is whether low-risk projects ought to require referral at all. In this sense, low-risk projects would be treated in the same way as existing cases in which environmental approvals are not required under Part 4 of the EPBC Act). What constitutes a 'low-risk project' can be defined in the primary legislation.

QLS supports the suggestion that data from environmental impact assessments be made publicly available, as is the case in NSW. In doing so the impacts of a proposed project can be verified by relevant stakeholders and members of the public, increasing confidence in the decision-making process.

**Question 19 - How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management?**

Aboriginal and Torres Strait Islander Peoples have been caring for country since time immemorial, the practices of Australia's Indigenous Peoples have been developed and

ongoing for 65,000 years. The collective traditional ecological knowledge Aboriginal and Torres Strait Islander Peoples have is unique, specific to geographic locality, and if properly utilised can enhance the ways in which Australia approaches the protection and conservation of our biodiversity and environment.

Indigenous Peoples must be considered in matters relating to the protection and preservation of Australia's unique biodiversity. It is essential to engage and consult with the right Aboriginal and Torres Islander peoples, that is, those with authority and knowledge of country. There exists not only an intimate traditional ecological knowledge, but a cultural and spiritual obligation that Aboriginal and Torres Strait Islander Peoples have to the land and waters they are connected to. This cannot be under underscored enough and necessarily requires appropriate levels of evidenced cultural due diligence to be undertaken.

Therefore it is essential that the EPBC Act incorporates mechanisms which require the consultation with and consideration of the appropriately identified (that is, evidenced as appropriate and lawfully and/or culturally authorised) Indigenous knowledges, as it relates to any surveying, proposed works, conservation plans, and protection orders.

It is important that the right people for country are engaged with. The Federal Native Title Regime can be utilised in this regard, the system of Representative Aboriginal and Torres Strait Islander Bodies (Native Title Representative Bodies) where there are positive Determinations of Native Title and where there are presently claims on the Native Title Register, provides a reasonable indication as to who the right people are to consult with. It is important that there exists an infrastructure that could be utilized to harmonise the way in which traditional owners are engaged with appropriately. However, it should be emphasised that cultural due diligence is not complete at this stage and further due diligence may be required. Prescribed Bodies Corporate (PBC) might also be utilised where a PBC has been established following the determination of native title.

Traditional land management practices and caring for country will vary from place to place and the various different kinds of environment. The incorporation of traditional land management practices needs to be cognisant of these variances across the Australian landscape, and in order to achieve this, appropriate engagement and consultations with Traditional Owners is necessary. Whilst many of the activities could be categorised in fire management, flora and fauna care, these need to be incorporated in any land management plans and strategies. The unique traditional ecological knowledge of traditional owners has been curated over many thousands of years.

A practice of Traditional Owners that is commonly known to wider Australia is the practice of "burning country", which clears the land from excess and is the catalyst for various native flora to germinate and rejuvenate. This practice has largely been suppressed across much of the country, and as a result, has largely impacted on the ability of Traditional Owners to engage with land management practice, and as can be seen in the recent bush fires, the inability for fire services to adequately prepare and reduce fire hazards. Traditional burning is often most preferable in comparison to aerial application which does not account for the talking and being with country by those holding Cultural Authority.

Regard should also be had to:

- The Convention on Biological Diversity (ratified by Australia in 1993), and in particular Articles 8 (In-situ Conservation) 17 (Exchange of Information) and 18 (Technical and

Scientific Cooperation) relating to the use of Traditional Knowledges and the involvement of Indigenous Peoples.

- Indigenous intellectual property and traditional knowledges of biological diversity should not be exploited and mechanisms need to be developed to ensure the protection of this.
- Adequate systems of consultation and remuneration are needed if Traditional Owners are going to be mobilised to engage and assist with matters arising under the EPBC Act. There are various pieces of legislation that trigger the need to consult, but many require consultation without any compensation and it becomes a large burden on the Traditional Owners having to engage across various regulatory regimes. This must be rectified. Undertakings which provide for no or less than market value should not be acceptable. It is therefore essential that any engagement with Traditional Owners is supported by access to Culturally appropriate, independent legal and other professional assistance.

**Appropriate Indigenous engagement – considering the International context**

In Queensland, the *Biodiscovery Act* 2004 focuses on including and protecting Traditional knowledges of Traditional Custodian groups. Queensland was the first state in Australia to introduce biodiscovery legislation, with the commencement of the *Biodiscovery Act* in 2004. The matter of Traditional Knowledges with respect to the regulation of biodiscovery was not covered by the Act. However, much has happened internationally since the Act commenced, particularly the advent of the Nagoya Protocol on Access and Benefit-Sharing which Australia signed in 2012.

Australia has accepted the United Nations Declaration on the Rights of Indigenous People (UNDRIP) document as a framework for recognising and protecting the rights of Indigenous Australians. The Declaration is based on the four key principles of self-determination; participation in decision-making; respect for and protection of culture; and equality and non-discrimination. UNDRIP recognises that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.

Article 31 provides that '*Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions*'.

Australia is a signatory to the UNDRIP and Article 31 supports the position that knowledge must be construed in accordance with self-determined definitions of what is real and valuable to the Traditional Custodians. In order to demonstrate an appropriate level of Indigenous engagement in accordance with International obligations, (to which Australia has agreed to), we provide the following case study.

Case Study - The Mitchell River Traditional Custodians Advisory Group (**MRTCAG**)

> *MRTCAG is entirely managed and driven by Traditional Custodians from clans from four tribal groups from the middle and upper Mitchell River catchment: Mbabaram;*

> *Wokomin; Kuku Djungan and Western Yalanji) and we have deep love, respect and passion for our culture and People.*[1]

Traditional Owner Custodian Groups and the MRTCAG Aboriginal Corporation is an example of best practice in this regard. They have aligned their strategy operations to comply with the *Biodiscovery Act* 2004 (including subsequent reforms of the Act) and the Nagoya Protocol. This ensures consistency with recognised International and National approaches such as: Indigenous Cultural and Intellectual Property recognition and protection; ensuring Free Prior and Informed Consent; Access and Benefit Sharing and Mutually Agreed Terms.

MRTCAG's research agreement making processes with institutions and individual researchers was developed ten years ago and they have been advocating for western research models to identify webs of relationships impacted and involved in community health protection. Bama Gala (Aboriginal way) recognises that the self and community are part of a natural collective or a web of relations with human, environmental and spiritual forces, all requiring balance and harmony. A Traditional Custodian model builds relationship with key community and external stakeholders to strengthen community capacities and created beneficial interdependences among stakeholders for Bama community, the land, health, prosperity and wellbeing.

It is clear that under the Nagoya Protocol, which is being reflected by the Queensland government in State legislation, it is important to include Traditional Knowledge in consultation and negotiation with Aboriginal and Torres Strait Islander Peoples before decision making.

There should be a recognition that this consultation may extend beyond the formal consultation periods for other matters. This reflects the complexity of the matter, and the need for a commitment to properly consult and negotiate in a manner which is truly reflective of the principles and obligation underpinning State and International laws and agreements.

**Question 24 - Offsets**

Offsets are a key tool used in conditioning actions which are approved under the EPBC Act, and are important to allow the legislation to achieve its objects in terms of allowing for development which appropriately protects and promotes the environment. However, there are some difficulties in the current framework for offsets at the Federal level which are set out below:

- Offsets are not specifically provided for in the EPBC Act itself, and only referenced a few times in the key supporting regulation. Accordingly, most offsets are implemented and administered pursuant to policies prepared by the Department administering the EPBC Act. Equally, the avoidance and mitigation hierarchy is not encapsulated in the legislation.

- Many proposals which are approved subject to requirements to deliver offsets under the EPBC Act are also approved under State legislation which requires offsets to be imposed. This can lead to duplication in assessment and conditioning, creating uncertainty around the requirements for offsets delivery and jurisdiction for imposing and enforcing offsets requirements. In Queensland, there is specific legislation which provides for conditioning offsets across a range of Queensland approvals, and which explicitly provides that offsets should not be imposed for matters which have been assessed under the EPBC Act. In practice, however, the two systems do not always work together well and the administering departments do not always agree on offsets

[1] https://dailywordplay.wordpress.com/2016/06/15/mrtcag-saves-landmarks/.

delivery. In NSW, there are variation rules that exist under biodiversity legislation, as opposed to the Commonwealth policy of like-for-like offsets. This can afford proponents greater flexibility in proposing alternative environmental outcomes that may also be acceptable in the circumstances.

- Most approvals under the EPBC Act which impose conditions requiring offset delivery do so by directing management plans and strategies to be prepared, submitted for approval and subsequently implemented. In many ways, this is appropriate, because the finer detail of an offsets delivery program for a project is unlikely to be available at the time of approval. However, this can also create difficulties for approval holders in understanding and maintaining their compliance, as well as potentially for the administering department as its ability to strictly enforce the requirements of plans which are subsidiary to an approval is questionable in some respects (and often dependent upon the specific drafting of an individual condition).

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Luke Murphy
**President**