

# SUBMISSION TO THE EPBC ACT REVIEW

ANON-K57V-XYT4-6

## Name

Mark Johnston

## Organisation

2XF Advice Pty Ltd

## State or Territory

Tasmania

## Areas of Interest

The objects of the Act; Cumulative impacts; Climate change; Decision making; Public participation in decision making; Biodiversity; Conservation;

## Attachment provided

No

## Do you give permission for your submission to be published?

Yes - with my name and/or organisation (if included)

## SUBMISSION RESPONSES

**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?**

A very significant hole in the EPBC Act is the omission of climate change considerations from the scope of the Act. This should be rectified as a matter of urgency.

The EPBC does not represent an overreach of the Commonwealth's powers. On the contrary, it is imperative that the Australian Government has the ability to influence environmental outcomes.

It may be that the regulations under the Act are excessively clunky and difficult for stakeholders to navigate. This means the regulations should be improved, rather than removed.

**QUESTION 2: How could the principle of Ecologically Sustainable Development (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?**

Deep consideration of ESD should be required under EPBC Act decision making.

Cost-benefit analysis (CBA) should be included within the framework. However I would caution strongly against putting all the decision making eggs in the CBA basket.

CBA can be potentially be manipulated - both by pro-development proponents and anti-development proponents. Moreover, environmental accounting is in its infancy. At the moment there is a systemic bias against biodiversity/environmental outcomes.

This systemic bias arises from the fact that it is very hard to place a monetary value on the full extent of "ecosystem services".

The name "eco-system services" itself is already unreasonably limiting the full value of ecosystems to human life. Eco-system services include water, timber, soil for agriculture, etc. The sense of deep pleasure and wonder that comes from admiring a majestic river red gum is not really considered to be an eco-system service.

The practice of economics (or any alternative pricing system) is not particularly good at measuring the value of non-market goods and services. We aren't very good at valuing goods and services where there are market failures - like in health & education & energy.

We are even worse at estimating the negative value, or cost, of pollution. We can estimate the costs - but we can't agree on the estimate. The CSIRO suggests we need a global carbon price of \$250 a tonne in the next decade or so. The World Bank has suggested a global carbon price of \$70 per tonne would work. The ERF scheme puts carbon at about \$14 tonne.

We are completely hopeless at estimating the value of things that aren't widely considered to be a good or a service. Things like a mother's smile, a father's hug, a dog's tail wag genuinely enrich human life - but we generally say they are priceless.

How would a CBA estimate the value of a colony of bridled nail tail wallabies?

The developer's economist might say they are worth \$100,000 each and think they are being extremely generous in assigning a value of \$3 million to a few wallabies (which would have a meat/ecosystem services value of perhaps \$300). Greenpeace's economist might say that a quarter of the world's population considers the extinction of a wallaby to be a calamity - and each one of those people consider that calamity to be worth \$100 million. \$100 million multiplied by 1.75 billion is a pretty big number.

Under the developer's CBA the benefits of the development could easily outweigh the \$3 million dollars in lost wallabies. Under Greenpeace's CBA the development will certainly not proceed. I'm not sure that this hypothetical decision on whether the development should proceed or not becomes made any easier through the use of CBA.

### **QUESTION 3: Should the objects of the EPBC Act be more specific?**

Yes, the EPBC has largely failed to halt ongoing degradation of Australia's natural environment. Greater specificity in the Act's objectives is one tool that can be used to improve outcomes.

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

no comment

**QUESTION 5: Which elements of the EPBC Act should be priorities 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?**

no comment

**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?**

The number one priority should be devising an Act and related regulations, guidance and governance structures that delivers outcomes - the protection & improvement Australia's environmental health

This priority can be served by:

1) Setting clear environmental standards

2) making the process of navigating the Act and Regulations more clear and straightforward. This is linked to point 1 - if there are clear standards, then development proponents know where they stand. We know that a rugby footballer cannot throw a forward pass - simple rules/standards that can be transparently judged allow the efficient operation of a game.

3) making the rule making & judging system entirely transparent. Decisions & their rationale should be publicly published in full. An appeals process should be allowed within 1 month of the publication of a decision. An independent appeals tribunal should determine whether the original decision should stand or be overturned.

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

no comment

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

Yes. Some developments that should not have been contemplated, or quickly given a "no" end up costing the all parties time & money to no good end. Other developments that should quickly get a "yes" get to that point too slowly.

Setting up clear standards / outcomes can streamline the application/decision making processes to the benefit of all

**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?**

Yes, the Commonwealth should take a stronger role - setting out the vision, principles and naming outcomes - and setting out a strategic framework + a set of environmental standards.

The State of the Environment reporting structure should be renovated to include outcomes & reporting - linked more closely with the Act.

The reports should be published then publicly discussed at an AGM equivalent meeting of COAG environment ministers & the members of an independent EPBC review panel

**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 environment standards with the Commonwealth taking a monitoring and assurance role? Does the information exist to do this?**

See answer to 9.

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

Yes - environmental improvement / restoration has to be an object of the Act - to claw back the immense losses suffered over the last decades.

**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?**

no comment

**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?**

no comment

**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?**

States should be given the opportunity, indeed encouraged, to deliver EPBC outcomes in line with national standards

**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 publicly available?**

Yes, or at least receive speedy approval. Data collection will be very important & should definitely be publicly available.

Organisations like ABS / ABARES and the like have lost much capacity. The ABS focuses on the national accounts - they should be given the remit to develop and maintain an environmental database.

The mania for privacy concerns is overblown by government & industry alike. EIAs affect multiple stakeholders and should be published with very few exceptions (Defence perhaps).

**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?**

Both

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

no comment

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

At present no.

Self regulation would need to be linked with bullet proof requirements to publicly report on activities & outcomes.

There would also need to be an "EPBC Act audit office" with the powers to monitor and verify. That office would need to undertake a minimum number of audits every year - and publicly report on results & publicly prosecute where appropriate. Out of & pre-court secret settlements, old-fashioned ASIC style, have been seen not to cut it.

**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?**

I don't know the answers to these questions. However I fully support greater involvement of Indigenous Australians in driving better environmental and heritage outcomes.

**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?**

Ideally there would be community representation on advisory & decision making bodies.

It would be possible to run a 3 step selection process.

- call for EOIs
- gather about 30 or 50 preferred candidates, selected to represent community diversity
- At the end of the workshop, which consists of dummy decision making exercises + a concluding presentation by each candidate on why they are well placed to join the body, the workshop candidates elect 3 people to sit on the body.

However the best and fairest way to increase community representation is to:

- have clear rules and requirements that can be understood by lay people
- ensure decision making is published
- allow a short appeals period where the community have a chance to object to or support the decision

**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?**

Reform of decision making structures & transparency of decision making is both vital.

No structure is perfect. And a perfectly transparent decision can still be the wrong one.

However, good structures and high transparency together provide checks & balances that can deliver good decisions much more often than not.

The current system is too heavily reliant on assumptions that the public service is somewhat independent of government and that ministers always act in the wider public interest. Sadly, these assumptions do not always hold. Governments are tending to demand that public servants blithely follow their instructions whether well or ill-informed and ministers are increasingly influenced by narrow, but powerful lobby groups.

Therefore decision making structures need to incorporate review points, expert advisory groups and appeal systems.

Transparency - complete disclosure of decisions and their rationale is vital - otherwise any appeal system is hamstrung from the start.

**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?**

I suspect that the EPBC Act should continue to largely rely on a traditional, rules based, approach.

The innovation should be focused on devising a rules approach that:

- minimises the number of different rules
- relies on outcome / performance based standards
- has different pathways for projects of different scale and impact.

Self regulation could become part of the approach. However "police" would still be required. We self regulate in terms of following road rules - once we have a licence we can hit the roads without further regulatory obstacles. But this system only works because we know that there is a chance that the police will catch breaches of the rules.

Most regulatory systems fail because of a lack of enforcement. Building regulators have powers to audit and strongly enforce rules - but they very rarely do so - because they are not funded or encouraged to act. This results in apartment buildings in NSW that are dangerous and collapsing walls in Victoria and underperforming buildings across the country.

With this in mind, there should be an Environmental Audits Office or equivalent established with sufficient funding and authority to properly enforce decisions made under the Act.

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

Carefully designed environmental markets should be designed to incentivise environmental restoration.

However, effort here should not divert attention away from a traditional, rules based system. A rules based system is best placed to protect the environmental values that still are retained in our landscapes.

Rules to prevent further degradation

A combination of rules, market development, guidance, trusts should be used to drive improvement.

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

- Offsetting should be banned in certain circumstances. Where a species is endangered, offsetting should not be allowed.

- Offsetting should be allowed when some environmental degradation will occur - if 10 times the quantity of improvement can be achieved elsewhere.

For example, if 100 hectares of semi-natural, but not harbouring endangered species, land will be lost to a development, the proponent could turn over 1000 hectares of farmland to a biodiverse, natural state - for example on eroded gullies or hilltops on over-cleared farmland. The developer would pay the farmer for the loss of any productive land and for works to restore the land and for ongoing management of the land.

**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 risk with the Commonwealth developing a public investment vehicle to coordinate EPBC Act offset funds?**

There are certainly opportunities here - but no detailed comments at this point

**QUESTION 26: Do you have suggested improvements to the above principles? How should they be applied during the review and in future reform?**

I think these principles could be made more ambitious regarding environmental outcomes.

I suggest principle 1 is redrafted to:

Effective Protection & Restoration of Australia's environment

Protecting and restoring Australia's unique environment and heritage through effective, clear and focussed protections for the benefit of current and future generations.

I suggest that principle 2 is redrafted to

Making rules clearer and decisions simpler

Achieving efficiency and certainty in decision making, including by improving the clarity of regulations and reducing unnecessary regulatory burdens for Australians, businesses and governments.

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

No. The Act is not sufficiently protecting Australia's environment and heritage.

Secondly, the Act's limited achievements are not being delivered particularly efficiently.

**QUESTION 28: How well is the EPBC Act being administered?**

no comment here

**QUESTION 29: Is the EPBC Act sufficient to address future challenges? Why?**

No. It is failing to address current challenges, there is no reason that it would be fit to manage future challenges.

**QUESTION 30: What are the priority areas for reform?**

- Incorporation of clear standards
- More effective consideration of strategic, region wide circumstances
- Governance - greater powers given to an independent tribunal/review board.
- Transparency - all decisions and actions publically available immediately
- Increased ability for state and local governments and businesses to self regulate. This should occur under conditions where they publicly declare their actions and state how their actions meet regulatory requirements. Further, an Environmental Audit Office would review the statements and undertake a sizable number (perhaps 20 or 30) of audits per year with the outcomes published and

breaches prosecuted. Any "out of court" settlements would not allowed to be confidential. On the contrary settlement conditions would be published.

**QUESTION 31: What changes are needed to the EPBC Act? Why?**

In addition to the other suggestions made within this submission, climate change must be made a clear and significant consideration in the EPBC Act and framework.

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

I'd like to reiterate my point that the Act could be better used to encourage restoration of already degraded land. There is a great need for restoration of ecosystems across the country.