

RESPONSE TO THE INTERIM REPORT SURVEY

Note: Responses were automatically limited to 255 characters unless otherwise indicated

Name

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Yes - with my name and organisation

NATIONAL LEVEL PROTECTION AND CONSERVATION OF THE ENVIRONMENT AND ICONIC PLACES

Legally enforceable National Environmental Standards should be the foundation for effective regulation. The Standards should focus on outcomes for matters of national environmental significance, and the fundamentally important processes for sound and efficient decision-making. Standards will provide certainty—in terms of the environmental outcomes the community can expect from the law, and the legal obligations of proponents.

Strongly agree

The goal of the EPBC Act should be to deliver ecologically sustainable development. The Act should require that National Environmental Standards are set and decisions are made in a way that ensures it is achieved. The Act should support a focus on protecting (avoiding impact), conserving (minimising impact) and restoring the environment.

Strongly agree

A greater focus on adaptive planning is required to deliver environmental outcomes. Regional plans should be developed that support the management of cumulative threats and set clear rules to manage competing land uses at the right scale.

Strongly agree

Strategic national plans should be developed for big-ticket, nationally pervasive issues such as the management of feral animals or adaptation of the environment to climate change. These plans should guide the national response and enable action and investment by all parties to be effectively targeted and efficient.

Strongly agree

INDIGENOUS CULTURE AND HERITAGE

The National Environmental Standards should include specific requirements relating to best practice Indigenous engagement, to enable Indigenous views and knowledge to be incorporated into regulatory processes.

Strongly agree

The national level settings for Indigenous cultural heritage protection need comprehensive review. This should explicitly consider the role of the EPBC Act in providing protections. It should also consider how comprehensive national level protections are given effect, including how they interact with the development assessment and approval process of the Act.

Strongly agree

Indigenous knowledge and western science should be considered on an equal footing in the provision of formal advice to the Environment Minister. The proposed Science and Information Committee should be responsible for ensuring advice incorporates the culturally appropriate use of Indigenous knowledge.

Agree

The scientific validity of indigenous knowledge cannot be assumed. Indigenous knowledge, particularly where there has been no presence for an extended period, must be tested just like any knowledge base.

Where aligned with their aspirations, transition to Traditional Owners having more responsibility for decision-making in jointly managed parks. For this to be successful in the long term there is a need to build capacity and capability, so that joint-boards can make decisions that effectively manage risks and discharge responsibilities.

Agree

Management of parks must be undertaken by appropriately skilled people. If they are traditional owners that's fine but the key to good management is to ensure all decision makers have the skills and experience to do so

Improved outcomes for Indigenous Australians will be achieved by enabling co-design and policy implementation.

Agree

The role of the Indigenous Advisory Committee should be substantially recast as the Indigenous Knowledge and Engagement Committee, whose role is to provide leadership in the co-design of reforms and advise the Environment Minister on the development and application of the National Environmental Standard for Indigenous engagement.

Agree

LEGISLATIVE COMPLEXITY

In the short-term, legislative amendments to the EPBC Act are required to address known inconsistencies, gaps, and conflicts in the Act.

Agree

In the longer-term, a comprehensive redrafting of the Act (or related Acts) is required. This should be done following the development of the key reforms proposed by this Review. This sequencing will ensure that legislation is developed in a way that supports the desired approach, rather than inadvertently hindering it.

Disagree

Redrafting could include consideration of dividing the Act—such as creating separate pieces of legislation for its key functional areas.

Strongly disagree

There is an imperative to keep the Act as one piece of legislation. There is frequently an overlap between each of the operative parts and splitting the act will prevent a holistic approach being adopted

EFFICIENCY - REMOVING DUPLICATION

Devolve decisions to other jurisdictions, where they demonstrate National Environmental Standards can be met.

Strongly disagree

These are national issues and should not be devolved to the States as the Commonwealth provides the necessary checks and balance

To base devolution on sound accreditation, quality assurance and compliance, escalation (including step-in capability) and regular review.

Strongly disagree

The devolution of nationally important values is a recipe for the watering down of the enforceability of the Act. It becomes dependent on State or Local funding for accreditation, quality assurance and compliance

Assessment pathways should be rationalised and implemented with clear guidance, modern systems and appropriate cost recovery. Small investments can dramatically reduce cost and uncertainty and improve decision-making.

Agree

These, and other reform directions proposed (National Environmental Standards, regional plans, information and data, modern regulatory systems) create opportunities for significant streamlining and efficiency, including where low risk actions will not require approval.

Agree

Streamline provisions for permitting of wildlife trade and interactions with other environmental frameworks.

Strongly disagree

This is a recipe for a compromised management system. It is wishful thinking to hope that streamlined provisions will not increase wildlife trade

TRUST IN THE EPBC ACT

Improve community participation in decision-making processes, and the transparency of both the information used and the reasons for decisions.

Agree

Provide confidence that decision-makers have access to the best available environmental, cultural, social and economic information.

Strongly agree

Amend the settings for legal review. While retaining extended standing, provide for limited merits review for development approvals. Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.

Agree

DATA, INFORMATION AND SYSTEMS

A national 'supply chain' of information is required so that the right information is delivered at the right time to those who need it. This supply chain should be an easily accessible 'single source of truth' on which the public, proponents and governments can rely.

Agree

This is sensible provided the 'single source of truth' is unbiased and uses established and agreed scientific principals

To deliver an efficient supply chain, a clear strategy is needed so that each investment made contributes to building and improving the system over time.

Agree

A custodian for the national environmental information supply chain is needed. The Commonwealth should clearly assign responsibility for national level leadership and coordination. Adequate resources should be provided to develop the systems and capability that is needed to deliver the evidence base for Australia's national system of environmental management.

Agree

A National Environmental Standard for information and data should set clear requirements for the provision of data and information in a way that facilitates transparency and sharing. The standard should apply to all sources of data and information, including information collected by proponents.

Strongly agree

To apply granular standards to decision-making, Government needs the capability to model the environment, including the probability of outcomes from proposals. To do this well, investment is required to improve knowledge of how ecosystems operate and develop the capability to model them. This requires a complete overhaul of existing systems to enable improved information to be captured and incorporated into decision-making.

Strongly agree

MONITORING, EVALUATION AND REPORTING

A coherent framework to monitor and evaluate the effectiveness of the EPBC Act in achieving its outcomes and the efficiency of its implementation should be developed. The framework must be backed by a commitment to its implementation.

Strongly agree

A revamp of national SoE reporting should incorporate trend analysis and address future outlooks to provide the foundation for national leadership on the environment.

Strongly agree

National environmental economic accounts will be a useful tool for tracking Australia's progress to achieve ecologically sustainable development (ESD). Efforts to finalise the development of these accounts should be accelerated, so they can be a core input to SoE reporting.

Agree

RESTORATION

The EPBC Act should require offsets to be considered only when options to avoid and then mitigate impacts have been actively considered, and demonstrably exhausted.

Strongly agree

The EPBC Act should require offsets, where they are applied, to deliver protection and restoration that genuinely offsets the impacts of the development, avoiding a net loss of habitat.

Strongly agree

The EPBC Act should incentivise investment in restoration, by requiring decision-makers to accept robust restoration offsets, and create the market mechanisms to underpin the supply of restoration offsets.

Strongly agree

There are opportunities for government to explore policy mechanisms to accelerate environmental restoration including those to leverage the carbon market, which already delivers restoration, to deliver improved biodiversity in suitable habitat types.

Agree

There are opportunities for government to explore policy mechanisms to accelerate environmental restoration including those to co-invest with the philanthropic and private sectors, including funding innovation to bring down the cost of environmental restoration, growing the habitat available to support healthy systems.

Strongly agree

COMPLIANCE, ENFORCEMENT AND ASSURANCE

Establish a modern, independent regulator responsible for monitoring, compliance, enforcement and assurance to be a strong cop on the beat.

Strongly agree

Increase the transparency of activities.

Strongly agree

Effectively draw on Standards, simplified law, and better systems to increase compliance and simplify enforcement and assurance.

Strongly agree

Shift focus toward assurance of devolved decision-making and monitoring, compliance and enforcement of national strategic plans, regional plans, offsets and regeneration.

Disagree

Devolution of decision making is the first step in watering down compliance. Nationally important values must be protected and enforced nationally

Provide the regulator with a full suite of modern regulatory monitoring, compliance, enforcement and assurance tools and adequate funding.

Strongly agree

PROPOSED REFORM PATHWAY

Do you broadly agree with the phased approach proposed by the Review?

Strongly agree

BROADER VIEWS (no character limit)

What has been missed?

This submission is made in response to Professor Samuel's Interim Report Chapter 3, pertaining to legislative complexity. The Interim Report states the EPBC Act's complexity makes it difficult, time-consuming and expensive for people to understand their rights and obligations. This leads to confusion and inconsistent decision-making. Section 3.2 of the Interim Report notes key terms and terminology in the EPBC Act lack clarity, which causes confusion about obligations and inconsistent interpretation. As a consequence, users of the Act, including departmental staff, aren't sure how the EPBC Act should apply. The Interim Report observes the Department has been inconsistent in its application and guidance about some requirements under the EPBC Act, which has added to confusion and uncertainty. While the Report makes these comments regarding Environment Impact Assessments, heritage-related sections of the Act also have challenges regarding the interpretation of key terms.

One of the focus area questions asked by Professor Samuel's Review is 'How can the EPBC Act be improved?' While the discussion paper has a strong environmental emphasis (reasonably so), it is assumed the Review will also considers matters which can generate better heritage outcomes. In

some ways this echoes Dr Allan Hawke's 2009 review of the Act which recommended 'the Australian Government provide greater leadership for heritage protection... actively promoting a national approach to heritage; and... the Act be amended to... recognise a range of management arrangements, including management plans, that are required to be outcome focussed'.

In the context of better outcomes for heritage, this submission addresses some ambiguities in the existing wording of the Act regarding the assessment of multiple heritage sites with common values. These ambiguities can be demonstrated by contrasting the assessment methodology employed under the EPBC Act to the approach adopted for World Heritage sites.

UNESCO has issued Guidelines for the Preparation of Serial Nominations to the World Heritage List (<http://whc.unesco.org/archive/serial-noms.htm>) to prepare serial nominations for the World Heritage List.

A serial nomination is any nomination which consists of two or more unconnected areas. A single World Heritage nomination may contain a series of cultural and/or natural properties in different geographical locations, provided that they are related because they belong to:

- (i) the same historico-cultural group;
- (ii) the same type of property which is characteristic of the geographical zone; or
- (iii) the same geological, geomorphological formation, the same biogeographic province, or the same ecosystem type.

It is important to note the Guidelines state 'it is the series, and not necessarily each of its components taken individually, which is of outstanding universal value. A serial nomination should be treated as a single nomination, not several nominations packaged together under a single cover letter'.

Serial nominations can be used to nominate many properties in the same thematic group or geological period in a single nomination dossier. Examples include the Australian Fossil Mammal Sites, Convict Sites, and the Gondwana Rainforests. Serial nominations may even be used for transboundary properties, such as Jesuit Missions of the Guaranis (Argentina and Brazil, 1984).

The essential point is the assessment for World Heritage is based on a holistic approach to multiple sites. It is the value of 'the whole', not just individual components, which is taken into account. This is a logical extension of the concept of 'site values' whereby an individual element may not reach the threshold for being considered significant but it nevertheless contributes to the overall heritage value of a place.

At this stage it is useful to note that under the EPBC Act S.324C, the National Heritage List is to comprise a record of places and their heritage values which, under subsection (2)(b), has satisfied the Minister's requirements that 'the place has one or more National Heritage values'. The criteria of National Heritage values to be achieved are prescribed in S.324D and regulations are required pertaining to natural, indigenous and historic values (this has evident similarities to the cultural and/or natural properties employed by UNESCO when considering World Heritage sites).

Nevertheless, the Heritage Branch of the Department of Agriculture Water and the Environment has advised the EPBC Act does not make provision for serial listings, and consequently each site must be assessed on its own merits. However, such an interpretation of the Act would appear not to align with the definition of 'place' specified in S.528 of Division 2—General list of definitions, as follows:

S.528 Definitions

In this Act, unless the contrary intention appears:

Place includes:

- (a) a location, area or region or a number of locations, areas or regions; and
- (b) a building or other structure, or group of buildings or other structures (which may include equipment, furniture, fittings and articles associated or connected with the building or structure, or group of buildings or structures); and
- (c) in relation to the protection, maintenance, preservation or improvement of a place—the immediate surroundings of a thing in paragraph (a) or (b).

Of particular relevance is that under paragraph (a), a 'place' can be multiple sites which, prima facie, would seem to have the same practical effect as the serial listing methodology employed by UNESCO.

The principal issue being raised in this submission is that geographically separated sites can be linked through one or more themes which meet the heritage value requirements of S.324D. As a result there needs to be greater clarity in the Act for the assessment of heritage sites across 'a number of locations, areas or regions'.

The Samuel Review asks for data, evidence or case studies which support the submission. The following example is provided as a way of demonstrating the application of multiple sites.

In February 2017, an application was made to have the Point Lonsdale headland considered for National Heritage due to its military and defence values. The application proposed the Point Lonsdale headland should be serially assessed together with other heritage defence sites at Port Phillip Heads due to their common values (many of which already have National or Commonwealth Heritage listing).

In June 2017, the Point Lonsdale headland was placed on the Commonwealth's National Heritage Finalised Priority Assessment List by the Federal Minister for the Environment although in correspondence from the Department it was stated 'Serial nominations are not possible under the EPBC Act. However the Australian Heritage Council will be undertaking a National Heritage assessment of Point Lonsdale and will consider potential linkages with related places including Shortland's Bluff, as part of this assessment'.

In September 2017, the Hon David Kemp AC, Chair of the Australian Heritage Council sought submissions in support of Point Lonsdale's heritage values as part of the assessment process for National Heritage. In November 2017, a group facilitated by Deakin University made a submission to the Australian Heritage Council concluding Point Lonsdale met several National Heritage criteria and recommended it should be included in the National Heritage list. The Deakin Group submission also noted the very strong operational linkages Point Lonsdale had with other listed defence sites around Port Phillip. The submission stated:

'Collectively the sites have a very strong common historical narrative that we have explored in Section 11 of our submission. It is noted that the EPBC Act, S.528 defines 'place' to include 'a location, area or region or a number of locations, areas or regions'. In this context we seek the Council's advice on what approach could be adopted to ensure a greater integration of the shared values of these... nationally important sites.'

In a related matter, in early 2018, a letter was sent to the Minister for the Environment and the Chair of the Australian Heritage Council proposing a thematic assessment under S.324 of the EPBC Act of the heritage values of the three headlands at Port Phillip Heads (including the South Channel Fort and the incomplete Pope's Eye Fort) with a view to having them collectively (serially) assessed for National Heritage.

In the Federal budget, the Minister commissioned the Federation of Australian Historical Societies (FAHS) under a Protection of National Heritage grant to undertake research over 2018/19 and 2019/20 on Australian coastal fortifications. However in a logical consideration of the project's potential national importance, the scope was expanded to include Australia-wide defences with particular focus on Port Phillip and Port Jackson. Two thematic studies were commissioned, namely:

- A thematic study of the early defence of Australia, i.e. nineteenth century east coast, and
- A thematic study of the significance of the defence fortifications and installations of Sydney Harbour and Port Phillip.

Within the FAHS, the project was managed by A/Professor Don Garden from Melbourne University (previously a Board member of the AHC). The completed studies took around 18 months to be submitted to the AHC. The studies are available at <https://www.history.org.au/advocacy/>. The FAHS Port Phillip study evaluated the following coastal defence heritage sites:

- Point Lonsdale
- Point Nepean
- Fort Queenscliff/Shortland Bluff
- South Channel Fort (& Pope's Eye Fort)
- Fort Gellibrand, Williamstown
- Swan Island Fort and defences
- HMVS Cerberus

Both the Point Lonsdale submission and the FAHS study of Port Phillip sites shows a distinct convergence of historic themes as defined in the AHC publication 'Australian Historic Themes Framework', specifically:

7. Governing

7.1 Australia as a province of the British Empire

7.7 Defending Australia

7.7.1 - Providing for the common defence

7.7.2 - Preparing to face invasion

7.7.3 - Going to war

Point Lonsdale's values fit unequivocally into the Australian coastal heritage defence narrative as articulated by the FAHS:

'Port Jackson and Port Phillip had relatively minor fortifications prior to the 1870s, but in the last thirty years of the nineteenth century there were particularly significant clusters of co-ordinated

sites established at their Heads' entrances, making them among the best - defended commercial harbours in the world, and certainly in the southern hemisphere. The defence sites demonstrated, as far as the colonial governments were able to acquire them, the latest in defence technology, design and equipment, including guns and gun carriages, fortification designs, mines, torpedoes, searchlights, etc. In the twentieth century, partly in WWI but particularly during the early years of WWII, these coastal sites were further developed and expanded against the threats from Japanese attack. The two groups of sites represent a highly significant theme in Australian history. They demonstrate how fears of vulnerability and invasion stimulated sustained debate about security and resulted in very high expenditure that established sophisticated and coordinated fixed systems to defend Sydney and Melbourne, particularly at the entrances to Port Jackson and Port Phillip'.

The FAHS study clearly demonstrates the shared heritage values of the various sites are of the highest order and the sites form an interconnected maritime, defence and environmental network. Both the FAHS Port Phillip study and the Deakin Group submission for Point Lonsdale show a clear overlap in National Heritage Criteria prescribed in the regulations (refer AHC's Guidelines for the Assessment of Places for the National Heritage List), specifically:

- (a) The place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history.
- (b) The place has outstanding heritage value to the nation because of the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history.
- (c) The place has outstanding heritage value to the nation because of the place's potential to yield information that will contribute to an understanding of Australia's natural or cultural history.
- (f) The place has outstanding heritage value to the nation because of the place's importance in demonstrating a high degree of creative or technical achievement at a particular period.
- (h) The place has outstanding heritage value to the nation because of the place's special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history.

The FAH study concluded:

'when the sites are viewed not individually but as parts of... integrated and coordinated schemes of defence, this enhanced perception of their social/cultural and military/technological significance arguably qualifies them for National Heritage Listing. They were designed to work as co-ordinated groups to defend their separate cities. This Thematic Paper therefore recommends that as they possess outstanding heritage significance for the nation, the Port Jackson Defence Group and the Port Phillip Defence Group be assessed as part of the PPAL for the National Heritage List'.

It is also relevant that in December 2019, Heritage Victoria significantly increased the area of the Point Lonsdale Headland to be included in the Victorian Heritage Register. The amended area is now known as the Point Lonsdale Maritime and Defence Precinct. The Register entry states:

'The Point Lonsdale Maritime and Defence Precinct is also significant for its associations with the military in both World War I and World War II. Its strategic location at the entry to Port Phillip Bay made it key in the defence of Victoria from potential seaborne attack. It is was one of a network of strategic defence locations around Port Phillip Bay, that also includes Point Nepean and Shortlands Bluff'.

In response to these latest well-researched studies of heritage defences, a request was made again in August 2020 to have the sites considered collectively. The Department's response was very supportive of the work being undertaken to have the heritage sites protected and celebrated but reconfirmed it was unable to undertake serial listing under the EPBC Act.

The perceived legislative inability of the Department to consider multiple heritage defence sites at the entrance to Port Phillip differs from the approach used in the National Heritage listing of the two Cornish mining sites, Burra and Moonta. While these two large sites are separated by a considerable distance, they were jointly listed in 2017 under one gazettal (<https://www.legislation.gov.au/Details/C2017G00516>) due to their common heritage values. The approach to Burra and Moonta is sensible as it unambiguously confirms the two sites have linked common heritage values.

These examples show there is a need to clarify the operation of S.528 of the Act to enable the Department and the AHC to interpret multiple places as a serial entry on the National Heritage list.

The Hawke Review noted a need to focus on outcomes rather than process and, in particular, the application of the Act needed to be more user-friendly to achieve outcomes in a practical manner. If it is accepted that the concept of serial listing is appropriate for Australian World Heritage entries, such as the Gondwana Rainforests or the Convict Sites, then the same clarity should operate for the National Heritage list.

The Interim Report states one of the key reform directions proposed by the Review is, in the short-term, legislative amendments to the EPBC Act are required to address known inconsistencies, gaps, and conflicts in the Act. It is therefore recommended S.528 of the Act is amended to define 'place' as 'a location, area or region or a series of locations, areas or regions'. The replacement of the word 'number' with 'series' is more appropriate as the term 'series' is defined as a number of similar or related events or things.

As an alternative to legislative amendment, legal opinion could be obtained which clarifies the operability of S.528 pertaining to serial listing. It is certainly open to interpretation that the Act does not specifically prohibit serial listings, and indeed the existing phrase 'a number of locations, areas or regions' strongly implies that a listing can contain multiple sites which have combined values sufficient to meet the threshold for National Heritage.

Whichever approach is adopted (either amendment of wording, or legal opinion), both the public and the Department will benefit from more certainty and consistency in decision making. The most important outcome from enabling serial listings is that it confirms heritage should be interpreted not just by location but by communality of attributes.

How could the proposed reform directions be improved?

Are there fundamental shortcomings that would require the Reviewer to rethink?

