



Inquiry into streamlining environmental regulation, 'green tape', and one-stop- shops

House of Representatives Standing Committee on the Environment

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Introduction

1. The Law Council of Australia welcomes the opportunity to submit this supplementary submission to the inquiry by the House of Representatives Standing Committee on the Environment ('the Committee') into streamlining environmental regulation, 'green tape', and one-stop-shops.¹
2. The Law Council gave evidence at the public hearing of the Committee in Canberra on Thursday 19 June 2014, and was invited to provide additional information, advice or recommendations concerning:
 - the guidance that could be provided to business, in a way that the regulators communicate more effectively about firms' responsibilities, and
 - advice about how the regulatory burden could be streamlined, including practical examples of current complexities.²
3. The Law Council notes that its earlier submission to the inquiry provided various examples of environmental regulation that have delivered economic and commercial benefits and stimulated innovative commercial opportunity. Environmental regulation can also contribute to Australia's compliance with multilateral agreements and international legal obligations.³
4. Regulation can have subtle and sophisticated effects. Caution is needed in reacting to submissions focussed solely on cost reduction or regulatory burden. As the Law Council submitted previously, regulation can curb market excesses; redirect market activity; redistribute wealth; trigger certain preferences; directly and indirectly initiate new opportunities, markets, products and industries; nurture business co-operation and new commercial alliances; and signal quality expectations that buttress regional branding and support regional development.
5. Assessments of expressions of frustration about 'green tape' need to distinguish the regulatory instruments from the processes of administrative implementation, and compliance and enforcement activity.
6. Streamlining needs to retain a sharp focus on legislative purpose and best practice techniques that provide clear 'up front' guidelines and communication, contain bureaucratic involvement by clear straightforward process directions, and optimise commercial opportunities.

Bilateral agreements

7. The Law Council notes that there is considerable support in many submissions for the process of bilateral agreement-making between the Commonwealth and the states

¹ Australian Parliament, Parliamentary Business, Committees, House of Representatives Committees, Standing Committee on the Environment, Streamlining environmental regulation, 'green tape', and one stop shops http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/Green_Tape; <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=environment/greentape/index.htm>.

² Australian Parliament, Parliament of Australia, House of Representatives, Past public hearings and transcripts, 19 Jun 2014, Canberra, ACT ([HTML & PDF](#)).>.

³ The findings of the [State of the Environment Report 2011](#) and the Australian Government's international obligations to comply with international legal obligations under multilateral environmental agreements underpin this view.

and territories. Where that results in national uniformity of high quality regulation, the Law Council supports that. However, the Law Council also notes that for national or international investors and development proponents, a series of varying bilateral agreements may create more, not less, complexity.

8. 'Significant impact' is the regulatory concept lying at the heart of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). It is an appropriate concept that achieves and maintains a focus on the environment, threats to it and, through the challenges it raises, creates opportunity for innovative commercial response and ongoing national growth. There is clear merit in ensuring that developments in areas with nationally significant conservation values do not destroy or degrade those values, and best practice regulation with harmonised application and effective monitoring of compliance across the jurisdictions would be best able to achieve that protection, and ecologically sustainable development.

Tourism industry concerns

9. A submission has been made to the Committee that tourism development in areas of national significance under the EPBC Act is a low risk, low impact activity burdened by the same approval process as high impact industries such as mining and resource development. From this, comes the proposition that tourism development, even within national parks and other protected areas, is suitable for simultaneous approval by the state and the Commonwealth under bilateral agreements under the EPBC Act, combined with leases and appropriate certification.
10. The Law Council's view, as expressed in its earlier submission, is that enabling states to approve developments may lessen Australia's compliance with its international obligations as it is the Australian Government that participates in multilateral environmental processes and is most familiar with the responsibilities they engender.
11. Improved environmental standards and improved guidelines for the tourism industry ought to enable industry-related approvals to occur more simply. These would be assisted by one-stop-shop, and national, industry-specific rules that have been developed with industry input. Tourism in areas of national and international significance can, in some circumstances, be far from low risk and/or low impact however, and so being mindful of Australia's international legal obligations in relation to protected areas, the Commonwealth has a responsibility to ensure that any streamlined assessment and approvals process do not compromise the protection of those areas' significant values.⁴

Agricultural industry (pastoral, farmers, irrigation, intensive livestock) concerns

12. Submissions concerning the agricultural industry emphasise the economic significance of agriculture, and acknowledge the benefit of programs that engage industry in targeted environmental outcomes. There are important calls in these submissions for sufficient resourcing to ensure that proponents gain knowledge of the legislation and regulations. Within this industry sector, knowledge of the regulations and clarity is critical to avoiding the problems articulated. The Law Council supports submissions

⁴ The Commonwealth and various states have disagreed over certain activities in national parks (see for e.g. The Grey Nomads, ['National park changes: Good sense or madness?'](#)).

calling for better stakeholder education, and would welcome projects aimed at improving knowledge of the EPBC Act and its regulations.

13. This and other industry sectors seek clear definitions and a rewrite of the legislation in plain English. Like most important legislation, the EPBC Act is long and can be difficult for the lay reader. Education and communication can assist in promoting awareness and understanding. However, care should be taken when directing scarce resources, to balance their allocation between public education, regulatory review, and ongoing research into areas of scientific uncertainty.
14. Likewise, the submission suggesting that the List of Threatened Species should be revised needs to be viewed critically. Consideration should be given to whether such a revision is likely to result in any substantial alteration to the List, when resources devoted to understanding the underlying science may be more likely to create environmental solutions and innovative commercial responses.
15. Submissions describing multiple layers of confusing, conflicting approval requirements across all layers of government, and between environment and other portfolio agencies, have merit. One-stop-shop bilateral agreements have a good chance of resolving such inconsistencies if they focus on national consistency, and avoiding multiple, duplicated reporting processes, and resources are provided to enable Commonwealth oversight and optimum regulatory standards.
16. Submissions advocating a streamlining of reporting obligations have some merit, but not if that would result in a lessening of available information. It is important that knowledge concerning water resources within regions is shared with all relevant government bodies and is available to interested parties. The Law Council agrees that consistency in formatting relevant data is important, and supports any approach which would enhance that.
17. Submissions expressing concern about, and advocating the removal of, isolated paddock trees, overlook other important elements for assessing 'significant impact' on the environment. For example, paddock trees can provide 'stepping stone habitat' for fauna, and can contribute to connectivity conservation and conservation corridors, which are important environmental attributes.⁵ These submissions also reflect a preference for a particular approach to contemporary crop farming that may not be consistent with the development of innovative ways for Australia to comply with statutory and international obligations to protect biodiversity.
18. The Law Council supports the development of nationally consistent policies, principles and standards for offsets as desirable, with offsets being the last resort in the 'mitigation hierarchy' of adverse environmental impacts. Submissions concerning offset requirements confront contemporary approaches to vegetation and habitat destruction that have operated for over a decade and are well built into best practice land use and development practice.

⁵ Kosciuszko2Coast Landholders–Links–Landscapes, '[Landscape links for small bushland birds](#)'; Celia A. Harvey, Nigel I.J. Tucker, and Alejandro Estrada, '[The Overstory #149--Live Fences, Isolated Trees, and Windbreaks: Tools for Conserving Biodiversity](#)'; Philip Gibbons, Miles Boak, '[The importance of paddock trees for regional conservation in agricultural landscapes: A discussion paper for consideration by the Riverina Highlands Regional Vegetation Committee](#)' (NSW National Parks and Wildlife Service, 2000).

Pesticides/ chemical industry concerns

19. The Law Council notes that pesticide approvals can have significant environmental consequences and should be approached carefully to ensure future harm is avoided. The Law Council also accepts the importance of clear 'upfront' rules combined with timely approvals and monitoring of impacts, particularly to avoid the environmental harm from such impacts as nutrient loading to the ocean in reef, riverine or marine areas.
20. The Law Council supports the availability of information and knowledge throughout the regulatory process, for example, about the safety of chemicals supplied in the market. The Law Council agrees that regulation in this area needs to be scientifically-based and targeted at areas of concern, particularly where necessary to protect human, animal, plant or environmental health or safety, or where the regulation contains implications for trade.
21. Submissions as to uncertainty in the risk assessment framework are of concern. It is important to avoid uncertainty, whilst insisting upon a scientific base for the regulation.

Manufacturing industry concerns

22. The Law Council notes that the test of the value of a regulatory scheme is not the 'measurable value' or 'energy productivity' of existing organisations, but rather the extent to which opportunity is created whilst protecting environmental resources, including those upon which the industry itself is dependent, not only for individual organisations but the national economy and society as a whole.
23. The Council shares the concern of others where resources may be directed from energy efficiency or other environmental improvement to pointless, excessive reporting or compliance activity, particularly if they de-incentivise organisations already operating in an environmentally sustainable fashion.

Resources industry concerns

24. The Law Council cautions that regulatory effectiveness is not to be judged by the number of pages that an applicant chooses to include in its environmental impact assessment (EIA), nor by its weight, print-run or the time the proponent takes to address all relevant issues. The quality of the analysis provided should be the main determinant, rather than the quantity of information submitted.
25. Clearly very large projects involve a vast array of multiple elements and many potentially significant environmental impacts that require the attention of a wide cross-section of professional consultant disciplines whose testing and reporting regimes necessarily take time. These reports form part of the normal scoping of any large-scale project not only in its environmental elements, but its commercial, operational and political aspects. The Law Council comments that concerns about delay and complexity may arise out of poor EIA management by both the proponent and the regulatory authorities. For example, it is widely recognised that preliminary documentation prior to formal EIA is best practice. The Hawke Review of the EPBC Act recommended that EIA reforms be addressed through the bilaterals process and

these reforms have been accepted by the former and current government who have agreed to the use of more landscape-scale strategic environmental assessments.⁶

26. The Law Council encourages approaches that will assist major projects. It supports removal of duplication amongst the Commonwealth and states/territories and within all levels of government, and for benchmarking Australia's environmental approval systems against overseas countries with equivalent international obligations. The Law Council prefers nationally consistent and harmonised regulatory approaches.⁷
27. Submissions raising concerns about the operational aspects of bilateral agreements, including conflicting information requirements and conditions, highlight the importance of consistency among bilateral agreements, and the need to minimise the number of differences between agreements. Conflict and inconsistency among different state laws highlights the importance of the Commonwealth's overall national role.

Timber importing concerns

28. A detailed case is put by timber importers that the cost of complying with the *Illegal Logging Prohibition Amendment Regulation 2013* under the *Illegal Logging Prohibition Act* will outweigh any benefits to be gained. It is argued that the high cost of a Due Diligence system required to demonstrate and document that imports are of low risk of containing illegally logged timber will flow on to retailers, builders, secondary wood products manufacturers and consumers. It is noted that the original Regulatory Impact Assessment (RIS) found that the costs exceeded the benefits.
29. The Law Council envisages that there are opportunities for working with international industry and legal practitioners overseas, particularly those located in Asia, to clarify and improve the operation of relevant legislation, and analyse customary regimes. The outcome of such legal work may include the prevention of illegal logging; the better protection of highly significant native forests and their biodiversity; and more sustainable land use and development. Change at the beginning of the supply chain could substantially avoid the transitional difficulties referred to in submissions from timber importers.
30. In considering submissions claiming that the RIS revealed costs exceeding benefits, caution is needed as to the assessment method used, i.e. was it clear for whom the impact was being assessed; was it primarily focused on costs and burdens or an assessment of the overall quality of the regulatory design; was there comprehensive stakeholder input (including those benefitted); a careful review of the benefits and opportunities, as well as the costs/risks of various options and a systematic search for alternatives? There is need for caution as to whether all benefits and opportunities were rigorously included in the benefit assessment because many RIA templates treat only superficially issues such as strengths, benefits and opportunities.
31. Submissions highlight the burdens arising from the new regulation suggest the need for transitional assistance, including education; supply chain checklists to assist

⁶ See the Australian Government's response to the EPBC Act review by Dr Allan Hawke AC, [Rec 4](#); and more generally: Australian Government, Department of Sustainability, Environment, Water Population and Communities, '[Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999](#)' (2011) and [The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999](#)

⁷ *Roxby Downs (Indenture Ratification) Act 1982* (SA), *Alcoa (Portland Aluminium Smelter) Act 1980* (Vic) *WesternPort Development Act 1967* (Vic).

confirmation of compliance with key international and national laws; liaison with industry to facilitate regulatory implementation, and the minimisation of flow-on costs.

32. While a case has been made for consideration being given to a method of regulation of the importation of timber which is more clearly expressed and makes the burden of compliance effective and proportionate to meet the object of the legislation, the Law Council notes that the Act is to be reviewed in 2017. The Department of Agriculture advises that its focus for the first 18 months of the operation of the new regulations will be to assist importers and processors to comply with the due diligence requirements.⁸

Compliance and enforcement

33. The Law Council urges the Committee to request the Australian Government Department of the Environment to report to Parliament as to its compliance with and implementation of recommendations in the recent Australian National Audit Office performance audit concerning implementation of the EPBC Act,⁹ as that report identified significant shortcomings in the Department's monitoring of compliance with, and enforcement of, the Act.
34. Again the Law Council emphasises that it is essential that flaws in the administrative process are not confused with the regulation itself, or its environmental and commercial objectives.

Conclusion

35. The Law Council recommends that the Committee have regard to regulatory purpose and environmental benefit, distinguishing it from the administration and implementation of the regulations, and noting methods for optimising benefit and innovation.
36. The Law Council urges caution in relation to the acceptance of the views in submissions reciting delay costs or 'blow outs', particularly within the context of large-scale projects, and cautions against concluding, at least without further investigation, that the cause of these is the regulatory framework.
37. Proposals for 'green tape' cuts need to be considered carefully, so as to avoid a regulatory vacuum and consequent uncertainty.
38. The Law Council concurs with the view expressed in various submissions, that regulatory modification which leads to the enhancement of business 'buy in' is desirable, and suggests that it can arise with clear and quantified standards and compliance measures agreed in consultation with industry and other stakeholders, along with suitable enforcement approaches.
39. Sharing information, and attention to knowledge/expertise, communication and education, will optimise positive impact. Regulatory models that actively involve key

⁸ Australian Government Department of Agriculture, [Department of Agriculture illegal logging position paper at June 2014](#).

⁹ Australian Government, Auditor-General, [Audit Report No 43](#), 2013–14, *Performance Audit: Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Department of the Environment* (Australian National Audit Office, 2014).

stakeholders, including proponents, generally optimise opportunity better than 'command and control' regulatory models that tend to constrain and limit participation.

40. In some circumstances, however, a 'command and control' model with elements of tight monitoring and enforcement is unavoidable.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.