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

House of Representatives Standing Committee on the Environment

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Executive summary

The Law Council supports, as part of a reasonable approach to regulation:

- Reducing the regulatory burden and duplication for business
- More use of one-stop shop assessment processes
- Improved environmental standards
- Better guidance for business
- Better use of strategic environmental assessments for long-term landscape-scale planning to determine where, and under what conditions, development can safely occur
- Significant investment in a Healthy Landscape and Development Planning Program.

This submission makes the following observations and recommendations:

- While it is clearly reasonable to eliminate regulation which serves no reasonable public purpose, it must be recognised that the fundamental purpose of environmental legislation is protection of the environment, within the broader policy framework of sustainable development. So, in taking any steps towards streamlining environmental regulation, due consideration must be given to the environment, its protection, its significant economic importance and its diverse values for current and future generations.
- The Law Council notes the potential for environmental regulation to deliver important economic and social benefits, and not just burdens. Regulatory controls affecting agricultural and environmental weeds are one such example.
- Regulatory change is an important element from which economic activity and new business opportunities emerge. An approach that sees environmental regulation only as a burden to be eliminated, and which may create a regulatory vacuum given changing policy frameworks, should be avoided. Such a view will impede sustainable new venture opportunities, with flow-on effects to 'green' job creation and GDP growth.
- A thoughtful approach to streamlining regulation would seek to modify the regulatory regime to apply cautious market-oriented measures with carefully focussed administrative or ministerial discretion, along with clear and stable up-front guidelines that business and other stakeholders can readily understand and adapt to.
- 'Regulatory best practice' should seek to reduce unnecessary bureaucratic regulatory burdens by, for example, reducing complex standards, whilst improving regulatory design and stakeholder input.
- Care needs to be taken in a federation which, including the Commonwealth, the states and the territories, comprises 9 polities, not to adopt a proposal which may permit of a 'multi-stop' approach to environmental impact assessment and approval of a project which may operate in more than one jurisdiction. Devolving responsibility for environmental impact assessment and approval from the Commonwealth to states and territories is likely to increase the cost of doing

business in Australia for companies working across state borders, when a harmonised national approach is preferable.

- Care is required to ensure that the regulatory scheme facilitates Australia's compliance with national and international commitments to ecologically sustainable development at the lowest economic cost both in the short and long term.
- The Law Council urges the Australian Government to recognise the non-regression principle as an appropriate criterion for assessing proposed legislative reforms affecting matters of national and international environmental significance.
- Further consideration should also be given to the various recommendations made in the Hawke Review of the EPBC Act and the former Government's response.¹ The Review emphasised the need for monitoring, performance audits and oversight powers to ensure that the processes accredited at state level were achieving the outcomes they claimed to accomplish.²

¹ 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*](#)

² Examples of compliance mechanisms are noted in: Australian Government, Australian Government, [Standards for Accreditation of Environmental Approvals under the *Environment Protection and Biodiversity Conservation Act 1999*, 27–28, but not the institutional mechanisms that should apply them.](#)

Introduction

1. The Law Council of Australia welcomes the opportunity to make a submission to the inquiry by the House of Representatives Standing Committee on the Environment into streamlining environmental regulation, 'green tape', and one stop shops.³ The Australian Government Minister for the Environment, the Hon Greg Hunt MP, asked the Committee on 27 February 2014 to undertake this inquiry.
2. The terms of reference require the Committee to inquire into and report on the impact of 'green tape', and issues related to environmental regulation and deregulation, with particular regard to:
 - jurisdictional arrangements, regulatory requirements and the potential for deregulation;
 - the balance between regulatory burdens and environmental benefits;
 - areas for improved efficiency and effectiveness of the regulatory framework; and
 - legislation governing environmental regulation, and the potential for deregulation.
3. This submission first addresses the terms of reference generally in Part 1, then sequentially in Part 2.
4. The views expressed rely on the expertise and experience of senior lawyers in the field of environmental law who are members of the Law Council's Australian Environment and Planning Law Group (AEPLG) in the Law Council's Legal Practice Section and Secretariat. The AEPLG includes members of state and territory law society and bar associations' counterpart committees, representing the Law Council's 'Constituent Bodies'.

Part 1: General comments

5. The Australian Government has pledged to reduce red and green tape burdens. It intends to audit all environmental legislation and regulation to identify 'unworkable contradictory or incompatible green tape'.⁴
6. The Law Council understands that the term 'green tape' is being used to refer to excessive formalism in public administration, or official procedures marked by excessive complexity resulting in delay or inaction. At the same time it must be recognised that not all environmental regulation falls into that category. Not all costs associated with a regulation are caused by inefficiency, or the unintended consequences of poor quality regulation. Some costs are necessary and deliberately imposed in the public interest.

³<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=environment/greentape/index.htm>.

⁴ Liberal Party of Australia, Media release: Prime Minister, the Hon Tony Abbott MP and Premier of New South Wales, the Hon. Barry O'Farrell 'One-stop shop for environmental approvals one step closer with NSW Government support', <<http://www.liberal.org.au/latest-news/2013/11/05/one-stop-shop-environmental-approvals-one-step-closer-nsw-government-support>>.

7. The industries subject to environmental regulation have expressed concerns about delay, the complexity of legislation, inconsistent and numerous regulations, uncertainty about information and processes, multiple agencies being involved with assessments and none accepting primary responsibility, changing goalposts, and the like. These issues are amenable to resolution by a careful approach to identifying which regulations serve the legitimate public purpose of protecting the environment and which are just 'green tape', in the sense of being unnecessary regulatory hurdles.
8. Care should be taken not to apply the term 'green tape' (which is not well defined and could be criticised as being an emotive term) in a way which encourages the view that environmental regulation has only a negative impact.⁵ As a 2013 Productivity Commission report highlighted, the way small businesses experience regulation is as much a result of regulators' engagement practices as an effect of the regulation.⁶ Some expressed concerns as to a perception of 'green tape' may be merely a matter of poor communication by regulatory authorities.
9. The Law Council cautions against the removal of legitimate environmental protections which have been imposed for reasons of fundamental importance to ecologically sustainable development. The Australian Government's integrated national law for the environment, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), was designed to put on a more co-operative footing federal-state environmental relations, after a series of High Court decisions overturned state government approvals granted to extractive industries in areas of high conservation value. Those court challenges included:⁷
 - *stopping sand mining on Fraser Island in Queensland (by refusing export approval)*;⁸
 - *prohibiting the construction of a state authorised dam in Tasmania*;⁹
and
 - *stopping rainforest logging in the wet topics of Queensland (by nominating the area for World Heritage listing as a precursor to prohibiting logging as incompatible with the World Heritage values of the area)*.¹⁰
10. The Law Council's previous submission on the need to retain Commonwealth powers in the environmental field¹¹ noted that the EPBC Act is the principal piece of national legislation directed at protecting Australia's environment. The Act was developed following recognition in both the 1992 and 1997 Intergovernmental Agreements for the Environment of the important role for the Australian Government in matters of international and national environmental significance. Those agreements in turn emerged after environmental concern had taken hold globally, during the 1970s–90s

⁵ An equivalent US phenomenon is discussed in JA Layzer, *Open for Business: Conservatives' Opposition to Environmental Regulation* (2012).

⁶ Australian Government, Productivity Commission, [Regulator Engagement with Small Business - Research report](#) (2013).

⁷ G. Early, 'Australia's national environmental legislation and human/wildlife interactions', (2008) 11 *Journal of International Wildlife Law & Policy* 101–155.

⁸ *Murphyrores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

⁹ *Commonwealth v Tasmania* (1983) 46 ALR 625.

¹⁰ *Queensland v Commonwealth* (1988) 77 ALR 291.

¹¹ Law Council of Australia, ['Environment Protection and Biodiversity Conservation Amendment \(Retaining Federal Approval Powers\) Bill 2012'](#).

as manifested in the Brundtland Report,¹² the Rio Earth Summit and the negotiation of an array of new multilateral environmental instruments.

11. The Law Council supports a robust legislative and regulatory scheme with workable, consistent and compatible elements. The Law Council's Policy Statement on Rule of Law Principles provides that the law 'must be both readily known and available, and certain and clear'.¹³
12. The Australian Government's policy as articulated in pre-election commitments is to 'engage in genuine consultation with business, the not-for-profit sector and the community before introducing legislation and regulation'.¹⁴ The Law Council advocates that such consultation should be guided by the principle that the fundamental purpose of environmental legislation is protection of the environment within a broader policy of ecologically sustainable development; and that due consideration be given in such consultations to the environment, its protection, its significant economic importance and the value of its conservation for current and future generations. This approach was emphasised in the 2011 State of the Environment Report which warned that Australians must not see themselves as separate from the environment nor the challenges it faced from climate change and other pressures.¹⁵
13. The consultation process should take into account the potential for environmental regulation to deliver important economic and social benefits, and not just burdens. The Law Council notes that regulatory change is an event from which economic activity and new business opportunities emerge. The work of economic thinkers, including Nobel laureates, confirms that regulation impacts the distribution of productive commercial activity across locations and away from unproductive and destructive activity.¹⁶ Regulation reduces uncertainty and serves to effectively direct human action according to government policy.¹⁷ It stimulates innovation and competitiveness¹⁸ and is a source of information about the use of resources to enhance wealth.¹⁹
14. New venture creation is widely considered to be a major determinant of a nation's economic health, being responsible for job creation and GDP growth and having important social implications.²⁰ Government needs to resist pressure to conclude,

¹² World Commission on Environment and Development, *Our Common Future*, Oxford University Press, Oxford, 1987.

¹³ Law Council of Australia, *Policy Statement: Rule of Law Principles* (2011)

<<http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>>

¹⁴ Parliamentary Secretary to the Prime Minister, Member for Kooyong, the Hon Josh Frydenberg MP, [Speech to the Sydney Institute: The Abbott Government's Deregulation Agenda: Priorities and Strategies](#) (2013).

¹⁵ Australian State of the Environment Committee, [Authors, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities](#) (2011).

¹⁶ WJ Baumol, '[Entrepreneurship: Productive, Unproductive and Destructive](#)', (1990) 98(5) *The Journal of Political Economy*, Part 1, (October), 893–921, P Drucker, *Innovation and Entrepreneurship: Practice and Principles* (1985); S Venkataraman, 'The distinctive domain of entrepreneurship as a field of research: an editor's perspective', (1997) 3 *Advances in Entrepreneurship, firm emergence and growth*, 119–138.

¹⁷ DC North, *Institutions, Institutional Change, and Economic Performance* (1991).

¹⁸ ME Porter, *The Competitive Advantage of Nations* (1990).

¹⁹ S Shane and S Venkataram, '[The promise of entrepreneurship as a field of research](#)', (2000) 25(1) *The Academy of Management Review*, 217–226; J Eckhardt and S Shane, 'Opportunities and Entrepreneurship' (2003) 29(3) *Journal of Management*, 333–49; JA Timmons, *New Venture Creation: Entrepreneurship for the 21st Century*, (5th Ed., 1999); Venkataraman, above n 16.

²⁰ DB Audretsch and AR Thurik, '[What's new about the new economy? Sources of growth in the managed and entrepreneurial economies](#)', (2001) 10(1) *Industrial and Corporate Change*, 267–315; DGW Birch, '*Job Creation in America: How our smallest companies put the most people to work*' University of Illinois at Urbana-Champaign's Academy for Entrepreneurial Leadership Historical Research Reference in

without further examination, that reduction of regulation will necessarily stimulate the economy.²¹ Regulation can affect the development of particular socio-economic groups on an aggregate level and redistribute wealth among particular groups.

15. Numerous examples abound where environmental regulation has created environmental, social, commercial and economic benefit. Examples include:

- energy efficiency rating schemes – that have directly led to substantial sales of energy-rating labelled products including lighting, home entertainment, heating, refrigeration and air conditioning, industrial equipment, water heating systems and white goods;²²
- water efficiency labelling schemes – that have saved water. An independent review of the implementation of the *Water Efficiency Labelling and Standards Act 2005* (WELS Act) found that its objectives of conserving water supplies by reducing consumption and promoting water efficient technologies in 'toilets, clothes washing machines, dishwashers, urinals, taps and showers' were being achieved. The scheme was found to be 'good public policy', appropriate, efficient and effective, notwithstanding that there was scope for improvement;²³
- motor vehicles standards – that have ensured poor quality vehicles are not supplied to the market. A public consultation report on the *Motor Vehicles Standards Act 1989* (Cth) noted that many submissions confirmed that the objectives and underlying principles of the Act were still valid: i.e. to provide safe, environmentally sound vehicles to the market; and to provide consumers with concessions to import vehicles where there are specific needs, notwithstanding some identified areas needed improvement;²⁴
- water trading – that has delivered ecological benefits. Monitoring of the Australian Government's water trading program found 'encouraging changes ... including a range of ecological benefits, such as better health in river red gums and better habitat for birds, fish and frogs';²⁵
- product stewardship – that has led to high levels of recycling. The 2012–13 outcomes of the National Television and Computer Recycling Scheme include for example, '40,813 tonnes of recycling ... equivalent to 98.8 per cent of the

Entrepreneurship, [available at SSRN \(1987\)](#); E Chell, '[Social enterprise and entrepreneurship: Towards a Convergent Theory of the Entrepreneurial Process](#)', (2007) 25(1) *International Small Business Journal* 5–26; S Kumar and D Liu, 'Impact of globalization on entrepreneurial enterprises in the world markets', (2005) 2(1) *International Journal of Management and Enterprise Development* 46–64.

²¹ ZJ Acs, DB Audretsch, P Braunerhjelm and B Carlsson, 'The Missing Link: The Knowledge Filter and Entrepreneurship in Endogenous Growth', *CEPR Discussion Paper No.4783* (2004); MW Minniti et al, *2005 Global Entrepreneurship Monitor Report* (2006).

²² Alan Pears AM, '[Energy-smart appliances cut Australian power bills by billions](#)', *The Conversation*, 23 April 2014; Council of Australian Governments, [National Strategy for Energy Efficiency](#) (2009). Similar sequelae were found from health safety regulation J Braithwaite, J Healy and K Dwan, *The Governance of Health Safety and Quality*, Australian Council for Safety and Quality in Health Care (2005).

²³ C Guest, [Independent Review of the Water Efficiency Labelling and Standards Scheme](#) (2010)

²⁴ Australian Government Department of Infrastructure and Transport, [Public Consultation Report: Motor Vehicle Standards Act](#) (2013), 7.

²⁵ Australian Government Commonwealth Environmental Water Office, [Commonwealth Environmental Water Office 2012-13 Outcomes Report](#)

scheme target and almost double the estimated level of recycling prior to the scheme's introduction',²⁶

- fuel quality standards – that have reduced air pollution, fostered design innovation and promoted human health. An independent statutory review of the *Fuel Quality Standards Act 2000* (2005) concluded that the overall policy objectives of the Act were being met and should not be altered, but that various issues should be addressed to improve the operation of the Act and its effectiveness;²⁷ and
- landfill waste management that has driven major commercial municipal waste management and recycling industries.

16. In relation to invasive weed management, *more*, rather than less, Australian Government regulation was recommended in a 2013 Senate report as a policy response to significant threats to Australia's plant biodiversity. The Rural Industries Research and Development Corporation²⁸ and Australia's 2014 draft *Fifth National Report to the Convention on Biological Diversity* both note that the estimated cost to the economy of invasive plant species (weeds) is more than AU\$4 billion per annum, and that invasive weeds 'are among the most serious threats to Australia's natural environment and primary production industries.'²⁹ The *State of the Environment Report 2011* noted that a third of rare species in Australia were threatened by the 'weed invasion' and that more knowledge was needed to plan strategies to mitigate the problems weeds create.³⁰
17. The Australian Government, through the Department of Agriculture, Fisheries and Forestry (DAFF) and the former [Department of Sustainability, Environment, Water, Population and Communities](#) worked through the Australian Weeds Committee (AWC), and the implementation of the Australian Weeds Strategy, to combat threats from invasive plants. The [Weeds of National Significance](#) (WONS) program, and the [National Cost Sharing Eradication Programs](#) were an important part of the national strategy. The Australian Government has also regulated the import and export of plant material through biosecurity controls and international border protection, and led coordinated action to combat invasive species through COAG's Standing Council of Primary Industries (which existed until 2013).
18. The Australian Weed Strategy was evaluated in 2013 but the evaluation report is not yet publicly available. A draft of a revised strategy is expected to be presented at the [Australasian Weeds Conference](#) in Hobart in September 2014.
19. The Australian Weeds Committee now reports to the [National Biosecurity Committee](#) that reports to a committee of federal and state and territory agricultural agencies' chief executive officers. The latter committee does not have COAG status. At the meeting of the Council of Australian Governments (COAG) in December 2013, 22 former COAG Councils were replaced with eight Councils, and none are dedicated to

²⁶ Australian Government Department of the Environment, [National Television and Computer Recycling Scheme - Outcomes 2012-13](#) (2014).

²⁷ Fuel Quality Standards Act Review Panel (with assistance from Economic Associates (Australia) Pty Ltd and SWB Consulting Pty Ltd, [Independent Statutory Review of the Fuel Quality Standards Act 2000](#) (2005)

²⁸ Rural Industries Research and Development Corporation, [Weeds](#).

²⁹ Australian Government, Department of the Environment, [Australia's Fifth National Report to the Convention on Biological Diversity: Draft for Public Consultation](#) (2014), 20.

³⁰ '8 Biodiversity | 3 Pressures affecting biodiversity | 3.9 Invasive species and pathogens' in State of the Environment 2011 Committee, *Australia state of the environment 2011*, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities (2011).

agricultural productivity or environmental protection.³¹ Commonwealth ministers may however, meet with their state and territory counterparts on an *ad hoc* basis 'where there are important areas of Commonwealth and State cooperation outside the Council system' that COAG has established.³²

20. In August 2013, the then Senate Environment and Communications References Committee after taking evidence from experts such as Dr Carol Booth of the Invasive Species Council, recommended that invasive plant species be regulated with *new* regulations:

Recommendation 16

*4.143 The committee recommends that the Department of Sustainability, Environment, Water, Population and Communities develop regulations under section 301A of the Environment Protection and Biodiversity Conservation Act 1999 for the regulation of controlled invasive plant species within Australia. The Council of Australian Governments should be involved in the process, to ensure that these measures are developed in consultation with state and territory governments.*³³

This inquiry is a timely opportunity for the Committee to seek the Australian Government's response to the Senate Committee's important recommendation regarding invasive species.

21. Water resources possibly affected by large coal mining and coal-seam gas developments are an important recent EPBC 'trigger' and 'matter of national environmental significance'.³⁴ This is an area where the Commonwealth has recently regulated in a new area. Referral under the EPBC Act ensures robust assessment of water-related conditions following fracking and coal seam gas developments that are likely to have a significant impact on a water resource, including surface water and groundwater. This trigger was introduced in 2013 following a Senate Committee inquiry that reviewed 235 submissions, and will be important to maintain in response to concerns about gas extraction impacting on agricultural land and protected areas.³⁵
22. The commercial benefits of improved environmental quality must not be overlooked or lost. As economist Myrick Freeman III demonstrated, economic benefits result from improved environmental quality arising from environmental regulation. Improved valuation techniques verify that the asset value of a high quality environment can be accurately assessed and must not be overlooked.
23. Further, well-targeted environmental regulation has directly facilitated private environmental initiatives. Thus, the *Victorian Conservation Act 1972* in Victoria has directly enabled the conservation in perpetuity of some 47,000ha of privately owned

³¹ Council of Australian Governments, COAG Meeting, 13 December 2013, [COAG communique -- FINAL.docx](#).

³² Ibid.

³³ Australian Parliament, [Senate Standing Committee on Environment and Communications, Effectiveness of Threatened Species and Ecological Communities' Protection in Australia \(PDF 1485KB\)](#), 7 August 2013.

³⁴ EPBC Act sub-div FB, as inserted by *Environment Protection and Biodiversity Conservation Amendment Act 2013* (Cth) sch 1 cl 1 ('*Water Trigger Amendment*').

³⁵ Parliament of Australia, Senate Environment and Communications Legislation Committee, [Environment Protection and Biodiversity Conservation Amendment Bill 2013 \[Provisions\]](#) (2013).

land and created a major private revolving fund for the purchase (and on-sale) of new environmentally significant land.

24. Clearly regulation can drive new solutions to problems and go well beyond prohibition, enforcement or free market control.

25. The Coalition parties recognize that

*some degree of regulation is ... a necessary and desirable component of establishing efficient markets and harmonious communities that promote substantial positive benefits for society as a whole.*³⁶

26. The Law Council supports this policy approach as being an approach to the role of regulation in society which is consistent with universal standards relating to the role of law in society.

27. Companies have noted their preference for direct regulation, even if the regulation is inefficient, compared to alternative, cost-effective instruments such as a tax, because competition is reduced by regulatory measures such as quotas restricting market entry and originating scarcity rents.³⁷ Regulation has also been viewed as a way of influencing business and social alliances to create standards of quality, nurtured through trusted networks.³⁸

28. Economists view regulation as public interest rectification of 'market failure' because, if left alone, private markets could not be relied upon to allocate resources in a socially optimal way.³⁹

29. For centuries, regulation has been called upon by commercial interests to curb market excess, redirect market activity and trigger new business opportunities. The balance of business burden and business benefit is well accepted commercially and regulation is, in fact, a key policy tool to achieve governments' economic and social objectives.⁴⁰

30. For this reason, an excessive focus on burdens is undesirable. The operational impact of a regulatory scheme may, in practice, achieve beneficial economic and social impacts. This should be measured against the expressed concerns of stakeholders required to comply with particular regulations.

Bureaucracy and regulation

31. The Law Council notes that it is possible to create a sound regulatory scheme, that reduces bureaucratic intrusion and delay, and which does not confuse excessive bureaucracy with regulatory burden.

³⁶ The Liberals and the Nationals for Regional Australia, *Boosting Productivity and Reducing Regulation*, Policy platform <<http://lpaweb-static.s3.amazonaws.com/Policies/ProdPolicy10Jul13.pdf>> and <<http://www.liberal.org.au/boosting-productivity-and-reducing-regulation>>.

³⁷ JM Buchanan and G Tullock, *The Calculus of Consent* (1975).

³⁸ L Davis, 'Social Responsibility and Banking – Responding to the New Realities', *Australian Business in Europe Conference, Paris, France*, 24 May 2002.

³⁹ AC Pigou, *The Economics of Welfare* (4th ed, 1932); H Seidman and R Gilmour, *Politics, Position and Power: from the Positive to the Regulatory State* (4th ed, 1986); WF Shughart II, *Antitrust Policy and Interest-Group Politics* (1990); C Sunstein, *After the Rights Revolution* (1990).

⁴⁰ ME Levine, 'Financial implications of regulatory change in the airline industry', (1975–6) 49 *Southern California Law Review* 645.

32. Regulation needs to be separated from the manner of its administration by the executive arm of government. The Law Council agrees that multiple government roles and extensive, unchecked bureaucratic discretion can have a deflating and demotivating impact upon entrepreneurial opportunity. On the other hand, however, in some instances, having multiple agencies involved in the scrutiny of decisions can ensure better decision-making and reduce the risk of regulatory capture. 'Regulatory best practice' articulates that **better** regulation, rather than simply removing regulation, should seek to reduce unnecessary bureaucratic regulatory burdens by, for example, reducing complex standards, whilst improving regulatory design and stakeholder input.⁴¹
33. A thoughtful approach to regulation will seek to apply cautious market-oriented measures with carefully focussed administrative or ministerial discretion, along with clear up-front guidelines that business and other stakeholders can readily understand and adapt to. Care is required to ensure that the regulatory scheme facilitates Australia's compliance with national and international commitments to ecologically sustainable development at the lowest economic cost both in the short and long term. The Coalition's Plan reinforces this:

Properly understood, conservation is not an obstacle to progress. It's part of it. ... The terms 'conservative' and 'conservation' have a common root. Both involve keeping the best of what we have. ... Our plan for a cleaner environment complements plans for a stronger economy, for stronger communities ... and for the infrastructure of the future as one of the five key elements in our overall plan for a better Australia. A cleaner environment is an essential part of restoring hope, reward and opportunity for all Australians because we should leave our country in better shape than we found it.⁴²

⁴¹ K Wegrich, [Regulatory Innovation and Multi-Level Gaming. The Europeanization of Better Regulation Policy](#) (n.d.); K Wegrich, 'The Administrative Burden Reduction Policy Boom in Europe: comparing Mechanisms of Policy Diffusion', [ESRC Centre for Analysis of Risk and Regulation Discussion Paper 52](#), London School of Economics, (2009).

⁴² The Hon T Abbott, [Speech to the Australian Industry Group: The Coalitions Plan for a Cleaner Environment](#).

Part 2 Particular elements in inquiry terms of reference

34. This Part considers each term of reference to which the Committee is to have regard.

Jurisdictional arrangements, regulatory requirements and the potential for deregulation

Jurisdictional arrangements

35. The overall *modus operandi* of most national environmental legislation over recent decades has been based on a cooperative approach delineating state and territory and federal functions, usually after the negotiation of relevant inter-governmental agreements, with increased reliance on international treaties for constitutional authority and policy direction. In the rare exception where Australian Government legislation directly overlaps state environmental legislation, s 109 of the Australian Constitution would ordinarily operate to give Commonwealth law primacy. Duplication is, in practice, a rare circumstance however.

36. Within the area of environmental impact assessment for example, the Australian Government has pursued a highly co-ordinated and collaborative approach through bilateral agreements accrediting state and territory environmental impact assessments so that duplication is avoided. In some instances, these agreements did not operate to extend state planning and development law to Commonwealth areas so to that limited extent Commonwealth law may have been perceived as intruding directly into state jurisdictions. These 'bilateral assessment agreements' are currently being renewed around Australia as the first suite of 'assessment bilaterals' come up for their first five-year review.⁴³ In December 2013, the Council of Australian Governments agreed to broaden the delegation of Commonwealth powers under the EPBC Act to 'approval bilateral agreements'⁴⁴ so that states and territories can approve developments impacting on matters of national environmental significance (usually with conditions attached) for the purposes of the EPBC Act.

37. The Law Council is concerned that the proposal for state-based one-stop-shops will actually create multiple regimes in nine different jurisdictions. This may not be welcomed by national and multinational corporations seeking to operate more efficiently and cost-effectively across state borders in Australia. Multiple potential state policy settings, which might ultimately conflict, are likely to considerably add to the cost of doing business nationally, without providing consistency and predictability or otherwise furthering the principles of the Coalition's Plan, or the aspirations of the Business Council of Australia or the Minerals Council of Australia, both of whom advocated for reform. This concern is confirmed in the *Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) which states:

Each jurisdiction may propose for accreditation, a set of arrangements that combine legislative provisions with plans, policies and programs. Each jurisdiction's proposal will necessarily be different, reflecting their respective circumstances, needs and interests. As a matter of principle, a comprehensive and flexible approach is much more likely to deliver acceptable conservation outcomes for matters of national environmental

⁴³ Australian Government Department of the Environment, '[Bilateral Agreements](#)'.

⁴⁴ Council of Australian Governments, COAG Meeting 13 December 2013, '[COAG Communique](#)'.

*significance than a regulatory approach that involves only the accreditation of a particular legislative system or process.*⁴⁵

38. The Law Council, as a national body, supports nationally harmonised, uniform laws rather than legislative diversity, and notes that industry is likely to prefer more rather than less regulatory consistency. The Law Council agrees with the Wentworth Group of Concerned Scientists that one national set of environmental assessment standards is preferable, which is as currently being negotiated with the bilateral assessment agreements, but that the Commonwealth should retain approval power. The Wentworth Group suggests 'the Commonwealth Environment Minister would still retain final EPBC Act approval powers, but there would be one process, one set of documentation and common public participation periods.'⁴⁶
39. The Law Council is also concerned that if the Australian Government de-regulates in areas that states and territories have vacated in order for Australia's regulatory framework to be coherent and open to the operation of market mechanisms, this may create a legislative vacuum. For example, as Adj Professor Rob Fowler noted in his Mahla Pearlman AO Oration in March 2014, the *Clean Energy Act 2011* (Cth) had prompted a collective effort by the states during 2012–13 to remove many pre-existing legislative and policy measures that were designed to mitigate climate change on the basis that were not 'complementary' to the national carbon price mechanism. Should the *Clean Energy Act 2011* be repealed, the consequential vacuum in relation to climate mitigation measures at the state and territory level will be substantial.⁴⁷ Such law and policy volatility is unlikely to be welcomed by industry and certainly not by advocates of ecologically sustainable development.
40. Professor Fowler noted that even in instances where Commonwealth environmental legislation operates directly within the states and territories, the Commonwealth has usually consulted with and obtained the support of those jurisdictions before enacting the legislation. Examples include the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*, the *Motor Vehicle Standards Act 1989* and the *National Greenhouse and Energy Reporting Act 2007*.
41. The EPBC Act is designed in part to secure compliance with Australia's international environmental obligations. Giving assessment and approval power to the Australian Government was intended to overcome shortcomings in state and territory assessment and development processes, with a view to providing more comprehensive, and consistent protection of MNES.
42. Under international law and the Australian Constitution, it is the Australian Government that has international legal personality and responsibility for 'external affairs', and while states can assist in treaty implementation, it is national governments who are primarily accountable to multilateral institutions for compliance with international treaty obligations. To ensure that compliance, the Australian Government needs to ensure that state, territory and local governments have appropriate monitoring, compliance and enforcement mechanisms in place.

⁴⁵ Australian Government, [Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999](#), para 19, 9.

⁴⁶ Wentworth Group of Concerned Scientists, [Statement on Changes to Commonwealth Powers to Protect Australia's Environment](#) (2012).

⁴⁷ R Fowler, [Mahla Pearlman AO Oration 2014](#).

43. Matters of national environmental significance ('MNES') under the Act are

- World Heritage properties
- National Heritage places
- wetlands of international importance
- listed threatened species and ecological communities
- migratory species protected under international agreements
- Commonwealth marine areas
- the Great Barrier Reef Marine Park
- nuclear actions (including uranium mines)
- protection of water resources from coal seam gas development and large coal mining development.

44. Most of these MNES are the subject of international commitments and their protection and management are of national concern, extending beyond the interests of any one state. As a consequence, the Law Council's view has been that the Australian Government's role in approving actions that impact on such matters should be retained.

45. The draft standards for accrediting state and territory assessment and approval laws and policies under the EPBC Act, provide that states' management arrangements and authorisation processes must not be inconsistent with Australia's obligations. The EPBC Act also includes as an object 'to assist in the co-operative implementation of Australia's international environmental responsibilities'.

46. The proposed approach in the draft accreditation standards⁴⁸ is likely to weaken best practice environmental governance in Australia. States tend not to participate in the meetings of subsidiary bodies/working groups under multilateral environmental agreements (MEAs), nor attend the conferences of the parties (COPs) under MEAs and to miss out on participating in the process of acquiring the knowledge necessary to set impact assessment guidelines consistent with international law.⁴⁹ The Law Council considers it appropriate that the Australian Government retains responsibility for ensuring that the Australian Government's obligations under international environmental law are met. The Law Council's Rule of Law Policy provides:

States must comply with their international legal obligations whether created by treaty or arising under customary international law⁵⁰

47. The Law Council is concerned to ensure that the streamlining of environmental law does not reduce the capacity of Australia to comply with its international commitments.

48. The Law Council recognises that there are opportunities to improve the operation of the EPBC Act to reduce duplication and provide clearer guidance regarding assessment expectations. For example, the reform proposals of the Wentworth Group of Concerned Scientists' would go a long way towards effectively streamlining assessment and approval practices. These include:

⁴⁸ Australian Government, above n 2.

⁴⁹ MK Davis Cross, 'Rethinking epistemic communities twenty years later', (2013) 39 [Review of International Studies](#), 137–160.

⁵⁰ Law Council of Australia, '[Rule of Law](#)'.

- Reducing the regulatory burden and duplication for business
- More use of one-stop shop assessment processes
- Improved environmental standards
- Better guidance for business
- Better use of strategic environmental assessments for long-term landscape-scale planning to determine where, and under what conditions, development can safely occur
- Significant investment in a Healthy Landscape and Development Planning Program.⁵¹

49. The Law Council is aware that the Australian Government aims to negotiate 'approval bilateral agreements' with the states and territories by October 2014. These agreements aim to ensure that any accredited process will result in at least equivalent protection of MNES as would have been achieved under the Australian Government's assessment and approval standards. Consistent with the non-regression principle, it is essential that any streamlining not be achieved at the expense of protection of such matters.

Regulatory requirements and the potential for deregulation

50. Agencies in the Australian Government's environment portfolio have accountability procedures in relation to their regulatory activities. An annual regulatory plan for example, outlines proposed activities⁵² and the requirements of the [Office of Best Practice Regulation](#) and the [Best Practice Regulation Handbook \(2013\)](#) tend to be followed.

The non-regression principle

51. The Law Council has previously urged the application of the emerging 'non-regression principle' to proposed environmental law reforms.⁵³ Consistent with that principle, and in the absence of credible assurances that state legislation offers equivalent protections, the Law Council has supported the retention of approval responsibilities under the EPBC Act by the Australian Government. The principle of non-regression is well established in international human rights law. The principle discourages public authorities from amending legislation where the amendments will reduce available protections.

52. There is growing international support for wider adoption of the principle in environmental law, as outlined by Emeritus Professor Michel Prieur, as the principle extends existing obligations in relation to preventing harm, public participation, intergenerational equity and precaution. As Em. Professor Prieur argues, 'simplification' or weakening of environmental legislation in an economic climate which favours development and does not sufficiently promote environmental values, necessarily compromises the achievement of ecologically sustainable development.

⁵¹ Wentworth Group of Concerned Scientists, above n 46.

⁵² Australian Government, [Annual Regulatory Plan for 2012-2013](#) (2013).

⁵³ Law Council of Australia, '[Environment Protection and Biodiversity Conservation Amendment \(Retaining Federal Approval Powers\) Bill 2012](#)', Submission to the Senate Standing Committee on Environment and Communications (2013).

In contrast, evidence of declining ecosystem health globally serves as a reminder that all countries should be striving to enhance, rather than weaken, environmental protections.⁵⁴

53. Affirmations of the non-regression principle include:

- Resolution by the European Parliament on 29 September 2011 to develop a common EU position ahead of the United Nations Conference on Sustainable Development (Rio+20);⁵⁵
- International Organisation of La Francophonie position paper on 8 February 2012, urging recognition of the principle in environmental matters;
- *Declaration on the Principle of Non-regression of Environmental Protection in Anticipation of the United Nations Conference on Sustainable Development (Rio+20)*, adopted at the international colloquium organized by the Brazilian Senate in Brasilia on 29 March 2012; and
- a motion adopted at the IUCN World Conservation Congress in Jeju, South Korea, in September 2012, urging national governments to recognise the non-regression principle.⁵⁶

54. The Law Council urges the Australian Government to recognise the non-regression principle as an appropriate prism through which to assess proposed legislative reforms affecting matters of national and international environmental significance.

Regulatory opportunities

55. It is important that the Australian Government, when attempting to stimulate economic activity, goes beyond a two dimensional view of regulation in terms of deregulation and reduction of regulatory 'burden'. Instead the Government should embrace an innovative approach to creating new venture and economic opportunities, consistent with the purpose of the review. Those who advocate a deregulation approach to regulation, generally follow an older school of economic thinking.⁵⁷ Other more recent thinkers see economic value in a more public interest model of government.⁵⁸ They view legislation as a commodity supplied by the state and allocated as demanded by private groups, according to the allocative efficiency of political outcomes. Even in a deregulated market, innovative regulatory concepts and systems have developed at

⁵⁴ M Prieur, '[Non-regression in environment law](#)', *S.A.P.I.EN.S* Vol5 5(2); A. Teleseksy, 'An emerging legal principle to restore large-scale ecoscapes' in C Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (2013), 175–190 at 185; NS Bryner, '[The Ecological Function of Property in Brazil: Balancing Public and Private Interests](#)'.

⁵⁵ Referenced in <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2011-0522&language=EN>>, cl 97.

⁵⁶ IUCN World Conservation Congress, [WCC-2012-Res-128-EN](#) 'Need for non-regression in environmental law and policy'.

⁵⁷ GJ Stigler and C Friedland, 'What Can Regulators Regulate: the Case of Electricity', (1982) 5(1) *Journal of Law and Economics* 1–16; JC Stigler, '[The Theory of Economic Regulation](#)', (1971) 2(1) *Bell Journal of Economics and Management Science* 3–21.

⁵⁸ Buchanan and Tullock, above n 37; JR Macey, '[The Myth of "Reregulation": The Interest Group Dynamics of Regulatory Change in the Financial Services Industry](#)' (1988) 45 *Washington and Lee Law Review* 1275; D Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (1995).

the hands of the deregulation body itself. For example emissions trading regulation emerged from a deregulated body.⁵⁹

56. Regulatory change that avoids complex, multi-layered government bureaucracy (e.g. involving varying state systems) appears likely to result in stronger positive impacts on new venture economic opportunities.
57. Transparent and accountable regulatory activity that avoids withholding information has been found to have a more beneficial impact.⁶⁰

The balance between regulatory burdens and environmental benefits

58. The Law Council recommends that this inquiry avoid the simplistic approach of pitting 'regulatory burden' against 'environmental benefit', where one must yield to the other. The Law Council urges careful articulation of each 'burden' to ensure that tailored and effective solutions are found to removing or diminishing those burdens.
59. The Law Council considers that claims of 'regulatory burden' need to be viewed carefully. The level of costs incurred in complying with the existing EPBC regime usually represents a small proportion of overall project development costs for most resource projects, and delays in project approval are not infrequently due to a proponent's failure to comply with environmental impact assessment requirements, particularly as to adequate scientific analysis, rather than an inherent regulatory defect. Further, any change to environmental regulation needs to ensure that it does not disproportionately impact small manufacturing plants and businesses.⁶¹

Areas for improved efficiency and effectiveness of the regulatory framework

60. *Efficiency* is a key economic concept. Efficient markets maximize welfare, with the law as an incentive system by which to impact future actions.⁶² *Effective* regulation is also a well-known regulatory concept to ensure that regulation is properly designed, employs appropriate strategies and is adequately enforced.⁶³ However, effective regulation is insufficient alone. *Effectiveness* must be combined with *responsiveness* and *coherence* if regulation is to be sound. *Responsiveness* is regulation that is consistent with and supportive of social norms and does not destroy them i.e. it builds in adherence with existing norms and guards against regulatory capture by high-stake interest groups influencing desired policy outcomes.⁶⁴ *Coherence* ensures that

⁵⁹ T McCraw, *Prophets of Regulation: Charles Francis Adams; Louis D. Brandeis; James M. Landis; Alfred E. Kahn* (1986).

⁶⁰ (2008) 32(5) *Journal of Entrepreneurship Theory & Practice*, [Special Issue: Government and Entrepreneurial Activity](#).

⁶¹ See cautions described in for example, PB Pashigian, 'The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares' (1984) 27(1) *Journal of Law and Economics* 1-28.

⁶² See, for example, C Veljanovski, *The New Law and Economics: A Research Review* (1982) 30, where regulation incentivates future investments in safety.

⁶³ B Hutter, *Regulation and Risk: Occupational Health and Safety on the Railways* (2001), B Hutter, *Compliance: Regulation and the Environment* (1997).

⁶⁴ C Parker and J Braithwaite 'Regulation' in P Cane and M Tushnet (eds) *The Oxford Handbook of Legal Studies* (2003), referring to G Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in G Teubner, (ed), *Juridification of Social Spheres: A Comparative Analysis of the Areas of Labor, Corporate, Antitrust, and Social Welfare Law* (1987) 128.

regulation links with underlying values of the legal system i.e. fairness, accountability, consistency and predictability.⁶⁵

61. In addressing *efficiency* and *effectiveness*, it is necessary to have regard to regulatory *impact*. Regulatory impact has four forms – direct, indirect, independent and unintended.⁶⁶ *Direct* effects occur when the primary target of the rule complies with it, such as when drink driving regulation results in fewer drivers over alcohol limits. *Indirect* effects are the consequences of compliance, such as when drink driving regulation reduces car accidents. *Independent* effects occur separately from conforming behaviour, such as when drink driving regulation promotes government popularity by indicating its concern to reduce road deaths. *Unintended* effects include unproductive and destructive behaviour, such as drug prohibition laws leading to organized crime. Analysis of proposed regulatory change needs to consider all four possible impacts, comparing social and environmental benefits with various regulatory options. Careful attention needs to be given to the potential costs of implementing each option, noting that events during the process of transition can reshape the comparison.⁶⁷

Legislation governing environmental regulation and the potential for deregulation

62. Best Practice regulatory approaches internationally recommend the use of a variety of different types of regulatory models or methods according to the desired outcome.⁶⁸ Differing impacts have been found to emerge from different regulatory approaches. For example, industry self-regulation contrasts with 'command and control' regulation.⁶⁹
63. Different approaches to the regulation of private economic activity encase assumptions as to the appropriate role of private power and the extent to which the state's role should be viewed as a productive entity that produces public goods, internalizes social costs and benefits and redistributes income optimally.⁷⁰
64. It would be a prudent use of public resources for the Australian Government and this inquiry to support the implementation of recommendations made by independent reviewers of regulatory schemes such as the 'Hawke Review' of the EPBC Act and to review the former Government's response. As the review report noted, the EPBC Act is 'in many respects ... still regarded as world leading.' It noted that there are many positive features of the Act that should be retained, including its clear specification of MNES; the Environment Minister's role as decision-maker; public participation

⁶⁵ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2003); S Breyer *Regulation and Its Reform* (1982); J Raz 'The Relevance of Coherence, in J Raz, *Ethics in the Public Domain* (1994).

⁶⁶ J Griffiths, 'Is Law Important', (1979) 54(2) *New York University Review*, 339, L Kelleher, *Schumpeter's Bahnbrechen considered in the light of Native Title Legislation and Indigenous Entrepreneurship*, Unpub. PhD Thesis (2013).

⁶⁷ J Quinn and MJ Trebilcock, 'Compensation, transition costs, and regulatory change, (1982) 32(7) *University of Toronto Law Journal*, 7; Dorfman, *Agenda for Research on the Transition and Effects of Regulation*, Report of Conference, Washington DC, (1978) 2.

⁶⁸ For example, OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (2002).

⁶⁹ Studies of transition to free market conditions in former Soviet bloc countries identified different impacts according to different regulatory approaches, D Ellerman, 'Pragmatism versus economics ideology in the Post-Socialist Transition: China versus Russia' (2010) 52 (10 March) *realworld economics review*, 2-27.

⁷⁰ OE Williamson, *The Mechanisms of Governance* (1996); R Dworkin, 'Liberalism' in S Hampshire (ed.), *Public and Private Morality* (1978), 113; RE McCormick and RD Tollison, *Politicians, Legislation and the Economy* (1981).

provisions; explicit consideration of social and economic issues; statutory advisory mechanisms; and a strong compliance and enforcement regime. The Hawke Review also emphasised the need for monitoring, performance audits and oversight powers to ensure that the processes accredited at state level were achieving the outcomes they claimed to accomplish. The review recommended the establishment of performance audit criteria.

65. The Australian Government's Standards for Assurance are of concern the Australian Government has vested and proposes to vest increased power over development assessment and approvals in the states without ensuring that appropriate scrutiny mechanisms are in place. The establishment or strengthening of mechanisms and institutions such as properly funded environment protection authorities, independent state Parliamentary Commissioners for Sustainability and the Environment; mandatory reporting to and scrutiny by Parliamentary Committees and/or State Auditors-General conducting mandatory and regular performance audits, and specialised Land and Environment Courts or specialised environment tribunals, would go some way to restoring an appropriate regulatory balance. The current statement in the Standards:

'119. States and territories maintain an appropriate system to ensure compliance by proponents with conditions of approval that relate to matters of national environmental significance'

needs to be more specific in identifying the institutional elements of such a system, beyond the options specified.⁷¹ The Australian Government, in its role as guardian of the international environmental law standards to which it has subscribed, should be insisting on the establishment and operation of proven scrutiny and accountability mechanisms.

66. At a minimum, any assessment of a regulatory regime, such as current Australian Government environmental regulation, requires clarification of precisely for whom the impact is being assessed. Full scoping is necessary of all the important issues that need to be addressed, and steps need to be identified which ensure that this has occurred. In considering the impact of any regulation, particularly environmental regulation, decision-makers must ensure the assessment avoids quasi 'scientific' economic solutions that silence debate from the widest possible perspectives toward a given political problem.⁷² Regulatory best practice in the European Union highlights the dangers of narrow impact assessment. It also emphasises the need, in reviewing regulation such as Australia's environmental regulations, to strongly and robustly assess the regulatory benefits.
67. Finally, regulatory reform that incorporates de-regulation needs to closely target the new opportunities, economic and environmental, that it seeks to achieve. It needs to be carefully targeted to new venture creation and policy achievement by tightly drafted deregulation laws ensuring that any new industries thus created can robustly (and profitably) implement the function formerly undertaken by the Australian Government.

⁷¹ Australian Government, above n 2, 27 [129–130].

⁷² CM Radaelli, '[Diffusion without convergence: how political context shapes the adoption of regulatory impact assessment](#)', (2005) 12(5) *Journal of European Public Policy*, 924–943, 938.

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 Independent 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 17 Directors – one from each of the Constituent Bodies and six elected Executives. 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, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 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.