

Submission by Professor Graeme Samuel AC to the Senate Environment and Communications Legislation Committee - Inquiry into the Environment Protection Reform Bill 2025 and related bills

We are currently at a crucial inflection point in the protection of our environment. To appreciate the passion of our next generation to preserve our unique species and our nature, you need look no further than the thousands of children who flocked to the Healesville Wildlife Sanctuary in Victoria over the school holidays to witness the remarkable efforts being undertaken to recover the near extinct orange bellied parrot and the endangered Tassie Devil.

In the Foreword to the Final Report of my Independent Review of the Environment Protection and Biodiversity Conservation Act (EPBC Act), I stated -

To shy away from the fundamental reforms recommended by this Review is to accept the continued decline of our iconic places and the extinction of our most threatened plants, animals and ecosystems. This is unacceptable. A firm commitment to change from all stakeholders is needed to enable future generations to enjoy and benefit from Australia's unique environment and heritage.

In June 2020, I delivered an Interim Report of my Independent Review of the EPBC Act to then Minister for the Environment, Sussan Ley.

Soon after the Interim Report was made public, I held an important meeting with representatives of all major stakeholders - conservationists, scientists, First Nations, business and farmers. They are listed in Appendix A of the Final report - the Consultative Group. I advised them that the Final Report would express my views, but that based on my extensive consultations prior to the Interim Report, those present should not expect that the totality of their aspirations would be met. If they would be satisfied with 80% of their aspirations, the environment would be a quantum leap ahead.

So I urged those involved in this Consultative Group to consider the ongoing degradation of nature and to accept that 80% of their aspirations would be substantially better than nothing, which would be the inevitable result of insisting on 100%. All at the meeting agreed - and so in continuous consultation we moved to the Final Report delivered in October 2020. That Report was made public in January 2023 and was embraced with enthusiasm by virtually all the stakeholders present at that meeting as well as then Environment Minister Ley.

Now after 5 frustrating years of failure on the part of our parliamentarians in Canberra, we have a real chance of halting the decline in the state of the environment and biodiversity and tackling the restoration of species whose existence has been allowed to decline to the state of near extinction over recent decades.

I have now compared the legislation tabled in Parliament by Minister Watt - the Environment Protection Reform Bill 2025, the National Environment Protection Agency Bill 2025 and the Environment Information Agency Bill 2025 - with the recommendations of the Review and can confirm that the Bills have adopted in total the substance of the Review. There are recommendations in the Review that are work in progress - primarily focussing on the National Environmental Standards (NES).

But all this notwithstanding, it seems some in our political class don't acknowledge the aspirations of stakeholders and instead seem intent on opposing the proposed reforms of the EPBC Act - to what end is beyond me. The inconsistencies and contradictions in the successive positions taken by the Coalition over the past 5 years is nothing short of bewildering. And the positions taken by the Greens reflect a fundamental misunderstanding of the proposed reforms - I do hope that this is not yet again a case of the Greens pursuing a course of action that results in their view of the perfect being the enemy of the very good.

Minister Watt has worked assiduously in consulting with relevant stakeholders and has in a few short months achieved what previous Ministers have seemed unable to achieve - a legislative reform package that implements the Review's recommendations and sets up a legislative blueprint for effective environment regulation that promises to halt the decline in nature and to rectify the damage that has been wrought over recent decades.

Importantly the Bill now sets up the process for establishing the rules - National Environmental Standards - that will determine developments that can take place without damaging the environment and set Standards for engaging with First Nations communities, establishing a vital database of information relating to the environment and fauna and flora that require protection and restoration and importantly ensuring effective oversight of the regulatory institutions and their application of the Standards.

The essential foundations of the reform program are efficiency and efficacy. Processes will be established to provide regulators, conservationists, farmers and business business with both certainty and efficiency, while at the same time provide effective protection of nature and restoration of the damage that has occurred over past decades.

The efficiency and efficacy of the proposed reforms is effected by a four tier regulatory hierarchy - detailed legislation, granular National Environmental Standards (NES), Guidelines to explain and assist in the interpretation of the legislation and the Standards, and a developing data base of rulings of regulators to provide a compendium of precedents of their regulatory rulings. This 'self help' process, assists those dealing with environmentally sensitive developments to understand the impact of the NES on their proposals. Moreover, it is a discipline on regulators in their application of the NES - the granular content of the NES should leave little room for misinterpretation or discretionary interpretation.

Is the proposed Bill perfect - even the Minister has commented that tweaks may be appropriate. So let me focus on those in this submission.

National Environmental Standards (NES)

These are the Rules, the foundation stones of future regulation of environment protection and restoration. Without the National Environmental Standards we have no Rules.

The NES - which it is noted are disallowable instruments, effectively preserving parliamentary oversight over delegated laws - must be granular in their detail, avoiding the use of discretionary or judgemental terms (eg. material, substantial, significant). Such terms are replete in the current EPBC Act. The NES must leave no doubt in the minds of development proponents, conservationists and regulators as to their meaning and application. To be otherwise drafted, invites inconsistent decisions, uncertainty and legal challenges.

In a similar vein, allocating decision making to the Minister should be used sparingly. Vesting responsibility for decision making in the Minister might superficially appear to be democratic - after all it is the Minister who is elected by and accountable to the electorate. But vesting decision making in the Minister invites a conga line of lobbyists to the Minister's office seeking their decision, often not in the public interest, but rather in the interests of the party sponsoring the lobbying effort. Allocating the decision making responsibility to a regulator, whose actions are subject to rigorous independent audit and oversight, removes the 'monkey on the back' of the Minister and minimises the prospect of inappropriate decisions influenced more by political rather than public interests. The proposed legislation requires clarity on the extent to which it is intended to vest decision making responsibilities in the Minister - and to limit those to rare circumstances.

National interest test

The Review recommended that the Minister should have the ability, to be used in rare circumstances, to make decisions that would be in the national interest notwithstanding that the decision may conflict with the NES. The resultant provision in the Reform Bill has caused concern amongst stakeholders, particularly in the identification of what might constitute the 'national interest'. The relevant provision is S157C which states -

In determining Australia's national interest for the purposes of a provision listed in subsection (3), the Minister may consider:

- (a) Australia's defence, security or strategic interests; or*
- (b) Australia's obligations under an agreement with one or more other countries.*

This does not limit the matters the Minister may consider.

I share the concern expressed by several stakeholders. This provision is so wide as to leave open the potential for abuse of the power vested in the Minister.

I don't consider it productive to attempt to list in the legislation the matters that should **exclusively** fall within the definition of the national interest. The list will either be too many or too few - whatever, it will not be possible but effectively define each item on the list with sufficient specificity to avoid legal dispute or abuse of the power vested in the Minister.

My recommendation is therefore to delete this provision from the Bill and instead include the 'national interest' in the Matters of National Environmental Significance (MNES) NES as one of the matters to be taken into account in determining if an approval should be granted to a proposed development. In other words the 'national interest' should become a consideration to be balanced against other considerations, in particular the protection and restoration of the environment. The determination will be made by whatever is the appropriate regulatory authority.

To assist in the interpretation of 'national interest' in the NES a definition of the national interest might be along the following lines (I acknowledge the assistance of AI in drafting these).

National interest means the overall benefit to Australia as a whole, having regard to the protection and sustainable use of the environment, the promotion of economic prosperity and social well-being, the fulfilment of Australia's international environmental obligations, the maintenance of national security and good governance, political independence, territorial integrity, economic welfare, social cohesion and the protection of national values and citizens.

When a decision is made "in the national interest" it involves weighing:

1. Environmental values – protection of biodiversity, ecosystems, heritage, and sustainable use of natural resources.
2. Economic interests – benefits to national productivity, resource security, or energy supply.
3. Social and community considerations – employment, regional development, Indigenous rights, and community well-being.
4. International commitments – Australia's obligations under treaties like the Convention on Biological Diversity or the Paris Agreement.
5. Strategic or security concerns – ensuring critical resource or infrastructure resilience.

National Environment Protection Agency (NEPA) - Environment Assurance Commissioner (EAC)

The Review recommended the establishment of the office of the Environment Assurance Commissioner. The model proposed in the Review contemplates that State and Territory environment departments (which will have been accredited with decision making responsibilities) and the Commonwealth environment department would make decisions on development proposals and have the responsibility for enforcement and compliance. It was proposed that the Environment Assurance Commissioner would be an independent office and act as an auditor and overseer of regulatory agencies - State, Territory and Commonwealth - vested with the regulatory responsibilities under the Act. Ultimately these agencies will be accredited State and Territory regulators together with the Commonwealth Department.

The Reform Bills in part contemplate this structure with the relevant institution being described as the National Environment Protection Agency (NEPA). However, in the reform legislation the NEPA is vested with assessment, decision making, enforcement and compliance responsibilities in respect of Commonwealth matters as well as the audit and overseer role proposed to be assigned to the EAC in the Review. These roles are intended to be relatively short lived as accreditation of States and Territories take place and they assume these responsibilities.

So long as the NEPA has these roles, there will be an unavoidable conflict of interest - the NEPA will be making decisions on developments, enforcement and compliance and then auditing and overseeing its own roles.

It was for this reason that the role of the EAC (now titled in the Reform Bills as the National Environment Protection Agency) being specifically defined as one of audit and oversight - reporting to the Minister with these reports to be tabled in Parliament. Moreover, the EAC/NEPA would have a 'live' oversight role, to bring to the attention of the Minister potential divergence from the NES by a State, Territory or Commonwealth regulatory agency - a catalyst for intervention by the Minister.

Conclusion

The foundation stones of the Review - efficiency and efficacy - have eluded us in the context of environment protection for decades.

But now we have a real chance to protect, indeed restore our environment while at the same time satisfying the economic imperatives of efficiency and productivity.

So my plea to our politicians in Canberra is simple. Please put aside your political differences and support this remarkable effort by the government - not for me or for the sake of the Review. Rather for our children, grandchildren and great grandchildren - our future generations who will look back to November 2025 and say their forbears did something tangible to preserve the environment for their benefit.

Professor Graeme Samuel AC
Monash Business School