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Ms Lisa Gropp  
Presiding Commissioner  
Australian Government Productivity Commission  
Locked Bag 2 Collins Street East  
Melbourne VIC 8003

07 September 2020

**Re: Productivity Commission Inquiry into Resources Sector Regulation**

Dear Ms Gropp,

Thank you for the opportunity to comment on the Productivity Commission's Draft Report on Resources Sector Regulation in Australia.

WWF-Australia is part of the WWF International Network, the world's largest independent conservation organisation. WWF's global mission is to 'stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature' and as such has a keen interest in regulation that supports sustainable development.

WWF has focused on the aspects of the overview report related to the Environment Protection and Biodiversity Conservation Act (EPBC) 1999, and on Indigenous cultural heritage, and the reforms required. We have responded to selected draft recommendations, draft leading practices, draft findings and information requests in our submission.

We believe that the on-going review of the EPBC Act, offers an important opportunity to strengthen environmental protections and reverse the decline in environmental capital and cultural heritage before it is lost for good. Reform also offers an opportunity to make regulatory systems more effective and efficient for industry. One essential change that can deliver positive outcomes for both the environment and industry is to establish an independent environmental regulator that is adequately resourced and mandated to administer delivery of the EPBC Act.

We welcome the opportunity to discuss our views with the Commission.

Dermot O'Gorman  
CEO WWF Australia

## **WWF SUBMISSION TO THE RESOURCE REGULATION INQUIRY**

### **DRAFT LEADING PRACTICE 5.1**

#### *WWF response*

There is provision for developing bioregional plans under the EPBC Act. This mechanism should have a higher uptake to protect and manage natural areas at a bioregional scale and support sustainable development. Bioregional planning as defined in the EPBC Act can help to streamline regulatory processes and improve inter-governmental coordination.

Bioregional plans effectively serve as strategic assessments and can also inform the development of plans at finer resolution. Bioregional plans would improve community participation, transparency of decision making, reduce risk of conflicts of interest and provide greater certainty for business. Bioregional plans and associated strategic assessments must however be based on the Free Prior and Informed Consent of Traditional Owners and Indigenous people with rights and interests. A National Environmental Standard on bioregional planning is currently being developed under the auspices of the EPBC Act review. The leader of the independent review proposes that National Environmental Standards should be legally binding and form the foundation of the “fundamental reform of national environmental law [that] is required”<sup>1</sup>.

*WWF recommends* greater reliance on bioregional planning processes as defined in the EPBC Act.

### **DRAFT FINDING 6.3**

#### *WWF response to water trigger draft finding*

WWF strongly believes that the ‘water trigger’ should be retained and its scope should be expanded to cover any significant impacts from any kind of development on the hydrology or quality of any water resource. On this issue, WWF aligns with the views expressed by Mr Tony Windsor, former Member of Parliament, who worked to introduce the water trigger and argued forcefully that effective water resource management requires both a national perspective and strong safeguards to guard against potential conflicts of interest in state and territory decision making<sup>2</sup>.

The Interim Report of the EPBC Act review (2020) and various Australian National Audit Office reports<sup>3</sup> into the EPBC Act have highlighted a range of implementation failures. WWF does not accept the argument that retaining the water trigger as a Matter of National Environmental Significance is not addressing a “significant regulatory gap”.

*WWF recommends* that the water trigger is retained as a Matter of National Environmental Significance, with the Commonwealth retaining approval powers, and that its scope should be expanded to cover any significant impacts from any kind of development on the hydrology or quality of any water resource.

### **DRAFT LEADING PRACTICE 6.4**

#### *WWF response*

WWF is not supportive of the use of deemed decisions. WWF believes that delays in assessments and approvals are mainly due to capacity and resourcing constraints affecting the regulatory agencies, which should be addressed as a matter of urgency. All decisions should be subject to merits review.

*WWF recommends* that mechanisms are put in place to ensure that regulators have sufficient capacity and resources to make timely decisions.

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<sup>1</sup> Page 8, interim report <https://epbcactreview.environment.gov.au/resources/interim-report>

<sup>2</sup> <https://www.abc.net.au/news/2014-08-26/windsor-dont-muddy-the-water-trigger-protections/5695902>

<sup>3</sup> Most recent audit: <https://www.anao.gov.au/work/performance-audit/referrals-assessments-and-approvals-controlled-actions-under-the-epbc-act>

## **DRAFT RECOMMENDATION 6.1**

### *WWF response*

WWF does not support the devolution of approval powers to states and territories in the absence of strong national environmental standards, rigorous accreditation processes and independent compliance mechanisms. Protecting Matters of National Environmental Significance requires a national perspective across state and territory boundaries; hence WWF considers that the Commonwealth should retain the ultimate power of review and approval. This will ensure an additional and necessary check on matters of truly 'national environmental significance', guarantee consistency across jurisdictions and protect against undue influence in local-level decision making. Better options to streamline decision-making include aligning national and state/territory approval processes, establishing joint Commonwealth-state teams for major projects, and ensuring that regulators have the necessary capacity, resources and statutory independence to make sound decisions.

WWF is deeply disappointed that Government introduced the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Assessments and Approvals) Bill 2020 to the House of Representatives on 27 August 2020, prior to submission of the final report of the EPBC Act's independent review (due by 31 October 2020). The independent review process only occurs once in a decade and none of the recommendations of the previous 'Hawke' review were implemented. As a result, the EPBC Act has been in place for 20 years without badly needed reforms to ensure that its objectives can be fulfilled while reducing delays and other frustrations experienced by regulated entities, including the resource sector.

The Australian Government has focused on implementing one element of what Professor Samuel has proposed without the other key elements of the supporting architecture required, notably an independent compliance and enforcement body and the development of a full suite of legally enforceable National Environmental Standards. WWF is also concerned that the Government has failed to propose any new funding to support states and territories in taking on an expanded role in national environmental decision-making. WWF believes that Governments should not commit to a devolution pathway until they have received and considered the final conclusions of the independent review of the EPBC Act.

*WWF recommends* that the Commonwealth retains approval powers under the EPBC Act and that the independent review should be concluded and its findings considered before governments make amendments to legislation or other major changes in environmental approval processes.

## **INFORMATION REQUEST 6.1**

### *WWF response*

The Interim Report of the independent review of the EPBC Act notes that robust national level settings for Indigenous cultural heritage protection are needed. The multi-jurisdictional Heritage Chairs and Officials of Australia and New Zealand (HCOANZ)<sup>4</sup>, is developing 'Best Practice Standards in Indigenous Cultural Heritage Management and Legislation'<sup>5</sup>. It is clear that there is room for improvement in the interactions between Indigenous heritage and the resources sector and for regulatory improvement to provide a clear and effective framework for Indigenous engagement and cultural heritage protection. The destruction of 46,000-year-old Indigenous heritage sites at the Juukan Gorge rock shelters on Puutu Kuntj Kurrama and Pinikura (PKKP) country in WA's Pilbara region provides an important case study.

WWF recommends that the Productivity Commission considers the relevant work being conducted under the auspices of the:

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<sup>4</sup> Including the Australian Heritage Council, a statutory advisory body that supports implementation of the EPBC Act.

<sup>5</sup> Page 45, Interim Report, Independent Review of the EPBC Act  
<https://epbcactreview.environment.gov.au/resources/interim-report>

- EPBC Act review, including the development of a National Standard on Indigenous engagement.
- Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) in improving cultural heritage identification, recognition and protection nationally.
- Process on modernising cultural heritage protection being convened by Ministers Ley and Wyatt.

WWF considers that nationally, the overall level of (proactive) Indigenous cultural heritage identification, recognition and protection and consideration of the aspirations, rights and interests of Indigenous Australians is an area where urgent legal and operational reforms are needed. WWF is pleased to see expressions of support for reform by the Australian and Western Australian Governments, not only with respect to the Juukan Gorge case but also more broadly.

*WWF recommends* that the Productivity Commission takes into account the outcomes of the Senate Inquiry on Juukan Gorge and the work to improve national cultural heritage protections under the EPBC review, as well as the process convened by Australian Government Ministers Ley and Wyatt in developing the Commission's final report.

### **INFORMATION REQUEST 7.1**

#### *WWF response*

WWF notes that systematic deficiencies in assessments, approvals, monitoring, compliance and enforcement under the EPBC Act have been identified in the Interim Report of the on-going independent review of the EPBC Act as well as a series of Australian National Audit Office reports. Our own research also supports these findings. For example, WWF's research indicates that between 2000-2017, around 7.7 million ha of potential habitat for terrestrial threatened species, terrestrial migratory species, and threatened ecological communities was cleared. Of this total, some 7.1 million ha (93%) was not referred under the EPBC Act resulting in no approvals or enforcement consequences<sup>6</sup>.

### **DRAFT LEADING PRACTICE 7.5**

#### *WWF response*

Allowing project proponents to meet their offsets obligations through financial contributions to environmental trust funds is not consistent with leading practice. The mitigation hierarchy requires avoidance of adverse impacts, in the first instance, followed by efforts to minimise impacts, before any consideration of compensation or offsetting. Moreover, offsets should where possible be provided in-kind and in close proximity to the impact site. Financial contributions to environmental trust funds should be supplementary and used only where site-based offsets are not feasible (subject to assurances that adverse impacts are 'acceptable'). The guiding principles of offset schemes should be adhered to at all times, including a commitment to 'net positive impact' on the environment, rather than 'averted loss', and using offsets only as a last resort, after options to avoid or minimise adverse impacts have been exhausted. WWF is supportive of the University of Queensland's (UQ) School of Earth and Environmental Sciences and the Centre for Biodiversity and Conservation Science submission with respect to leading practice principles and recommendations for offsets.

*WWF recommends* site-based offsetting as the primary mechanism with financial offsetting as supplementary. WWF also recommends reflecting key leading practice principles and recommendations of WWF and UQ in the Commission's final report.

### **DRAFT FINDING 10.2**

#### *WWF response*

Australia has adopted the United Nations Declaration of the Rights of the Indigenous Peoples, which includes the principle of Free Prior and Informed Consent (FPIC). We agree that effective

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<sup>6</sup>Ward et al (2019), Conservation Science and Practice. Lots of loss with little scrutiny  
<https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/csp2.117>

engagement with Indigenous communities must incorporate FPIC – this is leading practice. Properly exercising the principle of FPIC means that Indigenous people are presented with information in a suitable form, in advance, to inform their decision about whether to give or deny consent. If the engagement does not accept a veto, it is simply not consistent with free, prior and informed consent. As the draft Commission report notes, “resources companies are increasingly conscious of their ‘social licence to operate’”. A commitment to genuine FPIC is part of contributing to this social licence.

The Australian Government has developed ‘Engage Early - Guidance for proponents on best practice Indigenous engagement for environmental assessments under the EPBC Act’<sup>7</sup>, which we believe could go further to better recognise Indigenous rights and interests. A national standard for Indigenous engagement (part of a suite of ‘National Environmental Standards’) is currently being developed under the auspices of the EPBC Review. should be established in law as binding.

*WWF recommends* that FPIC (including acceptance that consent may be denied and that this must be respected) is adopted by the resource sector as a leading practice and is incorporated into relevant legislation to make it a legally binding commitment.

### **DRAFT LEADING PRACTICE 11.7**

#### *WWF response*

The conduct, capability, capacity and communication of a regulator is crucial in gaining and maintaining the trust of all stakeholders. In the case of the EPBC Act, WWF believes that an independent regulator should be established to conduct assessments, approvals, ensure effective delivery of compliance and enforcement functions and facilitate the development of bioregional planning.

Data collection and disclosure should also be valued as a leading practice. WWF recommends the development of an ‘Environmental and Heritage Information Management Strategy’ to set a strategic direction in using, collecting, sharing and presenting environmental data. The interim report of the EPBC Act independent review highlights this issue and notes that “a national ‘supply chain’ of information is required so that the right information is delivered at the right time to those who need it [... and] build community confidence that decisions are made on comprehensive information and knowledge, and that decisions are contributing to intended outcomes.”<sup>8</sup>

*WWF recommends* that the development of improved data gathering and disclosure systems should be considered as a key step in building community trust in regulators and project proponents.

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<sup>7</sup> Available here: <http://www.environment.gov.au/system/files/resources/3201a986-88e8-40f3-8c15-6e659ed04006/files/engage-early-indigenous-engagement-guidelines.pdf>

<sup>8</sup> Page 8 – interim report of the EPBC Act independent review.