

REFORMS TO THE EPBC ACT MUST ENSHRINE A FAIR SAY FOR THE COMMUNITY

The Hon Tanya Plibersek MP
Minister for the Environment and Water
House of Representatives
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Copies to:
Prime Minister The Hon Anthony Albanese
Attorney-General The Hon Mark Dreyfus KC

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Dear Minister,

Australia is poised with a once-in-a-decade opportunity to improve its federal environment laws. The dire State of the Environment 2021 report again showed the deeply concerning downward trend for Australia's nature, which includes the escalating impacts of the biodiversity, extinction, and climate crises, and the continuing, rapid destruction and degradation of Australia's globally unique and iconic land and sea Country.

Professor Graeme Samuel's review of the Environment Protection and Biodiversity Conservation (EPBC) Act offered important insights into the dysfunction that has undermined federal environmental regulation in Australia. Notably, he found a lack of trust by the Australian public in the EPBC Act's ability to deliver for nature, stemming from poor transparency, inadequate opportunities for public participation in decision-making, limited pathways for legal review, and perceptions of a government that shuns accountability for its decisions.¹ As a result, the Act fails to ensure integrity and accountability in decisions affecting the environment, resulting in unacceptable outcomes for people and the planet.²

We applaud your swift recognition of this integrity gap in Australia's environment laws, and your commitment to restoring public trust and confidence. We now call on you to comprehensively meet this commitment by enshrining a fair say for the community in environmental decision-making and recognising the unique rights of First Nations people.

Achieving integrity and accountability means more than increasing transparency; it requires enshrining the following set of human rights³—which Australia has signed on to—in Australia's environment laws:

- **The right to know** — to access the information that authorities hold.
- **The right to participate** — to have a genuine say in decision-making.
- **The right to challenge** — to seek legal remedy if decisions are made illegally or not in the public interest.
- **Cultural and self-determination rights of First Nations, including to give or withhold their free, prior and informed consent.**

¹ Professor Graeme Samuel AC, Independent Review of the EPBC Act – Final Report October 2020, pp. 81-83.

² Harding, R. (Ed.). (1998). Environmental decision-making: the roles of scientists, engineers and the public. The Federation Press.

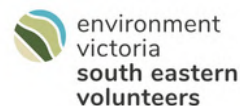
³ See Annex A: Community rights in environmental decision-making explained.

These rights are interdependent and indivisible: enshrining only one or two is not enough. Likewise, EPBC reforms and standards that simply affirm the existing status quo (e.g. by not improving current community consultation approaches or not expanding avenues to challenge decisions to include merits review) risk setting the reformed laws up for failure, exacerbating public distrust, and further eroding social licence for development projects. Proposed new features of the reforms, such as Environment Protection Australia and Environment Information Australia, must operate in ways that are open, transparent and responsive to community concerns.

Failure to enshrine these rights in the reformed law would also risk breaching Australia’s binding international legal obligations⁴ and undermining Australia’s aspirations to be a global leader on issues relating to the environment.

We call on you to seize the opportunity of the current EPBC reform process to properly and comprehensively enshrine community and First Nation rights to rebuild trust and integrity in our environment laws.

Yours sincerely,





The right to information

The public should have timely, free and easy access to best available information, including requirements for decision makers and/or proponents to: publish comprehensive and comprehensible information about all relevant actions and programs proposed under the Act before consultation; maintain an easily accessible and searchable public register in relation to applications, approvals, management plans and other required documents; and provide reasons for all decisions as a requirement or on request without cost, depending on the circumstances.

The right to public participation

Consultation and participation of community members should be enabled for decision-making at all levels. Consultation should occur early in the assessment process and allow for sufficient time for communities' internal deliberation and decision-making. Community feedback should be published, and both proponents and decision makers should be required to publish how they took such feedback into account.

The right to challenge / access to justice

All citizens should have standing to review or appeal decisions. Judicial review should be available for all administrative decision-making. Merits review for third parties should be available for project-level assessments and decisions. Third parties should have clearly defined avenues for pursuing civil enforcement actions and ensuring compliance with the relevant environmental legislation, conditions and policies.

The right of First Nations peoples to give or withhold their free, prior and informed consent (FPIC)

First Nations peoples' full and effective participation should be enabled at every stage of any action that may affect them directly or indirectly. Information on the likely impact of any activities must be disclosed in advance, and the time requirements for these processes should be led by First Nations people. FPIC processes must be culturally appropriate—and what is culturally appropriate must be defined by the people themselves.

Australia is a signatory to the **International Covenant on Civil and Political Rights**,⁵ This binding treaty enshrines human rights to: seek and receive information (Art. 19(2)); public participation (Art. 25(a)); and remedy for rights violations (Art. 2(3)), all of which apply in the context of environmental decision-making. It also enshrines rights to self determination (Art. 1) and cultural protections (Art. 27) which apply to First Nations people.

Australia was one of 175 member states who voted to pass the **Rio Declaration on Environment and Development**,⁶ which consisted of 27 universal principles to guide sustainable development. Principle 10 of the Rio Declaration affirms that:

"[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

In 2009 Australia endorsed the **United Nations Declaration on the Rights of Indigenous Peoples**,⁷ which reaffirms and sets out additional rights of Indigenous Peoples, including rights to:

- Self-determination (Art. 3-4),
- Cultural protection (Arts. 8, 11, 12)
- Participate in relevant decisions (Art. 18) and to give or withhold their free, prior and informed consent (FPIC) (Arts. 10, 19)
- Redress for breaches of FPIC (Art. 11(2), 28)
- Maintain spiritual links to Indigenous lands, waters and seas (Art. 25) and to own and control their traditional lands, territories and resources (Art. 26).

The 2022 **Kunming-Montreal Global Biodiversity Framework**,⁸ adopted by parties to the Convention on Biological Diversity, including Australia, commits all actors to taking a human-rights based approach. Target 22 specifically emphasises the rights of Indigenous Peoples and local communities in environmental decision-making, including:

"full, equitable, inclusive, effective and gender-responsive representation and participation in decision-making, and access to justice and information related to biodiversity"

Targets 1, 3, 5, 9, 21 and 23 also address other human rights.

In July 2022, the United Nations General Assembly passed a resolution acknowledging the **human right to a clean, healthy and sustainable environment** the resolution recognised that:

*"the exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment."*⁹

⁵ International Covenant on Civil and Political Rights 999 U.N.T.S. 171 (entered into force 23 March 1976).

⁶ Rio Declaration on Environment and Development, United Nations General Assembly, UN Doc. A/CONF.151/26 (Vol. I) (12 August 1992).

⁷ United Nations Declaration on the Rights of Indigenous Peoples, United Nations General Assembly Resolution 61/295, UN Doc. A/61/L.67 (13 September 2007).

⁸ Kunming-Montreal Global Biodiversity Framework UN Doc. CBD/COP/DEC/15/4 (19 December 2022)

⁹ UN General Assembly, The human right to a clean, healthy and sustainable environment, UN Doc A_76_L75 (26 July 2022)