Law Council
OF AUSTRALIA

23 September 2025

Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Productivity Commission,

Productivity Commission Interim Report—Investing in cheaper, cleaner energy and the transition to net zero

1. The Law Council welcomes the opportunity to provide a submission to the Productivity Commission on its Interim Report into investing in cheaper, cleaner energy and the net zero transformation (**Interim Report**).[1] This submission is informed by input from the Law Council's Australian Environment Planning Law Group (**AEPLG**) and Climate Change Working Group, as well as the Law Society of New South Wales, and the Law Institute of Victoria.

2. The Law Council supports the Interim Report's identification of emissions reduction as an important national priority.[2] Consistent with its Climate Change Policy,[3] the Law Council observes that the following principles should guide the development of federal and national law and policy responding to climate change:

   - Australia's international law obligations with respect to climate change, including under the Paris Agreement,[4] should be fully implemented, domestically;[5]
   - Australia's response to climate change should give effect to rule of law principles, including that new laws should promote certainty, clarity and transparent outcomes;[6] and
   - Australia's response to climate change should be fair and equitable and promote public confidence.[7]

3. Accordingly, Australia's regulatory response to climate change, including through the net zero transformation, must offer long-term solutions with higher levels of ambition and predictability. This is necessary to comply with its international obligations; to

[1] Productivity Commission, Australian Government, *Investing in cheaper, cleaner energy and the net zero transformation* (Interim Report, August 2025) <https://www.pc.gov.au/inquiries/current/net-zero/interim/net-zero-interim.pdf>.
[2] Ibid 1.
[3] Law Council of Australia, *Climate Change Policy* (Policy Statement, 27 November 2021) <https://lawcouncil.au/publicassets/4cc8f2e4-375d-ec11-9445-005056be13b5/2021%2011%2027%20-%20P%20-%20Climate%20Change%20Policy.pdf>.
[4] *Paris Agreement*, opened for signature 22 April 2016 [2016] ATS 4 (entered into force 4 November 2016) (**Paris Agreement**). Australia ratified the Paris Agreement on 10 November 2016.
[5] *Climate Change Policy* 10 [46]-[47].
[6] Ibid 10-11 [48]-[50].
[7] Ibid 11 [51]-[52].

Telephone +61 2 6246 3788 • *Email* mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

enable government agencies and businesses across all sectors of Australia's economy to best manage the physical, economic and other transition risks posed by the changing climate; and to empower business and civil society to make decisions within a decarbonising economy. Mitigation and adaptation measures adopted by Australia should be environmentally effective, economically efficient, and provide transparent reporting, including on the effectiveness of specific measures. They should also identify and address the needs of marginalised communities and groups which are most vulnerable to the physical and transition risks of climate change, and be informed by the knowledge and leadership of diverse communities—in particular, of First Nations communities as the original custodians of the land, by reference to principles of self-determination and free, prior and informed consent (**FPIC**).

4. Australia's national energy policy must also be determined and managed based upon the best available scientific evidence about its likely impact on the environment and Australia's performance of its international obligations. The Law Council agrees with other inquiry participants that environmental standards cannot be compromised to meet clean energy goals.[8]

5. Against this context, this submission addresses specific draft recommendations from the Interim Report, in particular, draft recommendations 1.2, 2.1, 2.2, 2.3, 2.4, 3.1, 3.2 and 3.3.

Comments on specific draft recommendations

Draft recommendation 1.2: The Safeguard Mechanism should cover more industrial facilities and carbon leakage provisions should be improved

6. The Law Council notes that the need for a lower facility threshold is being considered in other jurisdictions. For example, the NSW Environmental Protection Authority (**EPA**) is consulting on proposed licensing requirements for NSW's large greenhouse gas emitters.[9] The NSW EPA is proposing a range of requirements for licensees that emit 25,000 tonnes or more of carbon dioxide equivalent of Scope 1 and Scope 2 emissions per year.[10] It is important to ensure that a project can meet all requirements under State/Territory or Federal legislation in a way that does not create suboptimal outcomes. It will therefore be critical that regimes across jurisdictions are consistent with any proposed changes at the Federal level pursuant to draft recommendation 1.2.

Draft recommendation 2.1: Reform national environmental laws

7. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) performs vital functions in upholding and implementing Australia's international environmental commitments and ensuring that development affecting matters of national environmental significance is undertaken responsibly.[11] However, Professor

[8] *Interim Report* 38.
[9] See e.g. New South Wales Environmental Protection Authority, *Proposed Climate Change Licensee Requirements: Consultation Draft* (Report, July 2025) <https://hdp-au-prod-app-nswepa-yoursay-files.s3.ap-southeast-2.amazonaws.com/4217/5452/7883/25p4604-proposed-cc-licensee-requirements-for-consultation.pdf>.
[10] Ibid.
[11] *EPBC Act* s 3.

Graeme Samuel's 2020 Independent Review of the EBPC Act (the **Samuel Review**) identified that the Act is "outdated and requires fundamental reform".[12]

8. The Law Council supports Professor Samuel's findings and recommendations for reform to the EPBC Act, which must be developed through robust consultation processes and accompanied by proper Parliamentary scrutiny. The Interim Report identifies that "the Australian Government's 2022 Nature Positive Plan sought to enact recommendations from the Samuel Review, but only the first stage of the plan was implemented" and that the Government has "not yet announced a new plan".[13] The Law Council had significant concerns with the Government's approach to the *Nature Positive (Environment Protection Australia) Bill 2024* and related Bills.[14] Notwithstanding the urgency and importance of implementing the Samuel Review recommendations for environmental and economic reasons, it is essential that there are adequate, open and inclusive consultation processes to ensure transparency and public confidence in the remaining reforms, as well as a clear public plan for their development. The Law Council has produced a Best Practice Legislative Development Checklist that can be used to guide best practice legislative design, consultation and impact assessment processes for those reforms.[15]

9. The Law Council welcomes the Productivity Commission's consideration of the Samuel Review's findings and recommendations in its Interim Report, and makes the following observations with respect to specific actions proposed.

National environmental standards

10. Draft recommendation 2.1 includes, among reforms to expedite approvals for clean energy projects and to better protect the environment, the introduction of National Environmental Standards (**NES**). This was also a recommendation of the Samuel Review and is supported by the Law Council.[16]

11. As above with any reform of the EPBC Act, the draft NES must be released for adequate public consultation before their adoption by Parliament. The process for adopting, implementing, and ultimately, amending or updating NES also needs to be made clear. The context in which the NES are to be used must also be understood

[12] Professor Graeme Samuel AC, *Independent Review of the EPBC Act* (Final Report, October 2020) ii <https://www.dcceew.gov.au/sites/default/files/documents/epbc-act-review-final-report-october-2020.pdf>.
[13] *Interim Report* 38.
[14] See Law Council of Australia, 'Less than positive about Nature Positive' (Media Release, 26 July 2024) 1 <https://lawcouncil.au/media/media-releases/less-than-positive-about-nature-positive>; Law Council of Australia, Submission to the Environment and Communications Legislation Committee, *Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 and related Bills* (18 July 2024) <https://lawcouncil.au/publicassets/226e9074-e547-ef11-94a6-005056be13b5/4562%20-%20S%20-%20Inquiry%20into%20Nature%20Positive%20Bills.pdf>.
[15] Law Council of Australia, *Best Practice Legislative Development Checklist* (Policy Statement, 25 June 2025) <https://lawcouncil.au/publicassets/54c598e1-9263-f011-94b6-005056be13b5/2025%2006%2025%20-%20FD%20-%20Best%20Practice%20Legislative%20Development%20Checklist.pdf>.
[16] *Samuel Review* 2-5; See also Law Council of Australia, Submission to the Environment and Communications Legislation Committee, *Inquiry on the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021* (16 April 2021) 7 <https://lawcouncil.au/publicassets/628c26cc-53a2-eb11-943a-005056be13b5/3992%20-%20Inquiry%20on%20EPBC%20Act%20%20Standards%20and%20Assurance%20%20Bill%202021.pdf>.

clearly at the time of their introduction to ensure successful implementation.

12. While the introduction of NES is critically important, it is not a complete panacea to issues around delay for approvals under the EPBC Act identified in both the Interim Report and the Samuel Review.[17] It is important to first understand the sources and causes of approval delays—owing not only to the complexity of the regulatory system, but also due to resourcing, staffing issues and poor quality assessment documents—to appropriately deliver a more efficient approvals process.

13. To be effective, the NES also need to sit within a broader framework of reform.[18] Care and diligence must be taken to ensure the NES do not have a countereffect of encouraging a box-ticking approach to assessments.

14. The Interim Report states that the NES would support bilateral agreements.[19] The Law Council notes that State and Territory laws may require amendment to ensure compliance with NES, once legislated, especially, on process-based aspects (for example, any standards concerning public consultation) requiring application at the State or Territory level. This process may take time.

Impact on First Nations communities

15. It is essential that faster approvals still accommodate robust consultative processes. The Interim Report states that standards "should be developed for both engagement with local communities and engagement and participation in decision-making with Aboriginal and Torres Strait Islander people, as envisaged in the Nature Positive Plan".[20]

16. The United Nations Declaration on the Rights of Indigenous People (**UNDRIP**)[21] is an authoritative international standard informing how governments should engage with and protect the rights of indigenous peoples. Article 19 of the UNDRIP provides that States shall consult with indigenous peoples "in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them". The Law Council highlights the importance of UNDRIP's principles, in particular FPIC, with respect to First Nations communities' engagement and participation in decision-making under the EPBC Act. In this respect, the Samuel Review recommended an NES for Indigenous Engagement and Participation in Decision-Making,[22] noting however that amendments were needed to the EPBC Act to ensure the principle of FPIC could be fully incorporated into the standard.[23] The Nature Positive Plan undertook to build on this draft standard.[24]

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[17] *Interim Report* 36; See also *Samuel Review* 1, 9, 84-86.
[18] *Samuel Review* 4.
[19] *Interim Report* 39.
[20] *Interim Report* 46.
[21] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).
[22] *Samuel Review* 225.
[23] *Samuel Review* 6.
[24] Department of Climate Change, Energy, the Environment and Water, Australian Government, *Nature Positive Plan: better for the environment, better for business* (Report, December 2022) 14 <https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf>.

17. Early, meaningful and ongoing partnership with First Nations people should be emphasised for any proposed standard as vital to securing timely approvals. As noted in the Interim Report, such engagement must also be aligned with the Priority Reforms in the National Agreement on Closing the Gap with respect to 'meaningful, respectful and reciprocal' engagement with transparent, accountable mechanisms for decision-making.[25] Adequate resourcing and capacity-building in partnership with First Nations advisors are also needed to support the integrity of consultation processes.

18. First Nations communities should be given adequate time for their participation in consultation, including for their own deliberation and decision-making processes to occur.[26] As acknowledged in the Interim Report, a "significant proportion of land suitable for renewable energy projects is located on land over which Aboriginal and Torres Strait Islander people have legal rights and interests".[27] As a result, First Nations groups often face time pressures when participating in consultation processes under the EPBC Act, noting they are also often consulted through Native Title processes and State and Territory secondary approval processes, such as water licensing and heritage protection legislation. The Australian Law Reform Commission is considering similar capacity issues in its current Review of the Future Acts Regime under the *Native Title Act 1993* (Cth), and its recommendations may be relevant to this aspect of the Interim Report. Its final report is due by 8 December 2025.

19. The Productivity Commission should also consider scope to improve support for First Nations community-controlled organisations to develop, own and operate clean energy projects and engage with relevant approvals processes.[28]

Facilitation of regional planning

20. The Interim Report "recommends the Australian Government pursue reforms to better use regional planning to facilitate faster assessments and approvals".[29] As the Interim Report also identifies, the EPBC Act already allows bioregional plans to be made,[30] although those provisions are not often used. It is the Law Council's view that the focus for regional or landscape scale planning and environmental impact assessments (whether conducted under either the existing provisions of the EPBC Act or a reformed EPBC Act) should be on the delivery of better information to decision-makers. In turn, this can improve the quality of decisions and better contextualise cumulative impact assessments where multiple projects are proposed within a defined boundary. The other benefit would be streamlined and faster decision making.

Improving the efficiency of offset arrangements

[25] *Interim Report* 46.
[26] *Samuel Report* 225.
[27] *Interim Report* 45; See also Katie Quail et al. 'Large-scale renewable energy developments on the Indigenous Estate: How can participation benefit Australia's First Nations peoples? (May 2025) 123 *Energy Research and Social Science* 1.
[28] Professor Heidi Norman et al, *Local Aboriginal Land Council Powershift Sharing the benefits of the energy transition* (Report, Australian Public Policy Institute, June 2025) 28-30 <https://appi.org.au/wp-content/uploads/2025/06/APPI-Policy-Insights-Paper-Local-Aboriginal-Land-Council-Powershift.pdf>.
[29] *Interim Report* 42.
[30] *EPBC Act* pt 12.

21. The Law Council notes that, at present, creating an offsets package that satisfies the EPBC Act offsets policy and that truly offsets the impact of a particular proposal can be challenging in areas where there is contested and overlapping land use (for example, in areas open for mining). The Australian Government's Nature Positive Plan, itself, notes that current offset arrangements "are failing to prevent environmental decline … [do not] properly compensate for the loss of habitat or heritage values and are often not enforced or maintained".[31]

22. The Law Council considers that the Australian Government offset scheme proposed in the Interim Report would be useful and has the potential to contribute to a goal of no net loss, even if it may not deliver "like-for-like" offsets in all cases.[32]

23. However, the Law Council does not support the proposal for the Australian Government to "consider amending the Nature Repair Market (**NRM**) legislation to allow proponents to discharge their offset obligations by purchasing certificates that comply with offset rules".[33] It would be inappropriate to allow the use of NRM projects and biodiversity certificates as compliance offsets for biodiversity damage for reasons explained in the Law Council's submission on the *Nature Repair Market Bill*:

> *This would undermine the integrity and effectiveness of the NRM to achieve its stated objective "to promote the enhancement or protection of biodiversity in native species in Australia" and would not deliver a nature positive outcome. … [B]y facilitating a biodiversity offset scheme, the biodiversity offset market that was driven by biodiversity damage is the antithesis of the market the government is seeking to engage*.[34]

Draft recommendation 2.2: Set up a specialist 'strike team' for priority projects

24. The Interim Report recommends the establishment of a strike team with strong capability in clean energy projects to more efficiently assess 'priority projects' under the EPBC Act. This team would work closely with their energy colleagues in the Department of Climate Change, Energy, Environment and Water (**DCCEEW**).[35] It is critical to consider the specific skills required in the environmental impact assessment of priority projects and ensure sufficient resourcing for DCCEEW to establish the strike team without diverting staff from other important functions.

Draft recommendation 2.3: Establish a Coordinator-General

25. The Interim Report recommends the establishment of a new and independent Clean Energy Coordinator-General (**Coordinator-General**) to track the progress of approvals, which would include an ability to investigate and resolve delays.[36] The Law Council supports the Coordinator-General's proposed powers to escalate matters and

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[31] *Nature Positive Plan* 3.
[32] *Samuel Report* 11.
[33] *Interim Report* 45.
[34] Law Council of Australia Legal Practice Section, Submission to the Department of Climate Change, Energy, the Environment and Water, *Nature Repair Market Bill 2023 – Exposure Draft* (3 March 2023) 13 [32] <https://lawcouncil.au/publicassets/b1ce3227-8add-ed11-9480-005056be13b5/LPS%20Submission%20-%20Nature%20Repair%20Market%20Bill%202023%20Exposure%20Draft.pdf>.
[35] *Interim Report* 48.
[36] *Interim Report* 49.

recommend practical improvements to prevent unnecessary delays. However, it is important that the Coordinator-General's functions do not allow it to usurp or abrogate community consultation about projects. As contemplated in the Interim Report, the Coordinator-General should also work with government bodies to assist First Nations communities to engage effectively on renewable energy proposals.

Draft recommendation 2.4: Consider the energy transition in approval decisions

26. It would be useful for the Productivity Commission to clarify the following aspects of draft recommendation 2.4:

    a. Projects within scope—for example, would the Minister only have to consider the needs of the energy transition with respect to renewable energy projects (such as wind farms or solar farms), or also projects to produce critical elements for the energy transition (such as rare earth mines to extract minerals necessary for solar panels or batteries)?;

    b. Consultation requirements—it should be made clear that the fast-tracking of any approval process would not be at the expense of robust consultation with key stakeholders, including First Nations communities, and rural, regional and remote communities; and

    c. Temporal aspects—The concept of an "energy transition" infers that there will be an end point. At what point would the "energy transition" be complete, such that the Minister would no longer be expressly required to consider those needs?

27. In any event, the Law Council's view is that the application of the EPBC Act must be project-agnostic and there should not be 'special' or 'explicit' consideration given to a particular project's role in the energy transition.

28. Where the energy transition would be a relevant consideration in the Minister's decision-making, it will remain important for the NES and impact assessment processes to be applied consistently to actions across all areas. There is some potential for the energy transition consideration to result in arguably a different environmental standard applying to assessment of a subset of projects that will have a significant impact on a matter of national environmental significance. If proper regional planning, landscape-scale environmental impact assessment and renewable energy zones are pursued, this may even defeat the need for draft recommendation 2.4 in order to specifically address renewable projects.

Draft recommendation 3.1: Set up a climate risk information database covering all climate hazards

29. The Law Council supports the availability of information relating to climate risk and climate hazards, particularly across levels of government and independent bodies such as the Climate Change Authority. The Samuel Review also recommended the implementation of a clear national strategy for environmental information, adding that shared or collective development of information would be more efficient than

jurisdictional and fragmented systems.[37] The availability of accurate information also supports lawyers and policymakers to uphold their roles and functions in the context of climate change.[38]

[37] *Samuel Report* 158.
[38] *Climate Change Policy* 13.

Draft recommendation 3.2: Develop a nationally consistent climate resilience rating system for housing

30. The Law Council supports the proposal to develop a nationally consistent climate resilience rating system, although it may overlap with the Nationwide Housing Energy Rating Scheme and National Construction Code (**NCC**). To avoid confusion and duplication, the Productivity Commission could consider implementing the proposed resilience rating system through the existing NCC framework.

Draft recommendation 3.3: Governments should agree on a series of actions to improve housing resilience over time

31. The Law Council supports draft recommendation 3.3 and welcomes its focus on priorities to increase housing resilience including improving understanding of climate risks, facilitating retrofits and embedding climate risk in planning and zoning decisions.

Additional considerations

Environmental Impact of Artificial Intelligence

32. Members of the AEPLG have noted that the Interim Report does not refer to the role and impacts of artificial intelligence in relation to the energy transition. To this end, the Productivity Commission may wish to consider how the rise in use of artificial intelligence in Australia will cause significant energy and environmental issues arising from artificial intelligence's considerable energy and water consumption requirements, including as outlined:

    (i) Artificial intelligence requires large data centres to store and process data. Data centres require significant amounts of water to cool and run data centres, often requiring purpose-built water infrastructure to ensure consistent, high-flow water supply;[39]
    (ii) There are already substantial constraints on Australia's energy grid, and the lack of energy projects being developed (largely due to a convoluted approvals process) will cause further constraints on an already struggling system;
    (iii) Australia's grid and energy infrastructure will struggle to keep up with the increased energy and water consumption demands of artificial intelligence; and
    (iv) The impacts this may have on productivity, particularly in the context of imposing additional pressures on an already strained energy grid, ought to be considered.

[39] Norman Bashir et al. 'The Climate and Sustainability Implications of Generative AI' (2024) *An MIT Exploration of Generative AI* 7.

Contact

If the Law Council can be of any further assistance to the Productivity Commission during the course of its inquiry, please contact Chiara Angeloni (Principal Policy Lawyer) [redacted].

Yours sincerely



Juliana Warner

President