[redacted]

[redacted]

Dear Biodiversity Coordination Unit,

The Wilderness Society is a national, independent environmental advocacy organisation supported by around 30,000 members. Since 1976, the Society has stood at the forefront of the country's most historic campaigns, including the Franklin River, Fraser Island, Tasmania's Forests, James Price Point in the Kimberley and recently the Nullarbor and Great Australian Bight.

The Wilderness Society (South Australia) Inc (TWS SA) was established in 1983 and is part of the nation-wide Wilderness Society federation (TWS). We are an independent not-for-profit organisation that seeks to protect, promote and restore wilderness and natural processes across South Australia. The development of a comprehensive, state-wide, system of wilderness protection areas and marine sanctuaries (because the large intact functioning ecosystems they contain give native plants and animals their best chance of surviving climate change) is our focus.

We are a member of the South Australian Nature Alliance and support other member groups' views on the Discussion Paper for a new Biodiversity Act for South Australia.

Listening to and learning from First Nations South Australians is fundamentally important.

For any new biodiversity legislation to be effective it must have primacy over all legislation that may damage or destroy biodiversity.

We have serious concerns with reliance on biodiversity offset schemes and concepts such as 'ecologically sustainable development' (ESD).

Biodiversity conservation needs to be resourced, but not through biodiversity destruction. Delivering on 30 by 30 commitments via targeted additions and/or acquisitions, support for large scale re-vegetation to restore connectivity, conservation covenants etc across the public and private estate is vital.

TWS SA strongly believes that any new legislation must allow third parties to bring proceedings in the public interest, including by merits review. The community's ability to enforce the law is critical given the influence of vested interests. On this matter we ask that you also consider the points raised in the attached paper "Who holds the power - Community rights in environmental decision making".

Yours sincerely,
--

Peter Owen
Director

The Wilderness Society
(South Australia) Inc.
111 Franklin Street
Adelaide SA 5000

0423 550 018

Wilderness is any remote area of land or sea which, following thousands of years of First Nations' Traditional Ownership, continues to support large, intact functioning ecosystems unaffected, or affected to only a minor extent, by the impacts of modern industrial society.

Wilderness - Large Intact Functioning Ecosystem - LIFE

Wilderness Society

Life. Support.

Who holds the power?

Community rights in environmental decision-making





The Wilderness Society is a member-based nature conservation organisation, whose purpose is protecting, promoting and restoring wilderness and natural processes across Australia for the survival and ongoing evolution of life on Earth.

The Wilderness Society acknowledges that sovereignty was never ceded and recognises the rights and aspirations of First Nations' peoples in all aspects of land and water management, as well as decision-making in relation to their traditional lands, regardless of current land tenure. We pay our respects to their cultures and their elders past, present and emerging.

The Wilderness Society engaged the Environmental Defenders Office Ltd (EDO) to do a legal analysis of community rights in environmental decision-making across all Australian jurisdictions to inform the findings of this report.

This publication (and any material sourced from it should be cited as: Wilderness Society (2022), Who holds the power: community rights in environmental decision-making.

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Photo: Rob Blakers
Front Cover Photo: Sam Rosewarne

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Introduction

2022 is a special year for the rights of communities in relation to the environment.

It is the 50th anniversary of the first global conference to make the environment a major issue (1972 United Nations Conference on the Environment in Stockholm), which recognised that humans have "A solemn responsibility to protect and improve the environment for present and future generations".[1]

Thirty years ago, the 1992 United Nations Conference on Environment and Development resulted in the Rio Declaration for Environment and Development. The Rio Declaration's Principle 10[2] sets out **three fundamental rights** communities should have to ensure genuine participation in decisions made about the environment:

1. **The right to know**—access the information that authorities hold.
2. **The right to participate**—have a genuine say in decision-making.
3. **The right to challenge**—seek legal remedy if decisions are made illegally or not in the public interest.

In July 2022, the United Nations General Assembly declared that everyone on the planet has the right to a clean, healthy and sustainable environment.[3] Discussion around the environmental rights of communities is at the absolute forefront of the global political space.

These significant international conferences and declarations are formal recognition that communities around the globe have specific rights to take part in day-to-day decision-making by governments and corporations that affect them and their environment.

Of fundamental importance to this conversation is the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which establishes a universal framework of minimum standards for the survival, dignity and well-being of the First Nations peoples of the world—a declaration which Australia endorsed in 2009 but is yet to implement.

Research and practice around the world[4] shows that when communities have a genuine and meaningful say in decisions about the environment, outcomes for nature and people are better.

In 2022, Australian voters elected a parliament with an expectation that it would act with integrity on issues of climate and the environment. If we are to move towards an ecologically safe future, trust and integrity in environmental decision-making must be restored. The right for communities to have a genuine say in these decisions is a crucial step in ending the extinction crisis in a climate-changed world.





Photo: Brent Lukey

Executive summary

- Australia's current system of environmental decision-making is not working for the environment or communities.
- The inconsistent and patchy application of environmental community rights ensures decision-making is weighted in favour of proponents and vested interests.
- Meaningful community participation is fundamental to transparent and accountable government.

Decisions made with and by communities result in better outcomes for communities and the environment.

Australia's current failure to properly ensure a consistent and fair approach to community participation in environmental decision-making is leaving a legacy that is harming communities, driving a wildlife extinction crisis, and allowing the destruction and degradation of Australia's globally iconic land and sea Country.

The absence of strong environmental community rights means that governments are able to make decisions that are harmful to the environment, contrary to pleas from the community. Instead of listening to the community, governments are influenced by corporations that profit from the destruction of the environment.

It is critical that this trend is urgently reversed. Strong environmental community rights will require governments to be transparent and accountable when making decisions about the environment, resulting in better outcomes for people and nature.

Analysis of the problem

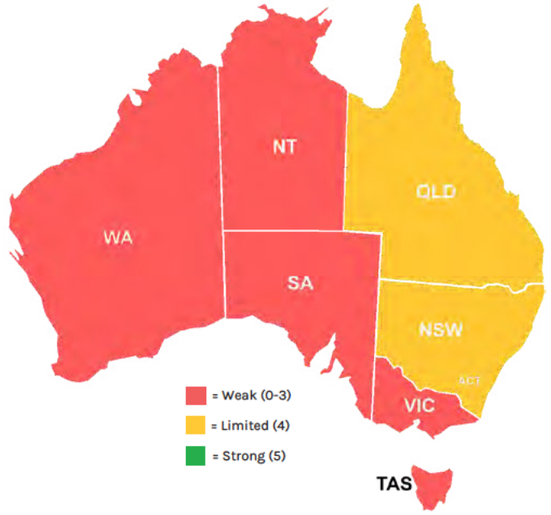
To understand whether Australia is properly providing for community rights in environmental decision making, the Wilderness Society engaged the Environmental Defenders Office (EDO) to analyse the primary environmental protection and planning legislation of each Australian state and territory—as well as Australia's federal nature laws—to assess how well these provide for the three core environmental community rights established by the Rio Declaration:

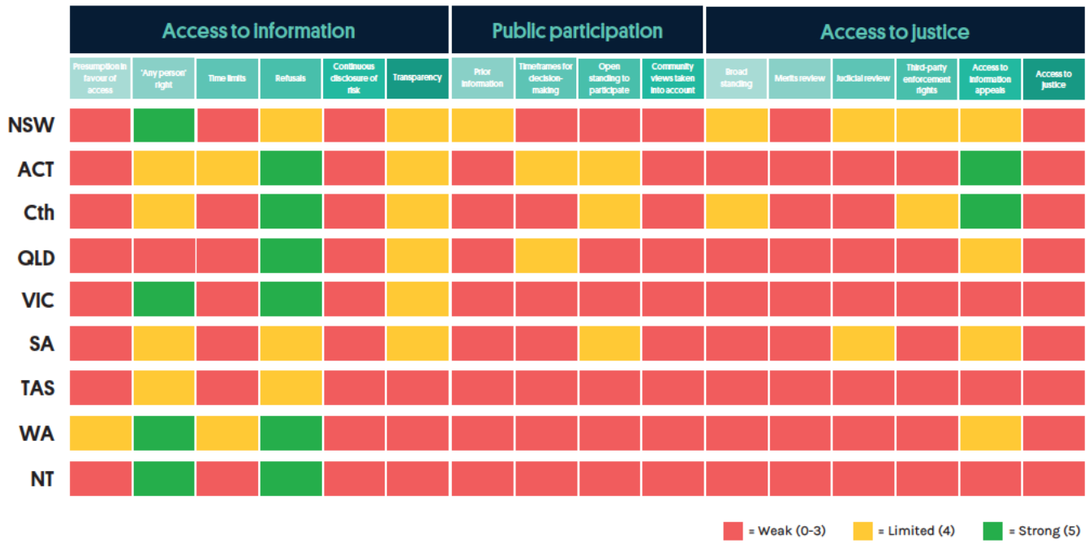
1. **The right to know**—access the information that authorities hold.
2. **The right to participate**—have a genuine say in decision-making.
3. **The right to challenge**—seek legal remedy if decisions are made illegally or not in the public interest.

The EDO's jurisdictional analysis and scorecard reveal the lack of environmental community rights currently provided by governments across the country. The report goes on to explain why this is a problem, with examples and case studies which show that against the odds, communities have made their voices heard. But it shouldn't be this hard. This snapshot of the jurisdictional analysis reveals the current state of the nation.

2022 Environmental Community Rights Scorecard & key findings

1. Australia has a continental and systemic problem with upholding community rights in relation to environmental decision-making.
2. There is no national approach to environmental community rights. Each jurisdiction provides for the rights to different degrees, yet overall the extent to which they are upheld is weak to limited.
3. Across the country, the scorecard shows there is inadequate transparency and accountability in environmental decision-making.
4. The inconsistent and patchy application of environmental community rights ensures decision-making is weighted in favour of proponents and vested interests.





What are the solutions?

To ensure communities have genuine and meaningful input into decisions that affect them and the environment, **the Wilderness Society is calling for governments across Australia to enshrine and activate community rights in environmental decision-making.**

The three universal environmental community rights need to be consistently embedded and implemented in Australia's laws and policies—at all levels of government—to ensure transparency, accountability and public participation are integrated in government and corporate decision-making about the environment.

If all communities across Australia are empowered with a nationally-consistent standard of strong environmental community rights, and are able to have a genuine say in decision-making, we'll see better outcomes for the environment and for communities.

What is environmental decision-making?

Governments at all levels make many types of decisions that affect the environment and communities, such as:

- whether a project should go ahead via environmental impact assessments and approvals (like a coal mine or a gas port);
- a regional plan or new plan for an area (e.g. new suburb, new airport);
- taking compliance and enforcement action;
- what resources should be released for exploitation (e.g. opening up a gas field or a forest for logging);
- environment standards (e.g. pollution or emission standards); and
- implementing a new policy or bringing forward a new law (e.g. fixing the national environment law or rolling back deforestation protections).

These decisions happen at many scales—national, state and local. These decisions cover environmental values at many scales—from the climate to ecosystems or landscapes of global significance to species that live in one small place. And these decisions may be being made by governments of many levels at the same time—local, state and federal.

The role of business and corporations in environmental decision-making

Business and industry actors also have an important role in ensuring communities have the rights they need to have a genuine say in decisions about the environment. This covers how a company considers what the community's views are when it makes decisions that affect that community, and also the role of industries and industry peak bodies in influencing laws and policies that dictate whether and how communities get a say.

The global trend towards organisations requiring a "social licence to operate" and investors seeking to understand the environmental, social and governance (ESG) credentials of the companies and activities they invest in has put a renewed spotlight on ensuring community views and concerns are incorporated in government and corporate decision-making.

Unfortunately, the experience is that corporate proponents of destructive projects aim to minimise community participation in environmental approval processes as much as possible, if not outright exclude communities from decision-making. The same is true of industry peak bodies that have repeatedly sought to restrict the rights of communities to challenge government decisions in the courts.[5]

In developing new laws for nature there is an opportunity to improve trust and integrity of institutions, by enshrining stronger environmental community rights in practice. As a key submission to the review of the *Environment Protection and Biodiversity Conservation Act 1999 (the EPBC)* revealed:

> **"Levels of community outrage around policy and project decision-making increasingly reflect a greater community intolerance of proponents who disregard community values... it is evident that many key stakeholders and communities are losing, or have lost, confidence in project development and government approval processes."**
>
> – Environment Institute of Australia and New Zealand.[6]



Photo: Adrian Guerin

Case study:

Equinor and the Great Australian Bight

Norwegian oil company, Equinor, undertook plans to drill for oil in the Great Australian Bight, in the face of staunch community opposition. Its exploration permits had been granted by the federal government, which at the time conducted no community consultation prior to granting permits to a range of oil and gas companies.

The federal government continued to support Equinor's plans, ignoring the community. Across southern Australia's coastline, communities, local governments and Traditional Custodians made their opposition to Equinor's drilling clear. At one point, Equinor sought limited public comment on its drilling proposal and received more than 30,000 submissions against the project. Equinor dismissed these entirely and the drilling was approved by the government.

That both the federal government and Equinor ignored the community and attempted to steamroll them in order to impose a massive fossil fuel expansion in the Great Australian Bight was frustrating, time consuming, worrying and simply unfair to those communities.

However, the community stood up and stood together in the face of this injustice—over many years, and eventually in court—and ultimately they prevailed. Equinor and the Australian federal and state governments would have been much better off listening to the community in the first place. It needn't and shouldn't have taken a multi-year campaign, costly legal action, expensive independent modelling reports and massive protests for Equinor to make the decision to not drill for oil in the Bight. Community rights should have been embedded in their corporate decision-making from the get-go.

Photo: Rodney Harris

Case study:

Walmadan (James Price Point)

In 2008, multinational corporations Woodside, BP, BHP Shell and Chevron, and the Western Australian government, became joint proponents of the nation's largest industrial gas hub. It was proposed to be built at Walmadan (James Price Point), on a First Nations songline, without any meaningful consultation with Traditional Custodians or the broader local community.

Environmental assessments revealed the culturally significant site was a First Nations burial ground, humpback whale nursery, and home to the largest known dinosaur trackway on the planet—and there were 11,000 submissions against the project proceeding. Despite this, the Chair of the Western Australian Environmental Protection Authority approved the project on their own, as every other board member was conflicted out due to holding interests in the corporations associated with the proposal.

In 2013, Goolarabooloo Law Boss Richard Hunter and The Wilderness Society took the state government to the Western Australian Supreme Court to argue that the longest and most complex environmental assessment in the history of the state should not be able to be made by one person. The judicial review was a success and the environmental assessment was invalidated.[7] Protests led by a strong local community with First Nations representatives over years, and this significant legal blow, led to Woodside walking away from Walmadan citing costly blowouts and time delays to the proposed $45 billion gas hub expanding to an unviable $80 billion.[8] Once again, the inclusion of community rights in environmental decision-making should have happened from the get-go.

Photo: FlemmingBojensen

What are community rights in environmental decision-making?

There are many rights that influence how specific communities have a say over what happens to the environment. First Nations people have unique consent-based rights, as set out by the internationally recognised United Nations Declaration on the Rights of Indigenous Peoples (see Recognising First Nations' Rights and Aspirations).

For community rights in environmental decision-making, we are referring to **three basic universal rights for all communities in Australia** that are fundamental to ensuring communities have a meaningful say in decision-making.

The three community rights in environmental decision-making are:

1.

The right to know—access to accurate and useful information held by authorities means that any person can access any publicly held information they need to participate in decision-making and understand the impacts of those decisions, including who will profit.

2.

The right to participate—have a genuine say in decision-making means communities need plenty of time to prepare and participate in decision-making, that participation can't be restricted to a select group of people, and that decision-makers must show how community views are taken into account.

3.

The right to challenge—access to justice for environmental decision-making means that individuals and communities have specific legal rights to get decisions reviewed or remade if the decisions have been made illegally, incorrectly or unreasonably.



These environmental community rights must function as a system, not as a series of disconnected rights. Each right interacts with and supports the function of the others.

For example, if you're a community member who's passionate about koalas, it's not possible to make meaningful, informed comment on a project that may destroy koala habitat unless you:

1. Understand the current population trends of koalas (e.g. are they dying out and becoming more endangered? Is their population increasing?);
2. Understand the impacts the project will have and how significant they are (e.g. will it wipe out all potential koala habitat in an area, or a tiny fragment of it?); and
3. Know that consultation is happening, be allowed (and supported) to participate, have enough time and resources to do so, and be able access all the information needed to do so.

And of course, to make consultation genuine, and to ensure integrity in decision-making, it is crucial that you can see that decision-makers have actually listened to and taken your views into account, and have access to affordable, equitable justice if decisions are made illegally or if decision-makers make bad faith decisions, or decisions that will harm communities or the environment.

Thus it's important both nationally and within each jurisdiction that each right is working well, and that best practice participation is an important component of the system.

Who do we mean when we say "community"?

Communities come in all shapes and sizes. A community is basically a social unit with something in common. Communities can be geographically-based, like a local suburb, town, state or country. They can be shaped around culture, religion, lifestyle, economic or citizen status, or employment. Communities can also be shaped around personal attributes such as gender, sexuality, ability, age, or values.

Each and every one of us is a member of at least one community—but likely we are members of many communities all at once.



Photo: Brent Lukey

Recognising First Nations' rights and aspirations

Over thousands of generations, hundreds of culturally diverse First Nations communities have lived on this continent we call Australia, living as one with cultural landscapes and applying sensitive and sustainable management and cultural practices. First Nations communities continue to remain strongly connected with their living culture, despite western legal and political systems continuing to deny and disrespect their cultural authority and human rights.

First Nations people have unique consent-based rights that should be recognised in Australian law and practice, as set out by the internationally recognised United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[9] The UNDRIP establishes a universal framework of minimum standards for the survival, dignity and well-being of the First Nations peoples of the world, and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of First Nations peoples.

The UNDRIP was the first statement that globally recognised the rights of First Nations people to self-determination and justice based on Free, Prior and Informed Consent (FPIC). These consent-based rights reflect the unique risks to First Nations people and culture in the context of dispossession, colonisation and injustice.

The destruction of Juukan Gorge sacred sites highlights the systematic failure to embed consent rights, as listed in the UNDRIP, in relevant Commonwealth and state laws and practice, even though Australia signed the UNDRIP more than a decade ago in 2009. Furthermore, despite an inquiry at the Commonwealth[10] level and a review in Western Australia,[11] legislative reform has failed to recognise the rights of First Nations as required by the UNDRIP.

Current Free Prior and Informed Consent (CFPIC)

Due to a lack of national standards of consultation for First Nations, there has been growing concern over the failure to ensure consent is adopted and involves a continuous, ongoing and contemporary process of engagement.

This concept is known as Current FPIC (CFPIC), and is a principle put forward by the Aboriginal Heritage Action Alliance, and supported by Wilderness Society as requiring implementation as a minimum standard in the implementation of the UNDRIP.

This principle emphasises that First Nations peoples have the right to full and effective participation at every stage of any action that may affect them directly or indirectly, that information on the likely impact of any activities must be disclosed in advance, and that the time requirements for these processes are respected and led by First Nations people.

CFPIC processes with First Nations people must be culturally appropriate–and what is culturally appropriate must be defined by the people themselves. This can mean that translations of proposals and reports are made available in local languages, translators are present for meetings where decisions are being sought, and engagement timeframes are built on and with regard to First Nations' people.

This ensures that planned activities or actions respond to First Nations peoples' concerns and interests—and, thereby, that the development process is self-determined.

In the context of post-election commitments by the Albanese government to deliver the Uluru Statement from the Heart in full[12], we note expected implications for implementation of the UNDRIP.

The UNDRIP principles need to be embedded in the laws and practices of all jurisdictions of Australian governments, corporations and organisations.



Mirning Senior Elder Uncle Bunna Lawrie and the local community oppose oil drilling in the Great Australian Bight
Photo: *Wilderness Society*

Why is it important that communities have rights in environmental decision-making?

It is vital communities have the right to protect and manage the environment through meaningful participation in decisions at all levels because:

1.

Australia's current system of environmental decision-making is not working for communities or the environment.

Despite a decade of research showing that Australian communities care about the places where they live and want to protect the country's natural assets[13], there is an increasing trend of poor outcomes for nature and people, resulting from inadequate and disingenuous consultation by governments.

Australia's current system of environmental decision-making is driving a wildlife extinction crisis and allowing environmental degradation of the ecosystems and landscapes that we depend on.[14]

The continent's incredible landscapes and globally important species are being destroyed at an astounding rate. As of 2012, 50% of Australia's forest and bushland had been destroyed in just 200 years of colonisation.[15] Australia is first for mammal extinctions in the world (far ahead of Brazil)[16], and second in the world for biodiversity loss in general (and just behind Indonesia).[17]

While communities are increasingly interested in environmental decisions, they "do not feel heard" in decision-making processes.[18]

2.

Decisions made with, and by, communities result in better outcomes for communities and the environment

Decisions made by governments and corporations that affect the environment are often focused on a short-term goal or single project proposal, without considering the cumulative impacts of multiple proposals through time.

Meaningful community participation allows communities, governments and corporations to understand and solve issues that risk affecting environmental and community health and wellbeing. It can also shed light on acceptance of a project or policy, and allows communities to identify risks (or levels of risk) that they are fundamentally unwilling to accept. Proponents and governments need to understand and accommodate the community's stance, otherwise decisions will be highly contested, create conflict and may ultimately be less durable.[19]

3.

Meaningful community participation is fundamental to effective, open and accountable government.

Public policies, including laws and regulations relating to the environment, shape this country. The value of genuine community participation in shaping government policies and decisions is widely acknowledged by governments around Australia[20]—although, as this report shows, governments largely pay lip service to this principle when it comes to making decisions about the environment. Decades of research, theory and community experience[21] have highlighted the value of meaningful community participation in decision-making, including that it:

- encourages trust and transparency between stakeholders when they can see how and why decisions are made, and can see that their needs are being considered in the process;
- gives governments and proponents early notice of social concerns and issues, putting them in a better position to deal with them proactively;
- improves the accountability of decision-makers, and reduces the need for adversarial action by communities whose views have not been heard; and
- provides an opportunity for decision-makers to understand and take into account First Nations Traditional Ecological Knowledge and other sources of information and expertise.



Photo: Warick Gow

The state of environmental community rights in Australia

After decades of campaigning to protect Australia's globally significant places and unique biodiversity, the Wilderness Society has identified a concerning trend: Australia is lagging dangerously behind when it comes to properly providing for community rights in environmental decision-making.

Across the country, there is an acknowledged lack of trust in how decisions are made—and who is making them. Professor Samuel's independent review of the *EPBC Act* in 2020 made this explicit:

> **"It is easy to see how Australia's environmental decision-making system leads to public perception that the environment is losing out to other considerations due to proponents having undue influence on decision-makers."[22]**

Over half of Australian voters believe that big business has the greatest influence over the Prime Minister and federal government ministers regarding their decisions made about the environment (51%).[23]

This lack of trust is informed by mounting evidence that most Australian governments stack the deck in the majority of these decision-making processes to favour business and vested interests, making it hard for communities to have a say. For example, almost all projects (over 99%) assessed by the federal government under Australia's national environment law get allowed or approved[24], with just 2% knocked back later by the courts—usually as a result of cases initiated by the community.

Additionally, Australian governments have different, and often contradictory, approaches to community consultation, making it hard—if not impossible—for communities to meaningfully input into government and corporate decisions.[25]

This imbalanced and inconsistent approach to community participation among Australian governments disincentivises, and often excludes, communities from decision-making processes (as case studies in this report demonstrate). This is one of the factors behind many projects with very little community support—or indeed even overwhelming community opposition—being waived through by governments across the country.

International approaches to environmental community rights

The human right to a healthy environment was first recognised internationally in the 1972 UN Stockholm Convention. Since then, over 183 nations, and the UN, have recognised the right to a healthy environment in various forms such as through their constitutions, regional agreements, other national laws or court decisions.[26]

The three universal environmental community rights were first globally recognised in the United Nations Rio Declaration for Environment and Development in 1992, under Principle 10:

"Environmental 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."[27]

Globally these rights have been ratified in a variety of nations across the globe through conventions and agreements, which recognise these community rights.

The European Commission brought the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention[28]) into effect 20 years ago. The Aarhus Convention set a baseline for international best practice in recognition of community rights related to environmental decision-making.

The Escazú Agreement[29], which came into effect early in 2021 after emerging from the 2012 United Nations Conference on Sustainable Development (Rio+20), is technically the *Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean*. It is the first environmental agreement adopted across Latin America and the Caribbean. It is also the first legally binding instrument in the world to include provisions on environmental human rights defenders and is being coordinated by the Economic Commission for Latin America and the Caribbean.



Case study:

Victoria's Department of Environment, Land, Water and Planning

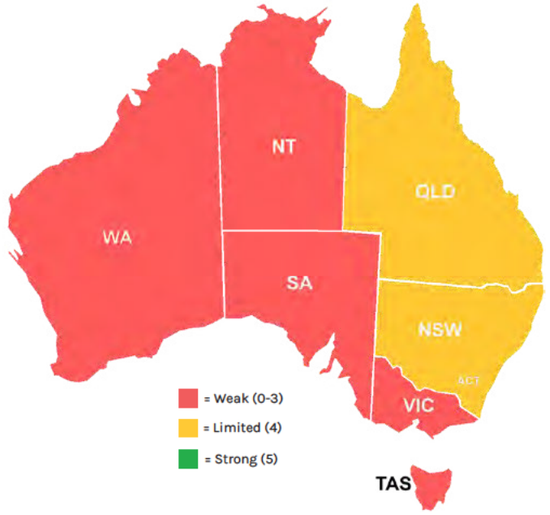
A 2018 review[30] found Victoria's Department of Environment, Land, Water and Planning (DELWP) was neither an effective or respected logging regulator. The review was initiated in the context of community concern about how the department responds to the contest between different forest values and how timber harvesting is regulated. Substantial community effort and expense by citizen scientists and regional environment groups to monitor logging operations was recognised to be a symptom of a lack of confidence in the department and its weaknesses in terms of transparency and accountability. The Victorian government, in response to the review, made a number of changes to logging regulation, including the establishment of the Office of the Conservation Regulator. However, the community continues to conduct its own monitoring efforts and reports of threatened species detections remain high.[31]

2022 Environmental Community Rights Scorecard

In partnership with the Environmental Defenders Office (EDO), the Wilderness Society has undertaken a nation-wide assessment of whether and how community views are taken into account by Australian governments. Review the EDO's full legal jurisdictional analysis here.

We identified 16 criteria against which to assess how well Australia's key environmental legislation at both state and federal levels provides for—or fails to provide for—community rights in relation to environmental decision-making.

The 2022 Scorecard identifies that all over Australia, our governments, environmental laws, regulations and policies are failing on environmental community rights, with this report demonstrating the extent to which rights are upheld is weak to limited across the nation.



	Access to information						Public participation				Access to justice					
	Presumption in favour of access	'Any person' right	Time limits	Refusals	Continuous disclosure of risk	Transparency	Prior information	Timeframes for decision-making	Open standing to participate	Community views taken into account	Broad standing	Merits review	Judicial review	Third-party enforcement rights	Access to information appeals	Access to justice
NSW																
ACT																
Cth																
QLD																
VIC																
SA																
TAS																
WA																
NT																

= Weak (0-3) = Limited (4) = Strong (5)

The Scorecard also identifies where the rights of communities are being overlooked and highlights the key barriers every individual or community, big or small, faces when seeking environmental justice for the places they love in this unique and biodiverse continent.

Key findings

1.

There is a continental and systemic problem with upholding community rights in relation to environmental decision-making.

No government in Australia has comprehensively enshrined strong community rights in environmental decision-making into legislation and practice.

Each government has particular failings around a combination of key rights that are unique to that jurisdiction. Some failings are across the board. Yet there are opportunities to improve specific rights within each jurisdiction—across state, territory and commonwealth levels.

Even relatively high-scoring governments, like the Australian Capital Territory and New South Wales, have major gaps where they are failing to provide for key rights such as basic access to information or correspondence, and the continuous disclosure of risk.

Some governments—such as in the Northern Territory and Western Australia—were failing across the board to embed comprehensive environmental community rights in practice and in law.

Scores vary highly within and between jurisdictions. For example, both Western Australia and New South Wales scored high on the right of any person to ask for access to information, without them having to prove or state a reason for requesting the information. However, New South Wales then scored extremely low in terms of actually ensuring that the person gets that information, while Western Australia scored high in this criteria.

In contrast, Western Australia does not have a requirement for the regular preparation, publication and dissemination of a report on the state of the environment, which is vital to ensure transparency—where New South Wales does prepare such a report.

Also, there are some rights that almost all Australian governments fail to provide. For example, there is an almost universal failure across all states, territories and the Commonwealth to consistently show how community views are taken into account, to ensure communities are kept up-to-date on any risks posed by projects, and to guarantee fair, fulsome and timely access to justice to review the merits of important decisions.

Unfortunately, the only community right that all governments practise well is letting community members know in writing when their request to access information is being refused.

2.

There is no national approach to environmental community rights. Each jurisdiction provides for the rights to different degrees, yet overall the extent to which they are upheld is weak to limited.

While every state has laws and policies relating to the three environmental community rights, no jurisdiction, either federal or state, has a consistent or comprehensive approach to environmental community rights. See Appendix 1: a table showing examples of environmental community rights failings.

There have been some ad hoc attempts made to establish public participation standards by specific governments. For example, the National Capital Authority adopted an international standard for public participation, and a key component of the new South Australian planning system is a mandatory Community Engagement Charter, but this only applies to policy development—not to project assessment or approvals. New South Wales also has a Charter for Public Participation established under recent planning reforms.[32]

The lack of a national approach to environmental community rights is important, as individuals and communities are often having to interact with local, state and national legislation and regulation, which affect environmental values of local, regional, national and international importance. Professor Samuel's independent review of the *EPBC Act* found that inconsistent community rights regimes and "unclear [state and federal] responsibilities mean that the community is less able to hold governments to account".[33] Communities mistrust decisions because they have limited access to information and a lack of opportunity to substantively engage in environmental decision-making processes.[34]

The independent review of the *EPBC Act* recommended that the federal government "improve community participation in decision-making processes, including through incorporation in the National Environmental Standards, and the transparency of both the information used and the reasons for decisions".[35] To restore trust and integrity in Australia's environment law, the federal government's promised *EPBC Act* reform must enshrine and activate a national approach to the three environmental community rights, as part of a package of bold reforms.

3.

Across the continent, there is inadequate transparency and accountability in environmental decision-making.

This analysis of access to information rights showed that this area had the highest gap between what was written into legislation and regulation, and the experience of communities trying to exercise those rights to access vital information about the environment and environmental decisions.

Essentially, access to information laws may look quite good on paper, but the implementation of the laws can be problematic.

One-third of government jurisdictions scored do not regularly prepare and publish a State of the Environment report to provide communities with up-to-date information on the quality of, pressures on and risks to the environment. A 2019 OECD Environmental Performance Review found that the lack of nationally consistent environmental information was a key failing of Australia's system.[36]

While almost all jurisdictions scored well for allowing anyone the right to apply to access information about decisions that have been made via freedom of information requests, most scored poorly for actually providing environmental information held by public authorities when requested by members of the public.

Timeframes for accessing information can also be extremely drawn out. While there are statutory timeframes for processing access to information requests, extension requests by agencies are common across all jurisdictions and often unreasonable and made at the last minute. South Australia and Tasmania consistently perform the poorest when it comes to providing information within statutory timeframes, although it should also be noted that Queensland seemingly does not publish information on this at all, which raises significant questions about its performance in this area.[37]

Access to rights to challenge or seek review of public decisions and ensure breaches are enforced also scored relatively poorly across jurisdictions. While most (but not all) states provided access to judicial review, access to merits review is very limited or non-existent for community members.

This is problematic, as judicial and merits reviews should operate in concert to ensure communities can hold governments to account on whether legal processes are followed (judicial review) as well as if decisions are meeting the intent of the legislation (merits review).

Professor Samuel's independent review of the *EPBC Act* recommends that the Act should be amended to provide for limited merits review for development approval decisions. This would help to "ensure decisions are meeting the intent of the legislation, not simply following processes".[38]

Finally, most jurisdictions limit third-party enforcement rights, which would otherwise enable communities to challenge acts and omissions by private persons and public authorities that breach laws relating to the environment. This is a key failure because, as Professor Samuel's Review noted, "third-party enforcement rights become more important in the absence of effective and transparent decision-making".[39]



Photo: Warick Gow

4.

The inconsistent and patchy application of environmental community rights ensures decision-making is weighted in favour of proponents and vested interests

The inconsistent approach to community participation around the country preferences large corporations and vested interests who have time, money and resources to hire people to be across all federal, state and local decision-making processes—something not possible for the ordinary Australian.

We also know from experience that governments are increasingly moving to forms of consultation that disincentivise community input in favour of "expert" evidence—relying on long, complicated webforms and requiring that public submissions are increasingly confined to highly technical input.

For decades, communities have been shut out of decision-making, with limited access to information, and have been unable to see how their views are taken into account, while decisions are overwhelmingly in favour of development and industry interests.

This limits the ability of communities to raise concerns about the potential social and environmental implications of a project or policy, and implies that community views and values are of lesser value to governments in decision-making.

This matters because the community's views and concerns speak to values that decision-makers should take into account. A technical assessment or technical input might help a decision-maker to understand a flaw in a development proponent's environmental assessment documentation, for example, but only an understanding and appreciation of community views and values can indicate to a decision-maker whether, for example, the risks associated with a proposed development are inherently higher than the community is able and willing to accept. It is, after all, most often the community and First Nations people, rather than industries, that bear the risks, costs and impacts of poor decisions.

It is also our view that governments making environmental decisions on behalf of the community should be intently concerned about whether the decisions they are making are consistent with the current and future aspirations of the community being impacted by them.

Access to and timeframes for public consultation vary greatly and, as noted, jurisdictions generally received low scores for providing environmental information held by a public authority when requested by any member of the public, and timeframes for communities accessing information can be extremely drawn out.

In contrast, there is a significant presumption in favour of vested interests when it comes to notifying the public of environmental risks, including information about imminent threats to human health or the environment (such an oil or toxic waste spill).

In practice, we often see that governments make decisions about a project before any consultation is undertaken, rendering consultation a tokenistic process at best. This often occurs where a project is designated as state or nationally "significant"—such as Santos' mega-gas project in the Pilliga in New South Wales—which designates that it will be fast-tracked through environmental assessment. In Tasmania, any person can comment on the assessment documents for declared "major projects"—however the Development Assessment Panel makes an initial assessment of a major project before the public has had a chance to comment on it, and there is no right for communities to appeal against a major project approval.

Finally, the degree to which governments are required to show how community views are taken into account varies greatly. In some circumstances there are requirements to publish summaries of submissions received, and some consultation processes do include a response from the decision-maker summarising key themes in the feedback received or any action taken in response.

What is needed now?

Australian communities should be confident in a system that will give them a fair say in the decisions that impact their lives and environment, and have safe and equitable access to meaningfully participate in government and corporate environmental decision-making.

Governments and corporations should seek and act upon the community's views because they genuinely appreciate the community's fundamental rights, responsibilities and interests, and they know that community participation leads to better, more durable decisions.

First Nations rights derived from the UNDRIP based on the principle of current, free, prior and informed consent, should be embedded across jurisdiction decision-making processes.

The solution: a national approach to community rights in environmental decision-making

Despite the influence vested interests have on decision-makers, passionate, motivated and organised communities can and do hold those with power and money to account. A massive dam wasn't built on the Franklin River in Tasmania, plans for a giant gas hub were abandoned at Walmadan (James Price Point), and the Great Australian Bight remains free from oil and gas extraction—thanks to Australian communities.

But it shouldn't take communities putting their lives on hold—dedicating years to organising, researching and protesting—to secure a healthy environment. Communities shouldn't be left to fight rearguard actions to stop the places they love from being destroyed, their culture trashed or their air and water polluted.

To ensure communities have genuine and meaningful input into decisions that affect them and the environment, **the Wilderness Society is calling for governments across Australia to enshrine and activate community rights in environmental decision-making.**

The three universal environmental community rights need to be consistently embedded and implemented in Australia's laws and policies at all levels of government to ensure transparency, accountability and public participation is integrated in government and corporate decision-making about the environment.

In assessing the performance of jurisdictions across the continent, this report demonstrates that the extent to which environmental community rights are upheld is weak to limited in every state and territory in Australia—as well as at the Commonwealth level.

While there must be improvements across all government and corporate decision-making processes Australia-wide, there is one particularly critical opportunity for change right now..

The federal government is currently undertaking a process to reform Australia's environment laws. It is essential that the federal government restores the community's trust in the laws by enshrining the three interdependent environmental community rights—the right to know, the right to participate and the right to challenge—as part of a package of comprehensive reforms.

If all communities across Australia are empowered with a nationally-consistent standard of strong environmental community rights, and are able to have a genuine say in decision-making, we'll see better outcomes for the environment and for communities.



Photo: Luke Ward

Appendix 1. Examples of environmental community rights concerns in each jurisdiction

Government Jurisdiction	Environmental Community rights: examples of poor performance
Cth	• The timeframes for decision-making: **Short timeframes for public consultation on matters of national environmental significance.** Score = 2/5 • Merits review: There is **no possibility of merits review** of a decision made by the Minister in relation to the assessment and approval of proposed development actions under the *EPBC Act*. Score = 1/5
NSW	• **In some cases, NSW laws explicitly reduce community rights. For example, forestry laws contain privative clauses to prevent third party forestry cases being brought by the community.** Most major projects, including fossil fuel developments, have had objector appeals to the Land & Environment Court removed by way of an Independent Planning Commission hearing. (unscored) • Continuous disclosure of risk: **There is inadequate disclosure generally of the risks posed by climate change to both environmental and human health in NSW,** and steps are not being taken to prevent or mitigate harm arising from climate change. Score = 2/5
ACT	• How community views are taken into account: Decision-makers who consider development applications are required to consider community views but are **not required to demonstrate how community views are considered**. Score = 2/5 • Continuous disclosure of risk: There is **no provision requiring the EPA to notify the public of environmental risks arising from activities** that are subject to environmental authorisations or agreements. Score = 2/5
QLD	• Presumption in favour of access/exemptions: There are many exemptions in the *Right to Information Act* (Qld). **The processes are lengthy, stretching at times to years, to the point of disabling access to information due to lack of timeliness**. Score = 2/5 • Judicial review: Standing for judicial review is limited. Score = 2/5
VIC	• Continuous disclosure of risk: **There are powers for the EPA to require someone to clean up/prevent pollution in an emergency situation but no requirement to inform the public**. Score = 1/5 • Presumption in favour of access/exemptions: Freedom of information laws are relatively good but implementation can be problematic. **Reliance on commercial sensitivity/ trade secret exemptions, or other exemptions occurs commonly, such as for pollution information**. Score = 2/5 • Time limits: **The EPA frequently—almost always—asks for extensions for information access requests**. Extension requests by agencies are common, often unreasonable and at the last minute. Score = 1/5
Tas	• How community views are taken into account: Planning authorities will only take into account a representation to the extent it is relevant to a consideration under a planning scheme. For **major projects, the Development Assessment Panel makes an initial assessment of a major project before the public has had a chance to comment on it**. Score = 2/5 • Presumption in favour of access/exemptions: In 2020, The Tasmanian Ombudsman found that **Tasmania had the worst rate of refusal to provide access to information of any jurisdiction in the country**. Tasmania is also the second-worst state when it comes to provision of information with statutory timeframes. Score = 2/5 • Transparency: Legislation requires the Tasmanian Planning Commission to **publish a State of the Environment report every five years, however the last SOE report was published in 2009**. Score = 1/5

Government Jurisdiction	Environmental Community rights: examples of poor performance
SA	• Merits review: The only third-party merits review rights apply to proposals classified as restricted under the PDI Act. **An appellant must lodge an appeal within 15 days.** Score = 1/5 • Continuous disclosure of risk: **There are no legal requirements to disclose environmental risk** either while a development is being considered for approval or post development if a risk eventuates. Score = 1/5 • How community views are taken into account: **There is no explicit requirement that community views be considered in planning decision-making. No Statement of Reasons is required for any decisions.** Score = 2/5
NT	• Presumption in favour of access/exemptions: Public sector organisations can **extend the time for decisions on information requests indefinitely,** despite there being a requirement for decisions within 30 days. **Applications take between 12-18 months to process on average.** Score = 1/5 • Transparency: **There is no State of the Environment report in the NT.** Very little is known about the quality of the natural environment and insufficient assessment has been carried out to understand the pressures on the environment. Score = 1/5 • Merits review: **There are no third-party merits review rights provided for in the *Environmental Protection Act*.** The Scientific Inquiry into hydraulic fracturing in the NT recommended the Petroleum Act/PER should be amended to provide for third party merits review rights, but this has not occurred. Score = 0/5
WA	• How community views are taken into account: **The *Aboriginal Heritage Act* (1972) does not provide the public with opportunities to make submissions or comments. The *Mining Act*, *Mining Regulations Act* and *PAGER Act* do not allow public submissions or comments.** Score = 2/5 • Continuous disclosure of risk: **There is no statutory obligation for WA government agencies to disclose environmental risks** from activities being considered for approval or post approval. Score = 0/5 • Transparency: There is no statutory requirement for a State of the Environment (SoE) report to be prepared under WA laws. **Only three SoEs have ever been published in Western Australia, most recently in 2007.** These were prepared by the EPA, not independent experts. Score = 0/5 • Third party enforcement rights: **WA laws do not provide for third party enforcement rights.** In particular, there are no provisions for third parties to seek injunctions for contraventions of WA laws. Score = 0/5

Appendix 2.
2022 Environmental Community Rights Scorecard (complete)

Community Right	Cth	Tas	ACT	QLD	WA	NT	NSW	SA	VIC	NOP	RFA
Access to information: The right of everyone to receive environmental information that is held by public authorities											
Presumption in favour of access: Any environmental information held by a public authority must be provided when requested by any member of the public, unless it can be shown to fall within a finite list of exempt categories. **Exemptions:** Public authorities may withhold information where disclosure would adversely affect various interests, e.g. national defence, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy. To prevent abuse of the exemptions by over-secretive public authorities, any exemptions are to be interpreted in a restrictive way, and in all cases may only be applied when the public interest served by disclosure has been taken into account.	3/5	2/5	3/5	2/5	4/5	1/5	2/5	2/5	2/5	3/5	3/5
"Any person" right: The right of access to information extends to any person, without them having to prove or state an interest or a reason for requesting the information.	4/5	4/5	4/5	3/5	5/5	5/5	5/5	4/5	5/5	4/5	4/5
Time limits: The information (or decision to refuse access) must be provided as soon as possible, and at the latest within one month after submission of a request for information. This period may be extended by a further month where the volume and complexity of the information justifies this, however the requester must be notified of any such extension and the reasons for it.	3/5	2/5	4/5	2/5	4/5	1/5	3/5	2/5	1/5	3/5	3/5
Refusals: Refusals, and the reasons for them, are to be issued in writing where requested.	5/5	4/5	5/5	5/5	5/5	5/5	4/5	4/5	5/5	5/5	5/5
Continuous disclosure of risk: Authorities must publicly disclose relevant information regarding environmental risks arising from activities it is responsible for managing and approving. This includes provisions to require authorities to immediately provide the public with all information in their possession which could enable the public to take measures to prevent or mitigate harm arising from an imminent threat to human health or the environment.	3/5	1/5	2/5	2.5/5	0/5	2.5/5	2/5	1/5	1/5	2/5	2/5
Transparency: There is a requirement for regular preparation, publication and dissemination of a report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.	4/5	1/5	4/5	4/5	0/5	1/5	4/5	4/5	4/5	4/5	3/5

Community Right	Cth	Tas	ACT	QLD	WA	NT	NSW	SA	VIC	NOP	RFA
Public participation: The right to participate in environmental decision-making											
Prior information: The community is informed early in an environmental decision-making process, and in an adequate, timely and effective manner through-out that process. Authorities must publicly disclose all documents on which environmental decisions will be based, allowing sufficient exposure time for the public to prepare and participate effectively during environmental decision-making.	3/5	3/5	3/5	3/5	3/5	2/5	4/5	3/5	3/5	2/5	2/5
Timeframes for decision-making: Public participation procedures include reasonable time-frames to allow the public to access relevant information, prepare and participate effectively during environmental decision-making.	2/5	3/5	4/5	4/5	3/5	2/5	3/5	2/5	2/5	2/5	2/5
Open standing to participate: Any person has the right to participate in government decision-making, regardless of locality or organisational-affiliation (or lack thereof).	4/5	3/5	4/5	3/5	3/5	3/5	3/5	4/5	3/5	3/5	4/5
How community views taken into account: The community's views have meaningful weight in the decision-making process and the decision-making authority must demonstrate how community views have been considered and taken into account during that decision-making process, including via a publicly available statement of reasons. Statements of reasons for decisions should also be disclosed as a matter of course within no less than 30 days of a decision being taken.	3/5	2/5	2/5	3/5	2/5	3/5	3/5	2/5	3/5	2/5	2.5/5

Community Right	Cth	Tas	ACT	QLD	WA	NT	NSW	SA	VIC	NOP	RFA
Access to justice: The right to challenge or seek review of public decisions and ensure breaches are enforced											
Broad standing: There is sufficiently broad standing (for any person with a demonstrable interest or special interest–specifically including non-legal or financial interests) to seek a review of government decisions, or enforce a breach, or anticipated breach, of environment law through third-party enforcement provisions (see below).	4/5	3/5	3/5	3/5	2/5	2/5	4/5	2/5	2/5	2/5	2.5/5
Merits review: There is broad standing for persons to seek a review of the substance (merits) of government decisions.	1/5	3/5	2/5	3/5	1/5	0/5	3/5	1/5	3/5	0/5	0/5
Judicial review: There is broad standing for persons to seek a review of government decisions in terms of whether that decision was taken in line with legal requirements.	3/5	2/5	3/5	2/5	1/5	2/5	4/5	4/5	3/5	3/5	3/5
Third-party enforcement rights: Any person has access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which breach laws relating to the environment.	4/5	3/5	3/5	3/5	0/5	2/5	4/5	2/5	2/5	1/5	1.5/5
Access to information appeals: A person whose request for information has not been dealt with to their satisfaction must be provided with access to a review procedure before a court of law or another independent and impartial body established by law (such as an Ombudsperson). These appeals should be free of charge or inexpensive in relation to the average wage in Australia.	5/5	2/5	5/5	4/5	4/5	3/5	4/5	4/5	3/5	3/5	4/5
Access to justice: The procedures referred to above must be "fair, equitable, timely and not prohibitively expensive", including limitations on upfront costs for community members exercising legal rights and the use of public interest cost orders in those cases.	2/5	2/5	3/5	2.5/5	1/5	2/5	3/5	1/5	3/5	2/5	2/5

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