BCA Business Council of Australia

Environment Protection Reform

Standard for Community Engagement

July 2026

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1. Introduction

The Business Council of Australia's (BCA) membership includes more than 120 chief executive officers of Australia's most impactful companies. We have been engaged with government and stakeholders on the reform of the Environment Protection and Biodiversity Conservation (EPBC) Act since prior to the Samuel Review in 2020. Our membership includes companies directly engaged in EPBC Act assessments and approvals, including in the mining and resources, energy, property, infrastructure, and legal sectors. More broadly, our members also have a strong interest in achieving positive environmental outcomes for the nation, including through policy settings that are durable, credible, and capable of maintaining community confidence.

To deliver projects that live up to the expectations of ecologically sustainable developments, project proponents must adequately consider local expertise and knowledge, informing environmental impacts and protection needs, as well as the economic and social implications of a project. To that end, there must be robust and high-quality consultation, which genuinely engages with the community, focused on a place-based approach that recognises and considers local viewpoints.

We appreciate the opportunity to provide feedback on the draft National Environmental Standard for Community Engagement. It is worth noting however that this Standard largely does not incorporate specific engagement approaches tailored to Australia's indigenous groups. First Nation's rights holders bring unique cultural, environmental, and economic interests which will need to be considered in project development and decision-making. The BCA understands that this has not been specifically included in this Standard given a separate First Nations Engagement Standard is being developed. Ideally, both of these Standards would have been considered together as part of the consultation.

2. Key recommendations

Recommendation 1.

There should be clarity on which decisions or community consultations the Community Engagement Standard applies, so that proponents and decision makers understand the requirements they must meet. Where the Standard does not apply, but consultation is still expected or required, it need to be clear that this is the case, and what the consultation expectations are in those circumstances.

Recommendation 2.

Recognise state and territory consultation processes for the same project, and work with states and territories to ensure there are not conflicting requirements.

Recommendation 3.

Provide guidance on identifying affected persons, including details around geographic proximity expectations (including appropriate downstream and cumulative impacts). This will need to tie into requirements in the First Nations Engagement Standard, given the need to engage fulsomely with groups that can speak on impacts to Country and native title.

Recommendation 4.

Alignment of the Community Engagement Standard with the Data and Information Standard and the First Nations Engagement Standard is essential.

Recommendation 5.

Recognise that community engagement can be used to influence not only project design, but also things like mitigation, approval conditions, assessment considerations, monitoring and adaptive management, and design of how economic opportunities are distributed, as well as input local knowledge. Reframe requirements around 'level of influence' of the public to better express what is being sought, and to recognise that input that will lead to change in design is not always practical (which importantly, does not mean that community consultation does not inform other aspects of the decision-making process).

Recommendation 6.

Provide a mechanism for proponents to confirm the 'reasonable' length of a consultation program upfront. Clarify that the minimum 10 business days only applies to the initial consultation period, and is not reset by additional consultation further into the process. Guidance for proponents should recognise that consultation timeframes should be proportionate to project complexity, likely impacts, accessibility needs, and also consider timeframe requirements that may be determined under the First Nations Engagement Standard.

Recommendation 7.

Update the text around regular assessment of the engagement plan to address specifically what is being required of the proponent (and what a decision maker is assessing). Provide guidance around when changes to engagement plans are expected, including when to consider stakeholder requests for changes.

Recommendation 8.

Proposal documentation should be accurate, balanced, accessible, and sufficient to support informed participation. However, there is a need to reconsider the language in the Standard around requirements for proposal documentation that asks for subjective judgement to be made. Additionally, the requirement to provide monitoring results during the consultation process should be amended to recognise that, by their nature, these may not be available until after a project is underway, and instead providing the proposed monitoring plan may, at the pre-approval stage, be a more appropriate.

Recommendation 9.

Update the response requirement in Principle 2 to address potential misuse of the Standard. This includes clarifying that the obligation to respond promptly to community queries does not require proponents to respond individually to repetitive, excessive, abusive, deliberately vexatious or otherwise unreasonable communications, provided proponents have appropriate processes in place to address relevant issues and support meaningful community engagement.

Recommendation 10.

Clarify the consultation summary report requirements and confirm that the report should be published to promote transparency and demonstrate how community feedback has been considered. The intersection between this reporting requirement and any in the First Nation's Standard should also be considered.

Recommendation 11.

The privacy requirements should be appropriately caveated to recognise that the proponent may not have full control of information and data provided to it, particularly once submitted to government processes.

Recommendation 12.

The ability for a stakeholder to withdraw data or information after its provision at any time undermines the ability for a proponent to rely on what has been provided. Clarify the right to withdraw so that individuals may withdraw from future engagement and request limits on future use of personal information, while recognising legitimate reliance on information already provided where it has informed statutory processes.

Recommendation 13.

Clarify informed consent requirements so participants understand how information will be used, disclosed and relied upon. Where a participant does not provide consent to a particular use of information, proponents should seek to resolve concerns, and offer alternative engagement pathways where reasonable. Ultimately, the requirement for establishing informed consent should be matched with the acknowledgement that it is reasonable for a proponent to no longer engage with a stakeholder that refuses to provide that consent.

Recommendation 14.

Reconsider the requirement to avoid duplicating data, noting that this should be limited to legitimate purposes, and subject to appropriate safeguards.

Recommendation 15.

Guidance on reasonable requirements for the translation, interpretation, and culturally appropriate communication of materials into other languages should be provided to clarify what is expected of proponents.

Recommendation 16.

The 'interested persons' referred to in Principle 4 should be replaced with 'affected persons' as defined at the start of the Standard.

Recommendation 17.

The plain English requirements should be appropriately caveated to recognise there may be unavoidable instances where technical language will need to be used, including in environment impact documentation for assessment. Plain English is a subjective term that a proponent should follow to their best endeavours and within reason, reflecting the context of the particular document.

Recommendation 18.

The expectations for who proponents must engage with should be drafted in a way that recognises it is not guaranteed that a proponent will be able to identify every stakeholder, and that some affected stakeholders may choose not to engage. Instead, reasonable efforts should be required to be made to identify and engage affected communities and under-represented groups.

Recommendation 19.

Guidance should be provided to support what is meant by 'areas with low internet connectivity', along with alternative engagement methods.

3. Improving clarity of the Standard

3.1 Clarity on application of the Standard

The Outcomes of the Standard state "input from the public is sought in relation to *decisions under the Act* [emphasis added] to facilitate improved outcomes for protected matters and support ecologically sustainable development". The principles however specifically refer to decisions to *approve an action*, the relationship between the Standard and the NOPSEMA framework, or to the making or varying of a bioregional plan.

There is a disconnect on the handling of other decisions under the Act that may require consultation, such as referral decisions (including whether an action is a controlled action and if so the level of assessment), and on modifications or other items that require consultation. There is also a question as to whether government consultations will also be held to the same Standard. This should be clarified so there is a clear understanding whether the Standard applies across these instances of community consultation, or whether the Standard solely applies to approval decisions. If it applies across this range of potential consultation, there needs to be consideration whether every requirement is fit for purpose for each consultation type. If it is only being required for some decisions (as it currently reads), then alternative guidance would be useful for those consultation processes that are not captured by the Standard.

Recommendation 1.

There should be clarity on which decisions or community consultations the Community Engagement Standard applies, so that proponents and decision makers understand the requirements they must meet. Where the Standard does not apply, but consultation is still expected or required, it need to be clear that this is the case, and what the consultation expectations are in those circumstances.

3.2 Recognition of state and territory processes

There should be explicit recognition that where state and territory processes for community engagement are also mandated, and these processes satisfy requirements under the Standard, that the engagement under those state processes can satisfy the Standard even if the project is not being assessed under a bilateral agreement. This may involve, for example, using council or state websites for publication of materials. The Federal Government should engage with the states and territories to create alignment where possible, and at minimum ensure there are not conflicting requirements (e.g. around privacy expectations).

Recommendation 2.

Recognise state and territory consultation processes for the same project, and work with states and territories to ensure there are not conflicting requirements.

3.3 Definitions

The BCA support the inclusion of 'affected persons' in the Standard, clearly linking to the geographic proximity of the project and its impacts. A place-based approach is appropriate to identifying the most relevant stakeholders for engagement and recognising local knowledge and experience that should be considered as part of the consultation process. Proponents would find guidance useful on the expectations around 'geographic proximity', and whether this is measured by distance or some other metric.

Recommendation 3.

Provide guidance on identifying affected persons, including details around geographic proximity expectations (including appropriate downstream and cumulative impacts). This will need to tie into requirements in the First Nations Engagement Standard, given the need to engage fulsomely with groups that can speak on impacts to Country and native title.

3.4 Alignment between Standards

The Community Engagement Standard will have to be considered and implemented in concert with both the Data and Information Standard, and the First Nations Engagement Standard. The alignment between these Standards will be essential to appropriately capturing and considering community input, including that of affected indigenous people and groups, and how the data and information received is treated.

Recommendation 4.

Alignment of the Community Engagement Standard with the Data and Information Standard and the First Nations Engagement Standard is essential.

4. Comments on each principle

4.1 Principle 1: Engagement is carefully planned, considerate, clear and adaptable

4.1.1 Level of influence

It is unclear what is intended or expected with regard to requirements to include "the level of influence the public can have on the proposal" (Sec 8, (1) (c)), and the "level of influence the public can have on the outcome" (Sec 8, (4) (i) (D)).

The framing appears to focus on engineering or scope changes, which may or may not be possible depending on the nature of the project. There is a wide variety of uses of the inputs from the public, for example, identifying impacts that may have not been adequately addressed, local knowledge that had not been previously identified, providing context that could inform specific conditions on an approval, or identifying management measures for protected species that might be implemented. This information can both be used to inform the proponent and the decision maker.

Communities are often not only interested in environmental impacts of projects but also how project-related economic opportunities and benefits are distributed. For example, input into where to focus employment opportunities to maximise participation of local or indigenous businesses, or employment and training opportunities for apprentices, as well as into multi-purpose infrastructure and facilities (such as temporary worker housing or new roads that will be made available for community use post-completion), that will provide an economic dividend for the broader community. Considering these issues as part of community engagement can support stronger long-term outcomes for communities and project proponents.

In this respect, the requirement for engagement to be planned with regard to 'level of influence', and the engagement plan having information on the 'level of influence' of the public is not always a meaningful inclusion.

If the intention is to require the proponent to explain areas of potential optionality that would benefit from public input (e.g. Option A impacts X, Option B impacts Y, for community input), to demonstrate to the public and decision makers where their input in design can be taken into consideration, this should be better explained. It should be clear that this is a requirement that is not always relevant (i.e. not all projects will reasonably have such optionality).

The BCA supports appropriate early engagement of the community, while ensuring that this is not a constraint in the approval process that prevents a project proceeding if early engagement had not been possible or appropriate to occur. Guidelines would be best placed to encourage and support early engagement. Its explicit inclusion in the Standard should be designed in a way that rewards proponents, without preventing a project's approval if (for an appropriate reason) a full early engagement approach is not undertaken prior to development of the project.

It is appropriate that proponents communicate back to the public (including through the consultation report submitted to the decision maker at the decision point) what changes have been made in response to community inputs, as well as what changes were considered and not implemented, and why that was the case. This meaningfully demonstrates the influence of the community in shaping the project and provides transparency around why community proposals could not be adopted.

Recommendation 5.

Recognise that community engagement can be used to influence not only project design, but also things like mitigation, approval conditions, assessment considerations, monitoring and adaptive management, and design of how economic opportunities are distributed, as well as input local knowledge. Reframe requirements around 'level of influence' of the public to better express what is being sought, and to recognise that input that will lead to change in design is not always practical (which importantly, does not mean that community consultation does not inform other aspects of the decision-making process).

4.1.2 Timeframe for consultation

There is a 10-business day minimum requirement for consultation under the Standard. This is appropriate as a minimum, recognising that this can and should be longer depending on the context of the project. Guidance on how this will be determined should be developed for proponents, and there should be a mechanism to ensure proponents are able to confidently proceed with their engagement plan and not face rejection on reasonable length of consultation at the end of the process.

It should also be made clear that the minimum requirement applies to the initial public consultation of the full proposal. For example, where additional consultation is called for when new information is introduced into the process, there should not be a requirement to reset the minimum period, as this could occur multiple times during a process.

Recommendation 6.

Provide a mechanism for proponents to confirm the 'reasonable' length of a consultation program upfront. Clarify that the minimum 10 business days only applies to the initial consultation period, and is not reset by additional consultation further into the process. Guidance for proponents should recognise that consultation timeframes should be proportionate to project complexity, likely impacts, accessibility needs, and also consider timeframe requirements that may be determined under the First Nations Engagement Standard.

4.1.3 Assessment of the engagement plan

The Principle calls for "regularly" assessing the progress and outcomes against the engagement plan (Sec 8 (4) (a) (iv)). This implies a scheduled assessment of the engagement plan (with an undefined frequency). Alternatively, if the requirement is that the plan is to be treated as a 'live document' which is updated as necessary based on stakeholder requirements, then this could be better expressed. There should be guidance to support proponents around scenarios where the decision maker will expect a plan to be updated, and scenarios where this might not be necessary or justified even when some stakeholders might be calling for extensions or changes in consultation. Giving proponents a basis for deciding whether their decision is appropriate from the decision makers' perspective would assist in consistency and certainty.

Recommendation 7.

Update the text around regular assessment of the engagement plan to address specifically what is being required of the proponent (and what a decision maker is assessing). Provide guidance around when changes to engagement plans are expected, including when to consider stakeholder requests for changes.

4.2 Principle 2: Transparent, accountable and responsive

4.2.1 Content of the public proposal documentation

The requirement to provide a document that has "accurate, objective and comprehensive information" (Sec 9 (4) (a) (i)) is clearly a baseline expectation; but at the same time is also a subjective test depending on the subject matter and the reader. For example, some stakeholders may object to the information provided with the view that it does not meet this threshold in their eyes. Unless this is appropriately testable if challenged, then it should be reconsidered whether this is appropriate framing. Guidance on appropriate levels of documentation should be provided.

There is also a requirement to provide "environmental performance and compliance outcomes, and monitoring results" (Sec 9 (4) (a) (ii) (B)). It is not clear how this requirement is expected to be satisfied prior to the approval process, given that presumably this is monitoring as the project progresses. This may be addressed by clarifying the requirement is to provide a program that demonstrates how outcomes and monitoring results will be publicly reported (which could then form the basis of conditioning).

Recommendation 8.

Proposal documentation should be accurate, balanced, accessible, and sufficient to support informed participation. However, there is a need to reconsider the language in the Standard around requirements for proposal documentation that asks for subjective judgement to be made. Additionally, the requirement to provide monitoring results during the consultation process should be amended to recognise that, by their nature, these may not be available until after a project is underway, and instead providing the proposed monitoring plan may, at the pre-approval stage, be a more appropriate.

4.2.2 Requirement for prompt response

The requirement to respond promptly to "any queries received from affected persons" (Sec 9 (4) (a) (iv) (B)) has the potential to be misused by vexatious persons. It should be appropriately caveated to ensure that these provisions cannot be used as a basis for failing the Standard's requirements where queries are inappropriate or excessive.

Where it is appropriate, reasonable reciprocal obligations on stakeholders in respect to their timely provision of any inputs should also be considered, so that processes are not inappropriately delayed. Delayed engagement by stakeholders, outside formal consultation windows in the Standard, should not delay assessment or impact assessment of a proponent's meeting of the Standard.

Together, this would assist in providing clarity for proponents in meeting the Standard, while maintaining meaningful and timely engagement with affected communities.

Recommendation 9.

Update the response requirement in Principle 2 to address potential misuse of the Standard. This includes clarifying that the obligation to respond promptly to community queries does not require proponents to respond individually to repetitive, excessive, abusive, deliberately vexatious or otherwise unreasonable communications, provided proponents have appropriate processes in place to address relevant issues and support meaningful community engagement.

4.2.3 Summary report

The requirement for the summary report (Sec 2 (4) (iii)) containing the details of inputs received and what was used to inform the project should be more clearly detailed. This could include:

- Summary of key themes throughout the engagement.
- How feedback influenced the project design, or what issues were considered and why there were not adopted.
- Any proposed mitigation measures to address concerns raised during the consultation, if they are appropriate.
- That the summary document will be made public, so that those that engaged in the process can understand how feedback was considered.

Recommendation 10.

Clarify the consultation summary report requirements and confirm that the report should be published to promote transparency and demonstrate how community feedback has been considered. The intersection between this reporting requirement and any in the First Nation's Standard should also be considered.

4.3 Principle 3: Engagement is ethical and protects privacy

4.3.1 Right to privacy

The protection of privacy (Sec 10 (1)) needs to be appropriately caveated to clarify that it is at the best endeavours of the proponent. This needs to consider, for example, that if consultation is undertaken though a government portal or website, then it is not wholly within control of the proponent, and that information provided and included in documentation to government (across all levels) is subject to freedom of information law requirements. There should also be guidance and instructions for proponents on how information provided on a confidential basis is to be dealt with in terms of the summary report, and provision of that information to government (assessors, the National EPA, and Environment Information Australia).

It is appropriate for proponents to clearly explain information-use, disclosure and confidentiality risks before information is provided. Appropriate and agreed protocols should be followed for First Nations cultural knowledge, heritage information, and Indigenous Cultural and Intellectual Property.

Recommendation 11.

The privacy requirements should be appropriately caveated to recognise that the proponent may not have full control of information and data provided to it, particularly once submitted to government processes.

4.3.2 Right to withdraw

The right to withdraw data and information provided at any time (Sec 10 (2) (a) (i) (D)) has the potential to undermine the ability for proponents to use data or information supplied by the public with any confidence. If that data or information is used as part of the process, then a withdrawal by the applicant of that data and information before decision making occurs could make the decisions based or justified by that information or data unviable or unjustifiable. This is clearly different from an individual withdrawing their *future* participation in further consultation. There needs to be a reasonable expectation that data and information provided to assist and inform a process is not suddenly able to be removed at any point after its provision.

For First Nations cultural knowledge, heritage information or information provided under culturally specific conditions, withdrawal, correction or restricted-use rights should be addressed through agreed protocols developed with the relevant rights holders.

Recommendation 12.

The ability for a stakeholder to withdraw data or information after its provision at any time undermines the ability for a proponent to rely on what has been provided. Clarify the right to withdraw so that individuals may withdraw from future engagement and request limits on future use of personal information, while recognising legitimate reliance on information already provided where it has informed statutory processes.

4.3.3 Informed consent

There is a requirement to obtain "informed consent" (Sec 10 (2) (a) (ii) (A)) from a participant taking part in community engagement. It should be made clear that an individual that refuses to provide informed consent is essentially accepting that their inputs are not required to be considered by the proponent, and that further engagement with that stakeholder by the proponent is not required by the Standard even where they are an affected person. The obligation on proponents should ultimately be to take reasonable steps to ensure participants are informed about how information collected through the engagement may be recorded, used, stored and disclosed, and a participant can then make an informed decision on their engagement.

For First Nations rights holders, consent processes will also need to recognise collective decision-making and cultural authority.

Recommendation 13.

Clarify informed consent requirements so participants understand how information will be used, disclosed and relied upon. Where a participant does not provide consent to a particular use of information, proponents should seek to resolve concerns, and offer alternative engagement pathways where reasonable. Ultimately, the requirement for establishing informed consent should be matched with the acknowledgement that it is reasonable for a proponent to no longer engage with a stakeholder that refuses to provide that consent.

4.3.4 Duplication of data

It is not clear what the requirement to "avoid unnecessarily duplicating data and information provided during the engagement" (Sec 10 (2) (a) (ii) (E) is intended to accomplish, or what is or is not "necessary". Data may be duplicated for redundancy purposes, or may be provided by multiple stakeholders in different forms. Given there are legitimate purposes for duplication of data, there should be consideration of what this requirement intends to achieve, and whether it could be reworked or otherwise removed.

Recommendation 14.

Reconsider the requirement to avoid duplicating data, noting that this should be limited to legitimate purposes, and subject to appropriate safeguards.

4.4 Principle 4: Engagement is accessible and supports inclusivity

4.4.1 Culturally and linguistically diverse engagement

It is important to ensure that stakeholders have information in language that they can understand and respond to. This includes recognising where a group of affected stakeholders are from culturally and linguistically diverse backgrounds and catering to those needs. The requirements however should not be open ended or undefined and should instead be based on reasonable requirements to cater for an affected community.

The current wording in the Standard (Sec 11 (1)) and Sec 11 (4) (a) (i) (D)) does not provide sufficient instruction on when translation is required. This would be assisted by guidance on when this is required (for example, how to

reasonably cater for a single individual's needs compared to a more substantial group of impacted individuals), recognising that individual localities will have different cultural needs depending on those impacted. This guidance could also encourage the use of trusted local organisations and networks to support participation where appropriate, and set out where it may be appropriate for face-to-face engagement options to be made available (such as for complex or high impact proposals), when interpreters should be used, and when visual, oral, or community-led engagement methods are appropriate. Guidance should recognise First Nations languages, cultural communication protocols, and trusted local organisations. It should also consider the needs of communities with low literacy, low digital access or other participation barriers.

Additionally, this Section refers to 'interested persons' rather than affected persons that is defined earlier in the Standard. This potentially opens the requirement for the proponent to provide translation or support for interested persons anywhere in the world, rather than specifically requiring a proponent cater for those individuals affected by the project directly.

Recommendation 15.

Guidance on reasonable requirements for the translation, interpretation, and culturally appropriate communication of materials into other languages should be provided to clarify what is expected of proponents.

Recommendation 16.

The 'interested persons' referred to in Principle 4 should be replaced with 'affected persons' as defined at the start of the Standard.

4.4.2 Use of 'plain English'

The requirement to use plain English and non-technical language (Sec 11 (4) (i) (B) and (C) and previously implied in Sec 9 (1)) is an important requirement in ensuring that project documentation is widely understood and digestible by the community and should be the default approach in communicating with the public.

Nevertheless, it should be appropriately caveated to recognise that when technical subjects are being canvassed (e.g. engineering or scientific data) this requirement will not always be possible to be adhered to, and that technical information may be necessary to properly detail the proposal. This is especially relevant when precise language is essential. In this vein, it should also be recognised that Environmental Impact Assessment documentation will inherently contain highly technical information, which will be necessary for assessment purposes.

There may be instances where it is appropriate for technical material to be supplemented by accessible summaries, visual aids and explanations of key assumptions, uncertainties and risks. Where technical language is unavoidable, proponents should seek to explain it in a way that enables affected communities to make informed contributions.

It should also be understood that what is 'plain English' for one stakeholder may not be for another, and so there should be an understanding that a proponent will undertake this to their best endeavours and within reason, without distorting or removing important context and information that needs to be communicated.

Recommendation 17.

The plain English requirements should be appropriately caveated to recognise there may be unavoidable instances where technical language will need to be used, including in environment impact documentation for assessment. Plain English is a subjective term that a proponent should follow to their best endeavours and within reason, reflecting the context of the particular document.

4.4.3 Inclusion in engagement

The Principle refers to "clearly identifying different stakeholders and types of community leaders that may be interested in the proposal", and "*ensuring* [emphasis added] that any relevant under-represented group and affected persons are included in the engagement" (Sec 11 (4) (a) (ii)).

While it is appropriate for the proponent to seek to cater for these groups wherever possible, it is not possible to either guarantee that every stakeholder is identified, or that every affected person is included in the engagement (especially if they avoid involvement). These requirements should be re-written in a way that reflects reasonable requirements on proponents, acknowledging that the stakeholder landscape may not be so clear cut and that not every stakeholder may wish to engage with the process. Proponents should instead be required to make reasonable efforts, demonstrated by their actions.

We also expect and support that, in addition to the requirements in this Standard, the First Nations Engagement Standard will have engagement requirements and processes related to First Nations representative bodies.

There is a requirement for alternative communication methods in areas with "low internet connectivity". This should be appropriately defined, particularly given the availability of modern satellite internet even in remote areas, which presumably means there is a socio-economic element that needs consideration, including around affordability, reliability, digital literacy, disability access, remoteness, and community preferences. Guidance should provide advice on alternative engagement methods where digital access is limited or inappropriate, including face-to-face meetings, printed materials, phone-based options, local radio, community noticeboards, and engagement through trusted local organisations.

Recommendation 18.

The expectations for who proponents must engage with should be drafted in a way that recognises it is not guaranteed that a proponent will be able to identify every stakeholder, and that some affected stakeholders may choose not to engage. Instead, reasonable efforts should be required to be made to identify and engage affected communities and under-represented groups.

Recommendation 19.

Guidance should be provided to support what is meant by 'areas with low internet connectivity', along with alternative engagement methods.

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