Biodiversity Council

Submission to the Inquiry into the Nature Positive (Environment Protection Australia) Bill 2024 and related bills

About The Biodiversity Council

The Biodiversity Council brings together leading experts including Indigenous knowledge holders to promote evidence-based solutions to Australia's biodiversity crisis. The Council was founded by 11 universities with the support of Australian philanthropists.

Overview

The Biodiversity Council broadly supports the government's *Nature Positive Plan* (NPP) reforms, particularly the overarching 'nature positive' objectives and the commitment to give First Nations a stronger voice in Australia's system of environmental protection. However, we regard the government's deferral of the bulk of those reforms to a proposed 'stage 3', which has no timeline, as both disappointing and unnecessary. Further delay of substantive reform to our national environmental law presents significant risk to Australia's environment. There has been limited detail on how, if or when tranche 3 will proceed. We thus make this submission in the context of the government's decision to proceed only with Nature Positive (Environment Protection Australia) Bill 2024 (EPA Bill), the Nature Positive (Environment Information Australia) Bill 2024 (EIA Bill) and the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 (ELA&TP Bill).

In our view the EPA and EIA bills do not go far enough in establishing EPA and EIA as strong national institutions supporting comprehensive and effective environmental policy. We also take the view that the ELA&TP Bill could readily include several NPP reforms that the government has deferred to its 'stage 3' of implementation, along with others which, in our view, are needed to protect and restore nature in Australia.

This submission reflects the Council's 2023 policy statement responding to the NPP, *Delivering on nature positive: 10 essential elements of national environmental law reform*.[1]

1. EPA Bill and Schedules 2 of the ELA&TP Bill

This section focuses on the EIA Bill, but for convenience, also discusses Schedule 2 of the ELA&TP Bill, as this schedule relates to the establishment of the EPA and the CEO's relationship with the minister.

Consistent with the findings of the Samuel Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the aims of the government's NPP reforms, including the restoration of public and stakeholder trust in national environmental decision-making, the Biodiversity Council supports a shift from discretionary decision-making by the minister to standards-based (ie. rules-based) decision-making by an independent regulator.

To achieve these aims, and, just as importantly, to be *seen* to be doing so, EPA needs to be a

[1] Biodiversity Council (2023) Delivering on nature positive: 10 essential elements of national environmental law reform. Biodiversity Council, Melbourne, available at: https://biodiversitycouncil.org.au/resources/delivering-on-nature-positive-10-essential-elements-of-national-environmental-law-reform

truly independent statutory body with an appropriately qualified board and board-appointed CEO. The EPA should also operate transparently and with full accountability to the minister and Parliament.

In that context, we do not support the establishment of EPA as a non-corporate statutory office of CEO, supported by Public Service staff, as proposed in the EPA bill. The vesting of such significant powers in a single person significantly increases the risk of inappropriate political or proponents' influence, because it can be so difficult for a single individual to resist such pressures. A multi-member board is much better able to resist any improper influence; moreover, the existence of a board and a CEO selected on merit greatly enhances the *perception* of there being a bulwark against any attempts at such influence.

As well as enhancing perceptions of independence, the presence of a board would ensure the EPA's decision-making is guided by members with a diverse range of expertise. The establishment of a board could also provide increased probity over decision making. For example, the board could delegate decision making functions to the CEO, but also be a decision making entity if the need or circumstance arose, such as for particularly controversial decisions.

The government's stated reason for not adopting a board model, namely 'the Minister's role in sensitive environmental decision-making', is a *non-sequitur*.[2] If it refers to the fact that the Minister retains certain powers, including a call-in power, these powers can be exercised with equal effectiveness whether the decision-maker is an individual or a collective body.

In this regard we note that all Australian EPAs and several comparable international EPAs including New Zealand have boards except the ACT.[3] We note also that broadly-comparable Commonwealth regulators, the Murray-Darling Basin Authority (MDBA) established under the *Water Act 2007,* and the National Offshore Petroleum, Safety and Environmental Management Authority (NOPSEMA), established under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act), and are statutory authorities with independent boards.

We are concerned that the current model for approval relies on a delegation instrument from the Minister rather than enshrining the statutory functions of the CEO to make decisions based on robust environmental standards (as was proposed to stakeholders in the government's consultations). Under the current approach, and by definition, the CEO of the EPA will be acting on behalf of the Minister through a delegated instrument. This coupled with the absence of a board casts a significant shadow on the proposed independence of the

[2] *Nature Positive Plan*, 29.

[3] See Queensland Government, *Independent Environmental Protection Agency (EPA) consultation: Discussion paper* (May 2022), available at https://environment.des.qld.gov.au/__data/assets/pdf_file/0025/270259/independent-epa-discussion-paper.pdf.

CEO, who will be appointed by the Minister and then effectively act on their behalf in the execution of their functions.

If the existing model does proceed unamended, we welcome that under proposed section 51AAA of the EPBC Act, the CEO, although a delegate of the minister, would not be subject to direction. We note however that it would still be open to the minister to decide to make a decision personally, thus creating a de facto 'call-in' power and again, potentially undermining the independence of the office.

We make the following recommendations with a view to maximising transparency and accountability, along with the quality of expert advice, in that context:

- Where the Minister decides to make a decision themselves, in place of the CEO as delegate, they should, for transparency, be required to notify the CEO in writing of this, and give reasons for that decision. The CEO should then be required to publish this notice on EPA website within 3 business days.
- To ensure that the proposed advisory committee is free to give full and frank advice, it should be exempt from civil liability.
- The CEO should be able to request advice of any statutory committee that advises the minister in exercising powers under the EPBC Act, not just the IESC, as proposed. As a result, the proposed amendments to Part 19 of the EPBC Act in Schedule 2 of the ELA&TP Bill should extend to the Threatened Species Scientific Committee, the Indigenous Advisory Committee and the Heritage Council.

Under the current proposal the Minister may delegate their approval decision making to the CEO. Section 58 of the EPA Bill provides for the CEO to delegate their responsibilities to other people; Section 53 specifies that those people may include employees of a State or Territory. Whilst the intent of this function may be for compliance or investigative matters, where the resources and cooperation between Commonwealth and State and Territory agencies is important, there is sufficient legislative uncertainty to suggest that an employee of a state or territory may be delegated approval functions that would be expected to be handled by the CEO. Section 58 (2) limits the persons to whom certain functions can be delegated, but there is sufficient legislative ambiguity in this drafting that it could provide for State or Territory employees being delegated approval making powers. It is recommended that a provision is included to explicitly exclude delegation for approval decisions to a person in any agency outside of the EPA.

Recommendations

1. Establish EPA as a fully independent statutory authority with its own legal personality and statutory appropriation, governed by an appropriately qualified board and board-appointed CEO, selected on merit.
2. Where the minister decides to make a decision themselves , in place of the CEO as delegate, they should, for transparency, be required to notify the CEO in writing of this, and give reasons for that decision. The CEO should then be required to publish this notice on EPA website within 3 business days.
3. To ensure that the proposed advisory committee is free to give full and frank advice, it should be exempt from civil liability.
4. Extend the proposed amendments to Part 19 of the EPBC Act in Schedule 2 of the ELA&TP Bill to include the Threatened Species Scientific Committee, the Indigenous Advisory Committee and the Heritage Council.
5. Amend section 58 to explicitly exclude the CEO delegating approval decisions to any staff in an agency outside of the EPA.

2. EIA Bill

Again, consistent with the findings of the Samuel Review of the EPBC Act and the government's NPP reforms, the Biodiversity Council supports the establishment of EIA as an important foundation for a comprehensive and effective approach to national environmental policy. We also support a number of key measures in the bill, including biennial State of the Environment (SoE) reporting and annual environmental economic accounts, though in various respects below we propose that those measures be strengthened.

Australia has committed to the Global Biodiversity Framework (GBF) and the Prime Minister has signed the Leader's Pledge for Nature.[4] Together, the four goals and 23 targets of the GBF, and the Leaders' Pledge, amount to a commitment to halt the decline of nature by 2030 and to achieve recovery by 2050. We fully support these 'nature positive' commitments, which are a counterpart to the national and international climate target of 'net zero by 2050'.

Just as Australia's emissions reduction targets are enshrined in the *Climate Change Act 2022*, we submit that 'nature positive' should be enshrined in legislation as a national goal and commitment. This would provide a clear policy context in which to implement the requirements in the bill for EIA to develop a nature positive monitoring, evaluation and reporting framework, produce annual environmental-economic accounts and a biennial State of the Environment Report, and for the government to respond with specific and

[4] For the GBF, see: https://www.cbd.int/gbf; for the Leaders' Pledge for Nature, see: https://www.leaderspledgefornature.org/

measurable environmental targets.

Legislating this framework does more than just bind successive governments to action; it also gives the clearest policy signals to business and society.

Independence of EIA and Separation from the Commonwealth

The bill proposes that the Head of EIA be an SES officer of the environment department, appointed to that role by the Secretary. While clause 12 guarantees the Head's independence in discharging statutory roles such as the preparation of SoE reports, in all other respects the Head will be a senior officer of the environment department, including being subject to transfer by the Secretary at short notice.

Although guaranteed independence in performing statutory duties, the Head has limited separation from the Commonwealth. In particular, although information collected by the Head is subject to protection against *unauthorised* release, under clause 22 the Head is able to authorise the release of information to Commonwealth entities if 'satisfied the disclosure is for the purposes of assisting the entity to perform its functions or exercise its powers'. This is a very low bar and it would not be surprising if the Head decided to provide full access to EIA data, on a routine basis, to the wider environment department, if not to other Commonwealth agencies.

We are concerned that this might cause those who between them hold most of Australia's environmental data — States and Territories, developers, researchers and First Nations peoples — to resist handing over their data. Indeed, we cannot see EIA as being a success without enduring and well-funded agreements with states, territories, research institutions and others to establish the national environmental data supply chain envisaged by Professor Samuel.

In that context, we note that the Head will have neither the coercive powers of the Australian Bureau of Statistics (ABS) nor the separation from government of the Australian Institute of Health and Welfare (AIHW), which, in collecting and publishing national health information and statistics, can only release information for the lawful purposes of its own Act, as distinct from the lawful purposes of the recipient.

In other words, the Head has neither the 'stick' of compulsion nor the 'carrot' of being a national, rather than Commonwealth, institution.

In our view, EIA is much more likely to secure access to the comprehensive and diverse information it needs if it is established on the model of the AIHW, with an independent board that includes stakeholder — including First Nations — representation; separate legal personality and Parliamentary appropriation; and powers of disclosure based on fulfilling the objectives of its own legislation.

We also propose that EIA have the power to require information to be provided, though that power should be used sparingly and require compensation on just terms where any intellectual property is acquired as a result. The bill should also make it clear that EIA is able to make commitments to confidentiality, e.g. for the protection of traditional knowledge or commercially valuable data.

Definition of Nature Positive and Baseline

In the context of Australia's international commitments, the definition of 'nature positive' in clause 6 of the bill is inadequate; it amounts to a statement that nature positive is being achieved if there is any improvement against a baseline. In our view, the definition should include the 2030 and 2050 goals and targets as above. Specifically we support the definition of nature positive being as follows:

> ***Nature positive*** is halting and reversing the decline in diversity, abundance, resilience and integrity of ecosystems and native species populations by 2030 (measured against a 2021 baseline), and achieving recovery by 2050.

We note amendments to this effect were moved by the Hon Zoe Daniel MP in the House of Representatives and we support these amendments.

Whilst the government has proposed to enable the head of EIA to specify a baseline against which progress is measured, there is no further information on what this baseline will cover or when it will be set. There is also provision for it to move over time at the behest of the head of the EIA. As such this design is a significant departure of the intent of 'nature positive'. The Biodiversity Council does not support the government's approach to setting a baseline, and is of the view it should be specified in the bill as 2021, the year of the most recent State of the Environment Report. There is good reason for this - namely there are a host of indicators in the 2021 SoE against which Australia's environmental health and performance can be measured.

Scope of environmental economic accounts

The bill defines environmental economic accounts ('accounts' for short) as 'statistical accounts that describe the condition of the environment and its relationship with the economy'. While these words are correct and taken from an official international source document, transposed into legislation in isolation, as a definition, they risk validating a common misconception, that accounts necessarily place a monetary value on environmental assets and flows of ecosystem services.[5] In fact, as the official UN System of Environmental Economic Accounts (SEEA) diagram illustrates, accounts can be implemented in a flexible and modular way; it is thus perfectly acceptable to produce ecosystem accounts in physical

[5] See United Nations, *System of Environmental Economic Accounting: Central Framework* (UN, 2014), available at https://seea.un.org/content/seea-central-framework-1.

terms only, and to proceed to monetary accounts only where this is useful and the relevant environmental assets and services can be quantified in monetary terms.[6]

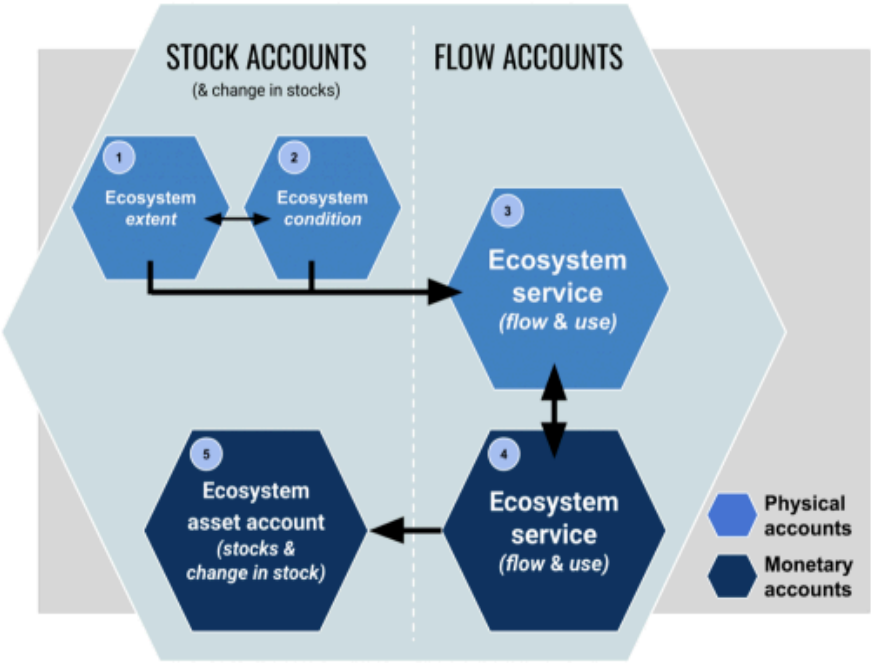

Figure: Ecosystem accounts and how they relate to each other.

Source: SEEA Ecosystem Accounts, https://seea.un.org/ecosystem-accounting.

Recommendations

6. Amend objects of act and definition of 'nature positive' to reflect Australia's international commitments to reverse the decline of nature by 2030 and achieve recovery by 2050; specifically updating the definition of nature positive to be:
    a. ***Nature positive*** is halting and reversing the decline in diversity, abundance, resilience and integrity of ecosystems and native species populations by 2030 (measured against a 2021 baseline), and achieving recovery by 2050.
7. Establish EIA as a fully independent statutory authority, with a governing board and independent legal personality, along the lines of the AIHW.
8. Amend the definition of 'environmental economic accounts' to make it clear that accounts can be expressed in physical or monetary terms, as appropriate.
9. Include a provision that environmental information and data received by EIA should only be published or otherwise released for purposes related with the functions of EIA and the objects of the EIA Act, rather than for purposes related to the functions of the recipient.

[6] See *System of Environmental-Economic Accounting—Ecosystem Accounting,* White cover (pre-edited) version (UN 2021), available at https://seea.un.org/sites/seea.un.org/files/documents/EA/seea_ea_white_cover_final.pdf.

10. Include provisions to enable EIA to acquire data compulsorily where voluntary arrangements cannot be negotiated, subject to appropriate protection for the rights of data holders, including traditional knowledge and intellectual property.

3. ELA&TP Bill

In consequence of establishing EPA and EIA without the rest of the NPP reforms, the 13 schedules in this bill consist mostly of transitional provisions and consequential amendments to existing laws; however, Schedules 11 and 12 contain substantive reforms. We have already commented on Schedule 2; our comments here are restricted to these latter two schedules, and to further matters which we submit should be included in the bill.

Schedule 11

We support the new compliance and enforcement powers, and the increased penalties, that Schedule 11 would insert into the EPBC Act.

Schedule 12

We oppose Schedule 12, the thrust of which is to give proponents the right to veto a decision by the minister under the EPBC Act to 'stop the clock' on statutory environmental assessment deadlines, pending the supply of (additional) information requested by the minister.

We do this for two reasons:

First, this proposal is not part of the NPP and in fact goes against the stated intent of the NPP to secure 'nature positive' outcomes while improving and streamlining regulatory processes. As is apparent on their face, the intent of 'stop the clock' provisions such as s 76, is to allow the minister to request additional information from the proponent where they believe, *on reasonable grounds*, that the documents supplied by a proponent do not contain sufficient information to 'allow the minister to make an informed decision'.

A right of veto on the stopping of the clock will have one of two consequences, both perverse. Either the minister will take decisions without requesting relevant and necessary information, which will both reduce the quality of decisions and increase the prospects of them being challenged through judicial review; or decisions will be more likely to be late, which will make the approval system *less* efficient. In either case, trust in the regulatory system, which the NPP seeks to restore, will only be further weakened.

To protect against abuse of stop the clock provisions, we would however support an amendment that required the minister to specify the (reasonable) grounds on which the specified further information is required, as this would give proponents information to inform any challenge a proponent might want to bring on the basis of stop the clock provisions being abused.

Second, the government's position has been that all environmental law reforms not related to the establishment of EPA and EIA should be deferred to 'stage 3'. As this change is not so related, why has the government included it here; if this change can be made now, why not others from 'stage 3', where the necessary provisions are relatively short?

Matters not currently included in the ELA&TP bill

On that basis, we propose that the ELA&TP bill be amended as follows, to include several other amendments to the EPBC Act from NPP. These deal with legislative objects; the making of National Environmental Standards; and the extension of the Standards to Regional Forest Agreements (RFAs).

We also propose several amendments to the EPBC Act that, while not drawn from the NPP, are readily made and would strengthen its operation, pending finalisation of the stage 3 reforms, should that occur. These amendments deal with the application of the 'mitigation hierarchy', the role of statutory conservation advices, and protection of critical habitat.

Finally, we propose several other amendments, not included in the NPP but in our view essential to achieving its objectives of better environment and heritage outcomes; better, faster decision-making; and restoring trust and integrity. These amendments relate to establishing a Commissioner for Country, and to extending the EPBC Act to deal with the most significant threat of all to the environment, that of climate change.

New Nature Positive Objects

Consistent with the NPP and our submission on the EIA Bill above, the EPBC Act should be amended to include objects that reflect Australia's international nature positive commitments to halt the decline of nature by 2030 and achieve recovery by 2050.

Standards: head of power and decision-making

A new part should be included in the EPBC Act to provide for the Minister to make National Environmental Standards by disallowable instrument. The minister should be required to make an initial suite of standards within 12 months, covering:

- Each Matter of National Environmental Significance
- Indigenous participation and engagement
- Community consultation and engagement
- Biodiversity offsets
- Environmental Data and information.

These are all standards that have already been substantially progressed in a policy sense.

Climate Change Considerations

The NPP commits the government to integrate climate change considerations, where relevant, throughout national environmental law without duplicating existing mechanisms for reducing greenhouse gas emissions. These commitments include requiring:

- proponents of projects assessed under national environmental law to provide estimates of emissions expected across the life of the project, including their approach to managing emissions in line with the government's commitments
- that regional plans, strategic assessments and other strategic planning consider climate change and include environmental adaptation and resilience measures.

There is no reason why these amendments could not be included in this bill. (We propose additional climate change measures, principally a climate 'trigger', below.)

Extend National Environmental Standards to RFAs: Repeal RFA Exemption

RFA's have been unsuccessful in protecting biodiversity and the government has committed in the NPP to extending National Environmental Standards to RFA regions. In our view this can only be achieved by repealing the RFA exemption in Part 3 Division 4 of the EPBC Act, and by providing that existing RFA exemptions expire after a transition period, which we propose would be 12 months.

Mitigation Hierarchy

Because the EPBC Act predates the emergence of the mitigation hierarchy (avoid, mitigate, offset) it makes no mention of biodiversity offsets, which are currently required as a matter of policy only. The NPP endorses this hierarchy, but also contains a commitment to add a further tier to the mitigation hierarchy, to allow proponents to make a conservation payment in lieu of implementing an offset requirement.

The conservation payment scheme is still under development and subject to legislation as part of the government's 'stage 3' reforms. In the meantime, the Act could otherwise reflect both existing policy and NPP reforms by amending Parts 9 and 10 to incorporate the mitigation hierarchy, including the requirement that offsets be 'like for like'.

Conservation advices and critical habitat

Currently the EPBC Act only requires the minister to consider (but not to follow) an approved statutory conservation advice from the Threatened Species Scientific Committee (TSSC). Upgrading that requirement to one that the Minister not to act inconsistently with a conservation advice, would provide significant additional protection for threatened species and communities.

In a related measure, it would be straightforward to require that all new conservation advices, and recovery plans, specify areas habitat critical to the survival of a species.

Commissioner for Country

The NPP places considerable emphasis on working in partnership with First Nations Peoples to improve environmental management and protect cultural heritage. But these commitments lack detail and the government has been slow in developing the partnerships it has promised.

In our view, the development of these partnerships, and the wider inclusion of Traditional Knowledge, could be advanced by appointing a Commissioner for Country.This role would complement the expert advisory role of the Indigenous Advisory Committee established under Part 19 of the Act.

We envisage that the Commissioner would:

- Support First Peoples as land managers, by providing them, in liaison with other agencies as appropriate, with information about caring for Country, including information about government programs associated with caring for Country
- Facilitate the building of capacity of First Nations communities and groups to engage with issues associated with caring for Country, including by cultural knowledge exchanges between those communities and groups
- Build Cultural Authority by facilitating Culturally appropriate and co-designed governance arrangements for First Nations' participation and engagement in environmental decision-making
- Be a voice for Indigenous Rangers on issues associated with caring for Country.
- Convey to the minister and their department, and to other Commonwealth agencies as appropriate, the views of First Nations' peoples and organisations about:
    - the protection, conservation and restoration of Country; and
    - the protection and management of natural and Indigenous cultural heritage values
- Liaise with the minister, portfolio entities (principally, but not limited to, EPA; EIA; Director of National Parks; Heritage Council; Great Barrier Reef Marine Park Authority; Threatened Species Scientific Committee; Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) Commonwealth Environmental Water Holder; and Bureau of Meteorology) on environmental issues that affect First Nations people in caring for Country, especially on biodiversity and culturally significant species, and on Indigenous cultural heritage. Among other things, this would allow the Commissioner to work with the Director of National Parks on new management arrangements for national parks.
- Liaise within government generally, as appropriate, and according due respect to the roles of other persons and bodies, on issues that affect First Nations people in caring for Country, especially on biodiversity and culturally significant species, and on Indigenous cultural heritage

- Liaise and consult with First Nations' peoples and organisations for the purposes of performing the above roles
- Communicate with the public on issues within the Commissioner's role

As to governance, we propose that:

- The Commissioner would be an Aboriginal or a Torres Strait Islander person appointed by the environment minister for a term of four years. They would be eligible for reappointment for a second term and could only be removed on grounds of incapacity or proven misbehaviour.
- The Commissioner would not be subject to direction from the Minister or Secretary, but the Minister could provide the Commissioner with an annual Statement of Government Intent as to government policies relevant to the Commissioner's role and any requests they might make of the Commissioner concerning to discharge of their responsibilities in light of those policies.
- The Commissioner would be supported by a Commissioner for Country Advisory Committee. The role of this committee would be to ensure that the Commissioner is aware of the views of First Nations' peoples and organisations from all regions of Australia.
- Members of the Commissioner for Country Advisory Committee would be appointed by the minister on the basis that the committee as a whole should be as well placed as possible to advise the Commissioner of the views of First Nations peoples and organisations from all regions of Australia.
- Before making the above appointments, the minister would be required to seek nominations from First Nations peoples and organisations in all regions of Australia.
- The Commissioner would also be supported by an Office of the Commissioner, staffed by public servants made available by the Secretary of the environment department.
- The Commissioner would be required to provide annual reports to Parliament on the discharge of their responsibilities.

Climate trigger

The EPBC Act does not deal with Australia's largest environmental problem, climate change, one that has enormous implications for biodiversity. While the government argues that climate change is addressed through various policies including the statutory Safeguard Mechanism and other policies, the Safeguard Mechanism does not apply to greenhouse gas emissions from land clearing, or to facilities emitting less than 100,000 tonne p.a., but more than 25,000 carbon-equivalent tonnes p.a., the reporting threshold under the *National Greenhouse and Energy Reporting Act 2007.* Nor does the Safeguard Mechanism allow the government to prohibit a large development that is likely to generate emissions in excess of Australia's carbon budget under the *Climate Change Act 2022*.

We propose that the EPBC Act be amended to insert a climate trigger, for actions likely to generate over 100k tonnes pa carbon emissions across scopes 1 and 2. The matter protected would be the environment as a whole.

This would allow the environment minister to take actions not currently possible under existing arrangements. The minister could:

- refuse to approve a development likely to produce emissions over the threshold, where those emissions would likely exceed Australia's carbon budget
- impose conditions on a below-threshold development, requiring avoidance and mitigation, for example by restricting the area of land cleared or by requiring use use of renewable energy to power equipment; to avoid duplication, these conditions could be subject to a proviso that they would not apply to the extent that the Safeguard Mechanism applied.

To deal with indirect impacts on other matters of national environmental significance and to overcome court decisions involving the adoption by ministers of the 'market substitution' argument to considering additionality, most recently in the *Living Wonders* case, the amendment would provide that the assessed net emissions from a project (across scope 1, 2 and 3) should be regarded as being increasing existing emissions by the assessed quantum of likely emissions from the action.[7]

In consequence of these amendments, it would be appropriate to amend the objects clause in the Act to include suitable reference to implementing Australia's international climate obligations and meeting Australia's domestic carbon budget. In the same vein, new sections should be added to Parts 9 and 10, mirroring existing requirements (such as s 139 relating to threatened species) that prevent the minister from approving any action that would be inconsistent with Australia's international obligations, but instead referring to Australia's international climate agreements and the carbon budget under the *Climate Change Act 2022*.

Water Trigger application to CCS

Carbon capture and storage projects are likely to have as great an impact on water resources as actions already within scope of water trigger, such as large coal mines. To deal with the potential impact of carbon capture and storage projects, we propose that the existing 'water trigger' in Part 3 Division 1 be amended to include carbon capture and storage projects.

[7] *Environment Council of Central Queensland v Minister for the Environment and Water (No 2)* [2023] FCA 1208

Recommendations

11. Include the following amendments to the EPBC Act in the ELA&TP bill:

    a. Amend the objects clause to include Australia's nature positive commitments and to define nature positive as proposed above for the EIA bill.
    b. Include a new part allowing the minister to make National Environmental Standards by disallowable instrument and requiring the minister to make an initial suite of standards within 12 months of commencement, covering:
        i. Each Matter of National Environmental Significance
        ii. Indigenous participation and engagement
        iii. Community consultation and engagement
        iv. Biodiversity offsets
        v. Environmental Data and information.
    c. Repeal the RFA exemption in Part 3 Division 4; provide that existing RFA exemptions expire 12 months after commencement.
    d. Amend Parts 9 and 10 to require decision-makers to apply the mitigation hierarchy in considering whether to approve an action or class of actions. The mitigation hierarchy should require the minister, in approving any action or class of actions, and as far as reasonably practicable, to set conditions of approval that require the proponent:
        i. to avoid specified impacts;
        ii. to mitigate impacts not required to be avoided;
        iii. to offset residual impacts on a 'like for like' basis.
    e. Amend s 139 EPBC Act to require the minister not to act inconsistently with an approved conservation advice; also amend s 266B and s 270 to require all new conservation advices and recovery plans to specify areas of habitat critical to the survival of a species that should not be subject to destruction
    f. Provide for a Commissioner for Country, as described above.
    g. Insert a 'climate trigger', applying to actions likely to generate over 100,000 tonnes per annum carbon-equivalent emissions across scope 1,2,3, as described above. Make consequential amendments to the objects clause and to Parts 9 and 10, as described above.
    h. Amend the EPBC Act to provide that in considering indirect climate impacts on matters of national environmental significance, assessed net emissions from a project, across scopes 1, 2 and 3, should be regarded as being additional to existing emissions.
    i. Expand the 'water trigger' in Part 3 to cover actions taken for the purposes of capturing carbon dioxide for underground storage.