Submission feedback for

Australia's new Nature Positive laws 2024

Prepared by
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Lower Latrobe Wetlands
Photo source – Friends of Latrobe Water

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Introduction

1. **Friends of Latrobe Water (FLoW)** is a community advocacy group based in Gippsland, Victoria. FLoW works to facilitate a positive post-coal mining legacy for future social and economic prosperity of the region in a manner that safeguards and protects the community and surrounding environment, including the Latrobe River that contribute freshwater flows to the Ramsar listed Gippsland Lakes.

2. FLoW has been active contributors to relevant federal submissions (EPBC Review, National Water Reform Inquiry, Ratifying the Minamata Convention, United Nations Special Rapporteur on Toxics and Human Rights, Draft PFAS National Environmental Management Plan: Version 3.0) and many state-based submissions, meetings and forums related to water management to improve environmental values for the Latrobe River Catchment inclusive of the Gippsland Lakes system.

3. FLoW continually challenge the lack of monitoring and absence of scientific evidence, conflicting and ineffectual state and federal regulatory and legislative frameworks, ongoing fragmented policy and governance coordination on top of a significant lack of resources to protect and manage Matters of National Environmental Significance (MNES).

4. FLoW's work revolves around good governance and improved policy to inform appropriate and rational decision-making on environmental law to protect and reduce biodiversity and habitat loss. As clients of Environmental Justice Australia (EJA) we were successful in having the Water Trigger applied to the Hazelwood Mine Rehabilitation Project, Victoria (EPBC Act Referral No. 2022/09239). Only time will tell if the current mechanisms to assess the impacts to MNES under the Bilateral Agreement will be effectual and protective.

5. Therefore, it is crucial a new national independent EPA with a clear statutory role and good governance framework is best placed for true environmental protective reform based on science to support our country's nature values and assets. This framework and criteria for decision-making MUST be consistent, concise and legally binding to prevent misinterpretation of the Act or allow political influence and abuse of discretionary powers to override the objective for what the nationalised environmental standard reforms are aiming to achieve.

Overview

6. As FLoW mainly deals with MNES, this submission will address some perceived flaws in the consultation papers that we believe the new statutory body and regulatory regime will continue to facilitate the ongoing poor decision-making for inappropriate project approval currently regulated by the EPBC Act.

7. As there will be a changed approval process and a reliance on updated data and information for assessing projects it is also important those state-based regional plans and state regulatory mechanisms are also updated, fit for purpose and standardised.

8. Our community's goal is for environmental reform to halt and reverse decline of threatened species but the draft laws are still fragmented and ambiguous with the potential to create unnecessary legal complications rather than be proactive and preventive to ongoing biodiversity loss.

9. FLoW cannot see how the new act is genuine environmental reform based on the current draft laws due to the following concerns outlined in this submission.

Data and Information

10. This is a key component of the *Nature Positive legislative package to promote transparency, defensibility, and public trust in decision-making processes relating to Australia's environment and heritage*. However, there are gaps in this section which are critical elements that need further clarification how they will be incorporated into the new national EPA framework.

11. The current provisions in the draft National Environmental Standards for decision-making has no mention to how historical information and existing data gaps and knowledge will be addressed. Nor how other relevant documents and management plan will be updated to incorporate climate change triggers including Scope 3 CO2 emissions which are not included.

12. How is a project proponent able to self-assess the likelihood of impacts if the data is not available?

Monitoring and cumulative impact of pollutant discharges

13. The Gippsland basin both onshore in Victoria and offshore in Commonwealth waters is/has been a significant hydrocarbon resource region for offshore oil/gas and Latrobe Valley coal and power generation. Their extraction has been exploited for many decades for its economic and industrial benefit. However, it has come at a terrible cost with depleting surface and groundwater, subsidence[1] and pollutant contamination to the air and watershed with consequential social health burdens.

14. This same region supports Ramsar sites and other MNES yet, it is one of the most poorly monitored areas in the state of Victoria. No data, no evidence.

15. There is no comprehensive monitoring system on industry pollutant discharges to air and watersheds including sediment testing for the industrial areas of Gippsland which feed into MNES, rather an adhoc collation of insufficient data unsuitable for credible data analysis.

16. The ongoing expansion of projects in the offshore region of Bass Strait has resulted in significant marine population reductions, however, assessments are now undermined to what species might migrate through, feed or habitat the area as opposed to what aquatic and bird life populated and had dependence on the marine environment in the past.

Cumulative impacts

17. It is not clear how the new regime will effectively assess cumulative impacts for projects when critical baseline data and ongoing monitoring is poorly managed.

18. The Wentworth Group of Concerned Scientists called out *not continuing the further decline* of ecological communities and *continued aggregated loss and degradation of* Ramsar Wetlands, World Heritage properties and National Heritage places with their July 2023 recommendations proposed for EPBC Act reforms. *Preventing 'Death by a Thousand Cuts'*

[1] Department of Conservation and Natural Resources, *Assessment of Subsidence Potential along the Gippsland Coast due to Subsurface Fluid Production* (Report, December 1995).

Addressing cumulative impacts to matters of national environmental significance (MNES) through reforms to the EPBC Act.[2]

19. Likewise for projects in Commonwealth waters. FLoW has just contributed feedback (18/03/24) to ESSO's current EPBC Referral (No. 2023/09731) as *not a controlled action* for their *South East Australia Carbon Capture and Storage Project, Onshore and State waters*. The proponent can declare environmental impacts for the same one project are out of scope for assessment due to other regulatory obligations under different acts. FLoW considers this a loophole that can be exploited therefore the cumulation of risk to harm to the environment and/or human health are not appropriately assessed.

20. How will the new national EPA data and information framework ensure that crucial historical and baseline information for the Gippsland region, which either no longer appears in online searches or have significant data gaps, to make credible science-based assessments?

21. Pollutant accumulation concerns only appears to be connected for Commonwealth marine areas. This excludes all onshore MNES – why? Is pollutant toxics to be picked up under each state's Regional Plans. This point is relevant because of what underpins the testing and monitoring for contaminants of concerns.

    3.3 Prohibitions on approval to take an action (Oct 2023 consultation)

    - *The CEO of EPA must not approve the taking of an action if:*
      - *the CEO of EPA is satisfied that taking the action would have, or is likely to have, an unacceptable impact on a protected matter, as follows.*

    Commonwealth marine

    ▪ *results in the accumulation of persistent organic chemicals, heavy metals, mainland run-off, pollution or other potentially harmful substances such that there are irreversible adverse effects on biodiversity, ecological integrity, social amenity or human health may be adversely affected.*

22. Assessing negative cumulative impacts on MNES and human health has been the major flaw in the current environmental approval regime. This also applies to the current contaminant concentration levels with

[2] *We also need to address the complex ways in which larger developments interact and aggregate to cause impacts that are more significant than when they are considered in isolation.* https://wentworthgroup.org/2023/10/preventing-death-by-a-thousand-cuts/

various chemical attributes differing from state to state as well as country to country.

23. All cannot be correct, but it is this inconsistency that are fundamental flaws which have in the past and are currently underpinning project approval based on outdated and unreliable contaminant trigger levels for environmental and human health risk and likelihood of harm from a project.

24. A nationalised EPA requires nationally consistent chemical standards based on best international science and *state of knowledge*. The current per- and polyfluoroalkyl substances (PFAS) levels and lack of action by all State and Territories is a case in point where a prejudicial stance with apparent conflicts of interest from the Federal Government are dictating an irresponsible and indefensible position on the management of PFAS in the environment in comparison to the US and European Union.

25. The concern here is State EPAs choosing to accept the Federal Government remit that PFAS is not a major problem to the environment by supporting the high triggers levels compared to international best practice.

26. A key test here is will a national EPA continue with the same remit or apply changes for the efficient and effective functioning of the new regime and approval process.

27. Also to be noted that the Victorian EPA who widely use *state of knowledge* as a key determinant under their new EPA Act 2017 do not apply this to themselves with PFAS management as the evidence.

28. Likewise, if the National Environmental Standards are deficient from the onset, it is not clear how *state of knowledge* will inform the required legislated changes to protect the environment.

29. Critically, what information will the new EPA regime determines underpins risk and harm to MNES from accumulating toxic contamination and lack of monitoring over project life to inform what ongoing degradation the Nature Positive Laws are trying to reform.

Regional Plans under EPA decision-making criteria

Failure of state-based accredited processes

30. Regional or bioregional plans provide the fundamental base information required for credible assessments. The concern for the new approval processes comes from the October 2023 consultation paper *for 3.5 Mandatory considerations in deciding whether to approve the taking of an action*. Some points are noted below.

    - *In deciding whether to approve the taking of an action, the CEO of EPA must have regard to:*
      - …
      - *any relevant regional plan;*
      - *if the proposed action has been assessed by a State, Territory or accredited decisionmaker under an accredited process – the assessment report provided by the relevant State, Territory or accredited decision-maker*
      - *any relevant comments given to the CEO by a Minister (Commonwealth, State or Territory) in response to an invitation to comment on the proposed decision (as described below), including in relation to any relevant environmental, social, cultural, economic or other matters;*
      - *any relevant notice from a State or Territory about impacts on things* other than protected matters (described above);

31. The Regional Planning Initiative needs to develop more robust bio-regional plans listing *matters of concern* for specific areas which have insufficient information to provide credible assessment analysis.

32. Climate triggers are cumulative to project impacts, so it is imperative Nature Positive Laws give due consideration to climate impacts, and climate change drivers. Likewise for sea level rise as rising sea levels plus sinking land is the double whammy of impacts to MNES relevant for Gippsland's vulnerable coastline in a Ramsar area and diminishing outer dune barriers.

33. The application of the precautionary principle needs to be used more readily for environmental decision-making when significant data gaps are known. Caution to be taken for assessments via the one-stop-shop principle when transferred to one authority, e.g. Victoria's Bilateral Agreement (see #35) The *Precautionary Principle* was applied for

FLoW's successful Water Trigger Application due to multiple authority input.

34. Community engagement is another avenue of knowledge when considering the cumulative impacts on natural assets and MNES. The inclusion of community and local indigenous input is paramount to successful environmental reform.

35. Victoria's Environmental Effects Act 1978 and it processes has significant failings that do little to protect MNES especially under the Bilateral Agreement, which was signed in 2014 by then Federal Minister, Greg Hunt.

36. The agreement was based on a flawed process with no one bothering to inform the Minister that Victoria didn't even have an adequate environmental assessment process in the first place yet, is now accredited as doing so giving effect to the Australian Government's 'One-Stop Shop' policy at the time.

37. The Victorian Auditor General noted the following in 2017:[3]

> ***Past reviews***
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> *Since 2000, two reviews and a Parliamentary inquiry have focused on the EE Act and the EES process. They found the legislation and associated EES processes to be costly, and lacking clarity and transparency.*
> *Between 2000 and 2013, successive governments committed to reforming the EES process, yet no significant legislative changes have occurred.*
> ***Improving the EES process***
> ***Legislative reform***
>
> *The most recent reform activity occurred following the 2011 Parliamentary report Inquiry into the Environment Effects Statement Process in Victoria. The Environment and Natural Resources Committee[4] concluded that Victoria's environmental impact assessment system was not meetings its objectives.*
> *…The committee recommended extensive legislative reform to increase certainty, reduce costs and shorten time frames.*

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[3] https://www.audit.vic.gov.au/report/effectiveness-environmental-effects-statement-process?section=

[4] https://catalogue.nla.gov.au/catalog/5756995

…The Parliamentary report identified issues raised by witnesses and in written submissions about the EES process, including:
• the lack of detail in the EE Act and uncertainty of the status of the Ministerial Guidelines made under the EE Act
• the non-binding nature of the minister's recommendations and conditions
• barriers to public participation
• the need for more robust monitoring and auditing arrangements.
In response to the inquiry, the former government committed to reforming the EE Act and EES process.
…The government agreed to the policy reforms but in late 2013 decided not to proceed with the proposed reforms. It did not provide reasons to the public or the department for discontinuing reform efforts.

38. According to the 2017 Auditor-General's report, none of the 50 recommendations about the process have been implemented nor has any up to this date, March 2024.

39. Victoria's EPA permissioning framework is flawed as it can only be as effective as the regulator chooses to determine what risk of harm is and to who and what. Risks to human health and the environment are not sufficiently identified if there is limited monitoring data and testing providing no evidence to prove harm and no way to analyse the extent of risks.

40. These processes along with poor regional assessments also reduces additional independent federal oversight especially for State promoted projects that require less rigorous standards and cannot be considered complimentary environmental management mechanisms for Nature Positive Laws.

41. Current compliance and enforcement by State-based EPAs are poorly resourced and appear to be captured by industry rather than prevent harm to the environment. Compliance and enforcement need to be better managed under federal law otherwise business as usual will not be trusted by the community.

Governance concerns

Independence of the new EPA

42. The new CEO role of the EPA cannot be called independent if the appointment is directed by the Minister. That instils no trust from the community. There needs to be significant transparency with this process as to the Board, skills, conflicts of interest. Again, this cannot be considered reform.

Ministerial Call-in Power

43. The new laws for decision-making need to be explicit, unambiguous and impartial. They need to be based on best available science otherwise this call-in power is more of the same problem from current poor decision-making with continuing potential for political interference or subjective 'satisfaction' of the new EPA or the Minister, especially for the Minister to assume decision-making approval from what is supposed to be an independent EPA.

44. Any call-powers and exemptions on projects that are assessed as unacceptable and comply with the new National Standards must have a strong criterion that is precise, transparent and accountable to the public. Otherwise, this discretionary power is not a protector of biodiversity and natural assets that the current approval processes are failing on so cannot be consider national environmental reform.

45. The provisions are too vague given the complexity of Australia's unique and degrading environment from past poor project approval, let alone the worsening climate constraints. Having 'regard to' a checklist is not good enough and cannot be classified as a Nature Positive Law reform. This leaves the environment vulnerable as this section is facilitating inconsistency and potential loopholes which could expose the government and community to legal challenges.

46. The following provisions are too broad, excessive, open to abuse and completely undermines the role of the new EPA to apply strong national standards,
    - *The Minister may elect to make a specified approval decision at any point* ***up until the business day immediately prior to the final decision due date in force***.

- *The Minister must publish the reasons for electing to make an approval decision and the reasons for the final decision on approval* ***as soon as practicable.***

47. What timeframe is *as soon as practicable* and where is the right of the community to review the merits of call-in powers and exemptions to ensure decision-makers have used credible science as their reasoning.

Restoration actions and restoration contributions (formerly known as offsets) reform

48. The commitment by the government to reform environmental offset arrangements appear to promote a payment option as a readily available get-out clause for the project proponent to undertake environmentally damaging projects while being disregarded by the decision-maker. This needs more clarification how this would apply in sensitive regions to not have its own cumulative impact and be in total conflict to the principle of Nature Positive Law for environmental reform.

Reasonable Practicable

49. *'As far as reasonably practicable'* has a dollar value to it. Therefore, the values and risk of harm to human health and the environment are further weakened. The flaw lies in a lack of criteria how the EPA decision-maker will apply this. A project should be assessed on the full cycle, its cumulative worth which means a capital worth/value on the receiving environment would need to be assessed.

50. The National Environmental Standards cannot be effective if the reasonably practicable rules continue to be applied under current principles with varied state-based assessments. This includes projects classified as state significant where environmental protections are accorded a lower priority worth with little oversight from Commonwealth environmental protections.