National Environmental Law Association

Briefing Note

NELA briefing note on key issues for Commonwealth environmental reform

1 Review of the *Environment Protection and Biodiversity Conservation Act 1999* generally

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is in need of significant reform. The EPBC Act was heavily criticised in the Independent Review of the EPBC Act (**Samuel Review**) which found that the EPBC Act is outdated, does not enable the Commonwealth to effectively fulfil its environmental management responsibility to protect nationally important matters, results in piecemeal decisions and acts as a barrier to holistic environmental management. The review makes 38 recommendations to reverse the current state of the environmental decline. These reforms are necessary for a multitude of reasons - to **set clear outcomes** for the environment, provide **transparency and strong oversight**, **restore the environment**, **measure effectiveness**, and to **respect and harness the knowledge of Indigenous Australians**. Following the Federal Environmental Minister's announcement of the Government's response to the Samuel Review and the recently released Nature Positive Plan: Better for the Environment, Better for Business' (NPP), NELA supports the Government's proposed introduction of National Environmental Standards as a core feature of the amendments, with the initial five national environmental standards covering Matters of National Environmental Significance; First Nations Engagement and Participation in Decision-Making; Community Engagement and Consultation; Regional Planning; and Environmental Offsets. New, legally enforceable **National Environmental Standards** should be the centrepiece of the recommended reforms.

On enforcement, the Samuel Review identified 41 breaches of the EPBC Act where compliance orders were issued since 1999. Of these, ten were breaches of wildlife trade provisions, and 31 breaches related to requirements for environmental approvals. Ultimately, enforcement of the EPBC Act was found to be rare and ineffective. To increase effective enforcement, it may be necessary to introduce an **independent statutory body (a Commonwealth Environment Protection Authority)** to ensure greater monitoring and enforcement of Commonwealth environmental laws. The establishment of an independent EPA was recognised as a government commitment in the Government's recent response to the Samuel Review. The statutory office of the Inspector-General of Water Compliance which came into effect on 5 August 2021 may provide useful guidance on a possible approach. **NELA also supports and urges the Government's proposed introduction of future national environmental standards for data management and compliance and enforcement, given the current notable issues with compliance and enforcement.**

2 Inadequate cultural heritage protections

The failings of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) and the EPBC Act in adequately protecting cultural heritage were recognised in the Samuel Review. Regarding the ATSIHP Act, Justice French noted in *Tickner v Bropho*[1] that underlying the creation of the Act 'was the idea that it would be used as a protective mechanism of last resort where State or Territory legislation was ineffective or inadequate to protect heritage areas or objects'. As identified in the Environmental Defenders Office (**EDO**) submission to the Interim Report of the Juukan Gorge Inquiry,[2] this reality 'places a huge burden on First Nations people to first seek protection from the State/Territory and then apply for a declaration to another level of government'. The ATSIHP Act was also criticised in the EDO submission as creating "stakeholder confusion over ministerial responsibility and administrative delay'. The Commonwealth should **place First Nations peoples at the heart of the ATSIHP Act and its decision-making processes**, consider creating an **enforceable standard for consultation requirements**, and **clarify the responsibilities of the Environment Minister and Indigenous Affairs Minister**. The need for the clarification and proper enforcement of

[1] *Tickner v Bropho* (1993) 40 FCR 183, 211.

[2] Environmental Defenders Office, 'Never Again – Interim Report of the Juukan Gorge Inquiry' (10 December 2020).

consultation requirements was evident from the Federal Court's judgement in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, where the court outlined standards for effective consultation. While the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) responded to the appeal decision by releasing its Consultation in the Course of Preparing an Environment Plan[3] on 15 December 2022 to clarify legal requirements for consultation, stringent and enforceable consultation requirements should be legislated. To this end, NELA supports the Government's commitment in its response to the Samuel Review to strengthen cultural heritage protections by replacing the existing ATSIHP Act in a way that ensures streamlined interactions with national environmental law, reducing the potential for complexity, confusion or gaps in protection.

3 Australian Carbon Credit Units review

The independent expert panel appointed by the Australian Government to review the integrity of Australian Carbon Credit Units (**ACCUs**) under the Emissions Reduction Fund (**ERF**) has delivered its report, making 16 recommendations for change, particularly in regard to governance and transparency. Notably, the report disagreed with claims made in 2022 that 70 to 80 per cent of credits issued did not represent real abatement and that the scheme was 'fundamentally well designed'. The Australian Government released a report adopting in principle all 16 recommendations which, if implemented, would significantly change the scheme's governance structure and how new methods of abatement are driven, created and regulated. The 16 recommendations made by the panel include:

- clearly identifying and separating the key roles of integrity assurance, regulation and administration;
- improving transparency and removing unnecessary restrictions on data sharing;
- improving the administration of three ACCU methods;
- clarifying the intention of the scheme;
- providing more support for regional communities and First Nations people to participate in and benefit from the scheme; and
- improving information and incentives, including in relation to non-carbon benefits and attributes.

NELA supports the implementation of the recommendations made, which will implement beneficial updates to the governance scheme, while increasing the innovation and flexibility of new methods by taking a proponent-driven approach. In implementing such recommendations, the Australian Government should ensure that reforms are consistent with new amendments underway to the Safeguard Mechanism and the Biodiversity Repair Market.

4 Safeguard Mechanism reform

The Government is reforming the Safeguard Mechanism and has explored potential amendments through the releasing of a consultation paper, exposure draft legislation, and a position paper for consultation which details proposed reforms to the Safeguard Mechanism. These reforms are directed at achieving Australia's emissions reductions target of 43% below 2005 levels by 2030 and commitment to net zero emissions by 2050, and overall requires reductions of 4.9% per year for entities covered by the Safeguard Mechanism. With reference to proposed amendments to the Safeguard Mechanism, NELA:

- supports the redrafting of the NGER Act objects to better reflect Australia's national and international greenhouse gas emissions reduction targets prescribed by the CC Act;
- supports the introduction of provisions which reasonably fetter the discretion of the Minister and Regulator to safeguard the integrity of SMCs;
- submits that the NGER Act should implement reforms which ensure that SMCs harness the highest integrity standards;
- supports the SMC Amendment Bill's inclusion of a provision which bases penalty amounts on the amount of damage caused to the climate by excess emissions (as also proposed in the position paper);
- supports the proposal in the SMC Amendment Bill explanatory note to increase transparency

[3] National Offshore Petroleum Safety and Environmental Management Authority, 'Consultation in the course of preparing an environment plan' (15 December 2022) <https://www.nopsema.gov.au/sites/default/files/documents/Consultation%20in%20the%20course%20of%20preparing%20an%20Environment%20Plan%20guideline.pdf>.

surrounding ACCU and SMC holdings in Registry accounts;

- believes that an option for smaller facilities falling below the designated large facility threshold to opt-in to the SM should be introduced;
- supports the inclusion of more robust auditing requirements for facilities providing reports under the NGER Act and provisions made for the relinquishment of issued SMCs as a result of false or misleading information;
- supports the consistent legal framework proposed by the SMC Amendment Bill for the handling of ACCUs and SMCs;
- supports the statement made in the SMC Amendment Bill explanatory note that a core element of the reforms to the SM will be a framework where baselines decline predictably and gradually over time in order to support strong emissions reductions being delivered by Safeguard facilities; and
- rather than implement proposed amendments to the NGER Act that will make it possible to transfer SMCs issued into a holding account so that they can be provisioned to emissions intensive trade exposed (**EITE**) facilities, NELA supports the more tailored approach to assisting EITE facilities proposed in the Positions Paper.

Reforms to the Safeguard Mechanism are necessary and timely if Australia is to meet its legislated commitments. Indeed, the proposed introduction of Safeguard Mechanism Credits (**SMCs**) would provide a useful market-based incentive for emissions reduction by allowing the issuing of tradeable SMCs for participants operating facilities that match or surpass Australia's climate targets.

5 Issues surrounding hydrogen legislation[4]

Hydrogen regulation is emerging into a labyrinth of existing rules not developed with the industry in mind, and perhaps not fit for purpose. In 2019, a report prepared for the Department of Industry, Innovation and Science identified 730 pieces of legislation and regulations potentially relevant to a national hydrogen industry. To prevent piecemeal regulation of hydrogen, **legislative review and reform which matches the pace of the industry's growth is necessary**, with a **common set of regulatory objectives that promote ecologically sustainable development**. The government should be particularly cautious of continuing the piecemeal regulation of hydrogen in its approach to implementing the Guarantee of Origin Scheme (**GO Scheme**), which will be established as new legislation and supported by instruments for methodologies and emissions measurement processes and sources. The GO Scheme will close for consultation on 3 February 2023, and would provide a mechanism to track and verify emissions associated with hydrogen and other low emissions commodities produced in Australia and provide an enduring certificate mechanism for renewable electricity which could support a variety of renewable energy claims.

6 Biodiversity

Biodiversity offsets are a compliance instrument designed to compensate for adverse environmental impacts from project development, whereas biodiversity credits are seen as more voluntary market instruments and can be used to finance stronger biodiversity outcomes. These credits have the ability to achieve positive impacts for the environment in a way the carbon credits scheme does not. At the 15th Conference of the Parties to the Convention on Biological Diversity (**COP15**), parties adopted the Kunming-Montreal Global Biodiversity Framework (**the Framework**). The Framework contains some key targets that will impact on government policy, reporting mechanisms and land use practices, which is designed to ensure that biodiversity becomes a consideration in government, corporate and land based decision making. NELA supports the 4 long-term goals proposed by the Framework, which seek that:

- integrity, connectivity and resilience of all ecosystems are maintained, enhanced or restored;
- biodiversity is sustainably used and managed;
- monetary and non-monetary benefits of genetic resources are shared equitably; and
- adequate means of implementation (e.g. financing, capacity-building) to fully implement the Framework are secured and equitably accessible.

NELA also supports the 23 global targets to be initiated immediately and achieved by 2030 to reach the 2050 goals as outlined in the Framework. Specifically, target 14 of the Framework calls for full integration of biodiversity and its values into policies, regulations, planning and development processes, and environmental assessments across all levels and government and across all

[4] Kerryn Brent, 'Regulating Australia's green hydrogen industry – objectives and challenges' (2022) 36(6) 130.

sectors. NELA encourages the Government to use this overarching target to evolve best practice planning and development, and impact on a broad range of governmental decision making.

The Commonwealth should consider **incorporating nature-positive principles in its reform of the EPBC Act and environmental policies and in its proposal for a voluntary biodiversity market.** The Nature Repair Market Bill (**NRM Bill**) exposure draft,[5] which will allow proponents who protect, manage or restore local habitat to receive biodiversity certificates which can be sold to other parties, makes some progress in this regard. Most notably, the NRM Bill proposes to introduce an overarching biodiversity assessment instrument to measure improvements in biodiversity. The exposure draft will close for consultation on 24 February 2023.

Further details on how the government intends to implement its **2022-2023 Threatened Species Action Plan**, which aims to prevent new extinctions in Australia and specifically commits to conserve more than 30% of Australia's land mass and oceans by 2030, should be provided. NELA welcomes the further information relating to **regional planning** provided by the Government in response to the Samuel Review. In its response, the regional planning process is to be designed to take account of cumulative impacts, as well as climate change considerations, and provide a streamlined approvals process. Regional planning will be designed to operate on a 'traffic lights system' across areas of 'High Environmental Value', 'Moderate Environmental Value' and 'Development Priority Areas'.

7 Limitations in native title law[6]

Native title excludes rights in minerals which are vested in the Crown. To the extent native title holders hold property, this right to the land remains subject to mining rights granted under applicable state law. Thus, traditional owners lack any substantive rights in disputing mineral projects beyond the right to negotiate under the *Native Title Act 1993* (Cth) (**NTA**). Further, the Indigenous Land Use Agreement resulting from the negotiation is registered on the National Native Title Tribunal, but its terms remain private as between the parties, and often contain confidentiality clauses. These confidentiality clauses risk silencing opinions that harness an intrinsic interest in the development of the site. Further, the content of native title does not contemplate cultural heritage rights. While native title is capable of including access to sacred ceremonies or sites, rights afforded under s 223(1) of the NTA are interpreted to exclude rights protecting cultural knowledge. The Commonwealth should consider the **potential for cultural knowledge to be considered native title** (as recommended in a 2015 Australian Law Reform Commission report)[7] and provide for **more substantive rights of negotiation and public accountability**.

[5] Australian Government, 'Nature Repair Market Bill 2023: Exposure Draft' < https://storage.googleapis.com/files-au-climate/climate-au/p/prj23a6fb56d20875fa57e91/public_assets/Nature%20Repair%20Market%20Bill%20%E2%80%93%20Exposure%20draft.pdf>.

[6] Kate Galloway, 'A legal lacuna: between cultural heritage and native title' (2020) 35(4) Australian Environment Review 98, 110.

[7] Australian Law Reform Commission, 'Other native title rights and interests?' (28 May 2015).