15 July 2024

Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: ec.sen@aph.gov.au

Dear Committee Secretary

Submission on the Nature Positive bills

The Minerals Council of Australia (MCA) welcomes the opportunity to provide a submission to the Senate Environment and Communications Committee inquiry in relation to the *Nature Positive (Environment Information Australia) Bill 2024*, the *Nature Positive (Environment Protection Australia) Bill 2024*, and the *Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024* (collectively the 'Nature Positive bills').

The Australian minerals industry is committed to the protection of Australia's unique environment. MCA members are committed to continual improvement in sustainability, including environmental performance. The Towards Sustainable Mining program supports continual improvement in site-level performance and transparency through consistent and independently verified assessment and reporting against good practice benchmarks.

The MCA supports robust environmental regulation that is both efficient and effective in achieving the sustainable development outcomes expected by the Australian community.

Australia's patchwork of environmental laws is inefficient for business and government and provides inadequate protection of nature.[1] Well considered reform is needed to boost investment in a range of priorities, such as housing, the energy transition, and resources. Duplicative, complex and inefficient processes in national environmental law create delays and uncertainty for business, increasing costs and deter minerals investment. This affects jobs, businesses and regional communities and the supply of minerals critical for the energy transition.

Australian businesses already operate in a high-cost and high-complexity regulatory environment. Introducing changes that create additional unnecessary regulatory burden, costs or uncertainty would only exacerbate these issues. This, in turn, would reduce productivity and further deter investment in an already difficult global market for capital.

The establishment of Environmental Information Australia (EIA) will provide benefits in the longer term. However, the other bills do little to improve current circumstances for business, and if changes are not made, will create even more uncertainty for industry, impacting the economy and Australia's ability to supply the minerals necessary to support the energy transition nationally and internationally.

MCA views on the Nature Positive bills and the amendments proposed to date are provided below.

[1] Professor Graeme Samuel AC, in the Forward to the *Independent Review of the EPBC Act*

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Staging of reform is appropriate

Reform of national environmental law is a complex task. The scale of change envisaged in the *Nature Positive Plan* cannot be achieved without thorough and considered consultation and road-testing of the practical workability of the proposed reforms.

The design and operation of national environmental law has a significant and direct influence on the minerals sector and other industries that underpin the economy and the prosperity of all Australians. Given this, it is imperative that sufficient time is taken to consult and test reforms to ensure they meet the government's aims of better business and environmental outcomes and avoid unintended consequences – these changes should not be rushed.

It is also recommended that a regulatory impact statement be prepared to better understand the affects of the proposed stage 2 changes.

The EPA must be accountable

Absolute EPA independence from government is a significant risk. An increasingly detached EPA with little accountability or requirement to operate in line with government objectives will create a high uncertainty, low confidence regulatory environment.

Decisions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) have a significant influence on the economy. Given this, it is imperative the EPA remains accountable to government, and therefore the Australian public, via elected officials. This will become even more important in future reforms, should the EPA be given primacy in decision-making.

To ensure the EPA's actions reflect community needs, the Minister's Statement of Expectations must be binding on the CEO of EPA. Furthermore, the Minister must have the ability to direct the EPA where needed, similar to other independent entities such as NOPSEMA. This direction does not go to the assessment or approval (in this case under delegation) of individual actions but the broader operation of the EPA.

Regulatory capability and culture are key determinants for efficient and effective regulation. It is therefore critical that the legislation does not allow the EPA to become increasingly detached, acting inconsistently with government's objectives, delaying assessments and decisions or putting in place barriers to engagement with proponents, resulting in unworkable requirements. The EPA's regulatory functions must be tied to the objects of the EPBC Act, including the balancing of social, economic and environmental considerations.

The Minister should have the ability to hold EPA to account, e.g. to address failures to meet statutory timeframes, poor administration of the EPA, or to re-dress major bias. Government should have the power to remove the CEO for failure to meet statutory requirements, demonstrable failure to consider the Minister's Statement of Expectations, or maladministration.

The EPA should be subject to regular review by the National Audit Office. The first review should take place within 18 months, with subsequent reviews occurring at least three months before the CEO's term ends. These reviews should inform any decision to reappoint the CEO with review findings made publicly available. To encourage responsiveness to public concerns, the CEO's term should be shortened to three years with a maximum of two reappointments.

Assessments should remain under Ministerial direction

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) grants the Minister decision-making authority, informed by the expertise of assessment officers within the Department of Climate Change, Energy, the Environment and Water (the Department).

Delegated decisions under the EPBC Act should remain with the Department, and not the EPA. Delegated decision-making by an independent entity creates ambiguity and uncertainty, as the delegated person effectively steps into the shoes of the Minister to make a decision on the Minister's behalf but cannot be directed by the Minister.

The EPA's role under the EPBC Act should be limited to compliance, enforcement and assurance, in line with the Government's pre-election commitment.[2] Maintaining assessments within the Department ensures a streamlined process and allows decision-makers to effectively direct their supporting assessment officers.

MCA also notes the recent Senate Economics Committee inquiry into the Australian Securities and Investments Commission (ASIC), which found that ASIC's 'remit is too broad for it to be an effective and efficient agency'. Allowing the new EPA to focus on compliance, enforcement and assurance would help to avoid the pitfalls of excessive remit.

Without guardrails, the new compliance and enforcement provisions will deter investment

At a time when investment is sorely needed, especially in fields such as energy and critical minerals, investors will be wary of the proposed compliance and enforcement provisions, given the extraordinary increases in penalty provisions proposed.

Legal compliance is always one of the highest priorities for companies. However, despite best efforts, there remains some risk that non-compliances may occur. These are often administrative or technical in nature and not material to the outcome for the protected matter.

While strict compliance measures are appropriate for egregious breaches, there is a need for a more proportionate approach for unintentional administrative or technical breaches or matters influenced by external factors.

As currently drafted, given the lack of constraints on the circumstances to which these would apply, environmental compliance risk will likely become a key risk consideration for investments in Australia, due to the possibility of minor or administrative non-compliance with approval conditions and the severity of the consequences (with fines up to a maximum of $780 million). Guardrails are needed in the legislation to avoid this occurring.

The unconstrained ability to issue environmental protection orders (EPOs) without an appropriate evidentiary basis will also weigh on investment decisions. EPOs, especially stop work orders, can have significant repercussions for large operations. They should be used only where necessary, proportionately, targeting the specific risk factor and be based on evidence of actual or potential environmental harm. Any stop work orders should have a limited duration, beyond which a court order should be required for extension. Proponents should be given adequate opportunity to respond and explain issues prior to an EPO being formalised.

Greenhouse gas emissions in the EPBC Act would be counterproductive

MCA notes calls for a climate trigger or climate considerations, specifically the consideration of greenhouse gas emissions in EPBC Act assessments. This would be duplicative of existing emissions regulation and ineffective.

The existing regulatory landscape for emissions is already complex and overlapping. The Commonwealth already has in place climate specific legislation for managing emissions, including the federal 'safeguard mechanism' and the National Greenhouse and Energy Reporting (NGER) Scheme. There is also a myriad of state and federal climate policies and regulation that apply to individual projects. It would be impractical and inefficient for environmental assessment officers to undertake an assessment of individual projects against national climate targets.

Given the multi-factor nature of climate change and carbon emissions, climate change matters should be addressed through a fit-for-purpose national policy framework, such as the safeguard mechanism. This position was supported by the *Independent Review of the EPBC Act*, which recommended against using the EPBC Act to regulate greenhouse gas emissions.

[2] This is also aligned with the Samuel Review, which recommended independent compliance and enforcement functions, but did not recommend independent assessments.

Any perceived deficiency in Australia's climate policy should be addressed through amendments to the 'safeguard mechanism' and NGER scheme rather than the EPBC Act to avoid duplication and potential for misalignment of approach.

A climate trigger will hinder, not help, the energy transition

Introducing a climate trigger in the EPBC Act would be counterproductive. It would unnecessarily expand the number of developments requiring assessment, duplicating efforts of existing state processes and the national safeguard mechanism. This would overload an already strained approval system, without any additional value to the Australian public nor to efforts to address climate change.

One of the biggest impacts of an overburdened assessment system will be on the increasing number of renewable energy projects. Renewables now make up the largest cohort of referrals under the EPBC Act and are already at risk from protracted and inefficient approvals.

A recent report by the Clean Energy Investor Group found that 'EPBC Act assessments have been identified as the single biggest challenge for delivering renewable energy projects in Australia, putting investment decisions and the likelihood of Australia meeting its clean energy targets and decarbonisation goals at significant risk'.[3]

Environment Information Australia can reduce timelines and costs

MCA supports the role of Environment Information Australia (EIA). A national environmental information function would be a powerful tool to help investors make informed proposals and for governments and EPA to carry out their functions. Assessment officers will have the advantage of a properly resourced data function on which to rely in carrying out the assessment of proposals.

EIA independence may create inefficiencies

There is little advantage of EIA being independent of government. EIA's most useful function is as a service provider to government and the EPA, and as well as to proponents. This service provision should be directed by government that rely on the services.

The independence may be of value in EIA's function in reporting on the state of the environment and the government's progress in achieving nature positive outcomes. However, this role is subsequent, to the provision of reliable data to inform decision-making today.

The case has not been made why EIA should be independent and the problem this seeks to resolve and there is a risk EIA may direct resources inefficiently in areas less critical to decision making.

Other bodies such as Geoscience Australia (GA) and the Bureau of Meteorology have a long history of being reliable, trusted custodians of data. GA, in particular, is well placed to take on the national data role. Reporting, such as State of the Environment reporting, could then be done through a function within the department. This would support the integration of environmental and other data for decision makers and avoid systems duplication.

Given the criticality of EIA data, a simple process for proponents to challenge and update environmental information based on quality data inputs (e.g. survey data provided by experts to inform project assessments) should be established.

Application of the Nature Positive definition and baseline

Nature Positive has been defined to be *"an improvement in the diversity, abundance, resilience, and integrity of ecosystems from a baseline".*

[3] Clean Energy Investor Group and Herbert Smith Freehills, *Delivering Major Clean Energy Projects in Queensland and Victoria*, 2023

The Explanatory Memorandum positions Nature Positive as a national goal and that EIA would be establishing a baseline to inform assessment and reporting of progress towards this aim, including State of the Environment reporting.

However, this is not reflected in the bill, which risks EIA misinterpreting it has a role in individual project assessment. The MCA recommends it be made explicit EIA's focus is on national-level reporting of progress against national-level baselines in the achievement of Nature Positive goals, including through progress against one or more of the elements of Nature Positive provided in the definition.

Appeals are driving increasing uncertainty

Judicial review processes are important to safeguard the rights and interests of affected individuals and to ensure development assessment and approval processes remain robust. However, the use of these mechanisms to relentlessly appeal decisions for the purposes of delaying or halting projects for ideological reasons is contrary to the intent of these safeguards.

The minerals and other industries are experiencing increasing challenges (capturing multiple projects in one case) and appeals across different aspects of the EPBC Act. These processes (which can involve multiple appellate courts) can tie up projects for many years despite little prospect of success, and often at taxpayer expense. It is the process, not the outcome, that creates significant delay and costs for proponents, many of which are simply seeking approval for extensions to ensure continuity of operation and certainty for their workforce and their communities.

One recent high-profile case (Munkara v Santos NA) has increased industry concerns that unmeritorious or vexatious appeals are being used as a tactic to delay projects and make these unviable.[4]

Misleading, vexatious or frivolous appeals and court action by third parties unrelated to the investment impact investment with significant direct and indirect cost to the taxpayer. According to the Menzies Research Centre, between August 2022 and June 2024, major projects held up by environmental appeals and court action have cost the Australian economy $17.483 billion and 29,784 jobs.[5]

Without raising the bar for such appeals and challenges, these appeals and court actions could put Australia's economy and climate targets at risk. Given the urgency of this matter, consideration should be given to addressing this issue in the current bills while respecting the rights of stakeholders to raise valid objections. This would help deliver more certainty for businesses.

One early practical action that could be taken would be to amend the EPBC Act to put a time limit on the lodgement of reconsideration requests for controlled action decision, which was highlighted in first Independent Review of the EPBC Act.

The MCA would welcome the opportunity to provide further input on environmental reforms. Should you have any questions, please do not hesitate to contact Chris McCombe– General Manager, Sustainability on

Yours sincerely

TANIA CONSTABLE
CHIEF EXECUTIVE OFFICER

[4] *Munkara v Santos NA Barossa Pty Ltd* (No 3) [2024] FCA 9
[5] Menzies Research Centre, 2024, *Open Lawfare: how Australia became the lawfare capital of the world*