



1 December 2023

Hon. Tanya Plibersek, MP
Minister for the Environment and Water
1A Great Buckingham Street (cnr. Cleveland Street) Redfern
Sydney NSW 2016

via email: tanya.plibersek.MP@aph.gov.au; david.mcelrea@dcceew.gov.au; maya.stuart-fox@dcceew.gov.au

Dear Minister

EPBC Lockup 1 - EPBC National Environmental Standards Interactions Submission

Thank you for the opportunity to provide our comments on the proposed **National Environmental Law Reforms (Environmental Reforms)**, under the Environmental Protection and Biodiversity Conservation Act 1999 (**EPBC**) that were reviewed in the EPBC Lockup 30-31 October.

We also thank Maya for her time earlier last week to discuss the progress of the reforms and her request for us to put the information in writing for the better understanding of everyone.

UDIA National is a strong supporter of the Government's initiative to overhaul the EPBC Act to streamline assessments and approvals. We appreciate the Minister and Department's consultative approach to a complex and important suite of reforms.

In the interests of time, we have provided a summary of the main issues we see following our review of the consultation documents provided during EPBC lockup 1.

While there is not yet enough detail on standards, process and guidelines to confirm if the reformed EPBC Act will improve the process, we have identified several issues that can be addressed now to ensure the EPBC is fair, practical, balanced and achieves the environmental objectives.

Overview.

Please read this submission in conjunction with the previous Environmental Standards Submission on MNES and our submission on the Nature Repair Market, which relate to many of the issues below.

The critical points are:

- The urban development industry supports many of the proposed changes to the EPBC Act under the government's Nature Positive Plan (**NPP**).
- We see how it can work, but the reforms require careful consideration to ensure the various mechanics work as intended and to ensure the process is accountable and transparent.

- Key reform issues for industry relate to the slow pace of approvals, constant re-interpretation of approvals policy by the Department of Climate Change, Energy, the Environment and Water (**Department**), leading to uncertainty and regular re-work, as well as the growing challenge of finding suitable offsets.
- In addition, currently, matters of national environmental significance are now being considered on a “near postage stamp” scale, drawing most key housing projects in urban growth areas into 2-3 year approvals processes with the EPBC Act lacking strategic focus.
- EPBC Act approvals are now a key risk and handbrake for new housing projects in urban growth areas.
- The move to consistent national standards, a nature conservation compensation program and a regional planning standard have the potential to deliver significant improvements.
- Our industry, is cautious, and concerned to ensure there are safeguards around EPA decision-making, given the fraught and difficult history with the current customer interface.
- Unfortunately, we have identified several changes in the proposals that risk adding to the existing problems.
- The proposed move to a non-Ministerial decision-making process via the CEO of the proposed Environmental Protection Authority (**EPA**), is a concern for industry. **The reforms provide an unfettered and unaccountable authority to an agency (EPA)** that has had difficulty managing a streamlined and balanced process.
- The reforms remove any real Ministerial oversight or right of recourse/review for proponents. Even if you do not want EPA review to sit with a Minister, it must sit somewhere as a non-legal review of decision making, for probity.
- The proposed approach makes finding a balance between the environment and social/economic outcomes even more difficult.
- Of equal concern is that much of the delegated policy that will dictate decision making is not available at present. This policy – such as recovery strategies that will set decision making requirements for impacts on the over 2000 MNES – does not exist and will not exist for years.
- While the Department promises that it will prioritise conservation strategies for MNES that currently intersect with development, we are not confident that this will occur in a timely manner, or that industry needs will be properly considered so that the right balance is struck. **We need clear processes and pathways that confirm the balance of issues within conservation strategies.**
- On offsets – which are the most problematic issue for current approvals – we greatly welcome the move to a nature conservation compensation system. However, **we need to have early involvement in the development of the framework and system** for this.
- The proposed (but as yet unspecified), percentage increase in offsets and unspecified costs for any compensation system, creates further uncertainty and must be developed with industry -

the risk is that the system will be unworkable and unaffordable, putting the cost of housing further out to reach of much of the community.

- Our industry remains keen to partner with and support the governments objectives under the NPP as it can deliver great outcomes for the environment, industry and the community.
- In the short term, want to confirm government will work with us to make legislative changes that ensure:
 - social and economic considerations are given better balance in the proposed new decision making rules.
 - There will be independent review mechanisms for 18 month review of the Legislation, EPA performance annually and non-legal review of EPA decisions.
 - industry will be heavily involved in the development of all of the key missing delegated policy affecting our industry to make sure that the right balance is in place.
 - regional planning is prioritised for key urban growth areas including WA, Queensland and NSW to assist with the ongoing delivery of affordable housing.

Below in the Appendix A is detail on several changes that need to be considered as part of the reforms to tighten up flaws in the proposed approach.

We are keen to discuss these reforms with you at your earliest convenience and we are open to all practical solutions that deliver the environmental agenda and resolve the identified issues.

Please do not hesitate to contact the UDIA National Head of Policy and Government Relations - Andrew Mihno on 0406 454 549 to discuss this submission.



Col Dutton
UDIA National President

APPENDIX A: Detailed Additional amendments needed in the drafting instructions (by exception)

a) EPA Accountability

- The EBPC Nature Positive processes are largely evolutionary changes to the existing rules; however, decision-making powers for assessment and approval will sit with the EPA.
- The Minister has a call-in power to determine an assessment/approval instead of the EPA and take into account issues that fall outside the standards **providing** it is exercised up to one day before the EPA makes an assessment decision themselves. **There is, however, no accountability or review process for EPA decisions once made.**
- It is never a good idea to have an agency without accountability for decisions as mistakes will be made and they cannot be corrected.
- The new rules mean we are more reliant on supporting documents, like Regional Plans, to be tightly specified in order to streamline processes and avoid protracted debates.
- With no delegation from a Minister, **there needs to be better review processes to ensure EPA accountability and transparency:**
 - **18 month review of the new Act** to optimise and amend any unintended problems that arise in the new regime.
 - **Yearly review of new Act and EPA performance that includes testimony and data from industry** to ensure there is no blocks or delays to process. Potentially by Senate Committee.
 - **Review of EPA decisions for assessments and/or approvals** – not legal recourse, but actual review process, where an issue meets a threshold of (say), conflict with Government initiatives (blocking urban growth areas etc) - administered by a third party standing outside the agency (not necessarily the Minister alone).

b) Definitions, rules & balance of social and economic factors

- The EPBC standards and guidelines are intended to give the EPA a clear pathway to reduce/remove broad variations in decisions. **This means definitions, rules and guidelines need to be tightly specified and clear,** to avoid debate.
- **We cannot determine if they are adequate because we do not have the detail on how they interact with standards as an end to end process.**
- As with all information systems (like an assessment and approvals process), vague and discretionary rules that do not set clear boundaries for exercise of decision-making powers means bureaucrats are effectively forced to ask for more information and delay decisions until either:
 - The application is amended to “fit” well within the boundaries – there is no “brightline boundary” to allow persons to predict the outcome of their application; or
 - The process is exhausted and the application abandoned.

- The current EPBC approach relies on the Department using “project specific discretion” with loosely defined boundaries for decision-making – this is creating (or allowing) widely different approaches and invariably delays for increasingly detailed (and less and less relevant), information. **There needs to be clear examples in the standards on how the standards and definitions are meant to be applied.**
- In addition, the proposed legislative changes will substantially narrow the considerations that the proposed EPA can take into account in making decisions on projects to only those relating to the environment. Under proposed rules, **social and economic factors cannot be considered by the EPA. This means finding the balance between the environment and social/economic outcomes will be even more difficult.**
- The EPBC Act decisions, overall, are meant to balance environmental, economic, business, social and community issues; however, the reforms (as currently worded), indicate that the EPA will look specifically at assessing environmental concerns alone. **There is no clear pathway and confirmation that the new Act will balance social, economic and environmental considerations.**
- It seems (but has not been confirmed), that the majority of work in simplifying and balancing “economic, business, social and community issues” falls to guidelines and, specifically, regional plans and recovery strategies. **There is no confirmation if or how that will happen. The EPA should be required to consider the EPBC objectives clause that includes balancing the environment, economy and business.**
- Further, if regional plans and other guidelines are vague or broadly framed, the process will be complex and delayed. **Industry needs to be directly involved in developing Regional Plans and recovery strategies and determining bare minimum information needed to avoid vaguely framed plans.**

c) Clause Specific changes needed in line with the detail above.

We need tighter wording in key proposed standards.

Current proposed wording gives the EPA vague and broad discretion in how they exercise powers (eg: no consequences for missed timelines) which undermines predictability:

- **ISSUE: Many clauses refer to the EPA discretion to do things they consider relevant or “satisfying themselves” that thresholds have been reached – this undermines the process and should be removed.**
 - Eg: **1. Assessment and Approvals Pathways** – clause 1.4 allows the CEO of the EPA to “consider any other matters they consider relevant” – either needs to drop “they consider” or specify boundaries on what is relevant.
 - Eg: **Lapsing Applications** – clause 1.8 allow the CEO of the EPA to lapse application approval “if the EPA is satisfied that the applicant cannot be contacted” – they need to drop “if the EPA is satisfied” and allow them to lapse where they cannot be contacted and specify what would be considered valid lack of contact. (also 3.3, 3.6)
 - Eg: **2. Assessment** – clause 2.1 states gateway application is accepted once the CEO of the EPA has all information – while there are strict timelines for applicants to apply and respond, there are no similar timelines on the EPA – **this is a critical undermining of process.** Timelines missed should result in independent (non-legal) review of the matter (which is not currently in the standards).

- Eg: **Timeframe for EPA Decision** – clause 2.4 states that failure of the EPA to meet the deadline (for approval) is not deemed to be a decision nor invalidate decision-making on the application – **this is an critical undermining of process**. Timelines missed should result in independent (non-legal) review of the matter (which is not currently in the standards).

This should apply to any request for information or decision timeframes or IESC consultant advice – could include an if-not-why-not qualifier where it does not go to review if there is a good reason for it as determined by the independent reviewer. (also PARTICULARS for Section 3)
- Eg: **Timeframe for EPA Decision** – clause 2.4 states that time for decision-making by the EPA starts to run once the EPA has accepted the application – there is no indication of a timeframe or process for accepting the application and needs to have this process mapped out.
- Eg: **3. EPA Decision making Criteria: Decision If Approval Required** – clause 3.3 requires the CEO of the EPA to consider several matters and should also include a further requirement to **“consider any issues to ensure no conflict with the objectives clause to balance Environmental, community, economic and business objectives.”** (also 3.5)
- **ISSUE: Many clauses refer to vague and/or wide requirements and can often be worded as a prohibition on EPA action which make it extremely difficult to satisfy and sets up a blocking point of failure that is unreasonable – We need better framed requirements and replace “must not approve” with “must consider”.**
 - Eg: **3.3 EPA Decision making Criteria: Prohibition on Approval to Take Action** – Clause 3.3 states broadly worded requirements that the EPA “must not approve” an action if the CEO of the “EPA is satisfied” taking action would have an unacceptable impact on a protected matter and lists several areas with impacts like “reduced viability” or “adversely impact habitat” of threatened species etc, “irreversible damage” or “inconsistent with guidelines” of world heritage – **the wording for a prohibition are too vague and potentially blocks anything from being approved.**

It should be amended to “must consider” and/or include the word “significantly” at the start of every clause or be more specific on actions they are targeting – ie: what is the practical analysis of “reduced viability” etc. (also 3.4)
- **ISSUE: Many clauses put unreasonable requirements that sit outside the applicants ability to influence and are unfair/impractical.** For example allowing attached conditions to approval to include protection of a protected matter (or avoid, mitigate or repair/compensation for damage) even if it is not the result/responsibility of action of the applicant – it is requiring the applicant to be responsible for something outside their remit. **There should be no conditions that sit outside the applicants direct control or influence.**
 - Eg: **Applying Conditions for Approval** – Clause 3.6 allowing attached conditions to approval to include (where the EPA is satisfied it is necessary), protection of a protected matter (or avoid, mitigate or repair/compensation for damage) **even if it is not the result/responsibility of action of the applicant – It should be removed** as it is requiring the applicant to be responsible for something outside their remit. (also National as Environmental Standards – provision EPA can apply NES even if not required by the act)
- **ISSUE: Some clauses allow the EPA to require a restoration payment for a specified amount rather than leaving it as an allowed option for payment** - the choice of doing an offset or a restoration payment should be the applicant’s NOT the EPA. **There is no objective fetter in the standards on the payment set by the EPA and should have boundaries/limits on operation.**

- Eg: **Restoration Contribution** – Clause 3.10 allow the EPA to allow or “require” a restoration payment for a “specified amount” rather than leaving it as an allowed payment - the choice of doing an offset or a restoration payment should be the applicant’s NOT the EPA’s.
- **ISSUE: The standards seem to try to determine law by the standards where these are matters for courts and are not an issue for legislation.**
- Eg: **Proposed Decision Whether to Approve** – Clause 3.12 states that the process laid out by the clause is an “exhaustive statement of natural justice”. It would seem **this is not for the Legislation to decide – it should be revised or deleted.**
- **ISSUE: Call in Power** – Provisions state the Minister can elect to make a decision at any point up until the business day immediately prior to the final decision due date. This does not take into account delays or shifted deadlines and means call-in ends potentially much earlier than EPA’s eventual decision – **The timeframe should be “up until the later of the due date or the decision of the EPA”.**
- **ISSUE: Call in Power** – Particulars state the Minister can only make a decision regarding aspects of the action regulated by the Act. The EPA is allowed to make decisions as they consider relevant to the action which is far broader than this limitation – equally, matters outside the Act are not valid activities of the Act to fetter – **this would seem to be an overstep and should be deleted or made clear the Minister can make decisions as they consider relevant.**
- **ISSUE: Call in Power** – Particulars state the Minister cannot remake a decision that has already been made by the EPA – **this, while intended to ensure EPA decisions are not politically interfered with, also makes the EPA above any review process which is bad legislation – There needs to be a separate independent review for EPA decisions.** Ministers are answerable to voters, bureaucrats are not answerable to voters an **should never have unaccountable powers.**
- **ISSUE: National Interest Exemption** – Provisions state the Minister can only use the national interest power if action is reasonably necessary AND there is insufficient time to assess under the process. **There should not be any time limitation on the Minister’s National Interest Power** – it is in the national interest because it is a “national interest” NOT because it is timely. **The time requirement is an unnecessary fetter on an elected official that risks binding the hands of Government and should be deleted.**
- **ISSUE: National Environmental Standards (NES)** – Provisions allow the Minister/decision-makers to consider NES even if it is not required by the Act – **this is an over reach that undermines the concept of simple predictable processes – delete or qualify that it must be directly relevant to the action/application.**
- **ISSUE: National Environmental Standards (NES)** – Provisions prevent the Minister/decision-makers revoking a National Environmental Standard in a way that will reduce Environmental protections – **NES can never be reduced, only added to and guarantees the EPBC will become unwieldy/complex. Needs to be removed or modified to read “remove necessary environmental protections as considered by the Minister.”**
- **ISSUE: What is the meaning of “machinery” in the NES Particulars – is it process? What is the process?**
- **ISSUE: Matters of National Environmental Significance (MNES) First Nations** must have opportunities to identify and protect cultural heritage - **there is no mechanism nor qualifiers on how it will operate. This is an unworkable provision that will complicate processes if it is not**

provided with clear boundaries and steps. There has to be a way to end the process or conclude.

- **ISSUE: Matters of National Environmental Significance (MNES) are required to consider several issues to make a relevant decision ie: “must” take these actions** – They directly conflict with clause 3.4 which allows approval only if an action is not inconsistent with NES. No action can be approved if it does not support viability, deliver net positive etc. **Should state instead under the NES that relevant decisions must not materially or unreasonably threaten/undermine etc issues 1 to 4 in this section.**
- **ISSUE: NES Restoration Actions and Restoration Contributions** – section 2 Requirement for Restoration Actions refer to project gains of “X%” – **There is no indication of how the percentage is reached or where it is sourced. Must be resolved and specifics included.** (used throughout the section and elsewhere).
- **ISSUE: NES Restoration Actions and Restoration Contributions** – section 4 Requirement for Restoration Contributions refer to conditions of approval proponents or conditions cannot direct restoration condition expenditure – we do not know what that means. **Please clarify.**
- **ISSUE: NES Restoration Actions and Restoration Contributions** – section 5 Restoration Contributions must deliver expected projected gains – this should be modified to may or should otherwise event the most minor immaterial underperformance will result in failing the test and consequences. **Should specify what happens when there is an immaterial underperformance.**