22 December 2023

Hon. Tanya Plibersek, MP
Minister for the Environment and Water
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Sydney NSW 2016

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Dear Minister

EPBC Lockup 2 - 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 EBPC Lockup 13-14 December.

This submission should be read in conjunction with the 30-31 October Lock-up submission (1 Dec).

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 2.

We appreciate the vast scope of what the Government is undertaking and the efforts being made to workshop the design.

Given the overwhelming volume of documentation, the tight timeframes and the difficult "analogue" approach of the lockups, it has been extremely difficult to ensure we have caught all issues. We will however provide further amendment if we find areas that have been omitted.

As noted before, there are still significant areas (as expected), that need detail (re: standards, process and guidelines), before we can confirm whether the reformed EPBC Act will improve the process.

Overall, we see several improvements related to our previous submission, however there are a number of very significant issues from that submission which have not been yet considered as well as gaps in the process, including the operation and governance of the EPA.

As with our 1 December submission, we have identified additional issues that should be addressed now to ensure the EBPC is fair, practical, balanced and achieves the environmental objectives.

Overview.

The overall concerns relate to:

- The CEO of the EPA being given unfettered powers to vary, suspend or revoke plans, providing no certainty for investment decisions. No procedural fairness process is expressly provided and the EPA powers are beyond the Ministers previous powers – AA320 (vary conditions), AA365 Suspend

approvals and AA390 (revoke approvals) are broader than under the current EPBC Act as they no longer require a precondition of "significant impact not assessed" or "impact substantially greater than predicted".

- Outside of their being a 3 year review of EPA performance, there is no pathway or governance of the EPA to ensure good decision-making – it is still appears to be a law unto itself.

- Combined with lack of detail on process or timeframes, including lack of any material impact (or pathway to resolve), for EPA missing timeframes and the EPA's ability to make the rules that will govern its performance of activities – clear examples of lack of process and conflict of interest. This creates unacceptable uncertainty for investment decisions.

- Equally, the process of application assessment by the EPA is very open ended with no limit or timeframes on requests for information – it becomes potentially very uncertain process.

- There are still very open ended application of conditions for approval including conditions unrelated to the action or not under the control of the applicant – raises considerable uncertainty.

- Key definitions or sections have not yet been drafted, including:
  - Objects not provided.
  - Definition of Ecologically Sustainable Development (**ESD**). There is no tie in of references to ESD and the decision-making process of the EPA. Our expectation is ESD should not change relative to existing and accepted international ESD principles, and we need to see the definition as well as how it will be incorporated into the approval processes/EPA decisions.
  - Draft legislation on the issue of Reconsideration of decisions.

The majority of issues raised in Appendix A of our 1 December submission remain unresolved including:

- There are a number of items where the CEO "must be satisfied" – these are set out in the exposure drafts as mandatory requirements now.
- The draft exposure bill for Environmental Assessment, Approvals and Permitting still references "exhaustive statement of natural justice" (Section AA155(6)).
- There are still open ended matters, such as where the CEO EPA must have regards to other matters prescribed by the rules when considering to grant approval for an action.
- Some conflict areas need careful consideration. For example, whilst the conflict around the CEO EPA needing to be satisfied the action is not inconsistent with National Environmental Standards is removed, the draft exposure bill requires the person making the application to demonstrate that the application is not inconsistent with as National Environmental Standard, which requires the action to "protect, conserve and support the restoration and recovery of habitat" and "support the viability".
- A number of subordinate rules/leg. and guidelines are not available; particularly the rules and recovery strategies.
- The paper on the AEPA sets out that there is the ability to have a decision reconsider in certain circumstances, but only where a substantial change in circumstances not foreseen at the time of the decision. Whilst positive, it is unclear if this is meant to encompass reconsideration of poor decision and needs to be fleshed out further.

The revised papers, environmental standards and exposure drafts appear to have taken into account some of the feedback previously provided by UDIA. For example:

- In the exposure draft for Environmental Assessment, Approvals and Permitting (Chapter 4) the wording for the definition of unacceptable impacts (which CEO EPA will not approve) now include words like "significantly reduces or will significantly reduce the viability".
- Requirement for an action to not be inconsistent with a National Environmental Standard has been removed as a requirement for the CEO EPA to approve an action (however, see below this has been moved to the person making the application).
- There is now mention of ESD at various points in the papers and drafts standards. This is particularly evident in the Regional Plans where the CEO EPA must have regard to economic and social matters when approving a Regional Plan. However, it remains to be seen whether this will be embedded within the objects of the Act and how it will be applicable to EPA decisions.
- Conditions not related to the action are now precluded actions. This includes specification of financial contributions or restoration contributions without consent of the proponent.
- The powers of the CEO EPA to lapse an application if a person is uncontactable are now defined (has attempted to contact three times in last 12 months, with at least once in the past 6 mths).

- In the short term, we still need to confirm legislative changes that ensure:
  - social and economic considerations are given better balance in the proposed new decision making rules for the EPA.
  - there will be independent review mechanisms for an 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 1 is an overview on several issues acknowledging both areas that appear to work and amendments that will enhance operation of the rules. **Please read them in conjunction with the earlier recommendations in the 1 December submission (Appendix A).**

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

a) Strategic Assessments

The **draft paper on Strategic Assessments** indicates that this facet of the Act will remain *relatively* unchanged. This is an area likely to be relied on less than Regional Plans by the development industry.

b) Regional Plans

This part of the new Act is likely to be of significant interest to the development industry and is a positive move overall providing a number of amendments outlined below can be implemented.

Regional Plans will be used to facilitate priority development activities at a landscape scale where there are land use conflicts. **The Plans however, must cover a region of sufficient scale to deliver net positive outcomes and be based on relevant ecological boundaries.**

We note, development of Regional Plans will be led by the States and Territories – importantly, they cannot be led by industry. **It is important however that the industry is involved in their development to ensure it covers off all necessary issues in sufficient detail to simplify processes.**

The Regional Plans will essentially replace Strategic Assessments for areas like the Cumberland Plain Conservation Plan and Perth and Peel Region. We understand, that:

1) the Regional Plans will designate development zones and conservation zones and will approve a class of actions.

2) Those actions will need to be registered with the EPA but will not require approval.

3) The Regional Plans require a net positive outcome for biodiversity to be achieved through a combination of prohibitions, conditions and regional restoration.

4) Overall, the CEO EPA must be satisfied that the Regional Plan will promote survival of enhance the conservation status of impacted listed species and communities.

Unfortunately, the intent, not necessarily well outlined in the paper, and had to be garnered during discussions with Departmental staff. We understand the intent, is to take a strategic view for the assessment and designation of development and conservation zones. For example, there is an intent that the on-ground assessment will not need to be as strict as site-based assessments, with greater reliance on things like predictive modelling. Likewise, when determining development and conservation zones a heat map will be developed to designate overall high-value biodiversity areas, with a view to protecting and conserving broad areas of high biodiversity value and developing low value areas, without the slavish small-scale avoidance criteria that we see applied sometimes. Likewise, the Regional Plans will allow management of issues at a landscape scale, including things like pest species management across a large area to improve biodiversity – something that would never be considered a restoration action under a site based assessment.

This intent should be captured in the new legislation and more detail provided on how this will actually work.

There are two other key issues with Regional Plans:

- The Regional Plans can be varied , including the zones, classes of actions, restoration action requirements and conditions. This is positive, providing flexibility to modify based on new information. However, there are a **few concerning elements**:
  - The **Minister must vary a Regional Plan if an area is identified as a critical protection area**.
  - The Minister also has relatively **unfettered powers to vary a Regional Plan** to improve outcomes for protected matters.

  Whilst there are some backstops (e.g. variations do not apply retrospectively to actions registered with the EPA in the last five years), **both of these items will deeply impact the certainty industry needs in Regional Plans and undermine Government's housing aims through increased risk and discouraging development in areas within the regional plan.**

- The wording requiring the CEO EPA "to be satisfied that the Regional Plan will promote survival of enhance the conservation status of impacted listed species and communities" is problematic.. **By its very nature, development will not promote survival or enhance conservation status of threatened species. This clumsy wording should be removed, with a focus on net positive outcomes.**

There is also the opportunity to have more of the post-approval regulation pushed to the State, rather sitting with the Commonwealth, with the Commonwealth having a review role every few years. **Day-to-day implementation of the Regional Plans must sit with the States.**

c) The EPA

In relation to the **draft paper on the EPA**, it appears the EPA will set out the rules by which it will be governed. This is another unsettling example of the EPA being a law unto itself. **Allowing the agency to make the rules, manage the process and govern itself without oversight is a conflict of interest that undermines good governance.**

We note there is also the ability for the EPA to establish advisory groups to assist in performance of powers. **Industry will need some detail on how this will be used (intended to be used), to determine if it will impact development approvals directly. We simply do not have information to understand the boundaries.**

The EPA will be subject to review every years 3 and every 5 years thereafter. **This is currently the only accountability on the EPA and should be more like every 12-18 months. A review every 5 years is unacceptable given Australia does not even allow its elected political leadership to hold power for this long (let alone unaccountable decision-making).**

d) Environmental Assessment, Approvals and Permitting

The **draft exposure bill for Environmental Assessment, Approvals and Permitting** (Chapter 4) takes into account previous feedback we have provided.

The matters the CEO must have regard to, while mandatory, are generally workable. **We note the inclusion of ESD principles, but there does not appear to be any detail on how ESD impacts EPA decision-making.**

There are a number of positive elements, including the inclusion of words "significantly" around unacceptable impacts and the ability to vary an actions and even conditions provided actions are not substantially greater, substantially different an d do not impact on new protected matters (although "substantially" could be defined). Otherwise, however, this section remained largely as per the earlier consultation and/or the current Act. We refer to the points raised in our 1 December submission Appendix A.

However, **of concern is that the CEO EPA can vary an action of his/her own volition** if they are satisfied it is necessary or even convenient to protect a protected matters or avoid, mitigate, repair or compensate for damage to a protected matter. **This can be done without consultation. This provides great uncertainty and allows the CEO EPA to vary an action at will. These matters should be resolved at the assessment phase and this power removed.**

It is not appropriate to have an unfettered power that has no review or accountability.

e) Recovery Strategies

The **draft exposure bill for Recovery Strategies** was overall uncontroversial. - the Recovery Strategies must include a Recovery Action Statement, or a Management Advice Statement or a Protection Statement. The Protection Statement is what need to be protected to ensure the survival of the species in the wild and *may* designate a critical protection area (habitat that is replaceable and necessary for the species to survive in the wild). If a critical protection area is designated Protection Statement must:

- Identify the area.
- Describe the characteristics of the habitat to be identified as a critical protection area.
- Set out why the habitat meets the criteria.

A strategy may also designate impacts that would constitute a reduction in viability.

We note however that conservation of Recovery Strategies is a mandatory requirement for the CEO EPA when considering to grant approval. **The Recovery Strategies will be powerful documents and without them it is hard to have sight on how the approvals process will work.** We welcome any detail that will allow us a better understanding of the actual Recovery Strategies to be able to make a proper assessment.