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The Department of Climate Change, Energy, the Environment and Water

Submission on the Australian government's Nature Positive Plan and proposed reforms to the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (EPBCA)

We are both experts in Climate and Environmental Law and are pleased to provide this submission regarding the Australian government's Nature Positive Plan and proposed reforms to the EPBCA. Professor Lyster is the Professor of Climate and Environmental Law at The University of Sydney Law School and Associate Professor Ed Couzens holds his position specifically in Environmental Law.

Greenhouse gas trigger in the EPBCA

Prior to commenting on the government's proposed reforms, we wish to address an issue which is not part of the proposed reforms. We hold the view that the EPBCA should include, as a Matter of National Environmental Significance, a 'trigger' to require the Minister to consider the greenhouse gas emissions likely to be emitted from a project assessed under the Act.

- A greenhouse gas 'trigger' was proposed in 2000

Introducing a greenhouse 'trigger' is not a new idea and should not be controversial. As long ago as 2000, Senator Robert Hill, the Coalition Minister for the Environment and Heritage, as he then was, released draft greenhouse regulations to include such a 'trigger' under the EPBCA. The provisions of the EPBCA would be 'triggered' if a project was likely to result in greenhouse gas emissions of more than 0.5 million tonnes of carbon dioxide equivalent in any 12-month period. This initiative was shortly before representing Australia at the Sixth Conference of the Parties (COP 6) to the *United Nations Framework Convention on Climate Change* (UNFCCC). In commenting on the 'trigger' Senator Hill stated, "The *Kyoto Protocol* does not mean that we can't have economic growth in Australia. What it does mean is that we have to be both smarter and more efficient in the way we go about achieving that growth."[1] Senator Hill went on to say that the greenhouse

[1] See https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/67W26%22#:~:text=%22Under%20the%20draft%20regulations%2C%20the,in%20any%2012%20month%20period (accessed 19 March 2024).

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trigger is a cost-effective mechanism that will assist Australia meet its international responsibilities at least cost. It would minimise the burden on Australian industry and safeguard the country's international competitiveness. To avoid duplication between the Commonwealth and the States, Senator Hill assumed that the assessment would be conducted at the State level. Ultimately, the draft regulations were sent to the States and Territories for comment and were not adopted.

We hold the view that the same could be said about the 2015 *Paris Agreement* and a greenhouse 'trigger' under the EPBCA. Indeed, the challenge of dealing with climate change is all the more urgent 24 years after Senator Hill's initiative.

- Meeting Australia's *Paris Agreement* target under the *Climate Change Act (2022)* (Cth)

The *Climate Change Act* has legislated Australia's Paris Agreement target of reducing Australia's net greenhouse gas emissions to 43% below 2005 levels by 2030 as well as the net zero by 2050 commitment. Importantly, the 2030 target is to be regarded as a floor and not a ceiling in terms of Australia's ability to reduce greenhouse gas emissions. Australia's annual greenhouse gas emissions have fallen by only 24.7 per cent since June 2005 and the legislated target must be achieved within the next **six years**. Consequently, a variety of legislative instruments are needed to comprehensively achieve this target and to go beyond it. We propose that a greenhouse 'trigger' under the EPBCA is such a measure.

- We do not support the Report of the Senate Standing Committees on Environment and Communications on the *Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022*

We do not agree that a greenhouse gas trigger is unnecessary because the government has enacted the Safeguard Mechanism. While the Safeguard Mechanism covers mining and oil and gas production, it is an inadequate mechanism for curtailing the release of greenhouse gases into the atmosphere. All Scope 1, 2, and 3 emissions from these projects should be considered under the EPBCA. It has been accepted by the NSW Land and Environmental Court that when considering whether to grant development consent for coal mining, all greenhouse gas emissions including the burning of that coal in third countries, should be considered in the 'public interest' (*Gray v Minister for Planning* 2006 132 LGERA 258). The Minister for the Environment should be legally required to consider Scope 1, 2, and 3 greenhouse gas emissions from coal, oil and gas projects.

Another reason we do not support the Report is that, as discussed below, we have concerns about allowing a facility to purchase carbon offsets in the form of ACCUs where a facility exceeds its baseline.

Recommendation: include a greenhouse trigger in the EPBCA as a Matter of National Environmental Significance.

<u>Biodiversity decline generally and 'Nature Positive'</u>

As Minister Plibersek wrote in the *Nature Positive Plan, December 2022*, the Samuel Review 'offers us an opportunity to make the fundamental changes we need to make'. These are important words. This is not a time for half-measures but an opportunity that must be taken. What should be remembered is that – given inevitable apathy, resistance and constraints – whatever reform measures are put in place will be watered down in practice. As noted in the *Nature Positive Plan*: '[i]n this response to the [Samuel] review, the Australian Government is laying down a marker for environmental law reform. The agenda outlined in this response presents the most comprehensive remaking of national environmental law since the EPBC Act was first introduced'. In light of this commitment, the goals and targets set should be ambitious, in expectation of the inevitable difficulties and delays that will hinder their implementation – in other words, we should aim high rather than low and our achievements will be higher – and if not now, when?

The Australian Government has embraced the Nature Positive initiative and has described it as 'a term used to describe circumstances where nature – species and ecosystems – is being repaired and is regenerating rather than being in decline' (*NPP 2022*). However, there is a grave danger that the concept of 'Nature Positive' will simply 'blur into' many of the existing plethora of 'buzzwords'. Just at national level, recent years have seen the adoption of various plans, programs and strategies, such as the '2015/2016 Action Plan'; 'Flagship Programs 20/20/2020'; 'Biodiversity Conservation Strategies 2010-2030'; 'National Strategy for the Conservation of Australia's Biological Diversity 1996'; 'Strategy for the National Reserve System 2009-2030'; 'Threatened Species Strategy 2015'; 'Australian Weeds Strategy 2017-2027'; 'Australian Pest Animal Strategy 2017-2027'; 'Strategy for Nature 2019-2030 (with 'Australia's Nature Hub'). There also are many similar strategies at State level.

The 'Nature Positive' concept should be used to unify these and the 'opportunity to make the fundamental changes we need to make' taken.

Recommendation: Clarify and entrench the lead role of the 'Nature Positive' concept in bringing together all of Australia's different plans, policies, programs and strategies.

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Conservation planning, the 30/30 Goal, and the nature/heritage overlap

The goal of protecting 30% of Australia's land and seas by the year 2030 is a worthy one, and achieving it would be cause for celebration. However, the 'devil lies in the detail' and ultimate success will depend not just on total percentile area but also on factors such as the degree of protection and connectivity. For example, the value of protecting a marine area from fishing might be undermined if this were to be defined as a ban on commercial fishing, but recreational fishing remained permitted. As a further example, the value of a protected area might depend upon its connections with other protected areas – a fragmented area might be worth little if species are unable to reach other parts.

It is a worthy commitment that 'the government will remove overly prescriptive processes and duplication in conservation and management planning for species, communities and, where relevant, heritage'. However, what is really needed is for biodiversity (species and ecosystems) to be given 'space' through the taking of a 'landscape approach'. The 'National Strategy for the Conservation of Australia's Biological Diversity 1996' advocated the taking of a 'landscape scale approach to biodiversity conservation' – this is not therefore a new concept, but it has not successfully been implemented. There never will be a better time than now to make 'linkage' an overarching theme.

The *Nature Positive Plan* (*NPP*) refers a number of times to the importance of acting 'at a landscape scale', unfortunately without defining this. It would be valuable to have a clear definition included, together with examples and firm commitments – especially if this could be expressly linked not just to regional planning, as the *NPP* suggests be done, but also to the concept of cultural landscapes so as to link the protection of biodiversity with the protection of cultural heritage. While the *NPP* is strong on the need to give greater recognition and respect to First Nations voices, the *NPP* does not sufficiently firmly explain that it is artificial to separate protection of nature from protection of heritage, and that both will suffer if they are not seen as inherently inseparable.

Recommendation: Define 'landscape scale' and commit to increasing connectivity, both physically through avoiding fragmentation of habitats and in spirit through affirming the inextricable natures of cultural and natural heritage and the environments in which they are found.

‘Sunsetting offsets’ and acknowledging ‘ecosystem services’

The *NPP* notes that ‘current offset arrangement are contributing to environmental decline’; and indicates that ‘the government will reform offset arrangements to ensure they deliver gains for the environment and reduce delays for proponents’. Unfortunately, these goals are not ‘the fundamental changes we need to make’. The nettle that needs to be grasped is that offsetting needs to be phased out altogether, not reformed. Unfortunately too, the linkage in the *NPP* of offsetting with the proposed ‘nature repair market’ is likely to entrench offsetting as a ‘cost of doing business’ instead of as an ‘exceptional procedure’.

Important guidance can be obtained from a 2018 judgment of the International Court of Justice (ICJ), in the *Certain Activities Case (Costa Rica v Nicaragua)*. In a dispute over how to calculate compensation for environmental damage, Nicaragua argued for replacement costs of lost ecosystem services, calculating this value ‘by reference to the price that would have to be paid to preserve an equivalent area until the services provided by the impacted area have recovered’ – essentially, an offsetting approach. The ICJ went further, however, and indicated that ‘it would assess the value to be assigned to the restoration of the damaged environment as well as to the impairment or loss of environmental goods and services prior to recovery’. Further, the ICJ indicated that it considered it ‘appropriate to approach the valuation of environmental damage from the perspective of the ecosystem as a whole, by adopting an overall assessment of the value of the impairment or loss of environmental goods and services prior to recovery rather than attributing values to specific categories of environmental goods and services, and estimating recovery periods for each of them’.

The *NPP* does not go far enough in the reforms it proposes to offsetting; and does not acknowledge the reality that the concept of offsetting is reaching its outer limits – there simply is not the available land, and ‘like for like’ offsetting is no longer possible.

We also draw the Department’s attention to the latest research[2] published on 26 March 2024 in the peer-reviewed journal *Communication Earth & Environment* indicating that ACCUs in Australia are deeply flawed, reinforcing also our view above that the Safeguard Mechanism is an inadequate mechanism for curtailing greenhouse gas emissions from coal, oil and gas developments.

Recommendation: Indicate that offsetting is a temporary convenience, not an entitlement, and that it will soon cease to be an available option.

[2] https://www.nature.com/articles/s43247-024-01313-x (accessed 30 March 2024).

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The nature of Environmental Impact Assessment

The *NPP* makes much of 'simplifying' and 'streamlining' the environmental impact assessment (EIA) process but says little about reforming and improving the process itself.

Internationally, there have been several important milestones in the development of EIA. In the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) case, 1997*, a judgment of the International Court of Justice (ICJ), it was firmly suggested in a separate opinion (of Justice Weeramantry) that EIA is required and that ongoing EIA should be required. 13 years later, in the ICJ's judgment in the *Pulp Mills case (Argentine v Uruguay), 2010*, the ICJ stated firmly that environmental law has so developed that it is now a principle of customary international law – and that ongoing EIA (entailing monitoring and review) is now part of the process. It would be valuable to see this entrenched in the reform of Australia's EIA law.

Recommendation: Entrench the principle that EIA does not cease at approval, but remains an ongoing requirement through regular monitoring and periodic review.

We trust that our submissions and recommendations assist the Department and we remain available for further consultation where required.

Yours sincerely

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