To: Department of Climate Change, Energy, the Environment and Water

Re: Nature Positive Consultation

30 March 2024

Introduction

AMEC appreciates the opportunity to provide a submission to the Department of Climate Change, Energy, the Environment and Water (DCCEEW) regarding the proposed reforms to the *Environmental Protection Biodiversity Conservation Act 1999* (EBPC Act) known as the Nature Positive reforms.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry association representing over 570 member companies across Australia. Our members are mineral explorers, emerging miners, producers, and a wide range of businesses working in and for the industry. Collectively, AMEC's member companies account for over $100 billion of the mineral exploration and mining sector's capital value.

Mineral exploration and mining make a critical contribution to Australia's economy, directly employing over 274,000 people. In 2021/22 Industry generated a record high $413 billion in resources exports, invested $3.86 billion in exploration expenditure to discover the mines of the future, and collectively paid over $63 billion in royalties and taxes.

All of Australia's mineral exploration and mining is undertaken within the parameters and approvals of the State and Commonwealth's environmental approval's regime.

Nature Positive

General Comments

The overwhelming and consistent theme of the feedback received from Industry regarding the proposed reforms has been focussed on the process of consultation, or the lack of it, rather than the content of the reform.

Industry is alarmed that DCCEEW have not consulted in a manner that would satisfy their own requirements. The patchwork of consultations has made a complex reform, even more opaque and hard to understand. We consider that the appropriate solution is to provide a 12-week consultation where all of the proposed reform to legislation is supplied for comment prior to their introduction to Parliament. The inclusion of case studies that demonstrate how these reforms are implemented would be welcome.

While AMEC has appreciated the opportunity to be in the room to read the available information, the draconian restrictions on electronic devices have resulted in hand transcription of policy being relayed to members. The choice to consult in this manner has undercut the work the staff at DCCEEW have

invested to undertake substantial work on short timeframes. It has also undercut the stated intention of the time – to seek feedback, as Industry Associations have been focussed on relaying information that could have been shared via the internet via DCCEEWs HaveYourSay website or an email.

The ongoing conversation around the challenges of the consultation process has obscured the substantial concerns from across Industry with what is proposed.

The content of the reforms will have severe implications for current and future project developments. The Australian economy is facing falling productivity and rising inflation. The reforms do not appear to address the long timeframes faced by all projects in Australia, nor do they reduce the cost of doing business. The mining and exploration industry have cited concerns for the investment profile of Australia in the face of the Nature Positive reforms.

Fundamental concerns remain.

The following are the concerns Industry have relayed to AMEC regarding the proposed reforms:

- **Ministerial decision making:** The Minister should have the final say.
- **Timeframes**: what is proposed is unlikely to lead to faster approvals.
- **Rising regulatory complexity and burden**: new concepts, a new approach, greater data requirements, two new Agencies and increasingly complex interaction with States.
- **Increasing cost of doing business**: heightened regulatory burden and complexity is directly correlated to a rising cost.
- **Regulatory effectiveness and efficiency**: Will the new Act address the findings detailed in the Australian National Audit Offices' Report-47 in 2019- 2020 report into *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*?
- **Fines:** The quantum of fines is unreasonable and will have a negative impact on investment.
- **Climate Change Trigger:** A Climate Change trigger should be ruled out as it is managed under its own bespoke legislative framework.
- **Data:** Australia does not have the necessary biological data to perform what this legislative framework proposes.
- **Uncertainty***:* When the reforms will be introduced and what they will entail are unclear.
- **Outcomes:** Despite the good intentions and narrative - there is little evidence this reform will lead to better outcomes.

Open questions that remain unanswered

The following comments are for areas that we anticipate will be covered by the Nature Positive legislation, however there is currently insufficient detail to understand how they will be implemented. These areas are all important for Industry and are listed below in order of priority.

Nature Positive (and Net Gain)

The titular concept of nature positive, and the related one of net gain, are undefined. This is a substantial risk for Industry. Industry feedback suggests that the narrative from Government has been inconsistent and unclear. There does not appear to be agreement on a methodology to calculate what is the positive outcome that the Commonwealth Government seeks to achieve. The scope of

Nature Positive also needs to be resolved, is it only for Matters of National Environmental Significance or is it broader – and if so, how?

The percentage chosen, as Nature Positive has been devolved to an X %, will have a material impact on the economic future of Australia. Great clarity on what process will be taken to identify the quantum of Nature Positive sought is needed.

Industry has noted that the approach of Nature Positive is a fundamental change to the foundations of Australian environmental legislation. To achieve Nature Positive it must be accompanied by a genuine change in the scalability and outcomes sought. It will demand new concepts, a move away from offsets, and a step change in the data and knowledge of ecosystems nationally.

If this amended framework was to be introduced, the Commonwealth Government would be implementing a regulatory framework with a fundamentally different underpinning than the State and Territories. The proposed regulatory misalignment is a concern.

Significance

What is considered significant and is in the remit of the Nature Positive legislation? The lack of a clear consensus definition of significance is a perennial concern for Industry with environmental legislation. This lack of definition renders it difficult for Industry to predict the likely impact of the reforms. Without clear criteria and metrics, it becomes challenging to assess progress accurately. The lack of definition contributes to conflict as third parties often have a different interpretation of what they consider to be significant. Finally, the lack of clarity makes it difficult to hold stakeholders accountable and erodes the broader social licence the legislation seeks to form.

Aboriginal Cultural Heritage

There is not enough detail to be able to provide specific comments on the treatment of Aboriginal Cultural Heritage. The current lack of transparency is making it very difficult to appreciate any impact on operations and our assets. Industry asks for greater clarity on the timeframe for reform, and how DCCEEW propose to manage the inherent duplication with the *Aboriginal Torre Strait Islander Heritage Protection Act 1984* and the State legislation.

Noting that Western Australian *Aboriginal Cultural Heritage Act 2021* engaged in this reform over five years, engaging with thousands of stakeholders and hosting a laborious co-design process.

Assessment Pathways

Draft documentation was shared with Industry Associations in October that detailed two new pathways for receiving an assessment. The decision to discard the long-standing, and generally well understood, referral followed by assessment process has created uncertainty and further confusion.

The new processes, both the low impact and the standard assessment pathway demand that a proponent has a greater volume of information on the project prepared prior to submission than the current system. A preliminary concern is how well this approach will integrate with the differing State and Territory processes around the country. A consistency amongst the States is that they still have referrals, scoping documents and terms of reference, where the responsible Decision-Making Authorities provide input prior to submission. The response from Government has been to suggest the

future guidance should suffice, however Industry experience suggests that each project draws unique questions, concerns, and requirements from Government. An advantage of the discarded referral process was that there was a clear expectation that proponents would meet and discuss with the Department prior to submission. It is anticipated that this practice will continue, albeit informally.

Industry has noted that the proposed Low Impact pathways will, frustratingly, not be a low administrative burden pathway. A proponent will still need to collate a comprehensive suite of documentation to support it; otherwise, they will run the considerable risk that the decision goes the other way and they are pushed into the Standard Approval Pathway.

The current drafting provided no information on the period in which the proponent will be notified that action will need approval or whether it meets the criteria for the Low impact pathway. The distinction was noted that what has been drafted does specify time frames to decide to approve or refuse, but not to tell you that you are on the correct pathway. A verification process is understood to occur, but what that precisely involves, and timeframes associated with it, are unclear.

The role of the State and Territory Governments is still very unclear. An open question that has been discussed at length by Industry is the risk that a State or Territory Environmental Protection Authority will be obliged to tell Environmental Protection Australia about a project impacting on MNES. Whether the EPA would be required to tell their Commonwealth colleagues ahead of when the proponent wants to submit the application to Commonwealth process is unclear.

Variations to Assessment.

Provision to allow variation of proposal during assessment is positive as current legislative framework does not allow for this. This has created numerous problems, and it is a step forward to include it.

Accreditation of States and Territories

The Nature Positive reforms will propose a new model of accreditation with parts of a State's environmental reforms being able to be accredited, rather than the whole scheme. This is supported by AMEC. However, the detail of how the proposed accreditation process will work is unclear. The reality that each State and Territory has slightly different environmental regimes will mean each accreditation must differ.

Due to the consultation method, it is unclear if the States and Territories have agreed with this style of approval pathway. A concern for Industry is whether there is evidence to suggest that this will not lead to increased congestion in the State and Territories current approval-based systems, and therefore delays in projects getting to Financial Investment Decision.

Industry's preference would be an explicit devolution of the accredited approval to the State. However, it is ambiguous whether that is possible in the legislative framework.

Climate Change

The upfront estimation of domestic Greenhouse Gas at development conception is a problematic approach due to the lack of data to do so. The estimation will need to be accompanied by an abatement plan that meet any State and federal abatement guidance material including assessment against the current Safeguard Mechanisms. This report will then be made publicly available as well as

dual referral by the EPA to the Minister for Climate Change and the Assessing Minister (Environment) to ensure a scrutinised assessment of the climate accounting for a project.

Original consultation discussed the need for greenhouse gas emissions estimates in project assessments, for which there is a robust existing system to lean on in order to provide proponents with an opportunity to develop an estimation of potential emission profiles. The reality of the estimations is that they can only remain an estimation until such times as the project is approved and has become operational. Therefore, abatement plans should also be retained as suggested and only enacted once there is a demonstrated baseline from operations.

Technological advancements in this area mean the lag between assessment and approval and approval and operation mean that there could be years between the original emission estimation and the final operation of a project's emission profile.

Zero Extinctions

Industry and AMEC support the broad theoretical intent of aiming for zero new extinctions. However, in practice the rhetoric does not align with the realities of the risk based Australian environmental regulatory landscape. There is a fundamental lack of data and science at both a species and regional scale to guarantee zero extinctions. This choice in language creates unrealistic expectations. When this expectation is paired with the longstanding precautionary principle that underpins environmental regulation, it threatens to stop all future development.

Draft Standards

Matters of National Environmental Significance

Are the requirements of the National Environmental Significance intended to apply to the same degree for any Matter of National Environmental Significance (MNES) regardless of whether it is one with a significant residual impact or not? An approval decision should not require the proponent to "maintain and improve conservation, management and recovery of MNES" if that MNES wasn't significantly impacted by the proposed action. Migratory species would often fall into this category.

As a whole the Standard is relatively clear in what they're trying to achieve. However, it is unclear to what extent each item in the Standard applies to various parties. For example, which parts are the responsibility of government, proponents, others, etc.? This needs to be made clear in future drafting otherwise there is considerable scope for proponents to be asked to meet parts of standards that may not be relevant to them.

Restorative Actions and Contributions

AMEC supports the Restorative Contributions model in principle but has several concerns.

The current drafting lacks the level of detail for Industry to assess the price of such a mechanism, and for a restorative action. It is assumed, with no evidence, that the restorative contribution model will be priced so that it can be implemented. It will increase the cost of doing business.

Industry has noted that a Restorative Contributions model will shift the liability for action to the Government. It is unclear what priorities will be given to restoration contributions and the activities of the Fund. A live example of this model could be the Pilbara Environmental Offset Fund in Western

Australia. Since its inception PEOF has struggled to achieve outcomes, being mired in administrative process and onerous consultation expectations.

A concern for Industry is that the current drafting appears to lack consideration and opportunity for innovative actions. Industry has proposed that proposals for an innovative technique of restoration actions could be limited by a maximum percentage of total restoration actions/contributions. To achieve Australian restorative actions the system should be weighted toward encouraging industry to propose and trial new measures. Especially if what is proposed are viewed as contributing to the conservation *gain* component as opposed to traditional offset view of counterbalancing residual impact.

How the Restorative Actions and Contributions model will work with various State systems is an open and unanswered question. A Contributions model will place a price on vegetation, as the New South Wales Biodiversity offset credit scheme does as well – it may be a different price. The Western Australian EPA released Advice indicating a shift away from 'like to like' in favour of 'like for like, and similar, values'[1]. The Northern Territory has a target-based model, acknowledging their unique environment that lacks sufficient disturbance for a 'like for like' model to work[2]. Noting that neither WA nor NT place a price on biodiversity. These three jurisdictions are indicative of the broader national inconsistency and a potential disconnect with Commonwealth restoration actions and contributions.

Industry has discussed the assumptions of the 'averted loss' component and whether it is relevant. If Government can clarify whether this standard is an 'either/or' situation with respect the possible actions of restore, manage and securely protect, that would be welcome. i.e. can you get credit for doing all three of these?

Clarity of whether each component of a restoration action must meet these criteria, or whether the criteria only need to be met by the whole is also needed. To highlight why this is relevant, as an example related to indirect action in the sense research may never be permitted, even as a small component of a bigger restoration action. Industry suggests a conservation planning document would likely never prioritise research above direct restoration actions.

Industry has sought greater clarification of how the Standards references to an approved State or Territory action will operate. For example, does this mean an equivalent offset required under a State or Territory approval? Alternatively, does it intend to shadow state offset requirements, existing only or in the future? Also, what happens when a State proposed offset is not considered an appropriate or approved restorative contribution?

The requirements for consideration of climate change scenarios will need greater guidance, and detail. Given the scale of climate change compared to the restorative contribution, the expectation needs to be detailed.

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[1] https://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/Public%20Advice%20Considering%20Environmental%20Offsets%20at%20a%20Regional%20Scale.pdf

[2] https://depws.nt.gov.au/environment-information/northern-territory-offsets-framework/northern-territory-offsets-framework

Industry has discussed the post approval reporting requirements considerably. The reporting requirements should be shaped so that a proponent can begin restoration as soon as practicable. There are requirements that will drive greater administration in the post-approvals space with negligible outcomes.

A key criticism is that the length of time a restoration action will take to reach full maturity[3]. Industry has noted that the primary academic and scientific work on restorative actions is based on international datasets, underscoring the need for Australian data.

The existing offset framework struggles to manage spatial and temporal mismatches – the offset project might not adequately compensate for the loss at the same location or timeframe as the impact, leading to fragmented landscapes and delayed benefits. Arguably the introduction of a Conservation Payments model will accelerate these concerns. It is unclear how the funding will be prioritised to ensure spatial and temporal considerations are addressed.

Monitoring and enforcement create significant hurdles. Ensuring that offset projects are implemented as promised and deliver the expected outcomes demands robust regulatory frameworks and ongoing oversight. The Commonwealth Government has not invested the necessary resources in this space, instead relying on reporting. These concerns underscore the need for careful consideration and refinement of offsetting mechanisms to genuinely fulfill their intended purpose of environmental conservation.

Regional Planning

The proposed Regional Planning standard provides a clear advantage to proponents that are in an area that has a regional plan, and their project is in an area that is identified for development. The Commonwealth Government is assuming that this approach will be adopted by the States and Territories. This has yet to occur.

There is clearly a jurisdictional question for environmental regulation as to how the overlap between Commonwealth and State legislative expectations will be met through the single document.

The DCCEEW document on the Pilbara Bioregion policy that was consulted upon in early January has demonstrated the concerns Industry may have with Regional Planning. With the application of scientific information to develop arbitrary exclusion zones and practice requirements that were impractical. The rigidity of management requirements prescribed in the Bioregion policy also reduced potentially innovative solutions and ignored the tenure constraints across the region. These arbitrary requirements would also remove the opportunity for site-specific information combined with best-practice measures to be considered in a science-based impact assessment process. This reduces the ability to find a data-based balance between conservation and economic outcomes.

Industry is concerned as most of Australia lacks the data needed to make a regional plan. There are simply not enough surveys. There is a lack of complex, longitudinal data. Existing data is challenged by questions of accuracy and reliability. Where there is a lack of data, assessments heavily rely on

[3] Xu, Y., et al. (2022). "Target species rather than plant community tell the success of ecological restoration for degraded alpine meadows." Ecological Indicators

scientific information which may be incomplete or subject to bias, which would undermine the credibility of findings and decisions based on them.

Industry has highlighted potential issues with scope of regional plans, which could both include overlooked impacts and ineffective mitigation strategies.

Stakeholder engagement is important, but it can be challenging to ensure meaningful participation from diverse groups with varying interests, potentially resulting in unaddressed concerns or resistance to proposed strategies. The PEOF in the Pilbara struggles to achieve its own stakeholder engagement standards has led to a paralysis in outcomes.

There is also the issue of implementation and enforcement, where even well-designed strategies may falter without adequate mechanisms to ensure compliance and monitor ongoing impacts, risking the failure to achieve desired environmental outcomes. This is complicated by the State and Commonwealth overlap. Addressing these concerns is essential for enhancing the effectiveness and legitimacy of environmental strategic assessments in guiding sustainable development practices within regions.

The Commonwealth Government's decision to pilot Regional Plans in Queensland was welcomed by Industry. Particularly those undertaken in areas that have mining activity such as Juliet Creek. Greater detail as to how the first period of this implementation has been undertaken would be welcome.

First Nations Engagement and Participation in Decision-making

The lack of information on the First Nations Engagement and Participation in Decision-making standards makes it difficult to comment. However, the lack of consultation on this Standard has raised concern and speculation within Industry. The experience and learnings from the Western Australian development, delivery and reversal of the *Aboriginal Cultural Heritage Act 2021* need to be considered. Alongside the potential confusion of a simultaneous consultation on the *Aboriginal Torres Strait Islander Heritage Protection Act 1984.*

Data and information

It is unlikely that any information produced specifically for the proposed action (e.g. consultant reports) would ever achieve Tier 1 data status. Furthermore, it seems that much data that might be categorised as Tier 3 will have to be ignored? This creates an inherent conflict with the precautionary principle, as Tier 3 data will be both ignored and a risk.

The taxonomic overlap and duplication that the Data Standards potentially create has been highlighted by Industry. In particular, it has been noted that the standards should not be creating new ways to classify Greenhouse Gas (GHG) emissions. This is concerning especially when it has a high likelihood of being confusing as publicly disseminated information with respect to a proponent's separate NGERS commitments. Data for GHG emissions should be described according to existing, and legislated, NGERS scope 1, scope 2, and scope 3 definitions only.

Across Australian jurisdictions there is already considerable overlap and inconsistencies in definitions. For example, which species are on threatened species lists? There are differences between each jurisdiction which create costs.

Community Engagement and Consultation

What is meaningful engagement, when is there enough engagement and how will that be determined are three questions that underpin Industry's consideration of this Standard.

The requirements are extensive and need clearer definition and outcomes:

- Proponent must offer opportunities for engagement and should offer multiple opportunities for engagement. Greater clarity is needed around the specifics of what is considered engagement, how often and when does it suffice.
- Proponent must hold a public meeting, either online or in person if internet accessibility is limited.
- Standard 6 weeks (30 business days) public consultation on relevant information (unsure of intent but probably the referral/ERD)
- Public comment period should be lengthened if "the proposal contains complex information". Complex information is defined as anything "more advanced than the lower secondary education level", i.e. beyond Year 9 reading level ability. Every single environmental approval document is beyond Year 9 reading level information.
- Proponent must explain what will be done with comments received

A proponent's choices in regard to the above, including how often, when and how it has consulted or offered opportunities for engagement) must be justified to the EPA in a separate Summary of Community Engagement and Consultation. Wider industry understands the necessity for community engagement, and the central role industry plays in a community: providing jobs, social and economic benefits. There are concerns that there will be a lack of prescription as to what is acceptable consultation, noting the difference between consent and consultation. There is concern regarding how this Standard will work with each State and Territory's Aboriginal and Cultural Heritage policies; as well as with the Native Title Act

Environmental Protection Australia

Our primary concern with this agency is the concentration of final environmental decision making in its remit. The establishment of an independent agency to regulate Australian environmental legislation is opposed and is seen by Industry as an overreach.

The Environmental Protection Australia agency's role should be limited to make recommendations to the Minister, and the Minister should have the final decision on whether every project proceeds.

Industry rejects the underlying contention that an independent Agency will make 'better' decisions because they will be separated from democratically elected representatives. Instead, what is proposed is a disempowerment of the parliament, and a shifting of a fundamental responsibility for crucial decisions across the Australian landscape from the political to a bureaucratic sphere. The independence of environmental decision making is an exclusion of the public from holding the final decision maker accountable. If a Cabinet Minister holds the responsibility for the final decision, the robust analysis of the Parliament, the media and the wider public can have greater transparency over what occurred and what will occur.

Industry has also noted that the traditional institution tasked with managing contentions of injustice is the Judiciary. Industry has also noted that the Australian judicial system has performed this role without fear or favor consistently.

The Environment Protection Australia is proposed to be an Agency focused on the protection of the environment. It will be staffed with environmental experts who have a narrow focus and responsibility for the environment. While the environment is a crucial aspect as to whether a project should proceed – however, it is not the only one. If democratically elected Australians decide that a project should proceed for grounds other than the environment, than a Minister should be capable of making that decision – and bearing the consequences of doing so.

Parliaments are a representative body of the community, and Cabinet Ministers take an oath for the betterment of Australia. The responsibility and authority for making decisions on Australia's environment should remain in the hands of the Australian people rather than be held by a non-elected official.

Shifting final decision making back to the Minister will have substantial flow through affects to what is proposed. Consequentially, the (insufficient) Ministerial call in powers will need to be removed, as the Minister should have the final decision. The national interest test should be removed as it is unnecessary. The terms of the CEO of the EPA need to be similarly adjusted.

Environmental Information Australia

The role of Environmental Information Australia will be crucial for the success of the Nature Positive concept. The legislation provided for comment has largely been machinery legislation that creates the agency. Such an Agency has an enormous task, collating, standardising and curating Australia's diverse data sets. The management of sensitive commercial intellectual property and its curation will be vital to delivering catchment scaled approach.

However, the role of discerning what data is considered of a sufficient quality, and what is not is incredibly powerful. There will be a natural bias toward the creation of new information that will be costly and duplicative for Australian business. The Government must consider how to digitalise existing data, and whether there are parts of existing data that can be acceptable. There are also data types, for example water modelling, which are bound by intellectual property and confidentiality.

Cost Recovery of the Nature Positive Reform

Since the 2023 consultation on cost recovery for the Nature Positive reforms, the Commonwealth Government has been silent as to how this will be funded. Industry notes that the reforms will create greater regulatory expectations and corollary demand increases for staff and systems. The lift in expectations will not occur for free, there must be greater transparency on how much these reforms will cost – and whether the lift in costs is leading to a sufficient increase in environmental outcomes achieved.

Other issues

Nomenclature

Why does the Nature Positive Reform duplicate many of the existing acronyms used in environmental regulation. For example, a number of jurisdictions have Environmental Protection Authorities, why does there need to be another EPA; and Environmental Information Australia shares the same acronym with Environmental Impact Assessment. This seems an avoidable problem, and while unlikely to now be addressed so late in the reform drafting, a source of muted frustration for Industry.

Wider Industry Education

The proposed reforms are complex, extensive, and intend to profoundly change the way the Commonwealth Government regulates environmental disturbance. This is not well understood in the wider Industry at all. This is partially the responsibility of the Government.

Bioregion Policy and Australian Nature Strategy

DCCEEW have released two further documents, the Pilbara Bioregion Policy and the Australian Nature Strategy – both of which are tangentially related to the Nature Positive reforms. The Bioregion policy is an unfortunately timed exercise in how the Commonwealth Government will apply the new Act. This has raised considerable concern for Industry, as there is a perception that the Pilbara would be rendered inoperable by its introduction. While the Australian Nature Strategy is still out for consultation, the affect of this overarching strategy on the biodiversity targets required to be achieved across the Pilbara Bioregion Policy and Nature Positive legislative package are unclear.

Final comment

The Nature Positive reforms need to be consulted on in a manner that allows all in Industry to see all of the documentation and provide feedback. The current model of consultation does not allow for this to occur. The Government is undercutting the authority and credibility of their reform through this opaque consultation process.

We ask that all Australians are provided with all of the information in the Nature Positive reforms to supply their feedback prior to its entry in to Parliament.

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