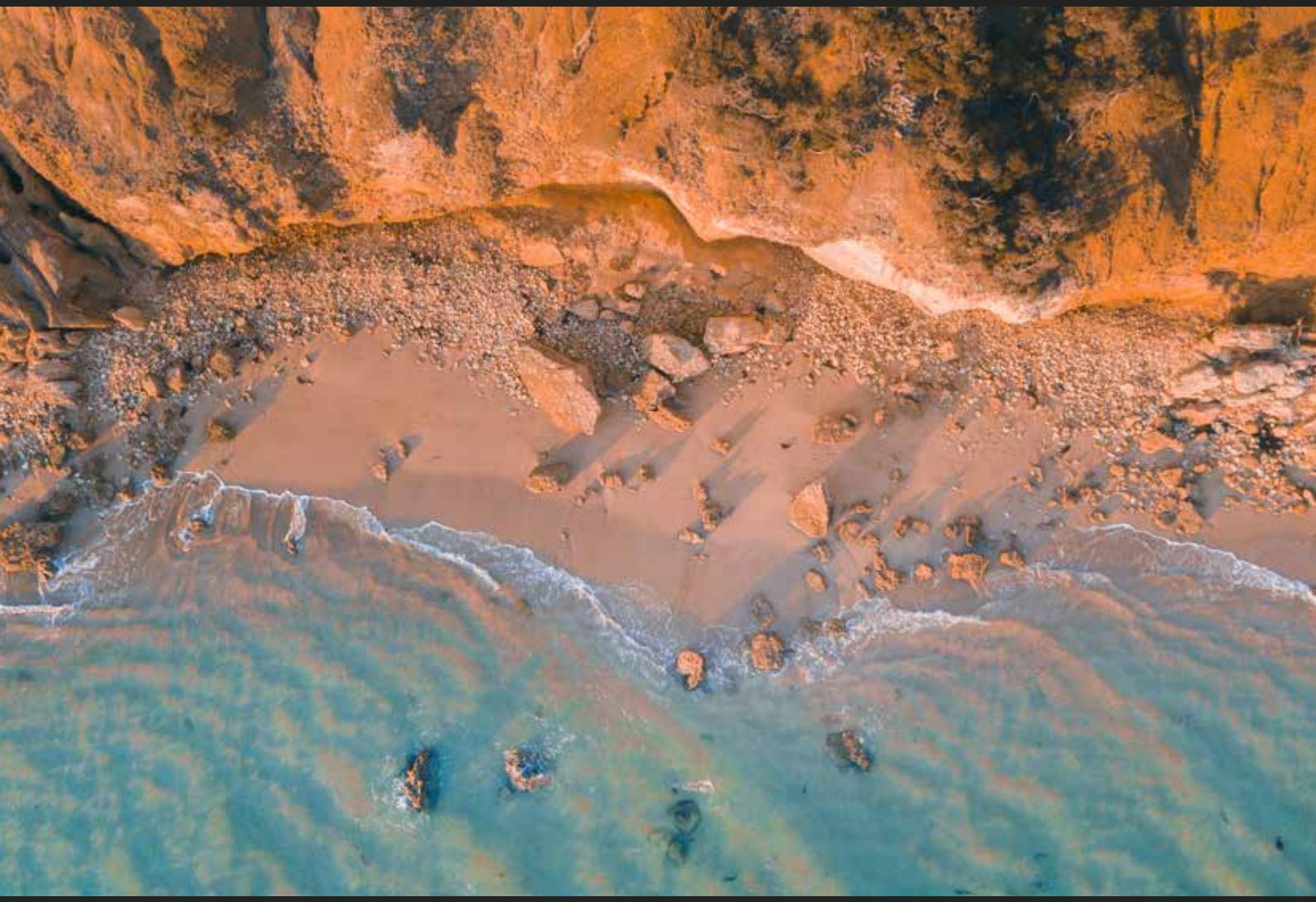
Environmental Defenders Office



Implementing effective independent Environmental Protection Agencies in Australia

Best practice environmental governance for environmental justice

January 2022

A Note on Language

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. In the domestic context, where possible, we have used specific references. Further, when referring to First Nations in the context of particular country we have used the term 'Traditional Owners'. More generally, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Islander peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

This report also discusses and makes a number of recommendations in relation to the development of Cultural Protocols based on First Nations Lore. While the word 'Lore' has been chosen, it is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia, and the EDO acknowledges that First Nations Lore should be respected in the same way that western laws are respected.

Contents

Executive Summary

Environmental Protection Agencies (**EPAs**) can play an important role in ensuring human impact on the environment, human health and other species is sustainable and just, for the health of the environment and humans in the current and long term. They are typically intended to act as a regulator of development, managing pollution, environmental destruction and waste and ensuring that the health of the public and the environment is maintained.

Many states and territories in Australia already have EPAs that are responsible for environmental regulation, although each varies greatly in its functions, powers, structure and effectiveness. Queensland is currently the only state or territory that does not have an EPA, and there is currently no national EPA.

However, EPAs in Australia are currently primarily focused on supporting industry to operate through licensing environmental impacts, with industry being considered their 'customers' in the business of environmental regulation. Standard setting and enforcement action by EPAs is similarly industry or polluter focused.

This report recommends that the focus of EPAs must shift to being more centered on protecting communities and the environment from environmental impacts, particularly ensuring there is environmental justice for individuals and communities that are disadvantaged by how society is structured. Individuals and communities can face structural disadvantage on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income. In the environmental context, communities and individuals that may face structural disadvantage include, for example, persons with disability, the elderly and young people who may be at higher risk from the impacts of heat and other extreme weather exacerbated by climate change. Low income communities that live in close proximity to polluting industries can be structurally disadvantaged where they are reliant on an industry for their economic stability which may also be impacting their health and environment, or where they cannot afford to live elsewhere. Environmental justice frameworks are necessary to ensure that EPAs equally protect individuals and communities who are vulnerable to environmental harm because of structural disadvantage.

Environmental burdens are also disproportionately felt by First Nations, through impacts to their Country, cultural practices and the resources that they depend on. Governance throughout Australia since colonisation has been highly destructive to First Nations and their culture, livelihoods and connection to Country and community. Decisions around land management, ownership and environmental impacts have been instrumental tools of this destructive colonisation. Any improvements to environmental governance in Australia must recognise that environmental racism is occurring in Australia and must ensure that environmental regulation is developed in a manner that recognises the unique status of First Nations as distinct communities with both individual rights and collective cultural rights. Environmental management and decision-making must also recognise and respect the self-determination of First Nations and be underpinned by the principle of free, prior and informed consent.

None of the EPAs in Australia have a grounding in environmental justice, nor do they explicitly act in conformity with Cultural Protocols based on First Nations Lore. They also lack proper foundations in

principles of international law relating to the rights of individuals in communities and groups that are structurally disadvantaged – in particular the rights and principles in the United Nations Declaration on the Rights of Indigenous Peoples, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the International Covenant on Economic, Social and Cultural Rights.

In addition, humans are facing three crises globally - climate change, biodiversity loss and pollution. Having effective and independent EPAs that are grounded in environmental justice, Cultural Protocols based on First Nations Lore, and international law, both nationally and in every state and territory, is essential to ensure that we are taking the necessary steps to protect the environment and prevent the worst impacts of these crises, and to ensure that we address the structures that have led to structurally disadvantaged groups suffering disproportionately from the impacts of these crises.

This report explores the importance of environmental governance that is grounded in environmental justice, Cultural Protocols based on First Nations Lore, and international law, details key facets of strong environmental governance needed to achieve environmental justice and equity, and makes recommendations for EPAs at the state, territory and national level. We have identified nine key best practice themes that should apply to both new and existing EPAs. The recommendations involve policy and operational improvements for existing agencies, and also reform of relevant legislation (or establishing new legislation) in each jurisdiction.

Summary of Recommendations

The EDO recommends that for effective environmental governance in Australia that promotes and upholds environment justice, state, territory and national EPAs must be implemented or reformed with the following nine key elements.

Recommendation 1: Duty to develop and act in conformity with Cultural Protocols which are based on First Nations Lore, and to uphold internationally recognised First Nations rights of free, prior and informed consent and self-determination

EPAs in Australia must have a duty to develop and act in conformity with Cultural Protocols based on First Nations Lore, and must have an underpinning in the United Nations Declaration on the Rights of Indigenous Peoples, in particular the principles of free, prior and informed consent and self-determination.

Recommendation 2: Underpinned by an environmental justice framework to ensure equality in environmental protection

All EPAs in Australia should be underpinned by environmental justice frameworks that:

- acknowledge and address environmental racism;
- meaningfully define environmental justice;
- legislatively enshrine mechanisms to achieve environmental justice; and
- have a proper foundation in principles of human rights under international law.

Recommendation 3: A clearly defined role and duties to ensure objectives are achieved

An EPA should have a clearly defined role to ensure it achieves its objectives, including:

- a duty to protect and improve the state of the environment and human health from the harmful effects of pollution, destruction and waste through assessment, enforcement, monitoring and reporting and standard setting, which is not overridden by other departments;
- a duty to achieve environmental justice;
- a duty to act consistently with the human right to a healthy environment for all;
- a duty to implement legislation in accordance with principles of ecologically sustainable development; and
- a duty to take action to prevent and mitigate greenhouse gas pollution and take all actions necessary to reduce the impacts of climate change.

Recommendation 4: Independence from Ministerial influence, other government agencies and industry capture

An EPA should be established as an independent statutory authority that has:

- a clear independent governance structure, supported by a Board to provide strategic advice and direction;
- freedom from ministerial influence or being overridden by other agencies; and
- policies and procedures to manage conflicts of interest.

Recommendation 5: Accountability mechanisms to ensure responsibilities are discharged with integrity in the public interest

An EPA should be accountable to the public, which includes:

- well-defined and clear criteria for decision-making;
- mechanisms to review decision-making, including open standing for judicial review and merits review;
- the regular publication of State of the Environment Reports; and
- powers to scrutinise performance, both of the government and itself.

Recommendation 6: Transparency in decision-making through disclosure and community engagement to support accountability

An EPA should be transparent in its decision-making processes to ensure accountability to the public, which should be achieved through:

- active and mandatory public disclosure of environmental information; and
- community engagement via guaranteed rights to make written submissions and meaningful engagement in decision-making processes.

Recommendation 7: Sufficiently empowered to protect the environment and human health

An EPA should be sufficiently empowered to fulfil its role to protect the environment, including the following powers:

- environmental monitoring and reporting to identify risks early;
- standard setting in accordance with the best available science;
- clear assessment criteria and decision-making powers; and
- compliance and enforcement.

Recommendation 8: Sufficient and certain funding to fulfil their functions

An EPA should have sufficient and certain funding to meet its operating needs and fulfil its functions adequately, with the majority of funding sourced from a combination of the polluter pays model and general budget allocations.

Recommendation 9: Relevant expertise to support decision making that is science-based and provides for First Nations justice and environmental justice broadly

An EPA should have the relevant expertise to effectively protect the environment and human health through informed and expert decision-making, with support from a Chief Environmental Scientist and experienced Board members which bring a diverse range of perspectives. EPAs must also recognise and value First Nations knowledge and views and ensure that this knowledge is considered meaningfully alongside and equally with western science and expertise.

Introduction

The current state of the environment

Australia is blessed with unique and precious species, ecosystems and natural resources, and is home to 20 World Heritage Sites,[2] over 600,000 native species[3] and two out of the 36 areas identified as biodiversity hotspots by the Critical Ecosystem Partnership Fund.[4] However, over the last two centuries, Australia has suffered the largest recorded degeneration in biodiversity across the globe, and continues to be threatened by the impacts of climate change.[5] There is increasing pressure on the biodiversity, ecosystem services, clean air, clean water and natural resources upon which Australians all depend.

Humanity is also currently facing three crises globally[6] - climate change, biodiversity loss and pollution. Multiple reports have highlighted the degraded state of environments and fauna and flora species population health in Australia. In a review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), it was discovered that the current provisions are inadequate; since 1999, only 0.7% of fauna and flora species have been removed from the threatened species list,[7] while more species continue to be added. In Queensland, specifically, it has been calculated that 26% of remaining fauna habitat had been cleared between 2013 and 2015.[8]

A Senate Inquiry into the Fauna Extinction Crisis highlighted that the ecological, cultural and economic impacts are likely to worsen if the inadequate conservation provisions are not addressed.[9] Further, the impacts of climate change are already being seen in drastic reality, through multiple bleaching events of the Great Barrier Reef, death of wetland areas caused by reduced rainfall and the increasing occurrence of extreme weather events. The recent independent statutory review of the EPBC Act found that 'Australia's

natural environment and iconic places are in an overall state of decline and are under increasing threat. The environment is not sufficiently resilient to withstand current, emerging or future threats, including climate change'.[10]

The Intergovernmental Panel on Climate Change (**IPCC**) Sixth Assessment Report released on 9 August 2021 documented the urgent need for stronger environmental governance to ward against the increasing risk of climate change. The IPCC Report unequivocally states that unless there are immediate, rapid and large-scale reductions in greenhouse gas (**GHG**) emissions, it will be nearly impossible to limit global warming to close to 1.5°C or even 2°C.[11] This report has been dubbed a 'code red' for humanity by the United Nations Secretary-General, who has called for immediate action to limit temperature rise to 1.5°C.[12] Few areas of regulation have been so deeply held up by political interference as action to mitigate climate change impacts.

The current state of environmental governance and First Nations and environmental justice

It is clear that Australia has a generation of environmental policies, politics and governance that do not work. In order to improve the state of environmental regulation and governance in Australia, we are recommending the development of an environmental justice framework that is implemented to underpin EPA operations, to address not only failures to protect the environment, but also to protect and improve human health and environmental outcomes equally for all communities.

While there are EPAs in most states and territories in Australia, none of them has a grounding in environmental justice, particularly as a framework to address environmental racism; nor have they developed Cultural Protocols based on First Nations Lore. EPA functions are also not underpinned by principles of international law which should apply to environmental regulation. These include the rights and principles in the United Nations Declaration on the Rights of Indigenous Peoples, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the International Covenant on Economic, Social and Cultural Rights. These international laws have been carefully drafted to support human rights and environmental justice in environmental regulation, but they are only effective if they are reflected meaningfully in domestic law.

First Nations justice and environmental justice require that EPAs focus their regulation and administration on equally protecting all communities and the environment from environmental impacts, while recognising and respecting First Nations distinct individual and collective cultural rights.

As a result of the failure to implement environmental justice to date, environmental burdens, such as pollution, environmental degradation or the impacts of climate change, are disproportionately felt by individuals and communities that are structurally disadvantaged on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income.

Environmental racism, being any environmental policy, practice or directive that differentially affects or disadvantages individuals, groups or communities based on race or colour, can be clearly seen in Australia, emphasising the importance of environmental regulation being underpinned by an environmental justice framework. Environmental racism can particularly be seen in Australia to be perpetrated against First Nations, particularly First Nations communities and individuals in rural and remote Australia. Examples of environmental racism against First Nations in Australia include:[13]

- the proposed siting of nuclear dump sites in the South Australian desert without consulting the Traditional Owners, the Barngarla People;[14]
- the impacts of asbestos mining at Baryulgil in northern New South Wales on the Bundjalung People, who formed the core of the workforce of the mine;[15]
- lead poisoning in Mount Isa, where there is a large First Nations community;[16] and
- drinking water that does not meet Australian standards in First Nations communities in the Kimberly region.[17]

EPAs in Australia must recognise that First Nations are distinct communities with both individual and collective cultural rights, which are codified in the United Nations Declaration on the Rights of Indigenous Peoples.[18] The principles of free, prior and informed consent and self-determination must also be meaningfully implemented into decision-making by EPAs, so that First Nations have an ability to withhold consent to environmental decision-making that will significantly affect their individual and collective cultural interests.

Environmental racism can also be seen to be perpetrated in Australia against culturally and linguistically diverse communities, further emphasising the importance of an environmental justice framework. Examples of environmental racism against culturally and linguistically diverse communities in Australia include:

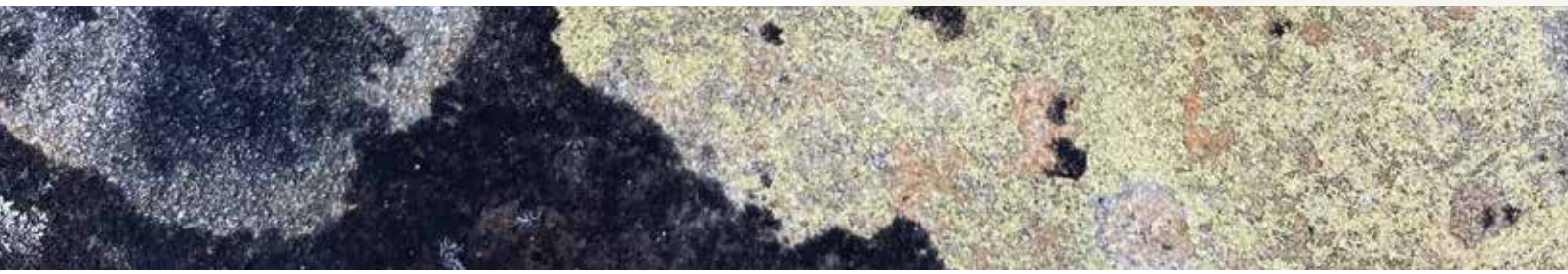
- the reopening of a polluting copper smelter in Port Kembla, in close proximity to a multicultural community with a large migrant population;[19]
- heat islands in Western Sydney suburbs caused by rising global average temperatures and poor development choices compared to more affluent and less diverse suburbs in Sydney's east;[20] and
- the East Perth Redevelopment Project, which transformed a previously industrial area into a 'contemporary urban landscape', leading to the displacement and marginalisation of the former majority migrant and Aboriginal population.[21]

Structural disadvantage that leads to environmental injustice can be caused by many sources, in addition to environmental racism. Individuals and communities can face structural disadvantage on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income. For example, communities in close proximity to polluting industries can be structurally disadvantaged where they are reliant on an industry for their economic stability that is also adversely impacting their health and environment.

A 2018 report by the Australian Conservation Foundation found that low-income families in Australia are disproportionately exposed to air pollution, with 90% of polluting facilities being located in low to middle income suburbs.[22] Low-income populations are also exposed to higher levels of toxic air pollution, either because polluting facilities are built in their neighbourhoods due to cheaper land or because these communities are only able to afford to live in areas near polluting facilities.[23]

Case study: Port Pirie, South Australia

Citizens in Port Pirie, South Australia, for example, have raised concerns about the exposure of their community to lead pollution which has built up over 50 years from the lead smelter in town in their dirt, dust and rainwater. High lead levels in blood can reportedly lead to a higher risk of miscarriages, impacts on growth, learning difficulties and reduced intelligence. The South Australian Government has responded to these impacts with health directives to the community. However, the response has been focused on citizen behavioural changes, such as avoiding rainwater, washing clothes and hair frequently, not hugging a baby until having a shower after engaging in lead-exposing work, and alerting citizens to the risks of drying clothes outside. Unfortunately, many citizens of the Port town are employed at the lead smelter or rely on the economic benefits of it to their town, meaning speaking out may threaten their livelihoods and positions in the community, placing these citizens at serious risk of disadvantage if they wish to take action to protect their environment and health, and the environment and health of their family and future generations.



Environmental justice requires recognition and understanding of the causes of structural disadvantage, highlighting who may be most susceptible, and addressing these systemic causes to provide for equal access to human health and the enjoyment of a healthy environment by all citizens.

In recognition of the importance of such equal access, the United Nations Human Rights Council (**HRC**) adopted a resolution on 8 October 2021 recognising the human right to a safe, clean, healthy and sustainable environment.[26] In particular, the HRC recognised that the consequences of environmental damage are felt 'most acutely' by those most vulnerable to those consequences, including Indigenous Peoples.[27] The United Nations High Commissioner for Human Rights called on States to take 'bold action' to ensure the resolution acts 'as a springboard to push for transformative economic, social and environmental policies that will protect people and nature'.[28]

The need for strong environmental governance

EPAs can play an important role in ensuring that human impact on the environment, human health and other species is sustainable and just, for the health of the environment and humans in the current and long term. They are intended to act as a regulator of development, managing pollution and waste, whilst ensuring that the health of the public and the environment is maintained.

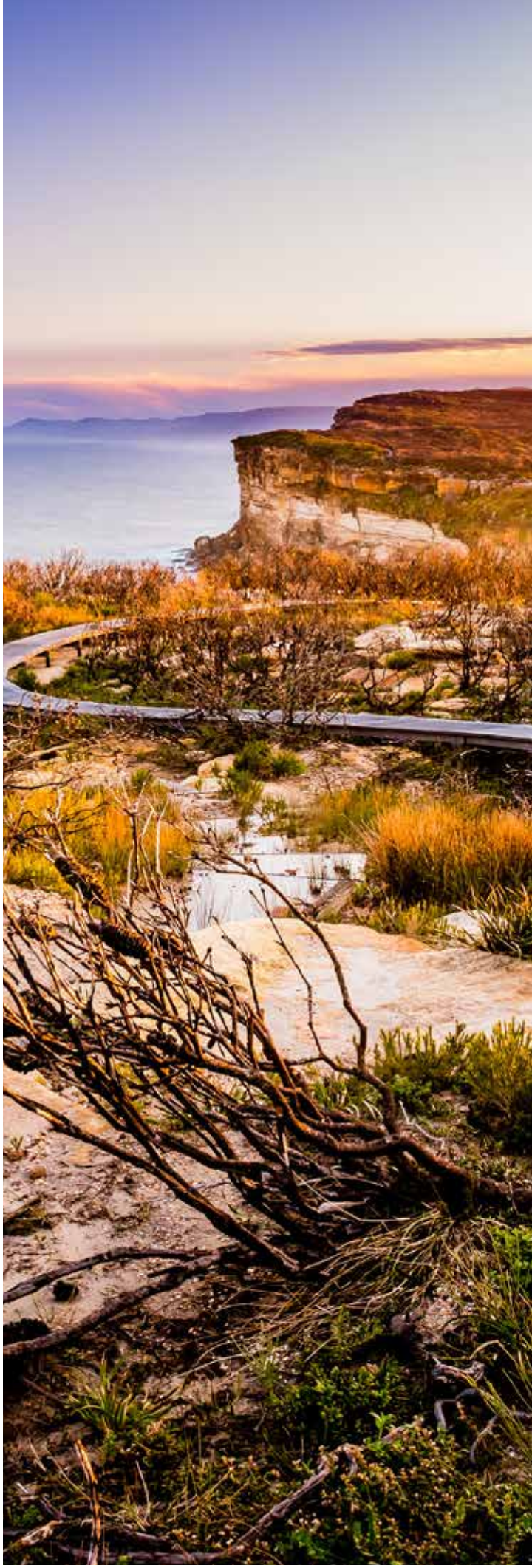
However, history has shown that the mere existence of an EPA does not guarantee that the environment will be protected, nor that development will be regulated appropriately without undue external influence. An environmental regulator established without sufficient independence mechanisms, resources or strong governance can lead to significant resource expenditure without a corresponding improvement to environmental governance outcomes.

Environmental governance that is not strongly focused on achieving environmental justice may also lead to inequity in environmental outcomes, such that those who are most vulnerable to the negative impacts of environmental degradation, pollution and climate change do not have a voice in the environmental regulatory process and continue to be disproportionately impacted by the adverse outcomes of environmental decision-making.[29]

Many Australian states and territories provide cautionary tales regarding the risks of establishing an EPA without strong governance. For example:

- In Queensland, an EPA was operational from 1998 to 2009. It plainly lacked meaningful independence mechanisms, a shortcoming which led to significant resource expenditure without improvements to environmental governance outcomes. The Department of Environment and Science (**DES**) now acts as Queensland's environmental regulator. DES often has its decision-making and advice overruled or interfered with by the Coordinator-General and the State Assessment and Referral Agency (**SARA**), including for the highest impact development proposed in the state.[30]
- In Tasmania, the regulatory arm of the EPA is not statutorily independent from the government. The EPA Board has also failed to take substantive action to protect the environment: for example, the Tasmania EPA has yet to publish Water Quality Objectives (**WQO**) for Tasmania's waterways in the 24 years since the commencement of the State Policy on Water Quality Management 1997, which requires WQOs to be identified by the EPA and factored into decision making in relation to water pollution and management.[31] The Tasmanian EPA has also failed to publish Emissions Limits Guidelines for a range of polluting activities, or statutory Codes of Practice for any industry or polluting activity.

- In the Northern Territory, a single person held three conflicting positions, being the Water Controller, responsible for water allocation and licensing, the CEO of the Department of Environment, Parks and Water Security, responsible for drafting and implementing water allocation plans, and also a board member of the Northern Territory Land Corporation, which benefits from water licensing decisions and the development and interpretation of water allocation plans.[32] While not in the context of an EPA, this provides a key example of the dangers of weak environmental governance resulting in major conflicts of interest with regards to environmental decision-making.
- In New South Wales, while there is an established EPA, it has not implemented certain legislative powers as required, or at all. For example, the NSW EPA has had the power to make Protection of the Environment Policies since 1997 but to date has not made a single policy.[33] This power could be used to implement policies to address the impacts of climate change on human health and the environment, by creating a goal of reducing GHG emissions. Further, it took survivors affected by the devastating 2019/20 bushfire season in NSW taking court action against the NSW EPA to ensure the EPA develops policies to address climate change in accordance with its legislative powers and obligations. The NSW Land and Environment Court has now recognised the NSW EPA has a duty to develop environmental policies to ensure environmental protection from climate change.[34] **See the EDO's recommendations for empowering the NSW EPA at: Empowering the NSW EPA to Prevent Climate Pollution.**



Unlike other comparable democracies such as the USA, Scotland and New Zealand,[35] there is currently no national EPA in Australia. National environmental decision-making is made by the Commonwealth Minister for the Environment under the not fit for purpose EPBC Act, which has been highly criticised because of its failure to protect the environment.[36] There have been many calls for a Federal EPA to improve environmental regulation nationally,[37] particularly given the scathing comments made about the operation of the EPBC Act in the 2020 independent review by Professor Graeme Samuel AC.[38]

If Australia is to see meaningful improvements in environmental and community health outcomes, a reduction of climate change risk and pollution, and an increase in public trust in environmental governance where confidence is low,[39] effective EPAs are required at a state, territory and national level that are independent, well-resourced and sufficiently empowered.

Establishing EPAs with strong governance arrangements has the potential to provide greater integrity and trust in environmental regulation in Australia, and thus ensure better regulatory outcomes for developers, community, government and the environment.[40]

EPAs must also have a strong grounding in environmental justice that recognises and addresses environmental racism, is developed in conformity with Cultural Protocols based on First Nations Lore, and has proper foundations in international law, to ensure that the benefits of environmental protection are felt equally by all and to ensure positive actions are taken to redress past and ongoing inequality.

This is particularly pertinent given that the worst impacts of climate change will be felt the most by those who have contributed the least to global emissions. Given the Secretary-General's 'code red' for humanity, strong environmental governance is now more necessary than ever if we are to avert climate catastrophe and protect the environment for future generations to come.

Elements of Strong Governance

1 Providing for First Nations Justice

Recommendation 1: Duty to develop and act in conformity with Cultural Protocols which are based on First Nations Lore, and to uphold internationally recognised First Nations rights of free, prior and informed consent and self-determination

EPAs in Australia must have a duty to develop and act in conformity with Cultural Protocols based on First Nations Lore, and must have an underpinning in the United Nations Declaration on the Rights of Indigenous Peoples, in particular the principles of free, prior and informed consent and self-determination.

First Nations in Australia have a unique relationship with Country, which is sacred and spiritual. This close relationship provides First Nations with a unique perspective on environmental protection and land management, as well as unique obligations to care for Country. This close relationship means that First Nations are often more vulnerable to environmental harm, and environmental racism in the development and application of environmental regulation. As a result, First Nations often suffer disproportionately from the adverse impacts of environmental harm, pollution and climate change.[41]

EPAs should have a duty to develop and act in conformity with Cultural Protocols based on First Nations Lore, and to ensure that First Nations knowledge, experience and opinions are prioritised when fulfilling their roles, whether it be monitoring, assessment, approvals, or compliance. This duty should be underpinned by the United Nations Declaration on the Rights of Indigenous Peoples and should acknowledge that First Nations are distinct communities with both individual and collective cultural rights. The principles of free, prior and informed consent and self-determination must be meaningfully implemented into decision-making by EPAs, so that First Nations have an ability to withhold consent to environmental impacts that will significantly affect their individual and collective cultural interests.

This duty should be meaningfully supported by requiring First Nations to be in decision-making positions of the EPA (discussed further in **Recommendation 9**), including on the Board or in an advisory role, and through key criteria requiring the views of the relevant First Nations to be centred in all land management, conservation and development decisions. Engagement with First Nations should not be limited only to Native Title holders and claimants, but should instead properly represent the knowledge and interests of all First Nations affected by those decisions.

a. Develop and act in accordance with Cultural Protocols based on First Nations Lore

Colonisation and dispossession have resulted in First Nations in Australia being structurally disadvantaged, including in the environmental context. As a result, environmental burdens such as pollution, environmental degradation and the impacts of climate change are disproportionately felt by First Nations. If EPAs are to protect the environment and human health, they must, at a minimum, develop Cultural Protocols in accordance with First Nations Lore and principles of free, prior and informed consent and self-determination.

First Nations Lore refers to the 'learning and transmission of customs, traditions, kinship and heritage'. First Nations Lore 'is a way of living and

interacting with Country that balances human needs and environmental needs'.[43] For First Nations, Country is sacred and spiritual, with Culture, Law, Lore, spirituality, social obligations and kinship all stemming from relationships to and with the Land.[44]

Cultural Protocols are accepted standards and procedures for all dealings between organisations such as an EPA and First Nations and are essential to ensure that respectful and meaningful partnerships and relationships are developed with First Nations communities and individuals.[45]

Cultural Protocols must be developed through extensive consultation and co-design with First Nations in the relevant jurisdiction in accordance with the principles of free, prior and informed consent, and self-determination, which must form the basis of all work with First Nations. These principles are discussed further below in the context of the United Nations Declaration on the Rights of Indigenous Peoples.

Cultural Protocols must also be developed in conformity with First Nations Lore. There is no 'one size fits all' approach to the development of Cultural Protocols, and what a specific Cultural Protocol involves and addresses will depend on the specific First Nations community that is being engaged with.

A duty to develop and act in accordance with Cultural Protocols based on First Nations Lore will require direct consultation with First Nations communities in all aspects of environmental regulation. This includes during the development of environmental standards and policies, monitoring of air and water quality, undertaking of environmental assessment, approval of development and setting of conditions, rehabilitation and remediation of land, and enforcement of breaches. Such consultation and engagement must be underpinned by principles of free, prior and informed consent, and self-determination.

The EDO has called for a modern framework to manage Flying-foxes in North Queensland which is 'developed in conformity to First Nations' Cultural Protocols'.[46] This would involve the co-design, development and implementation of Management Plans for Flying-fox roosts with local First Nations 'to ensure conformance with Cultural Protocols'.[47] **See the EDO's recommendations for a Flying-fox roost management framework developed in conformity with First Nations Cultural Protocols: *Flying-fox roost management reform for Queensland.***[48] Similar approaches are required for all aspects of environmental regulation, so that First Nations are directly involved in any decisions, policies or standards that will impact on their land and culture.

A duty to act in accordance with Cultural Protocols based on First Nations Lore also requires the protection of cultural heritage. Environmental and land management issues are often inseparable from First Nations cultural heritage, and so the regulatory and decision-making framework governing these two areas should be integrated, with First Nations perspectives and rights to self-determination privileged. This would also align with article 11 of the United Nations Declaration on the Rights of Indigenous Peoples, which recognises the right to 'maintain, protect and develop' cultural heritage,[49] demonstrating the importance of including cultural heritage protection in Australia's environmental regulatory framework (discussed more below). Substantial recommendations have been made in *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*[50] and the *Independent Review of the EPBC Act – Final Report*[51] about how First Nations cultural heritage could be better protected in jurisdictions around Australia. These recommendations should be closely considered in any reform of EPAs.

Case study: Destruction of Juukan Gorge Aboriginal Heritage Sites

On 24 May 2020, Rio Tinto destroyed 46,000+ year-old rock shelters in Juukan Gorge, located in Western Australia, causing profound and immeasurable cultural and spiritual harm to the Puutu Kunti Kurrama and Pinikura Peoples. This destruction was approved under Western Australian legislation, with no involvement of First Nations in the assessment process.[52] For further information on this incident and recommended cultural heritage reforms to avoid future destruction, see *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*.[53]

While this deplorable incident did not occur under environmental legislation, it demonstrates the importance of a legislative mandate to involve First Nations in decision-making that may have devastating impacts on Country, such as environmental impact assessment and development approvals to avoid incidents like this occurring.[54]

First Nations in Western Australia and in other jurisdictions often raise strong concerns with the EDO that their cultural heritage has not been protected due to the inadequacies of cultural heritage legislation. Yet, cultural heritage is also often not considered under environmental assessment processes by the EPA as it is deemed to be 'dealt with' under cultural heritage legislation. Currently, in both scenarios, First Nations are denied the opportunity to be involved in decision-making and to have their cultural heritage acknowledged and adequately protected. The relationship between cultural heritage and environmental legislation needs to be revised such that First Nations are involved in decision making in relation to both cultural heritage and the environment, so that cultural heritage is adequately protected under cultural heritage and development laws which speak to each other.

b. Implementing the United Nations Declaration on the Rights of Indigenous Peoples

The rights of Indigenous Peoples have been internationally recognised, with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) being adopted by the United Nations General Assembly on 13 September 2007[55] and endorsed by Australia on 3 April 2009.[56] As discussed above, First Nations in Australia have been structurally disadvantaged through colonisation and dispossession of land. As a result, environmental burdens such as pollution, environmental degradation and the impacts of climate change are disproportionately felt by First Nations communities, who often have little or no say in the way that decisions are made about their Country. It is therefore essential that EPAs are underpinned by and implement the rights of Indigenous Peoples protected in UNDRIP.

This requires recognition of First Nations as distinct communities with individual rights as citizens, as well as collective cultural rights as a peoples. In order to properly implement the rights of Indigenous Peoples protected in UNDRIP, EPAs must recognise 'that [First Nations] are equal to all other peoples, while recognising the right of all [First Nations] to be different, to consider themselves different, and to be respected as such'.[57] This is affirmed by article 1 of UNDRIP, which provides that Indigenous Peoples have the right to full enjoyment of all human rights both as a collective and as individuals.[58]

The unique status of First Nations as having both individual and collective cultural rights has been recognised in Queensland's *Human Rights Act 2019* (Qld),[59] Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic),[60] and the ACT's *Human Rights Act 2004* (ACT).[61] Other Australian jurisdictions introducing human rights legislation should similarly recognise the distinct cultural rights of First Nations, both at a national and subnational level.

Of particular importance in the context of environmental regulation and decision-making is the principle of free, prior and informed consent (**FPIC**), enshrined in articles 19 and 32 of UNDRIP.[62] FPIC is the right of Indigenous Peoples to give or withhold consent to any project that may affect them or their lands, and to negotiate conditions for the design, implementation and monitoring of projects.[63] The terms in this principle are defined as follows:[64]

> **Free:** implies that consultations should be conducted in the absence of any form of coercion, intimidation or manipulation.
>
> **Prior:** requires consent to be sought sufficiently in advance of any authorisation or commencement of activities and that relevant agents should guarantee enough time for indigenous consultation processes to take place.
>
> **Informed:** means that Indigenous Peoples should receive satisfactory information in relation to certain key elements, including the nature, size, pace, reversibility and scope of the proposed project, the reasons for launching it, its duration and a preliminary assessment of its economic, social, cultural and environmental impact.
>
> **Consent:** includes the option to withhold consent. Consultation and participation are crucial components of a consent process.

FPIC is also interrelated with the right of self-determination, which is expressed in article 4 of UNDRIP as the right to 'autonomy or self-government in matters relating to their internal and local affairs'.[65] Self-determination is particularly important for First Nations in Australia, who are still overcoming the impacts

of colonisation and dispossession. The work of EPAs must be underpinned by FPIC and the right of self-determination, particularly in the context of development assessment and approval, and in ongoing management or rectification of environmental harm on their lands. First Nations must be involved in these decision-making processes, and ultimately must be able to withhold consent for development activities that will significantly affect their cultural interests.

Other rights of Indigenous Peoples protected in UNDRIP that must be implemented by EPAs include the right to be free from discrimination,[66] the right to participation in decision-making that will affect their rights,[67] the right to own, use, develop and control traditional lands,[68] and the right to conserve and protect the environment of traditional lands.[69] In order for these rights protected in international law to be given effect they must be implemented via the objectives, structures and operations of national and subnational agencies, particularly EPAs where environmental decision making can have significant impacts on First Nations and their Country.

2 Underpinned by an environmental justice framework

Recommendation 2: Underpinned by an environmental justice framework to ensure equality in environmental protection

All EPAs in Australia should be underpinned by environmental justice frameworks that:

- acknowledge and address environmental racism;
- meaningfully define environmental justice;
- legislatively enshrine mechanisms to achieve environmental justice; and
- have a proper foundation in principles of human rights under international law.

An environmental justice framework is needed to underpin environmental regulation by EPAs in Australia, to ensure that disproportionate environmental burdens are not imposed on communities and individuals that face structural disadvantage on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income. Structural disadvantage refers to the disadvantage experienced by some individuals and communities as a result of how society is structured and functions.[70] Development of an environmental justice framework is intended to ensure that those communities facing structural disadvantage are not disproportionately impacted by adverse consequences of environmental degradation, pollution, and climate change, and are involved in environmental decision-making that impacts them.

The development of any environmental justice framework must acknowledge that environmental justice as a movement was developed to address environmental racism. An environmental justice framework must also meaningfully define environmental justice, legislatively enshrine mechanisms to achieve environmental justice, and be underpinned by international law.

A private members Bill introduced in Canada in 2021 provides an example of how environmental justice frameworks can be meaningfully developed and implemented by EPAs in Australia. The Bill, which did not pass, recognised in its preamble that a disproportionate number of people who live in environmentally hazardous areas are members of an Indigenous, racialised or other marginalised community. The Bill required the Minister of the Environment to develop a national strategy to assess, prevent and address environmental racism and to advance environmental justice. EPAs in Australia should similarly require the development of an environmental justice framework or strategy, which acknowledges and addresses environmental racism, meaningfully defines environmental justice in the Australian context, legislatively enshrines mechanisms to achieve environmental justice, and which is underpinned by international law.

EPAs in Australia should, in addition to being required to develop environmental justice frameworks, have a duty to achieve environmental justice by identifying and addressing any disproportionate environmental burdens imposed on structurally disadvantaged communities and individuals. This is further explored in **Recommendation 3**, which provides that a duty to achieve environmental justice should be placed on all EPAs.

a. Acknowledging and addressing environmental racism

An environmental justice framework cannot truly achieve justice unless it addresses environmental racism.

The term 'environmental racism' was coined by African American civil rights leader Dr Benjamin Chavis in 1982, who defined it as:

'Racial discrimination is the deliberated targeting of ethnic and minority communities for exposure to toxic and hazardous waste sites and facilities, coupled with the systematic exclusion of minorities in environmental policy making, enforcement, and remediation'.[72]

Dr Robert Bullard, who is considered the 'Father of environmental justice', defines environmental racism as:

'any policy, practice or directive that differentially affects or disadvantages (where intended or unintended) individuals, groups or communities based on race or colour'.[73]

If EPAs in Australia are to truly protect the environment and human health, they must also acknowledge and address past and ongoing racial inequality in the application of environmental regulation. In the US context, the environmental justice movement emerged to address environmental racism experienced by African American, Native American and Latinx communities. In the Australian context, environmental racism can be seen to be perpetrated against First Nations communities through the ongoing impacts of colonisation and dispossession, as well as the destruction of First Nations lands for settler purposes. For example, atomic tests were performed on the land of the Anangu People between 1955 and 1963, with many Anangu People being forcibly removed from their land. The atomic tests caused not only significant environmental harm to the land, but also severe cultural harm as the Anangu People could not continue to practice their traditions and culture on Country.[74]

Environmental racism can also be seen in the contamination of water in First Nation's communities in the Kimberly region of Western Australia. A 2015 report by the Western Australian Auditor-General found that water quality in First Nations communities did not meet Australian standards, with dangerous microbes found in the drinking water in 68 communities at least once over a two-year period.[75] A follow-up report in 2021 found that, despite the Western Australian government committing to address these water quality issues, 37 First Nations communities still tested positive for contaminants, including E. coli, nitrates and uranium.[76]

Environmental racism can also be seen to be perpetrated in Australia against culturally and linguistically diverse communities. This can be seen in Western Sydney, which is one of the most diverse regions in Australia and has large migrant communities.[77] Suburbs in Western Sydney have become 'heat islands' due to a deadly combination of rising global average temperatures caused by climate change and poor development choices such as dense buildings, a lack of trees and large expanses of black asphalt. Extreme heat particularly endangers children, elderly people, and people with disability and existing health conditions. For example, Penrith, a Western Sydney suburb, was the hottest place on Earth on 4 January 2020 at 48.9°C.[78] This is compared to more affluent and less diverse suburbs in Sydney's east, such as Mosman, which has moderately high vegetation cover compared to the western suburbs, lowering average temperatures and potential adverse health impacts.[79]

It is clear that environmental racism is occurring in Australia, in particular against First Nations communities and culturally and linguistically diverse communities. EPAs in Australia must, when developing an environmental justice framework to underpin their structure and activities, ensure that environmental racism is acknowledged and addressed.

b. Defining environmental justice

As a concept, environmental justice is difficult to define. However, in order to develop environmental justice frameworks that address the disproportionate environmental burdens placed on structurally disadvantaged communities, EPAs must develop a meaningful definition of environmental justice that underpins their functions and powers.[80]

The US EPA's definition of environmental justice is arguably the most cited, and defines environmental justice as:

> '[T]he fair treatment and meaningful involvement of all people, regardless of race, colour, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies'.[81]

The US EPA further defines 'fair treatment' and 'meaningful involvement' as follows:[82]

> 'Fair treatment' means that 'no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.'
>
> 'Meaningful involvement' means that people have an opportunity to participate in decisions about activities affecting their health or environment, that the public can influence regulatory decision-making, that community concerns will be considered in decision-making, and that decision-makers will seek out and facilitate the involvement of those potentially affected.

A number of theories also underlie environmental justice as a concept, including distributive justice,[83] procedural justice,[84] corrective justice,[85] social justice,[86] justice as recognition[87] and justice as capabilities[88]. Justice Preston, Chief Judge of the New South Wales Land and Environment Court, emphasises three of these theories when defining environmental justice: distributive justice, procedural justice and justice as recognition.

Distributive justice

Distributive justice is concerned with the distribution of environmental goods (or benefits) and environmental bads (or burdens).[89]

Procedural justice

Procedural justice is concerned with the ways in which decisions, including regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions.[90]

Justice as recognition

Justice as recognition is concerned with who is given respect and who is and is not valued. Justice as recognition requires the recognition of different social groups and communities, and of the natural environment and components of it.[91]

Case study: The Rocky Hill Coal Project and Distributive Justice

In the 2019 decision of Justice Preston in *Gloucester Resources Limited v Minister for Planning*[92] in the NSW Land and Environment Court, his Honour applied the principle of distributive justice in deciding whether to approve the Rocky Hill Coal Project (see paragraphs 398-416). His Honour stated that:

'distributive justice concerns the just distribution of environmental benefits and environmental burdens of economic activity. Distributive justice is promoted by giving substantive rights to members of the community of justice to share in environmental benefits (such as clean air, water and land, a quiet acoustic environment, scenic landscapes and a healthy ecology) and to prevent, mitigate, remediate or be compensated for environmental burdens (such as air, water, land and noise pollution and loss of amenity, scenic landscapes, biological diversity or ecological integrity). Issues of distributive justice not only apply within generations (intra-generational equity) but also extend across generations (inter-generational equity)'.[93]

His Honour went on to find that the Rocky Hill Coal Project will raise issues of distributive equity, both intra-generational equity and inter-generational equity, finding that:

- the burdens of the Project, the various negative environmental, social and economic impacts, will be distributed to people in geographical proximity to the Project;[94]
- the physical impacts of the Project, such as the high visual impact and the particulate, noise and light pollution, will be experienced by people in geographical proximity to the Project;[95]
- the Project will have particular negative impacts on Aboriginal people whose Country is to be mined. They have strong cultural and spiritual connections to Country, which will be severely damaged by the Project. This will cause negative social impacts to a disadvantaged and vulnerable group in society;[96]
- the Project may also impact on other disadvantaged groups within the community, such as lower socio-economic groups and people over the age of 55 years;[97]
- there is inequity in the distribution between current and future generations, where the economic and social benefits of the Project will last only for the life of the Project (less than two decades), but the environmental, social and economic burdens of the Project will endure not only for the life of the Project but some will continue for long after.[98] The benefits of the Project are therefore distributed to the current generation but the burdens are distributed to the current as well as future generations (inter-generational inequity).[99]

The principles of distributive justice therefore provided a helpful framework to assess the Project against, with regard to who would be most impacted by the approval of the mine and the fairness of how those impacts would be distributed.

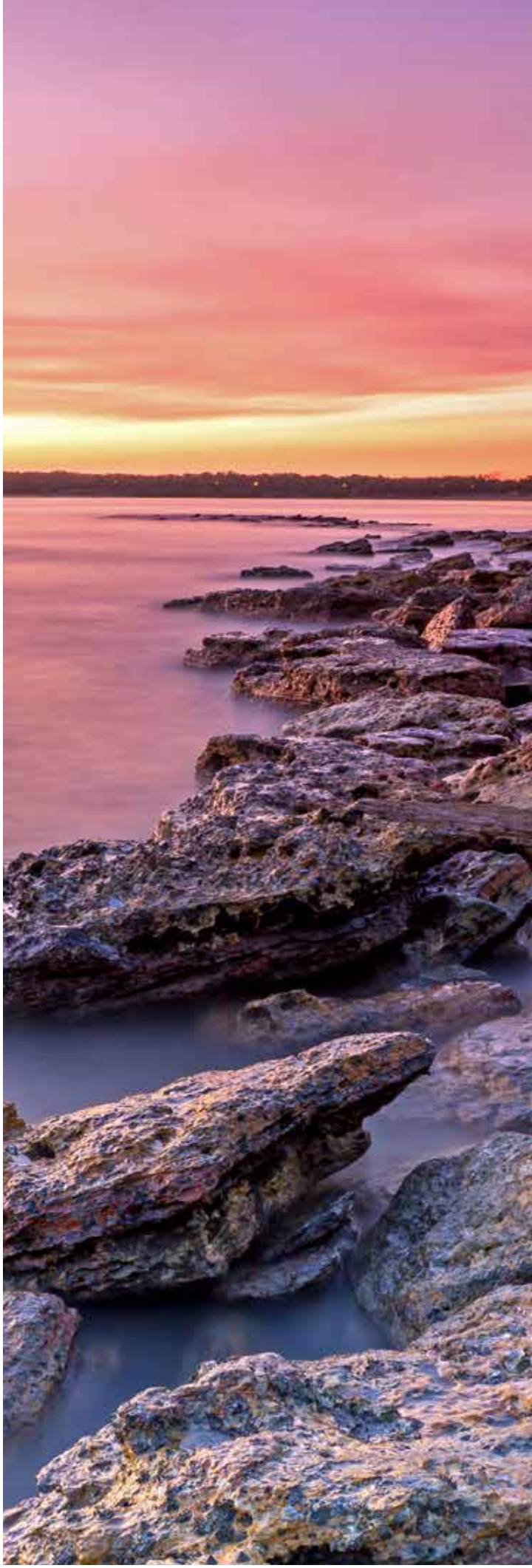
These definitions and theories of environmental justice discussed above should be used by EPAs in Australia to develop their own robust environmental justice definitions and frameworks.

c. Legislatively enshrining mechanisms to achieve environmental justice

If an EPA is to protect the environment and human health equally for all people, it must have legislatively enshrined mechanisms for achieving environmental justice. This should involve mechanisms to identify communities with environmental justice concerns, so that they can be directly consulted and engaged in decision-making that impacts them, with criteria that requires that their views and the causes of the injustice they experience be addressed in decision-making. For example, key communities likely to have environmental justice concerns are those at risk of structural disadvantage in Australia, including people of colour, culturally and linguistically diverse communities, low-income communities and First Nations communities.

Once communities with environmental justice concerns are identified and consulted, the injustices that they face must be addressed by the environmental regulator. This involves ensuring there is equity so that all people are treated equally in environmental decision-making processes, as well as ensuring there is justice by addressing the systemic causes of those inequities. Both equity and justice are required to achieve environmental justice.

Equity may be achieved through grants programs or resource allocations that target communities with environmental justice concerns, as well as policies that ensure decision-making is not discriminatory in its effect. Achieving justice requires that the root causes of the inequities faced by disadvantaged communities are addressed, which may involve structural or systemic change.[100]



Case study: Environmental Justice in the United States of America

By Executive Order 12898 of 11 February 1994, President Clinton ordered the US EPA to 'make achieving environmental justice part of its mission'.[101] The US EPA provides examples of how environmental justice can be implemented in practice by an environmental regulator, including through grants programs, a strategic plan and guidelines for federal agencies to address environmental justice concerns.

The US EPA has various grant programs available to communities with environmental justice concerns:[102]

- The EJ Collaborative Problem-Solving Cooperative Agreement Program provides funding for eligible applicants for projects that address local environmental and public health issues within an affected community;
- The EJ Small Grants Program supports and empowers communities working on solutions to local environmental and public health issues;
- The State Environmental Justice Cooperative Agreement Program provides funding to eligible applicants to support and/or create model state activities that lead to measurable environmental or public health results in communities disproportionately burdened by environmental harms and risks.

The US EPA's strategic plan, *EJ 2020 Action Agenda*, outlines how the agency is integrating environmental justice into its programs and practices. The strategic plan includes three key goals:

1. Deepen environmental justice practice within EPA programs to improve the health and environment of overburdened communities.
2. Work with partners to expand the EPA's positive impact within overburdened communities.
3. Demonstrate progress on significant national environmental justice challenges.

The US EPA also has a National Environmental Justice Advisory Council, whose role is to advise the EPA on how to integrate environmental justice into its programs, policies and activities, how to meaningfully engage with communities that have environmental justice concerns, and how to improve the operations of laws and policies to better protect the health and environment of vulnerable communities.[103]

d.Implementing international law

An environmental justice framework must be underpinned by principles of international law relating to the rights of individuals in communities and groups that are structurally disadvantaged, particularly the principles and rights found in UNDRIP (discussed above in **Recommendation 1**), the Convention on the Rights of the Child (**CRC**), the Convention on the Rights of Persons with Disabilities (**CRPD**), and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

Convention on the Rights of the Child

The CRC was adopted by the United Nations General Assembly on 20 November 1989 and ratified by Australia in December 1990.[104] It is essential that the development of an environmental justice framework is underpinned by the rights of the child enshrined in the CRC, as children are disproportionately affected by changes in their environment.[105]

An analytical study conducted by the Office of the United Nations High Commissioner for Human Rights found that children are disproportionately impacted by climate change, particularly girls, children with disability, children on the move, poor children, children separated from their families, and Indigenous children.[106] It is therefore essential that EPAs, which are responsible for the protection of the environment and human health, develop an environmental justice framework that is underpinned by and implements the rights of children.

Rights protected by the CRC of particular importance for the development of an environmental justice framework include the right to life,[107] the right to an adequate standard of living,[108] the right to culture,[109] and the right to rest, leisure, play and recreation.[110]

Convention on the Rights of Persons with Disabilities

The CRPD was adopted by the United Nations General Assembly on 13 December 2006 and ratified by Australia on 17 July 2008.[111] Disabilities cover a wide range of impairments, and the CRPD recognises 'that disability is an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.[112]

EPAs that are developing an environmental justice framework must ensure that they implement the rights of people with disability, particularly given that people with disability are more vulnerable to the adverse impacts of environmental degradation, pollution, and climate change.[113]

As part of their responsibility for protection of the environment and human health, EPAs must develop an environmental justice framework underpinned by the rights of people with disability. While all rights expressed in the CRPD should be implemented by EPAs, article 3 provides a general overview of the key principles that must underpin any environmental justice framework, including respect for inherent dignity and individual autonomy, non-discrimination, respect for difference, equality of opportunity, and accessibility.[114]

International Covenant on Economic, Social and Cultural Rights

The ICESCR was adopted by the United Nations General Assembly on 16 December 1966 and ratified by Australia on 10 December 1975.[115] The ICESCR enshrines a number of economic, social and cultural rights including, most relevantly in the context of environmental regulation, the right to an adequate standard of living,[116] and the right to the enjoyment of the highest attainable standard of physical and mental health.[117]

It is essential that EPAs develop an environmental justice framework that is underpinned by these rights, particularly given the responsibility of EPAs for protection of the environment and human health. The ICESCR creates obligations for States to address the impacts of environmental harm, pollution and climate change, particularly for those communities and individuals who are disproportionately impacted due to structural disadvantage.[118]

3 Role clarity

Recommendation 3: A clearly defined role and duties to ensure objectives are achieved

An EPA should have a clearly defined role to ensure it achieves its objectives, including:

- a duty to protect and improve the state of the environment and human health from the harmful effects of pollution, destruction and waste through assessment, enforcement, monitoring and reporting and standard setting, which is not overridden by other departments;
- a duty to achieve environmental justice;
- a duty to act consistently with the human right to a healthy environment for all;
- a duty to implement legislation in accordance with principles of ecologically sustainable development; and
- a duty to take action to prevent and mitigate greenhouse gas pollution and take all actions necessary to reduce the impacts of climate change.

Role clarity is essential for regulators to fulfill their functions effectively. Having a clearly defined role reduces actual or perceived conflicts and enables regulators to fulfil their purposes without duplicating or detracting from the role of other entities.[119]

Role clarity requires that:

- a regulator is clearly defined in terms of its objectives, functions, and co-ordination with other entities;[120]
- a regulator's purposes and the regulatory scheme's objectives are clear to staff and stakeholders;[121] and
- the functions of a regulator are assigned so that the performance of any one function should not limit or appear to compromise the regulator's ability to fulfil its other functions.[122]

For an EPA, role clarity must involve a clearly defined duty to protect the environment and human health from the harmful effects of pollution, destruction and waste. The role of an EPA should also involve a duty to achieve environmental justice, a duty to act consistently with a right to a healthy environment, a duty to implement the principles of ecologically sustainable development, and a duty to take action to prevent and mitigate GHG pollution and take action to reduce the impacts of climate change.

a. A duty to protect the environment and human health, which prevails over all other legislative obligations and agencies

If an EPA is to protect the environment and human health, it must have a clearly defined duty to which it can be held accountable. The primary role of an EPA should be to protect the environment and human health from the harmful effects of pollution, destruction and waste, including air, land and water pollution caused by emissions, destruction of ecosystems and habitats, production and discharge of waste, including GHG emissions. Having the role of the EPA clearly legislated is essential to ensure that it is clearly distinguished from other parts of government, so that the EPA can focus on achieving its objectives.

Further, the duty to protect the environment and human health should be paramount. The EPA and its duties must not be overridden by other departments or agencies. This duty should be expressed to prevail over other legislation. Having multiple environmental regulators is ineffective and can undermine and confuse the role of the EPA. The EPA should be the primary environmental regulator responsible for regulating activities that may have an impact or present a risk to the environment and for preventing pollution, avoiding environmental destruction and managing waste[123] Role clarity is essential for effective regulation, particularly in the complex realm of environmental regulation and management, where environmental protection can be undervalued as against imperatives of development.[124]

This duty also needs to form part of the environmental decision-making process, so that it is required to be considered when assessing environmental impacts or issuing development approvals and licenses. The duty of the EPA to protect the environment and human health from the harmful effects of pollution, environmental destruction and waste must also be supported by sufficient compliance and enforcement mechanisms and actions. While many EPAs in Australia have clear objectives to protect the environment and human health, many EPAs do not undertake effective compliance and enforcement activities to ensure laws are respected and upheld in practice.

b. A duty to achieve environmental justice

In addition to a requirement to develop an environmental justice framework, as discussed above in **Recommendation 2**, an EPA should have a duty to achieve environmental justice, as part of its role in protecting the environment and human health. A duty to achieve environmental justice should require an EPA to identify and address 'disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations' in its jurisdiction.[125]

The US EPA provides an example of a strong duty to address environmental justice, as it is under an obligation to:[126]

- identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, to the greatest extent practicable and permitted by law;
- develop a strategy for implementing environmental justice; and
- promote nondiscrimination in federal programs that affect human health and the environment, as well as provide minority and low-income communities access to public information and public participation.

A duty to achieve environmental justice is necessary for EPAs in Australia, as there is evidence of environmental burdens being placed disproportionately on communities and individuals who are structurally disadvantaged on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income.

c. A duty to act consistently with the human right to a healthy environment for all

Environmental justice also requires that the right to a healthy environment be recognised and implemented equitably for all citizens.[127] Given the recent international recognition of the right to a healthy environment by the United Nations Human Rights Council,[128] the EDO considers that there is 'a unique opportunity for Australian governments to take bold action' and legislatively recognise the right to a healthy environment.[129] Jurisdictions with an existing human rights legislative framework – currently only Victoria, Queensland and the Australian Capital Territory – should use this opportunity to enshrine the right to a healthy

environment and better provide for the protection of the environment and the health and wellbeing of their residents.[130]

The objectives of an EPA should also expressly recognise that the right to a safe, clean, healthy and sustainable environment is a human right, and should be charged with protecting this right. Enshrining the protection of the right to a healthy environment both in human rights legislation as well as in the objectives of an EPA would provide for stronger environmental laws and policies, improved implementation and enforcement, greater public participation in environmental decision-making, and reduced environmental injustices.[131]

d. A duty to implement legislation in accordance with principles of ecologically sustainable development

Ecologically sustainable development (**ESD**) is a long-standing and internationally recognised concept. The 'National Strategy for Ecologically Sustainable Development' (**National Strategy**), which sets out the broad framework under which governments will pursue ESD in Australia, was endorsed by the Council of Australian Governments in 1992.[132]

ESD is defined in the National Strategy as:

> 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.

The National Strategy includes a number of Guiding Principles, also known as the principles of ESD. Many of these principles, expanded upon below, are already incorporated into environmental regulation in Australia.[133]

The precautionary principle

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Inter-generational equity

The present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.

Conservation of biological diversity and ecological integrity

Conservation of biological diversity and ecological integrity should be a fundamental consideration in environmental planning and decision-making processes.

Improved valuation, pricing and incentive mechanisms

Environmental factors should be included in the valuation of assets and services.

Given the commitment by government at all levels in Australia to pursue ESD, as well as Australia's international obligations[134], an EPA must include the principles of ESD as a meaningful mandatory element of its regulatory and decision-making frameworks. An effective and independent EPA should be required to take into account or have regard to the principles of ESD when making key environmental decisions.

e. A duty to take action to reduce the risks of climate change

Climate change poses the greatest existential threat to the world's collective environment and health. While the main focus of EPAs is generally on regulating pollution, environmental destruction and waste, these issues are inseparable from climate change, which is a phenomenon caused by a diverse range of environmentally harmful activities. GHG emissions are a major contributor to climate change, and are emissions to the air from industrial processes. They are a form of air pollution. While, historically the regulation of air pollutants by some EPAs has been silent on GHG emissions, others such as the Victorian EPA have regulated GHG emissions. It is beyond doubt that GHG emissions have the character of a pollutant and should be regulated by EPAs as such.[135] For example, in Victoria the EPA has regulated GHG emissions as pollution, with the *Environment Protection Act 2017* (Vic) expressly including 'a greenhouse gas substance emitted or discharged into the environment' in the definition of waste.[136]

EPAs should therefore have a duty to take action to reduce the risks of climate change. As a result of this interrelation between pollution, environmental destruction, waste, and climate change, reducing the risks of climate change through mitigation and adaptation is a natural part of the mandate of an EPA. This duty must specifically include mitigating scope 1, 2 and 3 emissions, being emissions directly from and related to an industry and as a result of downstream outcomes of an industry. Scope 3 emissions must be included in emissions reductions efforts, to ensure that we are taking responsibility for the emissions from products that we are profiting from exploiting and to ensure we are not promoting their continued use.

This is particularly important given that EPAs are responsible for development approvals and licences in several jurisdictions, which typically have the most significant responsibility for emissions. A mandate to address climate change is also necessary to ensure that environmental justice is achieved, as climate change disproportionately impacts those most vulnerable to environmental harm, both in Australia and overseas. For example, Torres Strait Islanders have been experiencing the impacts of sea level rise from climate change for decades, yet they are one of the smallest contributors globally to the cause of this climate change.[137] A mandate to address climate change is also essential to achieve intergenerational equity, given that the worst impacts of climate change will be felt by future generations who have not contributed to global emissions and pollution.

An effective EPA should regulate climate impact mitigation through legislated targets and effective GHG emissions reductions regulation, which all agencies must be required to achieve and not compromise. This could be achieved through a Climate Act which implements key elements of needed climate action such as whole-of-government obligations to meet targets and oversight mechanisms.

See the EDO's recommendations for climate action in three key reports:

- ***A Climate Act for Queensland***
- ***A Climate Change Act for the Northern Territory***
- ***Climate-ready planning laws for NSW: Rocky Hill and beyond.***

Victoria's *Climate Change Act 2017* (Vic) provides a prime example of a strong legislative requirement to consider the impacts of climate change in environmental decision-making. The Victorian EPA is required to have regard to the potential impacts of climate change and the potential contribution to Victoria's GHG emissions when making decisions about development licences and permits.[139] This includes a requirement to consider direct, indirect, and cumulative impacts of climate change and GHG emissions, as well as long-and short-term impacts of climate change.

The New South Wales Land and Environment Court recently held that the New South Wales EPA has a duty to develop objectives, guidelines, and policies to ensure the protection of the environment in New South Wales from climate change.[140] This duty stems from the New South Wales EPA's legislative mandate to 'develop environmental quality objectives, guidelines and policies to ensure environment protection'.[141]

The duty to protect the environment and human health from the existential impact of climate change should be express. Implied duties should not be relied upon to create an obligation to address climate change. An effective EPA must:

- be under a clear, legislated duty to prevent, mitigate, monitor and report GHG pollution and take all actions necessary to avoid and reduce the impacts of climate change and to meet clear emissions reductions targets, which must extend also to all relevant agencies; and
- have a duty to not compromise the achievement of emissions reductions targets in all decision making.

4 Independence

Recommendation 4: Independence from Ministerial influence, other government agencies and industry capture

An EPA should be established as an independent statutory authority that has:

- a clear independent governance structure, supported by a Board to provide strategic advice and direction;
- freedom from Ministerial influence or being overridden by other agencies; and
- policies and procedures to manage conflicts of interest.

Independence helps achieve actual and perceived objective, impartial and consistent decision-making. This is because it reduces risks of conflict, bias, and improper influence. Establishing an EPA with a high degree of independence, both from those it regulates and from government, can provide greater confidence and trust that regulatory decisions are made with integrity and in the public interest. Independence is of particular importance for the regulatory integrity of an EPA because it regulates both government and non-government entities and engages in decision-making that has the potential to significantly impact on the interests of many stakeholders, including industry, the community, First Nations and other government bodies.[143]

An EPA should be formally established as an independent statutory authority, free from Ministerial influence. This includes implementation of a Board to provide strategic direction and oversight, made up of independent expert specialists in environmental regulation and science with strict legislated restrictions around conflicts of interest that are enforceable.

a. A clear, independent governance structure

The OECD identifies three main governance structures for independent regulators:[144]

- Governance Board model – the board has primary responsibility for providing oversight, guidance and policy to the regulator, with decision-making functions largely delegated by the Chief Executive Officer (**CEO**);
- Commission model – the board itself makes most substantive regulatory decisions;
- Single member regulator model – an individual is appointed as the regulator, and either makes most substantive regulatory decisions themselves or delegates them to staff.

The Governance Board model is recommended for an effective EPA, as it will ensure the EPA is supported by a number of experts who can provide guidance and strategic direction to the regulator.

The Governance Board model is recommended over the Commission model, as it will allow the board to delegate responsibility for implementation to the CEO and staff so that it can focus on providing strategic guidance, approval and oversight.

The Governance Board model is also recommended over the Single Member Regulator model, as it will ensure that there is less opportunity for corruption as may occur with a single board member and will also ensure the EPA is supported by a number of Board members with specialist expertise in a range of areas.

Under the Governance Board model, an EPA would be established as an independent statutory authority, with an appointed Board of at least 4 members responsible for strategic direction and oversight, each specialising in different areas of expertise. The regulatory and decision-making functions of the EPA would be vested in the CEO, who would be required to act in conformity with Cultural Protocols and on the advice of the Board, the Environmental Justice Group, the Chief Environmental Scientist and, as relevant, the Environmental Health Group. The CEO may have the power to delegate those powers as necessary, with the delegate subject to the same advice and obligations as the CEO.

The governance structure should reflect the status of the EPA as a specialist, science-based regulator. Board members should be required to meet particular expertise relevant to the governance of the EPA, including First Nations representation, scientific expertise and regulatory experience.

As has been discussed in **Recommendations 1 and 2**, EPAs should have a duty to act in conformity with Cultural Protocols that are consistent with First Nations Lore, and should also develop and implement an underlying environmental justice framework. As a result, there should be First Nations representation in the governance of an EPA, as well as substantive engagement with First Nations communities and communities that experience structural disadvantage on all aspects of environmental regulation.

The Board should sit alongside and meaningfully engage with the relevant Health Department in the shared purposes of protecting human health, ensuring meaningful air and water pollution standards and mitigating climate impacts.

Internally, there are three key roles that should be established:

- **A Chief Environmental Scientist** (**CES**) should be appointed as a legislated position with scientific qualifications, with the function of advising the CEO on regulatory decisions and standards and advising the Chief Health Officer or equivalent on environmental health matters.
- **An Environmental Justice Group**, with First Nations membership, should be established that advises the CEO on whether the environmental justice framework is being implemented by the EPA, and whether the EPA's various duties in relation to environmental justice and Cultural Protocols are being meaningfully complied with.
- **An Environmental Health Group** should be established, to lead monitoring and evaluation activities, to interpret data and advise the CES and CEO. This group could also work with the relevant Health Department on environmental health outcomes.

b. Freedom from Ministerial influence or being overridden by other agencies

An independent EPA must hold independent power and sufficient resources to assess and decide applications without intervention from Ministerial influence or being overridden by other Departments or bodies. Such freedom from Ministerial control or direction should be expressly provided for in legislation, as is the case with the EPAs in Western Australia and the Northern Territory. The roles of the responsible Minister and the EPA with respect to environmental decision-making should also be clearly defined to ensure that there is no confusion or overlap.[146]

However, we do note that merely legislating the independence of an EPA is not enough, and such independence needs to be implemented in practice. For example, while the WA EPA is formally free from Ministerial control, a report by organisation 350 Perth raised questions about whether this is the case in practice.[147] The WA EPA's Greenhouse Gas Assessment Policy was withdrawn only 8 days after publication, allegedly following a discussion with the WA Premier who raised the concerns of resources companies who were opposed to the policy.[148] Later versions of the policy removed the requirement for proponents to offset all residual (net) direct emissions.[149]

An EPA must be established with sufficient independence from other entities and branches of government, to ensure that there is integrity in and respect for its functions, powers and duties, including but not limited to the need for a rigorous and independent environmental impact assessment process.

Case study: Queensland Coordinator-General Overrides and Impedes Expert Agency and Court in Environmental Decision Making[150]

In Queensland, the Coordinator-General is responsible for coordinating and evaluating environmental assessment of declared 'coordinated projects', which are projects that typically pose the greatest environmental impacts. The Coordinator-General has the power to mandate environmental conditions which no other decision-maker can be inconsistent with, including the Court. This can lead to perverse outcomes where mandated conditions are implemented which are based on information that was found to be lacking, incorrect or inadequate on expert scientific enquiry, for instance, by the Department of Environment and Science (**DES**) or on Court review.

A Right to Information application by ABC News unveiled that the Queensland Coordinator-General made a decision inconsistent with the expert scientific advice of DES in the assessment of the Olive Downs coal mine, a coordinated project in central Queensland. DES advised the Coordinator-General that the draft environmental impact statement provided insufficient detail to properly assess the impacts to the environment of leaving final voids in the floodplain, and that the proposal was considered to pose a significant impact to the Isaac River floodplain and associated ecology. Yet, the Coordinator-General reportedly did not request the further information DES stated was necessary to properly assess the environmental risks of the project, and instead mandated conditions which provided for the final voids to be left in the floodplain. DES are unable to act inconsistently with mandated conditions imposed by the Coordinator-General.

This case study demonstrates the importance of establishing an environmental regulator that is able to conduct independent environmental impact assessment of major projects free from the unfettered involvement and decisions of other agencies.

c. Management of conflicts of interest

Managing conflicts of interest is essential for an environmental regulator, to ensure both that decisions are actually made in a fair and unbiased manner, in the public interest, without external influence, and to ensure that these decisions are seen and perceived by the public to be made free from influence.[152] This is particularly important in the context of environmental decision-making, where decisions can have wide reaching implications for the community and there is large scope for vested interests to otherwise impact decision-making.[153]

Environmental legislation should provide for measures to remove the risk of conflicts of interest in decision making, including clear definitions of what constitutes a real or perceived conflict of interest, disclosure requirements, risk mitigation and ongoing management and review requirements. This policy should be reviewed regularly, and the integrity of decision-making by an EPA should be regularly monitored through an external audit process.[154]

5 Accountability

Recommendation 5: Accountability mechanisms to ensure responsibilities are discharged with integrity in the public interest

An EPA should be accountable to the public, which includes:

- well-defined and clear criteria for decision-making;
- mechanisms to review decision-making, including open standing for judicial review and merits review;
- the regular publication of State of the Environment Reports; and
- powers to scrutinise performance, both of the government and itself.

Environmental regulators such as EPAs need to be held accountable for their decisions and actions. This is important to ensure that the EPA properly undertakes its functions and duties and, if it does not, that those impacted by any resulting environmental injustice, in the form of pollution, environmental degradation or climate change, are able to take action.[155] A system of accountability ensures that a regulator feels compelled to undertake and demonstrate the efficient and effective discharge of its responsibilities with integrity, honesty, and objectivity.[156] For an EPA, this includes clearly articulating the criteria for decision-making, the ability of the public to make submissions that will be meaningfully taken into account and to scrutinise decisions via merits and judicial review, the undertaking of published environmental monitoring and reporting for each project at a localised, regional and state/territory-wide level, and the scrutiny of performance via external audit.

a. Well-defined and clear decision-making criteria

Well-defined decision-making procedures and clear criteria are essential to ensure consistency, transparency and accountability for environmental decision-making.[157] Decision-making criteria should require consideration of the EPA's objective of protecting the environment and human health, as well as the implementation of the principles of ESD, environmental justice, First Nations justice and human rights obligations. The criteria should be clearly specified as criteria for environmental decision-making, and other key criteria should be well-defined, so that the EPA can be held accountable to its mandate.

Where decision-making criteria rely on the EPA setting standards, the standards required should be clearly prescribed and certain, should be set based on the best available science, be published in a timely manner, and reviewed regularly. There should be a mechanism to address if the EPA fails to produce or review standards.

b. Mechanisms for review of decision-making

External review of decision-making by an EPA should be available, with legislated open standing provisions for judicial and merits review to ensure that any person is able to seek redress given the public interest nature of EPA decisions. While in most Australian jurisdictions, judicial review is generally available for administrative decisions made under an enactment, whether legislated or at common law, all applicants must demonstrate standing and are subject to adverse costs orders. Further, while most decisions made by an EPA will be susceptible to judicial review, this form of review is generally limited to technical legal and procedural matters, and not the merits of the decision being challenged.

Given the limitations of judicial review and the importance of critical evaluation of environmental decision making free of political influence, merits review should separately be available for decisions made by an EPA in a no costs jurisdiction, with open standing provisions given the inherent public interest nature of EPA decisions.[158] Open standing must be provided for judicial review of decision-making by the EPA, in recognition of the public interest nature of these decisions, and there must be public interest costs provisions so that this form of redress is accessible.

c. State of the Environment Reports

The preparation of a State of the Environment Report is an internationally accepted method for assessing environmental performance and is a key means by which an independent EPA can ensure a government can be held accountable for the protection of the environment. While the preparation of a State of the Environment Report need not be the responsibility of an independent EPA, it should be the responsibility of an independent body rather than a government department.[159] The State of the Environment Report should be published annually with meaningful, consistent, legislated key indicators tracked and reported on that give a guide as to how well environmental and community health and integrity in environmental governance are tracking.

d. Scrutiny of performance

An EPA should have both the power and responsibility to evaluate the effectiveness of its own and other departmental regulatory interventions that impact on environmental matters. Regular reviews should be conducted of environmental regulatory regimes to ensure that objectives are being achieved and that areas in need of improvement are identified and acted upon.[160]

Regular scrutiny of the performance of EPAs is particularly important to ensure that any environmental injustice and environmental racism is monitored and documented. The collection and analysis of this data is essential to addressing the disproportionate burden of environmental harm on First Nations and structurally disadvantaged communities.

6 Transparency

Recommendation 6: Transparency in decision-making through disclosure and community engagement to support accountability

An EPA should be transparent in its decision-making processes to ensure accountability to the public, which should be achieved through:

- active and mandatory public disclosure of environmental information; and
- community engagement via guaranteed rights to make written submissions and meaningful engagement in decision-making processes.

A key concept underpinning environmental justice is procedural justice, which requires transparent, informed, and inclusive environmental decision-making processes.[161] For an EPA, this means ensuring that those most vulnerable to suffering any adverse impacts of this decision-making, such as pollution, environmental degradation and climate change, are able to meaningfully participate in and fully understand these processes.

One method of achieving this legal empowerment, and thus ensuring environmental justice is implemented, is through improved transparency mechanisms. The importance of transparency in environmental regulation has been emphasised internationally, with the 1992 Rio Declaration stating that individuals should have 'appropriate access to information concerning the environment… and the opportunity to participate in decision-making processes'.[162] It is also a recognised principle of the human right to a healthy environment.[163]

To be an effective environmental regulator, an EPA must be transparent in its decision-making processes. Transparency improves the efficiency and quality of regulatory operations, as the availability of information holds a regulatory body accountable for its activities, expenditure, and any potential undue influence on its regulatory practice.[164]

An EPA should provide for public disclosure of key environmental information, including decision-making processes and outcomes. There should also be meaningful, well-informed community engagement in decision-making processes. Such engagement should be actively pursued by the EPA to ensure that all relevant stakeholders are consulted and aware of decisions that may impact them.

Pursuant to principles of self-determination and FPIC, First Nations should be actively involved in environmental decision-making processes and should be able to withhold consent for activities that will significantly affect their cultural interests. There should also be emphasis on ensuring engagement and consultation is undertaken with environmental justice groups and individuals who may otherwise be disenfranchised from the decision-making process due to structural disadvantage, a lack of access to technology, a lack of understanding of environmental regulatory processes, a lack of scientific training, or because English is not their first language.

a. Public disclosure of environmental information

To be transparent and accountable, an EPA should provide public access to a broad range of environmental information, particularly relating to environmental decision-making processes and environmental impacts from activities it regulates.[165] This can be achieved through easily accessed and up-to-date public registers which record key information on development assessment and approvals, licensing, compliance and enforcement. This includes all management plans and similar plans approved under a permit, licence or approval. Monitoring data must be easily accessible so that the public can understand potential impacts pollution is having on their health and environment.

b. Community engagement

An EPA must be obliged to meaningfully engage communities in environmental decision-making, and ensure those communities are adequately informed by comprehensive information and within reasonable timeframes. First Nations should be directly involved in decision-making pursuant to principles of self-determination and FPIC, and structurally disadvantaged communities with environmental justice concerns should be actively engaged with pursuant to environmental justice frameworks and the duty to achieve environmental justice. This includes early engagement and the ability to make submissions on environmental decision-making, particularly where the decision will have wide ranging implications for the community.[166]

While environmental decision-making differs greatly between jurisdictions, consultation should broadly occur at the following stages: standard setting and review of standards and policies; decisions on whether proposals are clearly unacceptable or ineligible; drafting of terms of reference for assessments; assessment of proposals; and review and appeal of decisions, as discussed above under **Recommendation 5**.

7 Sufficiently empowered

Recommendation 7: Sufficiently empowered to protect the environment and human health

An EPA should be sufficiently empowered to fulfil its role to protect the environment, including the following powers:

- environmental monitoring and reporting to identify risks early;
- standard setting in accordance with the best available science;
- clear assessment criteria and decision-making powers; and
- compliance and enforcement.

A regulator's powers and functions should be adequate to enable the regulator to effectively fulfill its objectives.[167] A wide range of regulatory tools should be made available to the EPA to enable it to most effectively protect the environment and human health, such as general enforceable environmental duties, environment protection standards, approvals powers, economic instruments, environmental monitoring powers, remedial measures and sanctions.[168]

An EPA should have the remit of governing centrally over all environmental impacts – rather than areas of concern being split between various departments. As discussed earlier, these decision-making powers should be subject to merits review with open standing, so that the EPA is held accountable when exercising these powers and does so transparently, with full community engagement. The community should also have power and availability of mechanisms to enforce compliance with environmental legislation, such as environmental duties, when the EPA fails to do so.

a. Environmental monitoring and reporting

Proactive environmental monitoring powers are essential to identify and manage risks early, rather than relying on reactive measures to address environmental harm. This monitoring must be done regularly, on a legislated basis, with clear benchmarks and regular mandatory publication of data to view trends and understand current, prior and future impacts. It is important that there be monitoring and assessment of environmental quality, including of air and water quality and GHG emissions, undertaken by an independent regulator such as an EPA to ensure that there is accountability in the monitoring and assessment process.[169] Real time publication of data should be provided as much as possible, particularly for air and water pollutants and in high risk areas, such as areas with industry close to residential locations.

Environmental monitoring should include air quality, GHG emissions and water quality. The goal of such monitoring is to ensure that the EPA is aware of the current state of the environment and able to address any immediate threats to human health and the environment, and to enable the EPA to predict future threats or risks and take preventative action.[170]

b. Standard setting

An EPA should be responsible for setting legally enforceable environmental standards. Environmental standards should have statutory force and should be able to be easily updated to reflect new and emerging risks, new technologies and new risk-management approaches.[171] It is currently a major limitation in a number of jurisdictions that environmental standards or guidelines created by EPAs are not enforceable.

For example, in Western Australia the EPA has created a number of Environmental Factor Guidelines to assist in conducting environmental impact assessments, such as the Greenhouse Gas Emissions Guideline and the Air Quality Guideline. These guidelines are policy instruments and not legally binding, meaning that it is unclear how they will be applied by the EPA.[172] Such guidelines should be legally enforceable so that there is clarity in the assessment process, and so that proposals being assessed can be held accountable to these standards.

As a science-driven regulator, an EPA should also have the relevant expertise to set environmental standards, as well as an understanding of how those standards operate in the environmental regulatory framework.[173] As discussed in **Recommendation 9**, a Chief Environmental Scientist should be appointed to advise on environmental standards, to ensure that they reflect the most up-to-date scientific expertise.

c. Clear assessment criteria and decision-making powers

To be effective, an EPA must have substantive decision-making powers in relation to the environment. Ultimate decision-making power in relation to development approvals and environmental impact assessment should be clearly vested in the EPA, and not in a Minister or separate body. Such clarity about the relationship between the EPA, the Minister and other bodies is essential to maintaining the integrity of the regulatory structure that has been created.[174] Other agencies should not be empowered to override the decision making of the EPA, particularly where those agencies have pro-development mandates.

These decision-making powers should be clearly articulated so that all members of the community can clearly understand environmental regulation processes. All decisions of the EPA should also be subject to merits review, with broad standing provisions so that all concerned community members are able to challenge them, given the inherent public interest in EPA decisions.

Case study: Approval of Gas and Mining Projects in Western Australia

The Western Australian EPA is responsible for undertaking environmental impact assessments and preparing a report on whether the project may be implemented. However, the ultimate decision-making power to approve a project lies with the Minister for Environment, and not the EPA.[176]

In 2006, the WA EPA published a report finding that the Gorgon Gas Project, a proposed liquified natural gas plant, was environmentally unacceptable due to risks of impacts to flatback turtle populations, impacts on the marine ecosystem from dredging, risk of introduction of non-indigenous species and potential loss of subterranean and short-range endemic invertebrate species.[177] Despite these findings, the project was approved by the Minister for Environment on the basis that it would 'boost the Australian economy and provide jobs for thousands of Western Australians' and that the state government had 'worked tirelessly to facilitate major developments, particularly the massive Gorgon project'.[178]

More recently, in August 2016 the WA EPA published a report recommending against the implementation of a uranium mining project at Yeelirrie as it would be likely to cause the extinction of up to 11 species of subterranean fauna. Despite this recommendation, and a subsequent appeal decision in which the Minister for Environment upheld the EPA's recommendation, the Minister approved the project for implementation.[179]

These case studies demonstrate the importance of an EPA having substantive decision-making powers in relation to development approvals that will significantly impact the environment.

d.Compliance and enforcement

An EPA must also have power and sufficient resources to undertake compliance monitoring and ensure enforcement of all environmental conditions and activities, with a mandate to enforce the law without political influence. Compliance and enforcement policies should be developed and made publicly available to clearly articulate how the EPA is to conduct itself and how it will achieve regulatory outcomes. This will ensure that reactive enforcement measures are not pursued at the expense of proactive environmental regulation.

Achieving compliance with environmental regulation should not be seen by the EPA as an objective in its own right, but rather as one tool of many available to achieve the ultimate goal of protecting the environment.[180] Compliance and enforcement activities of the EPA should also be reported upon publicly, to demonstrate that the EPA is undertaking its role in ensuring compliance with the law, and to demonstrate to the public where the law has been breached and the remedy and repercussions from this breach.

While it is expected that an EPA will properly fulfil its compliance and enforcement functions, there should be powers for community members and people affected to enforce the Act and instruments such as approvals through civil enforcement mechanisms. Members of the community should be given standing to seek civil enforcement to ensure compliance and remedy any non-compliance and environmental harm.

These powers should not be limited to individuals directly affected by the non-compliance, and civil enforcement proceedings should be able to be brought in the public interest with public interest costs protections. An example of more expansive third-party enforcement rights is seen in Victoria, where the *Environment Protection Act 2017* (Vic) allows any person to seek leave to bring an application for a civil remedy where the application would be in the public interest, and the person has requested the Victorian EPA take enforcement or compliance action but they have failed to do so within a reasonable time.[181] Similar powers of third party enforcement exist in Queensland under the *Environmental Protection Act 1994* (Qld).[182]

People affected by environmental harm should also have immediate powers to seek relief to remedy or restrain pollution without needing to await action by the regulator, which can frustrate or delay enforcement action. Public interest cost protections are important for civil enforcement, to ensure that any person seeking to remedy environmental harm may do so without being open to a risk of adverse costs. For example, in the NSW Land and Environment Court Rules the Court may decide not to make an order for the payment of costs against an unsuccessful applicant if it is satisfied that the proceedings have been brought in the public interest.[183]

8 Adequate funding from mixed sources

Recommendation 8: Sufficient and certain funding to fulfil their functions

An EPA should have sufficient and certain funding to meet its operating needs and fulfil its functions adequately, with the majority of funding sourced from a combination of the polluter pays model and general budget allocations.

A lack of adequate funding can significantly hamper the ability of the EPA to fulfil its functions, and thus impact on the quality of the environment. The effects of inadequate funding have been seen in the USA, where budget allocation for the national EPA has not been adjusted in two decades and so has been significantly devalued and hampered.[184] The result of this funding deficit has been reduced enforcement capabilities, limited resources for providing environmental justice, and an inability to assist state environment programs.[185] A failure to fund an environmental regulator properly most affects disadvantaged communities as they are less likely to have the means to be able to protect their interests in decision making processes, monitoring pollutants and through seeking enforcement of laws and are more likely to be exposed to environmental harms such as pollution, environmental degradation and climate change.

In the Australian context, budget allocation for the environment has historically been inadequate, with an economic analysis of environmental spending by the Australian Conservation Foundation finding that between 2013-14 and 2016-17 the proportion of total state budget expenditure invested in environment and biodiversity had decreased by 16%, while Federal investment decreased by 35% in that time.[186] For example, the Victorian EPA did not receive an annual appropriation from the state budget between 2012 and 2020, relying instead on a landfill levy for the majority of its funding.[187] The Victorian EPA has only received a significant budget allocation in the 2021-22 budget following an independent inquiry and significant legislative reforms.[188]

a. Polluter pays model

A regulator's funding should be sufficient to meet operating needs and certain enough to enable planning for the future.[189] An EPA must have funding certainty and stability, with little to no reliance on funding sources that create conflicts of interest. It may be appropriate to fund development assessment and compliance activities via application fees, annual fees and cost recovery while development authorities are active, by way of implementing a 'polluter pays' model. However, this should not be the only source of funding for EPA programs.

b. Government appropriations

EPAs in Australia generally rely either on government appropriations, or on money collected from levies, penalties, fines and fees which are held in an Environment Protection Fund.[190] However, significant reliance on revenues from fines and penalties for environmental offences may discourage an EPA from actively preventing environmental pollution from occurring, and instead encourage it to pursue environmental offences at the expense of fulfilling its core functions, which would be a perverse outcome.[191]

The primary source of funding for an independent statutory authority like the EPA should be through direct government appropriations. This provides for a simplified and certain funding arrangement and also better satisfies community expectations for an independent regulator.[192]

9 Appropriate expertise

Recommendation 9: Relevant expertise to support decision making that is science-based and provides for First Nations justice and environmental justice broadly

An EPA should have the relevant expertise to effectively protect the environment and human health through informed and expert decision-making, with support from a Chief Environmental Scientist and experienced Board members which bring a diverse range of perspectives. EPAs must also recognise and value First Nations knowledge and views and ensure that this knowledge is considered meaningfully alongside and equally with western science and expertise.

An EPA needs to have the relevant expertise to provide effective protection of health and the environment by making robust, informed judgments about the underlying causes of adverse environmental impacts and seeking to avoid harms where possible.[193] See **Recommendation 4** for more information on the best governance structure.

a. First Nations Knowledge implemented through Board representation, an Environmental Justice Group and throughout EPA operations

EPAs must also recognise, value and implement the knowledge and experiences of First Nations in their operations and decision making. As was recognised in the independent review of the EPBC Act, environmental regulation often heavily prioritises and centres the views of western science, with Indigenous knowledge and views diminished and often dismissed.[194] Again, the importance of an environmental justice framework and a duty to develop and act in conformity with Cultural Protocols based on First Nations Lore is demonstrated. EPAs must develop mechanisms to ensure that First Nations that speak for and have traditional knowledge of Country are able to contribute to environmental decision-making, and to further ensure that First Nations knowledge is valued and considered alongside western science. This includes through identified positions on the Board, on an Environmental Justice Group and other advisory bodies, as well as through recruitment and retention of First Nations staff within EPAs more generally. The *Our Knowledge, Our Way* guidelines provide an example of a First Nations developed and led mechanism to ensure First Nations knowledge is valued and integrated in environmental management.[195]

b. Experienced Board Members

As stated above, the EPA should be a science-driven regulator, led by individuals with the necessary expertise to provide balanced advice and direction. Board members should be required to have experience and skills in relevant areas, including environmental regulation, management, science and law. Board members should also have diverse perspectives and experiences, to ensure that the views of structurally disadvantaged groups are equally represented.

c. Chief Environmental Scientist

The EPA should also establish a Chief Environmental Scientist (**CES**) as a legislated position with scientific qualifications, with the function of advising the CEO on regulatory decisions and standards and advising the Chief Health Officer on environmental health matters. Victoria is currently the only jurisdiction which requires a CES to be appointed. The CES is responsible for providing advice to the EPA relating to the objectives, duties and functions of the EPA.[196]

d. Environmental Health Group

As stated above at **Recommendation 4**, an Environmental Health Group should be established, to lead monitoring and evaluation activities, to interpret data and advise the CES and CEO on health focused matters. This group could also work with the relevant Health Department on environmental health outcomes. This will ensure a closer acknowledgment, awareness and mitigation of the community health impacts of environmental decision making.

Conclusion

Strong and independent EPAs will promote positive human health and environmental outcomes. To most effectively achieve their objectives of protecting the environment and human health and duties to identify and address environmental justice and First Nations justice, EPAs must be backed by strong governance arrangements that allow them to effectively regulate the environment without undue influence from political or economic interests. Strong environmental governance in Australia requires a regulatory body that has a First Nations justice and environmental justice framework, has a clearly articulated role, is independent, accountable and transparent, is adequately empowered to fulfil its role, has sufficient and certain funding, and is supported by scientific expertise.

As a priority, EPAs must achieve First Nations justice by developing and acting in conformity with Cultural Protocols based on First nations Lore, as well as the rights protected in the United Nations Declaration on the Rights of Indigenous Peoples. EPAs must also develop environmental justice frameworks to ensure that there is equal access to protection from environmental degradation, pollution and climate change, as well as equal access to the benefits of environmental regulation and to a healthy environment. This is essential to ensure that environmental burdens, such as pollution, environmental degradation and the impacts of climate change, are not disproportionately felt by structurally disadvantaged communities with environmental justice concerns, including First Nations, people with disability, elderly and young people, low-income communities and people of colour. It is also essential to ensure that the right to a healthy environment and human health can be experienced equally by all.

Given the urgent call to action delivered by the UN Secretary-General, and the necessity to ensure 'immediate, rapid and large-scale reductions in greenhouse gas emissions' if we are to limit global warming to close to 1.5°C or even 2°C,[197] it is imperative that Australia has robust and effective environmental regulation and regulators at both national and subnational levels. Improved environmental governance is essential to ensure that EPAs fulfil their main objective of protecting the environment and human health from the harmful effects of pollution and waste, which many EPAs in Australia have often failed to fulfil.

Australian governments, both federally and in states and territories, must commit to implementing or bolstering existing independent EPAs with strong governance arrangements and First Nations justice and environmental justice frameworks, to ensure equal access to a safe and healthy environment for all Australians, today and in the future.

EDO wishes to acknowledge with gratitude the assistance provided by many people in the researching, drafting and review of this report, including EDO solicitors, particularly Nicole Sommer, Rachel Walmsley and Fleur Ramsay, many volunteers and the Honourable Alan Wilson QC, previous Justice of the Supreme Court and Planning and Environment Court Chief Judge.

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