



Environmental
Defenders Office



Implementing an effective independent Environmental Protection Agency in Queensland

Best practice environmental governance for environmental justice

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The Environmental Defenders Office Ltd (**EDO**) have recently released a national report: *Implementing effective independent Environmental Protection Agencies in Australia: Best practice environmental governance for environmental justice*. In this report the EDO makes recommendations about the elements of environmental governance required for an effective independent Environmental Protection Agency (**EPA**) that is grounded in environmental justice, Cultural Protocols based on First Nations Lore, and international law. While the national report provides recommendations and commentary relevant to EPAs at a state and national level, this refined report has been provided to address the unique circumstances of environmental governance in Queensland.

The Queensland Government has made a commitment to investigating and consulting on the establishment of an independent EPA. To be effective at truly improving environmental governance, a new Queensland EPA must implement 9 elements of strong governance as a minimum, to ensure that First Nations justice, environmental justice and environmental protection are provided equally for all, and so that development is effectively regulated.

The EDO acknowledges as a starting point that 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 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.

Introduction

The Queensland Government has recently committed to considering the establishment of an independent Environmental Protection Agency (EPA) in Queensland. This commitment is to be commended, as Queensland is sorely in need of the greater integrity in environmental regulation and environmental justice that an effective and well-resourced independent EPA could provide.

The recent independent statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) 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”.¹ This report was closely followed by the Intergovernmental Panel on Climate Change Sixth Assessment Report, dubbed a ‘code red’ for humanity in documenting the urgent need for stronger environmental governance to ward against increasing climate change risk.² It is therefore essential that environmental regulation in Queensland, and across Australia is strengthened to be more robust and effective, and the implementation of a strong independent EPA is a key means of achieving this.

However, experience 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. As was experienced with the introduction of the EPA by the Queensland Government from 1998 to 2009, 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. It is also true that not all EPAs currently in place around Australia are sufficiently independent, well-resourced and robust to provide integrity in environmental governance.

Environmental governance that is not strongly focused on achieving environmental justice may also lead to inequity in environmental outcomes. 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 impacts of environmental decision-making without proactive action to address this inequity.³

If Queensland is to see meaningful improvements in environmental justice and community health outcomes, a reduction of climate change risk and an increase in public trust in environmental governance,⁴ it must establish an EPA that is centred 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. Establishing an EPA with a strong grounding in environmental justice will assist in improving integrity and trust in environmental regulation, and ensure that individuals and communities who are vulnerable to environmental harm because of structural disadvantage are equally protected.

An EPA 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 recognises the individual and collective rights of First Nations that are enshrined

in the United Nations Declaration on the Rights of Indigenous Peoples. The destructive impacts of colonisation and dispossession continue to be felt by First Nations in Queensland and throughout Australia. First Nations are disproportionately impacted by the adverse outcomes of environmental decision-making and regulation.

The Necessity for Reform

Since the abolition of the EPA in 2009, environmental regulation in Queensland has been the responsibility of various iterations of what is now the Department of Environment and Science (**DES**). DES is responsible for environmental impact assessment and decision making for specified environmentally relevant activities (**ERAs**), but not all environmentally impactful activities. Within DES's remit are prescribed ERAs, such as landfills, polluting industrial and agricultural activities, and resource project proposals, such as mining or petroleum/gas projects.⁵ DES can have a technical advice agency role for other development under the *Planning Act 2016* (Qld), or may not have any role in decision making.

Although DES is the hub of expertise in environmental management and science, DES often has its decision-making and advice overruled or interfered with by other agencies, including the Coordinator-General in respect of coordinated projects declared under the *State Development and Public Works Organisation Act 1971* (Qld), as well as the State Assessment and Referral Agency (**SARA**) in respect of development applications involving a matter of state interest.

A report by Transparency International Australia identified that the environmental assessment and approval processes in Queensland are vulnerable to corruption and conflicts of interest.⁶





Currently, the Coordinator-General has the power to mandate environmental conditions that no other decision-maker, including the Court, can be inconsistent with.⁷ Further, agencies such as SARA and Economic Development Queensland both have the power to disregard the expert advice of DES in the assessment of proposed development activities.

Even where DES has the power as the decision-maker in environmental assessment, it may be ignored in the environmental impact assessment process when led by the Coordinator-General, as demonstrated in the assessment of the Olive Downs coal mine (see case study below).

Case Study: Assessment of the Olive Downs Coal Mine

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 reportedly 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 and inappropriate 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 highlights the significant influence the Coordinator-General can have over DES in environmental assessment, which can diminish the integrity in Queensland's environmental assessment process.

The majority of the most significant environmentally and socially impactful development activities proposed in Queensland are assessed by SARA, Economic Development Queensland or the Coordinator-General. These significant development activities are assessed as either development applications involving a matter of state interest, development in designated priority development areas, or as projects declared to be coordinated projects.⁸

Environmental assessment by DES is also often considered to be inadequate. In the **EDO's recent report published in 2021, *Falling through the cracks: Issues with integrity in environmental assessment of gas activities in Queensland***, it was identified that there is a lack of integrity around environmental assessment of petroleum and gas applications. This is particularly concerning given this industry has the largest permit footprint, as well producing significant greenhouse gas emissions, both through direct, migratory and fugitive emissions.⁹

There are strong concerns that there is development industry capture of environmental governance in Queensland. This can be seen most simply through the review and appeal rights provided under the *Environmental Protection Act 1994* (Qld). Under this Act, developers hold rights across most development decision points to seek internal and external review or to appeal decisions concerning their applications for development activities. Conversely, there are very few powers for community members to seek internal or external review or to seek appeal on the merits of development decisions, limiting the ability of members of the public to challenge whether a decision was made in the public interest and in accordance with the law.¹⁰

Further, there are myriad examples of development decision-making being impacted by political interference over evidence-based science. The public attention on the assessment around the Carmichael coal mine highlights many such examples.

Case Study: Assessment of the Carmichael Coal Mine

Through a Right to Information request, Birdlife Australia recently obtained a previously unpublished report of an independent scientific panel that reviewed the conservation plan for the Black-throated Finch proposed by then Adani Mining Pty Ltd for the Carmichael coal mine application. The report concluded that the conservation plan was not sufficiently backed by evidence and didn't meet plan requirements, yet the plan was approved and the expert report was not made public. The erosion of evidence-based assessment by political interference can also be seen in the approval of water management plans for this mine, where scientific advice warned that they were inadequate, and such advice was once again ignored by decision-makers.¹²

There are also issues with a lack of transparency in environmental regulation by DES, particularly in relation to compliance and enforcement. For example, DES does not publish when Penalty Infringement Notices, the most commonly used enforcement tool, are imposed upon companies. Further, companies are not required to publish details of their compliance with their conditions in their annual reports,¹³ which is required in New South Wales. Gratefully, there are steps being taken by DES to improve access to information, but many more steps are needed for access to environmental information, a key tenet of environmental justice, to be sufficiently provided for to allow the public to know the impacts of activities on their environment and health as well as the state of the environment generally.

These are but a few of the many issues with the current state of environmental regulation in Queensland, demonstrating the necessity of an effective independent EPA with strong governance arrangements.

Recommendations for a Strong Independent EPA in Queensland

In our recent national report, *Implementing effective independent Environmental Protection Agencies in Australia: Best practice environmental governance for environmental justice*, the EDO recommended that an EPA should have the following 9 key elements of strong environmental governance:

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.



Conclusion

Environmental regulation in Queensland is in desperate need of reform to provide for meaningful environmental justice, and these 9 elements of good governance should be the minimum requirements for any EPA that is introduced in Queensland.

Queensland environment departments have for too long been chronically understaffed, underfunded and their powers overridden or stripped and granted to other departments with development and exploitation mandates. Additionally, key policy commitments, such as the Queensland Government's commitment to net zero emissions by 2050¹⁴, are not currently being upheld in environmental regulation in Queensland.

With the declining state of the environment, as well as the serious and increasing impacts of climate change which are already being felt most by those who have contributed least to global emissions, Queensland is overdue for improvements in environmental governance that achieve environmental justice.

An independent EPA is needed - one that is backed by strong governance arrangements that allow it to effectively regulate the environment

and protect the environment and human health equally for all. Strong environmental governance in Australia requires a regulatory body that provides for First Nations justice, is grounded in environmental justice, 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 relevant expertise.

Queensland should commit to implementing an independent EPA with these 9 key elements if it is to adequately protect the environment and human health, for the benefit of all Queenslanders today and in the future.

For further details on the 9 elements of environmental governance that are necessary for an EPA to effectively regulate development and protect the environment, see our national report, [*Implementing effective independent Environmental Protection Agencies in Australia: Best practice environmental governance for environmental justice.*](#)

Endnotes

¹ Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) ii.

² United Nations Secretary-General, Secretary-General Calls Latest IPCC *Climate Report* ‘Code Red for Humanity’, *Stressing ‘Irrefutable’ Evidence of Human Influence* (Press release, 9 August 2021).

³ United Nations Development Programme, *Environmental Justice: Comparative Experiences in Legal Empowerment* (Report, June 2014) 5.

⁴ Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) ch 4.

⁵ Queensland Government, *The environmental impact statement process for resource projects under the Environmental Protection Act 1994* (Guideline, 23 April 2019).

⁶ Transparency International Australia, *Corruption Risks: Mining Approvals in Australia* (Report, October 2017) 8-9.

⁷ Environmental Defenders Office, *Devolving extinction? The risks of handing environmental responsibilities to states & territories* (Report, October 2020) 21.

⁸ *State Development and Public Works Organisation Act 1971* (Qld) s 34A.

⁹ Environmental Defenders Office, *Falling Through the Cracks: Issues with Integrity in Environmental Assessment of Gas Activities in Queensland* (Report, 29 September 2021).

¹⁰ *Environmental Protection Act 1994* (Qld) ss 521 and 531 and Sch 2 ‘original decision’.

¹¹ Ben Smee, ‘Buried Queensland government report found Adani plan to protect black-throated finch was ‘superficial’’, *The Guardian* (Online, 2 September 2021) available here: <https://www.theguardian.com/australia-news/2021/sep/02/buried-queensland-government-report-found-adani-plan-to-protect-black-throated-finch-was-superficial>.

¹² MJ Currell et al, ‘Science sidelined in approval of Australia’s largest coal mine’ (2020) 3 *Nature Sustainability* 644.

¹³ Environmental Defenders Office, *Falling Through the Cracks: Issues with Integrity in Environmental Assessment of Gas Activities in Queensland* (Report, 29 September 2021).

¹⁴ ‘Queensland Climate Action’, *Queensland Government* (Web Page, 2021) available here: <https://www.des.qld.gov.au/climateaction>.



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