



Environmental
Defenders Office

**Submission on the Draft Environmental Management
and Pollution Control Amendment Bill 2022**

3 June 2022

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

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A Note on Language

EDO acknowledges that there is a legacy of writing about First Nations people without seeking guidance about terminology. In this submission, we have chosen to use the term “First Nations” to refer to Aboriginal and Torres Strait Islander peoples across Australia. We also acknowledge that where possible, specificity is more respectful. When referring to Tasmanian Aboriginal / palawa / pakana people in this submission we have used the term “Tasmanian Aboriginal”. We acknowledge that not all Aboriginal people may identify with these terms and that they may instead identify using other terms.

Acknowledgement of Country

The EDO recognises First Nations peoples as the Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

In providing these submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Draft Environmental Management and Pollution Control Amendment Bill 2022 (**the Bill**).

EDO has recently released its national report [*Implementing effective independent Environmental Protection Agencies in Australia: Best practice environmental governance for environmental justice*](#) (**Best Practice EPA report**). In that report, EDO makes recommendations about the elements of environmental governance required for effective independent Environmental Protection Agencies that are grounded in environmental justice, Cultural Protocols based on First Nations Lore, and international law. The Best Practice EPA report calls for a fundamental shift in the focus of EPAs from primarily supporting industry to operate through licensing of environmental impacts to protecting communities and the environment from environmental impacts, providing environmental justice for disadvantaged individuals and communities.

The following submission draws on the Best Practice EPA report recommendations to examine the Bill and proposes changes to Tasmania's environmental legislation and Environment Protection Authority (**EPA**) to meet best practice regulatory standards. In making this submission, EDO acknowledges that it cannot and does not speak on behalf of First Nations peoples. We make the following comments as experts in planning and environmental law with experience in seeking to protect First Nations and Tasmanian Aboriginal cultural heritage through the law.

EDO recognises the steps taken by the Tasmanian Government to heed calls for a truly independent EPA in Tasmania. The Bill is timely considering the findings and strong recommendations of the Legislative Council Sub-Committee Report on Finfish Farming in Tasmania dated 19 May 2022 (**Finfish Farming Report**) relating to environmental governance and the need for independent, transparent and accountable regulation of this growing industry by the EPA.¹ Our submission makes recommendations to strengthen the independence of the Tasmania EPA and bring it into line with best practice under the following headings:

1. Critical features of an independent EPA
 - 1.1. Need for Reform
 - 1.2. Providing for First Nations Justice
 - 1.3. An environmental justice framework
 - 1.4. An EPA with clearly defined roles, duties and objectives

¹ A copy of the Finfish farming Report can be accessed here: <https://www.parliament.tas.gov.au/ctee/Council/Reports/inq.fish.rep.20220519.FINALREPORT.jm.001.pdf>

- 1.5. An EPA that is independent from Ministerial influence, other government agencies and industry capture
- 1.6. An EPA that is accountable and transparent in its decision-making
- 1.7. An EPA that is sufficiently empowered with adequate funding and appropriate expertise
2. The Bill
 - 2.1. Ministerial statement of expectation
 - 2.2. Independence of the EPA Director
 - 2.3. Public release of monitoring information
 - 2.4. Environmental and Technical Standards

A summary of EDO's recommendations outlined in this submission can be found below.

1. Critical features of an independent EPA

Recommendation 1: The EPA should be subject to a duty to develop and act in conformity with Cultural Protocols developed by the Tasmanian Aboriginal community and to uphold internationally recognised First Nations' rights of free, prior and informed consent and self-determination.

Recommendation 2: The EPA should be underpinned by an environmental justice framework to ensure equality in environmental protection.

Recommendation 3: The EPA should have a clearly defined role and duties to ensure objectives are achieved.

Recommendation 4: The EPA should be independent from Ministerial influence, other government agencies and industry capture.

Recommendation 5: The EPA should have accountability mechanisms to ensure responsibilities are discharged with integrity in the public interest.

Recommendation 6: There should be transparency in EPA decision-making through disclosure and community engagement to support accountability, including through opportunities for the external review of the EPA's decision-making, with legislated open standing provisions for judicial and merits review (including for environmental licences and environmental protection notices that change permit conditions).

Recommendation 7: The EPA should be sufficiently empowered to protect the environment and human health.

Recommendation 8: The EPA should have sufficient and certain funding to fulfil its functions.

Recommendation 9: The EPA Board should have relevant expertise to support decision making that is science-based and provides for First Nations justice and environmental justice broadly.

2. The Bill

Recommendation 10: Commit to a full review of the EMPC Act to determine whether it provides for best practice and modern environmental regulation.

2.1 Ministerial statement of expectation

Recommendation 11: Repeal sections 15, 15A, 15B and 15C of the EMPC Act.

Recommendation 12: If recommendation 11 is not accepted, remove proposed clause 15(ab) from the Bill.

2.2 Independence of the EPA Director

Recommendation 13: Amend the EMPC Act to clearly provide a role for the EPA Board in appointing and providing oversight of the EPA Director.

Recommendation 14: Amend the EMPC Act to clearly articulate the EPA Director’s functions and powers.

Recommendation 15: Amend the EMPC Act to provide a process for the management of conflicts of interest by the EPA Director.

2.3 Public release of monitoring information

Recommendation 16: Amend clause 11 of the Bill to provide that any monitoring data, documents or reports required to be provided to the EPA (either through a permit or licence condition or as a result of another legal mechanism under the EPMC Act) must be available to the public.

2.4 Environmental and Technical Standards

Recommendation 17: Environmental and technical standards must be actively implemented, be clearly prescribed and certain, be based on the best available science, be published in a timely manner, and be reviewed regularly.

Recommendation 18: Amend proposed section 96O(1) in the Bill to “Environmental standards may be made for the purpose of assisting in avoiding, minimising, remedying and offsetting potential environmental harm, and/or give effect to best practice environmental management”.

Recommendation 19: Amend proposed section 96O(3) in the Bill to require that regard must be had to relevant Environmental Standards in all the listed decisions, and that reasons must be provided where EPA Director and/or Board decisions deviate from the requirements of Environmental Standards or they do not impose relevant Environmental Standards Conditions.

Recommendation 20: Delete proposed section 96O(6)(a) in the Bill.

Recommendation 21: Amend proposed section 96P in the Bill to include a requirement that “Environmental standards must be consistent with the best available science, Emissions Reduction Target, and any sector-based emissions reduction and resilience plans made under the *Climate Change (State Action) Act 2008*, as amended from time to time.”

Recommendation 22: Amend proposed section 96W in the Bill to include requirements for reviews of Environmental Standards to be undertaken on a 5-yearly basis; public submissions to the review of Environmental Standards and the consideration of those submissions by the Minister; and criteria for the Minister’s decision on whether the standard should be amended or revoked, including whether it is still consistent with their purpose.

Recommendation 23: Amend the Bill to provide provisions requiring Technical Standards to also be consistent with the objectives of the EMPC Act, State Policies, and environment protection policies, the best available science, Emissions Reduction Target, and any sector-based emissions reduction and resilience plans made under the *Climate Change (State Action) Act 2008*, as amended from time to time.

Recommendation 24: Delete proposed section 96X(4)(a) in the Bill.

Recommendation 25: In the Bill, include a provision requiring Technical Standards to be reviewed by the EPA Director every 5 years.

1. Critical features of an independent EPA

1.1. Need for reform

On 9 September 2021, the Minister for the Environment, Roger Jaensch announced the separation of the Tasmanian EPA from the then-Department of Primary Industries, Parks, Water and Environment (**DPIPWE**) into a standalone independent statutory authority commencing from 1 December 2021. In his announcement, the Minister described this change as being about clarifying the independent role of the EPA and broadening the EPA's responsibility for environmental assessments in Tasmania. The Minister also stated that legislative amendments to the *Environmental Management and Pollution Control Act 1994* (**EMPC Act**) would be required to give effect to the change.² Since this announcement, the DPIPWE has been renamed the Department of Natural Resources and Environment (**NRE**) and the Tasmanian EPA has commenced as a standalone authority. It would appear that the Bill is all that is proposed to formalise the independence of the EPA.

EDO considers that Tasmania 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 independent statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in 2020 (the **Samuel Review**) found that "Australia's natural environmental 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". The Samuel Review 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.³

While Tasmania's State of Environment report is deplorably overdue (the last one was published in 2009), there are many indications that our environment is suffering both the effects of climate change and the impacts of industrial activities and development. For example, one report found that "rivers in more extensively developed areas of catchments in Tasmania are under stress and this is causing changes in river health."⁴ The Finfish Farming Report expressly recommends that the independence of the EPA should be increased.⁵ It is therefore essential that environmental regulation in Tasmania 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, the mere existence of an independent EPA does not guarantee that the environment will be protected, nor that development will be regulated appropriately without undue external influence. As we have experienced in Tasmania (as outlined in the case studies below), an

² Jaensch, Roger (2021), A Stronger Environment Protection Authority, 9 September 2021, [A Stronger Environment Protection Authority | EPA Tasmania](#)

³ IPCC, 2022: *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926

⁴ DPIPWE (2020) Temporal and Spatial Patterns in River Health across Tasmania and the Influence of Environmental Factors, DPIPWE, Tasmania, at p iii, accessed through RTI and accessed at [https://nre.tas.gov.au/Documents/RTI%20061%20-%202020-21%20\(Stage%201\).pdf](https://nre.tas.gov.au/Documents/RTI%20061%20-%202020-21%20(Stage%201).pdf)

⁵ Recommendation 28, Legislative Council Sub-Committee Report on Finfish Farming in Tasmania dated 19 May 2022, at p 30.

environmental regulator established without sufficient independence mechanisms, a lack of clear legislative criteria for decision-making, and a focus on realising economic objectives, can lead to significant resource expenditure without a corresponding improvement to environmental governance outcomes.

To be effective at truly improving environmental governance, an independent Tasmanian EPA must implement the **9 elements of strong governance** recommended in the EDO's Best Practice EPA report and generally reproduced as the first 9 recommendations in this submission. Taken together, these recommendations will ensure that First Nations justice, environmental justice and environmental protection are provided equally for all, and so that development is effectively regulated. The justification for each of these recommendations in the Tasmanian context is outlined further below.

1.2. Providing for First Nations justice

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 (**FPIC**). While we note the Government has committed to implementing the recommendations of the *Pathway to Truth-Telling and Treaty Report*, including the call for the urgent reform of Aboriginal Cultural Heritage legislation, there is far more that can and should be done in Tasmania to ensure the principles of self-determination and FPIC are realised.

First Nations in Australia have a unique relationship with Country, which is sacred and spiritual.⁶ 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.

In addition to protecting Aboriginal cultural heritage under western law, an important way that Tasmanian Aboriginal Lore can be acknowledged and respected by the Tasmanian EPA is through the development and application of Cultural Protocols developed through extensive consultation and co-design with Tasmanian Aboriginal people in accordance with the principles of FPIC and self-determination. These Cultural Protocols can then form the basis for respectful and meaningful partnerships and relationships to be developed with Tasmanian Aboriginal communities and individuals.⁷

In Tasmania, there is currently no formal linkage between the *Aboriginal Heritage Act 1975* (being the primary legislation for the protection of Aboriginal cultural heritage in Tasmania) and the State's Resource Management and Planning System (**RMPS**).⁸ Key legislation in the RMPS, such as

⁶ Environmental Defenders Office, 'Flying-fox roost management reform for Queensland' (Report, 13 October 2021) at p 8, accessible at <https://www.edo.org.au/wp-content/uploads/2022/01/Implementing-effective-independent-EPAs-in-Australia-Report.pdf>.

⁷ See, for example, Torres Strait Regional Authority, 'TSRA Cultural Protocols Guide' February 2011 at p 5; Walanga Muru, 'Aboriginal Cultural Protocols' Guide, Macquarie University, 2017 at p 7.

⁸ See DPIPWE (2021), *Review of the Aboriginal Heritage Act 1975*, March 2021.

the *Land Use Planning and Approvals Act 1993* (**LUPA Act**) and the EMPC Act do not include provisions requiring consideration of the impacts of developments on Tasmanian Aboriginal heritage. The result of this lack of a linkage is that it is possible to not appropriately consult with the Tasmanian Aboriginal community in planning for projects and developments, resulting in proposals that do not have due respect for or regard to the United Nations Declaration of the Rights of Indigenous Peoples principles of FPIC and self-determination. Examples of where this has occurred include the works at the Jordan River Levee for the Brighton Bypass and the proposed four-wheel drive tracks in the Arthur Pieman Conservation Area in takayna / the Tarkine.

While the Tasmanian Government has committed to some changes to its planning and development approvals processes under the LUPA Act as well as its assessment procedures for public land (the Reserve Activity Assessment, and the Expressions of Interest for Tourism Opportunities in National Parks, Reserves and Crown Land) to include early consideration of potential Aboriginal heritage impacts, it has not committed to any changes to the EMPC Act.⁹

EDO has recently provided detailed comments on the Tasmanian Government's Consultation Paper: A new Aboriginal Cultural Heritage Protection Act.¹⁰ As outlined in that submission, EDO recommends the relationship between cultural heritage and environmental legislation be revised such that Tasmanian Aboriginal people are involved in decision making about both cultural heritage and the environment. This would ensure that cultural heritage is adequately protected under cultural heritage and development laws which speak to each other.

Recommendation 1: The EPA should be subject to a duty to develop and act in conformity with Cultural Protocols developed by the Tasmanian Aboriginal community and to uphold internationally recognised First Nations' rights of free, prior and informed consent and self-determination.

1.3. An environmental justice framework

An environmental justice framework is needed to underpin environmental regulation by the EPA in Tasmania to ensure that disproportionate environmental burdens are not imposed on communities and individuals that face structural disadvantages based on race, ethnicity, nationality, age, gender identity, disability or income. This should include incorporating into the EPA's statutory functions a duty to achieve environmental justice by identifying and addressing any disproportionate environmental burdens imposed on structurally disadvantaged communities and individuals.

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 require that their views and the causes of the injustice they experience to be addressed in decision-making. This is important in the Tasmanian context because of the way the current system has been set up to effectively lock the community out of environmental decision-making when it

⁹ Aboriginal Heritage Act 1975: Review under s.23 Tabling Report Government Commitment in Response to the Review Findings.

¹⁰ A copy of EDO's submission can be found here: <https://www.edo.org.au/publication/edo-submission-on-a-new-aboriginal-cultural-heritage-protection-act-tasmania/>

comes to key industries such as salmon farming. The lack of community consultation when it comes to salmon farming is explored in the case study below.

Recommendation 2: The EPA should be underpinned by an environmental justice framework to ensure equality in environmental protection.

1.4. An EPA with clearly defined roles, duties and objectives

In the EMPC Act, there is no simple, clear statement that the objective of the EPA is to protect the environment. Indeed, in 2007 the EMPC Act was amended so that the functions and powers of the EPA Board no longer had any reference to it using its best endeavours “to protect the environment of Tasmania” and “to coordinate all activities, whether governmental or otherwise, as are necessary to manage the use of, protect, restore or improve the environment of Tasmania”.¹¹

EDO recommends that the EMPC Act must include a clearly defined (and legislated) duty for the EPA Board and Director to protect the environment and human health from the harmful effects of pollution, destruction and waste; and that this duty should prevail over all other legislative obligations and agencies. The duty to protect the environment and human health should 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, and it must be supported by sufficient compliance and enforcement mechanisms and actions.

Recommendation 3: The EPA should have a clearly defined role and duties to ensure objectives are achieved.

In the case study below, we outline how a mining company that failed to comply with an environment protection notice issued by the EPA concerning the storage of potentially acid-forming waste rock on the bank of a river for 7 years, posing an ongoing risk to the environment.

Case study: Shree Minerals and the storage of PAF waste rock in takayna/the Tarkine

Shree Minerals proposed to develop an iron ore mine near the Nelson Bay River in takayna / the Tarkine. This area includes habitat for a variety of threatened species such as the Tasmanian Devil and the Giant Crayfish. The EPA Board approved the development permit in October 2012 despite the concerns of community groups such as the Tarkine National Coalition (TNC) that the mine did not have enough space to store its potentially acid-forming (PAF) waste rock below the water table, putting at risk the pristine Nelson Bay River. These concerns were well-founded because, in October 2013, Shree Minerals applied to the EPA to vary its permit conditions to allow for the temporary storage of PAF waste rock in a temporary waste dump above the water table due to the discovery of more PAF rock than was originally anticipated. In late 2013 the EPA Director approved this amendment.

With EDO's representation, in 2014 TNC applied to the Tasmanian Supreme Court to challenge that decision and won. Shree Minerals was subsequently required by an environment protection notice issued by the EPA to either move 80,000 cubic metres of waste rock into a mining pit or to start the planning process again with the local council and the EPA. Shree Minerals indicated that would be submitting a new development application in October 2016, however, that development application was not publicly notified until 2022. As far as EDO is aware, in the 7 years between the Court's decision and the new development application, EPA took no enforcement action against Shree Minerals to force it to move or otherwise treat the large pile of PAF waste rock from the banks of the Nelson Bay River.

¹¹ See *Environmental Management and Pollution Control Amendment (Environment Protection Authority) Act 2007*, section 6.

1.5. An EPA that is independent from Ministerial influence, other government agencies and industry capture

EDO's Best Practice EPA report recommends that the EPA be established as an independent statutory authority that has freedom from ministerial influence or being overridden by other agencies. Establishing an EPA with a high degree of independence, both from those it regulates and from the government, can provide greater confidence and trust that regulatory decisions are made with integrity and in the public interest.

While in Tasmania, the Board and Director of the EPA ostensibly make determinations independently of the Minister and elected Government, section 15 of the EMPC Act requires the EPA Board to act consistently with a "Statement of Expectations" from the Minister. This is problematic because it undermines the independence of the EPA and its ability to determine its priorities. For example, in the most recent version of the Statement of Expectation (2019-2020), the Minister acknowledged the task of balancing the facilitation of economic development on the one hand and the attainment of environmental objectives on the other and required the Board to take account of the need to provide more employment opportunities and to "facilitate this outcome wherever it can".¹² In other words, the Tasmanian Government has signalled to the EPA that it should prioritise economic objectives over environmental ones. The problems with the prioritisation of economic over environmental objectives are highlighted in the case studies on salmon farming (below) and mining in takayna/the Tarkine (above).

An independent EPA Board 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.

EDO notes that the proposed reforms to sections 15 and 15A of the EMPC Act as set out in clauses 6 and 7 of the Bill do not correct or address this fundamental issue of Ministerial influence of the EPA Board. However, EDO is pleased there are reforms (in clause 8 of the Bill) to expressly provide for the independence of the EPA Director. See our more detailed comments on these proposed reforms in part 2.1 of this submission below.

Recommendation 4: The EPA should be independent from Ministerial influence, other government agencies and industry capture.

Case study: Tassal's salmon farming operations in Macquarie Harbour

In 2012 Tassal and Huon Aquaculture began an expansion of salmon farming in Macquarie Harbour. By September 2016 environmental monitoring data had revealed very low dissolved oxygen levels on the harbour floor (reaching a record low in some locations) and a large increase in the presence of bacterial mats at some lease sites. In November 2016, IMAS advised the EPA and salmon farm operators that the floor of Tassal's Franklin lease and surrounding seafloor was virtually devoid of life due to extremely low dissolved oxygen levels, and it was unknown what impact this would have on the Maugean Skate or the Tasmanian Wilderness World Heritage Area.

Following the IMAS briefing, the EPA Director decided to reduce the biomass cap limit on the amount of salmon farmed in the harbour from 21,500 tonnes to 14,000 tonnes and directed Tassal to destock its Franklin

¹² Minister for Environment (2019), *Statement of Expectation Environment Protection Authority 2019-2020*, page 3.

lease by 28 February 2017. When Tassal responded by citing the “logistical, staffing and safety” impacts of direction to destock the Franklin lease and its inability to comply with the 14,000 tonne biomass limit, the EPA Director gave Tassal until 15 April 2017 to destock the Franklin lease and announced that he would delay his decision on the next biomass cap.

When a year-long biomass limit for Macquarie Harbour was set at 12,000 tonnes on 31 May 2017, the EPA gave Tassal permission to farm an extra 4,000 tonnes of salmon until January 2018 provided that it implemented an experimental “waste capture system” designed to capture solid fish farm waste underneath its pens, pump it to a boat from where it would be transported to land and ultimately treated by TasWater’s wastewater treatment plant at Pardoe. Each of these steps was approved by the EPA Director through the issue of environment protection notices. No referral was made to the Federal Environment Minister for an assessment of the experimental waste capture system under the EPBC Act. There was no opportunity for public comment concerning these activities, or independent review of the science presented by Tassal in support of them by the EPA Board.

By late November 2017, the EPA confirmed that significant fish mortalities had been reported by all three companies operating in the harbour. In March 2018 the EPA Director cut the biomass limit to 9,000 tonnes. In discussing his decision, the EPA Director admitted that science and modelling used as the basis for the expansion of salmon farming in Macquarie Harbour in 2012 was “flat wrong”. By 2017, there had been a failure by regulators to set biomass caps in Macquarie Harbour in an effective or timely manner in response to declining environmental conditions. The EPA Director’s 2017 decisions to reduce the cap and issue the associated management directions that allowed for waste capture technology, placed excessive weight on short-term economic considerations in the absence of scientific certainty on the precise impacts and likely recovery of the environment. The delay in the setting of biomass cap also resulted in the excessive stocking of leases by at least one operator, which in turn made future decisions on sustainable stocking density and biomass caps more challenging.

By May 2018, the EPA Director had confirmed that at least 1.35 million salmon had died in Macquarie Harbour since October 2017. The fish deaths resulted from an outbreak of Pilchard Orthomyxovirus (POMV). Following that revelation, in July 2018, the EPA Director set the biomass cap in Macquarie Harbour to 9,500 tonnes until 2020. While, this time, no additional biomass was allocated based on the use of waste capture systems, Huon Aquaculture still argued that the limit simply reflected the current stocking levels in the harbour, rather than the conservative stocking levels necessary to respond to the poor environmental conditions recorded in the IMAS February 2018 report. Huon Aquaculture linked the numerous large mass fish kills in the harbour from POMV to the high stocking rates facilitated by the waste capture systems and declining environmental health of the harbour. It called for a biomass cap in the vicinity of 6000 tonnes to be imposed. That call has been ignored by the EPA.

Without clear mandatory, science-based maximum caps for biomass and dissolved nitrogen output, and criteria for biomass determinations for salmon farms (and a legal pathway for those decisions to be reviewed by an independent expert tribunal), it is possible that the situation in Macquarie Harbour could be repeated in waterways around Tasmania.

1.6. An EPA that is accountable and transparent in its decision-making

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, can take action. Greater transparency also helps give the community confidence about how decision-makers weigh economic, environmental and social consequences.

In Tasmania, there are currently no clear and specific criteria for a decision by either the EPA Board or EPA Director to grant a planning permit.¹³ The Director or Board can “grant to a person a

¹³ Rather, assessments must be undertaken in accordance with the Environmental Impact Assessment Principles set out in s 74 of the EMPC Act. These principles are procedural in nature and do not identify the objectives of the assessment.

permit or environmental licence in relation to an activity if...satisfied that it is appropriate to do so". There are no legislative criteria about when it will be "appropriate" to issue a licence. Furthermore, the EPA Director has the power to change the conditions of a permit if satisfied it is "desirable" to do so. The consequences of not setting mandatory, science-based criteria for biomass determinations for salmon farming are provided in the Macquarie Harbour case study above. A further example of the EPA's failure to create well-defined and clear criteria is provided below in the case study on Tasmania's lack of Water Quality Objectives.

Case study: Water Quality Objectives in Tasmania

The EPA Board and Director are bound to apply any Water Quality Objectives (WQOs) in making decisions relating to water pollution and management under the EMPC Act. However, in the 25 years since the commencement of the State Policy on Water Quality Management 1997, there have been no published WQOs for either marine or freshwater waterways anywhere in the State. The EPA has advised the EDO that WQOs for a particular waterway are developed by the EPA Board (or by the Director, as the case may be) on a "case by case" basis in consideration of the "Default Guidelines Values for Aquatic Ecosystems" and/or the proponent's own water quality monitoring data.

To properly be given effect, WQOs need to be published. WQOs should set clear objectives for waterways so that when the EPA and other environmental regulators like planning authorities and the Department of Natural Resources and Environment are exercising powers and functions, they take all necessary steps to achieve the WQOs.

EDO notes the Bill proposes to provide the Minister with the power to create Environmental Standards which can then inform the EPA Board's or Director's regulatory decision-making. While EDO considers that these are potentially helpful, we still consider that, to improve the accountability of the EPA in Tasmania, the EMPC Act needs to be amended to provide well-defined and clear criteria for decision-makers in key decisions.¹⁴ 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 (for further on this refer to part 2.4 and recommendation 7 below).

Recommendation 5: The EPA should have accountability mechanisms to ensure responsibilities are discharged with integrity in the public interest.

In Tasmania, it is not always the case that members of the public can comment on or appeal the EPA's decisions. In the case of salmon farming, the EPA Director has the power to assess applications and issue environmental licences without reference to the EPA Board. This option for the EPA Director to assess salmon farms is unlike the assessment process for all other "level 2" activities regulated by the EPA under the EMPC Act, which are assessed by the EPA Board. This is important because it is only when the Board makes decisions that assessments must be subject to a transparent and public assessment process and decisions are subject to third party appeal rights, allowing independent scrutiny and oversight of such decisions.¹⁵ Furthermore, when the

¹⁴ For a list of potential criteria for decisions, refer to page 10 of EDO's [Submission in response to the Draft Environmental Legislation \(Miscellaneous Amendments\) Bill 2019](#).

¹⁵ We note with approval Recommendation 38 of the Legislative Council Sub-Committee Report on Finfish Farming in Tasmania dated 19 May 2022, at p 31, which recommends "applications and variations for marine farming environmental licences to be assessed by the EPA Board, consistent with other Level 2 activities under the *Environmental Management and Pollution Control Act 1994*".

EPA Director issues environment protection notices that change the conditions of a permit for an activity, there are no opportunities for public comment or appeal.

EDO, therefore, recommends that the accountability mechanisms of well-defined and clear decision-making criteria be reinforced by opportunities for the external review of the EPA's decisions, with legislated open standing provisions for judicial and merits review (including for environmental licences and environmental protection notices that change permit conditions) to ensure that any person can seek redress given the public interest nature of EPA decisions.

The EMPC Act should also make provision for the public disclosure of key environmental information, including decision-making processes and outcomes. While we note the Bill does make further provision for the disclosure of environmental monitoring and regulatory information, as discussed in more detail in part 2.3 of this submission, EDO considers that more can and should be done to make this information publicly available.

The EMPC Act should also provide for 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. According to principles of self-determination and FPIC, Tasmanian Aboriginal people should be actively involved in environmental decision-making processes that affect them and their cultural heritage and should be able to withhold consent for activities that will significantly affect their cultural interests. There should also be an emphasis on ensuring engagement and consultation are 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.

Recommendation 6: There should be transparency in EPA decision-making through disclosure and community engagement to support accountability, including through opportunities for the external review of the EPA's decision-making, with legislated open standing provisions for judicial and merits review (including for environmental licences and environmental protection notices that change permit conditions).

1.7. An EPA that is sufficiently empowered with adequate funding and appropriate expertise

The EPA's powers and functions should be adequate to enable the regulator to effectively fulfil its objectives. Integral to this is proactive environmental monitoring powers and the EPA being responsible for setting legally enforceable environmental standards.

EDO observes that the Tasmanian EPA has a range of powers to set enforceable environmental standards but has, in large part, failed to use those tools to their full potential. For example, the EPA could prepare environment protection policies (at the Minister's direction) for approval by the Environment Protection Review Panel. However, there are currently only two environment protection policies in effect: the Environment Protection Policy (Air Quality) 2004, and the Environment Protection Policy (Noise) 2009. Both of these policies do not set directly enforceable regulatory limits for air or noise pollution. In addition, the Tasmanian EPA has failed to publish:

- Water Quality Objectives (described in the case study above);

- Emissions Limits Guidelines for a range of polluting activities;¹⁶ or
- Statutory Codes of Practice for any industry or polluting activity.¹⁷

Concerningly given the real threat that climate change poses, there are currently no statutory policies or guidelines set by the EPA regulating carbon emissions in Tasmania.

While it is encouraging that the Bill is now proposing to provide the EPA with the power to set Environmental and Technical standards, EDO has questions about why the existing mechanisms such as environment protection policies, Emissions Limits Guidelines or Codes of Practice were not the preferred mechanisms to bring in these changes.

Recommendation 7: The EPA should be sufficiently empowered to protect the environment and human health.

Currently, there is no guaranteed level of funding for the Tasmanian EPA. In the year 2020-21, the Tasmanian EPA received \$11,673,468, comprising \$10,665,234 from the Consolidated Fund and \$1,008,234 provided by the Salmon Industry by payment of a levy. Of this amount, “\$10,129,654 was allocated to branches that fully or partially support the EPA”.¹⁸

The EPA also administers the Environment Protection Fund, established under the EMPC Act and funded through payment of fines. Disbursements from this fund are allowed for:

- financial assurances,
- environmental agreements,
- taking action to respond to an environmental emergency or its effects,
- education and training programmes concerning the protection, restoration or enhancement of the environment,
- any investigations, research, pilot programmes or other projects relating to the protection, restoration or enhancement of the environment, and
- making grants for environmental improvement purposes.¹⁹

In 2020-2021, the EPA received only \$2,123.56 into the fund from the payment of fines²⁰ and paid out of the Fund substantially more than that. It would appear that no fees or other levies on polluters are flowing directly to the Fund.

While the Tasmanian EPA’s operating budget has been relatively stable over recent years,²¹ a lack of adequate funding can significantly hamper the ability of the EPA to fulfil its functions, and thus

¹⁶ For example, no Emission Limits Guidelines have been published for Abattoirs and slaughterhouses; Produce processing industries; or Intensive animal husbandry despite it being a requirement under cl 18 of the *State Policy of Water Quality Management 1997*.

¹⁷ Indeed, despite the fact that compliance with a Code of Practice might be a defence to a charge for environmental harm, or other offences under the EPMC Act (see section 55A(1)(b)(ii)), no regulations have been set that provide a process for the creation of Codes of Practices. See section 102(2)(d) of the EMPC Act.

¹⁸ DPIPWE, EPA Annual Report 2020-2021, at p 44 accessed at:

<https://epa.tas.gov.au/Documents/EPA%20Annual%20Report%202020-21.pdf>

¹⁹ EMPC Act, section 97.

²⁰ DPIPWE, EPA Annual Report 2020-2021, at p 44 accessed at:

<https://epa.tas.gov.au/Documents/EPA%20Annual%20Report%202020-21.pdf>

²¹ See EPA Annual Reports for 2020-2021 2019-2020, 2018-2019, 2017-2018, accessed at:

<https://epa.tas.gov.au/about-the-epa/authority-documents-routine-disclosure/annual-reports>

impact the quality of the environment. Examples of where a lack of funding to EPAs has led to reduced compliance and regulatory oversight can be seen in the USA and Victoria.²² Here in Tasmania, the Finfish Farming Report made specific recommendations that EPA funding should be increased to allow it to properly undertake its monitoring and compliance functions for salmon farms, particularly around the issues of noise and light emissions.²³

EDO's Best Practice EPA report recommends that to be effective, an independent 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 (for example, through polluter levies paid into an environmental fund) and through consistent general budget allocations.

Recommendation 8: The EPA should have sufficient and certain funding to fulfil its functions.

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. Importantly, the EPA must develop mechanisms to ensure that Tasmanian Aboriginal people that speak for and have traditional knowledge of Country can contribute to environmental decision-making, and to further ensure that Tasmanian Aboriginal knowledge is valued and considered alongside western science. This includes through identified positions on the Board.

Under the current EMPC Act, the only diversity requirement for membership of the EPA Board is that there must be at least one person of each sex. There are no requirements around Tasmanian Aboriginal representation.

Recommendation 9: The EPA Board should have relevant expertise to support decision making that is science-based and provides for First Nations justice and environmental justice broadly.

2. Specific comments on the Bill

The following part of EDO's submission responds to the specific amendments proposed in the Bill. As noted above, EDO considers that there are numerous other substantial reforms required to the EMPC Act to guarantee Tasmania a best practice independent EPA. EDO, therefore, urges the Government to commit to a full review of the EMPC Act to determine whether it provides an adequate and modern foundation for environmental regulation in this State.²⁴

Recommendation 10: Commit to a full review of the EMPC Act to determine whether it provides for contemporary and best practice environmental regulation.

²² See EDO's Best Practice EPA report at p 48.

²³ Recommendations 29, 59 and 63, Legislative Council Sub-Committee Report on Finfish Farming in Tasmania dated 19 May 2022.

²⁴ EDO notes that other jurisdictions have or are in the process of thorough reviews of their environmental laws. For example, the Independent Inquiry into the Victorian EPA in 2016, resulted in a full rewrite and modernisation of the Environment Protection Act in that state. See: <https://www.epa.vic.gov.au/about-epa/laws/new-laws>

2.1. Ministerial statement of expectation

Existing sections 15, 15A, 15B and 15C of the EMPC Act provide for the provision of a Ministerial statement of expectation to the EPA Board, and the Board's response to that statement.

Clause 7 of the Bill proposes amendments to s 15A of the Act, as follows:

Section 15A(2) of the Principal Act is amended by inserting before paragraph (a) the following paragraphs:

- (aa) must further the objectives specified in Schedule 1; and
- (ab) must specify which of, and the manner in which, the objectives specified in Schedule 1 are being furthered by the ministerial statement of expectation; and
- (ac) must be consistent with the functions and powers of the Board; and

As EDO has already outlined in part 1.5 of the submission above, best practice independent EPAs should be free from Ministerial and other influences. Therefore, EDO considers that the existing sections 15, 15A, 15B and 15C of the EMPC Act are inappropriate and are not in keeping with a truly independent EPA.

Recommendation 11: Repeal sections 15, 15A, 15B and 15C of the EMPC Act.

Furthermore, the amendments proposed in subsection 15A (ab) are not consistent with an independent EPA as it allows for the Minister to selectively specify which objectives of the EMPC Act must be furthered by the EPA Board. Arguably, such a provision is inconsistent with section 8 of the EMPC Act which requires *all* objects set out in Schedule 1 to be furthered by the EPA Board, and it leaves it open for the Minister to direct the EPA Board to seek to further the object of economic development over the protection of the environment or maintenance of ecological processes and genetic diversity.²⁵ The furthering of the objectives in schedule 1 of the EMPC Act is necessarily a balancing exercise, per conventional understandings of Ecologically Sustainable Development.²⁶

Recommendation 12: If recommendation 11 is not accepted, remove proposed clause 15(ab) from the Bill.

2.2. Independence of EPA Director

The Bill proposes to introduce a new section 18 A into the EMPC Act to specifically provide for the independence of the EPA Director. While EDO is supportive of the new section, we consider that the Act should still provide some role to the EPA Board in providing oversight of the performance of the Director's functions and powers.²⁷ EDO further considers that there is also a need to

²⁵ The latest Ministerial [Statement of Expectation 2019-2020](#) to the EPA Board states that then Minister, expected "the Board to take account of the need to create a more prosperous and equitable society and this relies in large part upon providing employment opportunities where they are most needed. The Government's policy position is that a productive community is better able to manage society's long term environmental challenges and I expect the Board to facilitate that outcome wherever it can."

²⁶ See EDO's factsheet [What is Ecologically Sustainable Development?](#)

²⁷ In a similar way that the Victorian EPA Board has the power to appoint and provide oversight to the CEO of the Victorian EPA.

expressly outline the EPA Director's functions or powers,²⁸ and provide a process for the management of conflicts of interest of the Director.

Recommendation 13: Amend the EMPC Act to clearly provide a role for the EPA Board in appointing and providing oversight of the EPA Director.

Recommendation 14: Amend the EMPC Act to clearly articulate the EPA Director's functions and powers.

Recommendation 15: Amend the EMPC Act to provide a process for the management of conflicts of interest by the EPA Director.

2.3. Public release of monitoring information

The explanatory paper released with the Bill states, "The [EPA] presently lacks the power to make environmental monitoring information provided to it by a regulated party available to third parties or the public, without the permission of the regulated party. This is inconsistent with contemporary standards of environmental regulation and monitoring."

EDO agrees that it is inconsistent with contemporary and best practice standards that the EPA does not release environmental monitoring information and documents (such as monitoring programs) which are generally required to be prepared under conditions of permits or environmental licences.²⁹ However, in EDO's view, the EPA already has the power to release such information, either actively or under the assessed disclosure provisions of the *Right to Information Act 2009*. EDO considers that there is no other express provision in the EMPC Act³⁰ or any other legislation,³¹ that states that the EPA is not able to release this information where the information is collated as a result of a permit or licence.

While EDO supports any proposal to *expressly* provide that such information can be released by the EPA, we note that the proposed amendments to the EMPC Act still provide the EPA Director with discretion *not* to release information based on the same exemptions under RTI Act. Given the recent criticisms by the Tasmanian Ombudsman levelled at the Tasmanian Government agencies relating to their rate of refusal of RTI applications for disclosure of government information,³² and

²⁸ In a similar way to how the EPA Board's functions and powers are outlined in section 14 of the EMCP Act.

²⁹ We assume the data referred to in clause 11 is data required to be provided to the EPA either as requirement of a condition on a permit, EPN or licence or other "environmental management and enforcement instrument" within the meaning of s22 of the EMPC Act or because of another requirement of the EMPC Act, such as the obligation to notify of environmental harm.

³⁰ Section 23 of the EMPC Act merely required the EPA to consult with a person where it proposes to keep certain information that may be a trade secret on a public register. The EPA Board is not required to abide by the person's objections to the release of the information, and there are appeal mechanisms available for person's aggrieved of the EPA Board's decisions.

³¹ For example, the *Personal Information Act 2004* (Tas) applies to the personal information of "individuals" and not to corporations, which are by in large, the type of entities regulated by the EPA.

³² Tasmanian Ombudsman's Annual Report 2019/20 at p 29, accessed at:

https://www.ombudsman.tas.gov.au/data/assets/pdf_file/0005/592178/ANNUAL-REPORT-2019-2020-OmbudsmanTasmania.PDF

the fact that Tasmania is the worst performing Australia jurisdiction when it comes to RTI,³³ EDO considers that, by tying the EPA Director's decision to release monitoring information to the exemptions provided under the RTI Act, the proposed amendments provide no guarantee that there will be greater transparency or accountability for monitoring data or other regulatory information.

EDO considers that any environmental regulatory information should necessarily be on a public register and be freely available to the public. There are multiple reasons for this:

- The release of environmental monitoring and regulatory information allows people affected by an activity regulated by the EPA to know whether there is compliance with conditions regulating that activity. By way of example, where a quarry is next to residential premises and noise compliance testing is undertaken, that person should have access to the testing.
- If a condition is imposed as a result of public representations made or an appeal, the person making that representation should have access to the information provided in compliance with the condition without needing to request it.
- Public disclosure of this information is consistent with objective 1(c) of the Resource Management and Planning System in Schedule 1 of the EMPC Act to encourage public involvement in resource management.
- There can be no reason for a discretion to refuse to release environmental regulatory information to exist. Trade secrets and personal privacy are adequately protected by section 23 of the EMPC Act and the *Personal Information Protection Act 2004* respectively.

EDO, therefore, recommends that the EMPC Act be amended to expressly provide that any monitoring data, documents or reports required to be provided to the EPA (either through a permit or licence condition or as a result of another legal mechanism under the EPMC Act) must be available to the public. That is, the default position should be that this information is publicly available.

Recommendation 16: Amend clause 11 of the Bill to provide that any monitoring data, documents or reports required to be provided to the EPA (either through a permit or licence condition or as a result of another legal mechanism under the EPMC Act) must be available to the public.

2.4. Environmental and Technical Standards

The Bill proposes amendments to the EMPC Act to introduce two new regulatory documents: Environmental Standards and Technical Standards.

EDO has some questions about how the proposed new standards will operate in practice, and why the existing process for the creation of environment protection policies was not amended to perform the same function. As noted in part 1.7 of the submission above, the EPA has not made use of other regulatory mechanisms available to it to set enforceable environmental standards. While EDO is encouraged that the Bill is proposing to provide the EPA with further powers to set environmental and technical standards, these powers will only be effective if they are actively

³³ See NSW Information and Privacy Commission (2020) National Dashboard - Utilisation of Information Access Rights - 2018-19, accessed at: https://www.ipc.nsw.gov.au/sites/default/files/202007/OGP_metrics_all_jurisdictions_bar_all_years_Jul_2020.pdf

implemented, the standards are clearly prescribed and certain, are based on the best available science, published in a timely manner, and are reviewed regularly.

Recommendation 17: Environmental and technical standards must be actively implemented, be clearly prescribed and certain, be based on the best available science, be published in a timely manner, and be reviewed regularly.

2.4.1. Environmental Standards

The explanatory paper released with the Bill provides the following description of the amendments relating to Environmental Standards:

Environmental Standards will allow activity-specific licence and permit conditions and other requirements to be consolidated within one document. Standards will be made by the Minister following a period of consultation and must be tabled in both Houses of Parliament. Either House will have the power to disallow a tabled Standard.

An Environmental Standard may relate to one or more of the following:

- environmentally relevant activities;
- pollutants and chemicals;
- an industry or activity;
- waste management;
- environmental monitoring; and
- adoption of a national or international standard.

An Environmental Standard can require the EPA Board or Director to use its provisions when:

- considering whether to issue a permit, licence, environment protection notice or site management notice; or
- assessing a proposed or existing activity.

An Environmental Standard may also:

- require a person to comply with any ‘environmental standards offence provision’ in an Environmental Standard (if it applies to them) or they will be guilty of an offence; or
- specify that an ‘environmental standards condition’ within an Environmental Standard may be imposed as a condition or restriction on a permit, environmental licence (EL), site management notice, or EPN.

Proposed section 96O(1) in the Bill states that “Environmental standards may be made for the purpose of assisting in managing, mitigating or reducing potential environmental harm.” EDO questions the practical difference between the terms “managing, mitigating or reducing” in this context.

The objects of the EMPC Act, include:

- to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity... [where] sustainable development means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –

(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) **avoiding, remedying or mitigating** any adverse effects of activities on the environment.

- to **protect and enhance** the quality of the Tasmanian environment; and
- to prevent environmental degradation and adverse risks to human and ecosystem health by promoting pollution **prevention**, clean production technology, reuse and recycling of materials and waste minimization programmes; and
- to **regulate, reduce or eliminate** the discharge of pollutants and hazardous substances to air, land or water consistent with maintaining environmental quality; and
- to require persons engaging in polluting activities to make progressive environmental **improvements**, including reductions of pollution at source, as such improvements become practicable through technological and economic development; and
- to co-ordinate all activities as are necessary to **protect, restore or improve** the Tasmanian environment. (Emphasis added)

In consideration of these objectives, it would be far more appropriate for the purpose for Environmental Standards to refer to the commonly adopted mitigation hierarchy of “avoid, minimise, remediate and offset”.³⁴ EDO further considers that it would be appropriate for Environmental Standards to refer to “best practice environmental management”, as defined in section 4 of the EMPC Act. EDO, therefore, recommends changes be made to the Bill to reflect this as the purpose of Environmental Standards.

Recommendation 18: Amend proposed section 96O(1) in the Bill to “Environmental standards may be made for the purpose of assisting in avoiding, minimising, remedying and offsetting potential environmental harm, and/or giving effect to best practice environmental management”.

Proposed section 96O(3) provides that a provision of an Environmental Standard “may” indicate when “regard” must be had to a provision of the standards by the Board or Director in certain decisions such as granting permits licences or issuing environment protection notices. EDO considers that in order to be clearly prescribed and certain, relevant Environmental Standards should be considered as a matter of course in all the decisions listed in proposed section 96O(3). Furthermore, to add to the level of certainty of the application of Environmental Standards, the EPA Director or Board should be required to provide clear reasons if their decisions deviate from the requirements of Environmental Standards or they do not impose Environmental Standards Conditions.

Recommendation 19: Amend proposed section 96O(3) in the Bill to require that regard must be had to relevant Environmental Standards in all the listed decisions, and that reasons must be provided where EPA Director and/or Board decisions deviate from the requirements of Environmental Standards or they do not impose relevant Environmental Standards Conditions.

Proposed section 96O(6)(s) provides that Environmental Standards may “authorise any act, matter, or thing, that is referred to in the environmental standards to be from time to time

³⁴ See William N S Arlidge, et al A Global Mitigation Hierarchy for Nature Conservation, BioScience, Volume 68, Issue 5, May 2018, Pages 336–347, <https://doi.org/10.1093/biosci/biy029>

determined, applied or regulated by the Board or the Director”. In consideration of the best-practice requirement that any environmental standards be clear and certain (per recommendation 17 above), and of the fact that Environmental Standards may be imposed as conditions of environmental licences or permits, EDO considers the proposal to provide the Board and/or the Director with discretion to vary such provisions at will and with no criteria or opportunities for public comment or appeal provides far too much discretion and flexibility.

Recommendation 20: Delete proposed section 96O(6)(a) in the Bill.

EDO is supportive of the proposal that Environmental Standards be consistent with the objectives set out in the EMPC Act, and with State policies and environmental protection policies. In addition to being consistent with those instruments, Environmental Standards should be consistent with the best available science, and with the (soon to be legislated) Emissions Reduction Target, and any sector-based emissions reduction and resilience plans created under the *Climate Change (State Action) Act 2008*.³⁵ These are straightforward ways to ensure that those targets and plans are given practical and enforceable effect.³⁶

Recommendation 21: Amend proposed section 96P in the Bill to include a requirement that “Environmental standards must be consistent with the best available science, Emissions Reduction Target, and any sector-based emissions reduction and resilience plans made under the *Climate Change (State Action) Act 2008*, as amended from time to time.”

EDO supports the proposal for there to be public consultation on proposed Environmental Standards for 6 weeks, and the requirement that any public submissions in response to a draft Environmental Standard be considered by the Minister in deciding whether to make the standard. EDO also supports the proposal that Environmental Standards must be tabled in Parliament and may be disallowed.

It is currently proposed that Environmental Standards will only be reviewed every 10 years. EDO considers that such a long period between reviews is not consistent with requiring “persons engaging in polluting activities to make progressive environmental improvements” and has the potential to lock in outdated standards and practices. EDO further considers that there is no benefit for the reviews to be undertaken by the EPA behind closed doors and without seeking and considering input from the community and regulated industries. There should also be clear criteria for the Minister’s consideration of whether to amend or revoke the standard.

Recommendation 22: Amend proposed section 96W in the Bill to include requirements for reviews of Environmental Standards to be undertaken on a 5-yearly basis; public submissions to the review of Environmental Standards and the consideration of those submissions by the Minister; and criteria for the Minister’s decision on whether the standard should be amended or revoked, including whether it is still consistent with their purpose.

³⁵ See *Climate Change (State Action) Bill 2021*, clause 6.

³⁶ For further on the need for integration of the target into government decision-making, refer to EDO’s [Submission on the draft Climate Change \(State Action\) Amendment Bill 2021 \(Tas\)](#) dated 16 November 2021, and [Submission to the Independent Review of the Climate Change \(State Actions\) Act 2008 \(Tas\)](#) dated 29 April 2021

2.4.2. Technical Standards

The Technical Standards amendments are described in the explanatory paper as follows:

Supporting Technical Standards will be made and published by the EPA Director to describe acceptable methods, protocols and procedures related to environmental standards, and to assist in the implementation of State Policies, environment protection policies and National Environmental Protection Measures.

Technical Standards may authorise the EPA Board or Director to regulate or otherwise apply any matter included in the Standard.

While under the Bill, Environmental Standards are required to be consistent with the objectives set out in the EMPC Act, and with State policies and environmental protection policies, EDO is concerned that no similar provision has been made requiring Technical Standards to be consistent with those regulatory instruments.

While no examples of Technical Standards are provided in the explanatory paper released with the Bill, it appears that the intent is for these standards to apply to technical matters arising from Environmental Standards, and from State policies etc. EDO notes that in August 2020, the EPA released its “Technical Guidance for Water Quality Objectives (WQOs) Setting for Tasmania”. While there has been no indication that it is intended this guidance would be made a Technical Standard, it is EDO’s respectful view that these guidelines *are inconsistent* with the requirements of the State Policy on Water Quality Management 1997 in as far as they suggest that the EPA Board can simply set WQOs on a “case by case” basis rather than publishing a transparent document outlining the WQOs around the state.

EDO, therefore, recommends changes be made to the Bill to ensure Technical Standards are also consistent with the objectives of the EMPC Act, State Polices, and environmental protection policies. Consistent with our recommendation 19, Technical Standards should also be consistent with the best available science, any Emissions Reduction Target sector-based emissions reduction and resilience plans made under the *Climate Change (State Action) Act 2008*.

Recommendation 23: Amend the Bill to provide provisions requiring Technical Standards to also be consistent with the objectives of the EMPC Act, State Polices, and environment protection policies, the best available science, Emissions Reduction Target, and any sector-based emissions reduction and resilience plans made under the *Climate Change (State Action) Act 2008*, as amended from time to time.

As they appear to be very technical, EDO accepts that it may not always be appropriate to seek public comment on Technical Standards. However, given they are not subject to public consultation, EDO considers that there should be some appropriate checks and balances on the EPA Director’s powers to create Technical Standards and that they must be sufficiently clear and certain to be properly applied and understood. EDO, therefore, recommends that proposed section 96X(4)(a) be deleted as it provides too much discretion to the EPA Director or Board to potentially determine critical issues “from time to time” and without any public input of Parliamentary oversight.

Recommendation 24: Delete proposed section 96X(4)(a) in the Bill.

Finally, the Bill does not provide for the mandatory review of Technical Standards. EDO considers that this is inconsistent with the best-practice requirement for environmental regulation to be regularly reviewed.

Recommendation 25: In the Bill, include a provision requiring Technical Standards to be reviewed by the EPA Director every 5 years.