



Environmental
Defenders Office

Submission to UN Special Rapporteur on Toxics

15 May 2023

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.

www.edo.org.au

Submitted to:

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EXECUTIVE SUMMARY

The work of the EDO is underpinned by an environmental justice and human rights framework. Such a framework recognises that the human rights of certain people and communities are disproportionately impacted by environmental harm and guides EDO to focus on empowering overburdened people and communities to fight for environmental justice. This submission will focus on two overarching issues that Australia must address to ensure the effective management of hazardous toxics to protect its citizens' fundamental human rights. Australia must:

- enshrine in domestic law the right to a healthy environment; and
- reform the National Environmental Protection Measures (**NEPMs**) to reflect best practice health standards, and ensure they are enforceable and enforced.

This submission will provide input on the following thematic issues:

- Australia's failure to implement international human rights and environmental standards into domestic law;
- current cases and issues including key sources of hazardous substances such as mining and their impact on air and water quality; and
- the lack of effective remedies for harm caused by hazardous substances and wastes.

In addition to the below, we adopt our recommendations in our previous report on the status of the human right to a healthy environment in Australia, contained at **Annexure A**.¹

We provide also at **Annexure B** a summary of case studies from different Australian jurisdictions in which the regulation of pollution has been inadequate to protect communities and environments from surrounding polluting industries.

List of recommendations

Australia must:

- 1. enshrine the right to a healthy environment into domestic law;**
- 2. urgently reform the *National Environmental Protection Council Acts* to require states and territories to translate the NEPMs into enforceable and enforced subnational law;**
- 3. review the NEPMs to ensure they are in accordance with international standards and the best available science; strengthen the NEPM in relation to ambient air quality to bring it in line with the WHO global air quality guidelines (2021); and establish a NEPM that guarantees water quality, that is adopted into subnational laws and adequately enforced by regulators.**

¹ Environmental Defenders Office Ltd, 'A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia' (Web Page, July 2022) <<https://www.edo.org.au/publication/the-right-to-a-healthy-environment/>>.

RECOMMENDATION 1: Australia must enshrine the right to a healthy environment into domestic law.

Australia must legally recognise an explicit, standalone right to a healthy environment, which includes a toxic-free environment in which to live and work.² Legislative reform is urgently required to bring Australia in line with the international community, and its international obligations. At minimum, EDO recommends Australia must:

- implement its international commitments into domestic law, including by passing national human rights legislation such as an Australian Charter of Human Rights;
- enshrine the right to a healthy environment in national and subnational legislation; and
- amend existing national legislation³ to impose an obligation on national officials to act consistently with a right to a healthy environment when exercising functions under national laws.

Why is a right to a healthy environment urgently required?

In Australia, there is no explicit, standalone legal mechanism for overburdened people and communities to enforce the right to live in a clean, healthy, sustainable, and toxic-free environment.⁴ Enshrining the right to a healthy environment in federal and state legislation as a standalone right will not only allow for access to remedies and redress, but it will also ensure that new and amended legislation is scrutinised and assessed for its compatibility with the right to a healthy environment.

Despite being a signatory of several international human rights declarations and conventions,⁵ Australia does not have a national bill or charter of human rights and there are limited human rights protections under the Constitution or other national laws.⁶ For international treaties to be legally binding in Australia, they must be implemented into domestic law. While some states and territories have human rights laws that protect the rights of people who live in those jurisdictions,⁷ unlike most United Nations member states, the right to a healthy environment is not expressly recognised as a standalone right in national or subnational laws in Australia. This is despite Australia supporting the United Nations General Assembly resolution to recognise the right to healthy environment.⁸ Failure

² David R Boyd, *The right to a clean, healthy and sustainable environment: non-toxic environment – Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/49/53 (12 January 2022).

³ Such as the *Public Governance, Performance and Accountability Act 2013* (Cth), which imposes other obligations on national officials.

⁴ *Environment Protection Act 2017* (Vic) s 21 sets out the principle of equity which provides Victorian citizens are entitled to live in a safe and healthy environment and that people should not be disproportionately affected by harm or risk to human health and the environment. However, this is not a standalone right, rather it is part of the principle of equity to be considered by the entity administering that law.

⁵ See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

⁶ See, eg, *Australian Human Rights Commissioner Act 1986* (Cth); *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth).

⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter'); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld).

⁸ *The human right to a clean, healthy and sustainable environment*, GA Res 76/300, UN Doc A/RES/76/300 (1 August 2022, adopted 28 July 2022).



to explicitly recognise this right at any level of government in Australia weakens our human rights system, as a healthy environment is a precondition to the enjoyment of many other rights.

Queensland, Victoria and the Australian Capital Territory have introduced their own subnational human rights laws. However, EDO notes:

- these laws fail to recognise and protect a right to a healthy environment. Rather, the laws focus on civil and political rights, with limited protection of economic, social and cultural rights.⁹ Decision-makers retain discretion as to whether or not to recognise that these rights are fundamentally interconnected with the enjoyment of healthy environment;
- obligations are only imposed on public authorities,¹⁰ and there are no direct obligations on private corporations to protect human rights when conducting activities that might impact human rights, such as the discharge of pollutants into the environment;¹¹
- the ability for people and communities to enforce these rights is extremely limited. Only the Australian Capital Territory has a standalone cause of action for human rights in a court of law¹² – in other jurisdictions, human rights must be ‘piggy-backed’ onto other claims;¹³ and
- where a complaint mechanism is available, inadequate resourcing means that recommendations are severely delayed. For example, the Queensland Human Rights Commission currently has a backlog of over 500 complaints.¹⁴

Where human rights have been enshrined in subnational law, some judicial bodies have recognised the intrinsic connection between enjoyment of these rights, and the health of the environment¹⁵ (for further discussion, see Annexures A and B).

RECOMMENDATION 2: Australia must urgently reform the *National Environmental Protection Council Acts* to require states and territories to translate the National Environment Protection Measures into enforceable subnational law.

⁹ See [Human Rights Act 2004](#) (ACT) pts 3–3A; [Human Rights Act 2019](#) (Qld) pt 2, divs 2–3; Victorian Charter (n 7) pt 2.

¹⁰ [Human Rights Act 2004](#) (ACT) ss 40–40C; [Human Rights Act 2019](#) (Qld) ss 9–10, 58–60; Victorian Charter (n 7) ss 4, 38–9.

¹¹ In the Australia Capital Territory, other entities may choose to be subject to the obligations of public authorities, but this is not binding see: [Human Rights Act 2004](#) (ACT) s 40D. There is no such option under the Queensland or Victorian laws.

¹² [Human Rights Act 2004](#) (ACT) s 40C(2).

¹³ [Human Rights Act 2019](#) (Qld) ss 59–60; Victorian Charter (n 7) ss 38–9.

¹⁴ Queensland Human Rights Commission, *Shifting the focus: 2021-22 annual report on the operation of the Human Rights Act 2019* (Report, 24 November 2022) 109

<https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0019/41392/Complaints-ShiftingTheFocus_HumanRightsActAnnualReport_2021-22.pdf>.

¹⁵ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 <<https://archive.sclqld.org.au/qjudgment/2022/QLC22-021.pdf>>.

In Australia, pollution is regulated by state and territory governments under subnational laws.¹⁶ At the national level, the *National Environment Protection Council Act 1994* (Cth) (**NEPC Act**) provides for the development of NEPMs to provide national standards for pollutants via the National Environment Protection Council (**Council**). The Council was established to ensure that people enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia.¹⁷ However, there is currently no legal requirement to translate the NEPMs into national or subnational law.¹⁸

This has resulted in uneven implementation of the NEPMs across Australia's 8 state and territory jurisdictions. As illustrated in the case studies in **Annexure B**, the standards contained in the NEPMs are not being adequately translated into enforceable laws and regulations at the subnational level. Instead, the NEPMs are implemented via policy or guidance-type documents which leave decision-makers and regulators significant discretion in granting approvals for polluting activities and imposing conditions which satisfactorily limit the polluting impacts of such activities. This in turn constrains the ability for enforcement action to be undertaken when pollution events do arise.

We recommend that the *National Environmental Protection Council Acts* be reformed to require that NEPM standards be translated into enforceable standards in state and territory legislation. The NEPM standards in turn should require the imposition of conditions on environmental licences and development approvals that limit pollution to well below national standards and incentivise lowering emissions. In pollution hotspots where pollution is not easily attributed to a single point source, airshed or watershed values must be regulated to adequately address the cumulative impacts from localised polluting activities.

RECOMMENDATION 3: Australia must review the National Environment Protection Measures (NEPM) to ensure they are in accordance with international standards and the best available science.

Further, the NEPMs themselves need urgent reform in order to effectively regulate environmental toxics in a manner that fulfills Australia's international human rights obligations.

The current NEPMs are inadequate because:

- the National Environment Protection (Ambient Air Quality) Measure (**Air Quality NEPM**) is outdated: at minimum, the NEPM must be consistent with the World Health Organisation global air quality guidelines (2021) (**WHO Guidelines**);
- there is no NEPM in relation to water or noise;

¹⁶ In Australia, the Commonwealth government has limited powers to make laws with respect to the environment due to its Constitution. However, if Australia has signed an international treaty, our High Court has found the federal government has the power to make national laws that are relevant to the subject matter of that treaty see: *Commonwealth v Tasmania* (1983) 158 CLR 1.

¹⁷ *National Environment Protection Council Act 1994* (Cth) s 3(a).

¹⁸ *Ibid* s 7(1) which stipulates a broad intention to implement the NEPM subnationally. See also *National Environment Protection Council Act 1994* (ACT); *National Environment Protection Council (New South Wales) Act 1995* (NSW); *National Environment Protection Council (Northern Territory) Act 1994* (NT); *National Environment Protection Council (Queensland) Act 1994* (Qld); *National Environment Protection Council (South Australia) Act 1995* (SA); *National Environment Protection Council (Tasmania) Act 1995* (TAS); *National Environment Protection Council (Victoria) Act 1995* (Vic); *National Environment Protection Council (Western Australia) Act 1996* (WA).



- monitoring systems are inadequate to report breaches as they occur, with the Air Quality NEPM only requiring measurement of pollutants at an ‘ambient’ level, thus failing to capture the full extent of peaks or hotspots in pollution, entrenching sacrifice zones;²⁴
- in overburdened areas where even the Air Quality NEPM standards are regularly exceeded, industrial activities that are significant contributors to air pollution, such as coal mining, continue to be granted permits at a subnational level, further compounding a cumulative issue that is not adequately addressed by conditions imposed on individual licences; and
- compliance with the standards is not adequately enforced and there are limited or no rights for impacted individuals and communities to seek recourse to ensure their basic human rights are protected.

We recommend the Commonwealth, state, and territory governments:

- review the NEPMs to incorporate an exposure-reduction framework which guarantees continual reductions in the emission of pollutants for which there are no safe limits, shifting away from a reliance on threshold pollution limits;¹⁹
- if thresholds are to be retained, review the NEPM thresholds to ensure they meet and exceed the WHO Guidelines;
- identify and regulate areas worst affected by toxic pollutants, targeting overburdened populations;
- mandate real-time monitoring and accessible warning or alert systems; and
- enforce compliance with the standards with significant penalties for breaches including stop work mandates.

Recommendation 3a: Australia must strengthen the NEPM in relation to ambient air quality to bring them in line with the WHO global air quality guidelines (2021)

The Air Quality NEPM currently sets national ambient air quality standards in Australia. There is a separate NEPM that sets standards for air toxics including benzene, toluene, xylene, formaldehyde and polycyclic aromatic hydrocarbons,²⁰ however, due to an absence of available data on air toxics, this section will focus on the Air Quality NEPM.

The standards for nitrogen dioxide (**NO₂**), ozone (**O₃**), and sulfur dioxide (**SO₂**) in the Air Quality NEPM were set in 1998 and are overdue for revision. Scientific understanding of the impacts of these air emissions on human health has greatly changed since these standards were put in place.

International and Australian studies show that NO₂, ozone, and SO₂ are non-threshold pollutants, meaning that there is no safe level, or threshold, below which no health effects are observed.²¹

¹⁹ For example, in relation to air quality, emissions of PM_{2.5}, see Graeme R Zosky et al, ‘Principles for setting air quality guidelines to protect human health in Australia’ (2021) 214(6) *Medical Journal of Australia* 254 (‘Zosky et al’).

²⁰ National Environment Protection (Air Toxics) Measure.

²¹ Jie Chen and Gerard Hoek, ‘Long-term exposure to PM and all-cause and cause-specific mortality: A systematic review and meta-analysis’ (2020) 143 *Environment International* 105974: 1–23; Pablo Orellano et al, ‘Short-term exposure to particulate matter (PM₁₀ and PM_{2.5}), nitrogen dioxide (NO₂), and ozone (O₃) and all-cause and cause-specific mortality: Systematic review and meta-analysis’ (2020) 142 *Environment International* 105876: 1–15.

These standards and the regulatory frameworks that seek to implement them should therefore encourage continual air pollution emission reductions in Australia.²²

The Air Quality NEPM sets standards for ambient air quality in relation to the following air pollutants: SO₂, NO₂, O₃, carbon monoxide (CO), particles and lead.²³ The measure falls short of the pollutant limits recommended by the WHO global air quality guidelines, as set out in table 1 below.²⁴

Item	Pollutant	Averaging period	NEPM Maximum concentration standard	WHO Global Air Quality Guidelines	Dose threshold for health effects ²⁵
1	Carbon monoxide (CO)	8 hours	9.0 ppm/11.1 mg/m ³ ²⁶	10 mg/m ³	Unknown
2	Nitrogen dioxide (NO ₂)	1 hour 1 year	0.08 ppm/162 µg/m ³ 0.015 ppm/30.4 µg/m ³	200 µg/m ³ 10 µg/m ³	Unknown ~6–11 ppb/12.16 – 22.28 µg/m ³
3	Photochemical oxidants (as ozone) (O ₃)	8 hours	0.065 ppm/137 µg/m ³	100 µg/m ³	Unknown
4	Sulfur dioxide (SO ₂)	1 hour 1 day	0.10 ppm/282 µg/m ³ (0.075 ppm/212 µg/m ³ from 1 January 2025 ²⁷) 0.02 ppm/56.4 µg/m ³	N/A 40 µg/m ³	0.2–0.4 ppm/ 564 – 1130 µg/m ³ Unknown
5	Lead (Pb)	1 year	0.50 µg/m ³	No safe limit	None
6	Particles as PM ₁₀	1 day 1 year	50 µg/m ³ 25 µg/m ³	45 µg/m ³ 15 µg/m ³	None
7	Particles as PM _{2.5}	1 day 1 year	25 µg/m ³ (20 µg/m ³ from 1 January 2025 ²⁸) 8 µg/m ³ 7 µg/m ³ from 1 January 2025 ²⁹	15 µg/m ³ 5 µg/m ³	None

Table 1: comparison of the NEPM standards against the WHO Global Air Quality Guidelines.

While the 2016 and 2021 amendments to the Air Quality NEPM did incorporate reductions in maximum concentration standards for SO₂ and PM_{2.5}, these measures are inadequate because:

²² Zosky et al (n 31) 254.

²³ Air Quality NEPM (n 22) sch 2 table 1.

²⁴ Ibid. See also World Health Organisation, *Global Air Quality Guidelines: Particulate Matter (PM_{2.5} and PM₁₀), ozone, nitrogen dioxide, sulfur dioxide and carbon monoxide* (Guidelines, 22 September 2021).

²⁵ Zosky et al (n 31) 255, referring to table and sources cited therein.

²⁶ Converted using Lenntech, Converter Parts per Million (ppm) (Web Page)

<<https://www.lenntech.com/calculators/ppm/converter-parts-per-million.htm>>.

²⁷ Air Quality NEPM (n 22) sch 2 table 1A.

²⁸ Ibid s 6(c), sch 2 table 2.

²⁹ Ibid.



- there are only exposure reduction targets for SO₂ and PM_{2.5}, with no equivalent for CO, NO₂, O₃, Pb, or PM₁₀, many of which have unknown or no safe exposure thresholds for health effects,
- the Air Quality NEPM only provides for one reduction, rather than establishing a framework for staged and continuous reductions,
- the reduction will only commence from 1 January 2025, and
- the new standards will in any event exceed the WHO Global Air Quality Guidelines.

In relation to PM_{2.5}, leading air pollution expert Dr Gabriel da Silva has stated: ‘The national PM_{2.5} standards...do not correspond to levels at which exposure to this pollutant is safe; instead, they represent a level of risk that is at present deemed acceptable’.³⁰

The case studies in **Annexure B**, provide further evidence that the failure to adequately regulate pollutants is leading to significant environmental and community impacts around Australia.

Recommendation 3b: Australia must establish a NEPM that relates to water quality, that is adopted into subnational laws and adequately enforced by regulators.

There is no NEPM that relates to water quality. Presently, there exist only non-mandatory guidelines in relation to drinking water and other water-related issues, underpinned by the National Water Quality Management Strategy, all of which are intended to guide the work of the relevant state-based agencies.³¹ The National Water Initiative, Australia’s blueprint for national water reform agreed to by all States and Territories, fails to ensure drinking water security in remote Australian communities.³² EDO recommends a new NEPM be urgently developed to mandate environmental standards in relation to water quality and specifically implement the Australian Drinking Water Guidelines and Guidelines for Groundwater Quality Protection in Australia.

Please see **Annexure B** for case studies relevant to water pollution from McArthur River Mine and the regulation of safe drinking water. Both examples in the Northern Territory highlight the need for enforced national standards to ensure access to safe drinking water, which is a basic human right.³³

³⁰ Independent Expert Report of Dr Gabriel Da Silva, Submission to the Independent Planning Commission of NSW, *Mt Pleasant Optimisation Project SSD 10418* (22 July 2022) 5.

³¹ See, eg, Commonwealth of Australia, *Australian Drinking Water Guidelines 6 2011* (Guidelines, September 2022) <<https://www.nhmrc.gov.au/about-us/publications/australian-drinking-water-guidelines>>; ‘Guidelines for water quality management’, *Water Quality Australia* (Web Page) <<https://www.waterquality.gov.au/guidelines>>; National Water Initiative; Commonwealth of Australia, *Guidelines for groundwater quality protection in Australia* (Guidelines, 2013) <<https://www.waterquality.gov.au/sites/default/files/documents/guidelines-groundwater-quality-protection.pdf>>.

³² See, eg, Kirsty Howey and Liam Grealy, “Drinking Water Security, the Neglected Dimension of Australian Water Reform” (2021) 25 *Australasian Journal of Water Resources* 2, 111-120.

³³ UN General Assembly, The human right to water and sanitation: resolution / adopted by the General Assembly, 3 August 2010, A/RES/64/292.