



Submission

in response to

Inquiry into Auditor-general's Report 202: Meeting Obligations to Protect Ramsar Wetlands

prepared by

Environmental Justice Australia

27 November 2019

## **About Environmental Justice Australia**

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. We are independent of government and corporate funding. Our legal team combines technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to community-based environment groups, regional and state environmental organisations, and larger environmental NGOs, representing them in court when needed. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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## Introduction

We are pleased provide this submission to the Inquiry.

EJA have had a long-standing interest in the management and protection of Ramsar Sites, both in terms of law reform work we have undertaken in relation to wetlands and rivers, and in relation to collaborations we have undertaken with community groups and First Nations.

Our submissions below are directed to relatively high-level considerations of governance and policy for Ramsar Sites, as well as reference to examples of particular Ramsar Sites.

In general, the management of many, if not most, of Victoria's Ramsar sites is unacceptable in practice and represents a failure to meet obligations under the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* (Ramsar Convention) or failure of consistency with the *Environment Protection Biodiversity Conservation Act 1999* (EPBC Act) or both.

Governance arrangements for our Ramsar sites are unsatisfactory, funding arrangements are neither sufficiently transparent nor capable of meeting management needs, monitoring and reporting is poor and compromises an appropriate scientific and knowledge base, and performance of Ramsar management against appropriate international norms and standards is full of uncertainties.

Where management and ecological protection of Ramsar sites is relatively strong, such as at Melbourne Water managed sites at Edithvale-Seaford Wetlands and the Western Treatment Plant (WTP), this outcome is reflective of key factors and inputs such as:

- High degrees of collaboration between public agencies, community and non-government organisations, scientists, and academic institutions;
- In the case of the WTP, dual or multiple use;
- Management by a well-funded public entity with formal management and oversight role;
- Proximity to population centres and scrutiny by a 'community of interest' including constant monitoring and reporting;
- High degree of scientific and technical knowledge of the sites, including from a multi-disciplinary perspective, informing ecological management (including for example hydrology).

This inquiry and the Auditor-General's report (AG's report) provide an important and exciting opportunity to shift how we manage Ramsar sites. We have the opportunity to make Victoria's Ramsar sites international models in wetlands management. Indeed, the WTP represents such a model.

Further, establishing effective, transparent Ramsar Site management, which underpins healthy wetlands, does not require 'reinvention of the wheel'. The Ramsar Convention CoP and Secretariat have extensive guidance for Site management which Victoria can draw on. What is essentially required is the political and institutional will to do so.

## Legal obligations

Ramsar wetlands are wetlands included on the List of Wetlands of International Importance and, for the purposes of Australian law, declared as a Ramsar wetland under section 17 of the EPBC Act or designated for inclusion on the List under section 327 of the EPBC Act.

Such wetlands need to meet relevant criteria set out under the Ramsar Convention. In Victoria, as the AG's Report identifies, there are 11 Ramsar Sites in Victoria. Some are coastal, some riverine, some estuarine.

Ramsar sites are managed by way of cooperative arrangements between the Commonwealth, States or Territories, and other landowners. The Commonwealth must use its best endeavours to work with States and Territories to ensure there is a plan for each Ramsar Site (other than in Commonwealth areas), consistent with Ramsar Management Principles made under Regulations.

The Australian Government is bound by the provisions of the Ramsar Convention and recommendations and resolutions made by the CoP under it.

Approval and assessment provisions operate under the EPBC Act for an action that will or is likely to have a significant impact on a Ramsar Site.

Ramsar sites are subject to various statutory controls and requirements under Victorian law including:

- Planning law
- Protected areas legislation
- Plans and instruments made under water and/or catchment legislation
- Marine and coastal areas legislation.

Ramsar Management Principles ('RMP')<sup>1</sup> effectively set out in summary form key elements of the management framework for Ramsar sites. These principles establish obligations on the Commonwealth and form guidance for the States.

The RMP provide:

*The primary purpose of management of a declared Ramsar wetland must be, in accordance with the Ramsar convention:*

*(a) To describe and maintain the ecological character of the wetland; and*

*(b) To formulate and implement planning that promotes:*

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<sup>1</sup> *Environment Protection and Biodiversity Regulations 2000* (Cth), Schedule 6.

- i. *Conservation of the wetland; and*
- ii. *Wise and sustainable use of the wetland for the benefit of humanity in a way that is compatible with the maintenance of the natural properties of the ecosystem.*

*Wetland management should provide for public consultation on decisions and actions that may have a significant impact on the wetland.*

*Wetland management should make special provision, if appropriate, for the involvement of people who:*

- (a) Have a particular interest in the wetland; and*
- (b) May be affected by the management of the wetland.*

*Wetland management should provide for continuing community and technical input.*

The RMP also provide for detailed management planning requirements at General Principle 2.

As the RMP set out, there should be at least one management plan prepared for each Ramsar site. Other general requirements for Ramsar Site management planning are set out in the RMP.<sup>2</sup>

## **Ecological character and managed ecosystems**

Most Victorian Ramsar sites are managed ecosystems. Key management inputs include:

- Hydrology and the management of water resources. This is especially the case in riverine sites in northern Victoria, such as the Barmah Forest, Lake Albucutya and the Hattah Kulkyne Lakes.
- Hydro-ecology and the management of urban development. This is especially the case in relation to the Edithvale Seaford wetlands and (in different ways) the WTP near Melbourne.
- Hydro-ecology and the management of both marine systems and freshwater catchments. This is especially the case for the Gippsland Lakes.

In each case, a balance is required to be struck between human needs and impacts (such as water resources, development or infrastructure needs) and the maintenance and conservation of natural processes and systems.

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<sup>2</sup> *Environment Protection and Biodiversity Regulations 2000* (Cth), Schedule 6, clause 2.

To the extent that balance is framed in terms of ecological sustainable development (ESD) there is elaborate legal and policy guidance on how planning is designed and implemented that maintains ecological character, ensures conservation of wetlands, and achieves wise and sustainable use.<sup>3</sup>

Notwithstanding the paucity of scientific information and data for many sites, there is evidence that current management arrangements are compromising the ecological character of Ramsar sites or include management rules or provisions that do not, on the basis of available scientific information, meet parameters consistent with the maintenance of ecological character.

For example, environmental water planning for the Wimmera River establishes a watering regime in which hydrological indicators for frequency and duration of flooding of Lake Albacutya<sup>4</sup> exceed 'limits of acceptable' change for the ecological character of that wetland.<sup>5</sup> Such arrangements anticipate long-term compromise of ecological character. These arrangements are now embedded in water resource planning for the Wimmera-Mallee water resource plan area under Commonwealth law.

Similarly, exceedance of 'limits of acceptable change' has been established for hydrological and ecological indicators for the Barmah Forest.<sup>6</sup>

In each of these cases, flow regimes in regulated systems are insufficient to, or below the scientifically determined thresholds for, long-term system health. In other words, flow requirements for the health of water-dependent ecosystems (Lake Albacutya, Barmah lakes and forest) are not met by existing water management arrangements (eg environmental water reserve).

In riverine systems that include Ramsar sites, reform of the environmental water reserve is required in order to maintain ecological character and function within 'limits of acceptable change'.

For the Gippsland Lakes (marine influence and salinization of the estuarine lakes system) there are similar concerns with change to ecological character and insufficient information regarding limits of acceptable change apply, albeit in a still more complex estuarine system.<sup>7</sup> Both regulation of riverine flows and extended marine influence on the Ramsar site are compromising the ecological character of this system.

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<sup>3</sup> See eg Ramsar Convention Secretariat *Wise Use of Wetlands: Handbook 1* (Ramsar Handbooks, 4<sup>th</sup> ed, 2010), <https://www.ramsar.org/sites/default/files/documents/library/hbk4-01.pdf>, and the Ramsar Convention Secretariat Handbook Series generally.

<sup>4</sup> Wimmera CMA Wimmera River System Environmental Watering Management Plan, 57 Table 3-5; DELWP Long-term EWP, 40, Table 6.

<sup>5</sup> A. Cibilic and L White 2010. *Ecological Character Description for Lake Albacutya, a Wetland of International Importance - a report prepared for the Department of Sustainability, Environment, Water, Population and Communities* (2010), 23-24, 118-120.

<sup>6</sup> Hale and Butcher *Ecological Character Description for the Barmah Forest Ramsar Site: Report to the Department of Sustainability, Environment, Water, Population and Communities* (2011), Table E1, 1.

<sup>7</sup> BTM WBM *Ecological Character Description for the Gippsland Lakes Ramsar Site: Report to the Department of Sustainability, Environment, Water, Population and Communities* (2011); Paul Boon, Perran Cook and Ryan Woodland 'The Gippsland Lakes: Challenges Posed by Long-Term Environmental Change' (2015) 67 *Marine and Freshwater Research* 6 721.

The AG's report identifies a very uneven approach in management planning that includes actions directed to maintaining ecological character and addressing threats to ecological character.<sup>8</sup>

We submit that the maintenance of ecological character is the key standard of Ramsar Site management and must form the principal performance requirement of management and governance of Ramsar Sites. This obligation should be drafted expressly into all relevant regulatory measures and schemes applying to management of Ramsar Sites, such as planning schemes, Sustainable Water Strategies, catchment strategies, and marine and coastal plans.

In any circumstances where the maintenance of ecological character of a Ramsar Site is or may be threatened, such as where limits of acceptable are or may be exceeded (approached with a high degree of precaution), DELWP and relevant agencies must undertake full, comprehensive and transparent assessment of those Sites, with the intention of enabling Australia to meet its obligations under the Ramsar Convention, including under Article 3(2) if human interference is likely to lead to change in ecological character.

*Recommendations:*

- Express requirement for maintenance of the ecological character of Ramsar Sites needs to be incorporated into all statutory instruments pertaining to Ramsar Site Management
- All Victorian Ramsar Sites need to be subject to full, comprehensive and transparent assessment in order to inform whether Australia is meeting its obligations under the Convention in relation to Site management.

## **Management plans**

We submit that one of the principal shortcomings to the current Ramsar management plan arrangements is the failure to prepare (and require the preparation of) stand-alone and dedicated management plans for each Ramsar Site. Doing so should be a priority in Ramsar site management going forward.

Incorporating Ramsar management planning into other instruments, such as Regional Waterway Strategies, is liable to undermine accountability and effectiveness of planning for the specific and discrete requirements of the Ramsar site, including by way of:

- Obscuring the actions, purposes, objectives, and performance measures applicable to achieving Ramsar goals as distinct from other waterway goals or objectives. It is possible such plans absorbed into other planning arrangements would, or do, lead to confusion of purposes and the diminishing of distinct and high ecological standards intended for Ramsar sites.
- Creating barriers to collection and incorporation of clear and best available science to inform Ramsar objectives and standards (eg maintenance of ecological character).

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<sup>8</sup> AG Report, p 17, Fig 2C.

- Limiting clear pathways for institutional accountability against Ramsar standards, such as through fragmented accountabilities and/or uncertain status and roles of actors.

The far more preferable approach is to require preparation and implementation of a single management plan, specific to each Ramsar site, set out in accordance with and under the guidance of relevant Ramsar Convention policy and practice. The Ramsar Convention Secretariat has prepared extensive advice on site management planning.<sup>9</sup>

Consideration should be given to legislative reform to require management planning in accordance with and informed by Secretariat guidance. The better location for such requirements would be under the *Water Act 1989*.

*Recommendations:*

- Each Ramsar Site in Victoria must have its own stand-alone Management Plan, prepared in accordance with guidance and direction of the Ramsar Secretariat and CoP.
- Reform the Water Act 1989 to require expressly preparation of Ramsar Site management plan in accordance with Ramsar Convention Secretariat and CoP guidance and directions.

## Review of management plans

The AG Report found poor performance in respect of the review of management plans. A key consequence of this fact is that Ramsar wetlands, as inherently dynamic systems and subject to a range of pressures, are likely not being managed in a responsive and adaptive manner, with a view to maintaining ecological character.

Review of management plans should be mandated by law to occur at least every seven years.

Further, those review processes need to be informed by best available scientific knowledge (including indigenous knowledge). Consequently, review presumes positive obligations on Site manager(s) to collect, collate, analyse and distribute information on Ramsar sites in a systematic manner. This is to say, a review mandate would be a hollow requirement without the knowledge base on which to proceed.

These obligations accord with the AG Report's findings of major shortcomings in the available knowledge informing Site management and hence Australia's fulfilment of its obligations under international law.

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<sup>9</sup> Ramsar Secretariat Handbook 18: Managing Wetlands (4<sup>th</sup> ed, 2010), <https://www.ramsar.org/sites/default/files/documents/pdf/lib/hbk4-18.pdf>; see also A Satterjee, B Philips and D Stroud *Wetland Management Planning: A Guide for Site Managers* (WWF, Wetlands International, IUCN and Ramsar Convention (2008), [https://www.ramsar.org/sites/default/files/documents/library/wurc\\_mgt\\_planning2008.pdf](https://www.ramsar.org/sites/default/files/documents/library/wurc_mgt_planning2008.pdf)

The Ramsar CoP has endorsed a review tool for the assessment of Ramsar Site management effectiveness (R-METT).<sup>10</sup> This tool should be used to inform management review and performance of Victorian Ramsar Sites.

*Recommendations:*

- Review of Site Management Plans must occur no longer than seven years after their implementation.
- Review of Site management should occur in a manner consistent with guidance and direction of the Ramsar Secretariat and CoP.

## **Application of precaution to management actions**

The precautionary principle applies to management of Ramsar Sites,<sup>11</sup> as well as actions likely to have a significant impact on those sites.<sup>12</sup> This is a logical corollary of the sensitive and high ecological values of these sites.

In the present instance, the high degree of uncertainty associated with poor information and knowledge of Ramsar sites is grounds for robust application of precaution to their current management. This degree of uncertainty compounds inherent uncertainties associated with wetlands as dynamic systems.

In terms of the preparation and implementation of management regimes going forward precaution requires, in our submission:

- preference for actions requiring avoidance of harms; and
- clear programs setting out agenda for restoration over the management plan period and directed to maintenance of ecological character.

Express calculation of 'margins of error' in management planning should be required. Management planning should have as a key objective the narrowing of uncertainties as far as practicable, especially through appropriate scientific and indigenous knowledge programs.

*Recommendation:*

- All Ramsar management arrangements must expressly account for application of the precautionary principle in preparation and implementation of actions.

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<sup>10</sup> Ramsar CoP Resolution XII.15 *Evaluation of the management and conservation effectiveness of Ramsar Sites* (2015),

[https://www.ramsar.org/sites/default/files/documents/library/cop12\\_res15\\_management\\_effectiveness\\_e.pdf](https://www.ramsar.org/sites/default/files/documents/library/cop12_res15_management_effectiveness_e.pdf)

<sup>11</sup> See Ramsar Secretariat Handbook 18: *Managing Wetlands*, [54]-[55]; see also Ramsar CoP Resolution XI.9 *An Integrated Framework and Guidelines for Avoiding, Mitigating and Compensating for Wetland Loss* (2012),

<https://www.ramsar.org/sites/default/files/documents/library/cop11-res09-e.pdf>

<sup>12</sup> EPBC Act, s 133

## Governance models

Ramsar Sites in Victoria have suffered from poor governance. Governance of Ramsar Sites requires substantial overhaul. This is an outcome clearly flagged by the AG Report. Fundamentally, key shortcomings in governance include:

- Fragmentation in governance and poor or weak leadership and oversight, especially in relation to Sites under the primary responsibility of CMAs, DELWP and/or Parks Victoria. The Melbourne Water sites that performed better had the advantage of less fragmented management and oversight.
- Lack of funding and resourcing is critical to these failures, but in addition failure to prioritise Ramsar outcomes, retain and recruit knowledgeable and expert staff, manage sites proactively, and maintain internal or public accountability for performance are all major problems, each contributing to failure to meet international obligations.
- Lack of collaborative governance. There is a focus on current formal arrangements to emphasise the roles and functions of public agencies. It is appropriate that designated public agencies take a lead role in Ramsar site management, especially where they are land or waterway managers. But broader, more effective and formalised collaboration with other key actors needs to be incorporated into planning arrangements.

There is extensive guidance from the Ramsar CoP and Secretariat on collaborative governance of Ramsar Sites, which should inform governance of Victoria's Ramsar Sites.

In our submission reform of Ramsar Site governance is a critical outcome from the present Inquiry and the AG Report.

Governance reform includes two distinct but inter-related streams.

The first stream concerns the role and status of First Nations (Traditional Owners) in Ramsar Site governance. Their role in governance is distinctive by virtue of the fact that:

- Typically, Ramsar Sites represent significant places on Country, whether riverine, estuarine or marine and coastal sites.
- Connection to Ramsar Sites will likely be an expression of Aboriginal cultural rights protected under section 19 of the *Charter of Human Rights and Responsibilities Act 2006*.
- Many, if not all, Ramsar Sites will be subject to current co-management arrangements, Traditional Owners Settlement Act agreements, determined native title rights and interests, and/or obligations under reformed water legislation or biodiversity legislation. First Nations whose country intersects with Ramsar Sites typically hold legally recognised rights and interests in those Sites. This fact is absent from the AG Report. The Inquiry should make findings and recommendations on the important and unique role of First Nations in management of these Sites.

The Ramsar CoP have adopted recommendations and guidance directed specifically to participation of indigenous peoples in Ramsar Site management.<sup>13</sup> In effect, Ramsar 'wise use' obligations include co-management with indigenous peoples of resource management in Ramsar sites.<sup>14</sup>

Governance of Ramsar Sites needs to be reformed to provide for clear, consistent and effective co-management of those Sites, as appropriate, with First Nations organisations.

The second stream of governance reform concerns the role of community, non-governmental, scientific and related interests in Ramsar site management.

The involvement of community organisations, NGOs and scientific communities in Ramsar Site management appears to be ad hoc, depending on the particular Site at issue. For example, the WTP is a Site with extensive and long engagement with environmental NGOs (eg Birdlife Australia) and scientists. The Port Phillip and Bellarine Ramsar Site has had long-term engagement with Field and Game Australia and the Geelong Field Naturalists Club. In most cases, the involvement and/or representation of relevant interests in Ramsar Site governance has evolved on a case by case basis, ordinarily under the auspices of a government agency such as the Catchment Management Authority (CMA).

While there needs to be a coordinating or 'lead agency' role for a relevant State authority (such as a CMA, water authority or DELWP via a regional office) as the 'management authority', more structured and transparent models of governance are required.

Ramsar Site governance would likely benefit from a common model that includes:

- High-level coordinating body, including senior agency, NGO, First Nations, and private stakeholder representatives;
- 'Delivery' level coordinating body, whose work is directed to operational planning and outcomes; and
- A scientific panel or reference body, responsible for integrated resource assessment and advice across scientific and cultural knowledge.<sup>15</sup>

#### *Recommendations:*

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<sup>13</sup> Ramsar CoP Resolution VII.8 *Guidelines for establishing and strengthening local communities' and indigenous peoples' management of wetlands* (1999),

[https://www.ramsar.org/sites/default/files/documents/library/key\\_res\\_vii.08e.pdf](https://www.ramsar.org/sites/default/files/documents/library/key_res_vii.08e.pdf); Ramsar CoP Recommendation 6.3 *Involving local and Indigenous people in the management of Ramsar wetlands* (1999), [https://www.ramsar.org/sites/default/files/documents/library/key\\_rec\\_6.03\\_e.pdf](https://www.ramsar.org/sites/default/files/documents/library/key_rec_6.03_e.pdf).

<sup>14</sup> Ramsar CoP Resolution VII.8, Annex at [7].

<sup>15</sup> See *National Cultural Flows Research Project*, components 2-4,

[http://culturalflows.com.au/index.php?option=com\\_content&view=article&id=38&Itemid=131](http://culturalflows.com.au/index.php?option=com_content&view=article&id=38&Itemid=131).

- Governance of Ramsar Sites must be reformed in line with relevant guidance and directions of the Ramsar Convention Secretariat and/or CoP
- Ramsar Site governance must include co-management arrangements with First Nations/Traditional Owners where they seek this arrangement.
- A common and transparent collaborative governance model for Ramsar Sites should be developed and implemented.