

EDO Briefing Note: Environment Protection Australia - EPA

On 16 April 2024, Environment Minister Tanya Plibersek announced that rather than introducing the full package of legislation implementing the Nature Positive Plan, the Federal Government will implement reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) in stages, with the new federal Environment Protection Australia (**EPA**) established by stand-alone legislation in ‘stage two’. The new EPA will be responsible for enforcement and compliance of various national environmental laws, as well as approval and assessment decision-making under the existing EPBC Act.

The staged reforms fall far short of the comprehensive legislative reform we urgently need to see passing the Parliament this year to turn around Australia’s extinction trajectory, and do little to fix our fundamentally broken nature laws. However, **establishing an effective, independent and fit-for-purpose federal EPA is a significant reform that is long overdue**. This Briefing Note sets out EDO recommendations for establishing the new EPA, including that the EPA should:

- be established to be truly independent;
- have transparent operations to ensure community trust;
- have a clear and well-defined mandate;
- have functions that enable and ensure nature protection; and,
- be supported by urgent amendments to the EPBC Act.

KEY RECOMMENDATIONS

The EPA should be established to be truly independent:

1. The EPA should be governed by a CEO appointed by, and reporting to, an independent statutory skills-based Governance Board.

Around the country, EPAs and similar regulators are governed by Boards to preserve their independence and provide oversight of regulatory powers, culture, strategic direction, and operation. The new federal EPA should have a skills-based Board which would appoint a CEO subject to legislated skills criteria. The CEO would lead the EPA and make decisions, but report to the Governing Board. The Board should have staggered appointments and clear eligibility requirements, including for appointees to have substantial experience or knowledge, and significant standing, in specified fields such as environmental regulation, biodiversity conservation, law enforcement, and ecologically sustainable development. Appointment must be subject to clear conflict of interest rules, beyond basic requirements for disclosure, and First Nations representation on the Board must be required.

2. Appointment of a CEO should be subject to strict rules to ensure independence.

Direct appointment of a CEO on advice from the Minister risks politicisation and therefore diminishes public trust in the independent regulator. If the best practice Board model (outlined above) is not adopted, appointment of the CEO must be in accordance with a transparent legislative process. For example, this should entail a public recruitment process, including initial assessment by an independent panel or joint parliamentary committee following public advertising of the role, and the appointment of the CEO should

be informed by this advice. The CEO must have substantial experience or knowledge, and significant standing, in the specified fields, and strong conflict of interest rules must apply.

3. The EPA should be able to exercise its functions free from political influence.

The Minister will be able to issue a Statement of Expectations for the EPA, which will be published and responded to by the CEO. In line with our recommendations below, the operation of the EPA should be guided by a clear legislative purpose and duties. The ability of the Minister to issue a Statement of Expectations to the EPA should be constrained by these, such that the Minister cannot issue a Statement that is inconsistent with the legislative purpose and duties of the EPA.

With good resourcing and an independent structure that ensures expertise, the EPA will be best equipped to make decisions about the environment. We understand that the EPA will be vested with direct decision-making power for some functions, including licencing and permitting (such as for wildlife trade permits under the EPBC Act). However, approvals and assessments will instead be delegated to the EPA by the Minister, rather than being vested in the EPA itself. Similar to the 'call-in power' proposed for stage three, this arrangement means the Minister of the day may be able to take decisions out of the EPA's expert hands. Once available the proposed delegation provisions need to be scrutinised to ensure the EPA has clear decision-making authority.

The EPA must have transparent operations to ensure community trust:

4. The EPA must be subject to robust rules ensuring transparency in all functions and decision-making.

The transparency of the EPA's operations is crucially important in building public confidence in the integrity of its operations. There must be clear requirements for the publication within reasonable timeframes of relevant information, including decisions. This should be secured by ensuring a legislative presumption in favour of publication of information and decisions, with very limited and strictly defined exceptions; timeframes for publication of specific documents following the EPA's receipt or finalising of them; and requiring that any decision made by the Minister relevant to the EPA is also a registerable decision and published on the register. Minimum information publication requirements should be stipulated in the EPA legislation, rather than in subordinate rules.

5. The expert Advisory Body must have transparent functions.

The provision of an Advisory Body to assist the EPA with decision-making is a useful element of the proposed framework. However, the appointment process for this body must be transparent, subject to conflict of interest rules, and have clear terms of reference. Where advice is provided to the EPA, this should be made public, and published rapidly after provision (subject to narrow exceptions). The CEO should be required to state when they have received advice on a matter, and if they have deviated from advice from the body in any decisions.

The EPA should have a clear and well-defined mandate:

6. The EPA must be led by a clear purpose and duties.

To ensure the new EPA's independence and integrity, including to protect against weakening by future governments, its enabling legislation must have serious and enforceable guardrails. Clear duties and

objectives, coupled with civil enforcement provisions (discussed below), are important integrity and accountability measures and promote the rule of law.

The new EPA will be responsible for carrying out functions under several pieces of legislation, including the EPBC Act. It should be guided by a clear purpose in how it administers these functions. We note the Government has previously outlined what this could look like, which should provide an important guide for EPA activities under all relevant pieces of legislation.¹

The EPA should also have clearly defined duties to which it can be held accountable, including by the community, if it does not comply with those duties.² This must include a duty to protect the environment and human health from the harmful effects of pollution, destruction, degradation and waste, through assessment, enforcement, monitoring, reporting and standard setting, which is not overridden by other legislation. We also recommend duties to: achieve environmental justice; act consistently with the human right to a healthy environment for all; ensure substantive public participation in environmental decision-making; and implement legislation in accordance with principles of ecologically sustainable development.

7. EPA decisions and functions must be consistent with relevant National Environmental Standards.

The EPA will have responsibility for compliance and enforcement under the EPBC Act, including with the addition of some new enforcement provisions, including the power to issue environment protection orders, expanded environmental audit powers and increased penalties. As proposed under the Nature Positive Plan, the EPA's functions will be subject to a National Environmental Standard on Compliance and Enforcement. It is therefore important that stage two reforms establish the power for the Minister to create National Environmental Standards. This will enable an EPA specific standard to be made in relation to its compliance and enforcement activities. There must also be corresponding amendments to the EPA legislation to ensure that all EPA functions and decisions are consistent with relevant National Environmental Standards.

The EPA's functions must enable and ensure nature protection:

8. The EPA should have oversight of Regional Forest Agreements.

The Bill should include an explicit function for the new EPA to have an audit and assurance role in relation to Regional Forest Agreements (**RFAs**). This will provide important oversight while the Government continues to work with stakeholders and relevant jurisdictions towards applying National Environmental Standards to RFAs, and will assist with the protection of the many threatened species and ecosystems that rely on our native forests to survive.

9. Climate change should be integrated into EPA functions.

The EPA will be responsible for the assessment and approval of potentially climate-harming projects under the EPBC Act. It should have a mandate to facilitate the achievement of Australia's greenhouse gas emissions reduction targets, in line with the *Climate Change Act 2022*, mirroring the objectives of other relevant federal statutory bodies. The EPA should also have clear duties to prevent and mitigate greenhouse gas pollution and take all actions necessary to reduce the impacts of climate change, which should guide decision-making and activities across all functions. It will also have an important role in

¹ See DCCEEW, [Consultation on National Environmental Laws](#) (December 2023) 75.

² See, for example, EDO's *Bushfire Survivors* case in relation to the NSW EPA. A summary of the case and the Court's decision is available at <https://www.edo.org.au/2021/08/26/bushfire-survivors-hail-landmark-legal-win-on-climate/>.

assessing and approving new renewable energy infrastructure under our national environmental laws, and must be equipped and funded to ensure this is done in line with best practice.

10. Third party enforcement rights should be improved to bolster compliance.

A crucially important accountability mechanism for the new EPA is the inclusion in the Bill of broad third-party enforcement provisions in relation to the EPA enabling legislation and the legislation the EPA will administer. These provisions enable the community to take action to enforce the law in circumstances where the EPA has failed to do so or has itself breached the law. The Bill should explicitly allow for third-parties to enforce breaches of civil penalty provisions through seeking civil penalties. This means any person with the right to enforce an Act will have the ability to seek civil penalties against entities that have breached it, including the EPBC Act. This reform is critical to improve enforcement and deterrence particularly for significant environmental damage that has already occurred.

The EPA must be supported by urgent amendments to the EPBC Act:

11. Wholesale reform of the EPBC Act is needed urgently to address the biodiversity and climate crisis.

It is widely accepted the EPBC Act is not fit for purpose, and is failing communities and the environment. A regulator can only be as effective as the legislation it's enabled by, and setting up the EPA with responsibility for compliance and enforcement of the current Act is, alone, unlikely to make a material difference to the species and places the EPBC Act is intended to protect but fails to.

At the first instance, EDO recommends the following urgent amendments to the EPBC Act to support stage two reforms and set the foundations for stage three, and to urgently protect nature:

- Provide the Minister with the power to create National Environmental Standards, safeguarded by a non-regression clause that means environmental protection can't be reduced in subsequent standards.
- Strengthen existing provisions to ensure that unacceptable impacts (including impacts on critical habitat) are identified upfront and not permitted to proceed.
- Put restrictions on the use of biodiversity offsets.
- Uphold community rights, including by implementing full merits review for approval and assessment decisions.
- Legislate to ensure destructive and illegal deforestation is properly assessed under our nature laws, including by removing loopholes and exemptions.
- Ensure our national environmental laws properly address the biggest threat to nature – climate change.

For more information, see EDO briefing notes: [Stage 2 of the Nature Positive Reforms \(May 2024\)](#), and [Environment Information Australia \(May 2024\)](#).