



Environmental
Defenders Office

**Submission to the Environment and Communications
Legislation Committee on the Nature Positive Bills**

15 July 2024

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:

Environment and Communications Legislation Committee

Parliament of Australia

Via [online submission portal](#).

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Acknowledgement of Country

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations. We acknowledge that not all First Nations people will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

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Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the following Bills:

- Nature Positive (Environment Protection Australia) Bill 2024;
- Nature Positive (Environment Information Australia) Bill 2024; and
- Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024.

Collectively, the 'Nature Positive Bills' constitute the Government's 'stage two' package of nature positive reforms. Stage two aims to deliver two key elements of the Government's [Nature Positive Plan](#), namely the establishment of a new Federal Environment Protection Australia (**EPA**) and a new national Environment Information Australia (**EIA**).

In EDO's view, establishing an effective, independent and fit-for-purpose federal EPA would be a significant reform that would see the country's first national environmental regulator established; and EIA will be an important and useful new institution that will have a critical role in measuring our progress towards 'nature positive.'

However, the EPA as proposed falls short of this best practice model, and EIA functions need to be clarified and strengthened to ensure it is as effective as possible. The related environmental law amendments, proposed in addition to the two new institutions, are also insufficient to fix glaring problems in our fundamentally broken environmental laws. As such, on their own, the Nature Positive Bills 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, conserve our World and national heritage areas and protect nationally significant landscapes. Without broader reforms, these newly established institutions will only be responsible for enforcement and monitoring of our environment in line with fundamentally broken nature laws.

Foremost, it is crucial that the Government introduce – and this Parliament passes – a comprehensive package of legislation to halt the extinction crisis, fix community trust in environmental decision-making, and protect nature from dangerous climate change. Further delay will continue to fail Australia's unique wildlife and ecosystems, as well as future generations.

There is still time to ensure the stage two reforms will truly have an impact for nature. EDO is of the view that urgent action is needed to protect nature now by strengthening the two new institutions so they can effectively undertake their functions, and also by implementing simple, targeted amendments to prevent further harm to Australia's environment and climate.

EDO urges the Committee to consider amendments to the Nature Positive Bills to make sure the stage two reforms truly deliver what's needed to protect nature, the climate and community rights.

Summary of Recommendations

Environment Protection Australia - Nature Positive (Environment Protection Australia) Bill 2024 (EPA Bill)

Recommendation 1: The EPA should be governed by a CEO appointed by, and reporting to, an independent statutory skills-based Governance Board. Amendments for achieving this were proposed in the House of Representatives - see **Attachment 1**.

Recommendation 2: To compliment the Governance Board model (Recommendation 1) (or in the alternative) a Joint Parliamentary Committee should be established to consider proposed appointments to the office of the CEO of EPA, report to Parliament on the performance of the CEO's functions, and review Commonwealth environmental laws in relation to EPA functions. Amendments to establish a Joint Parliamentary Committee on the Environment to undertake these functions were proposed in the House of Representatives – see **Attachment 2**.

Recommendation 3: The EPA should be able to exercise its functions free from political influence. The ability of the Minister to issue a Statement of Expectations to the EPA should be constrained by the EPA's functions and duties which take precedent, for example as proposed in amendments tabled in the House of Representatives – see **Attachment 3**. (See also Recommendations 4-5).

Recommendation 4: The EPA Bill should establish clear **objectives** for the EPA in the exercise of relevant functions, powers or duties. The objectives of the EPA should be to:

- enhance the protection and restoration of Australia's environment;
- prevent the degradation of the environment and reduce risks to human health;
- deliver accountable, efficient, outcome-focused and transparent regulatory decision-making;
- deliver proportionate and effective risk-based compliance and enforcement responses, using data and information, including providing assurance that environmental outcomes are being met;
- promote public trust in environmental decision-making through publication of information, transparency of decisions and providing opportunities for the community, including First Nations people, to inform decision-making processes; and
- facilitate the achievement of Australia's greenhouse gas emissions reduction targets.

The EPA (and CEO) should be required to exercise powers and perform duties and functions under the Act or any other Act for the purposes of achieving the objectives set out above, to the extent that it is practicable to do so having regard to the nature of the power being exercised or the duty or function being performed.

Recommendation 5: The EPA Bill should set out clear, legislated **duties** for the EPA, such as those proposed in amendments tabled in the House of Representatives – see **Attachment 5**.

This should include duties 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;
- promote environmental justice;
- act consistently with the human right to a healthy environment for all;
- ensure substantive public participation in environmental decision-making;

- implement legislation and undertake functions in accordance with principles of ecologically sustainable development; and,
- take action to prevent and mitigate greenhouse gas pollution and take all actions necessary to reduce the impacts of climate change.

Recommendation 6: The EPA Bill should include a clear legislative provision for the EPA to act consistently with relevant National Environmental Standards, as in force from time to time.

Recommendation 7: The EPA Bill should include provisions that explicitly require:

- publication within reasonable timeframes of relevant information, including decisions and specific documents following the EPA’s receipt or finalising of them;
- minimum information publication requirements stipulated in the EPA Bill, rather than in subordinate rules;
- a legislative presumption in favour of publication of information and decisions, with very limited and strictly defined exceptions; and
- a requirement that any decision made by the Minister relevant to the EPA is also a ‘registrable decision’ and must be published on the register.

Recommendation 8: The provisions in the EPA Bill relating to the establishment and functions of the Advisory Group should be strengthened. As provided for in amendments tabled in the House of Representatives – see **Attachment 6** – this includes measures to:

- establish clear terms of reference for the Advisory Group;
- include conflict of interest rules;
- ensure advice provided to the EPA is made public and published rapidly after provision (subject to narrow exceptions); and
- require the CEO to state when they have received advice from the Advisory Group on a matter, and if they have deviated from advice from the Body in any decisions.

Recommendation 9: Establish third party civil enforcement provision in both the EPA Bill and the various environmental legislation that the EPA is tasked with administering, including the EPBC Act. In relation to the EPBC Act, amendments were moved in the House of Representatives which do so – see **Attachment 7**.

Environment Information Australia - Nature Positive (Environment Information Australia) Bill 2024 (EIA Bill)

Recommendation 10: Strengthen the definition of nature positive in line with international agreement by:

- defining nature positive to recognise the need to increase in the natural diversity, abundance, resilience and integrity (meaning the completeness, functionality and health) of species, populations and ecosystems with a goal of halting and reversing nature loss by 2030 and achieving full recovery by 2050, measured against a 2020 baseline; and
- removing provisions in the Bill requiring the Head of EIA to establish a baseline.

Recommendation 11: Give EIA functions to capture and manage data that will enable nature protection and recovery, including:

- reporting on recovery objectives and conservation plans (see **Attachment 9**);

- enabling better understanding of climate change impacts on MNES, including through tracking climate impacts on MNES, including the contribution of new actions and their emissions to climate impacts; and
- forestry reporting (State of the Forests) to track progress under the National Forest Policy Statement and fulfil reporting commitments of the Regional Forest Agreement legislation (and the Agreements themselves).

Recommendation 12: Provide EIA the ability to effectively obtain and manage data, including through:

- mandatory data sharing provisions for use in appropriate circumstances;
- limiting provisions that unduly restrict the publication of data; and
- a legislative requirement for EIA to act consistently with relevant National Environmental Standards, as in force from time to time.

Recommendation 13: Enable a First Nations Participation and Engagement Standard to be established which can deal with how First Nations knowledge and information is shared and used (see Recommendation 14 which recommends a broad standard making power be introduced as part of stage two reforms). The First Nations Standard must be designed by First Nations people for First Nations people.

Related amendments to support EPA and EIA - Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 (Environment Law Amendments Bill)

Recommendation 14: The instrument of delegation made by the Minister conferring functions on the EPA should be required to be made publicly available. Amendments for achieving this were proposed in the House of Representatives – see **Attachment 4**.

Recommendation 15: Provide the Minister with the power to create National Environmental Standards, safeguarded by a non-regression clause that means future standards cannot weaken existing standards.

Recommendation 16: The Environment Law Amendments Bill should be amended to:

- Add a standalone climate MNES (climate trigger) to ensure actions with significant climate impacts are assessed under national nature laws. For example, as set out in the amendment tabled in the House of Representatives – see **Attachment 10** for an example model.
- Ensure that proponents must disclose all direct and downstream emissions from proposed actions, and that climate change is a mandatory consideration in decision-making
- Amend objects and functions to include a requirement to contribute to meeting Australia’s domestic and international climate commitments, and protecting the environment from climate change
- Properly link the Safeguard Mechanism and Climate Change Act to the EPBC Act, so that actions cannot not be approved if they likely to breach emissions targets and thresholds.

Amend the definition of ‘impact’ to ensure it includes both climate and cumulative impacts.

Recommendation 17: Strengthen existing provisions to ensure that unacceptable impacts are identified upfront and not permitted to proceed, by:

- Inserting a definition of ‘unacceptable impacts’ into the EPBC Act. A suggested definition is provided at **Attachment 11**.
- Clarifying that nothing in the Act prevents the Minister from giving further consideration as to whether a project has unacceptable impacts when making a decision.
- Inserting provisions into the EPBC Act preventing the Minister from approving projects that will have or be likely to have unacceptable impacts on relevant matters of national environmental significance once a full assessment has been completed (e.g. at sections 137 – 140).

Recommendation 18: Amend the EPBC Act to put restrictions on the use of biodiversity offsets, including:

- A new provision which imposes restrictions and requirements on any conditions that relate to environmental offsets.
- Add a new provision explicitly requiring the Minister to apply the mitigation hierarchy when considering whether or not to approve the taking of an action, and what conditions to attach to an approval.

Recommendation 19: Amend the EPA Bill to explicitly require the CEO to establish and maintain a register of offsets and a register of post-approval documents. One option for establishing a register of offsets was tabled in the House of Representatives – see **Attachment 3**.

Recommendation 20: Legislate to ensure destructive deforestation and land clearing is properly assessed under our nature laws, including by removing loopholes and exemptions. One option for achieving this was tabled in the House of Representatives – see **Attachment 7**.

Recommendation 21: Implement third party merits review on decisions on referral, assessment, and approval of controlled actions.

Recommendation 22: Provide a mechanism for the community to formally request that a project be referred under the EPBC Act – see **Attachment 12**.

Recommendation 23: Strengthening civil enforcement, including through open standing and through civil penalties.

Summary of Attachments

Attachment 1: Amendments tabled by Sophie Scamps MP in the House of Representatives to establish a Governance Board for EPA. Relevant to **recommendation 1**.

Attachment 2: Amendments tabled by Zoe Daniel MP in the House of Representatives to establish a Joint Parliamentary Committee with oversight of EPA. Relevant to **recommendation 2**.

Attachment 3: Amendments tabled by Zali Steggall MP in the House of Representatives to establish objects and duties for EPA, constrain the Statement of Expectations, and provide for a register of offsets maintained by EPA. Relevant to **recommendation 3**.

Attachment 4: Amendments tabled by Allegra Spender MP in the House of Representatives to ensure the instrument of delegation relating to EPBC Act approval decisions is made public. Relevant to **recommendation 14**.

Attachment 5: Amendments tabled by Andrew Wilkie MP in the House of Representatives to enact an EPA with an alternative governance model, and including a Joint Parliamentary Committee and EPA duties. Relevant to **recommendations 2, 5**.

Attachment 6: Amendments tabled by Kylea Tink MP in the House of Representatives to ensure EPA publishes certain information and decisions on the register of registerable decisions, develops a Charter of Consultation, provides reasonable opportunity for public comment, and publishes information about the advisory group. Relevant to **recommendations 7, 8**.

Attachment 7: Amendments tabled by Sophie Scamps MP in the House of Representatives to remove the exemption for RFAs and continuous use under the EPBC Act, compel referral and assessment of proposed clearing of native vegetation in certain circumstances, and expand the availability of civil penalty orders. Relevant to **recommendation 9, 20**.

Attachment 8: Amendments tabled by Zoe Daniel MP in the House of Representatives to define nature positive. Relevant to **recommendation 10**.

Attachment 9: Amendments developed by EDO to ensure EIA has additional reporting functions relating to threatened species and ecological community recovery. Relevant to **recommendation 11**.

Attachment 10: Amendments tabled by Andrew Wilkie MP in the House of Representatives to create a new MNES – protection of the environment from significant emissions (climate trigger). Relevant to **recommendation 16**.

Attachment 11: Amendments tabled by Zali Steggall MP in the House of Representatives to define unacceptable impacts. Relevant to **recommendation 17**.

Attachment 12: Amendments developed by EDO to legislate a process for third parties to request the Minister to seek a referral of a project. Relevant to **recommendation 22**.

Introduction

On 27 June 2024 the Senate referred the following Bills to the Environment and Communications Legislation Committee for report by 8 August 2024:

- Nature Positive (Environment Protection Australia) Bill 2024 (**EPA Bill**),
- Nature Positive (Environment Information Australia) Bill 2024 (**EIA Bill**); and
- Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 (**Environment Law Amendments Bill**)

These Bills constitute the Government's 'stage two' package of nature positive reforms.¹ Stage two aims to deliver two key elements of the Government's [Nature Positive Plan](#),² namely the establishment of:

- a new Federal Environment Protection Australia (**EPA**); and
- a new national Environment Information Australia (**EIA**).

Establishing an effective, independent and fit-for-purpose Federal EPA would be a significant reform that would see the country's first national environmental regulator established; and EIA is an important and useful new institution that will have a critical role in measuring our progress towards 'nature positive'.

However, on their own, the Bills fall far short of the comprehensive legislative reform we urgently need to see passing this Parliament to turn around Australia's extinction trajectory, conserve our World and national heritage areas and protect nationally significant landscapes. Without broader reforms, these newly established institutions will only be responsible for enforcement and monitoring of our environment in line with fundamentally broken nature laws.

With almost all of the nation's environmental indicators showing declines, the impacts of the climate crisis being felt across the country, and communities losing trust in environmental decision-making processes, we have a critical opportunity to implement the strongest laws possible to turn this decline around and create a nature positive Australia.³

To that end, our submission addresses the following key issues:

- 1. Establishing a strong and effective EPA - key amendments to the EPA Bill**
- 2. Establishing a fit-for-purpose EIA - key amendments to the EIA Bill**
- 3. Delivering urgent and timely amendments to support the EPA and EIA – key amendments to the Environment Law Amendments Bill**
- 4. The importance of delivering comprehensive reform in stage three.**

¹ On 16 April 2024, Environment Minister Tanya Plibersek announced that rather than introducing a full package of legislation implementing its Nature Positive Plan, the Federal Government will implement reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) in stages. The current package of Bills (stage two) aims to establish Environment Protection Australia and Environment Information Australia. Broader reforms, including the introduction of National Environmental Standards, improvements to conservation planning, and changes to assessment and approval pathways, have been delayed to a later stage (stage three). Earlier reforms (stage 1) established the Nature Repair Market and expanded the 'water trigger' under the EPBC Act.

² <https://www.dcceew.gov.au/environment/epbc/publications/nature-positive-plan>

³ See EDO's legal updates on the reform process so far, [Urgency and ambition more important than ever for national nature law reform \(July 2023\)](#), [National environment law reform at last? Ambitious reform road ahead... \(December 2022\)](#).

EDO urges the Committee to consider amendments to the Nature Positive Bills to make sure the stage two reforms truly deliver what's needed to protect nature, the climate and community rights. For many of our at-risk species and ecosystems, time is running out – as many as 144 new animals, plants, and ecological communities were added to our national threatened species list last year alone,⁴ while climate impacts continue to devastate the places the EPBC Act is intended to protect.⁵ EDO is of the view that urgent action is needed to protect nature now, both by strengthening the two new institutions so they can effectively undertake their functions, but also by implementing simple, targeted amendments to prevent further harm to Australia's environment and climate.

Key Issues

1. Establishing a strong and effective EPA - key amendments to the EPA Bill

The primary object of the EPA Bill is to establish a national EPA with environmental regulatory functions. The new EPA will be responsible for enforcement and compliance of various national environmental laws,⁶ and may, under delegation, undertake approval and assessment functions under the existing EPBC Act (if the Minister chooses to delegate those functions⁷). The EPA will initially be established inside the Environment Department, before it becomes a stand-alone statutory body after its establishment on commencement of the EPA Bill (currently slated for 1 July 2025).

To be effective, and trusted by the community to make environmental decisions, the EPA must be set up to be independent, have clear statutory requirements relating to environmental protection, be staffed by experts, and be fully funded to do its job properly. This means the new EPA should have an independent governance structure (including a Governance Board that elects the CEO), a clear mandate and duties relating to the protection of the environment, and strict rules preventing political influence. The framework for establishing the EPA must require it to be transparent in its operation, including that decisions and information are made publicly available (subject to narrow limits). Improved compliance and enforcement powers are welcome to prevent and remedy breaches of the EPBC Act – but this should be backed in by broad third-party enforcement provisions which 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.

⁴ [The Guardian, More Australian wildlife added to threatened species list in 2023 than ever before, conservationists say \(22 January 2024\).](#)

⁵ The Guardian, ['Most of it was dead': scientists discover one of Great Barrier Reef's worst coral bleaching events](#) (26 June 2024).

⁶ These include:

- *Environment Protection (Sea Dumping) Act 1981*
- *Hazardous Waste (Regulation of Exports and Imports) Act 1989*
- *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995*
- *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*
- *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995*
- *Product Emissions Standards Act 2017*
- *Recycling and Waste Reduction Act 2020*
- *Underwater Cultural Heritage Act 2018*

⁷ The Nature Positive Plan envisages that assessment and approval powers will be vested directly in the EPA and this is expected to happen as part of stage three reforms. For now, stage two establishes new powers of delegation for the Minister to delegate functions to the EPA.

Below we set out recommendations for strengthening the EPA Bill to ensure the EPA can be a strong, independent and effective ‘cop on the beat’.

The EPA should be established to be truly independent.

To be effective, and trusted by the community to administer and enforce national environmental laws, the EPA must be set up to be independent, staffed by experts, and fully funded to do its job properly. Key elements must include:

- **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 Governance Board which would appoint a CEO in accordance with legislated skills criteria. The CEO would lead the EPA and make decisions, but report to the Governing Board. Direct appointment of a CEO on advice from the Minister, as currently proposed (see Part 5, Division 2 of the EPA Bill), risks politicisation and therefore diminishes public trust in the independent regulator. 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, and through selection by an independent panel. First Nations representation on the Board must be required.
- **Joint parliamentary committee:** A complimentary measure which would add further oversight and accountability for EPA would be the establishment of a Joint Standing Parliamentary Committee, which mirrors Committees responsible for oversight of other federal regulators.⁸ This Committee would not be responsible for setting EPA strategy (as would a Governance Board), but instead play a role in approving the appointment of the CEO of EPA; reviewing and reporting on EPA functions to the Parliament; and assessing the scope of EPA functions including possible expansion to other areas of national environmental law. If this measure is adopted in isolation from the Board proposal above, the legislation should require that the CEO have substantial experience or knowledge, and significant standing, in the specified fields, and strong conflict of interest rules must apply.
- **Statement of Expectations:** It is proposed that the Minister will be able to issue a Statement of Expectations for the EPA, which will be published and responded to by the CEO (see Part 3, Division 2 of the EPA Bill). In line with our Recommendations 4-5 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.

Recommendation 1: The EPA should be governed by a CEO appointed by, and reporting to, an independent statutory skills-based Governance Board. Amendments for achieving this were proposed in the House of Representatives - see **Attachment 1**.

⁸ See e.g., the Parliamentary Joint Committee on Corporations and Financial Services which oversee ASIC; and the Joint Committee of Public Accounts and Audit which considers functions of the Auditor-General.

Recommendation 2: To compliment the Governance Board model (Recommendation 1) (or in the alternative) a Joint Parliamentary Committee should be established to consider proposed appointments to the office of the CEO of EPA, report to Parliament on the performance of the CEO's functions, and review Commonwealth environmental laws in relation to EPA functions. Amendments to establish a Joint Parliamentary Committee on the Environment to undertake these functions were proposed in the House of Representatives – see **Attachment 2**.

Recommendation 3: The EPA should be able to exercise its functions free from political influence. The ability of the Minister to issue a Statement of Expectations to the EPA should be constrained by the EPA's functions and duties which take precedent, for example as proposed in amendments tabled in the House of Representatives – see **Attachment 3**. (See also Recommendations 4-5).

For completeness, we note that an alternative proposal for establishing the EPA was also moved in the House of Representatives that would see the EPA established with a CEO and Deputy CEOs appointed by the Governor-General on approval of a legislated Joint Parliamentary Committee – see **Attachment 5**. This proposal also proposes clear duties for the EPA – see further the discussion on duties and functions of the EPA below.

The EPA should have a clear and well-defined mandate, including direct legislative duties and functions.

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 functions, coupled with civil enforcement provisions (discussed below) to hold the EPA accountable to those duties and functions, are important integrity and accountability measures and promote the rule of law. This should include:

- **Clear purpose:** 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. The proposed object in the EPA Bill is not sufficient, although aiming for accountable, transparent and outcome-focused decision-making is a good start. Clear and substantive objectives will assist in guiding the performance of EPA functions, ensure a strong regulatory focus from the outset, and protect against weakening by future governments. Such objectives, linked to the performance of functions, are a common feature of legislation establishing environmental protection authorities across Australia.⁹
- **Defined duties:** 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.¹⁰ 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

⁹ See, for example: *Protection of the Environment Administration Act 1991* (NSW), ss 3, 6-9; *Environment Protection Act 2017* (Vic), ss 1, 357-359; *Environmental Protection Act 1986* (WA), ss 4A, 15-17; *Northern Territory Environment Protection Authority Act 2012* (NT), ss 7, 8; *Environment Protection Act 1993* (SA), ss 10, 13, 14; *Environmental Management and Pollution Control Act 1994* (Tas), s 14, Sch 1.

¹⁰ 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/>.

environmental decision-making; and implement legislation in accordance with principles of ecologically sustainable development.

- **Requirement to act consistently with National Environmental Standards:** The EPA will have responsibility for compliance and enforcement under the EPBC Act, as well as permitting, and if delegated assessment and approval, decisions. As proposed under the Nature Positive Plan, the EPA's functions should be carried out consistent with National Environmental Standards, including a National Environmental Standard on Compliance and Enforcement, as well as the crucially important First Nations Engagement and Participation in Decision-making Standard (as noted below, see **Recommendation 13**). Therefore, as outlined later in this submission, it is important that stage two reforms establish the power for the Minister to create National Environmental Standards.

Recommendation 4: The EPA Bill should establish clear **objectives** for the EPA in the exercise of relevant functions, powers or duties. The objectives of the EPA should be to:

- enhance the protection and restoration of Australia's environment;
- prevent the degradation of the environment and reduce risks to human health ;
- deliver accountable, efficient, outcome-focused and transparent regulatory decision-making;
- deliver proportionate and effective risk-based compliance and enforcement responses, using data and information, including providing assurance that environmental outcomes are being met;
- promote public trust in environmental decision-making through publication of information, transparency of decisions and providing opportunities for the community, including First Nations people, to inform decision-making processes; and
- facilitate the achievement of Australia's greenhouse gas emissions reduction targets.

The EPA (and CEO) should be required to exercise powers and perform duties and functions under the Act or any other Act for the purposes of achieving the objectives set out above, to the extent that it is practicable to do so having regard to the nature of the power being exercised or the duty or function being performed.¹¹

Recommendation 5: The EPA Bill should set out clear, legislated **duties** for the EPA, such as those proposed in amendments tabled in the House of Representatives – see **Attachment 5**. This should include duties 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;
- promote environmental justice;
- act consistently with the human right to a healthy environment for all;
- ensure substantive public participation in environmental decision-making;
- implement legislation and undertake functions in accordance with principles of ecologically sustainable development; and,
- take action to prevent and mitigate greenhouse gas pollution and take all actions necessary to reduce the impacts of climate change.

¹¹ See, for example, section 357 of the Victorian *Environment Protection Act 2017*. Note that state and territory EPAs often have substantive objects clauses similar to those proposed, and are guided by those objects as they exercise functions under numerous different Acts and/or regulations.

Recommendation 6: The EPA Bill should include a clear legislative provision for the EPA to act consistently with relevant National Environmental Standards, as in force from time to time.

We note that amendments were proposed in the House of Representatives to enhance the objects of the EPA Bill and set out clear duties for the EPA. See both **Attachment 3** and **Attachment 5**.

The EPA Bill must establish transparent operations and accountability measures to ensure community trust.

The transparency of the EPA's operations is crucially important in building public confidence in the integrity of its operations. Given the deficit of community trust in environmental decision-making,¹² and concern about how effectively our environmental laws are being enforced, the following changes should be made to the EPA Bill:

- **Publication of and access to information:** 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 'registrable decision' and must be published on the register. Minimum information publication requirements should be stipulated in the EPA legislation, rather than in subordinate rules.
- **Transparency of Advisory Group functions:** The provision of an Advisory Group 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.

Additionally, a crucially important accountability mechanism for the new EPA is the inclusion in the EPA Bill of broad **third-party enforcement provisions** in relation to the EPA enabling legislation and the legislation the EPA will administer. Such provisions would 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 EPA 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.

Recommendation 7: The EPA Bill should include provisions that explicitly require:

- publication within reasonable timeframes of relevant information, including decisions and specific documents following the EPA's receipt or finalising of them;

¹² See, Graeme Samuel, Independent Review of the EPBC Act (2020), 9. 'The community and industry do not trust the EPBC Act and there is merit in their concerns: The community and industry do not trust the EPBC Act and the regulatory system that underpins its implementation. A dominant theme in the 30,000 plus contributions received by the Review is that many in the community do not trust the EPBC Act to deliver for the environment. Limited access to information about decisions and the lack of opportunity to substantively engage in decision-making under the Act further erodes trust.'

- minimum information publication requirements stipulated in the EPA Bill, rather than in subordinate rules;
- a legislative presumption in favour of publication of information and decisions, with very limited and strictly defined exceptions; and
- a requirement that any decision made by the Minister relevant to the EPA is also a ‘registrable decision’ and must be published on the register.

Recommendation 8: The provisions in the EPA Bill relating to the establishment and functions of the Advisory Group should be strengthened. As provided for in amendments tabled in the House of Representatives – see **Attachment 6** – this includes measures to:

- establish clear terms of reference for the Advisory Group;
- include conflict of interest rules;
- ensure advice provided to the EPA is made public and published rapidly after provision (subject to narrow exceptions); and
- require the CEO to state when they have received advice from the Advisory Group on a matter, and if they have deviated from advice from the Body in any decisions.

Recommendation 9: Establish third party civil enforcement provision in both the EPA Bill and the various environmental legislation that the EPA is tasked with administering, including the EPBC Act. In relation to the EPBC Act, amendments were moved in the House of Representatives which do so – see **Attachment 7**.

For completeness, we note amendments tabled in the House of Representatives (see **Attachment 6**) proposed to:

- enhance the objects of the EPA Act with respect to transparent environmental regulatory decision making;
- require the CEO to make a Charter of Consultation for the CEO’s decision-making when performing the CEO’s functions;
- provide greater clarity around ‘registrable decisions’; and
- provide greater clarity around the disclosure of information and reasons for decisions.

These types of amendments would assist in improving the EPA Bill by establishing transparency and accountability measures to improve decision-making and build community trust.

2. Establishing a fit-for-purpose EIA - key amendments to the EIA Bill

The EIA Bill will establish a new statutory Head to lead an entity known as EIA, to be created within the Environment Department. The Head will have responsibility for obtaining and managing national environmental data and reporting against Australia’s environmental policies and programs.

It is proposed that the Head will have responsibility for recording achievement against, the goal of ‘nature positive.’ The definition of nature positive, which will be established in the EIA bill, is critically important, and must have a clearly measurable baseline in line with the Global Biodiversity Framework (rather than having that baseline set by the Head, as currently proposed). Increased frequency of State of the Environment reporting will also fall under the EIA’s mandate, and EIA will collect data and build an information base to undertake this reporting. To most effectively support nature protection and restoration, these functions should be transparent, data publicly available, and include reporting on recovery trajectories for threatened species, and

conservation plans. EIA will also handle sensitive data and information, including culturally important data. It's important that relevant National Environmental Standards are created to ensure this is done properly.

The establishment of EIA is a welcome reform which will, for the first time, create a single national source of environmental data and statutory requirements to holistically report on national environmental data. An EIA with clear functions that improves the collection, dissemination and use of environmental data will be critically important for tracking and understanding our changing environment, and is a useful and significant new institution.

Below we set out several recommendations for strengthening the EIA Bill to ensure EIA can be at its most effective and improve outcomes of the Australian environment.

Definition of nature positive must include a clear baseline for measuring progress.

'Nature positive' is an important concept for the whole of the nature positive reforms, including stage three, and will be defined in the EIA legislation. It is crucial this definition is meaningful, both for our international reporting obligations, but also to galvanize policy change, measure progress and identify priorities.

In line with the goals agreed under the Global Biodiversity Framework, the definition of 'nature positive' must recognise the need to increase in the natural diversity, abundance, resilience and integrity (meaning the completeness, functionality and health) of species, populations and ecosystems with a goal of halting and reversing nature loss by 2030 and achieving full recovery by 2050, measured against a 2020 baseline. A measurable and defined baseline is crucially important. Rather than requiring the Head of EIA to establish a baseline, the baseline should be built into the legislative definition of nature positive in this way.

Recommendation 10: Strengthen the definition of nature positive in line with international agreement by:

- defining nature positive to recognise the need to increase in the natural diversity, abundance, resilience and integrity (meaning the completeness, functionality and health) of species, populations and ecosystems with a goal of halting and reversing nature loss by 2030 and achieving full recovery by 2050, measured against a 2020 baseline; and
- removing provisions in the Bill requiring the Head of EIA to establish a baseline.

EDO notes that amendments were tabled in the House of Representatives that sought to amend the EIA Bill to establish a robust definition of nature positive with a 2021 baseline – see **Attachment 8**. While EDO supports these amendments generally, we recommend a 2020 baseline consistent with international agreements, and noting that while the most recent State of the Environment Report is dated 2021 (**SoE 2021**), it mainly uses data that pre-dates that (and so could be used to implement the 2020 baseline).

EIA must be required to capture and manage data that will enable nature protection and recovery.

The EIA should be tasked with capturing and managing data that will enable and support nature protection and recovery, including:

- **Reporting on recovery objectives and conservation plans:** While EIA will have reporting functions relating to Australia’s environment, including through the State of the Environment report and against environmental goals more generally, more specific information about threatened species should also be tracked. A notable gap in reporting obligations is an explicit requirement to monitor and evaluate the development and implementation of conservation planning documents (referring collectively to Recovery Plans, Conservation Advices, Threat Abatement Plans and Wildlife Conservation Plans). EIA should have additional functions relating to collection of data and reporting in relation to these conservation planning documents, including on threatened species recovery trajectories and progress against recovery actions. These additional functions will ensure EIA data is meaningful, granular, and can be used on the ground to make a difference to the species and ecosystems the EPBC Act aims to protect and restore. Reporting on these functions should be required, including through two-yearly reports to Parliament. We outline amendments that could achieve this in **Attachment 9**.
- **Enabling better understanding of climate change impacts on MNES:** Climate change is the biggest threat to nature, and impacts all aspects of our environment the EPBC Act aims to protect. There is currently no specific requirement for EIA to capture relevant data about climate change and EPBC Act approvals, or to collate and analyse data relating to climate change impacts on the matters of national environmental significance (**MNES**)¹³. EIA should have a specific role in understanding how climate change is impacting our environment, and how EPBC Act decisions have a material effect on our climate. EIA should collect information on how climate change is impacting on MNES, such as the contribution of new approvals under the EPBC Act to climate impacts, including through the direct and downstream emissions projections from new actions.
- **State of the Forest reporting:** The State of the Forests Report is an important source of information about Australia’s forests, and is used both domestically and for international reporting.¹⁴ Published every five years, it is used to track progress under the National Forest Policy Statement and fulfil reporting commitments of the Regional Forest Agreement (**RFA**) legislation (and the Agreements themselves). Given RFAs will eventually be brought under the national environmental law through the application of National Environmental Standards to RFA areas, it’s important the main database for EPBC Act information and approvals takes account of this information. EIA should have a role in collating forests data and publishing the State of the Forests Report. It should be required to do so more frequently than the current five yearly requirement, given the at-risk health of our native forests. In conjunction with State of the Forest reporting, EIA should monitor and report on woody vegetation extent and changes to that extent due to clearing and regrowth (similar to and drawing on the Statewide Landcover and Tree Study (SLATS) in Queensland and New South Wales).

¹³ Matters of national environmental significance include:

- world heritage areas
- national heritage places
- wetlands of international importance (listed under the Ramsar Convention)
- listed threatened species and ecological communities
- listed migratory species (protected under international agreements)
- Commonwealth marine areas
- Great Barrier Reef Marine Park
- nuclear actions (including uranium mines)
- water resources (that relate to unconventional gas development and large coal mining development).

¹⁴ <https://www.agriculture.gov.au/abares/forestsaustralia/sofr>

Recommendation 11: Give EIA functions to capture and manage data that will enable nature protection and recovery, including:

- reporting on recovery objectives and conservation plans (see **Attachment 9**);
- enabling better understanding of climate change impacts on MNES, including through tracking climate impacts on MNES, including the contribution of new actions and their emissions to climate impacts; and,
- forestry reporting (State of the Forests) to track progress under the National Forest Policy Statement and fulfil reporting commitments of the Regional Forest Agreement legislation (and the Agreements themselves).

The EIA Bill must establish clear and effective processes for data collection and handling.

The EIA Bill should establish clear and robust data handling processes to ensure EIA is able to effectively obtain and manage data and is required to make data publicly accessible. For example:

- ***EIA must be able to obtain and use relevant data, including through mandatory data sharing provisions:*** In order to do its job effectively, EIA must be able to obtain and use relevant data, including data collected and owned by others. While access to data may be able to be negotiated by EIA, it would be prudent for EIA to have legislative powers to compel access to data, in circumstances where this is necessary and justifiable. For example, there should be a legal requirement for proponents to provide to EIA and waive copyright on any environmental data submitted as part of an application, or collected to inform an application that is submitted, thereby allowing the EIA to incorporate that data into its datasets. There should also be similar provisions that would provide for the Commonwealth to compel states and territories to provide relevant data in order for EIA to carry out its functions.
- ***Information held by EIA should be publicly available:*** In order to promote transparency, support community engagement and encourage improved decision-making, information held by EIA should be publicly accessible and in a form that is easy to understand and use. We note that draft National Environmental Standards propose to restrict the publication of sensitive data, including commercial-in-confidence data. In our experience, the concept of commercial-in-confidence has been misused to withhold information that is highly relevant to informing public engagement in decisions. Any provisions aimed at restricting the publication of data must be limited.
- ***EIA functions, including data and information handling practices, must be consistent with relevant National Environmental Standards:*** EIA will be responsible for managing data from a myriad of different sources, including ‘sensitive data and information’. As proposed under the Nature Positive Plan, how EIA deals with data must be consistent with the National Environmental Standard on Data and Information. It is therefore important that stage two reforms establish the power for the Minister to create National Environmental Standards. This will enable an EIA specific standard to be developed in relation to its data and information assessment activities, and corresponding amendments to the EIA legislation must ensure that all EIA functions must be exercised consistent with relevant National Environmental Standards.

Recommendation 12: Provide EIA the ability to effectively obtain and manage data, including through:

- mandatory data sharing provisions for use in appropriate circumstances;

- limiting provisions that unduly restrict the publication of data; and
- a legislative requirement for EIA to act consistently with relevant National Environmental Standards, as in force from time to time.

The First Nations Participation and Engagement Standard, in conjunction with the Data and Information Standard, must deal with how First Nations knowledge and information is shared and used. EIA will need to deal with sensitive data and information, in line with the national Data and Information Standard. At present, it is not clear how culturally important or sensitive data will be managed by EIA as it relates to First Nations.

It is integral that any Indigenous Knowledge provided by First Nations peoples is respected and acknowledged as the intellectual property of those knowledge holders. Indigenous Knowledge includes both Traditional Knowledge and Traditional Cultural Expressions.¹⁵ Further, all data that is recorded as part of an assessment and approval (or other process) under the EPBC Act must remain the property of First Nations people. First Nations people must retain ownership of their Traditional Knowledge and Traditional Cultural Expressions and must have the right to control how their Indigenous Knowledge is collected, curated, integrated, analysed, used, shared and published, in accordance with Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples*. As such, EDO supports the development and implementation of the First Nations Engagement and Participation in Decision-making Standard (**First Nations Standard**), alongside the Data and Information Standard, in stage two, to guide the management of sensitive data, including Indigenous Knowledge. The First Nations Standard must be designed by First Nations people for First Nations people, and should be created as a priority.

Recommendation 13: Enable a First Nations Participation and Engagement Standard to be established which can deal with how First Nations knowledge and information is shared and used (see Recommendation 14 which recommends a broad standard making power be introduced as part of stage two reforms). The First Nations Standard must be designed by First Nations people for First Nations people.

3. Delivering urgent and timely amendments to support the EPA and EIA – key amendments to the Environment Law Amendments Bill

The Environment Law Amendments Bill contains some regulatory changes, announced as part of the stage two reforms, including new compliance mechanisms and stop-the-clock provisions. The Environment Law Amendments Bill also makes consequential amendments to various Commonwealth environmental legislation needed to support the creation of the EIA and EPA, including provisions relating to delegation and decision making.

However, the Environment Law Amendments Bill fails to make other key amendments that would address crucial gaps in the existing EPBC Act, support the effective functioning of the EPA and EIA, and set the framework for ‘stage three’ amendments, including, for example:

- **Powers to make national environmental standards**
- **Legal provisions to protect our environment from climate change**
- **Urgent safeguards to address Australia’s extinction crisis**

¹⁵ See Terri Janke and Company, [Indigenous Knowledge: Issues for protection and management](#) (2017).

- **Mechanisms for restoring public trust and holding decision-makers and regulators to account**

Each of these matters is discussed further below.

Compliance mechanisms

The Environment Law Amendments Bill introduces several new mechanisms aimed at improving compliance and enforcement:

- New environment protection orders that allow the Minister to stop work or restrict activities that pose an imminent significant environmental risks and harm in urgent circumstances.
- An additional audit mechanism called a ‘compliance audit’ which can be initiated by the Minister without notice to allow monitoring of compliance with the legislation.
- Increased penalties for breaches of the EPBC Act, in line with comparable schemes in Commonwealth legislation targeting financial crime.

In general, EDO supports these new compliance tools, but reiterates the need for additional amendments to strengthen the EPA and improve transparency and accountability as discussed throughout this submission.

Stop-the-clock provisions

The Environment Law Amendments Bill also introduces new ‘stop the clock’ provisions, which enable proponents to have a say on whether requests for further information from the regulator to a proponent will pause the timeframe for approvals, or keep the clock running.

We are concerned that, where proponents elect to not ‘stop-the-clock’ on a request for information, these provisions will put inappropriate time pressure on decision-makers to decide whether to approve the taking of an action without sufficient information on the impacts of that action on MNES. This risks undermining the environmental impact assessment process, which is designed to identify and assess environmental impacts of actions. If decision-makers are requesting additional information, this is a clear indication that there are gaps or inadequacies in the environmental assessment provided. There are likely to be questions raised about the integrity of any subsequent approval decision where requested information has not been provided.

Delegations and decision making

The Environment Law Amendments Bill makes consequential amendments to Commonwealth environmental legislation to give the newly established EPA regulatory functions under various acts including:

- *Environment Protection (Sea Dumping) Act 1981* (**Sea Dumping Act**),
- *Hazardous Waste (Regulation of Exports and Imports) Act 1989*,
- *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995*,
- *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*,
- *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995*,
- *Product Emissions Standards Act 2017*,
- *Recycling and Waste Reduction Act 2020*, and

- *Underwater Cultural Heritage Act 2018.*

EPA will be vested directly with decision-making and regulatory powers for some functions under these Acts, including licencing for wildlife trade permits under the EPBC Act, regulatory functions under the *Underwater Cultural Heritage Act 2018*, and permitting under the *Sea Dumping Act*. The range of functions for which EPA will be responsible demonstrates the need for a strong, robust governance structure which ensures independence, as well as substantive objects and duties to guide performance, as set out in **Recommendations 1 – 9**.

In particular, under the *Sea Dumping Act*, EPA will be vested with the power to grant permits to allow offshore carbon capture and storage, as well as the export of Australian carbon for offshore storage and sequestration (once the export amendments come into effect – see the Environment Protection (Sea Dumping) Amendment (Using New Technologies to Fight Climate Change) Bill 2023). In making these decisions, it is critical that EPA is well-equipped to make decisions in the public interest, bearing in mind crucial concepts of environmental law and Australia’s international legal obligations.

In relation to EPBC Act assessment and approvals, with good resourcing and an independent structure that ensures expertise, EDO is of the view the EPA will be best equipped to make decisions about the environment. However, at this stage, approvals and assessments will not be vested directly in the EPA. Instead those powers will be delegated to the EPA by the Minister under proposed new section 515AAA of the EPBC Act. Similar to the ‘call-in power’ proposed for stage three, this arrangement means the Minister of the day may still be able to take decisions out of the EPA’s expert hands. The instrument of delegation should be made public when available, and the circumstances in which the Environment Minister could take-over decision-making functions must be clearly defined, and limited to specific circumstances, in the legislation.

Recommendation 14: The instrument of delegation made by the Minister conferring functions on the EPA should be required to be made publicly available. Amendments for achieving this were proposed in the House of Representatives – see **Attachment 4**.

Powers to make national environmental standards

Under the Nature Positive Plan, the National Environmental Standards are intended to be legally-binding, outcomes-based instruments that will guide decision-making in the new regime. As proposed by Professor Samuel in the Independent Review of the EPBC Act, the Standards are important for supporting the new EPA to make better environmental decisions. This is a significant departure from the current, highly discretionary and often arbitrary, decision-making system under the EPBC Act. To set the foundation for stage three, the legislative architecture should be set in place to enable the Minister to create National Environmental Standards as envisioned. This will support both EPA and EIA to effectively fulfil their roles from the outset.

As noted above, EIA will be responsible for management of environmental and cultural data from different sources, including First Nations communities, and at a minimum, the Data and Information Standard, as well as the First Nations Participation and Engagement Standard, should be in place to give certainty to how this will be done from the outset. These must be followed by the full suite of National Environmental Standards, particularly the Standard for Matters of National Environmental Significance, which is intended to deliver nature positive outcomes for all

aspects of the environment our national nature laws intend to protect, and which should guide decision-making by the EPA (and Minister where retained).

Establishing the power for National Environmental Standards to be developed, created, and varied subject to a non-regression clause, should be part of these stage two reforms. Ultimately, the National Environmental Standards will need to be operationalised within the EPBC Act (or proposed stage 3 Nature Positive Bill) to ensure environmental and approval decisions are made consistent with National Environmental Standards.

Recommendation 15: Provide the Minister with the power to create National Environmental Standards, safeguarded by a non-regression clause that means future standards cannot weaken existing standards.

Legal provisions to protect our environment from climate change

Climate change is one of the key threats to the wildlife, landscapes and special places protected under the EPBC Act, yet there are no mechanisms in the Act for the Minister or the newly established EPA to directly consider climate change and climate impacts on nature when making approval decisions. It is nonsensical that our national environmental law does not currently directly address the greatest challenge facing the Australian environment.

To date, over 740 fossil fuel projects have been approved under the EPBC Act, with no requirement for decision-makers to consider how these projects will contribute to devastating climate change impacts, or even if their emissions profiles fit within our legislated emissions targets.¹⁶ With increasingly frequent and more severe climate events and impacts on all aspects of our environment, including all the matters the EPBC Act aims to protect – from the Great Barrier Reef to threatened species like the koala¹⁷ - it is essential that our federal nature laws properly account for climate. In EDO's view, protecting nature from climate change falls squarely within the remit of our national environmental law, and should be a priority of the federal government as it works to modernise and future-proof the 1999 legislation. Comments in recent judgements have made it even clearer that it is the role of the Parliament to ensure our environmental laws are fit-for-purpose in relation to climate change.¹⁸ It is simply impossible to achieve a 'nature positive' Australia without taking climate into account.¹⁹

As such, climate considerations should be built into our environmental laws at every stage. For the EPA, this means 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 (see **recommendations 4-5** above).

¹⁶ See e.g., Climate Council, [Beating Around the Bush: How Australia's National Environment Law Fails Climate and Nature](#) (27 September 2023).

¹⁷ The Guardian, ['Most of it was dead': scientists discover one of Great Barrier Reef's worst coral bleaching events](#)' (26 June 2024), The Guardian, ['Devastating': more than 61,000 koalas among 3 billion animals affected by bushfire crisis](#) (7 December 2020).

¹⁸ Environment Council of Central Queensland Inc v Minister for the Environment and Water [2024] FCAFC 56, [143].

¹⁹ 'The Australian environment faces significant future pressures, including land-use change, pollution, habitat fragmentation and degradation, and invasive species. Climate change will continue to exacerbate these impacts and contribute to ongoing decline.' *Independent Review of the EPBC Act* (October 2020) 41.

In relation to the assessment and approvals process under the EPBC Act, this requires explicit consideration of climate impacts and emissions contributions from new projects. This can be achieved through a ‘climate trigger’ – the creation of a new matter of national environmental significance (**MNES**) which explicitly deals with new projects which will have a significant impact on the climate.²⁰ This would allow decision makers to directly consider new projects on their climate impacts and expected emissions, and reject projects which would have an unacceptable impact on the climate. In EDO’s view, no new fossil fuel projects should be approved under the EPBC Act at all, as they are incompatible with limiting global heating to the internationally agreed temperature limits under the Paris Agreement.

At a minimum, the climate impacts of a proposed action should be disclosed from the outset (in the form of all direct and downstream emissions expected from the action), and must form a mandatory consideration for the decision-maker. Consideration must be given to Australia’s climate targets under the *Climate Change Act 2022*, as well as the emissions limits in the reformed Safeguard Mechanism. It is illogical that no analysis of these legislated carbon budgets currently takes place *before* a new project is approved, even if it is likely to be covered by the Safeguard Mechanism. Climate impact should also be considered in relation to each of the relevant matters of national environmental significance which will be impacted by the action, and the definition of impact should be updated to clearly encompass both climate, and cumulative impacts.

Finally, the nature positive reforms must urgently implement measures to make sure species listings can be updated after catastrophic climate events, like the Black Summer Bushfires.²¹ These changes are urgently needed to prevent further climate-related extinctions, properly incorporate climate adaptation measures, and meet our international emissions obligations – essentially, so that the EPA is administering fit-for-purpose and climate-ready laws.

Recommendation 16: The Environment Law Amendments Bill should be amended to:

- Add a standalone climate MNES (climate trigger) to ensure actions with significant climate impacts are assessed under national nature laws. For example, as set out in the amendment tabled in the House of Representatives – see **Attachment 10** for an example model.
- Ensure that proponents must disclose all direct and downstream emissions from proposed actions, and that climate change is a mandatory consideration in decision-making
- Amend objects and functions to include a requirement to contribute to meeting Australia’s domestic and international climate commitments, and protecting the environment from climate change
- Properly link the Safeguard Mechanism and Climate Change Act to the EPBC Act, so that actions cannot not be approved if they likely to breach emissions targets and thresholds.
- Amend the definition of ‘impact’ to ensure it includes both climate and cumulative impacts.

²⁰ See, [EDO submission to the Inquiry into the Environment Protection and Biodiversity Conservation Amendment \(Climate Trigger\) Bill 2022 \(13 October 2022\)](#).

²¹ See, EDO [Wildlife Can’t Wait](#) Report (November 2022).

Urgent safeguards to address Australia's extinction crisis

Australia is facing an extinction crisis. The Australian State of the Environment Report 2021) confirms that Australia's biodiversity continues to be in decline.²² SoE 2021 reports that the number of threatened species listed under the EPBC Act has risen for almost all taxa over the past 5 years and we can expect further extinctions of Australian species over the next two decades unless current management effort and investment are substantially increased.

Australia has made some key commitments in response to the extinction crisis. Notably it has signed up to the Kunming-Montreal Global biodiversity framework (**GBF**).²³ The GBF sets out 4 goals including that “the integrity, connectivity and resilience of all ecosystems are maintained, enhanced, or restored, substantially increasing the area of natural ecosystems by 2050” and “human induced extinction of known threatened species is halted and, by 2050, extinction rate and risk of all species are reduced tenfold and the abundance of native wild species is increased to healthy and resilient levels”. At a domestic level, the Government's Threatened Species Action Plan: Towards Zero Extinctions includes objectives of putting all priority species on track for improved trajectory, preventing new extinctions of plants and animals, and ensuring at least 30 per cent of Australia's land mass is protected and conserved.

Our national environmental laws must reflect our ambition and commitments to halt extinction and reverse biodiversity decline. The threat is too urgent, and risk to our native species too imminent, to wait any longer. There is an opportunity *now*, with the stage two Bills currently before Parliament, to make some urgently needed changes to the current framework to strengthen protections for threatened wildlife. Changes should include:

- **Unacceptable impacts:** The EPBC Act currently provides the Minister with the ability to notify a proponent that a referred action would have unacceptable impacts on a matter of national environmental significance. This signals upfront to a proponent that a project is likely to be refused. However, the term ‘unacceptable impacts’ is not defined and provisions are underutilised. Including a definition would provide greater clarity to proponents as to what is unacceptable, and set much clearer expectations as to when the Minister (or the EPA when these powers are delegated to the EPA) should be expected to utilise these powers. It would also complement proposed changes to ‘stop-the-clock’ provisions, which are also designed to improve the process for proponents. Proponents will benefit from a clear upfront decision about the feasibility of a project and would retain the ability to seek a review of the Minister's decision. Further, a clear definition would ensure EPA's time and resources are not spent on applications that have clear unacceptable impacts. An option for defining unacceptable impacts was tabled in the House of Representatives – see **Attachment 11**.

As part of broader stage three reforms, it is proposed that the new Nature Positive Bill will set clear obligations on relevant decision-makers to refuse unacceptable impacts on matters of national environmental significance at the assessment and approval stage. This could be achieved now by inserting provisions into the current Act preventing the Minister from approving projects that will have or be likely to have unacceptable impacts on relevant matters of national environmental significance once a full assessment has been completed (e.g. at sections 137 – 140).

²² [Australian State of the Environment Report 2021](#).

²³ <https://www.cbd.int/gbf/>

- **Biodiversity offsets:** In announcing stage two of the Nature Positive reforms, Minister Plibersek stated that results of an offsets audit underscore the need to urgently strengthen enforcement of decisions made under the EPBC Act. We agree. The stage two reforms do this generally, e.g., including through establishment of EPA, but the framework could be strengthened by including specific provisions that restrict the use of offsets in line with best practice, to ensure that when used offsets are able to deliver genuine environmental outcomes. For example, by inserting a new provision in the EPBC Act (e.g., s 134) which imposes restrictions and requirements on any conditions that relate to environmental offsets (including Part 9 and Part 10 approvals). Specifically, this should require that the Minister may only approve a proposal and attach conditions relating to the offsetting of impacts if satisfied that, for example:
 - Offsets are direct ‘like-for-like’ offsets (e.g., koala habitat must be protected if koala habitat is being destroyed);
 - The condition will require an offset to be securely protected before an action can commence (e.g., the project can’t go ahead if no offset is actually found); and,
 - The condition will require an offset to be secured in perpetuity.

The EPA Bill should also be amended to explicitly require the CEO to establish and maintain the following registers:

- A register of offsets, which includes the area of the offset, the relevant species, the offset agreement, and details of the specific project (including conditions relating to offsets) and area it is an offset for (this is important because it guards against proponents trying to use an offset area for a number of projects, which is something we have seen in practice often); and,
- A register of post-approval documents, which includes management plans, strategies, plans, as well as monitoring and compliance reports required under approvals; enforcement actions taken and documents relating to them (including details and documents, such as enforceable undertakings, penalty notices, and remediation orders/determinations).

One option for establishing a register of offsets was tabled in the House of Representatives – see **Attachment 3**.

- Add a new provision in Part 9, Division 1 (e.g. s 136) explicitly requiring the Minister to apply the mitigation hierarchy when considering whether or not to approve the taking of an action, and what conditions to attach to an approval.
- **Deforestation and land clearing:** Deforestation (from logging and land clearing) is a key driver of biodiversity loss. Land clearing has been identified as a key threatening process under the EPBC Act and habitat loss from deforestation is a key threat to nationally listed threatened species and ecological communities. Deforestation significantly alters the cycling of water, increases erosion, and increases the runoff of sediments and pollutants. Deforestation is also a significant source of greenhouse gas emissions and failure to curb excessive land clearing undermines Australia’s efforts to reduce emissions and protect carbon sinks.

Land clearing is not directly regulated by the EPBC Act. That is, land clearing activities, in their own right, do not require assessment and approval under the EPBC Act. Instead, land clearing activities may trigger the EPBC Act (and therefore require assessment and approval), only if an activity has, will have, or is likely have, a significant impact on a matter of national environmental significance.

There are a number of concerns with this current approach, for example:

- Even where there may be significant impacts on MNES, land clearing activities are often not referred for assessment²⁴ and the Federal Environment Department's compliance and enforcement on land clearing activities (e.g. engaging with landholders and/or enforcing the legislation where activities have been carried out without approval) has been lacking.
- Many states and territories' laws are inadequate and have failed to curb excessive land clearing rates (compounding the impacts of poor Federal oversight (i.e. the Federal government cannot rely on states and territories to take effective action on land clearing).
- The Federal Government has made commitments to halt and reverse deforestation and land degradation,²⁵ halt extinctions and conserve 30 per cent of terrestrial and inland water areas, and of marine and coastal areas, by 2030²⁶. Without strong leadership on land clearing by the Federal government it is unclear how Australia will achieve these commitments.

There are also concerns that continued use exemptions, originally intended –in 1999- as transitional provisions and sometimes applied erroneously, are being relied on to undertake clearing without assessment and approval.

In the case of commercial logging, a specific 'carve-out' for forestry operations carried out in accordance with a Regional Forest Agreement do not require approval under the EPBC Act. There is significant concern within the scientific and broader community about the ongoing tenability of the RFAs and continued exemption of forestry operations from crucial oversight where they impact on matters of national environmental significance, particularly after the 2019-2020 bushfires which had catastrophic impacts on swathes of native forests. EDO strongly agrees with a recent report that concludes the current RFAs are no longer tenable.²⁷ We note proposed amendments tabled in the House of Representatives sought to have the RFA exemption removed, meaning forestry operations that would have a significant impact on MNES would need to be assessed and approved under the EPBC Act like any other activity - see **Attachment 7**.

Recommendation 17: Strengthen existing provisions to ensure that unacceptable impacts are identified upfront and not permitted to proceed, by:

- Inserting a definition of 'unacceptable impacts' into the EPBC Act. A suggested definition is provided at **Attachment 11**.
- Clarifying that nothing in the Act prevents the Minister from giving further consideration as to whether a project has unacceptable impacts when making a decision.
- Inserting provisions into the EPBC Act preventing the Minister from approving projects that will have or be likely to have unacceptable impacts on relevant matters of national

²⁴ For example, a 2019 study found that over 93% of clearing of potential habitat for terrestrial threatened species and terrestrial migratory species, as well as threatened ecological communities between 2000 and 2017 was not referred for assessment. See Ward MS, Simmonds JS, Reside AE, et al. (2019) 'Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia' Conservation Science and Practice. 2019; 1:e117.

<https://doi.org/10.1111/csp2.117>

²⁵ 'Glasgow Leaders' Declaration on Forests and Land Use' <<https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>>

²⁶ Convention on Biological Diversity (2023) 'Kunming-Montreal Global Biodiversity Framework' <<https://www.cbd.int/gbf/>>.

²⁷ See Environment Justice Australia, *No longer tenable: Bushfires and Regional Forest Agreements*, available at: <https://www.envirojustice.org.au/wp-content/uploads/2020/03/EJA-report-No-longer-tenable-1.pdf>

environmental significance once a full assessment has been completed (e.g. at sections 137 – 140).

Recommendation 18: Amend the EPBC Act to put restrictions on the use of biodiversity offsets, including:

- A new provision which imposes restrictions and requirements on any conditions that relate to environmental offsets.
- Add a new provision explicitly requiring the Minister to apply the mitigation hierarchy when considering whether or not to approve the taking of an action, and what conditions to attach to an approval.

Recommendation 19: Amend the EPA Bill to explicitly require the CEO to establish and maintain a register of offsets and a register of post-approval documents. One option for establishing a register of offsets was tabled in the House of Representatives – see **Attachment 3**.

Recommendation 20: Legislate to ensure destructive deforestation and land clearing is properly assessed under our nature laws, including by removing loopholes and exemptions. One option for achieving this was tabled in the House of Representatives – see **Attachment 7**.

Mechanisms for restoring public trust and holding decision-makers and regulators to account

The Samuel Review found that the community does not trust our federal nature law or its implementation to deliver for the environment, and that “limited access to information about decisions and the lack of opportunity to substantively engage in decision-making under the Act further erodes trust”. Stage two as currently proposed does little to change the circumstances that led to this.

Significant gaps in the framework as contemplated by stage two in relation to community rights (the rights to know, to participate, and to challenge) in environmental decision-making include:

- **Third party merits review:** Merits review is critical for ensuring transparency in decision-making and accountability of decision-makers, and that the best decisions are being made in line with the intent of the legislation, and should be implemented in the EPBC Act and under lack of merits review for third parties of decisions on assessment and approval of projects.
- **Third party referral of projects:** There is a real need for the EPBC Act to contain a mechanism by which the community can refer a project for assessment if the proponent, State authority, or the Minister do not. At present, third parties are unable to refer a proposal to the Minister if they believe the proposal may be a controlled action under the EPBC Act. In practice, third parties who are concerned that a proposal has not been referred may write informally to the Minister raising their concerns and requesting the Minister to request referral under section 70, but there is nothing to compel the Minister to act on that request. This is particularly relevant to deforestation and habitat destruction. One option for inserting new provisions into the EPBC Act to allow for third party referral of projects for assessment is outlined at **Attachment 12**. These amendments are intended to legislate a process for third parties to request the Minister to seek a referral of a project (rather than a direct power for third parties to refer, as the form and content requirements for referrals may be a barrier for third parties).

- **Third party enforcement:** Third party enforcement is a crucially important accountability mechanism, which enable the community to take action to enforce the law in circumstances where the regulator has failed to do so or has itself breached the law. The EPBC Act contains very limited community rights for “interested parties”. This should be opened up to provide that any person may apply to the court to remedy or restrain a breach of the EPBC Act. The Bill should also explicitly allow for interested persons to enforce breaches of civil penalty provisions through seeking civil penalties. This reform is critical to improve enforcement and deterrence particularly for significant environmental damage that has already occurred.

Recommendation 21: Implement third party merits review on decisions on referral, assessment, and approval of controlled actions.

Recommendation 22: Provide a mechanism for the community to formally request that a project be referred under the EPBC Act – see **Attachment 12**.

Recommendation 23: Strengthening civil enforcement, including through open standing and through civil penalties.

4. The importance of delivering comprehensive reform in stage three

Our national environmental laws are failing the community, the climate, and the environment. Without a comprehensive overhaul of the EPBC Act, the new institutions established by the current package of Bills will simply be monitoring and regulating broken laws. A new EPA may mean that compliance and enforcement is more likely to occur if habitat is illegally cleared, but that is after the fact, when the harm has already occurred. Similarly, ensuring a State of Environment report is released every two years by the new EIA is useful – but without strong laws to prevent the harm occurring in the first place, it will simply document the decline and demise of our threatened species more regularly.

Even with some of the additional amendments recommended in our submission, there is still more work to be done. Key elements of the Government’s Nature Positive Plan, including a full suite of National Environmental Standards, a proposed new regional planning framework, strengthening of the conservation planning framework and new standalone cultural heritage protection laws remain outstanding.

It is crucial that the Government introduce – and the parliament pass – a comprehensive package of legislation in this term of parliament to halt the extinction crisis, fix community trust in environmental decision-making, and protect nature from dangerous climate change. Further delay will continue to fail Australia’s unique wildlife and ecosystems, as well as future generations.

*Thank you for the opportunity to make this submission.
Please do not hesitate to contact our office should you have further enquiries.*