



## Nature Positive Reforms – ‘Stage 2’ – Ensuring independence, accountability, and oversight

The Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) 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”.

The current package of Bills before the Parliament, which the Government is calling “Stage 2” of its Nature Positive reforms, establish a new Federal Environment Protection Australia (**EPA**),<sup>1</sup> a new national Environment Information Australia (**EIA**),<sup>2</sup> and make some largely administrative changes to existing environmental laws.<sup>3</sup>

This Briefing Note sets out changes that should be made to the “Stage 2” package to improve the integrity and independence of the proposed new EPA, including through strengthened governance, transparency and community participation and oversight mechanisms.

Further analysis of the Stage 2 Bills can be found in our [submission to Senate Inquiry into the Bills](#).

### **Amendments to the Bills are required for the EPA to be a truly independent and empowered regulator**

EDO has long advocated for improved compliance and enforcement of environmental laws (and has assisted communities to step in when regulators have failed to act), for laws that are capable of effective enforcement, and an independent environmental regulator to do this free of political interference.

To this end, we support the creation of an independent EPA as a “tough cop on the beat”. The EPA as proposed by the Stage 2 Bills is not best practice, and has a number of governance and design flaws which undermine its ability to be effective or independent. However, there are a number of substantial improvements that could be made to ensure the EPA has a clear role, is independent and that there is appropriate oversight to ensure its integrity.

### ***Governance arrangements supporting independence and providing oversight***

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 proposed new federal EPA does not have similar oversight and accountability mechanisms. There is no proposed Board or similar structure to provide oversight. The EPA Bill provides for a CEO of the EPA who will administer and enforce a number of environmental Acts. The CEO is to be appointed by the Governor General on the advice of the Minister. Powers will be vested in the CEO and the function of the EPA as an agency is to support the CEO. This is a highly unusual arrangement.

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<sup>1</sup> The Nature Positive (Environment Protection Australia) Bill 2024 (**EPA Bill**).

<sup>2</sup> The Nature Positive (Environment Information Australia) Bill 2024 (**EIA Bill**).

<sup>3</sup> The Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024.

As a number of witnesses to the Senate Inquiry into the Bills noted, vesting so much power in an individual, especially one appointed by the Government of the day, renders that person (and consequently the agency they lead and laws they administer) vulnerable to external pressure (from Government or from third parties such as industry). This arrangement therefore risks politicisation and diminishes public trust in the independent regulator. Measures to act as a bulwark against this should include:

- **a Governance Board to appoint CEO and provide oversight:** The new 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. The Board should have staggered appointments and clear eligibility and expertise requirements. 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 complementary 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.
- **Statement of Expectations:** The ability of the Minister to issue a Statement of Expectations to the EPA should be constrained by ensuring that the Minister cannot issue a Statement that is inconsistent with the legislative purpose and duties of the CEO or EPA (see 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, set out in legislative objectives, in how it administers these functions. The proposed objects clause 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 CEO and 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.
- **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.

***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, 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:** The EPA must be required to publish relevant information within reasonable timeframes. 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. Additional registers, of environmental offsets, and of post approval documents, should be required in the EPA Bill. 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.
- **Ensuring the community is heard by the EPA:** An important component of building community trust in the new EPA is, in addition to ensuring transparency of its operations and access to information, that the EPA be required to seek and take into account public comment on a range of decisions. The EPA Bill should include a broad requirement that the CEO provide reasonable opportunity for public comment. To translate this into practice, the EPA Bill should require a charter of consultation to be developed and implemented with respect to the CEO and EPA's functions. This will assist with ensuring the EPA has clear functions relating to community consultation from its inception, given the proposed Community Consultation Standard is proposed not to be implemented until Stage 3. This is a common requirement in environment and planning legislation in other Australian jurisdictions.<sup>4</sup>

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

**Civil enforcement** is an important accountability mechanism, which enables 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 EPA Bill should include broad civil enforcement provisions, both in relation to the EPA enabling legislation and in relation to the legislation the EPA will administer. This reform is critical to improve enforcement and deterrence particularly for significant environmental damage that has already occurred.

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<sup>4</sup> See, for example, *Environment Protection Act 2017* (Vic) s 53; *Environmental Planning and Assessment Act 1979* (NSW), Sch 1.

The EPBC Act contains very limited community rights for “interested parties”. This should be broadened to provide that any person may apply to the court to remedy or restrain a breach of the Act, as is the position in other jurisdictions (such as NSW).

### **The importance of delivering comprehensive reform**

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. For more information see:

[Reforming Australia's Nature Laws - edo.org.au](https://www.edo.org.au/reforming-australias-nature-laws).

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