Law Council
OF AUSTRALIA

Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 and related Bills

Environment and Communications Legislation Committee

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

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- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council is grateful to the following of its Committees and Constituent Bodies, whose contributions have informed this submission:

- The Law Council's Australian Environment and Planning Law Group (**AEPLG**);
- The Law Society of New South Wales (**LSNSW**);
- The Law Institute of Victoria (**LIV**);
- The Law Society of South Australia (**LSSA**);
- The New South Wales Bar Association (**NSW Bar**); and
- The Victorian Bar (**Vic Bar**).

Introduction

1. Australia's State of the Environment Report 2021[1] paints a grim and confronting picture of the extent of environmental deterioration in Australia. Compared to other OECD countries, Australia has one of the highest rates of species decline.[2] A year earlier, the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (the **EPBC Act**) undertaken by Professor Graeme Samuel AC (**Samuel Review**) concluded that the EPBC Act is "outdated and requires fundamental reform."[3]

2. The Government's commitment to reform the EPBC Act through its Nature Positive Plan[4] is therefore both welcome and urgent. The Law Council supports the Government's focus on "nature positive", which picks up Australia's international obligations under the Kunming-Montreal Global Biodiversity Framework to halt and reverse biodiversity loss by 2030.[5] The Law Council also supports the establishment of Environment Protection Australia (**EPA**) and Environment Information Australia (**EIA**) as part of the Government's Stage 2 of the Nature Positive law reforms.

3. While the Law Council welcomes the introduction into Parliament of the 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 (together, the **Nature Positive Stage 2 Bills**), each has scope for significant improvement. We have set out in this submission our analysis of the Nature Positive Stage 2 Bills, accompanied by recommendations for amendments.

Comments on process

4. The Nature Positive reforms represent a once-in-a-generation opportunity to correct serious shortcomings in Australia's environmental protection framework. Yet, the process that has been employed to develop and scrutinise this legislation has failed to reflect the breadth and significance of these reforms. The Law Council is concerned that the Nature Positive Stage 2 Bills have been developed with insufficient stakeholder input on its technical detail, and that the extremely short timeframe for this inquiry will reinforce this deficiency in the overall legislative development process.

Departmental consultation

5. The Law Council has consistently expressed concerns regarding the closed consultations on Nature Positive reform conducted by the Department of Climate Change, Environment, Energy and Water (the **Department**). These consultations have involved in-person meetings in Canberra on an invitation basis to review draft bills in hardcopy with no meaningful opportunity to consider and discuss the contents of the draft bills, or to retain a copy for further consideration and comment.

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[1] State of the Environment Report (2021), <https://soe.dcceew.gov.au/>.
[2] Ibid.
[3] Professor Graeme Samuel AC (2020), *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (**Samuel Review**), <https://www.dcceew.gov.au/sites/default/files/documents/epbc-act-review-final-report-october-2020.pdf>, ii.
[4] Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan* (December 2022), <https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf> (**Nature Positive Plan**).
[5] Decision 15/4, U.N. Doc. CBD/COP/DEC/15/4 (2022), <https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>.

6. As a national peak body, the Law Council forms its legal and policy positions via consultation with a wide range of members of the legal profession across different jurisdictions, including legal experts working in different areas of law. This process is important to test and review ideas, to develop robust advice, and to avoid as much as possible the introduction of legislation with unintended negative consequences or shortcomings.

7. The Government's choice to employ closed consultations has hindered the Law Council from generating a detailed and profession-wide view on the contents of the Nature Positive Stage 2 Bills as they were developed. The closed consultation approach employed is also inconsistent with open and transparent Government. While the Department organised high-level public webinars, this is not a substitute for public and comprehensive consultation on the detail and text of the proposed legislation itself, prior to its introduction into the parliamentary process.

Inquiry timeframes

8. The Law Council is equally concerned by the short timeframes for this inquiry. Since being referred to the Committee, the public has had approximately 12 business days to review three draft bills and their explanatory memoranda, and make submissions. The Nature Positive Stage 2 Bills and accompanying explanatory memoranda comprises over 500 pages. Compressed inquiry timeframes devalue the inquiry process itself and undermines the democratic parliamentary process for the proper scrutiny of bills.

9. The compressed inquiry timeframe risks reinforcing the consequences of inadequate consultation processes by the Government during the legislative development phase. The insufficient timeframe to review the Nature Positive Stage 2 Bills closely leaves open a tangible risk of unintended consequences flowing from the Bills that a high-level review is unable to identify.

10. The Law Council recommends that the Government remain open to amending the Nature Positive Stage 2 Bills (or Acts if the Bills are passed) in the context of Stage 3 of the Nature Positive Reforms. All stages of the reforms need to work in harmony. If issues are identified with the legislation at a later stage, the Government must be open to addressing them. As the LSSA notes, the success of the Nature Positive Reforms will require public education and further industry consultation on their application – and further issues may well come to light through these processes.

Recommendation

- **The Government must remain open to amending the Nature Positive Stage 2 Bills (or Acts, if passed) as part of Stage 3 of the Nature Positive Reforms, should issues be identified after the Bills pass in Parliament.**

Comments on the Nature Positive Stage 2 Bills

More safeguards required for the exercise of the CEO's powers

Proposed scope of the CEO's powers

11. The Nature Positive (Environment Protection Australia) Bill 2024 (**EPA Bill**) establishes a Commonwealth statutory entity, EPA, and the Chief Executive Officer

of the EPA (**CEO**) as a key decision maker. Various schedules of the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 (**Transitional Provisions Bill**) transfer decision making powers and functions under a range of environmental legislation to the CEO.[6]

12. The proposed new section 515AAA to be inserted into the EPBC Act provides:

> *515AAA Delegation to CEO or member of staff of EPA*
>
> *(1) The Minister may, by signed instrument, delegate all or any of the Minister's powers or functions under this Act to:*
>
> *(a) the CEO; or*
>
> *(b) a member of the staff of EPA.*

13. The Minister's decision-making can be delegated using this mechanism in relation to, among other things, designation of controlled actions, assessment processes and approval of controlled actions under the EPBC Act. These are significant powers subject to delegation. While the Minister currently delegates these decisions under the EPBC Act, this delegated authority is to a senior member of the Department. In contrast, if the Minister was to delegate the same functions under section 515AAA to the CEO, the delegation is to an independent entity who is not subject to direction by the Minister. The Minister may issue a statement of expectations to which the CEO must respond, but the CEO is not bound by the statement of expectations.

Analysis

14. We understand that the "CEO without a Board" model has been adopted due to the "Minister's role in sensitive environmental decision making".[7] It is worthwhile reviewing the OECD's guidance on factors to consider when deciding between a single-member decision-making model vs a multi-member decision making model for a regulatory body.[8] They are:

> *a) Potential commercial/safety/social/environmental consequences of regulatory decisions, taking account of the degree of impact of a risk event and the probability of its occurrence – a group of decision makers is less likely to be "captured" than an individual and a group will bring differing perspectives to decisions;*
>
> *b) Diversity of wisdom, experience and perceptions required for informed decision making because of the degree of judgement required (for example, where regulation is principles-based or particularly complex) – collective decision making provides better balancing of judgement factors and minimises the risks of varying judgements;*
>
> *c) Degree of strategic guidance and oversight of delegated regulatory decisions required to achieve regulatory objectives – where the regulator requires significant strategic guidance and oversight to achieve its regulatory objectives, such as in developing compliance or enforcement policies or resource allocation, these functions are better located in a*

[6] See, for example, Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 (Cth) Schedules 2-10.
[7] Nature Positive Plan, 29.
[8] OECD (2014), "Decision making and governing body structure for independent regulators", in *The Governance of Regulators*, OECD Publishing, Paris, https://doi.org/10.1787/9789264209015-8-en, 70-71.

body separate from its day-to-day operations. A multi-member body provides collegiate support for such strategic decision making;

d) Difficulty and importance of maintaining regulatory consistency over time – where regulatory decisions require a high degree of judgement, a multi-member decision-making body provides more "corporate memory" over time; and

e) Importance of decision-making independence of the regulator – a board will be less susceptible to political or industry influence than a single decision maker.

15. When considering different regulatory models, governments should be avoiding, by all means possible, the potential for regulatory capture. This occurs when a government agency (or decision-maker) becomes "captured" by vested interests. Powerful regulatory agencies should be protected from outside influences as far as possible or not created at all.[9] Responsible legislation safeguards against regulatory capture by a "high stake" interest group influencing the desired policy outcomes.[10]

Issues with "CEO without a Board" model

16. In light of the OECD guidance and the provisions of the EPA Bill, the proposed "CEO without a Board" model is problematic for a range of reasons:

    (a) It concentrates complex decision making under Australian environmental laws within a single person, increasing the risk of certain judgment factors (e.g. a particular group's interests or issues) being unduly given greater weight than other factors;

    (b) Under a single decision-maker model, the EPA is more susceptible to political or industry influence through direct approaches to the CEO, which undermines the public's perception of and confidence in the independence of the EPA;

    (c) The Ministerial appointment of the CEO may exacerbate a public perception that the role is not free of political bias. While the appointment process will have regard to the qualifications of candidates[11] and requires consideration of conflicts of interest,[12] it is unclear whether the Government's *Merit and Transparency Policy*[13] is intended to apply to this process. Without an open, transparent and merit-based appointment, there is a real risk that the candidate pool and the candidate ultimately appointed could reflect, or be perceived by the public to reflect, political preferences at the relevant time; and

    (d) The current model leaves the CEO's powers effectively unconstrained and without oversight, relying heavily on the experience and goodwill of the appointee (rather than good governance) to carry out their functions in an appropriate and effective manner. It is worth noting that the Samuel Review

[9] For example, Stigler, G.J., 1971, The Theory of Economic Regulation, *Bell Journal of Economics*, Vol 2, 3.
[10] For example, Parker, C. and J. Braithwaite, 2003, Regulation in Cane P. and M. Tushnet (eds) *The Oxford Handbook of Legal Studies,* Oxford University Press. Government of Victoria, 2011, *Victorian Guide to Regulation*, Department of Treasury and Finance, State of Victoria, Melbourne, Edition 2.1, August, OECD (Organisation for Economic Co-operation and Development) 2009, *Regulatory Impact Analysis: A Tool for Policy Coherence.*
[11] EPA Bill, s 44(2).
[12] EPA Bill, s 44(2)(c).
[13] Australian Public Service Commission, *Government's Merit and Transparency Policy* (11 December 2020), <https://www.apsc.gov.au/working-aps/governments-merit-and-transparency-policy>.

identified the “opaque rules and unfettered discretion in decision-making” under the EPBC Act as a key reason for its failure to afford adequate environmental protection.[14]

17. The possibility of an advisory group under Part 5, Division 4 of the EPA Bill does not cure these defects in governance arrangements. Notably:

    (a) The advisory group exists at the discretion of the CEO and can be established, altered or dissolved as the CEO sees fit by way of instrument[15] (noting also that this instrument is not a legislative instrument, and therefore is not subject to the Parliament’s disallowance process);

    (b) The scope of the advisory group’s functions is vague, described in the EPA Bill as “providing assistance or advice in relation to the performance of the CEO’s functions”[16] – it is left entirely to the CEO to decide what the group will advise on;

    (c) Although the advisory group needs to have “relevant skills or expertise”,[17] it is unclear what type of skills or expertise this is referring to – this should be articulated within the legislation; and

    (d) The CEO is not bound to follow any aspect of the advice of the advisory group.[18]

Improving governance arrangements

18. The Law Council urges the Committee to consider appropriate governance controls to address these issues. We recommend that the Committee consider employing the following strategies to strengthen the EPA’s governance arrangements:

    (a) **Establish a statutory, independent skills-based board**: this board could undertake all the functions contemplated for the advisory group, while bolstering the independence of the CEO and the EPA. The board could advise the Minister on the original appointment of the CEO, determine when the EPA should prosecute for serious environment protection offences, and determine the policies and long-term strategies of the EPA. This would enhance the integrity and transparency of the EPA’s decision making and the CEO appointment; and would also broaden the range of skills and qualifications that could be brought to bear on the discharge of the functions currently contemplated for the CEO.

    It is worth noting that this is also the model employed for environmental protection authorities in New South Wales,[19] the Northern Territory,[20] South Australia[21] and Victoria[22] – all are statutory corporations with boards. Except for the Australian Capital Territory and Queensland, all Australian State and

[14] Samuel Review, 3, 43, 48, 52.
[15] EPA Bill, s 54. Note that although not set out in the provisions of the EPA Bill, the CEO will have the power to revoke an instrument made – see the *Acts Interpretation Act 1901* (Cth), s 33(3).
[16] EPA Bill, s 54(1).
[17] EPA Bill, s 54(5).
[18] EPA Bill, s 56(b).
[19] *Protection of the Environment Administration Act 1991* (NSW) ss 5(2), 15, 16.
[20] *Northern Territory Environment Protection Authority Act 2012* (NT) ss 6(2), 10.
[21] *Environment Protection Act 1993* (SA) ss 11(2), 14B.
[22] *Environment Protection Act 2017* (Vic) ss 356, 361.

Territory environment protection authorities have a board.[23] All of these boards must navigate "sensitive environmental decision making"– this is not unique to the Commonwealth context. It is not clear why the Commonwealth should therefore depart from this well-established governance approach.

(b) **Specify circumstances in which the Minister can direct the CEO**: the CEO should not be operating with unfettered powers. The Minister should be able to direct the CEO in circumstances where the CEO is carrying out substantive functions delegated by the Minister under the EPBC Act. We recommend also that the CEO be required to have regard to the matters set out in the Statement of Expectations when exercising powers or functions.

(c) **High-level principles to guide the exercise of the EPA's and CEO's functions**: this approach has been employed in the establishment of other regulatory bodies (see for example section 11 of the *Climate Change Authority Act 2011* (Cth), set out at paragraphs 51 to 52 below), and can set out appropriate parameters and objectives that the EPA and CEO must consider in exercising statutory functions.

Recommendations

- **Amend the EPA Bill to establish a statutory, independent skills-based board to advise the CEO on the exercise of statutory functions, advise the Minister on the appointment of the CEO, determine when to pursue prosecutions, and determine the policies and long-term strategies of the EPA.**
- **Specify in the EPA Bill circumstances in which the Minister can direct the CEO.**
- **Insert into the EPA Bill a set of high-level principles to guide the exercise of the EPA's and CEO's functions.**

Limited merits review rights and EPA decisions

Samuel Review recommendation for limited merits review

19. In its final report, the Samuel Review recommended the inclusion of a limited merits review process 'on the papers' for development assessment and approval decisions made under the EPBC Act.[24] The final report noted the following rationale for the recommendation:

> *The recommended reforms to deliver improved transparency and robust oversight of decision-making address the underlying causes of distrust in decisions. This should reduce the need for third parties to resort to court processes to discover information. Improving participation and transparency will mean that stakeholders will be less likely, and have less justification, to resort to legal challenge.*
>
> *Legal challenges should be limited to matters of outcome, not process, to reduce litigation that does not have a material impact on the outcome.*

[23] *Protection of the Environment Administration Act 1991* (NSW) s 15; *Northern Territory Environment Protection Authority Act 2012* (NT) s 10 (called 'members'); *Environment Protection Act 1993* (SA) s 14B; *Environment Management and Pollution Control Act 1994* (Tas) s 13; *Environment Protection Act 2017* (Vic) s 361; *Environment Protection Act 1986* (WA) s 7.
[24] Samuel Review, 11.

> *In a mature regulatory framework, judicial and merits review operate in concert. Judicial review helps ensure legal processes are followed and is complemented by merits review to ensure decisions are meeting the intent of the legislation, not simply following processes.*[25]

20. As proposed in the Samuel Review report, this process would impose a low burden on cost and time, given it would be conducted 'on the papers' (i.e., without a hearing); limited to the material available at the time of the original decision; apply to the approval decision and the application of conditions; and involve consideration of whether the exercise of discretion was incorrect or unreasonable in the circumstances.[26]

Inclusion of limited merits review for EPA decisions under the EPBC Act

21. Contrary to the recommendation by the Samuel Review, the Government has chosen not to include the right to limited merits review of decisions contained in the EPBC Act. The stated rationale for not including such rights of review is as follows:

> *Legislating National Environmental Standards, greater transparency and establishing an independent EPA are more effective ways to improve and assure the quality of decision making. Limited merits review may also prevent projects from proceeding in a timely manner, as matters are held up by courts, which can lead to unreasonable and unfair costs for proponents. Members of the public will continue to be able to bring legal claims against decisions of the EPA or the minister for errors of law.*[27]

22. Given the low-cost nature and timing of the proposed limited merits review rights, the Law Council does not agree with the Government's comments that this would "lead to unreasonable and unfair costs for proponents". The Law Council also disagrees with the statement that limited merits review will result in matters "held up in courts", given the only outcomes that arise from that process are the decision affirmed, or returned to the original decision maker for remaking or varying. The Government's rationale for rejecting limited merits review misunderstands the limited merits review process and its lack of interaction with existing rights to seek judicial review in courts. Merits review has the benefit of a focus by the independent reviewer on the appropriateness of the outcome.

23. We consider the lack of ability to seek review of decisions made by the Minister or the CEO to be concerning, given the CEO's wide-ranging powers. For this reason, we urge the Committee to consider the inclusion of limited merits review for decisions made under the EPBC Act, consistent with the Samuel Review's recommendations.

Recommendation

- **The EPA Bill be amended to include a limited right of merits review, consistent with recommendation 13 of the Samuel Review final report.**

[25] Ibid
[26] Ibid.
[27] Nature Positive Plan, 5.

Definition of "nature positive"

Proposed definition of "nature positive"

24. The Nature Positive (Environment Information Australia) Bill 2024 (**EIA Bill**) establishes the Head of EIA. The EIA Head is responsible for providing the Minister, the CEO of the EPA, and the public with access to high quality information and data relating to the environment.[28] This includes the development and implementation of a monitoring, evaluation and reporting framework on the extent to which Australia is achieving "nature positive".

25. The proposed section 6 of the EIA Bill sets out a definition for "nature positive":

> *6 Definition of nature positive*
>
> *(1) Nature positive is an improvement in the diversity, abundance, resilience and integrity of ecosystems from a baseline.*
>
> *(2) In determining whether nature positive is being achieved, regard is to be had to whether there has been an improvement in the diversity, abundance and resilience of species that form part of ecosystems.*
>
> *(3) Improvements mentioned in subsection (2) may be sufficient, but not necessary, to achieve nature positive.*

26. The EIA Bill requires the Head of EIA to develop a baseline from which to measure the achievement of the "nature positive" goal.[29]

Analysis

27. This definition in the EIA Bill is a 'watered-down' version of the widely accepted definition of nature positive, as developed by the Nature Positive Initiative (**NPI**):[30]

> *"halt and reverse nature loss by 2030 on a 2020 baseline, and achieve full recovery by 2050."*

28. This internationally recognised definition reflects the commitments made by States at the United Nations Convention on Biological Diversity Conference of Parties 15 in December 2022, which included the adoption of the Kunming-Montreal Global Biodiversity Framework (**GBF**). The GBF's mission is to "halt and reverse biodiversity loss by 2030", and that "by 2050, biodiversity is valued, conserved, restored and widely used, maintaining ecosystems services, sustaining a healthy planet and delivering benefits essential for all people." Australia has expressed its commitment to the GBF as a State Party to the Convention on Biological Diversity.[31]

29. The definition of "nature positive" in the EIA Bill is out of step with this widely used NPI definition.

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[28] EIA Bill, s 9.
[29] EIA Bill, s 13(2).
[30] Nature Positive Initiative, *The Definition of Nature Positive* (February 2024), <https://www.naturepositive.org/app/uploads/2024/02/The-Definition-of-Nature-Positive.pdf>.
[31] Department of Climate Change, Energy, the Environment and Water, *A New Global Biodiversity Framework: Kunming-Montreal Global Biodiversity Framework* (17 January 2023), <https://www.dcceew.gov.au/environment/biodiversity/international/un-convention-biological-diversity/global-biodiversity-framework>.

A 2020 baseline

30. The inclusion of a specific baseline year within the text of the legislation provides an important assurance to the public that the Government's reform agenda is in the spirit of what is generally understood to be "nature positive". If it is necessary for the EIA to artificially construct a 2020 baseline using data from neighbouring years (reasons for which may include significant natural disasters in Australia in 2020), the EIA Bill could recognise this. For example, the Bill could set out that the methods used to construct a "2020 baseline" will be determined by the Head of EIA.

A 2030 target

31. While a 2030 target is contained within the Government's policy documents dealing with biodiversity decline,[32] the date is not specifically recognised in the text of the EIA Bill. No explanation has been provided in the Explanatory Memorandum for why the definition of "nature positive" does not include the 2030 target date for achievement. This contrasts with the approach taken in the *Climate Change Act 2022* (Cth), which includes a legislated greenhouse gas emission reduction target of 43%, against a 2005 baseline, and by 2030. While there may be a technical difficulty in expressing the 2020 baseline in the definition of nature positive, there appears to be no equivalent difficulty preventing expression of the target date, as was done in the *Climate Change Act 2022* (Cth).

Measuring nature positive

32. The Explanatory Memorandum to the EIA Bill suggests that nature positive may still be achieved if there is a reduction in the abundance or diversity of species, giving priority to the protection of ecosystems:[33]

> *Following subclause 6(3), an example would clarify that the diversity, abundance, resilience and integrity of an ecosystem may be improved by reducing the abundance of a species. The intention of clause 6 is to promote the improvement in the diversity, abundance, resilience and integrity of an ecosystem over an individual species, if a conflict were to arise. This note is intended to provide an example of the circumstances where this conflict may arise.*

33. This position creates an incentive to prioritise actions that preserve ecosystems (but not necessarily those that will protect species that face the threat of extinction). The Law Council is concerned that this approach will have the unintended consequence of enabling the destruction of the most threatened species in Australia. This issue was canvassed in an article published in The Conversation in September 2023 by Professor Martine Maron, Megan C Evans and Sophus zu Ermgassen:[34]

> *Take the Australian government's Nature Positive Plan – its official response to the scathing 2020 review of Australia's national environment law.*

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[32] For example, the proposed amendments to Australia's Strategy for Nature include a number of objectives linked to 2030.
[33] Explanatory Memorandum (EIA Bill), [26].
[34] The Conversation, *Nature Positive Isn't Just Planting a Few Trees it's Actually Stopping the Damage We Do* (22 September 2023), <https://theconversation.com/nature-positive-isnt-just-planting-a-few-trees-its-actually-stopping-the-damage-we-do-213075>.

Under the plan, 'conservation payments' could be made by developers when destruction of threatened biodiversity is permitted, but suitable environmental offsets cannot be found.

These conservation payments would then be invested by government into conservation projects – but they would not necessarily benefit the same biodiversity destroyed by the development.

The plan states this approach will deliver "better overall environmental outcomes". In reality it could make it possible to destroy habitat of our most threatened species and replace it with other, easier-to-replace biodiversity – as long as there is more "nature" overall.

34. We therefore recommend that subsections 6(2) and 6(3) be removed from the EIA Bill to avoid creating these perverse incentives.

35. The Law Council notes that the Environment and Communications References Committee Inquiry into Australia's Extinction Crisis is not due to report on its findings until 26 March 2025. This is the third extension of the reporting date which is now nearly 2 years later than the original reporting date determined when the inquiry was re-adopted in the current Parliament. This inquiry was initially referred in June 2018. The findings from this Inquiry should inform what actions are required to protect Australia's unique biodiversity (including the management of potential conflicts between protecting species and ecosystems as is contemplated by the EIA Bill), and should prompt action so that Australia can uphold its international treaty obligations under various international conventions on biodiversity protection and conservation. The Law Council urges the Committee to conclude the Inquiry and publish its recommendations without any further delay.

Recommendations

- **Subsection 6(1) of the EIA Bill be amended to include in the definition of 'nature positive' a baseline year of 2020, and a target date of 2030.**
- **Subsections 6(2) and (3) be deleted from the EIA Bill.**
- **The Committee publish as soon as possible its recommendations from its inquiry into Australia's Extinction Crisis.**

Environment Protection Orders and procedural fairness

Powers to issue Environment Protection Orders

36. Under Schedule 1, Part 1 of the Transitional Provisions Bill, the Minister (and in the future, the EPA CEO) can issue a written or verbal Environment Protection Order (**EPO**) to a person.[35] The order can impose a range of requirements on the person that the Minister reasonably believes are necessary, including an order to stop works. The EPO can remain in force until the Minister decides to revoke it, or it can be specified to lapse on a specified date. Failure to comply with an EPO is an offence punishable by 1,000 penalty units (fault-based offence) or 300 penalty units (strict liability offence).

[35] Transitional Provisions Bill, Schedule 11, Part 1, Item 2.

37. The regulatory framework around the issue of EPOs also includes a departure from the natural justice hearing rule pursuant to proposed section 474G, which provides as follows:

> *474G Natural justice hearing rule*
>
> *The Minister is not required to observe any requirements of the natural justice hearing rule in relation to the issue or variation of an environment protection order.*

Analysis

38. The Law Council is concerned with the absence of procedural safeguards in the issuing of EPOs by the Minister (or in the future, by the EPA CEO), particularly in relation to urgently issued or verbal EPOs. While there may be instances where immediate or urgent action is required to prevent serious environmental harm in the form of an EPO, the extensive and serious consequences associated with urgently issued or verbal EPOs have an insufficient foundation, considering that:

    (a) The ability to issue an EPO is based on the Minister's or EPA CEO's sole discretion – there is no requirement that evidence of the harm or the likelihood of harm caused by the potential act or omission be ascertained, to ensure the issuing of an EPO (including its contents, scope and duration) is proportional to the potential risk of harm;

    (b) Natural justice will not apply to the issue or variation of an EPO while strict liability offences apply for non-compliance with an EPO;

    (c) No definition or criteria are provided as to what may constitute "serious damage" (paragraph 474A(1)(b)), or "urgent circumstances" (paragraph 474A(4)(b)), both of which are threshold concepts to be taken into account when issuing an EPO; and

    (d) There are no clear appeal or review rights in relation to the issuing of an EPO.

39. These provisions are contrary to the fundamental right to procedural fairness, which is an important component of the rule of law.[36] The provisions confer virtually unlimited power enabling the Minister (and EPA CEO) to issue a verbal EPO, making it unlikely that a person will have prior notice that a decision may affect their interests. The inclusion of uncertain concepts leaves open the risk of incorrect applications of the EPO power, and this is even more concerning in the context of there being no clear review or appeal rights.

Recommendations

- **Insert in proposed subsection 474A(7) that a verbal EPO lapses if written notice of the EPO is not provided within 72 hours of issuing the verbal EPO.**
- **Insert in proposed section 474B definitions and a requirement that an EPO state the material facts or evidence relied on in deciding to issue an EPO.**
- **Insert in proposed Division 13A a right to limited merits review of a decision to issue an EPO.**

[36] *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ).

- **Define the terms "serious damage" and "urgent circumstances" or specify the criteria to be taken into account in determining what may constitute "serious damage" and "urgent circumstances" with respect to proposed paragraphs 474A(1)(b) and 474A(4)(b).**

Further policy considerations

State of the Environment reports

Two-year reporting cycle

40. Proposed subsection 14(1) of the EIA Bill increases the reporting cycle for State of the Environment reports from five years to two years. While increased information through reporting can be useful, we query whether the EIA will have the appropriate resourcing to undertake this exercise every two years. Given the scale of this report and the degree of effort that will likely be expended to prepare it each cycle, we question whether it is an efficient use of resources to undertake the exercise on a two-yearly basis. It may be the case that with improved systems for the capture and analysis of data, this process becomes less resource intensive.

Reporting against national environmental goals

41. Proposed subsection 14(2) of the EIA Bill requires the State of the Environment reports to contain information about progress in meeting the national environmental goals. These goals are set by the Minister under proposed subsection 18(3) of the EIA Bill.[37] The EIA Bill can be strengthened by including detail on the types of matters that the Minister will take into account in setting the national environmental goals. This would also safeguard against the risk that the national environmental goals change significantly every two years when the State of the Environment reports are tabled, and/or when there is a change in the Minister.

42. In this regard, we recommend that the EIA Bill include express references to the achievement of Australia's commitments under international treaties. This approach would be consistent with the treatment of the Paris Agreement under the *Climate Change Act 2022* (Cth).

Maximum civil penalties

43. The Law Council appreciates that significant increases to civil penalties is intended to deter non-compliance with relevant environmental obligations. However, the terms "detriment avoided" and "benefit derived", which impact the calculation of civil penalties, are broad and should be further explained in the Explanatory Memorandum to the Bill, with reference to the existing regulatory regimes the provisions are modelled on and how these terms should be considered in the context of contraventions of the EPBC Act.[38] The Explanatory Memorandum to the Bill should also set out what degree of nexus is intended by the term "reasonably attributed".[39] The Law Council considers this guidance important for the purposes of clarity and certainty, particularly given there is no ability to challenge the penalty imposed.

[37] For the first report under the new provisions, the national environmental goals will be set under Schedule 13, section 2(2) of the Transitional Provisions Bill.
[38] Transitional Provisions Bill, Schedule 11, Part 2, Item 47 (proposed subsections 481A(6)-(7)); Explanatory Memorandum (Transitional Provisions Bill), 5.
[39] Ibid.

Offences for environmental auditors

44. The Law Council notes that penalties for offences by environmental auditors (including the possibility of 6 months imprisonment)[40] may be disproportionately high and could limit the number of qualified and experienced persons willing to act in these roles. While the legislation should require a high standard of activity, it should also have regard to the fact that the regime relies on persons being willing to do this work – and on their insurers being willing insure them to do such work.

Sensitive public information

45. The Nature Positive Stage 2 Bills require certain information to be made publicly available and disclosed on relevant registers. Extensive powers are conferred on the Minister and the Head of EIA to determine what information should or should not be made available on the public registers. The data available on the public registers will largely rely on the voluntary provision of information.

46. As drafted, the EIA Bill does not make provision for the protection of commercially sensitive information, or information that may cause harm to a project proponent, individual, or company. The Law Council recommends that a mechanism be introduced to provide such protection. This protection should include:

    (a) the ability for individuals or companies voluntarily providing information to review the form in which the information will be published, prior to publication on the public register; and

    (b) a mechanism through which applicants may apply for sensitive information to be removed from public registers, with accompanying processes that would facilitate the urgent removal of sensitive information.

Indigenous knowledge

47. The Law Council reiterates the importance of integrating Indigenous knowledge into the decision-making points under the EPBC Act. It is essential that there be genuine engagement with First Nations peoples to ensure that their knowledge of Country is recognised, and respectfully and consensually utilised in the protection and enhancement of Country.

Comments on legislative drafting

EPA constitution and functions (sections 10 and 11, EPA Bill)

48. The Bill defines the EPA as comprising the CEO, its staff, and persons whose services are made available to the EPA.[41] At the same time, the function of the EPA (which includes the CEO) is to assist the CEO in the performance of the CEO's functions.[42] This is a circular formulation that should be redrafted.

49. A possible solution could be to redraft section 11 so that it specifies the functions of the EPA independently of the functions of the CEO. Examples the Committee can draw from include:

    (a) section 11 of the *Climate Change Authority Act 2011* (Cth), which sets out the functions of the Climate Change Authority;

[40] Transitional Provisions Bill, Schedule 11, Item 47.
[41] EPA Bill, s 10.
[42] EPA Bill, s 11.

(b) section 28 of the *Competition and Consumer Act 2010* (Cth), which sets out various functions of the Australian Competition and Consumer Commission; or

(c) section 11 of the *Australian Securities and Investments Commission Act 2001* (Cth), which sets out various functions of the Australian Securities and Investments Commission.

Recommendation

- **Revise section 11 of the EPA Bill to remove the circular link to the CEO's functions.**

Minister's statement of expectations (subsection 16(3), EPA Bill)

Clarifying the scope of the rules

50. Subsection 16(3) of the EPA Bill requires the Minister to consider and comply with matters prescribed by the rules in preparing a statement of expectations for the CEO and EPA.[43] The Explanatory Memorandum notes that these matters will be procedural requirements that the Minister will have to either comply with or have regard to.[44] It is however unclear what the subject matter scope of these procedural requirements will be. For example, the rules could prescribe matters that relate to the Acts under which the CEO has specific functions,[45] or could pertain to broader related matters. The Minister's rule-making power in the EPA Bill does not provide any clarity on this point either.[46] This is worth clarifying in the text of the Bill to appropriately define what issues the rules will be directed towards.

Overarching principles for the exercise of EPA/CEO functions

51. The underlying policy intent behind the Minister issuing a statement of expectations is to "to inform the CEO of government policy that is relevant to the powers and functions of EPA."[47] This objective can be strengthened by including in the text of the EPA Bill a set of principles that can guide the exercise of the CEO's and EPA's powers and functions. Given the wide-ranging nature of the EPA's likely work and its connection to Australia's international commitments, a set of guiding principles would be useful to provide a strategic focus to the EPA's work. These principles should start with the concepts that underpin the broad concept of "sustainable development".[48]

52. A similar approach has been taken in the *Climate Change Authority Act 2011* (Cth), which sets out the below principles to guide the performance of the Climate Change Authority's functions.[49] The Committee may also consider having regard to these in developing principles for the EPA Bill:

> *Any measures to respond to climate change should:*
>
> - *Be economically efficient;*
> - *Be environmentally effective;*
> - *Be equitable;*

[43] EPA Bill, s 16(3).
[44] Explanatory Memorandum (EPA Bill), [36].
[45] EPA Bill, s 13(1).
[46] EPA Bill, s 62.
[47] Explanatory Memorandum (EPA Bill), [34].
[48] For example, see the Law Council's Policy on Sustainable Development (14 September 2019).
[49] *Climate Change Authority Act 2011* (Cth), s 12(a).

- *Be in the public interest;*
- *Take account of the impact on households, business, workers and communities;*
- *Support the development of an effective global response to climate change;*
- *Be consistent with Australia's foreign policy and trade objectives;*
- *Take account of matters set out in Article 2 of the Paris Agreement; and*
- *Boost economic, employment and social benefits, including for rural and regional Australia.*

Recommendation

- **Insert a set of principles into the EPA Bill to guide the exercise of the EPA's and CEO's functions.**

"Serious risk" to human health or the environment (sections 29 and 30, EPA Bill)

53. The EPA Bill does not define what is meant by the term "serious risk" in the context of proposed sections 29 and 30. While the Explanatory Memorandum sets out some examples of what could be a "serious risk" (managing a national health emergency, Australia's international obligations in respect of serious human health risks, a national environmental emergency, or Australia's international obligations in respect of serious environmental risks), it does not explain how one determines this.

54. The term "serious risk" should be defined in the EPA Bill, criteria be specified for its identification or, at the very least, what might compromise "serious risk" should be appropriately explained in the Explanatory Memorandum to the EPA Bill.

Recommendation

- **Define or specify in either the EPA Bill or its Explanatory Memorandum what is meant by "serious risk" in the context of sections 29 and 30.**

Timeframe to develop baseline and reporting framework (Schedule 3, Part 1, Transitional Provisions Bill)

55. The EIA Bill does not include a timeframe within which the Head of the EIA must develop a baseline and reporting framework to measure progress in achieving nature positive. Instead, this timeframe is set out in the Transitional Provisions Bill.[50] For clarity and accessibility of information, we recommend that the EIA Bill include this information rather than the Transitional Provisions Bill.

Recommendation

- **The deadline for developing a baseline and reporting framework be moved from the text of the Transitional Provisions Bill to the EIA Bill.**

[50] 31 December 2025 – see the Transitional Provisions Bill, Schedule 13 Part 1.