



Law Council
OF AUSTRALIA

Office of the President

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Senator Karen Grogan
Senate Environment and Communications Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: ec.sen@aph.gov.au

Dear Chair

Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 [Provisions] and related bills—Questions on Notice

1. The Law Council was grateful for the opportunity to appear before the Senate Environment and Communications Legislation Committee (the **Committee**) at its public hearing on 26 July 2024, in relation to its inquiry into the Nature Positive (Environment Protection Australia) Bill 2024 [Provisions] and related bills (the **Stage 2 Nature Positive Bills**).¹
2. Following the inquiry, the Law Council received the below written questions on notice from Senator Lidia Thorpe:
 - 1) *There are a number of concerns about transparency, not just in the closed consultation process, but also whether the Government's Merit and Transparency Policy will apply to The Ministerial appointment of the CEO. What changes to the legislation does the Law Council of Australia believe will improve transparency within the Nature positive reforms?*
 - 2) *How would the establishment of a statutory, independent skills-based board improve governance arrangements?*
3. Given the remit of the Committee's inquiry, the Law Council's responses relate specifically to the Stage 2 Nature Positive Bills. The Law Council's response below should be read in connection with its earlier written submission to this inquiry.²

Improving transparency within the Stage 2 Nature Positive Bills

The importance of transparency in restoring trust in environmental decision-making

4. Transparency in decision-making is vital to building public trust and confidence in government institutions and holding decision makers to account for their actions.

¹ The Stage 2 Nature Positive Bills comprise of the following: Nature Positive (Environment Protection Australia) Bill 2024 (**EPA Bill**); Nature Positive (Environment Information Australia) Bill 2024 (**EIA Bill**); Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 (**Transitional Provisions Bill**).

² Law Council of Australia, 'Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 and related Bills' (18 July 2024), <<https://lawcouncil.au/publicassets/226e9074-e547-ef11-94a6-005056be13b5/4562%20-%20S%20-%20Inquiry%20into%20Nature%20Positive%20Bills.pdf>>.

Transparency assures the public that established processes are being followed, decision makers are operating with independence, stakeholder feedback is being considered, and there is opportunity for the public to understand and scrutinise the reasons for decisions that affect them and the broader community. Transparency also plays a key role in promoting the observance of the rule of law.³

5. The findings of the 2020 Samuel Review into Australia's federal environmental laws reveal a significant deficit in the public's trust in environmental decision making. There continues to be a public perception that environmental decision making is not delivering for the environment, for business or for the community.⁴ The review identifies that "*limited access to information about decisions and the lack of opportunity to substantively engage in decision-making under the Act*" as causative of this erosion of public trust. Further, Professor Samuel points to the opaque nature of decision making, leading to a public perception that environmental concerns are being given limited weight due to proponents having undue influence on decision makers.⁵ Ultimately, the Samuel Review concludes that trust can be restored through transparency and robust oversight of decision making to address these underlying causes.⁶

The Government's policy rationale for the Stage 2 Nature Positive Bills

6. The Government's policy rationale for the establishment of Environment Protection Australia (EPA) and Environment Information Australia (EIA) reflects the concerns raised by the Samuel Review. The stated rationale for the establishment of the EPA is to "*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*";⁷ and the stated rationale for the establishment of the EIA is to provide "*more transparency of the critical information and data that underpins regulatory decision-making*."⁸
7. While the policy rationale behind the Stage 2 Nature Positive Bills aligns well with the findings of the Samuel Review, the legislative provisions proposed, in our view, do not go far enough to promote transparency. We have set out below areas where transparency can be strengthened in the Stage 2 Nature Positive Bills.

A legislated open, merit-based process for appointing the CEO of the EPA

8. The proposed section 44 of the Nature Positive (Environment Protection Australia) Bill 2024 (EPA Bill) establishes that the CEO of the EPA is appointed by the relevant Minister, with the approval of the Governor General.⁹ The EPA Bill does not set out the process that the Minister must follow in making this appointment—this is left for government to decide.
9. As outlined in our earlier written submission, the proposed Ministerial appointment of the CEO may exacerbate a public perception that the CEO role is not free of political bias. Although the Second Reading Speech for the EPA Bill notes the Government's intention

³ See the Law Council of Australia, [Policy Statement on Rule of Law Principles](#) (March 2011).

⁴ Professor Graeme Samuel AC (2020), [Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 \(Samuel Review\)](#), ii.

⁵ *Ibid*, 9.

⁶ *Ibid*, 10-11.

⁷ The Hon Tanya Plikersek MP, '[Nature Positive \(Environment Protection Australia\) Bill 2024 – Second Reading](#)' (Speech, House of Representatives, 29 May 2024).

⁸ The Hon Tanya Plikersek MP, '[Nature Positive \(Environment Information Australia\) Bill 2024 – Second Reading](#)' (Speech, House of Representatives, 29 May 2024).

⁹ EPA Bill, s 44.

is to apply its *Merit and Transparency Policy*,¹⁰ this does not go far enough to address the public's concerns because:

- (a) The *Merit and Transparency Policy* is ultimately a policy document—there is no legal obligation for Government to follow it, and it can be amended by Government from time-to-time; and
- (b) The *Merit and Transparency Policy* currently provides a backdoor for a Minister to not advertise a vacancy and conduct a full selection process, for reasons including the availability of an eminent person, an urgent vacancy or the desire to appoint another person who already holds a different office—see section 2.6.6 of the Policy.¹¹ These are all discretionary considerations that the Minister can agree with the Prime Minister. Therefore, there is no guarantee that the CEO will, at all times, be selected in an open, merit-based and transparent manner, increasing the risk of a public perception that the CEO appointment is influenced by politics.

10. Given the significant public outcry regarding trust and transparency in environmental decision making, transparency in the CEO selection process needs to be an obligation embedded in legislation, not a discretion contained within government policy documents. We therefore recommend that the Committee amend section 44 of the EPA Bill, to include a requirement that the person selected as CEO of the EPA be appointed as a result of an open merit-based process that includes:

- (a) public advertising of the vacancy over a reasonable timeframe and including selection criteria for the position;
- (b) the shortlisting of at least 3 candidates who meet the selection criteria, on the advice of an independent skills-based board of the EPA (see also paragraphs 20 to 22 of this letter);
- (c) the selection of one of the shortlisted candidates as the CEO appointee.

Limited merits-review for decisions under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)

11. In our earlier written submission to the Committee in this inquiry,¹² we recommended adopting the Samuel Review recommendation for the inclusion of limited merits review rights under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)*. Merits review promotes the quality and consistency of the decisions of primary decision makers, as well as transparency and accountability in decision making. While the Law Council has a strong preference generally for full merits review, it recognises that the alternative limited merits-review right recommended would be an improvement in the current context, by:

- (a) Conducting the merits review 'on the papers'—there being no hearing associated with the review;

¹⁰ 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>>; The Hon Tanya Plibersek MP, 'Nature Positive (Environment Protection Australia) Bill 2024 – Second Reading' (Speech, House of Representatives, 29 May 2024).

¹¹ 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>>.

¹² Law Council of Australia, 'Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 and related Bills' (18 July 2024), <<https://lawcouncil.au/publicassets/226e9074-e547-ef11-94a6-005056be13b5/4562%20-%20S%20-%20Inquiry%20into%20Nature%20Positive%20Bills.pdf>>, [19]-[23].

- (b) Limiting the review to the materials available to the original decision-maker—no further time being spent gathering additional information; and
 - (c) Limiting the review to matters of substance that could alter the original decision, rather than matters of process that may not change the end outcome. (This arises by the very nature of merits review as compared to judicial review. In this respect, the Samuel Review recommended limiting merits review to the incorrect exercise of a discretionary power, or where a decision is unreasonable.)
12. A limited merits-review right also has the benefit of correcting deficiencies in and providing information about decision making early, which can help avoid more lengthy and expensive legal challenges down the track that cause delays in approval processes. This would address one of the key concerns raised by industry groups, as expressed at the hearing for this inquiry (see for example the comments below made by the Urban Development Institute of Australia):

*One of the issues we're facing, which has been raised by a number of members here today, is that currently we are seeing a long delay in getting approvals under the EPBC Act. I don't think that outcome is good for industry or for the environment. Whatever changes we make—whether we stick with the status quo or move to a new EPA and assessment under the EPA—we need to see improvements in that process. We have long delays due to a lack of clarity and certainty, and inordinate and repeated requests for additional information that result in long delays in getting timely approvals on projects. I don't think that's a good outcome.*¹³

13. We therefore reiterate our original recommendation to amend the EPA Bill to allow for at least a limited right of merits review for approval decisions, and the application of conditions to approvals, under the EPBC Act.

Issuing of Environment Protection Orders

14. As outlined in our earlier written submission to the Committee in this inquiry,¹⁴ there are several aspects in the issuing of Environment Protection Orders (**EPOs**) that can benefit from greater transparency:
- (a) **The factual basis for an EPO:** currently, the contents of a written or verbal EPO does not require the Minister to disclose the relevant facts that form the basis for the Minister's "reasonable belief" that a contravention of the EPBC Act has occurred or may occur. The proposed paragraph 474B(1)(c) requires an EPO, verbal or oral to disclose "*brief details of any alleged contravention or potential contravention to which the order relates*".¹⁵ Disclosure of the alleged contravention of the EPBC Act (without the underlying facts leading to that assessment) may not be sufficient information for a proponent to be able to appropriately identify the underlying factual matters that have led to the issue of the EPO. This also deprives a proponent of the opportunity to work constructively with the EPA or Minister to address the underlying issues justifying the EPO. We therefore recommend that the proposed paragraph 474BB(1)(c) be amended to

¹³ Evidence to the Environment and Communications Legislation Committee, Senate, Canberra ACT, 26 July 2024, 50 (Mr Nathan Garvey, Urban Development Institute of Australia).

¹⁴ Law Council of Australia, 'Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 and related Bills' (18 July 2024), <<https://lawcouncil.au/publicassets/226e9074-e547-ef11-94a6-005056be13b5/4562%20-%20S%20-%20Inquiry%20into%20Nature%20Positive%20Bills.pdf>>. [36]-[39].

¹⁵ Transitional Provisions Bill, Schedule 11, Part 1, Item 2.

insert a requirement to disclose, at a high level, the underlying facts that have led to the issue of the EPO.

- (b) **Limited merits review for an EPO:** As currently proposed, it is not clear to us whether there are any review or appeal rights for the issue of an EPO, or the scope of an EPO. This is even more concerning given the possibility that some EPOs will have no end date. (The proposed subparagraph 474B(1)(e)(ii) enables an EPO to be in force “*until it is revoked by the Minister*”.) In its evidence at the hearing for this inquiry, the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) stated that the proposed EPO regime is modelled on South Australian regimes.¹⁶ However, it is worth noting that even the South Australian regime for EPOs under their *Environment Protection Act 1993* (SA) provides for a 14-day appeal right against an EPO to South Australia’s Environment, Resources and Development Court.¹⁷ Such a provision is absent from the Stage 2 Nature Positive Bills.

For the reasons discussed at paragraphs 11 to 13 above, we strongly recommend that there be available a limited merits review right for the issue and scope of EPOs, to mitigate the risk of the incorrect application of EPO powers, particularly in circumstances where they have been issued verbally (and therefore in time-constrained circumstances).

Publication of Ministerial delegations to the CEO

15. The proposed new section 515AAA to be inserted into the EPBC Act enables the Minister, by signed instrument, to delegate powers under the EPBC Act to the CEO of the EPA.¹⁸ As outlined in our earlier written submission to this inquiry, this can encompass a wide range of powers, including designation of controlled actions, assessment processes, and approval of controlled actions under the EPBC Act.¹⁹ The delegation is also significant because, as currently drafted, the CEO of the EPA operates wholly independently of the Minister, and is not subject to any Ministerial directions²⁰ (as compared to the current set of Ministerial delegations to DCCEEW—the relevant officers exercising the delegated powers operate under the general direction of the Minister).
16. From a rule of law perspective, accountability in decision making, and for clarity in decision-making arrangements, we recommend that these instruments of delegation be made publicly available. This can be achieved by making the delegation instrument a ‘notifiable instrument’ within the meaning of section 11 of the *Legislation Act 2003* (Cth).
17. Additionally, we reiterate the concerns we expressed in our earlier written submission to this inquiry regarding the lack of accountability over the EPA’s CEO, and reiterate the need for mechanisms to keep the CEO accountable for any actions (including through the agency of an independent statutory skills-based board with specific functions in relation to the operation of the EPA as a whole as well as in relation to the CEO in

¹⁶ Evidence to the Environment and Communications Legislation Committee, Senate, Canberra ACT, 26 July 2024, 81 (Mr Graeme Grosse, Department of Climate Change, Energy, the Environment and Water).

¹⁷ [Environment Protection Act 1993 \(SA\)](#), s 93(2)(d).

¹⁸ Transitional Provisions Bill, Schedule 2.

¹⁹ Law Council of Australia, ‘Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 and related Bills’ (18 July 2024), <<https://lawcouncil.au/publicassets/226e9074-e547-ef11-94a6-005056be13b5/4562%20-%20S%20-%20Inquiry%20into%20Nature%20Positive%20Bills.pdf>>, [11]-[13].

²⁰ EPA Bill, ss 14, 16(2).

particular, powers for the Minister to direct the CEO in certain circumstances, and high level principles to guide the exercise of the CEO's functions.²¹

Nature positive definition

18. The current definition of nature positive in subsection 6(1) of the Nature Positive (Environment Information Australia) Bill 2024 (**EIA Bill**) does not include a transparent set of parameters to measure the Government's progress in achieving nature positive (i.e., halting and reversing nature loss). Without a transparent benchmark and target, it is difficult for the public to hold the Government to account on its progress and corresponding policy settings.
19. As set out in paragraphs 24 to 35 of our earlier written submission to this inquiry, we strongly recommend that the text of the EIA Bill include the baseline year (2020) and target year (2030), consistent with the widely accepted definition of "nature positive" and in line with Australia's international commitments under the Kunming-Montreal Global Biodiversity Framework (**GBF**).²²

The governance benefits of an independent statutory skills-based board

20. At paragraph 18(a) of our previous written submission to this inquiry, we recommended that the EPA Bill be amended to establish an independent statutory skills-based board. An independent statutory skills-based board can strengthen the EPA's governance arrangements in the following ways:

Broaden the skills that are brought to bear in environmental decision making

21. Under the EPA Bill as currently drafted, the CEO of the EPA need only have knowledge of, or experience in, one of the following fields:
 - (a) Conservation of biodiversity
 - (b) Ecologically sustainable development
 - (c) Heritage
 - (d) Indigenous affairs
 - (e) Law
 - (f) Law enforcement
 - (g) Natural resource management
 - (h) Any other matters prescribed by the rules.²³
22. If the EPA had an independent, statutory skills-based board, comprised of people with expertise in the fields listed above, complex decisions made by the EPA (and/or the CEO) could be informed by the range of experiences and skills that such a board could bring, ultimately improving the quality of decisions made. This is appropriate given the

²¹ Law Council of Australia, 'Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 and related Bills' (18 July 2024), <<https://lawcouncil.au/publicassets/226e9074-e547-ef11-94a6-005056be13b5/4562%20-%20S%20-%20Inquiry%20into%20Nature%20Positive%20Bills.pdf>>, [18].

²² 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>>.

²³ EPA Bill, s 44(2)(b).

complex nature of many environmental decisions, requiring a balancing of a multitude of judgment factors.

23. By way of example:

- (a) the Victorian Heritage Council (which faces similar decision-making complexity and need for diversity in skills and knowledge) complements its Executive Director's role with a board that has a range of knowledge and skills including in legal, history and engineering fields;
- (b) for decisions under Part 9 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) involving the protection of a World- or National-listed area—where the heritage values at stake are a combination of biodiversity and Aboriginal cultural heritage—an indigenous board member working with a board member with expertise in biodiversity conservation will bring greater insight and expertise to an approval decision (if the board were to have a role or function in such decisions).

Reduced risk and/or public perception of regulatory capture

24. One of the strongest concerns of the “CEO without a Board” model that the EPA Bill gives rise to is the significant risk of regulatory capture by powerful interest groups, which can lead to a public perception that the CEO role is not free of political bias. An independent statutory skills-based board can overcome this by having decision-making responsibilities distributed to a group rather than a single person, making it more difficult for decisions to be influenced by interest groups. The board could also advise the Minister on the CEO appointment, which would also bolster the public's confidence in the independence of the CEO's position. These points are also addressed in our earlier written submission to this inquiry at paragraphs 14 to 18. An independent statutory skills-based board will go a long way to restoring public trust and confidence in environmental decision-making that the Government is seeking to achieve through establishing the EPA.

Contact

25. If the Law Council can be of any further assistance to the Committee in the course of its inquiry, please contact Ms Ashna Taneja, Principal Policy Lawyer, on (02) 6276 3755 or at ashna.taneja@lawcouncil.au.

Yours sincerely



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