Environmental Defenders Office

Submission to the Inquiry into Australia's extinction crisis

9 April 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:

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Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonization.

Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide further input to the Inquiry into Australia's Extinction Crisis. We note that the purpose of the additional hearing in April 2024 is to:

> examine the progression of the Australian Government's reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). Topics under consideration include the government's implementation of the recommendations of the *Independent Review of the EPBC Act* undertaken by Professor Graeme Samuel AC; the Nature Positive Plan; and the ongoing consultation process on draft EPBC legislation.

EDO has been deeply engaged in the EPBC Act reform process over the last 5 years since the commencement of the Samuel Review. We refer the committee to our previous extensive submissions on the need for biodiversity law reform.[1]

Our primary recommendation is to urge the Government to introduce – and the parliament to pass – a comprehensive package of legislation in this term of parliament.

The EPBC Act is 20 years old and is not fit for purpose. It is failing our environment, business and community, and time is running out to save our iconic threatened species. Legislative reform is needed now – we cannot wait another decade for another statutory review to confirm what we all know – that the national environment laws are failing.

We commend the Government for its ambitious commitments in the Nature Positive Plan, as well as international biodiversity commitments for 2030. Substantial work has been done by the reform taskforce in preparing legislative and policy drafts, and we urge the government to finish the job they have committed to and introduce the comprehensive package to parliament this year.

In this context, we provide this high-level submission focussing on the **top 6 reform areas** that need to be addressed in the new laws this year. EDO would be happy to provide further specific analysis of these issues to the Committee if needed.

[1] EPBC Act reform submissions are available at: www.edo.org.au. We would be happy to provide the Committee with further specific analysis and recommendations if required.

Introduction

The EPBC Act is well overdue for reform, 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. These reforms are an opportunity to turn this decline around.[2]

This is the critical year to secure a strong legal framework that will ensure our national environmental regime truly protects and restores the habitats and ecosystems on the brink.

The Federal Government has committed to an ambitious agenda in the Nature Positive Plan to: create a new regulator, Environment Protection Australia (EPA), set legally enforceable National Environmental Standards, and make significant changes to biodiversity offsetting, threatened species protections, and planning and approval processes. This ambition is welcome, but the momentum for reform must continue, as the threats to our environment continue to stack up. This means we need nature positive legislation introduced and passed in this term of Parliament, so that the new laws can start to protect, repair and conserve nature as soon as possible.

This submission sets out EDO's priorities for urgent nature positive law reform in 2024. EDO has now attended four 'lock in' stakeholder consultations with the DCCEEW to view parts of the proposed new laws. We have serious concerns about how certain elements of the reforms are tracking, but believe that transformational law reform is possible this year, and 'nature positive' is within reach. We continue to work with the department taskforce, experts, eNGOs and academics to maximise this once in a generation opportunity to write laws that actually deliver for nature, climate and community.

We have identified 6 key components needed to ensure environmental law reform in 2024 will truly make a difference for the nature we love.

- **The new environmental laws must be clear, consistent, and outcome driven.**
- **An independent EPA, with a clear statutory role and good governance arrangements, is best placed to fix the trust deficit in environmental decision-making.**
- **First Nations communities should be at the forefront of environmental and cultural heritage protection.**
- **Community consultation and engagement must be at the core of environmental decision-making.**
- **Climate change is the biggest threat to our environment, and climate considerations must be integrated into the new law.**
- **Upfront nature protection and 'red lines' will be crucial to protect at-risk species and ecosystems.**

This submission provides further detail on the key issues below.

[2] See EDO's legal update 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).

1. The new environmental laws must be clear, consistent, and outcome driven

Australia urgently needs a new environmental law regime. The current EPBC Act is 20 years out of date, unable to deal with climate change and cumulative impacts, doesn't reflect community expectations, and creates uncertainty for proponents. The current Act is full of opaque rules and unfettered discretions in decision-making, which frequently results in poor environmental outcomes.[3] The new regime must turn this around, and not repeat mistakes of the past.

New nature positive laws must not replicate the existing discretionary decision-making processes that have so clearly failed to protect the places and species we love. We cannot simply copy and paste existing weak provisions and re-brand the laws as nature positive. Significant reform is needed.

Legal tests, decision-making criteria, and statutory powers should be clear, objective and constrained for best practice environmental decision-making. These reforms have the potential to restore community trust in federal-level environmental approvals and lead to truly 'nature positive' outcomes – but only if the institutions and legal processes under the reformed Act have integrity, legally enforceable standards, and are free from loopholes.

EDO is advocating for features like **objective decision-making** (i.e., not just relying on the decision makers to 'have regard to' a check list of considerations and be satisfied that procedural requirements have been met), clear tests requiring decisions to be consistent with the new National Environmental Standards, and specific statutory timeframes for the release of reasons for decisions. It is also important that there is clarity about which decisions, and which parts of the Act, the National Environmental Standards will apply to, and that their application is consistent. Environmental protections must apply to all types of projects, and any ability to remove or exempt projects from the usual assessment and approvals pathway (including through enabling the Minister to assume decision-making power from the independent EPA) must be constrained.

These critical elements are important to the functioning of the new regime as a whole, not just particular parts. Key tests, standards and clear requirements need to be explicit in the new legislation and not delegated to future rules and guidelines that may be easily changed.

2. An independent EPA, with a clear statutory role and good governance arrangements, is best placed to fix the trust deficit in environmental decision-making

The new EPA will be the key decision-maker for federal environmental approvals. It will be responsible for most decisions relating to the nine Matters of National Environmental Significance (MNES), which are currently regulated by the EPBC Act. The EPA will also have regulatory and enforcement duties, which is an important and overdue reform.

Along with the establishment of this new statutory body, the **approvals process** will change, and the Government has proposed a different, proponent-led, project consultation and self-assessment step – prior to an application for approval of an action being formally lodged. After undertaking this process, the proponent will apply to the EPA for approval, with the regulator assessing the application against the National Environmental Standards and other legislative factors before making a decision. Proponents will also have the option of seeking a decision that

[3] Independent Review of the EPBC Act – Final Report (October 2020).

approval under the federal laws *isn't* required, called the 'low-impact' pathway. The role of the EPA is therefore critical for the integrity of the new regime, which means its regulatory powers and structure need to be clear.

Community trust can only be restored in environmental decision-making if the decision-maker itself is transparent, accountable, non-partisan, and guided by clear statutory objectives and duties. EDO remains concerned about the EPA's **governance arrangements.** We are concerned about the proposed process for direct Ministerial appointment of the EPA's CEO, rather than an independent, skills-based Board model that has consistently been recommended by experts. An advisory body, appointed to assist the EPA in expert analysis and decision-making would be a useful addition – but only if the appointment, terms of reference, and conflict of interest policy for the advisory body are robust. Without public scrutiny of these functions, and transparency in the CEO's appointment process, the independence of the EPA may be in doubt.

Similarly, the proposed Ministerial **"call-in" power** threatens to undermine certainty in the new system. The power would give the Environment Minister of the day the ability to take a decision out of the EPA's hands at any point up to before the day the decision by the EPA is due, for any reason. Concerningly, the Minister's approval powers will be less robust – the Minister will not be required to apply the same considerations and legal protections as the EPA. It would allow the Minister to approve what would otherwise be an unacceptable impact, and to agree to projects that don't adhere to the Standards. An unfettered call- in power could completely undermine the role of a new EPA applying strong national standards – fundamental pillars of the nature positive reforms.

3. First Nations communities should be at the forefront of environmental and cultural heritage protection.

The absence of the First Nations Participation and Engagement Standard from the policy materials shared with stakeholders so far is of significant concern to EDO. Environmental burdens such as pollution, environmental degradation and the impacts of climate change are disproportionately felt by First Nations communities, who often have little or no say in the way that decisions are made about their Country. This needs to change.

The new nature laws must be underpinned by and implement the **United Nations Declaration on the Rights of Indigenous Peoples** (UNDRIP), particularly the principles of free, prior and informed consent, including in relation to environmental decision-making. This means any decision likely to have an impact on First Nations communities, cultural heritage, lands or water must first have the free, prior and informed consent of the relevant community, informed by an iterative, culturally appropriate consultation process. The rights of First Nations communities need to be front and centre – and progressing the reform package without this aspect is unacceptable.

Similarly, the **cultural heritage** regime in Australia needs urgent updating, with 1970s era legislation still in place in some states, and an outdated conception of underwater cultural heritage still present at the federal level. These Acts – the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the EPBC Act – should work in conjunction to enable First Nations communities to protect their Countries and cultural heritage as they deem fit.

4. Community consultation and engagement must be at the core of environmental decision-making.

As outlined above, a proposed change to the approvals process is the shift of onus on proponents to undertake all **community consultation** prior to application to the EPA. The intention, to ensure early and iterative consultation with community, with feedback taken into account in project design, is commendable. But experience with other schemes, such as relating to offshore oil and gas, shows this requires clear legislative guidelines, penalties for bad faith engagement, and a role for the regulator to step in if a proponent is failing to meet the standard.

It is critical for both public confidence in and the integrity of the new laws that community rights – the right to know, the right to participate, and the right to challenge – form part of the foundational architecture of the new laws. EDO does not support attempts to pre-empt this important process for specific industries.[4]

Requirements that the proponent must provide opportunities for engagement with community members – for example through a public meeting – and allow for clarification of relevant information about a proposed action, are welcome. This is however the bare minimum, and a much stronger requirement should apply to proponents to provide multiple opportunities for engagement when community concern is high, or accessibility to information might be limited.

It's important that the EPA can take an active role in overseeing, where appropriate, the process prior to lodgement of an application (as is proposed for the low-impact pathway). This is particularly so when the project is complex, controversial, has significant public interest, or where the proponent lacks the capacity to undertake the process themselves.

This proponent-led early engagement, while a positive step, cannot displace opportunities for the community to make submissions on a proposal directly to the decision-maker. The exposure drafts for the proposed new laws currently contain **no** provision for public exhibition and public submissions on applications.[5] This is a regression from the EPBC Act, and must be addressed.

The EPA must be required to seek and genuinely consider submissions from the public in making decisions, able to receive information directly from the community; and it must be required to demonstrate how key themes and issues from the consultation were taken into account.

The new laws should provide a clear pathway for community members to request the EPA to require a proposed action be submitted for federal assessment where the proponent has failed to refer it – this is an important accountability measure which is missing from the draft reforms to date.

Third-party **merits review**, the ability of community to request reconsideration of decisions on their merits, continues to be a key recommendation from Professor Samuel's *Independent Review of the EPBC Act* and from legal experts that must be brought into the federal environmental

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[4] See, EDO's Submission on the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024.

[5] We note that the publicly released policy papers assert that the decision maker may seek public feedback on projects, however this is not reflected in exposure drafts consulted on to date. We trust that this oversight will be amended.

approvals regime to provide additional accountability, and lead to better decisions.[6] And while we've seen some improvements for strengthened compliance and enforcement provisions, civil enforcement provisions need to be strengthened, and proposed privative clauses (limiting court review) need to be deleted.

5. Climate change is the biggest threat to our environment, and climate considerations must be integrated into the new Act.

The EPBC Act is Australia's governing legislation when it comes to approving new coal and gas projects. With 2023 confirmed to be the hottest year on record,[7] greenhouse gas emissions from fossil fuels the leading cause of climate change, it's nonsensical that our reformed environmental laws wouldn't deeply integrate climate change considerations into all parts of the decision-making process. The **climate and biodiversity crises – and solutions – are inextricably linked**. It is simply not possible to create 'nature positive' legislation without proper consideration of climate impacts, and climate change drivers.

The Safeguard Mechanism reforms do not meaningfully address the climate change impacts from new proposals or expansions. Assessment against the Safeguard Mechanism caps and rolling carbon budget does not happen until an action has been approved under national nature laws, and there are no clear grounds to refuse a project based on its Safeguard Mechanism obligations or impact.[8] Once a project has been approved, the Climate Change Minister may then be required to assess the new project against the Safeguard caps and subsequently reform the Safeguard regulations; however this process has no legal impact on the initial step of assessment and decision-making under national nature laws. Federal nature laws are therefore the logical place for assessment and consideration of a new project's climate impacts, *before* it gets approved.

Our national environmental laws must therefore account for the climate impact of new projects, and they must not allow for new fossil fuel projects to be approved. Simply requiring transparency about emissions from new projects isn't sufficient – the laws should be strong enough to prevent new, highly polluting projects which will damage climate and biodiversity. As proposed, the new legislation will require proponents to disclose an estimate of Scope 1 and 2 greenhouse gas emissions and proposed management of those, including any measures used to meet Commonwealth requirements, when applying to the EPA. However, this information is not explicitly required to be considered by the EPA in making its decision, as there are no explicit links to our legislated emissions targets, a carbon budget, or Safeguard Mechanism baselines, nor the international climate agreements Australia is a party to. This means that, as proposed, no thorough assessment of a new project's emissions – and the impacts those emissions will have on our environment – will take place before the project gets approved.

To be fit-for-purpose, climate-ready, and to be able to remain relevant as the climate continues to change, the new laws clearly must integrate climate in a much more substantive way. EDO supports the a new standalone climate MNES (a 'climate trigger') to pull projects in for assessment on the basis of their emissions. Climate changes considerations must also be embedded in all aspects of the new laws, including in decision-making. This includes reforming the definition of 'impact' to ensure cumulative impacts and climate change are addressed, empowering the EPA to

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[6] See, for example, EDO's May 2023 memo *Merits review as a critical component of access to justice for environmental decision-making in EPBC reforms.*

[7] https://www.theguardian.com/environment/2024/jan/09/2023-record-world-hottest-climate-fossil-fuel

[8] Section 3(2) National Greenhouse and Energy Reporting Act 2007 (Cth)

assess new projects against a carbon budget and Australia's emissions targets, and to refuse unacceptably climate polluting projects. The laws must also ensure species and ecosystems threatened by climate disaster can recover, and that native forests and carbon sinks are protected.

The laws must also be able to support the roll-out of the necessary renewable energy transition. The new regime will need to deliver efficient and effective assessment processes – subject to clear and robust environment protections – to facilitate a rapid transition. Regional planning will play a critical role in this, with areas mapped out for priority development, or as a protected, no-go zones. However, it's not clear the regional planning policy currently proposed by the Government will secure real environmental gains, with the model seemingly to allow approvals for classes of actions (similar to under a strategic plan) but not ensuring holistic management of an area in line with rigorous environment standards. EDO has concerns about the regional planning mechanism as currently proposed.

6. Upfront nature protection and 'red lines' will be important to protect at-risk species and ecosystems.

Upfront protections for nature have been promised – but there are concerns that proposals seen to date do not go far enough and will not turn around ongoing biodiversity decline.

Importantly, the new EPA will not be able to approve any developments which would have an **unacceptable impact** on a protected matter, such as World Heritage site, or threatened species habitat. This will represent a 'red line' that can't be crossed, and is an improvement on the current law. However, the definition of unacceptable impact must be clear, and achieve its objective of preventing further decline of listed species and ecological communities, maintaining and improving populations, supporting recovery, and protecting critical habitat. Unacceptable impacts must be well defined for all MNES, including impacts on water resources, and the threshold must be the *likelihood* of that impact occurring at all.

Protection for areas of high environmental value is proposed to be delivered through new regional plans. If done properly, strategic planning and approval process, such as **strategic assessments and regional plans**, are useful tools to address cumulative impacts and provide upfront safeguards for environmentally sensitive areas. However, based on materials seen to date the proposed tools seem to be more focussed on allowing for approvals or assessment pathways that exclude federal oversight, or allow less rigorous standards than the National Environmental Standards.

While increasing upfronts protection for nature is welcomed, other aspects of the reform framework have the potential to undermine the strong protections being put in place by the Federal government.

The possibility of **accreditation of the states and territories** to make Commonwealth environmental approval decisions is another significant concern, a policy advocated for by successive federal Coalition Governments and opposed by environmental experts and NGOs, is another risk. In EDO's view, accreditation should be avoided in favour of clear national laws and a

well-resourced EPA, which can make faster, better decisions – without a loss of environmental protection.[9]

If accreditation of state and territory processes is to progress as part of the new laws, it is imperative that community consultation and participation requirements are strong, and that accreditation arrangements secure robust environmental protections through adherence with the National Environmental Standards. It is also imperative that compliance and enforcement responsibilities for accredited arrangements remain with the federal EPA, and that third-party enforcement is provided for.

Similarly, proposed changes to the Federal environmental offsetting framework (referred to as "restoration actions and restoration contributions" in the drafts**)** is likely to lead to an increase in the use of **offsets.** Materials seen to date suggest that offsetting rules will be relaxed under the new laws, essentially paving the way for proponents to simply pay money to undertake environmentally destructive projects. Removing limits on indirect offsets and introducing monetary contributions in lieu of direct offsets represent a shift away from best practice like-for like offsetting. If offsets are to be allows, their use must be strictly limited and regulated in line with best practice.

Conclusion

The Nature Positive reforms present a once-in-a-generation opportunity for transformational environmental law reform at the federal level. EDO supports the ambition of the Federal Government in getting the job done, and will continue to work towards implementation of the new nature laws this year. However, this opportunity should not be squandered, and it's crucial we end up with a significantly better regime than the current, failing, EPBC Act.

This means we need strong new laws that ensure meaningful community consultation, are fit to tackle the climate crisis, and halt and reverse the extinction trajectory. In 2024, the EPBC Act reforms are the best chance we've got to truly protect our precious environment.

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

[9] See e.g., Devolving Extinction: The risks of handing environmental responsibilities to state & territories (October 2020)