

Second review of the Environmental Protection and Biodiversity Conservation Act 1999 (Cth)

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6 min. read

Worthwhile read for: Town Planners, Developers, Landowners

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Key points

- A second independent review of the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) commenced on 29 October 2019 and was completed in October 2020 (**Review**).
- Australia's environment and iconic places are in an overall state of decline and are not sufficiently resilient to withstand current and emerging future threats.
- The Review found that the EPBC Act in its current form is outdated and does not enable the Commonwealth to effectively perform its environmental management responsibilities.
- The Review recommended 38 necessary reforms to enhance Australia's state of the environment. At the centre of the proposed reform is the implementation of a new suite of legally enforceable National Environmental Standards (**NESs**).

The EPBC Act requires that an independent review must be undertaken at least once every ten years to examine the operation of the EPBC Act and the extent to which its objects have been achieved.

The Review found that Australia's natural environment and iconic places are in an overall state of decline and are not sufficiently resilient to withstand current and emerging future threats. Such threats include land-use change, pollution, habitat fragmentation and degradation and climate change. Overall, the Review considers that the EPBC Act is out-dated and does not enable the Commonwealth to effectively fulfil its environmental management responsibilities to protect matters of national environmental significance and requires fundamental reform.

Ultimately, the Review found that the EPBC Act and its operation does not appropriately:

- set clear outcomes for environmental management of matters of national environmental significance;
- provide transparency and strong oversight to build trust and confidence in decisions made under the EPBC Act;
- actively plan for environmental outcomes or restore the environment to accommodate Australia's future development needs in a sustainable way;
- measure effectiveness to ensure that the EPBC Act delivers the right level of protection to make a difference to the environment and to support changes where needed; and
- respect and harness the knowledge of Indigenous Australians to better inform how the environment is managed.

The Review recommended 38 substantial and necessary reforms that are necessary to address the above shortcomings and enhance the current state of environment.

At the centre of the recommended reforms is the introduction of a full new suite of legally enforceable NESs which are intended to focus on matters of national environmental significance and on environmental protection and management. To assist with the immediate implementation of NESs, the Review has developed four recommended NESs for:

- matters of environmental significance;
- Indigenous engagement and participation in decision-making;
- compliance and enforcement; and
- data and information.

The full suite of proposed NESs can be accessed [here](#).

However, the introduction of the proposed NESs will not work in isolation to improve the state of Australia's environment and a broader framework of reform is necessary. The key areas of reform outlined in the Review include:

1. Reducing legislative complexity

The Review found that the EPBC Act is complex. The reasons for its complexity include the inherent nature of the policy areas covered under the EPBC Act, which in themselves are complex. These include environmental approvals, Commonwealth reserves, heritage protection and the conservation and recovery of threatened species.

Additionally the construction of the EPBC Act is archaic and does not meet the Commonwealth's best practice guidance to minimise legislative complexity, for example, compliance and enforcement provisions are distributed throughout the EPBC Act, rather than having a broad set of compliance and enforcement provisions that can be applied across it. The Review recommended that known inconsistencies, gaps and conflicts in the EPBC Act should be addressed immediately. However, in the long term, comprehensive redrafting of the EPBC Act is required, including consideration of alternative structures such as creating separate legislation for its key functional areas.

2. The respectful inclusion of Indigenous Australians' knowledge and views

The Review found that over the past decade there has been an increase in recognising the value of incorporating indigenous knowledge, innovations and practices into environmental management. The importance of indigenous knowledge in environmental protection is largely seen outside the EPBC Act through Indigenous Land Use Agreements and Indigenous Ranger Programs, etc. However, the Review highlighted that indigenous knowledge and views are not fully valued in decision-making under the EPBC Act and that the EPBC Act prioritises the views of western science. The Review proposes that indigenous knowledge and western science be considered on equal footing in the provision of formal advice to the Commonwealth Minister for Environment. To achieve this, it is proposed that the NES for indigenous engagement and participation in decision-making, as developed by the Review, be adopted in full and implemented immediately.

3. Investment in the restoration of the environment

The Review recognised that 'offsets' are a tool which should limit environmental degradation and increase restoration. However, the Review found that as a result of shortcomings in the design and implementation of the *EPBC Act Environmental Offsets Policy, 2012 (Offsets Policy)*, the Offsets Policy is contributing to environmental degradation rather than protecting

and enhancing it. The Review highlighted that in practice proponents see offsets as something that is to be negotiated from the outset rather than making a commitment to explore all options to avoid or mitigate environmental impacts caused by a proposed development. The Review also found that offset requirements are applied as a condition to environmental approvals and the conditions are not adequately monitored or enforced to ensure appropriate management and compliance. The Review recommended that the Offsets Policy be amended immediately to ensure it is ecologically feasible and delivers genuine protection and restoration in high priority areas.

The Review recommends a staged reform pathway to ensure that comprehensive change is delivered. In order to see a genuine change in environmental protection and enhancement, immediate action must occur by early 2021 and a complete legislative overhaul be completed by 2022.

Given the Review's findings that the EPBC Act is outdated, complex and requires full fundamental reform, it will be interesting to see how the Commonwealth responds to the recommendations of the Review.

Details on the Review can be accessed through the Department of Agriculture, Water and the Environments' [website](#).

We will keep you updated on the Commonwealth's response to the Review. For more information please contact our [Planning](#) and [Environment](#) teams.

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