



COMMONWEALTH ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT UPDATE

AN OUTLINE OF THE RECENT AMENDMENTS TO THE EPBC ACT
AND RELATED NATIONAL ENVIRONMENTAL STANDARDS

PRESENTED BY

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LAWYERS

A close-up photograph of a Bird of Paradise flower (Strelitzia reginae) with vibrant yellow and orange petals and a blue and red structure. The flower is set against a blurred background of green leaves. A white semi-transparent rectangular box is overlaid on the image, containing text. The top-left corner of the image is cut off by a dark green geometric shape.

ACKNOWLEDGEMENT OF COUNTRY

HWLE would like to acknowledge the Traditional Custodians of the land on which we are today. We would also like to pay our respects to Elders past and present.

Session outline

- ▼ Overview of the Act
- ▼ History of the reforms
- ▼ Phases of reforms
- ▼ Outline of amendments in 2025
- ▼ Outline of MNES and Offset standards

Overview of the EPBC Act

- ▶ Constitutional limits to Commonwealth power shape the way the Commonwealth embarks on environmental laws.
- ▶ That's the main reason it's all so weird.
- ▶ Approval from the Minister under the Act is required for any **action** that has, will have, or is likely to have, a **significant impact** on a **matter of national environmental significance** (see s12, 15B, 16, 18, 20, 21, 23, 24B or 24D).
- ▶ Such "actions" are called "controlled actions" (see s67).
- ▶ The term "**action**" is broadly defined as including a project, development, undertaking, activity or series of activities and an alteration of any of these things (see s523-524A).
- ▶ There are 9 protected "matters of national environmental significance" (referred to as "MNES").

Meaning of “significant” and “likely”

- ▶ **Significant** means important, notable or of consequence having regard to its context or intensity
- ▶ It is a question of fact
- ▶ It is not a mathematical exercise but rather a matter of considering the evidence as a whole
- ▶ In the case of impacts on threatened species, it requires demonstration of impact on the species as a whole
- ▶ It is a single evaluative exercise
- ▶ “**likely**” means “a real or not remote chance or possibility” as distinct from “more probable than not”

Approval system

- ▶ The approval pathway for controlled actions has a two-step process before the final decision -
 - The Minister firstly determines whether the action is a controlled action (see chapter 4, Part 7 sections 67-79E)
 - and if so, then secondly determines the assessment process and
 - ultimately determines whether to approve the action (see Chapter 4, Part 8 and Part 9, sections 80-145).

History of the reforms

- ▼ In 2020 Professor Graeme Samuels report
 - scathing
 - Highlighted key failings in the EPBC Act:
 - Recommended a complete overhaul of the Act
 - Government responded to the report with the 'Nature Positive Plan' in 2022.
 - It wasn't so positive for the former Minister...
 - Following the 2025 Federal Election the government recommitted to the reforms in a more moderate manner. These reforms passed on the 28th of November 2025.

Phases of reforms

- Present round of reforms is to be delivered by several amending Acts including –
 - Environment Protection Reforms Act 2025 (which contains the substance of the key amendments)
 - National Environment Protection Agency Act 2025 (establishing the National EPA)
 - Environment Information Australia Act 2025 (establishing a national environmental information agency)
 - Environment Protection and Biodiversity Conservation (Reconsiderations) Act 2025
 - Environment Protection and Biodiversity Conservation (Restoration Charge Imposition) Act 2025

Outline of amendments from 2025

IT'S VOLUMINOUS

- Standards
- Assessment pathways
- National Interest
- Emissions
- Penalties
- NEPA
- Rulings
- Environment Information Australia

National Environmental Standards (NES)

- ▶ Minister has the power to create National Environmental Standards.
- ▶ New s136A now provides that the Minister must not approve an action unless the approval is consistent with any NES.
- ▶ First two NES on Matters of National Environmental Significance and on Environmental Offsets were out for consultation until 30 January 2026.
- ▶ The next NES are intended to address:
 - First Nations engagement;
 - community engagement; and
 - data and information.

Ledger approach to assessment (Unacceptable impact, net gain, environmental offsets)

- Several new concepts are now embedded into the assessment and approval process
 - Unacceptable impact;
 - Residual significant impact; and
 - Net gain.

Unacceptable Impact Concept

UNACCEPTABLE IMPACT

- **Defined** by new section 527F and is tailored to some extent to the circumstances.
- The section contains a table stretching over 10 pages listing the relevant "unacceptable impact" for each section of the Act and/or each MNES.
- It includes things like "a significant impact that seriously impairs the viability of the listed threatened species...".
- Example extract is shown in the next slide

Unacceptable Impact Table extract

Provision	Matter protected	Unacceptable impact
subsection 18(1)	a listed threatened species in the extinct in the wild category	a significant impact that seriously impairs the viability of the listed threatened species
subsection 18(2)	a listed threatened species in the critically endangered category	a significant impact that: <ul style="list-style-type: none"> (a) seriously impairs the viability of the listed threatened species; or (b) causes serious damage to critical habitat of the listed threatened species where the habitat is irreplaceable and necessary for the listed threatened species to remain viable in the wild

Meaning of ‘seriously impairs’

- ▶ The term "seriously impairs" which features in the Unacceptable Impact table, is defined in s527H as
 - (1) *A significant impact of an action seriously impairs something if, compared to the action not being taken, the impact results in an impairment or alteration of the thing that is of a severe nature and extent.*
 - (2) *For the purposes of subsection (1), have regard to the nature, intensity, duration, magnitude, geographic extent and context of the impact.*

Residual Significant Impact

- ▶ Residual significant impact is defined by new section 527J
- ▶ *“Residual significant impact of an action*
 - *(1) An impact that an action will have or is likely to have on a matter protected by a provision of Part 3 is a residual significant impact on the matter if all of the following apply:*
 - (a) the impact is significant;*
 - (b) the impact will not be avoided, mitigated or repaired in the course of taking the action;*
 - (c) the impact will not be avoided, mitigated or repaired in the course of complying with conditions to be attached to the approval of the taking of the actions.”*

Net Gain

▸ **Net gain** (or as the Act states "*passing the net gain test*") is defined in section 527K as follows:

▸ "*Approval of an action*

(1) An approval of the taking of an action passes the net gain test in relation to a residual significant impact the action has, will have, or is likely to have, on a matter protected by a provision of Part 3, if:

(a) either or both of the following kinds of conditions is attached to the approval:

(i) a condition requiring the holder of the approval to compensate for damage to the matter that has been, or may or will be, caused by the residual significant impact;

(ii) a condition requiring the holder of the approval to pay restoration contribution charge in relation to the residual significant impact; and

(b) compliance with the condition or conditions results in a net gain for the matter:

(i) if the regulations prescribe the net gain for the matter— that is at least equal to the prescribed net gain; or

(ii) otherwise—that the Minister is satisfied is appropriate; and

(c) if any other requirements are prescribed by the regulations in relation to compensation for damage to the matter—the requirements are satisfied."

Prohibitions

- ▶ New section 136B prohibits the Minister from approving an action that has an **unacceptable impact**.
- ▶ New section 136C prohibits the Minister from approving a proposal that does not pass the net gain test "*in relation to the residual significant impact on the matter*".
- ▶ Beyond the approval prohibitions, the Act applies those concepts to bilateral agreements, regional plans and management frameworks (and the streamlined approvals possible thereunder) and the associated powers for imposing conditions, varying and extending approvals etc.

Restoration contributions

- ▶ To purge the debt of an unacceptable impact, section 527K permits a proponent to use Restoration contributions enabled by the separate *Environment Protection and Biodiversity Conservation (Restoration Charge Imposition) Act 2025*.
- ▶ The Minister may declare that the residual significant impact cannot be addressed for some matters by use of a charge (see s134AA).
- ▶ The accounting infrastructure necessary for this approach is established by Part 12B, including the restoration Contributions Holder and associated Special Account.
- ▶ The Act essentially permits offsetting to net gain so that project proponents will be able to:
 - deliver an offset themselves through direct delivery, advanced delivery or the Nature Repair Market;
 - pay for the government to do it via a restoration contribution payment;
 - a combination of both.

Assessment pathways

THE REFORMS NOW PROVIDE FOR 5 ASSESSMENT PATHWAYS

- Accredited assessment process
- Assessment on preliminary documentation
- Streamlined Assessment pathway (new)
- Environmental Impact Statement
- Public inquiry

STREAMLINED ASSESSMENT

- Available to projects which meet the NES and provide certain information up front (including GG information)
- Not available for fossil fuel actions

Assessment pathways

STATED INTENTION TO EXPEDITE THE PROCESS -

- 130(1B)(a) to (d) specifies a period of between 30 business days and 40 business days for the Minister to determine whether to approve after receiving the relevant report.
- Further changes to the assessment process include a limit on Ministerial reconsideration requests to 28 days for third parties, even on controlled actions. (see s78A(2)).

Greenhouse Gas information

THE OBLIGATION IS ABSOLUTE -

- 84A(1) “The requirements in this Part that relate to giving greenhouse gas emissions information for actions apply regardless of whether the information relates to the relevant impacts of the action”.

THE INFORMATION REQUIRED INCLUDES -

- an estimate of Scope 1 and 2 GG emissions or declarations about whether the emissions will exceed a threshold set by regulation;
- the strategies the proponent will implement to manage the emissions; and
- how those strategies or measures are consistent with law and Federal Government policy about GG.

National Interest – NIP & NIE

NIP – NATIONAL INTEREST PROPOSAL

- ▶ Minister
- ▶ Not fossil fuel action
- ▶ Intended outcome that is in Australia's national interest (such as Australia's defence, security or strategic interest or obligations under an international agreement);
- ▶ Approval under the Act, but will be exempt from -
 - compliance with the National Environment Standards (see s136A(2));
 - unacceptable impact prohibition (s136B(2)); or
 - the net gain test (136C(2)).

National Interest Exemption- NIE

- ▶ Can be a fossil fuel action
- ▶ Minister must be satisfied that it is in the national interest that the relevant provision of the Act not apply
- ▶ Minister may expressly consider Australia's defence or security or a national emergency
- ▶ Exempts the action from relevant provision of Part 3
- ▶ Exemption specifies -
 - The action
 - The provision of the Act from which it is exempt
 - The person to whom it applies,
 - The period of the exemption
 - Any conditions

Penalties

- ▶ Most offences have gone from 420 penalty units to 1000 penalty units.
- ▶ The cap on civil penalties has increased to 5000 penalty units for an individual (or the sum of benefit derived and detriment avoided by the contravention multiplied by 3), whichever is the higher.
- ▶ For a company the maximum civil penalty is more convoluted and is the greater of
 - 50,000 penalty units (\$16.5m); or
 - 3 x the sum of the benefit derived and detriment avoided;
 - Or 10% of annual turnover prior to the offending, and if that amount is more than 2.5million penalty units, then 2.5million penalty units is the maximum.

Orders and Audit

- ▶ New environment protection orders that can be issued for up to 14 days in urgent situations to prevent or respond to major breaches.
- ▶ These orders can be extended once for a further 14 days if needed. (see new s474A and 474B).
- ▶ A new Division 12 of Part 17 (s458 onwards) empowering the CEO to direct a person to undertake an audit.

Land clearing

CHANGES TO CONCEPT OF "CONTINUOUS USE" UNDER S43B. THIS EXEMPTION NO LONGER APPLIES WHEN

- ▼ the land has not been cleared of vegetation in the past 15 years or
- ▼ the land is within 50 metres of a watercourse in the Great Barrier Reef catchment.

The previous exemption of actions under Regional Forest Agreements (RFA) will be removed from 1 July 2027.

National EPA

- Separate Act
- New agency with CEO
- Compliance and enforcement powers
- Other powers delegated by Minister
- Not intended to issue approvals
- Education and compliance largely

Rulings

- ▼ Minister or CEO may issue within their jurisdiction
- ▼ To state how the law applies to a person or in circumstances
- ▼ Public consultation
- ▼ Enforced by s514YT -

(1) In performing a function or exercising a power under this Act or the regulations, a person must not act inconsistently with a ruling that is relevant to the function or power

(2) Despite subsection (1), a person may act inconsistently if, having regard to the particular circumstances of the matter to which the performance of the function or the exercise of the power relates, the person is satisfied that it would be inappropriate to comply with subsection (1).

EIA

- National Environmental Information Institute
- “Environment Information Australia”
- Responsible for collecting and reporting on environmental data nationally

Draft NES – MNES

“Ensure decisions provide for the protection, conservation and, where necessary, recovery of [MNES]...and the environment...”

11 objectives.

The outcomes sought are -

“(1) The outcomes which this Standard is intended to achieve are that decisions under the Act:

(a) provide for the protection, conservation, and, where necessary, restoration of protected matters;

(b) contribute to the promotion and enhancement of the diversity, abundance, resilience, and integrity of protected matters; and

(c) facilitate ecologically sustainable development.”

Draft NES – MNES - Principles

4 PRINCIPLES TO ACHIEVE THE OUTCOMES -

- Mitigation hierarchy
- Contextual approach
- Compensation as a last resort
- Actions supported by data, first nations consultation and general consultation

Draft NES – Environmental Offsets

To provide a framework in which offsets (where permitted) adequately compensate for residual significant impacts to deliver a net gain and contribute to the protection and enhancement of protected matters.

Outcomes which this standard is intended to achieve are that:

- (a) offsets are relevant and available to compensate for the impact to the protected matter and support recovery or conservation;
- (b) offsets result in a measurable improvement from the baseline at the time the relevant decision is made under the Act for protected matters; and
- (c) offsets provide certainty that protected matters will be protected and enhanced

Draft NES – Environmental Offsets

8 PRINCIPLES TO ACHIEVE THE OUTCOMES AS FOLLOWS -

- Feasibility
- Security
- Direct and tangible
- Measurable improvements
- Additionality
- Like for like
- Relevant area
- Offset commenced prior to impact



Questions?


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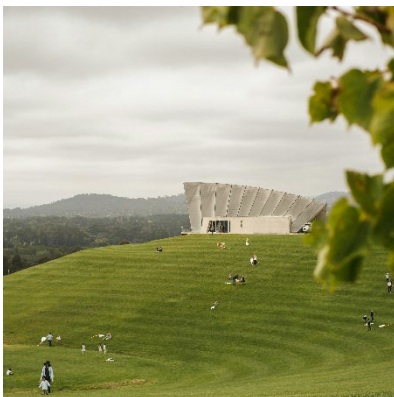
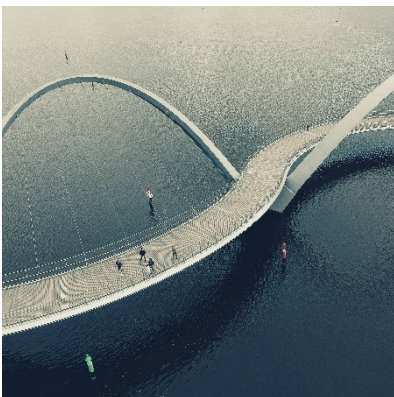
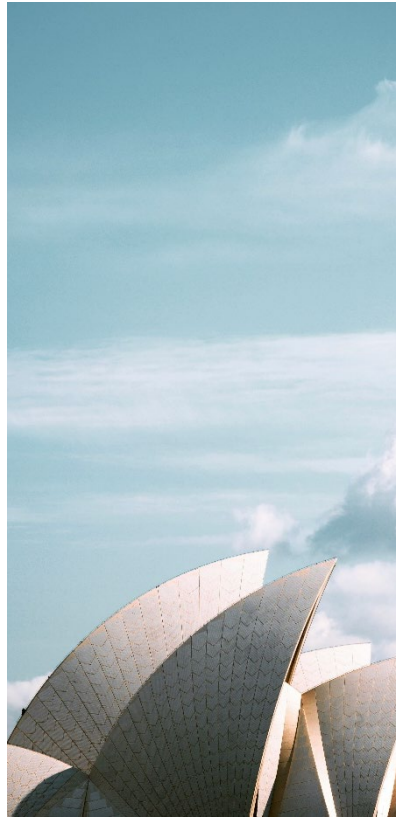
A close-up photograph of a Bird of Paradise flower (Strelitzia reginae) with vibrant orange and yellow petals and a blue and white crest. The background is softly blurred, showing green leaves and other parts of the plant. A dark green geometric shape is visible in the top-left and bottom-left corners of the image.

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