

Proposed EPBC Act reforms
Preliminary advice (3 Nov 2025)

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This advice is preliminary and high level. Given the proposed reforms include ~1,500 pages of amendments, and the complexity of the reforms, the provision of comprehensive and detailed advice will require more time.

Summary

- The reforms fail to address the key shortcomings of the Act.
- The reforms include measures that weaken some protections.
- Purported gains are minor and, in some cases, illusory.
- In our view, the reform package should not be supported unless – at a minimum – the following key changes are made.
 - Provisions are included to ensure land clearing is regulated under the EPBC Act.
 - The blanket exemption for the logging of native forests is removed.
 - The offset provisions are substantially amended.
 - The provisions designed to delegate approvals to State Governments are amended to reduce the risk of wholesale abdication of responsibility by the Australian Government.
- In addition, a climate trigger should be added given the limited scope and impact of the Safeguard Mechanism.
- Given the extent of the reforms, it is essential that there is sufficient time to analyse the changes and develop a considered response including amendments. This will not be possible before Parliament rises for the year. The Senate Inquiry is essential.

A. The reforms fail to strengthen protection for the environment – the critical issues are ignored

The reforms fail to address:

- Land clearing
- Logging of native forests
- Climate change

The main deficiency with the current EPBC Act is that key activities that are threatening the matters of national environmental significance do not trigger the Act. However, the proposed reforms do not address the scope of the Act and will not increase the number of actions that trigger the Act. All of the actions that currently avoid scrutiny will continue to avoid scrutiny.

The highest priority must be to ensure **land clearing** is effectively regulated. Our proposal (Attachment A) is clear and precise and should provide certainty for all stakeholders. We do

not propose adding a separate land clearing trigger. Instead, we propose “codifying” the types of land clearing that will come within the existing threatened species trigger. We define this as “high risk” land clearing.

In summary – our proposal provides that clearing of native vegetation over a specified area threshold is deemed to trigger the threatened species requirements if there are records of threatened species in the impacted vegetation type in the relevant subregion.

The Minister would *not* be able to approve high risk land clearing of remnant or mature regrowth in some cases (if the vegetation type has already lost 80% of its original extent), subject to the national interest exemption. Under our proposal, approval of high risk land clearing cannot be delegated to the States.

There are many cases of land clearing events that should have triggered the Act but have been ignored by State and Federal Governments – for example, a large area (~200+ hectares, across several properties) adjacent to a world heritage area in NSW, and containing habitat for numerous threatened species, was cleared sometime between 2021 - 2023 – see images at Attachment B. Our amendments make it clear that this type of land clearing triggers the EPBC Act.

The proposed reforms fail to remove the blanket exemption for **logging of native forests**. This exemption should be removed. Given the repeated breaches of environmental requirements by the NSW Forestry Corporation, it is inconceivable the Federal Parliament could exempt logging of native forests on the basis that State laws can be relied upon to protect the environment.

- There does not appear to be any basis on which the proposed National Environmental Standards can apply to forestry activities, given they will be exempt from the Act.

A **greenhouse trigger** should be added given the limitations of the Safeguard Mechanism. See Attachment C for more information on why a greenhouse trigger is needed. The trigger could apply to all projects likely to directly or indirectly result in 50,000 tonnes or more of greenhouse gas emissions per year - on average or at their peak – requiring all emissions from these projects to be subject to a carbon price that aligns with the aims of the Paris Agreement.

B. The reforms include measures that will significantly weaken protection for the environment

There are at least 2 major issues which represent a weakening of the existing position:

- a weakening of the **offset provisions** that will reduce the incentive for proponents to avoid and mitigate impacts on protected matters and undermine the ability for third parties to initiate legal proceedings to uphold offset requirements; and
- the inclusion of provisions which appear designed to facilitate a much greater **delegation of approval powers to State Governments**.

The reforms include a “**net gain test**”, which purports to ensure that actions cannot be approved unless all residual impacts on protected matters are **offset** through actions that result in a net gain for the impacted matter(s).

However, the Bill allows the net gain test to be satisfied through the payment of a “restoration contribution charge” to the Restoration Contributions Holder. The Restoration Contributions Holder is then obligated to spend the charge on either:

- (a) a restoration action that it is satisfied will result in a net gain for the impacted matter; or
- (b) a restoration action that results in a net gain for another matter protected by the same provision of the Act, even though it is not impacted by the relevant development.

This is highly significant.

- It allows for actions (developments) that are destroying habitat to be deemed to have a net gain on a protected matter, even though the impacts on the habitat are not offsettable (i.e. the impacts are irreversible) (because the proponent can pay into the Restoration Contribution Fund and thereby bypass the true net gain test).
- It allows actions (developments) that are destroying habitat to be deemed to have a net gain on a protected matter, even though there is no offsetting actions taken in relation to the impacted matter (e.g. impacts on koalas could be offset by actions directed at improving habitats for sea turtles).
- It allows the Restoration Contributions Holder to meet its obligations to “offset” the impacts of a development by providing a gain for a nominated alternative protected matter, even if the gain is substantially less than the losses to the true impacted matter. This is because the Restoration Contributions Holder’s obligations in relation to “alternative restoration actions” are framed around providing a “net gain” for the alternative protected matter, despite the fact the matter is not impacted by the relevant development (s 177CS(5)(c)). The use of the phrase “net gain” in this context is effectively meaningless because there is nothing to “net off” – the alternative protected matter is not impacted by the relevant development so there is no loss. In the absence of a loss, a gain of any magnitude will constitute a “net gain”.

In addition to the above issues, there are no provisions requiring adequate accounting for delivery of the net gain.

The impact of these provisions will be to lower the effective “price” for harming the environment, thereby increasing the likelihood that harmful projects will proceed.

Additional detail on the issues relating to offsets are in Attachment D, including information on how the offset provisions will, in effect, **mute the open standing provisions** of the Act.

To the best of our knowledge, in 25 years there has been only one example of the Australian Government **delegating its EPBC Act approval powers** to a State Government (in relation to the Opera House). However, the proposed Bills appear designed to facilitate **a much greater delegation of approval powers to State Governments**. There are some safeguards but these appear vague and discretionary. Detailed analysis is required of the relevant provisions to

appropriately limit the delegation of approval powers to States (e.g. new provisions to accredit management or authorisation frameworks and changes to regional planning provisions).

C. The purported gains are minor and in some cases illusory

The **proposed EPA** is a step forward but appears to be little more than a rebadged section of the Department. Unless the scope of the Act is addressed (e.g. land clearing), the EPA will be a mere observer as land clearing continues unabated, native forests are logged and our biodiversity continues to decline.

The introduction of **national environmental standards** is intended to limit the broad discretion under the Act to approval projects without adequate conditions. However, the Bill does not include the standards and does not include adequate restrictions on the making of the standards. Most significantly, even strong standards are irrelevant if the scope of the Act is not addressed. It is pointless having standards if land clearing etc is not regulated by the Act and thus subject to the standards.

The concept of an **unacceptable impact test** is, in theory, a step forward. However, the way in which the concept has been applied in the Bill needs further consideration because of the following.

- It is subject to the “Minister being satisfied” which provides a broad discretion.
- The test is too vague and the bar is set too high to materially restrict the exercise of approval powers. Most notably, it hinges on the notion of an action “seriously impairing” a protected matter. However, this is defined as “seriously altering” the matter for the worse, relative to a counterfactual (i.e. in the absence of the action). This is effectively unenforceable.
- Because bar is set very high and is vague, there is a risk that everything below this very high/vague bar will be approved - ie, this test may create an expectation that everything that is below the “bar” will be approved (and, in practice, everything will fall below a high / vague bar).

The **climate disclosure provisions** in the proposed Bills – which will mandate that new large-emitting facilities disclose their decarbonisation plans – will have no substantive effect. See attachment C.

Attachment A: Land clearing provisions

The proposed amendments set out in this document are intended to ensure effective regulation of “**high risk land clearing**”.

This is achieved by inserting new provisions which state that **high risk land clearing** is taken to have a significant impact on threatened species and/or threatened ecological communities.

- High risk land clearing is, in relation to threatened species, clearing that exceeds a specified area threshold and will result in clearing of a vegetation type for which there are threatened species records in that subregion in the last 50 years.
- High risk land clearing for threatened ecological communities is clearing that exceeds a specified area threshold and for which there is evidence that the vegetation contains a threatened ecological community.

There are several exemptions which are excluded from the definition of “high risk land clearing” including:

- Re-clearing of land that has been lawfully cleared since the EPBC Act commenced in 2000.
- Clearing required for the protection of human life, bushfires and infrastructure maintenance.

High risk land clearing must therefore be assessed and approved under the EPBC Act.

The assessment process can be an accredited State assessment process or, for minor clearing events, one of the streamlined assessment processes under the Act. This ensures that actions with more modest impacts can be assessed without undue delay.

However, the approval decision cannot be delegated to the State Government. State Governments have demonstrated they are unwilling to effectively regulate land clearing.

Approval cannot be given by the Australian Environment Minister for the clearing of remnant (including old growth) or mature regrowth vegetation where more than 80% of the ecosystem type of which the vegetation forms a part has been cleared (relative to its estimated pre-1750 extent), except under the national interest provisions.

(These provisions are a compromise – eg, they do not include a national cap on clearing levels, which could have been considered.)

The exemption for RFA forestry operations (logging of native forests) is also removed.

Insert new section 18B

18B High risk land clearing

- (1) **High risk land clearing** is taken to be an action which results, will result or is likely to result in a significant impact on:
 - (a) a listed threatened species; or
 - (b) a listed threatened ecological community.
- (2) **High risk land clearing** in relation to listed threatened species means an action which involves destroying or damaging an area of native vegetation ("**Impacted Vegetation**") where:
 - (a) the area of Impacted Vegetation is 20 hectares or more;
 - (b) the Impacted Vegetation contains one or more **Major Vegetation Groups** ("**Impacted Major Vegetation Group**");
 - (c) there are records, or other evidence, of a listed threatened species in the Impacted Major Vegetation Group in the **relevant sub-region** since 1 January 1975.
- (3) **High risk land clearing** in relation to listed threatened ecological communities means an action which involves destroying or damaging an area of native vegetation ("**Impacted Vegetation**") where:
 - (a) the area of Impacted Vegetation is:
 - (i) in relation to a listed threatened ecological community in the endangered category – 1 hectare or more; or
 - (ii) in relation to a listed threatened ecological community in the critically endangered category – 0.01 hectare or more; and
 - (b) there are records, or other evidence, which reasonably establish that the Impacted Vegetation contains a listed threatened ecological community in the endangered or critically endangered category.
- (4) Despite subsections 18B(2) and 18B(3), the following actions are not high risk land clearing:
 - (a) actions which involve destroying or damaging native vegetation that has re-grown since a previous lawful clearing event that occurred after 16 July 2000;
 - (b) actions which are reasonably necessary for the protection of human life or property;

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- (c) actions to respond to bushfires or to reduce the risk of bushfires, provided those actions are taken in accordance with all relevant State and Territory laws and there is no subsequent conversion of the native vegetation;
- (d) actions which involve the maintenance of:
 - (i) roads, tracks and fences existing on 1 November 2025, provided the width of clearing is less than 6 metres; or
 - (ii) infrastructure existing on 1 November 2025 for the provision of water, power and communications.
- (5) In determining the size of the area of native vegetation destroyed or damaged for the purposes of subsections 18B(2) and 18B(3), all areas of native vegetation that have been destroyed or damaged on the property on which the action has been or is proposed to be taken since 1 November 2025 are to be counted as part of the same action (irrespective of who caused the destruction or damage and how it relates to the proposed action).
- (6) For the purposes of subsection (5), a property means one or more land parcels, whether contiguous or not, that are managed as a single or integrated area as at 1 November 2025.
- (6) **Major Vegetation Groups** mean the Major Vegetation Groups listed in Schedule X
- (7) **Relevant sub-region** means, in relation to high risk land clearing, the IBRA (Interim Biogeographic Regionalisation for Australia) sub-region in which the action is proposed or has been undertaken.
- (8) This section does not limit section 18 or section 18A.

Insert new 33D Accreditation must not result in approval of high risk land clearing

- (1) The Minister may accredit a management or authorisation framework under subsection 33(2) for the purposes of a declaration only if the Minister is satisfied the framework will not result in the approval of an action consisting of high risk land clearing.

Insert new section 46D Agreement must not result in approval of high risk land clearing

- (1) The Minister may accredit a management or authorisation framework under section 46 for the purposes of a bilateral agreement only if the Minister is satisfied the framework will not result in the approval of an action consisting of high risk land clearing.

[Insert similar provision/constraint for regional plans]

Insert new section 136BA High risk land clearing of remnant or mature regrowth vegetation in highly modified ecosystems must not be approved

- (1) The Minister must not approve the taking of an action that is high risk land clearing if the vegetation to be cleared is remnant or mature regrowth and more than 80% of the ecosystem type of which the vegetation to be cleared forms a part has been cleared (relative to its estimated pre-1750 extent).
- (2) Despite subsection (1), the Minister may approve the taking of an action if:
 - (a) the action is a national interest proposal; and
 - (b) the Minister, acting reasonably, is satisfied that there are no prudent and feasible alternatives to the high risk clearing if the national interest proposal is to proceed; and
 - (c) the national interest proposal will result in a net gain for listed threatened species and listed threatened ecological communities through like-for-like offsets or an appropriate restoration contribution.
- (3) For the purposes of subsection (1), **ecosystems** must be defined at the Association Level (L5) under the National Vegetation Information System.
- (4) [Insert definition of **remnant** (which includes but is broader than old growth) and **mature regrowth**]

Deletion of Division 4, Chapter 2 (Forestry operations in certain regions)

Sections 38 – 43B are deleted.

[Transitional provisions to be drafted by Government].

Schedule of Major Vegetation Groups

Rainforests and Vine Thickets

Eucalypt Tall Open Forests

Eucalypt Open Forests

Eucalypt Low Open Forests

Eucalypt Woodlands

Acacia Forests and Woodlands

Callitris Forests and Woodlands

Casuarina Forests and Woodlands

Melaleuca Forests and Woodlands

Other Forests and Woodlands

Eucalypt Open Woodlands

Tropical Eucalypt Woodlands/Grasslands

Acacia Open Woodlands

Mallee Woodlands and Shrublands

Low Closed Forests and Tall Closed Shrublands

Acacia Shrublands

Other Shrublands

Heathlands

Tussock Grasslands

Hummock Grasslands

Other Grasslands, Herblands, Sedgeland and Rushlands

Chenopod Shrublands, Samphire Shrublands and Forblands

Mangroves

Inland Aquatic - freshwater, salt lakes, lagoons

Other Open Woodlands

Mallee Open Woodlands and Sparse Mallee Shrublands

Attachment B: Example of land clearing that avoided regulation under EPBC Act



Nov 2020

Oct 2023

The area cleared is immediately adjacent Werrikimbe National Park (NSW) – ie, adjacent to a world heritage area.

There are multiple records of nationally threatened species within metres of the cleared area including Spotted-tailed Quoll, Northern Long-nosed Potoroo, Glossy Black Cockatoo and Southern Greater Glider.

The action was not referred and there is no public record of any compliance action.

There is evidence of similar clearing on other properties in the region.

Attachment C: the need for a Greenhouse trigger

Why is a climate trigger needed when the Safeguard Mechanism (SGM) is already incentivising decarbonisation?

1. The SGM only imposes a carbon price on scope 1 emissions (most emissions associated with coal and gas are scope 3, i.e. they come from the combustion of the fuel overseas).
2. The SGM only applies to facilities outside of the grid-connected electricity sector whose emissions >100,000 tCO₂-e per year. This means it only applies to facilities responsible for 32% of emissions from the non-agriculture and land sectors (i.e. energy, industrial processes and waste) in Australia.
3. The SGM is an emissions-intensity based emissions trading scheme (ETS), not a cap-and-trade ETS. This means that only a relatively small proportion of emissions from covered facilities are subject to the carbon price. On average over the period to 2030, 8-10% of emissions from the 230 covered facilities will be subject to a carbon price (i.e. approximately 2.5% of emissions from non-agriculture and land sectors).
4. Since mid-2022, Australia's carbon price has hovered around AU\$35. This does not reflect the price required to meet the objective of the Paris Agreement (<2°C temperature increase).
5. Because of the relatively low ACCU price, and the small proportion of emissions subject to the carbon price, it is highly unlikely that the SGM will result in material on-site emission reductions until the second half of the 2030s (assuming continuation of existing policy settings). Covered facilities will rely primarily on ACCUs and "hot air" Safeguard Mechanism Credits (i.e. SMCs issued to facilities whose emissions are below their baseline due to factors unrelated to mitigation actions).

While a good carbon price is superior to a "climate trigger", given the timeframes for decarbonisation to keep temperatures <2°C and the state of carbon pricing here and in Australia's major export markets, a regulatory climate trigger is needed to ensure appropriate measures are put in place to mitigate greenhouse gas emissions associated with Australian industries, particularly the coal and gas sectors.

The climate disclosure provisions in the proposed Bills – which will mandate that new large-emitting facilities disclose their decarbonisation plans – will have no substantive effect. There is a similar requirement on facilities covered by the SGM, whereby if they surrender ACCUs equivalent to 30% or more of their baselines, they must publish a statement explaining why they haven't undertaken more on-site abatement activities. The statements made for these purposes are largely devoid of substance and do not provide an incentive to decarbonise (see: <https://cer.gov.au/markets/reports-and-data/safeguard-data/2023-24-baselines-and-emissions-data#accu-surrender-statements>).

Attachment D: Additional issues regarding Offsets

1. The quantum of the restoration contribution charge is critical to the outcomes of the reforms. However, the *Environment Protection and Biodiversity Conservation (Restoration Charge Imposition) Bill 2025* does not impose any material restrictions on how the charge is to be calculated (it does not even contain high level principles to constrain the regulations that are made in relation to the determination of the charge). The primary reason biodiversity offset payment schemes have failed in Australia is that the “offset price” has been set too low, which squeezes out legitimate offsets (developers pay into the fund rather than doing offsets) and leaves the Restoration Contributions Holder with inadequate resources to acquit the liability to offset the impacts of the regulated developments. The failure to include appropriate restrictions in the Restoration Charge Imposition Bill means the reforms are vulnerable to the same outcome (and raising the question – why aren’t there any restrictions on the quantum of the charge?).
2. The choices made by the Restoration Contributions Holder about the expenditure of the charges are at its discretion (i.e. the Holder “must be satisfied”). There are no material substantive restrictions, other than the requirement that, where charges are spent on an alternative restoration action benefitting a protected matter that is not impacted by the relevant development:

so far as is reasonably practicable, [the charge] is directed towards protecting, conserving or restoring a matter protected by the same provision of Part 3 as the affected matter in the bioregion where the affected matter is located.

For this restriction to work, it would need to be at the sub-bioregion level. Moreover, the inclusion of the caveat “so far as is reasonably practicable” provides the Holder with broad powers to expend funds outside of the bioregion where the impact occurs (e.g. effectively swapping impacts in coastal rainforests for “benefits” in desert ecosystems).

3. A key strength of the EPBC Act is the “open standing provisions”, which allow third parties to seek injunctions to prevent contraventions of the Act, including contraventions of approvals provided under the Act (e.g. violation of conditions relating to offsets). By orientating the EPBC Act’s processes to the restoration contribution fund, **the reforms will mute the effectiveness of the open standing provisions** because third parties will not be able to seek redress for legal contraventions concerning restoration actions. This is because the plan is for the restoration actions to be taken under the Nature Repair Scheme Act, which does not include open standing provisions and is explicitly designed to shield proponents and the Clean Energy Regulator from third party litigation concerning non-compliance with the requirements of the Nature Repair Scheme Act (i.e. the same as the ACCU scheme).

4. The intention is to use the restoration contribution fund to support projects under the Nature Repair Scheme Act. The Nature Repair Scheme Act is not designed to support offsets (for example, it does not include a proper additionality test – the test in s 57(1)(a) only asks whether the benefit would arise without the project, rather than whether the benefit would arise in the absence of the incentive provided by scheme). Furthermore, the use of the Nature Repair Scheme to purchase biodiversity benefits will be highly inefficient because it is designed as a private market, where each project is regulated independently of all others. Large efficiencies can be gained by managing projects as collectives. This significantly lowers transaction costs, including by minimising the need for intermediaries.