

LEAN positions on the EPBC and institutional reform

1. Commonwealth leadership on arresting environmental decline

Our constitution does not mention the environment, but successive High Court decisions and practice are clear that the Commonwealth “has a substantial, almost plenary, capacity to make laws concerning the environment.”¹ The external affairs power gives near plenary power and several other powers are available, including the corporations power.

LEAN believes restoring Commonwealth leadership on the environment is essential to halting and reversing catastrophic environmental decline.

2. Simpler, clearer legislation

LEAN notes the EPBC is a very unwieldy piece of legislation, a stitching together of laws that existed pre-1999. This delivers a confusing architecture. The Productivity Commission estimated there are 31 different pathways for major development approval in Australia². The complexity does not deliver good outcomes.

A cleaner, clearer, simpler piece of legislation should be an aim of reform.

3. Objects of the Act

The Act should include outcomes-based objects for biodiversity:

- end extinctions
- arrest habitat loss
- address invasive species

and objects for climate that recognise:

- the impact of climate change on matters of national environmental significance (MNES), including the increased risk of catastrophic events
- the need to reduce emissions to protect World Heritage sites, threatened species and other MNES
- the need to promote and support adaptation and resilience in the face of climate change
- the contribution of biodiversity and functioning ecosystems to climate change mitigation and adaptation.

An Act with the aim of arresting biodiversity decline must include climate change as a major threat to the environment. LEAN accepts the Government’s position that the primary mechanisms for reducing emissions are in other legislation, but impacts must be dealt with in the EPBC, as must the threshold decision on whether to approve new projects with potentially significant positive or negative impacts on the climate.

4. Strong National Standards

¹ Commonwealth Environment Powers. Report of the Senate Environment, Communications Information Technology and the Arts Reference Committee, 1999

² Productivity Commission, Major Project Development Assessment Processes, November 2013, p 102

LEAN supports Professor Samuel's core proposal that new legally enforceable national environmental standards should be outcomes focused.

The new legislation should establish a framework for reviewing and updating these standards and developing new ones. Standards should be legally enforceable legislative instruments, developed after consultation, including with the states and territories. Standards instruments should be flexible enough to reference other standards or material, but not in a way that could lead to standards in place at any point in time being weakened.

LEAN's highest priority is a threatened species protection and recovery standard.

5. No devolution of decision making to the states

LEAN believes Commonwealth leadership is essential to address the environmental challenges facing Australia. Many of the great environmental outcomes in Australia have been delivered by Commonwealth intervention.

Strong and enduring Commonwealth institutional arrangements and robust national environmental standards are the only pathway to entrusting the states and territories with greater responsibilities. LEAN strongly believes the Commonwealth should retain final decision-making power but sees a role for states and territories in project assessment processes, as long as they are in line with strong national environmental standards.

Regional planning can be a useful process for determining conservation priorities to inform decision making, as long as regional planning is grounded in national standards and supported by institutional reform. There are few historical examples of regional planning processes delivering good environmental outcomes, and standards and institutional reform will help ensure past failures are not repeated

6. Bringing RFA regions under environmental standards

Blanket exemptions for landscapes with the richest biodiversity under the law that is specifically intended to conserve that biodiversity, make no sense. Forestry should be treated like any other activity under environment law, rather than subject to an exemption. The implementation of national environmental standards should apply to forests.

7. New MNES

- Land clearing: According to the State of the Environment report "7.7 million hectares of land were cleared between 2000 and 2017; 7.1 million hectares (93%) was not referred for assessment under the EPBC Act.". A land clearing trigger to regulate proposals to clear substantial areas of native vegetation, vegetation in sensitive areas or of high conservation value should be introduced to ensure that land clearing that does not otherwise trigger the EPBC is regulated.

- National Parks Management:³ This can be simply expressed as amending the Act to include a trigger to cover actions likely to have a significant impact on a “protected area”. “Protected area” could be defined with reference to the National Reserve System Strategy 2009-2030, perhaps with scope to designate additional areas under the regulations.
- Climate Change: see below.
- Water Trigger: The “water trigger” in the current Act is limited to actions that involve coal seam gas development or large coal mines. New legislation should include an expanded trigger to cover all fossil fuel extraction which impacts on water resources, including shale or tight formation gas developments.

8. Invasive species

The current system for identifying and responding to key threatening processes such as invasive species is ineffective. New legislation should provide for a more systematic and strategic framework for identifying current and emerging threats to all matters of national environmental significance. The legislation should allow both key threatening processes and specific threats to be identified. Action required to abate threats should be identified at the time of listing.

9. Climate Change

The EPBC Act currently contains no direct reference to climate change. Given the increasing and devastating impacts of climate change on Australia’s environment, this lacuna must be addressed in the revised environmental laws. We propose this be done in four ways:

- a) Include climate change in the objectives of the Act (as above)
- b) Ensure consistency between the revised environmental law and the Climate Change Act 2022

The EPBC Act was not reflected in the Climate Change (consequential amendments) Act 2022 because of the Government’s commitment to review the EPBC.

The revised environmental laws should require that the exercise of all Commonwealth agency powers and functions be consistent with Australia’s Nationally Determined Contributions and other obligations under the Paris Agreement, and with Australia’s commitments under the Glasgow Leaders’ Declaration on Forests and Land Use, and the Global Methane Pledge.

- c) Include the climate as a Matter of National Environmental Significance

³ **2015 Platform:** p 64: *Labor will consider the appropriateness of a climate change trigger in the Environment Protection and Biodiversity Act 1999 and or successive framework, in the context of a comprehensive response to climate change. Labor will consider the appropriateness of a trigger to cover Australia’s system of national parks.*

2018 Platform p81: *Labor will create a land clearing trigger in the Environment Protection and Biodiversity Act 1999 and/or successor framework, in the context of a comprehensive response to land clearing and climate change. Labor will also consider a National Parks trigger to protect Australia’s system of National Parks. Labor will expand the water trigger to apply to shale or tight formation gas developments that impact on water resources.*

The climate should be considered a matter of national environmental significance and so any project likely to have a significant impact on the climate should be subject to environmental assessment.

d) Ensure climate impacts are considered in assessments and approvals

The revised environmental laws should ensure that the climate impacts of new projects are a mandatory relevant consideration. This should include specific requirements to consider the impact of a project on Matters of National Environment Significance in all decisions, taking into account the Australia's commitments under the United Nations Framework Convention on Climate Change, national targets set under the *Climate Change Act 2022*, and the cumulative impact of a project on emissions. As per Professor Samuel's recommendation, projects should be required to provide full disclosure of a project's emissions across its life, including emissions not generated in Australia, given the global nature of climate change.

The environmental laws would not directly control emissions as this would be best done under the revised Safeguards Mechanism for large projects, and other relevant mechanisms. But the environmental laws should be employed to assess the threshold question of whether a new project (or significant project expansion) should go ahead, taking into account the overall expected impact on the climate.

Climate impacts could be considered in a project's favour if, for example, it would help to accelerate the transition to clean energy or otherwise directly contribute to overall emissions reductions or removals.

10. Institutional Reform - a "transformational institutional structure"

Labor debated this over many years, including through a major project of the Chifley Research Centre, agreeing that:

- environment was analogous to climate change in needing an independent institutional structure to inform government policy making, setting policy targets and reporting delivery against them and conducting reviews into key resource issues.
- that regulation was best delivered by an independent institution, and
- that creation of independent institution/s was equally important in effective reform as new legislation. It provides ballast and a counter point in a policy area where the politics often swamps rational policy development and innovation is reliant on an over-stretched department.

Labor's commitment to institutional reform, aimed at delivering a step change in environmental outcomes, pre-dates the Samuel review. Professor Samuel's review was written for a conservative government. In the draft report, Professor Samuel proposed an independent institution, which was omitted from the final report.

Regulatory functions:

An independent and empowered EPA is central to the task of building an effective environmental governance regime. As Professor Samuel wrote in his review:

The community and industry do not trust the EPBC Act and the regulatory system that underpins its implementation. A dominant theme in the 30,000 or more contributions received by the Review is that many in the community do not trust the EPBC Act to deliver for the environment.

An independent EPA would help take the politics of development approvals and provide currently non-existent policing of the Act. It would: 1) lead development assessment processes 2) provide transparent advice on approval decisions (with the Minister able to override the advice with reasons) 3) deliver compliance and enforcement of the Federal environment law and 4) provide assurance and oversight in relation to plans, policies, programs and processes accredited under the Federal environment law (including Regional Forest Agreements).

LEAN believes the independence of the EPA is essential.

The Climate Change Authority's legislation includes criteria for board appointments. This should be backed up with a provision for appointments to be challenged if these criteria are not met.

Policy and reporting function:

In the past 20 years, environmental governance has been reduced to administration of the EPBC Act and delivery of ad hoc programs, with little or no accountability for program outcomes. Most other areas of policy have evolved, yet even though the challenges have escalated in terms of complexity and scale, environment policy has not. The environment department has failed to lead robust environmental policy progress. Innovation has been missing since the days when a matrix of environmental institutions under Hawke – most significantly the ESD process and the Resource Assessment Commission (RAC) – drove policy innovation. With catastrophic climate change and biodiversity outcomes, we need institutional capacity that can respond to rapid change.

A National Environment Commission would mirror the functions of the Climate Change Authority. A National Environment Commission would be the powerhouse of policy ambition, innovation and accountability to arrest environmental decline.

A National Environment Commission would:

1. Develop standards – the cornerstone of the Samuel recommendations. Review the effectiveness of regional plans and application of national standards. Sign off on conservation planning (including regional plans and threatened species recovery plans) and other biodiversity policies.
2. Build and hold data to inform environmental decision making. Lack of uniform and centrally collated data means most current environmental decisions lack any robust basis. This is another cornerstone recommendation of the Samuel review which Labor promised pre-election would be housed in an independent institution. This will require working closely with the states and private sector.
3. Write reports and hold inquiries on matters of national concern as requested by the Minister or self-identified. This could function like the Resource Assessment Commission, which was established at the same time as the Productivity Commission with the same model of open inquiries on nationally important and contested resource use issues.
4. Setting targets for progress and providing analysis of delivery. Currently the State of the Environment Report every 5 years is the only time we take stock of environmental indicators.

The Commission could deliver continuous reporting against targets, which would be tabled by the Minister to Parliament each year.

5. Deliver the functions of the ESD committee recommended by Samuel.
6. Recommend new Matters of National Environmental Significance.

It is possible these two institutional functions (regulation and policy leadership) could be delivered by one new body. This would require a firewall between them, avoiding the need for two new institutions.

END. October 2022, updated February 2023

APPENDIX – Platform and election commitments on institutional reform

Chapter three of the 2021 ALP National Platform states (our emphasis):

*Labor will ensure the Commonwealth has the institutional capacity to provide effective and transparent environmental management systems, which are essential for sound decision-making, monitoring, assessment and reporting of environmental performance and outcomes. That will include an Environment Protection Agency: **a strong cop on the beat that is genuinely independent of the government**, will report to the Parliament, and will play a central role in restoring Australians trust in the Commonwealth's capacity and willingness to protect our precious natural environment.*

Platform 2018:

*For the purposes of managing matters of national environmental significance, create strong, well resourced, science based institutions to administer the law: including **a federal Environmental Protection Agency to conduct public inquiries, provide transparent and timely advice to the Minister within a clear decision-making framework and enforcement**; and ensure there is the capacity in the public service to provide federal leadership on the environment*

Platform 2015:

*Labor will develop new frameworks for truly national protection and management of Australia's natural resources. This will include: Management, governance and decision making structures and responsibility, **including the independence of institutions** involved in environmental protection.*

The election commitment announced on 20 May 2022 by the then Leader of the Opposition and the then shadow minister for the environment states (our emphasis):

*Labor will establish an **independent** Environment Protection Agency that would have two divisions:*

- *A compliance and assurance division; and*
- *An environmental data, information and analysis division.*