

A National Environment Commission What would it do and why do we need it?

A LEAN brief, June 2023

The Minister for the Environment and Water has published a proposal¹ to establish an Environment Protection Agency as a portfolio agency with a Chief Executive Officer appointed by the Minister to regulate environmental approvals under reformed federal environment laws. Under the Minister's proposal, the Minister will retain call-in powers on decisions with transparency built into both the EPA's advice and the Minister's reasons for overriding it.

The election commitment published on 21 May 2022 said the independent EPA would include a separate division for environmental data, information and analysis.² Under the Minister's Nature Positive Plan, these functions would remain in the Department of Climate Change, Energy, the Environment and Water (DCCEEW).

We note the establishment of Environment Protection Australia, as foreshadowed in the 2023-24 budget, as a regulator responsible for environmental approvals and enforcement. We note the establishment of Environment Information Australia within the Department of Climate Change, Energy, the Environment and Water, to collect environmental data.

Conservation and environmental management and planning are complex policy areas subject to many competing interests. An independent and expert **National Environment Commission** can ensure that the crucial functions of data collection, mapping and analysis, development of strong national environmental standards and plans, and proactive conservation planning are undertaken in a way that secures the integrity of those policies as well as public trust in the policy process. Furthermore it will provide advice to government on resolving complex and contested issues and identifying the next horizon of threats and solutions. Biodiversity is in collapse, there is no area of government where creative, expert, big picture policy innovation is more needed. As the last 20 years have shown, departments do not have the capacity, mandate or skills to deliver this.

A National Environment Commission would play a similar role in relation to biodiversity conservation and environment as the Climate Change Authority has in relation to climate change policy.

The Australian Panel of Experts on Environmental Law (APEEL), the body who first designed the framework for law reform which was adopted by the Samuel Review, recommended both an independent EPA and Commonwealth Environment Commission as essential aspects of a new architecture to arrest environmental decline. The Hawke Review (the statutory review of the EPBC, a decade before the Samuel Review) recommended the creation of an Environment Commissioner.

¹ DCCEEW 2022, *Nature Positive Plan: better for the environment, better for business*, Department of Climate Change, Energy, the Environment and Water, Canberra, December
<https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf>

² See end of document for specific wording of the commitment

Specifically, the Commission would have the following **functions within the reformed laws**:

1. Develop and update National Environment Standards – the cornerstone of the Samuel recommendations.³
2. Review the effectiveness of regional plans and application of the standards.
3. Build and hold data to inform environmental decision making (the functions currently housed in the Minister’s proposed departmental agency, Environment Information Australia)
4. Sign off on conservation planning (including regional plans and threatened species recovery plans) and other biodiversity policies, such as Nature Repair Market priorities and methodologies.
5. Recommend new Matters of National Environmental Significance.
6. Deliver the functions of the ESD committee recommended by Samuel.

And the following functions on **policy review and innovation**, mirroring the Climate Change Authority’s powers and functions:

1. Set targets for progress and provide 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 would deliver continuous reporting against targets – such as zero new extinctions - and report this to Parliament each year, triggering actions for non-delivery.
2. With direction from the Minister, develop an annual work program of research and advice to inform government policy making. (The CCA’s current work program includes advice on 2035 emission targets, advice on the annual climate change statement, review of the Carbon Farming Act and review of the National Greenhouse and Energy Reporting Act).
3. Write reports and hold inquiries on matters of national concern as requested by the Minister or independently identified. The inquiry function currently in the EPBC legislation (but never used) would sit here but would be expanded to include open inquiries on nationally important and contested resource use issues.

Supporting governance of laws: These functions are highly technical and require a depth of knowledge and expertise that cannot be filled through generalist public service recruitment. For this reason, LEAN believes the staff who deliver these functions must be specifically recruited, trained and retained for this purpose. An immediate example here is the definition of “nature positive” which needs translation into all aspects of the legal architecture so that it drives the level of ambition the Minister has articulated.

In his review of the EPBC Act commissioned by the former Coalition government, Professor Graeme Samuel identified loss of community trust as a major problem with the federal government’s management of the environment.⁴ Highly expert and respected part-time Commissioners who maintain their leadership positions in relevant fields and lead public engagement - including inquiry processes - with the complex issues around conservation and biodiversity protection would build a trusted institution to underpin and support federal environmental management. They would play an important role also in communicating the complexity of environmental decision-making from a position of independence.

³ After the initial standard development that will occur by a mix of departmental and stakeholder engagement.

⁴ Samuel, G 2020, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra, October. <https://epbcactreview.environment.gov.au/resources/final-report>

Data collection and analysis and conservation planning functions underpin the ability of the Government to deliver on the Minister's commitment to ensure that Australia's environment laws and their operation will lead to a positive gain to nature, not the managed decline that we have seen over decades. ABARES, an analogy for the current proposed model of data management, has diminished over time both in quality and relevance of its work. LEAN strongly believes these functions must be carried out in a way that is independent of government. In particular, the ability to commission independent analysis and initiate public inquiries on emerging environmental issues - critical if the Government is to avoid merely reacting to environmental damage after it has taken place - cannot be found in a public service department whose priority is day to day service delivery and support for the Minister including in her or his statutory decision making functions.

Furthermore, as those who drafted the original EPBC Act often point out, there are numerous potential powers and actions included in the EPBC legislation that are not used. This illustrates the need for independent institutions to underpin the legal framework. Environment seldom does well out of a politicised process: it is not a recognised or articulate stakeholder. Independent expert institutions can strengthen the capacity and broaden the political space for government to defend the environment and ensure the law is delivered. The past 20 years of environmental decline have shown the limitations of vesting sole responsibility in political actors (however well motivated in some cases) for delivery of environmental protection.

Supporting policy review and innovation: In 1989 the Hawke Government set up the Resource Assessment Commission⁵ at the same time with similar powers and functions to the Productivity Commission (called the Industry Commission then) to conduct independent inquiries into major natural resource use questions. The Resource Assessment Commission successfully informed policy innovation on Kakadu and forests.

As described by Nick Economou, the Resource Assessment Commission was a key innovation in the Hawke Government's attempts to institute "pro-active long-term decision making in a deliberate bid to move away from short term, reactive processes" in relation to the environment. He also argues it was an expression of Labor's most successful policy paradigm, "accordism", defined by creating forums and institutions for consensus building across interests, defining the policy problem expansively and clearly, bringing as much information to the table as possible.⁶

The super power of the Resource Assessment Commission was its independence and thus its ability to bring together different - and often mutually hostile - stakeholders in a rational process trusted by the Australian public to arrive at a robust and credible outcome, as the AFR wrote when the Resource Assessment Commission was defunded (not abolished, it still exists in law!), " the RAC was an independent and credible source of environmental advice, and it made it very much easier for ministers to make rational decisions on such emotive issues as Coronation Hill and the management of coasts and forests...The RAC had effectively corralled industry and the environmentalists into a rational decision-making framework. Whoever lost the argument before the RAC would lose the public debate, and ultimately the political struggle."⁷

⁵ Stewart D and McColl G 1994, *The Resource Assessment Commission - an Inside Assessment*, Australian Journal of Environmental Management, 1:1, 12-23.

https://assets.nationbuilder.com/lean/pages/147/attachments/original/1682833326/The_Resource_Assessment_Commission_An_Inside_Assessment.pdf?1682833326

⁶ Economou N, *Accordism and the environment: The resource assessment commission and national environmental policy-making*, Australian Journal of Political Science, Sept 2007

⁷ Opcit, Stewart D and McColl G, p 22

The National Forest Policy Statement of 1992 was based on Resource Assessment Commission advice. This policy is still in place even though it is woefully inadequate in 2023. This illustrates the value of independent review and advice to ensure policies don't become zombies: inadequate yet with no institutional structure to reconsider them without major political investment.

The Climate Change Authority has demonstrated the value of a genuinely independent expert institution to provide advice on government policy. Notwithstanding a decade of neglect and damage under successive hostile governments, including attempts to stack its governing body, the CCA has continued to provide impartial, science-based advice to government.

It is important to note that the Climate Change Authority has mandated criteria within which it delivers its advice, such as economic efficiency, national interest, foreign policy etc. It is not a run-away "greenie outfit" but a serious public policy participant.

Indeed, given the strong overlap between climate change and biodiversity (both in terms of mutual impacts between climate change and biodiversity loss and in terms of mutual benefits from climate action and biodiversity protection and restoration), the CCA will need to work closely with a similar organisation addressing biodiversity. Such collaboration will be much easier between similar institutions than with a government department with a completely different structure and mandate.

The Minister has rightly noted the importance of designing the reforms to protect against regressive future governments. It is notable that when the Abbott Government dismantled the carbon price, it failed to dismantle the independent institutions that supported it - CEFC, ARENA and the Climate Change Authority. LEAN was an active participant in defending these institutions, working with Labor and the cross benches. In our experience, it was the institutions' independence and record of acting in the public interest, free of political interference, that motivated advocates and parliamentarians to defend them. Institutions within a government department will not be protected by the community and the parliament in the same way.

LEAN does not have a strong view on the best institutional arrangement for a National Environment Commission, other than it must be both independent and expert, and resourced to undertake proactive work. This can be achieved by establishing a small, separate, expert Commission with Commissioners meeting defined criteria appointed by Government; by establishing a wholly separate division for nature and environment policy and data within the independent EPA; or by establishing a separate division for nature and biodiversity within the independent Climate Change Authority.

What would it cost? Our proposed National Environment Commission is analogous to the Climate Change Authority. It would include the functions (data collection and analysis) and funds announced in the 2023 budget for Environment Information Australia (\$51.5 million). The October 2022 budget allocated \$47.1 million to the Climate Change Authority over 4 years. However, the Commission could start as a small agency. In 2020-21 the Climate Change Authority's budget was \$2.85 million, covering part-time board members and a small number of permanent staff. The agency's administration (staff, financial and IT management) can be delivered by the department. The Commission's ability to deliver its mandate would be enhanced with more resources than this.