

PROTECTING THE FUTURE

Federal Leadership for Australia's Environment



This research paper is a project of the Chifley Research Centre, the official think tank of the Australian Labor Party. This paper has been prepared in conjunction with the Labor Environment Action Network (LEAN). The report is not a policy document of the Federal Parliamentary Labor Party.

Publication details:

Wade, Felicity. Gale, Brett.

"Protecting the Future: Federal Leadership for Australia's Environment"

Chifley Research Centre, November 2018.

PROTECTING THE FUTURE

Federal Leadership for Australia's Environment

FOREWORD

Australians are immensely proud of our natural environment. From our golden beaches to our verdant rainforests, Australia seems to be a nation blessed with an abundance of nature's riches. Our natural environment has played a starring role in Australian movies and books and it is one of our key selling points in attracting tourists down under. We pride ourselves on our clean, green country and its contrast to many other places around the world.

Why is it then that in recent decades pride in our natural environment has very rarely translated into action to protect it?

We have one of the highest rates of fauna extinctions in the world, globally significant rates of deforestation, plastics clogging our waterways, and in many regions, diminishing air, water and soil quality threaten human wellbeing and productivity.

In this Chifley Research Centre (CRC) policy paper, we examine how Australia has arrived at this predicament and what needs to be done to give our environment the important place it once again deserves in Australian public policy making.

The mission of the Chifley Research Centre (CRC) is to champion a Labor culture of ideas. The CRC's policy work aims to set the groundwork for a fairer and more progressive Australia. Establishing a long-term agenda for solving societal problems for progressive ends is a key aspect of the work undertaken by the CRC. The research undertaken by the CRC is designed to stimulate public policy debate on issues outside of day to day politics. The current policy paper is the result of an ongoing collaboration between the CRC and the Labor Environment Action Network (LEAN).

The roots of Australia's current environmental malaise date back twenty years to the introduction of the *Environment Protection and Biodiversity Conservation Act (EPBC)* in 1999. The EPBC was much derided as a second-rate solution when it was first introduced by the Howard Government and twenty years on it hasn't aged well at all.



Put simply, the EPBC meets neither purpose of proactively protecting the environment or providing certainty of approval processes in the development of major projects.

Three important reports in recent years: the Hawke Review of the EPBC; the work of the Australian Panel of Experts in Environmental Law (APEEL); and the Productivity Commission's *Major Project Development Assessment Processes report* – have all highlighted the deficiencies of the EPBC.

This CRC policy paper highlights those shortcomings in detail. It also offers a way forward for a new structural framework for protecting our environment.

The key recommendations are to create a new legislative framework to replace the EPBC in order to enshrine federal government leadership in issues of national and international environmental importance.

However, new laws by themselves are not enough and that's why this report calls for the creation of a new body – the National Environment Commission.

Such an independent institutional structure would be responsible for a new development approvals process that would get rid of the current system with its long delays and lack of clarity around development approvals. It would provide open and transparent approvals to set guidelines, thus delivering better outcomes for the environment, communities and business.

A National Environment Commission would also have a key policy focus, allowing the nation to build a database of knowledge to inform better decision-making.

The new body would be empowered to investigate innovations in both policy and delivery. It will conduct inquiries into major environmental issues, (modelled on the Productivity Commission's approaches and lessons of the Resource Assessment Commission), and be an advocate for the environment in the national debate.

This report by Chifley Research Centre and LEAN should prompt a rethink of the framework for environmental protection in Australia and provides a blueprint for Commonwealth leadership on this important issue.

Brett Gale
Executive Director
Chifley Research Centre

November 2018



EXECUTIVE SUMMARY

This report calls for Australia to recommit to protection of the environment. Australia needs to reinvigorate its political commitment to protecting our natural heritage by creating powerful instruments that are fit for purpose in addressing the serious challenges presented this century.

Environmental degradation is accelerating in Australia. We have one of the highest rates of extinctions in the world; globally significant rates of deforestation; plastics clogging our waterways and in many regions diminishing air, water and soil quality threaten human wellbeing and productivity.

Environmental policy innovation in the past 20 years has failed to keep pace with environmental challenges. Climate change and population growth are putting unprecedented pressure on our environment. With the threats facing this country so much bigger than the site-by-site battles that first animated environmental concern, the need for better systems-based approaches is now critical.

The current federal environment regime and its key legal instrument, the *Environment Protection and Biodiversity Conservation Act (EPBC) 1999*, are not fit for purpose in the 21st century. A new approach must be delivered where the federal government takes a strategic leadership role, setting legally binding standards to be applied by other governments and industry, and backed by a reanimated commitment to protecting Australia's natural assets.

Critiques of the current federal environment laws (the EPBC) include:

- They are too focused on development approvals and not on proactive protection of the environment.
- They are toothless, delivering very little change in environmental outcomes – all major indicators of environmental health and sustainability are in decline.
- They fail to deliver business certainty, with long delays and lack of clarity in approval processes and little evidence of significantly improved environmental outcomes.
- They have no institutional backing to deliver innovation or lead visionary, system-wide policy solutions.
- They don't even mention climate change.



RECOMMENDATIONS

Recommendation 1: Scrap the EPBC and create a new Act and supporting institutions

A new Commonwealth Environment Act and new institutions to deliver its aims, should be delivered within the first year of any new government. Armed with the insights of the Hawke Review, the work of the Australian Panel of Experts in Environmental Law (APEEL) and the Productivity Commission's *Major Project Development Assessment Processes* report, there is no need for a long process of consultation as there are clear principles with which to act.

Recommendation 2: Commonwealth leadership on the environment

The new Act should enshrine federal leadership in issues of national and international importance. It is an anomaly of the Constitution that for too long no level of government has been responsible for arresting the decline of Australia's natural environment. The Act should legally obligate the Commonwealth to deliver the following:

- Protect Australia's natural environment and its biodiversity.
- End deforestation and restore native vegetation cover to protect nature and store carbon.
- Improve fresh water quality and flows in our river systems to provide clean water.
- Expand the protected area estate in line with international obligations including improved management across protected area tenures and a central role for traditional owners and local communities.
- Arrest and reverse species loss and decline.
- Ensure invasive species do not undermine environmental and economic assets.
- Improve the health of our oceans by addressing both terrestrial and marine threats.
- Prepare Australia and its planning and infrastructure systems to adapt to climate change.
- Ensure climate change considerations are central in making major development decisions.

- Ensure air quality protects human health and that Australians are protected from toxic pollution and contaminants.
- Deliver Australia's treaty obligations that relate to the environment, including the Convention on Biological Diversity, the UN Paris Climate Change Agreement and the Sustainable Development Goals.
- Reduce waste - including plastics and the environmental problems created by them.
- Respect Indigenous Australians' environmental rights and ensure improved social and economic benefits for Indigenous Australians in environmental protection is prioritised in public policy and funding.

Recommendation 3: New institutions – Policy leadership and innovation

The laws should set out simply and clearly the legal and administrative pathway to delivery of the objectives. The laws would establish a new empowered independent institutional structure to deliver its aims.

The first function that an independent institutional structure must deliver is that of policy leadership to create legally binding national plans and standards as dictated by the Act, to be delivered together with the states. The Minister would set priorities for this process. The federal environment department would deliver its programs.

This new policy institution would also build a database of knowledge to inform better decision-making, it would be empowered to investigate innovations in both policy and delivery, it will conduct inquiries into major environmental issues (modelled on the Productivity Commission's approaches and lessons of the Resource Assessment Commission) and, be an advocate for the environment in the national debate. These tasks and powers would be enshrined in the Act.

It would be the powerhouse to reignite policy ambition for protection of Australia's environment.



Recommendation 4:

New Institutions – Effective regulation

The new laws would set out the pathway to a stronger, clearer, development approvals process. Development approvals would sit within the proactive national plans and standards, which over time will deliver harmonisation between state and federal laws, removing duplication by clarifying decision making standards. The current lack of certainty and transparency in development approval processes will be removed, delivering streamlining so that business will know where it stands and will be able to get on with things.

A new independent institutional structure would test for compliance with national standards and lead the development approvals process and other regulatory functions, delivering better outcomes for the environment, communities and business.

The final decision maker for development approvals could be either the independent regulator or may remain with the Minister. This is an issue for further debate. Either way, the decision making process would be public, transparent and clear. By removing the Minister's role as decision maker in development approvals, the Minister would be free to be an advocate for the environment both publicly and around the cabinet table. However, others argue that the Minister should retain democratic accountability by being the final decision maker.

By clarifying the decision-making standards and making publicly transparent decisions based on them, greater community confidence would be engendered. The independent regulatory agency would lead the Commonwealth development approvals process making decisions within legislated timeframes, aided by greater clarity of expectations and design of the approvals process at the outset. It will also deliver effective compliance.

Recommendation 5:

National Environment Commission

These two functions – policy leadership and effective regulation – could be delivered either through one or two institutions. It is the view of this report that one institution would make more sense, a National Environment Commission delivering both the policy and regulatory functions to underpin the Act.

The National Environment Commission would be an expert institution, trusted by Australians.

Recommendation 6:

Adequate and effective funding

Protecting the environment does not come for free. The Australian Conservation Foundation estimates that environment spending has been reduced by 37 per cent since 2013–14, while the overall federal budget has increased by 18 per cent. The decline must be addressed and funding increased over time to ensure that the objectives of the new Act are realised.

However, these legal and institutional reforms will ensure every dollar is maximised. Over the past 25 years, public funding has delivered too little in terms of improved environmental outcomes. The reforms will provide much greater accountability and more focused outcomes for spending.





When the earth is spoiled, humanity and all living things are diminished. We have taken too much from the earth and given back too little. It's time to say enough is enough. Today's announcements won't solve everything. But with the right mix of political commitment and community support we can ensure that our country is simply the best in the world. This is our country, our future.

Bob Hawke, launching Landcare in Wentworth, July 1989.¹

¹ B. Hawke, "Speech by the Prime Minister, launch of the Statement on the Environment", 20 July 1989, Wentworth, available at <<https://d3n8a8pro7vnm.cloudfront.net/landcaretas/pages/100/attachments/original/1466406249/bob-hawke-speech-1989.pdf?1466406249>>.



REPORT STRUCTURE

Section one of this report will lay out the need for reform with a short catalogue of the evidence of environmental decline. It will briefly describe the history of federal environmental regulation in Australia and the key features and failings of the current regime, which is critiqued by environment and business advocates alike.

Section two articulates the key principles of reform, both legal and institutional.

Section three provides two case studies of how these reforms will address key environmental threats – plastics and extinctions.

SECTION ONE: EVIDENCE OF THE NEED FOR REFORM

1. **A catalogue of environmental decline**
2. **A short history of the Commonwealth and the environment**
3. **How the current laws work:**
 - Failing the environment
 - Failing to provide certainty to business
 - Lack of institutional pathways to policy innovations and leadership

SECTION TWO: THE PROPOSAL FOR REFORM

4. **Building good governance for Australia's environment**
5. **A new environment Act**
 - i. Enshrining federal leadership in law
 - ii. Limiting discretion: Legislating environmental improvement
 - iii. Proactive management and protection
 - iv. Delivering certainty through streamlined approval processes
 - v. Establishing independent institutions to deliver the Act's objectives
 - vi. Ensuring community involvement in environmental decision-making
6. **New trusted institutions**
 - i. An independent Commission – Policy leadership and innovation
 - ii. An independent watchdog – Effective regulation
7. **Funding – adequate and effective**

SECTION THREE: WHAT DOES THIS MEAN FOR THINGS WE CARE ABOUT?

8. **Plastic: Choking our waterways, killing our sea life and contaminating our food chain**
9. **Extinctions of species: The hairy-nosed wombat and friends**



INTRODUCTION

Australia's unique natural environment matters to Australians. The amazing continent on which we live is a source of pride. Its koalas, emus and kangaroos are embedded in the national identity.

The Australian Government has a responsibility to defend the community's interest by properly looking after the natural environment. A healthy environment has direct impacts not only on our sense of place and identity but also on the health of our people.

Good environmental stewardship matters to our prosperity too. As then Treasury Secretary Martin Parkinson put it in 2011:

With the expected rapid growth of the global economy over coming decades, significant pressures will be placed on global resources — particularly the natural environment. This presents a serious challenge, not only for Australia but for the world. The Australian economy will need to become more energy, resource and environmentally efficient.

In fact, going forward, energy, resource and environmental efficiency will be key drivers of productivity.²

NAB Chair Ken Henry has championed the need to protect and account for “natural capital”. He summarised this in 2016:

We need to manage our natural capital with the same diligence that we manage our financial capital. This means accounting for the condition of our environmental assets, including the availability of clean water, the quality of biodiversity and the condition of our soils. And it means an integrated national approach to natural capital management.

Natural capital is not a footnote in a business plan, it is a core asset on the balance sheet. That's true for an individual business; and it is true also for the nation.³

However, all key indices of the natural world – native species, native vegetation cover, water quality – are being degraded at an alarming rate. They are all worse than they were when the current federal environmental management regime was created almost 20 years ago. This is not acceptable in a country as wealthy as ours.

With threats to the environment – including climate change and rapid population growth – expected to escalate over coming years, we need a new environmental governance regime that is up to the task and the demands of the 21st century. Many of the challenges that face us cannot be solved with our traditional approaches. The current laws do not even mention climate change and its impacts.

Environment laws and institutions must arbitrate between competing interests, as this is inevitably a game of trade-offs. The current approach fails both business and Australia's natural heritage.

The proposals that follow sit on the shoulders of Dr Allan Hawke's 2009 statutory review (Hawke Review) of the current federal environment laws, the *Environment Protection and Biodiversity Conservation Act*, as well as the work of the Australian Panel of Experts in Environmental Law (APEEL), a group of Australian environmental lawyers, academics and retired judges who have used first principles to develop proposals for the legal and institutional reforms necessary to reverse environmental decline.⁴

Furthermore, these proposals incorporate the insights provided by the Productivity Commission's Major Project Development Assessment Processes report of 2013 and various public documents that industry sectors have authored on federal environmental assessments. It also relies on the picture provided by the federal government's 2016 State of the Environment report. All describe the weaknesses of the current approach and throw light on the path forward.

This report attempts to articulate the fundamentals of the legal and institutional reform needed to set Australia on the path to a sustainable future, to protect our amazing natural assets and augment our material prosperity.

² M. Parkinson, *Sustainable Wellbeing – an Economic Future for Australia*, the Shann Memorial Lecture, 23 August 2011, available at <https://static.treasury.gov.au/uploads/sites/1/2017/06/shann_2134.pdf>.

³ K. Henry, *Advancing Australia's Natural Capital*, the Fiona Wain Oration, 27 May 2016, Sydney, p. 18. Available at <https://sustainablebusinessaustralia.files.wordpress.com/2017/05/160527-dr-ken-henry-ac-speech-e28093-advancing-australia-s-natural-capital.pdf>

⁴ See <www.apeel.org.au> for APEEL's *Blueprint for the Next Generation of Australian Environmental Law* and the technical papers that inform it.



SECTION ONE: EVIDENCE OF THE NEED FOR REFORM

1 A CATALOGUE OF ENVIRONMENTAL DECLINE

EXTINCTIONS

In 2014 the World Wildlife Fund (WWF) calculated that the Earth had lost half its wildlife in the past 40 years.⁵ Australia is a major contributor to this decline.

Australia is facing an extinction crisis. Australia has the worst mammal extinction rate in the world. 30 native mammals have become extinct since European settlement. To put this in a global context, one out of three global mammal extinctions since 1788 have occurred in Australia.⁶ Since 2009 we have lost three animals to extinction.

Currently over 1700 animals are on the endangered list in Australia. Even once abundant species such as koalas are in danger and have joined the threatened species list. Australia is one of seven countries responsible for more than half of global biodiversity loss.⁷ Papua New Guinea, Indonesia, Malaysia, India, China and the United States (primarily Hawaii) join us in this club.

Australia is one of only 17 “megadiverse” nations and is home to more species than any other developed country. This partially explains why our rankings are grim, but also why our responsibilities are clear. Most of Australia’s wildlife is found nowhere else in the world, making its conservation even more important.

Humanity stripping the planet of species is intrinsically problematic. Some scientists are predicting we may see the extinction of the koala in New South Wales by 2050.⁸ This would be tragic. Furthermore, loss of species matters as it is a deeply interdependent system we live in. As we lose species we begin to unpick the stability of the systems necessary for survival. An immediate example is the collapse of bee populations in Europe, which is undermining pollination and threatening food production.

DEFORESTATION

Australia is one of the world’s worst land clearers. Our rates of deforestation put the country in the top ten in the world, alongside the Congo, Indonesia and Brazil.⁹ Australia is the only developed nation to feature on this list. Deforestation has accelerated in recent years due to the rolling back of vegetation protections in Queensland and New South Wales.

Deforestation is a key driver of climate change, as trees store carbon which is released when bush cover is lost. It causes soil loss and erosion, undermining the resilience of our agricultural industries. It is the main cause of species loss as habitat shrinks. It changes water systems as water is no longer filtered through established vegetation.

To protect species and arrest climate change, deforestation must stop and restoration of landscapes be undertaken at scale.

⁵ “Living planet report 2014”, *World Wildlife Fund*, 2014, available at <<https://www.worldwildlife.org/pages/living-planet-report-2014>>.

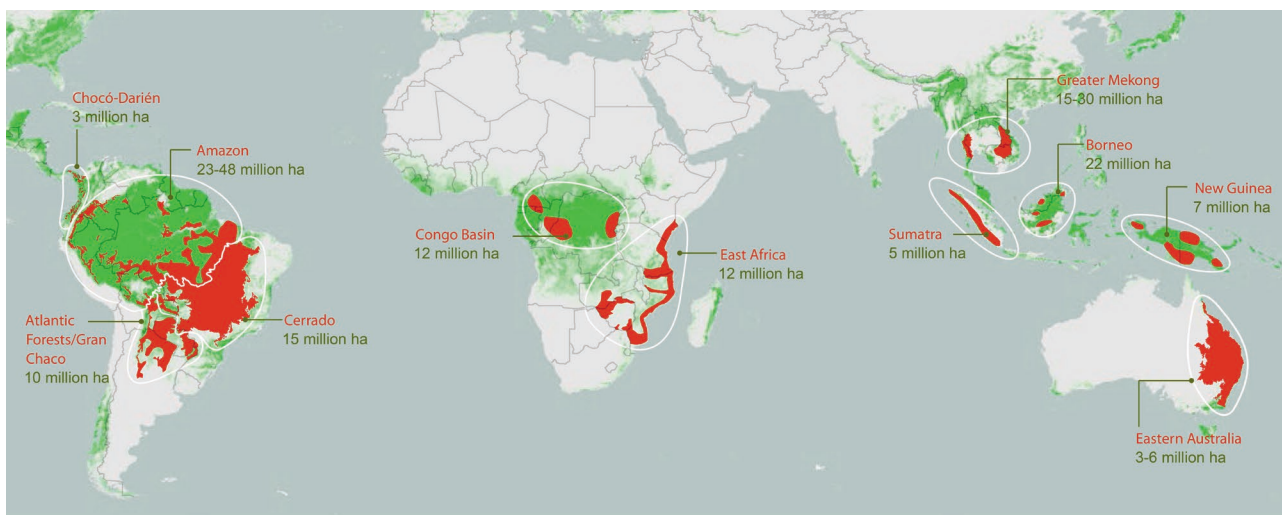
⁶ “Wildlife”, *Australian Wildlife Conservancy*, 2018, available at <<http://www.australianwildlife.org/wildlife.aspx>>. More information available at J. Woinarski, A. Burbidge and P. Harrison, “Ongoing unravelling of a continental fauna: Decline and extinction of Australian mammals since European settlement”, *Proceedings of the National Academy of Sciences*, 2015, vol. 114, no. 15, pp. 4531–40.

⁷ A. Waldon et al., ‘Reductions in global biodiversity loss predicted from conservation spending’, *Nature* 551, 16 November 2017, no. 551, pp. 364–67, article available at <<http://www.abc.net.au/news/science/2017-10-26/australia-biodiversity-loss-conservation/8987696>>

⁸ Patrick Wood, “Koalas face extinction in New South Wales by 2050 due to land clearing, scientist warns”, *ABC*, 7 September 2018, available at <<http://www.abc.net.au/news/2018-09-07/koalas-face-extinction-in-nsw-due-to-land-clearing/10212236>>.

⁹ “Living forests report chapter 5: Saving forests at risk”, *World Wildlife Fund*, 2015, available at <<https://www.worldwildlife.org/publications/living-forests-report-chapter-5-saving-forests-at-risk>>.





WWF "Living forests report", global deforestation fronts (green indicates forested areas, red is clearing zones).¹⁰

WASTE AND PLASTICS

Plastics choke Australia's oceans and inland waterways, they poison our marine life and now are ending up in our food. German researchers have found traces of plastic in most brands of beer!¹¹ Public concern over the issue has caused major retailers to get rid of single-use plastic bags and restaurants to reconsider their use of plastic drinking straws.

Only nine per cent of global plastics are recycled.¹² The recent recycling crisis triggered by China's refusal to process imported recycling materials threw a spotlight on the failure of Australia's environmental governance regime. Australians are amongst the world's most conscientious recyclers, yet governments have failed to honour these efforts by adequately building systems and industries to make use of these materials. The ability to seize economic opportunities from innovative recycling industries has been lost due to a lack of a visionary national response to this emerging environmental challenge.

POLLUTION OF AIR AND WATER

Air and water quality are both under pressure and threaten our quality of life and food security. The scale of the air pollution problem is unclear with no national monitoring or standards. It is those who are less well off, such as those who live near heavy industry, who pay the greatest costs.

The Australian Institute of Health and Welfare estimates that urban air pollution results in 3000 premature deaths each year in Australia, costing the nation up to \$24.3 billion in health expenses annually.¹³

Australia allows the use of over 80 chemicals that are banned in the UK and Europe, including 20 that are classified as either extremely or highly hazardous by the World Health Organisation.¹⁴ This issue deserves a higher level of scrutiny and response.

¹⁰ "Living forests report chapter 5: Executive summary", *World Wildlife Fund*, 2015, available at <http://awsassets.panda.org/downloads/lfr_chapter_5_executive_summary_final.pdf>.

¹¹ "Plastic microparticles found in beers", *Australian Popular Science*, 2014, available at <<http://www.popsci.com.au/science/plastic-microparticles-found-in-beers,391816>>.

¹² United Nations Environment Programme, *Single Use Plastics: A Roadmap for Sustainability*, 2018, available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/25496/singleUsePlastic_sustainability.pdf?sequence=1&isAllowed=y>.

¹³ Quoted in L. Cormack, "3000 deaths caused by air pollution each year prompt calls for tougher standards", *Sydney Morning Herald*, 13 November 2015, available at <<https://www.smh.com.au/environment/3000-deaths-caused-by-air-pollution-each-year-prompt-calls-for-tougher-standards-20151113-gkygv1.html>>.

¹⁴ World Wildlife Fund and National Toxics Network, *A List of Australia's Most Dangerous Pesticides*, 2010, available at http://tasmaniantimes.com/images/uploads/FINAL_A_list_of_Australias_most_dangerous_pesticides_v2.pdf



AGRICULTURAL DEGRADATION

Healthy soils and waterways underpin the viability of our agricultural production. Agriculture is an important export and is the lifeblood of our regions. The excessive use of fertiliser, land clearing and the struggle to keep feral animals and plants under control are grave threats to both farm production and fragile ecosystems.

Not only does production suffer but these problems damage our national icons. Two of the greatest threats to the Great Barrier Reef are the run-off of nutrients from fertilisers and siltation from land clearing.

As the global population grows, so too will the demand for Australia's agricultural products. It is essential that, with the impacts of climate change including increasing droughts and water scarcity, we shift to more sustainable land management in order to continue to build a prosperous agricultural sector in a changing world.

URBAN DEVELOPMENT AND LIVEABILITY

With two-thirds of Australia's population living in cities,¹⁵ governments should ensure urban environments are healthy and "liveable". Rapid population growth and inadequately planned changes to the urban form are causing concern and a sense of loss.

Environmental problems are felt acutely in cities. Air quality continues to decline, traffic sits motionless, commute times blow out. Decreasing contact with nature undermines amenity. Public disquiet about these issues is on the rise.

Better national oversight of urban environmental stewardship provides an opportunity for propagating liveable places, maintaining biodiversity and connecting Australians with nature.

"The main pressures affecting the Australian environment today are the same as in 2011: climate change, land-use change, habitat fragmentation and degradation, and invasive species. There is no indication that these have decreased overall since 2011."

Australia State of the Environment, five yearly Commonwealth government report, 2016¹⁷

¹⁵ "Media release: Census reveals that two-thirds of our population lives in cities", *Australian Bureau of Statistics*, 2016, available at <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release10>>.

¹⁶ "Australia is hot, but Sydney was the hottest in 80 years on Sunday", *Mashable*, 2018, available at <<https://mashable.com/2018/01/07/penrith-sydney-hot-weather/#SLINsl6G.mqf>>.

¹⁷ W.J. Jackson, R.M. Argent et al., "Overview", *Australia State of the Environment 2016*, Australian Government Department of the Environment and Energy, Canberra, 2017, p. x. Available at <<https://soe.environment.gov.au/theme/overview>>



2 A SHORT HISTORY OF THE COMMONWEALTH AND THE ENVIRONMENT

When the Australian Commonwealth was created in 1901, the Constitution adopted by the nascent nation made no mention of the environment. It wasn't an issue that figured as the states and Commonwealth demarcated responsibility for governing the newly created country.

The Commonwealth, however, first intervened on an environmental issue in 1908, using its trade and commerce power to regulate the trade in endangered birds, which were being decimated by the demands of the millinery industry.¹⁸

With the challenges facing us so much bigger than the site-by-site battles that first animated environmental concern, the need for better systems-based approaches is now critical.

Environment issues began to demand significant political attention in the 1960s. Gough Whitlam's famous "It's Time" speech in 1972 promised to make the Great Barrier Reef a national park, clearly marking the moment that the Commonwealth asserted its role in environmental protection. World-leading legislation followed, with the *Environment Protection (Impact of Proposals) Act 1974* establishing the concept of environmental impact statements for projects in which the Commonwealth had an interest. The Whitlam government ratified the World Heritage Convention and won High Court challenges by the Queensland and New South Wales governments aimed at curtailing its efforts to protect the Great Barrier Reef from oil drilling.

The Whitlam government's *Environment Protection (Impact of Proposals) Act 1974* provided for inquiries to be conducted into key environmental issues and disputes. These inquiries were used by successive governments to have a full public, independent discussion to identify the national interest on issues of conflict over use of shared natural resources. An inquiry into sand mining on Fraser Island initiated by Whitlam recommended an end to the practice, which was delivered by Malcolm Fraser's government in 1975.

The Fraser government established Kakadu National Park in 1979. It conducted an inquiry into whales and whaling that recommended an end to Australia's involvement in the industry, which took effect in 1979.

Bob Hawke promised to protect the Franklin River in the lead-up to the 1983 election and won the High Court case that affirmed the Commonwealth's right to intervene on the issue. Under Hawke, Australia led the international debate on banning mining in Antarctica and adopted an ambitious climate change policy, as did Opposition leaders Peacock and Hewson. Bob Hawke actively promoted the environment, providing World Heritage protection to Tasmania's forests and the Daintree rainforest. In 1989 he and his granddaughter appeared in *Climate in Crisis*, a TV special that was seen by 60 million people internationally.

The Hawke government not only saved natural icons but sought to further build systemic approaches to environmental imperatives. The National Strategy for Ecologically Sustainable Development (ESD), adopted in 1992, was an attempt to embed principles of sustainable development into all aspects of government.

The Resource Assessment Commission (RAC) (1989–93) was a globally innovative approach to addressing resource challenges. It conducted inquiries

¹⁸ A. Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Act 1999*, (the Hawke Review), October 2009, p. 3, available at <<http://www.environment.gov.au/system/files/resources/5f3fdad6-30ba-48f7-ab17-c99e8bcc8d78/files/final-report.pdf>>.



into environmental issues to support government decision-making. Set up at the same time as the Industry Commission (the precursor to the Productivity Commission), the RAC used a similar open inquiry approach but delivered a broader framework of analysis of the national interest. It took the political heat out of key environmental issues, both site-specific ones, such as uranium mining at Coronation Hill, and broader issues such as the timber industry and coastal management. The *Australian Financial Review* wrote at the time of its demise:

... 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 the 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.¹⁹

Its establishment was supported by the Australian Mining Industry Council and the National Association of Forest Industries. Its dismantling after only three inquiries marked a shift away from political commitment to the environment.

In 1992 and 1997, COAG Intergovernmental Agreements on the Environment were made between the states and the Commonwealth, which proscribed the Commonwealth Government's interventions in matters of the environment.

The High Court's Mabo decision of 1992 and the *Native Title Act* of 1993 shifted the terms for environmental decision-making in Australia by recognising Indigenous prior ownership.

It was in this context that John Howard won government in 1996. Proceeds from the Howard government's partial sale of Telstra saw \$1 billion allocated to environmental protections. In 1999 the Howard government legislated the *Environment Protection and Biodiversity Conservation Act* (EPBC), which pulled together all the disparate pieces of federal environment legislation and established the current approach to environmental management. Gone were the days of activist interventions by federal governments or their attempts to rationally debate systemic solutions through independent inquiries.

Kevin Rudd began his prime ministership by committing Australia to ratifying the Kyoto Protocol. Unfortunately, the ensuing decade of toxic climate change politics has tended to dominate the federal environment debate, crowding out other important issues. During the Rudd–Gillard years, the EPBC was used to halt a handful of proposals, perhaps most significantly the Traveston Dam, slated for the Mary River in Queensland.

Negotiated outcomes between the timber industry, unions and the environment movement led to the World Heritage listing of the most contentious 170,000 hectares of Tasmania's forests, thus ending more than two decades of contestation. After a hundred years of debate, a settlement was made to allocate water in the Murray-Darling river system. The super-trawler was stopped and the world's largest marine park network was established.

With the challenges facing us so much bigger than the site-by-site battles that first animated environmental concern, the need for better systems-based approaches is now critical. It is time to re-examine many of the compromises and truces negotiated in the past and apply the rigour and energy once seen in environmental policymaking to reimagining 21st-century solutions.

¹⁹ Quoted in D. Stewart and G. McColl, "The Resource Assessment Commission: An inside assessment", *Australian Journal of Environmental Management*, vol. 1, no. 1, 1994, p. 22.



3 THE CURRENT ACT AND HOW AND WHY IT FAILS

The current environmental law, *Environment Protection and Biodiversity Conservation Act 1999* (EPBC), attracted strident criticism at its inception.

Then Shadow Environment Minister Kelvin Thomson said, “Although it might be the largest environmental bill introduced into the Parliament, it is neither comprehensive nor fundamental reform.”²⁰ Julia Gillard described it as “a hastily cobbled together legislative nightmare”.²¹ The Australian Conservation Foundation, the Wilderness Society and Greenpeace said at the time, “Any Senator who votes for this unacceptable legislation in its current form will be supporting the degradation of Australia’s environment.”²²

The weaknesses of the current regime have been noted internationally. The World Resources Institute ranks Australia 37th of 70 in its global environmental democracy index – behind Mongolia, Cameroon and Russia. The methodology of the index has its limitations in the Australian context as it only ranks national-level laws, regulations and practices without consideration of state laws, however it clearly indicates our laws are not world’s best practice.²³

The Act is also unwieldy and complex. The Hawke Review noted, “It is clear from comments that many people, including professionals, find the Act hard to understand and navigate. The Act is currently repetitive, lengthy, unnecessarily complex, often unclear and, in some areas, overly prescriptive.”²⁴

Over time there has also been a chorus of critiques from various interest groups within Australia. It is striking that while both environment and business advocates (such as the Business Council of Australia) critique the current regime for very different reasons, many of the same key structural issues underpin the concerns. The same weaknesses – such as lack of clear terms for decision-making – lead to suboptimal environmental outcomes as well as delivering complexity and lack of certainty in the development approval process.

HOW THE CURRENT LAWS WORK: FAILING THE ENVIRONMENT

Too much emphasis on development approvals

The current laws are too focused on development approvals at the expense of adequate provision for proactive protection of the environment. The EPBC names a set of nine “matters of national environmental significance” (MNES) that primarily relate to treaty obligations and include World Heritage areas, nuclear issues and threatened species. If any of the MNES are deemed to be potentially impacted by a proposed development, they “trigger” a federal assessment and approval process.

There is no clear decision-making framework once the assessment begins. The laws do not obligate the Commonwealth to protect the values the laws identify, only to “consider” them. This means environmental outcomes cannot be assured. It also means there is no clarity of the terms for decision-making in relation to development approvals, leading to uncertainty and delay.

The “triggers” are reactive to development proposals rather than comprehensive tools with which to manage and protect the environment. This is central to the failure of environmental governance in Australia.

²⁰ Hansard, House of Representatives, 26 September 1999.

²¹ Ibid.

²² C. Hamilton and A. McIntosh, *Taming the Panda*, Australia Institute, Discussion Paper no. 68, 2004, p. 14.

²³ World Resources Institute, “Environmental Democracy Index”, available at <<http://environmentaldemocracyindex.org/rank-countries#all>>.

²⁴ A. Hawke, 2009, op. cit., p. 14.



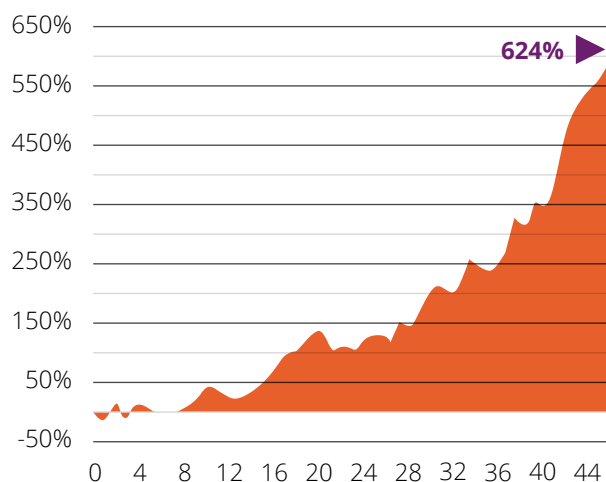
Management provisions have no power to deliver real-world outcomes

The laws include a process for listing threatened species and ecological communities and the preparation of “recovery plans”. These plans have no power to alter outcomes – such as protecting critical habitat – and there is no evidence that any of these listings or plans has arrested any species’ decline. They provide a good example of the environmental failings of the current Act, particularly in comparison to more effective legislative approaches such as the US *Endangered Species Act*.

Unlike the Australian laws, the US *Endangered Species Act* has delivered an increase or stabilisation of the populations of 85 per cent of the birds listed under the Act over its 40-year life, with their populations on average growing by 624 per cent.²⁵ To save a species, protection of habitat is the core imperative. The US Act delivers protection of critical habitat to 44 per cent of its threatened species.²⁶ In Australia, our Act delivers this protection to 0.3 per cent of our listed species. It is hardly surprising our extinction rate is so dire.

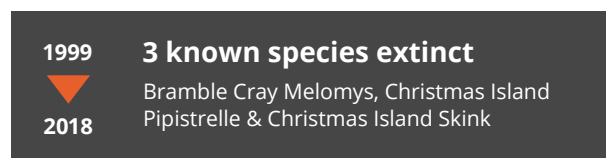
What’s more, the US Act provides a “strong, clear, well-established regulatory context” for management across an animal’s range, including quantitative recovery goals, reviews and enforcement.²⁷ Our laws provide none of this.

Average Growth of Endangered Bird populations at yearly intervals from start of the Endangered Species Act, USA



Source: K. Suckling et al., *A Wild Success: A Systematic Review of Bird Recovery Under the Threatened Species Act*, Center for Biological Diversity, June 2016.

Since the Environment Protection & Biodiversity Act was legislated...



Source: ACF, TWS, WWF, UQ, *Fast-tracking Extinction: Australia's National Environmental Law*, September 2018 except for feral deer numbers: Jesser 2005 and Victorian Parliamentary Inquiry

²⁵ K. Suckling et al., *A Wild Success: A Systematic Review of Bird Recovery Under the Threatened Species Act*, Center for Biological Diversity, June 2016.

²⁶ J. McDonald et al., “Improving policy efficiency and effectiveness to save more species: A case study of the megadiverse country Australia”, *Biological Conservation*, no. 182, 2015, pp. 102–8.

²⁷ K. Suckling et al., 2016, op. cit., finding 3.



No framework for accountable, outcome-focused strategic management of the environment

Not only do the laws fail within the limited parameters they set, more fundamentally they also fail to provide the legal framework to underpin an adequate response to great national threats to our environment and human health. The laws fail to address the lack of clarity around responsibility for arresting environmental decline, or to set the terms for policy success. They fail to set up processes that either prioritise policy and programs or take accountability for outcomes and spending.

HOW THE CURRENT LAWS WORK: FAILING TO PROVIDE CERTAINTY TO BUSINESS

For business proponents, critiques of the development assessment processes include:

- Lack of clarity of expectations at the outset.
- Duplication, with different criteria at the state and federal level.
- Delay and uncertainty created by duplication and shifting expectations. The Productivity Commission estimated in 2013 that a one-year delay in approval of a project of average size (capex \$473 million) is \$26 million to \$59 million. For a large project like an offshore liquefied natural gas project, the cost can be between \$500 million and \$2 billion.²⁸
- Complexity. The Institute of Public Affairs claims that there are 4669 pages of federal environment laws and regulations.²⁹ Current environmental impact statements can run to many tens of thousands of pages; the environmental impact statement for the proposed Carmichael mine was 22,000 pages.³⁰ Few believe these documents are delivering commensurate environmental outcomes. The Productivity Commission estimated that there are 31 different pathways for major development approval processes in Australia.³¹

Another impact on the economy is the community's increasing loss of faith in current environmental protection regimes. This loss of faith delivers increased contestation through on-ground protest and court action, fuelled by the perception of weak and poorly applied environment laws. This is not in the interests of individual development proponents or the reputation of Australia as a place to do business.

A stronger Act that clearly names the values the federal government has a responsibility to protect will provide a clear decision-making pathway and allow a streamlined and transparent approvals process to deliver to both the environment and the business community. Over time this will allow harmonisation with state laws and provide a clearer indication of what development is acceptable and what is not.

Sections of the business community have argued for the devolution of development approvals to the states. This has been rejected by the Labor Party in its National Policy Platform. The federal government's role in environmental decisions has been essential to ensuring the community's interests were defended over a number of decades. Without it the Franklin River would be dammed, the Daintree would still be logged and the Great Barrier Reef would be littered with oil rigs. The environment is best protected by the Commonwealth Government maintaining responsibility for key issues of national importance. By taking an appropriate role in policy leadership, the Commonwealth will increasingly set the standards rather than its current role of often duplicative interventions in development approvals.

²⁸ Productivity Commission, Major Project Development Assessment Processes, Melbourne, November 2013, p. 201.

²⁹ D. Shanahan, "Green tape's 80 fold explosion, costing \$176 billion a year", The Australian, 29 April 2017.

³⁰ Ibid.

³¹ Productivity Commission, op. cit., p. 102.



WHAT BUSINESS HAS SAID ABOUT THE EPBC

The minerals industry does not want any diminution of environmental protection. This is not the issue. Unnecessary and counter-productive regulation is. The current arrangements do not pass any reasonable test of regulatory efficiency or environmental dividend. There is a better way.

There should be a single assessment and approvals process to cover state and Commonwealth environmental matters for major projects across any industry, and the approvals process should be bound to statutory time frames.

Mitch Hooke, chief executive of Minerals Council of Australia, *Australian Financial Review*, 7 June 2013

The current EPBC Act is cumbersome, inefficient and rife with delays and hurdles in its administration. As a result, millions of dollars in costs have been added to the property sector owing to extensive delays, without achieving what the Act set out to do: improve environmental outcomes.

The Government now proposes to move towards a better strategic assessment model including adopting a single approval process across federal and state jurisdictions. This means the property sector will know what is required under the environmental rules from the start, without having to face the prospect of achieving environmental approval only to restart the process at the federal level.

Catherine Carter, ACT executive director of Property Council of Australia, *Canberra Times*, 28 August 2011

Complex and fragmented approval processes result in delays and additional costs to the economy at a time when all governments are moving to deliver projects to underpin economic recovery and future growth. Harmonising state planning and approval processes will be fundamental, but so is ending the duplications and inconsistencies which occur on projects requiring state and commonwealth approvals.

Brendon Lyons, executive director of Infrastructure Partnerships Australia, *Australian Financial Review*, 1 April 2009

Australia's environmental regulatory framework contains numerous overlapping, excessive and inconsistent requirements that are causing unnecessary project delays and costs. The legislation does not always clearly define or achieve its objectives, or add any additional benefit to the Australian economy. It imposes additional costs on the industry and, in some cases, delivers conflicting outcomes that extend project timeframes and costs.

Australian Petroleum Production and Exploration Association, submission to the Productivity Commission inquiry *Major Project Development Assessment Processes*, 2013



LACK OF INSTITUTIONAL PATHWAYS TO POLICY INNOVATION AND LEADERSHIP

Reducing environmental governance to simply the administration of the EPBC Act heralded a 20-year hiatus of innovation in this policy area. Society's understanding of the complexity of environmental systems and the human systems with which they interact has grown tremendously over 20 years. However in that same time span, federal environmental governance has pulled back, acting within the narrow parameters of administering the Act and ad hoc program delivery, with inadequate accountability for program outcomes. Most other areas of public policy have evolved, yet even though the challenges have escalated in terms of complexity and scale, environment policy has continued on the same trajectory.

The Resource Assessment Commission was a compelling example of an institutional structure that delivered innovation and rational debate in a contested sphere. It delivered a forum for the contest between interests to occur and had the authority, structure and resources to imagine solutions. It is a long time since we showed the political commitment required to design and empower an environmental institution that mirrored the Industry/Productivity Commission in both scope and authority.

CASE STUDY

Great Barrier Reef Foundation funding allocation: A decimated public service, privatisation of environmental protection and haphazard policy-making

The allocation in April 2018 of \$440 million dollars to a small environmental NGO in to administer protection to the Great Barrier Reef is not only a political scandal, it is evidence of three deeper problems with Australian environmental governance: a gutted public service, the spectre of privatised protection of the environment and a lack of clear strategic approaches to significant environmental threats.

Laura Tingle said on ABC TV's 7.30, "The gutting of the public service has often left government without the skills to actually run programs ... The irony now is the [environment] department has given half a billion dollars to a private foundation which in all likelihood will end up giving grants back to government bodies."³² We need to rebuild the institutional capacity within government to better care for the environment.

The decimation of the public service is related to a more sinister policy shift from within some governments. Shadow Treasurer Chris Bowen said, "By privatising the management of Australia's most precious and fragile environmental asset, money which could have been spent on the reef is instead spent on administration"³³ This was a high profile example of a dangerous trend emerging, where government funds for environmental protection are allocated to the private sector. In a world where privatisation of public goods is proving itself a failed experiment, the environment is not a policy area which can be out-sourced. It must remain a core service delivered by government to citizens who own the asset.

Finally, this incident also shows up the broader challenge with un-targeted allocation of funds in the environment sphere. This funding grant is just the latest tranche of the large amounts of taxpayer funding that has been allocated to protection of the Great Barrier Reef over recent decades, and yet we fail to see any fundamental improvements in its health. We need greater clarity of proposed outcomes to ensure funding is effective in reversing structural environmental decline.

³² Tingle, L, "The politics of Great Barrier Reef funding", 7.30, 16 August 2018, viewed at <<http://www.abc.net.au/7.30/the-politics-of-great-barrier-reef-funding/10129716>>.

³³ Karp P, "Scott Morrison says \$444m Great Barrier Reef grant 'right financial decision'", *The Guardian*, 1 October 2018



SECTION TWO: THE PROPOSAL FOR REFORM

4 BUILDING GOOD GOVERNANCE FOR AUSTRALIA'S ENVIRONMENT

It can be difficult to imagine pathways to good governance in today's context. The public service is weakened and the public's trust in politicians is at an all-time low. Hyper-partisanship politicises what should be evidence-based policy making. The dominance of market ideology has done little to assist good governance in policy areas that sit outside commerce, such as those residing in the realm of the common good like the environment.

This paper is a call to reclaim our commitment to good governance of the natural assets of which we are stewards. Good governance requires a mix of ingredients, relating to both process and people. Leadership and vision, authority to act within the governing party, stakeholder and community support are all essential to rebuilding effective environmental governance in this country.

So too are good laws and policy, accountability and transparency, and robust and trusted structures of expert public servants. It is important to remember that the following proposals for legal and institutional reform are essential to good governing, but they exist only with the support of suitable political will and community engagement to give them legitimacy and life.

GOALS FOR LEGAL AND INSTITUTIONAL REFORM

We must rebuild federal environmental governance by asserting federal leadership, and providing clearer, less discretionary laws with strong, independent institutions to deliver them.

We must provide certainty to business by streamlining processes through an independent federal regulator tasked with delivering speed of approvals and transparency. This reform is an economic one as well as an environmental one: a faster, more efficient and clearer development approvals process will aid the economy and sustainable development. Environmental outcomes and criteria will be clearer and stronger. The environment will be better protected.

We must shift from a focus on development approvals that has dominated federal environment law to a new, rigorous approach of proactive positive management of environmental assets – let's name what we want to protect and provide the laws and institutions to make it possible. This is not a proposal that strips states of their currently central role in environmental management but rather identifies key issues that have national importance and creates a strategic leadership role for the Commonwealth in setting direction and ensuring delivery of outcomes.

An independent institutional structure must provide the policy leadership necessary to achieve our ambition. Independent institutions are needed to deliver two key outcomes:

- provide the independent, expert and empowered leadership to deliver environment planning based in science that focuses beyond electoral cycles.
- improve the transparency, robustness and integrity of the regulatory functions of federal environmental governance.

In summary, we must apply the best of our policy thinking and expertise to provide a simple and adaptable approach grounded in measurable outcomes to a complex system. The complexity of natural systems is well known, so environmental law must mesh this with the complexity of social and economic systems. It is not easy.

New robust laws and institutions respected across society are required. To achieve what's needed, they must be above the fray of politics. The environmental governance regime in Australia needs more than tinkering – it needs root and branch reform.



5 A NEW ENVIRONMENT ACT

I. ENSHRINE FEDERAL LEADERSHIP IN LAW

A weak and ill-defined cooperative federalism has allowed Australia's environment to degrade with no level of government holding responsibility to halt the decline. As threats emerge, no one is responsible for designing and delivering a comprehensive response.

A new Commonwealth Environment Act should confer the task of protection and restoration of Australia's environment on the federal government and parliament and provide the tools for delivery of this task.

The federal government should provide national strategic leadership against a set of clear objectives. The federal government should also set priorities and measurable goals and standards and work with the expertise and specific knowledge of the states and local government.

The Act should not seek to override the roles of state and local governments in environmental protection; rather, it should augment them. States have provided most of the innovation in Australian environmental management and many of its gains. This is a cooperative approach to amplify the efforts of all levels of government. States would retain their role in delivering environmental management but on key issues of national significance would be working within national-level planning set by the Commonwealth.

Importantly, a new Commonwealth Environment Act would need to better recognise Indigenous Australians' land and water rights. *The United Nations Declaration on the Rights of Indigenous Peoples* contains a number of provisions that recognise the interests of indigenous people in environmental management and sets out principles to support respectful engagement between Indigenous Australians, the Australian government, and the community, on the environment through law. The exact nature of the new law's provisions to strengthen Indigenous Australians' environmental rights must be negotiated with the Indigenous community.



EMBEDDING FEDERAL LEADERSHIP

Constitutional powers

While our Constitution does not mention the environment, successive High Court decisions have supported the view that “the Commonwealth has a substantial, almost plenary, capacity to make laws concerning the environment”.³⁴ These powers include but exceed the responsibilities directly conferred by our treaty obligations. There are key limitations which must of course be respected and are discussed at length elsewhere.³⁵

As the 1999 Senate inquiry into Commonwealth environment powers concluded:

*...the Commonwealth Government has the constitutional power to regulate, including by legislation, most, if not all, matters of major environmental significance anywhere within the territory of Australia. The panoply of existing Constitutional heads of power confers on the Commonwealth extensive legislative competence with respect to environmental matters.*³⁶

This relevant constitutional authority includes the external affairs power (section 51 (xxix)), corporations power (section 51 (xx)), territories power (section 122) as well as taxation power (section 51 (ii)) and trade and commerce power (section 51 (i)). The Commonwealth also has extensive powers to allocate funding for environmental purposes, either directly or through grants to the states.

COAG conventions

The nature of the relationship of the states and Commonwealth goes beyond the legal constitutional arrangements – it also has a “political” aspect, relating to the norms that have been adopted through COAG processes over time. Then Prime Minister Tony Abbott abolished the COAG Standing Committee on Environment and Water (SCEW) in 2013. In remaking the intergovernmental environment committee, Australia has an opportunity to reset the terms of “cooperative federalism” that have limited effective coordinated environment efforts.

The two intergovernmental agreements of 1992 and 1997 that relate to environmental governance are outdated and need to be remade – they stand in the way of the Commonwealth providing strategic leadership. While there have been a number of intergovernmental “national strategies” written over time, they have generally failed. They are slow to materialise as they rely on a committee approach and have had no legal force or mechanism to ensure delivery. This must change.

Improving the effectiveness of our effort and spending on the environment requires Commonwealth leadership, however states must be allowed to deliver as is appropriate within their jurisdictions. Ideally the new expanded role for the Commonwealth will be welcomed by states as the burden of priority setting and managing the big picture will be covered.

With respect to the legal relationships, the Constitution also allows the Commonwealth – by virtue of section 109 – to exercise supremacy over state environmental laws where its legislation addresses the same subject matter. The United States has similar federal powers and national laws can overrule states on matters of the environment. In practice this is rarely used but acts as a tool to insist state legislation conforms with national standards.

³⁴ R. Fowler, M. Wilcox et al., “Environmental governance”, (Technical Paper 2), Australian Panel of Experts on Environmental Law, 2017, p. 14.

³⁵ For instance, *ibid.*

³⁶ *Ibid.*, p. 15.



II. LIMITING DISCRETION: LEGISLATING ENVIRONMENTAL IMPROVEMENT

The current Act suffers from a lack of clear objectives or desired outcomes. It is therefore set up to fail. A new Act must mandate environmental improvement.

The Commonwealth should be legally obligated to deliver the following:

- Protect Australia's natural environment and its biodiversity.
- End deforestation and restore native vegetation cover to protect nature and store carbon.
- Improve fresh water quality and flows in our river systems.
- Expanded protected area estate in line with international obligations including improved management across protected area tenures and a central role for traditional owners and local communities.
- Arrest and reverse species loss and decline.
- Ensure invasive species do not undermine environmental and economic assets.
- Improve the health of our oceans by addressing both terrestrial and marine threats.
- Prepare Australia and its planning and infrastructure systems to adapt to climate change.
- Ensure climate change considerations are central in making major development decisions.
- Ensure air quality protects human health and that Australians are protected from toxic pollution and contaminants.
- Deliver Australia's treaty obligations that relate to the environment, including the Convention on Biological Diversity, the UN Paris Climate Change Agreement and the Sustainable Development Goals.
- Reduce waste including plastics and the environmental problems created by them.
- Ensure Indigenous Australians' environmental rights are respected and improved and social and economic benefits for Indigenous Australians in environmental protection are prioritised in public policy and funding.

“The argument for Commonwealth Strategic leadership on environmental matters is equally as strong as the argument with respect to a range of economic policy areas such as taxation, corporate regulation, consumer protection, regulation of the financial sector and industrial relations”

Australian Panel of Experts on Environmental Law.
Blueprint for the Next Generation of Environmental Law.

The rest of the Act would provide the governance arrangements to deliver these objectives. The delivery of environmental improvements would be legislated with well understood decision-making criteria supported by a clear cascade of supporting instruments, targets and plans.

III. PROACTIVE MANAGEMENT AND PROTECTION

The current Act focuses on development approvals. We must shift to proactive management of the environment, defined at the highest level by the Act's objectives.

The current Act's central concept is a list of “matters of national environmental significance” that “trigger” federal environmental involvement and approval. The new Act should move away from the concept of triggers. Instead a list of “Commonwealth Environmental Interests” will define the issues the Commonwealth must protect whether they are reactively triggered or not.



How would this work?

The Act's ambitious objectives would establish a comprehensive set of Commonwealth Environmental Interests that define the areas of federal engagement in environmental management. These would identify the areas for Commonwealth strategic leadership.

For each of the Commonwealth Environmental Interests, the Commonwealth should establish what APEEL has called "Strategic Environmental Instruments", that is, pathways, goals and targets for the protection of these interests. A useful analogy is the European Union (EU) concept of directives: a directive is a legal act of the European Union which requires member states to achieve a particular result without dictating the means of achieving that result. The EU's environment directives sit under three headings: Pollution and Waste, Wildlife and Nature Conservation, and Other. The directives set targets, standards and dates for delivery.

As these Strategic Environmental Instruments clearly set out goals for environmental improvements, state and local governments operationalise them in much the same way as Europe's nation states autonomously design and deliver pathways to the achievement of the high-level goals of the EU directives.

These instruments would be designed by an independent agency, working with the Minister to set priorities and the department to design implementation. See below. Ideally the goals would be ruthlessly specific and measurable, with funding allocated accordingly. Accountability both through legal obligations and contracted outcomes-based funding would be tools for delivery.

At a regional level, Strategic Assessments and Regional Plans (based on bioregions, catchments or local government areas) would nest under and deliver national standards. Ideally these would be delivered in a cooperative, stakeholder-driven process where problem-solving can be collaborative.

IV. DELIVERING CERTAINTY THROUGH STREAMLINED APPROVAL PROCESSES

Commonwealth approval processes would be nested under the national standards delivered by Strategic Environmental Instruments. The instruments will make clear what are acceptable environmental impacts and development approval processes will reflect this. As the Instruments are applied over time, greater harmonisation between state and federal law will be delivered, streamlining development approvals.

In the September 2018 Interim Report of the Banking Royal Commission, Commissioner Kenneth Hayne described the promise of vertically integrated businesses that include banking, financial planning and mortgage broking. He concluded, "But the efficiency of the 'one-stop-shop' does not necessarily produce efficiency in outcomes for customers".³⁷ The comment equally applies to 'one stop shop' environmental approvals as they have been proposed in recent years. While their logic is compelling for business, the outcomes are seldom efficient for the environment or the citizens who share ownership of it. This proposal aims to streamline and simplify development approvals by making clear the decision making standards, not by reductionist approaches.

In late 2016 the Business Council of Australia (BCA) released a report outlining its preferred reforms to environmental assessment, citing delay and complexity as the key problems. The report relied heavily on the Productivity Commission's 2013 report, *Major Project Development Assessment Processes*. The BCA report summarised its model as follows:

"The model places a greater emphasis on upfront strategic planning, introduces a lead agency framework and umbrella timeframe and follows the principle of one project application, one assessment and one approval."³⁸

³⁷ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Interim Report (2018), Vol 1 p 79

³⁸ Business Council of Australia, *Competitive Project Approvals*, November 2016, p. 4.



The proposals in this paper would deliver many of these objectives:

- The Act's proactive approach and clear objectives would provide a proper basis for decision-making and the creation of local plans to manage each of the environmental assets identified in the Act. In the medium term this would deliver local strategic assessments and regional plans within which development could be conceived and approved.
- Creating an independent agency that leads and manages development approvals and compliance with the Strategic Environmental Instruments is central to this proposal (see below).
- This reform does not intend to reduce the states' or territories' role in environmental management, but by enshrining federal leadership it will inevitably lead to harmonisation and streamlining.

Key attributes of a federally led approval development process would be:

- Clarity and transparency of processes including time frames, chances of success and pathways. Assessments would be simplified and processes would match the complexity of the environment issues at stake. The independent regulatory agency would provide reliable, transparent advice on these issues at the outset.
- Proponents would know exactly what was expected through a federal-led and coordinated process run by the independent regulator.
- Legislated timelines for assessment and approvals.
- The independent regulatory agency would run the federal assessments, removing the current conflict of interest that is created by proponent-appointed assessors. This would be on a commercial "fee for service" basis and help fund the regulatory agency's operations.
- Collection of data toward the creation of a federal data store to inform better decision-making; currently data collected in the EIS process is the property of the proponent.
- Over time, regional strategic assessments designed to comply with national environment objectives will allow simpler land use allocation and therefore approval processes.

Decision making

There are two options for the model for final decision-making:

- **Minister as decision-maker.** Transparent and publicly available advice from the independent regulator for which the Minister would need to give reasons as to why he/she was deviating from such advice.
- **The Independent Regulator as decision-maker.** This model frees the Environment Minister from the task of being the referee, allowing him/her and the Environment Department to be active participants in the process and advocate on behalf of the environment. The submissions of Ministers (including the Environment Minister but also the Agriculture, Resources, Infrastructure etc.) would be given particular status in the decision-making process.

Under either model, the independent regulator would publicly document the decision making/advice outlining the way in which it fulfils the Act's objectives and protects the Commonwealth's Environmental Interests. This would radically improve the public's confidence in the decision-making processes.

Compliance and monitoring

The compliance regime for conditions applied to development approvals is weak, if not non-existent. Currently compliance is completely hamstrung by lack of funding, lack of independence from political imperatives and lack of powers to act. This makes a mockery of the federal approvals system. Community loss of confidence in current laws is fuelled by this. The new Act must provide powers to the new independent regulatory agency, and the government must provide funding to ensure compliance responsibilities can be delivered. Furthermore a full review of the sanctions for illegal activity should be conducted. Fines must be adequate to affect deterrence, with consideration of inclusion of personal liabilities for corporate law breaking.



V. ESTABLISHING INDEPENDENT INSTITUTIONS TO DELIVER THE ACT'S OBJECTIVES

The Act would establish an independent institutional structure to deliver its objectives, designing Commonwealth leadership and proactive protection of the environment, stream-lining development approvals and delivering effective compliance. (See below).

VI. ENSURING COMMUNITY INVOLVEMENT IN ENVIRONMENTAL DECISION-MAKING

Civil society rights in environmental matters must be protected. Australia's globally ground-breaking systemic environmental assessment legislation such as the NSW Wran government's *Environmental Planning and Assessment Act 1979* had community participation as a central concept. This was seen as essential to adequately protecting the community's interest in contestation about public resource exploitation and land use. It also brought community acceptance of outcomes. Appropriate engagement builds respect for the "umpire's decision". This concept has been eroded over time. Business advocates including the Business Council of Australia have endorsed the importance of greater community engagement. The BCA has specifically identified the need to engage community at key points in development approvals – during strategic plan design, and during both pre-assessment and assessment of developments.



6 NEW TRUSTED INSTITUTIONS

The best laws in the world are useless unless they are applied. We must build new institutional structures to ensure our ambition is delivered. We need an independent regulator as well as an empowered and independent body to run policy inquiries, provide policy leadership and drive positive outcomes.

Many areas of policy, particularly economic ones have independent institutions to improve government decision making and delivery. The Reserve Bank of Australia and the various regulators such as ACCC and APRA are examples. The Gillard government's Clean Energy Package recognised the value of independent expert bodies in improving environmental decision making, particularly with the establishment of the Climate Change Authority.

With community trust of politics and business at an all-time low, we must legislate the creation of science-fuelled and respected institutions that are trusted by all Australians to provide consistent leadership in the delivery of a new Commonwealth Environment Act and its objectives.

I. AN INDEPENDENT COMMISSION POLICY LEADERSHIP

We need an independent environment institution that Australians can trust, with the powers, mandate, information and resources to deliver a healthy environment. Ideally the independent institutional structure will rebuild community confidence that the environment has a rational champion, identifying and delivering the national interest in relation to environmental protection. It will not be blind to the nation's economic and social needs, bringing business, government and community together to solve problems. It will develop new alliances to support the huge task of environmental restoration that harness the capacity of both the private and public sector. It will initiate strategic inquiries into the key environmental challenges facing us and keep its eye on the future for emerging threats. It will gather the information and science we need to better make decisions. Importantly, it will be above politics.

In 2009, the Hawke Review identified many of the features recommended in this report. It recognised the need for independent institutions to augment environmental decision-making and recommended the establishment of "an independent Environment Commission" with the task of: a) managing and reporting on data; b) providing advice on decision-making – development approvals, bioregional plans etc.; c) providing compliance, enforcement and auditing delivery of the Act; and d) providing advice and reports including on policies and programs.

To plan adequately for the environment requires a horizon that is longer than the political cycle. The environment works in timeframes of decades and centuries, not parliamentary terms. Independence is essential to improve our approach to policy to protect the environment. The Act must ensure however, that the independent agency is working in concert with the Minister, with the Minister setting priorities and working in close collaboration.

Policy leadership functions of an independent agency:

- Develop "Strategic Environmental Instruments" as set out by the new Commonwealth Environment Act, setting targets and driving environmental protection regimes across the country. This work will be supported and operationalised by the Commonwealth environment department. The development of instruments will need to be prioritised, with the Minister identifying five-year priorities. These instruments will set funding priorities and deliver accountability to funding allocations.
- Provide policy leadership: identify emerging threats and innovative solutions by conducting environmental inquiries of a strategic nature, both as requested by the Commonwealth government or at its own initiative. This function will echo the approach of the Resource Assessment Commission³⁹ and have the same powers and processes of inquiry as the Productivity Commission, just a broader, richer definition of protection of the national interest.



- Provide a focus for debate and civil society engagement. Be an active and trusted advocate for the environment in the public sphere.
- Build a comprehensive, publicly owned data bank – currently a lack of comprehensive data undermines environmental decision-making in Australia. The Commonwealth government must actively build a data repository, working with the states and private sector development proponents to gather and aggregate data so that decision-making can be grounded in science. Research funding will be allocated toward clear outcomes.

National environmental accounts is a concept that has long been discussed in Australia as a pathway to better inform planning and allocation of resources. The Wentworth Group of Scientists has written on this extensively and its proposal could form the basis of a shared project with regional community groups to better account for the health of key environmental assets and inform priority setting and funding allocation.⁴⁰

- Establish specific projects to work with partners, states, private sector and civil society toward truly innovative solutions to environmental challenges, such as new shared funding models.

II. AN INDEPENDENT WATCHDOG – EFFECTIVE REGULATION

Regulatory functions to be delivered by the new, independent institutional structure:

- Lead the Commonwealth's environmental assessment and approval system.
- Deliver compliance functions for the Act and for conditions on approvals.
- Audit and monitor outcomes against the aims of the Act.

III. INSTITUTIONAL ARCHITECTURE – ONE INSTITUTION OR TWO?

There are two essential functions to be delivered by independent institutions; policy leadership and effective regulation. Some argue that one institution would struggle to deliver these concurrently. It is worth noting that the United States' Environment Protection Agency provides both functions. It is our conclusion that a single institution would be stronger and preferable and could be called the National Environment Commission. The National Environment Commission must clearly incorporate all the functions identified above in order to restore faith in the Commonwealth's commitment to protecting Australia's environment.

³⁹ D. Stewart and G. McColl, "The Resource Assessment Commission: An inside assessment", *Australian Journal of Environmental Management*, 1994, vol. 1, no. 1, pp. 12–23. This article provides a very good overview of the RAC's structure and operations.

⁴⁰ See <<http://wentworthgroup.org/programs/environmental-accounts/>>.



Protecting the environment does not come for free. The Abbott–Turnbull–Morrison government has slashed spending on the environment. Research by the Australian Conservation Foundation indicates that environment spending has been reduced by 37 per cent since 2013–14, while the overall federal budget has increased by 18 per cent. The proportion of the overall budget invested in the environment is two cents in the dollar.⁴¹

This must be addressed. However, large injections of funding in the past (most notably the National Heritage Trust and Caring for Country), while delivering innovative programs, failed to arrest the backward trajectory of environmental health. We owe it to taxpayers to improve governance toward better outcomes based on measurable aims. The process of setting national priorities with measurable goals will force much greater accountability of environment spending.

However, we must also identify programs that require long-term recurrent funding in order to deliver on strategic goals. The short-term grant-funding model is often a crude accountability tool and can undermine the long-term approach and stable organisational structures that the environment needs. The effective work of Indigenous rangers is an example of this, where building robust organisations over time and providing job security are both essential to the efficacy of the program.

Innovation in funding models will be imperative. This is where creative collaboration with the private sector matters. An example is the need to end deforestation and to replant, which is an essential climate change mitigation task as well important for biodiversity. Climate finance can be deployed to assist environmental outcomes.

We must also prioritise funding for research and development in environmental management. For example, robots are beginning to offer innovation in the agriculture sector and newly developing genetic eradication technologies offer the possibility of revolutionising the losing battle against feral animals.

CONCLUSION

Australia's environment is in crisis. It's time for renewed and innovative commitment to the task of ensuring our life support system continues to underpin the health of our people and the prosperity of our industries.

A new legal structure supported by independent institutions will deliver the environment protection and certainty that Australia needs.

⁴¹ ACF, "Media release: Budget 2018–19: Investment in a healthy environment cut to bare bones, while fossil fuel subsidies continue", 8 May 2018, available at <https://www.acf.org.au/budget_2018_19_investment_in_a_healthy_environment_cut_to_bare_bones_while_fossil_fuel_subsidies_continue>.



SECTION THREE:

WHAT DOES THIS MEAN FOR THE THINGS WE CARE ABOUT?

8

PLASTIC WASTE: CHOKING OUR WATERWAYS, KILLING OUR SEA LIFE AND CONTAMINATING OUR FOOD CHAIN

No one likes the idea of turtles drowning due to a belly full of plastic. Nor do we want to think about plastic ending up in our lungs and our dinner, let alone our beer. It feels like we are drowning in plastic. This is an overwhelming problem that needs a serious, coordinated national response.

The new Commonwealth Environment Act would establish the National Environment Commission. The National Environment Commission would have the task of scanning the horizon for emerging environmental challenges. The plastic problem has got to crisis point without adequate leadership from any level of government in Australia. These reforms would fix that with an independent, informed and empowered institution acting in the community and environment's interest. We need to reduce plastic use, improve our recycling outcomes and begin to build 'closed loop' industries. Australians are some of the best recyclers in the world and yet these efforts have not been honoured by our governments' responses. China's recent decision to reject foreign recycling materials showed up our failure to build industries and economic opportunity by processing recycling onshore. The current plastic crisis requires a multi-pronged and coordinated response.

The National Environment Commission would establish a Strategic Environmental Instrument, that is, a National Plastic Pollution Plan. The plan would set high-level targets, goals and standards and would be a legally binding document. This would be developed

in consultation with communities, regulators and businesses and could include a national inquiry if it was deemed helpful to the canvassing of all issues, particularly on industry development. A useful analogy is the European Union's approach. The EU sets legally binding directives and strategies that autonomous nation-states then deliver as they see fit. Similarly, our nationally coordinated plan would leave states with autonomy in terms of delivery. On plastics, the EU has a Plastic Bags Directive that sets targets for nation-states, which include a cost on single-use plastic bags by the end of 2018 and reduction of their use to 90 bags per person by 2019, ramping up to 40 bags per person by 2025.⁴² The EU is currently looking at directives for ten other single-use plastic products.

These directives will be accompanied by an EU Plastics Strategy⁴³ that covers all aspects of the challenge, including regulation on plastic use but also increasing the profitability of recycling and encouraging closed loop manufacturing, improving efficiency of recycling sorting and targets for recycled content, as well as plans for driving investment and innovation by sharing knowledge and skills and providing funding for innovation.

In Australia, COAG agreed in April 2018 to a target that all containers will be recyclable by 2025. While this is positive, it has no legal standing and no pathway for delivery. There is a long history of these COAG targets failing. It is also by no means comprehensive, addressing only one aspect of a bigger challenge.

⁴² Ecological Council of Denmark, "Media release: Consequences of the European Plastic Bag Directive", 2017, available at <<https://www.ecocouncil.dk/en/releases-3/109-economy-and-politics/2568-consequences-of-the-european-plastic-bag-directive>>.

⁴³ European Commission, "Media release: Plastic waste: European strategy to protect the planet, defend our citizens and empower industries", Strasbourg, 16 January 2018, available at <http://europa.eu/rapid/press-release_IP-18-5_en.htm>.



In July 2018 Unilever, one of the world's biggest consumer product companies, complained that lack of government leadership in Australia was slowing down the pace of a shift to more sustainable packaging, calling for "stronger co-ordination around how targets are delivered".⁴⁴

"To what degree can the government help industry take the right decisions and provide incentives?" said Unilever Australia and New Zealand chief executive Clive Stiff on ABC TV news. Industry looks for national leadership in facilitating industry outcomes necessary to addressing environmental challenges. Environmental governance reform provides the legal and institutional framework for this leadership to be delivered.

What's more, Stiff called for standardisation of the waste management laws and regulations in place across three tiers of government. "Recycling facilities across Australia are at different stages of life [regarding] what they will accept and what they won't," he said. Lack of national coordination on key issues that allow industries to grow, such as standardisation, are features of the current piecemeal approach.

A National Plastic Pollution Plan might include phase-out dates for various single-use plastics, an eventual ban on microbeads, regulated minimum recycled content in packaging, a proper national approach to container deposits and an approach to marine debris clean-up and sea-based litter. Furthermore it would propose appropriate government intervention to assist the growth of both the recycling industry as well as closed-loop systems for all businesses.

The new Environment Act would give the National Environment Commission the power to design the Strategic Environmental Instrument, that is, the National Plastic Pollution Plan, with legal standing to set out timelines, targets and standards. Much of the program delivery would be done by the federal environment department working alongside environment departments in the states and territories.



The Act would give the federal Minister or the commission the power to accredit state action plans against the instrument's goals. It would give the Minister power to directly regulate companies' activities to achieve the Commonwealth action plan if one of more states fail to make their own compliant plan. This is consistent with the Commonwealth's powers under the Constitution.

Implementation of, and compliance with the National Plastic Pollution Plan would be monitored by regulatory arm of the National Environment Commission.

⁴⁴ P. Lasker, "Consumer products giant calls for step up in war on plastics", *ABC TV News*, 24 June 2018, available at <<http://www.abc.net.au/news/2018-06-24/consumer-products-giant-calls-for-step-up-in-war-on-plastics/9902612>>.

Australia leads the world on extinction. In Australia, three animals have become extinct since 2009.

There are now more than 1700 animals on the national threatened list, an increase of 30 per cent since our national environmental law, the *Environment Protection and Biodiversity Conservation Act*, came into being in 1999. Rather than turn the trend around, our national environmental law has enabled the continued decline in threatened species populations. It has failed to address key threats and has not provided the critical protections needed for threatened wildlife.

The three greatest drivers of extinctions are the same as the key countrywide environmental pressures identified by the federal government's 2016 *State of the Environment* report:

- Deforestation and loss of habitat – the single largest reason for extinctions is loss of somewhere to live.
- Feral animals – cats, pigs, foxes kill native species and degrade habitat.
- Climate change – as the temperature warms, animals will need to be able to travel across country to higher altitudes to survive, as their traditional ranges become uninhabitable for them.

We must address each of these. On top of these systemic responses we will need targeted programs for the particular animals at greatest risk. The northern hairy-nosed wombat, the western ringtail possum and the swift parrot are just three of the 78 critically endangered Australian animals that need very targeted, accountable responses to save them from slipping into oblivion.



Systemic responses

Deforestation and habitat loss is not currently regulated under national environment law. The federal government only has a role in land clearing if a 'matter of national environmental significance' is triggered, such as the presence of a threatened species. Even so, illegal land clearing is seldom prosecuted due to lack of resources and political interference. This is evidence of the need for an independent compliance agency. New laws will make deforestation and vegetation management a "Commonwealth Environment Interest", delivering a legally binding policy that arrests vegetation loss and looks to rehabilitate landscapes. This would inevitably include full protection of habitat identified as critical to the survival of particular threatened species.

A long-term approach to feral animal control would also be developed by the National Environment Commission. Some difficult decisions need to be made about prioritisation and the most strategic way to address the devastating impact of feral animals. For too long money has been scattered and essentially wasted in a war that can never be won. As an example, the number of feral cats is unknown but estimates range between 4 and 20 million. Each cat kills at least four native animals a night, which puts the minimum daily death count at 16 million. Feral cats are literally stripping the country bare. The government, on the advice of the Commission might set a policy aim, such as "Feral Cat Free by 2050", echoing New Zealand's commitment to being "Feral Free by 2050". The National Environment Commission would then ruthlessly set priorities to make this a reality. These difficult choices are best made without political interference. Inevitably research and development will need to be prioritised to introduce new biological solutions to our tool kit.

Landscape scale management will need a strategy which identifies priorities backed by science. Funding for environmental protection has, under the current approach, been haphazardly applied. Choices must be made and the National Environment Commission will make plans and priorities for spending to actively manage national parks, World Heritage areas and other protected areas better and to support communities in replanting and restoring landscapes.

Species-specific responses

The new laws and federal leadership should include targeted approaches for species that are under immediate threat of extinction. While protecting habitat and removing ferals are the great systemic challenges, governments must also apply short-term focus on animals that are in danger of being lost forever.

The government could identify the top 20 species most in need of targeted and specific management. This process of prioritisation will deliver outcomes, not just reports. Private and public entities could bid to deliver increased populations of specific highly threatened species, ensuring we know with contracted accuracy if our management approaches are making a real difference before species are made extinct. Australia has world-leading skills in this approach, which sensibly should be used alongside more system-wide solutions.



