



The Government proposes to establish Australia's first national independent environmental regulator - Environment Protection Australia - and its first independent environmental data agency - Environment Information Australia.

This is the culmination of a decade of concerted activism within the Labor Party to remove environmental decision-making from the whims of politicians and place it in the hands of experts and science. It is a very big deal.

Members of the Labor Environment Action Network (LEAN) persuaded more than 500 Labor Party branches to call for this in the 2018 platform. When the final report of the review into the national environment laws commissioned by the then Coalition government and delivered by Professor Graeme Samuel failed to recommend an independent EPA, LEAN members mobilised to defend it in 2021.

Our members gave up their evenings to support independent environmental institutions because a lack of compliance and enforcement and a lack of scientific rigour in assessments and approvals has made Australia the extinction capital of the world.

National Environmental Standards were a centrepiece of Samuel's proposed reforms: a key innovation to shift the laws from simply describing processes to delivering outcomes. Standards will be the foundation of a rules-based approach to environmental protection and planning. They offer certainty to business by delivering faster and more efficient decisions - approvals and rejections.

The Samuel Review backed a stage approach to reform. It argued that National Environmental Standards should be the first reform: *"The recommended National Environmental Standards should set clear rules for decision-making. These should be immediately finalised as part of a full suite of Standards and adopted by early 2021 to kick-start change."*

LEAN strongly believes that this Stage 2 tranche of legislative reforms would be strengthened by a legislated ability to create National Environmental Standards and have them apply to decision making under the current *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC). This should be accompanied by an inclusive stakeholder process to finalise key standards before the next election.

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<sup>1</sup> Samuel, G 2020, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra, October. P 192

We continue to urge the Government to expedite the full reforms (Stage 3) promised in the Government's *Nature Positive Plan* in December 2022. In the meantime, the addition of a legislated power to create standards within Stage 2 can deliver immediate change in the outcomes for both business and the environment - one of the Plan's key objectives ('better for the environment, better for business'). Standards created under the current Act could then be transferred into a new Act within the full suite of reforms to the decision-making process.

### **Recommendations:**

1. LEAN fully supports the creation of Environment Protection Australia and Environment Information Australia. The establishment of these independent and empowered institutions is essential to delivering improved environmental outcomes in Australia.
2. LEAN supports the inclusion of a legislated power to create and apply National Environmental Standards under the existing EPBC Act as part of the Stage 2 legislative package, accompanied by a process, including all key stakeholders, to finalise key standards before the election.
3. LEAN urges the Government to expedite its work on Stage 3 of the legislative reform process, based on the following principles:
  - a. Nature positive is central to all actions and processes in the new laws - not just in new project approvals but also in positive conservation planning and restoration to repair past damage;
  - b. All decision-making - whether by ministers, public servants or private actors - must be subject to clear rules, including on consultation and the involvement of scientific expertise;
  - c. The Commonwealth must exercise its full powers to protect Matters of National Environmental Significance, even in the absence of state or territory cooperation.

### **Environment Protection Australia**

The proposed Environment Protection Australia (EPA) will deliver much needed dedicated and independent regulation, compliance and enforcement. When the full reforms are delivered, it will provide expert, independent environmental assessments at arms' length from the Government. In the meantime it will provide much needed compliance and enforcement and independent, expert advice to support the Minister in her decision making.

LEAN has long supported such an institution to have an independent governance board, consistent with international best practice.<sup>2</sup>

Within the Government's proposed legislation, LEAN welcomes the following features:

- a) The CEO's functions include making recommendations to the Minister for improved regulation. Such a provision enables the CEO to continuously evolve and improve regulation according to the EPA's experience and national and international best practice

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<sup>2</sup> OECD (2014), *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, <https://doi.org/10.1787/9789264209015-en>.

- b) The legislation explicitly says the CEO is not subject to direction by any person, including through the Minister's Statement of Expectations; the CEO also has to publish a Statement of Intent in response to the Statement of Expectations, which will provide transparency and ensure accountability.
- c) Disclosure of information to the person who provided the information will enable whistleblowers and third parties raising compliance concerns to understand how their concerns have been addressed.
- d) The CEO is appointed by the Governor-General, which means only the Governor-General can terminate that appointment. This is an additional independence measure.
- e) The EPA will be a statutory agency (and only sit within the department until 1 July 2025) - a further step towards independence.
- f) The EPA's annual report will be tabled in parliament in a timely way.
- g) The CEO must commission regular reviews (not more than 5 years apart) of the EPA's performance and the extent to which it is meeting its objects. The reviews must be published on the EPA website as soon as practicable so cannot be suppressed.

### **Environment Information Australia**

An independent Environment Information Australia is at least as important. Good decision-making relies on good information.

LEAN welcomes the following features in the proposed legislation establishing EIA:

- a) It includes the world's first legislated definition of nature positive, including the requirement for it to be measured against a baseline, to be determined by EIA.
- b) EIA's functions include developing and implementing a monitoring, evaluation and reporting framework to measure progress on achieving nature positive.
- c) The Head of EIA cannot be directed by any person, including the Minister, particularly in relation to the nature positive framework, the state of the environment report and the environmental economic accounts.
- d) The interval between State of the Environment reports reduces from five years to two years, enabling more timely assessments. The reports must explicitly include assessments of progress towards achieving national environmental goals. LEAN would like an explicit provision that progress towards achieving nature positive be included in the State of the Environment reports.
- e) The State of the Environment report must be published as soon as practicable upon completion, so cannot be suppressed by any Government.
- f) The Minister must respond to the State of the Environment report within six months, and that response must specify targets and timeframes in relation to the issues raised in the State of the Environment report.
- g) The legislation provides for the first explicit preparation of environmental economic accounts.

- h) The accounts must be tabled in both Houses of Parliament within 15 sitting days of completion, and also published as soon as practicable on the department's website. These are important transparency measures.
- i) EIA can declare National Environmental Information Assets, which means government agencies and private or non-government institutions (eg universities or research institutes) must publish that information, improving transparency and accessibility of important data. A national repository of authoritative environmental information will underpin the baselines against which Australia's progress in halting and reversing biodiversity decline can be measured.
- j) The Minister must commission regular independent reviews of the extent to which EIA is meeting its objects, and the reviews must be published as soon as practicable on the department's website and tabled in both Houses of Parliament within 15 sitting days. These are important transparency measures.

LEAN would like the government to go further. We have long argued for a National Environment Commission, similar to the Climate Change Authority: an independent, expert advisory body that not only hosts authoritative information but can also use that information to advise policymakers on important issues such as protection and restoration targets, and policy innovation in addressing the scale of our environmental challenges.

Such a body could review and regularly update the national environmental standards to ensure they take account of the latest scientific knowledge and global best practice.

### **Compliance provisions**

Strong compliance is essential to the functioning of any legislation, and weak compliance has been a particular problem with the implementation of the EPBC over many years.

LEAN welcomes the following provisions in the proposed amendments to the EPBC:

- a) The grounds for directing an environmental audit are expanded to include not just likely non-compliance with conditions, but also impacts that are more significant than initially anticipated when approvals or exemptions were given, or conditions set.
- b) Similarly, no-notice compliance audits can be implemented on the grounds that impacts are greater than anticipated.
- c) Auditors must be both qualified and independent and the Minister must be satisfied they are independent before including them on a panel or approving their appointment.
- d) Minister can issue environmental protection orders, which can stop, restrict or modify activity, or require specific actions.
- e) Environmental protection orders are not limited to Commonwealth areas.
- f) Environmental protection orders can be retrospective if an existing project is found to have a greater impact than anticipated.
- g) Penalties for non-compliance have been significantly increased, which should create genuine incentives for compliance, and to ensure impacts are not more significant than anticipated.

## **National environmental standards**

LEAN supports the inclusion in the Stage 2 legislative package of amendments to create and apply national environmental standards under the existing EPBC Act. This should be accompanied by an inclusive process involving all key stakeholders.

Amendments would empower the Minister to make, vary and review standards as disallowable instruments. Decisions under the EPBC Act would be required to be consistent with the standards. Standards would also apply to bilateral agreements with the states and territories.

## **Comprehensive environmental law reform - Stage 3**

While LEAN welcomes the introduction of new environmental institutions, good institutions can only do so much in applying flawed laws, and the current national environment laws will not deliver the nature positive outcomes the Minister has committed to.

We urge the Government to accelerate work on the last stage of the reforms, including legislated national environmental standards. These must also include clear definitions of unacceptable impacts and of habitats that must be protected, as well as an overdue recognition of the impacts of climate change.

The Minister has said she is not delaying the full reform package, merely bringing forward one part of it. The Australian community must hold her to her word. To deliver on her promises, she must provide the Australian public a proposal based on the following principles.

Firstly, nature positive must be at the centre of all considerations and embedded in all processes - not just approvals, where any damage must not be unacceptable and must be properly restored, but also in positive conservation planning and restoration actions to address the damage from past actions.

Baselines must be absolute, not continually declining, and the government must take concrete actions to improve on them. Recognition of climate change as a key threatening process is essential.

Secondly, environmental approvals and conservation planning must be rules-based. Broad and unaccountable ministerial discretion in the past has led to the current biodiversity crisis. All actions under the new laws must be subject to clear rules whether they are undertaken by the Minister, the EPA, EIA, the department or private actors. Decisions will still have to be made - there can be no algorithm to churn out automatic outcomes - so we need clear rules to govern how they are made. This includes rules on consultation.

Thirdly, the new laws must recognise Commonwealth precedence over matters of national environmental significance. These have been specifically designed to fall squarely and unequivocally under Commonwealth jurisdiction, either through the external affairs power (addressing matters of international concern) or through the corporations power. Co-operation between all levels of government is important, but state and territory governments have too

often acted against the interests of Australia's biodiversity. The Commonwealth must shoulder its responsibility to protect and restore it.

Laws framed around these principles, and applied and enforced by genuinely independent, expert institutions may finally turn the tide on Australia's biodiversity crisis and lead us to a nature positive future.