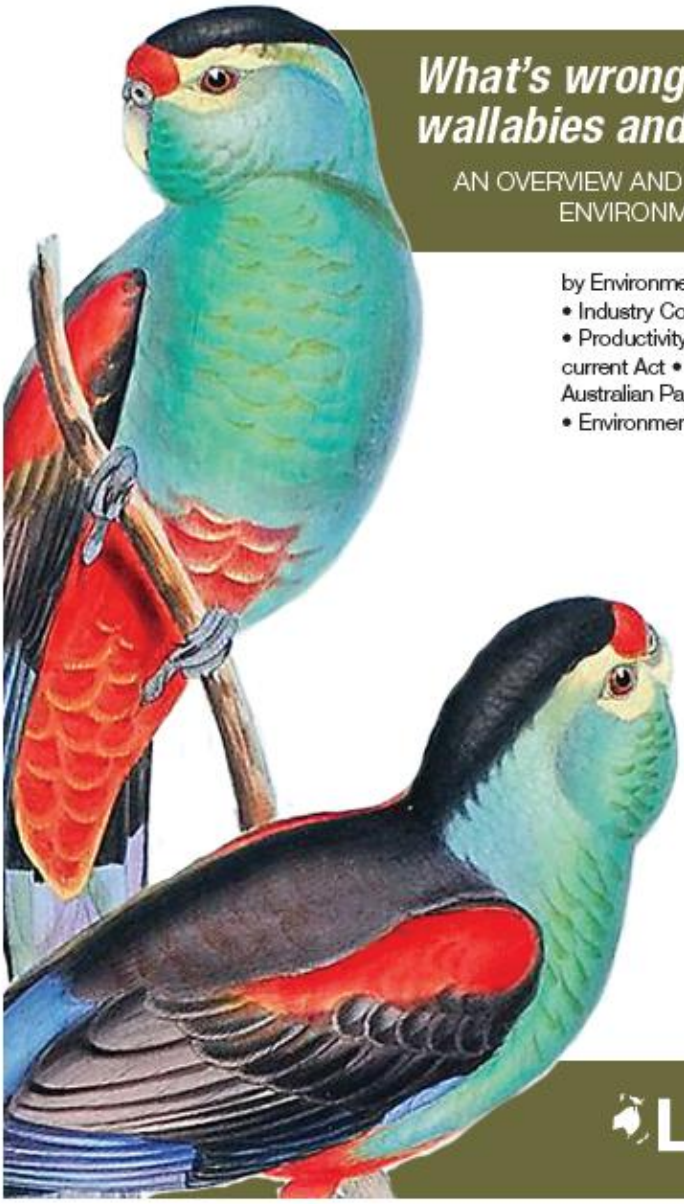
What's wrong with the wallabies and the parrots?

AN OVERVIEW AND SUMMARY OF CRITIQUES OF FEDERAL ENVIRONMENTAL LAW AND ITS IMPLEMENTATION

by Environmental NGOs • Business Council of Australia • Industry Commission • Australian Labor Party • Productivity Commission • Hawke Statutory Review of current Act • Wenworth Group of Concerned Scientists • Australian Panel of Experts on Environmental Laws • Environmental Defenders Offices



LEAN Labor Environment Action Network NATIONAL

Introduction

Australia's current Federal environment laws and institutions are failing to arrest alarming environmental decline. This must be fixed.

Labor committed, at the last Federal election, to comprehensive reform of Australia's Federal environment laws and institutions.

The Labor Environment Action Network (LEAN) is committed to ensuring Federal Labor is in a strong position to deliver world leading environmental legal and institutional reform when next in government.

To this end we are working to engage the Labor Party and labour movement on the importance of environmental legal and institutional reform. We intend to talk to all sections of the party about the scale of the problem, the nature of the failings of the current system and key principles that should inform Labor's response.

The critique of the current system is deafening. Everyone from the Institute of Public Affairs to the Wentworth Group of Scientists argue the system is failing.

LEAN has researched and summarised various stakeholder and government comments on the current Federal environment laws and their operation.

In the following pages is LEAN's summary and discussion of these critiques. What is most interesting about these diverse voices is their commonality of critique.

Summary of critiques

The salient points in many of these critiques include:

1. **Environmental outcomes are poor** – with declines across virtually every category of environmental indicator, such that the major indices of the health of our natural world (including native species, pests and weeds, soils and protection of freshwater) are all worse than they were four decades ago when Commonwealth environment laws began[1]:

2. **The EPBC Act assessment and approval processes have caused and continue to cause major cost and time imposts** to projects and to the economy more broadly. They have also engendered dissatisfaction among key stakeholders in a significant number of projects:
   - One of the major concerns of business about the operation of the EPBC Act lies in the duplication of state and Commonwealth environmental assessment processes and uncertainty about the expectations of different regulators. Businesses are legitimately concerned about the uncertainty, delay and expense of environmental impact and approval processes for projects that require assessment and decision under State / Territory Planning and Environmental law and the EPBC Act.
   - Communities are increasingly cynical about the current system and unrest is growing substantially as major projects are being proposed.
   - Disputation including court challenges are on the increase.

3. **The problems with the EPBC Act derive from its framing and content, and from its implementation mechanisms.**

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1 Adapted from: An Implementation Plan for Strong National Environment Laws, Policies and Institutions, PYL, 9 May 2016

- Although it contains positive features worth retaining, the problems with the EPBC Act mean that taken it does not effectively manage biodiversity conservation, and nor does it effectively manage the cumulative impact of multiple developments[2].
- The continued decline in the condition of Australia's land, water and marine resources will only intensify with climate change and population growth, and the expanding global demand for energy, food and minerals.
- Australia also faces the challenge of accommodating a projected 14 million more people in 2050, and most of this will be through urban development in sensitive coastal areas.
- By far the most effective way to "deliver better environmental outcomes" is to invest in doing the long-term landscape-scale planning to determine where, and under what conditions, development can safely occur
- For better environmental outcomes, there is a need to shift away from individual project-by-project development assessment and approvals, towards a more strategic and long-term approach to guiding development and sustainable use of natural resources, and managing the collective impacts of development on the environment. This will also create a greater level of certainty for developers and the community.

A number of reviews have identified these problems, including a Senate inquiry into the operation of the EPBC Act in 2009; the statutory 'Hawke Review' of the EPBC Act in 2009; and a range of Productivity Commission reports.

The Hawke Review, commissioned by then Environment Minister Peter Garrett, identified many ways in which the EPBC Act could be improved. As the most specific and comprehensive thinking of the issue, a summary of these warrants inclusion here.

- Increased focus on strategic approaches to environmental management (rec.1) including strategic assessments (rec.4) and bio-regional planning, including capacity for the Commonwealth to initiate regional planning (rec.6)
- Reduced duplication of processes (rec.1)
- Clarification and enhancement of the place of ecologically sustainable development principles in decision making (rec.2)
- Clarification of the objects of the legislation (rec.3)
- Greater use of joint processes and public processes in environmental assessment (rec.4)
- Development by the Commonwealth of monitoring, performance audit and oversight capacity and powers (recs 4, 61)
- Development of a national bio-banking system including provision for bio-banking as part of project approvals (rec.7)
- Recognition of ecosystems of national significance (rec.8)
- Recognition of vulnerable ecological communities as a matter of national environmental significance (rec. 14)
- Inclusion of a greenhouse trigger in federal environmental law (rec.10)
- Improved provision for recovery and threat abatement plans including regular review, regional scale and linkages to funding opportunities (rec.18)

2 Adapted from: Statement On Changes To Commonwealth Powers To Protect Australia's Environment, Wentworth Group, Sept 2012

- Improved identification of key threatening processes across the range of matters of national environmental significance (rec.19)
- Development of an industry code of conduct for environment consultants (rec.24)
- Clarified assessment powers, processes and decision criteria, including power to consider full range of environmental matters affected if a project triggers assessment under the Act (recs 25, 27);
- clarification of power for Environment Minister to request information on alternatives to proposals referred to approval (rec.26); and
- requirements for decisions to be based on best available information and consistent with ESD principles, relevant international obligations, and prescribed principles and management plans (rec.43)
- Improved heritage listing processes and management arrangements including World Heritage area management plans (recs 28-35)
- Independent performance auditing and compliance monitoring for Regional Forest Agreements (recs 38, 39)
- Increased provision for public participation and transparency of processes under the Act (recs 44-46, 56) including expanded standing provisions and revised costs provisions on review (recs 50-53)
- Consideration of expanded provision for merits review (rec 49)
- Establishment of an Environment Reparation Fund (rec 60)
- Improved cost recovery mechanisms (rec 62)
- Development of a system of national environmental accounts (rec.67)
- Establishment of an independent National Environmental Commissioner and National Environment Commission (rec. 71)

Many of the problems identified, and recommendations made, by the Hawke Review remain un-addressed – to the detriment of the economy, the environment and the people of Australia.

1. Criticisms of Australian environmental law from environment advocates

Environment advocates argue the laws are failing the most basic tests of effectiveness, as all of Australia's environmental indicators continue to decline. This has been documented through the findings of more than 20 years of periodic national and state level "state of the environment" reporting. The laws are not halting species loss or slowing habitat loss and degradation. Beyond this macro failure, there are other shortcomings. To take one instance: the *Environment Protection and Biodiversity Conservation Act 1999* does not mention climate change or consider its impacts.

Criticisms from environment advocates are well summed up in the May 2016 article reproduced below from Mr Brendan Sydes of Environmental Justice Australia[3]:

Failure at a deep architectural level in our system of environmental governance can only be fixed if our national government assumes the responsibility for strong national leadership

Failures in implementation. *Much biodiversity conservation legislation simply fails to deliver what it promises, leading to a lack of monitoring and compliance activities, delays in listing, failures to develop recovery plans, lack of using available tools like critical habitat determinations, poorly managed EIA processes, and regulatory cultures that cannot contemplate refusal of development applications.*

- ***Gaps and limitations in current legislation and policy.*** *Reviews of the legislation repeatedly find that things are missing or not working in the biodiversity conservation toolkit. We need best practice offsets, better prioritisation regimes, improved approaches to strategic assessments. We also need a redesign of biodiversity laws to absorb the reality and the uncertainty of climate change, with new approaches to create a framework for certainty, but also adaptive management, and the institutional foundations for managing protection and restoration in a climate change context.*
- ***Governance failure****. Considering the EPBC and state based biodiversity protection laws as a system is where you find the deepest failure, due to the allocation of responsibilities to different levels of government in our federal system.*

While reform at the level of implementation failures and fixing the biodiversity toolkit is critical, these reforms alone will be bound to fail unless we fix the underlying governance problem – the lack of an effective national system. The main failings are:

Fragmentation. *We have a fragmented and decentralised model of governance. No one is in charge.*

Variable standards. *The standard of environmental protection varies considerably from state to state. Some states, such as NSW, have a relatively well developed system of nature protection laws. In other states and territories laws are rudimentary is non-existent – SA, WA, NT for example. Things are not getting fixed, they're getting worse. One of the symptoms of failure here is that fixes to the first two levels of failure that I outlined above – implementation and fixing the toolkit - simply do not occur in our current system. Across the country, the story of our nature protection laws over the last 20 years has been one of stagnation, stalled and failed reforms, and now active retreat from previous legislative commitments.*

Confusion about the allocation of responsibilities. *The EPBC Act is premised on the Commonwealth assuming responsibility for "matters of national environmental significance" while the states continue with their responsibility for things within their borders - "concurrent" operation of state and commonwealth laws. In practice the result is actually a system of partial responsibility by the Commonwealth matched by an ever decreasing assumption of responsibility by the states.*

3 https://envirojustice.org.au/blog/why-we-need-an-overhaul-of-our-federal-environment-laws

How the EPBC Act tries to fix this but actually makes things worse: bilateral agreements

This unhappy state of affairs is then exacerbated by the use of the only mechanism available under the EPBC Act to try and lift the game of all jurisdictions – bilateral agreements between the states and the Commonwealth. In principle, bilateral agreements are a tool that could be used by the Commonwealth to elevate all state and territory systems to a consistently high standard and then retreat to the sidelines.
In practice, the "one stop shop" and the deregulatory anti-green tape agenda of which it is a part have simply sought to endorse various roll ups of out dated laws, policies and practices with the result that we are really no further advanced in environmental protection terms than we were prior to the EPBC being introduced.

A better way?

A Commonwealth government committed to leading using the powers available to it would be the starting point for nationally consistent approaches to environmental impact assessment, recovery planning, strategic assessment and regional planning, standard setting and much more.
This is all achievable if there is a commitment to national leadership by the Commonwealth government.
It's important to emphasise that this would not be a "takeover" by the Commonwealth government. States, as the primary land managers amongst many other things, will continue to have important responsibilities for implementation.
The point is to avoid the current situation that treats environmental protection in our federal system as a zero sum game where any involvement across two levels of government is bad for duplication, instead seeking an allocation of functions and responsibilities that plays to the best features of each level of government.
The exercise would not be straightforward – any improvement to environmental protection is inevitably politically contentious and the long history of tensions between States and the Commonwealth and environmental matters cannot be ignored.
There are however many models from other areas of public policy where the general trend has been toward national consistency, achieved through a large range of legislative and cooperative mechanisms – defamation laws, occupational health and safety, consumer protection are all examples where the trend has been toward national consistency and harmonisation.

2. Business criticisms of Federal environment law

Business has often seen the current Australian framework of environment laws as onerous and lacking transparency in their expectations, often creating duplication at state and Federal levels.

Representative business bodies

For example, the submission of the Australian Petroleum Production and Exploration Association to the Productivity Commission inquiry on Major Project Development Assessment Processes included the following:

> *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, sub. 17)*

The Business Council of Australia (BCA) has recommended (for example in its Competitive Project Approvals Report) the completion of the "one stop shop" agenda for reforms to the EPBC Act as a major response to these issues, together with implementation of measures proposed by the Coalition Government in 2015 to limit standing to seek review of decisions under the EPBC Act.

Labor has rejected these two areas of BCA recommendations (the first as representing abdication of Commonwealth leadership and risking adverse environmental outcomes without achieving the objective of regulatory simplification, and the second as reducing democratic participation and accountability for good decision making without being likely to simplify approval of well considered developments). In its 2016 election policy Labor did however accept that duplication and unnecessary project delays were substantial issues requiring law reform responses.

BCA in its Competitive Project Approvals report pointed to Productivity Commission analysis that the societal cost of a one year delay for an average project was $59 million and for a major project could be $2 billion. The Productivity Commission's report on major project approvals, as discussed below, recommends greater use of strategic assessments to reduce delays in consideration of particular projects. Similarly, the BCA's Competitive Project Approvals report recommends

> *More use of strategic planning to weigh up decisions about land use permissibility and conditions, allowing streamlined assessment of individual project applications.*

Although as noted BCA are seeking limitation of rights to seek review of decisions affecting development, which Labor has rejected, BCA do also recommend

> *Strengthened consultation, with the community engaging meaningfully in decision making at the strategic planning, pre-application and project assessment phases.*

As discussed later in this paper, there appears a reasonable degree of consensus around this element of "environmental democracy" on the basis that better community consultation and engagement should lead to more robust decision-making in the first place and at least potentially to reduced disputation and delay in subsequent stages.

BCA also made a series of process based recommendations for streamlining:

- A lead agency framework to co-ordinate processes involving multiple agencies or areas of government
- Maximum or target timeframes in legislation
- Single project application following community consultation
- Online application portal including baseline environment and heritage data
- Standardised Environmental Impact Statement requirements and approval conditions
- Performance based assessment of project risks
- Codes of conduct for EIS specialists and consultants
- Performance based compliance reporting
- Streamlined compliance administration e.g. through better inter-agency coordination and information sharing
- Performance monitoring of all agencies in planning process against best practice indicators

These recommendations are not readily characterised as prioritising development either over environmental outcomes or over community participation, and in fact present substantial areas of overlap with other reviews and recommendations as discussed later in this paper.

Other business concerns

Alongside criticisms and recommendations made openly by representative business voices, there has also been more radical criticism of environmental law by a think tank with undisclosed funding sources but considerable current influence in Australian conservative

politics - the “Institute of Public Affairs”[4]– which views environmental law not only as a constraint on productive enterprise but as presenting unjustified limitations on human rights and freedoms, notably the right to private property[5].

These views fail to engage with points which ought to be obvious, such as that

- productive human enterprise and the exercise of human rights and freedoms alike depend on a viable natural world and the ecosystem services it provides
- the appropriate exercise of one person’s rights is necessarily bounded by impacts on other peoples’ rights – including in use of common resources such as clean air and water.

As indicated below, Baroness Thatcher understood these propositions in a way in which the “IPA” apparently does not.

More specifically, restrictions on land clearing (in the interests of preserving biodiversity, preventing land degradation, erosion and run-off, and more recently in the interests of mitigating climate change) have been presented (for example by National Party politicians) as representing the taking of private property for public purposes without compensation[6]. These views can be criticised as misunderstanding or misrepresenting the nature of the property rights in land recognised in Australia since European settlement. As explained for example by the High Court (notably Justice Gummow) in *Wik Peoples v Queensland*[7] a pastoral lease for instance (as suggested by its name) does not equate with absolute ownership and the right to conduct any and all activities on the land without restraint, but is rather a limited grant from the Crown capable of co-existing with other rights (notably native title where it persists), and delimited by other public interests exercisable by the Crown[8].

Management of the relationship between farming and mining interests is one very important but hardly novel example of that co-existence – were it otherwise, many issues between farming and other competing uses could be resolved by a simple “lock the gate” veto exercised by farming interests where agreed solutions are not found.

Resolving competing interests

This discussion does however highlight the need (raised at other points throughout this paper) for environmental and other laws and institutions to provide appropriate frameworks, including economic frameworks, for resolution of competition between interests, and promotion of environmental interests (including climate change mitigation) and biodiversity conservation on private land; or

> *the importance of finding ways to protect socially valued natural and built assets that align the interests of owners with those of the wider community [Gary Banks, Chairman, Productivity Commission, 2008: Roundtable on Promoting Better Environmental Outcomes).*

This point has been expanded on by the Productivity Commission, particularly in its 2004 report on Impacts of native Vegetation and Biodiversity Regulations, also discussed at more length later in this paper:

> *In some cases, it is feasible that regulation to promote some public-good objectives may be efficient — for example, where a simple rule is more efficient than negotiations or auctions at property or regional levels. Importantly, however, if regulation involves the imposition of significant losses on some landholders, payment of compensation would promote acceptance*

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4 See for example http://johnmenadue.com/blog/?p=6023

5 For example see Tim Wilson, https://www.humanrights.gov.au/news/speeches/beyond-human-rights-exercising-freedoms

6 For example http://www.abc.net.au/news/2016-10-26/joyce-accuses-alp-of-adopting-communist-style-land-clearing-laws/7967932; and see http://www.smh.com.au/nsw/right-wing-extremists-labor-attacks-nats-over-land-clearing-comments-20140801-zza56.html

7 1996 HCA 40; http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1996/40.html

8 Technical paper number 2 from the Australian Panel of Experts on Environmental Law discusses these issues further

of, and compliance with, the rule. The efficiency of regulation as a policy instrument does not rest on the uncompensated transfer of long -accepted — and bought — rights.

3. Industry Commission report on environment issues

The predecessor body to the Productivity Commission, the Industry Commission, reported in 1998 on Ecologically Sustainable Land Management[9]. The report title was "A full repairing lease", reflecting this comment by UK Prime Minister Thatcher:

> *No generation has a freehold on the earth. All we have is a life tenancy — with a full repairing lease.*

This report is discussed here because, although it pre-dated the Environment Protection and Biodiversity Conservation Act 1999, it remains relevant. The findings and recommendations of the Industry Commission were far from comprehensively addressed in the EPBC Act. Although some recommendations have been subsequently substantially addressed (notably in national water reforms regarding the Murray Darling Basin achieved under Labor) others have not. Some of these have again been raised for consideration by the Australian Panel of Experts on Environmental Law as discussed later in this paper.

Criticisms of environment policy to date

Focusing on agriculture, but also noting the impacts of urban expansion and other economic activities, the Commission noted the following:

> *Although the benefits of economic development are considerable, they have affected the environment. Many of the environmental impacts have not been welcome and some were totally unexpected. The impacts associated with our agricultural development have included:*
> - *land degradation — such as waterlogging, soil erosion, salinity and acidity, weed and pest infestation;*
> - *degradation of creeks, rivers and groundwater aquifers; and*
> - *the loss and fragmentation of vital habitat such as forests and wetlands has contributed to species extinction — more than 20 per cent of our mammals, for instance, have been lost since European settlement.*

The Commission's criticisms of Australian environmental law and policy included:

- "to date the incorporation of ecological sustainability into policy has been ad hoc, incomplete and tentative"
- "Australian governments have yet to put in place a comprehensive, integrated and far-sighted way of promoting the ecologically sustainable management of natural resources"
- "regulation has often not recognised the severe practical limits to what can be achieved with prohibition. Much regulation is ad hoc and too frequently the only response."
- "often the design of the rules has had only limited input from those that have to work under them"
- Poorly functioning or non-existent markets for key natural resources, with a lack of well defined tradeable rights leading to overuse of some resources (notably water) and under-valuing of others (forestry and native flora and fauna)
- Little use of positive incentives to promote nature conservation on private land and poor coordination of incentives with other natural resource and environmental programs
- Poor accountability for outcomes
- Incomplete implementation of major reforms
- Deficiencies in the generation and dissemination of environmental knowledge and know-how

9 Report No. 60, Industry Commission, 1998. [http://www.pc.gov.au/inquiries/completed/land-management

Industry Commission recommendations

The Commission summarised the objectives of its recommendations as being to:

- *recast the regulatory regime to ensure resource owners and managers take into account the environmental impacts of their decisions;*
- *create or improve the markets for key natural resources; and*
- *encourage conservation on private land.*

Recommended regulatory regime

- *Environmental duty of care:* The Commission recommended a statutory duty of care for the environment, comparing this to duties used successfully regarding occupational health and safety risks and noting that a more restricted version already existed in Queensland, Victoria and South Australia:

  Everyone who could influence the risk of environmental harm should be required to take all reasonable and practical steps to prevent any foreseeable harm from their actions. This would promote more cost-effective measures to protect the environment — that is, those where the costs of prevention are commensurate with the risk and extent of the potential environmental loss.

- *Single unifying statute*: A single unifying statute in each jurisdiction setting out the principles to be observed in natural resource management , to replace current laws on natural resource and environmental management
- *Independent administering agency:* A single independent agency in each jurisdiction would be charged with administering the legislation.
- *Greater use of voluntary standards to guide compliance with general environmental duty:* Use of voluntary standards such as codes of practice and environmental management systems as far as possible for guidance on compliance
- *Outcome based standards*: Mandatory standards to prescribe outcomes rather than inputs as far as possible

Market reforms

- *Natural resource markets*: Creation or expansion of well-functioning markets for key resources including surface and ground water, farm forestry and native vegetation, and native flora and fauna, including creating or better defining tradeable property rights
- *Extension of existing tradeable pollution permits* including salts and nutrients to provide more effective and efficient means for dealing with pollution and waste
- *Pricing reforms* to eliminate subsidised resource use.

The Commission argued that these reforms would

- Encourage conservation and reduce environmental impacts
- Reduce incentives to clear vegetation and over-use water
- Direct privately owned resources into better resource management

Encourage conservation on private land

In addition to the impacts expected from its proposed market reforms and general duty of care, the Commission recommended that governments

- *Extend use of voluntary conservation agreements* including each State and Territory adopting an implementation strategy for this purpose
- *Ensure tax systems encourage environmental altruism* as much as other forms of altruism: the Commission found that this was not currently the case

Environmental knowledge and know how

- *Rights to know and duties to inform and consult* regarding environmental risks
- *Management of spatial information*: The Commission recommended improving collection and dissemination of environmental knowledge and know how including through an intergovernmental agreement on management of spatial information held by agencies with a view to improving the coverage, quality, reliability and public accessibility of that information.

Implementation of Industry Commission recommendations in the EPBC Act?

The second reading speech and explanatory memorandum for the Bill which resulted in the EPBC Act did not refer to the Industry Commission's 1998 report but rather emphasised the Bill as implementing a 1997 agreement of the Council of Australian Governments.

A quick comparison of the EPBC Act with the Industry Commission's recommendations illustrates the extremely limited degree of implementation which the Industry Commission report received under the Howard government (despite the Commission having received the reference for its inquiry on ecologically sustainable land management under that government, from Acting Treasurer John Fahey):

- *Environmental duty of care:* Not implemented
- *Single unifying statute in each jurisdiction* on natural resource and environmental management: Not implemented
- *Independent administering agency in each jurisdiction:* Not implemented
- *Greater use of voluntary standards to guide compliance with environmental duty:* Not substantially implemented
- *Outcome based standards*: Not substantially implemented
- *Natural resource markets including creating or better defining tradeable property rights*: Implemented for water and for carbon farming; not substantially implemented otherwise
- *Extension of existing tradeable pollution permits including salts and nutrients:* Not implemented except subsequently by Labor for greenhouse emissions (now repealed)
- *Pricing reforms* to eliminate subsidised resource use: not substantially or systematically implemented
- *Extend use of voluntary conservation agreements :* conservation agreements provided for under the EPBC Act; use has increased; but a comprehensive implementation strategy including economic base remains lacking
- *Ensure tax systems encourage environmental altruism:* systematic review not yet undertaken
- *Rights to know and duties to inform and consult regarding environmental risks:* not implemented
- *Intergovernmental agreement on management of spatial information* held by agencies with a view to improving the coverage, quality, reliability and public accessibility of that information: not fully implemented

It should be emphasised that it is not the intention here to present the Industry Commission report from 1998 as a comprehensive blueprint for reform in 2017 and going forward.

For one thing, the Industry Commission's task focused on the interaction between agriculture and environment rather than being a complete review of management of human interactions with environmental systems. Possibly for this reason, the Industry Commission report gives very little discussion of important strategic issues such as bio-regional planning, which do receive some attention in the EPBC Act and which have subsequently been recommended for increased emphasis.

It must also be acknowledged that development of effective voluntary standards to guide implementation of mandatory but general duties, recommended by the Industry Commission, can face more significant difficulties than might appear from the Industry Commission's discussion.

On this point, for example, the Productivity Commission has questioned[10] whether Standards Australia processes always meet standards for good policy and standards development including

- systematically considering costs and benefits before developing or revising a standard;
- publishing reasons for such decisions;
- ensuring balanced stakeholder representation;
- reducing barriers to volunteer and public participation;
- ensuring accessibility, transparency and timeliness, including appropriate appeals and complaints mechanisms.

As the Productivity Commission has also noted[11], Australian Standards are considerably less accessible than is now common or acceptable for Australian legislation and regulatory material. The Commission has recommended that free or low cost access should be ensured before giving such standards regulatory or co-regulatory effect.

Removal of mandatory standards, or a failure to develop and maintain such standards up to date, without success in production of high quality voluntary standards to guide compliance with more general requirements, could also substantially increase risks of uncertainty for business, while increasing risks of adverse environmental outcomes.

With these caveats, the Industry Commission report provided a very substantial reform agenda, most of which was not addressed with the introduction of the EPBC Act, and much of which remains unaddressed.

4. Early criticism of EPBC Act

The EPBC Act was harshly received by Labor in Parliament at the time of its introduction. The Member for Wills, Kelvin Thomson, commented:

> *Although it might be the largest environmental bill introduced into the parliament, it is neither comprehensive nor fundamental reform [HoR 29.6.1999]*

while the Member for Lalor, Julia Gillard, described it as a

> *hastily cobbled together legislative nightmare [HoR 29.6.1999]*

Many of the limitations of the framework headed by the *Environment Protection and Biodiversity Conservation Act 1999* were identified very early on in academic commentary For example in 2000 Chris McGrath *"Introduction to the EPBC Act, its implications for State environmental legislation and public interest litigation"*[12] noted that the EPBC Act was from the outset little more than a consolidation of pre-existing Federal laws, rather than being designed to provide a comprehensive framework, either for protection of the environment and integration of economic development and other intersecting interests, or for co-ordination of Federal, State and local government activities and responsibilities in an efficient and effective manner.

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10 http://www.pc.gov.au/inquiries/completed/standards/report

11 http://www.pc.gov.au/inquiries/completed/standards/report

12 Paper for Queensland Environmental Law Association seminar https://qela.com.au/wp-content/uploads/2014/11/00_08_07EPBC_Act.pdf

He also raised the concern that the system contemplated by the EPBC Act focused on short term project approvals, rather than accounting for cumulative and system scale impacts. The importance of systems which consider cumulative impacts had been earlier raised by the Industry Commission report.

5. Productivity Commission reports on environmental issues

The Productivity Commission has conducted public inquiries and research studies on a range of issues relevant to environmental regulation. As well as those dealing directly with issues under the EPBC Act, a, selection of other reports are also discussed here given the interrelationship between issues, and to provide an overall picture of the analysis and recommendations provided by the Productivity Commission.

Regulation of agriculture (2016:2)

The report of this Inquiry[13] (provided to Government in 2016 and released in 2017) so far as it concerned environmental regulation noted that there are clear needs for environmental regulation and that regulation has benefits as well as costs for the agricultural sector. It called for

- Regulations to consistently consider economic, social and environmental factors; require assessment of activities on a landscape or regional scale not only on an individual property scale; and be based on an assessment of environmental risks
- Better use of market based approaches to native vegetation and biodiversity conservation
- Improvement in advice and support to landholders on obligations under environmental regulation and approaches to engagement and consultation

The report notes views that the most important undue effects of regulation can be cumulative when any single instance of regulatory impact appears reasonably proportionate to important social objectives. The report's emphasis on landscape scale environmental assessment is an important counterbalance to this point. [14]

The report also referred to indications that water trading has improved farm productivity as well as environmental outcomes, while noting need for further attention to

- detailed design of regulations and market regimes
- groundwater rather than surface water flows only.

Marine fisheries and aquaculture (2016:1)

The report of this inquiry was provided to government in 2016 but not yet public as at 18 April 2017. The draft report[15] recommends adoption of tradeable quotas for commercial fisheries and closer integration of customary fishing rights and recreational fishing into fisheries management.

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13 http://www.pc.gov.au/inquiries/completed/agriculture/report

14 The report's example of a requirement for precise permission to take an outsize vehicle across a working railway line as an example of excessive regulation does seem to throw into question the credibility of the Productivity Commission's approach for anyone who is familiar with rail safety, or can Google search "Hixon rail crash". This incident involved an express train running into an outsized vehicle stranded on a crossing with 11 deaths and 45 injuries resulting – although it is fair to point out that the accident in that case was contributed to, rather than being prevented, by the presence of a police escort as is also required in the example cited in the Productivity Commission report, since in the Hixon case this was found to have diminished the outsized vehicle operator's awareness of his own responsibilities.

15 http://www.pc.gov.au/inquiries/completed/fisheries-aquaculture/draft

Mineral and energy resource exploration (2013:2)

The Government response to the EPBC Act review was excluded from the terms of reference for this inquiry; but in view of the EPBC Act itself not having the comprehensive coverage of natural resource management and environment issues previously recommended by the Industry Commission, considerable remained scope for discussion of environmental issues.

In this Report[16] the Commission made relevant recommendations including as follows:

- *Coal seam gas*: The Commission endorsed the use of the precautionary principle (uncertainty in science should not lead to inaction regarding significant risks of serious environmental harm) including in relation to coal seam gas exploration and extraction, while expressing concern that some regulation in this area did not appear to have complied with agreed COAG policy on application of regulation impact analysis.
- *Water trigger*: The Commission called for publication of cost-benefit analysis of the "water trigger" amendments to the EPBC Act including the exclusion of water trigger related actions from bilateral approvals.
- *Greater use of strategic assessments :* The Commission (in common with the Hawke review of the EPBC Act) recommended increased use of strategic assessments under the EPBC Act and, where appropriate, reduced use of project based assessments.
- *Increased publication of archived environmental information:* The Commission recommended that archived environmental information, including all information used in decision making processes, be made publicly available online as far as possible.
- *Indigenous heritage protection:* The Commission also made recommendations regarding protection of indigenous heritage in mineral and energy resource exploration . These are not discussed further here but would be relevant if review of the EPBC Act extends to how indigenous heritage should be protected.

This report also contains a concise view on the issue of unnecessary duplication in environmental regulation, which as noted earlier in this paper is raised in Labor's 2016 election commitments:

> ***Duplication of regulation*** *: the need to provide information to multiple regulators and go through multiple processes can add unnecessarily to compliance costs.*
> ***Inconsistency of regulation****: regulatory inconsistencies can occur within or across jurisdictions, and increase regulatory burdens. Inconsistency is likely to present particular problems for businesses operating across multiple jurisdictions.*
> ***Variation in definitions and reporting requirements****: variation in practices can occur between regulators within jurisdictions, although it is typically a more significant problem for businesses operating in multiple jurisdictions. Such variation can increase compliance costs.*

Major project development assessment processes (2013:1)

The Commission's Report[17] recommends expanding the use of Strategic Assessments and Plans where practical to do so and comments

> *Australia's DAA regulations are largely organised around the evaluation of one project proposal at a time. This means that governments consider the incremental impacts of a project, but not the cumulative impacts of a series of developments. This limits the ability of*

[16] http://www.pc.gov.au/inquiries/completed/resource-exploration/report
[17] http://www.pc.gov.au/inquiries/completed/major-projects/report

the regulatory framework to meet policy objectives, as can be seen from the challenges that are developing in the Pilbara and the Great Barrier Reef. Strategic Planning and Assessment can take into account the cumulative impacts that arise from multiple projects and other activities on landscape-scale ecosystems. In turn, this can result in subsequent project assessment and approval processes being less resource intensive and time consuming, since some of the issues have already been handled.

Despite these advantages, and even though Strategic Assessments have been available under the EPBC Act since 1999 (and under some state laws for lengthy periods); the use of this approach has only recently started to become more frequent.

The Commission also endorsed a role for independent authorities with environmental assessment and enforcement authorities as follows:

The Commission proposes that jurisdictions pursue the institutional separation of their environmental assessment and enforcement functions from their environmental policy functions. Given similar arrangements already exist in Western Australia and Tasmania, jurisdictional size seems not to be an important consideration. The least-cost institutional form should be determined by each jurisdiction having regard to existing structures. This institutional separation should not alter the authority of the relevant Minister to make primary environmental approval decisions. For the Australian Government, this means transferring the assessment and enforcement functions required by the EPBC Act from the Department of the Environment to a new independent agency.

In this report the Commission noted contrasting views on regulatory overlap and duplication. The submission from the Australian Petroleum Production and Exploration Association regarding regulatory overlap, inconsistency and unnecessary costs and delays is quoted earlier in this paper. In contrast, environmental NGOs argued that problems of regulatory overlap and duplication are overstated and, in any case, having both the Commonwealth and States and Territories involved acts as an additional safeguard to protect environmental assets. The Australian Network of Environmental Defender's Offices stated:

Contrary to industry claims and some media reports, State and federal environmental regulation is not duplicative; instead, environmental regulation by both State and Australian governments is part of the shared responsibility for the environment set up by the 1992 Inter-Governmental Agreement on the Environment. … Federal environmental regulation therefore provides a critical role in Australia's national environmental protection regime and achieving our international obligations. (sub. DR92)

On this, it seems appropriate to note, in common with Labor's 2016 federal election policy, that there is in fact a degree of duplication in environmental regulation in Australia; and that the issues are

- what aspects of this duplication are unnecessary and avoidable and
- what should be done about it

Lock The Gate Alliance questioned the ability of State and Territory Governments to adequately assess matters of national environmental significance:

There are matters of national environmental significance which state government authorities are not equipped to assess, and the assessment of which they have demonstrated they are not capable of adequately conducting, including the World Heritage Great Barrier Reef, for example, and threatened species that are not listed at the state level. Checks and balances are needed to ensure that assessment is rigorous and fulfils our international obligations. (sub. DR97)

The Commission recommended further efforts to pursue bilateral agreements with States

and Territories:

> The Commission regards bilateral agreements for assessment and approval on matters of national environmental significance under the EPBC Act as the best way to address directly overlapping and duplicative processes, while ensuring progressive environmental outcomes. Such agreements would go some way to promoting a 'one project, one assessment, one decision' framework for environmental matters

The Commission noted difficulties in securing progress with bilateral agreements consistent with Commonwealth environmental objectives to that point, and offered a five point plan as follows:

> *1. Increase the number of State and Territory assessment procedures with Commonwealth accreditation.*
> *2. Strengthen State and Territory approval and enforcement processes, through other reforms proposed in this report.*
> *3. Initially target concluding agreements in areas that are less environmentally sensitive and where there is better information about impacts, such as urban environments, rather than trying to secure a comprehensive nationwide agreement. The Commonwealth Government could maintain control over matters where it would be unlikely that the community would accept it exiting the field. In such cases, the States and Territories should accredit Commonwealth processes where they address the same matter.*
> *4. COAG should publish a timetable of agreed reforms and have the COAG Reform Council report annually on key milestones and barriers to reform, together with ways to address the latter.*
> *5. The outcomes of bilateral approval agreements should be monitored. To facilitate opportunities for learning, governments should report on the operation of the agreements.*
>
> *The Commonwealth Environment Minister would retain the right to withdraw accreditation if national standards were not being met. The Commonwealth Government could also maintain control over matters where it would be unlikely that the community would accept it exiting the field. In such cases, the States and Territories should accredit Commonwealth processes where they address the same matter. It is recommended that this proposal be properly scoped to identify the necessary steps and appropriate safeguards.*
>
> *The Commission also sees substantial scope for strengthening existing bilateral assessment arrangements as an interim step towards the reforms described above. Currently less than 30 per cent of projects are assessed under bilateral assessment arrangements. By building on existing (or expired) agreements, there are a number of areas where improvements could be made. These include: agreement on standards and procedures for assessment; better utilisation of existing legislative procedures; and extending, where relevant — for example in South Australia — the number of regulatory processes that are accredited under current bilateral agreements.*

Labor has rejected the option of a simple handover to the States and Territories and a Federal Government retreat from national environmental responsibilities. The Productivity Commission's five point plan does not appear to recommend a similar simple retreat from responsibility. Some environment advocates regard reform for arrangements for bilateral agreements as a way forward. Others (for example the NSW Environmental Defenders Office) consider that continued provision in the EPBC Act for bilateral agreements to hand over Commonwealth approval powers on any terms presents unacceptable environmental risks while not removing inconsistency for business, and that bilateral agreements should be restricted to assessments rather than including approvals.

In other settings[18] the Productivity Commission has discussed regulatory capture as a source of poor regulatory performance. It may be useful in this context to have further discussion on the potential for regulatory capture presented by current royalty and taxation arrangements in the energy sector in particular, as a reason for particularly close scrutiny of proposals for endorsement of State and Territory based regulation as the path to regulatory simplification.

Regulatory burden on the upstream petroleum (oil and gas) sector (2009)

In this report[19] the Commission recommended

> *To cut through regulatory duplication and overlap, the Commission proposes the staged establishment of a new national offshore petroleum regulator to undertake resource management, pipeline and environmental regulation in all Commonwealth, State and Territory waters*

Comments: Other critiques of current regulatory arrangements have questioned the level of independence from regulatory capture, and the degree of resourcing and expertise available to the agency established pursuant to this recommendation compared to overseas bodies in this area.

Rural water use and the environment: the use of market mechanisms (2006:1)

In this Report[20] the Commission found that markets were already making a significant contribution to increasing rural water-use efficiency; but that further reform is needed to ensure that water continually moves to wherever it has the highest value to society (including its value in environmental uses).

Impacts of native vegetation and biodiversity regulations (2004)

In this Report[21] the Commission proposed a three-part approach to reforming existing arrangements for biodiversity conservation on private land:

- improve existing regulatory regimes;
- remove impediments to and promote private conservation; and
- develop a formal process for sharing costs and devolving responsibilities

> *Retention, management and rehabilitation of native vegetation and biodiversity on private land are important for many reasons including resource sustainability and protection of endangered ecosystems. But existing regulatory approaches are not as effective as they could be in promoting these objectives and impose significant costs:*
>
> *The effectiveness of restrictions on clearing of native vegetation has been compromised by: a lack of clearly-specified objectives; disincentives for landholders to retain and care for native vegetation; and the inflexible application of targets and guidelines across regions with differing characteristics such that perverse environmental outcomes often result.*
>
> *Many landholders are being prevented from developing their properties, switching to more*

[18] For example Gary Banks, The good, the bad and the ugly: economic perspectives on regulation in Australia, http://www.pc.gov.au/news-media/speeches/cs20031002/cs20031002.pdf
[19] https://www.theguardian.com/environment/2007/nov/29/climatechange.carbonemissions
[20] http://www.pc.gov.au/inquiries/completed/water-study/report
[21] http://www.pc.gov.au/inquiries/completed/native-vegetation

profitable land use, and from introducing cost-saving innovations. Arbitrary reclassification of regrowth vegetation as remnant and restrictions on clearing woodland thickening in some jurisdictions are reducing yields and areas that can be used for agricultural production.

Some costs could be reduced and effectiveness improved if regulatory regimes followed good regulatory practices that promoted transparency and accountability. But more fundamental change is required to promote better targeting of policies to achieve clearly-specified environmental outcomes as efficiently as possible. There is also an urgent need for more equitable cost-sharing arrangements.

The Commission proposes a process of greater devolution of responsibility to the regional level, formalised within national and State/Territory guidelines, whereby:

- *Landholders, individually and/or as a group, would bear the costs of actions that directly contribute to sustainable resource use and, hence, the long-term viability of their operations. Regional bodies would determine what actions are required.*
- *The wider community would pay for the extra costs of providing 'public-good' environmental services, such as biodiversity conservation, that it apparently demands. Using regional institutions to deliver public-good objectives would promote coordination and consistency of approaches.*

Not only would this approach be more equitable but, by encouraging and rewarding the ongoing cooperation and effort of landholders, it would be more efficient and effective in achieving desired environmental outcomes:

Landholders would have positive incentives to retain and manage native vegetation and to deliver specified environmental outcomes in flexible, innovative and cost-effective ways. Payments to landholders for public-good conservation would facilitate increased scrutiny of costs and benefits of policy intervention.

Industries in the Great Barrier Reef Catchment and Measures to Address Declining Water Quality (2003)

In this Report[22], while recommending against overly simplistic or prescriptive policies to address diverse sources of pollution, the Commission drew attention to the relative economic importance of the Reef, a lack of comprehensive policies (including a lack of a mandate for the Queensland Environmental Protection Agency to control diffuse source discharges from agricultural activities) and deficiencies in data and monitoring.

Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies (1999:2)

In this Report[23] the Commission provided strong criticisms of the level of leadership on ESD provided by the Commonwealth across government, and made recommendations to enhance integration of economic, environmental and social considerations in decision making; coordination; the information base; monitoring and feedback in ESD implementation; and commitment to ESD.

An important finding of this inquiry is that there is a lack of clarity regarding what ESD means for government policy. ESD is often equated with the environment. This is reflected in the view of some agencies which considered their core business was not related to

[22] http://www.pc.gov.au/inquiries/completed/great-barrier-reef/report
[23] http://www.pc.gov.au/inquiries/completed/ecologically-sustainable-development/report

environmental issues and hence which reported that they had not undertaken any ESD related activities

Overall, progress on ESD implementation has been variable with the best examples in the area of natural resource management. In other areas, such as industry, transport and health, sustainability objectives are sometimes too broad or not explicit.
Models of successful ESD implementation in policy making tend to offer high degrees of stakeholder involvement. Successful models feature partnerships.
... many of the observed shortcomings in the context of ESD implementation can be traced back to failures to follow general good practice policy making. Departments and agencies do not always satisfactorily apply existing ex ante assessment mechanisms such as regulation impact statements and environmental impact assessments when they are formally required. Monitoring the effectiveness of policies and programs aimed at implementing ESD does not appear to be undertaken routinely by departments and agencies. Further, there appear to be even fewer examples where the results of monitoring activities are incorporated into policy or program revisions via feedback mechanisms.
It is acknowledged that some aspects of ESD implementation are highly information and data intensive — particularly in relation to the environment. However, there appears to be little long term commitment to information gathering and reporting in relation to the environmental dimensions of ESD.

... the NSESD provides only limited guidance on how decision makers are to integrate economic, environmental and social considerations in developing policies and programs. Guidelines of existing policy development and evaluation mechanisms (such as regulation impact statement guidelines and environmental impact assessment guidelines) should include specific reference to assessing the likely social, economic and environmental costs and benefits of proposals, in both the short term and long term.

The Commission recommended measures including

- systematic commitments on ESD by Ministerial Councils in all portfolios
- regular State of the Environment reporting
- development of a framework to facilitate performance measurement and enable comparisons of the effectiveness and efficiency of Commonwealth, State and Territory policies and programs in ESD related areas.

6. Hawke review of the EPBC Act

The EPBC Act provides for regular reviews at ten year intervals. The first review was conducted in 2008-09 and chaired by Dr Allan Hawke [previously Secretary of a series of Federal Departments: Veterans Affairs; Transport and Regional Services; and Defence] and reported in 2009.

The recommendations of the Hawke review are set out in the Introduction to this paper.

As noted in 2011 in the Government response to the Review

The Report was the product of an extensive public consultation process, to ensure the broadest possible range of expertise and views was considered. Dr Hawke received about 340 written public comments during the Review, and conducted more than 140 meetings with a wide variety of stakeholders, including representatives of business and industry, state, territory and local governments, private landowners, environmental and heritage non-government organisations, individuals, scientists, lawyers and other experts.

The Government response acknowledged the need for improved systems of environmental management and protection as follows:

> *Improving environmental outcomes is part of ensuring a sustainable future for Australia, one that protects our quality of life. The wellbeing of our communities is dependent on the health of our natural environments and the ecosystem services they provide, including the quality of our air, water and soil. The Australian community values our natural environments for these ecosystem services and for their rich biodiversity.*
> *International reports have confirmed the value of biodiversity and in particular ecosystem services. For example, the recently released United Nations Environment Program report,* ***Dead planet, living planet: Biodiversity and ecosystem restoration for sustainable development*** *(2010), notes that ecosystems deliver essential services worth between US$21 trillion and US$72 trillion a year, which is comparable with the 2008 World Gross National Income of US$58 trillion. At the same time, recent international findings continue to confirm that global biodiversity is in significant and ongoing decline. To tackle the challenge of biodiversity decline we must change how we manage the natural environment. This shift is important if we are to maintain healthy and resilient life-supporting ecosystem functions and biodiversity, particularly in the face of the impacts of climate change on natural ecosystems.*

The Government response to the Hawke review went on to state

> *The government is committed to achieving this shift in a way that will result in major improvements built around four key themes:*
>
> - *a shift from individual project approvals to strategic approaches including new regional environment plans*
> - *streamlined assessment and approval processes*
> - *better identification of national environmental assets, including through provision to list 'ecosystems of national significance' as a matter of national environmental significance under the EPBC Act*
> - *co-operative national standards and guidelines to harmonise approaches between jurisdictions and foster cooperation with all stakeholders.*

The Hawke Review made 71 recommendations for reform. The Labor Government accepted 68 of these recommendations in part or in full (although not all of these were implemented).

Many recommendations, and differences in approach taken by the Government Response where it departed from full acceptance of recommendations, were technical in nature. One recommendation not accepted was for a new Environment Act. This was rejected in favour of achieving reform through amendments to the EPBC Act in view of the amount of time and resources required for a complete legislative replacement. This is an argument with considerable substance if the essential purposes and coverage of the amended legislation remain unchanged. However, if the purpose of reform is more fundamentally to address the highly fragmented nature of regulation of environmental issues in Australia including land and resource management (as has been recommended since the Industry Commission review of environmental law in 1998) stronger arguments emerge for a new piece of legislation to replace (or at the least complement) the EPBC Act.

Some recommendations were concerned with tidying up the relationship between the EPBC Act, heritage legislation and other sources of environmental legislation (for example, streamlining the relationship between offshore petroleum regulation and the EPBC Act, rec. 66 - which has also been supported by the Productivity Commission although opposed by some environment advocates).

However, there was also a substantial reform agenda presented by the Hawke review, after a wide ranging process. This agenda – both in those recommendations previously accepted in full by Labor in government, and in those recommendations only accepted in principle or

in part, or not accepted at the time - provides one set of possible starting points for consideration of implementation of Labor's commitment to renewal of Australian environment law.

As noted, not all these recommendations were fully agreed by the last Labor Federal government.

However, lack of acceptance of some recommendations, in part or full, by the previous Labor government as not being necessary, because they were regarded as already able to be adequately addressed by existing legislation or by policy measures proposed or in train at the time, should not be conclusive in all cases against reconsideration of these recommendations by Labor, in view of experience in the years since 2011.

This experience includes the disturbing record of continuing decline in a range of environmental indicators, and the retreat from national environmental responsibility under the Abbott and Turnbull governments.

Improved environmental law and institutions may offer both means for Labor in government to protect Australian environment and for providing a degree of protection should a future conservative government adopt a damaging agenda similar to that for example of the Abbott government. (This of course should not lead to overlooking of opportunities for better use by a Labor federal government of powers and structures under existing legislation, particularly noting the likelihood of an incoming Labor government facing a difficult Senate for environmental law reform at least initially.)

Conversely, improved environmental law and institutions may offer both

- an agenda for return to a degree of bipartisan Federal support for environment protection (which as noted by Bob Debus for example[24] has previously existed at times in Australia);
- means for providing improved clarity and certainty for business in this area, particularly noting that relevant business decisions frequently span multiple terms of government.

One stop shops and Federal abandonment of responsibility

Very limited implementation of the Hawke Review recommendations had occurred by the time Labor left office in 2013, even where agreed to in substance or in full by the Government response.

Some of this was due to doubts as expressed by Prime Minister Gillard on whether the co-operative approach initially contemplated would in fact lead to streamlined administration and reduced business costs, or rather to an uneven approach from State to State which she compared to a "Dalmatian dog" of law and administration.

At the 2012 Council of Australian Governments meeting, the Commonwealth indicated more work was needed to ensure high and consistent environmental standards for bilateral agreements.

Rather than continuing Labor's consideration of how to improve both efficiency and effectiveness of Australia's environmental laws and institutions, the Abbott government sought to hand over large areas of environmental responsibility to State governments – without sufficient concern either for quality control of State regimes concerned against environmental objectives, or for "single national market" objectives of harmonisation and

[24] https://www.thesaturdaypaper.com.au/opinion/topic/2014/04/12/abbott-governments-offensive-against-nature-conservation/1397224800

consistency.

Environmental risks from inappropriate Federal retreat from responsibility in environmental law include for example the removal of capacity for Federal scrutiny over measures such as approval of broad scale land clearing, despite obvious threats both to Australia's biodiversity and to achievement of climate change commitments.
Substantial risks to clarity and certainty for business are also presented where conservative governments in particular attempt to cut so called 'green tape' not through development and co-ordination of high quality processes, or through identification of those issues where national consistency is particularly important and those issues by contrast where principles of subsidiarity and scope for local innovation ought to be given more weight, but by simple abdication of national responsibilities.

Some of these risks were in fact accurately identified by a senior officer of the Department of Environment in 2014 in the course of seeking to present a positive account of the one stop shop agenda[25]:

- While duplication and excessive monitoring can result in unnecessary costs without contributing to the objectives of the legislation,
- With too low a level of regulation and assurance, a lack of confidence leads to challenges to decisions resulting in legal and delay costs, and public discontent resulting in uncertainty for investment

Labor's Federal policy for the 2016 Election put the position clearly:

> *Since the Abbott-Turnbull Government came to power in 2013, environmental policy and the Environmental Protection and Biodiversity Conservation (EPBC) Act have been under attack, threatening our environment and our prosperity. The Liberal Government's policy to hand over federal environmental approvals to the States and local councils has created uncertainty and dysfunction. The so-called 'one stop shop' is in fact an eight stop shop which has been divisive, complex and controversial, with no public or environmental benefit.*

7. Wentworth Group of Concerned Scientists

In a statement[26] in 2012 the Wentworth Group noted that the "sensible and responsible" decision by COAG for major reform of environmental regulation across all levels of government to "reduce regulatory burden and duplication for business and to deliver better environmental outcomes" was one which would not be implemented but rather overturned by a handover of Commonwealth approval powers to States and Territories. They were highly critical of arguments put by the Business Council of Australia for such a handover:

> *The single example used by the Business Council of why state governments should be given Commonwealth approval powers actually serves to demonstrate precisely why they shouldn't. The Traveston Crossing Dam on the Mary River was proposed by a Queensland Government corporation and was recommended for approval by the Queensland Coordinator General. In 2009 the Commonwealth Environment Minister, Peter Garrett, acted under the EPBC Act to refuse the dam development on the "very clear" scientific evidence that it would cause unacceptable impacts on nationally protected species: the Australian Lungfish, the Mary River Turtle and the Mary River Cod. This decision was supported by the leader of the National Party, Mr Warren Truss, who said "the environmental evidence was overwhelming and Mr Garrett had no option but to reject (the) ill - conceived proposal."*

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[25] Paula Stagg, Review of Bilateral Agreements under the EPBC Act, National Environmental Law Association National Conference 2014, https://www.nela.org.au/NELA/Documents/Paula_Stagg_EPBC.pdf

[26] http://wentworthgroup.org/wp-content/uploads/2013/11/Statement-on-Changes-to-Powers-to-Protect-the-Environment.pdf

The Wentworth Group proposed an alternative suite of reforms drawing on the recommendations of the Hawke Review to deliver the dual COAG goals of reduced regulatory burden and duplication and to deliver better environmental outcomes.

Reducing regulatory burden

The Group recommended three priorities:

- One stop shops for assessments (rather than approvals)
- Improved national assessment standards to streamline assessments
- Better standards and guidelines to improve certainty for business

One stop shop assessment process

The Wentworth Group argued that

> *Duplications between state and Commonwealth processes can be reduced if business is given the option to have state governments administer the environmental assessment process on behalf of the Commonwealth.*
> *Under this arrangement, state government agencies would become the 'one-stop-shop' single entry point for business. Under this one-stop-shop model, a developer would have the option to submit their project referral to the relevant state government agency, which would then automatically refer it on to the Commonwealth, rather than a developer having to submit referrals separately to the two levels of government*
> *The Commonwealth Environment Minister would still retain final EPBC Act approval powers, but there would be one process, one set of documentation and common public participation periods.*

Improved environmental assessment standards

The Wentworth Group recommended that

> *As well as giving business the option to use a one -stop-shop arrangement, COAG should agree to reforms that enable the Commonwealth Environment Minister to delegate more project assessments to state governments under national environmental assessment standards.*

They noted this would require action to ensure that

- *all significant impacts on each of the eight matters of national environmental significance are assessed according to Commonwealth guidelines, using appropriate scientific and technical standards and survey methodologies*
- *state processes meet, at the very least, minimum public information and consultation standards provided for in the EPBC Act ; and*
- *state processes meet, at the very least, minimum third party review rights provided for in the EPBC Act*

As further noted by the Wentworth Group

> *The development of national environmental assessment standards would require a full public consultation process to ensure they were acceptable and appropriate. State planning and environmental assessment systems would need to be upgraded to meet these standards. State government laws and processes are not adequate for protecting matters of national environmental significance, and in many cases do not meet national standards for public participation, transparency, information, review and objective decision-making. Once state systems are improved to meet these standards, they would then be able to be accredited, and bilateral agreements would be signed, delegating to states the ability to conduct assessments on behalf of the Commonwealth.*

The Wentworth Group identified four safeguards required for bilateral agreements for one stop shop assessment processes:

> *1.The Commonwealth Environment Minister would retain call-in or veto powers for individual projects;*
> *2. The Commonwealth Environment Minister would conduct project assessments in those instances where the state government is the project proponent;*
> *3.Annual reports would be prepared by states on their implementation of the bilateral agreements which would be audited by an independent National Environment Commission; and*
> *4.The Commonwealth Environment Minister would retain the right to withdraw accreditation of state assessment processes at any time if national standards are not being adhered to*

The Wentworth Group noted that the Hawke Review had also recommended a critical assurance role for an independent National Environment Commission including through auditing the performance of States and Territories against national standards and agreements and in provision of advice to the Federal Minister for the purposes of making decisions about the environmental impact assessment and approval process under the Act.

Better guidance for business

The Wentworth Group referred to evidence that a substantial amount of compliance and assessment work by business could be avoided by better guidance on whether projects trigger the EPBC Act, and on means of carrying out projects to avoid causing a significant impact and thus triggering the Act.

> *The government could develop sets of science - based guidelines or standards for :*
> - *some or all of the eight matters of national environmental significance;*
> - *classes of actions, for example, activities associated with releasing water to Ramsar sites from coal seam gas extraction wells; and/or*
> - *specific business sectors, for example, residential and urban development or gas exploration*

The Wentworth Group noted that scientific guidelines to enable developers to assess, avoid and mitigate impacts on threatened or migratory species would be the obvious starting point given the preponderance of these issues among developments triggering the EPBC Act.

Delivering better environmental outcomes

The Wentworth Group noted that the 2011 State of the Environment Report documented extensive evidence of the continued decline in the condition of Australia's land, water and marine resources, and concluded that

> *The major flaw of the environmental impact assessment regime of the EPBC Act Is that it does not effectively manage biodiversity, nor does it effectively manage the cumulative impact of multiple developments*

They noted that the EPBC Act already contained provision for regional environmental plans and strategic assessments, and that the Hawke Review had recommended an expanded role so that these mechanisms are used more often and developed through more substantial processes.

Regional environmental plans

The Wentworth Group recommended these be developed for each of the 56 natural resource management regions in Australia, with the involvement of Commonwealth and State/Territory governments; local government; other environmental management and

planning groups; and industry, and identifying

- *areas where matters of national and state environmental significance are located in a landscape;*
- *the threats to those assets; and*
- *the mechanisms to guide and coordinate actions (including government funding, land use plans and conservation plans) to protect and manage threats to environmental assets, especially those actions likely to have a cumulative impact.*

Strategic environmental assessments

Strategic environmental assessments offer a pathway through which plans, policies or programs can be endorsed by the Commonwealth as adequately addressing impacts on matters of national environmental significance, such that further Commonwealth assessment of actions in accordance with that plan, policy or program is not required. The Wentworth Group argue that strategic environmental assessments offer both better environmental outcomes and improved certainty for business. They recommend amendments to the EPBC Act to ensure that these objectives are achieved:

> *the EPBC Act would need to be amended to specify the following standards:*
> *1.Objective goals or targets for environmental outcomes, such as 'improve or maintain', and resource use or pollution caps for ensuring cumulative impacts do not exceed ecological thresholds;*
> *2.Minimum requirements for information on environmental values, how environmental values are to be measured, and use of objective decision-making tools;*
> *3.Clear decision-making rules, trigger criteria or zoning to guide approval decisions following endorsement - this might include 'traffic light' zoning that identifies areas off limits to certain*
> *development and areas where development can go ahead under specified conditions;*
> *4.Comprehensive monitoring, evaluation and compliance regimes to be put in place to check whether outcomes are being achieved and approval conditions are being adhered to;*
> *5. Comprehensive public participation processes that provide adequate information and allow sufficient time for members of the public to consider and comment on the assessment; and*
> *6 Flexibility mechanisms that allow changes to be made to the plan and the approval conditions, if new information comes to light or experience shows approaches need to change.*
> *One of the roles of a National Environment Commissioner would be to advise the Minister on the terms of reference for, and the quality of, a strategic assessment*

Environmental accounts

Development of environmental accounts at national and regional scale was recommended in 2008 by the Wentworth Group of Concerned Scientists.

In November 2016 the Wentworth Group released the results of a five year trial of environmental accounts at regional level, together with Accounting for Nature: A Model for Building the Natural Environmental Accounts of Australia, building on the group's experience from the trial and involvement in building the International System of Environmental Accounts.

After receiving a presentation of this work from the Wentworth Group together with the Australian Bureau of Statistics and NRM Regions Australia, Commonwealth, State and Territory Environment Ministers agreed to work together to develop a common national approach to environmental accounts in 2017.

The Wentworth Group emphasises the role of environmental accounts in guiding public investments. Consideration also appears appropriate regarding the place of environmental accounts in other aspects of environmental governance.

8. Australian Panel of Experts on Environmental Law

In response to the Abbott Government's agenda for retreat from national environmental responsibilities rather than tackling needs for actual reform, an alliance of environmental civil society groups including Australian Conservation Foundation, the Wilderness Society and WWF set up the "Places You Love" alliance. Amongst other things, this alliance is currently pursuing a major initiative in support of new Federal environment laws. This alliance supports the Australian Panel of Experts on Environmental Law (APEEL)[27], a group of environmental law academics, practitioners and former judges who are considering the issues involved in designing a 21st century Federal environmental law framework. They have produced a number of technical papers[28] discussing the legislative and also the institutional framework aimed at delivering better outcomes for the environment, business, community and government.

APEEL will be conducting their own consultations on these papers during 2017. Rather than waiting for this process to conclude before commencing our own consultations, CRC and LEAN consider it useful to present here a summary and some initial discussion of the APEEL proposals.

It should be noted that APEEL's work is not confined to a review of the EPBC Act but deals with environmental law and institutions more broadly as well as intersecting areas of law. CRC and LEAN similarly intend in our consultations to take a broad view of the review task mandated by Labor's commitments in this area, while recognising the central importance of the EPBC Act. One result of this is that some of the law reform issues raised extend beyond the environment portfolio.

In brief summary, APEEL's work includes:

- Fragmentation of governance – Bioregional planning may be a way to reduce fragmented management by creating a framework (or if necessary legal requirements) within which environmental, land use, social and other plans could be brought together into a unified system … if well implemented [bioregional plans] could provide more systemic protection of biodiversity and other values an at the same time provide greater clarity for land users and developer and reduce the transaction costs of fragmentation.
- There is a lack of integration between water and land use planning … changing land uses (e.g. hobby farms and increasing number of dams) have the potential to affect water quality and volumes. Decisions on water availability have significant consequences for communities that rely on irrigation, and will shape future land use and have urban planning consequences. Ensuring effective and efficient management of land use and water systems requires that they be managed as closely coupled systems.
- Limitations of EIA and development approval processes – project-by-project approach misses cumulative impacts, fails to consider relevant future changes (e.g. population), fails to acknowledge inherent dynamism of environment, fails to monitor and enforce compliance with approval conditions and is often claimed to be pro-development. Failure of this stagnant methodology to accommodate for things like the impacts of climate change.
- Market instruments including "biodiversity offsets" – designed to ensure "maintain or improve"/"no net loss". There are serious problems. Lack of "like-for-like" offsetting, entrenching a pro-development culture, don't first seek to minimize loss, failure to establish "no go zones", poor success rates, failure to monitor, lack of long-term security.
- Inadequacies in monitoring, evaluation and reporting: "Australia's environmental data

[27] http://apeel.org.au/

[28] http://apeel.org.au/papers/

infrastructures are under-developed, which severely constrains the ability of Australian governments to develop and enact evidence-based environmental policy."

- Implementation deficits: the "… lack of an independent body to drive innovation and contribute to state accountability is a significant concern … it is only one illustration of a lack of Australian mechanisms to ensure implementation of environmental governance arrangements, and to ensure that there is a transparent evaluation of the effectiveness of legal and market instruments and public policy.
- Reform: "There are two fundamental challenges: managing the tension between private rights to exploit nature and the public interest in the sustainable use of nature; and the fundamental problem of finding sufficient resources for effective stewardship. It has been estimated (subject to many caveats and assumptions) that an amount roughly equivalent to the national expenditure on defence is required for landscape protection and restoration, and only a fraction of what is required in being invested.

8.1 Foundations of environmental law

While some recommendations in this APEEL paper may appear concerned with technical issues of drafting rather than policy principle, the two categories are not always easily separated. Not everyone involved in CRC / LEAN's consultations on *Protecting the Australian natural environment – laws for the 21st Century* may wish to engage with every issue raised in this section of APEEL's work, but recommendations in this section are briefly discussed for the sake of completeness.

> *RECOMMENDATION 1.1 : The Commonwealth government initiate a wide-ranging, national consultative process for the purpose of building a substantial agreement on a new societal goal for Australia that would enhance or replace the current Ecologically Sustainable Development (ESD) goal contained in the National Strategy for Ecologically Sustainable Development (1992) (NSESD), especially in light of the adoption by the United Nations in 2015 of the new Sustainable Development Goals (SDGs); and that it consider providing for the undertaking of this consultative process in its legislation.*

Comment: APEEL's paper presents important arguments in favour of consideration through wide consultation of possible need for expansion or replacement of the Environmentally Sustainable Development goal which underlies current Australian environmental law. However, this recommendation may be best considered as a recommendation for further consideration by Labor in government through the second formal review under the EPBC Act – rather than the extensive consultation recommended being seen as a prerequisite for progress on matters where policy directions for Labor to take to the next election are already sufficiently clear. There are obvious arguments against Labor making, or appearing in any way to make, already existing National Platform and election policy commitments dependent on future development of a consensus on societal goals.

> *RECOMMENDATION 1.2 Law-makers should adopt a more disciplined approach to the drafting of objects clauses in the next generation of Australian environmental legislation to ensure that they: (1) specify only the agreed societal goal for environmental law and some more specific objects applicable to the context of the particular legislation; (2) closely align these goal-related and context-specific objects statements; and (3) avoid the inclusion of principles of a 'directing' nature in such clauses.*

Comment: This recommendation is consistent with the recommendation of the Hawke review for revision of the objects of the EPBC Act. It may be appropriate for Labor to reconsider the previous government's rejection of this Hawke review recommendation.

> *RECOMMENDATION 1.3: When designing the next generation of Australian environmental laws, law-makers should draft legislation that is consistent with, and gives effect to, the following 'design-based' principles:*
> *- Principles of smart regulation;*

- Principles supporting the use of economic measures;
- Principles that endorse specific, widely-recognised regulatory tools and mechanisms; and
- Principles in support of environmental democracy;
together with the following new principles which have not yet been widely recognised or adopted in Australia:
- A principle of flexible and responsive environmental governance;
- A principle of environmental restoration; and
- A principle of non-regression.

Comment: These points are expanded on in the substance of APEEL's paper.
Points 1 and 2 are consistent with better regulation approaches long pursued by Labor in government – which emphasise pursuit of increased effectiveness as well as efficiency of measures to achieve social goals.

These approaches contrast with simple "deregulation" agendas - as pursued for example during annual "regulatory bonfire days" under the Abbott government. The Productivity Commission, while emphasising the need for better regulation and the avoidance of unnecessary regulatory burdens, has put the point concisely:

> *Environmental regulation is used to prevent or limit damage to the natural environment … Regulation is also part of the institutional architecture of markets, enabling, for instance, the establishment of property rights and the enforcement of contracts [Mineral and Energy Resource Exploration, Productivity Commission, 2013]*[29]

In the same report the Productivity Commission emphasised that

> *Regulator performance can have an even greater impact on the cost of doing business than the regulations themselves. Suggestions for improved regulatory practices include:*
>
> *governments providing the funding necessary to engage adequate, skilled regulatory staff*
> *...*
> *effective enforcement of regulations, using various tools from information and warnings to fines and prosecution.*

The first of these suggestions contrasts with the common conservative agenda of starving regulatory agencies of funding and reducing staff, which can actually increase the costs of doing business. The second suggestion is consistent with APEEL's reference above to smart regulation principles including an escalation principle.

The APEEL paper notes that some use of economic measures is already available under the EPBC Act , but argues that measures in these areas need improvement and broadening. In this respect the APEEL paper supports the view that the EPBC Act provided a far from comprehensive response even to the Industry Commission's 1998 report on ecologically sustainable land management.

Point 3 is more specific to the area of environmental management rather than general regulatory policy, and supports tools and mechanisms which have achieved broad acceptance in this area: in particular, environmental impact assessment as a means of providing for robust and preferably independent scientific advice to decision-makers

Point 4 is broadly consistent with Labor's 2016 election commitment :

Labor will …

- *Reinstate the principles of democracy, respect and protection of rights for civil society involvement in environmental matters including funding for Environment Defenders Offices (EDOs).*

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[29] http://www.pc.gov.au/inquiries/completed/resource-exploration/report

This point is also broadly consistent with the recommendations of the Hawke review for increased public participation and transparency of processes under the Act.

In Victoria, Labor's Platform commits to development of an Environmental Justice Plan. NSW Labor's Platform now contains the same commitment. LEAN has recommended that Federal Labor consider a similar commitment.

Specific recommendations by APEEL regarding standing and costs in court proceedings would inevitably be subject to a range of views in further consultations and in detailed development of legislation, but this should not detract from the degree of consensus already apparent regarding increased environmental democracy more broadly.

> *RECOMMENDATION 1.4: The precautionary principle and the prevention principle should be essential prescriptions in the next generation of Australian environmental laws, accompanied by provision for the engagement of the public in decision-making with respect to the level of risk and potential harm that is deemed acceptable*

Comment: The APEEL paper notes that the precautionary principle – in brief, that in cases of a lack of complete scientific knowledge the benefit of the doubt should be given to the environment – is well recognised in principle in Australian environmental law, but recommends that this principle should be reinforced both for administrative and for judicial decision making purposes. The Hawke review also recommended further legislative clarification on the effect to be given to a lack of complete scientific knowledge.

The APEEL paper notes that although the prevention principle - which calls for action to be taken to prevent known risks of environmental harm – is recognised in international environmental law and in European law, it lacks clear recognition in Australian law.

The recommendation at 1.4 regarding public participation is consistent with points made at 1.3.4 regarding environmental democracy and the degree of endorsement already given to those points including in the Hawke review. APEEL provide more extensive discussion and proposals regarding environmental democracy in number 8 of their technical papers.

> *RECOMMENDATION 1.5: The next generation of environmental laws should also prescribe the following, new directing principles concerning environmentally sustainable innovation (ESI):*
> *- A principle of achieving a high level of environment protection; and*
> *- A principle of applying the best available techniques (BAT).*

APEEL acknowledge that these would be substantial new features for Australian environmental law but note that they are well established and successfully used in Europe.
.
APEEL's proposal for an environmental restoration principle seeks to generalise and give added effectiveness to restoration requirements found in some specific legislation (for example regarding mining sites). The proposal here is for a duty for decision makers to consider restoration opportunities rather than a still more ambitious general duty on persons responsible for projects to achieve restoration.

> *RECOMMENDATION 1.6: The next generation of environmental laws should routinely provide for a general environmental duty to be imposed on all persons (including those undertaking mining activities) to: (1) prevent or minimise environmental harm likely to arise from their activities; and (2) to repair environmental harm they have caused and to restore ecological functions that they have impaired, to the greatest extent practicable.*

Comments: While this proposal would be likely to need careful explanation to ensure against misrepresentation, it was recommended as long ago as 1998 by the Industry Commission in its report number 60.

APEEL note that the South Australian, Tasmanian and Queensland environmental protection Acts each already specifically provide for a "general environmental duty" upon all persons to take all reasonable and practical measures to prevent or minimise pollution or environmental harm that is threatened by their activity. APEEL propose that such a general duty should be provided for in Federal environmental law.

Further, APEEL propose that a general environmental duty to repair and restore. They suggest such a duty could be imposed by environmental legislation on all persons who have caused environmental harm. Such a duty would need to be reinforced by mechanisms for its enforcement, including requirements for bonds or other forms of financial security to be posted when undertaking potentially damaging activities.

8.2 Environmental governance

> *Recommendation 2.1: The Commonwealth should define the nature and extent of its own role and responsibilities in relation to environmental matters; in doing so, it should:*
> *(i) acknowledge its responsibility for providing national strategic leadership on the environment; and*
> *(ii) recognise that the states will continue to be involved in environmental regulation under state environmental laws and regulatory processes.*

Comment: This recommendation is consistent with the commitment to renewed national leadership on the environment expressed in Labor's 2016 election policy. Subsequent recommendations in this APEEL paper provide one possible roadmap for implementation of that commitment.

> *Recommendation 2.2: The Commonwealth should develop a Statement of Commonwealth Environmental Interests (SCEI) comprised of three broad components:*
> *(i) a statement of the functions related to the environment that it will perform in the future, including:*
> *the provision of strategic leadership on environmental matters;*
> *specific aspects of environmental regulation, including environmental assessment and approval; and the environmental regulation of activities undertaken by Commonwealth entities (whether on or outside Commonwealth land) and by other parties on Commonwealth land;*
> *(ii) a statement of the environmental matters in which the Commonwealth has an interest, comprised of two elements:*
> *first, a revised list of matters of national environmental significance (MNES) that will serve as triggers for the Commonwealth's environmental assessment and approval process; and*
> *second, a revised list of additional matters besides the listed MNES with respect to which the Commonwealth could pursue a strategic leadership role; and*
> *(iii) a declaration that Commonwealth leadership on environmental matters extends to the adoption of responsible and progressive negotiating positions in international negotiations on various environmental matters.*

> *Recommendation 2.3: The Commonwealth, in pursuance of a national leadership role on environmental matters, should assume responsibility for the development of the following types of Commonwealth Strategic Environmental Instruments (CSEIs):*
> *(i) National Environmental Measures (NEMs), comprising strategies, programs, standards and protocols; and*
> *(ii) Regional Environmental Plans (REPs), comprising terrestrial landscape-scale plans and marine regional plans.*

> *Recommendation 2.4: The next generation of Commonwealth environmental legislation should spell out the process for the development of Commonwealth strategic environmental instruments and provide for such instruments to be treated as 'legislative instruments' under the Legislative Instruments Act 2003 (Cth).*

> *Recommendation 2.5: The implementation of each Commonwealth strategic environmental instrument should be addressed at first instance by the development of an implementation plan by each state (and*

also any affected Commonwealth agency) for approval by the relevant Commonwealth environmental institution, which should also have the power to:
(i) develop such a plan for states that fail to do so; and
(ii) to accredit state environmental legislation and administrative arrangements through an approved implementation plan.

Recommendation 2.6: The Commonwealth should pursue state cooperation with respect to the development and implementation of national strategic environmental instruments by:
(i) providing financial assistance to the states to support their implementation efforts, and
(ii) using the mechanism of conditional pre-emption of state regulatory powers, in particular with respect to environmental assessment and approvals, where states fail to cooperate in the implementation of national instruments or to attain the goals, targets or standards established by such instruments.

Recommendation 2.7: The Commonwealth should adopt specific financial assistance legislation under section 96 of the Australian Constitution that would:
(i) tie the provision of grants to the states in relation to particular Commonwealth strategic environmental instruments to the provision by the states of acceptable State Implementation Plans (SIPs) and the carrying out of any reform initiatives prescribed therein; and
(ii) provide for the establishment of an Environmental Future Fund, the income from which would be used to support such grants to the states.

Recommendation 2.8: The next generation of Commonwealth environmental legislation should provide that, where the Commonwealth considers a state has not acted sufficiently to implement a Commonwealth strategic environmental instrument, regulations may be made pursuant to the legislation to conditionally pre-empt (cf., over-ride) the operation of state environmental laws concerning:
(i) the approval/licensing of new activities involving matters of national environmental significance (MNES);
(ii) the approval/licensing of other prescribed kinds of new activities; and
(iii) the environmental regulation of existing activities of a prescribed kind, including with respect to requiring improved environmental performance, wherever any such activity is considered by the Commonwealth to be likely to impact significantly upon the implementation of the relevant Commonwealth strategic environmental instrument.

Recommendation 2.9: To ensure that the Commonwealth performs its responsibilities with respect to the development and implementation of national strategic environmental instruments, the following safeguards should be incorporated within the next generation of Commonwealth environmental legislation:
(i) vesting power in a new Commonwealth Environmental Auditor to monitor the implementation by Commonwealth agencies of Commonwealth strategic environmental instruments and to make recommendations for action by such agencies where this appears necessary;
(ii) to allow interested parties to request the Federal Court to order the relevant Commonwealth institution (see Recommendation 2.14 (i)) to:
(a) undertake the preparation of a particular strategic environmental instrument;
(b) undertake the preparation of an implementation plan where a state has failed to do so with respect to a particular strategic environmental instrument;
(c) activate the conditional pre-emption powers where the Court is satisfied that a state has failed to perform the tasks required of it under a State Implementation Plan (SIP); and
(iii) to allow parties to request the Federal Court to order non-complying Commonwealth agencies to develop implementation plans with respect to their own activities that are affected by a Commonwealth strategic environmental instrument, or to substantially perform obligations arising from their implementation plans.

Recommendation 2.10: The next generation of Commonwealth environmental legislation, in addition to providing for mechanisms to enable the Commonwealth to purse a strategic leadership role on environmental matters, should include the following types of other legislative arrangements, as appropriate to the particular context:
(i) The operation of complementary legislative schemes (for example, through uniform legislation or an applied law scheme) where the best environmental outcomes are likely to be achieved by apportioning roles and responsibilities between the Commonwealth and the states (for example, with respect to various risk regulation processes related to chemicals, genetically modified organisms, etc.);

(ii) The operation of an overlapping legislative scheme for environmental assessment and approval (EAA) of activities that may impact significantly on matters of national environmental significance (MNES) (see also Recommendation 2.12); and
(iii) The adoption of an over-riding (pre-emptive) regulatory scheme by the Commonwealth in the limited circumstances where the best environmental outcomes and market stability are likely to be achieved by Recommendation 2.11
The Commonwealth should review all of its existing administrative structures and regulatory functions to determine where opportunities exist to consolidate these within a new Commonwealth Environmental Protection Authority (CEPA) (see also Recommendation 2.14(ii)).

Recommendation 2.12: The Commonwealth should continue its involvement in the assessment and approval of activities that may impact significantly on matters of national environmental significance (MNES) alongside corresponding state processes, with the following reforms to the current process to be adopted:
(i) that consideration be given to all environmental impacts (including cumulative impacts) associated with the proposed activity, not just those related to the relevant MNES;
(ii) that the current list of MNES be expanded;
(iii) that responsibility for the key decisions whether to trigger the process and to approve activities made subject to the Commonwealth process be transferred from the Environment Minister to a new, independent Commonwealth environment authority.
(iv) that the exemption for operations covered by a regional forestry agreement be removed; and
(v) that the exclusion of offshore petroleum activities from the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) process be terminated.

Recommendation 2.13: That the next generation of Commonwealth environmental legislation, in providing for a Commonwealth environmental assessment and approval (EAA) process, should include provision for the following measures:
(i) a mandatory requirement to conduct a public inquiry whenever a full environmental impact statement (EIS) is required by the Commonwealth, such inquiry to be conducted by a panel of hearing commissioners selected from a pool of scientific and other experts appointed for this purpose;
(ii) for access to independent expertise to be provided to selected community representatives to assist them to present submissions to an EIS-related public inquiry;
(iii) a mandatory requirement upon proponents to undertake monitoring and reporting of the environmental impacts of projects approved under the Commonwealth EAA process, together with an adaptive management approach whereby conditions attached to a project approval may be revised to address any unforeseen impacts that are disclosed by such monitoring and reporting; and (iv) an audit of previous Commonwealth-managed EISs be undertaken by a newly-established Commonwealth environmental institution to provide a contemporary evaluation of the reliability of the impact predictions made therein (see also Recommendation 2.14(ii)).

Recommendation 2.14: To ensure the effective implementation of the next generation of Commonwealth environmental laws, the Commonwealth should establish one or more new statutory authorities to perform functions that will complement, replace and expand upon the functions currently exercised by the Minister and Department for Environment and Energy and other existing Commonwealth statutory environmental authorities, with the following possibilities in mind:
(i) a high-level (cf. Reserve Bank) Commonwealth Environment Commission (CEC) that would be responsible for: (a) administration of the system of Commonwealth strategic environmental instruments (see Recommendations 2.3-9); (b) a nationally coordinated system of environmental data collection, monitoring, auditing and reporting (including with respect to environmental sustainability indicators and trends); (c) the conduct of environmental inquiries of a strategic nature (akin to those conducted by the former Resources Assessment Commission); and (d) the provision of strategic advice to the Commonwealth government on environmental matters, either upon request or at its own initiative;
(ii) a Commonwealth Environment Protection Authority (CEPA) that would be responsible for: (a) administration of the Commonwealth's environmental assessment and approval system, including where conditional pre-emption of equivalent state legislation has occurred (see Recommendation 2.8); (b) the regulation of activities undertaken by Commonwealth authorities or by other parties on Commonwealth land; (c) the auditing of Commonwealth-required environmental impact statements (EIS) (see Recommendation 2.13(iv)); and (d) any other environmental regulatory functions that may be appropriately assigned to the CEPA (see Recommendations 2.2 and 2.4); and
(iii) a Commonwealth Environmental Auditor that would be responsible for (a) monitoring and

reporting on the performance of CEPA, the Minister and Department for Environment and Energy and other Commonwealth bodies in relation to their performance of their statutory environmental responsibilities; and (b) providing recommendations to the CEC on the need to develop new strategic environmental instruments (see Recommendation 2.9(i)).
Recommendation 2.15
That the Commonwealth establish a Commonwealth Environmental Investment Commission that would be responsible for addressing fundamental challenges to the effective resourcing of environmental management in Australia by identifying strategies to generate increased private and public sector funding and to maximise community investment and by also establishing an Environment Future Fund.

On specific proposals made by APEEL under this heading:

- The proposal to allow consideration of all environmental impacts, once assessment under the Act is triggered, was also made by the Hawke review
- Expansion of the list of matters of national environmental significance is consistent in principle with Labor's platform and election policy and also with the Hawke review. The particular list to be adopted clearly needs to be the subject of consultation. The list provided in State of the Environment reporting provides an obvious starting point.
- Transfer of responsibility for some decisions from the Minister to a new Commonwealth environment authority indicates one possible model of the functions of such a body (consistent for example with the NSW or Victorian Environment Protection Authority). Other possible models such as in Western Australia involve an independent body having advisory functions with Ministerial decision making authority being retained (as has been recommended by the Productivity Commission and the Wentworth Group).
- The proposal regarding removal of the EPBC Act exemption for actions pursuant to regional forestry agreements does not appear consistent with Labor's support as expressed in its Platform and reconfirmed in 2016 election policy for RFA processes. Note that the Hawke review recommended measures to enhance accountability for environmental outcomes under Regional Forestry Agreements
- Labor's policy for environmental law reform includes consideration of independent mechanisms. APEEL propose a number of independent mechanisms rather than seeking to have a single independent body undertake the range of roles which an independent authority might undertake. While this might appear complex it could provide a means of avoiding possible tensions in vesting the one body with different roles (such as in effect auditing its own performance).

8.3 Terrestrial biodiversity and natural resource management:

In number 3 of their technical papers APEEL call for reform of laws, institutions and policy for a more strategic and co-ordinated approach to biodiversity conservation, landuse planning and natural resource management.

Specific recommendations include:

GOVERNANCE FRAGMENTATION: 3.1 The Commonwealth should ensure integrated resource governance, by undertaking landscape-scale planning at appropriate bioregional scales and establishing nationally coordinated frameworks for the implementation of bioregional plans. This will require a consistent hierarchy of rules, roles and responsibilities.

Comments: As already noted, the Hawke review of the EPBC Act similarly recommended increased focus on strategic approaches to environmental management, including bio-regional planning, in contrast to reliance on a largely fragmented and reactive system based on project specific approval processes under the EPBC Act. In addition, APEEL technical paper 3 emphasises a need to coordinate with landuse and natural resource planning and laws, as well as a need to review the relationship between multiple layers and types of

environmental governance arrangements.

> *THE NATIONAL RESERVE SYSTEM: 3.2 The Commonwealth should ensure completion of the National Reserve System (NRS), to provide legal protection for the full range of ecosystems within bioregions and subregions.3 Related steps are needed to safeguard climate refugia and ensure connectivity across the landscape.*

Comment: Tony Abbott infamously claimed that too much of Australia is "locked up" in reserves[30]. However, as noted by APEEL, protected areas are not confined to national parks and other areas in public ownership, with 5% of the National Reserve System comprising private land managed under agreements with private landowners, and 43% comprising Indigenous Protected Areas managed by consent of indigenous peoples.

The Convention on Biological Diversity sets a target for 17 per cent of each of the world's eight ecoregions to be managed as protected areas[31].

While 17.88 per cent of Australia's land mass is currently protected in the National Reserve System, 31 out of 89 Australian bioregions have less than 10 per cent protected. APEEL note that 12% of threatened species listed under the EPBC ACT are not found in the National Reserve System; and that targets for protection of geographic range of threatened species are met for less than 20% of species.

These figures raise issues both of accountability of governments for achieving adequate levels of protection, and of the adequacy of mechanisms available including economic mechanisms.

Completion of the National Reserve System is intended to meet what remains, as noted by APEEL, the officially stated aim of Australian Government policy in this area:

> *to achieve a Comprehensive, Adequate and Representative selection of regional ecosystems representing Australia's bioregions and subregions*

In addition, interconnectivity between protected areas has particularly clear importance as climate change continues to affect the range suitable for vulnerable species.

> *MONITORING, EVALUATION AND IMPROVEMENT: 3.3 The Commonwealth should perform enhanced environmental monitoring, evaluation and reporting tasks. This requires a strategic approach to determining what data is needed for effective decision-making, who should be responsible for providing and collecting it, how frequently it should be collected, how it should be made available and used, and who should pay for this intelligence.*

Comments: APEEL put forward a range of proposals in this area including:

- Making State of the Environment reporting more regular and more directly tied to the performance of governance arrangements
- specifying in legislation and inter-government agreements what information should be collected and reported, to monitor the effectiveness of governance;
- requiring government agencies to share data and to publicly report performance audits including on environmental infrastructure, data systems and data gaps;
- nationally consistent standards for monitoring and reporting of environmental data, ensuring openness so that the data can be used for many purposes;
- periodic review, upgrade and/or extension of monitoring infrastructure ;

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[30] http://www.smh.com.au/federal-politics/political-news/tony-abbotts-speech-to-the-australian-forest-products-association-20140304-3464m.html

[31] Queensland Labor's platform accepts the Convention as providing the appropriate target for use within Australia: Labor recognises that the Convention on Biological Diversity set a target to preserve 17% of the Australian landmass as protected area estate. Queensland Labor commits to securing and conserving representative and viable samples of all bio-geographical regions of the state in the national park estate and moving towards the target set through the Convention on Biological Diversity. LEAN has proposed the same wording for adoption in the NSW Labor platform

- improving the transparency and sharing of private environmental data.

As well as providing the basis for improved sustainability, enhanced monitoring, evaluation and reporting may offer improvements in public trust in environmental management systems and decisions, with potential reductions in costs and delays for development through resort to more adversarial approaches. The Hawke review of the EPBC Act similarly recommended development by the Commonwealth of substantial monitoring, performance audit and oversight capacity and powers.

> *3.4 A governance system is required at the Commonwealth and state levels which is more adaptive to environmental change. This will require outcome objectives for the state of environmental resources, quantitative and measurable thresholds, and legal tools to implement stronger protections if systems or species are at risk of exceeding these thresholds.*
> *NOTE: A comprehensive approach to landscape-scale planning (Recommendation 3.1) could also help overcome the deficiencies of fragmented project-specific development approval processes that do not address cumulative impacts.*

Comments: This recommendation appears to be a necessary part of adoption of more strategic approaches to environmental management, having regard to the scale of environmental changes which have resulted and may result from human uses and impacts, including conversion of land to agricultural uses and urbanisation, and which are resulting and may result from climate change in particular. In this context it should be noted that (although this recommendation was not accepted at the time) the Hawke review recommended provision for regular review of recovery and threat abatement plans (together with other improvements in provisions regarding such plans including linkages to funding opportunities).

IMPLEMENTATION: 3.5 Stronger safeguards are needed to ensure the integrity of implementation of legal and administrative protections for the environment. These should include independent performance review, with clear reporting to the public, incorporated into Commonwealth and state legislation.

Comment: As noted earlier in this paper regarding APEEL draft recommendation 1.3.4, improved public participation as a safeguard for the integrity of environmental governance is consistent with Labor's 2016 election commitments :

Labor will

- *Reinstate the principles of democracy, respect and protection of rights for civil society involvement in environmental matters including funding for Environment Defenders Offices (EDOs).*

This point is also consistent with the recommendations of the Hawke review for increased public participation and transparency of processes under the Act.

As also noted earlier, the Hawke review also recommended expansion of the use of independent performance review in environmental governance.

> *OTHER RECOMMENDATIONS: In addition to these legal recommendations, two other issues should be addressed to ensure effective and fair governance: more reliable and adequate funding of sustainability investments and a stronger role for indigenous communities in biodiversity conservation and natural resources management.*
> *3.6 The Commonwealth should work with the states and the private sector to develop an effective fiscal model for natural resource governance. This should ensure that the costs of environmental stewardship can be met over the long term, and are borne equitably across the community.*
> *3.7 The Commonwealth and state governments should make a clear commitment to ensure effective consultation with, and the active participation of, Aboriginal and Torres Strait Islander peoples in environmental protection measures, cultural heritage and natural resource management (NRM). This commitment requires support for robust and culturally appropriate governance for Indigenous Protected Areas (IPAs), co-managed areas and Aboriginal and Torres Strait Islander peoples' land and waters and respect for the principle of free, prior and informed consent in regard to Aboriginal and Torres Strait Islander land and waters.*

Comments: APEEL in this paper emphasise the economic value to human economic activities of ecosystem services provided by the natural world, and the economic costs of environmental degradation, for example by invasive plant and animal species, and that this value and these costs are frequently insufficiently accounted for.

The Industry Commission in its 1998 report suggested three pillars are needed to support ecologically sustainable development and environmental land objectives:

- Use regulatory mechanisms to ensure that landholders and land managers do properly manage the environmental impacts of their actions;
- Create or expand markets for natural resources and use economic instruments, in preference to command and control; and
- Encourage conservation philanthropy and conservation on private land

The Hawke review recommended a range of economic measures for improved natural resource governance, including further refinement of carbon farming initiatives; development of a national bio-banking system; and development of a system of national environmental accounts.

APEEL estimates that an amount roughly equivalent to Australian defence spending may be required for landscape protection and restoration, with only a fraction of this being currently invested. They note that although Australia has many environment funding programs, including private and public programs, we do not have an investment strategy for the environment.

> *A comprehensive environmental investment strategy would involve many elements. A new partnership between government, landholders, business and the broader volunteer community is essential. This may require reforms to: better define eco-service proprietary rights and the limits to those rights, clarify stewardship obligations, create ecoservice markets that are transaction-cost efficient, provide more robust oversight and support for eco-service markets, reduce regulatory and administrative impediments to conservation on private landholdings, provide information and advice, set up institutions to collect and maintain environmental data, encourage corporate investment in the environment, for example through regulatory requirements, and implement appropriate institutional arrangements for environmental investment strategies that minimise transaction costs while maximising voluntary engagement.*

These proposals are included in a discussion of Australia's environmental laws because

- they clearly require significant supporting law reform elements, and
- law reform in the absence of a strategy for environmental investment will have limited effect

Costs which need to be addressed include

- Costs of monitoring and enforcement
- Direct costs of activities such as pest control
- Costs from competing activities foregone or modified to achieve environmental outcomes

Of course, environmental benefits can also generate economic benefits. One purpose of market mechanisms is to harness these benefits to provide incentives to meet costs.

APEEL note that climate related market mechanisms present important but very partial means for recognising the economic value of environmental stewardship. Economic measures additional to market mechanisms are also briefly discussed in number 7 of APEEL's technical papers, in particular regarding tax system issues.

Offsets

Biodiversity offsets present another market mechanism, which again is only relevant in some circumstances – that is, in the context of development projects with biodiversity impacts which cannot be mitigated fully within the project itself.

APEEL note that offsets are not specifically addressed in the EPBC Act but rather in related policy; and that while they have the advantage of providing a means for (in effect) putting a

price on habitat loss, they have experienced a range of limitations including

- failure to achieve “like for like” offsetting
- entrenching rather than reversing habitat loss
- focus on economic efficiency to the exclusion of other economic values, notably equity
- use of offsets without first minimising habitat loss within the project to the maximum extent
- failure to establish “no go” areas not subject to offsetting
- approving projects or allowing activity before offsets have been secured
- failure to monitor implementation and effectiveness
- failure to require long term security of offset sites

APEEL do not make specific legal recommendations regarding offsets but recommend increased caution in their use having regard to the factors listed above.

8.4 Marine and coastal issues

> *Australia’s coastal and marine environments are vital to its economic, recreational, and cultural wellbeing, yet many indicators of marine ecosystem health are declining. Protecting coastal and marine biodiversity and resources against the stressors of coastal development, fishing, oil and gas development, pollution, invasive species and climate change is critically important.* [APEEL technical paper number 4]

> *The cumulative pressures on our marine ecosystems are rapidly growing. Impacts from climate change are beginning to escalate, population pressures and coastal development continue to grow, globalisation of marine industries continues, the risks to tropical waters from oil and gas developments are increasing* [State of the Environment report, 2011]

In its national Platform Labor makes the following commitments regarding coastal and marine environments:

> *Labor will achieve our marine ecological, economic and social objectives in an open, integrated, participatory and planned manner. Labor will use modern, best-practice public processes like marine spatial planning involving stakeholders in a transparent way, to create and establish a more rational, adaptive and strategic use of marine space and the interactions between its uses, including Australia’s comprehensive network of marine reserves.*
> *Labor will work with traditional owners and local fishing communities across Australia who wish to manage their take of natural resources, their role in compliance activities and in monitoring the condition of plants and animals and the impact of human activities on local and regional biodiversity. We will work together to improve ways of educating the public about traditional and community connections to sea.*
>
> *In Australian waters and throughout the world’s oceans, Labor will encourage protection for iconic marine species like whales, dugongs, turtles and sharks, and will promote the conservation and research of key bioregional health indicator species.*

In their paper dealing with coastal and marine environments, APEEL emphasise a need for improved governance and institutional arrangements, rather than the details of the statutory regimes applying to different key threat areas (such as coastal development, agricultural runoff, fisheries, shipping, and offshore oil and gas extraction).

In this respect APEEL emphasise similar themes to those endorsed by other Parts but also by the Hawke review and indeed by Labor’s policy - in particular, improved governance and greater emphasis on strategic management: both to manage existing pressures and to

manage increased pressures from human uses and from climate change.

APEEL note that although in formal terms Ecologically Sustainable Development has now been inserted into many of the legal regimes governing uses of marine and coastal environments, the commitment presupposed in ESD principles to integrated decision making has not been achieved among the multiple actors responsible for laws and instruments in a range of sectors which govern marine and coastal environments.

APEEL recommendations

4.1. The Commonwealth to pursue agreement on a nationally-agreed vision for managing Australia's marine and coastal environment, with clearly-defined objectives and priorities, and measurable outcomes capable of supporting economic sectors reliant on the marine and coastal environment, ecosystem integrity and resilience, and ongoing enjoyment by the public (including anticipatory measures with respect to the impacts of climate change).

4.2. The Commonwealth to lead and implement a comprehensive system of marine spatial planning (MSP). Such a system will need to take a strategic approach that is ecosystem and place-based, participatory, adaptive, and that which integrates the needs of different sectors and agencies, and different levels of government. It will also need to address the land-sea divide and include coastal zone planning, noting the mechanisms for delivering coastal zone management may differ from those for the marine environment. MSP undertaken by the Great Barrier Reef Marine Park Authority provides a world-recognised example of how this may be achieved.

4.3. The Commonwealth to lead a national effort to ensure the completion of planning, establishment and management for the National Reserve System for Marine Protected Areas (NRSMPA), with the identification and zoning of new areas to be based on scientifically robust criteria, sound application of the CAR principles (comprehensive, adequate and representative) to establish a national network incorporating state and territory marine protected areas (MPAs), and national guidelines for MPA management.

4.4. The Commonwealth to lead a national effort to develop stronger measures for the prevention and control of marine pollution including damage to ecosystems from coastal development, particularly land-based sources of pollution affecting the Great Barrier Reef (GBR) and marine plastic pollution (MPP).

4.5. The Commonwealth should adopt more robust approaches to marine biosecurity, including nationally consistent ballast water protocols, and an enhanced capacity for rapid responses to manage new invasions or outbreaks.

4.6. The Commonwealth should work with the states to develop a sustainable funding model to support the marine spatial planning (MSP) process and subsequent management of marine protected areas (MPAs) and marine resources, taking into account the unique features of the marine environment, and the wide range of marine and coastal users and stakeholders.

4.7. For both the marine spatial planning (MSP) process and the completion of the National Reserve System for Marine Protected Areas (NRSMPA), better engagement with indigenous groups and recognition of sea country is essential, including recognition of the potential for multiple legal and non-legal modalities for sea country governance.

Comment: The Federal Labor platform contains the following relevant commitments regarding engagement with Aboriginal and Torres Strait Islander peoples:

Aboriginal and Torres Strait Islander people provide valuable guidance, knowledge and advice in preserving Australia's environment through their connections to land and sea country. Labor will work with Traditional Owners to ensure sustainable use of Australia's natural resources.
Labor will:

- *Support employment programs for Aboriginal and Torres Strait Islander people to work on and manage country, particularly through the highly successful Indigenous*

Ranger and Indigenous Protected Area programs

- *Encourage Aboriginal and Torres Strait Islander peoples' involvement in land management, including through national parks, tourism and state forests*.

The commitments in this section regarding land management could clearly be supplemented with appropriate platform and/or policy commitments regarding management of sea country.

8.5 Climate law

In its 2015 National Platform Labor committed to

- *Put climate change at the heart of our commitment to deliver jobs, innovation and investment to build a prosperous, safe and fair Australia.*
- *Introduce an Emissions Trading Scheme which imposes a legal limit on carbon pollution that lets business work out the cheapest and most effective way to operate within that cap. Labor's cap on carbon pollution will be based on robust independent advice and reduce over time in accordance with Australia's international commitments;*
- *Develop a comprehensive plan to progressively decarbonise Australia's energy sector, particularly in electricity generation. A commitment to reinvigorate and grow Australia's renewable energy industry, encourage energy efficiency and invest in low carbon energy solutions, is essential to that plan;*
- *Work to undo the damage that the Coalition Government has done to the renewable energy sector, and be ambitious in growing the renewable energy sector beyond 2020 by adopting policies to deliver at least 50% of our electricity generation from renewable sources by 2030;*
- *Restore integrity, independence and capacity to the environment and climate change portfolios and relevant science agencies;*
- *Work with the land sector and other stakeholders to store millions of tonnes of carbon in the land through better land and waste management; and*
- *Adopt post 2020 pollution reduction targets, consistent with doing Australia's fair share in limiting global warming to 2 degrees Celsius. Labor will base these targets on the latest advice of bodies such as the independent Climate Change Authority.*

In its 2016 federal election policy Labor added further detail to these commitments. Labor committed to

- *Net Zero Pollution by 2050 consistent with the international agreement to achieve a balance between emissions generated and those offset, sequestered or removed in the second half of this century*
- *45% emissions reduction on 2005 levels by 2030, consistent with the advice of the Climate Change Authority*
- *2025 emissions reduction target within one year of being elected*
- *Five yearly reviews to ensure that policy goals are continually updated to be consistent with the latest science.*

Consideration of possible roles for further legal measures in implementation of climate commitments may be desirable, including

- whether the target of net zero emissions by 2050 should be reflected in law, and if so in what terms
- whether interim emissions reduction targets, or requirements and processes for setting interim targets, should be provided for in legal measures (additional to the role of targets in setting caps for the purposes of emissions trading schemes) and if so in what terms
- whether statutory decision makers should be required to have regard to climate impacts where relevant
- whether government agencies should be required to develop climate mitigation and

adaptation plans

The Victorian Labor Government's Climate Change Bill 2016 contains provisions on each of these points. The Bill provides for:

- A 2050 net zero greenhouse gas emissions target;
- setting of interim 5 year targets.
- A duty on the Premier and Minister to ensure that targets are met
- A duty to obtain and publish independent expert advice before setting targets (including on the most efficient and cost effective methods, and with expert advice to consider the long term target; climate science and technology; economic circumstances and impacts; social circumstances including impact on health and wellbeing; environmental circumstances; national and global action)
- A duty on decision makers under scheduled Acts to have regard to relevant impacts of climate change and potential contributions to greenhouse gas emissions
- A whole of Government commitment to endeavour to ensure that any decision made by the Government and any policy, program or process developed or implemented by the Government appropriately takes account of climate change

In addition, given responsibilities of government at national level for corporate and financial regulation, and noting indications[32] that climate and carbon risk present significant threats to global financial stability, it might be considered whether climate related duties should be specified beyond government - for example specific duties of directors or trustees to disclose and address climate and carbon risks as part of general fiduciary duties and duties of skill and care.

APEEL climate paper

In their technical paper number 5 APEEL focus on issues of climate change mitigation. They note that climate change adaptation also requires attention. APEEL technical papers raise issues of the fitness of Australia's current environmental law and institutions to take adequate account of climate change impacts on the natural world. Beyond ecosystem impacts needing to be dealt with mainly by biodiversity laws, impacts on human systems are regarded as more closely linked with landuse and planning policies and laws.

Unlike other APEEL papers, APEEL's recommendations in their paper specifically on climate do not appear to add significant detail in most respects to existing Labor national platform and policy commitments (although being broadly consistent with those commitments). This may be a reflection of the depth of work already done within Labor on climate policy. There are however relevant recommendations in other papers, notably on ensuring that the National Reserve System as far as possible accommodates climate impacts. Climate issues among other environmental issues also arise in considering relevant options for business law.

8.6 Energy regulation

Similar comments appear appropriate on the recommendations in APEEL's paper number 6 concerning energy, in that they do not appear to add substantially to commitments already made by Labor.

The exception to this is that, in relation to energy efficiency, APEEL recommends enhanced mandatory standards on building efficiency as a means of addressing split incentives (as between builders and buyers and as between landlord and tenant) which prevent the economic benefits of energy efficiency being sufficient alone to deliver improved design and

[32] For example http://www.climateinstitute.org.au/articles/media-releases/financial-risks-arising-from-climate-change-highlighted-by-fsb-disclosure-task-force.html .

construction. As noted earlier in this paper, the Productivity Commission had recommended in 1999 that building energy efficiency be addressed by voluntary labelling in preference to mandatory standards. This view however appears to merit reconsideration in view of

- increasing evidence which has emerged since 1999 on the urgency of the climate crisis and the severity of its impacts including economic impacts
- the need for effective energy efficiency measures to be included in measures to enable Australia to meet international legal commitments on emissions reduction, and still greater need if Australia is to enhance those commitments to approach meeting its fair share of efforts to reduce emissions as recommended by the Climate Change Authority and accepted by Labor.

8.7 The private sector, business law and environmental performance

In developing its 2015 National Platform Labor accepted that climate change issues were not confined to the environment and energy portfolios, but needed to be addressed across policy issues, including economics and finance; cities, infrastructure and transport; agriculture; science and industry; health; foreign affairs and trade; emergency response; and defence and security.

APEEL's technical paper number 7 on business law picks up a similar theme - that laws with relevance to the environment are not confined to laws specifically identified as environmental law. APEEL discuss how environmental principles and standards may be integrated into Commonwealth laws relating to corporations, financial investment, tax, consumer protection and trade. Key questions identified are:

- *How might law embed environmental performance standards into broader areas of economic life such as corporate governance?*
- *How can the law encourage environmental innovation and leadership in the private sector?*
- *Given the business sector's economic resources, how can corporations and investors help fund the next generation of Australian environmental laws?*

In promoting discussion of APEEL's recommendations addressing these questions it is again necessary to emphasise that this does not amount to endorsement by CRC and LEAN of every specific recommendation.

Recommendations in APEEL's paper on business include:

> *7.1. A general duty on all companies to improve their environmental performance.*

Comments: The scope of the duty proposed in this recommendation is not immediately clear, including how it would relate to the general environmental duty which is proposed earlier by APEEL - and which as discussed earlier in this paper was also recommended by the Industry Commission.

> *7.2. Require companies to develop environmental management systems, sustainability plans, improved environmental reporting and processes for consultation with stakeholders. Company law should be reformed to establish an environmental judgement rule, collect and disclose environmental performance data, and reward shareholders with weighted voting rights.*

Comments: As argued by the Industry Commission in its "Fully Repairing Lease" report, production of plans and creation of systems at an enterprise level may have potential to produce outcomes adapted to the activities and circumstances of enterprises which more general legislative requirements may be less readily able to produce.

Of course, production of plans may also involve considerable effort. Requiring this effort as a matter of law (rather than as a voluntary option for meeting a mandatory general duty, as recommended by the Industry Commission) involves additional regulatory impacts which would need to be justified. APEEL acknowledge regulatory impact issues from their

recommendations in this area, and suggests consideration of differentiation on the basis of size of enterprise in implementation of these recommendations.

APEEL raise the option of ISO certification of environment management systems having a role for the purpose of compliance with other legislative requirements. This might be comparable for example to some compliance activities being given evidentiary weight under work health and safety laws. Careful discussion would appear necessary however on whether a requirement to produce ISO certified environmental management systems would be feasible to apply to all enterprises or able to withstand regulation impact analysis (suggested answer: no); or whether mandatory requirements for such plans if applied ought to be more selective, for example regarding scale of enterprise or nature of activities involved. APEEL do refer in this context to requiring environmental systems "such as" an ISO certified plan.

APEEL also raise the option of requiring environmental sustainability plans and reporting against these plans in annual reports. Reporting against a sustainability plan could produce more meaningful reporting than a general requirement (or encouragement) to report on ESD. However, while the requirement to produce a plan would clearly be less rigorous than a requirement to implement ISO certified environmental management systems, careful consideration would need to be made regarding

- Whether such plans should be made mandatory
- whether a mandatory requirement ought to be applied selectively (as APEEL acknowledge might need to occur) rather than generally - for example for enterprises above a certain size, comparably to requirements under the Affirmative Action (Equal Employment Opportunity for Women) Act 1986, for example, or which contract with the Commonwealth; or subject to some other set of triggers

APEEL also raise other options including

- Requiring corporations to consult routinely with stakeholders on environmental issues
- Requiring corporations to improve and report on collection of environmental performance data

Again, regulatory impacts in setting these as mandatory and general requirements would require serious consideration. The Industry Commission did also recommend a duty to consult, but this was framed as a duty to consult regarding particular risks rather than a more generally applicable and routine duty.

A threshold issue likely to arise in applying a duty to consult, could be the experience base and credibility of government imposing requirements on private sector organisations it has not first imposed on its own agencies.

> *7.3. Redefine the fiduciary and trust law responsibilities of financial institutions to require environmentally responsible investment.*

APEEL propose consideration of changes to fiduciary responsibilities and trust law to ensure that

- Environmentally responsible investment is required
- trustees and other fiduciaries are not prohibited or discouraged from considering social and environmental issues rather than financial issues alone.

Such a proposal may involve less radical change than it appears to, given that

- Specifically in relation to climate change and carbon risk, as noted earlier in this paper there are increasing indications that failure to consider these factors may constitute breach of fiduciary duties given financial risks involved, even if not all

environmental issues may carry the same level of short to medium term financial risk.
- APEEL do not propose removal or diminution of established fiduciary responsibilities
- As APEEL note, many financial and other institutions do already engage with social and environmental factors in their investment decisions on grounds of good corporate citizenship.

7.4. Oblige the Commonwealth's Future Fund to promote environmentally responsible investment.

Where governments participate in financial markets as investors, APEEL propose that government leads by example in taking social and environmental factors into account. They note that sovereign wealth funds in several jurisdictions including Norway (which is reported to be the world's largest such fund), France and New Zealand are required to have regard to ethical, social and environmental factors. Specifically they recommend that the Commonwealth Government's Future Fund be subject to equivalent standards, and note that even under existing legislation there may be some scope for ministerial investment directives to have this effect.

Again, specifically in relation to carbon and climate risk, the fact that current Future Fund chairman and former Liberal Treasurer Mr Peter Costello has not to date regarded it as appropriate for the Future Fund to take these factors into account may be an argument for doing so, rather than being an argument against[33].

7.5. Develop positive environmental disclosure obligations on business.

APEEL note that ensuring availability of information to consumers may influence environmental performance by businesses. (The standard "perfect market" hypothesis of course presupposes perfect information, and information asymmetries are a well recognised source of real world market failures). They propose development by the Australian Competition and Consumer Commission of guidelines on disclosure including on carbon and other waste emissions and resource consumption. Other examples might include environmentally responsible sourcing of food and related products.

As in other areas, although not specifically raised by APEEL, a threshold issue for credibility for government in implementing this recommendation might involve application of comparable disclosure requirements to its own operations and agencies.

At the 2016 election Labor made a related commitment[34] to increase civil penalties under the Australian Consumer Law, bringing them into line with penalties for anti-competitive conduct. This would apply to misleading information relevant to environmental issues, for example on sourcing of products.

7.6. Allow for the establishment of corporate 'hybrid' enterprises that blend profit maximisation and community benefit goals.

Comment: Although this model does not exist in Australia it has achieved considerable popularity elsewhere, with 1300 such enterprises in 31 US States, and 31000 such enterprises in Britain. It is argued to provide a valuable structure for pursuing social and environmental goods within a more sophisticated structure than offered by more traditional structures such as cooperatives.

As APEEL note, however, this proposal does nothing for existing companies that choose to remain within the conventional corporate law paradigm. These might be expected to remain both the majority of enterprises and most of those with significant environmental impacts.

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[33] See https://newmatilda.com/2015/10/14/john-hewson-attacks-coal-loving-peter-costello-over-future-funds-fossil-fuel-investments/

[34] http://www.100positivepolicies.org.au/giving_the_consumer_watchdog_more_teeth_fact_sheet

APEEL also briefly discuss issues in ensuring responsibility for environmental damage, noting the potential for misuse of corporate structures in this respect.

7.7. Reform the tax system to improve the financial advantages of environmentally responsible practices.

Alongside revenue raising options canvassed by APEEL in their technical paper number 2, regarding environmental governance, and number 3 regarding natural resource management and mechanisms for recognising the value of environmental stewardship, APEEL's paper number 7 follows the Industry Commission's 1998 report in recommending review and reform of relevant aspects of the taxation system to improve the financial advantages of environmentally responsible practices.

Issues raised by APEEL include

- Appropriate depreciation periods for capital expenditures on environmentally related works and distinctions for this purpose between primary producers and other businesses
- Possible accelerated depreciation for small business clean energy investments
- Lack of uniformity in treatment of conservation covenants for land tax and council rates purposes
- Remaining perverse incentives from local and state tax treatment of undeveloped land

As well as a review of the taxation system to identify opportunities to support greater investment in environmental management, APEEL call for a range of measures including

- A return to pricing of greenhouse gas emissions
- Removal of subsidies or concessions for fossil fuel use
- Expanded property tax concessions for nature conservation work on private land
- Restructuring of utility pricing to encourage water and other resource conservation

7.8. Explore new sources of finance such as goods and services tax (GST) revenue to support and incentivise environmental innovation and stewardship.

Comment: This recommendation although sitting within the Business Law section concerns application of GST and other revenue sources by government to provide funding for environmental purposes rather than reform of taxation law as such to ensure that inappropriate incentives are removed and appropriate incentives provided.

7.9. Give effect to the United Nations Guiding Principles on Business and Human Rights.

APEEL propose that the Australian Government should give legal effect to the United Nations' Guiding Principles on Business and Human Rights, which Australia has supported internationally, in view of connections between activities which raise human rights concerns and which raise environmental concerns. APEEL refer in this respect to discussions regarding a national Human Rights Act.

Issues to consider in this area may include that

- With the exception of anti-discrimination law, almost all human rights law development in Australia has concerned activities of government rather than of private sector or other non-government actors. Successive efforts by Labor in government nationally to introduce a Bill of Rights have contemplated obligations which bind public authorities rather than private persons or organisations. The Victorian Charter of Human Rights and Responsibilities similarly applies obligations to public authorities. Applying human rights duties outside this would be a substantial departure.
- The Australian Government has yet to apply explicit or detailed human rights

or environmental standards to its own engagement with or support of business activities, including finance for Australian business activities internationally. Further consideration of initiatives in this respect appears appropriate.

Options in other areas of law including trade law

APEEL do not make specific recommendations in this area but include a brief discussion in their paper number 7. They note concerns regarding "regulatory chill", including on environment protection, from some provisions in trade agreements, notably Investor-State Dispute Settlement clauses.

Labor's 2015 National Platform

- notes Labor's long record of support for an open global trading system but opposes low quality piecemeal deals
- Commits to ensuring democratic accountability during and at the conclusion of negotiation of trade deals
- Opposes provisions such as ISDS clauses which constrain the ability of government to make laws on environmental and other matters which do not discriminate between domestic and foreign businesses
- Commits Labor to work towards the removal of environmentally damaging subsidies, and promote mechanisms that balance the interests of environmental protection and open markets

As noted above by reference to APEEL's recommendation 2.9, discussion would appear useful regarding possible mechanisms which could enhance delivery in practice for this commitment, including possible roles for parliamentary scrutiny and public accountability mechanisms, as well as for the proposed national environment commission.

8.8 Democracy and the environment

Authoritarian and undemocratic regimes worldwide notoriously have disregarded environment protection, and repressed environmental defenders. Labor's 2016's election commitments included the following:

Labor will

- *Reinstate the principles of democracy, respect and protection of rights for civil society involvement in environmental matters including funding for Environment Defenders Offices (EDOs)*

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As also noted, the recommendations of the Hawke review of the EPBC Act included increased provision for public participation and transparency of processes under the Act.

APEEL recommendations

> *Recommendation 8.1: Environmental democracy must have as a foundation, respect for fundamental human rights and, in particular, an enforceable right to a clean and healthy environment. This is a standard that needs to extend the piecemeal rights that are currently protected within Australian laws and which are of limited effectiveness. Environmental rights are inspired by international developments, and driven by the desire for legal interventions in the face of environmental injustices and declining environmental conditions.*

Comment: An explicit rights basis in legislation has not been common in Australian legislative practice. APEEL do discuss some practical rather than purely theoretical implications of incorporation of rights talk. It should be noted that Victoria's review of its Environment Protection Authority did indicate particular public interest in the right of members of the community to a healthy and safe environment.

Further expansion of the intended effect of the inclusion of a statement of the right to a safe and healthy environment would appear useful. A right to a healthy and safe environment is not expressly recognised in human rights instruments to which Australia is a party. However, at least some aspects of environmental health are clearly implicit in human rights to health. Article 12 of the International Covenant on Economic Social and Cultural Rights (ratified by Australia in 1975) includes the following:

> *1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
>
> *2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*
>
> ...
>
> *(b) The improvement of all aspects of environmental and industrial hygiene*;

Also, as the United Nations Environment Program has pointed out[35], " Certain human rights, especially access to information, participation in decision-making, and access to justice in environmental matters, as essential to good environmental decision-making".

> *Recommendation 8.2: Australia needs improved procedural environmental rights, including rights to information, to public participation, and to accessible and just remedies in circumstances of demonstrated environmental harms and/or breaches of environmental laws. These improvements would extend the effectiveness of environmental protections and facilitate the involvement of communities in advocacy for clean and healthy environments.*

Comment: The points raised by APEEL regarding the importance for environmental protection of key procedural rights including the right to information, to public participation and to access to justice in environmental matters can be linked with commitments in Victorian Labor's platform, now followed in the NSW Labor platform, to development of an environmental justice plan.

> *Recommendation 8.3: To achieve realisation of fundamental human rights, there must be better integration of the operation of environmental laws with the exercise of Aboriginal and Torres Strait Islander peoples' rights and the achievement of justice for Aboriginal peoples. The relationship between Aboriginal peoples' rights and the environment is a distinctive and unique one, based on ancient but violently disrupted connections to Country. Environmental laws and governance have a role in recognising and advancing those connections. This role should include procedures and practices that contribute to the functioning of free, prior and informed consent by Aboriginal communities in matters that affect them, or their attachments to land and resources, in significant ways.*

Comments: Labor's national Platform on environment includes the following:

> *Aboriginal and Torres Strait Islander people provide valuable guidance, knowledge and advice in preserving Australia's environment through their connections to land and sea country. Labor will work with Traditional Owners to ensure sustainable use of Australia's natural resources*

NSW Labor's platform contains similar recognition of knowledge, while adding perhaps more explicit commitment to ensuring proper involvement in decision making:

> *NSW Labor will ensure that the interests of Aboriginal people are properly represented in government policy and decision making on natural resource issues and is committed to utilising the skills, knowledge and practices of traditional methods of land, sea and water management as practised by Traditional Owners.*

Free and prior informed consent by Aboriginal and Torres Strait Islander peoples to actions

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[35] [http://www.unep.org/delc/HumanRightsandTheEnvironment/tabid/54409/Default.aspx]

on their lands or affecting their heritage is clearly one aspect of recognition of indigenous knowledge and rights but a range of other aspects also require recognition.

> *Recommendation 8.4: Models of legal personality for the protection of nature should be explored. Rights-based approaches to the protection of ecological integrity can be based on the attachment of the rights of a legal person to natural places or objects directly, such as rivers or threatened species or forests. These are new and emerging approaches to environmental management which Australian jurisdictions should consider implementing.*

Comment: Although there have been recent developments in ascription of legal personality to aspects of nature in several overseas jurisdictions, the immediate practical applicability of this proposal in law reform in an Australian context is not clear.

> *Recommendation 8.5: Public integrity mechanisms, such as Environmental Commissioners, should be established to ensure that environmental decision-making is made accountable through appropriate oversight of the performance of environmental administration. Weaknesses in environmental laws can often be attributed to inadequate oversight of governance and practice, as much as more glaring problems such as corruption or under-enforcement or the absence of enforceable laws. Integrity institutions can provide tools of 'good practice' or 'best practice' alongside accountability and public scrutiny.*

Comment: Themes of accountability, monitoring and transparency also emerge strongly from a number of other reports on Australia's environmental law and institutions as discussed earlier in this paper.

9. Environmental Defenders Office NSW recommendations for EPBC Act amendments and improvements

In December 2015, the Environmental Defenders Office NSW (responding to a brief from Human Society International) proposed[36] ten priority reforms.

In many cases, as outlined below, these proposals are similar to recommendations made over the years by review bodies discussed earlier in this paper.

> *Recommendation 1: Repeal EPBC Act provisions allowing federal approvals to be handed to the States The 'one -stop shop' reforms must not hand over approval powers under the Act. Opportunities to improve national environmental law efficiency and effectiveness include:*
> *clarifying the Act's objects to focus on ESD and improving the clarity of drafting;*
> - *moving towards a single federal - state threatened species listing process;*
> - *Assessment bilateral agreements to accredit equivalent impact assessment laws;*
> - *reducing unnecessary project referrals via better guidance to proponents; and*
> - *improving Australia's capacity for robust strategic environmental assessments to address cumulative impacts and maintain or improve environmental outcomes*
> - *reforming and simplifying nomination processes to list species and other MNES*

Comments: These recommendations are broadly consistent with the Wentworth Group recommendations. The recommendation for revision of the EPBC Act objects clause and drafting echoes the recommendations of the Hawke review.

> *Recommendation 2: Establish a statutory National Environment Commission , responsible for advisory And oversight functions. The Commission would report to the Environment Minister or the Parliament, have its own staff, and be independent of departmental or ministerial direction.*

Comment: This recommendation echoes that of the Wentworth Group, the Hawke Review and the Industry Commission

> *Recommendation 3: Make EPBC strategic assessment more substantial and robust, including by*

[36] [http://hsi.org.au/assets/publications/HSI_EPBC_Act_priority_amendments_2016.pdf]

- *amending the Act to improve information requirements;*
- *requiring activities to achieve objective environmental outcomes such as a 'maintain or improve' environmental outcomes test;*
- *requiring cumulative impacts of past, present and future activities be considered*
- *revoking the accreditation of the National Offshore Petroleum Safety and Emergency Management Authority (NOPSEMA) to approve significant impacts on MNES, or at a minimum providing a ministerial 'call-in' assessment and decision - making power*
- *Improving transparency, community confidence and public engagement; and*
- *ensuring robust oversight via new legislated performance audit and 'call-in' powers.*

Comments: These recommendations are broadly consistent with the recommendations of the Hawke review. An exception may be that the recommendation to revoke accreditation of the National Offshore Petroleum Safety and Emergency Management Authority appears to run in the opposite direction from the Hawke review as well as from the views of the Productivity Commission in its relevant inquiry. The more limited option of a ministerial call in power resembles the recommendation of the Wentworth Group as an assurance mechanism (although applied by the Wentworth Group regarding bilateral agreements with States and Territories).

> *Recommendation 4:*
> *(i) Enact a new EPBC Act trigger in Part 3 to require federal approval of projects with major greenhouse pollution footprints (e.g. over 250,000 to 500,000t CO2 -e); and*
> *(ii)Insert a requirement to consider climate change mitigation and adaptation opportunities as part of strategic assessments and regional planning processes.*

Comments: The recommendation for a greenhouse trigger in federal environmental law was also made by the Hawke review. Labor included a commitment to consider such a trigger in its 2016 election policy.

> *Recommendation 5: Enact provisions for Ecosystems of National Significance to be listed under the EPBC Act (including a public nomination process) , and a new trigger in Part 3 to require federal approval of projects that may have significant impacts on them. The amendments should include an initial list of ecosystems for priority protection.*

Comments: The Hawke review also recommended recognition of ecosystems of national significance as matters of national environmental significance

> *Recommendation 6: Enact a new trigger to require federal approval of activities that may have significant impacts on areas under the National Reserve System (including state based national parks) and other listed protected areas (such as private covenanted land).*

Comments: The reserve system is clearly a key part of any effective national strategy for biodiversity conservation, and a recommendation that activities that have significant impacts on these areas should be considered as affecting matters of national environmental significance is hardly surprising. Implementation of this recommendation would need however to take into account factors affecting incentives for conservation on private land, including those identified by the Productivity Commission.

> *Recommendation 7: Enact a new trigger to require federal approval of significant land clearing. This would assess three things: activities over a certain scale; any clearing of threatened species habitat (or at a minimum, critical habitat); and an additional list of scheduled activities.*

Comments: Express coverage in a federal environmental law of land clearing at sufficient scale would be consistent with, while stating more directly, a climate trigger. Similarly, express coverage of clearing of critical habitat for threatened species would appear to restate more directly the effect of the existing trigger regarding threatened species rather than imposing substantively new regulatory restrictions..

> *Recommendation 8: Amend the EPBC Act to include vulnerable ecological communities as a matter of national environmental significance protected under sections 18 -18A.*

Comments: This recommendation was also made by the Hawke review

> *Recommendation 9: Amend the EPBC Act to include a package of measures to strengthen protections for threatened species, ecological communities and their habitats , including specific measures to strengthen critical habitat protection.*
>
> *Recommendation 10: Amend the EPBC Act so that the Environment Minister must apply the full protection of the Act if the review of a Regional Forest Agreement (RFA) has not occurred in the specified timeframe; or indicates serious non-performance; or information is inadequate.*

Comments: Labor's 2016 federal election policy reaffirmed Labor's commitment to Regional Forest Agreement processes. The Hawke review recommended independent performance auditing and compliance monitoring for Regional Forest Agreements. The NSW EDO recommendation would provide one mechanism for enforcing this Hawke review recommendation, although other mechanisms might well be able to be devised and applied.

10. Review of Victorian Environment Protection Authority

This review obviously has a focus on State based law and institutions rather than the EPBC Act or other aspects of national laws and institutions relevant to the environment. It is discussed here however as the most comprehensive such recent review at State level, which raises issues which are also relevant to the national regimes.

The Review reported[37] in March 2016 and a Victorian Government response is now available[38].

Key points from the Inquiry included:

- Strong public support for an independent Environment Protection Authority
- Support for environmental law in protecting human health and safety as well as the natural environment
- Need for the EPA to have strong scientific capacity and credibility
- Need for the EPA to have a local, rural and regional presence
- Need for the EPA to have clear roles in relation to other parts of government

Recommendations included

- Legislation to specify clear objectives, principles, functions and governance
- The EPA Act to specify not only a framework for the EPA but also obligations on other government agencies for a coordinated approach to environment protection
- Capacity needed for evidence based advice, public information and decision making across the EPA's areas of responsibility
- A full suite of sanctions available for breaches of the Act
- A wide range of regulatory instruments to be provided to allow greater efficiency and effectiveness in environment and health outcomes
- Local government environment protection officers to be integrated as a local quick response network within EPA roles
- The EPA to be given a similar role in mining as it has in other sectors
- Funding reform to avoid perceived conflicts of interest in cost recovery activities.

[37] http://epa-inquiry.vic.gov.au/epa-inquiry-report

[38] http://www.delwp.vic.gov.au/environment-and-wildlife/epa-inquiry