

57 RECOMMENDATIONS FOR THE NEXT GENERATION OF AUSTRALIA'S ENVIRONMENTAL LAWS

APEEL



The Australian Panel of Experts
on Environmental Law

Technical Papers 1: The Foundations for Environmental Law: Goals, Objects, Principles and Norms

NUMBER	RECOMMENDATION
1.1	The Commonwealth government should initiate a wide-ranging, national consultative process for the purpose of building substantial agreement on a new societal goal for Australia that would enhance or replace the current ESD goal.
1.2	Law-makers should draft legislation that gives effect to, recognised “design” principles (re smart regulation; the use of economic measures and particular regulatory tools; and procedural aspects of environmental democracy).
1.3	The following NEW design principles which have not yet been widely adopted in Australia also should be recognised by law-makers: <ul style="list-style-type: none"> • A principle of flexible and responsive environmental governance; • A principle of environmental restoration; and • A principle of non-regression.
1.4	The next generation of Australian environmental law should provide for new norms in the form of: <ul style="list-style-type: none"> • A general environmental duty of care; and • A general duty to restore and rehabilitate harmed environments.
1.5	The next generation of Australian environmental law should include as essential prescriptions both the precautionary principle (with specific provision also for the engagement of the public concerning the level of acceptable risk and potential harm) and the prevention principle .
1.6	The next generation of Australian environmental law also should prescribe the following, NEW directing principles concerning environmentally sustainable innovation for decision-makers: <ul style="list-style-type: none"> • A principle requiring the achievement of a high level of environment protection; and • A principle requiring the application of the best available techniques.
1.7	The adoption of risk and outcomes-based environmental regulation by environmental authorities should not be a substitute for the application of the precautionary principle wherever the required threshold level of scientific uncertainty exists.

Technical Paper 2: Environmental Governance

NUMBER	RECOMMENDATION
2.1	<p>The Commonwealth should define the nature and extent of its own role and responsibilities in relation to environmental matters. In doing so, it should:</p> <ul style="list-style-type: none"> • acknowledge its responsibility for providing national strategic leadership on the environment; and • recognise that the States will continue to be involved in environmental regulation under State environmental laws and regulatory processes.
2.2	<p>The Commonwealth should develop a Statement of Commonwealth Environmental Interests (“CSEI”) comprised of three broad components:</p> <ul style="list-style-type: none"> • a statement of the functions related to the environment that it will perform in the future, including : <ul style="list-style-type: none"> ○ 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; • a statement of the environmental matters in which the Commonwealth has an interest, comprised of two elements: <ul style="list-style-type: none"> ○ 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 • 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.
2.3	<p>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):</p> <ul style="list-style-type: none"> • National Environmental Measures (NEMs), comprising strategies, programs, standards and protocols; and • Regional environmental Plans (REPs), comprising terrestrial landscape-scale plans and marine regional plans.
2.4	<p>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 <i>Legislative Instruments Act 2003</i> (Cth.).</p>

2.5	<p>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:</p> <ul style="list-style-type: none"> • develop such a plan for States that fail to do so; and • to accredit State environmental legislation and administrative arrangements through an approved implementation plan.
2.6	<p>The Commonwealth should pursue State cooperation with respect to the development and implementation of national strategic environmental instruments by:</p> <ul style="list-style-type: none"> • first, providing financial assistance to the States to support their implementation efforts, and • second, 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.
2.7	<p>The Commonwealth should adopt specific financial assistance legislation under s.96 of the Constitution that would:</p> <ul style="list-style-type: none"> • 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 and the carrying out of any reform initiatives prescribed therein; and • provide for the establishment of an Environmental Future Fund, the income from which would be used to support such grants to the States .
2.8	<p>The next generation of Commonwealth 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 (over-ride) the operation of State environmental laws concerning:</p> <ul style="list-style-type: none"> • the approval/licensing of new activities involving matters of national environmental significance; • the approval/licensing of other prescribed kinds of new activities; and • 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.

2.9	<p>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:</p> <ul style="list-style-type: none"> • 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; • to allow interested parties to request the Federal Court to order the relevant Commonwealth institution (see Recommendation 14 (i)) to: • undertake the preparation of a particular strategic environmental instrument; • undertake the preparation of an implementation plan where a State has failed to do so with respect to a particular strategic environmental instrument; • 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; and • 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.
2.10	<p>The next generation of Commonwealth environmental legislation, in addition to providing for mechanisms to enable the Commonwealth to pursue a strategic leadership role on environmental matters, should include the following types of other legislative arrangements, as appropriate to the particular context:</p> <ul style="list-style-type: none"> • 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.); • The operation of an overlapping legislative scheme for environmental assessment and approval of activities that may impact significantly on matters of national environmental significance (see also Recommendation 12); and • 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 such an approach (for example, in relation to motor vehicle emissions and ozone regulation).
2.11	<p>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 (see also Recommendation 14(ii)).</p>

2.12	<p>The Commonwealth should continue its involvement in the assessment and approval of activities that may impact significantly on matters of national environmental significance alongside corresponding State processes, with the following reforms to the current process to be adopted:</p> <ul style="list-style-type: none"> • that consideration be given to all environmental impacts (including cumulative impacts) associated with the proposed activity, not just those related to the relevant matters of national environmental significance; • that the current list of matters of national environmental significance be expanded; • 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. • that the exemption for operations covered by a regional forestry agreement be removed; and • that the exclusion of offshore petroleum activities from the EPBC act process be terminated.
2.13	<p>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:</p> <ul style="list-style-type: none"> • a mandatory requirement to conduct a public inquiry whenever a full 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; • for access to independent expertise to be provided to selected community representatives to assist them to present submissions to an EIS-related public inquiry; • 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 • 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 14(ii)).

2.14	<p>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:</p> <ul style="list-style-type: none"> • 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 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; • 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 8); (b) the regulation of activities undertaken by Commonwealth authorities or by other parties on Commonwealth land; (c) the auditing of Commonwealth-required EISs (see Recommendation 13(iv)); and (d) any other environmental regulatory functions that may be appropriately assigned to the authority (see Recommendations 2 and 11); and • 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 Commonwealth Environment Commission on the need to develop new strategic environmental instruments (see Recommendation 9(i)).
2.15	<p>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.</p>

Technical Paper 3: Terrestrial Biodiversity and Natural Resource Management

NUMBER	RECOMMENDATION
3.1	<p>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 bio-regional plans.</p>
3.2	<p>The Commonwealth should ensure completion of the National Reserve System, to provide legal protection for the full range of ecosystems within bioregions and subregions.</p>
3.3	<p>A governance system is required at the Commonwealth and State levels that 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.</p>

3.4	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.
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 in Commonwealth and State legislation.
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 next generation of Australian environmental law should include a clear commitment to effective consultation with, and the active participation of, Aboriginal and Torres Strait Islander peoples in environmental protection measures, cultural heritage and natural resource management. This commitment requires support for robust and culturally appropriate governance for Indigenous protected areas, 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.

Technical Paper 4: Marine and Coastal Issues

NUMBER	RECOMMENDATION
4.1	The Commonwealth should pursue agreement on a nationally-agreed Vision for managing the 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.
4.2	The Commonwealth should lead the implementation of a comprehensive system of marine spatial planning that will take a strategic approach, is ecosystem- and place-based, participatory, adaptive, and integrates the needs of different sectors and agencies, and different levels of government.
4.3	The Commonwealth should lead a national effort to ensure the completion of planning and management for the National Reserve System for Marine Protected Areas
4.4	The Commonwealth should 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, and marine plastic pollution.
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 process and subsequent management of 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	Better engagement with Indigenous groups and recognition of Sea Country is essential or both the marine spatial planning process and the completion of the NRSMPA,, including recognition of the potential for multiple legal and non-legal modalities for Sea Country governance.

Technical Paper 5: Climate Law

NUMBER	RECOMMENDATION
5.1	Ratify the Kyoto Protocol Doha Amendment and re-evaluate the currently weak pre-2020 (second commitment period) target .
5.2	Forego available credits banked from the first commitment period as a way of increasing the domestic emissions reduction effort necessary to meet the second commitment period target.
5.3	Re-evaluate the currently weak post-2020 target in line with the guidance provided by the Paris Agreement and the recommendations of the Climate Change Authority (a 2025 target of a 30% cut from 2000 levels).
5.4	Ambitious emissions reduction targets seeking progressive reductions in emissions up to 2050 when emissions should be close to zero or below zero.
5.5	A national carbon price to provide a cost-effective mechanism for driving economy-wide emissions reductions and technological innovation for clean energy.
5.6	Phase out of fossil fuel energy sources and fossil fuel production by 2050 or earlier to avoid financial risks of stranded assets in an increasingly carbon-constrained world

Technical Paper 6: Energy Regulation

NUMBER	RECOMMENDATION
6.1	Impose a price on carbon (see also rec 5.5)
6.2	Incentivise renewable energy and low-carbon initiatives
6.3	Support the Clean Energy Finance Corporation
6.4	Facilitate energy efficiency
6.5	Removing fossil fuel subsidies
6.6	Adopt supply side measures to limit fossil fuel extraction.

Technical Paper 7: The Private Sector, Business Law and Environmental Performance

NUMBER	RECOMMENDATION
7.1	A general duty on all companies to improve their environmental performance.
7.2	Requirements for companies to develop environmental management systems , sustainability plans, improved environmental reporting and processes for consultation with stakeholders.
7.3	Allow for the establishment of corporate ‘hybrid’ enterprises that blend profit maximisation and community benefit goals.
7.4	Reform the tax system to improve the financial advantages of environmentally responsible practices (including possibility of establishing a national environmental stewardship fund to support environmental innovation and leadership in the private sector).
7.5	Give effect to the United Nations’ Guiding Principles on Business and Human Rights.

Technical Paper 8: Democracy and the Environment

NUMBER	RECOMMENDATION
8.1	Environmental democracy should be underpinned by a broad rights-based framework and in particular: <ul style="list-style-type: none">• the right to a safe and healthy environment;• key procedural environmental rights including the right to information, to public participation and to access to justice in environmental matters.
8.2	Interactions with Aboriginal and Torres Strait Islander communities/First Nations with respect to land and resources should proceed from the principle of requiring their free, prior and informed consent in matters and actions that affect them.
8.3	There is a need to consider further the role and nature of legal frameworks that shift the focus of law from human subjects to a ‘rights of nature’ or ‘wild law’ approach.
8.4	Public integrity in terms of accountability, monitoring and transparency in environmental performance should be reflected in institutional design and practice by building on existing institutions of law and administration, such as courts, tribunals and regulators.

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