LEAN Labor Environment Action Network NATIONAL

Environment Protection Reform Bill and six related bills

The Labor Environment Action Network (LEAN) has campaigned for many years to secure a reform to the Environment Protection and Biodiversity Conservation (EPBC) Act that actually protects the environment and conserves biodiversity. LEAN members gave their time and energy to secure the support of over 500 local Labor branches and other Party units for this reform at the 2018 ALP National Conference. LEAN members mobilised again in 2020 and 2023 to protect this commitment. LEAN campaigned hard within the Party to secure a strong election commitment in 2025 to fully implement the National Platform, particularly on the establishment of an independent federal Environmental Protection Agency (EPA). Rank and file Labor members have demonstrated at three National Conferences their strong commitment to environmental law reform that protects the environment.

In 2018, LEAN secured a commitment in the ALP National Platform to establish an independent Environmental Protection Agency (EPA) and an independent environmental data agency to remove environmental decisions from the political process.

The National Platform commitment is as follows[1]:

> *Labor is committed to stronger environmental laws that better protect Australia's environment and prevent further extinction of native plants and animals whilst facilitating genuinely sustainable development and economic activity. Environmental protection laws will provide for:*
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> *a. a strong and independent Environment Protection Agency;*
> *b. strong, legally enforceable National Environmental Standards;*
> *c. publicly available and transparent environmental data;*
> *d. efficient and effective environmental assessment processes; and*
> *e. independent conservation planning that identifies and prioritises the threats, actions and important habitat for threatened species and ecological communities*.

LEAN considers that, notwithstanding a number of imperfections, these bills essentially deliver that commitment. Moreover, LEAN considers the bills provide a strong basis for future reform.

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[1] Australian Labor Party National Platform p.50; available at https://www.alp.org.au/media/3569/2023-alp-national-platform.pdf

Recommendations:

LEAN recommends the following:

1) that the Government amend the national interest approval power such that a national interest approval must not be disallowed by either House of Parliament;

2) that the Government explicitly deal with land clearing that is currently not subject to Commonwealth oversight, either by removing the exemption for continuous use or by explicitly enforcing the limitations on the exemptions and undertaking compliance actions where activities are shown to have a significant impact on one or more MNES;

3) that the Government commit to provide adequate resources for both the National Environmental Protection Agency (NEPA) and Environment Information Australia (EIA) to enable them to fully carry out their functions, particularly in relation to conservation planning and implementation of 'net gain';

4) that the Senate pass these bills.

LEAN supports the following aspects of the bills:

1) Clear benchmarks based on environmental outcomes

The reforms include a clear definition of unacceptable impacts for each Matter of National Environmental Significance (MNES). The EPBC Act currently says the Minister *may* refuse to approve an action that would have an unacceptable impact,[2] but imposes no obligation to refuse approval on this ground, and provides no definition of what an unacceptable impact is. The reform bills constrain what is now an arbitrary Ministerial power and define a principled basis for its exercise. LEAN expects this to provide greater certainty for business as well as establishing a minimum benchmark for the protection of each MNES.

The reform bills give the Minister the power to make regulations creating outcomes-based national environmental standards. This was the central recommendation of the review of the legislation conducted by Professor Graeme Samuel and delivered over five years ago.[3] The Government has published an initial draft of the MNES standard[4]. LEAN notes the Minister has committed to releasing standards on offsets, First Nations consultation and environmental data.

[2]Division 1A - Decision that action is clearly unacceptable (sections 74B - 74D)
[3] Second Independent Review of the EPBC Act, Professor Graeme Samuel AC, p 2
https://www.dcceew.gov.au/sites/default/files/documents/epbc-act-review-final-report-october-2020.pdf
[4] https://consult.dcceew.gov.au/natl-environmental-standards-mnes

LEAN notes in particular that the reforms require no regression in the making of future environmental standards such that future standards must deliver at least the same level of protection to the environment.

2) ‘Net gain’ for the environment

The current Act requires ‘no net loss’, which has led to decline in environmental values.

Net gain will apply to offsets for any acceptable but still significant impact that cannot be otherwise avoided. It also applies to bioregional plans, strategic assessments for complex projects and conservation planning, to which national environmental standards will also apply.

LEAN notes that the effectiveness of ‘net gain’ in actually leading to a positive environmental outcome will depend heavily on how it is actually applied on the ground in decision making, and the extent to which landscape scale assessments and decisions take into account the cumulative impact of human actions on the environment. LEAN therefore urges the Government to ensure that these considerations are embedded in the implementation of the legislation.

3) The Minister is bound by rules relating to environmental outcomes, not just process

The current Act contains many provisions requiring the Minister to undertake certain processes or to take certain things into account in decision making. It does not, however, define those things in terms of their environmental outcome. The reform bills require that the Minister be satisfied that certain environmental conditions are met, including not causing unacceptable impacts (defined as particular outcomes for each MNES), not being inconsistent with national environmental standards, and generating net gain to the environment.

‘The Minister is satisfied’ is a strong requirement under administrative law. The Administrative Decisions (Judicial Review - ADJR) Act 1977 identifies as a grounds for review that a decision was made where *there was no evidence or other material to justify the making of the decision*[5], and further elaborates that this means

> *the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established.*[6]

Other grounds for review include that a decision maker took into account an irrelevant consideration[7] or failed to take into account a relevant consideration[8].

[5] ADJR s 5 (1) (h)
[6] ADJR s 5 (3)(a)
[7] ADJR s 5 (2)(a)
[8] ADJR s 5 (2)(b)

The Federal Court overturned a 2021 ministerial decision because the Court found that it was impossible for the Minister to have been personally satisfied that the requisite conditions for the decision were met, as the amount of time in which the decision was made was insufficient for the Minister to have properly assessed all the relevant information on which to be satisfied.[9]

LEAN notes therefore that the references to 'the Minister is satisfied' throughout the reform bills amount to a significant constraint on ministerial discretion. As the matters on which the Minister must be satisfied relate to meeting benchmarks for environmental protection and restoration, LEAN considers this to be a significant step forward from the current Act.

LEAN also notes that the requirement that the Minister be satisfied creates a strong line of accountability for decisions that fail to meet the requirements. LEAN considers Ministerial accountability to be a central and valuable feature of Australia's democratic system.

4) <u>The bills establish an independent National Environmental Protection Agency (NEPA)</u>

Under the current Act, the Minister makes all decisions but can delegate actions to the department, and in practice does delegate the vast majority of decisions.

The reforms create a National Environmental Protection Agency, which will have full responsibility for all monitoring, compliance and enforcement under the Act. While the Minister will be able to issue a Statement of Expectations, NEPA will not be subject to Ministerial direction, reducing political involvement. NEPA will have more effective compliance powers than are currently available. In particular it will be able to receive and act on public reports of actions and proposals in breach of the legislation more effectively than is currently possible for the Minister and Department. The Minister can also delegate to NEPA the authority to assess and approve actions under the Act. NEPA is also tasked to advise the Minister on the accreditation of specific state or territory processes and will have oversight over the operation of those processes to ensure they continue to meet Commonwealth standards. **Importantly, NEPA will have an explicit role in advising on future environmental law reform**.

5) <u>States and territories brought under Commonwealth supervision</u>

The current Act already allows the Commonwealth to enter into bilateral agreements with states and territories to deem their processes, including both assessment and approval processes, sufficient to meet requirements under the Act.[10]

The reforms will require that those agreements accredit specific state or territory processes for specified activities, and that the Minister be satisfied that those processes deliver Commonwealth requirements, notably on unacceptable impacts, consistency with specified national environmental standards and delivery of net gain. Accreditation will be monitored by the

[9] McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3) [2022] FCA 258 (23 March 2022)
[10] EPBC Part 5 - Bilateral Agreements (sections 44 -65A)

NEPA, which can review accreditation if the state or territory is not delivering the outcomes required by the Commonwealth.

This system will effectively set the Commonwealth's requirements as the benchmark for states and territories to meet if they are to deliver the streamlined processes that business demands.

6) Better environmental data

The reforms establish an independent data agency - Environment Information Australia - which will ensure that environmental data is collected and publicly available. This is essential for fully informed decision making and conservation planning.

Important features of the EIA's establishment include its ability to request data from persons and institutions, which should enable it to obtain a wide range of relevant data. EIA can also designate data as national environmental data, which means it must be made publicly available.

In the absence of such national data collection and publication, proponents often need to collect data that already exists, leading to unnecessary cost and delay. Conservation planning also depends on good data in a usable form. It is very difficult to protect, let alone restore, what we don't know or understand.

LEAN has campaigned for many years for a national environment commission that can not only collect data, but can also analyse and use such data for the purposes of conservation planning and identification of priorities for biodiversity investment. While EIA is not such a commission, it does represent a first step towards such an approach, should the Government wish to pursue it in the future.

LEAN is seeking two amendments to the reforms:

1) Remove or limit the proposed national interest approval

LEAN sees a strong case for a national interest *exemption* in cases of national emergency, where there is insufficient time to undertake even streamlined environmental approvals. LEAN notes that such a provision exists in the current Act, which covers emergencies affecting nature, or human life and health and institutions, or both.[11] LEAN observes that the provision as drafted in the reform bill makes clear that the intention is to cover genuine emergency situations, even though the Minister's power is not limited.

LEAN acknowledges that the Samuel review recommended a power for the Minister to override environmental protections in the case of a project of significant national interest.[12] Professor Samuel argued that in such cases, the democratic accountability of an elected Minister in an elected Government should override the normal rules for environmental protection.

[11] EPBC section 158
[12] Samuel review p.12

LEAN acknowledges the guardrails around the exercise of this power, where NEPA would need to provide a full environmental assessment and both that assessment and the Minister's reasons for overriding environmental protections would have to be published.

Notwithstanding these guardrails, LEAN sees significant risk of ministerial overreach with a purely executive power to approve long-lasting projects in the name of an ill-defined national interest. LEAN shares the concern of then US Supreme Court Justice Robert Jackson in a famous dissent of the danger that *'the principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need'*.[13]

In the case where a project is of such overriding national interest that it can be allowed to have even unacceptable impacts, LEAN submits that the government of the day should go through an additional process of parliamentary scrutiny. If the national interest approval is to be retained, it should be an instrument disallowable in either House of Parliament. This would not prevent a project from going ahead without environmental protections, but would ensure firstly that such a power is reserved for truly exceptional situations and secondly that the national interest argument is accepted by the parliament.

2) Remove the continuous use exemption

Reform of the continuous use exemption, which has been applied in practice as a near total exemption from any Commonwealth oversight for pastoral and agricultural land clearing, was not mentioned in the Samuel Review. Notwithstanding this, LEAN urges the Government to take the opportunity of the current reform to address it.

The current Act limits the exemption, such that it does not cover enlargement, expansion or intensification of use, or changes in the nature or location of use.[14] The exemption and the way in which it has been applied has led to significant loss of vegetation and critical habitat. Very substantial clearing in recent years has occurred without being referred for any Commonwealth assessment including of how far and whether the exemption in the law actually applies.[15] Unassessed land clearing on this scale generates greenhouse gas emissions which make it harder to meet Australia's emissions reduction targets.[16] The UNESCO World Heritage Committee has identified it as a specific threat to the Great Barrier Reef and its continued status as a World Heritage property.[17]

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[13] Korematsu v. United States, 323 U.S. 214 at p.246 (1944)
[14] EPBC Act s43B(3)
[15] https://canopy.acf.org.au/m/9b73d191fe0dca9/original/ACF-Investigates-Bulldozing-the-Bush.pdf
[16] In 2020 University of Queensland research for the World Wildlife Fund estimated that relaxing regulation of land clearing in Queensland alone risked a 10% increase in national emissions: https://assets.wwf.org.au/image/upload/file_consequences_for_Australian_emissions_of_land_clearing_in_Qld p.2 Also Climate Council, Land clearing and Climate Change: Risks & Opportunities in the Sunshine State https://www.climatecouncil.org.au/uploads/c1e786d5d0fe4c4bc1b91fc200cbaec8.pdf
[17] World Heritage Committee, Decision 47 COM 7B.2 Great Barrier Reef (Australia) https://whc.unesco.org/en/decisions/8726/

The continuous use exemption also enables state government shark netting programs to continue without federal oversight to ensure that they are adequately designed to avoid or mitigate significant threats to endangered species including whales and turtles.[18]

Removal of the exemption would not lead to the automatic end of relevant activities, but would bring them under the supervision of Commonwealth law, with attendant assessment, approval, monitoring and compliance provisions.

Proposed provisions allowing the Commonwealth to accredit state and territory processes that meet Commonwealth requirements would ensure that removal of the exemption would not lead to an unsustainable additional regulatory burden on the Commonwealth. But reform of this provision would ensure that one of the key drivers of decline in species and ecological systems[19] is brought under the same legal oversight as other threats to MNES.

LEAN would support a number of other amendments, but not at the expense of delaying the passage of the bills.

These include more clearly stating the intent to legislate to the full extent of the Commonwealth's constitutional powers over all matters under the Act; and the removal of provisions unnecessarily limiting the use of those powers (for example, the limitation of offences regarding damaging critical habitat only to instances of critical habitat occurring on Commonwealth land).

LEAN considers it anomalous that the application of the water trigger activating a need for assessment and approval under Commonwealth law is restricted to fossil fuel projects, rather than extending to any project likely to have a significant impact on water resources.

LEAN would support the addition within the environment laws of an ancillary liability provision modelled closely on that in the Corporations Act, to provide incentives for banks and consultants to ensure due diligence by their clients to meet their obligations under the Act.

LEAN would support an additional requirement for projects likely to fall within the Safeguard Mechanism to obtain an assessment from the regulator of the likely impact of that project on the mechanism as a whole.

LEAN does not share the view of those who argue that, since climate change is a key threatening process to all MNES, the absence of a 'climate trigger' or 'climate consideration' in the bill renders the rest of the reform meaningless.

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[18] See for example https://www.theguardian.com/environment/2025/oct/29/humpback-whale-calf-dies-off-nsw-coast-while-entangled-in-shark-net

[19] See for example State of the Environment Report 2021: Overview p 56 https://soe.dcceew.gov.au/sites/default/files/2022-07/soe2021-overview.pdf

LEAN notes the Government's argument that it is dealing with climate change through other measures, and its position that ending the approval of new fossil fuel projects would not significantly reduce global greenhouse gas emissions because:

- Australia's exit from the international fossil fuel market would not in itself result in a reduction in fossil fuel use, as users would source from other international suppliers;
- Australia has the opportunity to significantly reduce global fossil fuel use by providing clean energy alternatives in global supply chains, notably in the form of green metals and green hydrogen;
- Australia can only realise its ambition to be a clean energy exporter if global customers, who currently buy Australian fossil fuels, are willing to commit to purchasing clean energy inputs and they will not do so unless Australia can assure them it will continue to meet their energy needs even if its investments in clean energy exports do not bear fruit.

Without commenting on the merits of the Government's argument, LEAN accepts that the Government will not contemplate including a climate consideration in the current environmental law reform. LEAN notes that the previous Labor environment minister did consider the potential climate impact of emissions generated overseas by burning the product of a coal mine in approving its extension, but concluded there was insufficient direct impact on MNES to justify denying the approval.[20]

Moreover, **while climate change is a key threatening process for all MNES, it is not the only threatening process**.

LEAN considers the reform package before the Senate to contain very significant elements that will contribute to the protection and restoration of the environment while also potentially expediting the renewable energy transition in Australia.

LEAN does not support delaying the bills while amendments are considered. It is more than 5 years since the Samuel Review and more than seven years since LEAN successfully included environmental law reform in the Labor National Platform. Meanwhile, environmental decline has continued during that period and will continue in the absence of reform.

Overall, LEAN considers that no legislation is perfect and these bills represent a very significant step forward in securing the protection and restoration of the environment, and a good basis for future reform.

LEAN urges the Senate to pass the bills.

[20] Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2) [2023] FCA 1208 (11 October 2023) https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1208.html; upheld by the Full Federal Court in Environment Council of Central Queensland Inc v Minister for the Environment and Water [2024] FCAFC 56 (16 May 2024) https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/56.html