

THE FUTURE OF AUSTRALIAN ENVIRONMENTAL LAWS

OVERVIEW PAPER

APEEL



The Australian Panel of Experts
on Environmental Law

About APEEL

The Australian Panel of Experts on Environmental Law (APEEL) is comprised of experts with extensive knowledge of, and experience in, environmental law. Its membership includes environmental law practitioners, academics with international standing and a retired judge of the Federal Court. APEEL has developed a blueprint for the next generation of Australian environmental laws with the aim of ensuring a healthy, functioning and resilient environment for generations to come. APEEL's proposals are for environmental laws that are as transparent, efficient, effective and participatory as possible. A series of technical discussion papers focus on the following themes:

1. The foundations of environmental law
2. Environmental governance
3. Terrestrial biodiversity conservation and natural resources management
4. Marine and coastal issues
5. Climate law
6. Energy regulation
7. The private sector, business law and environmental performance
8. Democracy and the environment

The Panel

Adjunct Professor Rob Fowler, University of South Australia – Convenor

Emeritus Professor David Farrier, University of Wollongong

Professor Lee Godden, University of Melbourne

Professor Neil Gunningham, Australian National University

Associate Professor Cameron Holley, University of New South Wales

Dr Hanna Jaireth, IUCN World Commission on Environmental Law (private capacity) – Co-Convenor

Dr Bruce Lindsay, Environmental Justice Australia

Professor Jan McDonald, University of Tasmania

Professor Zen Makuch, Imperial College London

Professor Paul Martin, University of New England

Professor Jacqueline Peel, University of Melbourne

Professor Benjamin Richardson, University of Tasmania

Ms Rachel Walmsley, Environment Defenders Office NSW

The Hon. Murray Wilcox, AO QC, former judge Federal Court of Australia

The Panel acknowledges the expert assistance and advice, in its work and deliberations, of:

Dr Gerry Bates, University of Sydney

Emeritus Professor Ben Boer, University of Sydney

Associate Professor Karen Bubna-Litic, University of South Australia

The Hon. Bob Debus, AM, former Minister for the Environment and Attorney-General (NSW), Minister for Home Affairs (Cth)

Professor Robert Percival, University of Maryland

Ms Nicola Rivers, Environmental Justice Australia

The Hon. Paul Stein, AM, QC, retired Judge of the Land and Environment Court of NSW and Justice of the NSW Court of Appeal

Dr Sarah Waddell, Environmental Law Consultant

Produced and published by the Australian Panel of Experts on Environmental Law, Carlton, Melbourne.

Publication date: April 2017.

Citation: Australian Panel of Experts on Environmental Law, *The Future of Australian Environmental Laws* (Overview Paper, 2017).

Acknowledgements: The Panel expresses its gratitude to the many individuals and organisations who helped this project come to fruition. Camilla Taylor and EDO (ACT) volunteers are thanked for their copyediting assistance and Mandy Johnson for the desktop publishing and layout.

The Panel's mission: a blueprint for the next generation of environmental law

In 2013, a network of leading environmental non-government organisations across Australia established the Places You Love (PYL) Alliance to speak with one voice on key environmental issues. PYL identified the need for a long-term vision for Australia's environmental governance. From this decision, in November 2014, the Australian Panel of Experts in Environmental Law (APEEL) was launched.

APEEL comprises fourteen experts in environmental law, including academics, practicing lawyers and a former Federal Court judge. It represents almost four hundred years of experience in the field of environmental law. It is supported by eight Expert Advisors who serve as reviewers of papers and provide advice. The Panel has been provided with logistical support by PYL but it is independent of the Alliance. Technical papers have been developed by Panel members working in various streams (see further below), then reviewed by the full Panel and one or more of its Expert Advisors, before public release. Following a period of community consultation and engagement with key stakeholders the Panel will release its blueprint for the next generation of environmental law in the middle of 2017.

The need for a new generation of environmental laws for Australia

Australia is one of the most ancient, naturally beautiful and biodiverse places on Earth. It has nineteen World Heritage properties, sixty-five Ramsar wetlands and more than one million species of plants and animals, many of which are found nowhere else on Earth. It is rich in some natural resources, whilst others such as water are scarce. It has a unique natural and cultural heritage that contributes to the nation's wellbeing. Its inhabitants benefit from more than 50,000 years of caring for country by Aboriginal and Torres Strait Islander peoples.

A robust system of environmental management is vital to Australia's future. A critical part of this system is laws that enable the preservation, management and restoration of our common heritage. Whilst there is a limit to what laws alone can achieve, they are crucial for ensuring Australia sustains a healthy, resilient and productive environment.

The current environmental law framework in Australia has emerged incrementally, often in response to particular issues – for instance, the mining of Fraser Island and the proposed damming of the Franklin River. It also has reflected, and been influenced by, the development of international environmental law. It has involved in general a cooperative approach between Federal, State and Territory and local governments.

There is no single source of Australian environmental law – legislation, regulations, codes and policies (overlaid by international 'soft' and 'hard' law) have evolved to address complex conservation and resource use issues. Just at the Commonwealth level, there are over 70 laws dealing with environmental issues, and there are countless more in each State and Territory. Many institutions exist at federal, state, regional and local levels to implement these laws, whilst a diverse range of stakeholders and third parties interact with these laws and institutions, with varying degrees of influence.

Australia faces unprecedented environmental challenges. Australia's key environmental indicators continue to decline. These challenges were recently reflected in the national *State of the Environmental Report 2016*. Some of the persistent problems include a decline in biodiversity, degradation of productive rural land, intensification of development along coastlines and in sprawling cities, and the emerging impacts of climate change. These problems are in addition to the past damage that needs to be repaired.

The complexities of ecological problems, especially those that are cumulative and incremental over long periods, are difficult to regulate. Modern environmental law has enjoyed considerable early success in tackling the 'low hanging fruit', such as reducing point source emissions from large factories, but there are few such easy targets left. The current generation of ecological problems tend to be complex, cumulative and intractable, resisting earlier types of legal solutions. Such problems include invasive species, marine plastic debris, resource scarcities and climate change.

Environmental laws that look sound on paper frequently are not being effectively implemented. Many environmental law principles in Commonwealth and State environmental legislation have been under-utilised, are malleable in their interpretation due to not being precisely defined, and often are overridden by other considerations.

Given the need to address systematically, effectively and creatively Australia's ecological challenges, it is time to consider the need for more effective environmental laws. This is the task APEEL has set itself. In developing proposals for a new generation of Australian environmental laws, the Panel aims to ensure that law is a vehicle to maximise the goal of a healthy and resilient environment that benefits everyone.

APEEL's outputs: the Technical Papers series

Over the past eighteen months, APEEL has drafted eight Technical Papers. These discuss key issues and reform proposals for Australia's environmental laws. These eight Technical Papers deal with:

1. The foundations for environmental law.
2. Environmental governance.
3. Terrestrial biodiversity conservation and natural resources management.
4. Marine and coastal issues.
5. Climate law.
6. Energy regulation.
7. The private sector, business law and environmental performance.
8. Democracy and the environment.

Leading reform ideas in the Technical Papers

These Technical Papers constitute a substantial volume of work and involve complex legal concepts. Together they present fifty-seven specific recommendations. The Panel appreciates that many people will wish to concentrate on specific aspects of environmental law reform and/or the underlying environmental issues, rather than work their way through all eight papers. It therefore has produced this Overview Paper, which is based on a survey of Panel members, to ascertain which recommendations and broader reform themes enjoy strong support across the Panel.

We have identified eight 'core' reform themes that Panel members strongly favoured, and a further four 'supporting' themes for which a reasonable level of consensus was evident. There are two important qualifications to this overview. It does not represent a formal consensus of Panel members, although there was strong consistency in the survey responses. Also, the Panel is yet to formulate its final output and hence the themes identified here are not our final views. These will be guided by feedback received on the Technical Papers.

Core themes

Whilst two of the twelve themes have a substantive, policy focus (nature protection and climate change), the remainder have a broader 'systemic' character. Some propose the foundational elements of the next generation of environmental law (core objects, principles, rights and duties, and environmental democracy). Others address fundamentals of governance (roles, institutions, resources, integrity and information). One theme considers the role of other laws regulating the private sector (corporations, investment and taxation laws).

1. Environmental principles and duties

Note: TP = Technical paper.

References: TP1, Recs 1.2 and 1.3 (design principles), Recs 1.5 and 1.6 (directing principles), Rec 1.4 (duty of care and duty to restore); and TP7, Rec 7.1 (duty on corporations re environment).

Clear environmental principles should underpin the next generation of environmental law. There are two broad categories of environmental law principles:

- First, design principles which provide guidance for the drafting of laws (for example, regarding ‘smart’ regulation, the use of economic instruments and regulatory tools such as EIA, procedural rights, flexible environmental governance, environmental restoration and non-regression); and
- Directing principles to govern how decisions and policies are made (for example, regarding precaution, prevention of environmental harm and environmentally sustainable innovation).

In addition, environmental norms such as a general environmental duty of care and a general duty to restore and rehabilitate damaged environments are needed. There should be a general duty imposed on all companies under corporate law to improve their environmental performance (see also Theme 8 below).

2. Environmental Democracy

Reference: TP 8, Rec. 8.1.

Environmental norms in the form of substantive and procedural rights should be a core component of the next generation of environmental law. These should include:

- a substantive right to a safe and healthy environment; and
- procedural environmental rights (including the right to information, to public participation and to access to justice in environmental matters).

3. National Strategic Leadership on the Environment

References: TP 2, Recs 2.1 – 2.9; see also TP 3, Rec 3.1 and TP 4, Rec 4.2.

The Commonwealth should accept its responsibility to provide national strategic leadership on the environment, beginning with the production of a Statement of Commonwealth Environmental Interests (CEIS) that defines this leadership role, whilst also recognising that the States will continue to regulate for the environment.

The CEIS, and consequential Commonwealth environmental legislation, should provide for:

- the adoption of Commonwealth Strategic Environmental Instruments (CSEIs), comprised of both national environmental measures (strategies, programs, standards and protocols); and regional environmental plans (terrestrial landscape-scale bio-regional plans and marine bio-regional plans) (see also Theme 6 below);
- measures to ensure the implementation of CSEIs by the States and the Commonwealth (in particular, State and Commonwealth implementation plans, backed by direct financial assistance to the States and the potential for State laws to be over-riden by Commonwealth laws where necessary for this purpose); and
- measures to ensure that the Commonwealth performs its strategic role (for example, oversight by a Commonwealth Environmental Auditor and the Federal Court).

4. Commonwealth Environmental Institutions

References: TP 2, Recs 2.14 and 2.15.

Implementation of the next generation of Commonwealth environmental laws should be undertaken by new statutory authorities. Possible structures include:

- (i) a high-level (cf. Reserve Bank) Commonwealth Environment Commission (CEC) whose responsibilities would include administration of the system of CSEIs and a nationally coordinated system of environmental data collection, monitoring, auditing and reporting (see also Theme 10 below);
- (ii) a Commonwealth Environment Protection Authority (CEPA) whose responsibilities would include administration of the Commonwealth's environmental assessment and approval system and the regulation of activities undertaken by Commonwealth authorities or by other parties on Commonwealth land;
- (iii) a Commonwealth Environmental Auditor whose responsibilities would include monitoring and reporting on the performance by CEPA and other Commonwealth bodies of their statutory responsibilities, and providing recommendations to the Commonwealth Environment Commission on desirable new CSEIs; and
- (iv) a Commonwealth Environmental Investment Commission responsible for developing strategies to generate increased private and public sector funding and to maximise community investment (see also Theme 5 below).

5. Resources (funding model for effective environmental governance)

References: TP 2, Rec 2.15; TP 3, Rec 3.6; and TP 4, Rec 4.6.

Effective implementation of environmental laws depends substantially on the provision of adequate resources. Far more human and financial resources are needed and new funding models are required.

The Commonwealth should establish a Commonwealth Environmental Investment Commission to help generate increased funding. These resources should be invested in an Environment Futures Fund which could, for example, support the implementation of CSEIs.

6. Conserving nature (terrestrial and marine)

References: TP 3, Rec 3.1 and TP 4, Rec 4.2.

The Commonwealth should ensure integrated resource governance through landscape-scale planning at bioregional scales (with nationally coordinated frameworks for the implementation of bio-regional plans). Laws should provide for Commonwealth-led marine spatial planning that is ecosystem- and place-based. Both forms of bio-regional plans could be developed by the Commonwealth as CSEIs (see Theme 3 above).

7. Climate Change

References: TP 5, Recs 5.1 and 5.6 and TP 6, Recs 6.1, 6.2 and 6.5.

The next generation of environmental laws will need to provide for a comprehensive national response to climate change. This should include provision for:

- The imposition of a price on carbon;
- The phasing out of fossil fuels by 2050;

- The removal of fossil fuel subsidies; and
- The provision of incentives for renewable energy and low-carbon initiatives.

8. The Private Sector

References: TP 7, Recs 7.1 and 7.6.

To support effective environmental law, reform is required of laws that regulate the private sector for other purposes – for example, laws concerning corporations, investment and taxation. Reforms could include:

- imposing a general duty under corporations law for companies to improve their environmental performance; and
- reforming the tax system to support environmentally responsible practices.

Supporting themes

1. Integrity and Accountability

References: TP 2, Rec 2.14(iii); TP 3, Rec 3.5; and TP 8, Rec 8.4.

Environmental laws require a much stronger focus on their integrity and accountability for performance. This should include new oversight institutions (for example, a Commonwealth Environmental Auditor - see Theme 4), monitoring using independent performance reviews and greater transparency about performance.

2. Data collection, monitoring and reporting

References: TP 2, Rec 2.14 (i)(b); TP 3, Rec 3.4.

It is often asserted that a significant obstacle to effective environmental and natural resources management in Australia is the lack of adequate data. Nationally consistent and better funded data collection, monitoring, evaluation and reporting are needed. A Commonwealth Environment Commission could be responsible for a nationally coordinated approach to these key functions (see also Theme 4).

3. Societal Goal

Reference: TP1, Rec 1.1.

Environmental laws should be underpinned by a societal goal agreed as far as is possible through a wide-ranging, national consultative process. Given the time that has elapsed since the current goal of Ecologically Sustainable Development (ESD) was adopted, and taking into account the adoption in 2015 by the United Nations of the Sustainable Development Goals (SDGs), the Commonwealth should initiate a consultative process to explore a new societal environmental goal for Australia to enhance or replace the current ESD goal.

4. Embracing indigenous perspectives

References: TP3, Rec 3.7, TP 4, Rec 4.7 and TP 8, Rec 8.2.

The next generation of Australian environmental law requires 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 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.

NOTE: with respect to this particular theme, the Panel acknowledges that it has not had an Aboriginal or Torres Strait Islander person as one of its members, and that it has undertaken limited consultation on these matters with appropriate ATSI representatives. We intend to address this matter in the course of producing our final output later this year.

Where to next?

We believe that these Technical Papers provide a strong basis for discussion about the future of environmental law and governance in Australia.

Over the next two months, APEEL will welcome feedback including extended responses, critiques, brief reflections, questions, or proposals. We welcome your input in whatever form you may wish.

APEEL aim to revise our work and produce a final output, providing concluded views on directions for reform, by the middle of 2017.

You can participate via our website at www.apeel.org.au

APEEL



The Australian Panel of Experts
on Environmental Law