

NELA Issues Paper for Commonwealth Environment Minister National Independent EPA

1. Executive Summary

The Australian Government released its *Nature Positive Plan: Better for Business, Better for the Environment (Nature Positive Plan)*, in December 2022.¹ The Nature Positive Plan is the Government's formal response to Professor Graeme Samuel AC's independent review of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) (Samuel Review)*² and the 2021 State of the Environment Report.³ The Government has acknowledged that both reports present 'an alarming story of environmental decline'.⁴

The Australian Government's proposed Environment Protection Australia (**EPA**), outlined in the Nature Positive Plan, materially differs from the Samuel Review proposal of an Environment Assurance Commissioner (**EAC**). The role described for the EAC was, arguably, not adequately robust to perform the compliance and enforcement role required to ensure the integrity of the EPBC Act. NELA welcomes the Australian Government's decision to design and implement a national EPA. In implementing the national EPA, NELA urges the Government to learn from other jurisdictions, both at the state and territory level and overseas (for a comparison of the different state and territory models in Australia, see the **Appendix**). In particular, in this position paper, we highlight the importance of independence, clear decision-making functions and external oversight, as well as the risks of a "CEO without a Board" model. We urge the Government to bolster compliance and enforcement by conferring upon the EPA clear statutory powers and broad compliance tools, backed by appropriate resourcing and a high-integrity EPA culture that actively pursues its objects.

2. Issues

Unlike other comparable democracies such as the United States, Scotland, and New Zealand, there is currently no national EPA in Australia. Instead, national environmental decision-making is made by the Commonwealth Environment Minister under the EPBC Act and enforcement functions are carried out by the Department of Climate Change, Energy, the Environment and Water. A guiding principle of the Nature Positive Plan is to restore 'integrity and trust to systems and environmental laws'. In seeking to realise this principle, the Australian Government has committed to establishing an independent

¹ Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: Better for the Environment, Better for Business* (Report, December 2022) ('*Nature Positive Plan*').

² Samuel Graeme, *Independent Review of the EPBC Act* (Final Report, October 2020) ('*Samuel Review*').

³ Department of Climate Change, Energy, the Environment and Water, *2021 State of the Environment Report* (Report, 2021).

⁴ *Nature Positive Plan* (n 1) iii.

national EPA, which will be responsible for compliance and enforcement as well as issuing permits and licenses under the reformed EPBC Act.⁵ The EPA is proposed to be an independent statutory entity, led by a statutorily appointed CEO, but without a Board.⁶

3. Options analysis

3.1. Independence

Establishing an EPA with a high degree of independence, both from those it regulates and from government, can provide greater confidence and trust that regulatory decisions are made with integrity and in the public interest.⁷ Independence is of particular importance for the regulatory integrity of an EPA because it regulates both government and non-government entities and engages in decision-making that has the potential to significantly impact on the interests of many stakeholders.⁸

Consultation on an independent EPA in Queensland (the only Australian State without an independent environmental regulator), reiterated that public confidence would increase if an independent EPA was established.⁹ While this consultation related to a state EPA, it reflects general community perceptions about the need for independence in environmental decision-making. The Queensland discussion paper also demonstrated that 88% of benchmarked EPAs have been established with an independent organisational form—noting the unique position of the United States EPA as an independent agency existing within the executive branch of government.

EPA independence is also important to establishing a clearer and more effective regulatory framework for Commonwealth land and activities. Section 28 of the EPBC Act requires the assessment of Commonwealth activities that will have or are likely to have a significant impact on the environment. However, Australian Government entities on Commonwealth land remain less regulated than public and private entities that are subject to state environmental protection regulations in areas of pollution control and contamination. For example, the Department of Defence settled, but did not accept liability, for PFAS land contamination in Williamstown claiming it was not technically liable under state laws. The proposed national EPA may therefore achieve a clearer governance structure for Australian Government-owned land and activities.

3.2. Decision-making functions and external oversight

The Samuel Review recommended that an EAC be statutorily appointed to provide independent monitoring, auditing and transparent public reporting on the operational and administrative performance of all parties operating or accredited under the EPBC Act.¹⁰ The EPA that is proposed in the Australian Government's Nature Positive Plan differs from the EAC in that it is also required to undertake assessments and make

⁵ Ibid 28.

⁶ Ibid 28.

⁷ Ibid 35.

⁸ See also OECD, *Recommendation of the Council on Regulatory Policy and Governance* (Report, 2012) 14, which outlines three situations where independent regulatory agencies should be considered, all of which apply in the case of the proposed EPA.

⁹ Department of Environment and Science, *Independent Environmental Protection Agency (EPA) Consultation* (Discussion Paper, May 2022) 22 ('*Independent Environmental Protection Agency (EPA) Consultation*').

¹⁰ Samuel Review (n 2) 118.

decisions about development proposals, including approval conditions.¹¹ The Samuel Review left decision-making functions under the EPBC Act to the Commonwealth Environment Minister or an accredited party.¹²

Where a regulator is given a range of functions, it is important that these are complementary and not potentially in conflict.¹³ The performance of one function should not limit, or appear to compromise, the regulator's ability to fulfil its other functions. The requirement that the EPA provide oversight as to how the proposed National Environmental Standards are being upheld by accredited parties or instruments under the EPBC Act whilst also applying said standards to its own decision-making creates the perception of conflict. The independent monitoring function does not sit comfortably with some aspects of the assessment and decision-making powers.

While the proposed Environment Information Australia may be required to report on the performance of the EPA against national environmental goals, the decision-making of the EPA cannot be subject to independent oversight by the EPA itself. Empowering the EPA with decision-making functions raises legitimate questions as to how the EPA will perform these functions in an accountable manner.

3.3. CEO without a Board: Single-member regulator

The Nature Positive Plan proposes that the EPA be led by a CEO and that, 'given the Minister's role in sensitive environmental decision making', the EPA will not have a statutorily appointed Board.¹⁴ The proposed EPA therefore aligns with the 'single-member regulator' governance structure whereby an individual is appointed as a regulator and makes most substantive regulatory decisions and delegates other decisions to its staff.¹⁵ The proposal for a CEO model without a statutorily appointed Board may be intended to curtail political influence within the EPA. However, reliance on a single-member regulator structure encourages a perception of bias, misconduct, and corruption, and increases the risk that bias, misconduct and corruption will occur because only one person (i.e. the CEO) need be influenced to affect the regulator's decision making.¹⁶ To achieve legitimacy, a regulatory authority must be seen to be, and be free from external influence.

In addition to curing perceptions of improper conduct, and lowering the risk of such conduct, the presence of a Board would ensure the EPA's strategic direction is guided by members with specialist expertise in a range of areas. Board oversight provides for a broader range of skills and qualifications than a single person fulfilling the role of CEO.¹⁷ As can be seen from the **Appendix**, the presence of a Board is not inconsistent with an EPA being subject to Ministerial directions or Ministerial statements of expectations.

¹¹ *Nature Positive Plan* (n 1) 28.

¹² Samuel Review (n 2) 112.

¹³ OECD, *OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators* (Report, 2014) 33 ('*Best Practice Principles for Regulatory Policy*').

¹⁴ *Ibid* 29.

¹⁵ *Best Practice Principles for Regulatory Policy* (n 10) 69.

¹⁶ Environmental Defenders Office, *Implementing Effective Independent Environmental Protection Agencies in Australia* (Report, January 2022) 36.

¹⁷ *Nature Positive Plan* (n 1) 28-29.

3.4. Comparative EPA functions

Each Australian state and territory, apart from Queensland, has implemented some form of structural independence for its environmental regulator, by legislating an EPA or independent governance component within its environmental framework.¹⁸ The Australian state and territory EPAs share similarities with the United States EPA, in that their primary functions have greater emphasis on enforcement, oversight and audit.¹⁹ Notably, the presence of a Board is common to all state and territory EPAs (apart from the ACT).²⁰

At a national level, the United States EPA differs from the proposed Australian EPA as it creates regulations for environmental laws and sets national standards that states enforce through their own regulations.²¹ Indeed, the Nature Positive Plan states that the proposed EPA will not have such power as ‘the minister will retain responsibility for policy, regional planning, and standard-setting activities under national environmental law’.²²

4. Recommendations

4.1. Independence, decision-making functions and external oversight

NELA recommends that the Government ensure the independence of the EPA as a regulator. Independence of a regulator can occur in different ways and is not only derived from the structure of the regulator. A regulator can operate separately while sharing back-office resources with a government department, and conversely, a regulator may be subject to direction despite being a distinct entity (such as a statutory authority or body). Likewise, any regulator can be subject to external influence if its leadership or culture is inclined to be influenced.²³

A degree of structural separation can be beneficial as it provides protection from any perceived or actual influence, and as a result, can also promote a culture of independence and increased confidence for stakeholders and the broader community.²⁴ However, the level of separation between a government and the regulator is not the sole factor determining the level of independence of a regulator. The enabling legislation, in conjunction with the structure of the regulator, will ultimately determine the regulator’s level of independence.

¹⁸ Ibid 5.

¹⁹ See, eg, Environment Protection Authority Victoria, ‘What We Do’ (Web Page, 6 November 2022) <<https://www.epa.vic.gov.au/about-epa/what-we-do>> (‘What We Do’); United States Environmental Protection Agency, ‘Our Mission and What We Do’ (Web Page, 13 June 2022) <<https://www.epa.gov/aboutepa/our-mission-and-what-we-do>> (‘Our Mission and What We Do’).

²⁰ See, eg, United States Environmental Protection Agency, ‘Board of Scientific Counsellors (BOSC)’ (Web Page, 14 February 2023) <<https://www.epa.gov/bosc>>; Environment Protection Agency Victoria, ‘Our Governing Board’ (Web Page, 21 February 2023) <<https://www.epa.vic.gov.au/about-epa/governance/governing-board>>.

²¹ Our Mission and What We Do (n 17). Also note that at a state level, for example, the Victorian EPA develops and reviews environmental policies and regulations with the Department of Environment, Land, Water and Planning: What We Do (n 17).

²² *Nature Positive Plan* (n 1) 29.

²³ *Independent Environmental Protection Agency (EPA) Consultation* (n 23)21.

²⁴ Ibid 21.

To provide for clear separation of responsibilities, it would be appropriate to consider bestowing responsibility for developing and managing the National Environmental Standards (including the making of any new Standards or amendment of existing Standards) and related plans in a new body (such as a Commonwealth Environment Commission). Further, it would be appropriate to consider vesting independent oversight of the EPA's exercise of its own functions in another body, whether already existing (such as the Commonwealth Auditor-General) or a new body (such as an Environment Auditor).

4.2. Reconsidering the “CEO without a Board” model

NELA recommends the proposed “CEO without a Board” model be reconsidered. The creation of a Board would strengthen the role of the EPA, provide standing for the EPA in the eyes of stakeholders and act as a preventative measure against maladministration and corruption. It would also ensure that the EPA is supported by members with specialist expertise on particular matters, beyond the skills and capacity of a single CEO. The creation of a Board would be consistent with the experience of all state and territory EPAs in Australia (except the ACT), bringing the proposed national EPA in line with the experience and expertise of communities, experts and industry stakeholders engaging with environmental regulators around Australia.²⁵ The presence of a Board is not inconsistent with the EPA being subject to Ministerial directions or Ministerial statements of expectations.

4.3. Compliance and enforcement

NELA recommends that clear statutory powers and broad compliance tools be conferred upon the EPA to ensure it is a regulator with teeth. A culture within the EPA which supports their effective use and application should be encouraged. Appropriate funding to ensure the EPA can achieve its regulatory goals is imperative. Regulatory powers and tools could include directives and warnings such as infringement notices and directions orders, and strong compliance and enforcement tools, including strengthened civil and criminal offences. Fundamentally, a culture that supports the use of these tools will be essential to the success of the EPA in restoring trust and integrity in the EPBC Act and the achievement of nature positive outcomes over the coming decades.

National Environmental Law Association
11 July 2023

²⁵ See Appendix.

APPENDIX
Comparison of Australian EPAs Using Authorising Acts

	ACT Environment Protection Authority	NSW Environment Protection Authority	NT Environment Protection Authority	SA Environment Protection Authority	TAS Environment Protection Authority	VIC Environment Protection Authority	WA Environmental Protection Authority
Type of body	Statutory position - public servant ¹	Statutory corporation ²	Statutory corporation ³	Statutory corporation ⁴	Administrative body ⁵	Statutory corporation ⁶	Statutory body ⁷
Statutory objectives	Administer the <i>Environment Protection Act 1997</i> , the objects of which include protect and enhance environment quality and prevent environmental degradation and risk of human health harm ⁸	Protect, restore and enhance environment quality, having regard to ESD; and reduce the risks to human health and prevent environment degradation ⁹	Promote ESD; protection the environment, having regard to ESD; promote effective waste management and minimisation strategies; enhance confidence in environmental protection regime ¹⁰	Administer the <i>Environment Protection Act 1993</i> , the objects of which promoting ESD and ensuring that all reasonable and practicable measures are taken to protect, restore and enhance environment quality ¹¹	Administer the <i>Environmental Management and Pollution Control Act 1994 (TAS)</i> , the objectives of which include protect and enhance environment quality and prevent environmental degradation and risks to human and ecosystem health ¹²	Protect human health and the environment by reducing the harmful effects of pollution and waste ¹³	Use best endeavours to protect the environment and prevent, control and abate pollution and environmental harm ¹⁴
CEO	Public servant is the EPA ¹⁵	Yes ¹⁶	Yes ¹⁷	Yes ¹⁸	Yes (called Director) ¹⁹	Yes ²⁰	No, but there is a Chair ²¹
Board	No	Yes. Board not subject to the control and direction of the Minister ²²	Yes (called "members" of EPA). ²³ Members are not subject to direction or control of Minister. ²⁴	Yes ²⁵	Yes ²⁶	Yes ²⁷	Yes (called "members" of EPA). ²⁸
Ministerial direction	EPA must exercise its functions in accordance with any directions of the Minister, but Minister must not give a direction regarding a matter under parts 11 to 14 of the Act. ²⁹ Minister. Minister may direct an EIS be prepared ³⁰	Minister may give the Authority a written direction if Minister is satisfied it is in the public interest. ³¹ Written direction must be of general nature (unless EPA agrees otherwise) and must not relate to specific matter ³²	EPA is not subject to the direction or control of the Minister in the exercise of its powers or the performance of its functions. ³³	EPA is subject to the direction of the Minister except in relation to the making of a recommendation or report to the Minister; or the performance of its functions under Part 6 or Part 6A; or the enforcement of this Act ³⁴	Minister must provide Board with a ministerial statement of expectation. ³⁵ Board is to conduct its business and affairs consistent with the ministerial statement of expectation and Board's statement of intent. ³⁶ The Director is authorised and required to act independently. ³⁷	No (but Minister has previously issued EPA with a Statement of Expectations) ³⁸	Subject to the Act, neither the EPA nor the Chair is subject to the direction of the Minister. ³⁹ But Minister may direct EPA as to assessing a development proposal ⁴⁰ and Minister may direct EPA to assess referred schemes ⁴¹
Ministerial call-in power (in relation to exercising the approval functions of EPA)	No (but note comments above about Ministerial directions)	Yes - EPA licensing functions ⁴²	No	No (but EPA is subject to Minister's direction as noted above)	No (but EPA is subject to the Ministerial statement of expectations as noted above)	No (but note comment above about Ministerial Statement of Expectations)	No (but note comment above about Ministerial directions)
Accountability	Director-General appoints a public servant as the EPA. ⁴³	Board is to report annually to Minister and Minister must table report in both House of Parliament ⁴⁴	Chair is to report each financial year to Minister and Minister must table report in Legislative Assembly ⁴⁵	EPA is to report annually to Minister and Minister must table report in both Houses of Parliament ⁴⁶	Board must report annually to Minister and Minister must table report in each House of Parliament ⁴⁷	Annual reporting provided under <i>Financial Management Act 1994 (VIC)</i>	EPA is to report after each financial year to Minister and Minister must table report in each House of Parliament ⁴⁸

Note: Queensland does not currently have an EPA but has recently undertaken public consultation about re-establishing an EPA.⁴⁹

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- ¹ *Environment Protection Act 1997* (ACT), s 11.
- ² *Protection of the Environment Administration Act 1991* (NSW), s 5(2).
- ³ *Northern Territory Environment Protection Authority Act 2012* (NT), s 6(2).
- ⁴ *Environment Protection Act 1993* (SA), s 11(2).
- ⁵ *Environmental Management and Pollution Control Act 1994* (TAS), Division 1.
- ⁶ *Environment Protection Act 2017* (VIC), s 356.
- ⁷ *Environmental Protection Act 1986* (WA), s 7.
- ⁸ *Environment Protection Act 1997* (ACT), ss 12(1), 3C(1).
- ⁹ *Protection of the Environment Administration Act 1991* (NSW), s 6(1).
- ¹⁰ *Northern Territory Environment Protection Authority Act 2012* (NT), s 7.
- ¹¹ *Environment Protection Act 1993* (SA), ss 13(1)(k), 10.
- ¹² *Environmental Management and Pollution Control Act 1994* (TAS), s 14(1), Schedule 1 cl 3.
- ¹³ *Environment Protection Act 2017* (VIC), s 357.
- ¹⁴ *Environmental Protection Act 1986* (WA), s 15.
- ¹⁵ *Environment Protection Act 1997* (ACT), s 11.
- ¹⁶ *Protection of the Environment Administration Act 1991* (NSW), s 14.
- ¹⁷ *Northern Territory Environment Protection Authority Act 2012* (NT), ss 36, 37.
- ¹⁸ *Environment Protection Act 1993* (SA), s 14A.
- ¹⁹ *Environmental Management and Pollution Control Act 1994* (TAS), s 18.
- ²⁰ *Environment Protection Act 2017* (VIC), s 373.
- ²¹ *Environmental Protection Act 1986* (WA), s 7.
- ²² *Protection of the Environment Administration Act 1991* (NSW), ss 15, 16(2).
- ²³ *Protection of the Environment Administration Act 1991* (NSW), s 10.
- ²⁴ *Northern Territory Environment Protection Authority Act 2012* (NT), s 9(2).
- ²⁵ *Environment Protection Act 1993* (SA), s 14B.
- ²⁶ *Environmental Management and Pollution Control Act 1994* (TAS), s 13.
- ²⁷ *Environment Protection Act 2017* (VIC), s 361.
- ²⁸ *Environmental Protection Act 1986* (WA), s 7.
- ²⁹ *Environment Protection Act 1997* (ACT), s 93.
- ³⁰ *Environment Protection Act 1997* (ACT), s 94.
- ³¹ *Protection of the Environment Administration Act 1991* (NSW), s 13(1).
- ³² *Protection of the Environment Administration Act 1991* (NSW), s 13(2).
- ³³ *Northern Territory Environment Protection Authority Act 2012* (NT), s 9(1).
- ³⁴ *Environment Protection Act 1993* (SA), s 11(4).
- ³⁵ *Environmental Management and Pollution Control Act 1994* (TAS), s 15.
- ³⁶ *Environmental Management and Pollution Control Act 1994* (TAS), s 15C.
- ³⁷ *Environmental Management and Pollution Control Act 1994* (TAS), s 18A.
- ³⁸ Minister for Energy, Environment and Climate Change, 'Ministerial Statement of Expectations for the Environment Protection Authority (EPA)' (Letter, 27 October 2018).
- ³⁹ *Environmental Protection Act 1986* (WA), s 8.
- ⁴⁰ *Environmental Protection Act 1986* (WA), s 43.
- ⁴¹ *Environmental Protection Act 1986* (WA), s 48E.
- ⁴² *Protection of the Environment Administration Act 1991* (NSW), s 13A.
- ⁴³ *Environment Protection Act 1997* (ACT), s 11.
- ⁴⁴ *Protection of the Environment Administration Act 1991* (NSW), ss 16(3), (4).
- ⁴⁵ *Northern Territory Environment Protection Authority Act 2012* (NT), s 33.
- ⁴⁶ *Environment Protection Act 1993* (SA), s 111.
- ⁴⁷ *Environmental Management and Pollution Control Act 1994* (TAS), s 21A.
- ⁴⁸ *Environmental Protection Act 1986* (WA), s 21.
- ⁴⁹ Department of Environment and Science, 'Independent Environmental Protection Agency (EPA) Consultation' (Web Page, 9 August 2022) <<https://environment.des.qld.gov.au/management/epa-consultation>>.