



NELA's Response to Federal State of the Environment Report 2021

The State of the Environment report is a painful, if not unexpected, update on the status of Australia's biodiversity, ecosystems and climate. The current commentary that the primary reason for this decline is the previous Federal Government's inaction on matters of the environment is not the entire story and is somewhat misleading. This report is about so much more than politics, ecology and conservation science. It should also be read as a failure of the current suite of environmental laws and policies. These laws and policies have failed across multiple jurisdictions, governments, political parties and decades. No one party is to blame.

While the Federal Government has a large level of responsibility and should have done more to protect Australia's biodiversity and ecosystems over the preceding years, it is worth noting that the Federal Government is only responsible for a fraction of Australia's large suite of environmental laws. So while the Federal Government no doubt has a large role to play, it is limited in how it can respond to Australia's declining environment by utilising environmental law. The Australian Constitution allocates power of subject matters between the Federal Government and the States, and the environment has always been a matter for which the States have plenary power. However, the Federal Government signs international treaties concerning the environment (such as the Convention on Biological Diversity and the Ramsar Convention on Wetlands), and so takes on responsibility for implementing those obligations. As a result, primarily under the 'foreign affairs' power, the Federal Government introduced Australia's first Federal piece of environmental legislation in 1999, the *Environment Protection and Biodiversity Conservation Act* (EPBC Act). Environmental laws may be enacted under additional heads of legislative power, but that is a topic for another article.

There are various reasons why environmental lawyers, activists and conservationists have considered the EPBC Act to have failed, and to primarily regulate and allow for development, rather than regulating to minimise environmental harms. However, there appears to be a misunderstanding amongst the general public and non-lawyers as to what the EPBC Act actually does, and the power (or lack of power) it has to protect or conserve the environment. The EPBC Act provides a method for the Commonwealth to have a say in conservation and development matters that are *approved by the States*. It does this only in circumstances where there is a 'national interest' in the development application, and it lists these interests in the EPBC Act as 'matters of national significance'. In short, the EPBC Act can only be used to review a development application at the Commonwealth level if the development application risks one of these matters of national significance in some way. When the EPBC Act was being drafted and consulted upon, 30 different matters of national significance were proposed, out of which only six were incorporated into the final EPBC Act, limiting its effect from the outset. The failure of Australia's key piece of environmental legislation was well documented in the 2020 Samuel review. For example, there is no explicit mention of climate change in the EPBC Act – a glaring omission.

Contrast this to the responsibilities of, and breadth of environmental legislation implemented by, the States and Territories. State and Territory (and local) governments are responsible for all environmental matters, not only ‘matters of national environmental significance’. In Queensland alone there are over 20 pieces of legislation and regulation relevant to environmental planning, conservation and protection. These range from Acts concerning Coastal Management, Economic Development, Fisheries, Protected Areas and National Parks, Forestry, State Development and Public Works, Environmental Offsets and much more. Each of these Acts, and the many others around the country, require the same level of scrutiny and blame, that the EPBC Act has recently received.

It is these laws, and their equivalent and similar laws in other States and Territories, that are often neglected in political messaging. Comprehensive State legislative and policy reform is critical alongside modernising the EPBC Act in line with the recommendations of the Samuel review, and all levels of government must heed the call to action in the State of the Environment Report.

In light of this, NELA is happy to hear that the Federal Government is prioritising reform of the EPBC Act, and implores them to do so in line with recommendations of the Samuel Review, NELA and other environmental experts. However, NELA also notes that the Federal Government must consider how it can support the State and Territory Governments to improve their environmental laws and processes. This includes analysing the connectivity between laws and jurisdictions and considering whether some uniformity across jurisdictions is necessary to avoid the exceptions and ‘back doors’ currently being used at the State level to circumnavigate laws designed for environmental protection. Finally, all levels of government need to urgently undertake enquiries regarding how environmental conservation can be mainstreamed across all areas of governance, not just in typical areas of environmental regulation.

Authored by Dr Katie Woolaston,

A handwritten signature in blue ink, appearing to read 'Katie Woolaston', is displayed on a light grey rectangular background.

NELA Vice-President, on behalf of NELA