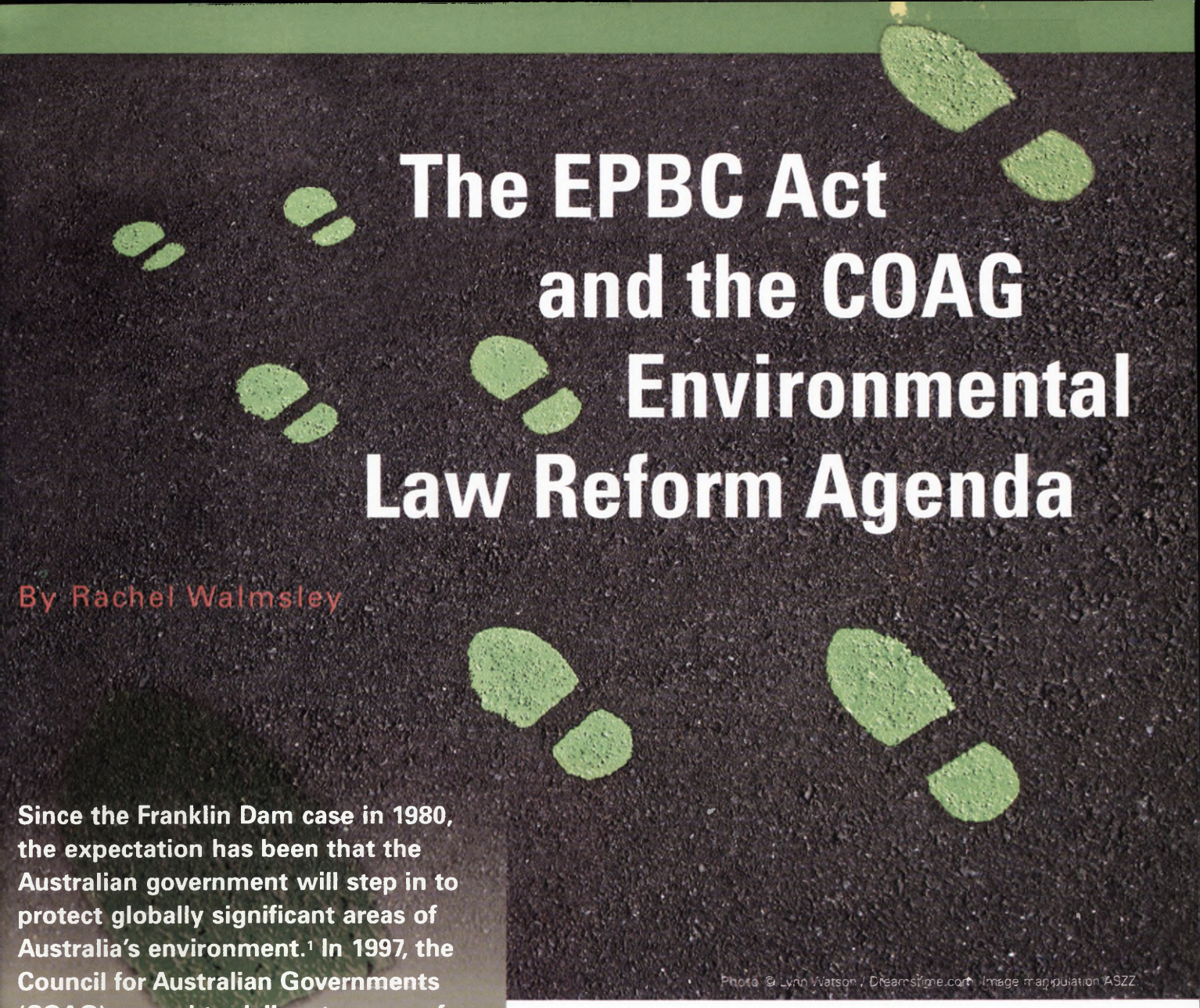
The EPBC Act and the COAG Environmental Law Reform Agenda

By Rachel Walmsley



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Since the Franklin Dam case in 1980, the expectation has been that the Australian government will step in to protect globally significant areas of Australia's environment.[1] In 1997, the Council for Australian Governments (COAG) agreed to delineate areas of environmental jurisdiction, restricting the focus of the Australian government to the protection of matters of national environmental significance, with the states and territories having responsibility for matters of state and local significance.[2] In 2012, a new COAG agenda has emerged, and the role of the Commonwealth government in environmental assessment and development approval is under review. This article briefly examines the current federal environmental law, the reform process, and the role of the Commonwealth in environmental protection.

THE CURRENT NATIONAL ENVIRONMENTAL LAW

The *Environment Protection and Biodiversity Conservation Act* (EPBC Act) was passed by the federal parliament in 1999. Among other things, the Act provides for the Commonwealth to have a role where an action (such as a mine, residential or tourist development, or freeway) is likely to have a significant impact on a matter of national environmental significance.[3] The matters of national environmental significance include world heritage properties, national heritage places, wetlands of international importance (listed under the Ramsar Convention), listed threatened species and ecological communities, migratory species protected under international agreements, Commonwealth marine areas, the Great Barrier Reef Marine Park, and nuclear actions (including uranium mines).[4] In these matters, the Australian government has ratified international agreements[5] and agreed to translate its international obligations into domestic legislation.

Since the EPBC Act was introduced, almost 4,000 actions have been referred for federal consideration.[6] Of the 3,744 referrals where a decision was made, only 7 have been refused >>

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on the grounds of having a clearly unacceptable impact on a matter of national environmental significance. The most recent annual report indicates clear trends. Queensland, NSW and Western Australia produce the greatest number of referred actions, with mining being the most frequent project type being referred.[7] In the vast majority of actions, a federal assessment has been triggered by potential impacts on listed threatened species or ecological communities.[8]

THE CURRENT REFORM PROCESS

The EPBC Act is by no means perfect. From a conservation point of view, under the Act major developments are rarely refused, as mentioned above. Consequently, environment and community groups are seeking to strengthen the provisions of the Act through the formal statutory review process. In contrast, from a business point of view, the Act imposes a layer of assessment and approval additional to state requirements, with time and cost implications.[9] Consequently, the business community is seeking to devolve the Act through a COAG review process.

The Hawke Review

Formally, the 10-year review of the EPBC Act began in 2009 when the Commonwealth government commissioned an independent review (Hawke Review). The Hawke Review Report made 71 recommendations to strengthen and improve the EPBC Act and clarify the scope and purpose of Commonwealth involvement in environmental matters. While the Hawke Review did recommend streamlining some regulatory processes and increasing the use of strategic assessments and bilateral approval processes, it also recommended additional matters of national environmental significance (including an interim greenhouse trigger), establishing a federal Environment Commission, and improved enforcement, including greater access to courts for public interest litigation.[10]

Almost two years later, in July 2011, the Commonwealth government made a formal response to the Hawke Review Report, and rejected a number of recommendations aimed at strengthening the EPBC Act. A clear emphasis in the government response is the aim to 'substantially deregulate and improve efficiency'.[11] The government response identifies a clear preference for a shift from individual project approvals to strategic approaches, streamlined assessment and approval processes, and developing co-operative national standards and guidelines to harmonise approaches between jurisdictions.[12] A significant amendment Bill implementing these changes has now been drafted and has been listed for introduction in the 2012 spring session of the federal parliament.[13]

The COAG review process

Notwithstanding the extensive Hawke Review process, in a move pre-empting the introduction of the amending legislation, COAG announced a concurrent reform agenda. On 13 April 2012, COAG agreed to major reforms of Australia's environmental and development assessment laws.[14] The reforms, proposed by the business community,[15] target priority areas including:

- addressing duplicative and cumbersome environment regulation;
- streamlining the process for approvals of major projects; and
- improving assessment processes for low-risk, low-impact developments.[16]

In contrast to the Hawke Review consultation process (which sought and analysed specific feedback on the operation of the Act including 220 submissions, 119 supplementary submissions, and face-to-face consultations in each state and territory with industry, NGOs, the community, individuals, research groups, academics, individual corporations and government agencies from every level of government), the COAG proposals come from one sector – the business community, as represented by the new COAG Business Advisory Forum.

The practical implementation of the COAG reforms involves the development of national environmental standards that states must meet in order to have their assessment processes accredited through strategic assessments and bilateral agreements with the Commonwealth.

The development of national standards and some other COAG proposals are already taking place independent of parliamentary processes, but how the COAG agenda will influence the EPBC amendment Bill is yet to be seen.

COAG has set an ambitious timeline for its reforms to be put in place. Standards are to be developed by December 2012 and bilateral agreements are to be in place by March 2013. The aim is a more streamlined assessment process whereby states undertake comprehensive assessments of development proposals. Those state assessments are supposed to take into account matters of national significance so that there is no need for assessment by the Commonwealth.

There are now, therefore, two concurrent reform processes occurring that involve the same regulatory area and raise critical questions about the ongoing role of the Australian government in protecting the environment. It is interesting that recently, notwithstanding the government's adoption of the COAG reforms, the Federal Minister for the Environment has been publicly scathing of state-based approval processes. Minister Tony Burke referred to the state-based assessment of the Alpha Coal Project in central Queensland as 'shambolic' in its failure to meet Commonwealth standards.[17] Instead of

indicating that dual approval requirements are 'cumbersome' or 'unnecessary' as suggested by the business sector, the Alpha Coal case study clearly reinforces the need for rigorous Commonwealth government oversight and the maintenance of high national standards, particularly where an iconic matter of national significance such as the World Heritage-listed Great Barrier Reef is involved.

No one is advocating that Australia needs a duplicative or inefficient regulatory system. However, on closer analysis, the government response to the Hawke Review, the imminent amending legislation, and the proposed COAG reforms raise some interesting legal questions.

WHAT IS THE ROLE OF THE COMMONWEALTH IN ENVIRONMENTAL PROTECTION?

The independently produced 2011 *State of the Environment Report* states:

> 'Our environment is a national issue requiring national leadership and action at all levels... The prognosis for the environment at a national level is highly dependent on how seriously the Australian government takes its leadership role.'[18]

In contrast, the Business Advisory Forum, through COAG, is seeking effectively to remove the Commonwealth from the development assessment process by delegating these powers to the states. This is flawed for at least six reasons.

First, the question of whether the Australian government can devolve its international responsibilities to the states remains *completely* open. States are not mandated to act in the national interest,[19] let alone in the international interest. It is the Australian government that is the signatory to the relevant agreements, and subject to international scrutiny. If the Commonwealth were to vacate the sphere of environmental regulation completely, there might be civil society actions (both legal actions and protests) to hold the government to account in meeting its international obligations.

Second, states may have inherent conflicts of interest where they are in fact the proponents of major projects, or stand to benefit financially from large mining or infrastructure projects.[20]

Third, both the Hawke Review and the COAG reforms proposed increased use of bilateral agreements and accreditation of state processes, but in some jurisdictions, environment and planning laws are under review.[21] The COAG agenda has significant reform implications for environment and planning legislation in all jurisdictions. Where laws are in a state of flux, the Commonwealth will not be able to accredit relevant processes by the March 2013 COAG deadline.

Fourth, what constitutes COAG's 'national environmental standards' is not defined. The reforms indicate a preference for 'environmental risk and outcomes based standards'.[22] Outcomes-based standards do not necessarily include essential processes such as community consultation, >>

independent objective environmental assessment, accountability and review. There is ample evidence to show that highly discretionary planning schemes without process standards do not achieve good environmental outcomes or community support.[23] The amendments necessary to ensure that comprehensive process standards and outcomes standards are in place before accreditation of a state's assessment processes can occur will take significant legislative action and time in each jurisdiction.

Fifth, the current EPBC Act allows accreditation of certain elements of state planning schemes, and both the Hawke Review and COAG reform processes indicate a preference for increased use of strategic environmental assessment for particular areas and issues. Accreditation will therefore not be of whole state Acts, and there are dangers in partial accreditation. While a state might have a plan in place for the development of a certain area, if the plan sits within broader planning legislation that does not have adequate process standards, the environmental outcomes might not be achieved.[24]

Finally, it can be argued that justifying reforms on the basis of reducing time and cost for development proponents is inconsistent with the principles of ecologically sustainable development (to which all Australian governments are formally committed through various legislation and agreements), including principles of intergenerational equity. The long-term environmental consequences of fast-tracking major projects (including those projects with the greatest potential impacts on carbon emissions, water usage, land clearing, pollution, human health, biodiversity and cultural heritage) have not been quantified, nor is there a clear process for accounting for these impacts on environmental assets and ecosystem services.

It is an interesting time to analyse the role of the Commonwealth in environmental law. It is yet to be seen which policy reform drivers behind the two concurrent reform processes will prevail. There is a real risk that the momentum created by the COAG agenda will subsume the statutory review process findings and that the considered expert advice of the Hawke Review will be relegated under the push to fast-track assessment of major projects. It remains to be seen how the COAG proposals will influence the imminent EPBC amendment Bill and the future role of the Commonwealth in protecting Australia's unique environment. ■

Notes: **1** While there is no explicit head of power for environment in the Australian Constitution, it is accepted that the Australian government may validly become involved in state-based environmental actions on the basis of Australia's international obligations and the external affairs power in the Constitution: see *Commonwealth v Tasmania* (1983) 158 CLR 1. **2** See *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment*, Council of Australian Governments, November 1997. **3** The EPBC Act also deals with other areas such as fisheries management and wildlife trade (for example, Part 13A – International movement of wildlife specimens, ss303BA–303GY). **4** See EPBC Act, Chapter 2, Part 3, Division 1, ss12-25. **5** For example: *Convention on Biological Diversity*, *Convention for the Protection of the World Cultural and Natural Heritage* (World Heritage Convention), *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (RAMSAR Convention), *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn Convention), the Australia/Japan *Agreement for the Protection of Migratory Birds and Birds in Danger of IExtinction and their Environment* (JAMBA), and the Australia/China *Agreement for the Protection of Migratory Birds and their Environment* (CAMBA). **6** A total of 3,982 project referrals have been received by the Commonwealth government since the Act was passed in 2000. Department of Sustainability, Environment, Water, Populations and Communities, *Annual Report 2010-2011*, p143. **7** *Ibid*, pp144-45. **8** 130 out of 240 controlled actions in 2010-11 related to listed threatened species or ecological communities. *Ibid*, p148. **9** See *Discussion Paper for the COAG Business Advisory Forum*, 10 April 2012, Business Council of Australia, p6; and A Macintosh, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): An Evaluation of Its Cost-Effectiveness', *Environmental and Planning Law Journal*, 26, 2009, p337. **10** *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, 30th October 2009. **11** *Australian government response to the report of the independent review of the EPBC Act*, Department of Sustainability, Environment, Water, populations and Communities, Australian government, 2011, p3. **12** *Ibid*. See *Legislation proposed for introduction in the 2012 Spring Sittings* (14 August – 29 November 2012). Department of the Prime Minister & Cabinet, p9. **14** COAG Communique, 13th April 2012. **15** *Discussion Paper for the COAG Business Advisory Forum*, 10 April 2012, Business Council of Australia. **16** COAG Communique, 13th April 2012. Other target areas include rationalising carbon and energy efficiency programs and reforming the national energy market – these are not addressed in this article. **17** See: www.abc.net.au/news/2012-06-05/burke-labels-reef-mine-approval-a-shambolic-joke/4053188. **18** State of the Environment 2011 Committee, *Australia state of the environment 2011—in brief. Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities*, 2011, p9. **19** A prime example of this is the Murray-Darling Basin, where vested state interests over many decades have led to a significant decline in the condition of the Basin. **20** For example, the assessment process for the Scoresby Freeway project near Melbourne was found to be flawed in *Mees v Roads Corporations* [2003] FCA 306. See also the Queensland Government approval of the Shoalwater Bay rail line and coal terminal proposal in 2008 (which was part of a $5.3 billion project to produce 25 million tonnes of coal a year for export) despite clearly unacceptable impacts on the Shoalwater and Corio Bay Ramsar wetlands and Commonwealth lands (the Shoalwater Bay Training Area). **21** For example, the NSW government released *A New Planning System for NSW Green Paper* in July 2012. This is to be followed by a White paper and Exposure Bill in the coming months, with legislation not expected until 2013. **22** COAG Taskforce Consultations, Environment Stakeholder Forum, 4 July 2012, Briefing Note, p3. **23** For example, the former Part 3A of the NSW *Environment Planning & Assessment Act* 1979 that has been subject to an ICAC review and has now been repealed. **24** For example, see Accreditation of the Western Sydney Growth Centres by the Commonwealth Government (See *Decision to endorse, the program for development of the South West and North West Growth Centres in Western Sydney*, NSW by Hon Tony Burke, 20.12.2011, under s146 EPBC Act, available at: http://www.environment.gov.au/epbc/notices/assessments/pubs/endorsement-sydney-growth-centres.pdf) While the Australian government intervened to ensure that the plan for the area contained improved offset requirements for federally listed species, the relevant state legislation, the *Threatened Species Conservation Act* 1995 (NSW), specifically ousted judicial review of the plan.

Rachel Walmsley *is Policy & Law Reform Director, EDO NSW,*
EMAIL *rachel.walmsley@edonsw.org.au*