One stop shop for environmental approvals a messy backward step for Australia

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The new Australian Government is establishing what it calls a "one stop shop" for environmental approvals. This principally involves entering approval bilaterals with State and Territory governments to accredit their decisions as satisfying any approval requirements under the Environment Protection and Biodiversity Conservation Act 1999 (Cth). The Federal Environment Minister claims that the one stop shop "will slash red tape and increase jobs and investment, whilst maintaining environmental standards". Whether the claimed benefits are achievable is an open question and there are serious potential problems with the proposed system. There is remarkably little evidence to support the claim that significant time and costs savings will be achieved by the policy. It also undermines one of the key functions and benefits of the EBPC Act in practice – to provide an appropriate level of oversight for State government decisions. This problem will be exacerbated if the Australian Government breaks its pre-election commitment to retain power for decisions on State government projects.

INTRODUCTION

In 1983 the Australian Government famously won the power to directly oversee State government decisions on environmental issues in the *Tasmanian Dam Case*.[1] The decision in that case on the constitutional power of the Commonwealth[2] to enact legislation to fulfil Australia's international legal obligations was cemented in later decisions of the High Court.[3] In the decade that followed, Australia entered wide-ranging international environmental treaties that, when combined with the principles stated by the High Court, gave the Commonwealth a virtual plenary power to make laws to protect the environment.[4] This built considerably on the powers the Commonwealth was recognised to have to indirectly protect the environment, such as under the corporations power.[5]

Yet this fundamental change in the constitutional power of the Commonwealth to protect the environment did not result in a shift of the historical reality that State, Territory and local governments licensed and regulated the vast bulk of activities impacting on the environment. Reflecting what Phillip Toyne called, "the reluctant nation",[6] the Commonwealth continued to handle only a tiny fraction of the day-to-day licensing and approval of activities impacting on the environment. The States continued to jealously guard their control of activities within their borders and the Commonwealth only occasionally challenged them in the cooperative federalism model of

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[1] *Commonwealth v Tasmania* (1983) 158 CLR 1. See Bates G, "The Tasmanian Dam Case and its Significance in Environmental Law" (1984) 1 EPLJ 325; Peel J and Godden L, "Australian Environmental Management: A 'Dams' Story" (2005) 28(3) UNSWLJ 668.

[2] Under s 51(xxix) (the external affairs power) of the Commonwealth *Constitution*.

[3] *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232 (the *Wet Tropics Case*); and *Victoria v Commonwealth* (1996) 187 CLR 416 (the *Industrial Relations Act Case*) at 487-488.

[4] Considering, for example, the wide obligations imposed by Art 8 of the *Convention on Biological Diversity 1992* to conserve biodiversity and ecosystems. See also Peel and Godden, n 1 at 670-675.

[5] See Crawford J, "The Constitution and the Environment" (1991) 13 *Sydney Law Review* 11.

[6] Toyne P, *The Reluctant Nation: Environment, Law and Politics in Australia* (ABC Books, Sydney, 1994).

federal-State relations that prevailed.[7] This was reflected in the 1992 *Intergovernmental Agreement on the Environment* (IGAE), which attempted to delineate for the first time the responsibilities and interests of the three levels of government with a marked retreat from an assertive Commonwealth role.[8] In 1997 the then newly-elected Howard Government concluded the *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment with the State and Territory Governments*.[9] This agreement adopted a similar, non-assertive approach as had the IGAE.

In 1999 the Commonwealth consolidated and expanded its main environmental laws in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) based on the Howard Government's Heads of Agreement.[10] The Act's main approval system protects a list of matters of national environmental significance (MNES) provided in Pt 3 of the Act, such as: World Heritage properties; Ramsar wetlands; National Heritage places; listed threatened species and ecological communities; listed migratory species; nuclear actions; and Commonwealth marine areas.[11] In 2013 the list of MNES was extended to include a water trigger for mining or coal seam gas (CSG) projects impacting on a water resource.

The operation of the EPBC Act has been quite extensively reviewed and analysed, including an inquiry in 2008-2009 known as the "Hawke Review".[12] There has been a healthy debate in the academic literature on the Act's operation and effectiveness.[13] While the Act is not a panacea and has done little to address serious threats to MNES such as climate change,[14] some major environmental outcomes have been achieved under it, such as the 2009 refusal of the Traveston Crossing Dam proposed by the Queensland Government.[15]

The EPBC Act created over-arching national legislation but did not fundamentally change the reality that in Australia's federal system of government the majority of environmental laws (including planning, mining and petroleum laws) are State and Territory laws. In fact, the number of projects assessed under the EPBC Act is miniscule in comparison to the number of projects assessed under State and Territory laws. For example, in 2008-2009 there were 438 referrals received under the EPBC

[7] Toyne, n 6, p 177; Peel and Godden, n 1 at 675.

[8] Toyne, n 6, p 180; Peel and Godden, n 1 at 676-678.

[9] Council of Australian Governments, *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment with the State and Territory Governments* (COAG, Canberra, 1997).

[10] See Peel and Godden, n 1 at 676-678; and Kennedy M, Beynon N, Graham A and Pittock J, "Development and Implementation of Conservation Law in Australia" (2001) 10(3) RECIEL 296 at 299-300.

[11] See generally, the Department of Environment website at http://www.environment.gov.au; Bates G, *Environmental Law in Australia* (8th ed, Butterworths, Sydney, 2013), Ch 3; and Fisher DE, *Australian Environmental Law: Norms, Principles and Rules* (2nd ed, Lawbook Co, Sydney, 2010), pp 446-449.

[12] Hawke A, *The Australian Environment Act: Final Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (DEWHA, Canberra, 2009).

[13] Including Ogle L, "The EPBC Act: How Workable Is It?" (2000) 17 EPLJ 468; Kennedy et al, n 10; Macintosh A, "Why the EPBC Act's Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives" (2004) 21 EPLJ 288; Macintosh A and Wilkinson D, "EPBC Act – The Case for Reform" (2005) 10 (1) AJNRLP 139; McGrath C, "Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act" (2006) 23 EPLJ 165; Macintosh A and Wilkinson D, "Evaluating the Success or Failure of the EPBC Act: A Response to McGrath" (2007) 24 EPLJ 81; Godden L and Peel J, "The EPBC Act: Dark Sides of Virtue" (2007) 31(1) MULR 106; Early G, "Australia's National Environmental Legislation and Human/Wildlife Interactions" (2008) 11(2&3) JIWLP 166; Bonyhady T and Macintosh A (eds), *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, Sydney, 2010); Tridgell S, "Evaluating the Effectiveness of the EPBC Act: 2008-2012" (2013) 30 EPLJ 245.

[14] McGrath C, "Review of the EPBC Act", paper prepared for the 2006 Australian State of the Environment Committee (DEH, Canberra 2006), http://www.environment.gov.au/node/22544.

[15] Discussed later in this article and described in Waters L, "Queensland and the Traveston Dam", Ch 6 and Bonyhady T, "Postscript", pp 273-283, in Bonyhady and Macintosh (eds), n 13; Wasimi SA, "Planning for a Large Dam Project: The Case of Traveston Crossing Dam" (2010) 24 *Water Resource Management* 2991; and de Rijke K, "The Symbolic Politics of Belonging and Community in Peri-urban Environmental Disputes: The Traveston Crossing Dam in Queensland, Australia" (2012) 82(3) *Oceania* 278.

Act.[16] In comparison, the total number of development applications received under State and Territory planning laws was 251,837.[17] The number of EPBC Act referrals represents less than 0.2% of the number of development applications under State and Territory planning laws.

Consequently, the importance of the EPBC Act as an over-arching environmental framework for Australia needs to be tempered with recognition that it is State and Territory planning, mining and petroleum laws where the bulk of detailed controls on land-use and resource management reside. Any consideration of the costs and delays that the EPBC Act creates for development in Australia needs to be understood in that context. The sheer enormity of the State and Territory approval systems is rarely acknowledged in criticisms of the EPBC Act.

In this context, unsurprisingly there is a great deal of overlap between the matters protected by the EPBC Act and what is protected and regulated under State and Territory laws. The Commonwealth could legislate to override State and Territory environmental laws but there has never been sufficient political support for such an approach. The EPBC Act is a compromise that formalises a dual regulatory approach for environmental protection with the States and Territories. While calling it a "dual regulatory approach" there are, in practice, three tiers as State and Territory governments devolve many environmental decisions and regulatory functions to hundreds of local governments. There were 565 local councils in Australia in December 2011,[18] so the number of government decision-makers involved in environmental regulation in Australia is far more than one Commonwealth, six State and two mainland Territory governments suggests.

Understanding that the EPBC Act exists in a federal system of government in which State and Territory laws provide a much more extensive regulatory system, the major role of the Act should be seen as providing oversight on State, Territory and local government decisions on activities impacting on the environment. The oversight role of the Commonwealth is particularly important where a project is proposed by a State or Territory government because in those cases the State or Territory governments can have difficulty in independently assessing a proposal. State, Territory and local governments can, and in many cases do, make sound assessments of projects even of their own proposals, but this is not always the case. Projects such as the Traveston Crossing Dam proposed by the Queensland Government can get caught up on the local political hurly-burly. This important role of the Commonwealth is discussed further below with reference to several case studies.

As the political furore surrounding the *Tasmanian Dam Case* demonstrates,[19] the oversight role of the Commonwealth for State decisions can generate very heated disputes between the Commonwealth and State governments where they disagree on a particular project. Some State governments and industry groups continue to strongly resent the Commonwealth's role in environmental approvals. For instance, in 2011 the then Queensland Opposition Leader, Campbell Newman, said the use of the EPBC Act to stop major projects approved by the State government was "intolerable for a sovereign state … to deal with any more".[20] In 2013 Newman, by now the Queensland Premier, called repeatedly for the Commonwealth to remove itself from regulating activities in the States and for Australia to engage in "competitive federalism" rather than cooperative federalism. As an example, one newspaper reported:

[16] Department of the Environment, Water, Heritage And The Arts, *Department of the Environment, Water, Heritage And The Arts Annual Report 2008-09 – Volume 2* (DEWHA, Canberra, 2009), p 45. Note: this figure includes residential development, infrastructure, mining, petroleum and offshore projects.

[17] Local Government and Planning Ministers' Council, *First National Report on Development Assessment Performance 2008/09* (COAG, Canberra, 2010), http://www.coag.gov.au/node/82. Note: this figure does not include mining, petroleum or offshore applications. There is no similar total figure available for such applications under State and Territory laws.

[18] Australian Bureau of Statistics, *Year Book Australia 2012* (ABS, Canberra, 2012).

[19] Toyne, n 6, Ch 3, provides a good account of this.

[20] Hurst D, "Are State's Rights Being Trampled in Rush for Environmental Protection?", *Brisbane Times* (24 June 2011).

> CAMPBELL Newman has rejected the concept of "co-operative federalism", saying intergovernmental relations should start with every state's right to seek a competitive advantage over each other, using lower taxes and less regulation to attract business and secure investment.[21]

The Queensland Premier's concept of States' rights reflects the reserve powers doctrine that was rejected by the High Court nearly a century ago as the wrong basis upon which to interpret the division of powers in the Australian *Constitution*.[22] It reflects a very narrow view of Australia's federal system of government that sees the Commonwealth's involvement in environmental approvals as illegitimate. This reflects what James Crawford called the "imagined Constitution" rather than the "real Constitution".[23]

This is a brief historical, legal and political background to the policy of the new Australian Government to create a "one stop shop" for environmental approvals in Australia. The policy was announced by the Coalition (of the Liberal and National parties) while in opposition before it won the Australian federal election in September 2013. It principally involves the Commonwealth entering approval bilaterals that accredit decisions of State and Territory governments as satisfying any approval requirements under the EPBC Act. The Queensland and New South Wales governments agreed to negotiate and enter an approval bilateral with the Commonwealth virtually immediately after the federal election and the remaining States and Territories agreed to do so at a meeting of the Council of Australian Governments (COAG) in December 2013.[24] Memoranda of understanding have been signed with all State and Territory governments to create approval bilaterals within 12 months but at the time this article was written the draft agreements had not been released publicly.

This article examines the legislative context of the "one stop shop" policy and its claimed benefits both to inform public debate on the policy and to lay a foundation for later analysis as the policy is rolled out in 2014 and beyond. It begins by summarising the legislative context and recent pushes for and against approval bilaterals. It then examines some of the conflicting public statements about what the one stop shop policy will involve before critically evaluating the policy.

LEGISLATIVE CONTEXT

Assessment bilaterals vs approval bilaterals

The starting point for understanding the legislative context for the one stop shop policy is that, subject to some exceptions,[25] actions that have, will have or a likely to have a significant impact on a matter protected under Pt 3 of the EPBC Act require approval under the Act and are termed "controlled actions". This process has three stages: referral, assessment and approval, under Pts 7, 8 and 9 respectively.

The EPBC Act recognised from the outset that State and Territory laws existed and there was a need to minimise duplication between the two levels of government. To do this Pt 5 of the EPBC Act provided for bilateral agreements between the Commonwealth and the State and Territory governments.[26] These are political agreements that are not directly enforceable.[27] There are two types of bilateral agreements:

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[21] McKenna M, "State Against State: Campbell Newman's Federalism", *The Australian* (12 April 2013).

[22] In *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129 (the *Engineers' Case*).

[23] Crawford, n 5 at 11-13.

[24] See the Department of the Environment, "One stop shop for environmental approvals" website at http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop.

[25] Such as ss 43A and 43B of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

[26] See generally, Hawke, n 12, pp 64-66.

[27] McGrath C, "Bilateral Agreements – Are They Enforceable?" (2000) 17 EPLJ 485.

- **assessment bilaterals**, which accredit State and Territory environmental impact assessment (EIA) laws to be substituted for the EIA processes provided in Pt 8 of the EPBC Act but which retain the final approval power for the Commonwealth Environment Minister under Pt 9;[28] and
- **approval bilaterals**, which accredit approvals by State or Territory governments given in accordance with an accredited management arrangement or authorisation process to have the effect of satisfying any approval requirements under Pt 9 of the EPBC Act.[29] If an action is approved by a State or Territory government in accordance with an approval bilateral, the person taking it does not need to refer it under Pt 7 of the EPBC Act, it does not require approval under Pt 9 of the Act, and there is no offence committed against Pt 3 of the Act by taking the action.

Assessment bilaterals have been agreed between the Commonwealth and all State and Territory governments and are now commonly used where a project is determined to be a controlled action requiring assessment under the EPBC Act.[30]

Approval bilaterals were one of the most controversial aspects of the EPBC Act during its passage;[31] however, until very recently, the power to enter them remained largely dormant. To enter an approval bilateral, Pt 5 of the EPBC Act requires a management arrangement or authorisation process to be accredited by the Federal Environment Minister and laid before each House of Parliament, where it may be disallowed. In practice, disallowance would only occur in a Senate that the government of the day did not control. Part 5 of the EPBC Act also sets out broad requirements for consultation and for the Minister to be satisfied that Australia's relevant international obligations will be met in entering a bilateral agreement. Part 5 also gives the Minister powers to suspend or cancel a bilateral agreement if the Minister is satisfied that it has not or will not be complied with.

Only one approval bilateral was entered in the first decade of the Act's operation, but it illustrates how an approval bilateral can operate. It related to actions impacting upon the Sydney Opera House undertaken in accordance with an approved management plan that was given effect under the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act).[32] While the approval bilateral was in effect, actions that were authorised by the New South Wales Government in accordance with the management plan under the EPA Act were not required to be referred under Pt 7 of the EPBC Act and did not require approval under Pt 9 of the EPBC Act. This bilateral agreement expired in 2010 and was not renewed.

Relationship with State and Territory approvals

As noted above, any valid analysis of the potential savings that might be achieved through approval bilaterals must address the fact that the EPBC Act exists in a federal system of government in which State and Territory laws often provide much more extensive, lengthy and costly approval requirements. Two case studies of large coal mines in Queensland illustrate this point.

Wandoan Coal Mine case study

The Wandoan Coal Mine in Queensland provides a good case study of a large project assessed under the EPBC Act and State laws. This open-cut thermal coal mine was proposed by Xstrata Coal to produce approximately 846 million tonnes of product coal over a 30-year period.[33] Assuming an average thermal coal price of $100 per tonne gives the resource a gross value of around $84.6 billion.

[28] See *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 47.

[29] See particularly *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 29 and 46.

[30] The agreements are available on the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) website http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements.

[31] See Kennedy et al, n 10 at 301-302; and Ogle, n 13 at 473-474.

[32] *Sydney Opera House agreement between the Australian Government and the State of New South Wales*, 2005, http://www.environment.gov.au/node/18545.

[33] Coordinator-General, *Wandoan Coal Project: Coordinator-General's Evaluation Report on the Environmental Impact Statement* (Coordinator-General, Brisbane, November 2010), p 3.

Appendix 1 shows a timeline of the assessment of the mine under the EPBC Act and State laws.[34] The mine:

- began its approval process under State laws in May 2007;
- was referred under the EPBC Act in June 2008;[35]
- was assessed concurrently under the EPBC Act and State laws under an assessment bilateral;
- was approved under the EPBC Act in March 2011 – a process that took nearly three years; and
- still has not received approval under all State laws as at 20 April 2014 – a process that has taken nearly seven years and has not yet finished.

The 14-volume environmental impact statement (EIS) prepared for the mine also illustrates that the State-level requirements for consideration of impacts (on groundwater, etc), were far more extensive than the consideration of MNES relevant to the EPBC Act.[36] The MNES considered were listed threatened species and communities. Impacts on threatened species were required to be addressed under the State laws, so the EPBC Act added comparatively very little to the EIS process.

The State-level approvals for the mine also involved a merits review hearing of public objections in the Land Court of Queensland[37] and a judicial review challenge by neighbouring landholders. In contrast, there were no court hearings regarding the EPBC Act approval for the mine.

Alpha Coal Mine case study

The Alpha Coal Mine proposed in central Queensland is a similar example where Commonwealth approval under the EPBC Act has been completed years ahead of State-level approvals. This large, open-cut thermal coal mine is proposed to be constructed by Hancock Coal and GVK in the Galilee Basin to produce 839.6 million tonnes of product coal over 30 years.[38] Assuming an average thermal coal price of $100 per tonne gives the resource a gross value of around $84 billion.

Appendix 2 shows a timeline of the assessment of the mine under the EPBC Act and State laws.[39] The mine:

- began its approval process under State laws in September 2008;
- was referred under the EPBC Act in December 2008;[40]
- was assessed concurrently under the EPBC Act and State laws under an assessment bilateral;
- was approved under the EPBC Act in August 2012 – a process that took nearly four years; and
- still has not received approval under all State laws as at 20 April 2014 – a process that has taken nearly six years and has not yet finished.

As for the Wandoan Coal Mine, the six-volume EIS prepared for the Alpha Coal Mine and associated rail corridor also illustrates that the State-level requirements for consideration of impacts (on groundwater, surface water, air quality, terrestrial ecology, etc) were far more extensive than the consideration of the impacts on MNES relevant to the EPBC Act.[41] The MNES considered were impacts on World Heritage properties, National Heritage places, listed threatened species and communities, and listed migratory species. In comparison to the extensive and costly analysis of matters such as groundwater considered under the State laws, the EPBC Act added comparatively very little to the EIS process.

[34] The author acted as a barrister in the Land Court of Queensland regarding this mine and the timeline was compiled from various documents presented in evidence in that case. A recent enquiry to the Queensland Government confirmed that the mining lease application has not yet been decided.

[35] EPBC referral 2008/4284.

[36] The EIS is available on the Wandoan Project website at http://www.wandoancoal.com.au.

[37] See *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd* [2012] QLC 013. The author acted as a barrister for one of the objectors in that case.

[38] Taylor C, *Expert Report to the Land Court* (Unpublished report, URS, Brisbane, 2013), p 15.

[39] The author is currently acting as a barrister in the Queensland Land Court regarding this mine and the timeline was compiled from various documents presented in evidence in that case.

[40] EPBC referral 2008/4648.

[41] The EIS is available on the GVK Hancock website at http://gvkhancockcoal.com.

The State-level approvals for the mine also faced a merits review hearing of public objections in the Land Court of Queensland, which involved extensive consideration of the groundwater impacts of the mine.[42] The mine requires a further approval for a water licence under the *Water Act 2000* (Qld) that has not yet been applied for. That approval process allows another merits review hearing in the Land Court and may take over 12 months to decide. In contrast, there were no court hearings regarding the EPBC Act approval for the mine.

The parallel Commonwealth and State processes for these mines are broadly typical of many large projects, although the timeframes involved are normally much shorter. Provided that a proponent refers their project under the EPBC Act at a similar time as lodging any necessary applications under State laws, even where a project is deemed a controlled action a decision on the EPBC Act process can be expected before the State approvals are granted.

To the extent that these mines are representative of assessment under the EPBC Act, their facts suggest that it does not materially delay projects and only very marginally adds to the assessment costs in the context of the total project beyond those associated with State or Territory approvals. Care should be taken in extrapolating from these two case studies, however, as they both involve large projects in the same sector in the same State. Projects referred and assessed under the EPBC Act are highly variable and the costs and delays for proponents are likewise highly variable.

There is no doubt that, unlike these two mines, in some cases the EPBC Act assessment adds significantly to the costs and delays of projects beyond the cost and delay associated with State and Territory approvals. Several case studies are presented below of projects where this has occurred, such as the Gunns Pulp Mill. This was also found in a survey of proponents of referrals under the EPBC Act from 2000-2009, which was conducted by Andrew Macintosh.[43] While many responses indicated little cost or delay was caused by the EPBC Act, some responses to the survey claimed significant costs and delays due to it.[44] Some respondents also made very hostile criticisms of the administration and effectiveness of the Act generally.[45]

While recognising that some projects experience significant costs and delays due to the EPBC Act, in evaluating the extent to which the one stop shop policy will reduce such costs and delays it must be born in mind exactly what the policy proposes to do. This is examined below after discussing the recent pushes for and against approval bilaterals.

RECENT PUSHES FOR AND AGAINST APPROVAL BILATERALS

A failed push under the Gillard Government

State governments and the business community have lobbied for greater use of approval bilaterals for several years;[46] however, a strong push was initiated by a discussion paper from the Business Council of Australia (BCA) in April 2012.[47] This push can be seen as part of a concerted strategy by business lobbyists to belittle and attack environmental law as "green tape".[48] This term has become a negative political slogan that represents a sustained attempt to whittle away the protections that have been established, particularly over the past 20 years, by the green safety net of environmental law.[49]

[42] See *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12. The author acted as a barrister for one of the objectors in that case.

[43] Macintosh A, *The EPBC Act Survey Project: Preliminary Data Report* (Australian National University, Canberra, 2009).

[44] Macintosh, n 43, pp 67-93.

[45] Macintosh, n 43, pp 82-91.

[46] See the submissions made to the Hawke Review, in Hawke, n 12, pp 65-67.

[47] Business Council of Australia (BCA), "Discussion Paper for the COAG Business Advisory Forum" (BCA, Melbourne, 10 April 2012), pp 5-6, http://www.bca.com.au/Content/101965.aspx.

[48] For example, Hepworth A, "Companies Urge War on Environmental 'Green Tape'", *The Australian* (11 April 2012); Crowe D and Hepworth A, "PM tells Premiers to Cut Green Tape to Free Capital", *The Australian* (12 April 2012); Wroe D, "States to Get Say in Abbott Green Tape Plan", *Sydney Morning Herald* (20 April 2012); Hepworth A, "Business Leaders Warn of 'Green Tape' Cost Blowouts", *The Australian* (3 July 2012).

[49] See McGrath C, "Mending Holes in the Green Safety Net" (November/December 2012) Issue 113 *Precedent* 4.

In response to the BCA proposal, the then Australian Government led by Prime Minister Julia Gillard of the Australian Labor Party (ALP) launched through COAG a process to develop standards to accredit State and Territory laws under the EPBC Act for approval bilaterals.[50] Little detail on exactly how the proposed system would operate was publicly released. The department then administering the EPBC Act developed a vaguely-worded "Draft Framework of Standards for Accreditation", which was released to the States and Territories in July 2012 and later published with an added explanatory preface.[51]

The process became quickly bogged down and ultimately faltered. In December 2012 the then Prime Minister was reported to have informed COAG that the process for accrediting approval bilaterals under the EPBC Act had been placed on hold due to concerns that existing State processes did not always meet the federal protection standards and governments were advised that this raised the risk of legal challenge, potentially increasing uncertainty for business.[52] Some States are understood to have been prepared to take over about 90% of environmental decision-making, while others wanted to take on only about 25%, resulting in a potential mishmash of laws around the nation.[53] The documents concerning these issues were never released publicly.

The then Prime Minister was reported in December 2012 to have asked the States to come back to the federal government with a unified national position about which environmental decision-making powers should be handed over and how they would legislate their pledge to meet high federal standards.[54] No further progress was made before the ALP lost the federal election in September 2013.

Greens' Bill to remove power for approval bilaterals

In response to the active consideration of approval bilaterals, in November 2012 Senator Larissa Waters from the Australian Greens Party (the Greens) introduced into the Senate the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*. The Bill was intended to remove the power to enter into approval bilateral agreements under the EPBC Act. It proposed to do so by removing s 46, which provides a power to the Minister administering the EPBC Act to enter into approval bilateral agreements with the States and Territories, and an agency of a State or Territory,[55] and making other consequential amendments. The Bill did not propose to alter the assessment bilateral provisions of the EPBC Act.

The Bill to abolish approval bilaterals was considered and rejected by a Senate committee in which the ALP and Coalition held a 5:1 majority over the Greens.[56] While the committee recommended the Bill not be passed, the report by the committee chair, Senator Cameron, on behalf of the three ALP senators, noted repeatedly the lack of substantive evidence presented in support of

[50] See the COAG website at http://www.coag.gov.au/node/313.

[51] Department of Sustainability, Environment, Water, Population and Communities, *Draft Framework of Standards for Accreditation and Statement of Environmental and Assurance Outcomes* (SEWPaC, Canberra, 2012). Discussed in Godden L and Peel J, "Cooperative Federalism and the Proposed COAG Reforms to the EPBC Act" (Nov 2012) *Australian Environment Review* 395.

[52] Taylor L and Coorey P, "Bid to Cut Green Tape Bogs Down in Detail", *Sydney Morning Herald* (6 December 2012). See also a departmental note to similar effect recorded in the report by the Senate Environment and Communications Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (Australian Senate, Canberra, March 2013), p 11, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2010-13/epbcfederalpowers/index. Note: the author made a submission and gave evidence to this inquiry.

[53] Taylor and Coorey, n 52.

[54] Taylor and Coorey, n 52.

[55] The definition of "agency" in s 528 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) would include a local government at least where it is created as a body corporate established under a State or Territory law.

[56] Senate Environment and Communications Legislation Committee, n 52. While the Committee membership lists only two Coalition senators, a third senator is listed as an author of the Coalition's section of the report.

claims of inefficiency, duplication and uncertainty caused by the EPBC Act or that it was hampering approval processes or investment or imposing unreasonable costs.[57]

Senator Cameron rejected the claims that the Commonwealth powers of approval in the EPBC Act are the cause of inefficiencies, delays and loss of income to project proponents.[58] He considered that there is confusion as to what is actually causing delays or uncertainties in the assessment and approval processes. He was persuaded by the evidence that assessment processes at the State and Territory level were in some circumstances causing delays, rather than processes at the Commonwealth level.[59]

While agreeing with the recommendation to reject the Bill, the two Coalition members of the Senate Committee, Senator Birmingham and Senator McKenzie, and a third Coalition senator who joined in their comments, Senator Ruston, took a very different view of the evidence. They relied heavily on a cost-benefit analysis by Deloitte Access Economics of assessment processes under the EPBC Act.[60] They concluded that this report established a benefit from reduced delays due to the EPBC Act estimated as $135.1 million in 2012-2013, increasing to $288.4 million in 2020-2021 in net present value terms. This, they said by reference to the report, represents a total gain to society of $1.19 billion.[61]

The Deloitte Access Economics analysis relied upon by the Coalition senators to show substantial costs that could be avoided due to bilateral agreements and other measures to reduce delays due to the EPBC Act is, however, clearly invalid. To calculate these "costs", the analysis used data supplied by the department administering the EPBC Act of delays in project assessments under the Act beyond statutory timeframes.[62] The analysis mentioned in passing, but did not acknowledge, the significance of the fact that it did not include, "time spent during environmental approval processes in state/territory or local governments".[63] Attributing all delays under the EPBC Act assessment as adding actual costs to proponents without considering State and Territory approvals is patently wrong. As the case studies of the Wandoan Coal Mine and Alpha Coal Mine given above illustrate, State-level assessments can take much longer than EPBC Act approvals.

The time taken for assessment of a project under the EPBC Act does not delay the project if it cannot proceed because of outstanding State or Territory approval requirements. The authors of the Deloitte Access Economics report seem to have little understanding of the reality of the assessment systems faced by proponents, where State and Territory approvals can take much longer than the EPBC Act. There are other major problems with relying on this analysis as evidence of savings that may be achieved through approval bilaterals. For instance, it did not separate projected savings due to improving existing assessment bilaterals, or savings due to creating new approval bilaterals, so it is not possible to know what cost savings can be attributed to approval bilaterals. However, the central error of attributing the time taken for assessment under the EPBC Act as an actual delay and cost for projects without considering State and Territory approvals clearly invalidates it and it should not be relied upon.

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[57] Senate Environment and Communications Legislation Committee, n 52, pp 15, 20 and 26-27.

[58] Senate Environment and Communications Legislation Committee, n 52, p 26.

[59] Senate Environment and Communications Legislation Committee, n 52, p 26.

[60] Deloitte Access Economics, *Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the Environment Protection and Biodiversity Conservation Act 1999* (report prepared for the Department of Sustainability, Environment, Water, Population and Communities, Canberra, 20 April 2011), http://ris.finance.gov.au/files/2011/09/EPBC-Act-Environmental-Impact-Assessment-CBA.pdf.

[61] Birmingham S, MacKenzie B and Ruston A, "Coalition's Additional Comments" in Senate Environment and Communications Legislation Committee, n 52, p 33.

[62] Only EPBC Act data is used throughout the report but see in particular, Deloitte Access Economics, n 60, pp 27-28 (s 5.4) and p 30 (Table 5.11).

[63] Deloitte Access Economics, n 60, p 28.

A twist added by the water trigger

A late twist in the story of approval bilaterals under the previous Gillard Government was added in amendments to the EPBC Act to create a new trigger in ss 24D and 24E of the EPBC Act to protect water resources from mining and CSG projects. The water trigger was championed by Independent MP Tony Windsor. He successfully moved an amendment to the government's Bill creating the water trigger,[64] which tacked on a small amendment to s 46 of the EPBC Act to prohibit State or Territory governments being accredited to make the final decision on actions assessed under the water trigger. A senate inquiry into the water trigger referred to this as the "Windsor amendments" and it was supported by the ALP and Greens senators but opposed by the Coalition senators.[65]

Productivity Commission support

In late 2013 the Productivity Commission published a lengthy report authored by two commissioners, Jonathan Coppel and Warren Mundy, reviewing Commonwealth, State and Territory assessment processes for major projects.[66] It compared Australia's system to the United States, Canada, New Zealand and the United Kingdom and found that none of them stood out as overall performing better than in Australia.[67] It considered Commonwealth, State and Territory approval processes for major projects and found a mixture of good and bad practices. It supported the proposal for approval bilaterals as part of a move towards a "one project, one assessment, one decision" system but suggested a two-way approach for bilaterals that is very different to any previous proposal for bilateral agreements of:

> Initially target concluding agreements [for approval bilaterals under the EPBC Act] in areas that are less environmentally sensitive and where there is better information about impacts, such as urban environments, rather than trying to secure a comprehensive nationwide agreement. The Commonwealth Government could maintain control over matters where it would be unlikely that the community would accept it exiting the field. In such cases, the States and Territories should accredit Commonwealth processes where they address the same matter.[68]

However, in weighing-up the arguments for and against approval bilaterals the Productivity Commission relied on the 2011 cost-benefit analysis by Deloitte Access Economics without recognising the central error in that report, noted above, that the claimed costs due to the EPBC Act did not account for delays under State and Territory approvals. The Commission noted that "it had not seen estimates of the savings from bilateral approval agreements" other than the analysis by Deloitte Access Economics.[69] Clearly, this analysis was an important factor in its reasoning. "Nevertheless", it said, "savings seem possible" from smaller unnecessary delay costs and reduced compliance costs from fewer inconsistencies or overlaps between approvals issued under the EPBC Act and State and Territory legislation.[70] The reliance placed by the Commission on the Deloitte Access Economics analysis without recognising that that analysis was invalid undermines even these tentative findings.

ONE STOP SHOP POLICY

Following the stalled attempt in 2012 by the Gillard Government to create approval bilaterals with all States and Territories, the Coalition parties, then the federal Opposition, announced their "one stop shop" policy in the lead-up to the federal election in September 2013. Since being announced, it has

[64] The *Environment Protection and Biodiversity Conservation Amendment Bill 2013*.

[65] Environment and Communications Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment Bill 2013 [Provisions]* (Australian Senate, Canberra, May 2013), pp 19 and 41. Note: the author made a submission and gave evidence to this inquiry.

[66] Productivity Commission, *Major Project Development Assessment Processes* (Productivity Commission, Canberra, 2013), http://www.pc.gov.au/projects/study/major-projects.

[67] Productivity Commission, n 66, p 45.

[68] Productivity Commission, n 66, p 15.

[69] Productivity Commission, n 66, p 191.

[70] Productivity Commission, n 66, pp 191-192.

been referred to in various policy documents as the "one-stop-shop", the "one-stop shop" and, most recently, the "one stop shop". The most recent term is used here.

The Coalition's policy regarding approval bilaterals was explained by its environment spokesperson, Greg Hunt, in a news report in May 2013 discussing the opposition's blueprint to repeal the carbon price. The news report said the following about the bilateral agreements:

> Mr Hunt said the federal opposition was having "very serious discussions" with all of the Coalition states to quickly implement one-stop-shop agreements for environmental approvals.
>
> "Some matters would be reserved where the commonwealth would be the one-stop shop but overwhelmingly it would be the states," Mr Hunt said.
>
> The areas where the federal government would retain ultimate control include offshore commonwealth waters, nuclear matters and projects for which the state was the proponent.[71]

Based on what was in this news report, the Coalition planned to enter approval bilaterals with the States to accredit their decisions as satisfying any approval requirements under the EPBC Act for most things but not all. While the news report referred only to "States", undoubtedly the same policy would be applied to the Territories. Under its policy, the Commonwealth would retain the final decision-making power at least for decisions concerning:

- offshore Commonwealth waters;
- nuclear matters; and
- projects for which the State or Territory is the proponent.

Were the one stop shop policy to be implemented in this way, the last of these criteria would alleviate the most significant concern about approval bilaterals because it is projects where a State or Territory is the proponent that they have the greatest difficulty being independent for.

"Projects for which the State is the proponent" presumably would include projects where a government-owned corporation (GOC) is the proponent or a joint venturer. This should mean that something like the Gordon-below-Franklin Dam, which was proposed by the Tasmanian Government's Hydro-Electric Commission (a GOC), would be caught, as would a project like the Traveston Crossing Dam and the Victorian Government's trial of alpine grazing, discussed further below. If projects for which a State or Territory GOC is the proponent were not excluded from approval bilaterals then that would be a very serious problem for any semblance of independent decision-making under the EPBC Act.

An example of a past large project that might not be caught by this sort of list would be the Gunns Pulp Mill, discussed below, which was proposed by a private company. Such a project might be handed over to the Tasmanian Government to assess. This project, however, illustrates some of the complexity and uncertainty that the new system would generate as one of the major impacts of the pulp mill was the discharge of its effluent into Bass Strait off Launceston into offshore Commonwealth waters. Would the State or the Commonwealth, therefore, assess it under the Coalition policy?

In June 2013 further details of the proposed one stop shop policy were revealed in a media release from the then Opposition Leader, Tony Abbott, but no mention was made of issues that the Commonwealth would retain control over. He claimed the one stop shop would "dramatically simplify the approvals process across federal, state and local jurisdictions, while maintaining environmental standards" and create a "single approvals process for environmental assessment and approvals under the [EPBC Act]" via the State system with a "single lodgement and documentation process".[72] In July and September 2013 the Coalition released formal policies containing commitments to a "one stop shop" but making no mention of areas where the Commonwealth would retain control, such as State projects.[73]

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[71] Lloyd G, "Libs Plan to Dismantle Carbon Laws", *The Weekend Australian* (18-19 May 2013), pp 1 and 4.

[72] Abbott T, "The Coalition's policy for a One-Stop-Shop for Environmental Approvals" (Media Release, 26 June 2013).

[73] Coalition, *The Coalition's Policy to Boost Productivity and Reduce Regulation* (Coalition, Canberra, July 2013), p 28; and Coalition, *The Coalition's Policy for Energy and Resources* (Coalition, Canberra, September 2013), p 5, http://www.liberal.org.au/our-policies.

Since winning the federal election on 13 September 2013, the Coalition's one stop shop policy has become its policy in government; however, in an interview on ABC Radio shortly after the election, Greg Hunt, by now the Federal Environment Minister, reaffirmed the commitment that the Commonwealth will not accredit the States to decide actions involving offshore Commonwealth waters, nuclear actions, or projects for which State governments are "likely to have a significant conflict of interest" as the proponent.[74]

On 16 October 2013 the Minister issued a press release about the government approving the framework for the one stop shop policy "to streamline environmental approvals".[75] In it, he claimed that the one stop shop "will slash red tape and increase jobs and investment, whilst maintaining environmental standards". No mention was made of retaining any classes of approvals for the Commonwealth to decide.

The pre-election commitments and the Minister's post-election commitments to retain certain decisions to the Commonwealth, including over State projects, are not found in any of the media releases or other documents published by the government on the one stop shop. This includes the Memoranda of Understanding (MoUs) that have now been signed between the Commonwealth and State and Territory governments to create approval bilaterals within 12 months.[76] In relation to approval bilaterals, the Queensland MoU stated:

> The Parties will pursue a comprehensive approval bilateral agreement to accredit Queensland to undertake approvals under the EPBC Act, to be concluded by 18 September 2014. A priority will be having the approval bilateral for major projects "agreed in principle" by the end of April 2014, followed by the statutory consultation periods.
>
> The Parties agree that the broadest range of approvals will be pursued under an approval bilateral agreement.[77]

The reference in the MoUs to "a priority will be having the approval bilateral for major projects" suggests that there may be a staggered approach where approval bilaterals first cover only major projects before attempting to cover "the broadest range of approvals". This may simply be clumsy language or it may reflect the proposal by the Productivity Commission, noted above, for a staggered approach for bilaterals initially targeting approval bilaterals under the EPBC Act in selected areas rather than trying to secure a comprehensive nationwide agreement.[78] However, the reference to "major projects" is found only in the Queensland and Victorian MoUs. All of the other MoUs refer instead to a "comprehensive" approval bilateral with most saying it will cover the "broadest range of approvals". There is no mention in any of the MoUs of the Commonwealth retaining approval powers in any area and the language of the MoUs suggests the opposite.

It is worth noting also in passing that there are some positives in the MoUs that should improve the efficiency of the EPBC Act approvals system marginally. For instance, the MoUs all state that for assessment bilaterals the "goal is to lift the use of a single accredited assessment process to 100 per cent".[79] That is a good thing and where the bulk of cost savings can be expected to occur as the experience under assessment bilaterals is that they generally increase the efficiency of the approval processes and reduce any duplication. It is in the assessment stage that the bulk of costs and delay are incurred. In addition, some of the renewed commitments in the MoUs to improve cooperation between the Commonwealth, States and Territories in areas such as avoiding inconsistent conditions are welcome and should reduce inefficiencies marginally.

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[74] ABC Radio, *Bush Telegraph* (13 September 2013), http://www.abc.net.au/radionational/programs/bushtelegraph/environmental-laws/4978050. Note: the author was also interviewed for this program.

[75] Hunt G, "One-stop Shop Approved by Government" (Media Release, 16 October 2013), https://www.liberal.org.au/latest-news/2013/10/16/one-stop-shop-approved-government.

[76] Available on the Department of Environment website, n 24.

[77] Commonwealth of Australia and State of Queensland, *Memorandum of Understanding* (18 October 2013) at [5.1.1] and [5.1.2].

[78] Productivity Commission, n 66, p 15.

[79] See paragraph [4.1.2] of each MoU.

In February 2014, as part of the one stop shop policy, the Minister transferred assessment of offshore petroleum and greenhouse gas activities under the EPBC Act to an independent Commonwealth statutory authority, the National Offshore Petroleum Safety and Environmental Management Authority.[80] This authority administers the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). The Minister endorsed assessment under that Act as a class of actions that satisfy approval requirements under the EPBC Act, using the powers in Pt 10, ss 146 and 146B, of the EPBC Act.[81]

In April 2014 the Commonwealth published standards for accrediting State and Territory approval systems under approval bilaterals.[82] These standards largely reflect the broad requirements imposed by the EPBC Act for approval bilaterals. However, they also propose that State and Territory governments will be able to screen applications in a similar way to Pt 7 of the EPBC Act.[83] The standards appear to contemplate State and Territory processes that closely mirror the EPBC Act process, including public notification of referral documents.

At the time of the writing of this article, none of the draft approval bilateral agreements had been released publicly. At this stage, therefore, it is uncertain whether the Commonwealth will accredit States and Territories to make all of the decisions they lawfully can (noting that the "Windsor amendments" to s 46 of the EPBC Act prevent this for the water trigger) or retain for itself the areas the Minister had previously said would be retained or some other approach.

A CRITICAL EVALUATION OF THE ONE STOP SHOP POLICY

While the extent to which the States and Territories will be accredited under the one stop shop policy to make the final decision on controlled actions remains uncertain, the policy can be critically analysed at this stage based on what is known. In summary, this analysis suggests that:

1. approval bilaterals will severely undermine the Commonwealth's oversight role;
2. approval bilaterals will have little benefit for efficiency and costs;
3. the "one stop shop" is a misleading rhetorical label only and under it there will still be dozens of major, separate environmental approval systems and hundreds of decision-makers in Australia;
4. the claim that the one stop shop will "maintain environmental standards" is vacuous as the decisions to be made by the States and Territories involve highly discretionary value judgments;
5. the one stop shop may well create greater uncertainty for government, business and the community than exists under the current system.

Approval bilaterals will severely undermine Commonwealth's oversight role

Handing approval powers to State governments in approval bilaterals would severely undermine one of the key functions and benefits of the EPBC Act in practice – to provide an appropriate level of oversight on State government-sponsored projects. Commonwealth laws prior to the EPBC Act created a number of direct and indirect federal powers to oversee State government decisions regarding the environment and resource management.[84] These laws were manifested in a variety of ways, such as the dispute in the mid-1970s over the Commonwealth's refusal to grant export licences for sand mined from Fraser Island even though the mines had been approved by the Queensland Government.[85] The EPBC Act made more comprehensive and direct what can be called a "healthy

[80] See the NOPSEMA website at http://www.nopsema.gov.au/legislation-and-regulations/environment.

[81] See the Department of the Environment website at http://www.environment.gov.au/node/25719.

[82] Department of the Environment, *Standards for Accreditation of Environmental Approvals under the EPBC Act* (Department of the Environment, Canberra, 2014), http://www.environment.gov.au/resource/standards-accreditation-environmental-approvals-under-environment-protection-and.

[83] Department of the Environment, n 82, p 20 at [65]-[71].

[84] See Crommelin M, "Commonwealth Involvement in Environmental Policy: Past, Present and Future" (1987) 4 EPLJ 101.

[85] *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1; Crommelin, n 84 at 104.

federal tension" by requiring projects undertaken or supported by State and Territory governments to pass through an independent Commonwealth approval process that is directed towards environmental protection not merely resource development.[86]

While State and Territory governments make many sound decisions that properly balance development and environmental protection, there is no question that this is not always the case. At least in some cases the integrity of the assessment of the impacts of projects undertaken or supported by State and Territory governments have been and continue to be poorly assessed by their own environment departments who dare not stand in the way of politically powerful projects or a government's overtly pro-development agenda.[87] The EPBC Act imposes a general tier of federal decision-making that applies to most large-scale projects including dams, roads and mines. State and Territory governments cannot control this process or direct the Commonwealth Environment Minister to approve their pet projects without adequate assessment. The EPBC Act is far from perfect and it is not a panacea to all environmental problems in Australia but it performs an important role in overseeing State and Territory government approvals.

A rare, first-hand account of how Commonwealth oversight of State government decisions improves those decisions was given in a submission to one of the recent Senate inquiries concerning the EPBC Act. Doug Campbell explained in his submission:

> Pre retirement I had upper middle management responsibilities to provide assessment and determination recommendations for land use change applications over almost half of NSW. Applications were largely, but not only, clearing of native vegetation. At different times I also had compliance responsibilities for the same part of NSW and occasionally for the entire State.
>
> A large, perhaps majority, proportion of my colleagues at levels from local District Officers to Senior Executives were "client captured" i.e. so immersed in the culture of the applicants that they deliberately or unintentionally acted on behalf of the applicant rather than the greater public good or society at large. Sometimes the answer must be NO.
>
> Often Commonwealth intervention, or awareness that intervention was possible, was the only ameliorant reducing bad client captured determinations and encouraging compliance actions to inspect compliance with conditional consents and taken action where necessary.
>
> My experience was repeated elsewhere in NSW and other States/Territories. The benefits of Commonwealth oversight at significant case level or at broader classes of applications or geographic levels was important regardless of Parties in power at State and Commonwealth levels and regardless of whether governments were from the same or different Parties.[88]

The danger of regulatory capture, as Campbell's experience describes, is well-known in the literature on regulatory design[89] and this is another reason for retaining a truly independent level of decision-making that cannot be controlled by one government – which itself is one of the main benefits of a federal system of government. Paul Grabosky and John Braithwaite made a general finding in their landmark 1986 study of the behaviour of Australian business regulators "that the greater the relational distance between the regulator and regulatee, the less powerful the regulatee, the greater the tendency to use formal sanctions".[90] Put another way, distance matters for the independence of decision-making. The size of the Commonwealth public service, its location in

[86] McGrath C, "Key concepts of the EPBC Act" (2005) 22 EPLJ 20 at 20.

[87] See, for example, Christoff P, "Degreening Government in the Garden State: Environment Policy under the Kennett Government, 1992-1997" 15 EPLJ 10 at 30-32.

[88] Campbell D, "Retain Commonwealth Oversight of Assessment and Determination of Development Applications", undated, submission 26, available on the Senate inquiry website, n 52.

[89] For example, see Grabosky P and Braithwaite J, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, Melbourne, 1986), pp 198-199, 203-217 and 230; Hawkins K, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Clarendon Press, Oxford, 1984) p 3; Richardson G, Ogus A and Burrows P, *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon Press, Oxford, 1982) pp 184-186; Briody M and Prenzler T "The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture?" (1998) 15 EPLJ 54.

[90] Grabosky and Braithwaite, n 89, p 217.

Canberra, and its national focus all promote its independence in environmental decision-making. In the context of the role of the EPBC Act, this reflects the point that approval bilaterals undermine its value significantly by removing the independence from State governments of the final approval for State projects.

A series of six case studies are used here to illustrate the importance of Commonwealth oversight of both State government-sponsored and private projects. The first is the historical example of the Tasmanian Dam dispute. The remaining five are case studies from the actual operation of the EPBC Act: Traveston Crossing Dam; Hummock Hill Island; the Gunns Pulp Mill; Victorian high country cattle grazing; and the Santos GLNG project.

Tasmanian Dam case study

The famous Tasmanian Dam dispute in 1983 is the prime historical example of the important Commonwealth role in overseeing State approvals as well as the political dangers in the Commonwealth Government attempting to "wash its hands" of contentious environmental disputes.[91] In it, the Tasmanian Government (acting through its Hydro-Electric Commission) was the highly-vocal proponent of the Gordon-below-Franklin Dam and the decision to build the dam was enshrined in State legislation.[92] Clearly, the Tasmanian Government wanted the dam to be built.

Had an equivalent of the EPBC Act existed at the time of the Tasmanian Dam dispute and had an approval bilateral been in place between the Commonwealth and the Tasmanian governments, there is no question that the dam would have been approved by the State Government. Such a conclusion should explode any notion that approval bilaterals delegating all decisions to State and Territory governments are either desirable or sound policy for the Commonwealth.

The Tasmanian Dam dispute is also an important illustration of the political dangers in the Commonwealth Government attempting to "wash its hands" of contentious environmental disputes. In 1982 the Commonwealth Government of then Liberal Party Prime Minister Malcolm Fraser refused to intervene to stop the Tasmanian Government, under then Premier Robin Gray (also a Liberal Party government), building the Gordon-below-Franklin Dam.[93] Bob Hawke, then the ALP Opposition Leader, swept to power to win the 1983 federal election on the back of a strong "No Dams" campaign nationally.[94]

The Tasmanian Dam dispute was a watershed both legally and politically for Australia and it seems unlikely that any Commonwealth government could now afford to refuse to become involved in an environmental dispute that inspires a national campaign. The Traveston Crossing Dam is a recent example of such a dispute where the political stakes were high.

Traveston Crossing Dam case study

The refusal of the Traveston Crossing Dam under the EPBC Act in December 2009 provides a compelling example of the importance of retaining Commonwealth approval powers under the EPBC Act. The Queensland Government, then led by ALP Premier Peter Beattie, proposed the dam in 2006 as part of a number of emergency measures while south-east Queensland was in the grip of an extended drought from 2001-2009. It was proposed to be constructed by Queensland Water Infrastructure Pty Ltd, a GOC, on the Mary River, to supply water to Brisbane. A strong local and national campaign called "Save the Mary River" was launched to stop the dam and the Coalition parties, then the State Opposition, joined the opposition to the dam.[95]

[91] See Bates, n 1; Toyne, n 6.

[92] Bates, n 1 at 337. Green R, *The Battle to Save the Franklin* (Fontana/ACF, 1981), cited in Toyne, n 6, p 38, suggested that, in fact, the Hydro-Electric Commission had an extraordinary level of political power.

[93] See Toyne, n 6, pp 39-41.

[94] See Toyne, n 6, pp 40-41.

[95] See the Save the Mary River website at http://www.savethemaryriver.com.

The dam was referred under the EPBC Act in November 2006 and determined to be a controlled action.[96] It was assessed under an assessment bilateral by an EIS prepared under the *State Development and Public Works Organisation Act 1971* (Qld) (SDPWO Act). That Act is administered at a State level by the Queensland Coordinator-General, a politically powerful public servant appointed by the State Government. He concluded that the environmental impacts could be adequately addressed, and recommended the dam be built.[97]

The Commonwealth Environment Minister at the time, Peter Garrett, was dissatisfied with the Coordinator-General's assessment and requested independent experts to review the EIS. They found major deficiencies in it.[98] Based on this independent advice he refused the dam due to "unacceptable impacts" on threatened species such as the Mary River cod and Australian lungfish.[99]

The refusal of the dam is an example of good decision-making under the EPBC Act and prevented a project that would have caused serious damage to several threatened species. In a strong criticism of the operation of the EPBC Act generally, Tim Bonyhady suggested this "stands out as the strongest decision made by an Environment Minister in the 10 years of the EPBC Act".[100]

Had an approval bilateral been in place at the time when the dam was proposed, it is certain that the Queensland Government would have approved it being built and severe impacts on the listed threatened species would have occurred. While it was not refused under the EPBC Act due to its costs or lack of a business case for it,[101] the refusal has had the practical effect of saving the Queensland Government approximately $1.130 billion in expenditure.[102]

Hummock Hill Island case study

Another example of the important role of the Commonwealth in overseeing State decisions is a proposed tourist and residential development that was supported by the then ALP-Bligh Queensland Government but refused by the Commonwealth.

In 2006, East Wing Corporation Pty Ltd proposed to construct, over 22 years, a large tourism and residential development on Hummock Hill Island, located approximately 30 km south of Gladstone on the Queensland coast. The total development value was estimated at $825 million.[103] Unlike the heavily industrialised Gladstone area to its north, the island is undeveloped and is surrounded by relatively undisturbed coastal ecosystems at the southern end of the Great Barrier Reef World Heritage Area.

The proposal was referred under the EPBC Act and determined to be a controlled action.[104] It was declared a "significant project" in early 2006 and assessed by an EIS under the SDPWO Act. That process was used for the assessment of the project under the EPBC Act under an assessment bilateral.

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[96] EPBC Act referral 2006/3150. The dam is discussed in Waters, n 15; Bonyhady, n 15; Wasimi, n 15; and de Rijke, n 15.

[97] See the discussion in Waters, n 15, and Bonyhady, n 15.

[98] See particularly Bonyhady, n 15.

[99] Garrett P, "Traveston Dam Gets Final No" (Media Release, 2 December 2009).

[100] Bonyhady, n 15, p 251.

[101] See the strong criticisms of other Queensland water infrastructure projects from the same period by the Queensland Auditor-General, *Maintenance of Water Infrastructure Assets: Report to Parliament 14: 2012–13* (Queensland Audit Office, Brisbane, 2013), pp 1, 23 and 35, reported in Stolz G and Tin J, "Beattie's $9b grid Proves to be a Massive Money Pit", *The Courier-Mail* (6 June 2013).

[102] Based on the unspent portion of the project's budget reported in APP, "Traveston Dam Cost Taxpayers $460m", *Sunshine Coast Daily* (7 December 2009).

[103] GHD, *East Wing Corporation Hummock Hill Island Development Initial Advice Statement: A Master Planned Integrated Tourism Community* (GHD, Brisbane, 2006).

[104] EPBC referral 2005/2502.

In February 2011, following completion of the EIS, the Queensland Coordinator-General recommended the proposed development be approved and it clearly had the support of the State Government.[105]

On 21 June 2011, the then Commonwealth Environment Minister, Tony Burke, announced that he proposed to refuse the project under the EPBC Act due to "unacceptable impacts" on MNES and invited members of the public to comment on the proposed decision.[106] The Minister gave the public until 20 July 2011 to provide comments on the proposed refusal but the proponent withdrew the referral on that date, obviously because they wished to avoid the refusal being made. The ultimate decision to refuse it was, therefore, not made and does not show up in statistics of refusals under the Act. This complicates analysis of the operation of the Act based on such statistics.[107] The story did not end there, however, as an amended proposal was referred under the EPBC Act in November 2012 and is currently undergoing assessment through a new EIS under the EPBC Act.[108]

While the Minister's proposed decision to refuse the original proposal under the EPBC Act has not stopped the project and it may still proceed in a revised form, the steps taken by the Minister again illustrate the important role played by the Commonwealth in overseeing State Government decisions to protect matters such as the Great Barrier Reef World Heritage Area.

Several authors have noted the role that politics plays in the administration of the EPBC Act[109] and this, no doubt, is often the case, as it is for all environmental laws, but independent oversight either by another level of government or by courts is one of the few ways our system of government has for discouraging poor decision-making for political ends. At the time that the Minister proposed to refuse the Hummock Hill Island development, Australia was under considerable international pressure over development adjoining the Great Barrier Reef World Heritage Area. In June 2011 the World Heritage Committee had urged Australia to undertake a comprehensive strategic assessment of the entire Great Barrier Reef World Heritage Area to better protect it.[110] It seems logical that this spurred the Minister's and his department's interest in closely examining development projects adjoining the Great Barrier Reef World Heritage Area. Independent oversight is often a healthy thing for good decision-making.

Gunns Pulp Mill case study

The Gunns Pulp Mill is another, though messier, example of the importance of not handing EPBC Act approval powers to State governments under assessment bilaterals. In that case Gunns Ltd made three referrals of the proposed pulp mill under the EPBC Act, the first two of which were withdrawn.[111] For the first two referrals the Minister had decided under the EPBC Act that the assessment of the relevant impacts of the pulp mill was to be done under the *State Policies and Projects Act 1993* (Tas) by the Tasmanian Resource Planning and Development Commission (RPDC). However, that process collapsed in March 2007 when Gunns Ltd withdrew from the RPDC process citing delays and the Tasmanian Government controversially passed special legislation, the *Pulp Mill Assessment Act 2007*

[105] Coordinator-General, *Hummock Hill Island Development Project: Coordinator-General's Report on the Environmental Impact Statement* (Queensland Coordinator-General, Brisbane, 2011).

[106] Burke T, *Invitation for Public Comment on Proposed Refusal of Referral by East Wing Corporation Pty Ltd of Urban and Commercial Development at Hummock Hill Island, Queensland* (EPBC reference No 2005/2502) (Department of Sustainability, Environment, Water, Population and Communities, Canberra, 2011).

[107] Tridgell, n 13 at 247-248 and 256-257, discusses some of the difficulties with various approaches to evaluating the EPBC Act.

[108] EPBC referral 2012/6643.

[109] For example, Macintosh A, "The Commonwealth", Ch 10 in Bonyhady and Macintosh (eds), n 13, pp 248-249; and Bonyhady, n 15.

[110] McGrath C, "UNESCO/IUCN Reactive Monitoring Mission Report on the Great Barrier Reef" (August 2012) *Australian Environment Review* 253 at 254-255.

[111] EPBC referrals 2004/1914, 2005/2262 and 2007/3385.

(Tas), to fast-track the approval at a State level.[112] A controversial and tortuous process led to the Commonwealth Environment Minister approving the third referral of the pulp mill in October 2007, subject to conditions requiring a further assessment and approval. The EPBC Act approval placed considerably greater obligations on the project than were imposed by the flawed State government process and this can be seen as another example of the importance of the EPBC Act in providing an independent oversight on large, State-sponsored projects. Had an approval bilateral been in place at the time when the pulp mill was proposed, it is certain that the Tasmanian Government would have approved it without the more stringent conditions imposed by the Commonwealth Environment Minister.

After the pulp mill was approved it collapsed on financial grounds and Gunns Ltd entered voluntary administration. Even in 2014, after the pulp mill project had collapsed, the then Tasmanian Premier Lara Giddings flagged possible State legislation to prevent legal challenges to the State approvals for the pulp mill, which the company administrators were attempting to sell. She stated: "We will do whatever it takes [including legislative changes] to ensure that the project that is up for sale is … as attractive as possible now".[113] Given such public statements it is difficult to have confidence in the State Government rigorously assessing any environmental impacts of such a project under an approval bilateral.

Victorian high country cattle grazing case study

Another clear example of why assessment bilaterals would severely undermine the benefit of the EPBC Act in regulating State government-sponsored projects is the decision of the then Federal Environment Minister, Tony Burke, in January 2012, to refuse an application by the Victorian Government for approval of a trial of alpine grazing in Victoria's high country.[114] The State Government strongly supported the interests of graziers but the Minister refused the application under s 74B of the EPBC Act as "clearly unacceptable" due to its impacts on the Australian Alps Parks and Reserves National Heritage Place. In a highly unusual step, the Victorian Government applied for judicial review of that decision but the Federal Court refused the application.[115]

Had an approval bilateral been in place at the time, it is certain that the Victorian Government would have approved its own proposal for Alpine grazing. The Minister's decision suggests that this would have resulted in clearly unacceptable impacts occurring.

Following the federal election in September 2013 which saw the Coalition elected, the Victorian Government referred a similar trial of cattle grazing in the Victorian high country.[116] In March 2014 the new Federal Environment Minister, Greg Hunt, approved the trial subject to conditions. It is reasonable to infer that the change in the decision-maker was a key factor in the different results for the two referrals. No doubt both Ministers would say they were upholding the high standards for decision-making under the EPBC Act even though very different conclusions were reached by each. This illustrates the discretionary nature of decisions under the EPBC Act.

Santos GLNG Project case study

A final case study of why independent oversight from the Commonwealth has an important role in improving decision-making comes from the 2012 discussion paper that initiated the most recent pushes from the then Gillard Government and the Coalition to enter approval bilaterals. In it the BCA provided a specific (though anonymous) example:

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[112] Described in Macintosh A and Stokes M, "Tasmania and the Gunns Pulp Mill", Ch 2 in Bonyhady and Macintosh (eds), n 13.

[113] ABC News, "Premier Keeps Door Open on Recall of Parliament to Back Pulp Mill Project", ABC online news (15 January 2014), http://www.abc.net.au/news/2014-01-15/premier-keeps-door-open-on-recall-of-parliament-to-back-pulp-mi/5201498.

[114] EPBC referral 2011/6219.

[115] Secretary to the *Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth)* (2013) 209 FCR 215; [2013] FCA.

[116] EPBC referral 2013/7069.

> … from a member company [of the BCA] that provides an illustrative example of the complexities of, and double handling in, the government approvals process. The environmental assessment for this major resources project was conducted under Australian Government and state legislation. It took more than two years, involved more than 4,000 meetings, briefings and presentations across interest groups, and resulted in a 12,000-page report. The assessment was advertised widely across Australia for comment and resulted in some 40 submissions. When approved, more than 1,500 conditions – 1,200 from the state and 300 from the Commonwealth – were imposed. These conditions have a further 8,000 sub-conditions attached to them. In total, the company invested more than $25 million in the environmental impact assessment.[117]

This anonymous example has been referred to repeatedly by the BCA in submissions supporting approval bilaterals and by the Coalition in support of its one stop shop policy[118] While neither the BCA nor the Coalition identified the project by name, it is presumably one of the three extremely large CSG and liquefied natural gas (LNG) projects in Queensland: the $23 billion Asia Pacific LNG Project (APLNG) being constructed by Origin Energy and its joint venturers;[119] the $20 billion Santos Gladstone LNG Project (GLNG);[120] or BG Group's Queensland Curtis LNG Project (QCLNG) involving $23 billion of investment from 2010-2014.[121] All of these are amongst Australia's largest capital infrastructure projects.

Of these three large LNG projects, the example appears to be of the Santos GLNG Project. It involved a spider's web of activities requiring multiple State licences for the CSG wells, pipelines and LNG hub at Gladstone (as did the APLNG and QCLNG projects). It was broken by the proponent into four referrals under the EPBC Act.[122] A total of 309 conditions were imposed under the EPBC Act, including: 74 conditions for the major LNG facility at Gladstone; 56 conditions for the dredging of Gladstone harbour; 112 conditions on the CSG wells; and 67 conditions for a 435 km pipeline joining the wells to the LNG facility.

The example is cited by the BCA because the total number of conditions for the whole series of activities appears to be very large but the example is a misleading one because the "project" is really an interrelated series of very different activities in terms of the environmental impacts. Regulators can hardly be criticised for imposing very different sets of conditions on the CSG wells in central Queensland and the dredging in Gladstone harbour. The Commonwealth and State approval conditions certainly overlap in places but the Commonwealth conditions focus on protecting MNES whereas the State conditions are general in nature. No clear instance of inconsistency or duplication between the Commonwealth and State conditions are identified by the BCA or the Coalition amongst the conditions for this project. Note also that the $25 million figure cited for the cost of the EIA processes is the cost for both State and Commonwealth assessments and is approximately 0.125% of the $20 billion capital investment in this project.

While the BCA and Coalition present this as an example of over-regulation, information from a whistleblower indicates that it may instead be an example of the need for stronger Commonwealth involvement in regulating such major projects. On 1 April 2013, ABC Four Corners aired a documentary concerning the poor decision-making processes followed in relation to the Santos GLNG and the QCLNG projects.[123] In that program a former employee of the Queensland Coordinator-General's Office, Simone Marsh, spoke of how she attempted to raise serious concerns about the lack of information on ground water impacts from the CSG components of the Santos GLNG project but

[117] BCA, n 47, pp 6-7.

[118] Abbott, n 72; Coalition (July 2013), n 73, p 11; Coalition (September 2013), n 73, p 5.

[119] See the APLNG website at http://www.aplng.com.au.

[120] Capital investment based on US$18.5 billion stated on the GLNG website at http://www.santosglng.com/the-project.aspx.

[121] Capital investment based on US$20.3 billion referred to on the QCLNG website at http://www.qgc.com.au/qclng-project.aspx.

[122] EPBC Act referrals 2008/4057, 2008/4058, 2008/4059 and 2008/4096 (two other referrals, 2008/4060 and 2008/4061, were withdrawn).

[123] Carney M and Agius C, "Gas Leak", ABC Four Corners documentary (1 April 2013), http://www.abc.net.au/4corners/stories/2013/04/01/3725150.htm.

was overruled apparently due to pressure to approve the project:

> SIMONE MARSH: I was taken into a meeting room, sat down and told that there wasn't going to be a chapter on groundwater and I was … stunned.
>
> I said "What are you talking about? What do you mean there's not going to be a chapter on groundwater? It's one of the biggest issues for the project".
>
> And he just repeated the words that there was not going to be a groundwater chapter in the Santos Coordinator-General's report and wouldn't give me any reason why or why not.[124]

Despite recognising in his report evaluating the EIS for the project that he lacked fundamental and critical information to determine groundwater impacts of the massive CSG well areas,[125] the Coordinator-General recommended the GLNG Project be approved.[126] This report is the final step in the EIS process under the SDPWO Act and concludes the Coordinator-General's formal oversight of the project. The process the Coordinator-General followed in recommending approval of the Santos GLNG project while critical information was missing is clearly a very poor decision-making process.

Consequently, while the BCA and the Coalition use the Santos GLNG project as an example of over-regulation, it would seem to be an example showing the need for careful oversight by the Commonwealth of such major projects, including groundwater impacts.

Approval bilaterals will have little benefit for efficiency and costs

The case studies given above show that there is an important role for the Commonwealth in overseeing State and Territory government decisions. Another criticism of the one stop shop policy is that claims that it will improve efficiency and reduce costs are overblown.

While recognising, as noted earlier, that some projects experience significant costs and delays due to the EPBC Act, in evaluating the extent to which the one stop shop policy will reduce such costs and delays it must be born in mind exactly what the policy proposes to do. There is a goal for assessment bilaterals to lift the use of a single accredited assessment process to 100% and improve cooperation between the Commonwealth, States and Territories in areas such as avoiding inconsistent conditions. The Commonwealth will also enter approval bilaterals to accredit State and Territory decisions to satisfy any approval requirements under the EPBC Act. The policy does not propose to repeal or amend the EPBC Act to reduce the MNES that must be considered. It is difficult to see what cost savings can be achieved by this, even for government administration. It largely seems to shift a significant administrative workload from the Commonwealth onto State and Territory governments.

With the exception of some marginal improvements through increased cooperation and increased use of assessment bilaterals, it is difficult to see where significant time and costs savings will be achieved by the policy. The current system of screening referrals and assessment bilaterals is largely avoiding unnecessary duplication and there appears to be little benefit from approval bilaterals in terms of reducing the delay and cost of approvals for projects around Australia.

The initial screening of referrals by the Commonwealth under ss 74B, 75 and 77A in Pt 7 of the EPBC Act as alternatively: clearly unacceptable; controlled actions; not controlled actions; or not controlled actions if taken in a particular manner, is a very efficient way of quickly disposing of actions that do not require further approval. For example, the interim report of the Hawke Review noted that from the commencement of the EPBC Act on 16 July 2000 to 30 June 2008 there were 2,696 referrals of which:

- 603 actions (22%) were found under s 75 to be controlled actions and required approval under the EPBC Act;

[124] Transcript from Carney and Agius, n 123.

[125] Coordinator-General, *Coordinator-General's Evaluation Report for an Environmental Impact Statement Gladstone Liquefied Natural Gas–GLNG Project under Part 4 of the State Development and Public Works Organisation Act 1971* (Coordinator-General, Brisbane, May 2010), s 7.2, http://www.dsdip.qld.gov.au/assessments-and-approvals/gladstone-liquefied-natural-gas.html

[126] Coordinator-General, n 125.

- 447 actions (17%) were found under s 77A to be not a controlled action provided the action was taken in a particular manner;
- 1,518 actions (56%) were found under s 75 to be not a controlled action and accordingly did not require approval under the EPBC Act; and
- one action was found to be clearly unacceptable under s 74B.[127]

Generally, the timeliness of decision-making under the Act is in accordance with the statutory requirements[128] and, therefore, the majority (76%)[129] of referrals are decided within a few weeks of being made. It is only the 22% of referrals that are determined to be controlled actions that proceed through the assessment and approval stages. Now that assessment bilaterals are in place for the States and Territories, many projects, particularly large ones, are assessed concurrently under the EPBC Act and State and Territory laws. As the case studies of the Wandoan Coal Mine and the Alpha Coal Mine given above illustrate, there may be very little, if any, actual delay in approvals being granted due to the EPBC Act.

There is also a counterintuitive and ironic twist in the tales of the Wandoan Coal Mine and the Alpha Coal Mine for those who argue in favour of approval bilaterals to speed up project approvals. If an approval bilateral had been in place for the assessment of these mines and a single approval with identical conditions was to be issued by the Queensland Government, then the approval of each mine under the EPBC Act would have been considerably delayed. That is, an approval bilateral would add several years to the EPBC Act approval timeframes for the mines rather than reduce them. There are, therefore, potentially significant advantages for proponents in *not* having projects assessed under an approval bilateral.

However, as noted earlier, some projects incur significant costs and delays under the EPBC Act. The case studies given above of the Gunns Pulp Mill and Hummock Hill Island are examples of such projects but also examples of important outcomes being achieved under the EPBC Act. The survey noted earlier of proponents under the EPBC Act reflects the fact that some projects incur significant costs and delay under the EPBC Act. This survey needs to be treated with caution, given that it surveyed only proponents and it was not validated for bias or inaccurate responses from proponents who oppose the EPBC Act or are aggrieved at particular regulatory outcomes.[130] It is also impossible to validate the responses for particular projects or understand the significance of costs incurred due to the EPBC Act in the context of the overall scale of the project as the results are presented anonymously. While bearing these limitations in mind, the survey results are useful in understanding the costs and delays associated with the EPBC Act and, from that, where improvements in efficiency might be found.

While the EPBC Act adds to the costs and delays for some projects, there are also cases where the Act has substantially increased the efficiency and reduced the time in the approval process. A case study that illustrates this is the Waratah Coal proposal to construct a rail line and coal terminal near Shoalwater Bay.

Shoalwater Bay rail and port case study

A case study of a particularly efficient referral process under the EPBC Act is the quick refusal as "clearly unacceptable" of a rail line and coal terminal proposed to be constructed in the Shoalwater Bay and Corio Bay Ramsar Wetland in central Queensland.[131] It is arguably one of the strongest

[127] Hawke A, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report* (Department of the Environment, Water, Heritage and the Arts, 2009), p 56. Macintosh, n 43, reported similar figures for 3105 referrals from 2000 to June 2009.

[128] The Auditor-General, *Performance Audit: Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999* (Audit Report No 38 2002–03, Australian National Audit Office, 2003).

[129] Combining the 17% determined to be not controlled actions if taken in a particular manner and the 56% determined to be not controlled actions for 2000-2008 in Hawke, n 127, p 56.

[130] Macintosh, n 43, p 15.

[131] EPBC Act referral 2008/4366.

decisions under the EPBC Act, and one of the clearest examples of good environmental outcomes achieved under the Act, but it has received very little attention in professional literature or commentaries on the EPBC Act.[132]

On 31 July 2008, Waratah Coal Inc referred a proposal for a large open-cut coal mine in the Galilee Basin and associated infrastructure, including a 495 km railway to a proposed new coal terminal.[133] The investment for the mine was reported to total $5.3 billion.[134] The company claimed that the project would have "potentially generated over A$10B of export revenue and over A$900M royalties per year for the State of Queensland".[135]

The new coal export terminal was proposed to be located in an undeveloped part of the Queensland coast that was inscribed on the Ramsar List due to its importance for migratory birds. It was midway between two existing major coal export ports on the Queensland coast. The company claimed the existing ports were at capacity and could not accommodate the large additional quantities from its mine.[136]

On 15 September 2008, the then Federal Environment Minister, Peter Garrett, rejected the proposal under s 74B of the EPBC Act on the basis that it "would have clearly unacceptable impacts" on the Ramsar wetland.[137] The Minister stressed in a media release that he "wish[ed] to make it abundantly clear" that his decision was due to the impacts of the rail and port and his decision "does not prevent an alternative proposal being lodged [with] alternative sites for the port".[138] At the time the Minister rejected the mine, the State Government was reported to have supported his decision;[139] however, it is unknown if that position would have changed had the Minister been willing to approve it. Unlike the power in s 74B of the EPBC Act to refuse a project at an early stage, there is no formal power under Queensland law for such a decision to be made.

Waratah Coal applied for judicial review of the Minister's decision, arguing that the decision was invalid because it was slightly outside of the time limit imposed by the EPBC Act but the Federal Court dismissed the application.[140] Following this the company lodged another referral for the mine proposing to export the coal from the existing Abbot Bay coal terminal to the north.[141]

This case study shows a quick and efficient decision being reached at a very early stage under the EPBC Act that avoided the proponent needing to undertake a full and expensive EIS for the project. A full EIS would have been expected to take a number of years and cost millions of dollars to complete. The early decision by the Commonwealth Environment Minister under s 74B of the EPBC Act short-circuited this lengthy process and thereby avoided these costs and delays. The Minister would not have had such a role if an approval bilateral had been in place.

Lack of evidence that the one stop shop will reduce costs and delays

A curious inconsistency overlooked by those who argue in favour of approval bilaterals is that proponents would still have to consider impacts on matters protected under Pt 3 of the EPBC Act. Only the decision-maker would change. Given that assessment bilaterals are already in place and

[132] It is not mentioned in the strong critiques of the EPBC Act in Bonyhady and Macintosh (eds), n 13. Tridgell, n 13 at 256, mentioned it only in passing.

[133] EPBC Act referral 2008/436.

[134] ABC News, "Waratah to Challenge Garrett's Shoalwater Ruling", ABC News online (6 September 2008).

[135] Waratah Coal, "Response to Federal Minister for the Environment" (Media Release, 5 September 2008).

[136] Waratah Coal referral of proposed action form (EPBC Act referral 2008/436), p 14.

[137] Garrett P, "Statement of Reasons for a Decision that the Action is Clearly Unacceptable under the EPBC Act" (DEWHA, Canberra, 5 September 2008).

[138] Garrett P, "Minister says No to Shoalwater Bay Rail and Port" (Media Release, 5 September 2008).

[139] ABC News, n 134.

[140] *Waratah Coal Inc v Minister for the Environment, Heritage and the Arts* (2008) 173 FCR 557; [2008] FCA 1870.

[141] EPBC Act referrals 2008/4366 and 2012/6250.

already allow EPBC Act matters to be incorporated into one assessment process, there do not appear to be any real savings for proponents if approval bilaterals are created.

A feature of the reviews of the EPBC Act and submissions from industry groups calling for approval bilaterals is the general lack of evidence showing inefficiency caused by the Act that approval bilaterals will reduce. Even the Hawke Review and Productivity Commission presented little evidence to support their recommendations for approval bilaterals.[142] This is particularly notable given the global movement for evidence-based policy over the past decade.[143] While what constitutes "evidence" is often debated,[144] an absence of evidence that a problem exists obviously detracts from any argument for a policy change to address it.

In 2006 the Taskforce on Reducing Regulatory Burdens on Business (Regulation Taskforce) appointed by the Howard Government stated the following as its first of six principles of "good regulatory process" that the Australian Government should adopt: "Governments should not act to address 'problems' until a case for action has been clearly established".[145] The Regulation Taskforce stated that, "… notwithstanding some weaknesses, the EPBC Act has delivered a more efficient and effective regulatory framework for business than previous legislation".[146] It referred to some general submissions on duplication and uncertainty regarding the operation of the EPBC Act but provided no specific evidence of inefficiency or costs imposed by the Act before going on to recommend that approval bilaterals be pursued.[147] Given the principles for good regulatory process that the Regulation Taskforce identified, there is a good deal of irony in the lack of evidence for that recommendation.

In its 2012 discussion paper arguing for approval bilaterals to be entered to accredit all State governments to approve actions under the EPBC Act, the BCA cited the Regulation Taskforce as evidence for the need for regulatory reform and then stated:

> The costs and delays associated with environmental impact assessments are significant. An Australian National University study estimated a direct cost to all industries of up to $820 million over the life of the EPBC Act.[148] Further, the referrals process under the EPBC Act is resource and cost-intensive, with referrals ranging from $30,000 to $100,000.[149] But even these costs pale in comparison to the potential costs of delays. For instance, at a coking coal price of $200 tonne, a 12-month delay to a 10 million tonne per annum export coking coal mine in Queensland could reduce Queensland royalty revenue by $170 million.[150]
>
> The Commonwealth's rejection of the Traveston Crossing Dam project in Queensland, following Queensland Government conditional approval of the project, highlights the need to develop a structured approach to environmental impact assessments and the need to accredit state approvals. The Traveston Crossing Dam project was subject to a comprehensive state environmental impact assessment – the whole process took a number of years to complete. The project was approved to proceed at the state level with conditions designed to protect the environment. The Commonwealth minister subsequently vetoed the project under the EPBC Act.[151]

The BCA's use of the refusal of the Traveston Crossing Dam by the Commonwealth unintentionally highlights the contradiction and central problem with their proposal – that, as

[142] Hawke, n 12; and Productivity Commission, n 66.

[143] Althaus C, Bridgman P and Davis G, *The Australian Policy Handbook* (4th ed, Allen & Unwin, Sydney, 2007), pp 67-71.

[144] Althaus, Bridgman and Davis, n 143, pp 67-71.

[145] Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (Regulation Taskforce, Canberra, 2006), recommendation 7.1, pp 146-147.

[146] Regulation Taskforce, n 145, p 72.

[147] Regulation Taskforce, n 145, pp 72-74.

[148] Macintosh A, "The EPBC Act: An Evaluation of its Cost-effectiveness" (2009) 26 EPLJ 337; and Macintosh, n 43.

[149] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (Melbourne, 2011).

[150] BCA calculation based on a Queensland royalty rate of 7% of value up to $100 million and 10% value above $100 million.

[151] BCA, n 47, p 6. Footnotes n 148 to n 150 adapted from original with citations slightly edited for style and cross-referencing in this article.

discussed above, if State governments are granted approval powers under the EPBC Act, State government projects that should not proceed will be approved. As the Traveston Crossing Dam shows – the State EIS was deficient and the Commonwealth Environment Minister needed to obtain further, independent advice from experts. He then refused to grant approval for the dam. That would not have occurred had an approval bilateral been in place.

The BCA's example of the potential costs of delays is also flawed. For one thing, a delay in approval would not mean that royalties of $170 million were "reduced" in the sense of being lost forever.[152] A delay would merely delay the royalties being paid.

The BCA's reference to an ANU study is a reference to the survey of proponents noted earlier.[153] Although the figures cited are not correct as the survey found many referrals cost less than $1,000, the general conclusion that the survey found significant costs and delays for some projects due to the EPBC Act is accurate. As noted earlier, the survey is useful but needs to be treated with caution. For instance, while finding that some proponents claimed the costs and delay of the EPBC Act amounted to losses of over $500,000, it did not place these costs in the context of the overall project scale. Depending on what is achieved, a cost of over $500,000 is perhaps an efficient and expected result for a huge project like the $20 billion Santos GLNG project. It is unclear from the survey what, if any, costs and delay will be avoided under the one stop shop policy.

Misunderstanding the relative scale of Commonwealth approvals

Another reason why claims such as the "one stop shop will slash red tape" do not survive critical analysis is that they misunderstand the scale of Commonwealth approvals in comparison to State and Territory approval requirements. As was noted earlier, State, Territory and local government approvals are far more numerous than EPBC Act approvals. As was illustrated by the Wandoan Coal Mine and the Alpha Coal Mine, their requirements are typically far more extensive, costly and time-consuming than those imposed by the EPBC Act.

The role of the EPBC Act often receives a great deal of attention in the press but, in reality, the number of projects assessed under EPBC Act is miniscule in comparison to State and Territory planning and mining laws. The example was given earlier of 438 referrals under the EPBC Act in 2008-2009,[154] compared to 251,837 development applications made in that year under State and Territory planning laws.[155] The importance of the EPBC Act as an over-arching environmental framework for Australia needs to be tempered with recognition that it is State and Territory planning, mining and petroleum laws where the bulk of detailed controls on land-use and resource management reside.

Given these facts, the one stop shop policy will, at best, only very marginally reduce approval requirements for Australian industry and development. The claims that this is a major simplification or major increase in efficiency are hyperbole.

The "one stop shop" label is misleading rhetoric only

Another criticism of the "one stop shop" policy is that it is a misleading rhetorical label only. There will be no, one "shop" with a single national, State or Territory process and single national, State or Territory regulator to assess projects. Under the policy there will still be dozens of major, separate (though often overlapping) environmental approval systems at a State and Territory level and hundreds of separate environmental decision-makers in Australia. For instance, for the Wandoan Coal Mine and the Alpha Coal Mine case studies given above, a proponent of a similar project under the one stop shop would still have multiple approvals to obtain and multiple decision-makers involved. Even leaving aside approvals for interfering with water resources and rail lines, etc, they would still need to:

[152] An argument about some loss of net present value may be valid, but that is not what the BCA argued.

[153] Macintosh, n 43.

[154] Department of the Environment, Water, Heritage and the Arts, n 16.

[155] Local Government and Planning Ministers' Council, n 17.

1. lodge an application addressing MNES with the relevant State or Territory government in accordance with the relevant approval bilateral for a decision to be ultimately made by the State or Territory government;
2. lodge an initial advice statement seeking a declaration that the project is a "coordinated project" from the Queensland Coordinator-General under the SDPWO Act;
3. apply for an environmental authority from the Queensland Department of Environment and Heritage Protection under the *Environmental Protection Act 1994* (Qld); and
4. apply for a mining lease from the Queensland Department of Natural Resources and Mines under the *Mineral Resources Act 1989* (Qld).

The one stop shop policy will not change the fact that there are multiple approval requirements at a State and Territory level that are not proposed to be rolled into one application process. For projects that require approval by local governments and do not require approval under the EPBC Act, there will still be literally hundreds of decision-makers in Australia. Given these facts, the "one stop shop" label can be seen as political rhetoric only. In practice, rather than a one stop shop, the policy will be more like a shopping mall.[156]

The claim that the one stop shop will "maintain environmental standards" is vacuous

The Coalition and the Federal Environment Minister have repeatedly claimed that the one stop shop will "maintain environmental standards". This claim is vacuous as the decisions which States and Territories will be accredited to make are highly discretionary value judgments. The requirements for bilateral agreements in Pt 5 of the EPBC Act, such as accredited management arrangements, authorisation processes, and audits, do not change the highly discretionary nature of any decision to approve an action or impose conditions. This means that the identity of the decision-maker and their values are critical factors in the decision that is reached. Unlike, for example, applying things like building standards that are highly prescriptive and quantifiable, decision-makers under the EPBC Act are required to consider broad qualitative criteria such as "economic and social matters"[157] and that the decision must not be inconsistent with Australia's international obligations.[158] Decisions made by a State or Territory government under an approval bilateral will be similar. The weighing-up process inherent in reaching such a decision means that there is no "standard" that is enforceable in any meaningful way.

Approval bilaterals may well create greater uncertainty

Another problem for the one stop shop policy is that it may well create greater uncertainty. As was noted earlier, in December 2012 the process for accrediting approval bilaterals under the EPBC Act was placed on hold by the Gillard Government due to concerns over potentially increasing uncertainty and creating a patchwork of different approval bilaterals in different States and Territories.[159]

The one stop shop policy faces a similar challenge of avoiding a patchwork system at several levels across Australia. Without a legislative change, the prohibition on entering approval bilaterals for the water trigger noted above complicates the policy considerably for mines and CSG projects. There is also the real possibility that not all of the States and Territories will agree to approval bilaterals for all decisions, particularly without the Commonwealth providing funding for any additional workload placed on the State and Territory concerned. That was one of the problems experienced by the Gillard Government. If the Coalition's pre-election commitments to retain the final approval power over certain classes of projects were fulfilled, this would also considerably complicate the policy.

Even if one assumes that the Commonwealth Government enters bilateral agreements with all States and Territories for all MNES and a legislative change allows these agreements to include the

[156] Thanks to Rachel Walmsley for this metaphor.

[157] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 136(1)(b).

[158] See *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 137, 138, 139 and 140.

[159] Taylor and Coorey, n 52.

water trigger, it seems unlikely that the Commonwealth will be able to wipe its hands of hotly contested decisions. It may be that the approval bilaterals include a "call in" power for the Commonwealth to deal with such projects on a case-by-case basis but this would itself complicate the "one stop shop". Alternatively, the Commonwealth might attempt to suspend the agreement under ss 57, 58 or 60 of the EPBC Act where the politics of a project such as the Gunns Pulp Mill make it politically dangerous for the Commonwealth. It should be noted that it is unclear whether the powers under these sections can be used for an individual case. Leaving that issue to one side, the possible use of such a mechanism and the political difficulty of the Commonwealth absolving itself of any responsibility in controversial cases create uncertainty.

CONCLUSION

The EPBC Act should be subject to regular review to make it as efficient, effective and equitable as is practicable. That approach is simply what standard texts on policy design recommend.[160] While there are some positives in the one stop shop policy that should reduce costs and delay at the margins, overall it is clear that the policy will weaken the existing system without significant gains in efficiency.

Handing approval powers to State and Territory governments in approval bilaterals would severely undermine one of the key functions and benefits of the EPBC Act in practice – to provide an appropriate level of oversight on State government-sponsored projects. This would undermine the effectiveness of the Act in achieving its objectives. This problem will be exacerbated if the Australian Government breaks its pre-election commitment to retain power for decisions on State government projects. It is also quite possible that the one stop shop policy will create a more complicated system than currently exists rather than simplifying it.

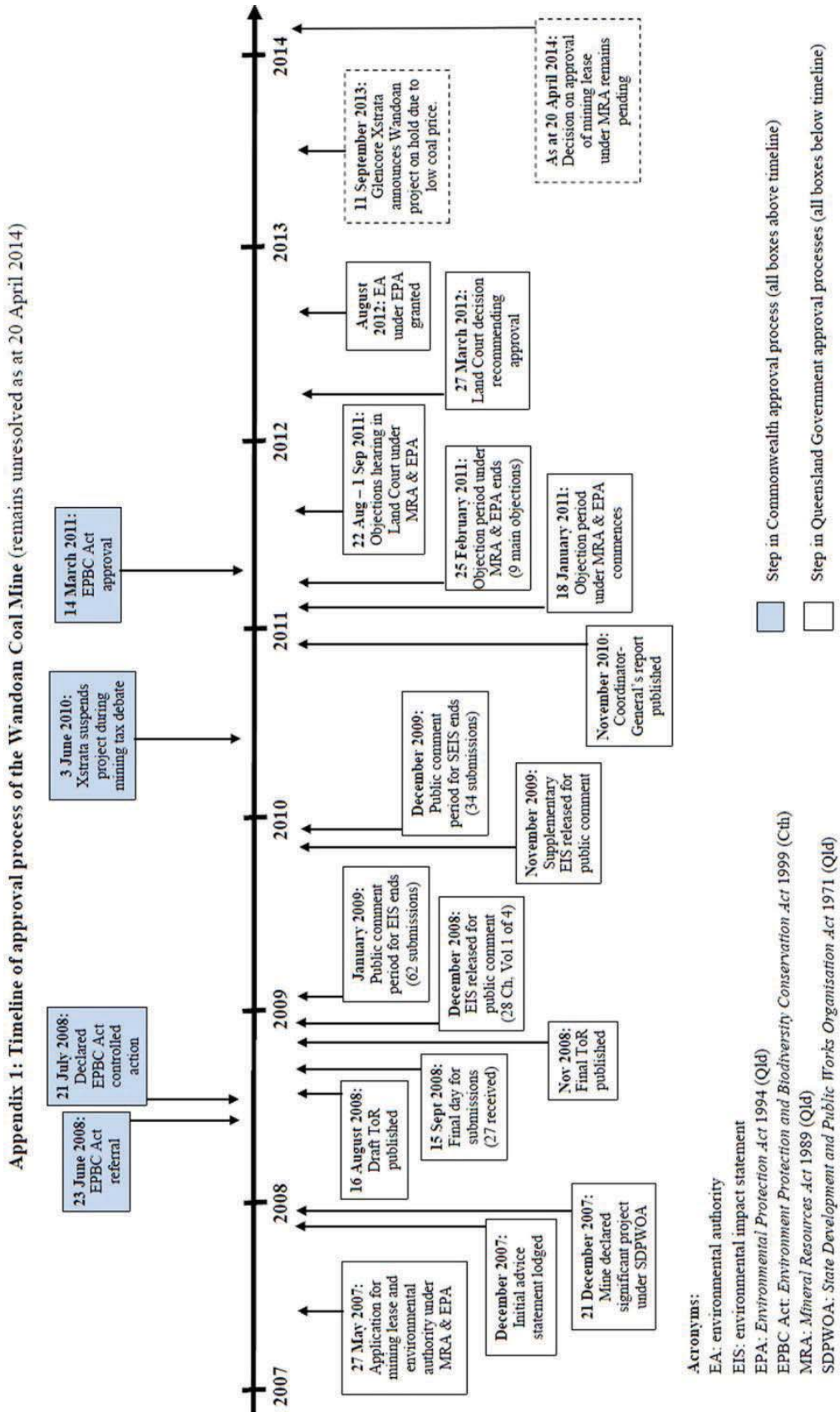
Given the problems with the one stop shop policy and the lack of evidence that it will achieve its claimed benefits and substantially improve the efficiency of environmental approvals in Australia, the obvious question is why is it being pursued? The obvious answer seems to be that industry lobby groups such as the BCA believe projects will receive more favourable treatment from State and Territory governments than from the Commonwealth Environment Minister. For their part, State and Territory governments are happy to minimise oversight by the Commonwealth. From the Commonwealth's perspective, the real agenda appears to be to avoid having to take responsibility for environmental decisions. The claims of improving efficiency and maintaining environmental standards appear to be a Trojan Horse for these otherwise naked political agendas.

Riding in the background is the political reality that it will be extremely difficult for the Commonwealth Government to attempt to "wash its hands" of contentious environmental disputes. The defeat of the Coalition Government led by Prime Minister Malcolm Fraser in 1983 for refusing to intervene to stop the Gordon-below-Franklin Dam is so well known that it seems impossible in political terms that the Commonwealth Government could attempt to take a similar stance again in such a dispute. The Traveston Crossing Dam is a recent example of a dispute where the political stakes were high.

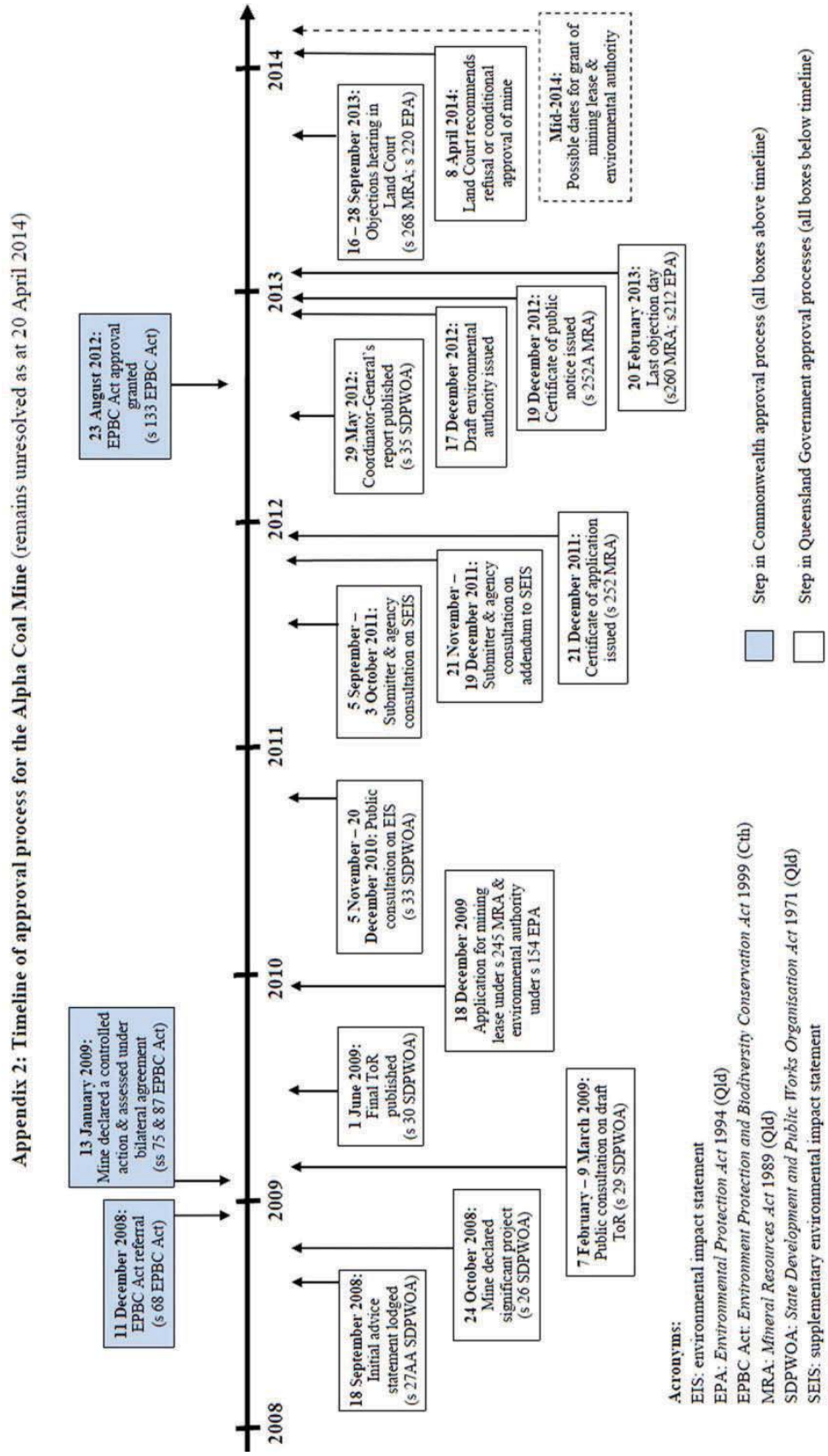
The one stop shop policy is an attempt to turn back the clock to before the Tasmanian Dam dispute when States generally made the major decisions affecting the environment and the Commonwealth did not interfere. This is a backward step for Australia and likely to be a complicated and messy one in practice.

[160] For example, Althaus, Bridgman and Davis, n 143; Dovers S, *Environment and Sustainability Policy: Creation, Implementation, Evaluation* (Federation Press, Sydney, 2005).

APPENDIX 1


Appendix 1: Timeline of approval process of the Wandoan Coal Mine (remains unresolved as at 20 April 2014)
2007
2008
2009
2010
2011
2012
2013
2014
27 May 2007: Application for mining lease and environmental authority under MRA & EPA
December 2007: Initial advice statement lodged
21 December 2007: Mine declared significant project under SDPWOA
23 June 2008: EPBC Act referral
21 July 2008: Declared EPBC Act controlled action
16 August 2008: Draft ToR published
15 Sept 2008: Final day for submissions (27 received)
Nov 2008: Final ToR published
December 2008: EIS released for public comment (28 Ch. Vol 1 of 4)
January 2009: Public comment period for EIS ends (62 submissions)
November 2009: Supplementary EIS released for public comment
December 2009: Public comment period for SEIS ends (34 submissions)
3 June 2010: Xstrata suspends project during mining tax debate
November 2010: Coordinator-General's report published
14 March 2011: EPBC Act approval
18 January 2011: Objection period under MRA & EPA commences
25 February 2011: Objection period under MRA & EPA ends (9 main objections)
22 Aug – 1 Sep 2011: Objections hearing in Land Court under MRA & EPA
27 March 2012: Land Court decision recommending approval
August 2012: EA under EPA granted
11 September 2013: Glencore Xstrata announces Wandoan project on hold due to low coal price.
As at 20 April 2014: Decision on approval of mining lease under MRA remains pending
Step in Commonwealth approval process (all boxes above timeline)
Step in Queensland Government approval processes (all boxes below timeline)
Acronyms:
EA: environmental authority
EIS: environmental impact statement
EPA: Environmental Protection Act 1994 (Qld)
EPBC Act: Environment Protection and Biodiversity Conservation Act 1999 (Cth)
MRA: Mineral Resources Act 1989 (Qld)
SDPWOA: State Development and Public Works Organisation Act 1971 (Qld)
ToR: Terms of reference

APPENDIX 2


Appendix 2: Timeline of approval process for the Alpha Coal Mine (remains unresolved as at 20 April 2014)
2008
2009
2010
2011
2012
2013
2014
11 December 2008: EPBC Act referral (s 68 EPBC Act)
13 January 2009: Mine declared a controlled action & assessed under bilateral agreement (ss 75 & 87 EPBC Act)
23 August 2012: EPBC Act approval granted (s 133 EPBC Act)
18 September 2008: Initial advice statement lodged (s 27AA SDPWOA)
24 October 2008: Mine declared significant project (s 26 SDPWOA)
7 February – 9 March 2009: Public consultation on draft ToR (s 29 SDPWOA)
1 June 2009: Final ToR published (s 30 SDPWOA)
18 December 2009 Application for mining lease under s 245 MRA & environmental authority under s 154 EPA
5 November – 20 December 2010: Public consultation on EIS (s 33 SDPWOA)
5 September – 3 October 2011: Submitter & agency consultation on SEIS
21 November – 19 December 2011: Submitter & agency consultation on addendum to SEIS
21 December 2011: Certificate of application issued (s 252 MRA)
29 May 2012: Coordinator-General's report published (s 35 SDPWOA)
17 December 2012: Draft environmental authority issued
19 December 2012: Certificate of public notice issued (s 252A MRA)
20 February 2013: Last objection day (s260 MRA; s212 EPA)
16 – 28 September 2013: Objections hearing in Land Court (s 268 MRA; s 220 EPA)
8 April 2014: Land Court recommends refusal or conditional approval of mine
Mid-2014: Possible dates for grant of mining lease & environmental authority
Step in Commonwealth approval process (all boxes above timeline)
Step in Queensland Government approval processes (all boxes below timeline)
Acronyms:
EIS: environmental impact statement
EPA: Environmental Protection Act 1994 (Qld)
EPBC Act: Environment Protection and Biodiversity Conservation Act 1999 (Cth)
MRA: Mineral Resources Act 1989 (Qld)
SDPWOA: State Development and Public Works Organisation Act 1971 (Qld)
SEIS: supplementary environmental impact statement
ToR: Terms of reference