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ROLLING BACK THE YEARS – REGRESSION IN COMMONWEALTH ENVIRONMENTAL LAWS

INTRODUCTION

My purpose today is to draw attention to a seismic shift that is currently taking place with respect to the role of the Commonwealth government in environment matters and to indicate why I believe there should be some profound concerns about this shift.

After some forty years of steady evolution of Commonwealth involvement in environmental matters on a cooperative basis with the States and Territories, the Abbott government proposes to wind the clock back to the early 1970's through a series of regressive actions, including handing over to the States and Territories its environmental approvals powers under its principal environmental law - the *Environment Protection and Biodiversity Conservation Act 1999 (Cth.).*

These approval powers currently are exercised by the Commonwealth in relation to projects that could have a significant impact on the various "matters of national environmental significance" identified in the EPBC Act – including world heritage, internationally protected wetlands, listed endangered species, ecological communities and migratory species, activities in Commonwealth marine areas, nuclear matters and, most recently water-affecting activities such as coal and coal seam gas extraction. The Commonwealth government is proposing to use a procedure that has lain dormant in the EPBC Act since its passage in 1999 that involves entering into contracts with each State and Territory (referred to as "bilateral agreements") to implement a transfer to them of its approval powers under the Act.

This is being described by the Commonwealth as its "one stop shop" initiative and it is being justified on the grounds of addressing excessive Commonwealth "green tape", in particular the unnecessary duplication by the Commonwealth of established of State functions. The Commonwealth argues that "streamlined" assessment and approval procedures will reduce excessive costs and delays for industry whilst maintaining high environmental standards.

I will seek to challenge these justifications for this initiative and to also raise questions concerning the capacity of State governments to adequately manage matters of national environmental significance, including international obligations under multilateral

environmental treaties. I will also suggest there is considerable potential for increased regulatory uncertainty for industry through a return to heightened conflict and the creation of what will become an 'eight stop shop' approach as a result of this initiative. Finally, and on a more constructive note, I will suggest there is a need to pursue, instead of this one-stop-shop system, a new "state of the art' Commonwealth environmental law that provides a positive, visionary pathway to a sustainable Australian environment, economy and society and which includes provision for Commonwealth assessment and approval processes to override those of the States where matters of national environmental significance are involved.

A BRIEF HISTORICAL PERSPECTIVE

In order to tackle this topic, I want to start by drawing on my almost forty years of experience in the field of environmental law and policy to provide some broader historical context, looking particularly at how cooperative federalism on environmental matters has operated until now. Since the dawning of environmental awareness in the early 1970's, the Commonwealth government has steadily increased its involvement in environmental matters, through legislation, policies and programmes that have largely been developed on a cooperative basis with the States and Territories. And, in so doing, the Commonwealth has provided a level of leadership and objectivity on environmental matters that I suggest it is difficult to identify on a commonly shared basis at the State level.

But now, the recently elected Commonwealth government appears to be intent on dismantling much of this Commonwealth fabric, masking its apparently ideological retreat from involvement in environmental protection behind an oft-repeated mantra of "red tape/ green tape reduction". The pinnacle of this assault is the government's "one stop shop" programme. I want to suggest to you that this seemingly technical exercise involving odd instruments called bilateral agreements, which might not be expected to attract the attention of the ordinary person in the street, is in fact a matter of the most profound importance and concern in terms of the future protection of the Australian environment.

Let me start by mentioning two specific matters of historical significance to this topic.

The process for the assessment and approval of major projects that may have a significant impact on the environment (referred to as "EIA") originated in the United States in 1970 and is now widely practised around the world. The Commonwealth government argues that the EIA procedures under the EPBC Act are a duplication of State processes. But this argument ignores the fact that it was the Commonwealth that first adopted EIA legislation in this country in 1974, in the form of the *Environment Protection (Impact of Proposals) Act 1974 (Cth.)* - which was then succeeded by the EPBC Act in 1999. The States and Territories came to this area of environmental regulation slowly over a period of years after the 1974 Commonwealth legislation. To suggest that the Commonwealth measures of today are duplicating State processes is an historical fiction, made even worse by the fact that since the late 1970's there have been cooperative arrangements in place to avoid duplication of process between the Commonwealth and State EIA systems. Such realities are conveniently ignored in the political rhetoric that is part of the "one stop shop" propaganda.

Second, there is in fact a lengthy history of Commonwealth involvement in the development of environmental law in Australia that is not widely appreciated. Way back in the late 1940's, the Commonwealth invoked section 96 of the Commonwealth Constitution to offer financial assistance to the States for public housing on the condition that they established "town planning" measures to ensure the orderly development of Australian cities and the "countryside". This triggered the development of State planning laws which, to this day, still constitute the foundation of environmental law in this country. Thus, the retreat by the current Commonwealth government from involvement in environmental matters runs contrary to a long and steadily evolving leadership role for the Commonwealth in this context and can only be viewed with dismay. It appears to have no clear rationale other than an ideologically based disdain for the cause of environmental protection, perhaps also coupled with a desire to shift some of the cost of environmental protection to the States and Territories.

COMMONWEALTH CONSITUTIONAL POWERS RE THE ENVIRONMENT

In the face of an apparent view within the current Commonwealth government that environmental protection is essentially the responsibility of the States and Territories, I will turn next, and only briefly, to the question of the constitutional capacity of the Commonwealth to legislate on environmental matters. It is clear from a series of High Court decisions ranging back to the *Tasmanian Dam case (Tasmania v The Commonwealth)* in 1982 that the Commonwealth has extensive power to legislate on environmental matters by making use of its authority under section 51 of the Constitution to make laws with respect to matters such as trade and commerce, corporations, external affairs, the peoples of any race and taxation. The Commonwealth has frequently utilised a combination of these powers to adopt about 50 separate Acts dealing with environmental matters, the epitome of which is the Howard Government's *Water Act 2007 (Cth.)* - which relies on some nine separate heads of power to underpin its constitutional legitimacy. This Act has recently been declared the subject of a review by the Commonwealth, presumably because it is regarded by the current government as excessively centralist in nature.

Given this extensive constitutional capacity with respect to environmental matters, how has the Commonwealth government approached the task of exercising this capcity? The short answer is that it has generally sought to develop cooperative legislative frameworks with the States and Territories and only rarely has it actually over-ridden relevant State environmental legislation. In reality, duplication with State measures is a rare circumstance, and even where it has occurred – as in the case of the EIA process under the EPBC Act - the Act provides in section 10 that it does not affect the concurrent operation of relevant State laws. I will return later to the assertions of unnecessary duplication through this Act of established State functions.

So, assertions of excessive Commonwealth "green tape" have little foundation in reality, but this has not discouraged the Coalition government from making them in support of its green tape reduction and one-stop-shop initiatives. It pledged prior to its election to "reduce the red and green tape burden imposed on the Australian economy by $1 billion per year". As part of this initiative, it is now undertaking "an audit of all (Commonwealth) environmental legislation and regulation, to work with the States to identify unworkable, contradictory or

incompatible green tape". A Commission of Audit, which is headed by the President of the Business Council of Australia, is pursuing this task.

COOPERATIVE FEDERALISM _ FORTY YEARS OF STEADY EVOLUTION

The political practice of "cooperative federalism" with respect to environmental matters has extended over the past 40 years well beyond legislative measures to include a large range of strategies, policies and programmes that involve collaborative arrangements between the Commonwealth and the States. The origins of this approach may be found in the Senate Select Committee Reports on air pollution (1969) and water pollution (1970), which found gross inadequacies in the then existing legislative and administrative arrangements at the State level. These reports recommended that the Commonwealth should pursue a cooperative approach with the State to address these inadequacies rather than legislating of its own accord. Since then, cooperative approaches have been developed across a very wide range of matters relating to the environment, particularly through negotiations in Ministerial Councils, beginning with the Australian Environment Council in 1972. Since 1992, these Councils have operated under the umbrella of the Council of Australian Governments (COAG), with the Council known as the Standing Committee on Environment and Water (SCEW) being the most recent successor to a long line of predecessors dating back to the AEC (in particular, ANZECC and the EPHC).

However, this long history of specialist Ministerial Councils to address environmental matters on a collaborative basis has recently taken a stunning reverse. In December 2013, a reorganisation of Ministerial Councils appointed under the umbrella of COAG was undertaken, resulting in an announcement on the SCEW website that:

> **"COAG decided that there would be a reduced number of Ministerial Councils. The Standing Council on Environment and Water is not included in the list of Councils to continue under COAG."**

Thus, for the first time in forty years, there is no longer an intergovernmental forum specifically dedicated to the discussion of collaborative, national approaches to environmental matters. This development appears to amount to the abandonment by COAG, at the behest of the Commonwealth government, of the long-standing cooperative federalism approach to environmental matters, in favor of a decentralized approach that leaves responsibilities for the environment largely in the hands of the States. This impression is reinforced by the following statement in the COAG Communique of December 2013:

> "The Commonwealth respects the States and Territories (the States) are **sovereign** in their own sphere. They should be able to get on with delivering on their responsibilities, with appropriate accountability and without unnecessary interference from the Commonwealth."

This statement clearly evidences the apparent view within the current Commonwealth government that environmental matters are a State responsibility. The resort to the notion of State "sovereignty" in support of this view is an extreme form of expression of what in

the 1980's was commonly called "States' rights". The resurrection of this concept constitutes a radical step backwards in federalism philosophy to an attitude that had ceased to have any real impact since the election of the Hawke Labor government in 1983. It is not evident at all, for example in the Intergovernmental Agreement on the Environment executed in 1992 or the subsequent Heads of Agreement on the Environment executed in 1997

There are indications in the recent Federal budget that this retreat will not be confined to the environment and may possibly extend to other matters such as health and education. Such a radical re-conception of the role of the Commonwealth government in these key areas surely warrants a broader public debate than can be encapsulated in the rhetoric of "red tape reduction" or budget balancing. It certainly bodes ominously for the future of much existing Commonwealth environmental legislation.

RECENT COMMONWEALTH REGRESSSION ON ENVIRONMENTAL MATTERS

So, how is this substantial regression in the role of the Commonwealth in environmental matters manifesting itself in practice? Let me list just some of the initiatives currently under way:

- The proposed repeal of the carbon price legislation and its proposed replacement by a Direct Action programme;
- The announcement in February 2014 that the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) would be the sole designated assessor for environmental approval of offshore petroleum projects within its jurisdiction, thus eliminating the requirement for their separate assessment and approval under the EPBC Act;
- the designation of 26 March 2014 as a "repeal day" for the purpose of repealing more than 1000 "redundant" federal laws and some 9500 regulations, including measures relating to :
    - the agricultural chemicals and veterinary medicines approval process;
    - the regulation of ozone-depleting substances and synthetic greenhouse gases;
    - permit and levy processes for sea installations; and
    - repealing s 255A of the Water Act 2007 (Cth) (which relates to the assessment of mining operations in the Murray–Darling Basin);
- the review of the Renewable Energy Target (RET) and proposed abolition of the Clean Energy Finance Corporation;
- the attempt to have 70,00 hectares of Tasmanian World Heritage forest areas delisted by the World Heritage Committee;
- the refusal of the Abbott government to include climate change or the environment on the agenda for the forthcoming G20 meeting in Brisbane, despite strong urgings from the USA and EU;
- the recently announced review of the Howard Governments Water Act 2007 in relation to the Murray Darling Basin;

- the approval of extensive dumping of sediments in the Great Barrier Reef in connection with a major expansion of port facilities at Abbott Point in Queensland that will allow exploitation of the Galilee Basin coal deposits;
- the abandonment of the management plans for Commonwealth designated marine parks, thereby removing protections from fishing in sanctuary zones within these parks;
- the termination of the National Wildlife Corridors initiative;
- the termination of funding for the national system of Environmental Defenders Offices established in 1995;
- the termination of the GVESHO funding scheme for environmental NGO's established in 1973, thereby threatening the continued existence of many small environmental organisations and also a number of State Conservation Councils;
- the proposed extinguishment of a number of national bodies addressing environmental matters, including the Climate Commission, the National Water Commission and the Australian Renewable Energy Agency;
- the introduction of legislation to repeal the energy efficiency opportunities program; and
- the reduction of funding for Land Care by $484 million, whilst allocating $525 million to a new "Green Army" programme and, just last week,
- The referral by the Attorney-General, George Brandis, to the Australian Law reform commission of a reference to enquire into the incursion into "freedoms" (e.g., property rights) by particular types of laws, including environmental laws.

THE ONE STOP SHOP INITIATIVE

But alongside these disparate measures, the Commonwealth has flagged its "one stop shop" initiative as a key element of its green tape reduction agenda. This initiative, which will ultimately see the transfer of Commonwealth approval powers under the EPBC Act to the States and Territories, involves three steps:

- first, the execution of a Memorandum of Understanding with each State setting out in detail the subsequent actions to be taken;
- second, the review and, as necessary, revision of existing **assessment** bilateral agreements to provide further streamlining of existing processes; and
- third, the execution of **approvals** bilateral agreements with each State that will effect the transfer of Commonwealth approvals powers under the EPBC Act to the States and Territories (where possible, by 14th September 2014, exactly twelve months after the election of the Coalition government).

The first stage of this initiative was concluded by December 2013, and the second stage is already well-advanced, with new assessment bialterals having been concluded with two States (Queensland and NSW) and draft bilaterals released for public comment in most

other jurisdictions. Most recently, the third stage has been embarked upon with the release of draft approvals bilateral agreements with Queensland and New South Wales.

It is the proposed abdication by the Commonwealth of any further role in relation to environmental approvals through this form of bilateral agreement that has been the subject of the most concern on the part of ENGO's and, indeed, the broader community. The Hawke Review, for example, noted that a poll undertaken by ANU in 2008 showed that 56% of respondents considered that the Commonwealth was doing too little with respect to environmental issues. A poll conducted by the Australian Conservation Foundation in 2012 suggested that 80% of those surveyed did not support the Commonwealth handing over its environmental approval powers to the States. The arguments for and against this handover have been vigorously advanced by both sides of the debate and warrant some further consideration.

JUSTIFICATIONS OFFERED FOR THE OSS INITIATIVE

Avoidance of duplication and streamlining of environmental approval processes

There is no difficulty in identifying the principal parties behind the "green tape" argument who are strongly promoting and supporting the one stop shop agenda. These are the resources sector and State governments. The mining and petroleum industries (including the emerging coal seam gas industry), working closely with the Business Council of Australia (BCA) and also through their separate industry associations, have agitated vociferously on the issue. Their rationale for urging the handover of Commonwealth approval powers to the States is that this is necessary in order to eliminate excessive "green tape" and the duplication of functions already performed by the States, and that it will also significantly reduce the costs and delays experienced by their industries through the operation of the EPBC Act. This "green tape" advocacy has become increasingly strident, with one industry spokesperson recently claiming that it is easier to do business in South Sudan than in New South Wales (which possibly may be true, but is not a meaningful comparison to make). The Abbott government has enthusiastically embraced this rhetoric in advancing its one-stop-shop initiative.

I have already sought to address the issue of alleged duplication of functions by arguing that in practice the Commonwealth has generally pursued a highly coordinated and collaborative approach in developing its own environmental legislation, including with respect to its EIA process requirements. The Commonwealth role in this area is confined to addressing the listed matters of national environmental significance, leaving the States to address all other environmental aspects separately. Insofar as any lack of coordination may have arisen from this current system, it could readily be addressed by means other than the complete withdrawal of the Commonwealth. I will argue later that the overlap arising in this context would be more appropriately addressed by State accreditation of the Commonwealth process – in effect, a reversal of the proposed one-stop-shop system.

Excessive costs and unnecessary delays for industry

In relation to the industry arguments regarding allegedly excessive costs and delays associated with the operation of the EPBC Act, I would note that:

- the allegations of excessive costs advanced, for example, by the BCA in an April 2012 submission to COAG have been found by an independent assessment to be spurious and greatly exaggerated;
- the level of costs genuinely incurred in complying with the EPBC Act process usually represents a small proportion of the overall project development costs for most major resource projects; and
- delays that have arisen in securing final environmental approvals for such projects have often been a result of State rather than Commonwealth processes, and also are often attributable to proponents having failed to produce adequate scientific analysis in their draft EIS's.

When considering the costs to industry of Commonwealth involvement in the EIA process, I would argue that it is also appropriate to also take into account the economic benefits of the avoided environmental harm that result from its engagement in the process. The measurement of such benefits in economic terms can be difficult, but it is not an entirely novel exercise. To take just two examples from overseas:

- a study by the US EPA found that the benefits of the 1990 Clean Air Act Amendments will exceed compliance costs by a factor of more than thirty to one by 2020;
- the European Commission has reported that full implementation of EU environmental legislation will bring an annual benefit of 50 billion euros in terms of growth, jobs and well- being across the European continent.

THE WIDER AGENDA BEYOND THE ONE STOP SHOP INITIATIVE

There is nothing new in the current campaign by the resources sector against Commonwealth involvement in EIA. The mining industry railed against the application of the EPIP Act to its activities constantly from the time of its adoption in 1974, especially after the Fraser Government took the unexpected step of using the Act to prohibit the export of mineral sands extracted from Fraser Island. It was joined in this opposition for many years by the forestry industry, culminating in proposals in the early 1990's to introduce so-called "resource security" legislation. The Commonwealth's *Forest Conservation and Development Bill 1991,* which was designed to implement the resource security concept, failed to be passed, in the face of strong community opposition.

The current "green tape" propaganda is simply the latest stanza in an enduring campaign against Commonwealth involvement in EIA by the resources sector, but it is enjoying much more traction than previous efforts. Underlying this campaign is a far larger issue with

respect to the future of those involved in the fossil fuel industry in Australia. The coal, oil and gas (including "unconventional" gas) industries have a great deal at stake in the face of the growing pressure to shift Australia's energy generation from fossil fuels to renewables in response to the challenge of climate change. They have found a willing ear in the current Coalition government and it is impossible to avoid the conclusion that the question of what is an appropriate role for the Commonwealth in EIA has been captured by a much larger contest involving the future choice between fossil fuels and renewable energy in Australia. In short, the Coalition government has become the handmaiden of the fossil fuel industry and is vigorously promoting its cause. As Ross Garnaut noted in his John Freebairn lecture delivered in Melbourne on 20th May 20014: "Big business has never been so directly influential with government and senses that it might be a winner which takes all on environmental matters."

The one-stop-shop agenda has also found willing ears at the State level, where governments are keen to eliminate Commonwealth involvement in decision-making concerning large-scale resources projects that they are seeking to attract to their respective jurisdictions. In reality, this has always been the case, but the arguments concerning duplication of process have been taken up afresh by State governments in recent times. For example, the South Australian Premier, Jay Weatherill, indicated in a recent letter to me defending his decision to proceed with the negotiation of an approval bilateral agreement with the Commonwealth, that he placed considerable reliance on a recent report of the Productivity Commission which he noted was "critical of the existing system due to unnecessary complexity and duplication…". This is a reference to the *Final Report of the Productivity Commission on Major Project Development Assessment Processes*, released in November 2013. This report in fact presents a strongly qualified recommendation only to proceed with approval bilateral agreements if five conditions are satisfied, including "*strengthening the approval processes of States and Territories through the implementation of other reforms proposed in this report."* It also suggests that:

> "A targeted approach is likely to lead to the Australian Government continuing to control matters where it considers that the community would not accept it exiting the field. In such cases, the States and Territories should accredit Commonwealth processes where the processes address the same matter."

This is a refreshing perspective on possible alternative approaches to Commonwealth accreditation of State EIA processes in all circumstances, but unfortunately it has not been further developed in the report and has been completely ignored by both the Commonwealth and State governments alike. I shall return to this idea in my conclusions.

THE MAINTENANCE OF HIGH ENVIRONMENTAL STANDARDS UNDER THE OSS SYSTEM

The Commonwealth government has insisted that the handover of its approval powers to the States will only be pursued where State systems offer equivalent standards of protection to those required under the EPBC Act. Satisfying this test involves both a legal and a political perspective, both of which warrant closer examination.

(i) Legal equivalence

Under section 46 of the EPBC Act, rigorous requirements must be met before the Commonwealth Environment Minister can execute a bilateral agreement with a State or Territory government. In particular, the Minister must be satisfied that (a) the relevant impacts of actions will have been adequately assessed and (b) any such action which is approved will not have unacceptable or unsustainable impacts on a matter of national environmental significance.

It might be argued that these requirements could only be met if State environmental legislation applies the same decision-making criteria as are currently stipulated in the EPBC Act. This would almost certainly necessitate substantial amendment of most State environmental approval legislation, which could in turn result in substantial delays in the implementation of the proposed hand-over of Commonwealth powers Whether these requirements will be legally satisfied through the provisions contained in the bilateral agreements is a matter that may well end up being determined in the courts. It is interesting to note that the recently released NSW approvals bilateral agreement provides in Cl.1.4(a) that NSW "is not obliged to make, amend or repeal any NSW laws".

In an apparent recognition of the possibility of legal challenges to the validity of approvals bilateral agreements, , the Commonwealth recently has introduced legislation to amend key provisions of the EPBC Act in a bid to shore up the legal foundations of its one-stop-shop initiative. These proposed amendments remove the protection of the water trigger from a bilateral agreement and provide for approvals to be granted by other parties than State government, such local government authorities. But even if this shifting of the legal goalposts succeeds, there remains serious doubt as to whether this will translate into effective and comparable standards of decision-making at the state level in practice.

(ii) Practical equivalence

The principal argument advanced against approval bilateral agreements and the one stop shop scheme is that the States are overly influenced by the economic benefits that they perceive will flow from resource development and therefore are not in a position to deal objectively with the consideration of MNES. This argument has been advanced succinctly by ANEDO as follows:

> "Only the Commonwealth has the mandate and the willingness to consider the needs of the whole of Australia when approving projects that could affect the environment. A State government has no motivation to put the national interest before its own State interest when approving development within its own State."

There are numerous historical examples in support of this argument. For example, there are situations where the Commonwealth has previously seen the need to invoke its powers under its EIA legislation to prevent a State government from proceeding with an environmentally damaging project - including sand mining on Fraser Island, the Franklin River dam and, more recently, the Traveston Crossing dam in Queensland.

But the outright rejection of specific proposals by the Commonwealth is not the only means of influence it can exert and is in fact a rarely exercised prerogative. A more pervasive influence has also been able to be exerted through setting conditions on environmental approvals that ensure more effective management requirements than might be accomplished by State processes alone. The concern therefore is that, even if there is a "legal equivalence" in relation to the exercise of Commonwealth approval powers by the States, this will not flow through to a practical equivalence in terms of refusals on occasions or the imposition of suitably strict conditions on approvals.

In response to this concern, it might be argued that there appropriate checks on the misuse by the States of their new found powers, in the form of judicial review actions and mechanisms provided for in the bilateral agreements. But these are of little comfort to those concerned about the quality of State decision-making under bilateral agreements. There is an important issue as to whether the same opportunities for judicial review will be available under the accredited State legislation as currently exist under the EPBC Act. Also, judicial review is quite difficult to secure unless some reasonably obvious flaw in the decision-making process is evident. The Commonwealth suggests that it will provide oversight of the performance of State decision-makers under bilateral agreements, for example via an "escalation" clause in each agreement and the possible eventual removal of State powers in relation to a particular proposed decision. But this may not be a realistic sanction, as noted in a recent article by solicitor and journalist, Marcus Priest:

> " …the practical ability of the Commonwealth to step in and make these assessments will be very limited by the reduction of government resources in

> Canberra for this function" (see Priest, M., "Power shift to alter environment landscape, 23rd May 2014, available at http://www.abc.net.au/news/2014-05-23/priest-power-shift-to-alter-environment-landscape/5473222

> Also, politically, such action would almost certainly be seen as a last resort step to be taken in only the most extreme circumstances, especially by the current Commonwealth government.

OTHER ARGUMENTS AGAINST THE OSS

Apart from the deficiencies of the justifications advanced for the one stop shop concept, there are other considerations which I suggest argue strongly against it.

First, the elimination of the Commonwealth as an "honest broker" in relation to the consideration of environmentally contentious projects will most likely lead, in my opinion to a return to the "warfare" situation which prevailed at earlier times in such situations, manifested through direct action protests and legal proceedings - but also now accompanied by a new tactical focus on discouraging financial investment in contentious projects (as evidenced in the recent successful campaign to persuade the Deutsche Bank not to invest in the Abbott point development). Rather than streamlining the approval of major projects, the end result may ironically turn out to be more prolonged and bitter disputation. This same point was made in the recent speech by Ross Garnaut previously mentioned, where he said:

> " We can expect trench warfare overdevelopment projects, delays, increases in the price of investment and damage to all relevant interests until this phase of the interface between environment and the resources sector is brought to an end. "

Second, the likely outcome of the one stop shop process is increased complexity and uncertainty for industry. The so-called one-stop-shop will in practice become an "eight-stop-shop" in which the detailed procedures and processes in each State and territory will vary considerably, despite their accreditation via approvals bilaterals. The fundamental desire of industry in relation to environmental regulation has been, and always will be, to have certainty of outcomes through clear and consistent regulatory measures. The reversion to State-managed EIA processes will almost certainly give rise to inconsistencies and uncertainties which, when associated with increased conflict, will ultimately produce the exact opposite result to what is intended by the one-stop-shop initiative.

CONCLUSIONS AND FUTURE DIRECTIONS

It may be that this initiative is, in reality, more of a cost-shifting exercise by the Commonwealth than a red-tape reduction one, reflected in the recent substantial reduction in staffing levels within the Commonwealth Environment Department. The States may find that they have been extremely short-sighted in agreeing to take over these tasks from the Commonwealth. Where are the States to find the additional resources required to effectively perform these newly acquired functions? In most States, we have seen in recent years a significant reduction in staffing levels within environment departments and it is difficult to see how these States can effectively perform these tasks at the same level as the commonwealth has previously done. If there is attendant, increased litigation against the States arising from inadequate performance, they may ultimately end up seeking to ahnd back the relevant powers to the Commonwealth.

But it is also hard to believe that many members of the Business Council of Australia, particularly those who are not in the natural resources sectors, will not also eventually question why this body has advocated so strongly for a new scheme that will deliver them less certainty of outcomes than the current one.

So, finally, where should we go from here?

Given the scale of the environmental challenges needing to be faced in this country, and globally, at the present time, and given also the growing sense of urgency on the part of scientists concerning the need to address these problems, it is difficult to understand the rationale for a substantial withdrawal from the field of environmental management by the Commonwealth.

Rather, I would prefer to see work done in the near future on the development of a “next generation” Commonwealth environmental law that would replace the current EPBC Act and set in place measures that would enable the Commonwealth to drive the sustainability agenda in Australia. I believe there is a compelling case for the establishment through of a Commonwealth Environment Protection Authority whose functions could include:

- administration of the NPI and SOE reporting;
- Establishing national standards for environmental quality;
- assuming some of the existing functions performed by the Commonwealth under its current environmental legislation, for example, with respect to the assessment of industrial and agricultural chemicals;
- retaining the responsibility for administration of EIA process , including environmental approvals on matters of national environmental significance; and

- Replacing the Environment Minister in the performance of the many other, biodiversity-related functions needing to be performed under the EPBC Act.

Turning to the specific context of EIA, I would propose a reversal of the current one=stop-shop scheme so that the Commonwealth process would prevail over State processes where it is applied to proposals that involve matters of national environmental significance. This is, in effect, what the Industries Commission recommended in its report in November 2013. In this respect, I remain firmly committed to the views I expressed in October 1999, shortly after the EPBC Act was passed:

> "It is difficult to understand why the Commonwealth has set in place the elaborate machinery of the EPBC Act for environmental assessment and approval of actions relating to matters of national environmental significance, only then to provide an equally elaborate mechanism for divesting itself of the responsibility to exercise these functions".

Whilst it may be difficult to prevent the current Commonwealth government from undertaking this transfer of its responsibilities under the EPBC Act, I firmly believe every effort should be made to do so, whilst at the same time also looking forward to a next generation Commonwealth environmental law that could offer the possibility of truly effective protection for the Australian environment.