



Australian Network of Environmental
Defender's Offices Inc

COAG ENVIRONMENTAL REFORM AGENDA

ANEDO RESPONSE – IN DEFENCE OF ENVIRONMENTAL LAWS

May 2012

*Our environment is a national issue requiring national leadership and action at all levels...
The prognosis for the environment at a national level is highly dependent
on how seriously the Australian Government takes its leadership role.*

– State of the Environment Report 2011

Introduction

Environmental Defender's Offices are a network of non-profit community law centres in each State and Territory around Australia. For the past 25 years we have helped the community to use the law to protect the environment. We have initiated hundreds of legal cases to protect the most sensitive and unique parts of the Australian environment, in the public interest. Of the 71 cases taken under the federal EPBC Act in the last twelve years, 24 have been run by EDOs. We also advocate for stronger environmental laws at state and federal level and have been involved in every major review of environmental regulation. We understand the value and importance of environmental laws and their role in protecting our unique environment from inappropriate development and pollution.

This paper provides a brief overview of:

- The recent COAG decisions that stand to profoundly affect environmental laws and protections,
- why environmental laws matter and why they reflect the fundamental values of Australians,
- why Commonwealth involvement in environmental regulation is vital, and
- how environmental laws should work in Australia

The COAG agenda – what was agreed to and what does it mean?

On 13 April 2012 the Council of Australian Governments (COAG) – the forum for the leaders of Federal, State and Territory governments in Australia – agreed to major reforms of Australia's environmental laws. The reforms, proposed by the business community, are directed at both Federal and State laws, particularly laws that assess new developments. The key reforms that COAG agreed to include:

- accelerated accreditation of state processes¹ that will effectively end Federal involvement in both the assessment and approval of environmentally sensitive developments under federal environmental laws,
- fast-tracking of approval of major developments in each State,
- 'rationalising'/removing energy efficiency and climate change schemes in each State, and
- removing other environmental laws seen as 'unnecessary' and 'costly for business'.²

These proposed reforms were put forward via COAG's new Business Advisory Forum³. No such forum exists for any other sector of the community. The reforms are directed squarely at reducing what big business sees as 'unnecessary delays' and costs.

This paper focuses on the first two reforms.

Withdrawal of Federal involvement in assessment of development

The Commonwealth has agreed to enter into fast-tracked agreements with each State to transfer its powers of assessment and approval under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to the States. This will cover all developments apart from those that affect world heritage, commonwealth marine waters and nuclear actions.⁴ This means that the Commonwealth would no longer have any role in either assessing the environmental impacts of State developments on nationally significant environmental matters or in deciding whether to approve those developments.⁵ COAG stated that a framework for such agreements would be settled on by December 2012 and all agreements would be signed off by March 2013.

Fast-tracking of major projects

COAG's agreement to implement fast-tracking of 'major projects' is a proposed reform at State rather than Commonwealth level. In most States this means new legislation will be implemented to speed up the approval process for any development project the State deems to be 'major'. Such projects would almost certainly include big mining or gas projects and

¹ Eg, COAG commitments included 'addressing duplicative and cumbersome environment regulation'; and agreement to 'fast-track the development of bilateral arrangements for accreditation of state assessment and approval processes, with the frameworks to be agreed by December 2012 and agreements finalised by March 2013'. See Council of Australian Governments Meeting Communiqué, 13 April 2012.

² Eg, agreement to 'examine and facilitate removal of unnecessary duplication and reduce business costs for significant projects'. See the COAG communiqué 13 April 2012 at http://www.coag.gov.au/coag_meeting_outcomes/2012-04-13/index.cfm

³ See the Business Advisory Forum communiqué 12 April 2013 <http://www.pm.gov.au/press-office/council-australian-governments-business-advisory-forum-communicu%C3%A9> and the Business Council of Australia's discussion paper for the Business Advisory Forum <http://www.bca.com.au/Content/101965.aspx>

⁴ Note that the Coalition has stated that if elected, they will go further in implementing an even more streamlined "one-stop shop" system for project assessment and approval including full administration of federal laws. <http://www.theaustralian.com.au/national-affairs/climate/tony-abbotts-environmental-one-stop-shop/story-e6frg6xf-1226333815692> In this instance, developments including those impacting world heritage, commonwealth marine waters and nuclear actions would be the responsibility of the States to assess and approve.

⁵ Such as Ramsar protected wetlands, nationally listed threatened species and ecological communities, migratory species and national heritage places.

transport infrastructure, but could also encompass much smaller developments (such as tourist resorts or industrial estates).⁶ In our experience, major project fast-tracking legislation usually results in: an exemption from, or reduction in, environmental assessments and approvals; a single decision-maker to make all relevant approval decisions (usually the Premier or Planning Minister); and a reduction in community consultation and third party rights to seek review.⁷

Why are we concerned?

This attack on environmental regulation is alarming at a time when climate impacts are increasing, development pressures on the environment are becoming more intense especially from mining, and threatened species are being lost at an unprecedented rate. Recognition and management of such issues requires a coordinated, national response. As the 2011 State of the Environment Report noted, 'Australians cannot afford to see ourselves as separate from our environment.'⁸

The COAG reform agenda threatens to wind back 30 years of important gains in environmental regulation. There is no indication in the COAG documents that environmental standards will be improved as a result of the reform, or that that is even a factor to be considered in the reform process. Moreover, COAG has agreed to a rapid timetable for implementing several of these reforms. Reforms will be judged by whether they "lower costs for business and improve competition and productivity." No value has been attributed to the economic benefits of protecting the environment and human health. The only statement in the COAG communique that refers to the environment is that First Ministers "reaffirmed COAG's commitment to high environmental standards", however this is not back up by any process, commitment or requirement to do so.

Of particular concern is the proposal for the Commonwealth to 'step back' from environmental assessment and project approval altogether. In a number of States and Territories environmental impact assessment is currently weak and inadequate, and the States alone cannot be relied upon for protection of environmentally sensitive places in the national interest. Whilst the current review and approval process at the Federal level under the EPBC Act is not perfect, if the Commonwealth accredits the State processes and no longer oversees development assessment or project approval, even worse environmental outcomes are likely.

The direct involvement of EDOs across Australia in environmental law over many years has shown us that it is imperative that both State and Federal governments are responsible for environmental regulation. We strongly oppose moves to reduce environmental regulation merely to ease pressure on big business and fast-track major development. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest. Strong environmental laws are essential to the continued health, prosperity and well-being of Australia, and the Australian environment.

⁶ For example in 2009 the Victorian government proposed state projects over \$10m be considered major, with discretion to extend that to any project the minister declared to be major.

⁷ For example, see Part 3A of the *Environmental Planning & Assessment Act 1979* (NSW), which has now been repealed.

⁸ State of the Environment 2011 Committee, *Australia State of the Environment 2011—In Brief*. Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, 2011, 'Headlines'.

Why environmental laws matter

Rather than being seen as 'green tape' or a burden on business, environmental laws are an essential element of a healthy society. Environmental laws not only protect our fragile ecosystems, they also protect our health, our communities, our economy, and future generations. The efficacy of an environmental assessment and approval system should not be judged solely on its ability to meet processing timeframes or attain 'satisfactory' development approval rates. More fundamental is the system's ability to produce ecologically sustainable outcomes.

Environmental laws form the basis for environmental protection in Australia: they set the standards that everyone in Australia must comply with. They require companies proposing developments to minimise environmental harm and to use resources as effectively as possible. They develop market mechanisms to help drive down greenhouse gas emissions, and allow members of the public to participate in decision making about activities that will affect their lives and their surroundings. They ensure that community resources such as clean air and clean water are safeguarded, and they protect biodiversity, natural resources and ecosystems.

The emphasis on reducing the costs to business of environmental compliance that forms the basis for the COAG reforms overlooks the costs to communities of a reduction in the laws that protect their health and local ecosystems. It can be argued that effective environmental regulation is a cost of doing business that companies can pass on to consumers across Australia. In contrast, the impacts of inappropriate development are disproportionately felt by the communities and local people that have to live with the consequences of such development.

Environmental policies and programs are useful, but they do not replace the need for law. Only laws can require governments and people to act in prescribed manners or prohibit and penalise for harmful or damaging activities. Policies and programs cannot set legally binding standards and requirements, or be enforced when breached. All three are needed to effectively protect the environment.

Environmental laws matter because they:

- recognise at their core the value of the environment, and can seek to ensure that decisions are made in accordance with the principles of ecologically sustainable development (ESD);
- protect the community's right to be informed of, and participate in, decision-making processes that affect the environment;
- ensure that a rigorous, science-based assessment of environmental impacts is applied in the decision-making process;
- provide enforcement mechanisms where environmental laws are breached; and
- ensure that our international environmental obligations are upheld.

Environmental laws lead to better decision-making

Environmental laws matter because they require decisions that affect the environment to be consistent, at their core, with the principles of ESD. This means that economic, environmental, social and equitable considerations – both short term and long term – are a genuine part of the

decision-making process. ESD seeks to uphold the precautionary principle, so that threats of serious or irreversible environmental damage are taken into account - even in the absence of full scientific certainty. It also recognises the principle of inter-generational equity, which seeks to ensure that present actions do not compromise future generations' ability to meet their development needs.

Environmental laws secure the right to public involvement in decision-making

Strong environmental laws protect the right of the public to a voice in environmental decision-making. At its best, public participation should enable citizens and community groups to engage, on equal terms, with far better resourced and organised interest groups in the decision-making process. It should ensure that governments are accountable for upholding environmental or planning laws and, more broadly, the national interest, which should properly extend beyond commercial interests to the interests of communities, health, biodiversity, future prosperity and sustainability. Public engagement has a vital role to play in actions that potentially harm the environment – stimulating innovative and socially responsible answers to environmental problems, improving enforcement of environmental laws, and, ultimately, better protecting the environment.

Environmental laws promote transparency and accountability

Environmental laws are important because they build into the system the rights of the community to participate in decisions, but they also provide public access to project information, giving real opportunities for input. They also require the proponent to report on its activities, and governments to be accountable for projects which they have approved. These mechanisms make it harder for big business to overlook the interests of less powerful groups and to prioritise speed and cost-savings in seeking development approval over the thorough assessment of impacts on communities and the environment.

Environmental laws require rigour, objectivity and certainty in environmental decision-making

Good environmental laws ensure that a rigorous, science-based assessment of environmental impacts is applied in the decision-making process. This provides clear minimum standards and objective processes for environmental impact assessment (**EIA**) and the protection of significant and sensitive parts of the environment.

Environmental laws ensure compliance, monitoring and enforcement

Environmental laws not only set the ground rules – they provide a framework for ensuring they are complied with. At both State and Commonwealth level, good compliance, monitoring and enforcement mechanisms ensure that the actions that have been approved are achieving the outcomes required. They provide for ongoing, rather than 'one off', protection.

Environmental laws protect communities and provide environmental justice

As noted at the outset, environmental laws don't just protect the environment. When properly implemented, they can help to address social disadvantage and 'fairness' in our legal system. For example, it is not uncommon that individuals from marginalised or lower socio-economic groups are more often exposed to inappropriate developments which lower air quality, water quality or the amenity of an area, with flow-on effects leading to ill-health, reduced land values, disadvantage and disempowerment. Environmental law can play a crucial role in assisting Aboriginal Australians to protect their cultural heritage. Environmental laws can ensure that all

Australians have equal rights to a healthy environment, liveable communities and protected cultural heritage; and ensure that businesses and government agencies have a legal responsibility to protect our environment and conserve natural resources.

Environmental laws are a priority for Australia and protect what we value

Environmental laws matter not only because they provide a framework for the protection of our biodiversity, our natural assets, and our heritage, but because they also protect our health, our communities, our economy, and future generations. These values are recognised all over the world, with environmental laws forming a basic component of functioning democracies. It is imperative at this time that the laws that protect our environment are themselves protected, and not undermined. Achieving and maintaining these protections should be a priority for all Australians.

Why Commonwealth involvement in environmental regulation is so important

The COAG proposal to remove the Commonwealth from environmental impact assessment and approval under the EPBC Act and hand those responsibilities to the States is a major concern for the following reasons.

Only the Commonwealth Government can provide national leadership on national environmental issues

Federal environmental laws are particularly valuable as they can provide an over-arching framework which sets the standard for environmental assessments and decisions.

As stated in the 2011 State of the Environment Report, "Our environment is a national issue requiring national leadership and action at all levels.... The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role."⁹

Not only does the Commonwealth generally have higher standards in environmental regulation, but it is better placed (and often better resourced) to manage the environment in the national interest and maintain an arms-length approach to considering projects. This includes where the State (or a State-owned corporation) is the development's proponent or otherwise has a financial interest in the development's approval. In such situations, the State has a clear conflict of interest that reasonably casts doubt on its ability to objectively and credibly pass judgment on proposed development. Federal environmental laws are often the only thing preventing States from approving actions that harm the environment, as demonstrated below.

States are not mandated to act in the national interest

It has been the experience of EDOs over decades that States do not act in the national interest in managing the environment. This is partly due to their single-State focus and partly because they lack the mandate and resources to consider consequences outside their State. A prime

⁹ State of the Environment 2011 Committee. *Australia state of the environment 2011—in brief. Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities*, 2011, 9.

example of this is the Murray-Darling Basin, where vested State interests over many decades have led to a significant decline in the condition of the Basin.

The Commonwealth, on the other hand, has the ability to properly consider national or cross-border issues and make decisions in the national interest. This is the reason the EPBC Act focuses on matters of national environmental significance – they are matters that by their nature should be considered and protected at the national level by a national government.

States directly benefit from the projects they are assessing

For many major development projects the State government is the proponent or a strong supporter of the project, or has an expectation of receiving revenue as a result of the project. Obvious examples are mining and major infrastructure projects. The State of Queensland's approval of the Shoalwater Bay rail line and coal terminal proposal in 2008 highlights the tendency of a State to prioritise short-term political interests over concerns for the environment. This proposal was part of a \$5.3 billion project to produce 25 million tonnes of coal a year for export. It was declared a significant project by Queensland's Coordinator-General (who thereby undertook the project's environmental assessment) but was rejected by the Commonwealth Minister for the Environment on the grounds that the proposed coal terminal would have 'clearly unacceptable impacts' on the Shoalwater and Corio Bay Ramsar wetlands and Commonwealth lands (the Shoalwater Bay Training Area). In these instances it is unrealistic to expect the State to make an impartial decision as to whether a project should go ahead.

Another example of a State government being more focused on short-term interests rather than the environment was Victoria's consideration of the Scoresby Freeway project that was proposed near Melbourne in 2003. The Victorian government referred the proposed freeway project to the Commonwealth for determination whether the project should be assessed under the EPBC Act but broke the project up into parts in the hope that it would not trigger review under the EPBC Act. Among other things, the Victorian government did not state in the referral that it was likely that a further freeway link would need to be constructed across a particular area of environmentally sensitive land in the future as a consequence of the construction of the Scoresby Freeway. Such deficiencies were challenged and the referral was found by the Federal Court to be misleading.¹⁰ This example demonstrates the inherent conflict of interest that results from leaving environmental impact assessment to state based processes, particularly when it is a State backed major project.

In general, the Commonwealth is a step removed from the development and therefore able to make a more reasoned and measured decision in the national public interest. There are many examples of States signalling that they would progress major projects that would have had significant adverse environmental impacts that were ultimately rejected by the Commonwealth. For example, the Traveston Dam in Queensland, Franklin Dam in Tasmania, Jervis Bay rezoning in New South Wales, releasing of water from Lake Crescent in Tasmania for irrigation, and the Nobby's Headland development in New South Wales, were all State-backed projects that were rejected by the Commonwealth due to the unacceptable environmental impacts they were going to cause. This situation will only be made worse if the COAG proposal for fast-tracking of major projects is adopted in each State. Fast-tracking reforms will reduce environmental controls, oversight and community participation. If the Commonwealth removes itself from approval of

¹⁰ Mees v Roads Corporations [2003] FCA 306.

these projects, as is proposed, there will effectively be no limit to States' powers to approve developments.

The Commonwealth must ensure we meet our international environmental obligations

Another important function of Commonwealth involvement in environment regulation is to ensure Australia is meeting its many international environmental obligations such as those under the Ramsar Convention, the Biodiversity Convention and the World Heritage Convention.

For example, in 2009 there was a proposal to develop a major tourist resort on Great Keppel Island in the Great Barrier Reef World Heritage Area. The State of Queensland declared the resort to be a 'significant project' and its intention to fast-track it for review and approval under State law. The proposed resort, which included up to 1700 low-rise tourist villas and up to 300 tourist apartments, was rejected by the Commonwealth on the grounds that it would "clearly [have] unacceptable impacts on" world heritage properties and national heritage places.

The Commonwealth holds primary responsibility for ensuring Australia's international obligations are met and it (rather than the States) is in the best position to do so. If the Commonwealth devolves its obligations under international law it will be up to the States to ensure that development activities comply with Australia's international obligations – a task that they are unlikely to be willing or able to do.

Only Commonwealth involvement can raise States up to a higher national standard

The absence of the Commonwealth from environmental decision-making means that there will be few (if any) checks and balances on State processes. At present, for development activities that require EPBC Act assessment, the Commonwealth can ensure that national standards are being met. Based on EDOs' experience, in a number of States and Territories environmental impact assessment is weak and inadequate. Major projects are often subject to less scrutiny and greater exercise of discretion, even though they are the very projects that are likely to have the highest environmental and social impacts. Without Commonwealth oversight, State Governments can continue to operate under inadequate regimes that do not provide appropriate levels of environmental protection.

For example, in Victoria the Government's decision to allow cattle grazing in Alpine national parks did not require any approvals at State level despite being clearly against the intent of State national parks regulation. Strong vested interests in the State overrode the weak environmental requirements. It took the Commonwealth to step in on behalf of nationally listed threatened species and end the practice.

Communities and ecosystems affected by major projects must not be overridden or ignored by fast-track development assessment and approval processes. Attempts to reduce community input and rush through major developments contributed to the former NSW government's demise in 2011.¹¹

¹¹ Former Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW).

How should environmental law work in Australia?

The COAG reform agenda has the potential to wind back 30 years of gains in environmental regulation. The reforms should instead be used as an opportunity to improve environmental standards across Australia, at the same time as lowering costs and increasing productivity.

The following items should be adopted by COAG as an essential part of any environmental reforms:

- COAG should make a commitment that any reforms made at the Federal or State level will be aimed at improving environmental standards, alongside the aims of increased productivity and lower costs.
- The Commonwealth should use this opportunity to raise States to a higher level of environmental standards, rather than allow a negotiated 'race to the bottom'. Standards are needed across a range of areas, such as environmental impact assessment; transparency of project information and decision-making processes; community engagement and access to justice; and monitoring, reporting and enforcement requirements.
- States should commit to only making reforms where they will demonstrably improve environmental standards.
- Environmental and planning legislation across the board should include open standing¹² to bring enforcement and judicial review proceedings (or broad standing at a minimum¹³). Open standing increases opportunities to enforce the law other than by reliance on government agencies, improves public confidence that laws will be adhered to,¹⁴ and helps ensure that limited resources are directed to resolution of substantive issues.
- The Commonwealth should retain its primary role in environmental impact assessment for nationally significant environmental matters, and not agree to bilateral approval agreements with the States. However, if bilateral approval agreements are signed, they should only be done on condition that each State meets a higher national standard that is at least commensurate with the EPBC Act's protections, rather than simply accrediting current weak State processes. For example in Victoria, a bilateral agreement should not be signed until Victoria has implemented the new environmental impact assessment legislation that it has committed to.
- States should not implement major project fast-tracking provisions that exempt major projects from environmental regulation. If major project fast-tracking processes are implemented, they should retain the highest levels of environmental impact assessment

¹² See EP&A Act 1979, s 123(1), 'Restraint etc of breaches of this act': *Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.*

¹³ See, eg, s 487 of the EPBC Act. However, EDO offices have observed that the current standing rule in s 487 of the Act imposes evidentiary barriers that prevent some applicants from obtaining standing, in addition to posing a practical burden in the preparation of proceedings.

¹⁴ See eg, F. Millner, 'Open standing and enforcement' (2011), 26 *Australian Environment Review* 7, pp 185-7. See also EDO NSW, NCC and TEC submission to NSW Planning Review Issues Paper (March 2012), response to Chapter E

and community involvement. The projects with the greatest potential impacts deserve the greatest assessment and scrutiny.

- Reforms to the EPBC Act should be aimed at improving environmental standards in the Act and ensuring all States are brought up to a higher national level.
- As the reforms proposed will have a direct impact on the community and the environment, not just business, COAG should institute a Community Advisory Forum to balance out the partisan views of the Business Advisory Forum.

The EDOs can provide more information on all of these requirements, and further advice on what the key elements of best practice environmental assessment should include.

Conclusion

The proposal by COAG represents a direct attack on environmental laws across Australia.

Public participation and environmental assessment processes are fundamental elements of good environment laws, and are essential for ensuring long term sustainable outcomes. The public interest value and benefits of these processes mean that they must not be dispensed with on the basis that some sectors perceive them to be an unnecessary burden. Any 'costs' of development assessment processes must be balanced by the public interest benefits. These benefits, although difficult to quantify with a dollar value, are vital and must be protected by robust environmental laws at both State and Commonwealth level.

For further information, please contact:

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