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TITLE: **Why new CSG law is not the green victory it may seem**

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PUBLICATION: **Crikey**

PUBLICATION DATE: **20/03/13**

LINK *http://www.crikey.com.au/2013/03/20/why-new-csg-law-is-not-the-green-victory-it-may-seem/?wpmp_tp=1*

Federal Environment Minister Tony Burke caused a stir last week when he announced the government was seeking to amend laws to ensure that federal approval is required for coal seam gas projects and large coal mines that could have a significant adverse impact on a water resource.

Although cheered by the rural independents, Greens and environmental groups, the proposal is illogical, runs counter to existing policy structures and is unlikely to improve environmental outcomes.

To be clear, there is no doubt there are legitimate concerns about the environmental impacts of CSG and large coal mines. Both have the potential to adversely affect surface and groundwater resources, which can lead to the degradation of other ecosystems. The loss of agricultural land and property intrusions associated with many of these projects have caused concern. In addition, the relative novelty of CSG and the rapid expansion of the industry have created problems for communities and regulators alike.

Given the difficulties faced by some state regulators, and the potential for inter-jurisdictional impacts from some projects, the Commonwealth could have a role to play in improving outcomes. However, the proposed water trigger is no solution, and more than anything, the way it has been introduced is no way to make good policy.

Back in 1997, the Council of Australian Governments reached an agreement on the division of environmental responsibilities between the Commonwealth and states. The outcome was that the scope of the Commonwealth's environmental impact assessment and approval regime would be confined to seven matters of national environmental significance: World and National Heritage properties, wetlands of international importance, threatened species and ecological communities, internationally recognised migratory species, nuclear activities and the Commonwealth marine environment. It was also agreed the Commonwealth would continue to regulate its own activities, and activities that could have adverse impacts on Commonwealth land.

Now, under the Environment Protection and Biodiversity Conservation Act, where a person undertakes an action that is likely to have a significant impact on any of these matters, they are required to obtain approval from the federal environment minister. Further, where the minister is

considering a project, he/she can only have regard to its impacts on the relevant “trigger”. That is, if a project requires federal approval because of its impacts on a threatened species, that is all the minister can consider. Other impacts are dealt with by the states and territories.

The rationale for restricting the Commonwealth’s approval regime to these designated matters is based on historical, constitutional and international law issues. The states have traditionally had primary responsibility for natural resource management and land use planning and, as a result, have established regulatory and administrative arrangements for dealing with these issues.

Allowing the Commonwealth to intervene in any environmental issue would lead to unnecessary duplication and exhaust the administrative capabilities of the federal government. On the other hand, it is acknowledged by most that the Commonwealth has a legitimate role in protecting matters of national environmental importance.

The compromise embodied in the 1997 COAG agreement was that the states and territories should be left in charge of things that are of purely local, regional or state significance, while the Commonwealth steps in if the environmental matter transcends state interests. The touchstones for deciding what is of national significance were supposed to be:

The existence of an international obligation to protect an asset or regulate a threat (e.g. universal heritage values under the World Heritage Convention or threatened species under the Convention for Biological Diversity)

An environmental asset that is managed by the Commonwealth or that is, of its very nature, of national significance (e.g. National Heritage places or the Great Barrier Reef Marine Park, which was added in 2009).

Although having a certain legal rationality, the division of responsibilities and ways they are reflected in the EPBC is unsatisfactory. The triggers are uncertain and, despite efforts to avoid it, there is inefficient duplication between the federal and state regimes. As a result of these and other issues, the EPBC has done little to improve the condition of the environment, frustrated industry and state regulators, and imposed costs on business and the taxpayer.

“Reform of the EPBC is long overdue but it should not happen like this.

Since 2006, COAG has been working to improve the EPBC and the way it interacts with state processes. The main thrust of the reform agenda has been to move the Commonwealth out of project-level regulation, and get it to focus on strategic issues, including trying to raise the states’ environmental standards.

In early 2012, COAG announced it was pushing ahead with the controversial end-game of this reform agenda — the devolution of federal approval powers under the EPBC to the states through what are known as “approval bilateral agreements”.

Only months prior to this, and at the behest of Tony Windsor MP, the federal government launched the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development to advise on the impacts of these projects on water resources. To ensure consistency with the reform agenda and COAG, the committee was designed to work collaboratively with state regulators in improving the information base for approval decisions. An agreement was later reached between the Commonwealth and NSW, Queensland, South Australian and Victoria on how the committee would carry out its functions, and the incorporation of its advice.

Then, in classic Labor style, the wheels came off. September 2012 saw the government turn the principles behind the EPBC on their head when it amended the legislation to “deal with” the now infamous Abel Tasman supertrawler saga. Three months later, the government announced that the approval bilateral agreement negotiations were proving difficult and that, as a result, it was shelving the proposal to devolve approval powers to the states. Now, in contradiction of the direction of the COAG reform agenda, and in breach of the terms of the 1997 COAG agreement, it has unilaterally introduced the new water trigger.

As with so much that occurs in the environment portfolio, the water trigger is unlikely to significantly alter environmental outcomes. What it will do, however, is increase costs, both for business and government, and further strain relations between the Commonwealth and states. Moreover, the nature of the intervention begs the question; if the government is willing to walk away from the 1997 COAG agreement, why confine the reforms to impacts on water resources from CSG and large coal mines?

There are two other quirks associated with the water trigger. First, unlike the existing triggers, there is no international convention that supports it, or a manifest policy justification that is equivalent to, say, National Heritage places. By abandoning the rationale for designating matters of national environmental significance, the government has reopened the can of worms on where the legitimate boundary of Commonwealth involvement in environmental regulation lies.

Secondly, by confining the operation of the water trigger to CSG projects and large coal mines, the government has created a trigger that runs counter the design philosophy behind the EPBC, which regulates projects on the basis of their impacts (irrespective of what type of project they are).

Reform of the EPBC is long overdue but it should not happen like this. The Gillard government is treating environmental regulation as a plaything for political point-scoring and, in doing so, obstructing progress on changes that could lead to substantive improvements in the condition of the environment and efficiency of government processes.

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