

EPLA update on Commonwealth legislation

This paper is designed to give an update on recent Commonwealth legislation. It also deals with some of the current bills before Parliament and the flagged reforms to the EPBC Act. It does not deal with the Clean Energy legislation in detail given the significant information already available on that topic.

Constitutional reform

While the Commonwealth has rejected moving towards a Bill of Rights and other legal protections of such rights that were discussed in the National Human Rights Consultation in 2009, it has flagged changes to the Constitution to recognise Aboriginal and Torres Strait Islanders Peoples.

The discussion paper on the topic indicates the amendments will bring Australia into uniformity with the United Nations Declaration on the Rights of Indigenous Peoples which was endorsed by the Australian Government in 2009. It discusses particular ways that Aboriginal people could be recognized in the Constitution and suggests amendments to remove possible discriminatory provisions such as the race power.

Submissions to the expert Panel chaired by Professor Mick Dodson and Mark Leibler on the recognition of Aboriginal and Torres Strait Islanders in the Australian Constitution have just closed. Increased recognition of aboriginal people may arguably lead to the underpinnings of arguments for greater protection of indigenous culture and heritage.

Changes to Federal litigation

In 2009, the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* was passed. It amended the Federal Court of Australia Act 1976 in relation to case management powers and appeal processes to ensure the efficient administration of proceedings and the reduction of costs. In line with those reforms further amendments have been made to the Federal Court Rules that commenced in August 2011. Applicants are now required to file a Genuine Steps Statement upon instituting proceedings. Respondents have to file a similar statement before the first return date. While a failure to follow the procedure does not invalidate the proceedings, it may be considered by the Court when making orders. This could lead to adverse costs orders. Certain proceedings are exempted from the statement including bankruptcy, some winding up orders and proceedings for civil penalties.

Similar reforms were to occur at a State level through the *Civil Dispute Resolution Act 2011* (NSW) but the commencement has been delayed for 18 months so the Federal changes can be observed and learned from before commencing here.

Renewable energy legislation

In June 2010 legislation passed Parliament that separated the Renewable Energy Target into two parts which commenced on 1st January 2011 through *the Renewable Energy (Electricity) Act 2010*. It was aimed to encourage the increase in renewable energy to 20% through the creation and regulation of renewable energy certificates with charges being liable for shortfalls in targets set for reductions. The Large scale Renewable Energy Target covers large scale renewable energy projects like wind farms, commercial solar and geothermal. The small scale Renewable Energy Scheme covers small scale technologies such as solar panels and solar hot water systems.

Both work through issue of credits for generation of renewable energy projects that can then be traded.

Building Energy Efficiency Disclosure Act 2010

This legislation took effect in July 2010, requiring sellers or lessors of office space of 2000 square meters or over to disclose an up to date Building Efficiency Certificate if they wish to sell, lease or sublease office space. Consideration will be given to expanding the scheme to other building types such as hotels, shopping centres and hospitals from 2012.

From 1 November 2011, a full certificate must be publicly accessible via the online building Efficiency register and include a NABERS energy star rating for the building, an assessment of tenancy lighting in the area of the building being sold or leased as well as general efficiency guidance. -The NABERS energy star rating must also be included in any advertising of the office space.

The Building Code of Australia in 2010 has increased the energy efficiency provisions for buildings. The provisions include a six star energy rating or equivalent for new residential buildings, and a significant increase in the energy efficiency requirements for new commercial buildings.

Product Stewardship Act 2011

The Act came into effect on 8 August 2011. It is designed to deal with increase of waste and address the short life of many products by increasing the amount of resources recovered from end-of-life products. Between 2003 to 2007 the amount of waste increased by nearly one third to 44 million tonnes per annum equivalent of 2000 kg for every Australian every year.

In response the Commonwealth has chosen to take a role in regulating waste, a reflection to some extent of the inadequacies of the National Environmental Protection Measures. It is not clear what is the constitutional basis for the legislation.

The idea behind the Act is to encourage people to recycle their products or encourage companies to design their products to limit the amount of materials and resources required for manufacture or limit the amount of hazardous materials the products contain. This is recognised as good product stewardship. The legislation will provide a basis for consumers to be confident about claims by companies that they are being good product stewards. The Act is meant to provide for a flexible and practical approach to this problem. A list of new products will be published each year that are covered by the legislation.

The Act provides for industries and products to be regulated in several ways:

- Voluntary accreditation of schemes without the need for regulation.
- Co-regulatory product stewardship schemes delivered by industry and regulated by Government, i.e. where there is a target to meet.
- Mandatory product stewardship which places legal obligations on parties to take action. This may include for example requirements at the end of the life of a product.

The products on the National Waste Policy implementation plan for product stewardship action include televisions and computers, packaging, tyres and mercury containing lights.

Proposals for future schemes will be evidence based taking into account costs and benefits. Price impacts are considered as part of the schemes.

The first product to be regulated under the legislation is televisions through a volunteer scheme.

Carbon Credits (Carbon Farming Initiative) 2011 was passed in September 2011 and will become operational from December 2011. This is the legislation that is part of the complementary land measures to supplement the carbon tax. It is designed to introduce a system of carbon credits for offsetting emissions or meeting regulatory requirements. It is also designed to reduce the emissions generated by agriculture and forestry that are around 23% of Australia's emissions and reflects the fact that these sectors are excluded from the carbon price obligations.

The carbon credits under the scheme are to reduce greenhouse gas emissions by increasing the amount of carbon stored in soil or trees, for example by growing a forest or reducing tillage on a farm to increase soil carbon. They are also designed to reduce emissions by capture and destruction of methane from landfill or livestock manure.

The idea is that these offsets will be purchased by companies seeking to offset their emissions. Various methodologies are being developed by the Government.

Some of the opportunities include reforestation, regeneration, rangeland restoration, soil carbon and native forest protection. Emissions reductions include fertiliser management, landfill gas management, manure management, reduced livestock emissions and savanna fire management. There will be permanence requirements to maintain the carbon offset or hand back the credits.

There are significant concerns about whether the efforts rewarded in the scheme will be additional projects, particularly as the Act defines this through common practice. It also excludes certain activities based on a negative list of activities rather than by excluding activities that are adverse to the environment. The Government has set up a Domestic Offset Integrity Committee to assess offset methodologies to ensure that the scheme leads to real abatement.

There is also an Indigenous Carbon Farming fund as native title land is dealt with separately under the scheme.

Motion on Torres Strait islands Sea Wall was a private members motion that passed Parliament last month. The Act ensures that the Federal Government will provide \$22 million for sea wall construction in the Torres Strait, and is the first Commonwealth adaptation measures other than significant funding for research into adaptation issues.

Environment Protection and Biodiversity Conservation Amendment (Recreational Fishing for Mako and Porbeagle Sharks) Act 2010

One amendment was made to EPBC Act last year to make it an offence for recreational fishers to take or trade or undertake an action that results in the death or injury of a short fin mako shark, a long fin mako shark or a porbeagle shark.

Protection of the Sea Legislation Amendment Act 2010

This was legislation to amend the: *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. It implemented the revised Annex VI to the International Convention for

the Prevention of Pollution from Ships to provide for the stepped reduction in the sulphur level in fuel oil used in ships; and *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* to create responder immunity to protect persons and organisations from liability who act reasonably and in good faith when providing assistance following a spill of fuel oil.

Hawke Review of *Environment Protection and Biodiversity Conservation Act 1999*

(EPBC Act). The ten year review of the Act undertook considerable consultation and submissions throughout 2009 to 2010 by Dr Allan Hawke, and panel of Professor Tim Bonyhady, Paul Stein, Professor Mark Burgman & Rosemary Warnock. It found that the public were broadly supportive of the EPBC Act and in many respects it was still regarded as a world leader. The report made 71 recommendations to improve the EPBC Act.

The Review's recommendations were summarized into a nine point plan as follows (with the Government response in italics):

- Redraft the Act to reflect better the Australian Government role and streamline its arrangements and rename it the Australia Environment Act (*Agreed and will strengthen Act with same key principles. The Government did not agree to strengthening of environmental considerations*)
- Establish an Independent Environment Commission to advise the Government on project approvals, strategic assessments, bioregional plans, and other statutory decisions (*Rejected*)
- Invest in the building blocks of a better regulatory system such as national environmental accounts skills development, policy guidance and acquisition of critical spatial information. (*Agreed with discussion of better threat abatement plans, key threatening processes, etc. Rejected need for Industry Code of Conduct for consultants*)
- Streamline approvals through earlier engagement in planning processes and provide for more effective use and greater reliance on strategic assessments, bioregional planning and approvals bilateral agreements (*Agreed should be greater strategic assessments, regional environmental plans and single national listing of threatened species and EECs and accrediting State listing processes. Also agreed should be identification of critical habitat when a species listed not separate process. Rejected need for maintain or improve test in accrediting Plans/assessments*)
- Set up an Environment Reparation Fund and national biobanking scheme (*Agreed to accredit state biobanking schemes and develop national standard. Rejected Environment Reparation Fund*)
- Provide for environmental performance audits and inquiries (*Agreed*)
- create a new matter of national environmental significance for ecosystems of national significance, water trigger and introduce an interim greenhouse trigger (*Agreed to set up ecosystems of national significance in areas assessed under strategic approaches. Rejected Water Plan trigger and interim greenhouse trigger*)
- improve public transparency in decision making and provide greater access to the courts for public interest litigation (*Most of these recommendations rejected including restoring merits review for certain decisions, have improved some of the public participation issues*)
- Mandate the development of foresight reports to help government manage emerging environmental threats *Agreed*.

There is no precise timetable for the amendments to the Act because of the need for discussions at COAG about the changes given the Commonwealth role in environmental issues.

Montara Oil –Commission of Inquiry

The Inquiry was set up to investigate the likely causes of the uncontrolled release of oil and gas into the Timor Sea from the Montara Wellhead Platform on 21 August 2009 and make recommendations to the Government on how to prevent future incidents. This report has become more timely because of the Deepwater Horizon incident at BP's Macondo field in the Gulf of Mexico.

In May 2011, the Report into the inquiry was released for public comment. The Report concluded that PTTEP Australasia (Ashmore Cartier) Pty Ltd (PTTEP AA) did not observe sensible oilfield practices at the Montara oilfield. It also found that the Northern Territory Department of Resources was not a diligent regulator and its minimalist approach to its regulatory responsibilities gave it little chance of discovering these poor practices. The Minister in response has been asked to consider cancelling their licence.

It contains 100 findings and 105 recommendations, which have implications for governments, regulators, and the offshore petroleum industry. The Government proposes accepting 92, noting 10, and not accepting three of the Report's recommendations. One includes establishing the National Offshore Petroleum Safety and Environmental Management Authority to oversee the industry. It also accepted that the EPBC Act should be amended to enshrine the polluter pays principle and enable recovery of costs of clean up which amounted to \$319million US in this case.

Clean Energy legislation package

This legislation is currently before Parliament. It includes the *Clean Energy Bill* and 13 ancillary bills. These include the following main Bills:

Climate Change Authority Bill 2011

Clean Energy Regulator Bill 2011

Clean Energy (Fuel Tax legislation Amendment) Bill 2011

Clean Energy (Charges Excise) Bill 2011

Clean Energy (Jobs and Competitiveness Program and Coal Fired Generation Assistance) Regulations 2011

Steel Transformation Plan Bill 2011

Clean Energy (Charges- Customs) Bill 2011

Clean energy (Income Tax Rates Amendments) Bill 2011

Clean Energy (Tax law Amendments) Bill 2011

Clean Energy (Household Assistance Amendments) Bill 2011

Environment Protection and Biodiversity Conservation Amendment (Mining Petroleum and Water Resources) Bill 2011

Tony Windsor has introduced a Bill before Parliament to introduce a requirement for approval of mining operations with a significant impact on water resources, and similarly offence provisions relating to that section. A mining operation includes mining, CSG,

prospecting and exploration as well as the storage of minerals and the construction of towns, camps or dams by constitutional corporations. A water resource is defined widely to include a river, lake, aquifer, whether permanent or seasonal or the recharge zone for such places. The provisions will not apply to actions declared by the Minister to be excluded and to actions authorised by an accredited mining authorization process which adequately address impacts on water resources.

There are two other private members Bills before the parliament that propose amendments to the EPBC Act:

- *Environment Protection and Biodiversity Conservation (Abolition of Alpine Grazing) Bill 2011*. It has been introduced by Adam Bandt to ensure that alpine grazing (which was re-introduced by the Victorian Coalition Government) is prevented directly under the EPBC Act
- *Environment Protection and Biodiversity Conservation (Public Health and Safety) Amendment Bill 2011*. This is a private members bill from Luke Hatsuyker, about removing flying foxes from Maclean in Northern NSW.

Illegal Logging Prohibition Bill 2011.

The Bill is still before the Parliament and currently before a Senate Committee. It seeks to combat illegal logging by prohibiting the importation of regulated timber products that contain illegally logged timber. It also prohibits the importation of regulated timber products or raw logs unless through approved importers or processors. There are certain processes for approval as a certifier including ensuring that imported products don't contain illegally logged timbers and that timber products are accurately described. There are considerable penalties for breaches including up to five years imprisonment.

Water issues

The Commonwealth Water Act 2007 meant greater cooperation on water issues particularly in the Murray Darling. The Act is based on international conventions and therefore has environmental objectives and healthy environmental flows at its core. It is dependent on the Murray Darling basin Plan for its implementation. The initial discussion on the Plan caused significant disquiet in irrigation communities given the required cuts to water to restore environmental flows and the final plan as a result has been delayed. If the Plan is watered down to meet the disquiet there may be real issues about its validity. It is likely therefore that the final Plan will end up in litigation of some variety.

Future reforms?

Other issues on the Commonwealth agenda include:

- Improved emissions standards for vehicles - subject to current discussion paper.
- Productivity Commission looking into Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments
- COAG Reform Agenda to streamline environmental and planning laws