

Appropriateness and effectiveness of the water trigger

In this submission, appropriateness and effectiveness are dealt with together, as it is proposed the scope of the trigger be modified.

Currently the water trigger is too narrow and not well targeted. It is clear that the fundamental policy objective is the protection of the water resource. This is reflected in:

- The 'significance' is not related to the size of the enterprise, but the impact on water resources;
- The discussion paper (Sn.7) considers the appropriateness of the trigger is reflected in whether '...it is fit for the purpose of protecting water resources...'

Thus, even if the water trigger is applied fully, it will not necessarily result in achievement of the policy objective as it deals only with the impacts of one or two industries. Such an approach is also demonstrably anti-competitive, and contrary to the principles of best practice regulation. To avoid such a discriminatory response and to achieve the policy objective, the trigger should be expanded to include all developments likely to have a significant impact on water resources.

Commonwealth's Head of Power

It is commonly believed that the Commonwealth have limited control over management of water resources. It is arguable that this is not the case. There is an acceptance of Commonwealth powers being exerted where the matter relates to external affairs, including international agreements (Pillai & Williams). This is also reflected in the Intergovernmental Agreement on the Environment which states the responsibilities and interests of the Commonwealth include: '*...ensuring that international obligations relating to the environment are met by Australia*'

(Clause 2.2.1 (1))

Relevant international agreements relating to water

The Commonwealth obligations for water resource management can be found in at least two international agreements. In chronological order:

- Under the Ramsar convention, Australia has committed to not only designate certain wetlands, but to work towards the **wise use of all wetlands**. Note that under the Ramsar agreement the term 'wetland' encompasses most water resources.
- The International Convention on Biodiversity as well as general obligations, incorporates specific targets (known as the Aichi targets). These include one specifically related to water:

*By 2020, **pollution**, including from excess nutrients, **has been brought to levels that are not detrimental to ecosystem function and biodiversity**.* (Target 8)

These two international agreements were used as the basis of managing water in the Murray Darling Basin, under the *Cwlth Water Act* (2007). They could equally apply to management of water resources more broadly.

Also, the more recently agreed (non-binding) United Nations Sustainable Development Goals include:

Ensure availability and sustainable management of water and sanitation for all (Goal 6)

Thus, under these international agreements, the Commonwealth could take steps to ensure all its water resource are managed in a wise and sustainable fashion. This includes actions to ensure by 2020 'pollution' is not at levels that are detrimental to ecosystem function and biodiversity. These agreements do not envisage an approach that manages only specific sources of water resource degradation. Thus a more complete interpretation would indicate the Commonwealth have an obligation to ensure all sources of water resource degradation are managed appropriately.

Need for intervention

Despite this head of power, it does not necessarily follow that the Commonwealth should intervene. The Commonwealth would only introduce extra regulation if a problem has been identified that is not being adequately addressed by current regulation or market forces.

A recent evaluation of water quality management in Australia concluded:

Water quality continues to be an issue that requires national policy intervention

(KPMG 2011)

It follows that this will also be true of the broader issue of water resource management.

The most recent summaries of the state of Australia's water resources include the State of Environment report (2011) and the more recent summary of Australia's water resources carried out by the Bureau of Meteorology. The State of Environment report summarized, in part, '*Many of Australia's inland water environments are in a degraded condition*'.

This reinforces the view that existing management, including market forces, has proved inadequate in protecting Australia's water resources.

In summary, to meet its international obligations, there is a strong case the Commonwealth to intervene in the better management of water resources, with attention not being given to any particular industry.

Efficiency of impact assessment

Independent impact assessment

It is accepted that the independent advice to the Minister by the IESC has 'strengthened regulatory decisions'. However, the current processes effectively involve duplicate impact assessment processes; one by the proponent, and one by the IESC. Efficiency would be improved if there were a single, independent, impact assessment. There is current legitimate criticism that impact assessments prepared by the proponent are inherently conflicted. This could be overcome by establishing a truly arms-length, independent impact assessment body, removing the need for duplicate assessments (various funding models would be possible). Such an approach would not only improve efficiency, but also effectiveness, as the greater confidence in the impact assessment process would likely reduce potential legal challenges.

Note that the need for a more independent impact assessment process has also been suggested by the professional body, the Environment Institute of Australia and New Zealand (EIANZ), see: <http://www.eianz.org/document/item/2701>

Impact on bilaterals

Currently, where Commonwealth intervention is triggered, separate assessments are done by both State and Commonwealth. There are currently moves through various bilateral agreements between the Commonwealth and States to move to a single assessment, carried out by the State. This approach has been subject to a good deal of criticism, primarily on the basis of real conflict of interests in assessments carried out by State jurisdiction

Much of the criticism could also be overcome, by making the impact assessment process more independent.

Decision making and setting of conditions will remain the responsibility of the regulator.

References

KPMG (2011). 'Evaluation of the National Water Quality Management Strategy'. Report prepared for Department of Sustainability, Environment, Water, Population and Communities.

<http://www.environment.gov.au/water/publications/quality/water-quality-final-report>

Pillai, S & Williams G. 'Commonwealth power and environmental management. Constitutional questions revisited'. *Environmental and Planning Law Journal* **32**, 395 – 408.