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# National harmonisation of environmental regulation

Discussion paper



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## National harmonisation of environmental regulation<sup>1</sup>

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*States and territories have primary responsibility for environmental regulation in Australia. But with each state and territory taking their own approach to regulating the diverse subject matter inherent in environmental law, the result is a myriad of different state- and territory-based laws and policies. Navigating compliance with these regimes can be a challenge for business and industry where their activities extend across multiple jurisdictions.*

*Both industry and environmental groups have advocated for environmental laws to be “harmonised”. In a recent Parliamentary Committee inquiry into the burden of environmental regulation imposed on Australian business, a recurring theme of much of the evidence heard was the need for harmonisation of environmental laws across state and territory jurisdictions and the Committee made recommendations for harmonisation to be pursued.*

*The argument is that although the environment may be unique in each state and territory, the processes and mechanisms which regulate its protection need not be. A standardised regime for environmental regulation, such as through the adoption of a model law by each jurisdiction, could reduce regulatory burden and improve compliance and environmental performance.*

*But would there really be benefits for business and the environment? What aspects of environmental regulation should be harmonised? What can we learn from the national harmonisation of safety regulation? Our paper considers these questions and seeks to start a conversation about the merits of the idea.*

### The complex patchwork of environmental laws in Australia

The Australian environmental legal system is complex. The explanation for that is, in part, the ‘jurisdictional patchwork’<sup>2</sup> owing to our federal system of government. That is, environmental regulation is effected to some degree at each of the three layers or levels of government in Australia: federal, state and local. Another explanation is that environmental law must inevitably reflect the complexity of the natural environment itself and of the practicalities of managing natural resources<sup>3</sup>.

Because of the lack of a direct head of power under the Constitution, environmental laws enacted by the Commonwealth must be made in pursuance of one or more of the legislative powers it does have, such as those relating to trade and commerce (s 51(i)), external affairs (s 51(xxix)) and corporations (s 51(xx)). This has not proven to be an impediment: the Commonwealth has enacted a significant number of environmental laws, but most have been enacted to give effect to the terms of international conventions<sup>4</sup>, in reliance solely or partly on the external affairs power.

The Commonwealth’s central piece of environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), establishes a framework for regulating impacts on “matters of national environmental significance”— the scope of which are generally confined to species or areas to be protected by Australia under international treaties, and impacts on Commonwealth areas or of activities carried out by Commonwealth agencies.<sup>5</sup>

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<sup>1</sup> A version of this paper was originally presented to the Queensland Environmental Law Association Conference in April 2016.

<sup>2</sup> Dr Melissa Perry QC, ‘The fractured state of environmental regulation’ (2013) *Australian Environment Review* 438

<sup>3</sup> Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 6th ed, 2006), 91; Douglas Edgar Fisher, *Australian Environmental Law* (Lawbook Co, 2003) 5.

<sup>4</sup> Bates, above n 2, 62-65.

<sup>5</sup> The most obvious exception is the “water trigger” in sections 24D to 24E of the EPBC Act (ie. water resources in relation to coal seam gas or large coal mining development). For this matter, reliance was placed on the power to regulate corporations (s.51(xx)) and the power to regulate trade and commerce (s.51(i)).

A large number of other Commonwealth environmental laws relate to Commonwealth places and areas, particularly marine areas<sup>6</sup>.

Meanwhile, the Australian states, having residual powers to legislate on all matters not specifically reserved to the Commonwealth under the Constitution (and ‘subject to the supremacy afforded to Commonwealth laws [by] section 109 of the Constitution’<sup>7</sup>, have primary responsibility for environmental regulation in Australia. Likewise in the Australian Capital Territory and Northern Territory, even though the Commonwealth has plenary legislative power, ministers have been granted executive authority in respect of environmental protection and conservation<sup>8</sup>. This division of responsibility was reflected in the Intergovernmental Agreement on the Environment between all levels of government in Australia in 1992, which provided that states and territories have responsibility for the policy, legislative and administrative framework within which living and non-living resources are managed within their boundaries.<sup>9</sup>

State and territory environmental laws are extensive. The complexity of the natural environment has necessitated a regulatory response to a broad range of subject matter. Environmental management—and by extension, environmental law—is a multidisciplinary field that involves the accommodation of a wide range of competing interests<sup>10</sup>. There are generally laws of each state and territory with respect to: environmental assessment and approval of resource activities and other major projects; the licensing of particular activities which pose a risk to the environment (known in Queensland as “prescribed ERAs”); land use planning; land, water, air and noise pollution control; incident notification; ground and surface water extraction and use; waste transport and disposal; native vegetation clearing; biodiversity and species conservation; protected areas management; coastal marine areas; and contaminated land management.

Each of the eight states and territories have taken their own approach to regulating the diverse subject matter inherent in environmental law, resulting in a myriad of different laws and policies across the country—an obvious challenge for business and industry with activities that extend across multiple jurisdictions.

### Examples of the divergence between jurisdictions

The divergence between different states’ laws is sometimes wide, sometimes narrow; sometimes substantive, sometimes cosmetic. For example, in most jurisdictions there is a requirement to notify the regulator of environmental incidents (see Table 1). In Queensland, a general duty applies to all persons who become aware, during the course of carrying out an activity, of events which cause or threaten serious or material environmental harm. A similar duty applies in South Australia. In contrast, other states have requirements to notify of pollution or waste discharges that exceed certain thresholds. The timeframes within which the action must be taken differ too. In Queensland, a strict 24-hour notification requirement applies, whereas each of the other jurisdictions have different (and more relative) timeframes.

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<sup>6</sup> Examples include the *Great Barrier Reef Marine Park Act 1974* (Cth); *Environmental Protection (Sea Dumping) Act 1981* (Cth); *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth); *Protection of the Sea (Civil Liability) Act 1981* (Cth); *Continental Shelf (Living Natural Resources) Act 1968* (Cth); *Antarctic Treaty (Environment Protection) Act 1980* (Cth), although most of those Acts were also made in response to international obligations; see Bates, above n 2, 64-65

<sup>7</sup> Perry, above n 1.

<sup>8</sup> *Australian Territory (Self-Government) Act 1978* (Cth), s 35; *Northern Territory (Self-Government) Regulations 1978* (Cth), s 4

<sup>9</sup> Intergovernmental Agreement on the Environment 1992, para 2.3.

<sup>10</sup> Fisher, above n 2, 5.

Table 1: Key duties to notify environmental incidents Jurisdiction When duty applies Applies to Timeframe

Jurisdiction	When duty applies	Applies to	Timeframe
Queensland <sup>11</sup>	An event that causes or threatens serious or material environmental harm	A person, while carrying out an activity (the primary activity) who becomes aware of the event, whether it is caused by the person's or someone else's act or omission in carrying out the primary activity or another activity	Within 24 hours
New South Wales <sup>12</sup>	A pollution incident that causes or threatens material harm to the environment	A person, becomes aware of the pollution incident that has occurred in the course of an activity	Immediately, upon becoming aware
Western Australia <sup>13</sup>	A discharge of waste that occurs as a result of an emergency, accident or malfunction (and in some other circumstances) and has caused or is likely to cause pollution, material or serious environmental harm	The occupier of the premises on or from which the discharge took place	As soon as practicable
South Australia <sup>14</sup>	Where serious or material environmental harm from pollution is caused or threatened in the course of an activity undertaken by a person	The person undertaking the activity	As soon as reasonably practicable after becoming aware
Victoria	No general statutory requirement	Not applicable	Not applicable
Northern Territory <sup>15</sup>	Where an incident occurs in the conduct of an activity that causes or is threatening or may cause pollution resulting in material or serious environmental harm	The person conducting the activity	As soon as practicable (and in any case within 24 hours) after first becoming aware

In addition, each jurisdiction has also developed guidelines which further clarify the duties to notify. These guidelines, together with the case law that has developed in the specialist environmental courts, give a different complexion to the practical aspects of notification in each jurisdiction.

<sup>11</sup> *Environmental Protection Act 1994* (Qld), ss 320A(1)(a), 320B-320D.

<sup>12</sup> *Protection of the Environment Operations Act 1997* (NSW), Part 5.7.

<sup>13</sup> *Environmental Protection Act 1986* (WA), s 72.

<sup>14</sup> *Environment Protection Act 1993* (SA), s 83.

<sup>15</sup> *Waste Management and Pollution Control Act* (NT), s 14.

Secondly, whilst different jurisdictions each have some form of executive officer liability for key environmental offences (and a due diligence defence), the wording of each the relevant provisions is unique (see Table 2).

Table 2: Executive officer liability for environmental offences Legislation Executive officer liability Due diligence defence

Legislation	Executive officer liability	Due diligence defence
<i>Environmental Protection Act 1994 (Qld)</i> <sup>16</sup>	If a corporation commits an offence, each of the executive officers of the corporation also commits an offence, namely the offence of failing to ensure the corporation complies with the Act	It is a defence to prove: <ul style="list-style-type: none"> <li>the officer took all reasonable steps to ensure compliance; or</li> <li>the officer was not in a position to influence the conduct of the corporation in relation to the offence</li> </ul>
<i>Protection of the Environment Operations Act 1997 (NSW)</i> <sup>17</sup>	If a corporation contravenes a provision attracting executive liability, each person who is a director or who is concerned in the management of the corporation is taken to have contravened the same provision	It is a defence to prove: <ul style="list-style-type: none"> <li>the person was not in a position to influence conduct of the corporation in relation to its contravention; or</li> <li>the person used all due diligence to prevent the contravention</li> </ul>
<i>Environmental Protection Act 1986 (WA)</i> <sup>18</sup>	If a body corporate commits an offence under the Act, each person who is a director or who is concerned in the management of the body corporate is taken to have committed the same offence	It is a defence to prove: <ul style="list-style-type: none"> <li>the person did not know and couldn't have reasonably be expected to know the offence was being committed;</li> <li>the person was not in a position to influence the conduct in relation to the commission of the offence; or</li> <li>the person used all due diligence and reasonable precautions to prevent the commission of the offence</li> </ul>

<sup>16</sup> *Environmental Protection Act 1994 (Qld)*, s 493(2).

<sup>17</sup> *Protection of the Environment Operations Act 1997 (NSW)*, s 169

<sup>18</sup> *Environmental Protection Act 1986 (WA)*, s 118.

<i>Environment Protection Act 1993 (SA)</i> <sup>19</sup>	If a body corporate contravenes a provision of the Act, a person who is an officer of the body corporate is guilty of a contravention	It is a defence to prove the alleged contravention did not result from any failure to take all reasonable and practicable measures to prevent contravention or contraventions of the same or similar nature
<i>Environment Protection Act 1970 (Vic)</i> <sup>20</sup>	If a corporation contravenes any provision of the Act each person who is a director or is concerned in the management of the corporation is also guilty of the offence which relates to the contravention	It is a defence to prove: <ul style="list-style-type: none"> <li>• the person was not in a position to influence the conduct of the corporation in relation to the contravention; or</li> <li>• the person used all due diligence to prevent the contravention</li> </ul>

Lastly, in contrast to the regulation of dangerous goods transport by the Australian Code for the Transport of Dangerous Goods by Road and Rail and a model law implemented by each jurisdiction, the movement of hazardous wastes is not regulated uniformly and the lists of wastes made subject to special regulation (“trackable wastes”) are not identical. In a survey conducted for the Commonwealth Department of Environment on the environmental regulation of hazardous wastes, GHD found that the existence of multiple jurisdiction-specific waste tracking regimes, each with their own waste classifications, codes and administrative requirements, complicated their respondents’ operations and added to the cost of doing business.<sup>21</sup>

### Calls for harmonisation

In a recent inquiry commenced in February 2014, the House of Representatives Standing Committee on the Environment investigated the current regulatory landscape and the potential for deregulation. The Committee’s driving force was to identify aspects of the current regulatory regime that are unwieldy, overly complex or which place unnecessary, onerous burdens on businesses and the community, but which do not deliver any associated improvements in environmental outcomes.<sup>22</sup>

In a sign of the times, the Committee was particularly interested in streamlining regulatory duplication between the Commonwealth and the states and whether the establishment of a “one stop shop” for environmental approvals (that is, for projects requiring assessment and approval under both state laws and the EPBC Act) could address problems that had been identified by the Productivity Commission in a 2013 report: unnecessary complexity and duplicative processes, lengthy approval timeframes and lack of regulatory certainty.<sup>23</sup>

<sup>19</sup> *Environment Protection Act 1993 (SA)*, ss 124, 129

<sup>20</sup> *Environment Protection Act 1970 (Vic)*, s 66B.

<sup>21</sup> GHD, *Transport and environmental regulation of hazardous waste – opportunities for harmonisation* (Final Report to the Commonwealth Department of Environment, July 2015) 28

<sup>22</sup> House of Representatives Standing Committee on the Environment, Parliament of the Commonwealth of Australia, *Streamlining environmental legislation: Inquiry into streamlining environmental legislation, ‘green tape’, and one stop shops* (2014) 3.

<sup>23</sup> Productivity Commission, *Major Project Development Assessment Process - Research Report* (2013) 2. The pursuit of a “one stop shop” for environmental approvals has since stalled (the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth) was blocked in the Senate) although it is still currently part of the Commonwealth Government’s policy.

Yet the Committee had a wide-ranging ambit, and a recurring theme of much of the evidence it received, from a large number of stakeholders and across a broad spectrum, was the further need for harmonisation across state and territory jurisdictions<sup>24</sup>. For example, the Australian Sustainable Business Group stated:

We would certainly support the ongoing [Council of Australian Government] process of trying to streamline environmental regulation. Looking at the way that the workplace health and safety legislative process has developed, perhaps in my lifetime we might see something similar in the environmental field, where [regulation is] ... put under one piece of model legislation taken up by individual state jurisdictions.<sup>25</sup>

The demand for greater consistency was a central finding of the inquiry, as highlighted by concerns raised that eight separate state-based approval systems would still remain under the “one stop shop” proposal. In its submission, the Law Council of Australia stated:

This may not be welcomed by national and multinational corporations seeking to operate more efficiently and cost-effectively across state borders in Australia. Multiple potential state policy settings, which might ultimately conflict, are likely to considerably add to the cost of doing business nationally, without providing consistency and predictability. The Law Council, as a national body, supports nationally harmonised, uniform laws rather than legislative diversity, and notes that industry is likely to prefer more rather than less regulatory consistency...<sup>26</sup>

In a section of its report titled “Towards a single, national regime of environmental regulation”, the Parliamentary Committee recommended that the Commonwealth continue to work with established Council of Australian Governments (COAG) processes to advocate for harmonisation of environmental regulation throughout all state and territory jurisdictions.<sup>27</sup>

These recommendations weren’t new however. Following an earlier review of the EPBC Act in 2009, Dr Allan Hawke had also called for Commonwealth, state and territory regimes and practices to be harmonised where appropriate. One of the actions recommended in his report was, to the extent possible in a federal system, to remedy inconsistencies between the Commonwealth and state and territory regulatory systems, in pursuit of a national approach to environmental regulation. Inconsistencies and gaps in regulation, it was stated, cause confusion, particularly for stakeholders that deal across jurisdictions.<sup>28</sup>

### Achievements to date

In April 2014, while the Parliamentary Committee’s inquiry was still underway, Environment Ministers across the country agreed to a National Review of Environmental Regulation as the next step in environmental regulation reform. The review (which is ongoing) is focused on identifying unworkable, contradictory or incompatible regulation and seeking opportunities to harmonise and simplify regulations. An Interim Report released in March 2015 provided a snapshot of current and completed reforms. Noted in the Interim Report were some states’ efforts to make their biodiversity offsets policies consistent with the Commonwealth’s EPBC Act offsets policy and those of other states, and the National Framework for Compliance and Enforcement Systems for Water Resource Management, which aims to provide a nationally consistent approach to water offences and penalties and other compliance and

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<sup>24</sup> House of Representatives Standing Committee on the Environment, above n 21, 82.

<sup>25</sup> House of Representatives Standing Committee on the Environment, above n 21, 83.

<sup>26</sup> Law Council of Australia, Submission No 37 to House of Representatives Standing Committee on the Environment, *Inquiry into streamlining environmental legislation, ‘green tape’, and one stop shops*, 29 April 2014, 13-14.

<sup>27</sup> House of Representatives Standing Committee on the Environment, above n 21, 84.

<sup>28</sup> Commonwealth of Australia, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, October 2009) 12.



enforcement tools. Also noted was a move to develop a common assessment methodology for the listing of threatened species, based on consistent application of the International Union for Conservation of Nature Red List categories and criteria. As the Interim Report states, differences between jurisdictions' species listing legislative frameworks have resulted in the development of nine separate threatened species lists. The taxa that can be listed, the capacity to list critical habitat, and the threat categories used are not aligned, contributing to substantial variation in the number and diversity of species listed in each jurisdiction.<sup>29</sup> The Interim Report stated that an outcome of the reform could be mutual accreditation of assessment and listing processes, for example, through bilateral agreements<sup>30</sup>.

Of course, there are numerous examples of environmental policies and strategies that have been coordinated across states and territories (usually with the Commonwealth taking a lead role) through formal processes such as COAG ministerial councils and the Environment Protection and Heritage Council (EPHC). This is “cooperative federalism” at work. Key examples are the National Environmental Protection Measures (NEPMs) developed by the EPHC, which set national objectives for protecting or managing particular aspects of the environment. There are currently seven NEPMs: for example in relation to ambient air quality and air toxics, diesel vehicle emissions, the National Pollutant Inventory, controlled waste between states and territories and assessment of site contamination<sup>31</sup>. NEPMs can be implemented by state or territory legislation as each legislature sees fit. For example, the *Environmental Protection Act 1994* (Qld) now requires that contaminated land investigation documents submitted under that Act state the extent to which the investigation was conducted in accordance with the *National Environmental Protection (Assessment of Site Contamination) Measure 1999* (Cth)<sup>32</sup> but it appears to be the only jurisdiction to require compliance with the measure in that way. A further example, highlighted above, is that the NEPM for hazardous wastes—the *National Environment Protection (Movement of Controlled Waste between States and Territories) Measure 1998* (Cth)—has been implemented by each jurisdiction but in the context of their own requirements regarding coverage, coding and classification of hazardous wastes, and for the licensing of waste generators, transporters and receivers and disposal and treatment arrangements.<sup>33</sup>

Whilst this type of work has helped to achieve greater consistency between jurisdictions, it will not deliver the degree of harmonisation ultimately envisaged by the Parliamentary Committee: a single, national regime of environmental regulation.

### A business case

A precedent for more wholesale harmonisation exists in safety law: the model Work Health and Safety (WHS) Act, which has now been adopted by all but two states and territories<sup>34</sup>. It was the culmination of years of “business regulation” reform<sup>35</sup>—much like the agenda now focused on environmental regulation—and has created common duties of care, incident notification and record keeping requirements, licensing requirements, roles and powers of inspectors, and risk management requirements, amongst other things.

<sup>29</sup> Commonwealth of Australia, *National Review of Environmental Regulation* (Interim Report, March 2015).

<sup>30</sup> *Ibid.*

<sup>31</sup> *National Environment Protection (Movement of Controlled Waste between States and Territories) Measure 1998* (Cth); *National Environment Protection (Air Toxics) Measure* (Cth); *National Environment Protection (Ambient Air Quality) Measure* (Cth); *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Cth); *National Environment Protection (Diesel Vehicle Emissions) Measure 2001* (Cth); *National Environment Protection (National Pollutant Inventory) Measure 1998* (Cth); *National Environment Protection (Used Packaging Materials) Measure 2011* (Cth).

<sup>32</sup> *Environmental Protection Act 1994* (Qld), s 389(2)(b)(iv).

<sup>33</sup> GHD, above n 15, iii.

<sup>34</sup> *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2012* (Tas); *Work Health and Safety Act 2012* (SA); *Work Health and Safety (National Uniform Legislation) Act* (NT).

<sup>35</sup> See the COAG National Partnership Agreement to Deliver a Seamless National Economy. Many of the reform streams are summarised in Productivity Commission, *Impacts of COAG Reforms: Business Regulation and VET*, (Research Report, volume 2, April 2012).

Could a model environmental law similarly provide a standardised approach to environmental regulation? There is a parallel in what was sought to be achieved by the model WHS Act: one of its key objectives was addressing compliance and regulatory burdens for employers with operations in more than one jurisdiction. The regulatory impact statement for COAG's model WHS Act concluded that although unquantifiable, the costs caused by overlaps and inconsistencies between jurisdictions were unnecessary and unlikely to have any offsetting safety benefits<sup>36</sup> and found that the model laws would deliver a marginal to small net benefit to the Australian economy<sup>37</sup>. Later, in an April 2012 report (at which time five jurisdictions had implemented the new laws), the Productivity Commission found that multi-state businesses were 'likely to see compliance costs fall and safety outcomes improve', generating total possible net cost savings to those businesses of \$480 million per year (although with net costs to singlestate businesses of \$110 million per year)<sup>38</sup>.

Gunningham conducted a study of very large businesses implementing the model WHS Act<sup>39</sup>. This group, he said, 'bear the brunt of compliance with inconsistent legislation in areas of shared Commonwealth, state and territory responsibility, whose regulatory burden is highest and whose productivity is most threatened where harmonisation is lacking'.<sup>40</sup> Further, the activities of his target group commonly impact on others up and down the supply chain giving them the capacity to shape the WHS practices not only of their own workforces but of those whom they engage.<sup>41</sup> He found that a significant majority (four-fifths) of respondents did consider that the benefits of the harmonised laws substantially exceeded the costs, with the majority of those indicating that the benefits were substantial and the costs modest or minimal. They cited benefits such as greater focus on safety, a reduced injury rate resulting in savings in multiple areas including workers compensation premiums, a reduction in costs and an increase in efficiency by having a single set of WHS laws, a greater emphasis on communication and consultation with contractors and other non-employees, and improved procedures and systems.<sup>42</sup> The substantial majority of his respondents thought that the introduction of the model WHS Act had had a considerable impact on the perceptions and behaviour of chief executives, directors and officers: the laws acted as a catalyst for business and workers to cooperate and review and improve safety procedures<sup>43</sup>.

Of course, such findings in relation to the WHS reforms cannot be directly applied to the environmental case, but the potential benefits seem generally analogous. It's arguable that a system of harmonised environmental laws could translate into similar benefits for businesses operating in multiple jurisdictions, including improved compliance and environmental performance, with flow-on effects down to contractors. But the costs of implementation in the private sector will be significant. There would be new concepts and new terminology introduced. Business systems and processes would need to be updated and adjusted, employees educated and trained. To justify the costs, a harmonised system would need to deliver real benefits. Its content would need to address aspects of the current regime ripe for harmonisation: where inconsistencies are driving up costs or creating state-based barriers to trade and investment, and where change is both politically and practically achievable.

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<sup>36</sup> Access Economics, *Decision Regulation Impact Statement for a Model Occupational Health and Safety Act* (2009) 68.

<sup>37</sup> Eric Windholz 'The evolution of Australia's harmonised OHS laws: Questions for today and tomorrow' (2011) 39 *Australian Business Law Review* 434.

<sup>38</sup> Productivity Commission, above n 34, 153.

<sup>39</sup> Neil Gunningham, 'Impacts of work health and safety harmonisation on very large businesses' (2015) 28 *Australian Journal of Labour Law* 33.

<sup>40</sup> *Ibid.*, 36.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, 44.

<sup>43</sup> Windholz, above n 36, 440.

### Benefits for the environment

That is not to say that a harmonised system couldn't also be designed to deliver greater environmental protection. For example, the proposal to create common threatened species assessment and listing processes (referred to above) was evaluated by the National Review of Environmental Regulation. It found that although there is likely to be little regulatory burden reduction from that reform, there could be demonstrable benefits for the management of threatened species and the ability to prioritise the allocation of resources to recovery actions for priority species and ecological communities.<sup>44</sup> Likewise, in its review of the potential harmonisation of hazardous waste regulation, GHD found that harmonisation could 'potentially improve environmental outcomes through, for example, better facilitating recovery of hazardous wastes with commercial value and better incentivising investment in hazardous waste treatment.'<sup>45</sup>

As the Parliamentary Committee stated in its report, even though the environment and biodiversity differs between each state and territory, the processes which regulate its protection need not be as substantially different as they are currently and harmonisation could still feasibly allow for differentiation between the ecologies of different regions of Australia.<sup>46</sup> As one of the commentators in the Hawke review process argued:

Australia is nationally environmentally significant as a whole. One piece is no more important than another and one part is inextricably linked to all the others. To have more than one policy state by state, territory by territory, local government by local government is nonsense, incomprehensible, complacent, inefficient and unachievable... To have fragmented legislation across the country via states, territories and local governments has proven unworkable.<sup>47</sup>

The different approaches in the law and policy of each jurisdiction are more likely due to historical, rather valid environmental or other reasons and may lead to different levels of environmental protection across the country.<sup>48</sup> Perry states:

Substantive differences between jurisdictions and the potential for inconsistent outcomes have particular significance in the context of the environment for the reason that environmental impacts are not necessarily isolated locally or even nationally. Ecological communities, for example, are not confined by state or local government boundaries. Projects that may destroy the integrity of nature corridors, for example, may have impacts well beyond the area directly affected. Further, granting permission to construct installations to manage erosion from rising sea levels and extreme weather events may have impacts on other parts of the coastline. In short, a good or bad environmental outcome in one location may have flow-on or cumulative effects that extend well beyond the geographical area directly affected.<sup>49</sup>

The process required to effect harmonisation though a model law could provide an opportunity to adopt "best practice" across the board: to both level the playing field and lift the level of play<sup>50</sup>. It has been noted that, for several states, the model WHS laws represented a significant modernisation of their WHS regulatory regimes.<sup>51</sup>

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<sup>44</sup> Commonwealth of Australia, above n 28.

<sup>45</sup> GHD, above n 15.

<sup>46</sup> Ibid.

<sup>47</sup> Commonwealth of Australia, above n 27, 64.

<sup>48</sup> Perry, above n 1, 439.

<sup>49</sup> Ibid.

<sup>50</sup> Gregory Rose and Christopher Smyth, 'Harmonising Australian environmental law: An Australian Oceans Act for Australia's oceans' (2006) 1 *National Environmental Law Review*, 32-37

<sup>51</sup> Windholz, above n 36.

So it seems a good idea in theory, but would harmonisation really reduce regulatory burden for business and industry? And would a consistent approach across jurisdictions really improve environmental outcomes? All of the costs and benefits of harmonisation would need to be carefully and realistically assessed.

### A note of caution

We can learn from the safety experience in that respect too. Windholz's critique of what was actually achieved by the harmonised WHS regime is a sobering caution to those considering harmonisation of other areas of social regulation affecting business.<sup>52</sup> He paints a picture of a harmonised WHS regime which may not deliver the uniformity and consistency its advocates sought, which may prove slow and cumbersome in maintaining its currency, and will be vulnerable to the introduction of jurisdictional differences over time.<sup>53</sup>

His first warning is that while a harmonised system may achieve greater consistency uniformity is improbable—there will inevitably be differences in the model laws enacted by each jurisdiction.<sup>54</sup> In the WHS experience, some states responded to local concerns by making state-specific changes to the model laws by adding or removing elements, resulting in “harmonisation plus” and “harmonisation minus” laws. Also, the model Acts will be enforced by nine different regulators, and interpreted by up to nine different judiciaries, which are bound to take different approaches, even with the same statutory roles, functions and powers.<sup>55</sup>

Another warning is that once in place, harmonisation will dilute one of the key benefits of a federal system of government: the continuous cycle of state-based experimentation, observation, review and improvement it provides:

Interjurisdictional competition over time encourages the development of policy innovations which, if successful, are diffused across jurisdictions to the benefit of all citizens: if one State's innovation is successful, the other States will observe and copy (or even improve upon) it; on the other hand if a State's innovation is unsuccessful, the other States will observe and avoid repeating the same mistakes.<sup>56</sup>

This creativity, experimentation and inter-jurisdictional learning, Windholz says, is lost in a harmonised system.<sup>57</sup>

A related concern is the harmonised regime's responsiveness. Windholz suggests that the harmonised regime may struggle to keep abreast of any required changes and improvements as legislative amendment of harmonised laws is not straightforward.<sup>58</sup> For the harmonised WHS laws, states agreed not to progress any amendment or new legislation that would materially affect the operation of model legislation without the endorsement of the relevant ministerial council.<sup>59</sup> If approved, all jurisdictions are then required to ‘undertake all necessary steps to introduce appropriate changes to their legislation with a view to ensuring that OHS legislation remains nationally consistent’.<sup>60</sup>

For these reasons, a national approach is more likely to succeed where the best or right approach to an area of regulation is relatively well known, accepted and the scope for innovation is small.<sup>61</sup> The WHS reforms have been described as codification of an already well-established regulatory

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid, 445.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid, 447.

<sup>57</sup> Gunningham, above n 38, 45.

<sup>58</sup> Windholz, above n 36.

<sup>59</sup> Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety 2008, para 5.5.2.

<sup>60</sup> Ibid, para 5.5.3.

<sup>61</sup> Windholz, above n 36.

regime, introducing only limited innovation and modifications: an evolution rather than a revolution.<sup>62</sup> This is not necessarily the case in environmental regulation, where new research is frequently changing our understanding of environmental issues and the way they should be managed.

The flip side to the above concerns however is that a harmonised environmental regime may afford business and industry, and the community, some much needed legislative stability. As readers would be well aware, environmental regulation is particularly vulnerable to change and reinvention. Incoming governments may be less inclined to overturn the existing environmental laws of their predecessors where they have been subject to a harmonisation process. In its submission to the Parliamentary Committee's inquiry, the Minerals Council of Australia highlighted that 'regulatory stability is a critical factor for industry confidence'.<sup>63</sup> Likewise, the Property Council of Australia stated that there is nothing more important to its industry than certainty.<sup>64</sup> Interestingly, the regulatory impact statement for the model WHS Act stated that the costs to Australian businesses of 'learning how to play by the new rules' were unlikely to be greater than the costs of ongoing changes under disparate jurisdictional regimes that would be experienced were the model WHS Act not to be introduced.<sup>65</sup>

However even a harmonised regimes will not be immune to changes over time. A model Act effectively provides a re-set to get everyone on the same page but once obtained, harmonisation must be maintained.<sup>66</sup>

### Concluding comments

The Parliamentary Committee's report stated that it believed harmonisation to be 'the next logical step in the efforts to streamline regulation'.<sup>67</sup> A uniform set of environmental laws across the country would certainly be neater and has appeal for that reason, but the driver will need to be more than just effecting a tidy up.

The costs of implementation for the private sector would be significant. To justify the costs, the benefits would need to be significant too. A model law would need to focus on those aspects of environmental law for which harmonisation will deliver real, measurable benefits. And even if there would be measurable benefits for businesses operating in multiple jurisdictions, the fairness of introducing new laws to benefit those businesses at the expense of single-state operators will need to be considered carefully.<sup>68</sup> A harmonised law could deliver benefits to the environment too, but it would need to avoid a weakening of environmental laws through the adoption of the lowest common denominator states' approach, or the loss of protections that are unique.

Achieving and maintaining harmonisation would no doubt be a long and costly process. The harmonised WHS laws were the culmination of more than 25 years' efforts<sup>69</sup> and even then have been characterised as a significant achievement in Commonwealth state relations.<sup>70</sup> The harmonisation of environmental regulation would surely require another a triumph in cooperative federalism. It would be an inherently political exercise—that would ultimately need to be driven by the Commonwealth—and would require the buy-in of business and industry, and the conservation sector, to succeed.

As the Parliamentary Committee and some of its submitters acknowledged, harmonisation of environmental law can only be a long term goal. But if it is indeed such a good idea in theory and it's one we keep coming back to, it deserves a deeper national conversation about its merits.

<sup>62</sup> Gunningham, above n 38, 45

<sup>63</sup> House of Representatives Standing Committee on the Environment, above n 21

<sup>64</sup> House of Representatives Standing Committee on the Environment, above n 21.

<sup>65</sup> Access Economics, above n 35

<sup>66</sup> Windholz, above n 36.

<sup>67</sup> House of Representatives Standing Committee on the Environment, above n 21, 83.

<sup>68</sup> Windholz, above n 36.

<sup>69</sup> Windholz, above n 36, 435.

<sup>70</sup> *Ibid.*

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