Better Protection or Pure Politics? Evaluating the 'Water Trigger' Amendment to the EPBC Act

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Editor's note: *This essay was written in late 2013. Since that time, the Federal government has introduced legislation, the Environment Protection and Biodiversity Conservation (Bilateral Agreement Implementation) Bill 2014, to modify the operation of the water trigger. If passed, this legislation would retain the water trigger as a matter of national environmental significance and continue the operation of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development. However, the amendments would allow State and Territory governments to be accredited for approval decisions related to large coal mining and coal seam gas developments likely to have a significant impact on a water resource.*

I. Introduction: Conflicting Storylines

In the past decade, water security has become a national priority. Amid recurring drought and increasing demand, Commonwealth and State legislators have begun to recognise that water resources are worthy of careful and cooperative protection.[1] In a similar period, Australia's 'mining boom' has generated enormous wealth.[2] Yet as extractive industries expand geographically and turn to unconventional sources, they are generating acute land use conflicts and putting pressure on existing regulatory regimes.[3]

In 2013, these two major national storylines – water scarcity and mineral prosperity – reached a crucial point of intersection. Prompted by uncertain hydrology, community lobbying and concern over inadequate State processes, the federal Labor Government added a 'water trigger' to Australia's flagship *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'). This controversial mechanism shifts power away from the States and empowers the Commonwealth to approve, refuse and place water-specific conditions on large coal mining and coal seam gas (CSG) projects that are likely to significantly affect water resources. This protective measure has been welcomed by communities and environmentalists,[4] criticised by industry groups,[5] and treated with

[1] See especially, *Water Act 2007* (Cth) s 3; Murray-Darling Basin Authority, *Basin Plan* (November 2012).
[2] Jim Minifie, 'The Mining Boom: Impacts and Prospects' (Report, Grattan Institute, July 2013).
[3] Daniel M Franks, David Brereton and Chris J Moran, 'Managing the cumulative impacts of coal mining on regional communities and environments in Australia' (2010) 28 *Impact Assessment and Project Appraisal* 299.
[4] Lock the Gate Alliance, 'Water Trigger a Step Forward on Long Road to Coal and Gas Reform' (Media Release, 12 March 2013); Australian Network of Environmental Defender's Offices (ANEDO), Submission No 46 to Senate Standing Committee on Environment and Communications, *Inquiry into the Environment Protection and Biodiversity Amendment Bill 2013*, 4 April 2013.
[5] Minerals Council of Australia, 'Minerals industry acknowledges further action on project approvals' (Media Release, 26 September 2013).

varying degrees of enthusiasm[6] and hostility[7] by members of Tony Abbott's federal Coalition Government.

This paper critically examines the *Environment Protection and Biodiversity Conservation Amendment Act 2013* (Cth) ('the Amendment'). Despite the conceptual appeal of providing 'protection that the community wants',[8] it uncovers conflicting accounts of why the water trigger has been implemented and what problems it is actually intended to solve. Even amongst its leading proponents, the Amendment has been variously framed: as an ecologically sustainable development strategy;[9] as a one-off governance intervention in response to irresponsible state decision-making;[10] and as part of a long term pattern of reforms.[11] This paper examines whether the Amendment measures up to any or all of these paradigms, and assesses its likely prospects under the Coalition Government.

II. The Water Trigger Amendment

A. History

Debate over the most suitable sites, scales and subjects of environmental regulation have periodically arisen in Australia's federal system.[12] Since *EPBC Act* was introduced, there have been various successful[13] and unsuccessful[14] campaigns to add to the Commonwealth-controlled 'matters of national environmental significance'.[15] Before the present Amendment, there were two attempts, by Greens Senator Larissa Waters[16] and the independent Tony Windsor MP,[17] to introduce a water trigger for mining developments. These attempts were resisted by Labor and the Coalition.[18] Indeed, from 2009 to late February 2013, the prospect of a water trigger received little or no attention in leading reform agendas including the Hawke Review of the *EPBC Act*;[19] the *National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development*;[20] and early outputs of the Productivity Commission inquiry into major project assessment processes.[21]

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[6] Greg Hunt, '50 "water trigger" referrals left in limbo finally processed' (Media Release, 26 September 2013).

[7] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2013, 2825 (Ian Macfarlane); Lenore Taylor, 'Coalition will "get around" new law on coal seam gas', *The Guardian* (online), 31 May 2013 <ww/w.theguardian.com/world/2013/may/30/coalition-coal-seam-gas-law)>.

[8] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2013, 1846 (Tony Burke).

[9] Tony Burke, 'Greater Protection for Water Resources' (Media Release, 12 March 2013).

[10] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2941 (Joel Fitzgibbon).

[11] Tony Windsor, 'Win for Water: Finally a trigger for CSG and coal' (Media Release, 12 March 2013).

[12] Paul Kildea and George Williams, 'The Constitution and the management of water in Australia's rivers' (2010) 32 *Sydney Law Review* 595, 601-3.

[13] *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008* (Cth).

[14] See, eg, the interim greenhouse gas trigger suggested by: Allan Hawke, 'The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999' (Final Report, Department of Environment, Heritage and the Arts, October 2009) 21-2.

[15] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 3 div 1 ('*EPBC Act*'). See also: Council of Australian Governments (COAG), *Heads of Agreement on Commonwealth and State roles and responsibilities for the Environment* (November 1997).

[16] Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011 (Cth).

[17] Environment Protection and Biodiversity Conservation Amendment (Mining, Petroleum and Water Resources) Bill 2011 (Cth).

[18] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 11 October 2011, 6973 (Stephen Conroy).

[19] Allan Hawke, above n 14.

[20] COAG, *National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development* (2012). See also: COAG Reform Council, 'Coal Seam Gas and Large Coal Mining Development: First assessment report' (Report, 28 February 2013).

[21] Productivity Commission, Australian Government, 'Major Project Development Assessment Processes – Productivity Commission Issues Paper' (Issues Paper, February 2013).

In a move praised by farmers and environmentalists,[22] but criticised as a 'backflip' by industry groups,[23] the federal Labor Government introduced water trigger legislation into Parliament on 13 March 2013.[24] This sudden policy turnaround was, by all appearances, driven by public pressure and immediate strategic necessity. Although formally led by the Minister for Environment, the Amendment's most instrumental supporter was undoubtedly Tony Windsor,[25] who represented the strong farming constituency of New England and was a crucial voting ally of the Labor Government.

Following debate in the House of Representatives, where the water trigger was controversially amended to exclude bilateral approval agreements,[26] the legislation was remitted to a Senate Committee for detailed consideration. After reviewing 235 submissions from diverse stakeholders, the Committee recommended its passage.[27] Following a lengthy second reading period in the Senate – which included 14 separate speeches from Coalition Senators in a tactical attempt to exhaust final pre-election sitting days[28] – the legislation was passed with bipartisan support on 19 June 2013[29] and became fully operative on 22 July 2013.[30]

B. Scope

The Amendment designates water resources as a 'matter of national environmental significance' in respect of large coal mining and CSG developments.[31] This empowers the Commonwealth to assess, approve and place water-related conditions on proposed extractive activities. Its practical effect is to redistribute a defined portion of State authority to the Commonwealth.

The water trigger operates according to the usual structure of the *EPBC Act*. As with other matters of national environmental significance, Commonwealth powers only arise in relation to 'controlled actions'.[32] According to s 24D of the amended Act, a large coal mining or CSG development is a controlled action if it will[33] (or is likely to[34]) have a significant impact on a water resource. This threshold provision has four defining elements.

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[22] Lock the Gate Alliance, above n 4; ANEDO, above n 4.

[23] Chamber of Minerals and Energy of WA, 'EPBC Act Back-Flip Completed' (Media Release, 19 June 2013) <www.cmewa.com/News,_Events_and_Media/News/NewsDetails/EPBC_Act_Back-Flip_Completed>.

[24] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2013, 1846 (Tony Burke).

[25] Windsor, above n 11. See also: Chris McGrath, 'Regulating water: debate swirls around Commonwealth's role' on *The Conversation* (20 May 2013) <theconversation.com/regulating-water-debate-swirls-around-commonwealths-role-14214>.

[26] Commonwealth, *Votes and Proceedings*, House of Representatives, 21 March 2013, 2202-3.

[27] Senate Environment and Communications Legislation Committee, Parliament of Australia, *Environment Protection and Biodiversity Conservation Amendment Bill 2013 [Provisions]* (2013) ('Senate Committee Report').

[28] For discussion of this 'filibuster' attempt, see: Commonwealth, *Parliamentary Debates*, Senate, 24 June 2013, 3724 (Christine Milne); Tony Windsor, 'Water trigger becomes law despite Coalition attempts to sabotage it' (Media Release, 19 June 2013).

[29] For the legislation in its original form, as tabled, see: Parliament of Australia, 'Environment Protection and Biodiversity Conservation Amendment Bill 2013' (21 March 2013) <parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5001_first-reps/toc_pdf/13055b01.pdf;fileType=application%2Fpdf>.

[30] For full details and documentation of the Bill's passage through Parliament, refer to: Commonwealth, 'Parliamentary Business: Environment Protection and Biodiversity Conservation Amendment Bill 2013' <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5001>.

[31] *EPBC Act* sub-div FB, as inserted by *Environment Protection and Biodiversity Conservation Amendment Act 2013* (Cth) sch 1 cl 1 ('*Water Trigger Amendment*').

[32] *EPBC Act* s 67.

[33] Ibid ss 24D(1)(b)(i), 24D(2)(c)(i), 24D(3)(c)(i), as inserted by *Water Trigger Amendment* sch 1 cl 1.

[34] Ibid ss 24D(1)(b)(ii), 24D(2)(c)(ii), 24D(3)(c)(ii), as inserted by *Water Trigger Amendment* sch 1 cl 1.

First, Commonwealth control only extends to 'large coal mining development' and 'coal seam gas development'. This includes extractive activities[35] and early stage exploration,[36] but excludes 'associated infrastructure' such as pipelines, roads and plant machinery.[37]

Second, the activity must have 'significant impact' on a water resource. The *EPBC Act* does not elaborate on this phrase. However, departmental guidelines indicate that a significant impact will be 'important [or] notable … having regard to its context or intensity'[38] and will directly or indirectly affect hydrology or water quality.[39] The Act and guidelines also require that impacts be considered cumulatively, with regard to past, present and reasonably foreseeable developments.[40]

Third, impacts must be 'likely' to occur. Departmental guidelines require 'a real or not remote chance' and specify that the precautionary principle should be applied.[41]

Fourth, impacts must relate to a 'water resource'. The *EPBC Act* adopts the broad definition of the *Water Act 2007*, which includes surface water and groundwater, in the form of watercourses, lakes, wetlands and aquifers, whether or not they currently contain water.[42] The definition also extends to organisms and ecosystems that contribute to the physical state and environmental value of the water resource.[43]

It should be noted that s 24D and its accompanying offence provision[44] are split into multiple sections which correspond to different bases of constitutional authority. Subsections 24D(1) and 24E(1) apply to actions taken by constitutional corporations[45] and Commonwealth agencies; ss 24D(2) and 24E(2) apply to actions taken for the purpose of international or interstate trade or commerce;[46] and ss 24D(3) and 24E(3) apply to actions taken in a Commonwealth area or a territory.[47] Together, these provisions cover almost all conceivable developments, because large coal mining and CSG projects invariably involve corporations or cross-border trade. The Amendment does not rely on the more widely used 'external affairs' power, because the water trigger is not referable to treaty obligations.[48]

C. Process

If, upon referral by the developer,[49] the Minister for the Environment decides that a coal mining or CSG development is a controlled action,[50] the development will require assessment and approval

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[35] Ibid s 528.
[36] Australian Government, Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC), 'Draft Significant Impact Guidelines: Coal seam gas and large coal mining developments – impacts on water resources' (Draft Departmental Guidelines, 2013) 4-5.
[37] Ibid.
[38] Ibid 6; Australian Government, Department of the Environment, Water, Heritage and the Arts (DEWHA), 'Matters of National Environmental Significance: Significant Impact Guidelines 1.1' (Departmental Guidelines, 2009) 3. See also: *Booth v Bosworth* (2001) 114 FCR 39, [99] (Branson J); *Minister for the Environment and Heritage v Greentree (No 2)* [2004] FCA 741 (11 June 2004), [191] (Sackville J).
[39] DSEWPaC, above n 37, 7.
[40] Ibid 9-10; *EPBC Act* s 528. See also: *Brown v Forestry Tasmania (No 4)* [2006] FCA 1729 (19 December 2006), [93]-[102].
[41] DEWHA, above n 38, 3; DSEWPAC, above n 37, 6. See also: *Booth v Bosworth* (2001) 114 FCR 39, [97]-[98].
[42] *EPBC Act* s 528, referring to *Water Act 2007* (Cth) s 4.
[43] Ibid.
[44] *EPBC Act* s 24E, as inserted by *Water Trigger Amendment* sch 1 cl 1.
[45] *Constitution* s 51(xx).
[46] Ibid s 51(i).
[47] Ibid s 52(i).
[48] Ibid s 51(xxix); *Commonwealth v Tasmania* (1983) 158 CLR 1.
[49] *EPBC Act* s 68.
[50] Ibid s 75.

under the EPBC Act.[51] Part 8 of the Act enables the Minister to choose between several modes of assessment, ranging from assessment based on referral information or preliminary documentation;[52] to an environmental impact statement;[53] to a full public inquiry.[54] Whichever mode is chosen, it is important to note that referred developments are not assessed holistically. In contrast to broader State assessment regimes,[55] the Commonwealth need only assess how a development will impact on water resources and other applicable matters of national environmental significance.[56]

Once assessment is complete, Part 9 of the EPBC Act authorises the Minister to unconditionally approve, approve with conditions or refuse the development.[57] Before making this decision, the Minister must obtain and consider advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC);[58] and must consider several factors including ecologically sustainable development.[59]

These Commonwealth requirements are additional to – and will likely overlap with – State regimes. For example, the federal Minister's duty to consider biodiversity conservation and 'social and economic matters' when granting approval under Part 9 of the EPBC Act[60] may encompass very similar subject matter to State Ministers' duties under the Environmental Planning and Assessment Act 1979 (NSW)[61] or the Environmental Protection Act 1994 (Qld).[62] For the eight existing matters of national environment significance, this crossover can be managed through bilateral assessment and approval agreements between Commonwealth and State authorities.[63] However, as controversially adjusted in the House of Representatives at the behest of Tony Windsor, bilateral approval agreements cannot be made in relation to the new water trigger.[64] The implications of this exclusion are discussed later in this paper.

D. Transitional Measures

The Amendment sets out detailed transitional measures. The water trigger does not apply to activities which, prior to 22 June 2013, had already been approved under Part 9,[65] or had already obtained IESC advice,[66] or had already been declared 'not a controlled action' with reference to existing triggers.[67] Developments that were less advanced on this crucial date – for example, those

[51] Unless a special exemption applies, see: *EPBC Act* ss 24D(4)(b)-(d), as inserted by *Water Trigger Amendment* sch 1 cl 1.
[52] *EPBC Act* s 87(1)(aa)-(b).
[53] Ibid s 87(1)(d).
[54] Ibid s 87(1)(e).
[55] See, eg, *Environmental and Planning Assessment Act 1979* (NSW).
[56] *EPBC Act* s 82. See further: Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (Federation Press, 3rd ed, 2012) 210.
[57] Ibid ss 133-4.
[58] Ibid ss 131AB, 136(2)(fa); as originally established under: COAG, *National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development* (2012).
[59] Ibid s 136.
[60] Ibid ss 3A, 136(1)(b), 136(2)(a).
[61] *Environmental Planning and Assessment Act 1979* (NSW) ss 5(a), 79C(1)(b), 79C(1)(e).
[62] *Environmental Protection Act 1994* (Qld) ss 175-6 (considering the 'standard criteria' defined in sch 4).
[63] *EPBC Act* ss 45-7.
[64] Ibid s 46, as amended by *Water Trigger Amendment* sch 1 cls 4A, 4B. **Note**: *if the Environment Protection and Biodiversity Conservation (Bilateral Agreement Implementation) Bill 2014 is passed, this restriction will be removed*.
[65] *Water Trigger Amendment* sch 1 cl 22(2)(a).
[66] Ibid sch 1 cl 22(2)(d). This exemption only applies if the Minister had also, by 22 June 2013, already informed the project proponent of the decision he/she intended to make in relation to the action.
[67] Ibid sch 1 cl 22(2)(b).

undergoing referral or assessment based on other matters of national environmental significance – are governed by the new regime.

In September 2013, the newly appointed Minister for the Environment Greg Hunt confirmed that 47 unresolved developments would require Commonwealth assessment for their impact on water resources.[68] Notable inclusions are Clive Palmer's $8.8bn China First mine and Gina Rinehart's $4.2bn co-owned Kevin's Corner mine (both located in Queensland's Galilee Basin), Shenhua's $840m Watermark Coal Project (near Gunnedah in NSW), and CSG projects proposed by Arrow Energy and Origin Energy.[69] Rather than starting approval procedures 'from scratch', the Minister will rely on existing submissions where possible and request further information as necessary.[70]

III. Promoting Ecologically Sustainable Development?

A key claim made in support of the Amendment is that it will promote ecologically sustainable development. Speaking in Parliament, Labor MP Justine Elliot described the water trigger as a 'major step forward when it comes to environmental protection'[71] and Greens Senator Larissa Waters praised the Government's willingness to 'act in the national interest to protect our precious groundwater and surface water resources from the possibility of massive damage'.[72] However, this value is disputed. The water trigger has also been described as 'a political agenda that has no environmental dividend'.[73] This section examines two issues which are central to the Amendment's utility – or lack thereof – as a sustainable development tool. It finds that the Amendment outstrips existing State regimes in some respects, but has a minimal environmental dividend in other ways.

A. Application of the Precautionary Principle

The *EPBC Act* aims to promote 'ecologically sustainable development' of natural resources.[74] A core element of this objective is the precautionary principle, which stipulates that:

> [I]f there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[75]

At present, there is significant uncertainty about the impacts of CSG extraction, and to a lesser extent, large coal mining operations.[76] Although industry proponents claim that CSG is a clean, safe

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[68] Hunt, above n 6.

[69] Greg Hunt, 'Water Trigger List' (Media Release, 26 September 2013) <www.environment.gov.au/minister/hunt/pubs/mr20130926a.pdf>. See also: Lenore Taylor, 'Mega-mines will have to comply with tough new "water trigger" law: Greg Hunt', *The Guardian* (online), 26 September 2013 <www.theguardian.com/environment/2013/sep/26/coalmines-comply-water-trigger-law>.

[70] Peter Briggs and Veronica Morland, 'EPBC Act – "Water trigger" Minister decides fate for 50 major coal and CSG projects' (Legal Briefing, Herbert Smith Freehills, 17 October 2013) <www.herbertsmithfreehills.com/insights/legal-briefings/epbc-act-water-trigger-minister-decides-fate-for-50-major-coal-and-csg-projects>. As stated by the previous Minister when explaining the transitional regime: Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2013, 1847 (Tony Burke).

[71] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2013, 2835 (Justine Elliot). See also: Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2013, 2828 (Sharon Grierson).

[72] Commonwealth, *Parliamentary Papers*, Senate, 14 May 2013, 2412 (Larissa Waters).

[73] Mitch Hooke, CEO of the Minerals Council of Australia – as quoted in: Babs McHugh and Tom Nightingale, 'Water trigger "has no environmental dividend"', *ABC Rural* (online), 27 September 2013 <www.abc.net.au/news/2013-09-27/water-trigger-for-coal-csg/4985026>. See also: Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2013, 2825 (Ian Macfarlane).

[74] *EPBC Act* s 3(1)(b).

[75] Ibid s 3A(b).

[76] For a recent discussion of coal mining impacts in a legal context, see: Rachael Webb, 'Water management and the coal mining industry in New South Wales' (2008) 25 *Environmental and Planning Law Journal* 272.

energy source with minimal risks,[77] this confidence is probably overstated. Government inquiries[78] and independent studies[79] cite a real risk of irreversible damage to ecosystems, urban catchments and productive agricultural areas. Accordingly, it is essential that decision-makers pursue an 'adaptive and precautionary management approach'[80] and rely on the best scientific information available. The water trigger contains two features which promote such caution.

The first advantage relates to scientific knowledge production. By shifting power from the States to the Commonwealth, the water trigger carves out a clearer and more direct role for IESC research and recommendations. Prior to the Amendment, the *National Partnership Agreement* provided that State decision-makers would 'take account of' advice provided by the IESC,[81] but this political commitment was subject to delayed and inconsistent implementation through individual Commonwealth-State referral protocols. Under the new Commonwealth regime which applies consistently to projects in all States, the Minister is legally obliged to obtain and consider IESC advice before making a decision.[82] As signalled by Tony Burke in his second reading speech, it is hoped that this regime will equip decision-makers with enough high quality information to make prudent decisions about hydraulic fracturing ('fracking'), groundwater connectivity and other notoriously uncertain phenomena.[83]

Second, the amended *EPBC Act* internalises the precautionary principle into key phases of decision-making. Under s 391 of the *EPBC Act*, the Minister must consider the precautionary principle when deciding whether a proposed large coal mining or CSG development is a 'controlled action', and when deciding whether to approve the development. For these purposes, potential threats are broadly conceived. There is good authority that the Minister must consider *all likely adverse impacts* on water resources, whether direct or indirect.[84]

The mandatory, science-based application of the precautionary principle under the new Commonwealth regime invites mixed comparisons with existing State regimes. On one hand, the amended *EPBC Act* compares favourably to legislation in Victoria and Western Australia. In Victoria, the *Planning and Environmental Act 1987* does not refer to the precautionary principle[85] and the *Mineral Resources (Sustainable Development) Act 1990* positions it as a guiding principle rather than

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However, see also: *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197 (27 August 2012) [175], [191]-[209] (Pepper J).

[77] Australian Petroleum Production & Exploration Association Ltd (APPEA), *Natural Coal Seam Gas* (2013) <www.naturalcsg.com.au>; Australia Pacific LNG, 'Hydraulic fracture stimulation: A safe way to extract coal seam gas' (Fact Sheet, 2013) <www.aplng.com.au/pdf/factsheets/Factsheet_Fraccing-APLNG.pdf>.

[78] General Purpose Standing Committee No 5, Legislative Council of NSW, *Coal Seam Gas* (2012); National Water Commission, 'Position Statement: Coal Seam Gas and Water' (Report, December 2010).

[79] Jay Rutovitz et al, 'Drilling Down – Coal Seam Gas: A Background Paper' (Report, Institute for Sustainable Futures, University of Technology, Sydney, November 2011); Graeme E Batley and Rai S Kookana, 'Environmental issues associated with coal seam gas recovery: managing the fracking boom' (2012) 9 *Environmental Chemistry* 425. For a discursive summary on particular risks in Queensland, see: Laura Letts, 'Coal seam gas production – friend or foe of Queensland's water resources?' (2012) 29 *Environmental and Planning Law Journal* 101, 103-4.

[80] National Water Commission, above n 78, 1.

[81] COAG, *National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development* (2012) cl 15.

[82] *EPBC Act* ss 131AB, 136(2)(fa).

[83] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2013, 1846 (Tony Burke).

[84] *EPBC Act* s 75(2). See further: *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 134 LGERA 272, [52]-[57]; Lyster et al, above n 56, 203.

[85] However, note recent case law, eg, *Gippsland Coastal Board v South Gippsland Shire Council (No 2)* [2008] VCAT 1545 (28 July 2008); *Myers v South Gippsland Shire Council (No 1)* [2009] VCAT 1022 (22 June 2009); as outlined by Justice Kevin Bell, 'The precautionary principle: what is it and how do courts use it to protect the environment' (Speech delivered at the Environmental Defenders Office Seminar Series, Melbourne, 13 July 2010) <www.edovic.org.au/downloads/files/seminars/2010/edo_seminar5_2010_justice_bell.pdf>.

a mandatory consideration.[86] Neither the precautionary principle nor ecologically sustainable development is mentioned in equivalent Western Australian legislation.[87] Conversely, the precautionary principle is well recognised in Queensland and NSW. In Queensland, it is a mandatory consideration forming part of the 'standard criteria' for project approvals.[88] In NSW, it serves as an important reasoning method (requiring the developer to disprove potential impacts)[89] and forms part of the 'public interest' consideration under s 79C of the *Environmental Planning and Assessment Act 1979*.[90]

The precautionary principle has recently become even more relevant mining projects in the Upper Hunter and New England regions of NSW. Under the NSW Government's new 'Gateway Process', CSG and large mining projects located on strategic agricultural land will be pre-assessed according to 'detailed scientific and technical criteria' and subjected to IESC advice *before* a development application may be lodged.[91] This cautious approach is further secured by 'exclusion' and 'buffer' zones surrounding critical industries and urban areas.[92] At least on paper, it is doubtful whether the amended *EPBC Act* fosters any greater application of the precautionary principle than the emerging NSW regime.[93] However (as explained in Section IV below), the Commonwealth regime may offer other, less tangible advantages in terms of good governance, perceived objectivity and community trust.

B. Integrated or Fragmented Decision-Making?

The *EPBC Act* provides that, as a principle of ecologically sustainable development, 'decision-making processes should *effectively integrate* both long-term and short-term economic, environmental, social and equitable considerations'.[94] Beyond the statute books, integrated natural resource management is recognised as best practice across many disciplines.[95] This sub-section examines whether the Amendment promotes or hinders an integrated approach. It focuses on three specific types of integration: *holistic* management of different aspects of a single project; *cumulative* management of impacts across multiple projects; and *long term* management of indirect and intergenerational risks.

Holistic regulation is desirable because it allows interconnected terrestrial, hydrological and biological systems to be considered together. Unfortunately, the amended *EPBC Act* does not

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[86] *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 2A(2)(g).
[87] *Planning and Development Act 2005* (WA); *Mining Act 1978* (WA).
[88] *Environmental Protection Act 1994* (Qld) s 175, as defined in sch 4.
[89] *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10.
[90] *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; *Gray v Minister for Planning* (2006) 152 LGERA 258; *Aldous v Greater Taree City Council* [2009] NSWLEC 17 (19 February 2009); cf *Minister for Planning v Walker* (2008) 161 LGERA 423.
[91] NSW Government, 'Strategic Regional Land Use Policy – Frequently Asked Questions: Introduction of Gateway Process and Gateway Panel' (Fact Sheet, October 2013). See further: Brad Hazzard, Katrina Hodgkinson and Chris Hartcher, 'NSW Government Protects Key Farmland and Homes' (Media Release, 3 October 2013); NSW Government, 'Strategic Regional Land Use Plan – Upper Hunter' (September 2012); NSW Government, 'Strategic Regional Land Use Plan – New England North West' (September 2012).
[92] *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) r 9A, to be amended by: *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Coal Seam Gas) 2013* (NSW) sch 1 cl 3.
[93] NSW Government, 'Getting the balance right: NSW land use' (Brochure, October 2013) 2. See also: Samantha Hepburn, 'NSW farms safe under tough new coal seam gas rules' on *The Conversation* (4 October 2013) <theconversation.com/nsw-farms-safe-under-tough-new-coal-seam-gas-rules-18860>.
[94] *EPBC Act* s 3A(a) (emphasis added).
[95] Global Water Partnership, 'Integrated Water Resources Management' (TAC Background Papers No 4, 2000); Australian National University, HC Coombs Policy Forum NRM Initiative, 'Natural Resource Management Policy and Planning in Australia' (Synthesis Report, 2011).

deliver on this philosophy. By structuring itself around discrete matters of national environmental significance, the Act tends to isolate particular impacts (such as the hydrological impacts of coal mining and CSG) from their wider ecological contexts. This narrow focus arguably creates a 'patchwork'[96] of environmental regulation and 'limits the effectiveness of the Act and circumscribes the power of the federal government'.[97] While the risk of fragmentation is somewhat mitigated by the Act's broad definition of water resources – which includes organisms and ecosystems that contribute to the physical state and environmental value of the water resource[98] – this definition still excludes serious risks to terrestrial agriculture, settlements and ecosystems.

The Act's fragmented approach continues at the approval stage. If the Minister wishes to conditionally approve a development, the specified conditions must be 'necessary or convenient' to protect water resources, or to protect another matter of national environmental significance triggered by the project (for example, threatened species).[99] It is unclear what degree of connection is required. In *Buzzacott v Minister*, the Full Federal Court held that s 134 comprises a structured discretion with does not 'empower the Minister to impose conditions generally'.[100] However, in *Lansen v Minister*, the same Court found a 'broad discretion to attach any type of condition which … may be considered relevant or appropriate'.[101] Whatever nexus is required, the Commonwealth will find it difficult to set conditions that comprehensively protect all aspects of water resources, unless there is deep cooperation from State authorities. Since bilateral approval agreements are currently excluded in respect of the water trigger,[102] such cooperation may be difficult.

A second core principle of integrated management is that projects should be assessed cumulatively, not just individually. This is especially true when dealing with geographically extensive, interconnected resources such as groundwater. The water trigger performs well in this respect. Under the *EPBC Act*, coal mining and CSG developments are defined according to their aggregate impact 'when considered with other … past, present or reasonably foreseeable developments'.[103] Draft departmental guidelines further specify that, where a proposed project is located in a well-developed area with multiple water users, the 'significant impact' threshold is more likely to be reached.[104] At least on paper, this cumulative approach is stronger than what is required under State regimes (with the possible exception of NSW).[105] Given that most State-based impact assessments reviewed by the IESC in 2012-13 were found deficient in their consideration of cumulative hydrological impacts,[106] greater Commonwealth scrutiny in this area is especially justified

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[96] Michelle Grattan and Tom Arup, 'Environmental powers to be kept by Canberra', *Sydney Morning Herald* (Sydney), 6 December 2012.

[97] Samantha Hepburn, 'Coal seam gas approvals need to look beyond water' on *The Conversation* (11 October 2013) <theconversation.com/coal-seam-gas-approvals-need-to-look-beyond-water-19058>.

[98] *EPBC Act* s 528, referring to *Water Act 2007* (Cth) s 4.

[99] Ibid s 134.

[100] *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111 (8 October 2013), [187].

[101] *Lansen v Minister for Environment* (2008) 163 LGERA 145, 200 [277].

[102] *EPBC Act* s 46, as amended by *Water Trigger Amendment* sch 1 cls 4A, 4B. **Note:** this may change if the *EPBC (Bilateral Agreement Implementation) Bill 2014* is passed.

[103]; *EPBC Act* s 528. See also: *Brown v Forestry Tasmania (No 4)* [2006] FCA 1729 (19 December 2006), [93]-[102].

[104] DSEWPaC, above n 37, 9-10.

[105] See especially: NSW Government, Department of Planning and Infrastructure, *Strategic Regional Land Use Policy* (2013) <www.planning.nsw.gov.au/srlup>. For criticism of this policy, see: Katherine Owens, 'Strategic Regional Land Use Plans: Presenting the future for coal seam gas projects in New South Wales?' (2012) 29 *Environmental and Planning Law Journal* 113.

[106] As stated in IESC project advice – see, eg: Interim IESC, 'Advice to decision-maker on coal mining project – Alpha Coal Mine, QLD' (20 July 2012) <www.environment.gov.au/coal-seam-gas-mining/interim-committee/pubs/iiesc-advice-alpha.pdf>; IESC, Advice to decision-maker on coal seam gas project – Arrow

and beneficial. In 2013-14, it will be interesting to see how much weight is given to cumulative impacts when the Minister makes decisions on major project clusters in Queensland's Galilee and Surat basins.[107]

A third important element of integration is the long term management of indirect and intergenerational risks. The amended *EPBC Act* has advantages and disadvantages in this respect. On one hand, the water trigger puts a spotlight on sustainability and requires the Minister to pay particular attention to the possibility of irreversible damage. However, the capacity of the Amendment to promote intergenerational equity is undermined by major 'loopholes'.[108] First, the water trigger does not apply to the emerging shale gas and tight gas industries, which threaten future water supplies in a similar way.[109] Second, the water trigger fails to address what is perhaps *the* most environmentally significant impact of Australia's coal industry – namely, its downstream and fugitive carbon emissions which are contributing to climate change. By implementing a relatively narrow water trigger for coal projects, rather than a more general and ambitious 'greenhouse trigger' as discussed by the Hawke Review in 2009,[110] the Commonwealth Government has failed to deploy the *EPBC Act* to its full potential as a sustainability instrument.

IV. Promoting Good Governance?

On some accounts, the water trigger's ecological credentials are merely incidental to its primary purpose: as an urgent measure to promote good governance and restore integrity. Influential politicians and advocacy groups have framed the Commonwealth's intervention as a necessary reaction to conflicts of interest and poor decision-making by States.[111] However, mining industry representatives and the Queensland Government have issued vocal counter-claims: that State approval processes are sufficient; and that the water trigger merely generates unnecessary duplication and 'green tape'.[112]

This section examines these opposing views. First, it investigates the extent and severity of the States' mismanagement of coal mining and CSG projects, and discusses whether the Commonwealth's water trigger is a suitable way to fill this governance gap. Second, it considers the efficiency trade-off. With reference to mining industry criticisms, it weighs up whether anticipated improvements in governance are worthwhile – or whether they will be negated by a consequential 'blow-out' in regulatory costs and delays.

Surat Gas Project – Expansion' (20 February 2013) <www.environment.gov.au/coal-seam-gas-mining/pubs/iesc-advice-arrow.pdf>. As interpreted by: Colin Hunt, 'Coal and gas fail the test when it comes to environmental impact' on *The Conversation* (26 April 2013) <theconversation.com/coal-and-gas-fail-the-test-when-it-comes-to-environmental-impact-13746>.

[107] For a list of projects awaiting assessment, see: Greg Hunt, above n 69.

[108] This term has been frequently used to criticise the water trigger – see, eg, Commonwealth, *Parliamentary Debates*, Senate, 17 June 2013, 2925 (Scott Ludlam); Lock the Gate Alliance, 'Lock the Gate Alliance Calls for urgent changes to close loopholes in Federal Govt Water Bill' (Media Release, 15 March 2013) <www.lockthegate.org.au/lock_the_gate_alliance_calls_for_urgent_changes_to_close_loopholes_in_federal_govt_water_bill>.

[109] See especially: Commonwealth, *Parliamentary Debates*, Senate, 17 June 2013, 2925-8 (Scott Ludlam).

[110] Hawke, above n 14, 97.

[111] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2941 (Joel Fitzgibbon); Commonwealth, *Parliamentary Debates*, Senate, 14 May 2013, 2412 (Larissa Waters); Windsor, above n 11; Australian Conservation Foundation, Submission No 198 to Senate Standing Committee on Environment and Communications, *Inquiry into the Environment Protection and Biodiversity Amendment Bill 2013*, 11 April 2013, 4-5.

[112] Australian Petroleum Production & Exploration Association (APPEA), Submission No 47 to Senate Standing Committee on Environment and Communications, *Inquiry into the Environment Protection and Biodiversity Amendment Bill 2013*, 7 April 2013; Graham Lloyd, 'Tony Burke's water safeguards to stifle investment: business', *The Australian*, 13 March 2013.

A. A Necessary Intervention?

When presented with large coal mining proposals, State regulators have often struggled to balance competing interests. The rise of CSG has placed additional stress on decision-making systems in Queensland, NSW and Victoria. The core governance question is whether these challenges are able to be managed at State level, or whether they are sufficiently pressing and serious to warrant Commonwealth intervention. There are credible arguments for both positions.

On one hand, industry groups have argued that any problems with the current regulatory regimes are best dealt at State level.[113] Such arguments in favour of a 'one-stop shop'[114] are made more palatable by purported improvements in State regulation. For example, a recent study comparing Queensland laws to best practice National Water Initiative principles concluded that reforms by the Bligh Government had put Queensland on track to achieve a 'robust, flexible and adaptive regime' for regulating CSG.[115] Strategic planning reforms in NSW have been promoted in a similar light.[116] If these State reform packages are (optimistically) taken at face value, then Commonwealth intervention appears to be unnecessary.

Conversely, supporters of the water trigger have publicly questioned State capacities to make consistent, evidence-based decisions about coal projects. In his second reading speech, Joel Fitzgibbon (Labor MP for Hunter) stated that the Amendment was necessary to overcome flaws in State decision-making and restore confidence in planning systems. Taking a stronger line, Larissa Waters (Greens Senator for Queensland) argued that highly politicised State approvals were 'mak[ing] an absolute mockery' of existing procedural safeguards.[117] Tony Windsor (independent MP for New England) voiced concerns that decisions were being driven by 'short term economic return' rather than long term public interest.[118] In May 2013, these problems were formally recognised by a Senate Inquiry. After considering 235 wide-ranging submissions, the Inquiry concluded that State procedures were 'inadequate'[119] and conducive to conflicts of interest, due to the States' strong financial stakes in attracting coal-related investment and tax revenues.[120]

The governance concerns expressed in Parliament have a strong factual basis – as demonstrated in April 2013, when a Queensland Government employee spoke out against the minimal attention given to the water impacts of Australia's largest CSG projects.[121] Speaking on the ABC *Four Corners* program, the whistleblower Simone Marsh revealed how the $18bn Santos and $20bn QCG projects (both located in southern Queensland) had been approved without reviewing basic site information and with conscious disregard for groundwater risks.[122] Marsh's claims are supported by 900 pages of documents – obtained under Queensland's Right to Information laws – which indicate impossibly short assessment timeframes and political pressure to produce a 'bankable' outcome.[123] Unfortunately, this situation cannot be dismissed as anomalous. In June 2012, the $6.4bn Alpha Coal Project attracted similar controversy after the Minister for Environment Tony Burke called

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[113] APPEA, above n 112; Australian Coal Association (ACA), Submission No 224 to Senate Standing Committee on Environment and Communications, *Inquiry into the Environment Protection and Biodiversity Amendment Bill 2013*, 12 April 2013.

[114] As proposed by the new federal Coalition Government – see Section V below.

[115] Letts, above n 79, 111; cf Marissa Calligeros, 'Tony Abbott and Campbell Newman reduce environmental checks', *Brisbane Times* (Brisbane), 18 October 2013.

[116] NSW Government, 'Getting the balance right: NSW land use' (Brochure, October 2013).

[117] Commonwealth, *Parliamentary Debates*, Senate, 14 May 2013, 2412 (Larissa Waters).

[118] Windsor, above n 11, 1.

[119] Senate Committee Report, above n 27, 30-1.

[120] Ibid 21.

[121] Australian Broadcasting Corporation (ABC), 'Gas Leak!', *Four Corners*, 1 April 2013 (Simone Marsh) <www.abc.net.au/4corners/ stories/2013/04/01/3725150.htm>.

[122] Ibid (Simone Marsh).

[123] Ibid (Matthew Carney).

Queensland's assessment process a 'shambolic joke' and threatened to suspend the State's bilateral agreement with the Commonwealth.[124] Further evidence of poor State processes arose in August 2013, when the WA Supreme Court invalidated the approval of the James Price Point gas facility due to decision-maker conflicts of interest.[125]

Taken together, these sources indicate a large gap between formal planning provisions and their practical application by State decision-makers. Failures in the Santos, QCG and Alpha cases occurred despite the apparent safeguards provided by Queensland's *Environmental Protection Act 1994*, which largely aligns with the National Water Initiative and nominates the precautionary principle as a mandatory consideration.[126] Similar complains have been made in relation to NSW projects – including Santos' CSG exploration in the Pilliga Forest[127] and AGL's Gloucester Gas Project[128] – despite the much-promoted rollout of Strategic Regional Land Use Plans (SRLUPs) and a stricter 'Gateway Process' for approvals.[129] These experiences affirm the need for Commonwealth intervention. Given the States' deep financial interests in resource extraction, the gap between formal rules and administrative reality is arguably *underlying and systemic* – and thus, cannot be bridged by merely introducing new plans and conducting cosmetic repairs at State level.

B. The Efficiency Trade-Off

Industry groups have complained that, regardless of potential improvements in governance, the amended *EPBC Act* framework is simply too inefficient and costly to deliver any net benefits. According to the Australian Coal Association, the water trigger 'completely undermines the Government's commitment to streamline environmental regulation'.[130] In a similar expression of 'anti-regulation ideology',[131] the Australian Petroleum Production and Exploration Association has criticised the Amendment for 'add[ing] duplication and inefficiency … at a time when clarity and investor certainty are required'.[132]

Turning first to the 'duplication' claim, there does appear to be some degree of overlap between State approval requirements and the new water trigger. If State decision-makers adhere to their statutory obligations to consider ecologically sustainable development, and take account of the most up-to-date scientific information on hydrological impacts, then in theory it should be unnecessary for the Commonwealth to review such matters under Parts 8 and 9 of the *EPBC Act*. Recent reforms in NSW and Queensland provide some support for this argument. However, as discussed above, the weight of evidence suggests that State procedures are not functioning well enough to meet community, media or parliamentary expectations. In light of this deficiency, the water trigger should be recognised as a pragmatic safety net, not an unnecessary duplication.

Accepting that the water trigger contains beneficial safeguards, the core question is whether such improvements are worthwhile – or whether they will be entirely outweighed by an accompanying rise in regulatory costs and delays. On one hand, mining and gas companies have complained that

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[124] As quoted in: Simon Cullen, 'Burke slams "shambolic" reef mine approval', *ABC News* (online), 5 June 2012 <www.abc.net.au/news/2012-06-05/burke-labels-reef-mine-approval-a-shambolic-joke/4053188>.

[125] *Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307 (19 August 2013). Note that this project related to a convention gas processing, not a coal seam gas project.

[126] Letts, above n 79.

[127] Kylie Galbraith, 'Group makes cover-up claim over plans for coal seam gas drilling in the Pilliga', *Northern Daily Leader* (Tamworth), 4 June 2013.

[128] Barrington-Gloucester-Stroud Preservation Alliance, 'Community outrage at AGL's plans to resume fracking' (Media Release, 2 October 2013) <bgsp-alliance.asn.au>.

[129] Owens, above n 105.

[130] ACA, above n 113, 1.

[131] McGrath, above n 25.

[132] APPEA, above n 112, 5.

approval timelines will be extended by several months or years,[133] costing billions of dollars in project revenue and, by extension, tax revenue.[134] A national law firm has similarly predicted that the 'deluge' of mining projects requiring Commonwealth assessment will stretch under-resourced departments and result in significant delays to projects.[135] According to previous Productivity Commission research, the exclusion of bilateral approval agreements may cause additional delays.[136]

However, these pessimistic predictions are directly countered by the Senate Inquiry. After canvassing industry, economists and legal practitioners, the Inquiry concluded that:

> Any additional costs would be relatively small compared with the total cost of viable projects, and would be unlikely to dissuade any but the most marginal developers.[137]

This conclusion was supported by evidence from Queensland barrister and environmental law specialist Dr Chris McGrath, who testified that major delays were unlikely due to the efficient operation of referral screening and bilateral assessment under the *EPBC Act*.[138]

By this author's own assessment, the truth lies somewhere between these two positions. While industry concerns over 'green tape' appear to be genuine (rather than merely a scare tactic to undermine support for the Amendment), the worst predictions of 'two or more years'[139] of delay are unlikely to eventuate. Current federal approvals under other *EPBC Act* triggers have been described as an exercise in 'studied haste',[140] and so far the average time between request and provision of IESC advice is between two weeks and two months.[141] While the lack of bilateral approval agreements means that (at least for now) developers will have to liaise with two levels of government, this is *already the case* for most affected projects – because multiple Commonwealth triggers are often activated, and because no State currently has a general purpose bilateral approval agreement with the Commonwealth. It should also be emphasised that bilateral assessment agreements are still available under the Amendment, and will almost certainly be used.[142] In any event, the Coalition Government's commitment to ensuring that Australia is 'open for business' suggests that adequate resources will be devoted to assessing lucrative projects as soon as possible.[143]

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[133] QGC, Submission No 228 to Senate Standing Committee on Environment and Communications, *Inquiry into the Environment Protection and Biodiversity Amendment Bill 2013*, 12 April 2013, 4; General Electric, Submission No 44 to Senate Standing Committee on Environment and Communications, *Inquiry into the Environment Protection and Biodiversity Amendment Bill 2013*, 3 April 2013, 4; APPEA, above n 112, 8.

[134] General Electric, above n 133; citing: Productivity Commission, 'Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector' (Productivity Commission Research Report, April 2009) xxv. See also: Australian Coal Association, above n 130, 5.

[135] HBL Ebsworth, 'National Implications of Changes to the EPBC Act for Coal Seam Gas and Coal Mining Operations' (27 June 2013) <www.hwlebsworth.com.au/latest-news-a-publications/publications/energy-and-resources/item/989-national-implications-of-changes-to-the-epbc-act-for-coal-seam-gas-and-coal-mining-operations.html>.

[136] Productivity Commission, above n 134, xlix (Recommendation 6.1).

[137] Senate Committee Report, above n 27, 19.

[138] Chris McGrath, Submission No 236 to Senate Standing Committee on Environment and Communications, *Inquiry into the Environment Protection and Biodiversity Amendment Bill 2013*, 3 May 2013, 2. See also: John Quiggin, 'FactCheck: does it take three years to get approval for a mine?' on *The Conversation* (7 July 2013) <theconversation.com/factcheck-does-it-take-three-years-to-get-approval-for-a-mine-15702>.

[139] QGC, above n 133, 4.

[140] Lyster et al, above n 56, 176; quoting *Wilderness Society Inc v Turnbull* [2007] FCAFC 175 (22 November 2007), [84].

[141] Inferred from published advices – see: IESC, Australian Government, *Advice on Coal Seam Gas and Large Coal Mining Development Proposals* <www.environment.gov.au/coal-seam-gas-mining/proposal-advice.html>.

[142] Greg Hunt, 'One-stop shop approved by Government' (Media Release, 16 October 2013).

[143] See, eg, Tony Abbott, 'The Coalition will restore strong, stable and accountable government' (Media Release, 23 September 2013); Greg Hunt, above n 6.

Even if the water trigger imposes a significant delay in some cases, this extra time is arguably justified by the scale and stakes of the projects in question. Since Australia's coal and gas resources are likely to retain their value in one, two or five years' time, whereas an ill-advised project could irreversibly damage water resources, an additional few months of assessment is an acceptable price to pay for greater public confidence and water security.

V. Conclusion: Ecology, Governance or Politics?

The Commonwealth's new water trigger is not conceptually elegant, nor practically ideal. Rather than a measured outcome of linear reforms, it is perhaps better understood as an idiosyncratic by-product of more immediate political, environmental and community forces. This lack of conceptual clarity is reflected in the remarkable array of reactions to the trigger. Before, during and after its passage through Parliament, it has been variously framed: as a channel for up-to-date science and cumulative impacts; as a safeguard against conflicts of interest and poor decision-making; and as an unnecessary duplication and blatant legislative overreach. These divergent views appear to flow from very different conceptions of whose interests the *EPBC Act* is supposed to serve, and what problems it is intended to solve.

However, as this paper has shown, the water trigger's chaotic birth does not necessarily make it a 'bad' reform. Given the questionable standard of State approval processes, there appear to be net benefits – in terms of ecologically sustainable development and good governance – to having an extra layer of Commonwealth approval for coal mining and CSG projects that may affect water resources. While any addition to the Commonwealth's matters of national environmental significance will inevitably spark complaints about 'duplication' and 'fragmentation' and 'green tape', these alleged costs are worth bearing – at least until the IESC and other bodies reach an informed consensus on hydrological risks.

Going forward, the key question is how the water trigger will be implemented by the Coalition Government, and in particular, how it will fit with the Government's widely-promoted 'one-stop shop' policy for major project approvals.[144] Government Ministers have struggled to articulate a uniform and legally correct view on this matter. Despite the clear exclusion of bilateral approval agreements under the Amendment as passed in June 2013,[145] Ian MacFarlane (Minister for Industry) stated in June 2013 that the water trigger 'contains nothing to prevent' the Commonwealth from devolving CSG approvals to the States.[146] Since taking office, Greg Hunt (Minister for Environment) has attempted to clarify the position.[147] Based on its Memorandum of Understanding with Queensland, dated 18 October 2013, the Coalition Government is apparently seeking to conclude broad spectrum bilateral approval agreements by late 2014, while maintaining its involvement in coal projects as required by the water trigger.[148]

As at late 2013, the Government had not expressly indicated that it would adjust or repeal the water trigger to allow for full devolution. However, given the Coalition's pro-industry footing and strong 'one-stop shop' policy platform, there is no guarantee that the water trigger will survive long enough to receive its two year statutory review in June 2015. Although abruptly and controversially conceived, its demise would nonetheless be a backward step for environmental protection in Australia.

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[144] See, eg, Joe Hockey, 'Australia: Open for Business' (Speech delivered to American Australian Association, New York, 16 October 2013).

[145] *EPBC Act* s 46, as amended by *Water Trigger Amendment* sch 1 cls 4A, 4B.

[146] As quoted in: Lenore Taylor, 'Coalition backs laws that will scupper its own coal seam gas policy', *The Guardian* (online), 19 June 2013 <www.theguardian.com/world/2013/jun/19/coalition-coal-seam-gas-policy>.

[147] Hunt, above n 142.

[148] *Memorandum of Understanding between the Commonwealth and Queensland* (18 October 2013) cl 5.1.1.