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THE GROWTH OF FEDERAL ENVIRONMENTAL LAW 1971 TO 2016

Morgan Begg, Research Fellow

Institute of Public Affairs
SECURING FREEDOM FOR THE FUTURE
1943 - 2018

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About the authors

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Executive Summary

Red tape costs the Australian economy at least $176 billion, or 11 per cent of GDP, each year in foregone economic output.

Environmental red tape and regulation in particular has grown significantly in recent decades.

This report provides an objective measure of the growth of federal environmental legislation since the creation of the first Commonwealth environmental department in 1971. The extent of federal environmental legislation is calculated by counting the number of pages of legislation that are administered by the various Commonwealth environmental departments since 1971.

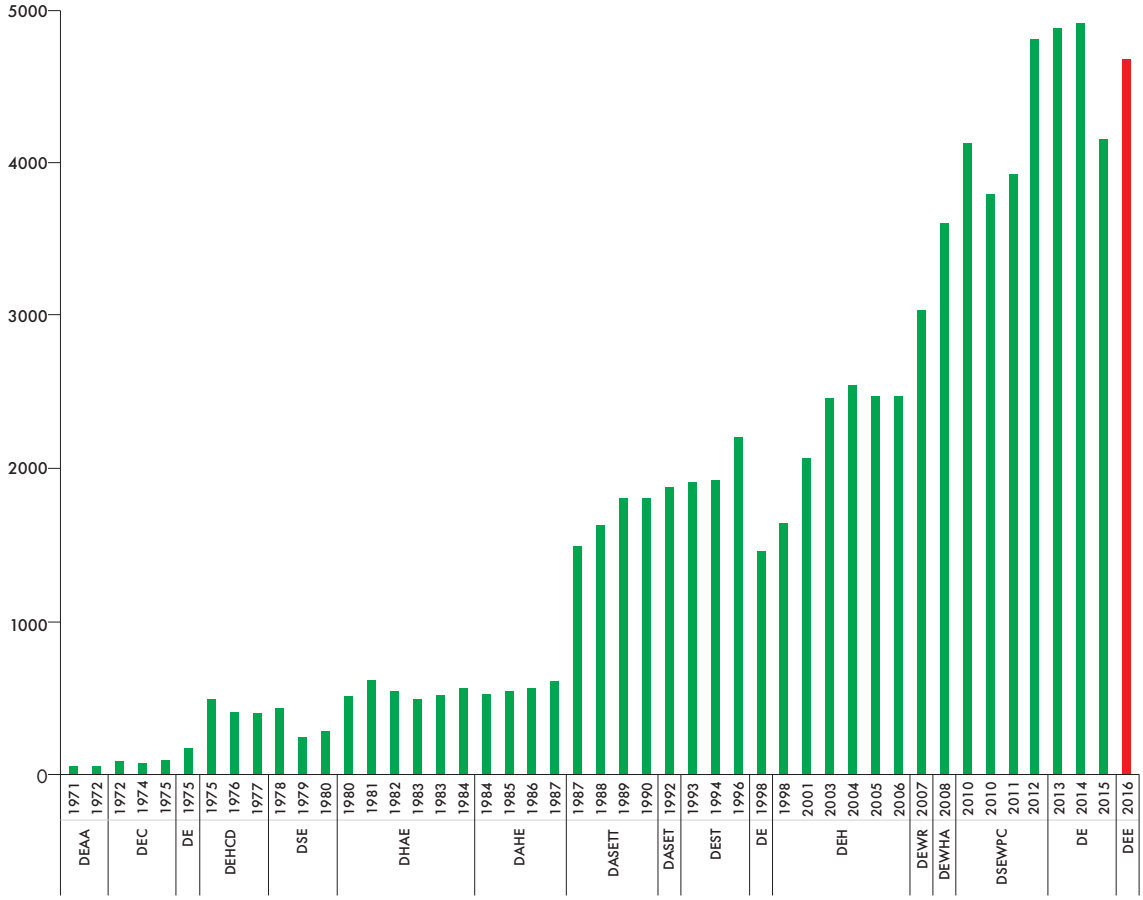
In 1971, the Department of Environment, Aborigines and the Arts administered 57 pages of federal legislation. In 2016, the Department of Environment and Energy administered 4,669 pages of legislation. The chart on page 4 demonstrates how environmental legislation has grown over time.

Federal parliament should address the red tape problem identified in this report in two ways:

- By repealing onerous regulations, such as section 487 of the *Environment Protection and Biodiversity Conservation Act 1999,* which gives green groups a special legal privilege to challenge federal environmental project approvals; and
- By eliminating duplication and devolving to the state governments the responsibility for administering environmental laws.

Growth of environmental law since 1971

This chart measures the growth of federal environmental legislation over time by counting the number of pages that have been administered by federal environment departments since 1971. The methodology used and its limitations are described on page 7.



DEAA: Environment, Aborigines and the Arts (May 1971-Dec 1972)
DEC: Environment and Conservation (Dec 1972-April 1975)
DE : Environment (Apr-Dec 1975; Oct 1997-Oct 1998; Sept 2013-July 2016)
DEHCD: Environment, Housing and Community Development (Dec 1975-Dec 1978)
DSE: Science and Environment (Dec 1978-Nov 1980)
DHAE: Home Affairs and the Environment (Nov 1980-Dec 1984)
DAHE: Arts, Heritage and Environment (Dec 1984-July 1987)
DASETT: Arts, Sports, the Environment, Tourism and Territories (July 1987-Dec 1991)
DASET: Arts, Sports, the Environment and Territories (Dec 1991-March 1993)
DEST: Environment, Sports and Territories (March 1993-Oct 1997)
DEH: Environment and Heritage (Oct 1998-Jan 2007)
DEWR: Environment and Water Resources (Jan 2007-Dec 2007)
DEWHA: Environment, Water, Heritage and the Arts (Dec 2007-Sept 2010)
DSEWPC: Sustainability, Environment, Water, Population and Communities (Sept 2010-Sept 13)
DEE: Environment and Energy (July 2016-)
DCC: Climate Change (Part of the Prime Minister and Cabinet Portfolio) (Dec 2007-March 2010)
DCCE: Climate Change and Energy Efficiency (March 2010-March 13)

History of Commonwealth environmental regulation

The framers of the Australian Constitution did not insert into that document a specific environmental power. While the states were the dominant regulators in this area, the Commonwealth commonly introduced regulations which had an incidental environmental object.

For instance, the Quarantine Act introduced in 1908 had a conservation purpose by introducing measures for the exclusion, detention, observation, segregation, isolation, protection, and disinfection of vessels, persons, goods, animals, or plants, and having as their object the prevention of the introduction or spread of diseases or pests affecting man, animals, or plants.[1]

The post war environmental movement argued that environmental protection required a direct legislative approach at the national and transnational level. This led to the establishment of the first Commonwealth department (partly) devoted to the environment, when the McMahon Coalition government in 1971 established the Department of Environment, Aborigines and the Arts.

The 1970s saw the introduction of significant environmental legislation, such as the *Environment Protection (Impact of Proposals) Act 1974*, the *National Parks and Wildlife Conservation Act 1975* and the *Great Barrier Reef Marine Act 1975*.

This increased legislative activity from the Commonwealth has been enabled by the High Court. Although no explicit head of power is found in the Constitution to support Commonwealth environmental legislation, the High Court has construed the present heads of power widely to enable environmental laws to be passed.[2]

Since 1971, the size of the environmental bureaucracy has grown persistently larger. This report measures the extent of the burden of federal environmental law by calculating how many pages of legislation were administered by various environmental departments since 1971. This report finds that over this period the burden of environmental laws has grown considerably, contributing to the significant red tape problem.

1 *Quarantine Act 1908* (Cth) s 4.

2 See for instance *Commonwealth v Tasmania* (1983) 158 CLR 1, where a majority of the Court held that the Commonwealth's *World Heritage Properties Conservation Act 1983* was constitutionally permitted by the external affairs power.

Environmental regulation and the red tape problem

Red tape is one of the primary factors restraining growth and prosperity in Australia. Research by the Institute of Public Affairs in May 2016 found red tape was costing the Australian economy $176 billion each year, or 11 per cent of Gross Domestic Product (GDP), in foregone economic output.[3] The burden of red tape is incurred across all industries and results in a range of economic costs.

Several examples highlight how red tape discouraging domestic investment and major projects in Australia:

- The Roy Hill iron ore mine in the Pilbara required more than 4,000 separate licences, approvals and permits for the pre-construction phase alone;
- In a 2013 report, the Productivity Commission gave the example of a project which was required to meet 1,500 government imposed primary conditions, and 8,000 sub-conditions;
- The Adani coal mine in central Queensland has spent seven years in the approvals process, endured more than 10 legal challenges, and prepared a 22,000 page Environmental Impact Statement.[4]

Environmental law is a significant part of this regulatory framework. Adani's Carmichael Coal Mine and Rail Project in particular highlights how environmental laws are used to delay major projects. The environmental impact statement process was initiated by Adani in October 2010, but was not given initial approval by the federal environment minister until 24 July 2014. In August 2015, the project was delayed again when the Federal Court formally set aside the initial approval under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).

The EPBC Act is the largest and most significant piece of federal environmental law, currently spanning two volumes and 1,117 pages. The EPBC Act requires federal environmental approval where actions, such as a proposed development, are likely to have a 'significant impact' on listed protected species of flora and fauna. A forthcoming paper by the IPA's Darcy Allen calculates that the number of listed species of flora and fauna protected by the EPBC Act has grown by approximately 40 per cent since 2000, and now numbers approximately 1,900. As Allen explains, this is not without cost: expanding the list of protected flora and fauna delays projects and imposes duplication costs, as the states have their own protected flora and fauna lists.[5]

The provision relied on by the Federal Court in to overturn the initial approval of the Adani project was section 487 of the EPBC Act. Section 487 imposes significant red tape costs by extending special legal privileges to green groups to challenge federal environmental project approvals. A paper by the IPA's Daniel Wild in October 2016 found that since its introduction in 1999, section 487 has imposed $1.2 billion in costs to the Australian economy.[6]

3 Dr Mikayla Novak, 'The $176 Billion Tax on our Prosperity' (Occasional paper, Institute of Public Affairs, 2016) http://ipa.org.au/portal/uploads/The-176-Billion-Tax-On-Our-Prosperity.pdf

4 Daniel Wild, 'Business Investment in Australia now Lower than under Whitlam' (Parliamentary Research Brief, Institute of Public Affairs, 2017).

5 Darcy Allen, 'Reform Directions for Threatened Species Listings' (Occasional paper, Institute of Public Affairs, unpublished).

6 Daniel Wild, 'Section 487 of the Environment Protection and Biodiversity Conservation Act: How Activists use Red Tape to Step Development and Jobs' (Occasional paper, Institute of Public Affairs, 2016)

Environmental regulation should be left to the states

If we take it as given that government should administer environmental regulations, the question is then which jurisdiction can impose it most effectively, while imposing minimal costs on business and development. One-size-fits-all centralised regulation can be an inappropriate approach and should be rejected in favour of environmental federalism.

Regulatory differences at different but equal jurisdictions is beneficial. Environmental federalism would mean states would be able to test their own regulatory systems and will be more likely to develop a set of rules appropriately tailored for that jurisdiction. Different rules being trialled simultaneously will enable the rules that best balance economic growth and environmental conservation to emerge. As Randy T Simmons wrote in The Independent Review in relation to federal species protection in the US, biodiversity protection efforts should be decentralised "to states and private organisations. Many competing answers are better than one, especially inasmuch as no one knows what the right answer is."[7]

There are number of benefits to devolving responsibility for environmental regulation. One benefit is that federalism enables the different jurisdictions to test the efficacy of new policies without imposing them on the whole country.

> The appropriate use of decentralized environmental decision making can have further benefits. In a federal system, state and local governments have the opportunity to introduce new and innovative regulatory measures. They can serve as laboratories in which to conduct experiments that can provide valuable lessons on the potential of new approaches to public policy.[8]

A decentralised environmental regulatory system also reduces the capacity for rent-seeking. As Simmons explains with reference again to the US:

> Environmentalists tend to push for centralized policies. If a preferred solution is imposed nationally, lobbyists do not have to deal with fifty state legislatures and the local interest groups of each state.[9]

Assuming environmental legislation is required, the ideal manner of environmental protection is still unknown. As Hayek explains, society suffers from a knowledge problem.[10] Only by trying multiple different sets of rules across multiple jurisdictions will political solutions arrive at the optimal point between protecting the environment and enabling economic growth.

7 Randy T. Simmons, 'Fixing the Endangered Species Act' (1999) 3(4) *The Independent Review* 511, 512.

8 Oates, Wallace E. "Environmental Federalism." *Resources for the Future,* Policy Commentary, 21 September 2009 http://www.rff.org/blog/2009/environmental-federalism-wallace-e-oates

9 Simmons (1999), 524.

10 See for instance Friedrich Hayek, 'The Pretense of Knowledge' (1989) 79(6) *The American Economic Review.*

Methodology and limitations

The measurement of environmental legislation over time was calculated by adding up the number of pages of legislation administered by federal environmental departments at multiple points in time. This information is collected in a series of Administrative Arrangements Orders, which lists each government department, the principal matters those department deal with and the legislation that department administers. These Orders are collected at the website of the National Archives of Australia.

The number of pages of that legislation is found predominantly at the Federal Register of Legislation, the official Commonwealth government archive of legislation and regulations.

To calculate the extent of total environmental legislation at a single point in time, each act of parliament had to be measured at that point in time. This would include the principal Act (the legislation as it was originally introduced) plus the effect of later amendments. The most efficient way to measure the size of a piece of legislation including amendments is to find a compilation version of the Act, which incorporates the amendments.

In this respect, the Federal Register of Legislation has a number of shortcomings. Compilations of some Acts in the 1990s and earlier are not available in a downloadable format. To calculate an approximate size of Acts in certain years, it was necessary to take the size of the principal legislation and add the size of substantial amending acts that were in force at that time. For example, at 24 July 1987, the Department of Arts, Sport, the Environment, Tourism and Territories administered the *Environment Protection (Impact of Proposals) Act 1974*. However, no compiled version of that law as at 24 July 1987 is available on the Register to download. To approximate the size of the *Environment Protection (Impact of Proposals) Act 1974*, the length of its most significant amendments (in 1975 and 1987[11]) have been added to the size of the principle 1949 Act to arrive at its approximate size at that point in time.

Our figures also include legislation administered by the Department of Climate Change (December 2007 to March 2010) and the Department of Climate Change and Energy Efficiency (March 2010 to March 2013) on the basis that their objectives were purely environmental in nature, but had been separated from the general environmental departments.

11 *Environment Protection (Impact of Proposals) Act 1975; Environment Protection (Impact of Proposals) Amendment Act 1987.*

Conclusion

The extent of federal environmental law has grown significantly since 1971.

This economic burden must be reduced by repealing particularly burdensome laws such as section 487 of the *Environment Protection and Biodiversity Conservation Act 1999*.

The general administration of environmental regulations should also be devolved to the states. By decentralising regulation, the rules will be more likely to arrive at the optimal point between environmental protection and economic growth.

Appendix A

Administrative Arrangements Orders give government departments responsibility for administering a list of legislation. This table lists the Administrative Arrangements Orders that were used in this report, and the calculated number of pages of legislation administered by those departments at that point in time.

Date of order	Name of department	Pages
31 May 1971	Department of the Environment, Aborigines and the Arts	57
6 March 1972	Department of the Environment, Aborigines and the Arts	59
20 December 1972	Department of the Environment and Conservation	94
2 October 1974	Department of the Environment and Conservation	81
10 February 1975	Department of the Environment and Conservation	97
1 July 1975	Department of Environment	173
22 December 1975	Department of Environment, Housing and Community Development	501
5 October 1976	Department of Environment, Housing and Community Development	415
20 December 1977	Department of Environment, Housing and Community Development	403
28 September 1978	Department of Environment, Housing and Community Development	441
12 September 1979	Department of Science and the Environment	253
3 September 1980	Department of Science and the Environment	287
3 November 1980	Department of Home Affairs and Environment	517
21 December 1981	Department of Home Affairs and Environment	626
7 May 1982	Department of Home Affairs and Environment	548
11 March 1983	Department of Home Affairs and Environment	496
1 July 1983	Department of Home Affairs and Environment	519
1 March 1984	Department of Home Affairs and Environment	564
13 December 1984	Department of Arts, Heritage and Environment	528
30 July 1985	Department of Arts, Heritage and Environment	551
30 January 1986	Department of Arts, Heritage and Environment	564
30 January 1987	Department of Arts, Heritage and Environment	613
24 July 1987	Department of the Arts, Sport, the Environment, Tourism and Territories	1498
4 March 1988	Department of the Arts, Sport, the Environment, Tourism and Territories	1632
13 March 1989	Department of the Arts, Sport, the Environment, Tourism and Territories	1806
3 July 1990	Department of the Arts, Sport, the Environment, Tourism and Territories	1808
31 January 1992	Department of the Arts, Sport, the Environment and Territories	1889
24 March 1993	Department of the Environment, Sport and Territories	1932
6 June 1994	Department of the Environment, Sport and Territories	1926
11 March 1996	Department of the Environment, Sport and Territories	2209
24 June 1998	Department of the Environment	1493
22 October 1998	Department of the Environment and Heritage	1650
26 November 2001	Department of the Environment and Heritage	2075
18 December 2003	Department of the Environment and Heritage	2458
27 October 2004	Department of the Environment and Heritage	2544
21 July 2005	Department of the Environment and Heritage	2480
21 September 2006	Department of the Environment and Heritage	2478

Table continued...

30 January 2007	Department of the Environment and Water Resources	3040
25 January 2008	Department of Climate Change (Part of the Prime Minister and Cabinet Portfolio)	211
	Department of the Environment, Water, Heritage and the Arts	3395
8 March 2010	Department of Climate Change and Energy Efficiency	251
	Department of the Environment, Water, Heritage and the Arts	3882
14 October 2010	Department of Climate Change and Energy Efficiency	420
	Department of Sustainability, Environment, Water, Population and Communities	3383
14 December 2011	Department of Climate Change and Energy Efficiency	492
	Department of Sustainability, Environment, Water, Population and Communities	3437
9 February 2012	Department of Climate Change and Energy Efficiency	1455
	Department of Sustainability, Environment, Water, Population and Communities	3347
18 September 2013	Department of the Environment	4871
23 Dec 2014	Department of the Environment	5004
9 July 2015	Department of the Environment	4143
1 Sept 2016	Department of the Environment and Energy	4669

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