AUSTRALIAN CONSERVATION FOUNDATION

17 January 2014

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Australian Conservation Foundation (ACF) Supplementary Submission to the Senate Inquiry into the Environment Legislation Amendment Bill 2013

ACF appreciates the opportunity to provide a supplementary submission to this Inquiry, having become aware that amendments to the proposed Bill have been circulated in the Senate to which our original submission did not make reference.

Matters of National Environmental Significance require national leadership

Ecological health and sustainability is critical to Australia's national interest. It is the Commonwealth Government's responsibility to lead the nation in ensuring our environment is responsibly managed and protected, and that we meet our obligations under international law.

The current sections of the EPBC Act which allow the Commonwealth to delegate its powers in relation to Matters of National Environmental Significance (MNES) to the states are contrary to the Commonwealth's responsibilities to protect the environment and should be removed. The Australian Conservation Foundation supports the amendments circulated by Senator Waters.

Effect of the proposed amendments

The amendments proposed would mean the power to make approval decisions under the EPBC Act could no longer be devolved via bilateral agreements to state governments.

According to successive Australian Governments, since the Act was passed in 1999:

> *"The Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act) is the Australian Government's central piece of environmental legislation.*
> *The EPBC Act provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places—defined in the EPBC Act as matters of national environmental significance." (Refer SEWPAC website)*

The EPBC Act is triggered only by a very limited class of actions – those which would impact on one of eight Matters of National Environmental Significance (MNES), defined in the Act.

Only 1,022 projects *have ever* required Commonwealth approval since its enactment in 1999. Of these, only ten (less than 0.01%) have been rejected, while many projects were allowed to proceed subject to conditions designed to prevent adverse environmental impacts.[1]

While it is triggered only rarely, the EPBC Act provides critical oversight that ensures development is balanced by environmental protection. The EPBC Act as it currently stands allows the Commonwealth Government to 'delegate' its approval powers under the Act to state governments through the mechanism of bilateral agreement. The effect of this Bill would be to remove this avenue for the Commonwealth to delegate its power. The retention of direct involvement by the Commonwealth in decisions regarding developments which impact MNES is critically important to the health of the Australian environment and for community confidence in the decision-making process.

Why the Commonwealth should retain its approval powers under the Act

States do not have the capacity to take on delegated Commonwealth powers under the Act
The exercise of full Commonwealth assessment and approval powers under the Act is a matter requiring significant resourcing and expertise, which is beyond the capacity of most state environment departments. Many state environment departments have undergone recent staffing and funding cuts, and are struggling with their current workloads. To take on additional Commonwealth responsibilities will require additional resourcing.

State Auditor-General's reports across the country report that state governments are struggling to fulfil their existing statutory obligations. For example, in Queensland, the Auditor-General found that in 2010 only 17 per cent of State's 576 protected areas which required park management plans had them in place.[2] This figure was still at 17 per cent in June last year. In Victoria the Auditor General found that less than half of the states' listed threatened species and communities had the required management statements completed, and estimated that at the current rate of progress it would take the Victorian Department of Sustainability and Environment an astonishing 22 years to complete them – presumably assuming no further listings occurred during that time.[3]

The trend around the country is for further cuts: for example in Queensland the Environment and Heritage Protection Department was cut 16% (220 redundancies) in 2012-13. In the absence of additional resources increasing both biodiversity budgets and staff, it seems highly unlikely the states could execute delegated powers adequately.

---

[1] Statement on Changes to Commonwealth Powers to Protect Australia's Environment *Wentworth Group of Concerned Scientists September 2012 p1*

[2] Report to Parliament No 9 for 2010 Sustainable Management of National Parks and Protected Areas Auditor General of Queensland p 15

[3] Victorian Auditor General's Report p23, p35

States do not have the necessary legislative frameworks

The Commonwealth can only delegate its powers under the Act to states that have the necessary legislative and regulatory frameworks. In 2012 the Commonwealth Government released draft standards which states would be required to meet before any bilateral agreements could proceed. These standards reflect the minimum requirements of the EPBC Act – the bar could not legally be set lower. However, analysis by the Australian Network of Environment Defenders' Offices concluded that:

> *Based on our extensive analysis and interaction with planning and environmental laws in each jurisdiction, we submit that no state or territory planning or environmental laws currently meet the minimum requirements of the 106 elements outlined in the Draft Standards Framework, let alone the full suite of best practice standards that Australia should be striving to implement.*[4]

Creating the regulation and legislation necessary to enable states to meet the minimum standards required to exercise powers under the EPBC Act is necessarily a complicated long-term project which excludes the possibility of responsible delegation in the near future.

States are not responsible for international obligations

The matters that our national environmental laws seek to protect reflect international obligations under treaties and agreements dealing with areas such as threatened species, migratory species, wetlands and world heritage areas. It makes sense for the Commonwealth to retain responsibility for these areas, or Australia may find itself being held to account for failure to meet international obligations which it has signed away to the states and can no longer control. States would have little incentive to ensure that these obligations are met, as they are not the party which would be held ultimately responsible.

State Governments do not answer to all Australians on MNES within their borders

Matters of National Environmental Significance (MNES) under the EPBC Act are *national* issues. The Great Barrier Reef is located in Queensland, but is an iconic Australian place that is important to all Australians. Similarly World Heritage sites belong to all of us, not just the people of the state in which they are found. Threatened and migratory species do not recognise state borders and can only be protected at a national scale. Nuclear actions are of concern to the whole nation wherever they are located. As a matter of logic, and accountability, the decision-maker in relation to these matters should be the government that is answerable to all Australian people.

States have particular conflicts of interest

If the Commonwealth Government were to delegate its decision making powers under the Act, it would create a situation in which a state government could be the proponent, assessor, decision-maker, and compliance enforcer of a development proposal which impacts a MNES. States are in fact frequently the proponents of actions referred to the Commonwealth Minister under the Act, and the conflict of interest inherent in this situation is clear. However even in cases where the state is not the formal proponent, the financial

[4] Submission on Draft Environmental Standards to accredit State/Territory approval processes under the EPBC Act *ANEDO November 2012 p 3*

benefits to the state that would flow from a proposed project, whether through royalties, investments or political relationships , make it extremely difficult for a state to make an impartial decision in the national interest. For example, the Tasmanian government abandoned its proposed road through the Tarkine rainforest when the area was granted heritage listing under the EPBC Act and it became clear that the project would be subject to Commonwealth approval. Without the Commonwealth as an independent decision-maker directly involved in the process, Tasmania would have prioritised its infrastructure plans over the environment.

The states track record on environmental protection is uneven, and poor at times

Due in part to the conflicts of interest noted above, the track record of states on protecting the environment gives no confidence that they would exercise additional powers responsibly. The great majority of environmental regulation falls within state jurisdictions, and in most cases, state environmental laws are inadequate, patchily implemented and poorly monitored and enforced. The trend is currently downward: around the country environmental protections are being rolled back by governments under the misleading rhetoric of 'cutting green tape'. The attitude of states to MNES is no better. Historically the Commonwealth Government has used its constitutional powers to prevent several damaging development proposals, which were approved by state governments, but would have impacted iconic Australian places, including a dam on the Franklin River, oil rigs on the Great Barrier Reef and sand mining on Fraser Island. Since the introduction of the EPBC Act in 1999, the Commonwealth Government has used the Act's provisions to prevent the Traveston dam on the Mary River and disallow cattle grazing in the Alpine National Park, a proposal which the Victorian Government continues to pursue. Just this week, Commonwealth intervention was required to halt proposed seismic exploration surveys by Apache Energy that would have had "clearly unacceptable" impacts on the Ningaloo World Heritage area.

Recommendation

The proposed amendments would be a significant step toward stronger national environment laws in Australia, and should be legislated.