

## **Chapter 2**

### **Issues arising in relation to the bill**

#### **Submissions**

2.1 The committee received a large number of submissions and a number of form letters, with the majority of submissions in support of the bill. Supporters of the bill raised a number of issues and challenged the arguments being made about the need for reduced Commonwealth involvement in approval of matters of national environmental significance. Most submitters expressed grave concern about the risks to the environment associated with granting approval powers to the states and territories.

2.2 Submitters who did not support the bill did so on the grounds that they view the option for states and territories to have approval powers as providing a way of improving business efficiency while at the same time maintaining a high standard of environmental regulation and management. The differing views, and issues raised in the evidence is discussed in further detail below.

#### **Support for the EPBC Act**

2.3 As the committee notes later in this chapter, some submitters did make suggestions for improving the operation of the EPBC Act. However the committee has found that there is strong support for the aims and objectives of the Act. At the time of introducing the EPBC legislation in 1999, the former Howard government noted that the bill:

...enables the Commonwealth to join with the states in providing a truly national scheme of environmental protection and biodiversity conservation, recognising our responsibility to not only this but also future generations. It does so by respecting and building upon the strengths of our Federation and the primary responsibility of the states for delivering on-ground natural resource management...By accepting Commonwealth leadership, respecting the role of the states and providing best process for users, the bill provides a framework within which to build public confidence and support for its vitally important objectives.<sup>1</sup>

2.4 The Minister at the time of introducing the EPBC legislation, former Howard government Minister for the Environment, Robert Hill, noted:

...the new legislation provides for Commonwealth leadership on environmental matters and respects the primary role of the States in relation to on-ground natural resource management. State agencies and areas of local governments are clearly the best places to write on ground delivery of environmental management, with both the practical expertise and the experience of local conditions. There is however also a critically important role for Commonwealth. The Commonwealth is ultimately responsible for ensuring that Australia meets its international environmental

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1 Hon Dr Sharman Stone MP, *House of Representatives Hansard*, 29 June 1999, p. 7772.

responsibilities and in our view must also demonstrate leadership on environment matters by, for example, working with the States to set national standards. The EPBC Act recognises the need for Commonwealth leadership and the reality that on-ground delivery should be carried out as far as possible by the States...Under this model the Commonwealth and the community can be confident that the matters of national environmental significance are being protected by processes we believe meet best practice.<sup>2</sup>

2.5 The committee has found that these aims are as relevant today as they were in 1999. During the inquiry Mr Peter Cosier, Director of the Wentworth Group of Concerned Scientists told the committee:

This country faces enormous environmental challenges: past mistakes in overclearing of land, overallocation of water resources, unsustainable fishing practices, the spread of weeds and feral animals, and the future threats of climate change and overdevelopment on our coastal environments. Environmental law can do little to address these past mistakes—we need another policy response for those—but it is a vitally important tool to ensure that future development does not cause further damage to Australia's environmental assets.<sup>3</sup>

## Improving efficiency

2.6 Submitters who did not support the bill advocate the use of approval agreements as a way of reducing inefficiencies in the current arrangements for environmental and development approvals.<sup>4</sup> The Business Council of Australia (BCA) says that the current system of assessment and approval under the EPBC Act leads to 'costly double handling'.<sup>5</sup> They argue that it is possible to provide a high level of assurance for the protection of Australia's unique environment and heritage values through approval agreements to improve competitiveness for project proponents.<sup>6</sup>

2.7 The BCA's central argument for rejecting the bill is that it will inhibit long term economic development of the Australian economy, and therefore the broader wellbeing of the community:

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2 Senator the Hon Robert Hill, *Opening Address*, 'A New Green Agenda' Conference, 14 October 1999.

3 *Proof Committee Hansard*, 15 February 2013, p. 27.

4 These divergent views were discussed in the Hawke report which found that state and territory governments and industry groups were generally supportive of an expanded role for bilateral agreements; however environment groups and non-government organisations were not. Department of the Environment, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009 (Hawke report), p. 86, available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 14 December 2013).

5 Business Council of Australia, *Submission 91*, p. 1.

6 Business Council of Australia, *Submission 91*, p. 1.

The successful delivery of major capital projects is critically dependent on timely regulatory approvals and well-considered and well-managed regulatory conditions upon approval. If Australia takes too long to deliver approvals, or the conditions placed upon approvals are unworkable, major capital projects will not proceed, or will not deliver full value to their owners or to the Australian community.<sup>7</sup>

2.8 The BCA argues that even though data to support this claim is 'scant'<sup>8</sup>, there are compelling reasons to allow for approvals to be carried out by the states and territories. This includes improved timeliness and predictability for business and aligning with international standards.<sup>9</sup>

2.9 While the committee heard claims that the Commonwealth approval process was causing inefficiency, that processes between the Commonwealth and the states and territories were duplicated, and that project proponents were labouring underneath the weight of uncertainty,<sup>10</sup> there was no substantive evidence presented to support these claims. These issues are discussed in further detail later in this chapter.

2.10 The option of developing approval agreements with states and territories was presented as a way to harness efficiency.<sup>11</sup> The BCA cites a 2009 report by the Productivity Commission which found that 'expediting the regulatory approval process for a major project [related to the upstream petroleum (oil and gas) sector] by one year could increase its net present value by 10-20 per cent'.<sup>12</sup>

2.11 However, the committee notes that this same report, the Productivity Commission's 2009 Research Report, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, found that the Commonwealth should retain approval powers in relation to matters of national environmental significance:

While effectively consolidating environmental and heritage approval processes would streamline those approval processes, there would also appear to be merit in retaining an independent decision maker of last resort, particularly in relation to matters of potential national environmental significance. This is consistent with the underlying rationale of the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999.<sup>13</sup>

2.12 The committee was presented with no compelling evidence to show how an approval agreement would improve business efficiency. However, a single submitter,

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7 Business Council of Australia, *Submission 91*, p. 2.

8 Business Council of Australia, *Submission 91*, p. 2.

9 Business Council of Australia, *Submission 91*, p. 2.

10 Business Council of Australia, *Answers to question on notice*, received 15 February 2013, p. 3.

11 VicForests, *Submission 42*, p. 1.

12 Business Council of Australia, *Answers to question on notice*, received 15 February 2013, p. 3.

13 Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, April 2009, p. 145.

PGV Environmental, claims that Commonwealth processes caused delays to a residential development which added to the cost and reduced the supply of residential housing lots in Western Australia.<sup>14</sup>

2.13 The Victorian Association of Forest Industries stated that '...the Bill would only reduce the efficiency and effectiveness of the current system and increase green tape, as well as administration and regulatory burden to Australian businesses.'<sup>15</sup>

2.14 The Australian Coal Association agreed:

Escalating costs and delays are making Australian mining projects less internationally competitive and this is jeopardising a once-in-a-generation opportunity for Australia to capture the benefits of global demand for our resources.<sup>16</sup>

2.15 The Pyrenees Shire Council in Victoria expressed concern about the ability of the Commonwealth to make timely decisions that reflect local knowledge and experience.<sup>17</sup> This view is shared by the Victorian Farmers Federation, who argue that the layers of government regulation at local, state and federal level cause 'major overlaps.'<sup>18</sup>

2.16 The BCA argues that risks can be adequately managed through the development of increased reporting and audit mechanisms, as recommended by the Hawke review, and existing safeguards under the EPBC Act. These include:

- a statutory requirement that the minister may only enter into a bilateral agreement if satisfied that it complies with the Act;<sup>19</sup>
- a statutory requirement that the minister publish a draft agreement with a 28-day consultation period and take into account any comments on the draft agreement;<sup>20</sup>
- that a draft bilateral agreement accrediting a management plan or authorisation process under an agreement be tabled in both houses of parliament for 15 sitting days as a disallowable instrument;<sup>21</sup>
- provisions to suspend or cancel part, or all, of a bilateral agreement if the minister considers that a state government has not complied with the agreement.<sup>22</sup>

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14 PGV Environmental, *Submission 115*, p. 1.

15 Victorian Association of Forest Industries, *Submission 56*, p. 2.

16 Australian Coal Association, *Submission 104*, p. 1.

17 Pyrenees Shire Council, *Submission 83*, p. 1.

18 Victorian Farmers Federation, *Submission 130*, p. 1.

19 EPBC Act, s. 50.

20 EPBC Act, s. 49A(a)(ii).

21 EPBC Act, s. 46(5).

22 EPBC Act, ss. 57–62; Business Council of Australia, *Submission 91*, p. 3.

2.17 The Minerals Council of Australia suggests that allowing for increased use of approval bilateral agreements in the states and territories could offer enhanced environmental outcomes through harmonisation of national standards, and allow the Commonwealth to:

...put its energies into assuming a more strategic role. Furthermore, the delegation of EPBC Act requirements to the States/Territories allows the Commonwealth to assume a more strategic role including: monitoring and reporting of EPBC listed entities; bio-regional planning (pre-emptive of development); and as standard setter for the harmonisation of State/Territory processes. This would target Commonwealth resources more appropriately and facilitate greater biodiversity outcomes at an overall lower cost to society.<sup>23</sup>

2.18 The Australian Chamber of Commerce and Industry says that approval agreements would not dilute the current system of legal protection for the environment but rather create efficiencies.<sup>24</sup> This view is supported by the BCA's assertion that increasing the use of assessment agreements alone will not create efficiencies, but rather there should be improved and increased use of both assessment and approval agreements. They note that many controlled actions are often approved with conditions attached under both state or territory and Commonwealth legislation:

Bilateral agreements for assessments only cannot reduce the duplication associated with conditional approvals following the assessment phase. In the experience of many of our members, developing secondary assessments and plans and seeking secondary approvals can be at least as costly as the primary assessments and approvals phase.<sup>25</sup>

2.19 The committee was presented with little evidence from the states and territories. However the Premier of Queensland, the Hon Campbell Newman MP, expressed his desire to continue negotiations that would allow for the states and territories to develop approval agreements with the Commonwealth. He also expressed disappointment with the Commonwealth's announcement that it would not be pursuing approval bilateral agreements at the present time.<sup>26</sup>

2.20 This disappointment was shared by several other submitters including the Australian Forest Products Association (AFPA) who go so far as to say that the bill 'to preclude such bilateral processes and approvals would be a retrograde step that is totally contrary to the national agenda'.<sup>27</sup> The AFPA told the committee that stakeholders can have confidence in the fact that the Commonwealth has always taken

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23 Minerals Council of Australia, *Submission 102*, p. 1.

24 Australian Chamber of Commerce and Industry, *Submission 116*, p. 1.

25 Business Council of Australia, *Answers to question on notice*, received 15 February 2013, pp 2–3.

26 The Hon Campbell Newman MP, Premier of Queensland, *Submission 134*, p. 1. See also Australian Chamber of Commerce and Industry, *Submission 116*, p. 2.

27 Australian Association of Forest Products, *Submission 146*, p. 2.

a 'conservative and precautionary'<sup>28</sup> approach to the development of approval bilateral agreements.

### **Managing conflict of interest**

2.21 There is a strong view that providing the states and territories with the power to grant approvals over matters of national environmental significance would create a situation where conflicts of interest are likely to arise. Many submitters expressed concern that this would put state or territory governments in the position where they could be project proponent as well as decision maker:

The absence of the federal government from environmental decision making would result in few, if any, checks and balances on state government processes. This is of particular concern as state governments are often the proponent for, or beneficiary of major development projects that traditionally trigger the EPBC Act, resulting in a significant conflict of interest.<sup>29</sup>

### **An incentive to approve**

2.22 Even in cases where the state or territory is not the proponent, many submitters raised concerns about the relevant state or territory receiving economic benefits from the development under consideration, acting as an incentive for approval regardless of the environmental impact. Economists at Large described this as a 'disincentive to adequately assess the environmental and social costs of a particular project and to act on this assessment.'<sup>30</sup>

2.23 In addition, the committee heard that if approval agreements were in place it is likely that state and territory planning departments would exercise decision making powers. Dr Chris McGrath told the committee of the situation in Queensland where the Coordinator-General's department is responsible for state development:

It is already accredited under the Queensland assessment bilateral. I would suspect that, if there were an approval bilateral with Queensland, the decision-making role would be given to that department, which is already a very powerful department. It is also not a department that is particularly concerned about environmental protection; it is all about the development of the state.<sup>31</sup>

2.24 The committee is concerned about the possibility of state and territory planning departments exercising decision making powers in relation to matters of national environmental significance, and notes that state and territory planning

28 Mr Grant Johnson, Australian Forest Products Association, *Proof Committee Hansard*, 8 February 2013, p. 2.

29 Latrobe City Council, *Submission 59*, p. 2; see also Friends of Grasslands, *Submission 41*, pp 1–2.

30 Economists at Large, *Submission 95*, p. 1.

31 Dr Chris McGrath, *Proof Committee Hansard*, 8 February 2013, p. 33.

departments are responsible for assessment of major economic development and infrastructure projects, not for protecting the environment.<sup>32</sup>

2.25 Submitters gave prominent examples of state or territory approved projects, which were then found by the Commonwealth to have likely adverse impacts on matters of national environmental significance and were rejected at Commonwealth approval stage:

One of the classic examples of this is the Traveston Dam inquiry in Queensland. There were sufficient significant concerns, both local community concerns of farming communities and about species that were under threat, for the Commonwealth to have to intervene in that process. I will not go into the details of the flaws of that, but that is one clear example that is more recent. Of course, the other examples around the protection of our more iconic areas—be they Kakadu, the Daintree or the Franklin River—go well back. The point here is that this speaks directly to the inherent conflict of interest that exists between what states want to achieve and what might be a robust environmental outcome.<sup>33</sup>

2.26 Professor John Quiggin, Australian Laureate Fellow at the School of Economics and School of Political Science and International Studies at the University of Queensland, provided examples of how approval powers given to the states and territories were likely to lead to competition to attract projects, encouraging the relaxation of their environmental standards. Professor Quiggin described this as a race to the bottom:<sup>34</sup>

It is in Australia's national interest that environmental standards for the approval of major projects should be nationally consistent and predictable over time. Attempts by competing state governments to attract investment by offering favo[u]rable treatment under such slogans as 'fast-tracking' and 'cutting green tape', will undermine this goal.<sup>35</sup>

2.27 This view is shared by the Conservation Council of South Australia who say:

The competition between states to attract industry puts the environment at risk. There is incentive for the state governments to reduce environmental protection in order to make themselves appear more attractive to industry.<sup>36</sup>

2.28 The committee is concerned that if the Commonwealth were to lose its oversight and approval power in relation to matters of national environmental

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32 See for example, NSW Government of Planning and Infrastructure, 'About Us' available at <http://www.planning.nsw.gov.au/SettingtheDirection/OurprioritiesinNSW/tabid/93/language/en-AU/Default.aspx> (accessed 4 March 2013); see also Department of Sustainability, Environment, Water, Population and Communities, *Answers to questions on notice*, received 8 March 2013, p. 2.

33 Mr Graham Tupper, Australian Conservation Foundation, *Proof Committee Hansard*, 15 February 2013, p. 17.

34 Professor John Quiggin, *Submission 146*, p. 2.

35 Professor John Quiggin, *Submission 146*, p. 2.

36 Conservation Council of South Australia, *Submission 107*, p. 2.

significance, this may encourage competitive federalism of the kind being advocated by the Premier of Queensland whereby:

...intergovernmental relations should start with every state's right to seek a competitive advantage over each other, using lower taxes and less regulation to attract business and secure investment.<sup>37</sup>

### **Lack of evidence that the current process is hampering investment**

2.29 The committee heard that there is no empirical evidence to suggest that the current EPBC approval process is hampering investment or imposing unreasonable costs on individual projects. Latrobe City Council expressed the view that as the EPBC Act currently precludes Commonwealth intervention for all decisions except those that are specifically defined as matters of national environmental significance, this already provides a system whereby:

...bilateral assessment agreements can...be used to align the requirements of state and federal environmental assessments without requiring a hand-over of decision making responsibilities.<sup>38</sup>

2.30 The National Parks Australia Council stated:

Statements by business interests that bilateral agreements will improve efficiencies simply have not been substantiated and appear unlikely to be substantiated in the future. Throughout the extensive reviews of the EPBC Act over the past 6 years, there has been no work done in any sector which identifies specific efficiencies from the devolution of Federal approval powers to the States and Territories.<sup>39</sup>

2.31 The Wentworth Group of Concerned Scientists contested the BCA's assertion that environmental regulation is putting at investment at risk, stating that the BCA uses only one example to make such a broad claim:

The single example used by the Business Council of why state governments should be given Commonwealth approval powers actually serves to demonstrate precisely why they shouldn't. The Traveston Crossing Dam on the Mary River was proposed by a Queensland Government corporation and was recommended for approval by the Queensland Coordinator General. In 2009 the Commonwealth Environment Minister, Peter Garrett, acted under the EPBC Act to refuse the dam development on the "very clear" scientific evidence that it would cause unacceptable impacts on nationally protected species: the Australian Lungfish, the Mary River Turtle, and the Mary River Cod.<sup>40</sup>

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37 Michael McKenna, 'State against State: Campbell Newman's Competitive Federalism', *The Australian*, 12 April 2012, available at <http://www.theaustralian.com.au/national-affairs/state-politics/state-against-state-campbell-newmans-federalism/story-e6frgczx-1226324307482> (accessed 5 March 2013).

38 Latrobe City Council, *Submission 59*, p. 2.

39 National Parks Australia Council, *Submission 140*, p. 2.

40 Wentworth Group of Concerned Scientists, *Submission 93*, p. 1.



2.32 Dr Chris McGrath claimed that contrary to arguments that Commonwealth approval processes cause delays, the evidence suggests that state government processes cause greater problems. He presents the Wandoan Coal mine proposal as an example of a project requiring both state and Commonwealth approval. While the Commonwealth process was completed between 23 June 2008 and 21 March 2011,<sup>41</sup> in January 2013 the state of Queensland had not yet made a decision under their legislation since it was referred on 27 May 2008. He says:

It is important in this context to recognize that State and local government approvals are far more numerous than EPBC Act approvals and their requirements are typically far more extensive, costly and time-consuming than those imposed by the EPBC Act.<sup>42</sup>

2.33 Dr McGrath also challenged the claim by the BCA and others that Commonwealth approval powers were leading to a loss of income by project proponents. Even if a project is being delayed, this is not to say that the royalties or income of the project is lost forever, it may just mean that the income is delayed.<sup>43</sup>

2.34 Dr Martin Taylor from the World Wildlife Fund Australia told the committee that mechanisms for cooperation between the states and territories and the Commonwealth were already in place, and it is these that should be better utilised:

We already have mechanisms for the states and the Commonwealth to cooperate on the assessment of bundles of projects. That is a much better level at which to apply the act so you actually take into account cumulative effects on the environment. You do not just go project by project. That is a far better way. Those provisions are already in the act. We do not see any particular need to delegate approval power to the states or have a system for that when the Commonwealth and the states can already cooperate in applying the EPBC Act.<sup>44</sup>

2.35 The Wentworth Group of Concerned Scientists point out that since 1999, the EPBC Act has provided for the states and territories to work cooperatively with the Commonwealth through assessment agreements. However, they say that the reasons this is not occurring efficiently is because the states and territories cannot meet the standards required by the Commonwealth.<sup>45</sup>

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41 This timeline for the Commonwealth process was confirmed by the Department of Sustainability, Environment, Water, Population and Communities, although it noted that their records indicated that Commonwealth approval was given on 14 March 2011: Department of Sustainability, Environment, Water, Population and Communities, *Answers to questions on notice*, received 8 March 2013, p. 6.

42 Dr Chris McGrath, *Submission 141*, p. 2.

43 Dr Chris McGrath, *Submission 141*, p. 6.

44 Dr Martin Taylor, World Wildlife Fund Australia, *Proof Committee Hansard*, 15 February 2013, p. 16.

45 Wentworth Group of Concerned Scientists, *Proof Committee Hansard*, 15 February 2013, p. 28.

2.36 In any event, the committee heard that out of 1022 projects referred for Commonwealth approval, only 10 had been rejected, so the proposal for states and territories to have approval powers as a way of reducing inefficiencies is likely to have been overstated.<sup>46</sup>

2.37 The Wentworth Group of Concerned Scientists suggest that stronger oversight of the current assessment agreements is required, as was recommended by the Hawke review through the creation of an independent National Environment Commission.<sup>47</sup>

Once you have that independent auditing power not only do you have the safeguards or the possibility of building the safeguards in that you are raising but you also have the ability of the Commonwealth to audit the states in the processes that are either assessment processes or approvals processes that have been delegated down through bilaterals.<sup>48</sup>

2.38 The committee notes that the Commonwealth government rejected the recommendation of the Hawke report for the establishment of a National Environment Commission.<sup>49</sup>

### **Confidence in the states and territories**

2.39 Many submitters and witnesses express concern about the ability of the states and territories to make decisions to deliver the best environmental outcomes, and argue that relevant state and territory government departments may not be sufficiently resourced to make decisions based on all available evidence.<sup>50</sup>

2.40 A number of submitters referred to three examples of proposals that were ultimately rejected by the Commonwealth under the EPBC Act; Traveston Crossing Dam in Queensland; Gunns Pulp Mill in Tasmania; and cattle grazing in the Victorian high country. Submitters claim that it is almost certain that these proposals would have been allowed if an approval bilateral agreement had been in place with the relevant state.<sup>51</sup>

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46 Australian Conservation Foundation, *Proof Committee Hansard*, 15 February 2013, p. 18.

47 Wentworth Group of Concerned Scientists, *Proof Committee Hansard*, 15 February 2013, p. 29.

48 Wentworth Group of Concerned Scientists, *Proof Committee Hansard*, 15 February 2013, p. 30.

49 Department of the Environment, Heritage and the Arts, The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999, October 2009 (Hawke report), p. 114, available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 27 February 2013).

50 Ms Rachel Walmsley, Australian Network of Environmental Defenders' Offices, *Proof Committee Hansard*, 15 February 2013, pp 38–39. See also: Colong Foundation for Wilderness, *Supplementary Submission*, pp 2–6.

51 Dr Chris McGrath, *Submission 141*, p. 4.

2.41 Concerns about the ability for the Commonwealth to cancel or suspend approval bilateral agreements were also raised. Professor Lee Godden makes the following points:

- There is insufficient monitoring and audit of the implementation of agreements so it is impossible for the Commonwealth to know whether agreements are being complied with;<sup>52</sup>
- For powers of suspension or cancellation to be invoked, a third party referral to the Commonwealth Minister is required and depends on the community having sufficient knowledge and resources to fulfil this function; and
- There is a lack of procedural clarity on how a state or territory's request to cancel and agreement would be triggered.<sup>53</sup>

2.42 The committee heard that many submitters and witnesses placed confidence in the Commonwealth to offer sound decision making. The committee heard from two Victorian councils that described the significance of their environmental assets and the view that the discretion involved in decision making about these important assets was best held by the Commonwealth to protect the national interest.<sup>54</sup>

2.43 There was also considerable discussion in evidence about recent public service job cuts in the states and territories and the ability of the states and territories to adequately carry out additional obligations that may arise under approval agreements.<sup>55</sup>

2.44 Concerns about the capacity of the states and territories to deliver appropriate enforcement were also raised:

If we are looking for efficiency gains and improving timeliness, not having the staff to do the assessments is obviously going to impact. It also, as we note in our submission, has implications for enforcement. We note that over the last three years the federal environmental department investigated 980 incidents across Australia under the EPBC Act, with 40 court actions, resulting in fines and enforceable undertakings of almost \$4 million. If the Commonwealth step out of this space and leave it all to the states there is no guarantee that the states will enforce the laws to the same extent—that

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52 Professor Lee Godden, *Answers to questions on notice*, received 15 February 2013, pp 4–5.

53 Professor Lee Godden, *Answers to questions on notice*, received 15 February 2013, p. 4.

54 Ms Jane LLoyd, *Proof Committee Hansard*, 8 February 2013, p. 13.

55 National Parks Australia Council, *Submission 140*, p. 3; Humane Society International, *Proof Committee Hansard*, 15 February 2013, p. 16. The committee has considered recent announcements of public service job cuts in states and territories and notes, for example, reports that 220 out of 1117 jobs will be lost from the Queensland Department of the Environment (Koren Helbig and Robyn Ironside, 'Full list of Queensland public service redundancies', *Courier Mail*, 11 September 2012); see also Senate Environment and Communications References Committee, *Inquiry into the Effectiveness of threatened species and ecological communities' protection in Australia*, *Proof Committee Hansard*, 22 February 2013, pp 16–17; and Department of Sustainability, Environment, Water, Population and Communities, *Answers to questions on notice*, received 8 March 2013, p. 1.

they can fill the shoes of the federal government in terms of compliance, for example.<sup>56</sup>

2.45 The department confirmed that there were instances where states and territories could not comply with the standards required under assessment agreements. Dr Kimberley Dripps advised the committee that '...in the operation of some of the assessment bilaterals we find that the assessment provided by the states is inadequate to meet the standards of the EPBC Act.'<sup>57</sup> The Green Institute told the committee that as there is no national information system for monitoring and reporting on the state of the environment, there is no objective way of knowing if the states and territories are meeting their existing obligations.<sup>58</sup>

2.46 The Australian Conservation Foundation cite the findings of state Auditor-Generals which show that states and territories are failing to meet their existing environmental protection obligations.<sup>59</sup>

2.47 The committee has found that there is a high degree of concern that state and territory governments simply do not have the ability to exercise the standards of decision making required. The committee was advised by the Wentworth Group of Concerned Scientists that this is not to say that they may not have this capacity in the future.<sup>60</sup> However the committee does not agree. The committee's view is that it is not appropriate for the states and territories to exercise decision making powers for approvals in relation to matters of national environmental significance. On this point the committee notes that the Premier of Queensland is advocating that the relationship between the states and territories and the Commonwealth should be one of 'competitive federalism'.<sup>61</sup> If this approach is taken in relation to assessment and approval for matters of national environmental significance, the committee considers that this would have a detrimental impact on the nation's unique natural heritage.

2.48 In this context, the committee also notes the department's response to questions about proposed changes to assessment processes under the NSW planning system (the NSW Green Paper<sup>62</sup>). The department advised that the full implications of the Green Paper for accreditation of NSW assessment approaches would not be known

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56 Ms Rachel Walmsley, Australian Network of Environmental Defenders' Offices, *Proof Committee Hansard*, 15 February 2013, p. 39.

57 Dr Kimberley Dripps, Department of Sustainability, Environment, Water, Population and Communities, *Proof Committee Hansard*, 15 February 2013, p. 56.

58 Green Institute, *Submission 129*, p. 2.

59 Australian Conservation Foundation, *Submission 90*, p. 2.

60 Wentworth Group of Concerned Scientists, *Proof Committee Hansard*, 15 February 2013, p. 28.

61 Chris Uhlmann, 'Federal vs state funding fight escalates', *ABC 730 Report*, <http://www.abc.net.au/7.30/content/2013/s3698073.htm> (accessed 26 February 2013).

62 See further NSW Government, *A New Planning System for NSW*, at: <http://www.planning.nsw.gov.au/a-new-planning-system-for-nsw> (accessed 8 March 2013).

until NSW passes legislation.<sup>63</sup> The committee is concerned that this now creates considerable uncertainty about the NSW assessment processes. The committee would therefore be alarmed at the prospect of referring any approval powers to state governments as this is inconsistent with the Commonwealth's international obligations and the intent of the EPBC Act.

### **Securing Australia's natural heritage**

2.49 A number of submitters expressed concern that the desire for continued economic growth brings with it ever-increasing pressure on the natural environment. The Commonwealth government's powers in the EPBC Act were described as an ultimate protection or 'bulwark' to hold back these pressures.<sup>64</sup> While it is outside of the scope of this inquiry, several submitters called for strengthened powers of the Commonwealth under the EPBC Act, and broadening of the criteria that would trigger the approvals process.<sup>65</sup>

2.50 The committee heard from a number of submitters and witnesses who believe the Commonwealth government is in the best position to safeguard Australia's environmental assets. Many submitters noted that ecosystems do not neatly follow state and territory boundaries, therefore the Commonwealth should be making decisions that affect the national interest.<sup>66</sup>

### **International obligations**

2.51 The committee has found that matters of national environmental significance and Australia's international obligations are at the heart of the EPBC Act, and for these reasons, submitters and witnesses view the role of the Commonwealth Minister in approvals related to matters of national environmental significance as critical.<sup>67</sup> Professor Lee Godden noted that under the *Convention Concerning the Protection of the World Cultural and Natural Heritage* there is an obligation placed on national governments to ensure the protection, preservation and continuation into the future of the World Heritage areas. 'These are specific obligations that the Commonwealth government enters into and it alone bears the responsibility for discharging those obligations.'<sup>68</sup>

2.52 The Law Council of Australia urged the Commonwealth to retain its powers for approval of matters of national environmental significance. They express concern that in the absence of guaranteed equivalent environmental protection being offered by states and territories, the Commonwealth should not devolve its approval powers.

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63 Department of Sustainability, Environment, Water, Population and Communities, *Answers to questions on notice*, received 8 March 2013, p. 2.

64 Colong Foundation for Wilderness, *Submission 25*, p. 1.

65 Blue Mountains Conservation Society, *Submission 27*, p. 2.

66 See for example: Mr Justin Smyrk, *Submission 35*, p. 1; Lawyers for Forests, *Submission 112*, p. 2; Ms Nina Earl, *Submission 34*, p. 1.

67 Professor Lee Godden, *Answers to questions on notice*, received 15 February 2013, p. 6.

68 Professor Lee Godden, *Proof Committee Hansard*, 8 February 2013, p. 11.

They advocate the application of the principle of non-regression which 'discourages public authorities from amending legislation where the amendments will reduce the available protections.'<sup>69</sup>

### **Committee view**

2.53 During its deliberations the committee was presented with evidence to show that the EPBC Act is, in the main, working well and that there is overwhelming community support for the Commonwealth to maintain its oversight powers to ensure proper protection of the environment. The committee has found that international obligations compel the Commonwealth to retain its powers for approving matters of national environmental significance in order to deliver strong national coordination and control to protect Australia's biodiversity, to reduce habitat loss and land degradation and to protect the nation from biosecurity risks. The committee rejects the claims made by business interests that Commonwealth powers of approval are the cause of inefficiencies, delays, and loss of income to project proponents.

2.54 The committee considers that there is confusion amongst submitters as to what is actually causing delays or uncertainties in the assessment and approval processes. On this point the committee is persuaded by evidence that it received to indicate that assessment processes at the state and territory level were in some circumstances causing delays, rather than processes at the Commonwealth level. The committee would also like to caution against the assumption that any future approval bilateral agreements would solve all of the problems that are perceived to exist in the current system.<sup>70</sup> In fact, the committee was presented with no empirical evidence to substantiate claims that Commonwealth involvement was hampering approval processes.

2.55 This was confirmed by the department at the committee's public hearing on 15 February 2013:

**CHAIR:** So there has been no evidence from the Minerals Council or the BCA to say: 'Here are the efficiency problems with the EPBC'?

**Dr Dripps:** Not that I recall.

**CHAIR:** I find that amazing because of everything you read in the papers. I went to Corrs Westgarth and their environmental lawyers are saying the efficiencies that can be gained by this are unassailable, but you have not heard of that, have you?

**Dr Dripps:** We are certainly doing some work internally—as I think Mr Knudson said at estimates earlier in the week—to improve our efficiency, but in terms of the problem definition, I am certainly often confronted with generalities and I look forward to receiving any advice on specifics.

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69 Law Council of Australia, *Submission 92*, p. 2.

70 See for example evidence from the Minerals Council of Australia, *Proof Committee Hansard*, 15 February 2013, p. 12.

**CHAIR:** That is interesting, Dr Dripps. That is all we have had. We have not had one hard piece of evidence before this committee that says that a federal government should change the EPBC Act to allow for the states to make assessments and approvals on the basis of these inefficiencies. I have not seen any, and you are saying you have not seen them either.

**Dr Dripps:** That is right.<sup>71</sup>

2.56 And:

**CHAIR:** I just think it is very important. Your evidence tells us that there is no evidence that putting the federal powers back to the states will improve efficiency.

...

**Dr Dripps:** I think what I said is that we have the publicly available reports and we have the same anecdotal evidence that has been presented to you—

**CHAIR:** So no hard evidence.

**Dr Dripps:** from various industry organisations about the efficiencies and inefficiencies that occur in administration of the act.

**CHAIR:** That means that there is no hard evidence; there is anecdotal evidence. Is that correct?

**Dr Dripps:** That is a conclusion from reading the reports, if you like.<sup>72</sup>

2.57 In response to the committee's questioning on whether any analysis has been undertaken of delays under EPBC Act processes and associated costs, the department noted that a report was presented by Deloitte Access Economics in April 2011.<sup>73</sup> Unfortunately, this information was only provided to the committee in answers to questions on notice on 8 March 2013, so the committee has not had time to fully consider this report. However, it appears that the report focusses on a cost-benefit analysis of reforms to the EPBC Act proposed by the Hawke review and concludes that the 'reforms should proceed, with resourcing provided for their implementation'.<sup>74</sup>

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71 Dr Kimberley Dripps, Department of Sustainability, Environment, Water, Population and Communities, *Proof Committee Hansard*, 15 February 2013, p. 59.

72 Dr Kimberley Dripps, Department of Sustainability, Environment, Water, Population and Communities, *Proof Committee Hansard*, 15 February 2013, p. 60.

73 See Department of Sustainability, Environment, Water, Population and Communities, *Answers to questions on notice*, received 8 March 2013, p. 6 referring to Deloitte Access Economics, *Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the EPBC Act*, 20 April 2011, <http://ris.finance.gov.au/2011/09/12/response-to-the-review-of-the-epbc-act-%E2%80%93-regulation-impact-statement-%E2%80%93-department-of-sustainability-environment-water-population-and-communities/> (accessed 8 March 2013).

74 Deloitte Access Economics, *Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the EPBC Act*, 20 April 2011, p. iii, available at: <http://ris.finance.gov.au/2011/09/12/response-to-the-review-of-the-epbc-act-%E2%80%93-regulation-impact-statement-%E2%80%93-department-of-sustainability-environment-water-population-and-communities/> (accessed 8 March 2013).

It is the committee's view therefore that the Deloitte report does not substantiate claims that EPBC Act processes are causing undue delays and costs to proponents.

2.58 Furthermore, the committee notes that any costs to the proponent associated with meeting EPBC Act requirements are legitimate in the context of meeting Australia's national and international environmental obligations. Further, the committee considers that caution is required when considering cost reduction proposals to ensure they are not counterproductive and do not result in cost cutting reducing the Commonwealth's capacity to meet its national and international environmental obligations.

### ***National Environment Commissioner***

2.59 The committee is persuaded by the evidence it received to indicate that Australia's interests would be well served by establishing an independent National Environment Commission and appointing a National Environment Commissioner, as recommended by the Hawke report. The Commissioner would be responsible for improved oversight of environmental protection legislation, and carry out monitoring, data collection, reporting, audit and enforcement functions under the EPBC Act. The Commissioner would also provide advice to the Environment Minister for the purposes of decision making for environmental impact assessment and approvals processes under the Act, including decision making on project assessments, strategic assessments and bioregional plans, as recommended by the Hawke report.

2.60 On this basis the committee believes the Commonwealth government should reconsider its response to this recommendation of the Hawke report.

### **Conclusion**

2.61 The committee notes the Commonwealth acknowledged that 'significant challenges emerged in developing approval bilateral agreements that provide consistency for business and assurance to the community that high standards will be made and maintained'<sup>75</sup> and said it 'will introduce legislative reforms to progress its response to the Hawke review of the *Environment Protection and Biodiversity Conservation Act 1999* to further streamline and strengthen environmental regulation'.<sup>76</sup> The department has confirmed that it is not currently exploring, or negotiating internally, or with states, options for transferring EPBC Act approval responsibilities to the states.<sup>77</sup>

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75 Department of Sustainability, Environment, Water, Population and Communities, *Submission 114*, p. 5.

76 COAG Communique, 7 December 2012, p. 4, <http://www.coag.gov.au/node/475> (accessed 4 March 2013); and see also Department of Sustainability, Environment, Water, Population and Communities, *Answers to questions on notice*, received 8 March 2013, p. 5.

77 Department of Sustainability, Environment, Water, Population and Communities, *Answers to questions on notice*, received 8 March 2013, p. 7.



## **Recommendation 1**

**2.62** Given the need to address a range of issues raised with the committee and associated with the reform of the *Environment Protection and Biodiversity Conservation Act 1999*, the committee recommends that the bill not be passed.

2.63 However, the committee believes that any streamlining and strengthening of environmental regulation must only be undertaken in the context of Australia's national and international obligations. The critically important role of the Commonwealth, and its ultimate responsibility for ensuring national and international environmental responsibilities are met, must be paramount in any legislative review.

## **Recommendation 2**

**2.64** The committee recommends that the Minister for Sustainability, Environment, Water, Population and Communities analyses the evidence before the committee and prepares legislation to amend the *Environment Protection and Biodiversity Conservation Act 1999* consistent with the issues raised in this report and which are designed to ensure that the Commonwealth's national and international environmental obligations continue to be met.

2.65 In this context, the committee also notes the evidence in relation to the operation of COAG and its reform agenda in relation to national environmental matters.

## **Recommendation 3**

**2.66** The committee recommends that COAG deliberations on national environmental regulation must be, at all times, underpinned by Australia's national and international obligations and the objects of the *Environment Protection and Biodiversity Conservation Act 1999*.

2.67 The committee notes the recommendation from the Hawke review for the appointment of a National Environment Commissioner and the creation of an independent National Environment Commission. The committee is of the view that the Commonwealth should reconsider its position on this recommendation as the evidence in support of the recommendation is strong. The adoption of this recommendation would ensure independent advice to the minister based on environmental priorities as distinct from advice which promotes and prioritises business 'efficiency' at the expense of our national and international environmental obligations.

## **Recommendation 4**

**2.68** The committee recommends that the Commonwealth reconsider its position on the recommendation from the Hawke review for the appointment of a National Environment Commissioner and the creation of an independent National Environment Commission.

2.69 The committee expresses concern in relation to the evidence of significant cuts to state government environmental departments as part of austerity measures by a number of state governments.

### **Recommendation 5**

**2.70** The committee recommends that COAG, as a matter of priority, undertakes an assessment of the capabilities of state government environment departments and their capacity to engage effectively with the Commonwealth to protect matters of national environmental significance. The committee further recommends that COAG make an assessment as to the implications for reduced resources in state environmental departments and the dominance of state planning departments and its implications for protecting matters of national environmental significance.

2.71 The committee expresses grave concern at the potential for significant environmental degradation if the policy of competitive federalism results in a 'race to the bottom' on environmental protection in a bid for increased resource exploitation. In this context, the committee is alarmed at the statements on competitive federalism by the Premier of Queensland.<sup>78</sup>

2.72 The committee is of the view that competitive federalism will result in a diminution of environmental outcomes. The committee believes that COAG should take steps to ensure that competitive federalism does not undermine the effective operation of the EPBC Act nor our national and international environmental obligations.

### **Recommendation 6**

**2.73** The committee recommends that COAG urgently consider the implications of competitive federalism in relation to the effective of operation of the *Environment Protection and Biodiversity Conservation Act 1999* and our national environmental and international environmental obligations.

**Senator Doug Cameron**  
**Chair**

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78 Chris Uhlmann, 'Federal vs state funding fight escalates', *ABC 730 Report*, <http://www.abc.net.au/7.30/content/2013/s3698073.htm> (accessed 26 February 2013); and see also Michael McKenna, 'State against State: Campbell Newman's Competitive Federalism', *The Australian*, 12 April 2012, available at <http://www.theaustralian.com.au/national-affairs/state-politics/state-against-state-campbell-newmans-federalism/story-e6frgczx-1226324307482> (accessed 5 March 2013).