Australian Labor Party Senators' Dissenting Report

1.1 In 2011, the then Labor Government released its response to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (commonly referred to as the 'Hawke Review'). In its response, the Labor Government committed to achieving better environmental outcomes, while improving the efficiency of the management of matters of national environmental significance. This included a shift from individual approvals to strategic processes; and developing more efficient assessment and approval processes.[1]

1.2 Following this response, COAG agreed in April 2012 to prioritise approval bilateral agreements under the EPBC Act. Discussions about approval bilateral arrangements were held with the states and territories and a draft framework of standards for the accreditation of environmental approvals was released in November 2012.

1.3 While discussions with all jurisdictions were constructive, the Labor Government concluded that the significant challenges that emerged meant that providing both certainty and consistency for business and maintaining high environmental standards could not be achieved through an approval bilaterals process and did not progress this agenda. Instead a focus was put on meeting common information requirements, eliminating duplication and avoiding delayed approval processes.

1.4 The current Government often refers to the approval bilaterals process begun under the previous Labor Government as part of an argument for Labor's hypocrisy. This is clearly a misleading argument as Labor explored the option of pursuing approval bilaterals with the states and found that they would not lead to better environmental or business outcomes. This remains the position of Federal Labor.

1.5 Federal Labor Shadow Minister Mark Butler summarised Labor's opposition to these changes in his second reading speech on the Bill:

> At the end of the day we take as a matter of principle the view that matters of national environmental significance—which is the scope of matters covered by this legislation—must remain the province of a national government. That is not a party political perspective. Whether it is a national coalition or national Labor government and whether it is state

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1 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), http://www.environment.gov.au/system/files/resources/5f3fdad6-30ba-48f7-ab17-c99e8bcc8d78/files/final-report.pdf (accessed on 20/06/2014); Australian Government, Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, August 2011, http://www.environment.gov.au/system/files/resources/605a54df-7b33-4426-a5a8-51de24b29c71/files/epbc-review-govt-response.pdf (accessed on 20/06/2014)

> Labor or state Liberal governments, our view is the same: the Commonwealth should have responsibility for matters of national environmental significance, for a whole range of reasons that I have tried to outline.[2]

1.6 For a full view of Federal Labor's views on this matter this dissenting report should be read in conjunction with the March 2013 Environment and Communications Legislation Committee Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012.

1.7 The Chair's report includes a comprehensive summary of many of the arguments against the Bill.

1.8 Public comment in support of the Bill in the Chair's report was largely focussed on the perceived reduction in cost for industry.

1.9 In evidence to the hearing, the Department could not outline what had changed since the 2012 decision by the previous Labor Government to stop the process apart from an election commitment by the Abbott Coalition Government.[3]

Schedule 1 - Referral of Controlled Actions

1.10 As highlighted in the Chair's Report, nearly all of the submissions received opposed the one stop shop reforms for some or all of the following reasons:

- it will add complexity to approval processes;
- it will not result in any efficiency gains;
- currently, no state or territory has sufficient resources or the appropriate environmental processes in place to adequately assess actions that may impact on national environmental standards;
- it will result in a diminution of current environmental standards pertaining to matters of national environmental significance; and
- it will create potential conflicts of interest.

1.11 The Chair's Report highlighted that submissions from industry groups and the Premier of Queensland supported the amendments on the basis of reducing duplication in assessment processes to reduce monetary and time costs to industry.

1.12 Evidence from Dr Chris McGrath noted that the decisions made under the EPBC Act are highly discretionary and 'whether a decision complies with Australia's obligations under the World Heritage Convention or not is a matter that reasonable minds can differ on'. Dr McGrath concluded that 'the standards that are imposed in the approval bilateral are not worth the paper they are written on, because all of these decisions, at the end of the day, are a matter of discretion with broad parameters.'

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2 The Hon. Mr Mark Butler MP, Shadow Minister for the Environment, Climate Change and Water, *House of Representatives Hansard*, 16 June 2014.

3 Dr Rachel Bacon, Department of the Environment, Committee Hansard, 10 June 2014, p. 45.

Complexity

1.13 The Chair's report uses an extract from the Department's submission that highlights the lack of consistency between the Commonwealth and states and territories can lead to differences in processes, outcomes and timeframes to argue in support of the changes. However, the Bill will clearly not result in one uniform environmental approvals process for all states and territories. There will continue to be a lack of consistency between the Commonwealth and states and territories in assessing matters of national environmental significance because the Bill allows states and territories to keep their own processes, as long as they meet national standards.

1.14 Mr Glen Klatovsky from The Places You Love Alliance highlighted in evidence at the hearing concerns of many submissions and witnesses around the complexity of the reforms and inability of states to meet national standards:

> They are taking what is currently, in my view, a one-stop shop—a set of nationally significant items that the Australian public have voted repeatedly in support of under the EPBC Act and which the federal government have had approval powers over through one system, the federal system—and are proposing to put it through eight separate systems. The original concept of allowing states to do assessment and approvals was based upon a belief that the states and territories would get up to the standards of the EPBC Act, which they have failed to do 15 years down the line.[4]

1.15 Rather than seeking to harmonise approvals processes for matters of national environmental significance, the Bill will entrench the differences between states and territories. Companies that operate across jurisdictions will be required to have understanding of each individual jurisdiction's processes for matters of national environmental significance, rather than just an understanding of the Commonwealth's processes.

1.16 The Chair's report notes that the Department of the Environment, the Minerals Council of Australia and AMEC believe that the Bill will eventually see the removal of duplication.

1.17 However, as highlighted by the first drafts of the bilateral agreements with New South Wales and Queensland there is no guarantee that states and territories will have approvals processes strong enough to ever see the complete removal of duplication.

1.18 Further, as Schedule 5 of the Bill allows for people or entities, such as local government, to be authorised by the state to make approval decisions, industry could be faced with many hundreds of decision makers each with their own processes. Therefore, Labor Senator's agree with a large number of submissions that the Bill is likely to increase complexity in the foreseeable future.

4 Mr Glen Klatovsky, The Places You Love Alliance, Committee Hansard, 10 June 2014, p. 5.

Efficiency Gains and Cost Reduction

1.19 The Chair's report highlights that many submissions believe that there will not be efficiency gains and cost reductions from the Bill. The Chair's report specifies that the largest regulatory costs for proponents are typically in the assessment phase, which is already completed in conjunction with states and territories, only typically requires an extra form to be completed and is normally completed within a few weeks. The Chair's report notes that AMEC and Minerals Council claim that this form takes a lot of extra time.

1.20 The Chair's report notes a cost benefit analysis conducted by Deloitte Access Economics, from the Minerals Council submission, concluded there would be over $1 billion in net benefits to business and government over a ten year period if bilateral agreements 'along with administrative reforms' were implemented. Examination of the cost benefit analysis uncovers that the net benefits from just the bilateral agreements is around one third of the total claimed in the Minerals Council submission.[5]

1.21 Labor Senators note that the cost benefit analysis undertaken by Deloitte Access Economics focussed solely on net benefits to government, industry and the economy from bilateral agreements and administrative reforms and assumed that environmental outcomes would remain constant.

1.22 The Chair's report notes evidence from Mr Glen Klatovsky of The Places You Love Alliance that good environmental protection laws deliver substantially higher public financial benefits, many multiples higher than compliance costs. Mr Klatovsky referred to the United States and the European Union. A speech by Professor Rod Fowler to the Forum for Nature expands on these points:

> - a study by the US EPA found that the benefits of the 1990 Clean Air Act Amendments will exceed compliance costs by a factor of more than thirty to one by 2020;
>
> the European Commission has reported that full implementation of EU environmental legislation will bring an annual benefit of 50 billion euros in terms of growth, jobs and well- being across the European continent.[6]

1.23 The Chair's report notes evidence from the Department that there is different analysis conducted by the Department of Environment to that conducted by states and territories. In this evidence, it appears that the Department generalises away the importance of its own specialised analysis regarding matters of national environmental significance.

> (the Department of Environment)…looks at often much of the same types of material or the same types of environmental assessment material and

5 Department of Sustainability, Environment, Water, Population and Communities, Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the Environment Protection and Biodiversity Conservation Act 1999, p 2, April 2011, http://ris.finance.gov.au/files/2011/09/EPBC-Act-Environmental-Impact-Assessment-CBA.pdf (accessed on 20/06/2014)

6 Professor Rob Fowler, Private Capacity, Forum 4 Nature Speech, Adelaide 26 May 2014, p. 8.

> surveys et cetera but does that from the perspective of looking specifically at what the potential impacts might be on matters of national environmental significance. **Essentially** the state or territory regulator is looking at the whole-of-environment impacts, and the role of the Commonwealth regulator is to look at the eight or nine specific enumerated matters of national environmental significance under the Commonwealth legislation, so essentially the proponent is dealing with two regulators as part of the same project approval process. (*emphasis added*)

1.24 It is true that under the current model proponents are dealing with two regulators as part of the same project approval process. However, these two regulators are analysing the application on very different scales. As the Department outlines, the Commonwealth Department must have regard to matters of national environmental significance, while the states and territories have regard to whole-of-environment impacts within the jurisdiction's borders.

1.25 The Chair's report uses evidence from the Department related to the benefits of the recent accreditation of the NOPSEMA process. NOPSEMA is the sole national regulator for offshore petroleum, not eight very different state and territory jurisdictions. Labor Senators believe that the NOPSEMA example does not justify the devolution of approvals as it is related to a single national authority, not a national standard applied across eight states and territories.

1.26 The Chair's report also uses evidence from the Department of potential savings for a project proponent but does not consider any increased costs to the Commonwealth and / or states and territories. As states and territories have no experience in approvals relating to the nine matters of national environmental significance, they will need specialists capable of regulating proposals to the national standard. Further, as the Commonwealth will retain call in powers on all delegated approval it will need to retain staff to complete an approval in the case of a call in. As the purpose of these reforms are to make the approvals process more efficient while keeping environmental outcomes constant, Labor Senators are concerned that the Commonwealth will either have to keep a large number of staff with excess capacity to deal with call ins or see a large delay in project approvals.

1.27 Further, Labor Senators are concerned about the capacity of smaller states to approve projects relating to matters of national environmental significance at a national standard. A state regulator may only practice regulation with regard to specific matters of national environmental significance on a small number of occasions. This raises the potential for mistakes and costs to proponents from appeals and damage to the environment.

1.28 The Chair's report mentions the evidence from Environmental Justice Australia that the Bill will create further uncertainty in the approvals process. Further, Glen Klatovsky of The Places You Love Alliance provided evidence to the hearing that he felt that the Business Council of Australia appear to be less certain about the concept than they were in 2012 because of the potential exposure to litigation from poor processes of states and territories.

> It is interesting to read the Business Council of Australia's submission to this inquiry. They really emphasise the need for Commonwealth officers to

> be in each of the states and territories to actually make sure that this can work. This is at a time of massive job shedding, at both federal and state levels.[7]

1.29 The Business Council of Australia's submission noted a need for close administrative cooperation between the Commonwealth and states to ensure consistency in decisions. As Mr Klatovsky summarised in his evidence, The Business Council of Australia proposed an expansion of the Commonwealth public service to oversee state agencies as 'critical' to support the transition and 'remove duplication while maintaining environmental outcomes'.[8]

1.30 The Business Council did not propose a time frame for the cessation of the extra Commonwealth staffing or if some Commonwealth staff would assist more than one jurisdiction. Labor Senators are surprised by this submission, given the vast recommendations to slash the Commonwealth public service in the Business Council of Australia's Commission of Audit.

1.31 Labor Senators would have liked to question the Business Council of Australia on this proposal but the Council refused the Committee's invitation to appear at the hearing. This is despite the hearing being held in Melbourne, the location of the head offices of the Business Council of Australia.

Maintenance of National Environmental Standards

1.32 The Chair's report summarises arguments proposed in many of the submissions that bilateral approvals agreements will see a 'potential diminution' in national environmental standards, because 'states and territories do not have the same standards as those contained in the EPBC Act and are not capable of assessing impacts of projects on matters of national environmental significance and the national interest'.

1.33 The Chair's report highlights that a number of submissions argued that there was therefore a need to keep national protection measures on matters of national environmental significance.

1.34 In addition to the evidence included in the Chair's report, Labor Senators wish to highlight further evidence of a number of witnesses on the negative impact of bilateral approval agreements on matters of national environmental significance and on Australia's international obligations and the need for national leadership on the environment.

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7 Mr Glen Klatovsky, The Places You Love Alliance, *Committee Hansard*, 10 June 2014, p. 3.

8 Business Council of Australia, *Submission 45*, p. 3.

1.35 Mr Peter Cosier from the Wentworth Group of Concerned Scientists noted in evidence to the hearing the large focus of referrals to the Commonwealth on threatened and migratory species:

> Seventy-five per cent of proposals that need to come to the Commonwealth under the EPBC Act are to do with the threatened species or migratory species triggers, which is effectively a land-clearing trigger.[9]

1.36 Mr Brendan Sydes from Environmental Justice Australia summarised the need for a national approach to management of nuclear materials:

> Nuclear, of all things, is not something where you want the eight or nine different rail gauges type phenomenon; that is something where there ought to be consistent, strong Commonwealth leadership.[10]

1.37 Mrs Alexia Wellbelove from the Humane Society International highlighted concerns regarding a potential race to the bottom between states without regard to a national perspective:

> Our concern is that this bill is seeking to bend federal law to meet these lower state standards. Clearly the need for this bill has been driven by the fact that these laws are not up to the job, and we are concerned that there is the potential for a race to the bottom. It also leads us to the conclusion that our most important, nationally protected places and wildlife will have decisions made on them at the state or even worse the local level and not with the necessary national perspective. HSI's position remains firmly that national environmental issues need national leadership.[11]

1.38 Ms Ruchira Talukdar from the Australian Conservation Foundation summarised the concerns of many submissions in evidence at the hearing regarding an inability of states and territories to meet Australia's international obligations:

> When it comes to international obligations, like Ramsar or World Heritage, the Australian public do not have confidence that state governments can protect those kinds of areas adequately. One reason for this is: it is not for one state alone to decide whether a matter that is of national or international significance should be protected, which is why the EPBC Act was put into place in the first case after the Tasmanian dam case.[12]

1.39 Ms Rachel Walmsley from the Australian Network of Environmental Defender's Offices expanded on the concerns regarding Australia’s international obligations in evidence at the hearing:

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9 Mr Peter Cosier, Wentworth Group of Concerned Scientists, *Committee Hansard,* 10 June 2014, p. p. 53.

10 Mr Brendan Sydes, Environmental Justice Australia, *Committee Hansard*, 10 June 2014, p. 14.

11 Mrs Alexia Wellbelove, Humane Society International, *Committee Hansard*, 10 June 2014, p. 32.

12 Ms Ruchira Talukdar, Australian Conservation Foundation, *Committee Hansard,* 10 June 2014, p. 2.

> If you look at state and territory laws, they rarely mention things like the convention on migratory species. They rarely refer even to the Ramsar Convention. These are all things that are right through the EPBC Act. State legislative definitions of migratory species do not refer to the conventions and there is no requirement for states to comply with international obligations. Once we get down to state level, there is just not the same level of detail as there is in the EPBC Act.[13]

1.40 Mrs Alexia Wellbelove from Humane Society International also expanded on the concerns regarding Australia's international obligations in evidence at the hearing:

> By handing over decision-making on migratory species, World Heritage, wetlands of international importance or Ramsar to the states, we fail to understand how Australia can effectively implement the conventions that those matters have arisen from. For example, migratory species is listed as 'migratory species' under the EPBC Act because it has been listed on the appendices of the CMS convention, as it is known. Australia has to prepare a national report to that convention and, if those matters are delegated to a state, territory or local government, we do not understand how Australia can effectively meet its commitments.[14]

1.41 Labor Senators note that the Department's evidence was focussed around a range of oversight measures including the process for the approval of the bilateral agreement, five year reviews, unscheduled audits, a senior officers committee and a call-in power for the Commonwealth.

1.42 Labor Senators note that the Abbott Coalition Government has announced a staff reduction at the Department of the Environment of 480 positions over three years. Labor Senators also note that a number of Department of Environment staff will be seconded to state governments to assist with the implementation of bilateral approvals agreements. Labor Senators are concerned that the Department of Environment will have insufficient resources for comprehensive unscheduled audits of state government processes let alone to complete a full approval in the case of a call-in.[15]

1.43 Further, Labor Senators are concerned that the Minister responsible for approving a bilateral approvals agreement and for oversight of state government processes has in just nine months broken three key election commitments on funding for the Emissions Reduction Fund, Landcare and the One Million Solar Roofs

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13 Ms Rachel Walmsley, Australian Network of Environmental Defender's Offices *Committee Hansard,* 10 June 2014, p. 27.

14 Mrs Alexia Wellbelove, Humane Society International, *Committee Hansard*, 10 June 2014, p. 36.

15 ABC News, Federal Environment Department to shed 480 more public servants in latest round of job cuts, 7 April 2014, http://www.abc.net.au/news/2014-04-07/federal-environment-department-to-shed-more-jobs/5372702 (accessed on 20/06/2014)

program and allowed spoil from dredging to be dumped within the Great Barrier Reef marine park area.[16]

1.44 Labor Senators believe that this short track record shows that the Minister is incapable of standing up to his Cabinet colleagues to even maintain national environmental standards.

1.45 In June 2014 the World Heritage Committee delivered a harsh verdict on the Government's failure to protect the Great Barrier Reef.

1.46 At its annual meeting the committee voted to keep alive their threat to list the Great Barrier Reef 'in danger' the Committee also labelled the handover of federal environmental approval powers to the Queensland Government as 'premature'.[17]

Capacity and Readiness of States and Territories to Implement Approvals Process

1.47 The Chair's report summaries concerns of a number of submissions that the states and territories do not have the capacity and are not ready to implement bilateral approval agreements and processes.

1.48 The only arguments the Chair's Report provides against these propositions are that the draft approval bilateral agreement with New South Wales allows for the embedding of officers from the Department of Environment and that the Commonwealth relies on State Government processes in the assessment phase.

1.49 As raised earlier in the Dissenting Report, the notion of embedding Department of Environment officers in State Governments was raised in the Business Council of Australia's submission, in what has been implied to mean that the BCA has little confidence in the capacity and readiness of states and territories.

1.50 In regards to the duplication of effort, Labor Senators note that there have been long standing assessment bilateral agreements with states and territories and that this method of assessment has significant value for all parties.

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16 Professor Stewart Lockie, *The Conversation*, 'Is the Coalition's Green Army good news for Landcare?', 6 September 2013, http://theconversation.com/is-the-coalitions-green-army-good-news-for-landcare-17936 (accessed on 20/06/2014); Professor Alan Pears, The Conversation, Billions axed in clean energy: renewable target is next, 14 May 2014, http://theconversation.com/billions-axed-in-clean-energy-renewable-target-is-next-26578 (accessed on 20/06/2014) Tony Allan, ABC Rural News, Landcare and research cuts in Budget, 13 May 2014, http://www.abc.net.au/news/2014-05-13/budget-overview/5441510 (accessed on 20/06/2014); Department of the Environment, Approval Abbot Point Terminal 0, Terminal 2 and Terminal 3 Capital Dredging, Queensland, 10 December 2013, http://www.environment.gov.au/epbc/notices/assessments/2011/6213/2011-6213-approval-decision.pdf (accessed on 20/06/2014)

17 Tom Arup, Sydney Morning Herald, Australia on notice over Great Barrier Reef's environmental damage, 18 June 2014, http://www.smh.com.au/environment/conservation/australia-on-notice-over-great-barrier-reefs-environmental-damage-20140618-zsdts.html (accessed on 20/06/2014)

Potential Conflicts of Interest

1.51 The Chair's Report notes that a number of submissions highlighted that there are potential conflicts of interest as a state or territory government's role as the proponent of a project. The Chair's Report fails to include the evidence from Dr Chris McGrath that the draft approvals bilateral agreements were, before the election, not going to allow states to make decisions over projects where they were the proponent.

> The (Abbott) government and the current environment minister said before the election that they would be not allowing states to make decisions over projects where they were the proponent as well as a couple of other things, and they have not done that under the (draft) approval bilaterals.[18]

1.52 A small amount of focus was given to the other obvious potential conflict of interest – a state or territory government's focus on local development in its region of the country and where an economic development or planning minister or official is set to be responsible for approving projects relating to matters of national environmental significance. Dr Chris McGrath stated his concerns in evidence to the hearing:

> (The approvals decision) should be made by the federal environment minister, who is your best chance of having someone who is there protecting matters of national environmental significance. Under the Queensland approval bilateral, you are giving the decision to the state Coordinator-General, who is a public servant whose core purpose is to develop the state. It is not about protecting the environment at all.[19]

1.53 The Chair's Report includes an example from the Department where the Federal Defence Minister may be the proponent and the Federal Environment Minister the decision maker as evidence that conflicts are managed now. Labor Senators believe that this example to be vastly different to the Queensland example where the Co-ordinator General is both the proponent and the decision maker.

1.54 Labor Senators are concerned that while the Department is confident it will "know the kinds of things that the states and territories are assessing and considering", it can't provide a clear assurance that the Commonwealth will be alerted to every conflict of interest and that states and territories have the capacity to appropriately manage real and perceived conflicts of interest.

Schedule 2 – Flexibility in Performing Assessment of Controlled Actions

1.55 The Schedule sets out for the Department of Environment to complete the approval process where an approval bilateral agreement is suspended, cancelled or ceases to apply.

1.56 Labor Senators are concerned that at a time when the Commonwealth Government is reducing employment levels at the Department of Environment by 480 positions, there will be insufficient excess capacity to deal with incomplete approval processes.

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18 Dr Chris McGrath, Private Capacity, Committee Hansard, 10 June 2014, p. 71.

19 Dr Chris McGrath, Private Capacity, Committee Hansard, 10 June 2014, p. 72.

1.57 Labor Senators are concerned that this will either lead to delays to approval processes, delays to other work of the Department of Environment or calls on consolidated revenue for additional funds.

Schedule 3 Part 1 – Amendments Relating to Water Resources

1.58 The Schedule will not remove the water trigger from matters of national environmental significance, but will allow for the Minister to accredit state and territory processes to approve matters previously prohibited for approval by a state or territory government.

1.59 The Chair's Report notes a number of arguments against the delegation of powers around the water trigger because of the cross jurisdictional boundaries of water and the insufficient capacity or conflict of interest of state and territory governments.

1.60 The Chair's Report notes the Minerals Council's opposition to the water trigger is because it 'effectively' duplicates a process and that other industry groups also oppose the water trigger. Mr Chris McCombe of the Minerals Council provided an example of the ”effective” duplication:

> The broad EIS information that is collected for a project is not suitable to be provided to the Commonwealth for assessment under the water trigger. They have to take the material and create essentially mini environmental impact statements, package them up and send them off to meet the very specific requirements of the water trigger under the EPBC Act.[20]

1.61 As the Chair's Report notes, the water trigger was put in place because of state and territory government’s inability to adequately deal with threats to water resources, particularly cross jurisdictional water resources such as the Great Artesian Basin and Murray Darling Basin. Labor Senators consider the specific requirements of the water trigger are to not be duplicative because of the very nature of the issue; that the water resource is of national significance and a national approach to decision making is needed.

Schedule 3 Part 2 – Amendments Relating to Bilaterally Accredited Authorisation Processes

1.62 The Chair's Report briefly notes the concerns raised by a number of submissions on the ground that policies and processes are not subject to public or parliamentary oversight.

1.63 In addition to the evidence included in the Chair's report, Labor Senators wish to highlight further evidence of a number of witnesses on the potential issues from using policies or guidelines that aren't subject to public or parliamentary oversight.

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20 Mr Chris McCombe, Minerals Council, *Committee Hansard*, 10 June 2014, p.60.

1.64 Ms Walmsley summarised the concerns of many submissions in evidence to the hearing:

> In a lot of jurisdictions, a significant amount of detail is in a policy or a guideline. If they are accredited, the Commonwealth may be able to say, 'At the point of accreditation, yes, those standards were in the guidelines.' But, without parliamentary oversight or scrutiny, guidelines can be changed at a state level, and they regularly are. Even if a standard may exist in a guideline at the time an accreditation is officially done, those guidelines may change.[21]

1.65 Mr Tom Warne-Smith from Environmental Justice Australia further expanded on how approval bilaterals remove the guarantee certain national standards will be met in evidence to the hearing:

> The fundamental problem with the bill is that it removes the protections that guarantee those standards. In adopting policies and guidelines we have removed the requirements that decision makers are firmly bound to particular considerations.
>
> The significant problem in the bill is that it removes the mechanism for maintaining consistency by allowing policy and guidelines to be utilised and relied on in the scheme, when decision makers themselves cannot rely on those instruments. In applying those instruments as they apply from time to time and removing the parliamentary oversight and the public consultation process that is required for bilaterals, we are removing the guarantee that certain standards will be met.[22]

1.66 Mr Bradley Tucker from the Wentworth Group of Concerned Scientists provided the Committee with substantial evidence regarding the draft policies under the New South Wales and Queensland bilaterals:

> They are delegating approvals under bilaterals that have draft policies which give state bureaucrats discretion without having to justify their discretion. That, to me, in no way would satisfy the protection of a matter of national environmental significance.
>
> The New South Wales draft policy allows for a broader category of supplementary measures to constitute an offset. This is currently capped at 10 per cent in the Commonwealth policy. While the New South Wales policy only limits research and education measures to 10 per cent, it does allow a broader range of measures to fulfil the other 90 per cent. The other reason why New South Wales does not meet the Commonwealth standard is that, in cases where there might be social or economic benefits that accrue in New South Wales, biodiversity offsets can be discounted.

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21 Ms Rachel Walmsley, Australian Network of Environmental Defender's Offices Committee Hansard, 10 June 2014, p. 28

22 Mr Tom Warne-Smith, Environmental Justice Australia, *Committee Hansard*, 10 June 2014, p. 11, p. 16.

> With respect to Queensland, there is a significant amount of detail in their legislation that is still to be formed around their offsets and how they might meet Commonwealth standards. The main issue there is that the bilateral agreement will accredit supporting guidelines and they are only in draft form and not finalised. Also, the agreement for offsets is not necessarily in accordance with the offsets assessment guide, so there could be projects in Queensland that fall short of meeting the Commonwealth offsets guide, as long as they apply the Commonwealth policy. It might not be in accordance with the offsets assessment guide, so there could be a lesser offset applied in Queensland.[23]

1.67 Dr Chris McGrath described the lack of parliamentary oversight "as a minefield" and at evidence to the hearing and expanded on this point:

> I am looking at this from a judicial review perspective. I think there is a minefield. Even if they were reflected in law, I think it is a minefield of how the Commonwealth tries to enforce them. Not having them reflected in law and allowing policies and those sorts of things is just making it murkier. If you look at the draft approval bilaterals in Queensland, clearly the coordinator-general's act, the State Development and Public Works Organisation Act, is being amended to include a special designation process for when things are under the approval bilateral. In New South Wales, as I understand, most of the laws are not being amended to deal with it.[24]

1.68 In response, the Chair's Report includes an answer from the Department that there must be a 'legislative hook' for a policy or process. However, the Chair's Report does not provide evidence that there would be legal enforcement of standards in approved state and territory policies and guidelines.

1.69 Labor Senators consider it inappropriate to give this level of flexibility to state and territory governments.

Schedule 4 – Minor Amendments of Bilateral Agreements

1.70 The Chair's Report notes that the Commonwealth Environment Minister may approve minor amendments to accredited processes without the need for parliamentary oversight or public consultation.

1.71 The Chair's Report notes a comprehensive example from ANEDO where Schedule 4 together with Schedule 3 Part 2 could be used by a state or territory government to alter procedures then have an approval granted by the Commonwealth Environment Minister retrospectively. The example continues that neither action may require parliamentary oversight or public consultation and the amendment needs only to meet the Minister's definition of not have a 'material adverse impact'.

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23 Mr Bradley Tucker, Wentworth Group of Concerned Scientists, *Committee Hansard*, 10 June 2014, p. 55.

24 Dr Chris McGrath, Private Capacity, *Committee Hansard*, 10 June 2014, p. 70.

1.72 The Chair's Report notes evidence from the Department that without Schedule 4 small changes would cause significant uncertainty for the operation of bilateral agreements.

1.73 Labor Senators consider it inappropriate to give this level of flexibility to state and territory governments as outlined in detail in response to Schedule 3 Part 2.

Schedule 5 – Miscellaneous Amendments

1.74 The Chair's Report notes that a miscellaneous amendment will increase the range of entities allowed to approve actions to potentially include local government or a state or territory environmental court or tribunal and that a number of submissions were opposed on the grounds of capacity to act in national interest, potential conflicts of interest and negative impacts on maintenance of strong environmental standards. The explanation from the Department sought to highlight that the amendment will change the focus from the identity and legal status of the decision maker to the decision maker's ability to adhere to high environmental standards.

1.75 The Chair's Report did not include the evidence provided to the hearing by Mr Graham Short of the Association of Mining and Exploration Companies who said:

> We would not be supportive of that particular concept. There are already some issues that have arisen by various planning processes and planning schemes and town planning schemes by local authorities that do not have an understanding of the mining industry. I am pretty sure that our membership would not support the concept of local councils or local authorities being involved in the decision-making process.[25]

1.76 Labor Senators note the opposition to the devolution of decision making to local government or a state or territory environmental court or tribunal from ENGOs and the mining industry and do not support the amendment.

Conclusion

1.77 Labor Senators note that the Chair's report relied heavily on the assurances of officials from the Department of the Environment about the adequacy of the proposed process for one-stop shop approvals.

1.78 Labor Senators are concerned that this Bill will lead to a more complicated process, that some submissions have titled an eight-stop shop, particularly in the foreseeable future while the Commonwealth Department of the Environment works to bring state governments up to national environmental standards.

1.79 Labor Senators are also concerned that this Bill does not contain adequate safeguards to ensure the maintenance of current environmental standards, particularly given the track record of the Abbott Coalition Government on the environment.

25 Mr Graham Short, Association of Mining and Exploration Companies, *Committee Hansard*, 10 June 2014, p.24

Recommendation:

1.80 The Australian Labor Party Senators reject the arguments in the Chair's Report in support of the Environmental Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 and recommend that it not be passed.

Senator Anne Urquhart
Deputy Chair
Senator for Tasmania

Senator Louise Pratt
Senator for Western Australia