



Law Council  
OF AUSTRALIA

Martyn Hagan  
Acting Secretary-General

18 January 2013

Committee Secretary  
Senate Standing Committee on Environment & Communications  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600.

*Email: ec.sen@aph.gov.au*

Dear Sir/Madam

***Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012***

The Law Council of Australia is the peak body of the Australian Legal Profession. It welcomes this opportunity to make a submission to the Committee considering the above Bill.

The *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* is the principal piece of national legislation directed at protecting Australia's environment. The EPBC Act was developed following recognition in both the 1992 and 1997 *Intergovernmental Agreements for the Environment* of the important role for the Federal Government in matters of international and national environmental significance. The EPBC Act identifies the following matters of national environmental significance (MNES):

- [World Heritage properties](#);
- [National Heritage places](#);
- [Wetlands of international importance](#) ('Ramsar wetlands');
- [Listed threatened species and ecological communities](#);
- [Migratory species](#) protected under international agreements;
- [Commonwealth marine areas](#);
- [Great Barrier Reef Marine Park](#); and
- Nuclear actions (including uranium mines).

These MNES are subject to international commitments and their protection and management is of national concern, extending beyond the interests of any one state. As a consequence, it was considered appropriate to require approval from the Federal

government before any action can be taken that is likely to adversely impact on any of the listed matters.

The EPBC Act provides for bilateral agreements between the states and the Commonwealth to accredit each other's assessment and approval processes (see ss 45-48).

The *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* proposes changes to remove the power for the Federal government to enter into bilateral agreements which delegate approval powers under the EPBC Act to State governments (*State approval bilaterals*). The proposed amendment responds to reform proposals adopted by the Council of Australian Governments (COAG) in April 2012.<sup>1</sup>

Implementation of State approval bilaterals would essentially remove any role for the Commonwealth government in the assessment and approval of actions likely to impact on MNES.

The Law Council urges the application of the non-regression principle in any assessment of environmental law reform. Consistent with that principle, and in the absence of any assurance that state legislation offers equivalent protections, we support the retention of approval responsibilities under the EPBC Act by the Federal government.

### **Principle of non-regression**

The principle of non-regression is well established in international human rights law. The principle discourages public authorities from amending legislation where the amendments will reduce the available protections.

There is growing international support for wider adoption of the principle in environmental law, as outlined by Emeritus Professor Michel Prieur.<sup>2</sup> Recent affirmations include:

- Resolution by the European Parliament on 29 September 2011 to develop a common EU position ahead of the United Nations Conference on Sustainable Development (Rio+20)<sup>3</sup>;
- International Organisation of La Francophonie position paper on 8 February 2012, urging recognition of the principle in environmental matters;
- *Declaration on the Principle of Non-regression of Environmental Protection in Anticipation of the United Nations Conference on Sustainable Development (Rio+20)*, adopted at the international colloquium organized by the Brazilian Senate in Brasilia on 29 March 2012; and
- The IUCN World Conservation Congress in Jeju, South Korea, in September 2012, urged national governments to recognise the non-regression principle<sup>4</sup>.

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<sup>1</sup> The announcement made by Prime Minister prior to the COAG meeting on 7 December 2012 made it clear that proposed accreditation of state approval processes has now been deferred.

<sup>2</sup> Prieur, M. 2012. "Non-regression in environment law" in S.A.P.I.EN.S Vol5 5(2). IUCN Commissions. Available at <http://sapiens.revues.org/1405>. Copy attached

<sup>3</sup> Referenced in <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2011-0522&language=EN>>, cl.97.

<sup>4</sup> WCC-2012-Res-128-EN Need for non-regression in environmental law and policy

As Emeritus Professor Prieur argues, “simplification” or weakening of environmental legislation in an economic climate which favours development and does not sufficiently promote environmental values, necessarily compromises the achievement of ecologically sustainable development outcomes. In contrast, evidence of declining ecosystem health globally serves as a reminder that all countries should be striving to enhance, rather than weaken, environmental protections.

The Law Council urges the federal government to recognise the non-regression principle as an appropriate prism through which to assess proposed legislative reforms affecting matters of national (and international) environmental significance.

### **International obligations**

The EPBC Act is designed in part to secure compliance with Australia’s international environmental obligations. Giving assessment and approval power to the Federal government was intended to overcome shortcomings in state and territory assessment and development processes, with a view to providing more comprehensive, and consistent, protections to MNES.

The Law Council considers it appropriate that the Federal government retains responsibility for ensuring that these obligations are met.

The Law Council is concerned that state governments, and the legislative regimes they implement, remain inadequate to protect these matters and to meet Australia’s international commitments. In fact, in deferring the COAG reform agenda in December 2012, the Federal government acknowledged that the States had not been able to provide assurances that the standards under the EPBC Act could be met.<sup>5</sup>

State and territory governments, by their nature, will focus on state issues and interests, particularly those states experiencing economic difficulties. Furthermore, there is a limit on the expertise, resources and legislative powers of individual State governments to adequately consider impacts outside their jurisdictions.

The recent determinations in relation to the Victorian government’s decision to allow cattle grazing in Alpine national parks illustrates the importance of maintaining Federal checks-and-balances in relation the MNES. In response to strong lobbying from grazing stakeholders, the Victorian government sought to permit the resumption of grazing in habitat for nationally listed threatened species. In contrast, the Federal government was satisfied that the practice would have inappropriate impacts on the listed species and refused to allow the grazing.

Unless the current approval powers under the EPBC Act are retained, the Federal government would not have power to intervene in similar situations in future. This is likely to lead to poorer environmental outcomes and compromise the protection of MNES.

### **Differing Levels of Participation Infrastructure**

The capacity of members of the public to seek to enforce compliance with environmental law varies from State to State. For example in NSW any person has the right to bring legal

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<sup>5</sup> See Grattan and Arup, ‘Environmental powers to be kept by Canberra’ (December 6 2012) <http://m.smh.com.au/opinion/political-news/environmental-powers-to-be-kept-by-canberra-20121205-2avw7.html>

proceedings to remedy or restrain a breach of most environmental laws, whereas in other jurisdictions common law standing may have to be established. Similarly the rights of access to information (FOI laws) and the availability of legal aid vary from State to State.

Accreditation of State approval processes will be unfair and will discriminate between Australian citizens seeking to protect matters of national environmental significance.

### **Improving the EPBC Act**

The Law Council recognises that there are opportunities to improve the operation of the EPBC Act to reduce duplication and provide clearer guidance regarding assessment expectations. For example, the Wentworth Group of Concerned Scientists' proposal for consolidating assessment processes, with final approval powers retained by the Commonwealth<sup>6</sup>, would go a long way towards effectively streamlining assessment and approval practices.

However, consistent with the non-regression principle, it is essential that any streamlining not be achieved at the expense of protection of matters of national environmental significance.

If there is a perceived need to reduce "green tape", then there remains the capacity for the States to accredit Commonwealth approval processes in a bilateral agreement (a Commonwealth Approval bilateral).

### **Conclusion**

Without any assurance that state legislation (both the laws themselves and the implementation of those laws in practice) will achieve the same level of protection as the EPBC Act, the Law Council does not support any devolution of approval powers to the states or territories.

The Law Council therefore urges the Federal government to retain the current approval powers in relation to actions with the potential to significantly impact on MNES.

Thank you for the opportunity to make these comments. If you would like to discuss our position in more detail, please do not hesitate to contact Gwen Fryer, A/Section Administrator, Legal Practice Section, Law Council of Australia on 02 6246 3722 or at [gwen.fryer@lawcouncil.asn.au](mailto:gwen.fryer@lawcouncil.asn.au).

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<sup>6</sup> Wentworth Group of Concerned Scientists, 'Statement on Changes to Commonwealth Powers to Protect Australia's Environment', < <http://www.wentworthgroup.org/blueprints/changes-to-commonwealth-powers-to-protect-australia-s-environment>>

This submission has been lodged by the authority delegated by Directors to the Secretary General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.

Yours sincerely

**Martyn Hagan**

**A/Secretary-General**

Attachment: Prieur, M. 2012. "Non-regression in environment law" in S.A.P.I.EN.S Vol5 5(2). IUCN Commissions.