

The Senate

Environment and Communications
Legislation Committee

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

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Committee membership

Committee members

Senator Doug Cameron (ALP, NSW) (Chair)
Senator Simon Birmingham (LP, SA) (Deputy Chair)
Senator Catryna Bilyk (ALP, TAS)
Senator Bridget McKenzie (NATS, VIC)
Senator the Hon. Lisa Singh (ALP, TAS)
Senator Larissa Waters (AG, QLD)

Committee secretariat

Ms Sophie Dunstone, Committee Secretary
Ms Toni Matulick, Committee Secretary
Ms Sophie Power, Principal Research Officer
Mr Chris Lawley, Senior Research Officer
Ms Jacquie Hawkins, Research Officer
Mrs Dianne Warhurst, Administration Officer

Committee address

PO Box 6100
Parliament House
Canberra ACT 2600
Tel: 02 6277 3526
Fax: 02 6277 5818
Email: ec.sen@aph.gov.au

Internet:

[www.aph.gov.au/Parliamentary Business/Committees/Senate Committees?url=ec_ctte/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/index.htm)

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Chapter 1

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

Conduct of the inquiry

1.1 The Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012 was introduced on 27 November 2012 by Senator Waters (Australian Greens) as a private Senator's bill.

1.2 On 28 November 2012 the Senate referred the bill for inquiry and report by 25 February 2013. On 25 February 2013, the reporting date was extended to 28 February 2013. On 28 February 2013, the report date was further extended to 12 March 2013.

1.3 The Senate Selection of Bills Committee noted in its report of 29 November 2012:

Referral of this Bill will provide an important opportunity for the Australian community and relevant experts and industry representatives to input on the Bill's provisions.¹

1.4 The committee advertised the inquiry on its website and *The Australian* newspaper and wrote to organisations and individuals to invite submissions. The committee received 175 submissions and a number of form letters (listed at Appendix 1). The committee held two public hearings, both in Canberra, on 8 and 15 February 2013.

Summary of the bill

1.5 The purpose of the bill is to prevent the Commonwealth from delegating its current powers under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) for approving proposed actions that significantly impact on matters of national environmental significance to the states and territories.

1.6 Matters of national significance protected under the EPBC Act are those that would affect:

- world heritage properties
- national heritage places
- wetlands of international importance
- threatened species and ecological communities
- migratory species
- Commonwealth marine areas

1 Senate Selection of Bills Committee, Report No. 16, 29 November 2012, Appendix 8.

- the Great Barrier Reef Marine Park
- nuclear actions (including uranium mines).²

Environment Protection and Biodiversity Conservation Act 1999

1.7 The EPBC Act is the Commonwealth's primary piece of environment legislation and was designed to address perceived problems with Australia's approach to environment protection. The Act replaced the *Environment Protection (Impact of Proposals) Act 1974*, the *Endangered Species Protection Act 1992* and a number of other environment related Acts.³

1.8 The objects of the Act include:

- to provide for the protection of the environment, especially those aspects which are a matter of national environmental significance;
- to promote the conservation of biodiversity;
- to provide for the protection and conservation of heritage;
- to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
- to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
- to assist in the co-operative implementation of Australia's international environmental responsibilities.⁴

Current system of bilateral assessment and approvals processes

1.9 At present, a proposed action that would affect matters of national environmental significance requires referral to the Commonwealth Minister for the Environment. If the minister decides that a proposed action will, or is likely to, have a significant impact on one or more matters protected by the EPBC Act, the action will need to be assessed and approved under the EPBC Act before it can proceed. This is called a controlled action.⁵

1.10 Proposed actions can be assessed using different methods, including accredited assessment based on information provided by the applicant, assessment on preliminary information, assessment by environmental impact statement or public

2 EPBC Act, Part 3.

3 Acts consolidated in the EPBC Act include: the *National Parks and Wildlife Conservation Act 1975*; *Whale Protection Act 1980* and the *World Heritage (Properties Conservation) Act 1983*.

4 EPBC Act, subsection 3(1).

5 Department of Sustainability, Environment, Water, Population and Communities, *EPBC Act—Environment assessment process*, <http://www.environment.gov.au/epbc/publications/pubs/assessment-process.pdf> (accessed 14 January 2013).

environment report, and assessment by public inquiry.⁶ The EPBC Act sets out statutory timeframes for approval decisions for all environmental assessment processes.⁷

1.11 Part 5 of Chapter 3 of the EPBC Act deals with bilateral agreements and makes provision for the Commonwealth Minister for the Environment to enter into bilateral agreements subject to conditions set out in the Act.

1.12 There are two types of bilateral agreement:

- an assessment agreement – where state or territory processes are used to assess the environmental impacts of a proposed action but the approval decision is made by the Commonwealth minister under the EPBC Act;⁸ and
- an approval agreement – where actions that are subject to a bilaterally accredited management arrangement or authorisation process in place under state or territory law do not require further assessment or approval under the Act.⁹

1.13 The Commonwealth government has had bilateral agreements with all state and territory governments to accredit environment *assessment* processes that meet set standards. The Department of Sustainability, Environment, Water, Population and Communities (the department) has advised the committee that the agreement with New South Wales (NSW) has expired but is expected to be renegotiated in 2013.¹⁰ Assessment agreements are in place with all other states and territories.¹¹

1.14 An approval bilateral agreement was in place with the NSW government to protect the National Heritage and World Heritage values of the Sydney Opera House, however this expired in 2010.¹² The department advised the committee that this

6 Department of Sustainability, Environment, Water, Population and Communities, *EPBC Act—Environment assessment process*, <http://www.environment.gov.au/epbc/publications/pubs/assessment-process.pdf> (accessed 14 January 2013).

7 See EPBC Act, s. 130; and Department of Sustainability, Environment, Water, Population and Communities, Answers to Questions on Notice, received 8 March 2013, pp 5–6.

8 EPBC Act, s. 47.

9 EPBC Act, ss. 29 and 46. See also 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. 83, available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 14 December 2013).

10 Department of Sustainability, Environment, Water, Population and Communities, *Submission 114*, p. 3; see also Department of Sustainability, Environment, Water, Population and Communities, Answers to Questions on Notice, received 8 March 2013, p. 2.

11 See further Department of Sustainability, Environment, Water, Population and Communities, *Bilateral Agreements*, <http://www.environment.gov.au/epbc/assessments/bilateral/index.html> (accessed 24 January 2013).

12 Department of Sustainability, Environment, Water, Population and Communities, *Submission 114*, p. 3.

agreement was replaced by a conservation agreement for the Opera House as a world heritage site because that was less administratively burdensome and achieved the same outcome.¹³

1.15 The department advised the committee that if a proposed action is covered by an assessment bilateral, then that action is assessed under the accredited state or territory process. After assessment, the proposed action still requires approval from the minister under the EPBC Act. This arrangement allows a proponent to produce a single set of environmental assessment documentation and to undertake a single public consultation process, thereby reducing duplication of state and Commonwealth requirements.¹⁴ Under the EPBC Act the minister is required to provide a decision on a matter referred for approval within 30 days.¹⁵

1.16 The department states that assessments for 17 projects were completed under bilateral agreements in 2011-12 and a further 91 projects were under assessment using a bilateral agreement as of 30 June 2012. According to the department, the assessment bilateral approach accounted for 23% of projects approved in 2011-12.¹⁶

1.17 If the Commonwealth were to enter into approval bilateral agreements with the states or territories, this would allow projects with significant impacts on matters of national environmental significance to be both *assessed and approved* by state or territory authorities. The Commonwealth government would then have an oversight role.¹⁷ At its public hearing in Canberra on 15 February 2013, the department outlined steps that the Commonwealth has to take should it enter into an approval bilateral agreement:

There are also a number of statutory steps required under the EPBC Act before the Commonwealth can enter into an approval bilateral agreement. Those safeguards include a statutory requirement that the draft approval bilateral agreements be made publicly available for comment for a minimum of 28 days under section 49A and, additionally, that the accreditation of the authorisation process is subject to disallowance within a period of 15 sitting days under section 46.¹⁸

13 Department of Sustainability, Environment, Water, Population and Communities, *Proof Committee Hansard*, 15 February 2013, p. 55.

14 Department of Sustainability, Environment, Water, Population and Communities, *Submission 114*, p. 3.

15 Department of Sustainability, Environment, Water, Population and Communities, *Proof Committee Hansard*, 15 February 2013, p. 51.

16 Department of Sustainability, Environment, Water, Population and Communities, *Submission 114*, p. 3.

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

18 Department of Sustainability, Environment, Water, Population and Communities, *Proof Committee Hansard*, 15 February 2013, p. 50.

The Hawke Review

1.18 On 31 October 2008, the then Minister for the Environment, Heritage and the Arts, the Hon Peter Garrett AM MP commissioned an independent review of the EPBC Act which was headed by Dr Allan Hawke (the Hawke review).

1.19 The review was undertaken in accordance with section 522A of the EPBC Act which stipulates that an independent review of the operation of the Act and the extent to which the objects of the Act have been achieved must be undertaken within 10 years of the Act's commencement.

1.20 The final report of the Hawke review was published in October 2009. *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Hawke report) made 71 recommendations over a wide range of areas, all aimed at improving the operation the EPBC Act.¹⁹

1.21 The Hawke report discussed a number of issues relating to the relationship between the states and territories and the Commonwealth and their respective roles in assessment and approval processes.

1.22 Relevantly, recommendation four of the Hawke report states:

The Review recommends that the Commonwealth work with the States and Territories as appropriate to improve the efficiency of the Environmental Impact Assessment (EIA) regime under the Act, including through:

- (1) greater use of strategic assessments;
- (2) accreditation of State and Territory processes where they meet appropriate standards;
- (3) accreditation of environmental management systems for Commonwealth agencies where the systems meet appropriate standards;
- (4) publication of criteria for systems and processes that would be appropriate for accreditation;
- (5) creation of a Commonwealth monitoring, performance audit and oversight power to ensure that any process accredited achieves the outcomes it claimed to accomplish;
- (6) streamlining and simplification of assessment methods, including combining assessment by preliminary documentation and assessment on referral information and removal of assessment by Public Environment Report;
- (7) establishing joint State or Territory and Commonwealth assessment panels;

19 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), available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 27 November 2012).

- (8) use of joint assessment panels or public inquiry for projects where the proponent is either the State or Territory or Australian Government; and
- (9) greater use of public inquiries and joint assessment panels for major projects.²⁰

1.23 The Commonwealth government agreed to this recommendation.²¹ In its response to the Hawke report, the Commonwealth noted that the EPBC Act already provides for accreditation of state and territory assessment and approvals processes. The Commonwealth government's response stated:

The government is committed to enhancing the scope and use of these mechanisms to reduce duplication of systems and provide more certainty for business without reducing protection for matters of national environmental significance.²²

1.24 Recommendation six of the Hawke report deals with an expanded role for strategic assessments and bioregional plans so that they are used more often; and a strengthened process for creating these plans. The recommendation also calls for changes to allow the Commonwealth to unilaterally develop regional plans, specify mandatory required information for strategic assessments; create a 'call in' power for plans, policies and programs likely to have a significant impact on matters that fall within the definition of national environmental significance, and for creation of a broad performance audit power to assess the performance of accredited systems.²³ The government accepted the substance of this recommendation, but not all elements of it.²⁴

1.25 The Hawke report also recommended the appointment of a National Environment Commissioner and the creation of an independent National Environment

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- 20 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. 28, available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 14 December 2013).
 - 21 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 10.
 - 22 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 11.
 - 23 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. 29, available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 14 December 2013).
 - 24 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, pp 15–20.

Commission.²⁵ The Hawke report noted that the EPBC Act has no provision for an expert body to provide routine expert advice on actions referred under the Act,²⁶ and recommended that the National Environment Commissioner be responsible for the provision of advice to the minister for the purposes of making decisions about the environmental impact assessment and approval process under the Act.²⁷

1.26 The report recommended that the primary objective of the National Environment Commissioner should be to promote the adoption of environmentally sustainable practices by providing independent scrutiny, reporting and advice. The Commissioner would also be responsible for:

- providing independent expert advice to the minister for the purposes of evidence based decision-making for environmental impact assessment and approvals processes under the Act;
- monitoring, audit, compliance and enforcement activities under the Act;
- undertaking and reporting on performance audits, for example, to assess the level of compliance with the Act by a particular industry sector or region;
- preparing other reports and providing other advice to the minister when requested – this could include advice about policies and programs; and
- responsibility for managing the provision of environmental data and information and reporting on that information.²⁸

1.27 The government did not support this recommendation.²⁹

25 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. 336, available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 4 March 2013).

26 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. 235, available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 4 March 2013).

27 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. 330, available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 4 March 2013).

28 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. 333, available at: <http://www.environment.gov.au/epbc/review/publications/final-report.html> (accessed 4 March 2013).

29 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 114.

Australian government response to the Hawke review

1.28 On 24 August 2011, the Minister for Sustainability, Environment, Water, Population and Communities, the Hon. Tony Burke MP announced 'the first major overhaul' of the EPBC Act as part of the government's response to the Hawke report. He stated that the reforms would include:

A more proactive approach to protecting Australia's environment through more strategic assessments and regional environmental plans.

A more streamlined assessment process to cut red tape for business and improve timeframes for decision making, including an option for decisions on proposals within 35 business days, if all required information is provided.

New national standards for accrediting environmental impact assessments and approvals to better align Commonwealth and state systems.³⁰

1.29 At the time of writing, legislation to amend the EPBC Act to implement these reforms had not yet been introduced, however the committee noted that the government is committed to introducing changes to the EPBC Act in 2013 as part of delivering its response to the Hawke report.³¹

COAG reform agenda

1.30 Since 1997, under the former Howard government's *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment*, the Council of Australian Governments (COAG) has agreed to the delineation of areas of environmental responsibility between the Commonwealth and the states and territories, with the focus of the Commonwealth on matters of national environmental significance and relevant international treaty obligations.³²

1.31 In April 2012 COAG announced that it would reform the administration of national environment regulation in order to 'reduce duplication and double-handling while maintaining high environmental standards.'³³ To do this, COAG agreed to prioritise the development of approval bilateral agreements under the EPBC Act.

1.32 The agreement by COAG to streamline environmental assessments and approvals confirmed a proposal by the Business Council of Australia (BCA) published in a discussion paper for the COAG Business Advisory Forum and publicly released on 10 April 2012.

30 <http://www.environment.gov.au/minister/burke/2011/mr20110824.html> (accessed 21 November 2012).

31 COAG Communique, 7 December 2012, p. 4, <http://www.coag.gov.au/node/475> (accessed 4 March 2013).

32 <http://www.environment.gov.au/epbc/publications/coag-agreement/index.html> (accessed 24 January 2013).

33 Department of Sustainability, Environment, Water, Population and Communities, <http://www.environment.gov.au/epbc/publications/accreditation-standards-framework.html> (accessed 11 December 2012).

1.33 The proposal recommended that all jurisdictions work together to ensure environmental impact assessments for all eligible projects are assessed using bilateral agreements under the EPBC Act.³⁴ It also recommended that the Commonwealth commit to a six month timeframe to accredit state environmental approvals to remove the Commonwealth's powers so that state approvals would count for Commonwealth approvals.³⁵

1.34 The Commonwealth government had previously signalled its intention to make amendments to the assessments and approvals processes as part of its response to the Hawke report.³⁶

1.35 Support for increased use of accredited assessments and approvals processes by the states and territories was endorsed by the inaugural Business Advisory Forum to COAG which was convened and chaired by the Prime Minister and attended by state and territory premiers and chief ministers, and business leaders. The communique from this forum announced:

From discussions today, our ambitions are clear: streamlined environmental regulation that delivers strong environmental outcomes and better conditions for business. In delivering these ambitions, the Commonwealth will maintain its capacity for a final approvals responsibility for World Heritage and high risk projects, with a framework to assess risk to be agreed between the Commonwealth and States, including on a bilateral basis.³⁷

1.36 At its 13 April 2012 meeting, COAG also announced its agreement to:

- fast track the development of bilateral arrangements for accreditation of state and territory assessment and approval processes, with the frameworks to be agreed by December 2012 and agreements finalised by March 2013;
- develop environmental risk and outcomes based standards with states and territories by December 2012; and

34 Business Council of Australia, *Discussion Paper for the COAG Business Advisory Forum*, 10 April 2012, p. 5.

35 Business Council of Australia, *Discussion Paper for the COAG Business Advisory Forum*, 10 April 2012, p. 5.

36 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 11.

37 Prime Minister of Australia, The Hon Julia Gillard MP, *Press Release*, Council of Australian Governments Business Advisory Forum Communiqué, 12 April 2012, <http://www.pm.gov.au/press-office/council-australian-governments-business-advisory-forum-communiqu%C3%A9> (accessed 23 January 2013).

- examine and facilitate removal of unnecessary duplication and reduce business costs for significant projects.³⁸

Framework of Standards for Accreditation

1.37 Following the COAG meeting of April 2012, in July 2012 the Commonwealth government released to the states a *Statement of Environmental Assurance Outcomes* and *Framework of Standards for Accreditation*. These documents were made public in November 2012.

1.38 The *Statement of Environmental and Assurance Outcomes* lists outcomes for 'improving productivity, environmental outcomes as reflected in the EPBC Act, and associated outcomes for approval and assessment systems and assurance'.³⁹ This document expresses COAG's desire for the development of bilateral agreements which improve productivity outcomes and meet Australia's obligations under the EPBC Act.

1.39 The *Framework of Standards for Accreditation* sets out:

- standards for accreditation which reflect the specific accreditation requirements of the EPBC Act;
- requirements of Commonwealth law and policy that are essential for the Commonwealth to be satisfied that relevant environment standards will be maintained; and
- Commonwealth considerations to provide additional guidance to jurisdictions on areas that the Commonwealth will take into account when determining whether the standards have been met.⁴⁰

Places You Love Campaign

1.40 Following COAG's announcement that the Commonwealth would consider amendments to the EPBC Act to allow it to enter into agreements with the states and territories to carry out approvals, an alliance of environment protection organisations started the 'Places You Love' campaign. This campaign called upon the Commonwealth to reject the COAG proposal to provide the states and territories with

38 Department of Sustainability, Environment, Water, Population and Communities, *Draft Statement of Environmental and Assurance Outcomes*, p. 1
<http://www.environment.gov.au/epbc/publications/pubs/environmental-assurance-outcomes.pdf>
(accessed 11 December 2012).

39 Department of Sustainability, Environment, Water, Population and Communities, *Draft Statement of Environmental and Assurance Outcomes*, p. 1
<http://www.environment.gov.au/epbc/publications/pubs/environmental-assurance-outcomes.pdf>
(accessed 11 December 2012).

40 Department of Sustainability, Environment, Water, Population and Communities,
<http://www.environment.gov.au/epbc/publications/accreditation-standards-framework.html>
(accessed 5 February 2013).

approval powers currently held by the Commonwealth Minister for the Environment.⁴¹

COAG's meeting of 7 December 2012

1.41 At its meeting of 7 December 2012 COAG considered issues related to reform of environmental regulation. The communique from this meeting stated that:

...the Commonwealth 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.⁴²

1.42 The communique advises that COAG is committed to streamlining environmental regulation to deliver 'strong environmental outcomes and better conditions for business'.⁴³ COAG also agreed that all jurisdictions will:

...direct their regulatory and referral agencies to eliminate duplication and to avoid sequential assessments and delayed approval processes and also to utilise common information requirements for both assessments and approvals.⁴⁴

1.43 While it was anticipated that COAG may have announced its intention to give the states and territories increased powers for approvals, this did not occur.⁴⁵ In its submission to the inquiry the department advised that:

...significant challenges emerged in developing approval bilateral agreements that provide consistency and certainty for business, and assurance to the community that high standards will be met and maintained.

Consequently, approval bilateral agreements are not being progressed until these challenges can be met by states and territories.⁴⁶

Overview of the provisions of the bill

1.44 The purpose of the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012 is to prevent the Commonwealth from delegating its current powers for approving proposed actions

41 Places You Love, <http://placesyoulove.org/take-action/> (accessed 23 January 2013).

42 COAG Communique, 7 December 2012, p. 4, <http://www.coag.gov.au/node/475> (accessed 10 December 2012).

43 COAG Communique, 7 December 2012, p. 4, <http://www.coag.gov.au/node/475> (accessed 10 December 2012).

44 COAG Communique, 7 December 2012, p. 4, <http://www.coag.gov.au/node/475> (accessed 10 December 2012); See also: Department of Sustainability, Environment, Water, Population and Communities, *Submission 114*, p. 5.

45 Reported by various media outlets, see for example: Babs McHugh, 'Industry says backflip on environmental approvals may be just a bump in the road', ABC Rural News, <http://www.abc.net.au/rural/news/content/201212/s3649908.htm> (accessed 5 February 2013).

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

that significantly impact matters of national environmental significance to the states and territories.⁴⁷

1.45 The proposed bill would also prevent the Commonwealth from referring its powers for regulating nuclear activities to state and territory governments.⁴⁸

1.46 Proposed item 2 of the bill removes bilateral agreements from the list of cases set out in Part 4 where approvals under the EPBC act are not required.

1.47 Proposed item 4 of the bill amends the definition of bilateral agreements so that bilateral agreements under the EPBC Act would include environmental assessment processes, not environmental approvals.⁴⁹

1.48 Proposed item 5 of the bill removes section 46 of the EPBC Act, and would have the effect of removing the ability for a bilateral agreement to declare actions that do not require approval under the Part 9 of the EPBC Act.⁵⁰

1.49 Proposed items 6–36 of the bill are consequential amendments to prevent bilateral agreements from declaring that certain actions do not require approval under Part 9 of the EPBC Act.⁵¹

47 Under section 29 of the EPBC Act, in circumstances where an action that would ordinarily require approval is taken in a state or territory, and the action is covered by a bilateral agreement, and there is a bilaterally accredited authorisation process or management arrangement in place, then the action is declared by agreement not to need approval.

48 Proposed item 23.

49 Explanatory Memorandum, p. 2.

50 Part 9 of the EPBC Act deals with approval of action.

51 Explanatory Memorandum, p. 2.

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.¹

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

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.²

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.³

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.⁴ The Business Council of Australia (BCA) says that the current system of assessment and approval under the EPBC Act leads to 'costly double handling'.⁵ 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.⁶

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:

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.⁷

2.8 The BCA argues that even though data to support this claim is 'scant'⁸, 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.⁹

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,¹⁰ 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.¹¹ 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'.¹²

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 1999.¹³

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

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.¹⁴

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.'¹⁵

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.¹⁶

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.¹⁷ 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.'¹⁸

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;¹⁹
- 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;²⁰
- 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;²¹
- 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.²²

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.²³

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.²⁴ 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.²⁵

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.²⁶

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'.²⁷ The AFPA told the committee that stakeholders can have confidence in the fact that the Commonwealth has always taken

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'²⁸ 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.²⁹

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.'³⁰

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.³¹

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.³²

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.³³

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:³⁴

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.³⁵

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.³⁶

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

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.³⁷

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.³⁸

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.³⁹

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.⁴⁰

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 2011,⁴¹ 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.⁴²

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.⁴³

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.⁴⁴

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.⁴⁵

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.⁴⁶

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.⁴⁷

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.⁴⁸

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

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.⁵⁰

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.⁵¹

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;⁵²
- 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.⁵³

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.⁵⁴

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.⁵⁵

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

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.⁵⁶

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.'⁵⁷ 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.⁵⁸

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.⁵⁹

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.⁶⁰ 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'.⁶¹ 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 Paper⁶²). The department advised that the full implications of the Green Paper for accreditation of NSW assessment approaches would not be known

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.⁶³ 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.⁶⁴ 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.⁶⁵

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.⁶⁶

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.⁶⁷ 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.'⁶⁸

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.

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.'⁶⁹

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.⁷⁰ 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.

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.⁷¹

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.⁷²

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 2011.⁷³ 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'.⁷⁴

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'⁷⁵ 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'.⁷⁶ 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.⁷⁷

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.⁷⁸

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

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).

Coalition Additional Comments

Government's backflip on streamlining

1.1 Coalition Senators note with disappointment the majority report's statement, in relation to the COAG meeting of 7 December 2012 that:

While it was anticipated that COAG may have announced its intention to give the states and territories increased powers for approvals, this did not occur.¹

1.2 Coalition Senators highlight that the Government created this expectation, including through the 12 April 2012 COAG Communique statement that the "Commonwealth will work with the States and Territories to improve the process for approvals of these categories [projects within the Commonwealth's current jurisdiction affecting world heritage sites and specific areas of action, including nuclear actions, defence development and developments affecting Commonwealth waters] ... for consideration by COAG at its next meeting."²

1.3 The Government, including the Prime Minister, further fuelled such expectations through statements indicating the Government accepted the case made by business and industry groups regarding the need for delegated assessment and/or approval powers.

Look, what we want to work towards here is a streamlined system, so that projects don't go through two layers of assessment for no real gain. And so the classic examples that are brought by business is where people have gone through sequential assessments, so it's double the time, things that have been required for the first assessment are required in a slightly modified form for the second assessment, so they don't even get the benefits of just uplifting the work and re-presenting it, it's got to be redone. So clearly that is an inefficient system.³

At the inaugural meeting of the Business Advisory Forum yesterday, business leaders raised delays in environmental approvals and assessments as a major cost. These delays, due to duplicative processes across federal and state systems, can take businesses months or even years to resolve.

Today COAG acted on that concern and the Gillard Government and states and territories agreed to fast track arrangements to use state assessment and approval processes by March 2013.

1 Chair's draft.

2 COAG Communique, 13 April 2012, pp. 2-3, <http://www.coag.gov.au/node/313> (accessed 12 March 2013).

3 Prime Minister, joint press conference, 12 April 2012, <http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-24> (accessed 12 March 2013).

The removal of these regulations will protect the environment whilst ending the costly delays that result from double-handling and duplication.⁴

1.4 Coalition Senators accept the case for streamlining of regulatory processes, including through the use of bilateral agreements for both assessments and approvals, as provided for by the EPBC Act but which would be prevented by the bill, as made in a number of submissions noted in the majority report and backed by a number of reports referenced in the majority report.

1.5 It was for these reasons that the Coalition in April 2012 committed to offer state and territory governments the opportunity to act as a one-stop-shop for environmental approvals as well as seeking to create a single lodgement and documentation process for environmental approvals.⁵ There is no reason why assessment and approvals procedures cannot be made more efficient without any diminution of environmental or heritage standards.

1.6 Coalition Senators are therefore disappointed at the Government's backflip as evidenced by COAG's failure to make the progress the Government was promising in April 2012.

Improving efficiency

1.7 Coalition Senators are disappointed at the majority report's dismissal, of submissions and evidence taken, as "no compelling evidence to show how an approval agreement would improve business efficiency".

1.8 Coalition Senators note, for example, that a Deloitte Access Economics report of April 2011, to which the majority report refers only briefly, includes a cost-benefit analysis of reforms to the EPBC Act proposed by the Hawke review. Of particular relevance is recommendation 4 of the Hawke review, as highlighted in the majority report.

1.9 The Deloitte Access Economics report found that:

There would be benefits to project proponents, Australian, state and territory governments and the economy from reducing delays in the assessment process.⁶

1.10 The Deloitte Access Economics report quantified some of the impacts of delays relating to assessments:

4 Media release, Prime Minister and Minister for Finance and Deregulation, 13 April 2012, p. 1, <http://www.pm.gov.au/press-office/coag-signs-proposals-cut-red-tape> (accessed 12 March 2013).

5 Leader of the Opposition, address to the Australian Industry Group, 20 April 2012, available at <http://liberal.org.au/latest-news/2012/04/20/tony-abbott-speech-australian-industry-group-coalitions-plan-cleaner> (accessed 12 March 2013).

6 Deloitte Access Economics, Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the EPBC Act, 20 April 2011, p. 27, 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 12 March 2013).

Preliminary data in 2010-11 indicate that the assessment process under the EPBC Act is currently delaying projects as follows:

- Referral decisions – 28% delayed, average delay 8 days (235 decisions total).
- Assessment approach – 35% delayed, average delay 42 days (94 decisions total).
- Approval decisions – 22% delayed, average delay 69 days (64 decisions total).

Overall, the average length of delay faced (i.e. including those not delayed) was as follows:

- Referral decisions – 2 business days.
- Assessment approach – 15 business days.
- Approval decisions – 15 business days.

On that basis, a project that is determined to be a CA [controlled action] (and undergoes the three stages of assessment) in 2010-11 faces an average delay of 32 business days, or more than six weeks. That does not include time spent by the proponent gathering information while the statutory clock is stopped, or time spent during environmental approval processes in state/territory or local governments.⁷

1.11 The Deloitte Access Economics report also found that:

The estimated benefit from reduced delays...was thus estimated as \$135.1 million in 2012-13 increasing to \$288.4 million in 2020-21 (Table 5.15). In NPV [net present value] terms, this represents a total gain to society of \$1.19 billion.⁸

1.12 Among submissions cited by the majority report but disappointingly dismissed as offering “no compelling evidence to show how an approval agreement would improve business efficiency” was that made by the Business Council of Australia.

The community must be assured that under the approvals system, Australia’s unique environment and heritage values will be maintained or enhanced. This can and should be achieved without compromising the competitiveness of project proponents.

7 Deloitte Access Economics, Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the EPBC Act, 20 April 2011, pp 27–28, 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 12 March 2013).

8 Deloitte Access Economics, Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the EPBC Act, 20 April 2011, p. 33, 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 12 March 2013).

Australia's planning and environmental laws, at all levels of government, must facilitate the efficient approval of major capital projects upon which Australia's economic wellbeing is increasingly dependent.

The Australian economy is more reliant on the successful delivery of major capital projects than ever before. Business Council of Australia research indicates that by 2013, expenditure on capital investment is likely to grow to 30 per cent of GDP. A large part of all Australian economic activity will therefore be dependent on the success of major capital projects. Given Australia's increased reliance on major capital projects, it is imperative that all governments configure their environmental approvals processes to ensure decisions are predictable and timely.⁹

1.13 Another submission, made by the Pyrenees Shire Council in Victoria but cited by the majority report only in passing, expressed concern about the Commonwealth's ability to make timely decisions reflecting local knowledge and experience:

The Pyrenees Shire Council is committed to protecting and where possible enhancing environmental values within its area of responsibility. The most efficient and effective way of achieving this is to reduce the number of layers and steps involved when submitting a proposal for review and approval. Considerable time and effort goes into providing information, receiving feedback, developing strategies, formulating a submission and negotiating a final outcome. The process can become very cumbersome the more layers and organisations that are involved.¹⁰

1.14 The Victorian Farmers Federation also supported the use of bilateral agreements and therefore strongly opposed the bill:

The VFF considers that there are significant advantages to retaining the ability to delegate to state governments the approval of referred actions under the Environment Protection and Biodiversity Conservation Act...Furthermore, bilateral agreements for this delegation will not change the EPBC Act, but rather take a more practical approach to its administration.

...

State governments are in a stronger position than the Commonwealth to administer the EPBC Act because:

- They have greater experience with administering environmental regulation
- There is a higher level of recognition for state based regulation
- They are closer geographically to the proponents of referred actions.¹¹

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

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

11 Victorian Farmers Federation, *Submission 83*, p. 1.

Labor's blame game

1.15 Coalition Senators are aghast at the attacks in the majority report on the capacity, conduct and approach of the states.

1.16 While it is no surprise given their own enthusiasm for wasteful, debt driven spending that Labor Senators would attack what they describe as “austerity measures” within the states, Coalition Senators note that such “austerity” is required due to years of Labor waste, deficits and mismanagement at a state level.

1.17 Should expanded use of assessments or approvals bilaterals with states be undertaken, states would have to appropriately resource the relevant agencies to ensure the requirements of such bilaterals were met and standards of assessments and approvals were upheld.

1.18 Coalition Senators find the argument that a state or territory may have “an incentive to approve” proposals because they may receive “economic benefits from the development under consideration” especially perverse. Arguably the federal government has as much if not more to gain from projects proceeding, given the benefits that flow directly to federal finances from increased revenue associated with income tax or company tax receipts generated by a project. Labor's support for this argument is symptomatic of their general ignorance of the broad benefits that flow from economic development.

1.19 Similarly, Coalition Senators find the attack by Labor Senators on the concept of competitive federalism, which they suggest risks a “race to the bottom on environmental protection” as concerning. Seeking smarter and more efficient ways to deliver environmental regulation without reducing environmental standards should be an objective of all levels of government. Competitive tension between the states should be used to harness this result. Simply having more public servants and more red tape does not guarantee better environmental outcomes, it simply guarantees higher costs.

Conclusion

1.20 Unlike Labor, when the Coalition promises to achieve streamlined approvals processes, as advocated in recommendation four of the Hawke Review, we actually intend to do so.

1.21 Accordingly, we support the majority report's recommendation that this bill not be passed, but do so without the extensive reservations made by Labor Senators.

Senator Simon Birmingham
Deputy Chair

Senator Bridget McKenzie

Senator Anne Ruston

Australian Greens – Dissenting Report

1.1 The *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* will remove the Commonwealth's ability to hand its responsibilities for approving developments that significantly impact matters protected under our national environmental laws to a State or Territory.

1.2 As has been demonstrated in evidence throughout this inquiry, the changes proposed by this bill have the support of environmental experts, lawyers and the broader Australian community. In fact, well over 90% of the 175 submissions to this inquiry supported this bill.

1.3 The Australian Conservation Foundation submitted:

The current sections of the EPBC Act which allow the Commonwealth to delegate its powers in relation to Matters of National Environmental Significance (MNES) to the states are contrary to the Commonwealth's responsibilities to protect the environment, and should be removed.¹

1.4 Humane Society International believes it will never be appropriate for the Federal government to hand over their federal approval powers to the States. Accordingly, the power to do so should be removed from the EPBC Act.²

1.5 The New South Wales Conservation Council submitted:

If the Federal Government hands over its approval powers under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) to the states, as it is currently legally able to do, important environmental protections, established over 30 years, will be in jeopardy. We are unequivocally opposed to the delegation of approval powers to the states and territories under the EPBC Act and therefore support the Bill.³

1.6 The Australian Law Council submitted:

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.⁴

1.7 The Australian Network of Environmental Defenders Offices submitted that it believes that Commonwealth involvement in environmental regulation in Australia is

1 Australian Conservation Foundation, *Submission 90*, p. 1.

2 Human Society International, *Submission 46*, p. 2.

3 NSW Conservation Council, *Submission 92*, p. 1.

4 Australian Law Council, *Submission 92*, p. 2.

vital, and ANEDO does not support the delegation of Commonwealth approval responsibilities under the EPBC Act to States and Territories.⁵

1.8 Professor John Quiggin, of the University of Queensland's School of Economics submitted:

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 favorable [sic] treatment under such slogans as 'fast-tracking' and 'cutting green tape', will undermine this goal. Maintenance of federal approval powers under the EPBC Act will promote this goal.⁶

1.9 Sustainable Business Australia submitted:

The role of our national environmental regulatory system is to ensure that it properly assesses the environmental impact of proposed capital investment on our national natural asset, the environment. This Bill will ensure that important economic development meets the required standards, and achieves a more effective and efficient system of environmental, and reinforce the significant role the Commonwealth Government has to play in securing this asset for all Australians, both for now and for generations to come.⁷

1.10 The inquiry provided an invaluable opportunity for committee members, and the community at large, to carefully scrutinise whether there should be provisions under our national environment laws for the handover of national responsibilities to states and territories.

Of great note are the findings of the committee:

- Most submitters expressed grave concern about the risks to the environment associated with granting approval powers to the states and territories. [para 2.1]
- The committee was presented with no compelling evidence to show how an approval agreement would improve business efficiency [para 2.12]
- The committee is concerned that if the Commonwealth were to lose its oversight and approval power in relation to matters for national environmental significance, this may encourage competitive federalism [para 2.28]

1.11 And most importantly:

- 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. [para 2.47, underline added]

5 Australian Network of Environmental Defenders Offices, *Submission 128*, p. 2.

6 Professor John Quiggin, *Submission 146*, p. 3.

7 Sustainable Business Australia, *Submission 174*, p. 2

1.12 Yet, the majority recommendations fall short – failing to act on the committee’s own unequivocal findings, and support this bill that would prevent state and territories from being able to be the sole regulators of our nation’s most environmentally destructive projects.

1.13 Sadly politics appears to have trumped sound evidence based policy.

1.14 Instead the committee recommends a very welcome but oddly unrelated reform - that the government create an independent National Environment Commission. This reflects the position in the Greens’ *Too Precious To Lose: Principles to Protect Australia's Environment* released in June 2012, and we urge the Government to act promptly on this recommendation.

1.15 While the independent review of the EPBC Act reported in October 2009, the Government took over 18 months to release its policy position in August 2011, and we are still yet to see any amending legislation come before the parliament. On this trajectory it is unlikely that any national environment commission would be established in a timely manner.

1.16 Sadly, the recommendation for a national environment commission appears to be a gesture to distract the community from the fact that the committee is not prepared to stand with them and act on all the evidence before them; that the committee has failed to recommend that Australia’s environment be permanently protected from the risk of state governments being handed responsibility for our most precious places and species.

1.17 In the face of statements by the Opposition that they will use these provisions to hand off federal powers, and in the face of overwhelming evidence before the committee that the hand-off provisions should be repealed as this bill would do, the Government has a window to remove these provisions. Failure to do so would make the Government complicit when any future government sought to use these provisions. Failure to do so would also undermine the legacy of Commonwealth oversight of our nationally important species and places – which Labor Prime Minister Bob Hawke was instrumental in establishing.

1.18 If the Government has genuinely backed away from its support to hand off federal environment powers to states, it should support this bill. Anything less is an admission that they are not prepared to put the needs of our national environment ahead of vested interest lobby groups.

1.19 This bill provides the opportunity for the government to future proof the EPBC Act, and ensure ongoing national protection for our nationally important species and places.

1.20 The Australian Greens commend this bill to the Senate.

Senator Larissa Waters

Appendix 1

Submissions, form letters and answers to questions taken on notice

Submissions

- 1** Ms Joy Ringrose
- 2** The United Bird Societies of South Australia Inc
- 3** Ms Lois Katz
- 4** Mr Carlos Whiley
- 5** Mr John Tedge
- 6** Mr Allan McKay
- 7** Mr Adrian Watkins
- 8** Mr Peter Sainsbury
- 9** Ms Eileen Whitehead
- 10** Ms Mia Dalby-Ball
- 11** Name Withheld
- 12** Mr Adam Connell
- 13** Ms Anne Kotzman
- 14** Miss Claire Ogden
- 15** Ms Dereka Ogden
- 16** Ms Jenny Spragg
- 17** Dr Lyndon DeVantier
- 18** Dr Graeme Armstrong
- 19** Mr Richard Stanford

- 20 Mr Albert Mah
- 21 Mr Ian Rudd
- 22 Ms Karin Geradts
- 23 Ms Nita Clifton
- 24 Ms Pamela Rothfield
- 25 The Colong Foundation for Wilderness Ltd
- 26 Mr Doug Campbell
- 27 Blue Mountains Conservation Society Inc
- 29 Ms Margeaux Chandler
- 30 Doctors for the Environment Australia Incorporated
- 31 Ms Juanita M Johnston
- 32 Mr Raymond Cox
- 33 Magnetic Island Community Development Association Inc
- 34 Ms Nina Earl
- 35 Mr Justin Smyrk
- 36 Mr Russell Jones
- 37 Jonathan Peter and Josephine Prowse
- 38 Ms Lesley Hook, Birdlife Southern New South Wales
- 39 Mr Hank Vandepol
- 40 Mr Jean Dind
- 41 Friends of Grasslands
- 42 VicForests
- 43 Aldershot and District Against Mining
- 44 Ms Ruby Rosenfield
- 45 Kingston Conservation and Environment Coalition
- 46 Humane Society International
- 47 National Parks Association of NSW

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- 48** South East Australian Naturalists Association (SEANA) Inc
- 49** BirdLife Northern Queensland
- 50** Wellington Shire Council
- 51** Mr Timothy Bidder
- 52** Australian Koala Foundation
- 53** Mr Peter Gillbank
- 54** Mr Victor Hill
- 55** Mr Kris Schmah
- 56** Victorian Association of Forest Industries
- 57** Mr Shawn Jarvey
- 58** Ms Imelda Grant
- 59** Latrobe City Council
- 60** Fraser Coast Branch of the Wildlife Preservation Society of Queensland
- 61** Australasian Wader Studies Group
- 62** Ms Lenore Keough
- 63** Friends of Shorebirds SE
- 64** Ms Karen Davis
- 65** Manduka Cooperative
- 66** Name Withheld
- 67** Ms Eve Plant
- 68** Office of Giz Watson, MLC, Western Australia
- 69** Mr Kenneth Brown
- 70** Name Withheld
- 71** Mr Richard Costin and Annabelle Sandes, Kimberley Media
- 72** Dr K. Vernon Bailey AOM
- 73** Wildlife Preservation Society of Queensland, Townsville Branch
- 74** Dr Geralyn McCarron

- 75 Mr David Arthur
- 76 Ms Caroline Reid
- 77 Mr Mike Rathbone
- 78 Ms Janet Harwood
- 79 Ms Lisa Nicholls
- 80 Ms Kath O'Brien
- 81 Name Withheld
- 82 Ms Marion Shaw
- 83 Pyrenees Shire Council
- 84 Ms Kendall Lovett
- 85 Nature Conservation Council of NSW
- 86 Wildlife Preservation Society of Queensland
- 87 Logan and Albert Conservation Association
- 88 Keppel and Fitzroy Delta Alliance
- 89 North Queensland Conservation Council
- 90 Australian Conservation Foundation
- 91 Business Council of Australia
- 92 Law Council of Australia
- 93 Wentworth Group of Concerned Scientists
- 94 WWF-Australia
- 95 Economists at Large
- 96 Birdlife Echuca
- 97 Birds Queensland
- 98 Caldera Environment Centre
- 99 Name Withheld
- 100 Save the Mary River Coordinating Group Inc
- 101 Ms Anna Bridle

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- 102** Minerals Council of Australia
- 103** Professor Lee Godden and Professor Jacqueline Peel, Centre for Resources, Energy and Environmental Law, Melbourne Law School, The University of Melbourne
- 104** Australian Coal Association Limited
- 105** Mr John Renowden
- 106** Australian Forests and Climate Alliance
- 107** Conservation Council of South Australia
- 108** Nature Conservation Society of South Australia
- 109** BirdLife Australia
- 110** Wide Bay Burnett Environment Council
- 111** Australasian Bat Society Inc
- 112** Lawyers for Forests
- 113** Hume City Council
- 114** Department of Sustainability, Environment, Water, Population and Communities
- 115** PGV Environmental
- 116** Australian Chamber of Commerce and Industry
- 117** Anne Layton-Bennett and John Donnachy
- 118** Conondale Range Committee
- 119** BirdLife Southern Queensland and Protect the Bush Alliance
- 120** Mr Dan Monceaux
- 121** South East Forest Rescue
- 122** Bimblebox Nature Refuge
- 123** Central West Environment Council
- 124** Ms Deedre Kabel
- 125** Gecko-Gold Coast and Hinterland Environment Council Association Inc
- 126** Australian Forest Products Association

- 127 South East Region Conservation Alliance (SERCA)
- 128 Australian Network of Environmental Defender's Offices
- 129 Green Institute
- 130 Victorian Farmers Federation
- 131 Ms Monique Filet
- 132 Name Withheld
- 133 Prof Ralf Buckley
- 134 Premier of Queensland
- 135 Mary River Catchment Coordinating Committee
- 136 Wildlife Preservation Society of Queensland, Gold Coast and Hinterland
- 137 Ms Juanita Johnston
- 138 Ms Adele Maguire
- 139 Confidential
- 140 National Parks Australia Council
- 141 Dr Chris McGrath
- 142 Fraser Island Defenders Organisation
- 143 Name Withheld
- 144 The Wilderness Society WA
- 145 Confidential
- 146 Professor John Quiggin
- 147 Ms Alix Gibson
- 148 Ms Amanda Rosenfeld
- 149 Mr Brendan Doyle
- 150 Dr Chris Johansen
- 151 Mr Colin Rainbird
- 152 Mr Craig Heading
- 153 Ms Debra Edwards

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- 154** Ms Emma Thomas
- 155** Mr Frank Di Mascolo
- 156** Ms Helen Anderson
- 157** Mr Ian Heath
- 158** Mr James Bellis
- 159** Mr James Crawford
- 160** Mr James White
- 161** Mr Jason Graham
- 162** Ms Jenny Stevens
- 163** Ms Jessica Larkman
- 164** Ms Jodie Milton
- 165** Ms Lara Murray
- 166** Ms Lyn Prowse-Bishop
- 167** Mr Mark Dowse
- 168** Mr Mark Wren
- 169** Ms Natalie Stanton
- 170** Mr Raymond Dowling
- 171** Mr Rob Harvey
- 172** Mr Simon Rowell
- 173** Ms Susan Morley
- 174** Sustainable Business Australia
- 175** Pacific Hydro Australia

Form letters

- 1** Form letter A - Received from the Cairns and Far North Environment Centre Inc; Birdlife East Gippsland; Lesley Dalziel OAM; Judy and Tom Fenton; Bat Conservation and Rescue Qld. Inc.; Peter C Laws; H.O.P.E. Australia; Lorna Hobbs; The South Australian Ornithological Association Inc.; Dianne Emslie; Birdlife Mornington Peninsula; and Valerie La May

- 2 Form letter B - Received from Heather Coombs; Gordon Curtis; Helga Hill; Sarah Moles; Richard Morrow; Susan Cooke; Mark Rich; and Kent Hutton

Answers to questions taken on notice

North Queensland Conservation Council – answers to questions taken on notice (from public hearing, Canberra, 8 February 2013)

Wellington Shire Council - answers to questions taken on notice (from public hearing, Canberra, 8 February 2013)

Latrobe City Council - answers to questions taken on notice (from public hearing, Canberra, 8 February 2013)

Economists at Large - answers to questions taken on notice (from public hearing, Canberra, 8 February 2013)

Professor Lee Godden - answers to questions taken on notice (from public hearing, Canberra, 8 February 2013)

Minerals Council of Australia – answers to questions taken on notice (from public hearing, Canberra, 15 February 2013)

Business Council of Australia – answers to questions taken on notice (from public hearing, Canberra, 8 February 2013)

Minerals Council of Australia – answers to further written questions taken on notice (from public hearing, Canberra, 15 February 2013)

Australian Forrest Products Association – answers to questions taken on notice (from public hearing, Canberra, 8 February 2013)

Department of Sustainability, Environment, Water, Population and Communities – answers to questions taken on notice (from public hearing, Canberra, 15 February 2013)

Appendix 2

Public hearings

Friday, 8 February 2013 – Canberra

Australian Forest Products Association

Mr Peter Grist, Manager, Resources

Mr Grant Johnson, Policy Manager

**Centre for Resources, Energy and Environmental Law, Melbourne Law School,
University of Melbourne**

Professor Lee Godden, Director

Wellington Shire Council

Ms Joanne Caminiti, Coordinator, Sustainability

Latrobe City Council

Ms Jane LLoyd, Coordinator, Environment Sustainability

National Parks Australia Council

Ms Christine Goonrey, President

BirdLife Australia

Ms Samantha Vine, Head of Conservation

Nature Conservation Council of NSW

Mr Pepe Clarke, Chief Executive Officer

The Colong Foundation for Wilderness Ltd

Mr Keith Muir, Director

Dr Chris McGrath – Private capacity

Economists at Large Pty Ltd

Mr Tristan Knowles, Director

Professor John Quiggin – Private capacity

Green Institute

Ms Margaret Blakers

South East Region Conservation Alliance

Ms Heather Kenway, Committee Member

Business Council of Australia

Mr Matt Garbutt, Principal Adviser

Ms Maria Tarrant, Deputy Chief Executive

Gecko-Gold Coast and Hinterland Environment Council Association Inc

Mrs Mary Anne Adams, Secretary

Wildlife Preservation Society of Queensland

Mr Des Boyland, Policies and Campaigns Manager

Save the Mary River Coordinating Group Inc

Mr Stephen Burgess, Technical Advisor

Ms Glenda Pickersgill, President

Birds Queensland

Dr Richard Noske, President

North Queensland Conservation Council

Ms Wendy Tubman, Coordinator

Mr David Kreutz – Private capacity

Friday, 15 February 2013 – Canberra

Minerals Council of Australia

Mr Christopher McCombe, Assistant Director, Environmental Policy

Ms Melanie Stutsel, Director, Health, Safety Environment and Community Policy

World Wildlife Fund Australia

Dr Martin Taylor, Manager, Protected Areas and Conservation Science

Australian Conservation Foundation

Mr Graham Tupper, National Liaison Manager

Humane Society International

Mrs Alexia Wellbelove, Senior Program Manager

Wentworth Group of Concerned Scientists

Mr Peter Cosier, Director

Ms Claire Parkes, Policy Analyst

Australian Network of Environmental Defender's Offices

Mr Brendan Sydes, Lawyer

Ms Rachel Walmsley, Director, Policy and Law Reform

Department of Sustainability, Environment, Water, Population and Communities

Dr Kimberley Dripps, Deputy Secretary

Mr Mark Flanigan, First Assistant Secretary, Regulatory Reform Taskforce

Ms Kelly Pearce, Assistant Secretary, Regulatory Reform Taskforce

