Australian Greens Dissenting Report

Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014

1.1 This Bill would facilitate the handover of Commonwealth powers to approve damaging projects under the Environment Protection and Biodiversity Act (EPBC Act) to State and Territory governments, local governments and other unspecified bodies. It winds back environmental regulation in Australia by 30 years and leaves our precious plants, animals and places vulnerable to environmental vandalism like never before.

1.2 The Australian Greens opposed this bill in the House and will oppose it in the Senate.

Our national environmental laws

1.3 Our national environment law, the EPBC Act, was passed in 1999 by the Howard government. The EPBC Act is designed to give Australia's Environment Minister the power to protect the places and animals which are so important that they matter to all Australians: World Heritage Areas, threatened species and ecological communities, National Heritage, Ramsar wetlands, migratory species, the Great Barrier Reef, nuclear actions, water resources threatened by coal or coal seam gas, and Commonwealth land and waters.

1.4 All developments that would have a significant impact on any of those "matters of national environmental significance" currently require approval from the Federal Environment Minister. State assessment processes are currently accredited by the Commonwealth under agreements called "assessment bilateral agreements" so proponents do not have to undertake two separate environmental impact assessments, but separate approvals are still required from the State and the Commonwealth governments.

1.5 The Australian Greens have always supported a strong role for the Commonwealth in protecting the environment. It is in Australia's national interest to have robust national environmental protections to fulfil our international obligations and to protect nationally significant matters. Most importantly, strong national environmental laws give effect to the community's strongly held and often forcefully expressed desire for Commonwealth protection for our precious places.

1.6 Sadly, our environment laws are already failing us. Australia's environment and biodiversity are clearly in decline. The number of threatened species has nearly tripled in the last twenty years and we are in a biodiversity crisis. The Great Barrier Reef has lost half its coral since the 1980s, and could lose another half in the next decade. We have lost valuable places and wildlife to the thousands of damaging developments that have already gone ahead. These laws haven't been able to protect parts of our environment which need protection.

1.7 What is needed is radical strengthening of our federal environmental laws – not a wholesale hand-off of powers down to pro-development state governments.

Previous attempt to hand over approval powers

1.8 The Australian Greens oppose the handover of approval powers, and have done so whichever government has proposed it.

1.9 In 2012, the Federal Labor government proposed to pursue similar approval bilateral agreements with State and Territory governments. That proposal was abandoned in after December 2012 after strong criticism from environment groups, the broader community and the Greens, and sustained warnings that environmental standards would be eroded, and that the system would in fact become complex.

1.10 The Australian Greens introduced a Bill to remove the ability for the Commonwealth to hand over approval powers, but it was not supported.[1]

1.11 Nevertheless, a Senate inquiry into that Bill by this Committee found in March 2013, 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.'[2] (*emphasis added*)

State governments cannot be trusted

1.12 State governments have a track record of environmental vandalism. If State and governments had their way, the Great Barrier Reef would be scarred by oil rigs, and the Franklin River in the Tasmanian Wilderness World Heritage Area would be dammed.

1.13 In recent times, State governments have been the most enthusiastic backers – or proponents – of damaging and dangerous projects which were rejected by the Commonwealth, such as the proposal to graze cattle in the Alpine National Park, the Mary River Dam, the Galilee mega coal mines, the Abbot Point dredging project, and the proposed gas hub at James Price Point.

1.14 The failure of Regional Forestry Agreements to protect native forests all over Australia further demonstrates how dangerous it is to leave environment protection to the states.[3]

1.15 This poor track record provided the original rationale for the EPBC Act, so the handover of approval powers is a serious backwards step.

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1 The Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012. The homepage of this Bill and second reading speech can be viewed here: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s894

2 Committee Report, para 2.47, Senate inquiry into the Environment Protection and Biodiversity Conservation Amendment Retaining Federal Approval Powers) Bill 2012.

3 See the report One Stop Chop – How regional forest agreements streamline environmental destruction <http://www.edotas.org.au/one-stop-chop/>

1.16 As the Australian Conservation Foundation submitted,

> It is ACF's experience over 50 years that States and territories frequently fail to act in the national interest in managing the environment. The Commonwealth is best placed to consider national and cross-border issues and make decisions in the national interest.[4]

Environmental standards will fall

1.17 The Government has ceaselessly repeated the assertion that environmental standards will be maintained, but this runs squarely against the available evidence. Under the handover of powers, State, Territory and local government decision makers would have little inclination, capacity, or incentive to maintain environmental standards.

1.18 The standards won't change the states' poor attitude and record on environment protection, and they can't prevent states determined to approve projects which will damage the environment. Compliance will be a key problem - the states will find a way around the standards or deliberately flout them, as we've seen when the Queensland Government refused to comply with the assessment standards for the Alpha coal mine in Queensland.

1.19 Crucially, the federal environmental laws leave a lot of discretion about approvals and conditions to the decision maker – currently the federal Environment Minister – and under the planned hand-off of powers, that discretion would be exercised by the State Ministers, who have a track record of environmental vandalism. The standards do not constrain that discretion. As Dr Chris McGrath submitted,

> The requirements for bilateral agreements in Pt 5 of the EPBC Act … do not change the highly discretionary nature of any decision to approve an action or impose conditions. This means that the identity of the decision-maker and their values are critical factors in the decision that is reached. Unlike, for example, applying things like building standards that are highly prescriptive and quantifiable, decision-makers under the EPBC Act are required to consider broad qualitative criteria such as "economic and social matters" and that the decision must not be inconsistent with Australia's international obligations. Decisions made by a State or Territory government under an approval bilateral will be similar. The weighing-up process inherent in reaching such a decision means that there is no "standard" that is enforceable in any meaningful way.[5] (*references omitted*)

1.20 The identity of environmental decision makers matters a great deal. Although draft approval bilateral agreements have not been published for each state, the Queensland draft agreement proposes to accredit the Coordinator-General under the *State Development and Public Works Organisation Act 1971* (SDPWOA Act). Under Queensland legislation, the Coordinator-General is an unelected public servant who is not bound to consider ecologically sustainable development in making decisions.

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4 ACF, submission 46, p. 2.

5 Dr Chris McGrath, submission 1, attachment 1, p. 25.

Instead, their statutory role is to facilitate economic development via major infrastructure and resources projects. This mandate is utterly inconsistent with exercising approval powers under the EPBC Act.

1.21 It remains the federal government's job to look after the most important and precious of Australia's environment assets, which are of international significance, like the World Heritage Great Barrier Reef. No standard will be able to replace the protection that is meant to be provided by the federal Government for our precious places and wildlife, because of our international obligations to do so.

Authorisation processes in subordinate instruments

1.22 One truly farcical aspect of the Bill is the proposal to accredit non-legislative instruments such as policies or guidelines to take the place of federal environmental laws. Locating critical national environmental protections in such non-statutory instruments makes a sham of Government's claim that environmental standards will be maintained. Environmental Justice Australia submitted that such instruments engender uncertainty:

> Guidelines cannot be expressed to fetter a discretion under an Act. A decision maker must "give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy". So whilst a guideline or policy may purport to direct or require a particular outcome or to require that something be done in a particular way great care needs to be taken that that is what is in fact required or permitted by the Act.[6] (*references omitted*)

1.23 Environmental Justice Australia also observed that the language of the Bill permits accredited processes under approval bilateral agreements to be set out in an instrument which is not made under a law. That is, the standards need not be legally binding at all.

> The Explanatory Memorandum further explains that "To do so, subparagraph 46(2A)(a) provides that an authorisation process must be set out in or made under a law of the State or Territory or be set out in an instrument made under such a law."
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> The explanatory memorandum is not strictly correct it its description of the clause. The Bill in fact only requires that the process be set out wholly or partly in or under a law or in an instrument. This means that a significant part of the process being accredited may not be set out in or under an Act or legislative instrument of the relevant State or Territory.[7]

1.24 Allowing the state or local governments to assume responsibility for internationally significant environmental assets and not even requiring them to reflect the federal standards in their own laws makes an absolute mockery of the Abbott Government's claims that the standards will be complied with. This bill ensures that

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6 Environmental Justice Australia, submission 54, p. 6.

7 Environmental Justice Australia, submission 54, p. 5.

the standards currently enshrined in the EPBC Act will be watered down and disregarded, as they may exist in mere guidelines, plans or policies.

State and Territory processes and regulatory capacity are inadequate

1.25 State and Territory governments lack the processes and regulatory capacity to administer the EPBC Act and safeguard matters of national environmental significance.

1.26 They should not be entrusted with further responsibilities, especially since many are going through budget cuts. There will not be the staff to undertake additional responsibilities and protect the national environment.

1.27 Under Queensland's draft approval bilateral, it is proposed to accredit the SDPWO Act, which has recently been amended, but not to the extent that it meets the standard of the EPBC Act. Experts are united in their agreement that currently no state law anywhere in the country meets the level of the EPBC Act.[8]

1.28 Dr Chris McGrath stated that:

> I just cannot see how the approval bilaterals are consistent with the standards of accreditation that the department published a few months ago. When you read the standards of accreditation it reads like the Commonwealth thinks that the states are going to do exactly what the EPBC Act requires but under their legislation. When you read the approval bilaterals and you understand the state legislation, it is clear that there is nothing like that from the state's perspective. They are going to take their existing laws and pretty well just say, 'Well, we'll consider the Commonwealth matters of national and environmental significance.' How you enforce the requirements against the state government I find very, very difficult to foresee.[9]

1.29 State public service cuts have degraded often already weak regulatory capacity, leaving State government wholly unsuitable to exercise EPBC Act responsibilities, which will include compliance monitoring and enforcement. ACF submitted that:

> Multiple State Auditor-Generals' reports have found that state governments are struggling to fulfil their existing statutory obligations. In Victoria the Auditor General found that less than half of the states' listed threatened species and communities had the required management statements completed, and estimated that at the current rate of progress it would take the Victorian Department of Sustainability and Environment an astonishing 22 years to complete them … The Queensland Auditor General's report made it clear that the Queensland Environment department "is not fully effective in its supervision, monitoring and enforcement of environment

8 Australian Network of Environmental Defenders Offices, submission 49

9 Committee Hansard, 10 June 2014, p. 70

> conditions and is exposing the state to liability and the environment to harm unnecessarily".[10]

1.30 A similar verdict was reached by Western Australia's Auditor General in 2011.[11]

1.31 Job cuts have degraded the capacity of the Queensland, New South Wales and Victorian Environment Departments to police regulation. ACF submitted that:

> …in Queensland the [E]nvironment and Heritage Protection Department was cut 16% (220 redundancies) in 2012-13. In the absence of additional resources increasing both biodiversity budgets and staff, it seems highly unlikely the states could execute delegated powers adequately.[12]

Potential for conflicts of interest

1.32 The proposed handover of approval powers highlights an unresolvable conflict of interest: State and Territory governments often play too active a role in, and benefit too directly from, major resources and development projects to exercise independent judgement.

1.33 An even more galling conflict of interest would occur where State governments or their instrumentalities are themselves the proponents of projects. This bill allows such actions to be covered by approval bilateral agreements, meaning states will be ticking off on their own projects – well and truly the fox in charge of the henhouse.

1.34 The Mary River Dam project in Queensland was one such proposal. The proponent was a State government owned corporation. Dr Chris McGrath submitted that:

> The Commonwealth Environment Minister at the time, Peter Garrett, was dissatisfied with the Coordinator-General's assessment and requested independent experts to review the EIS. They found major deficiencies in it. Based on this independent advice he refused the dam due to "unacceptable impacts" on threatened species such as the Mary River cod and Australian lungfish … Had an approval bilateral been in place at the time when the dam was proposed, it is certain that the Queensland Government would have approved it being built and severe impacts on the listed threatened species would have occurred.[13]

1.35 The existence of a conflict of interest was illustrated well by Mr Klatovsky of the Places You Love Alliance in relation to James Price Point in Western Australia. The relevant approval by the Western Australian environment minister was later found to be unlawful. Mr Klatovsky stated:

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10 ACF, submission 46, p. 3.

11 Western Australian Auditor General, 2011, *Ensuring Compliance with Conditions on Mining,* <https://audit.wa.gov.au/wp-content/uploads/2013/05/report2011_08.pdf>

12 ACF, submission 46, p. 3.

13 Dr Chris McGrath, submission 1, attachment 1, p. 16.

> It was a development where the proponent was not the gas companies; the proponent was the Department of State Development. The Minister for State Development was the proponent, and he also happened to be the Premier. In this circumstance, the Premier of Western Australia was the proponent for a $47 billion gas hut. He was on TV and in the papers every day pushing the case for this development.[14]

Local governments are wholly unsuitable

1.36 This Bill also allows local governments, and potentially other bodies such as unelected expert panels to be accredited to make approval decisions under the EPBC Act. This is a deeply alarming development. Local councils are not financially equipped to make those decisions, and certainly lack the necessary expertise and perspective to do so. It is also well-acknowledged that they are vulnerable to undue influence and corruption. Local governments do a sterling job with their existing responsibilities but are wholly unsuitable to discharge the national interest.

Call-in power in the draft approval bilateral agreements

1.37 Much was made by the Government of the reserve 'call-in' power which has been written into the draft approval bilateral agreements with Queensland and New South Wales. The contradiction in assuring the public that the states are up to the job yet retaining a federal call-in power seems lost on the Government.

1.38 Sadly the call-in power is wholly inadequate to protect the national environment. It sets a test for re-intervention by the Commonwealth at a much higher bar than the current EPBC Act, and requires a level of knowledge about the inadequacy of a state process to properly assess a proposal, and in a limited period of time (before the approval is issued) that will be impossible for the federal Environment Minister to meet given reductions in staff. Where will the federal staff be to monitor the states in order to inform the federal environment minister in a timely manner of the need for a call-in? They will have been redeployed or sacked, according to the evidence given to me in Budget Estimates 2014. Alternatively, the call-in can be exercised if the state government tells the federal government that the state is falling short – and one can hardly expect a state to own up to being environmentally inadequate.

1.39 There will be no political will for the federal Environment Minister to call projects in, no staff to alert them in a timely manner of the need to do so, and no realistic prospect of the high bar for a call-in being able to be met.

1.40 The federal government already only has a sliver of environmental powers – they only have responsibility when there is a significant impact on a matter of national environmental significance. Plans to retain just a sliver of that sliver will lead to business uncertainty, and the hand-off remains an abrogation of their responsibility to protect all nationally and internationally significant parts of Australia's environment. The role of the federal government in protecting our national environment should not be open to negotiation by big business and state governments.

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14 Committee Hansard, 10 June 2014, p. 1.

Lack of evidence base to justify handing off environmental powers

1.41 The duplication argument used by the government to justify washing their hands of all environmental responsibilities right when they are most needed is a furphy.

1.42 There is no credible evidence of the need for these proposed reforms, nor evidence that the environmental risks can be managed. Government appears to have blindly accepted the claims of the mining industry and Business Council of Australia about duplication and the compliance costs of environmental protection laws without seeking a sound evidence basis for those claims. Even the industry themselves cannot come up with concrete examples of where the federal environmental approval phase of an assessment process, a mere 28 days, delays a project.

1.43 Any delays in the environmental approvals process would occur during the assessment phase (often because the developer has not provided sufficient information), so it is at the assessment phase that reforms should be directed – not at the approval phase which cannot deliver any significant streamlining and will simply deliver environmental corner-cutting.

Handing over the water trigger

1.44 The proposal in this Bill to hand over the recent federal protection for water from significant impacts by coal and coal seam gas (CSG) (the "water trigger") is a slap in the face to all communities facing the onslaught of coal and CSG on their land and water.

1.45 The abject failure of state governments to properly regulate the industry and to legislate adequate protections for ground and surface water was precisely the reason the rural Independents and Greens worked to ensure the previous Labor Government implemented federal protection. The water trigger came about as a result of overwhelming community concern about the lack of appropriate protection for groundwater by the States, and the continuing scientific concern about long term impacts on groundwater quality and quantity.

1.46 Giving away these newly acquired federal powers to act in the national interest to protect water – and by extension, farmland, communities, the climate and the Reef – is a kowtow to the big miners the likes of which is sadly becoming common under this Government.

> The Lock the Gate Alliance and our members are strongly supportive of the water trigger because we understand that water resources cross jurisdictional boundaries, and decisions about mining projects that have irreversible impacts on water require the perspective that only a Commonwealth trigger can provide.[15]

1.47 The Wilderness Society simply describes the proposal as 'not only a broken promise, but also a potential disaster'.[16]

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15 Lock the Gate Alliance, submission 24, p. 5.

16 The Wilderness Society, submission 56, p. 4.

Conclusion

1.48 The Australian Greens believe that passing this Bill to facilitate the handing over of Commonwealth environmental approval powers to States, Territories, local government, and other as yet unspecified persons would be hugely destructive backwards step.

1.49 The hand-off of proposal under the EPBC Act as it stands is a recipe for environmental destruction, but this bill worsens the situation by giving away new powers to protect water, by removing the requirement for federal standards to be reflected in state laws and by allowing local Councils or other accredited agencies to perform the obligations of the Commonwealth.

1.50 This bill ensures that the standards currently enshrined in the EPBC Act will be watered down and disregarded, as they may exist in mere guidelines, plans or policies.

1.51 When combined with the existing pro-development attitude of state governments and the lack of political will to refuse development applications, the atrocious environmental track record of states, the states' role to promote the state and not the national interest, the staff cuts in various state environment departments, the discretion inherent in decision-making that means it matters who makes the final decision, the existing inadequacy of state environmental laws, and the inherent conflict of interest where state governments are the proponents for development that they will now have the final tick off on, the Abbott Government has confirmed itself to be the worst federal government for the environment in Australia's history.

1.52 This bill is the biggest step backwards in environmental protection in 30 years, and the Australian Greens will fight it with every fibre of our being.

Recommendation: That the bill not be passed.

Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014

1.53 The Australian Greens support the principle that proponents should pay for the cost of regulating their damaging conduct, but cannot support this Bill.

1.54 There is a well-recognised literature on 'regulatory capture' in which a regulatory agency which is supposed to act in the public interest is compromised by too-close relationships with those it is charged with regulating. The Department of Environment, in through Senate Estimates hearings in February 2014 has displayed a startling lack of engagement with this concept, even though it is a key risk to their effectiveness.

1.55 Given the chronic under-resourcing and consequent under-staffing of the Department of Environment, the Australian Greens fear that dependency on fees from proponents will further compromise the Department's ability to maintain its independence. Without proper safeguards, the risk of regulatory capture flowing from dependence on fees for service cannot be managed.

Recommendation: That the bill not be passed.

Senator Larissa Waters
Senator for Queensland