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STATEMENT ON CHANGES TO COMMONWEALTH POWERS TO PROTECT AUSTRALIA'S ENVIRONMENT

*"The prognosis for the environment at a national level is highly dependent on how seriously
the Australian Government takes its leadership role."*

Australian State of the Environment Committee, 2011

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*"The prognosis for the environment at a national level
is highly dependent on how seriously the Australian Government takes its leadership role."*

Australian State of the Environment Committee, 2011¹

In August 2011, COAG agreed on major reform of environmental regulation across all levels of government to "reduce regulatory burden and duplication for business and to deliver better environmental outcomes".² This sensible and responsible decision was overturned in April 2012 following lobbying by the Business Council of Australia, with the Commonwealth now agreeing to hand over its environmental approval powers to state governments.³

This action by the Commonwealth, without any prior consultation with the wider community, will take environmental policy in Australia back decades. It will not only damage the environment, it will also result in project delays because of the inevitable opposition to such poor environmental protection.

Since the intervention of the Hawke government in the early 1980s there has been a maturing of environmental policy in Australia. In 1997, COAG agreed to delineate areas of environmental responsibility, with the focus of the Australian Government being on the protection of matters of national environmental significance, including its international treaty obligations such as the *1993 Convention on Biological Diversity*.⁴ This was embedded in law by the Howard government when it introduced the *Environment Protection and Biodiversity Conservation (EPBC) Act* in 1999.

The 2011 *State of the Environment Report* documents the continuing decline in the health of Australia's environmental assets: our land, water and marine ecosystems.⁵ Taxpayers are now contributing tens of billions of dollars each year to repair past damage to our natural capital. A primary role of the EPBC Act is to ensure that future development does not cause further damage to nationally significant environmental assets. Its influence therefore is fundamental to the future health of Australia's environment.

The Business Council's paper contains very little evidence to support its claims that the Commonwealth's environmental approval powers are putting at risk billions of dollars of investment, and that this is having adverse impacts on the Australian economy.⁶

However, the EPBC Act is only triggered when a development is likely to have a significant impact on matters of national environmental significance. As a result of this standard, only 1,022 projects, from across the whole of Australia, have ever required formal Commonwealth approval, and of these only 10 (one a year on average) have been rejected.^{7,8} Conditions have been placed on a total of 1,773 projects.⁹ Without conditions, these projects would have likely led to significant adverse impacts on the environment.

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.¹⁰ 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.¹¹ This decision was supported by the leader of the National Party, Mr Warren Truss, who said "the environmental evidence was overwhelming and Mr Garrett had no option but to reject (the) ill-conceived proposal."¹²

There is no justification for handing Commonwealth approval powers to the states. It puts at risk decades of national environmental reform. Instead, this paper proposes an alternative suite of reforms, drawing on the recommendations of the Hawke Review of the EPBC Act in 2009, to help deliver COAG's dual goals to "reduce regulatory burden and duplication for business" and at the same time "deliver better environmental outcomes" for Australia.

1. Reducing regulatory burden and duplication for business

One of the major concerns of business about the operation of the EPBC Act lies in the duplication of state and Commonwealth environmental assessment processes and uncertainty about the expectations of different regulators. As noted by COAG in August 2011, “reforms are needed to better integrate state, territory and commonwealth regulatory arrangements for environmental protection.”¹³

There have now been several reviews of the operation of state and Commonwealth development assessment processes: a Senate inquiry into the operation of the EPBC Act in 2009¹⁴; the statutory ‘Hawke Review’ of the EPBC Act in 2009¹⁵; and a Productivity Commission report into planning, zoning and development assessments in 2011.¹⁶

The Productivity Commission’s research report found that the different local, state and Commonwealth planning, zoning and development assessment systems constitute one of the most complex regulatory regimes in Australia. It highlighted a set of leading practices, including simplifying development instruments, improving development assessment criteria and processes, and public participation and transparency standards.

The Hawke Review, through a rigorous and consultative review process, proposed a comprehensive package of reforms to improve, expand and refine the Act “directed at better placing the Australian Government to manage the environmental challenges of the future.”¹⁷ These reforms have only been partially adopted by the government, and a number of recommendations aimed at strengthening the Act have been ignored.¹⁸

This paper highlights a number of opportunities to streamline state and Commonwealth development assessment processes and at the same time improve environmental standards.

We recommend COAG focus on three priorities:

1. Introducing the option for a single ‘one-stop-shop’ assessment process to reduce duplication for business;
2. Improving national environmental assessment standards to streamline assessment processes; and
3. Developing better guidelines and standards to improve certainty for business.

1.1 One-stop shop assessment process

Each state has had a bilateral agreement in place that accredits some of its planning processes as suitable for conducting environmental impact assessments on behalf of the Commonwealth. However in the past five years only 30 per cent of project assessments were delegated to state governments.¹⁹

The Hawke Review concluded that “the main issue with the assessment bilateral agreements is the breakdown in relations between state and territory agencies and Commonwealth assessors.” It recommended improving procedures and cooperation between agencies, and standardising environmental impact assessment approaches.²⁰

Duplications between state and Commonwealth processes can be reduced if business is given the option to have state governments administer the environmental assessment process on behalf of the Commonwealth.

Under this arrangement, state government agencies would become the ‘one-stop-shop’ single entry point for business.

Under this one-stop-shop model, a developer would have the option to submit their project referral to the relevant state government agency, which would then automatically refer it on to the Commonwealth, rather than a developer having to submit referrals separately to the two levels of government.

The Commonwealth Environment Minister would still retain final EPBC Act approval powers, but there would be one process, one set of documentation and common public participation periods.

In practice this would mean that:

1. Each government would specify its requirements for assessment (if required), and the state government would consolidate these requirements in one document for the developer. These requirements would have to meet national assessment standards.
2. The developer would then (if required) submit one environment impact report/statement that covers the requirements of the two levels of government.
3. The state and the Commonwealth would then assess the development independently (but concurrently), or in those instances where there is an assessment bilateral in place, the state would assess the development on behalf of the Commonwealth.
4. The state and the Commonwealth would make independent approval decisions according to their respective legislated standards, but these approvals would be consolidated within one approval document containing a combined set of approval conditions.

Successful administration of the one-stop-shop process would rely on improved cooperation between both levels of government - in coordinating and clarifying information requirements for developers, in liaising on processing times and key decisions, and in consolidating state and Commonwealth conditions into one simple approval. This could be as simple as establishing a Commonwealth environment office in each major city.

1.2 Improved environmental assessment standards

As well as giving business the option to use a one-stop-shop arrangement, COAG should agree to reforms that enable the Commonwealth Environment Minister to delegate more project assessments to state governments under national environmental assessment standards. This would streamline assessment processes and reduce uncertainties for business in negotiating different requirements across different jurisdictions.

The first step would be for COAG to agree to a set of national environmental assessment standards:

- for determining whether the action is likely to lead to better environmental outcomes;
- to ensure all significant impacts on each of the eight matters of national environmental significance are assessed according to Commonwealth guidelines, using appropriate scientific and technical standards and survey methodologies;
- to ensure that state processes meet, at the very least, minimum public information and consultation standards provided for in the EPBC Act; and
- to ensure that state processes meet, at the very least, minimum third party review rights provided for in the EPBC Act.

The development of national environmental assessment standards would require a full public consultation process to ensure they were acceptable and appropriate.

State planning and environmental assessment systems would need to be upgraded to meet these standards. State government laws and processes are not adequate for protecting matters of national environmental significance, and in many cases do not meet national standards for public participation, transparency, information, review and objective decision-making.

Once state systems are improved to meet these standards, they would then be able to be accredited, and bilateral agreements would be signed, delegating to states the ability to conduct assessments on behalf of the Commonwealth.

These bilateral agreements would only succeed on the condition that states accept the following Commonwealth safeguards:

1. The Commonwealth Environment Minister would retain call-in or veto powers for individual projects;
2. The Commonwealth Environment Minister would conduct project assessments in those instances where the state government is the project proponent;
3. Annual reports would be prepared by states on their implementation of the bilateral agreements which would be audited by an independent National Environment Commission; and
4. The Commonwealth Environment Minister would retain the right to withdraw accreditation of state assessment processes at any time if national standards are not being adhered to.

The Hawke Review's recommendation that an independent National Environment Commission be established is particularly important to safeguard the delegation of more environmental assessments to states.²¹ The Review recommended that a National Environment Commission take on an assurance role in auditing the performance of states against standards and agreements and "take on responsibility 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."

The National Environment Commission could function in a similar way to the National Water Commission, including undertaking biannual reviews of progress.

1.3 Better guidance for business

The 2010-11 annual report of the Commonwealth environment department shows that 72 per cent of projects referred to the Commonwealth over the life of the Act have not needed further assessment and approval,²² either because:

- they were found to not have a significant impact on any of the 8 matters of national environmental significance (52 per cent of projects); or
- the Minister decided that, provided a project was carried out in a 'particular manner', it would not cause a significant impact (20 per cent of projects).²³

This represents a substantial amount of compliance and assessment work by business before finding that approval under the EPBC Act was not needed.

The Productivity Commission recommended that the Commonwealth provide better guidance on what constitutes a significant impact on a matter of national environmental significance.²⁴ This would provide more certainty to developers in determining whether their project triggers the Act, avoiding the time and cost spent in completing unnecessary referrals.

The Commonwealth could use guidelines and standards to prescribe how projects could be carried out to avoid or mitigate impacts on matters of national environmental significance. As long as the project referral could demonstrate that it was complying with the relevant guideline or standard, and that the project was not going to contribute to a cumulative impact, the Minister could decide the project required no further assessment under the EPBC Act.

The government could develop sets of science-based guidelines or standards for:

- some or all of the eight matters of national environmental significance;
- classes of actions, for example, activities associated with releasing water to Ramsar sites from coal seam gas extraction wells; and/or
- specific business sectors, for example, residential and urban development or gas exploration.

Whilst guidelines and standards can improve certainty, developers should also respect the rights of civil society to appeal the decisions made under them.

The vast majority of developments that trigger the EPBC Act, 73 per cent in 2010-11 (Table 1), do so because of their potential to have a significant impact on threatened species and threatened ecological communities and/or migratory species.

This is the obvious starting point - to develop scientific guidelines that enable developers to more readily assess whether their project is likely to have a significant impact on threatened and migratory species. The government could also develop more specific standards that indicate acceptable approaches to avoiding or mitigating impacts on threatened and migratory species. There are a number of such science based, peer-reviewed standards which could be drawn upon.

Better guidance on these matters would mean fewer projects need to be referred to the Commonwealth, reducing the regulatory burden for business.

Table 1. Matters of National Environmental Significance Protected in 2010-11²⁵

MATTER OF NATIONAL ENVIRONMENTAL SIGNIFICANCE	NUMBER OF PROJECTS TRIGGERED (%)
1 World Heritage values of a World Heritage listed property	4
2 National Heritage values of a National Heritage listed place	5
3 The ecological character of a declared <i>Ramsar</i> wetland	6
4 Listed threatened species and ecological communities	51
5 Listed migratory species	22
6 Nuclear activities with a significant impact on the environment	1
7 Commonwealth marine environment	10
8 The Great Barrier Reef Marine Park	1
<i>Total</i>	<i>100</i>

2. Delivering better environmental outcomes

The major flaw of the environmental impact assessment regime of the EPBC Act is that it does not effectively manage biodiversity, nor does it effectively manage the cumulative impact of multiple developments.²⁶

The 2011 *State of the Environment Report* documented extensive evidence of the continued decline in the condition of Australia’s land, water and marine resources.

These pressures on Australia’s environment will only intensify with climate change and population growth, and the expanding global demand for energy, food and minerals. The expansion of coal seam gas is one example of the potential to create a series of compounding and additive effects that, if not carefully planned for, may be beyond the capacity of natural systems to absorb. Australia also faces the challenge of accommodating a projected 14 million more people in 2050,²⁷ and most of this will be through urban development in sensitive coastal areas.

By themselves, individual developments may have an insignificant impact on the environment, but when combined, their cumulative impact can result in long-term damage to Australia’s land, water and marine ecosystems.

For example, earlier this year the World Heritage Committee outlined its concerns for the Great Barrier Reef World Heritage Area and “the potentially significant impact on the property’s Outstanding Universal Value resulting from the unprecedented scale of coastal development currently being proposed”.²⁸

By far the most effective way to “deliver better environmental outcomes” is to invest in doing the long-term landscape-scale planning to determine where, and under what conditions, development can safely occur.

If COAG is to deliver on its August 2011 commitments, it needs to shift away from individual project-by-project development assessment and approvals, towards a more strategic and long-term approach to guiding development and sustainable use of natural resources, and managing the collective impacts of development on the environment.

This will not only deliver the second part of COAG's August 2011 commitment to "deliver better environmental outcomes, including through greater use of regional planning and strategic assessments,"²⁹ it will also create a greater level of certainty for developers and the community.

The EPBC Act already has provisions for regional environment plans and strategic assessments.³⁰ The Hawke Review recommended that the government "expand the role of strategic assessments and bioregional plans so that they are used more often; and strengthen the process for creating these plans and undertaking these assessments, so they are more substantial and robust".³¹

2.1 Regional Environment Plans

The EPBC Act provides for regional environment plans to conserve biodiversity and protect other environmental values.

Regional environment plans are a way of taking a more proactive approach to protecting the environment and conserving biodiversity by integrating environmental assessment, natural resource management and land use and development planning. However, they have had limited use in the terrestrial environment to date.

Regional environment plans would identify:

- areas where matters of national and state environmental significance are located in a landscape;
- the threats to those assets; and
- the mechanisms to guide and coordinate actions (including government funding, land use plans and conservation plans) to protect and manage threats to environmental assets, especially those actions likely to have a cumulative impact.

The 56 natural resource management regions across Australia would be the most appropriate scale at which to do these plans. Regional environment plans should be done collaboratively, with both Commonwealth and state/territory governments, local councils, other environmental management and planning groups, and industry.

To do regional environment plans well requires a government commitment to long-term planning, cooperation, and a significant investment in the scientific information to underpin the planning.

2.2 Strategic Environmental Assessments

The EPBC Act also provides a mechanism for the strategic assessment of plans, policies and programs, by which governments and developers can assess and manage impacts from multiple developments and activities on the environment:

- A plan could be, for example, a local council's land use plan, and the strategic assessment might consider different land use zoning tools as mechanisms for avoiding impacts on matters of national significance.
- A policy could be, for example, a bushfire management policy of a state government agency, and the strategic assessment might consider different options for managing bushfire risk that avoid impacts on threatened species.
- A program could be a state government's coastal management, planning and development framework, as is currently the subject of the Queensland Government's Great Barrier Reef strategic assessment.

Strategic assessments can be used to identify matters of both national and state environmental significance therefore streamlining and simplifying development planning by enabling all environmental values to be considered together.

Following a strategic assessment, if the Commonwealth Environment Minister is satisfied the plan, policy or program adequately addresses impacts on matters of national environmental significance, the Minister can endorse it. The Minister can then approve classes of actions within the plan. In other words, if the Minister is satisfied a plan, policy or program will deliver acceptable environmental outcomes, then developments that are in accordance with that plan, policy or program will not require further Commonwealth assessment.

Strategic assessments done well can be of benefit to the environment. Rather than leaving the assessment until after a plan, policy or program has been finalised and actions set in place, strategic assessments completed either before, or even at the same time as, the development of a major plan or policy are more likely to deliver better environmental outcomes.

Strategic assessments can also be of benefit to business. They can provide certainty on where sustainable development can occur and the type of activities that will be allowed, and they clarify environmental requirements and conditions up-front and early in the planning or project development process. Strategic assessments also exempt certain actions from the need for further assessment under the EPBC Act.

If strategic assessments are to deliver better environmental outcomes, the EPBC Act would need to be amended to specify the following standards:

1. Objective goals or targets for environmental outcomes, such as 'improve or maintain', and resource use or pollution caps for ensuring cumulative impacts do not exceed ecological thresholds;
2. Minimum requirements for information on environmental values, how environmental values are to be measured, and use of objective decision-making tools;
3. Clear decision-making rules, trigger criteria or zoning to guide approval decisions following endorsement - this might include 'traffic light' zoning that identifies areas off limits to certain development and areas where development can go ahead under specified conditions;
4. Comprehensive monitoring, evaluation and compliance regimes to be put in place to check whether outcomes are being achieved and approval conditions are being adhered to;
5. Comprehensive public participation processes that provide adequate information and allow sufficient time for members of the public to consider and comment on the assessment; and
6. Flexibility mechanisms that allow changes to be made to the plan and the approval conditions, if new information comes to light or experience shows approaches need to change.

One of the roles of a National Environment Commissioner would be to advise the Minister on the terms of reference for, and the quality of, a strategic assessment.

2.3 A Healthy Landscapes and Development Planning Program

To do regional environment plans and strategic assessments well takes substantial investments of time and resources.

Significant upfront investment is required to gather the science needed for sound decision-making and to meet the high standards of public participation and transparency.

COAG should agree to a \$300 million Healthy Landscapes and Development Planning program (on a 1:1 matching basis) for expanding regional environment planning and strategic assessments in areas of Australia that are most subject to the cumulative impacts of development. COAG should also consider requiring contributions from business.

The Healthy Landscapes and Development Planning Program would:

1. Fund regional plans and/or strategic assessments for priority regions where there are known development pressures that are likely to have cumulative impacts on matters of national environmental significance, such as urban growth areas, sensitive coastal areas and resource development areas;
2. Integrate regional plans and strategic assessments with matters of state and regional environmental significance, local and state land use plans and regional natural resource management plans; and
3. Fund comprehensive scientific assessment of environmental values and assets, including but not limited to the eight matters of national environmental significance.

The Commonwealth should ensure regional environment plans and strategic assessments are underpinned by the following safeguards, by stipulating a condition of funding is:

1. A requirement that the plan, policy or program must demonstrate that it will improve or maintain environmental outcomes;
2. A requirement that the plan, policy or program must protect matters of national environmental significance, and guide their management by providing greater certainty on where sustainable uses can occur, the type of activities that will be allowed and the conditions under which activities may proceed;
3. Clear mechanisms (such as spatial zoning or standards and codes) to deal with both broad and fine scale environmental values and impacts;
4. Adherence to mandatory information standards for assessment (including consideration of alternative development scenarios and cumulative impacts);
5. Comprehensive requirements for public participation in both the assessment, planning and approval process;
6. The establishment of long-term resource condition monitoring to monitor changes in the environment, and guide any changes to the plan, policy or program;
7. Clear mechanisms to review and update plans to deal with future impacts and new information that may not be foreseeable at the time of the plan or assessment;
8. Ongoing independent performance auditing to ensure endorsed plans, policies or programs and their conditions are being complied with; and
9. Call-in powers where an endorsed plan, policy or program is not achieving required outcomes.

3. Conclusion

The 2011 *State of the Environment Report* documents the continuing decline in the health of Australia's environmental assets: our land, water and marine ecosystems. How governments and communities manage the ever-increasing demands on Australia's natural assets and the ecosystems they are a part of, is fundamental to the future of Australia as a prosperous nation with a healthy environment.

COAG's April 2012 agreement to hand over Commonwealth environmental approval powers to state governments puts at risk decades of environmental reform, and risks the health of environmental assets which the Commonwealth has an obligation to protect.

Instead, the Commonwealth should pursue an alternative suite of reforms to reduce "regulatory burden and duplication for business" and "deliver better environmental outcomes" for Australia, by:

1. Agreeing to a Healthy Landscapes and Development Planning Program to expand regional environment planning and strategic assessments in areas of Australia that are most subject to the cumulative impacts of development;
2. Introducing the option for business for a single 'one-stop-shop' assessment process to reduce duplication of state and Commonwealth processes;
3. Improving national environmental standards to streamline assessment processes; and
4. Developing guidelines and standards to give greater certainty to business.

Notes and References

- 1 State of the Environment 2011 Committee (2011) *Australia: State of the Environment 2011*. Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities. Canberra: DSEWPaC, 2011.
- 2 COAG Communique, COAG meeting of 19 August 2011
- 3 COAG Communique, COAG meeting of 13 April 2012
- 4 COAG (1997) *Heads of agreement on Commonwealth and State roles and responsibilities for the environment. November 1997*.
- 5 As for Note 1.
- 6 Business Council of Australia (2012) *Discussion paper for the COAG Business Advisory Forum*, April 2012.
- 7 Australian Government Department of Sustainability, Environment, Water, Population and Communities (2011) *Annual Report 2010-2011*. Canberra. Appendix A
- 8 As for Note 7. Over the life of the Act, 10 projects have been refused approval under the EPBC Act: the Lauderdale Quay Housing and marina development project in Tasmania; the Christmas Island phosphate mines (later overturned in the Federal Court); a residential development in Townsville; the Traveston Crossing Dam in Queensland; a rezoning of land for residential development in Shoalhaven local government area, New South Wales; the Nobby's Lighthouse redevelopment in Newcastle; an irrigation water release in Tasmania; a subdivision and development on Kangaroo Island; a residential building on Norfolk Island; and electrocution of spectacled flying foxes to protect an orchard in Queensland.
- 9 As for Note 7.
- 10 QLD Coordinator-General's Evaluation Report: *Synopsis - Traveston Crossing Dam Stage 1*. October 2009.
- 11 "Traveston Dam gets final no", Media release, 2 December 2009. Peter Garrett, Minister for the Environment, Heritage and the Arts. <http://www.environment.gov.au/minister/archive/env/2009/mr20091202a.html>
- 12 "Traveston Crossing Dam Knocked out", Media Release, 11 November 2009. Warren Truss, Leader of The Nationals. <http://www.warrentruss.com/press.php?id=1501>
- 13 COAG Communique, COAG meeting of 19 August 2011.
- 14 Senate Standing Committee on Environment, Communications and the Arts (2009) *The operation of the Environment Protection and Biodiversity Conservation Act 1999*. First Report. 2009.
- 15 Australian Government Department of the Environment, Water, Heritage and the Arts (2009) *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, October 2009, Final Report*. Commonwealth of Australia.
- 16 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment*. Research Report, Canberra.
- 17 The 2009 review of the EPBC Act involved 220 submissions, 119 supplementary submissions, as well as face-to-face consultations in each State and Territory with industry, NGOs, the community, individuals, research groups and academics, individual corporations and government agencies from every level of government in every state and territory.
- 18 Australian Government Department of Sustainability, Environment, Water, Population and Communities (2011) *Australian Government response to the report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*.
- 19 As for Note 7.
- 20 See Page 65 of the Hawke Review (Note 15).
- 21 See Recommendation 71 of the Hawke Review (Note 15).
- 22 As for Note 7.
- 23 These circumstances are described in Section 77A of the EPBC Act and are referred to as 'particular manner decisions'.
- 24 As for Note 16.
- 25 As for Note 7. Derived from "particular manner" and "controlled action" statistics in Table 8 of Appendix A
- 26 See Chapter 3 of the Hawke Review (Note 15).
- 27 Australian Government Treasury (2010) *The Intergenerational Report*. <http://www.treasury.gov.au/igr/igr2010/>
- 28 United Nations Educational, Scientific and Cultural Organization, *Convention concerning the protection of the world cultural and natural heritage. World Heritage Committee Thirty-sixth session*. Saint-Petersburg, Russian Federation, 24 June – 6 July 2012.
- 29 COAG Communique, COAG meeting of 19 August 2011.
- 30 See Part 12, Division 2 (bioregional plans) and Part 10, Division 1 of the Act (strategic assessments).
- 31 See Recommendation 6 of the Hawke Review (Note 15).