

**Dr Chris McGrath**

LLB (Hons), BSc, LLM (Environmental Law), PhD

**Barrister-at-Law**

Room 423-35, Chamberlain Building

The University of Queensland

Brisbane Qld 4072 Australia

Website: <http://www.envlaw.com.au> ABN 40 110 324 909

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20 May 2014

Christine McDonald

Committee Secretary

Senate Standing Committee on Environment and Communications

Parliament House

CANBERRA ACT 2600

Dear Ms McDonald

**Re: Submission to inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* and the *Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014***

I write in response to your letter of 19 May 2014 inviting me to provide a written submission to the Senate inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* and the *Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014*.

I note that the Committee has been requested to review the Bills and gather evidence on matters including the:

- potential impacts of delegating<sup>1</sup> environmental approval powers to State and Territory governments;
- maintenance of high environmental standards;
- benefits of streamlining and reducing red tape; and
- potential impacts of cost-recovery on environmental assessment and approval processes, including budgetary impact, cost impacts for proponents and impacts on process timing.

My background for making this submission is that I am a barrister and a senior lecturer in environmental regulation at The University of Queensland.<sup>2</sup> I hold a BSc in ecology, an LLB, LLM and PhD. The topic of my PhD was, “How to evaluate the effectiveness of an environmental legal system”.<sup>3</sup> I have acted and am currently acting as a barrister in litigation under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC

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<sup>1</sup> A better choice of words would be “accredit”. Approval bilaterals do not “delegate” approval powers to State and Territory governments. Approval bilaterals accredit approvals by State or Territory governments given in accordance with an accredited management arrangement or authorisation process to have the effect of satisfying any approval requirements under Part 9 of the EPBC Act (see ss 29 and 46 of the EPBC Act). Delegation has a technical meaning under Commonwealth law and the EPBC Act. Section 515 of the EPBC Act allows the Minister to delegate his or her powers or functions to the department and director administering the Act. There are other general delegation powers in the *Acts Interpretation Act 1903* (Cth), ss 34AAB-34A and *Public Service Act 1999* (Cth), s 78. Neither the power in s 515 nor the other general powers of delegation appear to allow the Commonwealth Minister to delegate decisions under Part 7, 8 or 9 of the EPBC Act to a State or Territory minister or public servant. Regarding the legal constraints on delegation see, Aronson M and Groves M, *Judicial review of administrative action* (5<sup>th</sup> ed, Thomson Reuters, Sydney, 2013), Ch 6.

<sup>2</sup> This submission does not represent the views of The University of Queensland.

<sup>3</sup> My thesis is published as McGrath C, *Does environmental law work? How to evaluate the effectiveness of an environmental legal system* (Lambert Academic Publishing, 2010), available at <http://www.envlaw.com.au/delw.pdf>

Act)<sup>4</sup> and involving Queensland's mining, planning and nature conservation laws. I have published several articles regarding the EPBC Act<sup>5</sup> and in 2006 I was asked by the Australian State of the Environment Committee to evaluate the effectiveness of the Act.<sup>6</sup> In my practice as a barrister I have acted for governments, developers, individuals and community groups, including companies making referrals for large projects under the EPBC Act.

I attach a copy of an article that I recently authored in the *Environmental and Planning Law Journal*, which analysed the "one stop shop" policy that the first of the Bills is intended to facilitate.<sup>7</sup> The evidence and analysis presented in that article may be of assistance to the Committee in considering the matters it has been requested to review.

I am in the process of reviewing the draft approval bilaterals that have been publicly released for New South Wales (NSW) and Queensland since the attached article was written. If my further analysis is completed by the date required for submissions to the Committee, 30 May 2014, I will endeavour to provide it as a further submission to the Committee.

My initial view is that the proposed approval bilaterals, the Bills being considered by the Committee, and the amendments at a State level in Queensland to facilitate the approval bilaterals are increasing the complexity of approval processes, not simplifying them. I cannot see any significant simplification or potential costs savings that will be achieved under these agreements or the one stop shop policy generally if applications under State laws in fact meet the obligations under the agreements to consider impacts on matters of national environmental significance. The Gillard Government placed on hold the negotiation of approval bilaterals with the States in late 2012 in part to avoid creating a more confusing set of environmental laws than existed at that time.<sup>8</sup> Reading the draft approval bilaterals, in my opinion that course was a wise one.

I am happy for this submission to be published and I do not wish any part of it to remain confidential.

Kind regards

Dr Chris McGrath

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<sup>4</sup> Including: *Booth v Bosworth* [2001] FCA 1453; (2001) 114 FCR 39; (2001) 117 LGERA 168 (the Flying Fox Case); and *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190; (2004) 139 FCR 24; (2004) 134 LGERA 272 (the Nathan Dam Case).

<sup>5</sup> Including: McGrath C, "Bilateral agreements – are they enforceable?" (2000) 17 *Environmental and Planning Law Journal* 485; McGrath C, "The Queensland Bilateral" (2002/2003) 8(38) *Queensland Environmental Practice Reporter* 145; McGrath C, "Key concepts of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)" (2005) 22(1) *Environmental and Planning Law Journal* 20; and McGrath C, "Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest" (2008) 25(5) *Environmental and Planning Law Journal* 324.

<sup>6</sup> McGrath C, "Review of the EPBC Act", paper prepared for the 2006 Australian State of the Environment Committee, Department of Environment and Heritage, Canberra, available at <http://www.deh.gov.au/soe/2006/emerging/epbc-act/index.html>

<sup>7</sup> McGrath C, "One stop shop for environmental approvals a messy backward step for Australia" 31 (3) *Environmental and Planning Law Journal* 164-191. Note that the attached article was written prior to the Bills being released and prior to the draft approval bilaterals for NSW and Queensland being released.

<sup>8</sup> Taylor L and Coorey P, "Bid to cut green tape bogs down in detail" *Sydney Morning Herald*, 6 Dec 2012, <http://www.smh.com.au/federal-politics/political-news/bid-to-cut-green-tape-bogs-down-in-detail-20121205-2avve.html#ixzz32Du3q6Pr>