LOCK THE GATE ALLIANCE
AUSTRALIANS WORKING TOGETHER TO PROTECT OUR LAND, WATER, AND FUTURE

Reply to: Georgina Woods
Policy Officer
PO Box 290
Newcastle 2300
30 May 2014

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

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

Thank you for the opportunity to comment on these Bills.

The Lock the Gate Alliance is a grassroots network of more than 170 community groups and thousands of individuals concerned about the impacts of inappropriate mining. Our members and supporters are rural and regional people that have first-hand experience of the impact of coal and unconventional gas mining on water resources, and other matters of national environmental significance.

Lock the Gate is alarmed about the impact of these Bills on water resources and other matters of national environmental significance, and believe that there will be profound environmental and legal consequences if the Bills proceed in the their current form.

We have no argument with the Government's attempt to introduce cost recovery into the environmental assessment process, but that is not the sole purpose of the *Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014* (the *EPBC Cost Recovery Bill*). The *EPBC Cost Recovery Bill* also introduces formalised processes for "Action management plans" that we believe, in the form it is currently proposed, will lead to unintended environmental harm and poor administrative process.

The *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* (the *Bilateral Agreement Bill*) presents a much more serious threat. We submit that this Bill should be opposed by the Senate, because it will set a system in place for worsening degradation and loss of matters of national environmental significance in contravention of Australia's international responsibilities, the objects of the EPBC Act and the public interest.

1. The EPBC Cost Recovery Bill

After the section of the *EPBC Act* requiring written notice about the assessment approach (s91), this Bill would add a new section, requiring the Minister to advise the proponent of an action that they "may elect under section 132B to submit an action management plan for approval." The new section

132B would enable the proponent to elect to prepare "an action management plan" prior to gaining approval.

The amendments will remove the subsection that current allows the Minister to impose conditions on approval that require the preparation, submission for approval by the Minister, and implementation of a plan for managing the impacts of the approved action on a matter protected by the Act, such as a plan for conserving habitat of a species or ecological community and replaces this with a far more limited provision. The new section 134 (3) (e) would enable a condition to specify that "an action management plan" must be submitted to the Minister for approval, accompanied by a fee, but provides no specifics on what the plan is for, or how it is development. More alarmingly, this condition can only be impose "if an election has been made, or is taken to have been made" by the proponent under the new s132B, electing to prepare such a plan. This section will, in effect, remove the discretion of the Department and the Minister to require management plans to be developed for matters of national environmental significance unless the proponent chooses to.

The proposed s134A gives the Minister the opportunity to seek public comment on a proposed "action management plan" but does not mandate this.

We support moves to provide the opportunity for public comment on the making of management plans for managing the impacts of projects on matters of national environmental significant, but believe that this should be a requirement for all management plans, not a discretionary measure for the Minister to determine. We are aware of many recent cases of major resource projects with profound impacts on matters of national environmental significance where the impacts and mitigation measures are poorly described in Environmental Impact Statements, and the projects receive approval regardless, with multiple conditions requiring management plans to be developed to address the deficit of information, understanding and detail evident at the EIS stage. We have long considered this to be highly inappropriate, because of the real risk of cases where approvals are given for activities whose impacts are not properly understood, and found, once the proper and adequate assessment analysis is done, to be far greater than previously thought, with little recourse for correcting the approval decision and revoking the approval.

Nevertheless, we think the approach laid out in this legislation will not entirely resolve this problem.

We also support the basic idea of the new proposed section 143A, which requires Ministerial approval, in writing, of changes to Management Plans, but again believe that public scrutiny of these Ministerial decisions will be crucial to ensuring they are made in the public interest and in accord with the objects of the Act. This section needs amendment to provide for public exhibition of proposed changes to Management Plans, and options for judicial review of decisions under that section, but it also needs to specify the circumstances under which variations will be considered and granted.

Other sections of the Act provide for circumstances where certain actions by the Minister will be taken, for example, if it becomes clear that there will be a significant impact on a matter of national environmental significance that was not foreseen when the approval was given or the action plan prepared. At the moment, this section gives power to the Minister to make any kind of change he or she chooses with no reference to the terms of the approval, or the impact that his or her decision may have on matters protected under Part 3 of the Act. This needs to be amended: in its current form, this section could sanction actions by the Minister that contravene the objects of the Act, and the international conventions to which Australia is signatory.

The Bilateral Agreements Bill

The delegation of approval powers to the States and Territories in the manner proposed in this Bill has the potential to inflict irreversible environmental damage to matters of national environmental significance. In our view, it will be impossible to maintain high environmental standards of assessment, approval, monitoring and compliance if this Bill is passed. Australia will be at risk of breaching its obligations under several international treaties. Furthermore, the measures proposed in this Bill are in direct contradiction to the objects of the EPBC Act.

Accredited approvals

The Committee is asked to inquire into the environmental impacts of delegating approval powers to the States, but this is something for which there is already a process available in the *EPBC Act*. Part 4 of the Act already provides for the Commonwealth to declare that classes of actions do not require approval under Part 9 because they have been declared so by a bilateral agreement and are approved and undertaken in accordance with an approved management arrangement or authorisation process. The process currently available in the Act provides important checks and balances on the hand-over of approval powers to the States which will be completely removed by this Bill. We believe that the States do not have the capacity, jurisdiction or legal and administrative arrangements in place to adequately meet the responsibilities that will be thrust upon them by this Bill and the bilateral approval agreements that are currently on public exhibition.

Under the current arrangements, bilateral agreements to accredit authorisation processes (bilateral approval agreements) must be made in accordance with the objects of the *EPBC Act*, must be tabled in parliament, and are subject to pre-requisites outlined in the regulations. The regulations currently specify, for example that bilaterally accredited management arrangements for World Heritage properties must "must state what must be done to ensure that the relevant World Heritage or National Heritage values are identified, conserved, protected, presented and transmitted to future generations and, if appropriate, rehabilitated." These measures provides the crucial checks and balances to ensure that the Commonwealth is still meeting its international obligations and the objects of the *EPBC Act*.

This Bill instead makes the sweeping change that Part 7 of the Act (actions requiring approval) *will not apply at all to actions covered by bilateral approval agreements*. The bilateral approval agreements currently on exhibition for NSW and Queensland will broadly accredit the planning processes now in place under the NSW *Environmental Planning and Assessment Act 1979* (NSW), *Environment Protection Act 1994* (Qld) and *State Development Public Works Organisation Act 1971* (Qld) with no amendment to those processes, no assessment of their adequacy for this purpose, no prior Strategic Assessment, data collection or cumulative landscape scale review of the current state of matters of National environmental significance.

Similarly, section 87 (1) (a) of the Act already allows the minister to decide that an accredited assessment process will be used for the assessment of the relevant impacts of a controlled action, but this is tempered by section 87 (4) (c), which ensures that an accredited assessment approach can only be used if "the process will ensure that the relevant impacts of the action are adequately assessed." This Bill repeals that section, and replaces it with the rather weaker, "there has been or will be an adequate assessment of the relevant impacts of the action under the process."

There are numerous gratuitous elements in the Bilateral Agreements Bill that will make this process shoddy, loose ended and against the principles of orderly administrative procedures that protect the public interest, including retrospective application. For example:

- Part 2 of Schedule 3 of this Bill would provide that approval is not required under Part 9 of the Act even if the accredited management approach is only partly in force.
- Section 1 of Schedule 4 gives the Minister the power to change bilateral approval agreements and apply the change to actions that have already been approved. In our reading, this section would give the Minister power to sanction something that has been found to be unlawful, by changing the agreement under which it was made and retrospectively applying that change to approval decisions that have previously been made.
- Part 10 of Schedule 5 Part 10 allows bilateral approval agreements to back date their application to the time when the changes made by this amendment Bill come into force: "The amendment made by item 1 of this Schedule **applies to an action that is approved in accordance with a management arrangement or authorisation process** that is a bilaterally accredited management arrangement or a bilaterally accredited authorisation process for the purposes of a bilateral agreement on or after the day this item commences, **regardless of when the agreement is entered into."** The effect of this is that whenever a bilateral authorisation process is entered into with NSW, it will accredit Part 4, the Part 3A transitional arrangements and Part 5 of the *EP and A Act* to be a bilaterally accredited authorisation process. Any action **approved under those sections of that Act after this item of the bill commences**, will become an action to which Parts 7 and 9 do not apply, even if the bilaterally accredited authorisation process is not finalised.
- Section 12 of Schedule 1 of the Bilateral Agreements Bill means that these changes can apply to projects that have already been referred: "The amendments made by this Schedule apply in relation to a referral of a proposal to take an action under section 68 of the *Environment Protection and Biodiversity Conservation Act 1999*, whether made before, on or after the day this item commences."

State's jurisdictional limits

Australia is a signatory to the Convention on Biological Diversity (CBD), the World Heritage Convention (WHC), three international agreements for the protection of migratory birds (CAMBA, JAMBA and ROKAMBA). Each of these environmental treaties needs to be brought into Australian law for the agreements made under them to have effect. This is achieved by the *Environment Protection and Biodiversity Conservation Act 1999*.

It is appropriate and necessary that the Commonwealth of Australia, as the signatory to these agreements, maintains responsibility for their domestic implementation through the *EPBC Act*. The current process available in the Act to accredit authorisation processes at least provides mechanisms to determine whether the State process being accredited is capable of fulfilling these international obligations and the objects of the EPBC Act, and to prevent such an agreement being made if it does not. Without this system, we have no doubt that these matters of international significance, and national importance will be degraded and our obligations breached.

The draft approval bilaterals that are currently on exhibition for NSW and Queensland illuminate why the changes to the *EPBC Act* proposed in this Bill represent a grave dereliction of legal and moral responsibility by the Commonwealth.

In the matter of assessment of matters of National Environmental Significance, NSW is required, under the terms of the proposed bilateral agreement, to "ensure" that there is "adequate assessment" of matters of NES. "Adequate assessment" the draft agreement clarifies, means that the actions are "assessed in accordance with applicable NSW Laws **and to the extent permitted by those Laws** (whether expressly or impliedly)." The reality is that NSW laws do not extend to

providing adequate assessment of matters of national environmental significance. NSW laws do not give effect to the international agreements into which Australia has entered. Furthermore, the matters that NSW decision-makers are required to take into account in making decisions about resource projects are inconsistent with the objects of the *EPBC Act*, and will not provide assessment that a reasonable person would describe as "adequate" for matters that are outside NSW's jurisdiction.

The NSW draft approval bilateral broadly gives accreditation to all assessments and decisions under Part 4, Part 5.1 and transitional Part 3A processes in the *EP&A Act* and the Queensland draft does the same for the *EP Act* and the *SDPWO Act*. There is no mention in either draft of cooperation between the states on matters that cross state boundaries, and no scope for a cumulative impact assessment that addresses cross-border cumulative direct and indirect impacts. There has been no assessment undertaken of the capacity of these laws to fulfil the responsibilities being imposed upon them.

There is also no provision for oversight of state-based decision-makers. Absurdly, the proposed NSW agreement relies upon the NSW decision maker to identify their own limitations in regard to matters that are of national and international significance, but not expressly protected or identified in NSW laws and decision-making: "Where a NSW decision-maker (including the NSW Minister) proposes to make a decision that, in the opinion of the NSW decision-maker, may not be consistent with its obligations under clause 6 (because of a consideration of all matters of relevance under applicable NSW law) the NSW Minister will, as soon as practicable (but in any event before the decision is made) notify the Commonwealth Minister of the proposed decision."

Water trigger

Part 1 of Schedule 3 and section 1 of Schedule 5 of this Bill would reverse a decision of the parliament last year to exclude the water trigger for coal mines and coal seam gas projects from a bilaterally accredited authorisation processes (bilateral approval agreements). The current Government has stated that it is committed to the water trigger, but these changes effectively undo the water trigger completely, since the draft agreements on exhibition at the moment will give this accreditation to the bog standard State planning processes that were in place before the water trigger was created.

We are aware that mining companies are highly critical of sections 24D and 24E of the EPBC Act, which was introduced last year to make the impact of coal mining and coal seam gas on water resources a matter of national environmental significance. 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.

It is well-established in Australia that water management is a matter of national concern, and that water resources like the Murray Darling Basin, the Lake Eyre Basin and the Great Artesian Basin are of fundamental importance to the continent, its people and natural landscapes. Impacts on these resources by large coal mining and coal seam gas are already occurring. Federal oversight of decision-making in this area was long-overdue and still requires far greater attention than it is currently getting.

Water resources that are not of obvious continental scope are equally in need of Federal oversight, because they support communities and industries that are of national importance. One example of these is the drinking water supply of Australia's largest city. Sydney's drinking water catchment

already has several coal mines beneath it, which have led to cracking of major creeks feeding its storages. The threat to the water supply of such a large and important population from mining for coal or coal seam gas is certainly a matter of national significance. Similarly, major water impacts are expected from two large coal mines proposed for one of the most productive agricultural areas in the State and the country – the Liverpool Plains in the State's north west. Each year, the Plains produces enough grain for 365 million loaves of bread, 62.5 million packets of pasta, and 58 million boxes of cornflakes. It is feeding the nation. The threat that this crucial food producing region would be fatally compromised by the loss of highly productive and heavily utilised alluvial aquifers to coal mines is a matter of national importance and huge public interest.

Part 5.1 of the EP&A Act 1979 will become an "accredited authorisation process" if the current draft approval bilateral is made law. This piece of law is currently ill-equipped to assess and prevent major impacts on water resources in the Sydney catchment and the Liverpool Plains, as is evident by the Department of Planning's recent recommendation to approve the Watermark coal mine and failure to implement long-standing recommendations for constraining coal mining under the Special Areas of Sydney's drinking water catchment.

All of these measures are being hurried into place without any assessment being carried out of the efficacy of these State laws to do the job that is being handed to them. In our direct experience, they are not capable of understanding and preventing direct, indirect and cumulative impacts, and the Federal water trigger is needed more than ever.

Conclusion

Thank you for the opportunity to make this submission. We strongly recommend that the Senate rejects the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* and that the Senate only considers passing the *Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014* with significant amendment to limit discretionary power and ensure consistency with the objects of the EPBC Act.