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18 January 2013

Sophie Dunstone
Committee Secretary
Senate Standing Committee on Environment and Communications
Parliament House
CANBERRA ACT 2600

Dear Ms Dunstone

Re: Submission to inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*

I write in response to the call for submissions to the Senate inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (the Bill).

I am a barrister and a senior lecturer in environmental regulation at The University of Queensland.[1] 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".[2] I have acted as a barrister in litigation under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act)[3] and involving Queensland's mining, planning and nature conservation laws. I have published several articles regarding the EPBC Act[4] and in 2006 I was asked by the Australian State of the Environment Committee to evaluate the effectiveness of the Act.[5]

The Bill is intended to remove the power to enter into approval bilateral agreements under the EPBC Act. It proposes to do so by removing section 46, which provides a power to the Minister administering the EPBC Act to enter into approval bilateral agreements with the States and Territories[6], and making other consequential amendments. There are currently no

[1] This submission does not represent the views of The University of Queensland.
[2] 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
[3] 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).
[4] 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.
[5] 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
[6] For simplicity, I will refer to States and Territories in this submission collectively as "States".

approval bilaterals in force under the Act. There are, however, assessment bilaterals in force for all States and mainland Territories under section 45 of the EPBC Act which accredit State and Territory environmental impact assessment laws for the assessment stage but the Commonwealth retains ultimate decision-making powers. The Bill does not propose to alter the assessment bilateral provisions of the Act.

In summary, I support the Bill's proposed removal of the power to enter approval bilaterals with States under the EPBC Act for four main reasons:

1. Handing approval powers to State governments in approval bilaterals would severely undermine one of the key functions and benefits of the EPBC Act in practice – to provide an appropriate level of oversight on State government-sponsored projects. This would undermine the effectiveness of the Act in achieving its objectives of protecting the environment, particularly matters of national environmental significance, and conserving biodiversity.

2. The current system of initial screening of referrals[7] and assessment bilaterals is sufficient for avoiding unnecessary duplication and there is likely to be little, if any, benefit from approval bilaterals in terms of reducing the delay and cost of approvals for projects around Australia. If approval bilateral were in place, proponents would still need to consider impacts on national environmental significance so there would be no material costs saving. Despite the arguments advanced by the Business Council of Australia (BCA),[8] experience over the past 12 ½ years of the operation of the EPBC Act has shown that the Act is operating efficiency with assessment bilaterals and without approval bilaterals and its approval requirements do not significantly add to the cost or timeframes for approval of projects under Commonwealth, State and local government laws. 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.

3. Approval bilaterals will create greater uncertainty for government, business and the community than exists under the current system.

4. It is unlikely that approval bilaterals will ever be beneficial for the efficient and effective operation of the EPBC Act and the power to enter them should be removed from the Act.

I will address these points in more detail after considering the background to the Bill.

Background to the Bill

The Bill responds to a proposal initiated by a discussion paper from the BCA in April 2012.[9]

[7] Under sections 74B, 75 and 77A.

[8] BCA, Discussion Paper for the COAG Business Advisory Forum, 10 April 2012, available at http://www.bca.com.au/Content/101965.aspx. The support of State governments and the business community for approval bilateral was recorded in the Hawke Review: Hawke A, Bonyhady T, Burgman M, Stein P and Warnock R, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999: Final Report* (Department of the Environment, Water, Heritage and the Arts, October 2009), pp 65-67.

[9] BCA, n 8, pp 5-6.

In response to the BCA proposal, the Council of Australian Governments (COAG) launched a process[10] to develop standards to accredit State and Territory laws under the EPBC Act for approval bilaterals.

The department administering the EPBC Act developed a vaguely-worded "Draft Framework of Standards for Accreditation", which was released to the States and Territories in July 2012 and later published with an added explanatory preface.[11]

In December 2012 the Prime Minister is reported to have informed COAG that the process for accrediting approval bilaterals under the EPBC Act had been placed on hold due to concerns that existing state processes did not always meet the federal protection standards and governments were advised this raised the risk of legal challenge, potentially increasing uncertainty for business.[12] Some states are understood to have been prepared to take over about 90% of environmental decision-making, while others wanted to take on only about 25%, resulting in a potential mishmash of laws around the nation.[13]

The Prime Minister is reported to have asked the States to come back to the federal government with a unified national position about which environmental decision-making powers should be handed over and how they would legislate their pledge to meet high federal standards.[14]

Approval bilaterals will severely undermine the role and importance of the EPBC Act

Handing approval powers to State governments in approval bilaterals would severely undermine one of the key functions and benefits of the EPBC Act in practice – to provide an appropriate level of oversight on State government-sponsored projects. Three examples from the operation of the Act since 2000 illustrate this point: Traveston Crossing Dam; the Gunns Pulp Mill; and cattle grazing in the Victorian high country.

Refusal of the Traveston Crossing Dam (EPBC 2006/3150)

Clear evidence of the importance of retaining Commonwealth approval powers under the EPBC Act is the refusal of the Traveston Crossing Dam in 2009 due to its expected impacts on threatened species such as the Mary River cod (*Maccullochella mariensis*) and Australian lungfish (*Neoceratodus forsteri*). The Queensland Government was the proponent of the dam and the environmental impact statement (EIS) for it was approved by the Queensland Coordinator-General. The Commonwealth Environment Minister at the time, the Hon Peter Garrett MP, requested independent experts to review the EIS and they found major deficiencies in it. His subsequent decision to refuse the dam based on that independent expert advice was an example of good decision-making under the EPBC Act, which prevented a project that would have caused serious damage to several threatened species.

Had an approval bilateral been in place at the time when the Traveston Dam was proposed, it is certain that the Queensland Government would have approved the dam being built and severe impacts on the listed threatened species would have occurred.

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[10] See http://www.coag.gov.au/node/313

[11] See http://www.environment.gov.au/epbc/reform/index.html and http://www.environment.gov.au/epbc/publications/accreditation-standards-framework.html

[12] Lenore Taylor and Phillip Coorey, "Bid to cut green tape bogs down in detail" *Sydney Morning Herald*, 6 December 2012, available at http://www.smh.com.au/opinion/political-news/bid-to-cut-green-tape-bogs-down-in-detail-20121205-2avve.html

[13] Taylor and Coorey, n 12.

[14] Taylor and Coorey, n 12.

Gunns Pulp Mill (EPBC 2007/3385)

The Gunns Pulp Mill is another, though messier, example of the importance of not handing EPBC Act approval powers to State governments under assessment bilaterals. In that case Gunns Ltd made three referrals of the proposed pulp mill under the EPBC Act, the first two of which were withdrawn.[15] For the first two referrals the Minister had decided under s 87 of the EPBC Act that the assessment of the relevant impacts of the pulp mill was to be done under the *State Policies and Projects Act 1993* (Tas) by the Tasmanian Resource Planning and Development Commission (RPDC). However, that process collapsed in March 2007 when Gunns Ltd withdrew from the RPDC process citing delays and the Tasmanian Government controversially passed special legislation, the *Pulp Mill Assessment Bill 2007* (Tas), to fast-track the approval at a State-level. A controversial and tortuous process led to the Commonwealth Environment Minister approving the third referral of the pulp mill in October 2007, subject to conditions requiring a further assessment and approval. The EPBC Act approval rightly placed considerably greater obligations on the project than was imposed by the flawed State government process and this can be seen as another example of the importance of the EPBC Act in providing an independent oversight on large, State-sponsored projects.

Had an approval bilateral been in place at the time when the pulp mill was proposed, it is certain that the Tasmanian Government would have approved it without the more stringent conditions imposed by the Commonwealth Environment Minister.

Refusal of cattle grazing in the Victorian high country (EPBC 2011/6219)

Another clear example of why assessment bilaterals would severely undermine the benefit of the EPBC Act in regulating State government-sponsored projects is the recent decision of the Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities (the Minister) on 31 January 2012 to refuse an application by the Victorian Government for approval of a trial of alpine grazing in Victoria's high country.[16] The Minister refused the application under section 74B of the EPBC Act as "clearly unacceptable" due to its impacts on the Australian Alps Parks and Reserves National Heritage Place. The Victorian Government failed to have that decision set-aside by the Federal Court.[17]

Again, had an approval bilateral been in place at the time when the alpine grazing trial was proposed, it is certain that the Victorian Government would have approved it and, as the Minister's own section 74B decision shows, clearly unacceptable impacts on the Australian Alps Parks and Reserves National Heritage Place would have occurred.

Approval bilaterals have little, if any, benefit for efficiency and costs

The current system of screening referrals and assessment bilaterals is sufficient for avoiding unnecessary duplication and there is likely to be little, if any, benefit from approval bilaterals in terms of reducing the delay and cost of approvals for projects around Australia.

The initial screening of referrals under sections 74B, 75 and 77A as alternatively: clearly unacceptable; controlled actions; not controlled actions; or not controlled actions if taken in a particular manner, is a very efficient way of quickly disposing of actions that do not require

[15] EPBC referral No. 2004/1914, EPBC referral No. 2005/2262 and EPBC referral No. 2007/3385.
[16] EPBC referral No. 2011/6219.
[17] *Secretary to the Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth)* [2013] FCA 1 (4 January 2013) (Kenny J).

further approval. For example, the interim report of the Hawke Review noted that from the commencement of the EPBC Act on 16 July 2000 to 30 June 2008 there were 2,696 referrals of which:

- 603 actions (22%) were found under section 75 to be controlled actions and required approval under the EPBC Act;
- 447 actions (17%) were found under section 77A to be not a controlled action provided the action was taken in a particular manner;
- 1,518 actions (56%) were found under section 75 to be not a controlled action and accordingly did not require approval under the EPBC Act.
- One action was found to be clearly unacceptable under section 74B.[18]

Generally, the timeliness of decision-making under the Act is in accordance with the statutory requirements[19] and, therefore, the majority (76%)[20] of referrals are decided within a few weeks of being made. It is only the 22% of referrals that are determined to be controlled actions that proceed through the assessment and approval stages. Now that assessment bilateral are in place for the States and Territories, many projects, particularly large ones, are assessed concurrently under the EPBC Act and State laws. Consequently, there is normally very little, if any delay in approvals being granted due to the EPBC Act.

A curious inconsistency overlooked by those who argue in favour of approval bilaterals is that proponents would still have to consider impacts on matters protected under Part 3 of the EPBC Act. Only the decision-maker would change. Given that assessment bilaterals are already in place and already allow EPBC Act matters to be incorporated into one assessment process, there do not appear to be any real savings for proponents if approval bilaterals are created.

In arguing for approval bilaterals to be entered to accredit all State governments to approve actions under the EPBC Act, the BCA stated (footnotes in original):

> "The costs and delays associated with environmental impact assessments are significant. An Australian National University study estimated a direct cost to all industries of up to $820 million over the life of the EPBC Act.[21] Further, the referrals process under the EPBC Act is resource and cost-intensive, with referrals ranging from $30,000 to $100,000.[22] But even these costs pale in comparison to the potential costs of delays. For instance, at a coking coal price of $200 tonne, a 12-month delay to a 10 million tonne per annum export coking coal mine in Queensland could reduce Queensland royalty revenue by $170 million.[23]

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[18] Hawke A, Bonyhady T, Burgman M, Stein P and Warnock R, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report* (Department of the Environment, Water, Heritage and the Arts, 2009), p 56.

[19] The Auditor-General, *Performance Audit: Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999* (Audit Report No.38 2002–03, Australian National Audit Office, 2003).

[20] Combining the 17% determined to be not controlled actions if taken in a particular manner and the 56% determined to be not controlled actions for 2000-2008 in Hawke et al, n 18, p 56.

[21] Macintosh A, "The Environment Protection and Biodiversity Conservation Act 1999 (Cth): An Evaluation of Its Cost-Effectiveness" (2009) 26 *Environmental and Planning Law Journal* 337; and Macintosh A, "The EPBC Act Survey Project: Preliminary Data Report" (Australian Centre for Environmental Law, Australian National University, 2009).

[22] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (Melbourne, 2011).

[23] BCA calculation based on a Queensland royalty rate of 7% of value up to $100 million and 10% value above $100 million.

> The Commonwealth's rejection of the Traveston Crossing Dam project in Queensland, following Queensland Government conditional approval of the project, highlights the need to develop a structured approach to environmental impact assessments and the need to accredit state approvals. The Traveston Crossing Dam project was subject to a comprehensive state environmental impact assessment – the whole process took a number of years to complete. The project was approved to proceed at the state level with conditions designed to protect the environment. The Commonwealth minister subsequently vetoed the project under the EPBC Act."[24]

The BCA's use of the refusal of the Traveston Crossing Dam by the Commonwealth Environment Minister unintentionally highlights the contradiction and central problem with their proposal – that, as discussed above, if State governments are granted approval powers under the EPBC Act, State government-sponsored projects that should not proceed will be approved. As the Traveston Crossing Dam shows – the State EIS was fundamentally flawed and the Commonwealth Environment Minister needed to obtain further, independent advice from experts. He then refused to grant approval for the dam. That would not have occurred had an approval bilateral been in place.

The BCA's example of the potential costs of delays is also flawed. For one thing, a delay in approval would not mean that royalties of $170 million were "reduced" in the sense of being lost forever. A delay would merely delay the royalties being paid. But more importantly, as shown in the Wandoan Coal Mine and Alpha Coal Mine case studies given below, in practice the EPBC Act is not materially delaying projects proceeding beyond the time taken for State-level approvals.

The BCA relies on research by Andrew Macintosh from ANU in support of its arguments of the costs imposed by the EPBC Act,[25] but that research is marred by a central fallacy similar to the BCA's use of the Traveston Crossing Dam. The central fallacy in Macintosh's research is he compares the costs of administering the EPBC Act, which can be quantified in monetary terms, with environmental outcomes achieved by the Act, which cannot be quantified in monetary terms. The criteria upon which the cost-benefit analysis is made are never clearly articulated in the article or associated publication of data but it comes to a head in the conclusion where Macintosh states the EPBC Act "was not a cost-effective environmental policy instrument."[26]

Comparing the costs and benefits of environmental legislation is notoriously difficult and unwieldy, particularly for benefits of the environment that cannot be quantified in monetary terms, as Ross Garnaut has commented in relation to climate change policy.[27] Macintosh falls into the trap of comparing monetary administrative costs with non-monetary environmental outcomes as if they were equivalents or at least comparable. He does not state the criteria for the comparison and simply steps over the logical fallacy to reach a conclusion that his analysis does not validly support (i.e. that the EPBC Act was not cost-effective). Such a finding is frequently reached by economists who assess environmental programs for efficiency, cost-effectiveness and cost minimization but who over-simplify the evaluation process and fail to appreciate the wider benefits of environmental programs that cannot be easily attributed to outcomes of the programs.[28]

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[24] BCA, n 8, p 6.
[25] Macintosh, n 21, EPLJ.
[26] Macintosh, n 21, EPLJ p 360.
[27] Garnaut R, *Garnaut Climate Change Review* (Cambridge University Press, Cambridge, 2008), Ch 1.
[28] Bartlett R, "Evaluating Environmental Policy Success and Failure", Ch 8 in Vig N and Kraft M (eds), *Environmental Policy in the 1990s - Towards a New Agenda* (2nd ed, CQ Press, Washington, 1994), pp 173-174.

One example shows the difficulty of comparing the monetary administrative costs with the non-monetary environmental outcomes achieved by the EPBC Act. In the Flying Fox Case the Federal Court granted an injunction under the EPBC Act restraining lychee farmers from using a large electric grid to kill Spectacled Flying Foxes, a species the Court found to be part of the World Heritage values of the Wet Tropics World Heritage Area.[29] Branson J found that the total number of Spectacled Flying Foxes killed as a result of the operation of the grid in 2000-2001 was of the order of 18,000 animals and that at that time the total Australian population of the species did not exceed 100,000.[30] Branson J found:

> "… the probable impact of the operation of the Grid, if allowed to continue on an annual basis during future lychee seasons, will be an ongoing dramatic decline in the Spectacled Flying Fox population leading to a halving of the population … in less than five years. [This would] render the Spectacled Flying Fox an endangered species in the Wet Tropics World Heritage Area in Australia in less than five years [and] have a significant impact on the world heritage values of the Wet Tropics World Heritage Area."[31]

Spectacled Flying Foxes are considered important for seed dispersal, evolutionary processes and general ecological function within the rainforests of North Queensland,[32] now largely contained in the Wet Tropics World Heritage Area, but how can this ecological function and heritage be given a monetary value? Quite simply – it can't. This means that while the EPBC Act was instrumental in stopping culling[33] that appeared to be wiping out a keystone species for World Heritage rainforests, the benefits of this outcome cannot be given a monetary value to weigh against the administrative costs of the EPBC Act. As a consequence the methodology adopted by Macintosh, in addition to being poorly defined, contains a central fallacy. Monetary administrative costs cannot be compared with non-monetary environmental outcomes, particularly as Macintosh attempts to do without ascribing value to the environmental outcomes actually achieved.

Despite the arguments advanced by the BCA and by Macintosh, experience over the past 12 ½ years of the operation of the EPBC Act has shown that the Act is operating efficiency with assessment bilaterals and without approval bilaterals and its approval requirements do not normally significantly add to the cost or timeframes for approval of projects under Commonwealth, State and local government laws. There are some examples where the EPBC Act approval has taken longer than State approvals, such as the Gunns Pulp Mill discussed above, but these are exceptions that can normally be avoided if a proponent refers their project under the EPBC Act early and does not wait until all State approvals have been obtained.

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[29] *Booth v Bosworth* (2001) 114 FCR 39 (Branson J). See McGrath C, "The Flying Fox Case" (2001) 18 *Environmental and Planning Law Journal* 540. The author was junior counsel for the applicant in this case.

[30] *Booth v Bosworth* (2001) 114 FCR 39 at 52 [48] and 60 [81]. For a peer-reviewed analysis of the effects of this culling on the Spectacled Flying Fox species, see McIlwee AP and Martin L, "On the intrinsic capacity for increase of Australian flying-foxes (*Pteropus spp*, Megachiroptera)" (2002) 32(1) *Australian Zoologist* 76, esp at 93-94.

[31] *Booth v Bosworth* (2001) 114 FCR 39 at 65 [104] – 66 [106].

[32] Richards GC, "The Spectacled Flying-fox, *Pteropus conspicillatus* (Chiroptera: Pteropodidae), in north Queensland: diet, seed dispersal and feeding ecology" (1990) 13 *Australian Mammalogy* 25; Richards GC, "A review of ecological interactions of fruit bats in Australian ecosystems" (1995) 67 *Symp Zool Soc Lond* 79; Hall L and Richards G, *Flying foxes: Fruit and blossom bats of Australia* (UNSW Press, Sydney, 2000).

[33] See McGrath, n 29; McGrath C, "Swirls in the stream of Australian environmental law: debate on the EPBC Act" (2006) 23 *Environmental & Planning Law Journal* 165 at 170-172; and McGrath C, "Flying foxes, dams and whales: using federal environmental laws in the public interest" (2008) 25 *Environmental & Planning Law Journal* 324 at 341-2.

Wandoan Coal Mine case study

The Wandoan Coal Mine provides a good case study of a typical, large project assessed under the EPBC Act and State laws, rather than the exceptional process followed for the Gunns Pulp Mill. Appendix 1 shows a timeline of the assessment of the mine under the EPBC Act and State laws. Note that:

- The mine began its approval process under State laws in May 2007;
- The project was referred under the EPBC Act in June 2008;[34]
- It was assessed concurrently under the EPBC Act and State laws under an assessment bilateral;
- It was approved under the EPBC Act in March 2011 – a process that took nearly 3 years; and
- It still has not received approval under all State laws as at 18 January 2013 – a process that has taken nearly 6 years and has not yet finished.[35]

The 14-volume EIS prepared for the Wandoan Coal Mine is also noteworthy in illustrating that the State-level requirements for consideration of impacts (on groundwater, etc), were far more extensive and that the consideration of the impacts on matters of national environmental significance relevant to the EPBC Act.[36] The matter of national environmental significance considered was impacts on threatened species and communities. Impacts on threatened species was required under the State-laws, so the EPBC Act added comparatively very little to the EIA process.

The Alpha Coal Mine is a similar example where Commonwealth approval under the EPBC Act has been completed 12-18 months ahead of State-level approvals (despite the erroneous criticisms of the Queensland Premier accusing the Commonwealth of delaying the project).[37]

The process for the Wandoan Coal Mine and the Alphan Coal Mine approvals are typical of large projects and this means that in practice the EPBC Act is not materially delaying projects proceeding beyond the time taken for State-level approvals.

The number of EPBC Act approvals is miniscule in comparison to State and local government approvals

It is important to recognize that State and local government approvals are far more numerous than EPBC Act approvals and, as illustrated by the Wandoan Coal Mine, their requirements are typically far more extensive, costly and time-consuming than those imposed by the EPBC Act.

The role of the EPBC Act often receives a great deal of attention in the press but, in reality, the number of projects assessed under EPBC Act is miniscule in comparison to State and Territory planning and mining laws.

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[34] EPBC referral No. 2008/4284.
[35] See Xstrata Coal's website at http://www.wandoancoal.com.au/EN/PROJECT/Pages/ProjectApprovals.aspx
[36] The EIS is available at http://www.wandoancoal.com.au/EN/PublicationsandMedia/Pages/EnvironmentalImpactStatement.aspx
[37] See McGrath C, "Federal 'green-tape' myth for Alpha mine" (The Conversation, June 2012), available at https://theconversation.edu.au/federal-green-tape-myth-for-alpha-mine-7499

For example, in 2008-2009 there were 438 referrals received under the EPBC Act,[38] including not only matters regulated under State and Territory planning laws, but also mining and offshore activities. Whilst some of these projects are very large, such as the Wandoan Coal Mine, in comparison the total number of development applications (not including mining, petroleum or offshore approvals) received under State and Territory planning laws was 251,837.[39]

The importance of the EPBC Act as an over-arching environmental framework for Australia needs to be tempered with recognition that it is State and Territory planning, mining and petroleum laws where the bulk of detailed controls on land-use and resource management reside.

Approval bilaterals would create greater uncertainty

The decision by the Prime Minister in December 2012 is understandable that the process for accrediting approval bilaterals under the EPBC Act had been placed on hold due to concerns that existing state processes did not always meet the federal protection standards and governments were advised this raised the risk of legal challenge, potentially increasing uncertainty for business.[40] Some states are understood to have been prepared to take over about 90% of environmental decision-making, while others wanted to take on only about 25%, resulting in a potential mishmash of laws around the nation.[41]

I agree that approval bilaterals would create greater uncertainty for government, business and the community than exists under the current system. It would also be very difficult and create additional uncertainty to build in a safety-net whereby the Commonwealth Environment Minister could "call-in" a project that he or she felt would not be appropriately assessed by a State government. Without such a call-in power, creating approval bilaterals would mean that projects such as the Traveston Crossing Dam and cattle grazing in the Victorian high country would be assessed by their own proponent governments. That would lack independence and integrity and it would severely undermine the value of the EPBC Act. If a call-in power were created, it would require the Commonwealth to continue to monitor the appropriateness of State decisions, which would reduce any administrative cost-savings at a Commonwealth level.

Based on the issues and evidence discussed above, in my opinion it is unlikely that approval bilateral will ever be beneficial for the efficient and effective operation of the EPBC Act and the power to enter them should be removed from the Act.

Conclusion and recommendation

The EPBC Act should be subject to regular review to make it as efficient, effective and equitable as is practicable, as this inquiry and other reviews of the Act have done over the

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[38] Department of the Environment, Water, Heritage and the Arts, *Department of the Environment, Water, Heritage and the Arts annual report 2008-09* (DEWHA, Canberra, 2009), available at http://www.environment.gov.au/about/publications/annual-report/08-09/outcome1-settlements.html#indicators.

[39] Local Government and Planning Ministers' Council, *First National Report on Development Assessment Performance 2008/09* (Prepared by the South Australian Government, Adelaide, 2010), available at http://www.lgpmcouncil.gov.au/publications/. Note: The true figure of State and Territory approvals for comparing to the EPBC Act is actually higher as the figure of 251,837 only includes applications for single residential, multi-unit residential, commercial, industrial, subdivision and other types of development under State and Territory planning laws. It does not include mining and petroleum applications, which are also large in number.

[40] Taylor and Coorey, n 12.

[41] Taylor and Coorey, n 12.

past decade. That approach is simply what standard texts on policy design recommend.[42] However, this inquiry should take the opportunity to rule out approval bilaterals being agreed under the EPBC Act.

Handing approval powers to State governments in approval bilaterals would severely undermine one of the key functions and benefits of the EPBC Act in practice – to provide an appropriate level of oversight on State government-sponsored projects. This would undermine the effectiveness of the Act in achieving its objectives of protecting the environment, particularly matters of national environmental significance, and conserving biodiversity.

It is largely a fallacy that the EPBC Act is a major impediment or adds significant additional cost to projects in Australia. There are exceptions where the EPBC Act has added significant extra costs, such as for the Gunns Pulp Mill, but where this occurs it is normally where the Act is also providing important protection to the environment that have not been provided by State laws. In addition, as the Wandoan Coal Mine case study illustrates, State-level approvals often take far longer than EPBC Act approvals, require similar information, and can be run concurrently to avoid any delay due to the EBPC Act.

I respectfully agree with the Prime Minister's decision to place on hold the approval bilateral process because it will create greater uncertainty for government, business and the community than exists under the current system.

In my opinion it is unlikely that approval bilaterals will ever be beneficial for the efficient and effective operation of the EPBC Act and I recommend that the power to enter them should be removed from the Act.

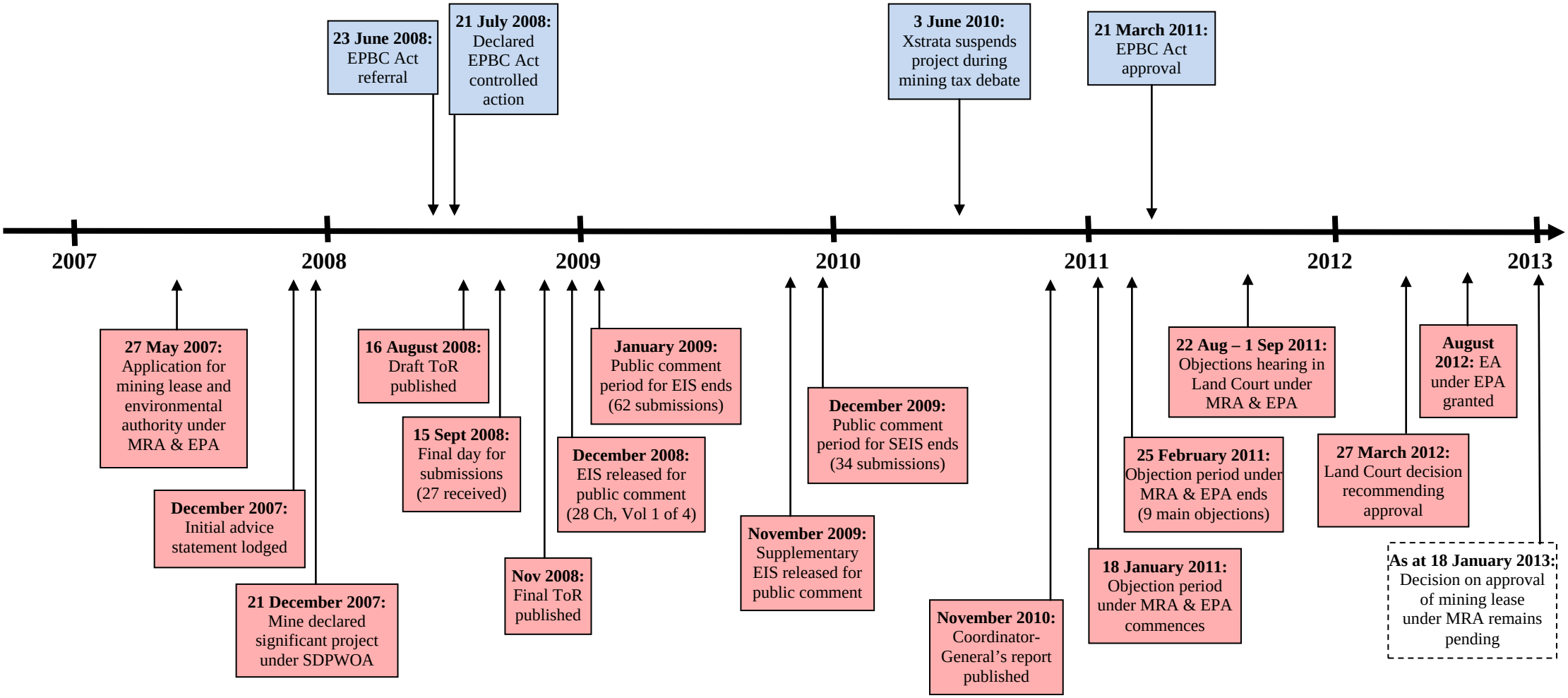
I would be happy to expand on this submission orally if requested. I do not request that this submission be kept confidential and I consent to it being published.

Kind regards

Dr Chris McGrath

[42] For example, Althaus C, Bridgman P and Davis G, *The Australian Policy Handbook* (4th ed, Allen & Unwin, Sydney, 2007); Dovers S, *Environment and Sustainability Policy: Creation, Implementation, Evaluation* (Federation Press, Sydney, 2005).

Appendix 1: Timeline of approval process of the Wandoan Coal Mine [remains unresolved after 5 ½ years as at 18 January 2013]



Acronyms:
EA: environmental authority
EIS: environmental impact statement
EPA: *Environmental Protection Act* 1994 (Qld)
EPBC Act: *Environment Protection and Biodiversity Conservation Act* 1999 (Cth)
MRA: *Mineral Resources Act* 1989 (Qld)
SDPWOA: *State Development and Public Works Organisation Act* 1971 (Qld)
ToR: Terms of reference

Step in Commonwealth approval process

Step in Queensland Government approval processes