

THE SENATE STANDING COMMITTEE ON ENVIRONMENT AND
COMMUNICATION

SUBMISSION TO THE INQUIRY INTO THE
ENVIRONMENT PROTECTION AND
BIODIVERSITY CONSERVATION AMENDMENT
(RETAINING FEDERAL APPROVAL POWERS)
BILL 2012

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Melbourne Law School.
University of Melbourne
185 Pelham Street
CARLTON VIC 3053

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

Submission by Professor Lee Godden – Director, Centre for Resources, Energy and Environmental Law, Melbourne Law School, The University of Melbourne.

Professor Jacqueline Peel – Centre for Resources, Energy and Environmental Law, Melbourne Law School, The University of Melbourne.

We thank the Committee for this opportunity to comment on the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012.

We submit that the Bill under consideration puts forward necessary amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) that will clarify the appropriate role and responsibilities of the federal government vis-à-vis state governments in approving projects that fall within the scope of the legislation. Below we elaborate the reasons underlying our submission providing:

- A brief overview of the role of bilateral agreements under the EPBC Act and the role of approval bilaterals that are the focus of the Bill;
- Our views on the significance and desirability of the amendments.

In particular, we submit that the amendments proposed in the Bill will support the long-standing cooperative approach to environmental management in Australia, ensure Australia is able to discharge its international environmental obligations and maintain a necessary role for the federal government in approving projects which may adversely impact matters of national environmental significance.

In effect, the Bill recognises the important role for state governments in environmental assessment through the bilateral assessment process, but in line with cooperative federalism principles recognises the need for a balanced two-tier system, with the federal government retaining responsibility for project approvals.

Bilateral agreements and how they fit in to the EPBC Act processes

Under the *Environment Protection Biodiversity Conservation Act* the process for environmental assessment and decisions about whether such actions should proceed (and under what conditions) involves 4 steps – referral of action; Ministerial decision as to whether an action is a *controlled action*; assessment; and approval.

An *action* (defined broadly to include a project, development, undertaking, activity or series of activities – see s 523(1)) which may have an impact on certain prescribed *matters of national environmental significance* (MNES) must be referred to the Commonwealth Minister administering the EPBC Act: s 68. The Minister is then responsible for deciding whether the action is a *controlled action* i.e. one that must be assessed for its impacts and approved before the action can be taken: s 75. Following assessment, the Minister must decide whether or not to approve the taking of the action and whether to impose any conditions: ss 130(1), 134(1).

The Minister's power to enter into *bilateral agreements* with the states and self-governing territories under s 45 modifies this arrangement to devolve responsibilities to a state or territory government. There are two types of bilateral agreements:

- Section 47: 'assessment bilaterals' – the agreement declares that an action or class of actions assessed by the state or territory in a manner specified in the bilateral agreement under state or territory law does not require assessment under Part 8 of the EPBC Act (i.e. assessment of its impacts on MNES by the federal Environment Minister).
- Section 46: 'approval bilaterals' – the agreement declares that an action or a class of actions approved by the state or territory in accordance with a *bilaterally accredited management arrangement or authorisation process* does not require approval under Part 9 of the EPBC Act (i.e. no federal-level approval of the project is required).

Currently, there is a bilateral agreement on environmental assessment (typically these agreements accredit state EIA legislation) in place between the Commonwealth and all state governments.

How this Bill amends the EPBC Act

The Bill repeals section 46 (item 5) which provides for the making of approval bilaterals and Division 1 Part 4 (item 2) which provides that approval by the Minister for an action is not required if the action has been approved in accordance with a bilateral agreement.

The Bill amends references to bilateral agreements to ensure that they only refer to assessment bilaterals and not approval bilaterals (items 1, 3, 4, 6-36).

The Significance of the Amendments

1. Co-operative federalism

The strength of Australia's environmental protection regime derives from a system of 'cooperative federalism', in which Federal, State and Local Governments have defined roles in environmental protection and management. The 1992 Intergovernmental Agreement on the Environment (IGAE) endorsed cooperative federalism, giving it particular importance for environmental matters. This power sharing arrangement has shaped the modern development of environmental protection in Australia and is key to understanding the interaction between Commonwealth and state government assessment and approval processes for project developments under the EPBC Act.

The policy of cooperative federalism acknowledges that each tier of government has a role to play in ensuring the overall integrity of the environmental protection system. The Council of Australian Governments (COAG) has played a key part in articulating the scope of these roles.

Devolving approval powers to the states for actions that may impact on MNES, now or at any time, erodes the necessary checks and balances that this system provides sensitive areas as World Heritage places and Ramsar wetlands and effectively creates a single tier system where all power lies with the states. It also erodes significant gains made by the Commonwealth government over the last 30 years in providing leadership to lift environmental protection standards, at a time when such leadership is needed most.

Effectively devolution of approvals powers through bilateral agreements to state and territory governments would create a single tier system where the Commonwealth no longer had a check and balance role. This is problematic, especially where the relevant 'action' (project) was either one proposed by a state government or strongly supported by that level of government.

2. Our international obligations

The Federal Government is tasked with ensuring Australia meets its international obligations under multilateral treaties which the Australian government has ratified, such as the *Convention on Biological Diversity*. The states bear no such obligation under international law. As we remark in a recently published article:

The idea that states, through bilateral agreements, would effectively become responsible for ensuring compliance with international obligations is a significant departure from accepted legal understanding.

Domestic power sharing arrangements are no bar to international responsibility and the Commonwealth risks facing 'being held accountable at an international level for decisions that it has delegated through bilateral agreements.'¹

¹ Lee Godden and Jacqueline Peel, 'Cooperative Federalism and the Proposed CoAG Reforms to the EPBC Act' (2012) 28(1) *Australian Environment Review* 395.

The specific role of the Commonwealth Government in relation to international obligations and matters of national environmental significance can be illustrated by the recent *Alpine Grazing Case*.²

The Alpine Grazing Case

The Federal Court upheld the decision by the Commonwealth Environment Minister that the Victorian Government's cattle grazing research trial (proposed action) in the Australian Alps National Parks and Reserves, 'would clearly have unacceptable impacts on the National Heritage values' of the Alpine park region.³ In more specific terms, The Commonwealth Minister decided the proposed action would significantly impact the protected national heritage ecology and species diversity, undermining Australia's ability to meet its obligations under the *Convention on Biological Diversity*. The Victorian Government then sought judicial review of the Minister's decision in the Federal Court on several grounds.

In the Federal Court judgment, Justice Kenny, referred to the respective roles of the state and federal governments in relation to National Heritage protection, quoting from the National Heritage protection amendment Act second reading speech:

COAG agreed on the need to rationalise existing Commonwealth/State arrangements for the identification and protection of heritage places. In this context, COAG agreed that the Commonwealth's role should be focussed on places of National Heritage significance.

...

There is a gap between state regimes, which protect places of local or state significance, and the world heritage regime, which protects places of significance to the world.⁴

The judgment reinforces the need for federal involvement in the protection of national environmental matters, such as National Heritage listed parks. Under a devolved system of bilateral assessment AND approvals, the Victorian government would have been empowered to unanimously assess AND approve cattle grazing in the Alpine National Park. Instead, with federal oversight of the protection of MNES, the grazing trial was rejected at the outset because of its unacceptable impacts. Accordingly, this case serves to show how vesting all responsibility in the states – as proponents of actions in violation of Australia's international environmental obligations – could significantly undermine our national environment protection regime.

As such, this case illustrates the significance of this Bill in its proposed amendments to the EPBC Act to ensure the Commonwealth retains its important role in relation to protection of matters of national environmental significance and to ensure effective compliance with international obligations for biodiversity conservation.

² *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) ('Alpine Grazing Case').

³ Alpine Grazing Case at [149].

⁴ Commonwealth, *Parliamentary Debates*, Senate, 15 November 2002, 6477 (Ian Campbell), quoted in Alpine Grazing Case, [122].

3. Conclusion

In sum, there are important reasons for retaining a federal role in the approval process for actions which have or are likely to have impacts on protected environmental matters under the EPBC Act. This Bill, through removing the potential for delegation to states of EPBC Act approval powers, would reinforce the appropriate role of the federal government in national environmental protection and fulfillment of Australia's international environmental obligations.

The Bill works within the cooperative federalism power sharing processes that have been a feature of the Australian system for environmental assessment and protection since 1992. It is an important measure in retaining integrity within that system.