Australian Network of Environmental Defender's Offices Inc

Submission on Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012

18 January 2013

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

The Australian Network of Environmental Defenders Office's (**ANEDO**) includes independent EDO offices in each State and Territory with expertise in environmental assessment and approval legislation. As public interest lawyers, we strongly support the implementation of efficient and effective environmental standards in legislation in all Australian jurisdictions.

For the past 25 years EDOs across Australia have helped the community to use the law to protect the environment. We have initiated hundreds of legal cases to protect the most sensitive and unique parts of the Australian environment, in the public interest. Of the 71 cases taken under the federal *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) in the last twelve years, 24 have been run by EDOs. We also advocate for stronger environmental laws at state and federal level and have been involved in every major review of environmental regulation. We understand the value and importance of environmental laws and their role in protecting our unique environment from inappropriate development and pollution.

The direct involvement of EDOs across Australia in environmental law over many years has shown us that it is imperative that both State and Federal governments are responsible for environmental regulation. We strongly oppose moves to reduce environmental regulation to fast-track the approval of major developments that will have the most significant impacts on the environment. Strong environmental laws are essential to the continued health, prosperity and well-being of Australia, and the Australian environment.

On 13 April 2012 the Council of Australian Governments (**COAG**) agreed to major reforms of Australia's environmental laws (**COAG reforms**). The reforms, proposed by the business community, were directed at both Federal and State laws, particularly laws that assess new developments. Through this COAG process, the Commonwealth agreed to enter into fast-tracked agreements with each State to transfer its powers of approval under the EPBC Act to the States. This meant that the Commonwealth would no longer have any role either in assessing the environmental impacts of State developments on nationally significant environmental matters or in deciding whether to approve those developments.[1] COAG stated that a framework for such agreements would be settled on by December 2012 and all agreements would be signed off by March 2013.

ANEDO released an analysis and response subsequent to the announcement of the COAG reforms.[2] In particular that document details concerns with regard to the proposal for the Commonwealth to hand over approval responsibilities under the EPBC Act to the States and Territories. ANEDO believes that

[1] Such as Ramsar protected wetlands, nationally listed threatened species and ecological communities, migratory species and national heritage places.

[2] ANEDO, 'COAG environmental reform agenda: ANEDO response – in defence of environmental laws' (May 2012), available here: http://www.edo.org.au/policy/policy.html

Commonwealth involvement in environmental regulation in Australia is vital, and does not support the delegation of Commonwealth approval responsibilities under the EPBC Act to States and Territories.

It seems that the immediate threat to environmental laws contained in the COAG reforms in has now receded,[3] but the power for the Commonwealth to enter approval bilateral agreements remains in the Act. Accordingly, we support the principle and intent of the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012 (**Bill**), which seeks to remove the power currently contained in the EPBC Act that allows the Commonwealth to enter approval bilateral agreements and hand responsibility for approving proposed actions that significantly impact matters protected under the EPBC Act to a State or Territory.

This submission sets out why retention of Commonwealth approval powers is vital for environmental protection.

[3] Grattan and Arup, 'Environmental powers to be kept by Canberra' (December 6 2012) http://m.smh.com.au/opinion/political-news/environmental-powers-to-be-kept-by-canberra-20121205-2avw7.html

Why retention of Commonwealth approval powers is vital

Only the Commonwealth Government can provide national leadership on national environmental issues

As stated in the 2011 State of the Environment Report, "Our environment is a national issue requiring national leadership and action at all levels.... The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role".[4]

Australia's rivers and endangered species do not keep neatly within State borders. Only the Federal government has the ability to properly consider national or cross-border issues and make decisions in the national interest. This is the reason the EPBC Act focuses on matters of national environmental significance – they are matters that by their nature should be considered and protected at the national level by a national government.

The Commonwealth must ensure we meet our international environmental obligations

Another important function of the Commonwealth is to ensure Australia is meeting its many international environmental obligations such as those under the Ramsar Convention, the Biodiversity Convention and the World Heritage Convention. It is appropriate that our national government has primary responsibility for ensuring compliance with these obligations, and not the States.

To illustrate this, in 2009 there was a proposal to develop a major tourist resort on Great Keppel Island in the Great Barrier Reef World Heritage Area. The State of Queensland declared the resort to be a 'significant project' and its intention to fast-track it for review and approval under State law. The proposed resort, which included up to 1700 low-rise tourist villas and up to 300 tourist apartments, was rejected by the Commonwealth on the grounds that it would "clearly [have] unacceptable impacts on" world heritage properties and national heritage places. There are many examples of States signalling that they would progress major projects that would have had significant adverse impacts on matters protected under international law – projects that were ultimately rejected by the Commonwealth. We will elaborate on this further below.

States and Territory environmental laws are not up to standard

In EDOs' experience, in a number of States and Territories environmental impact assessment is weak and inadequate. Based on our analysis and interaction with planning and environmental laws in each jurisdiction, we submit that *no* State or Territory planning or environmental laws currently meet the standards contained in the EPBC Act.[5] Several State jurisdictions have major project provisions contained in planning laws (or standalone major project legislation), which in

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[4] State of the Environment 2011 Committee. *Australia state of the environment 2011—in brief. Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities,* 2011, 9.

[5] See, for example, ANEDO, 'Submission on the Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act 1999' (November 2012), available here: www.edo.org.au/policy/121123-COAG-Cth-accreditation-standards-ANEDO-submission.docx

every case prioritises the passage of major projects, usually subjecting them to less scrutiny and greater exercise of discretion, even though they are the very projects that stand to have the highest environmental and social impacts.[6]

The absence of the Commonwealth from environmental decision-making would mean that there will be few (if any) checks and balances on State processes. This point is illustrated by the Victorian Government's decision to allow cattle grazing in Alpine national parks. This activity did not require any approvals at State level despite being clearly against the intent of the Victorian *National Parks Act 1975*. It took the Commonwealth to step in on behalf of nationally listed threatened species and end the practice.

At present, for development activities that require EPBC Act assessment, the Commonwealth can ensure that national standards are being met and in certain circumstances, can raise States up to a higher national standard. The power to do so should not be able to be given away, as is currently allowed by sections 29 and 43 of the EPBC Act.

States fail to administer and enforce their own environmental laws

Generally speaking, most States do not have a good track record in relation to establishing and administering their own environmental laws. There are environmental protection laws on the State books that are not even used, and for those that are, are regularly not monitored or enforced.[7] For example, a recent report by the Victorian Auditor-General was scathing of the enforcement and compliance activities of the two main departments charged with administering environmental legislation in Victoria, the Department of Sustainability and Environment and the Department of Primary Industries.[8]

Conversely, in the last three years, the federal Environment Department investigated 980 incidents across Australia under the EPBC Act. The Department also undertook over 40 court actions resulting in fines and enforceable undertakings totalling almost $4 million.[9] If the Commonwealth powers are devolved to the States, the community has no guarantee that States/Territories will fill this space and ensure compliance with the EPBC Act.[10] Indeed, given their

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[6] In NSW, under both Part 3A and its replacement system, 'State Significant Development' (SSD), major projects remain *exempt* from a significant list of 'concurrence' approvals normally required from various agencies (such as for coastal protection, fisheries, Aboriginal heritage, native vegetation, bush fire and water management). A range of other authorisations *cannot be refused*, and must be consistent with an SSD project approval (including aquaculture, mining leases and pollution licences). See *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), ss 89J and 89K. In addition, the current revised system for fast-tracking 'State Significant Infrastructure' (SSI) retains many features of the former Part 3A.

[7] See, for example EDO (Victoria)'s report series 'Monitoring Victoria's Environmental Laws' which examines the extent and effectiveness of the Victorian government's implementation and enforcement of key environmental laws, at http://www.edovic.org.au/law-reform/major-reports/framework-for-action.

[8] Victorian Auditor General's Office (2012), *Effectiveness of Compliance Activities: Departments of Primary Industries and Sustainability and Environment*
http://www.audit.vic.gov.au/reports_and_publications/latest_reports/2012-13/20121024-compliance-dpi-dse.aspx

[9] Department of SEWPaC/DEWHA, figures compiled from annual reports, 2009-10, 2010-11, 2011-12.

[10] While this is difficult to guarantee, for reference we note that a deliverable in the 2009-10 federal Environment Department budget was that the Department investigate 100% of reported EPBC compliance

record of lack of enforcement action, there are considerable concerns regarding this.

States have demonstrated that they alone cannot be relied upon to administer and enforce their own environmental laws, let alone those of the Commonwealth.

States are not mandated to act (and do not act) in the national interest

It has been the experience of EDOs over decades that States do not act in the national interest in managing the environment. This is partly due to their single-State focus and partly because they lack the mandate and resources to consider consequences outside their State.

As mentioned, there are several examples of States signalling that they would progress major projects that would have had significant adverse environmental impacts, that have been ultimately rejected by the Commonwealth. For example, the Traveston Dam in Queensland, Franklin Dam in Tasmania, Jervis Bay rezoning in New South Wales, releasing of water from Lake Crescent in Tasmania for irrigation, and the Nobby's Headland development in New South Wales, were all State-backed projects that were rejected by the Commonwealth due to the unacceptable environmental impacts they were going to cause.

ANEDOs concerns in this area also stem from the precedent set by the use of Regional Forestry Agreements (RFAs) in Australia.[11] History has shown that when the Federal government exempts the States or delegates them powers under the EPBC Act, environmental protection will be undermined and the Federal government struggles to retain an oversight role. The experience with Regional Forestry Agreements illustrates this. RFAs are an example of an 'accredited' state instrument. If an 'approved' RFA is in place with regard to a certain forest, logging activities in that forest are exempt from the approval requirement of the EPBC Act. History has shown that once entered, RFAs are very difficult (and the Commonwealth has proven itself unwilling) to unravel. This is true even when a State has blatantly failed to comply with an RFA. The best example of this is the manifest failure of the Tasmanian Government to meet its obligations under RFAs over the years, and the absolute unwillingness of the Commonwealth to address this.[12]

States directly benefit from the projects they are assessing

For many major development projects the State government is the proponent or a strong supporter of the project, or has an expectation of receiving revenue as a result of the project. In such situations, the State has a clear conflict of interest that reasonably casts doubt on its ability to objectively and credibly pass judgment on proposed development.

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incidents in accordance with its published compliance and enforcement policy (and this target was achieved). See DEWHA annual report, 2009-10, p 68.

[11] RFAs are an example of a state instrument 'accredited'. If an 'approved' RFA is in place with regard to a certain forest, logging activities in that forest are exempt from the approval requirement of the EPBC Act.

[12] In fact in once infamous instance, the Commonwealth resolved the situation of the Tasmanian government's non-compliance with an RFA by simply changing the terms of the agreement to avoid litigation, see Brown v Forestry Tasmania [2008] HCATrans 202 http://www.austlii.edu.au/au/other/HCATrans/2008/202.html

Obvious examples are mining and major infrastructure projects. The State of Queensland's approval of the Shoalwater Bay rail line and coal terminal proposal in 2008 highlights the tendency of a State to prioritise short-term political interests over concerns for the environment. This proposal was part of a $5.3 billion project to produce 25 million tonnes of coal a year for export. It was declared a significant project by Queensland's Coordinator-General (who thereby undertook the project's environmental assessment) but was rejected by the Commonwealth Minister for the Environment on the grounds that the proposed coal terminal would have 'clearly unacceptable impacts' on the Shoalwater and Corio Bay Ramsar wetlands and Commonwealth lands (the Shoalwater Bay Training Area). In these instances it is unrealistic to expect the State to make an impartial decision as to whether a project should go ahead.

In instances where a State government is assessing a project that it has an interest in, the need for Federal approval adds a much-needed layer of protection for the environment. No matter what checks and balances are in place, and no matter what standards the States are required to meet in order for the Commonwealth to hand over approval powers to them under the EPBC Act, the potential for this conflict of interest (and corruption risk) will always be there. It is entirely inappropriate for a State to be proponent, assessor, approver and beneficiary of a project. This is a primary reason for ANEDO's overall objection to the approval bilateral agreements.

Conclusion

The direct involvement of EDOs across Australia in environmental law over many years has shown us that strong Commonwealth involvement is critical to effective environmental protection. The proposed delegation of Commonwealth approval responsibilities under the EPBC Act to States and Territories as decreed by COAG, represents a winding back of 30 years of important gains in environmental regulation. History has shown that overall environmental standards in Australia will not be improved if States are given sole responsibility for environmental regulation. Federal environmental laws are often the only thing preventing States from approving actions that harm the environment. ANEDO has formed the view that States are fundamentally not in the position to stand in the shoes of the Commonwealth and assess impacts on matters of national environmental significance in the public interest.

For the above reasons, ANEDO believes it will never be appropriate for the Federal government to hand over their federal approval powers to the States. Accordingly, we support the power to do so being removed from the EPBC Act.