Submission

in response to

Senate Standing Committee on Environment and Communications Inquiry into Environment Protection and Biodiversity Conservation (Streamlining Environmental Approvals) Bill 2020

prepared by

Environmental Justice Australia

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About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. We are independent of government and corporate funding. Our legal team combines technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to community-based environment groups, regional and state environmental organisations, and larger environmental NGOs, representing them in court when needed. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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Submitted to: Committee Secretary, Senate Standing Committee on Environment and Communications

1. The *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020* is in essence the Government's revisiting of an earlier but persistent agenda to dismantle key aspects of national environmental law and regulation.

2. At the heart of the Bill is what can be referred to as 'devolution' of approvals powers through administrative arrangements (bilateral agreements), presently intended to operate for the protection of the various Matters of National Environmental Significance set out under the Act.

3. Assessment processes are already subject to a form of 'devolution' by way of bilateral agreements with the States and Territories.

4. The Bill has been tabled in the Parliament purportedly in concert with the release of the Interim Report of the Independent Review into the EPBC Act. It is the sole effort made on the part of the Government to respond to the headline findings of the interim report that the EPBC Act is failing the environment.[1] It is not even a thinly-veiled attempt to respond to those findings; it is an entirely cynical and opportunistic to recycle the earlier 2014 agenda to devolve Federal approvals for actions impacting significantly on MNES.

5. The Final Report of the Independent Review has not been released by the Minister.

6. The Interim Report contained relatively wide-ranging recommendations on reform to the EPBC Act. Notwithstanding the merits of the Interim report, the overwhelming majority of its findings and recommendations are ignored by the Government in this Bill.

7. The effective headline finding of the Interim Report was Australia's environmental performance is unacceptable. Contributions to the evidence base includes well-document failures of administration of the Act,[2] extensive carve-outs (such as for forestry), and heavy reliance on Ministerial discretion and failed policy instruments such as offsetting.[3]

8. The problems with the Act and its administration concern incapacity to confront multiple environmental crises, including extinction and pollution, not inefficiency of approvals. This goes to the fundamental point that the Act concerns Australia's environmental performance not merely environmental approvals.

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[1] See especially Professor Graeme Samuel *Independent Review of the EPBC Act: Interim Report* (2020), Chs 1, 2

[2] See eg Australian National Audit Office Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999 (Report 47, 2020), https://www.anao.gov.au/work/performance-audit/referrals-assessments-and-approvals-controlled-actions-under-the-epbc-act

[3] See eg VAGO Protecting Critically Endangered Grasslands (2020), https://www.audit.vic.gov.au/report/protecting-critically-endangered-grasslands?section=

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9. In our submission, the Committee should advise the Senate not to support the Bill.

10. The reasons for opposing 'devolution' of EPBC Act approvals powers to States and Territories under bilateral agreements have been canvassed extensively, including in the 2014 attempts to progress the so-called 'one stop shop'.

11. In 2014 it was clear that arrangements under State and Territory laws (authorisation processes) would not meet standards of environmental protection required under the EPBC Act,[4] including where these standards are required to be consistent with Australia's international obligations.

12. The present Bill simply reproduces the same problem.[5] In enabling 'flexibility' the Bill will effectively enable environmental approvals to accord with inferior State and/or Territory standards. If an original intention of the bilateral agreement regimes was to raise State and Territory environmental standards that patently has not occurred.

13. The legal machinery intended to be implemented to give effect to bilateral approvals arrangements will produce more, not less, obscurity and complexity in environmental laws. There would be a multitude of approvals regimes, functioning under legal and non-legal instruments, traversing, most likely, federal subject-matter (MNES) and State or Territory ('authorised' planning, environmental or natural resources) schemes.

14. In addition, the proposed 'authorising' provisions under the Bill, which intend to give effect to devolution of approval-making, would establish arrangements that are legally questionable. EDO Victoria (as EJA then was) made precisely those points at the time. We have attached our 2014 submission, which includes detailed submissions on questions of law relevant to these problems. Those problems turn on issues of accountability and conformity of administration (especially at the State level) with the law (where the prevailing law is a Commonwealth law) and enforcement of State environmental machinery by the Commonwealth.

15. The scheme of 'devolution' proposed exposes environmental approvals, intended to meet Federal and international standards, to conflicts of interest. Specifically, it can be clearly anticipated that State-sanctioned approval of development or resource use can come into conflict with EPBC Act standards. States frequently sponsor, propose and/or benefit from activities they would be approving. Examples of this dynamic are royalties from mining projects, land clearing enabling development, and energy or water resource projects generating

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[4] ANEDO *An Assessment of the Adequacy of Threatened Species and Planning Laws in All Jurisdictions of Australia* (2012)
[5] See EDO Australia *Devolving Extinction? The Risks of Handing Environmental Responsibilities to the States and Territories* (2020), https://www.edo.org.au/wp-content/uploads/2020/10/201004-EDO-PYL-Devolving-Extinction-Report-FINAL.pdf

revenues to State agencies. Powerful conflicts here compromise proper and effective environmental protections in the face of development and resource imperatives of the States.

16. Where forms of 'devolution' now operate in a manner akin to what is proposed under the Bill those conflicts and compromises already undermine Australia's environmental performance and amplify extinction risks of threatened species. The clear example of this lies in Regional Forests Agreements. As recently as mid-2020, the Federal Court exhaustively examined the functioning of the Victorian RFA and concluded that inherent conflicts between commercial imperatives of the State logging agency and biodiversity conservation undermined the latter.[6]

17. In that instance, an extraordinarily complicated regulatory regime, accredited by the Commonwealth under bilateral arrangements, demonstrably failed to implement a 'substitute' environmental protection regime operating under State law.

18. Compromised environmental outcomes under RFA arrangements should be a salutary lesson for the Committee and the Senate in achieving bilateral approvals arrangements that would in any way meet national and international environmental standards.

19. A further caution to 'devolution' of environmental approvals to the States and Territories can be found in analogy to certain arrangements for water management under the Commonwealth Water Act and the Basin Plan. A relevant example can be found in the SDL Adjustment Mechanism legislated under amendments to the *Water Act 2007* and the *Basin Plan 2012*. Under this Mechanism a range of 36 projects ('measures') are to be implemented by Basin States in order produce equivalent environmental outcomes to recovering water for the environment. In effect, preparation and implementation of a range of 'offsetting' measures has been devolved to the States, with Commonwealth oversight by the MDBA. A 2018 assessment of 36 'supply measures' proposed by the States undertaken by the Wentworth Group of Concerned Scientists[7] showed that only one of those projects would meet standards capable of equating to recovery of water for the environment. The sole project likely to do so was contingent on 'constraints strategy' targets (which remain unmet).

20. Commonwealth standards in respect of water ecosystems, intended to be delivered under water legislation by Basin States, are not being met. This is in circumstances of arguably robust, if flawed,[8] Commonwealth legal and

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[6] *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704.

[7] Wentworth Group of Concerned Scientists *Requirements of SDL Adjustment Projects to Ensure They Are Consistent with the Water Act 2007, the Basin Plan 2012, MDBA policies, and Intergovernmental Agreements* (2018), https://wentworthgroup.org/wp-content/uploads/2018/05/Requirements-for-SDL-adjustment.pdf.

[8] As to the legality of the Basin Plan and subsidiary arrangements, including the SDLAM, see South Australia *Royal Commission into the Murray Darling Basin* (2019)

regulatory machinery. In our submission, this is testament to very real problems associated with devolution of environmental management, concerning national and international priorities, to the States.

21. In general, as a matter of policy and good practice, a national environmental approvals regime, governed under robust and independent national institutions, is required to effect adequate national environmental outcomes, reflective of the national interest and demonstrating (where relevant) genuine commitment to international obligations.

22. A final submission we make concerns the extraordinary and cursory nature of this inquiry. From the establishment of this inquiry to its reporting the Committee has been given approximately two weeks. Three days' notice was given for the making of submissions before the submission period closes.

23. At best this process can be interpreted as unreasonable, if not tokenistic. At worse, it is a serious compromise of Parliamentary processes.

Attachment: EDO Submission to 2014 Senate Committee Inquiry into Bilateral Agreement Implementation Bill

Submission

in response to

Senate Standing Committees on Environment and Communications inquiry into the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 [Provisions]

prepared by

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3 June 2014

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Introduction

The Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (the Bill) makes a number of very significant changes relating to the making of approval bilateral agreements.

The objections from the community and conservation groups to the proposed Commonwealth accreditation of state and territory environment and planning laws are many and well known. There is a large body of evidence to support the contention that the states and territories will not adequately protect matters of national environmental significance and should not be given the sole responsibility for doing so.[9]

Environmental Justice Australia strongly opposes the proposed devolution of Commonwealth responsibility via the 'one stop shop' model and we agree with the broad range of groups and individuals that have made submissions to this and other inquiries strongly opposing the Government's proposals. We also oppose the further extension of approval bilateral agreements to coal seam gas and large coal mine developments that are likely to have a significant impact on a water resource.

Setting aside the merits or otherwise of the 'one stop shop' model more generally there are some particularly concerning issues with the Bill that need to be addressed irrespective of one's view on whether the States and Territories should be able to assess and approve actions for the purposes of the EPBC Act protections.

The Bill is a response to the simple reality that the current state and territory planning and environment laws (authorisation processes) do not meet the standards required by the EPBC Act and do not adequately protect threatened species and ecosystems.[10] Rather than requiring the States and Territories improve their laws to ensure that they meet the required standards, the response in the Bill is to lower the standards and make the current requirements more 'flexible' to facilitate the accreditation of deficient state and territory laws.

Accrediting state legislation for the purposes of a Commonwealth Act is very rare. Doing so by an administrative instrument is particularly problematic. The only other example of such an accreditation arrangement that we are aware of is section 43 of the *Native Title Act 1993* (Cth) (NTA), which provides that the Minister may accredit alternative laws of a State or Territory dealing with the right to negotiate provided that the Minister is satisfied that those laws comply with specified standards. In that case the determination that the state or

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[9] See Australian Network of Environmental Defender's Offices (ANEDO), *An Assessment of the Adequacy of Threatened Species & Planning Laws in All Jurisdictions of Australia* (2012).
[10] Ibid.

territory laws apply is by legislative instrument and the power to accredit instruments as they exist from time to time is not given by the NTA.

The process under the *Native Title Act* is more akin to an assessment bilateral agreement. The authority given to the Minister is far greater in the case of an approval bilateral as it extends to removing the operation of the approval process under the EPBC Act entirely.

When creating the power for the Commonwealth to enter into bilateral agreements under the EPBC Act, the Parliament recognised that the ability to effectively delegate[11] a Commonwealth responsibility to the States and Territories is very significant and it included a range of safeguards given the scale of the responsibility that was being given to the Minister. The Bill erodes those safeguards and creates considerable uncertainty in doing so.

<u>Background to Approval Bilateral Agreements</u>

The approval bilateral agreement mechanism allows the Commonwealth Minister for the Environment (the Minister) to determine that state and territory laws effectively fulfil the requirements of the EPBC Act.[12] If the Minister makes such a determination he or she can enter into a bilateral agreement with a State or Territory and if the agreement covers an action no federal approval will be necessary where that action is approved under the relevant state or territory law.

Criteria for making approval bilateral agreements

The EPBC Act sets out criteria for the making of approval bilateral agreements that relate to each of the MNES. For example the Minister may only enter into a bilateral agreement relating to national heritage places if the Minister is satisfied that the agreement will provide for the management of the place in accordance with the national heritage management principles.[13]

An approval bilateral agreement must also contain an undertaking by the State or Territory to ensure that the environmental impacts of actions covered by the declaration will be assessed to the greatest extent practicable.[14] Further, the Minister may only enter into a bilateral agreement if the Minister is satisfied that the agreement accords with the objects of the EPBC Act and meets any other requirements set out in the regulations.[15] Importantly a bilateral agreement must be consistent with the EPBC Act and regulations.[16]

Authorisation processes

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[11] Whilst the Act does not permit a delegation to the States and Territories as accreditation under the Act is that the State and Territory processes are deemed to satisfy the requirements and provide the protections of the EPBC Act the outcome is effectively the same.
[12] EPBC Act section 45.
[13] See EPBC Act sections 51-54 and 56 and EPBC Regulation 2000 Part 2B.
[14] EPBC Act section 48A.
[15] EPBC Act section 50.
[16] EPBC Act section 48(2).

What amounts to an authorisation process for the purposes of a bilateral agreement is left quite open under the Act and described only as a process under which actions are authorised as set out in law of the State of Territory.[17]

The Minister may only accredit an authorisation process if the Minister is satisfied that actions approved in accordance with the authorisation process will be properly assessed and will not have unacceptable or unsustainable impacts on MNES.[18]

The range of state and territory laws that may be accredited as authorisation processes is quite broad and includes not just planning and environment laws[19] but also potentially mining laws,[20] fisheries laws[21] and major project legislation.[22] The operation, content and objects and purposes of each of these laws vary significantly both within and across the different Australian jurisdictions.

Changes proposed in the Bill

Accrediting instruments

The Bill proposes to increase the authority given to the Minister and places a far greater reliance on the States and Territories to properly protect MNES with few safeguards to ensure that the standards required by the Act are being met. Instead of being restricted to accrediting 'authorisation processes' (planning and other approval processes to allow environmentally damaging activities) set out in 'laws' of the States and Territories, the Bill will allow the Minister to accredit authorisation processes set out "wholly or partly, in a law of the State or Territory... or an instrument made under such a law, or is made, wholly or partly, under such a law". The Bill therefore proposes to remove an important protection that EPBC Act requirements are contained in the *laws* of a State or Territory and creates considerable uncertainty about how the new arrangements will actually work.

According to the explanatory memorandum the purpose of the amendment to expand the scope of the processes that can be accredited is to "ensure flexibility in the authorisation processes which can be accredited under an approvals bilateral agreement."[23] The Explanatory Memorandum further explains that "To do so, subparagraph 46(2A)(a) provides that an authorisation process must be set out in or made under a law of the State or Territory or be set out in an instrument made under such a law."

The explanatory memorandum is not strictly correct it its description of the clause. The Bill in fact only requires that the process be set out *wholly or partly* in or under a law or in an

[17] EPBC Act section 528 definition of 'authorisation process' and section 46(2A).
[18] EPBC Act section 46(3).
[19] See for example *Environment Planning and Assessment Act 1979* (NSW); *Planning and Development Act 2005* (WA).
[20] See for example *Mineral Resources Sustainable Development Act 1990* (Vic); *Petroleum Act 1998* (Vic); *Petroleum (Onshore) Act 1991* (NSW).
[21] See for example *Fishers Management Act 2007* (SA).
[22] See for example *Major Transport Projects Facilitation Act 2009* (Vic); *State Development and Public Works Organisation Act 1971(QLD).*
[23] Explanatory Memorandum p20.

instrument. This means that a significant part of the process being accredited may not be set out in or under an Act or legislative instrument of the relevant State or Territory.

To pass to Ministers of the States and Territories the power to make guidelines that are effectively binding determinations of rights and responsibilities for the purposes of the EPBC Act, without even the safeguards of the State and Territory Parliaments is a unique and very significant step.

The making and use of guidelines for the purposes of the EPBC Act has already proven to be fraught. In *Humane Society International Inc v Minister for the Environment & Heritage*[24] it was held that guidelines issued by the Minister in relation to whether actions affecting the grey headed flying fox and the spectacled flying fox were controlled actions were not authorised by the EPBC Act.

The Administrative Review Council has said that:

> 'although policies can be very helpful in decision making, they cannot be relied on if they conflict with a statute, a subordinate law or a court ruling… A policy can guide decision making, but must not prevent a decision maker exercising discretion. It cannot constrain them to reach a particular decision, nor can it prevent them taking all relevant considerations into account. Policy must never be applied inflexibly. A decision maker 'must be prepared to consider whether it is appropriate to depart from the policy in an individual case.'[25]

Council guidelines have to make it clear that the guidelines are sufficiently flexible to allow for proper consideration of individual cases on their merits otherwise the resolution would appear to carry the force of a general law; an effect which could not be attributed to [policy or guidelines].[26]
Guidelines cannot be expressed to fetter a discretion under an Act.[27] A decision maker must "give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy".[28] So whilst a guideline or policy may purport to direct or require a particular outcome or to require that something be done in a particular way great care needs to be taken that that is what is in fact required or permitted by the Act.

Not only are decision makers not bound to follow administrative instruments such as guidelines and policy (unless the law itself specifically says that they are) in certain circumstances they may be bound not to following administrative instruments,. For a scheme to rely on guidelines that decision makers cannot rely on is very problematic.

Whilst it may be argued that in accrediting any guidelines or policy the Minister can consider the validity of any guidelines and decide to accredit them, the additional layer of difficulty created that does not exist when accrediting legislation creates a significant risk as to the

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[24] [2003] FCA 64.
[25] Administrative Review Council, Decision Making: Lawfulness; Best-practice guide 1, Canberra (2007) 8.
[26] *Carroll v Sydney City Council* (1989) 15 NSWLR 541.
[27] *Minister of Immigration, Local Government and Ethnic Affairs v Gary Gray* [1994] FCA 1052.
[28] *Khan v the Minister of Immigration and Ethnic Affairs* [1987] FCA 457 [25].

outcomes that the accreditation is permitting. A particular set of facts can never require the departure from a process set out in an applicable law.

The additional risk is that part of the process may be set out entirely in administrative instruments that are not directly connected with any Act of Parliament. In such a case any obligations under that part of the process would of course not be able to be enforced and further issues about the executive power of the States and Territories to apply such schemes could be raised.

Adopting instruments as they exist from time to time

The Bill provides for the adoption in bilateral agreements of instruments as they exist from time to time.[29] It is relatively rare to disapply the prohibition in section 46AA of the Acts interpretation Act 1901, or the equivalent in section 14 of the Legislative Instruments Act 2003 that applies to legislative instruments. Doing so creates a significant risk and removes the need for Parliamentary approval of a change in the law.

The Explanatory Memorandum explains that the reason for the amendment is to "ensur[e] that bilateral agreements can make reference to the most current version of instruments and policy documents."[30] This sounds reasonable and sensible, however the reality is that it removes an important protection against a subsequent version imposing lesser environmental protections than what had previously been accredited.

The Parliament's ability to delegate legislative power has long been recognised.[31] However there are limits to this capacity and Parliament cannot abdicate its legislative power.

> …the Parliament of the Commonwealth is not competent to "abdicate" its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned.[32]

The practical reality of the scheme that is being proposed in the Bill is that it would effectively be the Minister and the States and Territories that have the responsibility for the content of the law relating to the approval of projects that are likely to have a significant impact on MNES. Following the making of the bilateral agreement there will be little to no role for the Parliament yet the operation of the scheme may change quite significantly.

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[29] Bill schedule 5 item 9.
[30] Explanatory Memorandum p3.
[31] *Baxter v Ah Way* (1909) 8 CLR 626; *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan Informant* (1931) 46 CLR 73.
[32] *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan Informant* (1931) 46 CLR 73, Evatt J at 121.

There are other examples of laws where applying instruments as they exist from time to time is permitted[33] however in this case it is directly contradictory to the notation of accreditation and the requirement that the Minister be satisfied that the agreement accords with the objects of the Act[34] and meets the other requirements for agreements set out in sections 51 to 54 of the EBPC Act. Not only may instruments incorporated into the bilateral agreement be later amended either by the Minster or potentially by state and territory ministers, the Bill provides that the instruments do not yet have to exist.

The obvious question is how can the Minister be satisfied that there will not be an unacceptable impact on MNES and how can the Parliament be asked to approve that decision if the bilateral agreement is allowed to incorporate instruments that they have not even seen?

Given the level of discretion afforded under the state and territory Acts it is not possible to be confident about the parameters under which future administrative instruments will be made. The *Environmental Effects Act 1978* (Vic) is an example of a hugely discretionary scheme that creates considerable uncertainty about what would and would not be required of a proponent. The standard of assessment of any given project that may be approved following the process set out in that Act may vary enormously and it is impossible to say prospectively what standards of assessment might be applied to any given action.

Whilst there are obvious difficulties and principled reasons to object to the capacity to incorporate instruments in this way it must be acknowledged that there may also be reasonable examples where it is appropriate to incorporate the most contemporary instruments and one can reasonably say that it is not necessary for formal variation and parliamentary support for the change. These examples would come from the EPBC Act itself for example bioregional plans, recovery plans and much of the other conservation material that is either able or required to be developed under the EPBC Act. It is logical that these plans are picked up and applied by a bilateral agreement.

Both the *Acts Interpretation Act* and the *Legislative Instruments Act* provide for the incorporation of current Acts and legislative instruments recognising that Parliament has a supervisory role in the creation of those instruments. Rather than allowing any instrument to be applied as it exists from time to time this could be restricted to instruments made under the EPBC Act and perhaps even certain state or territory instruments but these should be individually considered before such a significant power is created.

Conclusion

What the Bill really demonstrates is that it is not possible to recognise the existing range of state and territory planning and environment laws under the EPBC Act in any meaningful way that respects both the qualitative protection created by the EPBC Act and the procedural requirements to maintain executive accountability to the Parliament.

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[33] See for example EPBC Act section 134(3)(c) in relation to conditions placed on approvals (note that this is very different as the Minister controls the process and allows requirements to be placed on proponents); *Navigation Act 2012* section 342.
[34] EPBC Act section 50.

Whilst the idea of using state and territory processes for the EPBC Act may sound reasonable and potentially efficient in theory, the reality is that it cannot realistically be done in a way that satisfies the state and territory desire for greater autonomy and reluctance to improve their current schemes to be consistent with the requirements of the EPBC Act.

State and territory environment, planning and other associated processes and schemes were designed for a range of different purposes, have different outputs and all manner of different mechanisms to achieve them. Making them fit into the EPBC Act model is very difficult and will quite possibly create more confusion, delay and difficulty that it can ever hope to resolve. The attempt to facilitate additions or changes through executive instruments will not overcome the underlying problem that the laws are not designed to achieve what is required by the EPBC Act. The obvious consequence is that decision makers will at times act ultra vires. Rather than simply creating 'flexibility' the Bill also creates considerable uncertainty that creates a greater risk of litigation to resolve disputes.

The underlying reason for the Bill is to allow deficient state and territory schemes to be accredited under the EPBC Act. One has to ask why the Commonwealth is being asked to change what is a reasonable standard that is in the interests of both environmental outcomes as well as public accountability and transparency because the States and Territories refuse to bring their laws up to national standards. If the States and Territories want to take advantage of what they perceive to be better arrangements they should be willing to amend their laws to meet those standards. The Parliament of Australia should not be being asked to diminish the standards that it has determined appropriate when there can be no possible beneficial change as a result.

The states can make the necessary changes if they wish to. If they do not it is hard to see why the Parliament of Australia should be prepared to accommodate them when it means not only providing for poorer environmental outcomes but also relinquishing control of the protection of matters of national environmental significance to the vagaries of state and territory executives.

For further information on this submission, please contact: