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15 February 2013

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Senate Committee,

Answers to questions on notice in relation to the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012

Thank you for the opportunity to provide oral evidence on Friday 8 February. I was asked three questions which I took on notice, listed below.

1. [W]hat is the additional time from the proponents' perspective that is added at the final approval stage? Given that, as you said, we have already saved a whole lot of time and duplication by having the assessment processes accredited, how much time is there on top of that for the final approval stage that is added by having the Commonwealth separate, as it is at the moment?[1]

2. [C]ould you provide the committee with your opinion about the operation of sections 57 to 64 of the act in relation to the suspension and cancellation of bilateral agreements? If you believe this is the case, and I am assuming from you evidence that you do, why do you think this would be a not effective enough safeguard over Commonwealth referral of approval powers to the states?[2]

3. Given that, in the context of the Hawke review is it possible for the existing act to provide sufficient flexibility with sufficient environmental controls? [D]o you see any practical way of balancing this issue of improved efficiency, less cost and environmental protection under the existing act without implementing this bill that is before us?[3]

I enclose answers to the questions.

Yours sincerely,
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1. [W]hat is the additional time from the proponents' perspective that is added at the final approval stage? Given that, as you said, we have already saved a whole lot of time and duplication by having

[1] Senator Waters, Proof Committee Hansard, Environment and Communications Legislation Committee, Friday February 2013, p. 13.
[2] Senator Waters, Proof Committee Hansard, Environment and Communications Legislation Committee, Friday February 2013, p. 11
[3] Chair, Proof Committee Hansard, Environment and Communications Legislation Committee, Friday February 2013, p. 12

the assessment processes accredited, how much time is there on top of that for the final approval stage that is added by having the Commonwealth separate, as it is at the moment?

Once the commonwealth Minister has received the appropriate assessment documentation, he or she must make a decision on approval of a controlled action within the relevant period (s130 (1a)). The length of the relevant period varies according to the type of assessment undertaken. For assessments undertaken under bilateral agreements, an assessment report is prepared by the State/Territory Government; accordingly, a decision upon approval by the Minister must be undertaken within **30 days of receiving the assessment report** (see table below).

Type of Assessment	Relevant period	Section
Assessment report	30 business days after receiving the assessment report	130(1b(a))
Assessment on referral information	20 business days after receiving the final recommendation report	130(1b(b))
Assessment on preliminary documentation	40 business days after receiving	130(1b(c))
Public environment report/environmental impact assessment	40 business days after receiving the public environment report/final environmental impact statement	130(1b(d))
Commission conducts inquiry	40 business days after receiving the report of the Commission.	130(1b(e))

Note that the Minister can specify a longer time for the relevant period by providing a copy of the specification and publishing the specification in accordance with the regulations (s130 (4)). Time does not run while the Minister waits for advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development, nor while further information is being sought (ss 180(4A)&(5)).

Note also that Commonwealth Minister must invite comments in relation to the approval decision from other relevant Ministers; and the proponent and associated parties (ss 131, 131AA) with comments to be received within 10 days. The Minister may seek public comment in relation to the approval (s 131a); again comments to be received within 10 days. These comment periods would fall within the timelines specified above in relation to the period between the Commonwealth Minister receiving assessments and the final decision on approval or approval with specified conditions or a refusal (s133).

The relatively tight timelines of no more than 40 days between receipt of the relevant assessment and the 'approval' decision by the Commonwealth Minister indicate that there are already very streamlined processes (and transparent and mandatory timeframes) in place under current EPBC Act requirements. It emphasizes that if efficiencies are to be achieved in the overall process then devolving approval powers under bilateral 'approval' agreements may not necessarily achieve this outcome. Indeed, depending upon the state legislation involved, there may not even be as tightly mandated time frames as those under the EPBC Act.

2. [C]ould you provide the committee with your opinion about the operation of sections 57 to 64 of the act in relation to the suspension and cancellation of bilateral agreements? If you believe this is the case, and I am assuming from you evidence that you do, why do you think this would be a not effective enough safeguard over Commonwealth referral of approval powers to the states?

Overview of sections 57-64

Sections 57 to 63 provide for suspension or cancellation of the effect of a bilateral agreement or certain provisions in an approval bilateral agreement or assessment bilateral agreement in certain circumstances, to protect the objects of the EPBC Act and in fulfillment Australia's international environmental obligations, such as ensuring that the ecological values of internationally significant wetlands are protected.

The Environment Minister's power to suspend or cancel a bilateral agreement can be triggered in three ways:

Section	Circumstances triggering Minister's power	Conditions on exercise of power to suspend or cancel
57	A third party ("a person") may refer matters to the Minister which the person believes contravenes a bilateral agreement	The Minister *must* decide whether the bilateral agreement has been contravened and what action he or she should take. The Minister must publish his or her decision and the reasons for that decision.
58 and 59	The Minister believes that the State or Territory Minister has not complied with the terms of the bilateral agreement, or has not or will not give effect to the agreement in a way that accords with the relevant objects of the EPBC Act and promotes the discharge of Australia's international obligations relevant to the agreement (i.e. environmental protection obligations) (s 58).	The Minister *must* consult with the appropriate State or Territory Minister party to the bilateral agreement in question (s 58). The Minister *may* decide to give notice of suspension or cancellation if after consultation the Minister is not satisfied that the State or Territory Minister has not complied with the terms of the bilateral agreement, or has not or will not give effect to the agreement in a way that accords with the relevant objectives in EPBC Act and promotes the discharge of Australia's international environmental obligations (s 59). If the Minister gives notice, the Minister must give the appropriate State or Territory Minister reasons (s 59). The decision and reason for decision must also be made public (s 59).
60	The Minister is satisfied that the State or Territory party to the agreement is not complying with the agreement, or will not comply with the agreement; *and* as a result of non-compliance, a significant impact is occurring or is imminent on any matter protected by a provision of Part 3 that is relevant to an action in a class of actions to which the agreement relates.	The Minister *may* suspend the agreement or specified provisions of the agreement for 3 months or less. Notice of suspension must be given to the appropriate Minister of the State or Territory and published in accordance with the regulations. The Minister must consult with the appropriate Minister of the State or Territory about the non-compliance as soon as practicable after the notice has been given.
63	Appropriate Minister of a State or self-governing Territory *may* request the federal Environment Minister give notice of suspension or cancellation	The Environment Minister *must* give a notice of suspension or cancellation as requested. The notice and reasons for suspension or cancellation must be published.

The notice of cancellation or suspension will apply, such that the effect of the agreement or specified provision of the agreement is suspended or cancelled for the purposes of this Act, or of a specified provision of this Act, *either generally or in relation to actions in a specified class*.[4]

The Minister can give notice of cancellation of the agreement while an agreement is suspended (s 61) and the Minister can revoke the suspension or cancellation in certain circumstances (s 62).

In summary, the Minister's powers prima facie are directed to ensuring that matters of national environmental significance (including those matters the subject of international obligations) are insulated from being significantly impacted by 'actions'.

Assessment of adequacy of ss 57-64 as a safeguard

The existing provisions in the EPBC Act to cancel or suspend bilateral agreements for state approval of actions provide an insufficient safeguard for the protection of matters of national environmental significance (MNES) for **4** main reasons:

1. The circumstances triggering the Minister's power are ad hoc. They follow no designated procedure for regular audit or monitoring of the implementation of the agreement, (or indeed its operation in respect of any designated project) in order to uncover circumstances when the powers should be exercised. In sum the process is very open-ended and discretionary lacking the strong triggering and explicit criteria of other sections of the EPBC Act such as the requirement for mandatory referrals in regard to potential controlled actions.
2. Under current provisions, for the powers to be invoked it can rely on a third party to bring breaches of the agreement to the notice of the Commonwealth Minister. There is no mandatory requirement to do so, and we question whether the community will have either sufficient knowledge or resources to fulfill this 'watch dog' function. Alternatively, the Minister is to satisfy himself or herself that a state is non compliant and, 'as a result of the non compliance a significant impact is occurring or imminent on a matter of national environmental significance. We query how the Minister is to be satisfied i.e. what process is to be undertaken?, by what criteria would the Minister be satisfied?, how would information be obtained?. This is particularly acute where there is a concurrent assessment bilateral agreement as it results in what we termed in our oral evidence as a closed loop.
3. The provisions whereby a state may request the Federal Minister to give notice of suspension or cancellation of a bilateral agreement similarly lack procedural clarity as to when/ how this would be triggered. They are characterized as discretionary requests rather than a mandatory requirement. Also we query the viability of such provisions particularly where there might be strong economic and social factors operating against the likelihood of a state making such a request.
4. More widely, there is the general problem of the difficulty and cost of ensuring adequate long term monitoring and compliance once the bilateral agreements are in place to ensure high standards of protection for the MNES. We acknowledge this is a more general problem across the legislation. However we argue that these provisions risk undermining the integrity of the Act unless there IS adequate and transparent compliance for these specific provisions. The need for robust administrative oversight is not overcome, simply displaced to a less rigorous procedure under these sections.

Finally we note some queries in relation to how s 64 is to operate in conjunction with ss 58-63.Section 64, which is very obscurely drafted, provides that the cancellation or suspension of bilateral agreement does not affect certain actions. Actions approved in a specified manner can be taken. We interpret this to refer to the situation where approvals were given under a bilateral agreement prior to the notice of cancellation

[4] EPBC Act, ss 59(4), 63(2) and (3).

or suspension, although we acknowledge that the wording is ambiguous. If this section is read literally it may suggest that actions already approved before the notice of the suspension or cancellation of the bilateral agreement can continue to be taken. Thus the effect of the cancellation and suspension operates only into the future; actions already approved, which may cause significant impact on MNES will remain in place. We note that under s 65 that there is regular review of bilateral agreements on a 5 yearly basis and expiry of agreements as specified within each agreement. (Senator Waters noted in regard to my oral evidence that this is the current situation with respect to NSW).

In view of the lack of clarity around the operation of section 64 we suggest that, in line with a precautionary approach, it may be more advantageous to ensure that the Commonwealth retains the approvals decision making powers. In this way it will be able to rely on the processes in place for decision-making about a specific controlled action under the EPBC Act (e.g. ss 130 – 132) including rigorous criteria for approvals, rather than seek to remedy harm that may have occurred or is imminent by the more cumbersome process of suspending or cancelling an entire bilateral agreement or specific provisions within the agreement.

3. Given that, in the context of the Hawke review is it possible for the existing act to provide sufficient flexibility with sufficient environmental controls? [D]o you see any practical way of balancing this issue of improved efficiency, less cost and environmental protection under the existing act without implementing this bill that is before us?

The Hawke Review supported the retention of the option to enter into approval bilateral agreements but recommended that where approval bilaterals are used "the Commonwealth will need a monitoring, performance audit and oversight power to ensure that the process accredited is achieving the outcomes it claimed to accomplish. Performance audit criteria will need to be specified for the accredited system before approval is granted."[5] This recommendation from the Hawke Review accords with the need for independent oversight by the Commonwealth to be maintained. As noted in our oral evidence, the international trends support robust independent accountability and transparency for decision-making. Similarly, in response to concerns raised by a Senate Inquiry about the quality of state environmental assessments, the Hawke Review responded that "criticisms of accredited State processes failed to recognise that the concerns they have with the State legislation do not pass through to the EPBC Act decisions."[6]

The accreditation standards for bilateral agreements on approval powers proposed in 2012, in our view, lacked sufficient guarantees of oversight and audit and a means of ensuring that the Commonwealth had sufficient information upon which it could require compliance. The issue of third party appeal rights was uncertain.

Further, we suggest that there are inherent difficulties in the accreditation process for devolution of the approval of actions to state and territory governments as there are different criteria in place for approvals related decision-making under the respective legislation for the Commonwealth as opposed to the state ministers under relevant state legislation. We append to the end of the answers to the questions on notice an extract of an article that explains in more depth our position on accreditation standards.

Thus our view is that without sufficient guarantees of independent oversight and audit; and given the problematic nature of accreditation standards that a more effective alternative to the Hawke Review recommendation (and one that may deliver greater regulatory certainty) is to remove the provisions within the Environment Protection and Biodiversity Conservation Act (EPBC Act) that allow for the

[5] *Australian Environment Act: Report of the Independent review of the* Environment Protection and Biodiversity Conservation Act 199 ('Hawke Review'), at [2.36].
[6] Hawke Review, at [2.27].

Commonwealth to enter into bilateral agreements in respect of the approval of actions. That is the substance of the Bill the subject of the Inquiry.

In the Hawke Review recommendation there would still be a need for Commonwealth administrative agencies to be involved in auditing and oversight functions so we question whether there would be a significant reduction in 'green tape', even though the approval phase is not the lengthy part of the overall process.

We underscore the importance of ensuring approvals processes are robust, without conflict of interest and in accordance with the overarching objectives of the EPBC Act. Indeed, The Hawke Review made some pertinent points about why the Commonwealth Environment Minister should remain the primary decision-maker:

> [D]ecision−making involves the challenging task of balancing competing environmental, social and economic considerations. It is appropriate that these decisions continue to be made by an elected representative of the people. In the vast majority of cases, it is expected that the Minister will follow expert advice. Retaining the Minister as the primary decision−maker under the Act also means that the Minister can be held publicly accountable for those decisions and it creates a context that motivates experts to ensure their reasoning is careful, well supported and convincing.[7]

Matters of *national* environmental significance and *Australia's* international obligations are at the heart of the EPBC Act. Accordingly, for the reasons of accountability outlined in the Hawke Review quoted above, the *Commonwealth* Minister must be the primary decision-maker on approvals relevant to MNES. As discussed in our submission, State and Territory governments are not responsible for discharging international obligations and do not have specific responsibilities to prioritise national obligations in relation to MNES.

As discussed in the answer to Question 2, above, the Bill provides the most effective means of achieving this objective as the existing provisions in the Act do not provide adequate safeguards.

Appendix

Excerpt from Lee Godden and Jacqueline Peel, 'Cooperative federalism and the proposed COAG reforms to the EPBC Act, *Australian Environment Review* Vol 28 No 1 2012, p. 395.

Standards:

[The accreditation] standards developed for COAG adoption in December 2012 required state laws to meet generalized outcomes such as 'high quality assessments' and that 'authorized actions do not have unacceptable or unsustainable impacts' on MNES.[8] The draft framework outlined proposed standards for individual MNES. The standards for wetlands of international importance, was illustrative.

> A bilateral agreement…may only be entered into if: it is not inconsistent with Australia's obligations under the Ramsar Convention and the agreement will promote the management of the wetland in accordance with principles detailed in an annex to the framework.

…

'This problem may be compounded by issues around compliance and monitoring. While the proposed framework acknowledges the need for compliance and monitoring, it is not clear how the Commonwealth can ensure this occurs. There is provision for the

[7] Hawke Review, at [13.9].
[8] Ibid at 10.

Commonwealth Minister to withdraw from [i.e. suspend or cancel] a bilateral agreement,[9] but not to directly enforce breaches of the EPBC Act where it is infringed through state processes. This is particularly problematic in respect of intergovernmental immunities, and more generally would seem unlikely in a model that emphasizes cooperative federalism. More importantly how can the Commonwealth know when it should withdraw or when non-compliance happens if it is effectively out of the loop of decision-making in the assessment and approvals phase, notwithstanding requirements upon the states to furnish various reports, and for there to be robust sharing of information between all levels of government. These potential problems at the level of individual MNES standards have parallels at a broader scale.

In concert with draft standards directed to individual MNES, there are system standards.[10] System standards deal with matters such as: auditable standards to identify whether proposed actions are likely to have a significant impact upon an MNES (the EPBC Act already has a relatively sophisticated procedure but it is not clear how audit would occur); and whether there has been or will be adequate assessment, including indirect and cumulative impacts. Such system standards largely replicate EPBC Act elements, but fail to provide a correlative criterion for determining how exactly state/territory law would meet such standards, and importantly, which entity would determine relevant correlations. While, in theory, this model could promote a lifting of standards across development assessment and approval processes, the lack of transparency as to how, and by which level of government, equivalencies are to be determined could make these standards problematic; notwithstanding principles to guide accreditation. The objective of systemic level reforms are to ensure that, '[t]he community has confidence that systems will deliver certainty, efficiency, transparency, appropriate opportunities for public engagement and legally robust decisions.' [11]

[9] EPBC Act ss 56-65.
[10] Ibid at 17.
[11] Ibid at 17.