18 January 2012

Australian Conservation Foundation (ACF) Submission to the Senate Inquiry
Environment Protection and Biodiversity Conservation Amendment
(Retaining Federal Approval Powers) Bill 2012

Matters of National Environmental Significance Require National Leadership.

Australia's system of environmental laws is currently failing to prevent environmental degradation on almost every available indicator, including loss of biodiversity, habitats, and ecosystem health.

Australia should be seeking to strengthen environmental protections and programs to reverse these trends, not to weaken national protection. Ecological health and sustainability is critical to Australia's national interest, and it is the Commonwealth Government's responsibility to lead the nation in ensuring that our environment is responsibly managed and protected, and that we meet our obligations under international law.

The current sections of the EPBC Act which allow the Commonwealth to delegate its powers in relation to Matters of National Environmental Significance (MNES) to the states are contrary to the Commonwealth's responsibilities to protect the environment, and should be removed. We support the Bill, and believe it should go further by explicitly ruling out delegation of the Commonwealth's approval powers under other statutory avenues.

Effect of the Bill Proposed

According to successive Australian Governments since the Act was passed in 1999:

> *"The Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act) is the Australian Government's central piece of environmental legislation.*
>
> *The EPBC Act provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places—defined in the EPBC Act as matters of national environmental significance." (Refer SEWPAC website)*

The EPBC Act is triggered only by a very limited class of actions – those which would impact on one of eight Matters of National Environmental Significance (MNES), defined in the Act.

Only 1,022 projects *have ever* required Commonwealth approval since its enactment in 1999. **Of these, only ten have been rejected** (less than 1%), while many projects were allowed to proceed subject to conditions designed to prevent adverse environmental impacts.[1]

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[1] Statement on Changes to Commonwealth Powers to Protect Australia's Environment *Wentworth Group of Concerned Scientists September 2012 p1*

While it is triggered only rarely, the EPBC Act provides critical oversight that ensures development is balanced by environmental protection. The EPBC Act as it currently stands allows the Commonwealth Government to 'delegate' its powers under the Act to state governments through the mechanism of bilateral agreement. The effect of this Bill would be to remove this avenue for the Commonwealth to delegate its power. The retention of direct involvement by the Commonwealth in decisions regarding developments which impact MNES is critically important for the health of the Australian environment, and for community confidence in the decision-making process. We therefore support the amendment of the EPBC Act as proposed in this Bill. The remainder of this submission outlines some of the key reasons why approval powers under the EPBC Act should never be delegated from the Commonwealth to the States.

Why the Commonwealth should retain its approval powers under the Act

The States do not have the Capacity to take on delegated Commonwealth powers under the Act.
The exercise of the Commonwealth powers under the Act is a matter requiring significant resourcing and expertise, which ACF believes would be beyond the capacity of most state environment departments – many of which are already struggling with their current workloads – to deliver without additional resourcing. State Auditor-General's reports across the country report that state governments are struggling to fulfil their existing statutory obligations. For example, In Queensland, the Auditor-General found that in 2010 only 17 per cent of State's 576 protected areas which required park management plans had them in place[2]. This figure was still at 17 per cent in June last year. In Victoria the Auditor General found that less than half of the states' listed threatened species and communities had the required management statements completed, and estimated that at the current rate of progress it would take the Victorian Department of Sustainability and Environment an astonishing 22 years to complete them – presumably assuming no further listings occurred during that time[3]. The trend around the country is for further cuts: for example in Queensland the Environment and Heritage Protection Department was cut 16% (220 redundancies) in 2012-13. In the absence of additional resources increasing both biodiversity budgets and staff, it seems highly unlikely the states could execute delegated powers adequately.

States do not have the necessary legislative frameworks in place
The Commonwealth can only delegate its powers under the Act if the States which are to exercise the powers have the legislative and regulatory frameworks in place to enable them to do so. In 2012 the Commonwealth Government released draft standards which it said states would be required to meet before any bilateral agreements could proceed. These standards reflect the minimum requirements of the EPBC Act – the bar could not legally be set lower. However, analysis by the Australian Network of Environment Defenders' Offices concluded that:

> *Based on our extensive 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 minimum requirements of the 106 elements outlined in the Draft Standards Framework, let alone the full suite of best practice standards that Australia should be striving to implement.*[4]

Creating the regulation and legislation necessary to enable states to meet the minimum standards required to exercise powers under the EPBC Act is necessarily a complicated long-term project, excluding the possibility of delegation in the near future.

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[2] Report to Parliament No 9 for 2010 Sustainable Management of National Parks and Protected Areas Auditor General of Queensland p 15

[3] Victorian Auditor General's Report p23, p35

[4] Submission on Draft Environmental Standards to accredit State/Territory approval processes under the EPBC Act *ANEDO November 2012 p 3*

States are not responsible for international obligations
The matters that our national environmental laws seek to protect reflect international obligations under treaties and agreements dealing with areas such as threatened species, migratory species, wetlands and world heritage areas. It makes sense for the Commonwealth to retain responsibility for these areas, or Australia may find itself being held to account for failure to meet international obligations which it has signed away to the states and can no longer control. States would have little incentive to ensure that these obligations are met, as they are not the party which would be held ultimately responsible.

State Governments do not answer to all of the Australian people on MNES within their borders
Matters of National Environmental Significance (MNES) under the EPBC Act are exactly that – *nationally significant.* The Great Barrier Reef is located in Queensland, but is an iconic Australian place which is valued by all Australians. Similarly world and natural heritage places belong to all of us, not just the people of the state in which they happen to be located. Threatened and migratory species do not recognise state borders, and can only be protected at a national scale. Nuclear actions are of concern to the whole nation wherever they are located. As a matter of logic, and accountability, the decision-maker in relation to these matters should be the government which is answerable to the people of Australia.

States have particular conflicts of interest
If the Commonwealth Government were to delegate its decision making powers under the Act, it would create a situation in which a state government could be the proponent, assessor, decision-maker, and compliance enforcer, of a development proposal which impacts a MNES. States are in fact frequently the proponents of actions referred to the Commonwealth Minister under the Act, and the conflict of interest inherent in this situation could not be clearer. However even in cases where the state is not the formal proponent, the financial benefits to the state which would flow from projects proposed, whether through royalties, investments or other means, and the political relationships involved, very frequently are sufficiently strong incentives that is still clearly impossible for a state to make a decision at arm's length. For example, the Tasmanian government abandoned its proposed road through the Tarkine rainforest when the area was granted heritage listing under the EPBC Act and it became clear that the project would be subject to Commonwealth approval. Without the Commonwealth as an independent decision-maker directly involved in the process, Tasmania would have prioritised its infrastructure plans over the environment.

The States Track Record on Environmental Protection is uneven, and poor at times.
Due in part to the conflicts of interest noted above the track record of States on protecting the environment gives no confidence that they would exercise additional powers responsibly. The great majority of environmental regulation falls within state jurisdictions, and in most cases, state environmental laws are inadequate, patchily implemented and poorly monitored and enforced. The trend is currently downward: in states around the country environmental protections are being rolled back under the misleading rhetoric of 'cutting green tape'. The states' attitude to MNES is no better. Since its enactment, the Commonwealth Government has used its powers under the EPBC Act to prevent several damaging development proposals which would have impacted iconic Australian places, and which were approved by the states, including proposals to dam the Franklin River, and build a massive resort on Great Keppel Island. More recently the courts upheld the Commonwealth Government's decision to disallow cattle grazing in the Alpine National Park under the EPBC Act, a project which Victoria continues to support vocally in spite of the court ruling. And just this week, Commonwealth intervention was required again, to halt proposed seismic exploration surveys by Apache Energy that would have had "clearly unacceptable" impacts on the Ningaloo World Heritage area.

Recommendation to strengthen proposed Bill
At the core of the proposed Bill is the removal of the current provisions of the EPBC Act that explicitly provide for delegation of authority to the States, particularly sections 29-31, 46 and associated provisions.

We note that, even with those proposed amendments, delegation of approval power to the States could still in effect be accomplished through other existing or potential mechanisms. For instance, there may be nothing preventing a delegation of approval power through a Conservation Agreement under Part 14 of the EPBC Act, or under a bioregional plan under the Act, or conceivably even under a non-statutory contract between the Commonwealth and a State.

ACF encourages the Committee to examine possible additional legislative changes that would prevent the possibility of a bilateral approval agreement being adopted as a "conservation agreement" or a "bioregional plan", thus accomplishing by stealth that which the Bill seeks to eliminate as an overt possibility.

Conclusion
If a proposal is deemed to be a Matter of National Environmental Significance, and if successive Australian Governments have relied on the EBPC Act as their central piece of environmental legislation to assess and manage MNES, then for all of the reasons outlined in this submission the **EPBC Act needs to be amended to ensure that the Commonwealth Government discharges its responsibility on behalf of all Australian people to protect our unique and valuable environmental heritage, and to remove the discretion to delegate these powers to States.**

It would be unthinkable for the Commonwealth Government in matters of national defence or border security to delegate decision making powers to each State Government for the use of defence or other national security assets that are located within each State border. An effective national defence policy requires national leadership. National and international environment assets, like the Great Barrier Reef, also require national leadership and active national decision making on behalf of all Australians.