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

Green Institute Submission, 18 January 2013

This bill is strongly supported. The power to make bilateral approval agreements under the Environment Protection and Biodiversity Conservation Act should be repealed; measures should be introduced to strengthen the Commonwealth government's environmental authority, not weaken it.

1. Introduction

This bill responds to the April 2012 decision by COAG (Council of Australian Governments) to implement bilateral approval agreements and adopt a fast-track process to that end. Only the COAG Business Advisory Forum was consulted, and the timing makes it clear that the Business Council of Australia had inside knowledge of the proposal (see timeline attached).

The COAG decision is another step in the devolution of Commonwealth environmental responsibilities to the states following the introduction of Regional Forest Agreements RFAs) in 1999. RFAs operate as an exemption from the Environment Protection and Biodiversity Conservation Act (EPBC Act) for the native forest logging industry by accrediting state systems and processes. In December 2009 the government rejected Hawke Review recommendations that would have tightened the standards for native forest logging.[1] It is not surprising that other industries, especially mining, are seeking treatment equivalent to that enjoyed by the logging industry.

The COAG plan is still on foot and will be considered again at the next COAG meeting in the first half of 2013. In the absence of a public consultation process, this Senate inquiry is an opportunity to examine some of the plan's implications. The following comments assume that the government's Draft Framework of Standards[2] (Standards) indicates the Commonwealth's intentions if bilateral approval agreements were implemented. The comments focus mainly on biodiversity and on the experience gained during the 15 that RFAs have been in force.

2. Issues

2.1 Environmental standards compromised

Australia has had national environment laws since 1974 and the Commonwealth's constitutional authority has been confirmed since 1983. Implementation of bilateral approval agreements would reverse 40 years of work towards a national approach to environmental protection which is crucial for a country that is also a continent and which supports a large part of the world's biodiversity.

Bilateral approval agreements would compromise environmental protection in three ways: by fragmenting responsibility, through decision-makers' potential conflicts of interest, and through decision-makers' lack of resources.

[1] http://www.alp.org.au/federal-government/news/hawke-report-epbc-act/
[2] http://www.environment.gov.au/epbc/publications/pubs/accreditation-standards-framework.pdf

Fragmentation. Instead of a national decision-maker and a national approach, decisions about matters of national environmental significance (MNES) would be fragmented amongst eight jurisdictions, each with their own legislation and processes. The Standards indicate that the Commonwealth is open to 'progressive' or 'flexible' accreditation. This opens the prospect of incomprehensibly complex situations where the same action is treated differently from state to state and issue to issue, or remains subject to both Commonwealth and state approval if it affects several MNES only some of which are subject to a bilateral approval agreement. Consideration of the national or cross-border impacts of decisions is also likely to be compromised.

Conflict of interest. States are closer to and more dependent on development than the Commonwealth. Conflicts of interest are inevitable and will tend to influence decision-making where environmental considerations stand in the way. For example, all but one of the WA EPA members disqualified themselves from approving Woodside's James Price Point proposal (although they had taken part in deliberations on the project). There are numerous examples where Commonwealth processes and decisions have been more stringent than the states.

Resources. The resource implications for state governments of implementing bilateral approval agreements have not been canvassed either in COAG communiqués or in the published report from the Business Advisory Forum (only costs to business were mentioned in the Business Council's discussion paper). Two types of costs can be anticipated: the actual cost of undertaking the approval process; and the potential cost of increased litigation. If states do not provide additional resources to implement bilateral approval agreements, standards will fall.

2.2 Compliance

RFAs show that the Commonwealth is likely to be extremely reluctant to police bilateral approval agreements. For example, when Tasmania was found not to have complied with its RFA in the Wielangta case, the Commonwealth and state governments agreed to amend the RFA, not upgrade Tasmania's standards. RFAs are supposedly subject to five-year reviews: the first five-year review for NSW RFAs was completed in 2010 (four years late) and the second has not begun; the second five-year review for Victorian RFAs was also completed in 2010. As of January 2013, the joint state-Commonwealth response to both sets of reviews has still not been published.

2.3 Outcomes and oversight

Contrary to the assertion in the Standards that Australia's current environmental standards are 'high' there is evidence that the current system is failing. The 2011 State of the Environment Report found, on the basis of limited information, that population size, geographic range and genetic diversity are decreasing in a wide range of species, including plants, animals and other forms of life.[3]

Australia lacks a comprehensive national environmental information system for monitoring and reporting on the condition of the environment (Hawke Review, p.316). There is therefore no mechanism for assessing objectively whether the states are meeting their obligations and whether the already poor performance of Australia's environmental protection systems is being further compromised. The Hawke Review recommended establishing a National Environmental Commissioner to provide independent scrutiny, reporting and advice. The government rejected the recommendation.

[3] http://www.environment.gov.au/soe/2011/summary/biodiversity.html#ib8

2.4 Experience with RFAs

RFAs are a model for bilateral approval agreements. They have been in force for 12 to 15 years and, as the Hawke Review noted, remain highly contentious. Examples of failure to protect biodiversity, and particularly threatened species, are numerous, some exposed through judgments in major court cases.

- In the Wielangta case, Forestry Tasmania's (FT) logging regime was found to be having a significant impact on the Tasmanian Wedge-tailed Eagle, Wielangta Stag Beetle and Swift Parrot.[4] The court also found that FT had 'manipulated' evidence and that one of their witnesses appeared more concerned to be an advocate for FT than an independent witness assisting the court.
- In Victoria's Brown Mountain case,[5] Environment East Gippsland won a temporary injunction against logging threatened species habitat (and was awarded 90% of costs); the court required the government to attempt to verify community survey results before logging could resume.
- In the MyEnvironment case opposing logging of Leadbeaters Possum habitat, the court found that the adequacy of the reserve system for the Possum needed urgent review.[6] Largely as a result of unabated logging pressure after more than 40% of its habitat was burnt, Leadbeaters Possum may now be reclassified from endangered to critically endangered.[7] A submission for the reclassification was made in December 2012.
- In NSW, community audits have revealed a pattern of systemic non-compliance with environmental laws in public native forests available for logging.[8]

The Hawke review recommended that RFAs be subject to rigorous independent performance auditing, reporting and sanctions for serious non-compliance. The government rejected the recommendation.

3. Commonwealth powers

If there is a genuine issue of duplicated decision-making, the most effective way to remove the duplication and achieve high environmental outcomes for Australia as a whole is to maintain and strengthen the Commonwealth's role. The states could accredit Commonwealth decision-making processes for those matters of NESP for which the Commonwealth is constitutionally responsible.

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[4] http://on-trial.info/
[5] http://www.eastgippsland.net.au/?q=campaigns/brown_mountain
[6] http://www.myenvironment.net.au/
[7] http://blogs.scientificamerican.com/extinction-countdown/2012/12/18/logging-australian-possum-extinction/
[8] If a tree falls

Attachment. Timeline

December 2009	Hawke Review of the EPBC Act recommends that it be streamlined and renamed the *Australian Environment Act*, emphasizing that "environmental considerations are to be considered first when making decisions under the Act".
December 2009	Commonwealth rejects Hawke Review recommendations to strengthen oversight of Regional Forest Agreements and add a greenhouse trigger
August 2011	Government response to the Hawke Review rejects recommendations to strengthen the EPBC Act and opens the door to Commonwealth-State bilateral approval agreements
August 2011 to April 2012	Presumed extensive consultation between Commonwealth and State governments and the Business Council of Australia (BCA)
April 10, 2012	**BCA releases a 15-page discussion paper advocating six 'reforms' to lower business costs by 'streamlining' environmental assessments and approvals**
April 12, 2012	**The COAG Business Advisory Forum endorses the BCA reforms** **Business Advisory Forum Taskforce established**
April 13, 2012	**COAG endorses the BCA reforms** **COAG Working Group on Environmental Regulatory Reform established**
May 2012	Statement of Environmental and Assurance Outcomes released: describes the outcomes required for productivity (reduce unnecessary costs for business and contribute to increased productivity and economic growth) and the environment (Australia's 'high' environmental standards are maintained).
July 2012	Draft Framework of Standards for Accreditation (Standards) released to the states. Sets out the standards required to accredit state decision-making Presumed ongoing Commonwealth-state negotiations to enable bilateral agreements to be concluded by March 2013
Nov 2012	Draft Standards published 'for people to see the approach' the government is taking in negotiations with the states
Dec 6, 2012	Business Advisory Forum discusses the framework
Dec 7, 2012	COAG defers consideration of the framework and Standards to next meeting in the first half of 2013
March 2013	Commonwealth-state bilateral approval agreements scheduled for completion