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EPBC Amendment (Bilateral Agreement Implementation) Bill 2014

Bill before Senate could weaken national environmental oversight

Briefing Note – September 2015*

EDO NSW is a community legal centre specialising in public interest environmental law

Summary

There has been recent focus on proposals to limit standing to bring legal cases under Australia's main environmental law, the EPBC Act.[1] But in May 2014 the federal Government introduced another proposal into Parliament – the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (**the Bill**).

Retaining legal standing is very important. But in some ways the Bill described here is just as significant. It could slash the number of projects that the Commonwealth is required to oversee for approval in the first place – by helping delegate national environmental powers to the States and Territories (**States**).

The upshot of the Bill is that it will make it easier for the Government to 'switch off' the EPBC Act – and federal oversight of national environmental impacts – for most developments. This would be a major setback for Australia's environmental laws.

The Bill has already passed the House of Representatives. Debate began in the Senate on 14 September 2015, when it was adjourned on the evening of the federal leadership ballot.

What the Bilateral Agreement Bill means for national environmental protection

In brief:

- If the Bill is passed, the next steps for the Government to switch off the EPBC Act for most projects would be to sign 'Approval Bilateral Agreements' with all willing States.[2]
- Federal approval would still be needed for significant impacts on water resources from coal and CSG proposals, following Government amendments to the Bill in the Senate.

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* *Please note: This briefing note provides general information only, not legal advice. The status and contents of Bills can change quickly. For further information on the issues raised in this briefing note, please contact Nari Sahukar, Senior Policy & Law Reform Solicitor.*

[1] The EPBC Amendment (Standing) Bill 2015 aims to limit access to the Federal Court to review the legality of a decision under the EPBC Act (such as the flawed Carmichael/Adani coal mine approval – see our briefing note).

[2] The Commonwealth has already signed agreements with States and Territories to take over the *assessment* stage for impacts on 'matters of national environmental significance' (MNES). The proposed next step is to hand over the *approval* stage. However, Queensland and Victorian Governments (and federal Labor) recently stated their opposition to *approval* bilateral agreements that would allow State authorities to *approve* impacts on MNES.

So the Government has pulled back from its attempt to hand over project approvals where the 'water trigger' applies,[3] but still seeks to delegate oversight of other matters.

- Draft Agreements to do this have already been exhibited in most States.
- EDOs of Australia have consistently opposed these 'Approval Bilateral Agreements' – as they abandon federal environmental responsibilities, leave national issues in State hands, and increase potential conflicts of interests, where States gain from projects they approve.
- EDO analysis has found that no State or Territory environmental laws meet federal EPBC standards (see **Attachment A**).
- Yet the Bill would remove safeguards requiring States to raise their *legal standards* to meet an EPBC Act equivalent level before the Commonwealth can hand over approvals. State approvals would still need to meet certain criteria but wouldn't have to do so in law.
- In our view, the federal Environment Minister (not a State Planning Minister) should keep responsibility for *approving* impacts on Matters of National Environmental Significance (**MNES**). State *assessments* should only be accredited if they are equivalent in law.

Six further concerns about the Bilateral Agreement Bill

More specifically, the Bill would:

1. **Make it easier to hand over Commonwealth oversight of environmental impacts.**
    - This is a concern because if Approval Agreements are signed, as the Abbott Government proposed, State governments would *assess* and *approve* impacts on almost all MNES. This includes impacts on World Heritage Areas like the Great Barrier Reef, Uluru, the Ningaloo Coast, Tasmanian Wilderness and the Blue Mountains; nationally threatened species, Ramsar wetlands, national heritage places, migratory species like seabirds and whales, and nuclear actions.

2. **Allow state approval policies and guidelines (not just laws) to be accredited.**
    - This is a concern because State assessment and approval processes under policies and guidelines may not have oversight from State parliaments, or be enforceable by the courts. State policies should not replace federal laws.

3. **Allow 'minor' amendments to an accredited State approval process without further public exhibition.**
    - This is a concern because it relies on the federal Environment Minister's satisfaction that the changes won't materially impact on MNES or public participation. Policies and guidelines are likely amended more often than laws.

4. **Give the federal Environment Minister unfettered discretion in the matters he or she can consider in deciding whether to accredit a State approval process.**
    - This is a concern because the current EPBC Act limits what the Minister can take into account.[4]

5. **Open the way for *local councils* to take on approval responsibilities for MNES.**[5]

[3] Since the 'water trigger' commenced in 2013, there has been a legislative prohibition on handing over EPBC Act approvals to the States for impacts where that trigger applies (i.e. large coal and CSG projects that may significantly impact on water resources, and are therefore assessable under the EPBC Act's water trigger).
[4] E.g. the Minister must be satisfied that impacts on MNES will be adequately assessed and not be 'unacceptable or unsustainable': EPBC Act, s. 46(3). The Bill would add 'any other matter that the Minister considers relevant.'

- This is a concern as local councils don't have sufficient capacity or expertise to effectively take on our national and international obligations to protect environmental assets like Ramsar wetlands, threatened and migratory species.

6. Allow handover of federal powers to apply retrospectively to past State approvals.

- This is a concern because the Bill could switch off the need for federal approval even if the State government approved the project *before* its process was actually accredited.[6] This would seem to pre-empt EPBC Act approval processes that the community may legitimately expect.

The Bilateral Agreement Bill's progress so far

The Bill has already passed the House of Representatives in June 2014. EDOs of Australia made a submission opposing the Bill. A Senate Inquiry Report (2014) was split on the Bill.

On 14 September 2015, the Bill was partly debated by the Senate. Debate was adjourned on the evening of the Liberal leadership spill. At the time of writing (21 September) it is unclear if and when the Senate will vote on the Bill.

Conclusion: Better policy options are available

Bilateral agreements that accredit weak State or Territory laws and policies are no substitute for a strengthened EPBC Act. A range of policy alternatives for strengthening environmental laws are available instead. EDOs of Australia has called for three things:

- Revisit the Independent Review of the EPBC Act package of recommendations (Hawke Review 2009) to improve both environmental protection and regulatory effectiveness.[7]
- Improve State environmental *assessment* laws via a 'highest common denominator' approach to environmental standards, in line with recommended federal improvements. Any accreditation of State *assessment* processes must be based on clear and equivalent standards enshrined in legislation.[8]
- Even if States and Territories show they can be entrusted with assessment of national environmental impacts, the Commonwealth must maintain its final *approval* powers.

As the most recent *State of the Environment Report* (2011) concludes:

> *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.*

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[5] The Bill's original Explanatory Memorandum refers to 'allowing approval bilateral agreements to include approvals made by any person or organisation authorised by the State or Territory (such as local governments), rather than only [those defined as] "the state" or an "agency of the state". i.e. The Bill removes the Act's current limits on delegations to projects 'approved by the State' or 'an agency of the State' or Territory (s. 46(1)).

[6] See 'Note' to proposed subsection 46(1), Bill Schedule 5, item 1. See further the Bill's Supplementary Explanatory Memorandum, item 15 p 7: 'The new subsection 46(1) … clarifies that an action may be approved prior to the accreditation of the process for the purposes of an approvals bilateral agreement.'

[7] Areas that the Hawke Review identified to strengthen the EPBC Act included, for example: cumulative impact assessment; a greenhouse assessment trigger in lieu of a price on pollution; a harmonised threatened species list; and a National Environment Commission which could for example oversee assessment bilateral agreements.

[8] Stronger State and Territory laws would include, for example:

- improved, proportionate and comprehensive assessment standards that are designed to achieve ESD;
- greater transparency, public participation, accountable decision-making and governance arrangements;
- better resourcing, leading practice monitoring, enforcement, audits and reporting; and
- increased community access to justice (including court oversight) to ensure trust in decision-making.

Attachment A: EDOs' Report on State Environmental Standards, 2014 (excerpt)

An Environment Defenders Offices' report for the Places You Love Alliance in 2012 found that no State or Territory environmental and planning laws met federal standards under the EPBC Act. An updated report in 2014 showed the gap between State and national environmental standards was widening.

This is important because the EPBC Amendment (Bilateral Agreement Implementation) Bill seeks to allow State policies, not just laws, to be accredited as meeting federal standards. This will also complicate approval procedures as requirements are set out in several different places – the EPBC Act, State laws, State policies or guidelines, and in bilateral agreements.

Comparison Table – Do state planning laws explicitly incorporate core EPBC standards?

EPBC Act core standard	Qld[i]	TAS	ACT	SA	NT	VIC	NSW	WA
Does the state (or territory) planning law explicitly refer to the principles of ESD in objects?	Partly[ii]	Partly	Yes	Partly	Partly[iii]	No	Yes[iv]	Partly[v]
Does state planning law explicitly refer to the World Heritage Convention?	No[vi]	No	No	Partly	No	No	No[vii]	No
Does state law specifically refer to the Ramsar (Wetlands) Convention?	Partly[viii]	No	Partly[ix]	No	No	No	No[x]	No[xi]
Does state threatened species list include all federally listed species and communities?	No	No	Partly[xii]	No	No	No	No[xiii]	No
Does state planning law specifically refer to the Convention on Biological Diversity?	No	No	Partly[xiv]	No	No	No	No	No
Does state threatened species list include all federally listed migratory species?	No	No	Partly[xv]	No	No	No	No	No
Does state law specifically refer to Convention on Migratory Species, JAMBA, CAMBA, ROKAMBA?	Partly	No	No	No	No	No	No	No
Does state law prohibit the approval of nuclear actions?	No[xvi]	Partly	No	Partly	Partly	Yes[xvii]	Partly[xviii]	No[xix]
Does state law provide equivalent standing for third parties[xx] to bring proceedings in relation to major projects?	Partly[xxi]	Yes	Partly[xxii]	No	No	No[xxiii]	Partly[xxiv]	Yes
Do state offset standards meet Commonwealth standards regarding 'like for like' and limited use of indirect offsets?	No[xxv]	No[xxvi]	Partly[xxvii]	Partly	Partly	Partly[xxviii]	No[xxix]	Partly[xxx]
Is the state environment minister responsible for approving major projects?	No	No[xxxi]	No	No	No	No	No[xxxii]	Partly[xxxiii]
Does state appoint independent decision makers for state-proposed projects?	No	No[xxxiv]	No[xxxv]	Yes	Yes	No	No[xxxvi]	No[xxxvii]
Do state laws provide special procedures for early refusal where project impacts are 'clearly unacceptable'?[xxxviii]	No	No[xxxix]	No[xl]	Partly	Partly	Partly	No[xli]	Partly[xlii]

For a full analysis of the laws in each State and Territory refer to the full 2014 report, *Assessment of the adequacy of threatened species & planning laws*.