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The voice for the environment since 1955

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13 June 2014

Submission of Objection: draft NSW - Commonwealth approval bilateral agreement

Dear Sir/Madam,

INTRODUCTION

The Nature Conservation Council of NSW (NCC) is the peak environment body for New South Wales, representing over 120 organisations across the state. Together we are committed to protecting and conserving the wildlife, landscapes and natural resources of NSW, and have long-standing experience in environmental and planning matters.

We welcome the opportunity to comment on the draft NSW – Commonwealth bilateral approval agreement (**draft agreement**), which will hand important Federal approval powers under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) to the NSW Government.

We recognise that this draft agreement is part of a broader move by the Federal government to establish a 'one-stop-shop' for environmental approvals under the EPBC Act. We have significant concerns with this approach. Rather than creating a 'one-stop' shop, we see this process as removing important Federal oversight on matters of national environment significance, and allowing multiple, inconsistent processes through multiple state agreements.

Over the course of the last two years, our organisation has strongly argued against the handing of Federal approval powers to the states. Most recently we responded to the inquiry into streamlining environmental regulation, 'green tape', and one stop shops. A copy of this submission is **enclosed**.

The 2011 State of the Environment Report found that Australia is going backwards in biodiversity conservation, the health of our watersheds, the protection of our forests and woodlands, and responding to climate change.[1] Given the declining state of our environmental assets, we look to the Federal government to uphold and strengthen environmental laws to safeguard Australia's natural heritage for future generations.

This submission (1) outlines our broad concerns with handing Federal approval powers over to the states, and (2) highlights our specific concerns with the draft NSW-Commonwealth approval bilateral agreement.

KEY CONCERNS WITH HANDING FEDERAL APPROVAL POWERS TO THE STATES

NCC does not support the Federal government's 'one-stop shop' agenda, including the handing of Federal approval powers to the states. In particular, we have the following key concerns:

Only the Federal government is suited to make environmental decisions in the national interest

There needs to be national leadership on national environmental issues. Our rivers, critical ecosystems and endangered species do not adhere to state borders. Only the Federal Government can properly consider national or cross-border issues and make decisions in the national interest. This is why the EPBC Act focuses on matters of national environmental significance – they are matters that by their nature should be considered and protected at the national level by the national government.

History has shown that federal oversight on matters of national environmental significance provides critical protection for Australia's lands, water and threatened wildlife. Ill-conceived development proposals, supported by state governments, have threatened Australia's natural heritage several times in the past, prompting the federal government to step in to prevent irreversible harm. Without federal intervention, the Franklin River would be dammed, there would be oil rigs on the Great Barrier Reef and pristine Shoalwater Bay would be home to a large coal port.

There is a significant conflict of interest when states are proponents or have vested interests in the outcomes of projects

In many instances, development projects that trigger the EPBC Act are projects where the state government is either the proponent, a major beneficiary, or has shown political interest in the project proceeding. This results in a direct conflict of interest when the state also acts in the role of approval authority.

Recent evidence shows that conflicting interests can result in state and territory governments undermining essential environmental protection for short-term economic and political gain. Examples include the Queensland Government's inadequate environmental assessment of the Alpha coal mine project that would harm the Great Barrier Reef and the NSW Government's approval of trial cattle grazing in national parks.

[1] Australian Government expert committee, State of the Environment 2011, 'In brief', at 9

National environmental law enables Australia to meet its international environmental obligations

The Commonwealth, not the states, is signatory to and responsible for upholding Australia's obligations to a number of international agreements for the protection of environmental assets, including matters of national environmental significance under the EPBC Act.[2]

There is strong concern that states do not have adequate approval and assessment processes in place to meet Australia's international obligations at a national level.

If the Commonwealth devolves its obligations under international law it will be up to the states to ensure that development activities comply with Australia's international obligations – a task that they are unlikely to be willing or able to do. The Commonwealth holds primary responsibility for ensuring these international obligations are met, and it is in the best position to do so.

States have a poor record of establishing and administering environmental laws

The 'one-stop' shop approach fails to address concerns that state legislation does not meet the standards necessary to effectively protect matters of national environmental significance.

In a number of states and territories environmental impact assessment is currently weak and inadequate, and the states alone cannot be relied upon for protection of environmentally sensitive assets in the national interest.

For example, the Australian Network of Environment Defender's Office conducted a thorough assessment of threatened species laws and planning legislation in each jurisdiction and it found that no state or territory planning laws met best-practice standards for environmental assessment.[3]

The major projects approval framework of the NSW *Environmental Planning and Assessment Act* 1979 (**EPA Act**) (in particular those sections of Part 4 that relate to the assessment and approval of State Significant Development and State Significant Infrastructure have been widely criticised.

[2] The Commonwealth is responsible for ensuring Australia meet its obligations under conventions and agreements such as:

- The Convention on Biological Diversity
- The Convention for the Protection of World Cultural and Natural Heritage
- The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar)
- The Convention on the Conservation of Migratory Species of Wild Animals
- The China-Australia Migratory Bird Agreement (CAMBA) and
- The Japan- Australia Migratory Bird Agreement (JAMBA)

[3] *An assessment of the adequacy of threatened species and planning laws in all jurisdictions in Australia*, December 2012, Australian Network of Environmental Defender's Offices Inc. (ANEDO). www.edo.org.au/edonsw/site/policy_discussion.php,

In particular:

- There is broad power and discretion concentrated in the Minister for Planning.[4]
- Major projects are exempt from important environmental approval requirements under NSW environment protection laws.[5]
- Third party merit appeal rights are restricted.[6]

Currently in NSW, there are a number of proposals on foot that trigger the EPBC Act because they have an impact on matters of national environmental significance, for example:

- T4 Coal Terminal, Newcastle, which threatens the ecological character of the Hunter estuary Ramsar Wetlands.
- Warkworth Modification 6 which threatens Warkworth sands Woodland an endangered ecological communities (EEC).
- Expansion of the Wilpinjong Coal Mine Project which threatens the federally listed EEC White box, Yellow Box, Blakely's Red Gum Grassy Woodland.
- Wallarah 2 coal project which has the potential to have significant impacts on ground, surface and catchment water resources and threatened species.
- Angus Place Mine Extension and Springvale Mine Extension which threaten a significant part of the Gardens of Stone region.

There is strong concern that:

a) The NSW planning system does not meet the necessary requirements to properly assess the impacts of these proposed developments on the relevant matters of national environmental significance.
b) The NSW government should not exercise the Federal environmental approval functions for these projects that will impact on matters of national environmental significance.

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[4] For example, the introduction of the former Part 3A of the *Environmental Planning and Assessment Act* 1979 EPA Act) increased the Minister's discretionary decision making powers and was the cause of much community concern. The Independent Commission Against Corruption recommends that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective (see above no. iii, Recommendation 1). The Nature Conservation Council of NSW, Total Environment Centre and EDO NSW argue that objective decision making can not only improve environmental outcomes, but also reduce uncertainty, ensuring that decisions are transparent and that decision makers are accountable, see *Our Environment, Our Communities – Integrating environmental outcomes and community engagement in the NSW planning system*, p 20-22 (www.nccnsw.org.au/planningreport)

[5] When the former Part 3A (EPA Act) was introduced it removed important licensing and approval requirements from other agencies for Part 3A projects. This continued with the repeal of Part 3A and the reintroduction of state significant development under Part 4. This essentially removed a critical component of the assessment and management of environmental impacts including pollution, and impacts on heritage, water and Aboriginal cultural heritage .This goes against the fundamental idea that proposals likely to have the most impact should be subject to the most scrutiny, removed important agency oversight and concentrated assessment and approval in the Department of Planning.

[6] Third party merits appeal rights are important for maintaining accountability and transparency in environmental and planning decisions, including the assessment and approval of major projects. Despite the repeal of Part 3A in 2011, merits appeal rights for state significant development remain limited. Third party merits appeal rights are not available in the case of critical infrastructure proposals, proposals that have been to public hearing as part of a PAC review and proposals that would not have otherwise been designated development. It is noted that ICAC has recommended the expansion of third party merits appeals to a range of additional categories of private sector development (above no iii. Recommendation 16).

A patchwork of standards provides less, not more certainty

It has been claimed that transferring federal approval powers to the states will remove unnecessary duplication that is causing high costs to business in Australia. The claimed duplication is a fallacy. An assessment by Economists at Large found numerous flaws in the methodology used by the Business Council of Australia to estimate costs.[7]

Further, the Senate Environment and Communications Committee found that federal-state duplication is minimal, and that environmental standards would be put at risk if federal approval powers were delegated.[8]

There is no evidence suggesting that the transfer of federal approval powers to the states and territories is the most efficient way to transform the system of environment assessment and approvals. In reality the Commonwealth and the states have distinct interests in particular outcomes. It is beneficial, particularly for environmental approval processes, to have multiple, independent arbitrators. Devolving approval powers to states and territories would leave Australia with a patchwork of inconsistent and ineffective environmental protections that would lead to more, not less uncertainty for business.

Protection of environmental assets requires a system of checks and balances

The EPBC Act delivers important environmental safeguards by placing checks and balances on the exercise of state power. The ability to hand over that power solely to states should be removed from our national environmental law.

History has shown that when the Federal Government exempts the states or gives them powers under the EPBC Act, environmental protection will be undermined and the Federal Government struggles to retain an oversight role. There is no evidence the Federal Government could effectively monitor and oversee the operation of bilaterals, including at the referral stage. Experience with Regional Forests Agreements indicates that non-compliance or ineffective implementation will not lead to any significant response from the Commonwealth.

There must be proportionate assessment of impacts

It is a basic tenet of planning and development assessment that the level of scrutiny should be proportionate to the impacts of a project. That is, high impact development should be subject to the most rigorous assessment.

Major projects, by their nature, require the highest level of assessment. Conversely, matters of national environmental significance require the highest level of protection. The regulation surrounding major project assessment and matters of national environmental significance is an important and necessary part of our environment and planning framework.

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[7] *A response to the Business Council of Australia's Discussion Paper for the COAG Business Advisory Forum*, 2012, Economists at Large, Melbourne, Australia.

[8] Senate Environment and Communications Committee, Report on the *EPBC Amendment (Retaining Federal Powers) Bill 2013.*

SPECIFIC CONCERNS WITH DRAFT NSW – COMMONWEALTH BILATERAL APPROVAL AGREEMENT

For the reasons outlined above, NCC does not support the Draft NSW-Commonwealth Bilateral Approval Agreement.

In addition to the concerns outlined above, we make the following specific comments on the draft NSW – Commonwealth Bilateral Approval Agreement.

- **Ministerial party to the draft agreement**

  NCC is concerned with the proposal to declare the NSW Minister for Planning as party to the draft agreement. At the Commonwealth level, it is the Federal environment minister, advised by the federal environment department, who exercises the Ministerial functions under the EPBC Act.

  This distinction is important. The Commonwealth environment minister is not exercising a broad planning approval function. Instead, he/she has the specific function of determining whether development that has an impact on a matter of national environmental significance can go ahead.

  It is not appropriate for this function to be handed to the NSW Minister for Planning. The more appropriate party to the agreement would be the NSW Minister for the Environment.

- **Reference to the NSW Draft Biodiversity Offsets Policy**

  The draft agreement seeks to accredit the NSW Draft Biodiversity Offsets Policy for Major Projects (**draft policy**). This is not supported by NCC. In particular:

  - It is inappropriate for the draft agreement to accredit a draft NSW policy that is in the final stages of consultation, and may be substantially amended before it is finalised.

  - NCC has significant concerns with the draft policy, in particular; the failure of the NSW Government to deliver on its commitment to achieve 'net positive' biodiversity outcomes; the failure to identify and protect 'red flag' areas including areas of high conservation value; the weakening of the 'like for like' offsetting requirements; multiple pathways to offsetting, including supplementary measures and mine site rehabilitation; and the proposal to allow discounting.

  A copy of NCC's submission on the draft NSW Biodiversity Offsets Policy for Major Projects is **enclosed.**

- **Unenforceable language**

  The draft agreement often uses unclear and unenforceable language.

  For example, the phrase 'endeavour' or 'best endeavours' is used throughout the agreement:

  - Object F: "*The parties will use their best endeavours to implement the commitments in this Agreement acting in a spirit of cooperation and consultation to achieve an efficient, timely and effective process for environmental assessment and approval"* (emphasis added)
  - Clause 4.2(b): *"Where an action forms part of a larger action that does not occur wholly within the State of NSW, NSW will consult and use its best endeavours to coordinate its assessment and approval processes with other relevant jurisdictions*"
  - See also clauses 7.3(a), 8.2, 13(d), 13 (e) and 16.1(a)(ii).

  We note that there is no legal definition of "best endeavours", and it is not clear what actions would fulfil this obligation.

- **Ecological sustainable development (ESD)**

  Clause 6.5 of the draft agreement requires decision makers to "*have regard to sustainable development or ecologically sustainable development*" (emphasis added).

  We are concerned that this clause anticipates proposed changes to the NSW planning system that would remove ESD from NSW planning laws. It is our view that the NSW government's proposed definition of 'sustainable development' deliberately moves away from ESD and is not consistent with the EPBC Act or the *National Strategy for Ecologically Sustainable Development.*

  Our specific concerns on this issue are set out on pages 2-3 of our letter to former NSW Minister for Planning, Brad Hazzard in July 2013 (***enclosed***). The letter also outlines other specific concerns with the NSW government's Planning Bill 2013.[9]

- **Class of actions identified in the agreement**

  Schedule 1, Clause 4 outlines the classes of actions that fall within the agreement including development under Part 4 of the EPA Act and State significant infrastructure. As outlined above, we have significant concerns that the NSW assessment and approval process for major projects is inadequate. Further consideration must be given as to whether the NSW planning system and NSW environment laws meet the *Standards for*

[9] Our full response to the NSW government's White Paper and Planning Bill 2013, *Charting a new course: Delivering a planning system that protects the environment and empowers local communities,* Nature Conservation Council of NSW and Total Environment Centre, June 2013 is available at: http://planspolicies.planning.nsw.gov.au/?action=view_submission&job_id=5927&submission_id=67638

Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999.

From our brief observations, the following provisions warrant further consideration:

- Clause 6 and 7: Specifically whether NSW laws are consistent with the objects of the EPBC Act, and in particular, the object to promote ecologically sustainable development.

- Clause 111 – Review by courts: Specifically whether the NSW laws provide review rights by courts that are at least equivalent to those existing for decisions under the EPBC Act.

- **Consistency with international agreements**

Clause 6.3 of the draft agreement requires that decision-makers "not act inconsistently" with Australia's international obligations, including with respect to:

- World heritage values of declared World Heritage property,
- National heritage values of National heritage,
- The ecological character of declared Ramsar wetlands,
- Listed treated species or ecological communities
- Listed migratory species.

Australia's international environmental obligations are significant, and as outlined earlier in our submission, it is the Commonwealth, not the states, that is signatory to and responsible for upholding Australia's obligations

We do not consider that there has been adequate consideration of whether NSW laws establish adequate approval and assessment processes in order to meet Australia's international obligations.

- **Other issues:**

Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development

Clause 5.4 of the draft agreement creates a framework for the NSW government to refer coal seam gas and large coal mining developments to the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development. It is unclear if this clause will remain if the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill* 2014 is passed. In our view, the 'water trigger' should not be handed over to the States, and, in any case, the obligation to refer coal seam gas and large coal mining developments to the Independent Expert Scientific Committee should remain.

Incomplete information

Several sections of the draft agreement make reference to additional material which is not available for review. Further information is required to understand how these sections of the agreement will operate in practice.

For example:

- Clause 5.1 (Note) indicates that notification to inform a proponent that they may need to refer an action that is not covered by the agreement to the Commonwealth, may be undertaken in accordance with standard guidelines. At this stage the guidelines are not available for comment.

- Clause 9 of the draft agreement allows "suitable alternatives" to management plans for world heritage and national heritage places, however there is no information on these suitable alternatives.

- Clause 10 of the draft agreement requires the parties to jointly develop Administrative Arrangements for the implementation of the agreement. These Administrative Arrangements underpin key components of the agreement, and is not clear whether these will be consulted on before they are implemented.

CONCLUSION

Strong environmental protection laws are a critical part of a healthy, sustainable society. Our Federal environmental laws ensure that decisions pertaining to our national environmental assets are made with transparency, in consultation with the public and meet robust environmental and international standards.

NCC does not support the draft NSW-Commonwealth Approval Bilateral Agreement. If enacted, it will remove critical federal government oversight on matters of national environmental significance.

The federal government plays an important role in protecting Australia's land, water, threatened wildlife and bioregions. This role must be retained.

We urge the Federal government to stand strong as a champion for iconic natural landscapes and for matters of national environmental significance.

To this end, **the draft NSW Approval Bilateral agreement should be withdrawn.**

Yours faithfully,

Pepe Clarke
Chief Executive Officer