Environmental Defenders Office

Submission to the Inquiry into the *Environment Protection & Biodiversity Conservation (Streamlining environmental approvals) Bill 2020*

18 November 2020

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

For further information on this submission, please contact:

Rachel Walmsley
Head of Policy and Law Reform
T: (02) 9262 6989
E: rachel.walmsley@edo.org.au

Executive Summary

The Environmental Defenders Office Ltd (**EDO**) has extensive experience across Australia in providing legal advice on how the *Environment Protection & Biodiversity Conservation Act 1999* (**EPBC Act**) currently works and on how it could be reformed to more effectively clarify national leadership, strengthen and coordinate processes, and deliver environmental outcomes.

We welcome the opportunity to provide comment on the *EPBC Amendment (Streamlining Environmental Approvals) Bill 2020* (**the Bill**), but advise that the Bill warrants greater scrutiny than a 10 day inquiry process, and must be considered in the context of the broader reforms currently being developed as part of the independent statutory review process (**the Review**).

It is of particular concern that when the Bill was forced through the House of Representatives in September, debate was gagged, voting on amendments was prevented, and no Government MP even spoke in support of the Bill. The Bill is being promoted by the Government as comprising minor technical amendments needed to facilitate the making of durable bilateral agreements between the Commonwealth and States and Territories to hand over environmental approval powers. In fact, the implications of the Bill are far from minor and technical. The proposal to devolve environmental responsibilities is not new and remains fraught with risk.

We have provided extensive input into the 10 year independent statutory review process, providing detailed expert analysis and advice on the package of reforms under consideration by Prof Graeme Samuel. The 10 year review provides an opportunity for proper and comprehensive reform. As identified in the Interim Report, the EPBC Act is now 20 years old and is in need of extensive reform. It is complex, inefficient, and most importantly, it is not meeting its aim of protecting the environment and conserving biodiversity. Our environment is in decline and our biodiversity is in an extinction crisis.

The Interim Report identified core components of reform needed to reverse the environmental decline, including establishment of national environmental standards, establishing an independent regulator, greatly improving data quality and availability, regional planning, Indigenous engagement, investing in restoration and a range of other improvements. All these elements of the broader reform package would be pre-empted by a Bill focusing only on devolving approval powers to the states and territories. We note that the political process of the Bill is separate to the independent statutory Review, but the real potential for the Bill to undermine the outcomes of the Review cannot be ignored.

We therefore do not support the Bill. Fixing our environmental laws is critical and must be done properly.

EDO recommends the Bill be withdrawn to provide an opportunity to consider the Final Report of the Review that has not yet been publicly released, and for a comprehensive suite of national environmental standards to be developed. A new and comprehensive Bill should be developed for consideration next sitting period that addresses a comprehensive package of reforms to fix our laws and reverse trajectories of environmental decline, including architecture for national environmental standards, compliance, enforcement and assurance.

Passage of this Bill at this time cherry picks the high risk option for dubious 'efficiency' reform while potentially undermining implementation of all the other important reforms flagged in the Interim Report for environmental outcomes – including in relation to restoration, Indigenous engagement, environmental markets, data and regional planning. It would be a missed opportunity for the main outcome of the Review to be the locking in of current inadequate requirements in the name of efficiency, without actually galvanising the necessary legislative reform to achieve environmental outcomes.

This submission addresses:

1. **The legal risks and implications of devolving environmental approval powers to the States and Territories**
2. **The EPBC Act Review process**
3. **Specific comments on the schedules in the Bill**
4. **What is missing from the Bill and why it should be withdrawn**

To assist the Committee, we attach the following documents in the **Appendix:**

- *Devolving Extinction? The risks of handing environmental responsibilities to states & Territories*, EDO and PYL Report, October 2020
- *EDO submission to the 10 year review of the EPBC Act*, April 2020
- ANEDO submission to the Inquiry into the 2014 *EPBC Amendment (Bilateral Agreement Implementation) Bill 2014*, May 2014.

We would be happy to discuss this submission further at an inquiry hearing.

1. The legal risks and implications of devolving environmental approval powers to the states and territories

Overview of the risks of devolution

The Bill is being promoted by the Government as comprising minor technical amendments needed to facilitate the making of durable bilateral agreements between the Commonwealth and States and Territories to hand over environmental approval powers. In fact, the implications of the Bill are far from minor and technical.

The Bill pushes the same agenda as 2012 and 2014 'one stop shop' proposals to devolve Commonwealth powers for environmental protection and matters of national environmental significance to States and Territories. The significant reasons the devolution amendments needed to enact the 'one stop shop' policy have never successfully passed parliament still exist.

Given that previous attempts to introduce the 'one stop shop' stalled due to the complexity and a serious underestimation of the technical work involved in amending state standards, this new proposal to fast track and lock in devolution under the existing inadequate framework is high risk and set to an impossible timeframe. The Interim Report highlighted that our laws are already too weak, and interim amendments risk weakening them further.

The fact is that devolution of the federal government's environmental protection role to the state and territory governments is still a flawed, high risk and ill-considered policy for multiple reasons, including:

- only the Australian Government can provide national leadership on national environmental issues, strategic priorities and increased consistency;
- the Australian Government is responsible for our international obligations to protect the environment, which the EPBC Act implements;
- State and Territory laws still do not meet national standards;
- State and Territory environmental laws and enforcement processes are not always up to standard, and do not consider the cross-border, cumulative impacts of state-based decisions;

- States and Territories are not mandated to act (and do not act) in the national interest;
- State and Territory governments often have conflicting interests – as a proponent, sponsor or beneficiary of the projects they assess; and
- State and Territory governments would need significant resourcing assistance to take over the job (and potentially the liability) of federal government in assessing impacts to matters of national environmental significance, but no resourcing has been committed to by the federal government to take on this extra, important work.

In addition, and contrary to the rhetoric, due to Australia's federal structure, the 'one stop shop' for environmental approvals will still actually involve a patchwork of eight different jurisdictional 'shops.' This will not create efficiency or certainty for proponents.

Australia is facing an extinction crisis. Our environment is still reeling from the bushfires exacerbating already threatened wildlife. Now is not the time to prop up a failed framework to hastily weaken our laws and abrogate Commonwealth responsibility. Rushed, ill-considered decisions now at the behest of WA mining companies[1] are not worth the long term, potentially irreversible impacts to our precious, unique animals and land, and our sustainable recovery pathway. National environmental law reform is critical and must be done comprehensively.

Audit of state and territory laws

The proposal to devolve environmental responsibilities is not new and remains fraught with risk. In 2012 and 2014, the Places You Love alliance commissioned the Environmental Defenders Office to undertake audits of state and territory laws.[2] The conclusion of both audits was that **no State or Territory legislation met the full suite of existing national environmental standards required to protect matters of national environmental significance**.

Given the re-appearance of the 'one stop shop' – now 'single touch approvals' - policy and the introduction of this new Bill, the Places You Love alliance commissioned the Environmental Defenders Office to provide an updated analysis of whether state and territory laws can actually do the job of protecting the environment and matters of national environmental significance. The clear answer is **no**.

Our Devolving Extinction? Report shows the same conclusion – **not only does no state or territory law meet current national standards, but in some jurisdictions, the environmental protections in state and territory laws have actually been weakened.**

The Report is a damning audit of core standards in state and territory legislation and associated case studies, highlighting the need for comprehensive reform at all levels, and underscoring the importance of the Commonwealth in taking a leadership role in protecting and enhancing our unique environment for future generations.

Full report: *Devolving Extinction: The risks of handing environmental responsibilities to state & territories* – see **Attachment 1 in the Appendix**

[1] Documents accessed under FOI laws: https://www.theguardian.com/environment/2020/oct/02/rio-tinto-made-early-call-for-morrison-to-transfer-environmental-approval-powers-to-wa

[2] *An assessment of the adequacy of the threatened species and planning laws in all jurisdictions of Australia*, December 2012, Updated 2014. Available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/279/attachments/original/1380668130/121218Appendix1Reportontheadequacyofthreatenedspeciesandplanninglaws.pdf?1380668130

Do State and Territory laws meet national standards?

State and Territory laws are not designed to specifically address matters of national environmental significance, and this analysis confirms that the laws do not comprehensively address existing EPBC Act standards. It is clear that for State and Territory laws to actually meet existing standards, substantial law reform is already needed.

We refer the Committee to the following table that summarises the degree to which State and Territory legislation meets EPBC Act standards.

Comparison Table – Do State and Territory planning laws explicitly incorporate core EPBC Act standards?

EPBC Act core standard	Qld	Tas	ACT	SA	NT	Vic	NSW	WA
Does the state (or territory) planning law explicitly refer to the principles of **ESD** in objects?	Partly[1]	Partly	Yes	Partly[2]	Yes	No	Yes[3]	Partly[4]
Does state planning law explicitly refer to the **World Heritage Convention**?	No	No	No	No	No	No	No[5]	No
Does state law specifically refer to the **Ramsar** (Wetlands) Convention?	Partly[6]	No	Partly[7]	No	No	No	Partly[8]	Partly[9]
Does state threatened species list include all **federally listed species and communities**?	No	No	Partly[10]	No	No[11]	No[12]	No[13]	No[14]
Does state planning law specifically refer to the **Convention on Biological Diversity**?	No	No	No[15]	No	No	No	No	No
Does state threatened species list include all **federally listed migratory species?**	No	No	Partly[16]	No	No[17]	No	No	No
Does state law specifically refer to **Convention on Migratory Species, JAMBA, CAMBA, ROKAMBA**?	Partly[18]	No	No	No	No	No	No	Partly[19]
Does state law prohibit the approval of **nuclear actions**?	No[20]	Partly	No	Partly[21]	No[22]	Yes[23]	Partly[24]	Partly[25]
Does state law provide equivalent **standing for third parties**[26] to bring proceedings in relation to major projects?	Partly[27]	Yes[28]	Partly[29]	No	Partly[30]	No[31]	Partly[32]	Partly[33]
Do state **offset standards** meet Commonwealth standards regarding 'like for like' and limited use of indirect offsets?	No[34]	No[35]	Yes[36]	Partly[37]	No[38]	No[39]	No[40]	No[41]
Is the state **environment minister** responsible for approving major projects?	No	No[42]	No	No	Yes	No	No[43]	Partly[44]
Does state appoint **independent decision makers** for state-proposed projects?	No	No[45]	No[46]	No	No[47]	No	No[48]	No[49]
Do state laws provide special procedures for **early refusal** where project impacts are 'clearly unacceptable'?[50]	No	No[51]	No[52]	No[53]	Partly[54]	Partly	No[55]	Partly[56]
Do state laws adequately assess **impacts of large coal and coal seam gas projects on water resources**?	No[57]	No[58]	N/A	No	No[59]	Partly	Partly[60]	No[61]

See the full-size table

For State and Territory laws to meet **new** national standards for environmental outcomes and assurance – as foreshadowed by the independent review process – there would need to be significant reform at the national, state and potentially regional and local levels. There would need to be both legislative reform, governance reform and significant resourcing at multiple levels to ensure that national standards were consistently applied and enforced on the ground at the project level. This analysis shows the scale of the reform task is substantial and should not be underestimated.

Case studies

The report also includes the **top 30 case studies** that illustrate through actual examples how State and Territory laws, processes and policies do not meet current national standards and do not provide assurance that environmental outcomes will be delivered under a system of devolved responsibilities. The case studies are:

1. **The Victorian RFA and Leadbeater's Possum – Victoria**
2. **The Melbourne Strategic Assessment – Victoria**
3. **Carnaby's cockatoos – Western Australia**
4. **The Tasmanian RFA and the Swift Parrot – Tasmania**
5. **Export Fisheries accreditation – Queensland**
6. **Traveston Crossing Dam – Queensland**
7. **Land clearing at Maryfield Station – Northern Territory**
8. **Native vegetation management – Queensland (Kingvale)**
9. **Biodiversity offsetting – NSW**
10. **National Environment Protection Measure – Air Quality**
11. **The Gorgon Gas Project – Western Australia**
12. **Red tailed black cockatoo habitat burning – Victoria**
13. **Manyana – Residential development in bushfire ravaged NSW**
14. **Governance and conflicts of interest – Queensland**
15. **Land clearing under self-assessable codes – NSW**
16. **McArthur River Mine – Northern Territory**
17. **Yeleerie Uranium – Western Australia**
18. **Tourism in world heritage, Lake Malbena – Tasmania**
19. **Shamrock Station irrigation project – Western Australia**
20. **Warragamba Dam – NSW**
21. **Shoalwater and Corio Bays Area – Queensland**
22. **Juukan Caves and cultural heritage protection – Western Australia**
23. **Four-wheel drive tracks and national heritage – Tasmania**
24. **Great Barrier Reef Management – Queensland**
25. **Toondah Harbour – Queensland**
26. **National water management – South Australia and NSW**
27. **Flying Foxes – Queensland**
28. **Water storages and the Macquarie Marshes – NSW**
29. **Olympic Dam mine expansion proposal – South Australia**
30. **Koala protection – NSW**

For the detail of these case studies, we refer the Committee to our full report at **Appendix – Attachment 1.**

In summary, the case studies do the following:

- document the environmental outcomes of Commonwealth accreditation of state and territory schemes such as Regional Forest Agreements and strategic assessments;
- include examples of where State and Territories approved projects despite impacts on matters of national environmental significance;
- expose divergence of Commonwealth versus state standards – for example, for biodiversity offsets;
- demonstrate inaction on compliance and enforcement at the state level;
- identify limitations on current standards setting regimes – for example, NEPMs;
- expose the impacts of deregulation or weakened laws at a state level, for example in relation to land clearing;
- demonstrate the critical role of third party review and access to information; and
- provide specific examples of the failures of States and Territories to implement international obligations, for example in relation to unique world heritage, Aboriginal cultural heritage, Ramsar wetlands, and migratory species.

Common themes in the case studies and the analysis of State and Territory legislation provide evidence for the following conclusions:

1. Does Commonwealth accreditation of state and territory laws deliver environmental outcomes? **Mostly no.**
2. Can state and territory laws guarantee national standards will be implemented? **No**
3. Do state and territory systems have independent assurance, compliance and enforcement (and deal effectively with conflicts of interest)? **No**
4. Do state and territory laws adequately implement international obligations? **No**
5. Do state and territory laws adequately address cumulative and cross boundary impacts? **No**

The audit of core standards in State and Territory legislation, combined with the case studies, highlight the need for comprehensive legislative and governance reform at all levels, and the importance of the Commonwealth in taking a long-term leadership role to protect and enhance our unique environment for future generations.

In this context, the current Bill should be withdrawn.

2. The EPBC Act Review process

As noted, EDO has provided extensive input into the 10 year independent statutory review process, providing detailed expert analysis and advice on the package of reforms under consideration by Prof Graeme Samuel.

The Review provides an opportunity for proper and comprehensive reform. As identified in the Interim Report, the EPBC Act is now 20 years old and is in need of extensive reform. It is complex, inefficient, and most importantly, it is not meeting its aim of protecting the environment and conserving biodiversity. Our environment is in decline and our biodiversity is in an extinction crisis.

The review process provides an opportunity to re-write the law to better recognise our interdependence with the environment and the pathways necessary to ensure we deliver a healthy, thriving and resilient environment for future generations. The Interim Report identified core components of reform needed to reverse the environment decline, including establishment of national environmental standards, establishing an independent regulator, greatly improving data quality and availability, regional planning Indigenous engagement, investing in restoration and a range of other improvements. **All these elements of the broader reform package would be pre-empted by a Bill focusing only on devolving approval powers to the States and Territories under the current inadequate framework.**

It is extremely poor process that the Bill (and this Inquiry) is pre-empting the release of the Final Report of the Review. The complex and interrelated recommendations need to be considered and implemented as a package. It is not possible to support this Bill in the absence of all the critical architecture around standards and assurance, data, community engagement etc.

The Bill should therefore be withdrawn to provide an opportunity to consider the Final Report of the Review that has not yet been publicly released. A new and comprehensive Bill should be developed for consideration next sitting period that addresses a comprehensive package of reforms including architecture for national environmental standards, compliance, enforcement and assurance. Legislation should establish a process for developing and reviewing the critical full suite of national environmental standards.

EDO was appointed to the Consultative Group established by Prof Samuel following the release of the Interim Report in July. Through that process we worked intensively with other experts and stakeholders to explore ideas particularly around national environmental standards and the architecture to ensure standards could be effectively applied and enforced – critical in a devolved system.

We would be happy to discuss specific recommendations in further detail with the Committee. Some specific requirements in relation to standards and assurance are noted below as examples of what is missing from the Bill, and to illustrate the fulsome reforms that need to be developed and considered.

To assist the Committee and illustrate the complex range of issues that need to be considered and addressed in a proper legislative reform process, we attach the *EDO submission to the 10 year review of the EPBC Act*, April 2020 in the **Appendix – Attachment 2**.

3. Specific comments on the schedules of the Bill

EDO (then ANEDO) made a submission on the 2014 *EPBC Amendment (Bilateral Agreement Implementation) Bill 2014* (**2014 Bill**). Given that many of the clauses are the same in the 2020 Bill, we refer the Committee to our previous submission – attached in the **Appendix – Attachment 3.**

This part of the submission identifies the problematic implications of the proposed amendment clauses, and also identifies areas that are missing from the Bill.

Key concerns with the Bill

With some exceptions, the amendments proposed by the Bill are procedural and seek to clarify, codify and expand existing practices. There are no new clauses in the Bill that improve environmental assessments or outcomes. Basically, the Bill is designed to shore up the devolution process by broadening the list of State and Territory policies and processes that can be accredited (potentially including local government), devolving assessment requirements in relation to water impacts of large coal and coal seam gas projects (the 'water trigger'), and reducing parliamentary scrutiny of 'minor' changes to accredited processes under approval bilateral agreements. The amendments expand Ministerial discretion – even though the high existing levels of subjective discretion have been identified as problematic. The Bill includes potentially retrospective clauses and broadens the range of what can be accredited to include policies and guidelines - even documents that may not be written yet. We note that the drafting of the Bill is confusing and adds complexity to an already unwieldy Act.

Our specific concerns for each schedule are outlined below.

Schedule 1 – Referral of controlled actions

The Explanatory Memorandum (**EM**) indicates that the amendments in Schedule 1 are necessary because "despite section 66, there is currently nothing in the Act to prevent a person from referring an action to the Minister under Part 7 that is otherwise covered by the scope of an approved bilateral agreement" (p4). The amendment proposes to remove potential duplication by preventing referral where an action has been approved by a State or Territory (new s 66A(1)) or where an action is being, or is to be assessed and has not yet been approved (new s66A(2)).

Where an approval bilateral agreement has been cancelled or suspended, actions will be able to be referred, but the Minister can decide to still use the state process under the new section 66A(3). Our concerns about still using a discredited state process are discussed below in relation to Schedule 2. Further the note to section 66A(3) is confusing: "*Suspension of the effect of an agreement may not occur even if notice of suspension has been given...*" – this does not provide certainty as to the status of accredited agreements.

The new section 66A(4) applies where an action operates in two or more States – actions may still be referred for a state where the is no approval bilateral in force (ie, the Commonwealth can do the assessment for that state). It is not clear how this situation would be managed and coordinated in practice. Actions that have cross-jurisdictional impacts are an example of where Commonwealth coordination and oversight is essential. EDO recommends the Commonwealth should maintain their approval role where actions and impacts cross jurisdictions.

A further concern is the potential retrospectivity of the proposed amendments in Schedule 1. While there is some discretion for the Minister to decide whether the amendments will apply to referrals that were made before the amendments commence (Item 12(2)), in principle, legislative amendments should not be retrospective.[3]

Schedule 2 – Flexibility in performing assessment of controlled actions

The EM (p5) states:

> *the purpose of the amendments in Schedule 2 is to ensure there is an efficient process to complete the assessment and approval of an action under the Act where a bilateral agreement with a State or Territory is suspended or cancelled, or an approval bilateral agreement otherwise ceases to apply to a particular action.*
> *…*
> *If a State or Territory has completed, or partially completed, an assessment of the impacts of an action, the amendments in Schedule 2 will provide the Minister with the discretion to determine whether that State or Territory assessment can be completed or used under Part 8 for the purpose of deciding whether or not to approve an action under Part 9 of the Act.*

We have a number of concerns about the amendments in this Schedule including:

- In relation to '**deemed referral for actions excluded from an approval bilateral agreement'** the EM states *"It is expected that an approval bilateral agreement will include provisions allowing the Minister, or a State or Territory Minister, to declare that a particular action is no longer within a class of actions to which the approval bilateral agreement relates. These provisions would operate to allow the Minister to 'call-in' an action for assessment and/or approval under the Act in circumstances where it is appropriate that the Commonwealth approve the action. For example, the Minister may call-in an action covered by an approval bilateral agreement if adequate environmental protection is not being achieved."* The new section 69A provides a Minister can make a declaration *under an agreement* that a specified action is excluded. EDO submits that call in powers must be more clearly articulated in legislation and not dependent on inclusion in negotiated agreements.[4]
- Even where an action is called in the Minister can still use a state assessment (or part of an assessment) to make an approval. The rationale for this is unclear – why call in an action, if the Minister is just going to use the state assessment and not apply a federal assessment?
- Where an action is excluded and therefore referred to the Commonwealth, the new section 69A(4) and 69B modify existing provisions in Part 7, including in relation to information requirements, but concerningly there is discretion as to whether there will be public consultation on the referral (as is currently required). In the absence of a national standard for public consultation on impacts on MNES, it cannot be assumed that state processes will have provided for this adequately.

- In relation to use of **partially completed state or territory assessments**, the amendments (Item 6) give the Minister discretion to use these assessments to complete an approval – even though the EM notes "*the steps in the State or Territory processes (described in the accredited management arrangement or accredited authorisation processes under an approval bilateral agreement or the specified*

[3] Further, such a determination is a not a legislative instrument and is not subject to parliamentary scrutiny or disallowable (Item 12(3)).
[4] Declarations under agreements are not legislative instruments and therefore not subject to parliamentary scrutiny.

manner of assessment in an assessment bilateral agreement) will differ, and may not align with the steps under the various assessment approaches under Part 8". This raises concerns of accreditation of different processes in the absence of clear national standards. In the absence of national standards, there will be 'eight shops' and the Minister will have discretion to cherry pick parts of processes to use, even where accredited agreements have been suspended or cancelled – presumably for not meeting standards. In Item 6, amending section 87(3)(c), it is not clear what criteria will be used to consider whether the existing partially completed assessment has been adequate to continue then under the new process?
- There is a risk of locking in inadequate assessments under existing frameworks (for example, in Item 8, section 87(4) (a)).

- Similarly, in relation to '**declaring a State or Territory assessment as an assessment for the purposes of Part 8'** (new sections 87A and 87B) questions arise as to why the Minister is calling in an action if satisfied that the State or Territory process is adequate? Confusingly, under new section 87A(2) the assessment may be concluded by the State or Territory *after* the exclusion declaration is made.
- Again there are references to the situation where an agreement has been suspended or cancelled, the Minister has discretion to make an approval decision based on potentially inadequate assessment from a discredited State or Territory process (new section 87B(1)). There is a lack of justification for the new section 87B that provides an assessment of State or Territory can still be approved even where the bilateral agreement is suspended/cancelled – why should this be allowed when there are no qualifications around the reasoning of why the agreement was suspended/cancelled?
- Throughout this Schedule (and indeed the Bill) it is made clear that the declarations based on the newly granted discretions are not legislative instruments and therefore do not have parliamentary scrutiny (for example, new section 87B(1)).

- The Schedule also provides for accrediting assessment processes not accredited under an agreement on a case by case basis even when the assessment has been partially accredited under a non-accredited process ('**assessment of impacts of actions by an accredited assessment process**'). The EM states (p10) "*to make the decision, the Minister will need to be satisfied that the process has been, or is being, carried out under a law of the Commonwealth, a State or self-governing Territory, and that there has been, or will be, an adequate assessment of the relevant impacts of the action under the process."* In the absence of clear and enforceable national standards, this will be another discretionary subjective opinion about 'adequacy' of State and Territory laws.
- The amendments in Schedule 2 are also intended to have retrospective application and potentially apply to assessments underway before the amendments commence. This is inappropriate in legislation, and of significant concern as it contemplates retrospectively endorsing processes that do not meet current standards (see our analysis above).

Schedule 3 – Accreditation of certain State processes

Part 1 – Amendments relating to water resources

Under the Bill, CSG and large coal mining developments are no longer exempt from being subject to an approval bilateral agreement. The water trigger currently operates to make any "coal seam gas development" or "large coal mining development", which has or will have or is likely to have a significant impact on water resources, a protected matter under the EPBC Act. The amendments remove the water trigger exclusion, thereby allowing actions involving CSG and large coal mining developments affecting water resources to be declared as actions which do not require approval under Part 9. The changes will apply to any referrals subject to the water trigger which are yet to be determined. That is, any referred CSG or large scale coal mining projects not yet decided may be assessed under an accredited approval bilateral, even if the referral was made prior to the amendments introduced by the Bill commencing. The amendments are contrary to the original rationale for the trigger - that it is not appropriate to have State or Territory governments assessing such developments – and will result in less Commonwealth oversight.

While the amendments requiring that the IESC's advice must still be sought and 'taken into account' (Item 5 – amending s48A(2)), and powers for the Minister to request additional IESC advice on bilateral agreements (Item 6) provide some consolation; the Schedule retrospectively removes exemption of water trigger from bilateral approval agreements for applications already applied for (Item 7).

EDO recommends that water trigger approvals be retained by the Commonwealth, particularly where there are significant and potentially cross-boundary impacts on water resources.

Part 2 - Amendments relating to bilaterally accredited authorisation process

This part of Schedule 3 proposes to provide for accrediting guidelines and policies under agreements. Currently an authorisation must be 'set out in law' – ie, legislation. This broadening of what can be accredited under an approval bilateral agreement is of significant concern, and has the potential to undermine application and enforcement of national environmental standards.

Accreditation of processes contained in policies and guidelines rather than legislation will reduce certainty and public or parliamentary oversight as amendments to subordinate documents can be made more easily and regularly with less requirements for scrutiny. In our view this is giving too much discretion to the State and Federal Executives at the expense of Parliamentary oversight and accountability. Without regulatory guidance in relation to the criteria for enforcement / implementation of such guidelines, the breadth of documents that may be sought to be accredited is not clear. There is no detail of criteria prescribed by regulations for a management arrangement or authorisation process (Item 11).

Currently, the Minister may accredit an authorisation process where the process is "set out in a law of the State or Territory." In particular, section 46(2A) provides (emphasis added):

> *What is a bilaterally accredited authorisation process?*
> *(2A) An authorisation process is a bilaterally accredited authorisation process for the purposes of a bilateral agreement declaring that certain actions do not require approval under Part 9 for the purposes of a specified provision of Part 3, other than section 24D or 24E, if and only if:*
> *(a) the authorisation process* ***is set out in a law of the State or Territory*** *that is a party to the agreement, and the law and the process are identified in or under the agreement; and*
> *(b) the authorisation process has been accredited in writing by the Minister in accordance with this section for the purposes of the agreement.*

The Bill seeks to amend this provision (and other related provisions) to allow accreditation of an authorisation process that is:

(a) set out, wholly or partly, in a law of a State or Territory; or
(b) set out, wholly or partly, in an instrument made under a law of a state or Territory; or
(c) made, wholly or partly, under a law of a State or Territory.

The EM indicates this change will allow the Minister to accredit, for example, procedures or guidelines which are made or issued under State or Territory law, but which are not set out in the State or Territory legislation itself, provided they meet appropriate Commonwealth standards for assessing and approving actions.

Section 46(3)(a) continues to require the Minister to be satisfied that the “authorisation process and the law under which it is in force, or which it is set out, meet the criteria prescribed in the regulations.” There are not presently any criteria for authorisation processes in the EPBC Regulations 2000 (criteria are included for management arrangements for World Heritage properties, and for assessment bilateral agreements). The Samuel Interim Report indicated that standards would be in regulations, but it is not clear how specific standards will be applied to this discretionary process. The Minister is required to be satisfied that there has been or will be adequate assessment of impacts on MNES and that approved actions will not have unacceptable or unsustainable impacts on a protected matter. Again, there is a lack of consistent standards, criteria and definitions to support this process.

A fundamental concern is that subordinate instruments, policies and guidelines can be more readily changed at the State and Territory level, usually without parliamentary scrutiny. The recent political fiasco in NSW concerning the significant weakening of a state environmental planning policy and guideline drafted to protect koala habitat vividly illustrates how state policies cannot be depended upon to enforce national environmental standards (see Case study # 20 in our *Devolving Extinction* Report).

Schedule 4 – Minor Amendments of bilateral agreements

The amendments in Schedule 4 purport to address situations where minor amendment are made to a management arrangement or authorisation process. It is suggested that this will provide certainty about ongoing operation of bilateral agreements (ie, they will not need to be remade every time there are changes to processes at the State or Territory level) and that the amendments will ‘facilitate continuous improvement’ (EM p14). With a broader range of processes able to be accredited under the Bill and more easily changed at the State level (as discussed above), the amendments could also result in incremental weakening.

The crucial effect of these amendments (new sections 46A, 46B and 47A) is that if something is considered by the Minister to be ‘minor’ (ie having no reduction in protection, material adverse impact on a protected matter, material adverse impact on the assessment of impacts, or material adverse effect on a person’s ability to participate in the process) then the requirements for remaking a bilateral agreement can be avoided. In practice this means less public consultation and changes to agreements will not be disallowable by parliament (section 47A(4)). It means less scrutiny.

Again, the Schedule includes some potentially retrospective provisions (for example, section 46B).

Schedule 5 – Miscellaneous

The EM indicates that amendments in Item 1 – **Declaration of actions not needing approval** – facilitate devolving the water trigger, but the new clause is broadly drafted to cover broad classes of actions. Again, the note is of concern indicating that under the amendments, exemption from Part 9 can include approvals made before relevant processes have been even accredited?

Schedule 5 contains amendments allowing for a **broader range of entities to approve actions under an accredited management arrangement or authorisation process**. Examples given in the EM include decisions made by expert bodies and Local Councils.

Local Councils are not designed or resourced to undertake assessments of matters of national environmental significance. In the absence of national environmental standards and a detailed multi-level assurance framework, it is extremely risky to devolve national environmental responsibilities to under-resourced local bodies with no oversight.

There are also proposed amendments to provide that the **Minister may take "any other matter" into consideration when determining whether to accredit an authorisation process**, broadening the matters which may be considered. Section 46(3) provides that the Minister may only accredit an authorisation process for the purposes of a bilateral agreement if s/he is satisfied of the things set out in that section:

- that the process meets the criteria in the regulations;
- that the process will be an adequate assessment of impacts on protected matters; and
- that actions approved in accordance with the process will not have unacceptable or unsustainable impacts on protected matters.

The Bill seeks to add a further paragraph section 46(3)(d), allowing the Minister to also consider "any other matter that the Minister considers relevant." The additional note added to s46(3) by the Bill provides that such matters "may include, for example, the terms of the bilateral agreement or State policies or plans".

Potentially this could provide a legal hook for the Minister to consider national environmental standards, but this **is weak and unclear and certainly not a sufficient head of power to make enforceable national standards**. In addition, "any other matter" also potentially broadens the Minister's powers to have regard to matters such as social and economic issues and the "deregulation agenda" in determining whether to accredit an authorisation process. This is inconsistent with the EPBC Act objectives. Furthermore, it could lead to inconsistency between state processes as the Minister applies "any other matter" at the behest of particular state-based interests.

Item 9 – new section 48AA – allows adoption of 'an instrument or other writing' under a bilateral agreement, even if not in force at time of agreement being made. This means there is **discretion to accredit a non-statutory document that has not even been written yet**. There is no guarantee that such a document would effectively address and apply national environmental standards, and as noted above, subordinate instruments, guidelines and documents can be easily changed. It is completely inappropriate to accredit non-existent 'writings.'

The proposed amendments in Item 10 again contain potentially retrospective provisions and facilitate approvals of actions under management arrangements or authorisation processes as soon as the Bill commences "regardless of when the agreement is entered into." This is confusing drafting and does not provide clarity or certainty as to the status of accreditation when approvals are made. We do not support unclear, retrospective and broadly drafted provisions.

4. What is missing from the Bill and why it should be withdrawn

It is of significant concern that the Bill before this Inquiry has already been rammed through the House of Representatives with little or no consideration of the significant risks of rushing devolution in the absence of standards and assurance. The Bill fails to include key elements for reform suggested in Graeme Samuel's Interim Report. Specifically, there is **no mention of national environmental standards**, even though this is suggested as a critical foundation of reform in the Interim Report The Bill also has **no mention of an independent compliance and enforcement regulator** or assurance standards (ie, mechanisms and safeguards to ensure that processes, policies and standards are implemented as agreed). These issues are discussed further below.

The two key pillars of reform: national environmental standards and compliance, enforcement and assurance

In terms of the elements of reform identified in the Interim Report needed to address our environmental crisis, there are two fundamental pillars. The first is comprehensive and enforceable national environmental standards and the second is independent assurance, compliance and enforcement. No level of devolution should be allowed to proceed without the two pillars being established in a new and comprehensive Environment Act.

National environmental standards

A key pillar of Graeme Samuel's vision for EPBC Act reform as set out in his Interim Report is the development of enforceable national environmental standards. The idea is that the Commonwealth will set standards for matters of national environmental significance (**MNES**), such as threatened species, Ramsar wetlands, migratory species, world and national heritage. These standards are to underpin a range of environmental law processes, including:

- assessment and approval of actions that are likely to impact MNES;
- regional planning and funding; and
- accreditation of state and territory laws and other regulatory regimes that meet the standards.

The Interim Report confirms that the current EPBC Act is failing to deliver environmental outcomes and proposes that national standards are needed to identify and mandate the desired outcomes. To achieve the comprehensive reform needed to address the extensive failings of the current Act, the Report contends that a whole suite of detailed standards will be required. The Interim Report states:

> *The Review proposes that the suite of National Environmental Standards should set the requirements for decision-making to deliver outcomes for the environment, and clearly define the fundamental processes that ensure sound and effective decision-making. As a starting point, the Review proposes that the suite of National Environmental Standards should include requirements relating to:*
>
> - *ecologically sustainable development*
> - *matters of national environmental significance (MNES)*
> - *transparent processes and robust decisions, including:*
>   - *judicial review*
>   - *community consultation*
>   - *adequate assessment of impact, including climate impacts on MNES*
>   - *emissions-profile disclosure*

- *Indigenous engagement and involvement in environmental decision-making*
- *monitoring, compliance and enforcement*
- *data and information*
- *environmental monitoring and evaluation of outcomes*
- *restoration and recovery*
- *wildlife permits and trade.*

The task of developing national standards is critical and immense given the wide range of complex environmental issues that need to be regulated. Standards for a robust system would ideally cover everything from overarching principles to evidence-based standards for individual species and for specific processes. The Appendix to the Interim Report sets out eight examples of prototype standards, addressing:

- an overarching MNES standard,
- world and national heritage,
- wetlands of international importance (Ramsar wetlands),
- threatened species and ecological communities,
- migratory species,
- the Commonwealth Marine environment;
- the Great Barrier Reef Marine Park, and
- protection of the environment from nuclear actions.

The prototype standards as initially drafted in the Appendix to the Interim Report largely reflect the status quo and restate current EPBC Act requirements and considerations. This will not deliver environmental outcomes. **In our view, the standards need to raise the bar.**

To give an idea of what kind of requirements will need to be in a strengthened standard, it is useful to start with the overarching MNES standard prototype as proposed in the Interim Report. If a strong clear overarching standard can be agreed, this will help guide the development of the plethora of detailed standards that will be required for specific matters and processes.

The overarching standard should set the bar high and guide development of a subsequent suite of standards by requiring, for example, that all relevant decisions, actions, plans and policies must:

- protect, maintain and enhance environmental values and ecological character of MNES,
- be consistent with the principles of ecologically sustainable development, the precautionary principle and the principle of non-regression,
- address and prevent cumulative impacts, and
- avoid or abate listed key threatening processes.

These are just some examples of core concepts that need to be built into enforceable standards. In addition, terms proposed in the prototype standards such as “unacceptable impact” must be clearly and scientifically defined and it must be made clear that the standards are to be applied at all scales – including both the bioregional planning scale and at the individual project level.

Significant expert input and discussion is needed to strengthen the prototype standards and develop the necessary suite of detailed standards and related policies. EDO worked with members of the Consultative Group and a range of experts who were given the daunting task of designing standards. We commend the independent Review for engaging a range of leading experts in specific areas to engage in the standards drafting process, however we are very concerned at the timeframes set for this crucially important work. There was particular pressure to rapidly draft interim standards given the Review and legislative timeframes proposed.

Interim standards

This Bill is being rushed through before the full suite of standards is developed. We understand that the intention is that interim standards will be developed for this process. Interim standards are likely to focus on MNES, but also include indigenous engagement and involvement in decision making, compliance and enforcement, assurance and data and information.

We have serious concerns about the adequacy of interim standards – particularly in terms of whether they will be legally able to go beyond the inadequate current requirements or whether they will be constrained by the existing framework – essentially locking in the status quo of environmental decline. This is just one of the many legal and environmental risks of the devolution agenda.

We have concerns about the legal status and enforceability of interim standards. If they are simply appendices to broad bilateral accreditation agreements, they may not have the regulatory force necessary to underpin a reformed system and actually deliver environmental outcomes. Locking in weak interim standards under the current inadequate framework via a rushed Bill now has the real potential to derail plans for the comprehensive legislative reform identified in the Review – ie, of drafting a new Act or Acts.

To be effective for a range of purposes, standards will need to be able to be applied at a range of scales – from national law, to state processes, to conditions of approval for individual projects. The standards will be meaningless if they are not effectively applied at the project level where environmental impacts and outcomes occur. For standards to achieve the desired environmental outcomes under a new or amended Act, they need to be clear, mandatory and tailored to the wide range of regulated issues. A simplified short list of general, discretionary or unclear standards will not improve effectiveness, clarity and certainty for business and industry, or deliver environmental outcomes.

In summary, national environmental standards have the potential to be a game changer in reforming Australian environmental law if:

- There is a comprehensive suite of environmental outcome and assurance standards;
- An overarching standard requires that MNES be protected, maintained and enhanced, and that cumulative impacts are addressed;
- Adequate time is given for the standards to be developed by experts;
- The standards are underpinned by comprehensive data and information and set against clear baselines, so that progress and outcomes can be tracked;
- The standards can be strengthened over time in response to new environmental information, impacts or events;
- The standards apply at all levels;
- The standards are mandatory, enforceable and not able to be overcome by exemptions (ie any flexibility should be strictly limited); and
- The standards are enforced by an independent national regulator.

The current Act does not include a power to make and enforce national standards. **This detail is critical and it is not in the Bill.** The Government has already ruled out an independent regulator, and a full suite of assurance standards and mechanisms does not yet exist.

Compliance, enforcement and assurance

For the proposed system of national standards to work, it will be necessary to ensure there is a robust framework involving independent compliance and enforcement regulators with a full suite of powers established and resourced at both the national and state/territory levels – and that their roles are clearly defined and coordinated to avoid any duplication. This requires establishing assurance auditing responsibilities at the national level, but also requires coordinated compliance and enforcement of national standards at multiple levels.

It will not be sufficient for the Commonwealth to simply do assurance audits of overall outcomes of broadly accredited schemes – this is too blunt a tool. For the community to have confidence in the system, there needs to be actual enforceability of standards involving a clear line of sight from national level legislation down to individual project conditions. The full suite of national standards needs to be in place for effective implementation at all scales.

EDO supports an independent regulator at the Commonwealth level having clear powers to audit accreditation, assessment, approval, planning processes and decisions made at any level for compliance with national environmental standards. This is critically important. However, it will be insufficient if the only recourse linked to such an auditing power is to recommend to a Minister to exercise discretionary call in powers, or exercise a power to suspend accreditation (this power is extremely unlikely to be exercised even with evidence of significant and consistent breaches, as the Regional Forests Agreement model has demonstrated). Insufficient and ineffective assurance mechanisms will diminish the power of national standards, undermining the foundation of the reforms suggested in the Interim Report.

Sufficient assurance requires an independent body at the national level to do both auditing of assessment and approval processes and decisions and any accredited regimes, but also be empowered to take specific compliance and enforcement action in relation to specific breaches – with a full suite of compliance and enforcement powers.

Assurance that devolved decision making processes will enforce national standards?

There is an alarming lack of assurance under the proposed devolved framework. It is assumed that the accreditation process will be rigorous, however the Bill currently before parliament does not guarantee this. For example as noted above, it allows accreditation of policies not set out in law, not even written yet, and removes oversight of parliament (by removing disallowance mechanisms) for a number of determinations. The Bill reduces oversight of minor changes to state laws that may impact environmental outcomes at the project level.

To give actual assurance, a framework needs to have independent compliance capacity at the federal and state/territory levels, proper public and parliamentary scrutiny, and clear consequences for breaches.

If a devolved system proceeds, there would need to be independent regulators at the State and Territory levels empowered to effectively enforce national standards (for example – at the project level through conditions), in addition to the national independent regulator enforcing standards (for example – for existing approvals, Commonwealth approvals, certain categories of accredited approvals, and for called-in approvals). There are models that can be drawn upon to establish bodies equipped with the independence and powers to effectively enforce standards. For example, the Natural Resource Access Regulator (**NRAR**) in NSW was established by statute following an independent review of water management in NSW and has already changed the culture of water law compliance and enforcement in NSW.[5]

Further, if the devolution agenda continues on the current high risk trajectory and even includes potential accreditation of local level decision-making processes, the assurance framework will need to extend to local levels. This is a significant oversight risk with additional resource and liability implications.

It is insufficient to have monitoring and reporting of devolved responsibilities if it is not comprehensive at all levels, and if there is no real regulatory power to act on breaches or political will to revoke accreditation.

For the proposed standards system to work, it is critical that national standards are applied and enforceable at all levels by an effective independent regulator/s. This requires a suite of assurance and compliance standards and mechanisms applied at different scales (potentially to multiple regulators and decision-makers in multiple jurisdictions under a devolved model). In terms of assurance, the need for clarity, consistency and above all enforceability is paramount.

The proposed devolution model is very high risk – and all the risk is borne by the environment and the community.

In summary, a risky Bill rammed through parliament to abrogate federal environmental responsibility is the exact opposite to the comprehensive and evidence-based reform needed to address our environmental decline and extinction crisis. We reiterate that in terms of the architecture of the reform needed, comprehensive and enforceable national environmental standards and independent assurance, compliance and enforcement are the two fundamental pillars. It has become clear that no level of devolution can proceed without the two pillars – and a comprehensive range of reforms – being established in a new and enforceable Environment Act.

[5] Despite the well-documented cultural problems in NSW water agencies, NRAR has been extremely effective in a short period (from an Interim Report September 2017 - to legislation establishing the NRAR assented to in November 2017 - to NRAR opening its doors April 2018). Since establishment it has commenced 20 prosecutions with a 9/10 success rate for completed matters, as well as a range of different compliance actions. It has certainly changed the culture of water compliance and enforcement in NSW and functions as a 'strong cop on the beat.' The legislation establishing NRAR is available at: https://legislation.nsw.gov.au/#/view/act/2017/64. In terms of independence, it has an independent Chair and Board, and the ability for a Minister to direct the Regulator is clearly limited in the legislation (see section 7).

Appendix

Attachment 1:

Full report: *Devolving Extinction: The risks of handing environmental responsibilities to state & territories*

Attachment 2:

***EDO submission to the 10 year review of the EPBC Act*, April 2020.**

Available at: https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf

Attachment 3: ANEDO submission to the Senate Inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* and the *Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014*, May 2014.

The full submission and attachments are available on the 2014 Inquiry webpage.