



Law Council
OF AUSTRALIA

Legal Practice Section

17 November 2020

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

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

Dear Committee Secretary

**ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT
(STREAMLINING ENVIRONMENTAL APPROVALS) BILL 2020**

1. This submission has been prepared by the Australian Environmental Planning Law Group (**AEPLG**) of the Law Council of Australia's Legal Practice Section. The AEPLG welcomes the opportunity to make a submission to the Senate Standing Committees on Environment and Communications in relation to the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 (**the Bill**).
2. At the time the Bill passed the House of Representatives and was introduced into the Senate, the Law Council repeated its longstanding view that the Commonwealth should be demonstrating leadership in biodiversity conservation.¹ A copy of the Law Council's statement is **attached** to this submission. The comments made by the Law Council in that statement remain relevant today.
3. The AEPLG notes that the amendments proposed by the Bill are essentially the same as those proposed by the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014. The Group also notes that the amendments proposed in the Bill are intended to facilitate the implementation of approvals bilateral agreements,² remove potential duplication of process and make related technical changes to the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**).
4. However, these technical amendments do not address the concerns that the Law Council expressed in its attached statement, nor do they address the issues that the Law Council raised in its submission³ to the Independent Review of the EPBC Act

¹ Law Council of Australia 'Law Council of Australia calls for parliamentary inquiry into environment bill', Media Release (4 September 2020).

² That is, bilateral agreements that provide for the accreditation of State or Territory processes to approve actions for the purposes of Parts 7-9 of the EPBC Act.

³ Law Council of Australia, *Statutory Review of the Environment Protection and Biodiversity Conservation Act 1999(Cth)*, Submission to the Department of Agriculture, Water and the Environment, 20 April 2020.

(Review) chaired by Professor Graeme Samuel AC. Paragraphs 99 to 101 of the Law Council's submission to the Review state:

99. *If approval bilateral agreements are to be implemented, and the non-regression principle is to be met, the agreements cannot operate and should not operate without robust and comprehensive Commonwealth oversight. This oversight, which must be properly resourced in both financial and human terms, is necessary to ensure that Commonwealth standards of assessment and approval are maintained, the Commonwealth's international obligations under the international treaties to which it is a signatory are met and public confidence and trust is maintained.*

100. *In the absence of Commonwealth oversight, the Law Council is concerned that over time, the standards of assessment and approval will not be maintained by State and Territory regulators and that each State and Territory may implement the EPBC Act requirements in a different way leading to inconsistency and unfairness for proponents and third parties. This slip in standards is unlikely to be intentional, but is more likely to be as a result of the increased workload shouldered by those regulators as a result of assuming both assessment and approval roles for themselves and on behalf of the Commonwealth and stressors particular to each State or Territory.*

101. *On balance, the Law Council does not favour the expansion of bilateral agreements to cover approvals in a broad-brush way. The Commonwealth must retain its role upholding Australia's international obligations to protect our biodiversity, world heritage, Ramsar wetlands and other MNES, to consistently apply those obligations nationally and to ensure public confidence that Australia's environment will be protected.⁴*

5. The Interim Report of the Review (**Interim Report**) potentially addresses the concerns expressed by the AEPLG by recommending the drafting and implementation of National Environmental Standards, which State and Territory governments would need to comply with in the context of an approvals bilateral agreement, coupled with a 'strong cop on the beat' to ensure that the National Environmental Standards are maintained and that State and Territory governments comply with their obligations under an approvals bilateral agreement.
6. The Bill fails to address the Law Council's concerns in its submission to the Review, or the recommendations in the Interim Report.
7. The Final Report from the Review has now been completed and the AEPLG understands that it is now with the Minister for the Environment. The Final Report will no doubt contain refinements and additional recommendations in relation to bilateral agreements, National Environmental Standards and the regulatory enforcement environment that is needed to ensure that the Commonwealth's international obligations to protect Australian biodiversity are upheld.
8. Taken in isolation, the amendments in this Bill may not appear significant in the context of the Act as a whole. However, given the importance of the recommendations in the Final Report, the AEPLG believes that it is premature for the

⁴ Ibid.

Parliament to be considering the amendments in the Bill before the Final Report and the Australian Government's response to it are made public and until National Environmental Standards have been drafted and adopted. The amendments should be considered in light of the complete suite of findings and recommendations from the Review and the Australian Government's response to the Review and after the National Environmental Standards are in place.

9. The Group would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Australian Environment Planning Law Group Chair, Robyn Glindemann on robyn.glindemann@lantegy.com.au.

Yours sincerely



Michael Tidball
Chief Executive Officer

Friday, 4 September 2020

Law Council of Australia calls for parliamentary inquiry into environmental bill

The Law Council of Australia has warned that the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 (**the Bill**) must not be rushed through the Senate and has called for its referral to a parliamentary inquiry.

The Bill is intended to streamline environmental approvals under the *Environment Protection and Biodiversity Conservation Act 1999 (the Act)* by facilitating ‘the legally robust devolution of environmental approvals to the states and territories’.

The Law Council maintains its longstanding view that the Commonwealth should be demonstrating leadership in biodiversity conservation and environmental protection, given its unique role sitting at the apex of government in Australia and its independence of particular State and Territory interests.

Law Council President Pauline Wright said: “Australia is a signatory to some 33 key treaties and protocols regarding the environment. The Commonwealth Government must remain at the helm in ensuring that Australia’s obligations under those treaties and protocols are met.”

“Bilateral agreements should not operate without robust and comprehensive Commonwealth oversight which is necessary to ensure that the Australia’s obligations under international treaties are met and public confidence and trust is maintained.”

“This is particularly important in the context of the protection of Australia’s many World Heritage Listed sites, which include not only sites of outstanding environmental value but also sites of sacred value and importance to Australia’s First Nations peoples.”

In his independent review of the Act, Professor Graeme Samuel AO has proposed the devolution of decision making from the Commonwealth to the states and territories, but within a broader reform platform, including the development of clear, legally enforceable National Environmental Standards combined with a *strong assurance framework*.

The Law Council stresses the importance of placing approvals of bilateral agreements within a strong assurance framework that clearly demonstrates how the Commonwealth Government will ensure that its obligations under international law will be met.

“This assurance framework must be clear, transparent to the public and properly developed. We have an independent inquiry that has not even had the chance to complete its final report and reflect on over 3000 unique submissions by concerned people and organisations. We must let that run its due course before embarking on this significant change.”

“We must also have regard to the outcomes of the current Parliamentary inquiry into the destruction of caves at the Juukan Gorge and the protection of Indigenous cultural heritage. A Senate inquiry into the Bill must accommodate these broader processes by allowing the public time to consider and reflect on their findings.”

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The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.