CONSERVATION COUNCIL
ACT REGION

Comments on the Draft ACT – Commonwealth Bilateral Approval Agreement *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)

12 September 2014

If you have any queries regarding this submission please contact: Clare Henderson Executive Director on 6229 3202 or director@conservationcouncil.org.au.

The Conservation Council ACT region is the peak non-government environment organisation for the Canberra Region. We have been the community's voice for the environment in the Canberra region since 1979.

Our mission is to achieve an ecologically sustainable and zero net carbon society through advocacy, education, research and engagement with community, the private sector and with government.

We represent more than 40 member groups who in turn represent over 15,000 supporters. We harness the collective expertise and experience of our member groups and networks. We work collaboratively with Government, business and the community to achieve the highest quality environment for Canberra and its region.

The Conservation Council is active in a number of campaign areas. Our current focus includes:

- **Biodiversity Conservation** – protecting our unique ecological communities and the Bush Capital
- **Climate Change** – a regional, national and global challenge
- **Planning** – the right things in the right places
- **Transport** – connecting people and places
- **Waste** – being efficient through closed-loop systems
- **Water** – smart use of a scarce resource
- **Governance** – for a Smarter, Sustainable Canberra

1. Overview

On Thursday 14 August the Planning and Development (Bilateral Agreement) Amendment Bill was tabled in the ACT Legislative Assembly. This bill is intended to make changes to enable the ACT to take on national environmental responsibilities and approvals for proposals affecting Matters of National Environmental Sigificance.

The Commonwealth / ACT Bilateral Approval Agreement was circulated on Friday 15 August for public comment.

We welcome the opportunity to provide comment on the proposed delegation of Commonwealth environmental approval powers and responsibilities to the ACT Government.

In short we do not support this.

Our future prosperity depends on a healthy environment. It is unacceptable for the Commonwealth to weaken environmental protection by delegating to the ACT approval decision-making on any matters of national environmental significance. This approach will not deliver necessary environmental outcomes.

We do not want the ACT Government to take on environmental approvals which are currently, and should remain, the responsibility of the Commonwealth. Our national environment laws need to be strengthened not weakened.

These laws protected the Franklin River from being dammed, Fraser Island from mining and the Great Barrier Reef. Plus lots more.

The Conservation Council is part of the Places You Love Alliance, Australia's largest ever coalition of environmental organisations representing 1.5 million Australian members and supporters – which strongly opposes attempts to hand assessment and approval powers for Matters of National Environmental Significance (MNES) to state and territory governments.

The Conservation Council strongly opposes these measures to facilitate handing Commonwealth environment responsibilities to the ACT Government. They weaken hard-won national environment protection laws, will result in conflicts of interests, and it is inappropriate for the ACT Government to be both proponent and regulator. It will also create a patchwork system, with every state administering different environmental protection laws, creating uncertainty and legal risk for industry. We'll end up with an eight-stop-shop or more.

We note the concept of the "one-stop-shop" being pursued in the ACT is not supported by either the national ALP or the national Greens. In addition the ACT Labor-Greens Parliamentary Agreement indicates an ongoing role for the Commonwealth in environmental approvals on Matters of National Environment Significance.

> ***Recommendation 1:***
> ***We support an ongoing role for the Commonwealth in approving proposals which impact on matters of national environmental significance.***

The Draft Bilateral Approval Agreement and the proposed changes to the *ACT Planning and Development Act 2007* via the *Planning and Development (Bilateral Agreement) Amendment Bill 2014* do not provide an ongoing approval role for the Commonwealth. Nor does it ensure that the Commonwealth will be involved in overseeing proposals significantly affecting Matters of National Environmental Significance.

> ***Recommendation 2:***
> ***We recommend against delegating Commonwealth responsibility for 'Matters of National Environmental Significance' under the EPBC Act to the ACT Government and therefore that the ACT Bilateral Approval Agreement be withdrawn.***

In addition to our broad concerns about the transfer of national environmental laws to State and Territory Governments we propose that there are a large number of deficiencies in both

the Agreement and in the proposed changes to the ACT Planning and Development Act such that environmental outcomes will not achieved.

> ***Recommendation 3:***
> ***We recommend due a range of deficiencies that the ACT Bilateral Approval Agreement be withdrawn.***

2. Importance of National Environment Laws

We support a strong Commonwealth role in efficient and effective implementation of the EPBC Act to protect Australia's unique biodiversity and heritage. Australia's environment cannot be protected without strong federal environmental laws. As the State of the Environment Report 2011 notes:

> *Our environment is a national issue requiring national leadership and action at all levels…The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.*

We therefore support the establishment of best practice environmental standards in all Australian jurisdictions, and the retention of environmental approval powers by the Australian Government for matters of national environmental significance (MNES).

We do not support the Commonwealth Government entering into approval bilateral agreements with any State or Territory under the EPBC Act under any circumstances. In brief, Commonwealth oversight of MNES is vital because:

- The Commonwealth Government is best placed to provide national leadership on national and cross border issues such as rivers, migratory birds, and nuclear matters;
- The Commonwealth and not State Governments are responsible for meeting Australia's international obligations;
- Environmental standards will be put at risk if federal approval powers are delegated.
- State and Territory environmental laws and enforcement are not up to the required standard;
- States often have conflicting interests, as they benefit directly from the projects they are assessing.
- Multiple State Auditor-Generals' reports have found that state governments are struggling to fulfil their existing statutory obligations. States do not have the capacity to take on delegated Commonwealth powers under the Act.
- Australia's valuable water resources need coordinated and effective inter-jurisdictional environmental protection; state mining and water laws have been unable to fulfil this role to date. Accordingly, we strongly supports the retention of federal assessment powers under the water trigger and does not support recent proposed amendments to allow the water trigger to be handed over to states.
- Uranium mining and the wider nuclear fuel cycle involves issues of national concern and responsibility. There are serious concerns about the capacity of the States and territories to adequately and comprehensively address the suite of issues raised by any proposal to mine uranium.

3. Is there an ongoing role for Commonwealth?

Claims by the ACT Government give an impression that the Commonwealth and the ACT will both maintain a role in approving proposals that affect Matters of National Environmental Significance. For instance it is claimed by Greens Minister Rattenbury MLA the Bill "maintains an ongoing approvals role for the Federal Government in environment protection matters".

Chief Minister Katy Gallagher MLA states: "the Commonwealth will retain a role in the ACT approval of proposals involving matters of national environmental significance".

However a dual role in approvals is completely contrary to the purpose of the "One-Stop-Shop". There are a range of statements and documents which clearly indicate that if the Bilateral Approval Agreement is put in place approvals will vest with the ACT Government and it will be the only decision-making point. For example:

> **Only one decision including conditions on approval is made** by the Australian Capital Territory, accounting for Australian Capital Territory matters and matters of national environmental significance… **No separate Australian Government referral, assessment or approval will be required for proposed actions that fall under an accredited process**.

All the Bill and Draft Bilateral Approval Agreement provides is for an **optional** opportunity for the Commonwealth Minister to provide "advice" on a proposed draft decision notice of the ACT Government. [Section 127A (Bill), Section 6.7 Draft Bilateral Approval Agreement]. The Commonwealth Minister has **only** ten working days in which to provide advice on the draft decision notice. There is no requirement for the Minister to be provided with all of the assessment documentation. This requirement to refer only applies to proposals in the Impact Track.

There is no obligation in either the Bill or the Bilateral requiring the Commonwealth to provide advice or comment. It is completely **optional**. It is not possible for State/Territory legislation to direct the Commonwealth Government by mandating an ongoing role for Commonwealth environmental approvals.

It also needs to be clear that regardless of any advise provided the ACT Government would be the "decision-maker" and would issue the final approval.

Section 128(1)(b)(v) of the Bill provides that the ACT decision-maker must not make a decision which is inconsistent advice (if any) received by the Commonwealth Minister.

Therefore, advice, if given by the Commonwealth Minister, must be considered however it is clear by virtue of the intent of creating one approval mechanism that the advice could not be of the nature of vetoing a draft decision notice or specifying conditions of approval.

The timeframe is completely inadequate at only ten days and the ACT Government retains the final approval.

A fundamental weakness is that any potential role of Commonwealth is at the tail-end not at beginning of the process. Under current arrangements proponents if they believe a proposal will have impacts on MNES can [have to] submit a referral to the Commonwealth seeking advice on whether the "action" is a controlled action and if yes the level of assessment which is required.

The language in the draft Bilateral approval is significantly looser than in the Bill in that it only states that the ACT Government **may** provide a draft decision notice to the Commonwealth Minister. [Section 6.7] Again there is no obligation on the Commonwealth Minister to provide comment – rather the Commonwealth Minister may provide comment within ten working days in relation to the draft decision notice.

It is questionable whether any significant comment or advice provided by the Commonwealth Minister to the ACT decision-maker could be upheld if it made in the absence of consideration of all the environmental assessment documentation.

None of this provides a robust framework for ensuring the "Federal Government will continue to oversee proposals that are likely to have nationally significant adverse environmental impacts". (Rattenbury Media Release 14 August 2014). In short the inclusions in both the Bill and the draft Bilateral Approval agreement are tokenistic and will not ensure an ongoing systemic role for the Federal Government in environmental approvals on proposals affecting Matters of National Environmental Significance.

4. Commonwealth Call-in determination

We note that the Section 16, and in particular 16.2 and 16.4, of the Draft Bilateral Approval Agreements provides scope for the Commonwealth Secretary (16.2) or Minister (16.4) to intervene in the accredited approval process before a decision is made. This provision is not unique to the ACT agreement and is included in other bilateral agreements.

While we support a call-in power for the Commonwealth it is problematic as it does not provide proponents the certainty of process which exists under approvals via the existing arrangements and will politicise environmental approvals rather than continuing the mainstreaming of them as has occurred over the last 30 years or so.

5. Eight Stop Shop

Under the Commonwealth Government's proposed policy, each state and territory will have different regulatory requirements, creating a patchwork regulatory system. Instead of the mythical one-stop shop we will have an eight-stop shop. There is a strong likelihood that, rather than deliver streamlined approval processes, the delegation of approval powers to the ACT with new legislation with new terminology, will result in approval delays. Without proper Commonwealth assessment, individual and community stakeholders will feel disengaged and there may be legal challenges.

A comparison of the Queensland and NSW Bilateral Approval agreements with the ACT already shows significant differences in the agreements.

6. Efficiency

Instead of rushing to sign approval bilateral agreements, the Australian Government should examine the range of policy alternatives for strengthening environmental laws that are available with an aim of improving the efficiency and effectiveness of national

Efficiency can be increased by coordinating and improving assessment processes and putting in place a suite of consistent and robust environmental standards in all jurisdictions, without abdicating Commonwealth approval powers.

7. Conflict of interest

One of the most significant concerns regarding the one-stop-shop has been that it could is where the State Government is the proponent they will have difficulty making an independent decision. It is a clear conflict of interest. Likewise it is inappropriate for a State Government to be both the decision-maker and the regulator. Where the ACT Government is the proponent it cannot easily make an independent assessment.

In September 2013 Minister Hunt confirmed that the Commonwealth will retain control over decisions for projects for which state governments are "likely to have a significant conflict of interest" as the proponent. There is no provision in the Draft Bilateral Approval Agreement to give effect to this.

Here in the ACT one of the greatest threats to our unique and national significant biodiversity is urban development and the ACT derives a large % of its income from land sales. It can't be both the proponent and regulator for future urban development.

Our woodlands are nationally significant. About 95% of Yellow-Box Red Gum Grassy Woodlands have been destroyed nationally and it is listed as critically endangered. The remaining ACT patches are exceptional in term of size, quality and diversity. They have very high regional and national conservation significance. They are important habitat for species of local and national significance such as the Superb Parrot.

Over the last ten years the ACT has lost over 300 hectares of these critically endangered Yellow-Box Red-Gum Woodlands to urban development in the ACT. It is likely we would have lost more if it wasn't for Commonwealth involvement.

8. Adequacy of ACT laws

Australian Network of Environmental Defenders Office analysis over the past two years make clear that no existing State or Territory major project assessment process meets the standards necessary for federal accreditation (notwithstanding some have been accredited). Nor do these processes meet best practice standards for environmental assessment.