

Report on Public Comments on the Draft NSW Assessment Bilateral Agreement

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, a draft assessment bilateral agreement between the Commonwealth and the State of New South Wales (NSW) was published on 12 December 2014 with an invitation for any person to comment by 2 February 2014 (more than 28 days).

This report provides a summary of submissions. The submissions will be published on the Department of the Environment's website, except where the author has marked the submission, or parts of the submission, as confidential.

18 submissions were received on the draft assessment bilateral agreement within the statutory public consultation period. The following submissions were received in the order in which they were received:

1. John Jeayes
2. Cotton Australia
3. Indigenous Advisory Committee, established under the *Environment Protection and Biodiversity Conservation Act 199 (EPBC Act)*
4. Confidential
5. Teresa James
6. Confidential
7. Environment Defender's Offices NSW
8. Confidential
9. Nature Conservation Council of NSW
10. NTSCORP
11. Land & Environment Planning
12. Australian Conservation Foundation
13. Running Stream Water Users Association Inc
14. The Wilderness Society Newcastle
15. NSW Minerals Council
16. NSW Farmers
17. Rylstone District Environment Society
18. Places You Love

1. One-Stop Shop policy

Issues Raised

All submissions included comments directed at the Australian Government's 'One-

Stop Shop' policy and not directly related to particular provisions of the draft NSW assessment bilateral agreement ('the agreement').

Submissions were both supportive and unsupportive of the 'One-Stop Shop' policy. Some submissions generally supported simplifying and removing regulatory duplication. Some submissions considered the 'One-Stop Shop' policy would reduce protection for the environment and matters of national environmental significance (NES), and result in inconsistent assessment standards across Australia. Some submissions also expressed doubts around the capacity of the NSW Government to adequately protect matters of NES and to enforce environmental laws.

Response

The agreement relates to the process for environmental assessment of matters under the EPBC Act, and is not an approval bilateral agreement for the purpose of s.46 of the EPBC Act. The agreement reflects the relevant statutory requirements of the EPBC Act.

The agreement will not reduce the Commonwealth's obligations under the EPBC Act with respect to matters of NES. The agreement accredits assessment processes that meet the requirements of the EPBC Act and Regulations. Under the agreement, NSW recommendations to the Commonwealth decision-maker must be consistent with relevant international obligations and Commonwealth plans, policies and guidelines.

The agreement also provides for close cooperation between the parties and assurance mechanisms to ensure environmental standards are being maintained. This includes an escalation process, transitional and five year reviews of the agreement, and reporting mechanisms to enable the Commonwealth to fulfil its reporting obligations under the EPBC Act and internationally.

Should the Minister not be satisfied that the agreement is being complied with, or consider that assessment processes accredited under the agreement do not give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations, sections 57-64 of the Act provide a mechanism by which the agreement can be cancelled or suspended.

All assessment bilateral agreements are the result of negotiations between the Commonwealth and state and territory governments. The differences in the agreements reflect differences in state processes, laws and arrangements. NSW already assesses impacts on matters of NES under the existing assessment bilateral agreement, and impacts on matters of NES that are also listed at the state level. The approach taken in developing the agreement means that only those processes that meet EPBC Act requirements, and adequately and comprehensively assess matters of NES, have been considered for accreditation.

2. Applying conditions

Issues Raised

Some submissions expressed concern that the agreement did not clearly specify that NSW would be required to notify the Commonwealth when varying or amending conditions of approval, beyond the annual reporting requirements specified in section 12 of the agreement.

Response

The agreement includes regular reporting and oversight of the operation of the agreement through the Senior Officers' Committee, together with a number of open information provisions and a mutual commitment to cooperative implementation and annual reporting on variations to conditions. In addition, it is anticipated that any significant variation to approval conditions that is of concern would be brought to the attention of the Department of the Environment and the Minister. This would occur either through public notification or through engagement with NSW and/or the company in question (who will still be a holder of an approval from the Commonwealth). Under the EPBC Act the Minister retains the power to add or vary conditions attached to an approval in particular circumstances, including where there is an impact that is substantially greater than was anticipated through the assessment.

3. Offsets

Issues Raised

Several submission raised concerns with regard to the application of the NSW approach to offsets, in particular the *NSW Biodiversity Offsets Policy for Major Projects*. Specific concerns included:

- Consistency with the Commonwealth's current approach to offsetting;
- The approach in relation to 'like-for-like' offsets;
- Accounting for conservation actions undertaken under other programs or schemes; and
- The use of supplementary measures.

Other submissions expressed support for the *NSW Biodiversity Offsets Policy for Major Projects*, which was considered an improvement on the existing agreement.

Response

The Agreement allows NSW to apply the NSW Biodiversity Offsets Policy for Major Projects on the basis that it will ensure that long-term environmental outcomes are achieved in accordance with the objects of the EPBC Act. This policy is generally consistent with the Commonwealth's key principles for environmental offsets. It is based on a transparent and scientifically rigorous methodology, and focuses on 'direct' and 'like-for-like' offsets – which generate a quantifiable, on-ground benefit

for the matter of NES that is being targeted. The policy also includes a strong focus on security and enforceability of offsets through Biobanking Agreements, which provide for long-term management and protection of offset sites. While the policy permits deviations from the 'like-for-like' principle in limited circumstances, this does not apply to matters of NES.

To avoid unacceptable or unsustainable impacts on matters of NES, NSW will apply the 'avoid, mitigate, offset' hierarchy outlined in clause 7.1 of the Agreement. These principles outline that offsets will not be considered until all reasonable avoidance and mitigation measures are considered, or acceptable reasons are provided as to why avoidance or mitigation of impacts is not reasonably achievable.

The NSW Biodiversity Offsets Policy allows environmental offsets to coincide with mine site rehabilitation. These offsets would be narrowly focused on conservation activities that benefit the relevant matter of NES, above and beyond what would otherwise be required. These offsets are therefore 'additional', although special care will be taken to ensure that the conservation benefits accruing from these offsets are clearly measured and delineated.

The agreement requires a review of the effectiveness of the NSW Biodiversity Offsets Policy for Major Projects to ensure that offsets derived in accordance with this policy are delivering long-term environmental outcomes for matters of NES. This will occur as part of a transitional review of the Agreement, which is to take place 12 months after the date the Agreement commences.

4. Conflicts of Interest

Issues Raised

Some submissions express concern at potential 'conflicts of interest' in relation to NSW Government assessments and approvals of certain actions. Some submissions state that there is a lack of impartiality by the NSW Government where state-owned corporations and agencies are proponents or beneficiaries of developments, particularly major projects. These submissions state that this would likely result in a reduction in the quality of the environmental assessment, and approval conditions.

Response

The situation of a state, territory or Commonwealth government approving a project proposal from another area of government is not unusual. For example, the EPBC Act allows for the Commonwealth Environment Minister to make decisions on actions proposed by the Commonwealth.

NSW decision-makers must comply with state statutory processes and principles of administrative law. Under the agreement, protections are in place to ensure that NSW will not act inconsistently with relevant international obligations and Commonwealth plans, policies and guidelines. Administrative arrangements will be developed to support the efficient and effective operation of the assessment process.

The agreement provides for an escalation process to resolve any issues that may

arise. It also includes requirements for review, reporting and public access to information that will enable the Commonwealth, and the community, to ensure environmental standards are being maintained. For example, project documentation will be made publicly available. Institutional arrangements that are transparent provide a general protection against the potential for inappropriate assessment processes.

5. Scope

Issues Raised

Some submissions questioned why the scope of the agreement was expanded to incorporate, among other processes, development assessed under Parts 4 and 5 of the *NSW Environmental Planning and Assessment Act (1979)*. In particular, submissions raised concerns about:

- Increased complexity due to the inclusion of the additional processes; and
- How assessments under Part 5 of the *NSW Environmental Planning and Assessment Act (1979)* correspond to assessments under the EPBC Act.

Other submissions supported the expansion in scope of the agreement.

Response

The agreement broadens the scope of the 2013 assessment bilateral agreement, to achieve maximum efficiency and provide increased certainty for proponents.

The agreement largely reflects the framework and provisions of the draft approval bilateral agreement with NSW (released for public exhibition in 2014 and available on the Department of the Environment's website), and brings forward some of the streamlining benefits of an approval bilateral agreement, including an increased commitment from NSW to address all Commonwealth requirements for environmental assessment and approval. The agreement will also assist in the transition to an approval bilateral agreement, through the early implementation of a number of the streamlining commitments included in the draft approval bilateral agreement.

Part 5 of the NSW Environmental Planning and Assessment Act (1979) is taken by the agreement to correspond to assessment by Preliminary Documentation under the EPBC Act. This method is typically applied to projects for which:

- *The number and complexity of relevant impacts is low and locally confined;*
- *The relevant impacts of the action can be predicted with a high degree of confidence; and*
- *Good quality information has been provided in the referral.*

The agreement only applies to an action assessed under Part 5 of the NSW Environmental Planning and Assessment Act (1979) (other than where an EIS is required) if the Minister has been given an opportunity to ask that another assessment

approach be used and the Minister has not done so; or the Minister has agreed in writing that the assessment approach be used.

6. Consultation

Issues Raised

Some submissions raised concerns about the adequacy of Indigenous consultation when proposing to take an action under the agreement, with a call to significantly expand the scope of Traditional Owner engagement in state and Commonwealth processes. Other submissions commented that the agreement does not require NSW to consult with the Commonwealth prior to finalising an assessment report, including in relation to proposed conditions.

Comments were also received regarding the public exhibition periods under Part 5 of the NSW *Environmental Planning and Assessment Act (1979)*.

Response

The agreement includes provisions for the engagement of Indigenous peoples. In particular, clause 8 provides that assessments will recognise the role and interests of Indigenous peoples in promoting conservation and ecologically sustainable use of natural resources and promote the cooperative use of Indigenous peoples' knowledge of biodiversity and Indigenous heritage.

Regarding consultation on assessment reports and approval conditions, the intent of the agreement is to streamline assessment processes to the maximum extent possible. To ensure a smooth transition to the new arrangements, the agreement provides for Commonwealth guidance and support to further build state capacity to prepare assessment reports and recommendations that meet Commonwealth requirements.

The agreement also provides for regular reporting and oversight of the operation of the agreement through the Senior Officers' Committee, as well as a cooperative approach to implementation. If the Commonwealth decision-maker considers that conditions recommended by NSW for matters of NES are not adequate, the decision-maker can add conditions to an approval under the EPBC Act.

In terms of consultation on Part 5 assessments, the agreement specifies that documentation about each assessment under Part 5 (other than where an EIS is required) must be made available to the public and released for public comment. The public must be given at least 14 days to provide comments to the consent authority. Projects must be assessed consistent with the requirements of Schedule 1 of the agreement.