

TRANSITIONAL REVIEW OF THE BILATERAL AGREEMENT RELATING TO ENVIRONMENTAL ASSESSMENT

Commonwealth of Australia
(The Department of the Environment and Energy)

and

The State of New South Wales
(The Department of Planning and Environment and
the Office of Environment and Heritage)

August 2017

SECTION 1 – INTRODUCTION

Under the Commonwealth’s *Environment Protection and Biodiversity Conservation Act 1999* (**the EPBC Act**), approval from the Australian Government Environment Minister (or their delegate) is needed for any proposed action—including projects, developments, activities, or alteration of these things—likely to have a significant impact on a matter protected by Part 3 of the EPBC Act. Approval can only be granted by the Environment Minister after the impact of the proposed action on the matters protected has been assessed.

To remove duplication in environment regulation, Part 5 of the EPBC Act provides for the Commonwealth to enter into bilateral agreements with the states and territories. Under assessment bilateral agreements, the Commonwealth can accredit a state or territories’ environment assessment processes where they meet the requirements of the EPBC Act. This allows proponents to prepare a single set of assessment documentation for both the Commonwealth and the state or territory approval processes.

The Commonwealth and New South Wales (NSW) governments (**the parties**) entered an assessment bilateral agreement (**the Agreement**) on 26 February 2015. The Agreement:

- ensures that matters of national environmental significant (**MNES**) are protected as required under the EPBC Act by:
 - Committing NSW to prepare an Assessment Report, including a recommendation to the Commonwealth on whether to approve an action. Where approval is recommended, the Assessment Report is to recommend conditions which, to the greatest extent possible, address impacts to MNES so that there are not unacceptable or unsustainable impacts on those matters.
- ensures an efficient, timely and effective process for environmental assessment and approval of actions by:
 - accrediting certain NSW processes for assessment under the *Environmental Planning and Assessment Act 1979* (NSW), including the NSW Biodiversity Offsets Policy for Major Projects;
 - exempting certain actions from assessment under Part 8 of the EPBC Act, where those actions have been assessed through an accredited process, and in the manner specified in Schedule 1 of the Agreement; and

- committing the Commonwealth to make its best endeavours to ensure that conditions under the EPBC Act are strictly limited to matters not addressed, or likely to not be addressed, by NSW conditions.

A copy of the Agreement is available on the websites of the Department of the Environment and Energy and the NSW Department of Planning and Environment.

An evaluation of the effectiveness of the Agreement will be undertaken in 2020 as part of the statutory five year review. A non-statutory transitional review of the Agreement was required to be undertaken 12 months after commencement to assess whether the objects of the Agreement were being achieved and whether the Agreement has been implemented and is working effectively. As no projects were determined in accordance with the Agreement 12 months after it commenced (i.e. the projects were either still under assessment or assessment had not yet commenced), the review was undertaken covering the 24 months after the Agreement's commencement.

This non-statutory 24 month review focused on the parties' progress in implementing the Agreement between 26 February 2015 and 26 February 2017, as outlined in Section 2, particularly with regards to:

- Referrals of proposed actions;
- Assessment of MNES;
- Relevant plans, policies and other instruments; and
- Communications and collaborative approaches between the parties.

The review considered the projects which have been, or were being, assessed under the Agreement during the review period and are summarised in Section 3.

The review reports against the Key Performance Indicators (KPIs) agreed to by the Senior Officials Committee, where it is appropriate to do so. Due to the review's focus on the parties' procedural, administrative and operational matters, public input has not been sought.

The review identified that the parties have made significant progress in implementing the Agreement, resulting in:

- Increased awareness of the parties' obligations under the EPBC Act; and
- Increased consistency and coordination in the issuing of Commonwealth and NSW environmental assessment requirements.

The review also identified that there are some aspects of the Agreement's operation that could be improved. This report details these aspects, and recommends the implementation of improvement

initiatives. A number of these initiatives have been identified as being able to be quickly implemented by the parties and thus will be prioritised. These include that the parties:

- Identify improved processes for early engagement with proponents to ensure alignment of the NSW and Commonwealth assessment timeframes such that the Agreement can apply;
- Continue to build capacity of NSW assessment officers in undertaking assessments that meet the standards of the EPBC Act;
- Review the Administrative Arrangements to ensure they provide an appropriate level of guidance for assessment officers, particularly with regards to information sharing with the Commonwealth; and
- Identify opportunities to improve information sharing regarding compliance and enforcement matters.

SECTION 2 – PROGRESS IN IMPLEMENTING THE AGREEMENT AND PRIORITY INITIATIVES FOR IMPROVEMENT

CLAUSE	PROGRESS SO FAR	PRIORITY INITIATIVES FOR IMPROVEMENT	RATIONALE FOR PRIORITY INITIATIVES
Cooperative approach to referrals			
<p>The clauses in Section 5 make provisions for the Commonwealth and NSW to work together at the scoping stage of the proposal to ensure that the highest proportion of proposals being assessed under accredited processes are assessed under the Agreement, and that assessments under the Agreement are initiated in a timely manner and are undertaken with the least possible administrative steps.</p>	<p>In the first two years of the Agreement, awareness of obligations under the EPBC Act has been raised in NSW assessment teams through seminars, workshops and one-to-one support provided by Commonwealth Embedded Officers. A range of mechanisms have been established for informing proponents that an action may need to be referred to the Commonwealth including reference to the EPBC Act and the Bilateral Agreement in recent policy documents including the Integrated Mining Policy and the Wind Energy Framework.</p> <p>NSW (DPE) assessment officers regularly consult with the Commonwealth and proponents on the likelihood that a proposed major project (or modification to a proposed project) may have significant impacts on MNES. This allows for specific information on EPBC Act obligations and implications of timing, in relation to the Agreement, to be communicated to proponents in the early stages of their project. In the first two years of the Agreement, a small number of controlled actions were not assessed under the Agreement because they were referred to the Commonwealth during or after exhibition for purposes of determination under the Environmental Planning and Assessment Act 1979 (Projects referred to the Commonwealth after</p>	<ul style="list-style-type: none"> ▪ NSW to consider approaches to increasing proponents’ awareness of potential obligations under the EPBC Act particularly in the early stages of the development application process. ▪ NSW to develop guidance material for proponents to highlight the cost benefits of utilising the single assessment process under the Agreement, and the importance of timing in relation to referrals. ▪ NSW to finalise revised internal guidance material, including procedures and checklists, to ensure referral and notification requirements are met in a timely manner and with the least number of administrative steps. ▪ NSW to ensure guidance material and procedures are adopted widely and consistently across the assessment teams. ▪ The Commonwealth and NSW to identify improved processes for early engagement with proponents to ensure alignment of the NSW and Commonwealth assessment timeframes such that the Agreement can apply. 	<ul style="list-style-type: none"> ▪ It is important that proponents are aware of the environment assessment process. ▪ Early engagement in relation to the EPBC Act will ensure the highest possible number of controlled actions are assessed under the Agreement. ▪ Ensures the Agreement is utilised where appropriate. ▪ Ensures there are official records of all proposals being assessed under the Agreement and

	<p>a project has been place on exhibition by NSW cannot be assessed under the Agreement).</p> <p>The Commonwealth procedurally issues a letter, on receipt of a referral, notifying the NSW Minister of a controlled action proposed to be undertaken in NSW. The letter seeks advice from NSW on the manner that it will be assessed and whether the Agreement will apply. NSW has developed procedural guidelines for assessment officers that instruct NSW assessment officers to notify the Commonwealth (in a timely manner) of projects to which the accredited process will apply.</p>		<p>demonstrates clear communication between the Commonwealth and NSW.</p>
Assessment			
<p>Operationally for the Agreement to work, NSW must assess impacts on MNES whilst undertaking an assessment for the purposes of approval under the EP&A Act. The clauses in Section 6 make provisions for NSW to ensure that proponents identify and assess all impacts on each relevant MNES. In addition, NSW must ensure and that there is sufficient information in the Assessment Report such that the Commonwealth decision-maker may consider those impacts when determining whether</p>	<p>In 2015, following commencement of the Agreement, the Commonwealth provided generic guidance on environmental assessment requirements for EPBC Act approval purposes to NSW to assist in the preparation of environmental assessment guidelines for individual projects.</p> <p>NSW has routinely issued environmental assessment requirements in accordance with Schedule 1 (3.2(b)) of the Agreement to proponents of projects being assessed under the Bilateral Agreement to date. These guidelines have been incorporated into the Secretary's Environmental Assessment Requirements (SEARs) or issued as Supplementary SEARs which under EP&A Regulations is a statutory requirement that proponents identify, assess impacts and include their assessment in the EIS.</p>	<ul style="list-style-type: none"> ▪ The Commonwealth and NSW to work together to update operating procedures to ensure relevant assessment officers in both DPE and OEH receive referral documentation as early as possible in the process. ▪ The Commonwealth and NSW to work towards increasing proponents' understanding of the EPBC Act's requirements for explicit assessment of relevant impacts on each MNES. ▪ The Commonwealth and NSW to identify key actions to support a transition to business as usual. ▪ The Commonwealth and NSW to ensure prompt and accurate communication regarding how controlled actions are assessed under the EPBC Act and the finalisation of NSW Assessment Reports, 	<ul style="list-style-type: none"> ▪ Ensures a sufficient level of information and analysis is provided by proponents in their assessment documentation. ▪ Ensure relevant assessment officers in both DPE and OEH receive referral documentation as early as possible in the process and are able to prepare supplementary

<p>to approve. NSW must seek expert advice jointly with the Commonwealth for Coal mining and coal seam gas projects and either government may seek advice as needed.</p>	<p>Since providing generic guidance, the Commonwealth has only been engaged in the preparation of SEARs for one project; Narrabri Gas, at the invitation of NSW and driven by the complex and emerging nature of the project. Aside from the Narrabri Gas project, the Commonwealth has not been charging proponents for this stage of the assessment process, demonstrating real and effective outcomes arising from the Agreement.</p> <p>NSW has worked to prepare Assessment Reports in accordance with the requirements. Since commencement of the Agreement, only five assessment reports had been drafted and only one project assessment has been completed. For this project, the Commonwealth decision-maker had sufficient information to make an approval decision, on the basis of the Assessment Report and recommendations provided by NSW.</p> <p>NSW and Commonwealth have developed clear procedural guidelines and practice notes for NSW and Commonwealth assessment officers in relation to projects being assessed under the Agreement.</p> <p>The Commonwealth routinely provides information in relation to consideration of a referral and specific assessment notes to NSW with the notification of a controlled action to assist NSW officers in preparation of SEARs and subsequent review of assessment material prepared by proponents.</p>	<p>to reduce delays in progressing with assessments and approval decisions.</p> <ul style="list-style-type: none"> ▪ Compliance with Schedule 1 of the Agreement to ensure MNES are addressed in the assessment under the NSW process such that statutory requirements under the EPBC Act are met. ▪ NSW’s assessment officers’ level of understanding in relation to the assessment requirements for projects subject to the Agreement, to ensure they are able to prepare supplementary environmental assessment requirements and assessment reports without Commonwealth assistance. ▪ The Commonwealth and NSW to develop procedural guidelines for identifying, assessing and seeking advice from the Independent Expert Scientific Committee (IESC) on Coal Seam Gas and Large Coal Mining Development. ▪ NSW to ensure assessment checklists include a reminder for assessment staff to review all environment impact statements prior to publication, to ensure the proponent has provided the necessary level of detail in relation to impacts on each MNES in accordance with the supplementary SEARs. ▪ NSW to maintain records of projects for which expert advice is sought from IESC 	<p>environmental assessment requirements and assessment reports without Commonwealth assistance.</p> <ul style="list-style-type: none"> ▪ Ensures assessment is consistently undertaken and documented in the manner prescribed by the Agreement. This will help NSW assessment officers to evaluate information provided by proponents in EISs, to ensure it is sufficient to facilitate assessment of impacts on MNES in accordance with the requirements of the EPBC Act. ▪ Ensures requests for advice are
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	<p>NSW has undertaken some steps to build the capacity of NSW assessment staff to assess impacts on MNES and encourage adoption of the bilateral process through preliminary guidance material and workshops. The number of assessment staff and routine turn-over of staff in the agencies has resulted in minimal effectiveness of capacity building efforts to date. NSW is seeking internal expertise to increase effectiveness of capacity building efforts and general adoption of the Agreement.</p>	<p>and/or other expert bodies, to facilitate ongoing monitoring.</p>	<p>commenced as early as possible in the assessment process and in accordance with the requirements in the Agreement.</p>
Relevant plans, policies and other instruments			
<p>The clauses in Section 7 make provisions for NSW to ensure that a proposal recommended to the Commonwealth for approval is not inconsistent with relevant policies and plans, relevant conservation advice is given consideration and that impacts to MNES will be avoided and mitigated and, if required, offset. The Commonwealth has endorsed the NSW Biodiversity Offsets Policy (including the Framework for Biodiversity Assessment (FBA)) and the rules established under section 127B of the Threatened</p>	<p>NSW (DPE) has developed a standard set of assessment requirements in relation to MNES in consultation with the Commonwealth. These assessment requirements require proponents to provide:</p> <ul style="list-style-type: none"> ▪ details of any offsets proposed to address residual adverse significant impacts and how these offsets will be established; ▪ details of how the FBA had been applied in accordance with the objects of the EPBC Act; and ▪ details of credit profiles required to offset the development in accordance with the FBA and/or mapping and descriptions of the extent and condition of the proposed offset. 	<ul style="list-style-type: none"> ▪ The Commonwealth and NSW to develop procedural guidelines for assessing and determining applications involving residual significant impacts on MNES. ▪ NSW to ensure more transparency around how the FBA has been applied to MNES and meets the standards of the EPBC Act. ▪ NSW to ensure due consideration and/or implementation of relevant plans, policies and other instruments to ensure the environmental outcomes from approved projects meet the Commonwealth's standards. ▪ NSW to work towards increasing assessment officers' level of understanding in relation to requirements for offsets (particularly where migratory species are being impacted), to ensure they are able to assess whether the proponent has met 	<ul style="list-style-type: none"> ▪ Increasing assessment officers' understanding will facilitate early identification of any inconsistencies in proponents' applications, with limited assistance from the Commonwealth. ▪ It is important that there is more transparency around how the FBA has been

<p>Species Conservation Act 1995 (NSW), or the Fisheries NSW Policy and Guidelines for Fish Habitat Conservation and Management for the purposes of calculating offset requirements on the basis that the principles of the NSW Offset Policy are consistent with the EPBC Act Offset Policy.</p>		<p>these requirements, with limited assistance from the Commonwealth.</p>	<p>applied to MNES and meets the standards of the EPBC Act.</p>
Communications, reporting and collaborative approaches			
<p>The clauses in sections 8, 9, 12 & 14 make provisions for NSW and the Commonwealth to work together to ensure implementation of the Agreement is supported through clear and ongoing communications between Governments and with third party stakeholders and through genuine collaborative approaches.</p>	<p>Since the Agreement came into force NSW have standardised the content of advertisements for actions assessed under the Agreement and aligned public exhibition protocols with the Commonwealth. The Commonwealth and NSW have also worked together to ensure that all projects subject to the Agreement are exhibited in line with the relevant requirements. For example, relevant information regarding the projects (such as SEARs, Commonwealth and NSW environmental assessment requirements, environmental impact statements and public submissions) has been published on the DPE website (as required by clause 8.2(a)). This information has been published in accordance with NSW's Web Content Accessibility Guidelines (WCAG) 2.0 Level AA.</p>	<ul style="list-style-type: none"> ▪ The Commonwealth and NSW will provide information on the operation of bilateral assessments on their websites. In particular, this should include information on how to identify and characterise Commonwealth listed threatened species and communities in such a way that offset liabilities can be calculated wherever possible using the BioBanking methodology. ▪ NSW will ensure procedures adopted to support the implementation of the Agreement provide for efficient and effective data collection and monitoring and reporting, including against key performance indicators. ▪ NSW is currently upgrading its Disability Inclusion Action Plan to increase accessibility among persons with disabilities including visual and auditory 	<ul style="list-style-type: none"> ▪ It is important that there is transparency in relation to effectiveness of the Agreement and its implementation.

		<p>impairments, as well as particular needs groups such as those with cognitive and learning disabilities. This will include specific provisions for public consultation sessions, for example mobility impaired persons.</p> <ul style="list-style-type: none"> ▪ The Commonwealth and NSW to identify opportunities to improve information sharing regarding compliance and enforcement matters. 	
Administrative Arrangements			
<p>Clause 11 and the Agreement's Administrative Arrangements outline measures for the Agreement to be administered in a co-operative and efficient way.</p>	<p>To support the implementation of the Agreement, in late 2015 deeds of agreement were signed for two Commonwealth staff to commence two year placements within NSW. The embedded officers have undertaken a range of initiatives providing transitional support to NSW assessment officers to ensure that the requirements of the Agreement are administered co-operatively and efficiently.</p> <p>A Senior Officers' Committee has been established to oversee the implementation of the Agreement. The Committee meets regularly, and the Commonwealth and NSW are represented at these meetings by senior executives.</p>	<ul style="list-style-type: none"> ▪ The Commonwealth and NSW to review the Administrative Arrangements to ensure they provide an appropriate level of guidance for assessment officers, particularly with regards to information sharing with the Commonwealth. 	<ul style="list-style-type: none"> ▪ It is important there are strong administrative arrangements in place to support the implementation of the Agreement.

SECTION 3 – PROJECTS ASSESSED, OR BEING ASSESSED, UNDER THE AGREEMENT

Since its commencement on 26 February 2015, 28 controlled actions have been, or are being, assessed under the Agreement. This includes 7 controlled actions transferred for assessment under the Agreement (transitional projects).

The projects assessed, or being assessed, under the Agreement at the date of publishing are summarised in the Table below.

Project	DPE Number	EPBC Number	Status End of Feb 2017	Status at Publishing	Transitional Project? ¹
Airly Coal	SSD 12_5581	2013/7076	NSW approved	Commonwealth approved	Yes
Brandy Hill Quarry	SSD 5899	2015/7453	Public Exhibition commenced	Proponent reviewing submissions received during public exhibition	No
Bylong Coal	SSD 14_6367	2014/7133	Assessment documentation with the independent Expert Scientific Committee for Review	Assessment phase	Yes
Caroona Coal	SSD 6472	2014/7173	Withdrawn	Withdrawn	Yes
Dendrobium Mine Extension Project	SSD 8194	2017/7855	SEARs ² issued – proponent preparing draft assessment documentation	SEARs issued – proponent preparing draft assessment documentation	No
Drayton South Coal	SSD 6875	2014/7402	NSW Refusal	Not progressed	Yes
WestConnex M5	SSD 6788	2015/7520	Proponent reviewing submissions following public exhibition period	NSW and Commonwealth approved	No
Glenfield Waste Services Materials Recycling Facility	SSD 6249	2015/7529	Proponent reviewing submissions following public exhibition period	Proponent reviewing submissions following public exhibition period	No

¹ Clause 18 of the Agreement provides for ‘transitional’ projects, which were already under assessment in accordance with the previous bilateral agreement but for which a substantial proportion of the assessment was still to be undertaken at the time the Agreement was made. In summary, Clause 18 provides that these projects would be assessed under the Agreement on a best efforts basis, rather than a binding basis, with NSW retaining a specific prerogative to not apply the Agreement at any point.

² Secretary’s Environmental Assessment Requirements

Gunlake Quarry	SSD 15_7090	2015/7557	SEARs Issued – proponent preparing draft assessment documentation	NSW approved – Assessment Report has been provided to the Commonwealth	No
Haerses Road Quarry (Old Northern Road Quarry Extension Project)	SSD 6437	2015/7608	SEARs Issued – proponent preparing draft assessment documentation	Proponent reviewing submissions following public exhibition period	No
Hume Coal	SSD 15_7172	2015/7526	SEARs Issued – proponent preparing draft assessment documentation	Proponent reviewing submissions following public exhibition period	No
Jupiter Windfarm	SSD 13_6277	2015/7518	SEARs Issued – proponent preparing draft assessment documentation	Proponent reviewing submissions following public exhibition period	No
Liverpool Range Windfarm	SSD 6696	2014/7136	Public exhibition commenced	Proponent reviewing submissions following public exhibition period	Yes
Martin Creek Quarry	SSD 14_6612	2016/7725	More information on draft Assessment Report required by NSW	Proponent reviewing submissions following public exhibition period	No
Marulan Limestone	SSD 7009	2015/7521	SEARs Issued – proponent preparing draft assessment documentation	SEARs Issued	No
Narrabri Gas	SSD 14_6456	2014/7376	Public exhibition Start	Proponent reviewing submissions	Yes
Narrabri to North Star Inland Rail	SSI 16_7474	2016/7729	SEARs Issued– proponent preparing draft assessment documentation	Proponent preparing draft assessment documentation	No
Newcastle Inner City Bypass	SSI 14_6888	2015/7550	Proponent reviewing submissions following public exhibition period	Proponent reviewing submissions following public exhibition period	No
Parks to Narromine Inland Rail	SSI 16_7475	2016/7731	SEARs Issued – proponent preparing draft assessment documentation	Proponent preparing draft assessment documentation	No
Parramatta Light Rail	SSI 8285	2017/7966	Not Applicable	SEARs Issued – proponent preparing draft assessment documentation	No

Spur Hill	SSD 6509	2014/7239	SEARs Issued	Proponent preparing draft assessment documentation	Yes
Tahmoor South Coal Mine	Unknown	2014/7162	On hold	Proposal withdrawn under EPBC Act	Yes
Vickery Extension Project	SSD 7480	2016/7649	SEARs Issued – proponent preparing draft assessment documentation	SEARs Issued	No
Wambo Southern Underground Extension	DA 305-7-2003 MOD 12	2016/7636	NSW approved	Commonwealth approved	No
Wambo United Coal Project	SSD 7142	2015/7600	Proponent preparing draft assessment documentation	Proponent preparing draft assessment documentation	No
Warragamba Dam raising	SSI 8441	2017/7940	Not applicable	NSW preparing SEARs	No
Western Slopes Pipeline	SSI 8272	2017/7894	Not applicable	SEARs Issued - Proponent preparing draft assessment documentation	No
Wilpinjong Coal	SSD 6764	2015/7431	Proponent preparing draft assessment documentation	NSW approved - Assessment Report has been provided to the Commonwealth	No