

REPORT ON PUBLIC COMMENTS ON THE DRAFT WESTERN AUSTRALIA ASSESSMENT BILATERAL AGREEMENT

OVERVIEW

The assessment bilateral agreement (the agreement) between the Commonwealth and Western Australia (WA) is one aspect of the Commonwealth Government's 'one-stop-shop' policy. The agreement provides for the accreditation of WA processes to enable an integrated approach to the assessment of actions requiring approval from both the Commonwealth and WA.

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (EPBC Act), a draft agreement was published on 29 May 2014 with an invitation for any person to comment by 27 June 2014. Before entering into the agreement, the Commonwealth Environment Minister is required by section 49(A)(b) of the EPBC Act to take into account any public comments received in response to that invitation.

This report provides an overview of issues, both general and specific, that were raised in public submissions. The report also details amendments made to the agreement arising from public comments.

A total of 20 submissions were received from industry, community groups, professional organisations and individuals (see Attachment A). Thirteen submissions were either substantially supportive or supportive of elements of the agreement. Seven submissions were generally unsupportive. A number of the submissions provided comments that did not relate directly to the assessment bilateral agreement. 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.

SUMMARY OF ISSUES RAISED

Many of the submissions raised general concerns regarding the agreement, including:

- whether the WA assessment process can adequately address matters of national environmental significance (MNES), including the resourcing and capacity of WA agencies;
- the ongoing role of the Commonwealth in relation to WA assessment processes, including clarity on the Commonwealth's role once the agreement is implemented and concerns over a possible lack of a Commonwealth role in cross jurisdictional assessments and a national perspective; and
- the potential for perceived conflict of interest due to possible state economic interests in projects being assessed.

Comments in relation to specific content of the agreement addressed issues including the following:

- the scope of WA assessment processes covered by the agreement, including arguments for either narrower or broader scope;
- consultation on assessment reports, including between WA and the Commonwealth;
- consultation and engagement with Indigenous people and communities;
- further opportunities to reduce duplication in the assessment process, specifically regarding clearing of native vegetation; and

- implementation of the agreement, including review mechanisms, comment periods, public release of information and consideration of cross border impacts.

GENERAL ISSUES

Adequacy and consistency of WA assessment processes to address MNES

Issue

Several submissions:

- provided specific examples of where impacts on MNES have not been assessed under the *Environmental Protection Act 1986* (EP Act) in relation to major projects;
- expressed concern that WA agencies would not have sufficient resources to implement the bilateral agreement,
- expressed concern that implementation of the agreement could lead to decreased protection for MNES; and
- raised the importance of consistency in assessments under the agreement, noting the delegation of responsibility for environmental management to various government ministers of WA.

Response

The agreement reflects relevant statutory requirements of the EPBC Act and Regulations in relation to assessment bilateral agreements (including under Part 5 of the EPBC Act and Part 3 of the EPBC Regulations) and includes those WA assessment processes that meet the requirements of Commonwealth legislation. The agreement also provides for continued co-operation between parties and additional opportunities to improve the operation of the agreement. For example:

- Clause 6.5 supports the WA and Commonwealth governments to work collaboratively together by ensuring ongoing measures to improve efficiency and effectiveness of administrative processes.
- Clause 6.9 requires WA decision-makers consider relevant Commonwealth guidelines, policies and plans, to the extent relevant.
- Clause 8.1 specifies that the Commonwealth will work with WA to address inconsistencies in the conditions attached to approvals for an action assessed under the Agreement and WA law. This approach is designed to minimise duplication in condition setting, which was supported by a number of submissions. This includes in relation to native vegetation clearing (Schedule 1, Item 3.2 and 3.3(c)).
- Clause 9 requires parties to work co-operatively, by a range of methods, including exchange of information (clauses 6 and 9.3) and the development and amendment of guidance material. Additional mechanisms for cooperation will be detailed in administrative arrangements.
- Clause 14 refers to the scope to make minor amendments to the agreement to facilitate improved efficiencies under the one stop shop policy, as well as providing for the parties to the agreement to make improvements to the operation of the agreement over time.
- Schedule 1 Item 6.2 contains detailed requirements for the content of assessment reports, to ensure adequate assessment of impacts on matters of national environmental significance.

A thorough analysis of WA legislation covered by the agreement was undertaken against the requirements of the EPBC Act and Regulations. For each class of actions, the analysis confirmed that the relevant WA process, in conjunction with the specified manner of assessment set out in Schedule 1, would meet the requirements of the EPBC Act and Regulations in relation to assessment of impacts to MNES. The Commonwealth will retain the ability to supplement WA conditions if they do not adequately address impacts on MNES.

As outlined in the Memorandum of Understanding signed between the State and the Commonwealth in December 2013 (the MOU), the Commonwealth and WA will consider activities to support the transition and implementation of the agreement, including the potential for embedding Commonwealth officers within WA agencies.

Commonwealth role

Issue

Submissions included comments regarding the ongoing role of the Commonwealth in relation to assessing potential impacts on MNES.

Response

The agreement will not reduce the Commonwealth's responsibilities under the EPBC Act with respect to MNES. Under the agreement, the Commonwealth Environment Minister will still be required to make a decision on whether to approve a proposal that will have, or is likely to have a significant impact on MNES under the EPBC Act. Should the Minister not be satisfied that the agreement is being complied with, or that assessment processes are not consistent with the objects of the EPBC Act and Australia's international obligations, sections 57 to 64 of the EPBC Act provide a mechanism by which the agreement can be cancelled or suspended (clause 13.1). In addition, under section 132 of the EPBC Act the Commonwealth Minister retains the power to request additional information from the proponent, state or any other person before making an approval decision.

Potential conflict of interest in assessment of MNES

Issue

Submissions included comments regarding the potential for conflict of interest when WA agencies assess major projects from which the state will receive a revenue stream.

Response

This concern was raised in relation to projects assessed by WA Environment Protection Authority (EPA). The EPA is an independent agency which is not subject to direction by the Minister and its advice to the WA Government is public. The assessment processes, including those processes which would be accredited under the agreement, require stakeholder engagement and consideration of public comments. The Commonwealth Minister retains an approval role, and must be satisfied that the assessment report provided under the agreement provides enough information about the relevant impacts of each proposed action on matters of national environmental significance (Schedule 1 Item 6.2).

Issues not directly related to the assessment bilateral agreement

Issue

A number of the submissions provided comments that did not relate directly to the assessment bilateral agreement, including in relation to an approval bilateral agreement with WA, cost recovery and about the one-stop-shop policy more generally.

Response

As outlined in the MOU, WA and the Commonwealth are pursuing an approval bilateral agreement to accredit WA to undertake approvals under the EPBC Act. As with the assessment bilateral agreement, there will be an opportunity for the public to comment on the draft approval bilateral agreement, in line with requirements of the EPBC Act.

Cost recovery will apply to projects referred on or after 14 May 2014 with exception for individuals and small businesses with less than \$2 million annual turnover. The Agreement reflects both the Commonwealth and WA commitment to minimise costs to business while maintaining high environmental standards. This will occur through cooperative efforts to strengthen intergovernmental cooperation on the environment.

CONTENT OF THE BILATERAL AGREEMENT

Scope of accredited WA assessment processes

Issue

A number of submissions cited there was a lack of clarity regarding the scope of the agreement, particularly regarding the WA assessment processes covered. A number of submissions recommended that additional WA assessment processes should be included within the scope of the agreement.

Response

Schedule 1 has been amended to provide further clarity on how native vegetation clearing permits are addressed in the agreement. It clarifies that clearing permits assessed by WA are within the scope of the agreement other than statewide purpose permits where the relevant impacts are not assessed before the clearing permit is granted. This also applies to assessments conducted by the Department of Mines and Petroleum under delegation under the EP Act.

Assessments by Environmental Review and Management Program (ERMP) have been included in Schedule 1 for transitional purposes. Although that assessment process is no longer implemented in WA under the EP Act, there remain some projects being assessed under this process and the previous assessment bilateral agreement. Inclusion of ERMP therefore ensures the transition of those projects from the existing bilateral agreement to the agreement.

The scope of the agreement may be reviewed over time. Other assessment methods may be incorporated at a later time if they meet the relevant statutory requirements of the EPBC Act and Regulations.

Consultation on Assessment Reports

Issue

Some submissions were supportive of the collaboration between WA and the Commonwealth outlined in the agreement while others raised concerns that the agreement would reduce Commonwealth input to assessment reports and decision making on MNES.

Response

A collaborative approach between the parties is reflected in the agreement which provides for close cooperation throughout the assessment process. For example, in relation to the determination of relevant impacts to MNES (clause 6.6) and drafting of conditions (clause 8.1).

.Administrative arrangements will also be developed to further detail arrangements between State and Commonwealth agencies to give effect to the agreement.

Stakeholder Engagement: Indigenous peoples

Issue

A number of submissions expressed concern about the extent to which the agreement provides for consultation with Indigenous peoples.

Response

Clause 7.1(a) recognises 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. Clause 7.1(b) recognising the views of relevant Indigenous people are likely to be a primary source of Information on cultural heritage.

Clause 7.3 recognises that Indigenous people may have particular communication needs, and that WA will make special arrangements to ensure that such groups with particular communications needs have an adequate opportunity to comment on proposed actions. The agreement also relies on existing WA processes for stakeholder engagement.

Implementation of the Agreement

Review Mechanisms

Issue

The review mechanisms in the agreement were subject to a number of comments in the submissions. Of particular concern was the need for a review one or two years after the commencement of the agreement.

Response

The agreement reflects the requirement under the EPBC Act for review of the bilateral agreement every five years. Clause 10.2 also allows for a review of the agreement within two years of commencement.

Public comments on assessment information

Issue

Some submissions commented on the period required for public comment on assessment documentation outlined in Schedule 1. Comments related to the differing public comment requirements for different processes and the requirement for proponents responding to public

submissions to 'take into account' public comments rather than address the substance of public submissions.

Response

Public comment periods and public release of information under the agreement are consistent with EPBC Act and Regulation requirements. Minimum public comment periods for assessment documentation are provided in Schedule 1.

The agreement provides different minimum public comment periods for Assessment on Proponent Information and Public Environment Review. This is consistent with the requirements of the EPBC Regulations, which provide for different public comment periods depending on the complexity of the assessment approach.

Cross border assessments

Issue

Some submissions expressed concern regarding cross jurisdictional actions and impacts, and how such actions would be properly assessed.

Response

As outlined in clause 4.2, the agreement only applies to projects that occur wholly within WA. For projects that do not occur wholly within WA or which have impacts on other jurisdictions, WA and the Commonwealth must consult relevant jurisdictions and agree an appropriate assessment approach (this may include the WA processes outlined in Schedule 1). This approach is consistent with the 2012 assessment bilateral agreement.

MINOR TECHNICAL AMENDMENTS

In response to public comments outlined above, the following minor technical amendments were made to the agreement:

- Correction of a minor drafting error in clause 6.9(c).
- Amendment in Schedule 1 Item 2.1(a) to clarify scope of accreditation of native vegetation clearing permit process.

Attachment A: List of submissions

1. Western Power
2. H. Nore
3. Australian Conservation Foundation
4. Fremantle Ports
5. Wilderness Society, Conservation Council of WA and Wildflower Society of WA (combined)
6. Places You Love Alliance
7. Property Council of Australia
8. Environmental Consultants Association
9. Ningaloo Coast World Heritage Advisory Committee
10. B. Deehey
11. Kimberley Land Council
12. A.L. Hill
13. Urban Development Institute of Australia (WA)
14. Environmental Defenders Office WA
15. World Wildlife Fund
16. Minerals Council of Australia
17. J. Mumme
18. Chamber of Minerals and Energy of Western Australia
19. Association of Mining and Exploration Companies
20. Chamber of Commerce and Industry of Western Australia (*received after close of public comment*)