Report on Public Comments on the Draft Victorian Assessment Bilateral Agreement

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), a draft assessment bilateral agreement between the Commonwealth and the State of Victoria was published on 5 September 2014 with an invitation for any person to comment by 3 October 2014 (28 days).

This report provides a summary of issues across all submissions for the purposes of section 45(4)(c) of the EPBC Act. The submissions will be published in full on the Department of the Environment's website after the agreement is finalised, except where the author has marked the submission, or parts of the submission, as confidential.

A number of the submissions received provided comments that were out of scope for the public consultation process. These comments primarily related to the approval bilateral agreement which constitutes the third step in implementing the One-Stop Shop policy. While such comments are recorded and considered more broadly by the Department of the Environment in relation to the One-Stop Shop policy, they have not been included as part of this report on public comments.

Ten submissions were received on the draft assessment bilateral agreement (the agreement) within the statutory consultation period. Submission six will not be published as it contains information which is considered private and confidential by the author.

1. Save Tootgarook Swamp Inc.
2. Minerals Council of Australia, Victorian Division
3. Preserve Western Port Action Group
4. Hume City Council
5. Biodiversity Planners Network Special Interest Group (BPN)
6. Brimbank City Council (**Confidential**)
7. Trustpower Limited
8. Maurice Schinkel
9. Environmental Justice Australia
10. Beacon Ecological

1. Accredited assessment processes

Submissions expressed both concern and support for Victoria's assessment processes specified in Schedule 1 of the agreement, and the ability to maintain high environmental standards under those processes. In particular, concerns were raised regarding the adequacy of the processes to ensure an adequate assessment of the impacts of actions on matters of national environmental significance (**matters of NES**).

Some submissions stated that an agreement should only be entered into once certain requirements have been met including:

- state environmental laws and policies are amended to meet national best practice environmental standards, that accord with the objects of EPBC Act, and are at least commensurate with the EPBC Act protections, and
- removal of the *Environment Effects Act 1987* (Vic) from the agreement until new laws have been made in accordance with a recent Victorian Government review of this Act.

While some submissions expressed support for the intention to cover a wide range of assessment types and moving to a single assessment process, concerns were expressed about particular assessment processes, specifically:

- that the assessment processes under Victorian legislation were unnecessarily long and onerous when compared with the processes of other states or the processes set out under the EPBC Act, and
- that the comprehensive impact statement (CIS) process under the *Major Transport Projects Facilitation Act 2009* (Vic) should not be accredited due to the hypothetical nature of the assessment, which can result in a project being approved that may or may not have the impacts that were assessed, and may not stay within the footprint proposed. The East-West link freeway development was used as example of a flawed assessment process.

It was also stated that Victoria should agree to 'not act inconsistently with' relevant policies, rather than the requirement to take such policies into account, to ensure that assessments meet the requirements of the EPBC Act. Further, it was stated that the Commonwealth should agree on the method of assessment undertaken by Victoria for each proposed action under the agreement.

Some submissions stated that there should be commitments in the agreement that, when seeking to align Commonwealth and state conditions as per clause 8.1, avoiding and minimising impacts will remain the primary objective, and the ability to impose conditions necessary to meet the objectives of the EPBC Act and protect matters of NES should be retained.

There was also concern about potential for state assessments to be delegated to local government, and that there should be assurances and processes in place in the agreement to ensure adequate consultation with local government and the private sector on a range of factors, including the development of relevant plans and policies.

Government response

The agreement would accredit Victorian environmental assessment processes where those processes meet the requirements of the EPBC Act and Regulations. The agreement also provides for close cooperation between the parties to ensure environmental standards are being maintained.

Further, clause 9 of the agreement provides that the parties agree to take steps to improve the efficiency and effectiveness of their own administrative processes to the greatest extent possible, including by providing industry data from environmental impact statements to the public.

In relation to conditions of approval, clause 6.4 and 8 outline the objective to impose a single set of outcome focussed conditions and to avoid, to the greatest extent possible, the need for additional conditions imposed by the Commonwealth Environment Minister in approving an action. This does not limit the Minister from setting additional conditions of approval, should he consider it appropriate to do so.

In relation to Victoria's cooperation with, and the potential for delegation to local government, the assessment bilateral agreement with Victoria accredits processes set out in or under Victorian legislation. Any substantial changes to these processes will require amendments to the agreement, and subsequent public comment.

The agreement provides robust obligations for Victoria to undertake an assessment of all relevant impacts of proposed actions to which the agreement applies. Under section 132 the EPBC Act, the Environment Minister may also request further information if the Minister believes that he or she does not have enough information to make an informed decision on whether or not to approve the action.

Should the Commonwealth Environment Minister not be satisfied that the agreement is being complied with, or 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. Section 65 of the EPBC Act also requires a review of a bilateral agreement at least once every five years while the agreement is in effect.

2. National consistency and role of the Commonwealth

Some submissions stated that the separate Commonwealth and Victorian assessment processes provided important checks and balances.

Some submissions stated that it would be more logical for the State to hand powers to the Commonwealth to avoid conflicts. This would enable all data to be captured under a single system and provide a uniform approach across the country.

Some submissions stated that EPBC Act processes are viewed as providing certainty and consistency nationally. It was stated that the reform will result in an inconsistent approach to environmental assessments between jurisdictions due to differences between accredited processes and bilateral agreements. Some submissions stated a preference for the Commonwealth maintaining powers and a leadership role, and establishing best practice environmental standards across all jurisdictions.

Concern was expressed that the agreement will reduce the overall focus on maintaining high environmental standards and will not protect matters of NES within a region. Submissions stated that this would undermine a key function of the EPBC Act in providing confidence in decision-making relating to matters of NES.

It was stated in some submissions that negotiation of the agreement could have lifted state processes to a higher standard and created national consistency, but that it has failed in this respect.

Government response

The EPBC Act and Regulations set out the requirements and standards relating to assessment bilateral agreements. The proposed agreement accredits Victorian environmental assessment processes where those processes meet the requirements of the EPBC Act and Regulations. The proposed agreement provides for close cooperation between the parties to ensure environmental standards are being maintained. The difference in the presentation of the assessment bilateral agreements with different jurisdictions reflects different state assessment processes. All agreements are drafted to meet consistent standards and the requirements of the EPBC Act and Regulations.

The agreement does not change the Commonwealth's responsibility and powers under the EPBC Act in relation to the approval of actions, monitoring of compliance, and enforcement measures. Should the Commonwealth Environment Minister not be satisfied that the agreement is being complied with, or 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 EPBC Act provide a mechanism by which the agreement can be cancelled or suspended. Section 65 of the EPBC Act also requires a review of the agreement at least once every five years while the bilateral agreement is in effect.

3. Capability of the State to administer Commonwealth law and protect matters of NES

Some submissions expressed concern that Victoria is not adequately resourced to administer Commonwealth law or lacked the capability required to assess matters of NES. Reasons provided were:

a. strained state resources; and
b. inadequacies of the state mapping system, specifically that it is inaccurate, lacks integrity at the property level, and is insufficient for the identification and assessment of matters of NES. To address these concerns, it was recommended that targeted surveys and site assessments be carried out for each EPBC Act assessment.

Submissions supported the review provisions of the agreement, however some submissions stated that a three year review period would be more appropriate than a five year period. Other submissions considered that the Commonwealth should prioritise an audit of state compliance with agreements to date.

There was support for the commitment in clause 9.5 to develop guidance documents, and some submissions stated that such documents should be developed for each threatened species, with the input of technical experts, advisory committees, independent groups and local government through the Municipal Association of Victoria. It was suggested that such documents should also be publicly available.

Government response

The proposed agreement would accredit Victorian environmental assessment processes only where those processes meet the requirements of the EPBC Act and Regulations. The agreement provides for an adequate assessment in relation to matters of NES by specifying the matters that Victoria must assess, and ensures that Victoria will take into account information provided under a strategic assessment and relevant statutory guidelines, policies, plans and instruments when preparing assessment reports on relevant impacts in relation to a proposed action. This includes, where relevant, a recovery plan for a relevant listed threatened species or ecological community, any relevant approved conservation advice and any relevant threat abatement plan (clause 6.8(a)). These documents are publicly available on the Department of the Environment's website.

The agreement does not change the Commonwealth's responsibility and powers under the EPBC Act in relation to the approval of actions. The Commonwealth Minister must not approve an action that is likely to have unacceptable or unsustainable impacts on matters of NES.

Section 65 of the EPBC Act requires a review of the agreement at least once every five years while the bilateral agreement is in effect. Additional reviews of the agreement may be undertaken if required to measure the operation and effectiveness of the Agreement.

4. Further streamlining opportunities

There was general support in submissions for the alignment of administrative processes, and both support and opposition to the intention, as stated in object G of the agreement, to develop an approval bilateral agreement by the end of 2014. Some were of the view that it would be more prudent to delay until a comprehensive review of the assessment bilateral agreement is undertaken, to ensure that outcomes are being met, and a determination can be made of the state's capacity to apply the assessment bilateral agreement.

There was support for the ability to make minor amendments to the agreement without impacting its operation. It was recommended that any further streamlining or delegation of responsibilities should be subject to consultation with local government and the public more broadly to ensure that a robust and transparent system is established.

Submissions also stated the need for stakeholder engagement, including local government, ecological consultants, technical experts, and non-government organisations for future steps and the development of supporting documentation.

Government response

The Australian and Victorian Governments will continue to work collaboratively to further streamline environmental regulation, as permitted under national environmental law. A staged approach is being taken to any further streamlining opportunities to ensure that any further proposals meet the high environmental standards of the EPBC Act.

The parties aim to ensure that this process is clear and consistent for proponents and the community. Any consideration of further streamlining under a bilateral agreement will be subject to the public consultation and participation requirements of the EPBC Act. An approval bilateral agreement will only be entered into if the agreement and any authorisation processes proposed for accreditation meet the standards of the EPBC Act and the state can demonstrate that the expected outcomes will be met.

5. Transparency and conflicts of interest

Submissions outlined significant concerns about the potential for conflicts of interest where the Victorian Government is the proponent of an action or has a financial interest in the action. These submissions indicated that the Commonwealth should retain the role of assessing such actions or that additional assurances were required in order to ensure that such projects would be independently assessed via a rigorous and transparent process. The Port of Hastings development was cited as an example where the state will have a conflict of interest in assessing the expansion, and under the proposed arrangements in the agreement, there will be less effective checks and balances to ensure a rigorous assessment process.

In regard to the assessment method outlined in Items 2.1(d) and 6 of Schedule 1 to the agreement (assessment by an advisory committee under the *Planning and Environment Act 1987* (Vic)), there were some concerns that the process for electing members to an advisory committee were not clear. Further, submissions stated that the nomination process should be made public to ensure a rigorous assessment of impacts on matters of NES is made by suitably qualified scientific experts.

Submissions also stated that the administrative arrangements be made publicly available, for consultation or once finalised, to improve transparency.

Government response

The situation of one part of government being responsible for assessing an action proposed by another part of government is not unusual. For example, the EPBC Act allows the Commonwealth Environment Minister to assess and make decisions on actions proposed by another Commonwealth department, agency or other entity. To ensure such processes are adequate and free from bias, relevant assessment documentation must be made available for public comment. The same is true under an assessment bilateral agreement.

6. Enforcement and compliance

Whilst a number of the submissions supported improved coordination in enforcement and compliance activities, some submissions called for the Commonwealth to maintain a strong role in compliance and enforcement and the ability to review the agreement and assessment processes. There was further concern expressed in regard to delegated enforcement and compliance responsibilities. In particular, there was concern that further delegation of enforcement and compliance activities to local government—as is the current arrangement for state matters—would require additional resourcing to ensure that environmental outcomes are maintained.

Government response

The Australian Government retains compliance responsibility for actions that breach the EPBC Act. The agreement seeks to improve cooperation on enforcement and compliance activities, where projects require assessment and approval under both the EPBC Act and relevant Victorian laws. This is to ensure that enforcement and compliance activities are not duplicated, and are to the greatest extent practicable consistent and effective.

7. Cooperation

A number of submissions were generally supportive of provisions for greater cooperation between the Commonwealth and Victoria; in particular, the establishment of a Senior Officials Committee, transitional support from the Commonwealth and ongoing access to Commonwealth expertise. There was also support for greater access to information and improved information sharing between the Commonwealth, Victoria and project proponents; however some submissions stated that certain information will need to remain confidential.

Government response

The agreement is intended to promote greater access to environmental information, and improve information flow so as to streamline state and Commonwealth environmental assessment and approval processes. In line with existing requirements, project proponents will not be required to make information which is confidential in nature publicly available as part of environmental assessment processes.

8. 'Call-in' of projects under the assessment bilateral agreement

Some submissions stated that the Commonwealth should not be prevented from 'calling in' projects after a decision has been made that the assessment bilateral agreement will apply to a particular assessment. As such, it was suggested that clause 4.3(b)(ii)—restrictions on determination that an action is not within a class of actions—should be removed from the agreement.

Government response

Clause 4.3 of the agreement allows the Minister to exclude a particular action from being assessed under the agreement. The intent of clause 4.3(b)(ii) is to provide certainty to proponents and ensure that assessments are not unnecessarily delayed, after a decision has been made as to whether the agreement will apply.

Clause 13 of the agreement provides that the Commonwealth Minister may cancel or suspend all or part of the agreement under certain circumstances; in particular, where the objects of the agreement are not being met.

Further, under an assessment bilateral agreement, the Commonwealth Minister remains the approving authority. Any assessment undertaken as part of the agreement must be sufficient to allow the Commonwealth Minister to have sufficient information to make an informed decision whether or not to approve the proposed action and, if so, under what conditions.