

Chapter 2

Streamlining of Approvals Processes

Current law

2.1 The creation and implementation of the *Environment Protection and Biodiversity Conservation Act 1999* has worked towards ensuring a focus on the protection of matters of national environmental significance by Australian Government interests, while at the same time ensuring that the States and Territories have retained responsibility for matters of state and local significance.

2.2 The regulations introduced by the Act have been successful in providing for a higher level of protection for the environment than was previously the case, while at the same time providing for timely, transparent and efficient development approvals processes.¹

2.3 However, in the six years since the original legislation was enacted, it has become apparent that this legislation needs to be amended to make it more practical when it comes to approvals and related processes to allow for more efficient administration of the Act.

Rationale for change

2.4 Since coming into effect, it has been recognised that the Environment Protection and Biodiversity Conservation Act 1999 (the Act) needs to be improved, particularly for those making applications or nominations under the Act.²

2.5 Operational improvements can be achieved by reducing processing times and the number of decision points affecting the environmental assessment and approval of proposed developments by using more strategic approaches and by providing greater incentive for development interests, the states, territories, and local government, to engage with the Act earlier in their planning cycles.³

2.6 The amendments propose to allow for faster approvals to occur by allowing the examination of preliminary proposals for development and making a preliminary assessment on that basis.

1 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 2.

2 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.

3 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.

2.7 The bill introduces more incentives for proponents of development actions to engage earlier in the planning process, through the implementation of bioregional plans that will allow for over-arching strategic assessments.

2.8 Once the provisions of the bill take effect, the Commonwealth will set plans that will allow for the routine approval of developments by the states and territories. This mechanism proposes to free up the Commonwealth from having to approve those development proposals that can be managed at a state and/or territory level through bilateral agreements.

Changes proposed by the bill

2.9 The bill proposes to make changes to a number of areas where the existing Act has been shown to be inadequate in its practical application in the approvals process.

2.10 One significant aspect of the bill is the move towards reduced processing times for development approvals that will also result in reducing costs for development interests. This will assist with the removal of 'red tape' within the existing Act, while still working to ensure positive environmental outcomes.⁴

2.11 The bill proposes to allow the Commonwealth to adopt new or strengthen existing bioregional plans by way of bilateral agreements with the states and territories. This will allow for the routine approval of some developments without the need to seek Commonwealth approval, thus giving the states and territories more control over the process and also reducing approval times for proponents of developments expected to comply with the Act.

2.12 This reduction in duplicative processes will be made possible through improved co-operation between the states and territories and the Commonwealth in the form of stronger bilateral agreements than currently exist, and through the accreditation of state and territory authorisation processes, and legally binding management arrangements as outlined below.

2.13 The insertion of division 3 of part 4 into the Act amends existing legislation to provide an incentive to have certain proposed actions considered within the context of bioregional plans. If an action is proposed to be taken within the context of a bioregional plan then these actions do not require individual approval under the Act, as long as the Minister is satisfied that the taking of the action or actions will not have unacceptable or unsustainable environmental impacts.⁵

4 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.

5 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 25.

2.14 Currently under the Act, bilateral agreements between the Commonwealth and states and territories last five years. Under the new provisions of the bill these agreements will now continue unless revoked, to cater for longer-term development projects and proposals.⁶

2.15 This is reflected in an amendment to section 65 of the Act which provides for a bilateral agreement to have effect for a period specified in the agreement, rather than ceasing to have effect after 5 years, leading to increased certainty, especially for larger scale developments that may be operating for periods longer than 5 years at a time.⁷

2.16 In addition, development approval processing times have essentially been reduced by removing the need for proponents to provide the Minister with preliminary information prior to a decision on assessment approach being made.⁸

2.17 In order to allow for this, the bill repeals section 86 of the Act, removing the need for proponents to provide preliminary information if the action is deemed to be a controlled action under section 75 of the Act. As the explanatory memorandum outlines, preliminary information provided by a developer of a project duplicated information that was already provided for in referral documents, adding unnecessary red tape to the approvals process.⁹

2.18 A new section 95 has been proposed in the bill that contributes towards a reduced timeframe for assessment by allowing proponents to provide adequate information for assessment at the time of referral, in effect reducing the amount of administration required under the existing Act.¹⁰ This provides developers with the incentive to engage earlier in planning processes.

2.19 Once the bill becomes law, it will also be possible for the courts to seek financial surety for damages if court injunctions are sought against developers of proponents of actions for breaches of the Act. This will work towards ensuring the elimination of vexatious injunctions by third parties.

2.20 This is made possible through the repeal of section 478 of the existing Act which effectively removes the 'no undertakings as to damages' provision.

6 Department of the Environment and Heritage, preliminary committee briefing, 18 October 2006.

7 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 28.

8 Blake Dawson Waldron Lawyers, *Environment Alert*, October 2006, p. 2.

9 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 32.

10 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 33.

Environmental safeguards

2.21 The bill amends section 53 of the Act to require the Minister to have regard for approved conservation advice relating to a listed threatened species or a listed threatened ecological community when entering into a bilateral agreement with the states and territories.¹¹

2.22 An amendment to section 72 of the Act by inserting a new subsection 72(3) allows for a number of alternative proposals to be submitted for consideration for a proposed action. The motivation for this is to not only allow for greater flexibility in the planning stages of a proposed action, but to facilitate better environmental outcomes by allowing the relative impacts of the different proposals to be taken into consideration.¹²

2.23 The bill also provides for increased transparency of the development approvals process. The amendment of sections 104 and 105 of the Act will require that the proponent of any proposed action finalise and publish an Environmental Impact Statement that contains a summary of public comments received during the consultation on the draft report.¹³

2.24 Another measure which encourages better environmental outcomes is an amendment to section 134 of the Act, which allows the Minister to attach conditions to Part 9 approvals, requiring specific activities to be undertaken for protecting, repairing, or mitigating damage to, a matter protected under part 3 of the Act; or, requiring a specified financial contribution to support such activities.¹⁴

2.25 These amendments allow for broadened conditions to be attached to developments such as voluntary compensatory actions and financial contributions to offset developmental impacts where these impacts are unavoidable.¹⁵

2.26 A new subsection 144(2A) provides the Minister with the ability to suspend an approval in reasonable circumstances, for example the Minister may suspend an

11 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 27; *Environment Protection and Biodiversity Act 1999*, p. 94.

12 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 27.

13 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 35.

14 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 37.

15 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 6.

approval to ensure that a development activity does not occur during a time of year that may be damaging to a threatened species.¹⁶

Comments and concerns

2.27 A number of organisations welcomed the majority of changes proposed by the amendments, arguing that these changes would give more certainty to existing provisions and streamline the efficiency of approvals, referrals, assessment and administrative processes to protect matters of national environmental significance, while reinforcing a commitment to sustainable development.¹⁷

2.28 As stated by the Chamber of Minerals and Energy WA in their submission to the inquiry:

CME does not advocate for lower standards of environmental protection measures but rather promotes improvements to the efficiency and co-ordination of legislation within and between jurisdictions. CME thus supports the majority of proposed amendments improving the efficiency of EPBC Act such as the proposed changes to assessment and approval provisions.¹⁸

2.29 Other witnesses to the inquiry, including the Minerals Council of Australia, welcomed and supported as follows:

The establishment of processes for rapid decisions on straightforward proposals;

Clarification of what constitutes an indirect impact, with a project now needing to be the “substantial cause” or to “facilitate in a major way” any indirect impacts before these become a relevant consideration;

Greater flexibility to change proposals during the assessment and approval process;

Increased capacity to rely on conditions of approval imposed by other Ministers (including State/Territory Ministers); and

Formal processes for consulting with proponents in advance of approval decisions.¹⁹

2.30 The Minerals Council of Australia in their appearance at the committee hearings stressed the importance of environmental protection measures in conjunction

16 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 39.

17 Tasmanian Government Department of Tourism, Arts and the Environment, *Submission 20*, p2; Minerals Council of Australia, *Submission 65*, p. 2; The Association of Mining and Exploration Companies, *Submission 1*, p. 1; Australian Network of Environmental Defenders Offices, *Submission 17*, p. 5.

18 *Submission 63*, p. 1.

19 *Submission 65*, p. 2

with the streamlining efforts, as this would give more certainty to council members who were proponents of development actions that they were doing the right thing by the community thereby reinforcing their commitment to sustainable activities.²⁰

2.31 The Property Council also highlighted their recognition and support for best practice in environmental policy for Australia. As they stated in their submission to the inquiry, they support and advocate best practice in environmental policy for Australia, and said that:

The Property Council views the amendments as generally worthwhile in improving the efficiency of the administration of the Act and as a step towards providing greater certainty of process.²¹

2.32 As the Law Council of Australia argued in their submission, the provisions provide enhanced ability to deal with large-scale projects and give priority attention to projects of national importance through the use of strategic assessment and approval approaches, and put in place measures to assist developers to avoid impacts on matters of national environment significance protected by the Act.²²

2.33 During the committee hearings the Law Council also pointed out, in regards to the adequacy of the existing legislation in relation to planning approvals:

My understanding is that most of the time it has been referred to the states for assessment first and then it comes back to the Commonwealth government. It is a tortuous process because it is lengthy. If you are putting in a development of any sort, your time constraints are always important, so the more streamlined we can have any legislation the more likely we are to get a sensible result for everybody.²³

2.34 In addition to general support for the streamlining provisions of the bill, there were a number of witnesses to the inquiry who raised concerns about the proposed amendments to the Act, arguing that the changes would be a backward step for environmental protection rather than an improvement. Some raised concerns that the streamlining of approvals processes and the move towards stronger bilateral arrangements with the states and territories would weaken environmental protection from developers under the bill as there would be less scrutiny of individual projects. The Australian Council of National Trusts pointed out:

The expanded use of management policies and plans and bioregional plans will reduce the amount of scrutiny which proposals will be subjected to.²⁴

20 Ms Melanie Stutsel, *Committee Hansard*, 6 November 2006, pp 6, 9.

21 *Submission 67*, p. 1–2.

22 *Submission 37*, p. 1.

23 Mrs Maureen Peatman, *Committee Hansard*, 6 November 2006, p. 23.

24 Rev Patrick. Comben, *Committee Hansard*, 6 November 2006, p. 38.

2.35 In a review of the existing Act, The Australia Institute pointed out that between July 2000 and July 2006 approximately 149 development proposals were approved, and only four refused under part 9 of the Act. In effect this meant that the environment approval and assessment (EEA) regime had only prevented four development proposals from going ahead since the regime began operating six years ago.²⁵

2.36 This concern was also raised by The Australia Institute during the committee hearings as substantiation that the current approvals regime was not tough enough, and that any streamlining of the system would in effect make it even easier for development approvals to be carried through successfully without rigorous environmental assessment.²⁶

2.37 Others, such as the Minerals Council of Australia, argued that:

We have concerns that in some jurisdictions there are not bilateral agreements in place; hence we have two layers of approvals and two layers of assessment, which can delay projects and does not actually lead to any greater level of environmental protection from those projects.²⁷

2.38 This concern has largely been addressed in the bill, as under the amendments proposed by the bill, state and territory governments will be required to have significantly improved environmental protection measures via approved bioregional plans under new bilateral agreements with the Commonwealth. This will ensure a better level of protection for the environment and will also ensure a greater level of consistency across the jurisdictions than currently exists under the Act. There will be more streamlined approvals processes while at the same time adequate environmental protections will be maintained.

2.39 The Department of the Environment and Heritage explained that:

The notion that somehow or other we could do a bioregional plan and then the Commonwealth could walk away from that region and not be concerned about anything that might happen is a little bit misleading.²⁸

2.40 Another point that was raised was that while the proposed amendments appeared to create the appropriate changes for streamlining environmental assessment processes, they would not necessarily provide for a decision making rationale that was consistent across commonwealth, state and local government assessment processes.²⁹

25 Macintosh, Andrew, *Environment Protection and Biodiversity Conservation Act – An Ongoing Failure*, The Australia Institute, July 2006, p. 2.

26 Mr Andrew Macintosh, *Committee Hansard*, 3 November 2006, p. 7.

27 Ms Melanie Stutsel, *Committee Hansard*, 6 November 2006, pp 2–3.

28 Mr Gerard Early, *Committee Hansard*, 6 November 2006, p. 59.

29 Birds Australia, *Submission 10*, p. 3.

2.41 Yet, as the Department pointed out during the committee hearings:

The strategic assessment of policies, plans and programs will also involve rigorous environmental assessment and proper public consultation. An approval granted as a result of a strategic assessment will enable the Minister to set legally enforceable conditions that are subject to the penalty provisions of the EPBC Act. Just as in the case with a normal approval, the Minister would have the ability to vary the conditions if new information came to light about the impacts of the approved action. The Minister also has the ability to suspend or revoke a strategic assessment approval if unforeseen impacts come to light.³⁰

2.42 Support was given for these aspects of the legislative changes by the Australia Network of Environmental Defender's Offices:

Amendments to section 134 provide that the type of conditions the Minister can attach to approvals can include financial contributions towards projects not directly related to the controlled action. ANEDO supports this condition with three provisos. First, any such financial contribution must go toward remediation and conservation projects and not simply go to Consolidated Revenue. Second, there should be a nexus between the conservation project and the development project itself on equity grounds. Third, the basis for the calculation should be set down in regulations for transparency and accountability.³¹

2.43 The Law Council of Australia also supported the proposed amendments in relation to remediation. As they outlined in their submission to the inquiry:

The amendments: Provide a power for the Federal Court to make a Remediation Order, but only on application by the Minister. Confer on the Minister a power to make a remediation determination, or to accept enforceable financial undertakings as an alternative to prosecution and; The Minister may make remediation determinations regarding contravention of civil penalty provisions (within six years) (Division 14B, section 480D). Any financial contributions for paid for civil penalty contraventions should be applied to remediation of the particular site, species or ecological habitat that has been damaged, or to provide for its ongoing sustainability.³²

2.44 Under the provisions of the bill, there would also be the increased opportunity for public comment and transparency during the environmental assessment and review process in relation to proposed actions.

2.45 These new arrangements were supported by Birds Australia, who stated in their submission to the inquiry:

30 Mr Gerard Early, Department of the Environment and Heritage, *Committee Hansard*, 6 November 2006, p. 52

31 *Submission 17*, p. 28.

32 *Submission 37*, p. 5.

There appear to be a number of positive elements in the amendments. Increased opportunity for public comment and transparency during the environmental assessment and review processes is welcomed, for example the provision for public comments on section 75 decisions.³³

2.46 And as the Association of Mining and Exploration Companies stated:

The changes reinforce a commitment to sustainable development while at the same time recognising the need to streamline the processes associated with managing sustainable development.³⁴

Conclusion

2.47 Overall, the Department considered that the proposed amendments would facilitate a shift in the Australian Government's focus from ad hoc project-by-project approvals to a focus on a more strategic framework.³⁵

2.48 It was explained that this approach is more likely to ensure that regional natural resource management plans are taken into account, providing a stronger and more strategic framework for environment and heritage protection.³⁶

2.49 As the Minister has said, the Australian Government is streamlining the Act with a series of amendments that will improve environmental protection by focusing more on outcomes than process while maintaining our strong commitment to protecting Australia's unique and iconic natural, cultural and Indigenous heritage.³⁷

Committee view

2.50 The committee supports the changes to the Act in relation to streamlining of approvals processes and the strengthening of the relationship with the states and territories in regards to these streamlining provisions. The amendments appear to largely eliminate duplication of processes between the states and territories and Commonwealth authorities in relation to the Act.

2.51 The committee supports the proposal for the rollover of bilateral agreements with the states and territories, subject to five yearly reviews. The committee

33 *Submission 10*, p. 4.

34 *Submission 1*, p. 1.

35 Mr Gerard Early, Department of the Environment and Heritage, *Committee Hansard*, 6 November 2006, p. 50.

36 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 4.

37 Senator the Hon. Ian Campbell, Australian Minister for the Environment and Heritage, *Government to strengthen Australia's environment law*, Press Release C255/06, 12 October 2006.

recognises that this is an effective use of state and territory resources within Commonwealth agreements.

2.52 The amendments remove complexity and time consuming and unnecessary procedures that exist currently under the Act.

2.53 The committee is also of the view that the new efficiency arrangements will free up departmental resources in order for them to concentrate effectively on other important aspects of managing the Act, assuring a continuing focus on environmental outcomes.