Business Council of Australia

Submission to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012

Working to achieve economic, social and environmental goals that will benefit Australians now and into the future

About the BCA

The Business Council of Australia (BCA) brings together the chief executives of 100 of Australia's leading companies.

For almost 30 years, the BCA has provided a unique forum for some of Australia's most experienced corporate leaders to contribute to public policy reform that affects business and the community as a whole.

Our vision is for Australia to be the best place in the world in which to live, learn, work and do business.

Introduction

This is a submission to the Senate Standing Committees on Environment and Communications Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012 ('the Bill').

The Business Council of Australia supports all measures to reduce double handling of regulatory approvals while maintaining environmental standards and outcomes. As such, the Business Council does not support the Bill and urges the committee to recommend its withdrawal.

The Business Council considers that bilateral agreements that accredit state and territory government approvals processes under the Environment Protection and Biodiversity Conservation Act (EPBC Act), with appropriate assurance and monitoring mechanisms, are a key vehicle for reducing this costly double handling at no cost to the environment.

Greater use of assessment and approval bilateral agreements were recommended by the independent review of the EPBC Act (the Hawke review)[1] and this recommendation was supported by the government in its response to the Hawke review.[2]

The government should maintain the option to utilise approval bilateral agreements in the future.

The need to remove double handling of environmental approvals

The community must be assured that under the approvals system, Australia's unique environment and heritage values will be maintained or enhanced. This can and should be achieved without compromising the competitiveness of project proponents.

Australia's planning and environmental laws, at all levels of government, must facilitate the efficient approval of major capital projects upon which Australia's economic wellbeing is increasingly dependent.

The Australian economy is more reliant on the successful delivery of major capital projects than ever before. Business Council of Australia research indicates that by 2013, expenditure on capital investment is likely to grow to 30 per cent of GDP. A large part of all Australian economic activity will therefore be dependent on the success of major capital projects.[3] Given Australia's increased reliance on major capital projects, it is imperative that all governments configure their environmental approvals processes to ensure decisions are predictable and timely.

The investment pipeline of major capital projects will touch all aspects of the Australian economy and communities, including:

- employment opportunities and the level of national income
- Commonwealth and state government budgets
- the quality of service provision for users of infrastructure as we build the nation's stock of economic infrastructure (transport, energy, water and communications infrastructure)

- the ability of governments to meet the needs of a growing and ageing population in our cities and regions, and to lift standards of living as we improve the provision of hospitals, schools and other important social infrastructure
- how the community and businesses efficiently and sustainably consume Australia's scarce resources and reduce greenhouse gas emissions.

The successful delivery of major capital projects is critically dependent on timely regulatory approvals and well-considered and well-managed regulatory conditions upon approval. If Australia takes too long to deliver approvals, or the conditions placed upon approvals are unworkable, major capital projects will not proceed, or will not deliver full value to their owners or to the Australian community.

While data is relatively scant, recent research suggests that the efficiency of Australia's regulatory approvals process is not world standard. A recent report commissioned by the Minerals Council of Australia noted that the average Australian thermal coal project experiences an additional 1.3 years of delay relative to those elsewhere.[4]

Competitor countries are moving to further reduce the time taken to deliver environmental approvals. Canada, for example, has introduced statutory time limits for environmental approvals and made provisions for accrediting provincial governments' approvals as part of this process.

The Business Council has previously cited an example from a member company that provides an illustrative example of the complexities of, and double handling in, the government approvals process.[5] The environmental assessment for this major resources project was conducted under Australian Government and state legislation. It took more than two years, involved more than 4,000 meetings, briefings and presentations across interest groups, and resulted in a 12,000-page report. The assessment was advertised widely across Australia for comment and resulted in some 40 submissions. When approved, more than 1,500 conditions – 1,200 from the state and 300 from the Commonwealth – were imposed. These conditions have a further 8,000 sub-conditions attached to them. In total, the company invested more than $25 million in the environmental impact assessment.

The use of approval bilateral agreements should be part of a broader effort that is required by all levels of government in Australia to improve the efficiency and effectiveness of the planning and environmental approvals system. This effort is not about reducing environmental standards or one level of government abdicating its responsibility to protect the environment. It is about using every available mechanism to protect the environment in an efficient manner without unnecessary and costly double handling. Bilateral agreements are one mechanism for achieving this goal and the option to use such agreements should be retained.

The history of bilateral agreements

Provisions enabling bilateral agreements have been part of the EPBC Act since it first became law over a decade ago. These agreements allow the responsible federal minister to declare that classes of actions do not need assessment or approval, or both, if they have been assessed or approved by a state government.

The Commonwealth has bilateral agreements with all states and territories that accredit state government environmental assessment processes.[6]

Only one bilateral agreement has been made to cover state government approvals. This agreement was made between the Commonwealth and the New South Wales Government in 2005 to "minimise duplication of environmental assessment and approval processes relating to the protection of the World Heritage and National Heritage values of the Sydney Opera House".[7]

More recently, following extensive consultation, the Hawke review considered the use of approval bilateral agreements and found that "the Commonwealth should give full faith and credit to state systems that are proven to provide good environmental outcomes". It went on to recommend "accreditation of [state] processes where they meet appropriate standards".

In November 2012 the Commonwealth released a draft framework of standards for the accreditation of approvals under the EPBC Act.[8] This framework, for the first time, comprehensively detailed the standards that state government decision-making processes would need to meet in order to be accredited under the EPBC Act. The framework included a requirement that a comprehensive assurance regime be in place in order for a bilateral agreement to be made.

Given that the longstanding provision allowing approval bilateral agreements has been used successfully in the past, that it has been subject to a recent comprehensive, independent, public review, and has been supported by the Commonwealth Government in its response to that review, the Business Council sees no reason why such a provision should be removed from the EPBC Act. The provision should remain regardless of whether or not it is current government policy to utilise bilateral agreements to accredit state government approvals.

Safeguards and assurance mechanisms

The Hawke review noted that "where approval bilateral agreements are used in the future, the Commonwealth will need a monitoring, performance audit and oversight power to ensure that the process accredited is achieving the outcomes it claimed to accomplish". We fully support this position and see strong public assurance mechanisms as critical to well functioning and sustainable bilateral agreements.

Our view is that the current assurance mechanism, coupled with reporting and audit requirements that should be negotiated as part of any approvals bilateral, provide for appropriate monitoring, performance audit and oversight.

Current assurance and safeguards mechanisms include (but are not limited to):

- a statutory requirement that the responsible minister may only enter into a bilateral agreement if satisfied that it accords with the objects of the EPBC Act and all requirements prescribed in regulations (Section 50)
- a statutory requirement that the responsible minister publish a draft agreement for a 28-day consultation period and take into account any comments on the draft agreement (Section 49A(a)ii)
- that a draft bilateral agreement accrediting a management plan or authorisation process under a bilateral agreement be tabled in both houses of parliament for 15 sitting days as a disallowable statutory instrument (Section 46(5))
- provisions to suspend or cancel part, or all, of a bilateral agreement if the responsible minister considers that a state government has not, or will not, comply with the agreement (Sections 57–64).

Further, the EPBC Act precludes the responsible minister from entering into approvals bilateral agreements in relation to certain highly sensitive classes of action, such as those related to nuclear actions (Sections 55 and 56, for example).

Such assurance mechanisms mean that the Commonwealth Government retains stewardship of environmental matters of national significance. In this way, the use of accreditation does not represent a reduction in environmental protection and oversight, or imply that the Commonwealth Government has vacated the legal space or in any way reneged on its legal responsibilities.

Notwithstanding the detailed nature of the EPBC Act and its subordinate legalisation, there remains scope for the responsible minister (or relevant state government minister under a bilateral agreement), to exercise judgement in deciding whether to approve a project. This has led to concerns being raised that state governments would not be able to exercise appropriate judgement in relation to matters of national environmental significance.

Judgement and discretion are inherent in most areas of regulation, and are important features of best practice regulation that allow for an efficient risk-based approach to implementation. Any judgement and discretion must also be accompanied by clear regulatory objectives and standards and a transparent decision-making process.

We believe that any risks associated with this issue can be adequately managed through the existing safeguards and monitoring mechanisms permissible under the EPBC Act, noting that bilateral agreements are statutory instruments that confer the full objects of the EPBC Act and its regulations upon the state government decision-making processes. Any residual risk can be managed through partial accreditation, whereby approval bilateral agreements accredit only classes of actions, within a defined geographic area, for which the Commonwealth is confident that a state government process is sufficient to meet the obligations of the EPBC Act.

Conclusion

The Business Council of Australia does not support the Bill and urges the committee to recommend its withdrawal.

At its December 2012 meeting, COAG reaffirmed its commitment to broad environmental regulation reform that enhances efficiency and increases certainty for business while maintaining high environmental standards. It also noted that the Commonwealth will introduce legislative reforms to progress its response to the Hawke review of the EPBC Act to further streamline and strengthen environmental regulation.

The Business Council is disappointed that, following the December COAG Business Advisory Forum, the Commonwealth appears to not support bilateral agreements as a mechanism to achieve this reform objective at this time. Notwithstanding, the Business Council sees no reason to amend the EPBC Act to rule out the use of bilateral agreements in the future. It would be inappropriate and contrary to Australia's national interest to do so without a concrete, immediate and viable reform proposal to achieve the streamlining of environmental approvals and remove the double handling between the Commonwealth and the states.

Notes

1. Commonwealth of Australia, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* by Dr Allan Hawke AC, 2009, pp. 66 and Recommendation 4 on p. 73.
2. Commonwealth of Australia, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, 2011, p. 10.
3. Business Council of Australia, *Pipeline or Pipe Dream? Securing Australia's Investment Future*, 2012.
4. Minerals Council of Australia, *Opportunity at Risk: Regaining our Competitive Edge in Minerals Resources*, 2012, p. 13.
5. Business Council of Australia, *Discussion Paper for the COAG Business Advisory Forum*, 2012.
6. Agreements can be found on the Department of Sustainability, Environment, Water, Populations and Communities website at **www.environment.gov.au/epbc/assessments/bilateral/index.html**
7. An agreement between the Australian Government and the State of New South Wales under Section 45 of the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) relating to actions approved and taken in accordance with the bilaterally accredited management plan for the Sydney Opera House (2005) **http://www.environment.gov.au/epbc/assessments/bilateral/pubs/soh-agreement.pdf**.
8. Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act, **http://www.environment.gov.au/epbc/publications/accreditation-standards-framework.html**

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