



NSW MINERALS COUNCIL
PO Box H367
Australia Square, NSW 1215

T 02 9274 1400
nswmining.com.au
ABN: 42 002 500 316

Committee Secretary
Senate Standing Committees on Environment
and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Date: 15/07/2024

By email: ec.sen@aph.gov.au

**Nature Positive (Environment Information Australia) Bill 2024,
Nature Positive (Environment Protection Australia) Bill 2024, and
Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024**

Dear Members of the Committee,

I am writing in relation to the Nature Positive (Environment Information Australia) Bill 2024, the Nature Positive (Environment Protection Australia) Bill 2024, and the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 which have been referred to the Environment and Communications Legislation Committee for report by 8 August 2024.

In addition to supporting the detailed comments from the Minerals Council of Australia, NSWMC and its members provide the following comments.

Reconsideration Requests under the EPBC Act

The Transitional Provisions bill amends the Environment Protection and Biodiversity Conservation Act 1999 (**EPBC Act**) and 8 other Acts to support the establishment of Environment Protection Australia (**EPA**) and the Head of Environment Information Australia.

NSWMC and its members are seeking additional amendments to the EPBC Act to address deficiencies in the current reconsideration request mechanism in Division 3 of Part 7 of the Act. The provision is being deliberately exploited by various parties to delay the determination of fossil fuel projects.



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Under s 78A of the EPBC Act, any person (other than a Minister of a State or self-governing Territory) may request the Minister to reconsider a decision made under s 75, on the basis of any one of the extensive matters set out in ss 78(1)(a)-(ca). A request made under s 78A must comply with the Regulations.

A reconsideration request under s 78A can be made at any time prior to a final determination being made under Part 9, even where assessment documents have been submitted and the approval process has already begun. This can result in reconsideration requests being made up to two years after the original s 75 (whether or not a proposed action is a "controlled action") decision has been made.

This issue has been raised in previous reviews. The first independent review of the EPBC Act undertaken by Dr Allen Hawke also identified issues with s 78A. The Final Report from 2009 included commentary around the deficiencies and specifically time delays, and included a recommendation to limit the time under which a reconsideration request can be made by any person¹.

This provision is poorly designed in its current form and lends itself to procedural manipulation that undermines the primacy of the assessment process. In the absence of clearer sequencing arrangements, opponents of projects can time their requests in such a way that forces lengthy delays without necessarily introducing new issues of relevance to the assessment criteria. The below case study highlights how the reconsideration request provision is being misused.

Members of the Committee should be aware that this is not an abstract regulatory issue. The misuse of the reconsideration request provision is currently threatening a number of NSW mining projects including:

- The Narrabri Underground Project, which was approved by the NSW Government in March 2022. This project will support over 500 ongoing mining jobs. Since receiving NSW Government approval, and despite the Minister for the Environment reconsidering the Controlled Action request, the project has endured a two-year delay waiting for a final determination from the Commonwealth;
- The Mt Pleasant Optimisation Project, which was approved by the NSW Government in September 2022. This project will support around 600 mining jobs. Despite the Minister for the Environment reconsidering the Controlled Action request, It has faced a delay of nearly two years for Commonwealth approvals;

¹ Recommendation 47

<https://webarchive.nla.gov.au/awa/20130329091649/http://www.environment.gov.au/epbc/review/publications/final-report.html>



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- The Boggabri Mod 8 Project, which was approved by the NSW Government in February 2024. Boggabri Mod 8 has been waiting for 2 years without any decision on the reconsideration matter. This project will support around 800 jobs; and
- Up to eight other NSW mining projects currently registered as controlled actions under the EPBC Act which could potentially suffer similar damaging delays in the future unless this power is fixed.

Case Study - Reconsideration Requests: Mt Pleasant Optimisation Project

Background

- The assessment process commenced in December 2019 when MACH Energy applied under the Environmental Planning and Assessment Act 1979 (NSW) for the Planning Secretary's environmental assessment requirements. Approval was granted in September 2022.
- In July 2020, MACH Energy referred the Optimisation Project to the Federal Minister and it was determined to be a controlled action under the EPBC Act in August that year.
- On 8 July 2022, the Environment Council of Central Queensland (ECCQ) made the reconsideration request two years after the Minister's controlled action decision.
- On 4 November 2022, the Minister determined that the reconsideration requests were valid and announced a reassessment of 18 major coal and gas proposals, including the Mount Pleasant and Narrabri mines.
- In May 2023, the Minister announced a decision to approve three of the projects that were subject to the reconsideration requests.
- In June 2023, the ECCQ filed Federal Court proceedings to challenge two of the three project approvals issued by the Minister: the Mount Pleasant and Narrabri Coal Mines.
- In October 2023, after a comprehensive review of the approval decision and related evidence, the Federal Court dismissed the case.
- In November 2023, the ECCQ appealed the decision to the Full Federal Court.
- In May 2024, after another comprehensive review of the approval decision and related evidence, the Full Federal Court dismissed the appeal.
- In June 2024, after multiple dismissals, the ECCQ applied for special leave to appeal the approvals to the High Court. Depending on timing to hear the matter, it could potentially remain unresolved until late 2024.

Minister agrees to defer decision

Despite the Federal Court and the Full Court of the Federal Court dismissing the case after lengthy reviews of relevant evidence, consecutive undertakings have been provided to the ECCQ that the Minister would not make any decision to approve the Project under the EPBC Act until the matter has been determined in the High Court. Despite the Federal Court and the Full Court of the Federal Court's unambiguous and comprehensive decisions dismissing the challenge, the projects now sit in limbo.

Impact on the Project

Absent the reconsideration request by the ECCQ, the Minister could have approved the Optimisation Project under the EPBC Act in 2022.

Absent the ECCQ's decision to appeal Justice McElwaine's judgement of 11 October 2023, we



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expect that the Minister would have proceeded to determine the EPBC referral in 2023.

The consequence of the multiple reconsideration request appeals are. It is likely to prevent the Optimisation Project from being approved under the EPBC Act until Q1 2025, a delay of almost three years from when the Minister could have approved the project if there were no reconsideration requests.

NSWMC and its members are requesting the existing provisions of the EPBC Act be amended so that the reconsideration process is enhanced to ensure it is less vulnerable to abuse by project opponents and more aligned with the assessment process that lies at the heart of the Act.

At a minimum, amendments that strengthen the Act should be considered, including:

- A streamlined window for a reconsideration request (which at present can be made any time prior to final determination under Part 9) could be limited to a 28 day timeframe after the relevant controlled action decision has been made. NSWMC notes that most appeal windows for approvals of major projects are limited to 28 days in relevant State-based planning legislation around the country;
- Additional clarity on how "new information" is defined in the Act to ensure that only information that did not exist at the time of the original decision can be considered as part of any reconsideration request;
- The proponent should be given a reasonable period of time (e.g 20 business days) to comment on the request and provide additional context if required; and
- A time limit of 28 business days for decisions on reconsideration requests should be legislated (noting that at present there is no time limit for a decision under s 78C).

Establishing a new EPA as an assessment body for EPBC Act projects

The new EPA will take on the assessment of Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) applications, as well as compliance and enforcement. It is assumed the Minister (or delegate) remains the decision-maker for EPBC Act applications as per current regulatory settings.

As a matter of principle, the NSWMC supports the Minister being retained as the determination authority for EPBC Act applications, and the DCCEEW being retained as the assessment authority. Given the role of multiple levels of government in the assessment of major projects under the Act, it will be important to prevent duplication wherever possible.



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In terms of EPBC Act assessments, transferring the existing DCCEEW functions to a newly formed independent EPA raises questions and ambiguity around the transfer of delegated power, particularly for determinations.

Given the stated objectives of the Federal EPA are to streamline regulatory decision-making and enhance compliance, clarification of the delineation of determination powers, in particular those assigned to the Minister under the current Act, would be beneficial.

Specifically, clarification is sought on the precise role of the EPA, the Department and the Minister under the proposed legislation, particularly in relation to:

- Undertaking EPBC Act assessments and determinations;
- The powers the Minister intends to delegate to the independent EPA; and
- If the EPA is exercising Ministerial powers under delegations, what capacity the Minister will have to direct the EPA to perform its functions where it is operating under delegated powers.

The details on these issues have not previously been made available for properly considered stakeholder feedback. The authority bestowed upon the Federal Minister in the current Act provides a critical layer of transparency and accountability around key decisions and any alteration to these arrangements warrant careful consideration.

NSWMC and its members appreciate your consideration of these matters.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Stephen Galilee", with a large, sweeping flourish at the end.

Stephen Galilee
CHIEF EXECUTIVE OFFICER