

***Environment Protection and Biodiversity Conservation Amendment
(Retaining Federal Approval Powers) Bill 2012***

**Submission from the Department of Sustainability, Environment, Water, Population and
Communities**

Introduction

The Australian Government Department of Sustainability, Environment, Water, Population and Communities (the department) welcomes the opportunity to make a submission regarding the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (the Bill).

The department has portfolio responsibilities in administering regulatory provisions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The following information on the relevant sections of the EPBC Act is provided to assist the Senate Standing Committees on Environment and Communications with their deliberations.

Objects of the EPBC Act

The EPBC Act, which commenced in 16 July 2000, is the Australian Government's central piece of environment legislation. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities, heritage places and Commonwealth marine areas - defined in the EPBC Act as matters of national environmental significance.¹ The EPBC Act is also the statutory mechanism to ensure that Australia meets its obligations under key international environmental conventions. Section 3(1) of the EPBC Act outlines the objects of the EPBC Act:

(1) The objects of this Act are:

- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and*
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and*
- (c) to promote the conservation of biodiversity; and*
- (ca) to provide for the protection and conservation of heritage; and*
- (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and*
- (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and*
- (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and*

¹ Matters of National Environmental Significance are: World Heritage, National Heritage, Wetlands of International Importance (Ramsar wetlands), Threatened Species and Communities, Migratory Species, Nuclear Actions, the Commonwealth Marine Area, and the Great Barrier Reef Marine Park. Seven of the eight matters of national environmental significance were first identified in the 1997 COAG *Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment*. The Great Barrier Reef Marine Park was added in 2009.

(g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

The EPBC Act also enables the government to join with the states and territories in providing a national scheme of environment and heritage protection and biodiversity conservation². This allows the Commonwealth to cooperate with states and territories to achieve the objects of the EPBC Act. Section 3(2) of the EPBC Act states amongst other things:

(2) In order to achieve its objects, the Act:

(g) promotes a partnership approach to environmental protection and biodiversity conservation through:

(i) bilateral agreements with States and Territories; and

(ii) conservation agreements with land-holders; and

(iii) recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity; and

(iv) the involvement of the community in management planning.

Bilateral agreements

In accordance with the objects of the EPBC Act there are established mechanisms to minimise the risk of duplication and increase efficiency. One of the most far reaching of these mechanisms is bilateral agreements. Chapter 3, Part 5 of the EPBC Act sets out the approach to bilateral agreements. Section 44 sets out the objects for this part.

44 Object of this Part

The object of this Part is to provide for agreements between the Commonwealth and a State or self-governing Territory that:

(a) protect the environment; and

(b) promote the conservation and ecologically sustainable use of natural resources; and

(c) ensure an efficient, timely and effective process for environmental assessment and approval of actions; and

(d) minimise duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (and vice versa).

There are two types of bilateral agreements:

- an *assessment bilateral agreement* may declare that actions assessed in a specified manner by a state or territory need not be assessed under the EPBC Act, thus minimising duplication between Commonwealth and state or territory assessments; and

² See also the 1997 COAG Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment.

- an *approval bilateral agreement* may declare that actions taken under accredited state or territory management arrangements or authorisation processes do not need further Commonwealth approval under the EPBC Act.

Assessment bilateral agreements

Assessment bilateral agreements have been negotiated with each state and territory. The New South Wales agreement has expired, however it is expected to be renewed in 2013.

The power to make assessment bilateral agreements is set out in Chapter 3, Part 5 section 47. If a proposed action is covered by an assessment bilateral, then that action is assessed under the accredited state/territory process. After assessment, the proposed action still requires approval from the Minister under the EPBC Act³. This arrangement in effect allows a proponent to produce a single set of environmental assessment documentation and to undertake a single public consultation process.

The assessments of 17 projects were completed under bilateral agreements in 2011–12 and a further 91 projects were under assessment using a bilateral agreement as of 30 June 2012⁴. The assessment bilateral approach accounted for 23% of projects approved in 2011–12.

Further information on assessment bilateral agreements can be found at <http://www.environment.gov.au/epbc/assessments/bilateral/index.html>.

Approval bilateral agreements

There has only been one approval bilateral agreement since the establishment of the EPBC Act. An approval bilateral agreement between the Commonwealth and New South Wales Governments was signed in 2005 in relation to the management plan for the Sydney Opera House. The agreement expired in 2010.

The relevant provisions for making an approval bilateral agreement are set out in Part 5 section 46 of the EPBC Act. An approval bilateral agreement covers both the assessment and approval of proposed actions which would otherwise require approval.

The EPBC Act has prerequisites and thresholds for entering into an approval bilateral agreement. There are also a number of statutory steps required under the EPBC Act before the Commonwealth can enter into an approval bilateral agreement.

Steps to finalise an approval bilateral agreement

The following steps must be taken under the EPBC Act in order to put a bilateral agreement in place.

- *Develop management arrangement or authorisation process:* The relevant state or territory government is responsible for developing the relevant arrangement or process and ensuring that the arrangement or process is in effect under a law of that state or territory (subsections 46(2) and (2A)).
- *Tabling in Parliament:* The Minister must table in Parliament the state or territory arrangement or process which the Minister is considering accrediting for 15 sitting days. The accreditation of the arrangement or process is subject to disallowance during this period (subsections 46(4) and (5)).

³ EPBC Act, section 47(4), and section 133.

⁴ Department of Sustainability, Environment, Water, Population and Communities, Annual Report 2011–12, page 262.

- *Accrediting the arrangement or process:* If the arrangement or process is not disallowed, the Minister may then proceed to accredit in writing the arrangement or process for the purpose of the bilateral agreement and publish the accrediting instrument. The Minister must be satisfied that the following preconditions under subsection 46(3) are met before accrediting an arrangement or process:
 - the arrangement or process meets the criteria prescribed in regulations (if any) (there are currently no prescribed criteria);
 - there has been or will be “adequate assessment” of the impacts of actions on each protected matter relevant to the agreement; and
 - actions subsequently approved under the arrangement or process “will not have unacceptable or unsustainable impacts” on a protected matter.
- *Authority to enter into agreements:* The Commonwealth Environment Minister (the Minister) can enter into bilateral agreements under subsection 45(1) of the EPBC Act. Section 46 (1) sets out that the Minister may declare that actions do not require approvals under the Act if an approval has been granted by a state or territory in accordance with a ‘bilaterally accredited management arrangement’ (arrangement) or a ‘bilaterally accredited authorisation process’ (process).
- *Public notification:* The EPBC Act requires that the Minister issues a public notification of intent to develop a draft bilateral agreement, as soon as practicable after starting the process of developing a draft bilateral agreement with the state or territory (Section 45(3) of the EPBC Act).
- *Public consultation:* Having prepared a draft, the Minister must publish the draft bilateral agreement and an invitation for the public to comment on the draft agreement. The invitation to comment must be open for a minimum of 28 days. All public comments must be taken into account by the Minister in deciding whether to enter the agreement (Section 49A of the EPBC Act).
- *Entering bilateral agreement:* The Commonwealth Environment Minister, and the responsible state minister, would execute a bilateral agreement following conclusion of the public consultation and tabling periods. The Commonwealth Environment Minister may declare that actions in a class specified by the agreement approved in accordance with the accredited authorisation process do not require approval under Part 9 of the EPBC Act for the purposes of a specified provision of Part 3 of the EPBC Act.
- *Publication of agreement and statement of reasons:* As soon as practicable after entering the agreement, the Minister must publish the final agreement, a statement of reasons for entering into the agreement, and a report on any comments received on the draft.

Test that must be satisfied for approval bilateral agreements

Approval bilateral agreements must meet the requirements in subsection 48A(2) and (4) and cannot extend its scope over any of the matters identified in section 49(2) - Commonwealth parks. The approval bilateral agreement may include a range of provisions for the smooth operation of the agreement such as commencement, expiry, monitoring and reporting on its operation, varying or revoking, and suspension or cancellation (section 48 and Division 3). There are also further criteria specified in the regulations for the making of heritage management arrangements.

Before entering into an agreement, the Minister must be satisfied that the approvals bilateral agreement accords with the objects of the EPBC Act (section 50). Further, sections 51 through 55 set out particular things that the Minister must be satisfied of before he or she can enter an agreement against each matter of national environmental significance. These requirements can be summarised as requiring that agreements, or their provisions:

- are not inconsistent with Australia's obligations under each of the relevant international agreements;
- promote management of protected areas such as World Heritage properties, National Heritage places and Ramsar wetlands in accordance with management principles adopted under the EPBC Act;
- promote the survival and/or enhance the conservation status of any relevant threatened or migratory species and are not inconsistent with recover plans or threat abatement plans; and
- are not inconsistent with any relevant threat abatement plans or recovery plans.

In addition subsection 46(3) requires that the Minister may only accredit the management arrangement or authorisation process via an approvals bilateral if satisfied that:

- the arrangement or process meets the criteria prescribed in regulations (if any) (there are currently no prescribed criteria);
- there has been or will be "adequate assessment" of the impacts of actions on each protected matter relevant to the agreement; and
- actions subsequently approved under the arrangement or process "will not have unacceptable or unsustainable impacts" on a protected matter.

Recent Council of Australian Governments discussions

During 2012 officials held a range of discussions with all states and territories on the potential for approval bilateral as part of the Council of Australian Governments (COAG) process. While discussions with all jurisdictions during 2012 were constructive, significant challenges emerged in developing approval bilateral agreements that provide consistency and certainty for business, and assurance to the community that high standards will be met and maintained. Consequently, approval bilateral agreements are not being progressed until these challenges can be met by states and territories.

Noting this, in December 2012, COAG committed to continue to work to streamline environmental regulation that delivers strong environmental outcomes and better conditions for business. As a further step to improving processes relating to environmental regulation, COAG agreed that all jurisdictions will direct their regulatory and referral agencies to eliminate duplication and to avoid sequential assessments and delayed approval processes and also to utilise common information requirements for both assessments and approvals. Further information on the 7 December 2012 COAG meeting can be found at <http://www.coag.gov.au/node/475>

The department is working with states and territories on streamlining environmental regulation with a focus on improving assessment bilateral agreements, improving our practice and increasing the use of strategic assessments.

Conclusion

In closing, the department notes that the EPBC Act currently has prerequisites that ensure that high environmental standards would have to be met before the Commonwealth could enter into an approval bilateral agreement with states and territories. Safeguards include a statutory requirement that draft approval bilateral agreements be made available for public comment for a minimum of 28 days⁵. Additionally, the accreditation of the authorisation process is subject to a disallowance period of 15 sitting days⁶.

⁵ EPBC Act, section 49(A).

⁶ EPBC Act, section 46.