Native Title Services Victoria Ltd – National Native Title Council

Joint Submission

To

House of Representatives
Standing Committee on the Environment

Inquiry into

Streamlining environmental regulation, 'green tape' and one-stop shops

Introduction

This submission is the joint submission of Native Title Services Victoria Ltd (NTSV) and the National Native Title Council (NNTC). NTSV is a native title service provider funded (primarily) by the Department of Prime Minister and Cabinet to support Victoria's Traditional Aboriginal Owners in processes under the *Native Title Act 1993* (Cth.) ("NTA") and the *Traditional Owners Settlement Act 2010* (Vic.). The NNTC is the peak body of the fifteen native title representative bodies and native title service providers across Australia.

The submission follows upon and largely reflects the oral evidence presented to the Committee on Friday 2 May 2014 in Melbourne by Mr Matthew Storey. Mr Storey is Chief Executive Officer of NTSV and a Director and Executive Member of the NNTC.

The submission goes to four main areas: the significance of effective and efficient environmental regulation to native title holders; the practical implications of section 45 bilateral approval agreements under the *Environment Protection and Biodiversity Act 1999* (Cth.) ("EPBC"); giving effect to those EPBC objects referring to Indigenous peoples; and, the management of Indigenous cultural heritage.

Environmental Regulation and Native Title Holders

In the slightly over twenty years since the passage of the NTA the relationship of many of Australia's Indigenous peoples to their traditional lands has been recognised as property rights under the processes of the NTA. This recognition creates the opportunity for native title rights to be the foundation for much needed economic development opportunities for many indigenous communities. As such native title holders have a clear interest in improving the efficiency of environmental regulation in order that project development costs can be reduced. Such a reduction can lead to a greater number of viable projects and can increase the return from projects facilitating greater benefits to native title holder project partners.

This noted it must also be acknowledged that native title holders have a fundamental and essential connection to their traditional lands that compels of them that they both respect and protect the lands intrinsic natural and spiritual values. As such native title holders also have a clear obligation to ensure that environmental regulatory processes are effective in supporting them in their custodianship of their traditional lands.

From these joint bases NTSV and the NNTC welcome the current inquiry as providing a mechanism to ensure that the efficiency of environmental regulation is improved while ensuring and hopefully improving its ongoing effectiveness. NTSV and the NNTC believe that the implementation of bilateral agreements with States and Territories relating to environmental approvals can provide a mechanism to achieve these joint goals. However, before discussing how bilateral approval agreements can provide such a mechanism it is important to consider the practical operation of a bilateral approval agreement.

The operation of bilateral Approval Agreements under s 45 EPBC

It must be accepted that some criticism of the proposed bilateral approval agreements stems from a perception that state environment protection standards are inferior to those of the Commonwealth. The processes of the EPBC are 'triggered' by a possible "significant impact" on a matter of national environmental significance as identified under the EPBC. By contrast most state and Territory environmental impact assessment legislation is enlivened where a proposal 'is likely significantly affect the (broadly defined) environment' (or words to similar effect). Thus, the Commonwealth legislation is more restricted in its scope (restricted to the listed matters of National Environmental Significance) but deeper in its scrutiny of these matters. By contrast state or territory legislation could be characterised as broader in scope and with a consequential higher level scrutiny. The Nathan Dam Case (*Minister for the Environment and Heritage v Queensland Conservation Council Inc & WWF Australia* [2004] FCAFC 190) is an example of the depth of analysis of consequences of

impacts under the Commonwealth legislation in contrast to the breadth of consideration under state legislation.

Of course the point to be borne in mind is that this difference of approach is a result of legislative interpretation and not (necessarily) divergent policy approaches. Given that under a s 45 bilateral approval agreement the legislative basis of the exercise of a statutory discretion under the EPBC is the same whether this function is undertaken by a Commonwealth or State Minister there is no necessary basis for reaching a conclusion that this approach will lead to a reduction in environmental approval standards. This view is emphasized by the fact that irrespective of the identity of the decision maker the decision will still be subject to the judicial review mechanisms incorporated into the EPBC.

However the corollary of this point is that a single decision maker exercising separate discretions under two different legislative regimes is not necessarily any more efficient than two decision makers doing so. As Mr. Storey stated in evidence – it may be a one stop shop, but that shop is department store. A state minister exercising a discretion under the EPBC pursuant to a bilateral approval agreement may still feel obliged to seek additional information or impose additional conditions on any subsequent approval that the same state minister exercising a discretion under state environmental assessment legislation does not require.

In the context where, pursuant to s 46, state approval processes effectively replace EPBC approval processes the stringent requirements for accreditation of state processes are unlikely to lead to significant alteration of this result. That is to say even if a state minister is exercising a single accredited discretion, if that discretion has to fully comprehend matters currently contemplated under the state assessment processes and the detailed consideration of matters of national environmental significance identified under the EPBC it cannot be automatically assumed the process will be more expeditious. The state minister's decision will still contain the same components as would be the case if the state ministers was exercising a delegated authority under the EPBC or if the state and Commonwealth ministers were exercising separate discretions.

Giving Effect to the Objects of the EPBC

The objects of the EPBC are set out in section 3. These objects make particular reference to the role of Australia's Indigenous peoples in: conservation; the maintenance of biological diversity; and, ensuring ecologically sustainable development.[1] The 2014 *Standards for Accreditation of Environmental Approvals under the EPBC*[2] ("the *Standards*") set out the standards required by the Commonwealth for approval state processes prior to entering a bilateral approvals agreement. The *Standards* provide certain "thresholds" for bilateral agreements and accreditation.

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[1] See ss 3(1)(f), 3(1)(g) and 3(2)(g)(ii)
[2] Australian Government, Department of the Environment, Canberra, 2014.

These state (at p 9) "[i]n general terms, the Commonwealth Environment Minister must be satisfied that a bilateral agreement and State or Territory processes or arrangements...*accord with the objects of the EPBC...*".

The *Standards* thus suggest that bilateral approval agreements and the processes that relate to them create the opportunity for to facilitate the role of Indigenous peoples in the areas of: conservation; the maintenance of biological diversity; and, ensuring ecologically sustainable development, as set out in the objects of the EPBC.

This would appear to be an achievable goal, the achievement of which would signify that the processes pursuant to a bilateral approval agreement achieved the objects of the EPBC to a *greater* degree than currently. This is because there are currently no processes in place to give effect to the objects of the EPBC regarding Indigenous people at an operational level. The Indigenous Advisory Council having broader policy functions only.

The goal could be achieved by ensuing that state or territory process that are the subject of a bilateral approval agreement require consultation with relevant indigenous organisations part of the approvals process. As native title organisations (Native Title Representative Bodies and Service Providers and Prescribed Bodies Corporate) are indigenous organisation discharging statutory functions with respect to land management they would be the logical and convenient organisation with which to require consultation as part of these processes.

Indigenous Cultural Heritage

Indigenous Cultural Heritage ("ICH") matters are not currently matters of National Environmental Significance under the EPBC unless they are also a National Heritage Place under the Act. Some level of protection is offered to ICH under both the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP) and under ICH (related) legislation in each state and territory. This situation has led to some discussion as to the desirability of integrating ICH matters into the EPBC and repealing the ATSHIP or alternative repealing the ATSHIP and having no Commonwealth role in the protection of ICH but leaving this matter entirely to state or territory regulatory regimes. The most recent example of this speculation is contained in the Productivity Commission Inquiry 2013 Report: *Mineral and Energy Resource Exploration.*[3] The Productivity Commission (at pp 165-166) appears to entertain the proposition that because the majority of applications under ATSHIP are either unsuccessful or improperly made it serves little useful purpose and operates mainly to facilitate forum shopping by project opponents. The Commission concludes (Recommendation 6.1, p 170) by recommending a Commonwealth system of accreditation and state and territory ICH regimes but that accreditation should only occur once the state and territory regimes should only occur upon satisfaction of the

[3] Productivity Commission 2013, *Mineral and Energy Resource Exploration*, Inquiry Report No. 65, Canberra.

Commonwealth standards. Implicit in the Commission's recommendation is that ATSHIP should not be repealed in the short term but that consideration to its repeal in the future. The Commission does not recommend immediate integration of ICH into the EPBC.

The NNTC and NTSV agree with the recommendation of the Productivity Commission that ATSHIP should be retained at that measures should be taken to ensure that state and territory ICH regimes are of a consistently high standard. As a corollary the NNTC and NTSV concur with the implied view of the Productivity Commission that ICH should not be integrated into the EPBC at this time.

As part of any process of ensuring the standards and efficacy of state and territory ICH regimes the NNTC and NTSV would support consideration of innovation which would facilitate greater coordination between ICH and environmental assessment procedures. In the context of the current inquiry it may be that the process of incorporating consultation with indigenous peoples as a requirement of any processes pursuant to a bilateral approval agreement provides a useful starting point in developing greater coordination between ICH and environmental assessment processes.

NTSV, NNTC

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