Minerals Council of Australia

30 May 2014

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

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

Dear Sir/Madam

Senate Committee Review - EPBC Bilateral Agreement Implementation and Cost Recovery Amendment Bills

The Minerals Council of Australia (MCA) welcomes the opportunity to provide a submission to the Senate Committee review of the EPBC Amendment (Bilateral Agreement Implementation) Bill and EPBC Amendment (Cost Recovery) Bill.

As you are aware, the MCA represents over 85 per cent of minerals production in Australia. The Council's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

The MCA strongly supports the Australian Government's regulatory reform agenda, including the implementation of the 'one-stop shop' for environmental approvals. These reforms will help increase business confidence and enhance Australia's reputation as an investment destination for responsible development.

The Australian minerals industry is committed to environmental regulation which is both efficient in its operation and effective in achieving the desired outcomes. The industry does not seek to remove or diminish environmental standards or safeguards, but instead supports streamlining processes to meet environmental outcomes through the removal of unnecessary and costly duplication.

The industry has consistently supported efforts to reduce duplication and improve the efficiency of project approvals through greater alignment between State and Federal processes. Key to this will be implementing the necessary legislative reforms to provide for the effective operation of approval bilateral agreements under the *EPBC Act* without diminishing environmental safeguards and standards.

WALTER TURNBULL BUILDING
LEVEL THREE
44 SYDNEY AVENUE FORREST CANBERRA ACT 2603
PO BOX 4497 KINGSTON ACT 2604
TELEPHONE: + 61 2 6233 0600
FACSIMILE: + 61 2 6233 0699
WEB: www.minerals.org.au
EMAIL: info@minerals.org.au
ABN 21 191 309 229

The MCA strongly supports the EPBC Amendment (Bilateral Agreement Implementation) Bill. Specifically, the proposed amendments:

- ensure the workability of the one-stop shop arrangements and smooth implementation of approval bilateral agreements;
- provide greater certainty for project proponents and investors; and
- provide clarity on the operation of assessment and approvals bilaterals for all stakeholders.

While we remain opposed to the EPBC Act 'water trigger' for coal seam gas and large coal mining development, the MCA particularly welcomes amendments to ensure that affected projects can be included in the one-stop shop arrangements. The proposed amendments will also increase the availability of expert advice to governments on the relationship between water resources and key job and wealth generating resource projects so coal projects can be provided equal treatment with other mining projects.

With respect to the EPBC Amendment (Cost Recovery) Bill, the MCA does not support cost recovery to fund the Australian Government in carrying out its legislative responsibilities and considers the implementation of the *EPBC Act* should instead be properly resourced from the Government's existing revenue base. Should cost recovery be implemented, the MCA considers this should be equitable, transparent and a clear link established between cost and service, supported by a service agreement with the proponent.

Further comments on the two Amendment Bills are provided in the attached submission.

The MCA would welcome any opportunity to provide further input on these important reforms..

Yours sincerely

BRENDAN PEARSON
CHIEF EXECUTIVE

MINERALS COUNCIL OF AUSTRALIA

SENATE ENVIRONMENT AND COMMUNICATIONS COMMITTEE REVIEW OF ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT (BILATERAL AGREEMENT IMPLEMENTATION) BILL 2014 AND THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT (COST RECOVERY) BILL 2014

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1. Imperatives for the one-stop shop

1.1 Policy Drivers

The MCA considers the one-stop shop reforms and the implementation of approval bilateral agreements represent a shift towards best practice regulation by removing duplication, improving regulatory efficiency and providing for improved monitoring and enforcement. Specifically:

- **Removing Duplication -** Duplication of Federal and State regulatory process has increased in recent years, an example of which was the introduction of the 'water trigger' in 2013. Furthermore, integration and co-ordination in the administration of regulatory processes is currently lacking, resulting in a range of sub-optimal outcomes including the application of duplicative and contradictory conditions and reporting requirements, leading to confusion and delays (see Case Study 1).
- **Improved Efficiency -** A 2013 analysis of regulations influencing exploration and mining activity undertaken by URS[1] for the MCA found that the lack of co-ordination and integration of approvals processes (within and between jurisdictions) is a key cause of inefficiency (see Case Study 2). This lack of regulatory alignment, and indeed duplication of effort, between jurisdictions could be addressed to deliver superior environmental outcomes while increasing time and resource use efficiency.

  Furthermore, the 'features of good regulation' as defined by COAG provide that "*regulatory burden can be reduced if the public (proponent) is required to undertake a minimum level of interaction with Government*".[2] Accordingly, the MCA considers the principle of subsidiarity should apply, whereby the assessment and approval should be managed by the competent authority at the lowest effective level and avoid increasing administrative burden introduced by higher levels of unnecessary oversight.
- **Improved Monitoring and Enforcement** - Reforms to improve and streamline the operation of the *EPBC Act* will free up Australian Government resources to focus more effectively on monitoring and enforcement, thereby improving community confidence in regulatory process.

1.2 Economic Imperative

The Australian minerals industry is facing tougher market conditions globally in attracting foreign investment and competing with the rapid growth of alternative sources of supply of mineral commodities. Delays and uncertainty in project approval processes pose significant risks to the industry's current and future global competitiveness.

Investment funds are mobile, and the perceptions of investment risk can change quickly. Mining investments are both capital intensive and long-lived, with projects needing to deal with significant technical and physical risk throughout the whole life of mine. Given these complexities, governments need to ensure the efficiency and effectiveness of the regulation governing mining project approvals.

The MCA notes significant instances of delays impacting on project timeframes or project certainty. A 2012 Port Jackson Partners report commissioned by the MCA highlights the impact

[1] Update of National Audit of Regulations Influencing Mining Exploration and Project Approval Processes, URS, 2013
[2] COAG - A Guide for Ministerial Councils and National Standard Setting bodies, October 2007.

of project delays in Australian thermal coal projects, with an average of 3.1 years for approvals compared to the average of 1.8 years for the rest of the world.[3]

A 2011 Deloitte study commissioned by the Australian Government found the implementation of approval bilateral agreements along with administrative reforms would result in significant net benefits to both the Australian Government and project proponents.[4] Specifically, the estimated cost savings over a 10 year period include:

- $378 million in net benefits for the Australian Government.
- $90 million in net benefits for the state and territory governments.
- $745 million in net benefits for proponents.

While the $745 million represents the direct benefits to industry, it is important to note that benefits will also be realised by reducing the significant indirect costs incurred from delays (including contractors and equipment on stand-by). Furthermore, improved certainty around regulatory timeframes will reduce the risk to capital investment and the likelihood a project will miss its investment window, or be subject to a change in the cost of capital.

Delays arising from duplication and inefficiency between the two layers of government regulation have a significant cost impact on both proponents and Government resources. They also have flow on impacts to the community, dependent business and the economy as a whole in terms of lost opportunity and income.

Case Study 1 – Misaligned Offset Requirements

In 2008, a coal company sought to extend the operations of its mining operation, under Part 3A of the NSW Environmental Protection and Assessment Act 1979.

Due to the likelihood of impact on matters of National Environmental Significance, the proposal was referred to the Department of Sustainability, Environment, Water, Population and Communities (SEWPAC). The differences between the assessments of SEWPAC and NSW Department were material and resulted in significant resources and time being tied up in negotiations to attempt to broker a single position.

In the end, two separate agreements on offsets had to be negotiated for the proposed project. This resulted in a delay to the project of over six months.

[3] Port Jackson Partners, *Opportunity at risk*, September 2012

[4] Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the Environment Protection and Biodiversity Conservation Act 1999

Case Study 2 - Duplicative and Inconsistent Process

An MCA member company was required to refer their project to the Western Australian Government and the Australian Government for approval under the EPBC Act. The assessment was carried out under an assessment bilateral agreement, whereby the WA process was accredited by the Commonwealth.

Despite both State and Federal agencies being involved in the assessment process, the then Commonwealth Minister extended the timeframe for decision three times, requiring additional information on matters already addressed and conditioned by the State in their approval of the project. In response, the company was required to rewrite documents provided in the original environmental assessment for submission to the Commonwealth.

One aspect of the project involved designing a tailings storage facility and final landform, the proposal for which was approved by the WA EPA and other competent authorities. The Commonwealth raised concerns about the design and continued to request further information, despite those same concerns already being addressed in the WA approved proposal (which was concurrently assessed by both Governments). The Commonwealth then recommended another review of the design and proposed an alternative design option which was inconsistent with Australian design standards and counter to the wishes of the local community.

After rewriting and re-submission of material the Commonwealth accepted the original WA approved proposal, however conditioned the project to undertake another review by a Commonwealth approved expert, ignoring the independent advice already provided and the role of the WA regulator.

This process resulted in an eight-month delay after the WA Government had completed its assessment and approved the project at significant cost to the proponent.
A key factor in this case was the failure of the Commonwealth to recognise the requirements of the WA regulatory regime. Specifically, during the Commonwealth's eight month delay in consideration of approval, recommendations for project conditions were made which duplicated and even contradicted WA approval conditions aimed at addressing the same issues. This occurred despite these concerns being raised by both the WA Government and the proponent.

2. Model for Accreditation of the States/Territories

The MCA is supportive of the accreditation of States/Territories to undertake assessment and approvals under the *EPBC Act.* The MCA considers the approval bilateral agreements should be underpinned by the following criteria:

- The objectives of the regulation should be upheld, including no reduction in the level of environmental protection.
- Processes should be open and transparent to improve community confidence and provide greater certainty for all stakeholders.
- Regulatory standards should be consistently applied, with periodic benchmarking and review.

- Agreements should provide legal certainty for all parties, transparency in their operation, be comparable and provide flexibility to allow for adaption to the differing regulatory/administrative processes across jurisdictions.
- Agreements should be supported by assurance arrangements which clearly define the role, responsibilities and expectations of Government parties and be supported by robust standards for benchmarking performance.
- A clear process for review and call in of actions undertaken under bilateral arrangements be established that allows parties to resolve issues that arise through communication and negotiation before legal mechanisms are employed.
- Effective auditing, compliance and enforcement of arrangements and to ensure environmental outcomes are met, and to build public confidence in regulatory outcomes.

Amendments to the Water Trigger

The MCA strongly supports the proposed amendments to remove the restriction on the use of approval bilaterals for the purposes of the protection of water resources from coal seam gas development and large coal mining development. Without this amendment a true one-stop shop cannot be achieved. Further, the States/Territories are responsible for all other aspects of water management, therefore the amendment will allow for those currently disparate management frameworks to be better integrated.

While the MCA supports this amendment, it should be recognised the industry has long held the position that the 'water trigger' is both duplicative and unnecessary and its complete removal should be considered for the following reasons:

- The water trigger is largely duplicative of State responsibilities. Furthermore, the Constitutional responsibility for the management of waters rests with the States.
- The water trigger duplicates the National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development for little to no demonstrable environmental benefit.
- The water trigger is inconsistent with the *EPBC Act* as it is a sector specific trigger which focusses on a specific type of action and not an impact. Furthermore, the trigger has no connection to international obligations which underpin the Act.
- A water trigger was initially rejected by the Senate Rural and Regional Affairs and Transport Committee in 2012. However, political imperatives in 2013 drove its reintroduction and passing without an appropriate Regulatory Impact Statement to determine its costs and benefits for what was a significant change to the *EPBC Act.* Accordingly, the MCA supports the recommendations of the 2013 Productivity Commission Report on Major Project Development Assessment Processes that the water trigger should be subject to a Regulatory Impact Statement.

While the MCA recommends the removal of the water trigger, the proposed amendments are supported as a significant step towards improving its operability, through the consolidation of regulatory responsibility for water management at the State/Territory level.

3. Projected Impacts of a 'one-stop shop'

The MCA has long advocated the broader use of approval bilateral agreements under the *EPBC Act* and supports their implementation under the one-stop shop reforms. Accrediting State and Territory Governments to make approvals under the *EPBC Act* aided by the proposed Amendment Bill reforms will deliver the following:

- Streamlined referral, assessment and approvals, eliminating existing duplication of effort arising from poorly coordinated regulatory processes. Accordingly, this will reduce unnecessary delays and the associated additional cost burden to business and the broader community.

- Reduced costs to the Australian Government, through a reduction in required resourcing levels.

- Consistent and complementary project conditioning - through the provision of a single consolidated set of conditions, incorporating all inter-government requirements.

- Consolidated environmental offsets requirements - The development of a single set of offset requirements to accommodate both Commonwealth and State matters will promote strategic approaches to offset development and the consolidation of offsets for a more enduring environmental outcome.

- Simplified co-ordination - A single layer of Government for assessment, approval, monitoring and enforcement, will reduce overall resourcing requirements, simplify communication and streamline reporting processes.

- Water trigger - States/Territories are responsible for all other aspects of water management. Accreditation of States/Territories to make approvals under the water trigger will allow for those currently disparate management frameworks to be better integrated

- States/Territories not currently part of the National Partnership Agreement on Coal Seam Gas and Large Coal Mine Developments, will be able to seek advice from the Independent Expert Scientific Committee.

- Australian Government resources will be freed up, allowing them to refocus on strategic environmental objectives, including:
  - Monitoring and reporting of EPBC listed entities.
  - Investment in the collection and integration of environmental data.
  - Resourcing of strategic programs to address the drivers of national biodiversity decline.
  - Supporting and resourcing regional environmental management approaches (strategic/bioregional assessments).

4. Cost Recovery

The MCA does not support the EPBC Amendment (Cost Recovery) Bill. The MCA considers that cost recovery should not be implemented to fund the Australian Government in carrying out its legislative responsibilities. Rather, the implementation of the *EPBC Act* should instead be properly resourced from the Government's existing revenue base (noting the aforementioned Deloitte estimate of $378 million in net benefit to the Australian Government from the implementation of bilateral agreements).

The MCA has previously provided a submission on the 2012 Cost Recovery Impact Statement for the *EPBC Act.* For the Committee's reference, the full MCA submission can be found on the MCA website.[5]

The MCA provides the following general comments, should the proposed cost recovery process be implemented:

- Cost recovery should be equitably applied to all industries, linked to actual costs incurred by Government and not the capacity of a proponent to pay.
- Costs recovered should remain directly linked to the level of service, be based on 'optimal' process and be linked to statutory timeframes.
- A service agreement with the proponent should be developed at the commencement of the Commonwealth process. The agreement should clearly articulate the level of service to be provided, defined outcomes, the fees to be levied, and any required staging of payments.
- Fees should not, nor be seen to, compromise the objectivity of decision making by the assessor.
- Fees should be regularly and independently audited to ensure accountability and value for money.

Given the reduced role for the Australian Government under the proposed one-stop shop reforms, the MCA considers the forecasted revenue projections outlined in the recent budget be reviewed.

5. Conclusion

The MCA strongly supports the implementation of approval bilateral agreements under the one-stop shop reforms process. Accordingly the MCA supports the EPBC Amendment (Bilateral Agreement Implementation) Bill, and considers the proposed changes to be both necessary and timely to allow for the smooth and efficient operation of approval bilateral agreements.

The MCA considers this important reform to the administration of the *EPBC Act* can contribute to an environmental assessment and approval process which is efficient without compromising standards of environmental protection. Furthermore, this reform provides the opportunity for the Australian Government to focus on monitoring and enforcement, improving community confidence through greater access to information and supporting States/Territories to address strategic environmental matters.

With respect to the EPBC Amendment (Cost Recovery) Bill, the MCA does not support cost recovery to fund the Australian Government in carrying out its legislative responsibilities and considers the implementation of the *EPBC Act* should instead be properly resourced from the existing revenue base.

[5] http://www.minerals.org.au/news/environmental_protection_and_biodiversity_conservation_act_cost_recovery_im