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Committee Secretary
House of Representatives Standing Committee on
the Environment

By email to environment.reps@aph.gov.au

Dear Committee Secretary

CSR Building Products Limited Submission to the Commonwealth House of Representatives Standing Committee Inquiry into streamlining environmental regulation, 'green tape' and one stop shops

CSR Building Products Limited (CSR) owns and operates significant clay mining operations throughout Australia. These operations supply materials for the manufacture of building products.

CSR welcomes the opportunity to make this submission to the Commonwealth House of Representatives Standing Committee Inquiry (Inquiry) into streamlining environmental regulation, 'green tape' and one stop shops.

The submission focuses on the Inquiry's Terms of Reference (TOR), being:

- jurisdictional arrangements, regulatory requirements and the potential for deregulation in the context of the unnecessary duplication of environmental assessment at Commonwealth and State level;
- the balance between regulatory burdens and environmental benefits;
- areas for improved efficiency and effectiveness of the regulatory framework – namely, reducing duplication in the regulatory process.

1. Executive Summary

CSR has concerns that a "new listing" under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), such as the listing of the Koala as a Vulnerable Species on 2 May 2012, has the potential to apply to resource projects that were approved under State legislation prior to the new listing and have been under development in some instances for more than 50 years.

More specifically, the exemption provided under section 43A of the EPBC Act that is intended to apply to previously approved actions, technically may apply to projects where there have been changes made to the environmental authorisation that requires further environmental assessment by the relevant authority. We are strongly of the opinion that this restriction will cause the unnecessary referral of significant projects that have been previously approved and are underway.

Where a change is made to a previous environmental authorisation that required some level of environmental assessment, we consider that it would be far more appropriate and effective for the exemption to continue to apply unless the change results in “an enlargement, intensification of expansion of the use”. For this outcome to be clearly articulated under the legislation, amendments would need to be made to section 43A of the EPBC Act, and further clarification would need to be given in the “*Prior Authorisation and Continuing Use Exemptions: Sections 43A and 43B of the Environment Protection and Biodiversity Conservation Act 1999*” (**Guidelines**).

2. Prior Authorisation and Continuing Use Exemptions

Sections 43A and 43B are transitional provisions.

(a) Prior authorisation exemption: section 43A

Section 43A of the EPBC Act applies in relation to actions which have previously been authorised under a Commonwealth or State law.

Section 43A(1) exempts an action from the requirement for approval under Part 9 of the EPBC Act where:

- (a) “the action consists of a use of land, sea or seabed;*
- (b) before the commencement of the EPBC Act, the action was authorised by a specific environmental authorisation;*
- (c) immediately before the commencement of this Act, no further specific environmental authorisation was necessary to allow the action to be taken lawfully; and*
- (d) at the time the action is taken, the specific environmental authorisation continues to be in force.*

Sub-section (1A) further states that “*for the purposes of 1(c) and (d), a renewal or extension of a specific environmental authorisation is taken to be a new specific environmental authorisation unless:*

- (a) the action that is authorised by the authorisation following the renewal or extension is the same as the action that was authorised by the authorisation before the commencement of this Act; and*
- (b) the renewal or extension could properly be made or given without any further consideration of the environmental impacts of the action.*

Note: If a renewal or extension of a specific environmental authorisation is taken to be a new specific environmental authorisation, the condition in paragraph (1)(c) or (d) would not be met”.

Sub-section (2) goes on to clarify that an environmental authorisation means “*an authorisation made under a law of the Commonwealth, a State or a self-governing Territory that has either or both of the following objects (whether express or implied):*

- (a) to protect the environment;*
- (b) to promote the conservation and ecologically sustainable use of natural resources”.*

The Guidelines further state:

“If the action being undertaken is substantively different to the action that was originally authorised, or if the original authorisation is varied, or requires a variation – section 43A does not apply”.

(b) Continuing use exemption: section 43B

Section 43B of the EPBC Act exempts an action from the requirement for approval under Part 9 of the EPBC Act, if that action is a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of the EPBC Act (and where section 43A does not apply).

Section 43B only applies to actions that can be taken lawfully without a specific authorisation under a law.

Although a project does not necessarily need to be complete in order to rely on the s.43B exemption, sub-section (2) makes it clear that where the activity is authorised under an approval that issued prior to the commencement of the EPBC Act or a new Listing Event, and the relevant approval remains in force at the time the action is taken, the s.43B exemption may not be relied on (ie section 43A applies instead).

3. Issues

Obviously the application of the exemption under section 43A depends on the facts and circumstances of each matter. However, we have been advised by our lawyers that on the basis of a strict reading of the legislation and Guidelines, the exemption under section 43A will not apply if changes are made to the environmental authorisation “that require further environmental assessment”.

A resource project that has been previously authorised under State environmental legislation, such as a clay mine for the supply of resources for the manufacture of building materials, will be developed in stages over more than 50 years. The development of this type of resource project is largely dictated by market conditions and the demand for building materials.

Using Queensland as an example, a resource project is authorised under State legislation by the issuing of a Mining Lease (ML) under the *Mineral Resources Act 1989* (**MR Act**) and an Environmental Authority (**EA**) under the *Environmental Protection Act 1994* (**EP Act**).

Given that a resource project such as a clay mine could conceivably be developed over a period in excess of 50 years, changes are invariably needed to be made to the EA during this period that will trigger some level of environmental assessment. For example, changes are often made to EA conditions to provide for alternative emission limits or locations. Changes are also often made to rehabilitation plans as the project is developed in stages under the Plan of Operations, that is required to be updated by the proponent and submitted to the authorities for approval every 5 years. However, these types of changes to the conditions of an EA do not result in an enlargement, intensification of expansion of the previously authorised use.

In summary, we consider that the ambiguous wording of the section 43A exemption under the EPBC Act, has the potential to trigger assessment under Part 9 of the EPBC Act for projects that have been previously approved under State legislation and are under development.

4. Recommendations

CSR supports the objective of the EPBC Act to protect Matters of National Environmental Significance.

However, we do not consider that the unnecessary referral of resource projects that have been previously authorised under State legislation and in some cases have been under development for more than 50 years, is consistent with the Department’s agenda to remove the unnecessary burden that environmental regulation places on industry and remove unnecessary “red tape”.

In contrast, this potential outcome will cause:

- Significant and unnecessary delays in development;

- unnecessary time and expense being incurred by both developers and government authorities; and
- Substantial regulatory burden for little environmental benefit.

Where a change is made to a previous environmental authorisation that required some level of environmental assessment, we consider that it would be far more appropriate and effective for the exemption to continue to apply unless the change results in “an enlargement, intensification or expansion of the use”. For this outcome to be clearly articulated under the legislation, amendments would need to be made to section 43A of the EPBC Act, and for further clarification would need to be given in the Guidelines.

CSR welcomes the opportunity to further consult with the Department on this matter. Please do not hesitate to contact me if you would like to discuss the issues raised in this submission.

Yours sincerely

Tony Cusick

**Senior Development Manager
CSR Limited**

