Submission 057.1
Date received: 21/05/2012

Australian Network of Environmental Defender's Offices Inc

ABN: 85 763 839 004

C/- Environment Defender's Office (Vic) Inc.
PO Box 12123
A'Beckett Street PO
Melbourne VIC 8006

Ph: (03) 8341 3100
Fax: (03) 8341 3111

21 May 2012

Ms Peggy Danaee
Inquiry Secretary
Committee Secretary
House of Representatives Standing Committee on Climate Change, Environment and the Arts

Dear Ms Danaee,

Response to question on notice to the Australian Network of Environmental Defender's Offices

At the hearing on 4 May 2012 we offered to provide the Committee with more detail on what the Commonwealth should require of the States and Territories if it is to enter into bilateral approval agreements under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) as is proposed under the COAG announcement of 13 April 2012. We set out that information below.

Background

Earlier this year the Commonwealth Government stated that although it will amend the provisions relating to bilateral approval agreements via reforms to the EPBC Act, it had no plans to implement approval agreements at any stage in the near future. The COAG announcement on 13 April contradicted that, stating that bilateral approval agreements would be in place in each State and Territory by March 2013, with a framework to be approved by December 2012.

The purpose of bilateral agreements (assessment and approval) is to reduce duplication of assessments,

but only if a State's processes are at least as robust as the Federal assessment process, and meet 'best practice' criteria. The Commonwealth currently has bilateral assessment agreements in place in each State and Territory under s 47 of the EPBC Act. The experience of bilateral assessment agreements leaves us with no confidence that bilateral approval agreements will be implemented in a robust way. The bilateral assessment agreements in place in many States and Territories fall far short of the requirement to be at least on par with federal processes and meet best practice criteria.

For example in Victoria the Commonwealth accredited the existing system and did not require Victoria to make any improvements despite it being clearly inadequate and not equivalent to federal standards or best practice criteria. Similarly in NSW the Commonwealth accredited the Part 3A major projects assessment process under the *Environmental Planning and Assessment Act 1979* (NSW) in 2009, despite the provisions of Part 3A being so discretionary that it could not guarantee public participation or environmental protection standards.

We have no reason to believe that bilateral approval agreements will fair any better. This is highly concerning considering that approval agreements have significantly greater implications for the environment, as they essentially result in the Commonwealth delegating its responsibility for managing the impact on nationally significant environmental matters to the States and Territories under the EPBC Act.

Bilateral approval agreements should not be made

Only the Commonwealth has the resources, mandate and national perspective to properly assess matters of national environmental significance, and ensure decisions are not based on State interest or bias. For these reasons we do not support the implementation of bilateral approval agreements in any State or Territory. However, if bilateral approval agreements are made the following are essential criteria that must be adhered to, to ensure that State processes adequately consider and protect nationally significant environmental matters.

Minimum requirements for bilateral approval agreements

Bilateral approval agreements must only be made if they will ensure a 'highest common denominator' approach rather than a 'race to the bottom'. The Commonwealth must commit to an overarching requirement that national standards and accredited State/Territory processes provide at least equivalent protection to matters of environmental significance to that provided in the EPBC Act.

In order to achieve this, the following requirements must be the basis of every bilateral agreement. These requirements should be included in the EPBC Act or EPBC regulations before the Commonwealth enters into any discussions with States and Territories to commence negotiation of bilateral approval agreements.

ACT, GPO Box 574 Canberra ACT 2601, T: 02 6247 9420 F: 02 6247 9582 E: edoact@edo.org.au
NSW - SYDNEY, 1/89 York St, Sydney NSW 2000, T: 02 9262 6989 F: 02 9262 6998, E: edonsw@edo.org.au
NSW - NORTHERN RIVERS, PO Box 868 Lismore NSW 2480, T: 1300 369 791, F 02 6621 3355 E: edonr@edo.org.au
NT, GPO Box 3180 Darwin NT 0801, T: 08 8982 1182 F: 08 8982 1183, E: edont@edo.org.au
NORTH QLD, 1/96-98 Lake St, Cairns QLD 4870, T: 07 4031 4766 F: 07 4041 4535, E: edonq@edo.org.au
QLD, Level 9, 193 North Quay Brisbane QLD 4000, T: 07 3211 4466 F: 07 3211 4655, E: edoqld@edo.org.au
SA, GPO Box 170 Adelaide SA 5001, T 08 8410 3833 F 08 8410 3855, E: edosa@edo.org.au
TAS, 131 Macquarie St, Hobart TAS 7000, T: (03) 6223 2770, F: (02) 6223 2074, E: edotas@edo.org.au
VIC, PO Box 12123, A'Beckett St PO VIC 8006 T: 03 8341 3100 F: 03 8341 3111 E: edovic@edo.org.au
WA, Suite 4, 544 Hay Street, Perth WA 6000, T: 08 9221 3030 F: 08 9221 3070, E: edowa@edowa.org.au

The State or Territory system being accredited must:

1. improve or maintain all matters of NES, including[1] ;
   - the persistence of threatened and migratory species;
   - the integrity of threatened ecological communities and critical habitat;
   - the function of the Commonwealth marine environment;
   - the values of heritage areas;
   - the character of Ramsar wetlands; and
   - the character of ecosystems of national significance;

2. provide a decision making framework that prevents significant environmental impacts where possible, mitigates unavoidable impacts, and offsets any impacts that will occur[2];
3. ensure that the assessment conducted is appropriate to the predicted level of impacts. Projects with greater impacts require greater scrutiny and longer timeframes for public engagement;
4. include a clear power for a decision-maker to refuse a project where environmental impacts are not acceptable;
5. appropriately identify and manage environmental uncertainties [3];
6. demonstrate active adaptive management in responding to emerging threats, non compliance and public concerns[4];
7. clearly identify when considerations other than environmental impacts, for example social and economic considerations, are taken into account in decision making. (Many State processes allow social and economic factors to be considered as part of their EIA decisions, whereas under the EPBC Act only environmental factors are allowed to be considered unless the decision is made by the Minister)[5];
8. include timeframes and processes for meaningful public participation and input that are at least equivalent to those under the EPBC Act [6];
9. provide adequate public access to information about the project proposal to allow for meaningful public participation;
10. include the ability to make legally binding environmental conditions as part of project approvals[7];
11. ensure that extended standing is provided for judicial review of any decisions covered by the agreement, at least equivalent to s 487 of the EPBC Act;

---

[1] As recommended by the Hawke review para 2.37
[2] As recommended by the Hawke review para 2.37
[3] As recommended by the Hawke review para 2.37
[4] As recommended by the Hawke review para 2.37
[5] As recommended by the Hawke review para 2.37
[6] As recommended by the Hawke review para 2.37
[7] In Victoria for example there is no ability to impose legally binding conditions on approvals via the EIA process under the *Environment Effects Act*.

12. not exclude judicial review of any decisions covered by the agreement. (Some State legislation attempts to prevent judicial review of environmental decisions[8]);
13. contain a transparent and robust system of compliance monitoring to ensure project proponents are complying with project approvals and conditions, including minimum monitoring requirements that the States must meet [9];
14. require project proponents to produce transparent and verifiable reports of environmental performance after approvals have been given[10]; and
15. contain enforcement powers at least equivalent to those under the EPBC Act to enforce breaches of approvals and conditions.

Many State and Territory processes fall far short of this at present.

To ensure that bilateral approval agreements do not weaken the intent of the EPBC Act or the Commonwealth's role in protecting nationally significant environmental matters, the following principles and actions should also apply:

16. Bilateral approval agreements will not apply when the State or Territory Government is the project proponent or major supporter of the project or stands to directly financially benefit from the project.
17. Finalisation of bilateral approval agreements will be based on whether the State or Territory meets the national standard as set out in regulations, rather than on meeting artificial timelines (such as the March 2013 date proposed by COAG). The Commonwealth should only sign off on bilateral approval agreements when it is clear the State or Territory system meets those standards. This may include the need for the State or Territory to make legislative amendments.
18. The Commonwealth will retain the right to 'call in' the project for a separate Federal assessment and/or approval if it does not think the State has adequately assessed the project according to the bilateral agreement. (This currently the case for assessment bilaterals and should be retained for approval bilaterals).
19. Include in the EPBC Act a requirement that bilateral approval agreements will be monitored by the Commonwealth and regular performance audits will be conducted to ensure that States are complying with bilateral agreements[11]. An independent Commonwealth 'Environment Commission' should be established for this role. The Commonwealth must prepared to terminate the agreement if States are not complying with it.

[8] See for example s263 of the *Major Transport Project Facilitation Act 2009* (Vic).
[9] As recommended by the Hawke review para 2.37
[10] As recommended by the Hawke review para 2.37
[11] In accordance with Hawke Review recommendations 4(5) and 61. Eg recommendation 4(5): "creation of a Commonwealth monitoring, performance audit and oversight power to ensure that any process accredited achieves the outcomes it claimed to accomplish".

ACT, GPO Box 574 Canberra ACT 2601, T: 02 6247 9420 F: 02 6247 9582 E: edoact@edo.org.au
NSW - SYDNEY, 1/89 York St, Sydney NSW 2000, T: 02 9262 6989 F: 02 9262 6998, E: edonsw@edo.org.au
NSW - NORTHERN RIVERS, PO Box 868 Lismore NSW 2480, T: 1300 369 791, F 02 6621 3355 E: edonr@edo.org.au
NT, GPO Box 3180 Darwin NT 0801, T: 08 8982 1182 F: 08 8982 1183, E: edont@edo.org.au
NORTH QLD, 1/96-98 Lake St, Cairns QLD 4870, T: 07 4031 4766 F: 07 4041 4535, E: edonq@edo.org.au
QLD, Level 9, 193 North Quay Brisbane QLD 4000, T: 07 3211 4466 F: 07 3211 4655, E: edoqld@edo.org.au
SA, GPO Box 170 Adelaide SA 5001, T 08 8410 3833 F 08 8410 3855, E: edosa@edo.org.au
TAS, 131 Macquarie St, Hobart TAS 7000, T: (03) 6223 2770, F: (02) 6223 2074, E: edotas@edo.org.au
VIC, PO Box 12123, A'Beckett St PO VIC 8006 T: 03 8341 3100 F: 03 8341 3111 E: edovic@edo.org.au
WA, Suite 4, 544 Hay Street, Perth WA 6000, T: 08 9221 3030 F: 08 9221 3070, E: edowa@edowa.org.au

We are happy to provide further information on any of these issues on request.

Yours sincerely,

Nicola Rivers
Director, Law Reform, Environment Defenders Office (Vic)
On behalf of
The Australian Network of Environment Defenders Offices

ACT, GPO Box 574 Canberra ACT 2601, T: 02 6247 9420 F: 02 6247 9582 E: edoact@edo.org.au
NSW - **SYDNEY**, 1/89 York St, Sydney NSW 2000, T: 02 9262 6989 F: 02 9262 6998, E: edonsw@edo.org.au
NSW - NORTHERN RIVERS, PO Box 868 Lismore NSW 2480, T: 1300 369 791, F 02 6621 3355 E: edonr@edo.org.au
NT, GPO Box 3180 Darwin NT 0801, T: 08 8982 1182 F: 08 8982 1183, E: edont@edo.org.au
NORTH QLD, 1/96-98 Lake St, Cairns QLD 4870, T: 07 4031 4766 F: 07 4041 4535, E: edonq@edo.org.au
QLD, Level 9, 193 North Quay Brisbane QLD 4000, T: 07 3211 4466 F: 07 3211 4655, E: edoqld@edo.org.au
SA, GPO Box 170 Adelaide SA 5001, T 08 8410 3833 F 08 8410 3855, E: edosa@edo.org.au
TAS, 131 Macquarie St, Hobart TAS 7000, T: (03) 6223 2770, F: (02) 6223 2074, E: edotas@edo.org.au
VIC, PO Box 12123, A'Beckett St PO VIC 8006 T: 03 8341 3100 F: 03 8341 3111 E: edovic@edo.org.au
WA, Suite 4, 544 Hay Street, Perth WA 6000, T: 08 9221 3030 F: 08 9221 3070, E: edowa@edowa.org.au