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Legislation Committee
Answers to questions on notice
Environment portfolio

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Topic: PUBLIC CONSULTATION ASSESSMENT BILATERAL AGREEMENTS

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Senator Singh asked:

Senator SINGH: Let us not talk broadly. Let us dig down a bit. Have you got a feedback report you can table before the committee?
Dr Bacon: We do have a report. I would have to check whether I have it here with me before I can table it. I can certainly provide that to you if I do not have it here right now.
Senator SINGH: If you could check, that would be good.
Dr Bacon: We do prepare a report on public comments received for each agreement. We can certainly table that and provide that to the committee.

Answer:

Reports are attached for the consultations on the draft assessment bilateral agreements for the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. These reports are also available on the Department's website at:

http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop

Public submissions on draft assessment and approval bilateral agreements are available on the Department's website at:

ACT

Assessment bilateral agreement
http://www.environment.gov.au/node/36235

Approval bilateral agreement
http://www.environment.gov.au/node/37385

NSW

Assessment bilateral agreement
http://www.environment.gov.au/epbc/bilateral-agreements/nsw/submissions-assessment

Approval bilateral agreement
http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw/submissions-approval

NT

Assessment bilateral agreement
http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/nt/submissions-assessment

Queensland

Assessment bilateral agreement
http://www.environment.gov.au/node/34993

Approval bilateral agreement
http://www.environment.gov.au/node/36769

SA

Assessment bilateral agreement
http://www.environment.gov.au/node/36225

Tasmania

Assessment bilateral agreement
http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/tas/submissions-assessment

Approval bilateral agreement
http://www.environment.gov.au/node/37387

Victoria

Assessment bilateral agreement
http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/vic/submissions-assessments

WA

Assessment bilateral agreement
http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/wa/submissions-assessment

Report on Public Comments on the Draft ACT Assessment Bilateral Agreement

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), a draft assessment bilateral agreement between the Commonwealth and the Australian Capital Territory (ACT) was published on 28 March 2014 with an invitation for any person to comment by 28 April 2014.

This report provides a summary of submissions received on the draft ACT assessment bilateral agreement. The submissions will be published on the Department of the Environment's website, except where the author has marked the submission, or parts of the submission, as confidential.

Five submissions were received on the draft assessment bilateral agreement:

1. Richard Sharp
2. Friends of Grasslands
3. Property Council of Australia
4. Indigenous Advisory Committee (amended version provided 2 May 2014, after the close of the comment period)
5. Environmental Defender's Office, Australian Capital Territory (received 30 April 2014, after the close of the comment period)

1. Effect of the draft bilateral agreement

Issues Raised
Three submissions were supportive of the use of the draft assessment bilateral agreement to reduce duplication within ACT and Commonwealth assessment processes. All submissions offered suggestions for improvements to the agreement. One submission expressed concern at the adequacy of the comment period on the agreement and suggested how the comment process could be strengthened.

Some submissions made specific comment on the scope and application of the draft assessment bilateral agreement. Some submissions called for the agreement to address additional matters, such as Indigenous heritage and protection of the broader environment. Two submissions suggested that the objects of the agreement should exhibit clearer alignment with the requirements and objects of the EPBC Act.

Two submissions noted the function of the ACT government as both a proponent and an environmental regulator. One submission questioned the application of best practice environmental protection standards by the ACT government. A submission sought clarification surrounding the application of the agreement in regard to the jurisdiction of the National Capital Authority.

Response
The draft bilateral agreement relates to the process for environmental assessment of matters under the EPBC Act. The agreement reflects the relevant statutory requirements of the EPBC Act, including accordance with the objects of the EPBC Act. The agreement provides for close cooperation between the parties to ensure environmental standards are maintained. The agreement also contains obligations to

ensure all relevant impacts of proposed actions to which the agreement applies are adequately assessed.

Under an assessment bilateral agreement, the Commonwealth Environment Minister retains an obligation to make a decision on the approval of an action assessed under the agreement, and under what conditions. Should the Minister not be satisfied that the bilateral agreement is being complied with, or that assessment processes under the agreement do not give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations, sections 57 to 64 of the Act provide a mechanism by which the agreement can be cancelled or suspended.

The draft bilateral agreement does not apply to actions within Commonwealth areas, however the agreement may apply to actions that are proposed within ACT land that may affect Commonwealth areas. The EPBC Act definitions of 'Commonwealth areas' and 'Commonwealth land' apply to the agreement. The management and planning control in certain areas of the ACT are under the control of the National Capital Authority. The agreement only applies to the assessment of actions subject to the EIS assessment process under the *Planning and Development Act 2007*(ACT).

2. Content of the bilateral agreement

Issues Raised
Some submissions made general or specific comments on the content of the draft assessment bilateral agreement, while others sought to clarify terms used within the agreement. Two submissions asserted that the agreement could be improved to further reduce duplication in assessment processes. One submission noted the agreement should provide greater certainty for proponents in regard to timeframes for assessment.

Some submissions proposed amendments or additions to the content of the draft bilateral agreement, including the following:

- More frequent review of the operation of the agreement
- Regular reassessment of compliance with EPBC Act requirements.
- Requirements for the audit of the ACT public service in relation to the operation of the agreement.
- Recommendations regarding the role and function of the senior officers' committee.
- Questions were raised regarding the process for developing, and the function of, administrative arrangements, and one submission suggested additional matters that could be addressed within these arrangements.
- Assessment reports should allow for the assessment of impacts on connecting habitat.
- The bilateral agreement should provide for better recognition of the rights of, and engagement with, Indigenous peoples.

Response
The draft bilateral agreement includes appropriate content to reflect the requirements for an agreement under section 47 of the EPBC Act, and is consistent with the

Memorandum of Understanding agreed with ACT on establishing a 'one stop shop' for environmental approvals. The EPBC Act and EPBC Regulations contain further requirements relating to assessment bilateral agreements, including requirements to review the operation of a bilateral agreement. The agreement accords with these requirements.

Administrative arrangements will be developed by the Commonwealth and the Australian Capital Territory to support operation of the proposed ACT assessment bilateral agreement. The arrangements will describe how the parties will work together, including processes for communication in relation to assessments under the agreement, mechanisms for review and oversight of the operation of the agreement and information sharing.

The draft bilateral agreement states that the assessment report must describe the impacts on matters of national environmental significance. Further, the assessment of impacts on listed threatened species and migratory species includes impacts on the habitat of these species.

The draft bilateral agreement includes provisions for the engagement of Indigenous peoples. In particular, clause 7.1 provides that assessments will recognise the role and interests of Indigenous peoples in promoting the conservation and ecologically sustainable use of natural resources, and promotes the cooperative use of Indigenous peoples' knowledge of biodiversity and Indigenous heritage. Clause 7.3 of the agreement provides that special arrangements will be made to make information available to groups with particular communication needs, and references the importance of ensuring Indigenous people have access to information.

In response to a submission from the Indigenous Advisory Committee, clause 6.6(b) of the draft bilateral agreement has been amended to allow that the final assessment report may provide additional information on cultural matters (in addition to social and economic specified in the draft agreement). This recognises that cultural matters may also be a relevant consideration for the Commonwealth Environment Minister in making a decision under Part 9 of the EPBC Act.

3. Assessment process as outlined in Schedule 1

Issues Raised
Some submissions expressed concern at perceived shortcomings with the assessment processes specified in Schedule 1 of the draft bilateral agreement. These comments related to:

- the provision of information by the Australian Capital Territory to inform a Commonwealth approval decision;
- the impact of proposed reforms to the *Planning and Development Act 2007* (ACT) and its impact on the maintenance of to assessment standards;
- the adequacy of opportunities for public comment and appeals processes;
- the role and strength of the linkages between the ACT biodiversity laws; and
- public access to information in relation to the assessment process and operation of the bilateral agreement.

Response
The draft bilateral agreement provides robust obligations for the ACT to undertake an assessment of all relevant impacts of proposed actions to which the agreement applies. Under the EPBC Act (section 132), the Commonwealth Environment Minister may also request further information if the Minister believes that he or she does not have enough information to make an informed decision on whether or not to approve the action.

Public access and participation described under the draft bilateral agreement meets the standards and requirements of the EPBC Act.

4. Comments in relation to the broader one stop shop policy and other suggestions

A number of suggestions within the submissions did not not relate to the scope of the bilateral agreement, including comments relating to ongoing roles and responsibilities associated with strategic assessments under the EPBC Act, decisions made under the *Australian Capital Territory (Planning and Land Management) Act 1998* (Commonwealth), and activities associated with approval of actions (e.g. enforcing conditions and dispute processes). Two submissions included comments directed at the Australian Government's one stop shop policy which were not directly related to the draft assessment bilateral agreement.

Report on Public Comments on the Draft NSW Assessment Bilateral Agreement

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), a draft assessment bilateral agreement between the Commonwealth and the State of New South Wales (NSW) was published on 20 November 2013 with an invitation for any person to comment by 18 December 2013 (28 days).

This report provides a summary of submissions. The submissions will be published on the Department of the Environment's website, except where the author has marked the submission, or parts of the submission, as confidential.

Twenty three submissions were received on the draft assessment bilateral agreement. The following submissions were received in the order in which they were received:

1. Mr Richard Sharp
2. Mr Greg Smith
3. Mr Roland Bow
4. Blue Mountains Conservation Society Inc.
5. Mr Wayne Olling
6. Natural Allies
7. Urban Taskforce
8. Australian Conservation Foundation
9. Association of Mining and Exploration Companies Inc
10. Ms Sharon Salmi
11. Property Council of Australia
12. Australian Network of Environmental Defenders Offices Inc.
13. The Wilderness Society Inc.
14. NSW Minerals Council
15. Batwatch Australia
16. WWF Australia
17. Ms Lindy Smith
18. NSW Aboriginal Land Council
19. Minerals Council of Australia
20. NSW Farmers Association
21. Indigenous Advisory Committee, established under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)
22. Friends of the Koalas
23. G. King

1. One stop shop policy

Issues Raised

All submissions included comments directed at the Australian Government's 'one stop shop' policy and not directly related to particular provisions of the proposed NSW draft assessment bilateral agreement (the agreement).

Submissions were both supportive and unsupportive of the 'one stop shop' policy. Some submissions stated that efficiencies would result from the reform and offered the view that the NSW Government is better positioned to assess projects within the state. Some submissions considered the 'one stop shop' policy unnecessary and contended that it would reduce protection for the environment and matters of national environmental significance. Some submissions also expressed concern at potential 'conflicts of interest' in relation to NSW Government assessment and approval of certain actions and expressed doubts around the capacity of the NSW Government to adequately protect matters of national environmental significance and to enforce environmental laws.

Some submissions reiterated the importance of various issues in the environmental decision-making process, including high environmental standards; transparent decision-making processes; accountable governance arrangements; opportunities for public participation; appropriate community access to review processes; and robust compliance, monitoring, enforcement, reporting and assurance mechanisms.

Some submissions also contained a range of observations on the process for developing the agreement. These included several criticisms around the duration and timing of the public consultation period.

Response

The agreement relates to the process for environmental assessment of matters under the EPBC Act, and is not an approval bilateral agreement for the purpose of s.46 of the EPBC Act. The agreement reflects the relevant statutory requirements of the EPBC Act.

The agreement will not reduce the Commonwealth's obligations under the EPBC Act with respect to matters of national environmental significance. The agreement accredits assessment processes that meet the requirements of the EPBC Act and Regulations. The agreement also provides for close cooperation between the parties to ensure environmental standards are being maintained. The agreement includes requirements for the NSW decision-maker to consider Commonwealth guidelines and plans such as the EPBC offset policy, recovery plans, conservation advice and threat abatement plans.

Should the Commonwealth Environment Minister not be satisfied that the agreement is being complied with, or that assessment processes accredited under the agreement do not give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations, sections 57-64 of the Act provide a mechanism by which the agreement can be cancelled or suspended. Section 65 of

the EPBC Act also requires a review of the agreement at least once every five years while the bilateral agreement is in effect.

The draft assessment bilateral agreement was notified and available for comment for 28 days, in accordance with the requirements of the EPBC Act.

2. Content of the bilateral agreement (excluding Schedule 1)

Issues Raised

Some submissions made specific comment on the scope and content of the agreement. Some submissions also proposed amendments to the agreement.

Some submissions questioned the extension of the agreement to certain actions. These included:

- actions impacting on water resources, particularly in relation to coal seam gas or large coal mining developments;
- nuclear actions;
- actions impacting on Indigenous heritage;
- actions where the NSW Government is both the proponent and the regulator; and
- actions that have environmental impacts within NSW and another jurisdiction.

Response

Consistent with other matters of national environmental significance, the EPBC Act provides that coal seam gas or large coal mining development that may have a significant impact on a water resource, may be the subject of an assessment bilateral agreement. Clause 6.3(d) of the agreement stipulates that the NSW government must seek and take account of the advice of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development in preparing an assessment report for such a development.

In relation to actions where the State of NSW is both the proponent and the regulator, the Commonwealth Environment Minister will retain an obligation to make a decision on an action assessed under the agreement. The agreement also contains obligations for NSW to undertake an assessment of all relevant impacts of proposed actions to which the Agreement applies.

Actions that have environmental impacts within NSW and another jurisdiction are not exclusively regulated by the EPBC Act. Nevertheless, clause 4.2 provides that, for actions which do not occur wholly within NSW, or which are taken in NSW but have relevant impacts in other jurisdictions, the parties will consult and use their best endeavours to reach agreement with other affected jurisdictions on an appropriate assessment process.

3. Content of the bilateral agreement

Issues Raised

Some submissions made general or specific comment on the content of the agreement. Some submissions also proposed amendments to the agreement.

Some submissions asserted that the agreement could be further improved to reduce duplication in the assessment process, and provide greater certainty for proponents with regards to timeframes and expectations of requirements to be assessed.

Some submissions stated that the agreement should note relevant NSW government policies, such as offsets and wind farm development policies. Some submissions also sought clarification on the assessment of coal seam gas and large coal mining developments under the agreement.

Some submissions suggested changes to certain clauses for example:

- clause 6.8 (Relevant plans and policies) should be expanded to include a wider range of matters;
- clause 7.1 (Indigenous peoples) should be extended in scope;
- clause 10 (Review) should provide for independent and more frequent reviews; and
- clause 15 (Freedom of information) should ensure that delays in freedom of information processes are avoided.

There was also a proposal that proponents be allowed to 'opt out' of the accredited assessment process for independent consideration if they choose.

Response

The agreement includes appropriate content to reflect the requirements for an agreement under s.47 of the EPBC Act, and is consistent with the Memorandum of Understanding agreed with NSW on establishing a one stop shop.

The EPBC Act and Regulations contain the requirements or standards relating to assessment bilateral agreements. Under an assessment bilateral agreement, the Commonwealth Environment Minister will continue to make decisions on whether or not to approve a particular proposal that has been assessed under a bilateral agreement, and ensure that relevant Commonwealth policies are taken into account where relevant.

The proposed content of clauses 6.8, 10 and 15 are consistent with EPBC Act requirements and Commonwealth policy.

The agreement includes provisions for the engagement of Indigenous peoples. In particular, clause 7.1 provisions that assessments will recognise the role and interests of Indigenous peoples in promoting conservation and ecologically sustainable use of natural resources and promote the cooperative use of Indigenous peoples' knowledge of biodiversity and Indigenous heritage.

4. Accredited assessment processes

Issues Raised

Some submissions expressed concern at perceived shortcomings with the legislation and assessment processes specified in Schedule 1 of the agreement and argued that these processes were not consistent with EPBC Act requirements. These comments related to:

- the adequacy of NSW Government processes in assessing impacts on matters of national environmental significance;
- the level of discretion afforded to the NSW Government at different stages of the assessment and approval process;
- provision of adequate information to inform a Commonwealth approval decision;
- the role of NSW environmental agencies;
- the difficulties associated with assessing the impacts of developments that may be 'split' or staged over time; and
- adequacy of public comment processes and community appeal rights.

Response

The agreement provides robust obligations for NSW to undertake an assessment of all relevant impacts of proposed actions to which the agreement applies. Under the EPBC Act, the Environment Minister may also (under s.132) request further information if the Minister believes that he or she does not have enough information to make an informed decision on whether or not to approve the action.

Further, clause 11 of the agreement provides that the Parties agree to take steps to improve the efficiency and effectiveness of their own administrative processes to the greatest extent possible, including by providing industry data from environmental impact statements to the public.

In relation to comments regarding the difficulties associated with assessing the impacts of developments that are 'split' or staged over time, the referral process under Part 7 of the EPBC Act allows the Minister to request the referral of a larger action, where he is satisfied that the action referred is a component of a larger action. In addition, the agreement ensures that any accredited assessment undertaken by NSW will be done in a manner that meets the requirements of the EPBC Act.

Public access and participation under the agreement meet the standards and requirements of the EPBC Act. Because the Commonwealth Environment Minister is the decision maker for projects assessed under the assessment bilateral agreement, the standing provisions and offence provisions relating to the provision of false or misleading information contained in the EPBC Act will still apply to actions assessed under the bilateral agreement.

Clauses 36 and 37 of the agreement provide that special arrangements will be made to make information available to groups with particular communication needs, with particular reference to the importance of ensuring Indigenous people have access to information. The agreement also recognises the important role of Indigenous people in promoting conservation and the ecologically sustainable use of natural resources.

5. Relationship between draft assessment bilateral agreement and the NSW Planning Bill 2013

Issues Raised

Some submissions raised concerns about the timing of the agreement, when the NSW Government has proposed significant amendments to the *Environmental Planning and Assessment Act 1979*, as proposed by the NSW Planning Bill 2013.

It was also noted that the agreement should be able to accommodate future changes to the NSW planning legislation to prevent unnecessary duplication in assessment as a result of the new reforms.

Response

The agreement accredits specific classes of actions assessed under the Environmental Planning and Assessment Act 1979, as specified in Schedule 1 of the agreement. The Commonwealth Environment Minister has entered into the agreement, in accordance with the relevant requirements of the EPBC Act relating to the manner of assessment specified in the agreement. The specified manner of assessment relate to processes under the Environmental Planning and Assessment Act 1979, as in force at the date the agreement was made.

The Commonwealth will continue to work with NSW to determine the impact of proposed amendments to the Environmental Planning and Assessment Act 1979 on the operation of the agreement and the relationship to the Australian Government's policy to establish a one stop shop for environmental approvals.

Report on Public Comments on the Draft Queensland Assessment Bilateral Agreement

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**), a draft assessment bilateral agreement between the Commonwealth and the State of Queensland was published on 8 November 2013 with an invitation for any person to comment by 6 December 2013 (28 days).

A number of the submissions received provided comments that were out of scope for the public consultation process on the draft amending agreement. These comments primarily related to the approval bilateral agreement which constitutes the third step in implementing the one stop shop policy. While such comments are recorded and considered more broadly by the Department of the Environment in relation to the one stop shop policy, they have not been included as part of this report on public comments.

This report provides a summary of issues across all submissions, which will be published in full on the Department of the Environment's website after the agreement is finalised, except where the author has marked the submission, or parts of the submission, as confidential.

43 submissions were received on the draft assessment bilateral agreement. Submissions 27 and 41 will not be published as they contain information which is considered private and confidential by the author.

1. Gregory Smith
2. Daniel Solomou
3. Aurizon Operations
4. Ergon Energy
5. Gavin Hammond
6. Shona Murray
7. Queensland Resources Council
8. National Parks Association of Queensland
9. Saunders Havill Group
10. Australian Conservation Foundation
11. Joan Vickers
12. Susan Ryan
13. Mary River Catchment Coordinating Committee
14. Property Council of Australia
15. Batwatch Australia
16. North Queensland Conservation Council
17. Colin Dietz
18. Queensland Conservation
19. Rowan Barber
20. Wildlife Preservation Society of Queensland
21. Australian Network of Environmental Defender's Offices
22. The Wilderness Society
23. Friends of the Earth Brisbane
24. Safe Climate Brisbane

25. Minerals Council of Australia
26. Business Council of Australia
27. QGC
28. Regional Development Australia Far North Queensland and Torres Strait
29. G King
30. Tourism and Transport Forum Australia
31. Indigenous Advisory Committee
32. WWF-Australia
33. Ilona Harker (campaign petition – 833 names)
34. Origin Energy
35. Audrey [no last name provided]
36. Cairns and Far North Environment Centre
37. Association of Mining and Exploration Companies
38. Greater Mary Association
39. Australian Marine Conservation Society
40. Juanita Johnston
41. Confidential submission
42. Robert E. Rutkowski
43. Environment Institute of Australia and New Zealand

1. Some submissions expressed concern regarding accreditation of state assessment processes in relation to certain matters, including:

a. meeting national or international obligations;

b. assessing impacts of actions on matters of national significance, for example:

i. nuclear actions;
ii. actions in or impacting on the Great Barrier Reef;
iii. actions impacting on Commonwealth marine areas;
iv. actions impacting on water resources, including cumulative impacts, particularly in relation to coal seam gas or large coal mining actions;
v. actions impacting indigenous heritage; or

c. assessing actions that cross jurisdictional boundaries.

Some submissions stated that the separate Commonwealth and Queensland assessment processes provided important checks and balances. Some submissions also suggested that compliance with international obligations should be an express requirement of the bilateral agreement.

Some submissions supported the broad scope of the draft bilateral agreement and inclusion of matters of national environmental significance, such as the inclusion of assessments of certain nuclear actions.

Response

The proposed agreement accredits Queensland environmental assessment processes where those processes meet the requirements of the EPBC Act and Regulations. The proposed agreement also provides for close cooperation between the parties to ensure environmental standards are being maintained. Should the Commonwealth Environment Minister not be satisfied that the agreement is being complied with, or that assessment processes accredited under the agreement do not give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations, sections 57-64 of the Act provide a mechanism by which the agreement can be cancelled or suspended. Section 65 of the EPBC Act also requires a review of the agreement at least once every five years while the bilateral agreement is in effect.

In relation to cross-jurisdictional impacts, clause 12.2 of the draft assessment bilateral agreement provides that where an action is taken in, or has relevant impacts in more than one jurisdiction, the Parties agree to consult and use their best endeavours to reach agreement with other affected jurisdictions on an appropriate assessment process.

2. Submissions expressed both concern about, and support for, Queensland's assessment processes, and the ability to maintain high environmental standards under those processes. In particular:

a. that not all Queensland legislation makes reference to principles of ecologically sustainable development, and
b. concern about the processes to be accredited, in particular:

    i. that the only process that should be accredited is the environmental impact statements under the *Environmental Protection Act 1994* (Qld); and
    ii. that the *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWO Act)** should not be accredited due to potential conflict of interest and the absence of merit or judicial review under the SDPWO Act.

Some submissions indicated that the Commonwealth should retain the role of assessing actions where the Queensland Government or an agent or authority or the Queensland Government is the proponent, or where the Queensland Government is a beneficiary or has a demonstrated political interest in an action. Some submissions raised concerns that the draft bilateral agreement prioritises financial benefit over the maintenance of environmental standards.

Some submissions stated that an agreement should only be entered into where a state amends its environmental laws to meet higher national standards, that are at least commensurate with the EPBC Act protections, and that no assessment bilateral agreement should be entered into until all relevant Queensland legislation is consistent with the EPBC Act.

A number of submissions expressed concern over what is perceived as Queensland's poor environmental track record in meeting high environmental standards, and recent changes to Queensland legislation and policies that are considered to be contrary to good environmental and heritage outcomes. Some submissions considered that environmental conditions may decline more rapidly as a result of the bilateral agreement, and provided examples of projects approved at the state level but not by the Commonwealth. Some submissions outlined that the Commonwealth should retain the power to impose any conditions of approval necessary to meet objectives of the EPBC Act and protect matters of national environmental significance.

Some submissions further proposed that states should be required to demonstrate their capacity to undertake robust assessments, through the development of matters of national environmental significance specific policy and analysis. Some submissions further considered that it should be mandatory for Queensland to seek advice on relevant matters from Commonwealth agencies with relevant expertise.

Some submissions called for the Commonwealth to maintain a strong role in compliance and enforcement and the ability to review the assessment processes. Some submissions sought a staged approach to accreditation of state processes, with proposals of increased environmental sensitivity accredited later in the process.

Some submissions also outlined opportunities for the Commonwealth to recognise or maintain confidence in Queensland environmental assessments, such as by recognising existing koala conservation provisions.

Response

The draft agreement does not diminish the Commonwealth's responsibility and powers under the EPBC Act in relation to the approval of actions, monitoring of compliance, and enforcement measures.

The draft agreement would accredit Queensland environmental assessment processes where those processes meet the requirements of the EPBC Act and Regulations. The draft agreement also provides for close cooperation between the parties to ensure environmental standards are being maintained. Should the Commonwealth Environment Minister not be satisfied that the agreement is being complied with, or that assessment processes accredited under the agreement do not give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations, sections 57-64 of the Act provide a mechanism by which the agreement can be cancelled or suspended. Section 65 of the EPBC Act also requires a review of a bilateral agreement at least once every five years while the agreement is in effect.

In relation to conditions of approval, clauses 21(c) and 21(d) outline the objective to impose a single set of outcome focussed conditions and to avoid, to the greatest extent possible, the need for additional conditions imposed by the Commonwealth Environment Minister in approving an action. This does not limit the Minister

from setting additional conditions of approval, should he consider it appropriate to do so.

Under the Intergovernmental Agreement on the Environment 1992 (IGAE) the parties agreed that ecologically sustainable development should be used by all levels of Government in the assessment of natural resources, land use decisions and approval processes. The Parties' ongoing commitments made under the IGAE are reflected in clause 2 of the draft agreement.

3. Some submissions expressed concern about the method of assessment under the draft bilateral agreement for all classes of actions, particularly that:

- Recovery plans should be required to be considered;
- Advice from expert bodies should be mandatory;
- The precautionary principle should be applied in assessing impacts to the greatest extent possible; and
- There should be an explicit role for strategic assessments;

Response

The proposed agreement accredits Queensland environmental assessment processes where those processes meet the requirements of the EPBC Act and Regulations.

The draft agreement is intended to promote principles of cooperation between the parties and streamline the assessment process, and does not limit the parties' ability to improve the quality of environmental impact assessment.

The draft agreement relates to assessments under Part 8 of the EPBC Act. It is not intended to include strategic assessments under Part 10 of the EPBC Act. The draft agreement does not limit the parties from continuing to work closely to identify opportunities for strategic assessments to be conducted.

4. Some submissions raised concerns about the differences between the draft amending agreement with Queensland and the draft assessment bilateral agreement with New South Wales, and that the New South Wales draft agreement was more environmentally robust. Some submissions stated that it is important to have national consistency in the agreements.

A particular element of the draft New South Wales agreement which some submissions stated could form part of the Queensland amending agreement was more robust auditing and oversight mechanisms. Some submissions called for performance indicators, including the costs of compliance for proponents, to be developed. A number of submissions expressed the need for an independent body or commissioner to oversee the assessment of actions under the agreement.

Some submissions also referred to the inclusion of a commitment to refer coal seam gas and large mining projects to the Independent Expert Scientific Committee in the draft New South Wales agreement.

Response

The difference in the presentation of the two draft agreements reflects that the Queensland draft agreement is an amended version of the existing agreement, whereas the NSW draft agreement is an entirely new agreement.

A number of administrative procedures relating to audit, oversight and reporting are detailed in the administrative arrangements, and are provided for through mechanisms in the EPBC Act.

The EPBC Act and Regulations set out the requirements and standards relating to assessment bilateral agreements. The proposed agreement accredits Queensland environmental assessment processes where those processes meet the requirements of the EPBC Act and Regulations.

5. A number of submissions considered that amending the assessment bilateral agreement or entering into an approval bilateral agreement pre-empts the release of standards for accreditation and an assurance framework, which is important in achieving consistent environmental standards across jurisdictions.

Response

The EPBC Act and Regulations contain the requirements or standards relating to assessment bilateral agreements. Under an assessment bilateral agreement, the Commonwealth Environment Minister makes a decision on whether or not to approve a particular proposal that has been assessed under a bilateral agreement, and ensures that actions will not have unacceptable or unsustainable impacts on matters of national environmental significance.

6. Some submissions raised further opportunities for streamlining in the draft bilateral agreement. In particular:

a. the scope of accreditation under the draft agreement would not provide for regulatory efficiencies for small to medium actions that fell outside the scope of the draft agreement;
b. the Queensland environmental offsets policy should be expressly recognised within the draft agreement;
c. the draft agreement should stipulate timeframes for finalising the assessment report and making approval decisions; and
d. use of only one compliance and inspection process for both the Commonwealth and Queensland.

Some submissions sought increased collaboration between the Commonwealth and Queensland in the assessment process, particularly:

a. there should not be a limit on the number of times that a draft assessment report is provided to the Commonwealth;
b. agreement should be reached regarding information requirements under assessment processes and draft assessment reports; and
c. secondment of Commonwealth staff to Queensland.

Some submissions supported the inclusion of a call in power for the Commonwealth Environment Minister.

Response

The processes proposed to be accredited under the draft assessment bilateral agreement meet these requirements and standards. Under the EPBC Act an assessment bilateral agreement may accredit practices, procedures or systems of a state or territory for environmental assessment. The agreement identifies the processes suitable for accreditation.

The Australian and Queensland Governments will work collaboratively to further streamline environmental regulation, as permitted under national environmental law. The administrative arrangements between the parties establish procedures to ensure assessments under a bilateral agreement are conducted in an efficient and timely manner.

7. Some submissions noted that procedural standards should be maintained, including:

a. rights of public access and participation, including the involvement of Indigenous communities, and greater transparency and consultation on standard Terms of Reference under the assessment bilateral agreement;
b. offence provisions relating to the provision of false or misleading information should be equivalent to Commonwealth requirements; and
c. standing to commence court actions should be equivalent to the standing provisions under the EPBC Act.

There was varying support for the use of standard conditions and/or Terms of Reference, for example some submissions felt they provided greater guidance and certainty to industry, whilst other submissions expressed concern that their use would not capture the particulars of each project or action.

Some submissions proposed that the Commonwealth should be required to continue to agree to draft terms of reference for all projects, and that Queensland provide draft assessment documentation to the Commonwealth.

Some submissions outlined the importance of strengthening the engagement and involvement of Indigenous communities in the draft agreement and during the assessment process.

Some submissions also expressed that public access to information should be maintained, including by making information on environmental assessments

available to the public along with correspondence between Queensland and the Commonwealth relating to environmental impact statements.

Response

Public access and participation under the draft agreement meet the standards and requirements of the EPBC Act. Because the Commonwealth Environment Minister is the decision maker for projects assessed under the assessment bilateral agreement, the standing provisions and offence provisions relating to the provision of false or misleading information contained in the EPBC Act will still apply to actions assessed under the bilateral agreement.

Clause 11 of the draft agreement provide that the Parties agree to take steps to improve the efficiency and effectiveness of their own administrative processes to the greatest extent possible, including by providing industry data from environmental impact statements to the public.

Clauses 36 and 37 of the draft agreement provide that special arrangements will be made to make information available to groups with particular communication needs, with particular reference to the importance of ensuring Indigenous people have access to information. The draft agreement also recognises the important role of Indigenous people in promoting conservation and the ecologically sustainable use of natural resources.

While the draft agreement reflects a commitment to develop standard Terms of Reference, such Terms of Reference will not be used where they are not suitable for a particular action. The Terms of Reference specify the material to be contained in an Environmental Impact Statement in order for the proper assessment of an action to be undertaken. If the Environmental Impact Statement and / or assessment report do not contain sufficient information, the Minister may require additional information to be provided to determine whether any proposed actions will not have unacceptable or unsustainable impact on matters of national environmental significance.

8. Some submissions raised issues with interpretation or definitions used in the draft bilateral agreement, including

a. that the Queensland Environment Minister should be defined as the relevant Minister;
b. that ‘standard outcome focussed conditions’ should be defined to provide additional clarity;
c. that the meaning of ‘project control’ in clause 11(f) be further clarified; and
d. that the terms greater up-front guidance to industry and substantial modifications should be defined.

Some submissions further outlined that clauses and phrases in the draft agreement are formed in a broad or ambiguous manner.

Response

Specific to 8a above, the relevant Queensland Minister is defined as the Queensland Minister(s) responsible for the administration of the Queensland legislation and specified in Schedule 1 of the draft agreement. The relevant Minister will be the Minister responsible for the assessment of an action in a particular case under the relevant class of action. This definition is necessary in giving procedural and administrative effect to clauses in the draft agreement regarding the assessment process to be undertaken.

Further operational detail for the draft agreement will be included in the administrative arrangements.

Report on Public Comments on the Draft South Australian Assessment Bilateral Agreement

Overview

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**), a draft assessment bilateral agreement between the Commonwealth and the State of South Australia (the **draft agreement**) was published on 14 February 2014 with an invitation for any person to comment by 17 March 2014.

A number of the submissions received provided comments that were out of scope for the public consultation process on the draft assessment bilateral agreement. These comments primarily related to the approval bilateral agreement which constitutes the third step in implementing the one stop shop policy. While such comments are recorded and considered more broadly by the Department of the Environment in relation to the one stop shop policy, they have not been included as part of this report on public comments.

This report provides a summary of issues across all submissions, which will be published in full on the Department of the Environment's website after the agreement is finalised, except where the author has marked the submission, or parts of the submission, as confidential.

Public submissions

12 submissions were received on the draft assessment bilateral agreement.

1. South Australian Chamber of Mines and Energy (SACOME)
2. JBS&G
3. The Wilderness Society (South Australia) Inc.
4. Australian Network of Environmental Defender's Offices Inc.
5. Indigenous Advisory Committee
6. BHP Billiton
7. Minerals Council of Australia
8. Property Council of Australia
9. Primary Producers SA
10. Conservation Council SA
11. Southern Fleurieu Landholders Group
12. Nature Conservation Society of South Australia

'One stop shop' policy

All submissions made comment on the implementation of the Australian Government's 'one stop shop' policy. Submissions were both supportive and unsupportive of the policy and contained suggestions on improvements that could be implemented to better deliver the outcomes of the policy.

A number of submissions were broadly in support of the one stop shop policy as a means of generating greater streamlining for environmental assessment and approvals to reduce cost to industry, while at the same time recognising that high environmental standards will be maintained. Submissions in support of the policy welcomed the broadening of scope of the draft assessment bilateral agreement to include processes regulated under the *Mining Act 1971* (SA).

Some submissions also made suggestions to further extend the scope of the draft agreement, to include assessment processes under the:

- *Petroleum and Geothermal Energy Act 2000* (SA);
- *Natural Resources Management Act 2004* (SA);
- *Native Vegetation Act 1991* (SA); and
- *Environment Protection Act 1993* (SA).

In contrast, some submissions were not supportive of the one stop shop policy on the basis that environmental regulatory standards would be diminished under the policy. Some submissions commented that:

a. the federal government is the appropriate body to retain oversight of the regulation of national environmental matters;
b. there is scope for potential conflicts of interest for the South Australian Government where the State is both the proponent for the assessment of a proposed action and the decision-maker for the approval of the proposed action;
c. the South Australian Government has limited resources to manage the increased scope of the agreement;
d. EPBC Act requirements are inadequately reflected in the draft agreement; and
e. false and misleading offence provisions of the EPBC Act do not apply for activity that would be covered by the draft agreement.

Response:

The scope of the draft agreement would include the majority of developments declared 'major projects' in SA under the *Development Act 1993* (SA) and *Mining Act 1971* (SA) which may require an assessment for their impacts on matters of national environmental significance (**MNES**). Additional state processes will be considered in developing an approvals bilateral agreement.

Environmental standards will be maintained under the proposed agreement. The proposed agreement relates to the process for environmental assessment of matters under the EPBC Act, as contained within accredited state legislation. The proposed agreement reflects the relevant statutory requirements of the EPBC Act and the *Environment Protection and Biodiversity Conservation Regulations 2000* (**EPBC Regulations**) in relation to assessment bilateral agreements (including under Part 5 of the EPBC Act and Part 3 of the EPBC Regulations). The proposed agreement is not an approval bilateral agreement for the purpose of s 46 of the EPBC Act.

The proposed agreement will not reduce the Commonwealth's responsibilities under the EPBC Act with respect to MNES. Under the proposed agreement, the Commonwealth Environment Minister will still be required to make a decision on whether to approve a proposal that has or will have, or is likely to have a significant impact on MNES under the EPBC Act. This decision remains subject to the standing provisions for judicial review and offence provisions relating to the provision of false or misleading information contained within the EPBC Act. The proposed agreement also provides for close cooperation between the parties to ensure high environmental standards are being maintained and preserves the requirements contained in Subdivision B of Division 1 of Part 9 of the EPBC Act for the Commonwealth Environment Minister to have regard to certain matters, and to not act inconsistently with applicable plans, principles and conventions, when making a decision.

Clause 14 of the draft agreement refers to the scope to make minor amendments to the assessment bilateral agreement to facilitate improved efficiencies under the one stop shop

policy. Clause 14.1 would also provide for the parties to the assessment bilateral agreement to make improvements to the operation of the agreement over time.

The implementation of the assessment bilateral agreement would be overseen by a Senior Officers' Committee, representing both parties, established under draft clause 9.2. The administrative arrangements made under the proposed agreement will detail and provide for the establishment, operation and terms of reference of the Senior Officers' Committee. In addition assurance arrangements will be put in place to ensure ongoing compliance with the proposed agreement.

Potential conflicts of interest are unlikely to arise under the proposed bilateral agreement. In relation to actions where the State of South Australia is both the proponent and the decision-maker, the Commonwealth Environment Minister retains an obligation to make a decision on an action assessed under the agreement. The proposed agreement also contains obligations for South Australia to undertake an assessment of all relevant impacts of proposed actions to which the bilateral agreement applies.

The proposed agreement will replace the existing assessment bilateral agreement between the Commonwealth and the State of South Australia (the **existing agreement**). The existing agreement accredits specific classes of actions under the *Development Act 1993* (SA). This proposed agreement will increase the scope to accredit specific classes of actions assessed under the *Mining Act 1971* (SA) (Schedule 1 of the agreement). The Commonwealth is satisfied that the proposed agreement meets the relevant requirements of the EPBC Act.

Assessment of certain impacts

Some submissions expressed concern regarding inclusion of state assessment processes in relation to certain matters, including:

a. meeting national or international obligations;
b. assessing impacts of actions on matters of national significance, for example:
    i. nuclear actions;
    ii. actions impacting on Commonwealth marine areas;
    iii. actions impacting on water resources, including cumulative impacts, particularly in relation to coal seam gas or large coal mining actions;
    iv. actions impacting indigenous heritage; or
c. assessing actions that cross jurisdictional boundaries.

Response:

The Commonwealth is satisfied that the proposed agreement would allow for an adequate assessment of relevant impacts on MNES. The proposed agreement includes South Australian environmental assessment processes which meet the relevant requirements of the EPBC Act and Regulations for an agreement to be made.

Should the Commonwealth Environment Minister not be satisfied that:

- the agreement is being complied with, or
- assessment processes included under the agreement give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations,

sections 57-64 of the EPBC Act provide a mechanism by which the agreement can be cancelled or suspended. This is reflected in clause 13 of the proposed agreement. Section 65 of the EPBC Act also requires a review of the agreement at least once every five years

while the bilateral agreement is in effect. In addition, under clause 4.3, the Minister can also determine that an action is not within the scope of the proposed agreement.

To ensure the objectives of the proposed agreement are met in relation to integrated environmental assessment, the proposed agreement allows for actions on state land or in state waters that impact on Commonwealth land or the Commonwealth marine environment to be subject to assessment. The existing agreement also allows for such indirect impacts to be the subject of a bilateral assessment. The proposed agreement would not affect the Commonwealth's responsibility for the assessment and decision on approval of actions occurring wholly within Commonwealth marine areas, on Commonwealth land or by Commonwealth agencies.

The proposed agreement only applies to actions wholly within South Australia, including its coastal waters (clause 4.2(a)).
The EPBC Act provides that coal seam gas or large coal mining development that may have a significant impact on a water resource may be the subject of an assessment bilateral agreement. Clause 6.4(d) of the proposed development requires that South Australia obtain advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development in preparing an assessment report for such a development.

The proposed agreement recognises the important role of Indigenous people in promoting conservation and the ecologically sustainable use of natural resources. In particular, clause 7.2(c)(ii) specifies that the views of Indigenous peoples will be treated as the primary source of information on the value of Indigenous cultural heritage. In response to a submission from the Indigenous Advisory Committee, clause 6.7(b) of the proposed agreement provides that the final assessment report will provide additional information on social, *cultural* and economic matters. This recognises that cultural matters may also be a relevant consideration for the Commonwealth Minister in making a decision under Part 9 of the EPBC Act.

Bilateral assessment processes

Submissions expressed either support for or concern about South Australia's assessment processes, and the ability to maintain high environmental standards under those processes. In particular, some submissions included comments relating to:

a. the processes to be accredited including:
    i. the ability of certain processes under the *Mining Act 1971*(SA) to deliver the required environmental outcomes;
    ii. the capacity of the state department to conduct adequate assessment under the *Mining Act 1971* (SA);
    iii. ensuring *Mining Act 1971* (SA) processes are correctly correlated to EPBC Act assessment approaches;
    iv. the environmental impact assessment (EIA) process under the *Development Act 1993* (SA)*;*
    v. inclusion of section 47 of the *Development Act 1993* (SA) in relation to amendment of EIS, PER or DR under the draft bilateral agreement; and
    vi. review options under the *Development Act 1993* (SA) and *Mining Act 1971* (SA).
b. SA capacity to provide adequate assessment documentation, in particular:
    i. capacity to prepare the assessment report;
    ii. ability for SA to proceed to finalising assessment report without responding to a request for further information from the Commonwealth Minister;

c. public comment requirements satisfying EPBC Act requirements for nation-wide consultation;
d. inclusion of legislation lacking reference to ecologically sustainable development; and
e. interaction of other South Australian legislation with the draft agreement, including the *Roxby Downs (Indenture Ratification) Act 1982* (SA).

Response:

Accredited processes

Retention Leases (RLs) under the *Mining Act 1971* (SA) are granted mostly in cases where, in the opinion of the Minister, economic or other reasons justify not proceeding immediately to mining activity.

RLs may be granted for a range of activities, including:

- desk top studies;
- further market analysis;
- advanced exploratory activities seeking additional information on an ore body (e.g. to better determine methods of mining).

If activities on a RL may trigger the EPBC Act, then under the proposed agreement the activity would need to be assessed in accordance with the requirements in Item 4 of Schedule 1. These requirements reflect EPBC Act requirements and would ensure that the appropriate level of rigor for environmental impact assessment is achieved.

The *Mining Regulations 2011* (SA) require inclusion of an environmental assessment in an Exploration Program for Environment Protection and Rehabilitation (PEPR), which is to be submitted and approved by the Minister before mining may commence under a condition of lease. The Exploration PEPR process would therefore maintain the quality of assessment of impacts on matters of national environmental significance (MNES). The Production PEPR process however is not an environmental assessment process. Rather it describes the criteria that will be used to demonstrate achievement of the environmental outcomes developed through the Mining Lease Proposal (MLP) process, and the associated monitoring program. Accordingly, a minor amendment has been made to Schedule 1, Item 2.1(d)(iv) of the draft agreement, to clarify that it relates to Exploration PEPRs only and not to Production PEPRs.

The draft agreement will apply to any developments declared 'major projects' under the *Development Act 1993* (SA) and *Mining Act 1971* (SA) and as such it will trigger the requirement for an Environmental Impact Statement (EIS), Public Environment Report (PER) or Development Report (DR) under Part 4 Division 2 of the *Development Act 1993* (SA). Division 2 of Part 4 of the *Development Act 1993* (SA) includes sections 46 to 48E inclusive, under which the Minister declares a major development or project, and decides on assessment by either EIS, PER or DR and states how that assessment will be undertaken.

Any major development or project assessment would be made under Division 2 of Part 4 of the *Development Act 1993* (SA), as modified by the *Roxby Downs (Indenture Ratification) Act 1982* where applicable. The draft agreement allows for the process to be undertaken by South Australia in accordance with the *Development Act 1993* (SA) and the draft agreement. Relevant parts of the *Roxby Downs (Indenture Ratification) Act 1982* (SA) (clauses 7, 28, and 48) are covered by the draft agreement.

A minor amendment to Item 3 of Schedule 1 (Class of actions under the *Development Act 1993* (SA)) has been made to clarify that where the assessment of a controlled action under an assessment approach described at Item 2.1(b) of Schedule 1 is on the basis of an application made to the Minister responsible for the administration of the *Roxby Downs (Indenture Ratification) Act 1982* (South Australian Indenture Minister), then the activities that are required to be taken by either or both of the Development Assessment Commission and the SA Minister under Item 3 of Schedule 1, may instead be taken by the South Australian Indenture Minister.

Environmental assessments under the draft agreement

The EPBC Act and Regulations set out requirements and standards relating to assessment bilateral agreements. The draft agreement includes South Australian environmental assessment processes that meet the requirements of the EPBC Act and Regulations.

A thorough analysis of the South Australian legislation included under the draft agreement against the requirements of the EPBC Act and Regulations was undertaken. For each class of actions, the analysis confirmed that the relevant South Australian process, in conjunction with the specified manner of assessment set out in Schedule 1 to the draft agreement, met these requirements.

Under the proposed agreement, the Commonwealth Environment Minister will still decide whether to approve a proposal that affects MNES under the EPBC Act. This decision remains subject to judicial review.

The proposed agreement also provides for close cooperation between the parties to ensure high environmental standards are being maintained. These include the following:

- Detailed requirements for content of assessment reports, to ensure adequate assessment of impacts, under clause 6.4 of the proposed agreement.

- Under clause 6.6 of the proposed agreement, the Commonwealth Minister may provide comment on a draft assessment report.

- Detailed administrative arrangements and the establishment of a senior officers committee, under clause 9.1 and 9.2 of the proposed agreement.

- Detailed review and audit provisions to ensure the effectiveness of the operation of the proposed agreement under clauses 10 and 11.

- Under clause 14.1 of the proposed agreement, both parties will notify and consult each other on matters that come to their attention that may improve the operation of the proposed agreement to ensure continuous improvement of the operation of the agreement by both parties.

Under the proposed agreement, SA is required to provide the Commonwealth Minister with sufficient information about the relevant impacts of the action to allow the Minister to make a properly informed decision under Part 9 of the EPBC Act. The Commonwealth Environment Minister is satisfied that the processes in Schedule 1 will further the objects of the proposed agreement and meet the requirements for accreditation under Part 5 of the EPBC Act.

Further comments

1(a). A number of submissions suggested changes to specific clauses in the draft agreement, in particular clause 6:

a. Clause 6.4(b): clarification on nature of 'statement' to be provided by proponent;
b. Clause 6.4(e): optional provision of advice between SA and Commonwealth agencies;
c. Clause 6.5(b): concern over the use of generic terms of reference;
d. Clause 6.6(a): clarification of the Commonwealth's role in condition setting;
e. Clause 6.6(d)(ii): ability of the state to proceed to a final assessment report without consideration of Commonwealth advice; and
f. Clause 6.9: relevant plans and policies to be considered in preparing an assessment report.

1(b). Additional comments in relation to other clauses of the draft agreement included:

g. Clause 4.2(c): the agreement should be extended to cover the assessment of actions in Commonwealth areas;
h. Clause 4.3(b): inability of Commonwealth Minister to exercise discretion under Clause 4.3(a) once a notice has been given by the State Minister under Clause 5.3(a);
i. Clause 5.1: SA to ensure a proponent refers appropriate actions for assessment under the draft agreement to SA;
j. Clause 7.2: standards for engaging Indigenous peoples under assessment processes;
k. Clause 8.1(c): approach to minimisation of duplication of condition setting;
l. Schedule 1 – Item 2.1(e): assessment methods under the *Mining Act 1971* being correctly referenced;
m. Schedule 1– Item 3.4: improvement of access to public comment.

Response:

In response to public comments, some changes have been made, in particular:

- a change to clause 6.7(b) of the draft agreement in response to comments from the Indigenous Advisory Committee;

- a change to clause 6.4(b) of the draft agreement to clarify the reference to a 'statement' in that clause;

- a change to Item 2.1(d)(iv) of Schedule 1 to specify that actions assessed under Part 10A of the *Mining Act 1971* (SA), which includes a program under section 70B of the *Mining Act 1971* (SA) relates to Exploration Programs for Environment Protection and Rehabilitation only and not to Production Programs for Environment Protection and Rehabilitation;
- a change to Item 2.1 of Schedule 1 (class of actions under the *Development Act 1993* (SA)) to clarify that certain functions otherwise performed by the South Australian Planning Minister, the South Australian Major Developments Panel, or the South Australian Development Assessments Commission in relation to the *Roxby Downs (Indenture Ratification) Act 1982*, will instead be performed by the South Australian Indenture Minister; and

- Minor technical correction to the definition of Matter of NES.

Responses to other comments on specific clauses where changes to the agreement were not made are outlined below.

The proposed agreement only applies to controlled actions for the purposes of the EPBC Act (clauses 6.1 and 7.1). Such actions are confined to actions that have or will have, or are likely to have a significant impact on MNES. Projects that will not have such impacts are out of scope of the proposed agreement.

Clause 6.4(e) of the proposed agreement is supported by clause 9 relating to cooperation between the parties, including in relation to the exchange of information. Clause 6.4(e) will be further supported by administrative arrangements which will further detail the roles and responsibilities of each of the parties and may include guidelines for the exchange of information (clauses 9.1(a) and (c)).

Clause 6.5(b) notes that the parties' endeavours to improve the efficiency and effectiveness of their own administrative processes will include, but are not limited to, the use of common streamlined generic terms of reference for assessments. It is not intended that this will preclude the implementation of project specific terms of reference, where required.

Under clause 6.6 of the draft agreement, the Commonwealth Minister has the opportunity to provide comment on the report at its draft stage, prior to finalisation. The Commonwealth Minister is aware of the timeframes involved in providing comment on assessment reports and conditions (clause 6.6(c)) as well as the requirements for continued co-operation between the Commonwealth and SA in the preparation of assessment reports and, overall, ensuring the effective operation of the agreement (clauses 6.6(a) and 9).

Clause 6.9(b) is intended to ensure recovery plans, as prepared by the Commonwealth in accordance with the EPBC Act, are considered by SA in the preparation of assessment reports on relevant impacts under the proposed agreement. Clause 6.9 only applies where a proposed action is a 'controlled action' for the purposes of the EPBC Act.

Clause 4.2(c) is consistent with the requirements of section 49 of the EPBC Act. The proposed agreement allows for actions on State land or in State waters that impact on Commonwealth land or the Commonwealth marine environment to be assessed bilaterally. The Commonwealth will retain an assessment and approval role for actions occurring wholly within Commonwealth waters and marine areas, on Commonwealth land or by Commonwealth agencies.

In the event that contention arises over clause 4.3(b), clauses 12 and 13 of the proposed agreement can apply. Further, an assurance framework is being prepared which will set out how the Commonwealth will satisfy itself that the one stop shop policy is implemented appropriately by the States and Territories.

Clause 5.1(a) requires the Commonwealth to work in co-operation with SA to ensure proponents are aware of requirements of the EPBC Act in relation to the referral of actions. The requirements of clause 5.1(a) will be supported by transitional arrangements, under clause 2(c) and the administrative arrangements which will facilitate the operation and outcomes of the proposed agreement (clause 9).

The proposed agreement recognises the important role of Indigenous people in promoting the conservation and the ecologically sustainable use of natural resources. Consultation

with statutory bodies under the EPBC Act will continue to occur in line with specified legislative requirements.

Clause 7.2 of the proposed agreement provides for consideration of Indigenous peoples in the preparation of assessment reports (clause 7.2(c)). In addition, any actions assessed under the *Mining Act 1971* (SA) that are within the scope of the assessment bilateral agreement will trigger Part 9B of the *Mining Act 1971* (SA) which contains requirements in relation to negotiations on native title land (clause 7.2(d)).

Clause 8.1(c) of the proposed agreement proposes an approach to the minimisation of duplication in condition setting such that the Commonwealth will work with SA to address any gaps in MNES conditions set under the EPBC Act, resulting in a single set of conditions. It is intended that this clause be exercised in instances where projects may fall outside of model conditions, as developed jointly by the Commonwealth and SA to address MNES. As the agreement is not a legally binding instrument (clause 2(b)), section 134 of the EPBC Act will continue to apply to provide the Commonwealth Minister the requisite statutory discretion, where required. In addition, clause 8.2 contains requirements for both parties to monitor compliance with conditions to ensure high environmental standards are being maintained.

Item 3.4 of Schedule 1 satisfies the requirements of the EPBC Regulations and is to be read in conjunction with the requirements of clause 7, which accounts for particular communication needs.

2. Some submissions made further comment on the coverage of MNES under the draft agreement, either suggesting an increase or decrease in scope of coverage. The treatment of the following MNES matters were raised:

i) nuclear actions: some submissions raised concerns about the inclusion of this matter for state assessment;
ii) Ramsar wetlands: ability of South Australia to manage Ramsar wetlands in accordance with Ramsar principles;
iii) threatened species and ecological communities: concerns over the protection and improvement of listed species and communities;
iv) listed migratory species: concerns over protection of conservation status; and
v) World Heritage: management of world heritage properties within SA.

Response:

The expanded scope of the proposed agreement does include nuclear actions.

In addition, the EPBC Act contains penalty provisions for nuclear actions that have, will have or are likely to have significant impacts on the environment.

Clause 6.4 of the proposed agreement contains detailed requirements, in accordance with the requirements of the EPBC Act and Regulations, to ensure that there is an adequate assessment of the impacts of actions on MNES.

Clause 9.5(a) of the proposed agreement commits the Commonwealth and SA to jointly develop guidance documents relating to the assessment of MNES under the agreement. Clause 9.5(b) specifies that guidance documents may include:

- referral and application guidelines relating to significant impacts on MNES;
- guidance documents for listed threatened species and ecological communities; and

- other relevant documents relating to MNES prepared by the Commonwealth under the EPBC Act that falls within the scope of the proposed agreement.

It remains the responsibility of the Commonwealth Minister under the proposed agreement to ensure that Australia's international obligations are being met. Should the Commonwealth Minister not be satisfied that the agreement is being complied with, or that assessment processes included under the draft agreement give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations (e.g. Ramsar Convention and world heritage principles), sections 57-64 of the EPBC Act provide a mechanism by which the agreement can be cancelled or suspended. This is reflected in clause 13 of the proposed agreement. Section 65 of the EPBC Act also requires a review of the agreement at least once every five years while the bilateral agreement is in effect, as reflected in clause 10 of the proposed agreement.

3. Some submissions raised further opportunities in relation to streamlining in the draft bilateral agreement. In particular:

a. specification of timeframes for the preparation of assessment reports and determination of approval decisions; and
b. consideration of strategic assessments under the draft assessment bilateral.

Additional suggestions for improved operation of the assessment bilateral included expanded public access to information.

Response:

The Australian and SA Governments will continue to work collaboratively to further streamline environmental regulation, as permitted under national environmental law. The administrative arrangements between the parties will establish procedures to ensure assessments under a bilateral agreement are conducted in an efficient and timely manner (clause 9).

Clause 7.3 notes that documentation about assessments will be made available to the public. Timeframes on public comment periods for accredited processes are specified in Item 3.4 of Schedule 1 of the proposed agreement. In addition, clause 9 supports the administration of the proposed agreement and also establishes improved information sharing arrangements between parties.

The proposed agreement relates to assessments under Part 8 (assessing impacts of controlled actions) of the EPBC Act. It is not intended to include assessments under Part 10 (strategic assessments) of the EPBC Act.

4. Additional measures to support the one stop shop policy were suggested or commented on by a number of submissions. These included:

a. administrative arrangements to facilitate and assist SA to manage the single assessment process;
b. aligning of SA and Commonwealth offsets policies; and
c. appropriate resourcing.

Response:

Clause 6.4(c) of the proposed agreement outlines detailed criteria that SA will ensure are included in the assessment report to ensure that a single assessment can be relied upon by

the Commonwealth Minister in making a decision under Part 9 of the EPBC Act. In addition, the administrative arrangements will support the ability of SA to deliver a single assessment approach.

Clause 6.9(a) of the proposed agreement notes that the Commonwealth EPBC Act Environmental Offsets Policy is to be considered by SA in the preparation of assessment reports. In relation to SA offset outcomes that do not align with the Commonwealth Offsets Policy, parties are to consult to produce appropriate recommendations in the assessment report (clause 6.9(a)).

The Commonwealth will consider provision of transitional and ongoing support to SA, to be further detailed in the administrative arrangements, to facilitate the operation and outcomes of the agreement.

Changes made to the draft agreement:
Minor technical amendments were made to the agreement in response to the submissions, outlined further above.

Report on Public Comments on the Draft Tasmanian Assessment Bilateral Agreement

Overview

In line with the Commonwealth 'One-Stop Shop' policy and as required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), the draft assessment bilateral agreement (the agreement) between the Commonwealth and Tasmania was published on 18 July 2014 with an invitation for any person to comment by 15 August 2014. This report summarises and provides responses to issues raised through this process and is a report for the purpose of section 45(4)(c) of the EPBC Act.

Three submissions were received on the agreement:

1. Minerals Council of Australia
2. Property Council of Australia
3. Environmental Defenders Office (Tas)

Each submission made various general observations about the agreement. These included:

- support for streamlining and improved coordination of Tasmanian and Commonwealth assessment processes;
- opportunities to minimise delays and reduce approval timeframes through the agreement;
- concern at reduced Commonwealth involvement in management and assessment of environmental issues in Tasmania; and
- concern at the resourcing burden imposed on Tasmania by the agreement.

Issues

The Property Council of Australia and the Environmental Defenders Office (Tas) (EDO) made specific comment on the content of the agreement, including suggested amendments. These comments addressed the following issues:

- alignment of the objects of the agreement with the objects of the EPBC Act;
- the scope of the agreement in relation to accredited assessment processes;
- the plans and policies requiring consideration by Tasmania under the agreement;
- the content and adequacy of assessment documentation prepared by Tasmania under the agreement;
- capacity of the Commonwealth to impose approval conditions under the agreement;
- operation and transparency of the administrative arrangements and the Senior Officers' Committee (which are to be established to assist in implementation of the agreement); and
- need for transitional support from the Commonwealth to Tasmania to implement the agreement.

Some comments were directed at matters beyond the provisions of the agreement and related to the 'One-Stop Shop' policy or the operation of the EPBC Act more generally. Other comments suggested minor or technical changes to the agreement to clarify the meaning of different clauses.

Response

The Commonwealth's 'One-Stop Shop' policy will put in place measures to maintain high environmental standards, while reducing regulatory duplication across jurisdictions.

The agreement relates to the process for assessment of impacts on matters of national environmental significance under the EPBC Act. The agreement reflects the statutory requirements of the EPBC Act and the *Environment Protection and Biodiversity Conservation Regulations* 2000 (EPBC Regulations) in relation to assessment bilateral agreements.

In relation to comments received on the content of the agreement:

- Consistent with section 50(a) of the EPBC Act, the agreement accords with the objects of the EPBC Act. The agreement accredits Tasmanian assessment processes under the *State Policies and Projects Act 1993* (Tas), *Land Use Planning and Approvals Act 1993* (Tas) and *Environmental Management and Pollution Control Act 1994* (Tas). A thorough analysis was undertaken of the agreement and each relevant assessment process against the requirements of the EPBC Act and EPBC Regulations. The analysis confirmed that each process, in conjunction with the specified manner of assessment set out in Schedule 1 to the agreement, met these requirements.
- In undertaking an assessment under the agreement, Tasmania must consider Commonwealth guidelines and policies, such as recovery plans, conservation advices and threat abatement plans (Clause 6.8). Clause 6.8 remains inclusive rather than exclusive, such that plans and policies are to be considered where relevant. In response to a comment from the EDO, clause 6.8 has been amended to include explicit reference to management plans for World Heritage properties, National Heritage places and declared Ramsar wetlands.
- Under the agreement, the Commonwealth Minister can comment on the assessment report prepared by Tasmania, prior to finalisation (clause 6.5). The Commonwealth Minister can also request or use additional information in relation to the proposal under assessment before making an approval decision (section 132 and section 136(2)(e) of the EPBC Act).
- Under the agreement, the Commonwealth Minister will still be required to make a final approval decision on each proposal and to impose approval conditions if deemed necessary. The agreement requires the Commonwealth and Tasmania to avoid duplicative or inconsistent approval conditions, to the extent possible (clause 8.1).
- The administrative arrangements between the parties will include mechanisms for communication, review, oversight and information sharing (clause 9.1). The administrative arrangements will also detail and provide for the establishment and operation of the Senior Officers' Committee (clause 9.2). The administrative arrangements will be made publicly available when finalised. In response to a comment from the EDO, clause 9.1 has been amended to further clarify the purpose of the administrative arrangements.
- The agreement will accredit Tasmanian assessment processes, and replaces an existing assessment bilateral agreement. The agreement does not affect requirements for the Commonwealth Minister to make a final approval decision in relation to matters of national environmental significance. It is not anticipated that the agreement will impose a significant resource burden on Tasmania. As part of the broader 'One-Stop Shop' reform the Commonwealth has also offered to provide transitional support to state and territory agencies in the form of embedded officers on a temporary basis, to ensure implementation occurs as smoothly as possible.

Report on Public Comments on the Draft Victorian Assessment Bilateral Agreement

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), a draft assessment bilateral agreement between the Commonwealth and the State of Victoria was published on 5 September 2014 with an invitation for any person to comment by 3 October 2014 (28 days).

This report provides a summary of issues across all submissions for the purposes of section 45(4)(c) of the EPBC Act. The submissions will be published in full on the Department of the Environment's website after the agreement is finalised, except where the author has marked the submission, or parts of the submission, as confidential.

A number of the submissions received provided comments that were out of scope for the public consultation process. These comments primarily related to the approval bilateral agreement which constitutes the third step in implementing the One-Stop Shop policy. While such comments are recorded and considered more broadly by the Department of the Environment in relation to the One-Stop Shop policy, they have not been included as part of this report on public comments.

Ten submissions were received on the draft assessment bilateral agreement (the agreement) within the statutory consultation period. Submission six will not be published as it contains information which is considered private and confidential by the author.

1. Save Tootgarook Swamp Inc.
2. Minerals Council of Australia, Victorian Division
3. Preserve Western Port Action Group
4. Hume City Council
5. Biodiversity Planners Network Special Interest Group (BPN)
6. Brimbank City Council (**Confidential**)
7. Trustpower Limited
8. Maurice Schinkel
9. Environmental Justice Australia
10. Beacon Ecological

1. Accredited assessment processes

Submissions expressed both concern and support for Victoria's assessment processes specified in Schedule 1 of the agreement, and the ability to maintain high environmental standards under those processes. In particular, concerns were raised regarding the adequacy of the processes to ensure an adequate assessment of the impacts of actions on matters of national environmental significance (**matters of NES**).

Some submissions stated that an agreement should only be entered into once certain requirements have been met including:

- state environmental laws and policies are amended to meet national best practice environmental standards, that accord with the objects of EPBC Act, and are at least commensurate with the EPBC Act protections, and
- removal of the *Environment Effects Act 1987* (Vic) from the agreement until new laws have been made in accordance with a recent Victorian Government review of this Act.

While some submissions expressed support for the intention to cover a wide range of assessment types and moving to a single assessment process, concerns were expressed about particular assessment processes, specifically:

- that the assessment processes under Victorian legislation were unnecessarily long and onerous when compared with the processes of other states or the processes set out under the EPBC Act, and
- that the comprehensive impact statement (CIS) process under the *Major Transport Projects Facilitation Act 2009* (Vic) should not be accredited due to the hypothetical nature of the assessment, which can result in a project being approved that may or may not have the impacts that were assessed, and may not stay within the footprint proposed. The East-West link freeway development was used as example of a flawed assessment process.

It was also stated that Victoria should agree to 'not act inconsistently with' relevant policies, rather than the requirement to take such policies into account, to ensure that assessments meet the requirements of the EPBC Act. Further, it was stated that the Commonwealth should agree on the method of assessment undertaken by Victoria for each proposed action under the agreement.

Some submissions stated that there should be commitments in the agreement that, when seeking to align Commonwealth and state conditions as per clause 8.1, avoiding and minimising impacts will remain the primary objective, and the ability to impose conditions necessary to meet the objectives of the EPBC Act and protect matters of NES should be retained.

There was also concern about potential for state assessments to be delegated to local government, and that there should be assurances and processes in place in the agreement to ensure adequate consultation with local government and the private sector on a range of factors, including the development of relevant plans and policies.

Government response

The agreement would accredit Victorian environmental assessment processes where those processes meet the requirements of the EPBC Act and Regulations. The agreement also provides for close cooperation between the parties to ensure environmental standards are being maintained.

Further, clause 9 of the agreement provides that the parties agree to take steps to improve the efficiency and effectiveness of their own administrative processes to the greatest extent possible, including by providing industry data from environmental impact statements to the public.

In relation to conditions of approval, clause 6.4 and 8 outline the objective to impose a single set of outcome focussed conditions and to avoid, to the greatest extent possible, the need for additional conditions imposed by the Commonwealth Environment Minister in approving an action. This does not limit the Minister from setting additional conditions of approval, should he consider it appropriate to do so.

In relation to Victoria's cooperation with, and the potential for delegation to local government, the assessment bilateral agreement with Victoria accredits processes set out in or under Victorian legislation. Any substantial changes to these processes will require amendments to the agreement, and subsequent public comment.

The agreement provides robust obligations for Victoria to undertake an assessment of all relevant impacts of proposed actions to which the agreement applies. Under section 132 the EPBC Act, the Environment Minister may also request further information if the Minister believes that he or she does not have enough information to make an informed decision on whether or not to approve the action.

Should the Commonwealth Environment Minister not be satisfied that the agreement is being complied with, or that assessment processes accredited under the agreement do not give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations, sections 57-64 of the Act provide a mechanism by which the agreement can be cancelled or suspended. Section 65 of the EPBC Act also requires a review of a bilateral agreement at least once every five years while the agreement is in effect.

2. National consistency and role of the Commonwealth

Some submissions stated that the separate Commonwealth and Victorian assessment processes provided important checks and balances.

Some submissions stated that it would be more logical for the State to hand powers to the Commonwealth to avoid conflicts. This would enable all data to be captured under a single system and provide a uniform approach across the country.

Some submissions stated that EPBC Act processes are viewed as providing certainty and consistency nationally. It was stated that the reform will result in an inconsistent approach to environmental assessments between jurisdictions due to differences between accredited processes and bilateral agreements. Some submissions stated a preference for the Commonwealth maintaining powers and a leadership role, and establishing best practice environmental standards across all jurisdictions.

Concern was expressed that the agreement will reduce the overall focus on maintaining high environmental standards and will not protect matters of NES within a region. Submissions stated that this would undermine a key function of the EPBC Act in providing confidence in decision-making relating to matters of NES.

It was stated in some submissions that negotiation of the agreement could have lifted state processes to a higher standard and created national consistency, but that it has failed in this respect.

Government response

The EPBC Act and Regulations set out the requirements and standards relating to assessment bilateral agreements. The proposed agreement accredits Victorian environmental assessment processes where those processes meet the requirements of the EPBC Act and Regulations. The proposed agreement provides for close cooperation between the parties to ensure environmental standards are being maintained. The difference in the presentation of the assessment bilateral agreements with different jurisdictions reflects different state assessment processes. All agreements are drafted to meet consistent standards and the requirements of the EPBC Act and Regulations.

The agreement does not change the Commonwealth's responsibility and powers under the EPBC Act in relation to the approval of actions, monitoring of compliance, and enforcement measures. Should the Commonwealth Environment Minister not be satisfied that the agreement is being complied with, or that assessment processes accredited under the agreement do not give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations, sections 57-64 of the EPBC Act provide a mechanism by which the agreement can be cancelled or suspended. Section 65 of the EPBC Act also requires a review of the agreement at least once every five years while the bilateral agreement is in effect.

3. Capability of the State to administer Commonwealth law and protect matters of NES

Some submissions expressed concern that Victoria is not adequately resourced to administer Commonwealth law or lacked the capability required to assess matters of NES. Reasons provided were:

a. strained state resources; and
b. inadequacies of the state mapping system, specifically that it is inaccurate, lacks integrity at the property level, and is insufficient for the identification and assessment of matters of NES. To address these concerns, it was recommended that targeted surveys and site assessments be carried out for each EPBC Act assessment.

Submissions supported the review provisions of the agreement, however some submissions stated that a three year review period would be more appropriate than a five year period. Other submissions considered that the Commonwealth should prioritise an audit of state compliance with agreements to date.

There was support for the commitment in clause 9.5 to develop guidance documents, and some submissions stated that such documents should be developed for each threatened species, with the input of technical experts, advisory committees, independent groups and local government through the Municipal Association of Victoria. It was suggested that such documents should also be publicly available.

Government response

The proposed agreement would accredit Victorian environmental assessment processes only where those processes meet the requirements of the EPBC Act and Regulations. The agreement provides for an adequate assessment in relation to matters of NES by specifying the matters that Victoria must assess, and ensures that Victoria will take into account information provided under a strategic assessment and relevant statutory guidelines, policies, plans and instruments when preparing assessment reports on relevant impacts in relation to a proposed action. This includes, where relevant, a recovery plan for a relevant listed threatened species or ecological community, any relevant approved conservation advice and any relevant threat abatement plan (clause 6.8(a)). These documents are publicly available on the Department of the Environment's website.

The agreement does not change the Commonwealth's responsibility and powers under the EPBC Act in relation to the approval of actions. The Commonwealth Minister must not approve an action that is likely to have unacceptable or unsustainable impacts on matters of NES.

Section 65 of the EPBC Act requires a review of the agreement at least once every five years while the bilateral agreement is in effect. Additional reviews of the agreement may be undertaken if required to measure the operation and effectiveness of the Agreement.

4. Further streamlining opportunities

There was general support in submissions for the alignment of administrative processes, and both support and opposition to the intention, as stated in object G of the agreement, to develop an approval bilateral agreement by the end of 2014. Some were of the view that it would be more prudent to delay until a comprehensive review of the assessment bilateral agreement is undertaken, to ensure that outcomes are being met, and a determination can be made of the state's capacity to apply the assessment bilateral agreement.

There was support for the ability to make minor amendments to the agreement without impacting its operation. It was recommended that any further streamlining or delegation of responsibilities should be subject to consultation with local government and the public more broadly to ensure that a robust and transparent system is established.

Submissions also stated the need for stakeholder engagement, including local government, ecological consultants, technical experts, and non-government organisations for future steps and the development of supporting documentation.

Government response

The Australian and Victorian Governments will continue to work collaboratively to further streamline environmental regulation, as permitted under national environmental law. A staged approach is being taken to any further streamlining opportunities to ensure that any further proposals meet the high environmental standards of the EPBC Act.

The parties aim to ensure that this process is clear and consistent for proponents and the community. Any consideration of further streamlining under a bilateral agreement will be subject to the public consultation and participation requirements of the EPBC Act. An approval bilateral agreement will only be entered into if the agreement and any authorisation processes proposed for accreditation meet the standards of the EPBC Act and the state can demonstrate that the expected outcomes will be met.

5. Transparency and conflicts of interest

Submissions outlined significant concerns about the potential for conflicts of interest where the Victorian Government is the proponent of an action or has a financial interest in the action. These submissions indicated that the Commonwealth should retain the role of assessing such actions or that additional assurances were required in order to ensure that such projects would be independently assessed via a rigorous and transparent process. The Port of Hastings development was cited as an example where the state will have a conflict of interest in assessing the expansion, and under the proposed arrangements in the agreement, there will be less effective checks and balances to ensure a rigorous assessment process.

In regard to the assessment method outlined in Items 2.1(d) and 6 of Schedule 1 to the agreement (assessment by an advisory committee under the *Planning and Environment Act 1987* (Vic)), there were some concerns that the process for electing members to an advisory committee were not clear. Further, submissions stated that the nomination process should be made public to ensure a rigorous assessment of impacts on matters of NES is made by suitably qualified scientific experts.

Submissions also stated that the administrative arrangements be made publicly available, for consultation or once finalised, to improve transparency.

Government response

The situation of one part of government being responsible for assessing an action proposed by another part of government is not unusual. For example, the EPBC Act allows the Commonwealth Environment Minister to assess and make decisions on actions proposed by another Commonwealth department, agency or other entity. To ensure such processes are adequate and free from bias, relevant assessment documentation must be made available for public comment. The same is true under an assessment bilateral agreement.

6. Enforcement and compliance

Whilst a number of the submissions supported improved coordination in enforcement and compliance activities, some submissions called for the Commonwealth to maintain a strong role in compliance and enforcement and the ability to review the agreement and assessment processes. There was further concern expressed in regard to delegated enforcement and compliance responsibilities. In particular, there was concern that further delegation of enforcement and compliance activities to local government—as is the current arrangement for state matters—would require additional resourcing to ensure that environmental outcomes are maintained.

Government response

The Australian Government retains compliance responsibility for actions that breach the EPBC Act. The agreement seeks to improve cooperation on enforcement and compliance activities, where projects require assessment and approval under both the EPBC Act and relevant Victorian laws. This is to ensure that enforcement and compliance activities are not duplicated, and are to the greatest extent practicable consistent and effective.

7. Cooperation

A number of submissions were generally supportive of provisions for greater cooperation between the Commonwealth and Victoria; in particular, the establishment of a Senior Officials Committee, transitional support from the Commonwealth and ongoing access to Commonwealth expertise. There was also support for greater access to information and improved information sharing between the Commonwealth, Victoria and project proponents; however some submissions stated that certain information will need to remain confidential.

Government response

The agreement is intended to promote greater access to environmental information, and improve information flow so as to streamline state and Commonwealth environmental assessment and approval processes. In line with existing requirements, project proponents will not be required to make information which is confidential in nature publicly available as part of environmental assessment processes.

8. 'Call-in' of projects under the assessment bilateral agreement

Some submissions stated that the Commonwealth should not be prevented from 'calling in' projects after a decision has been made that the assessment bilateral agreement will apply to a particular assessment. As such, it was suggested that clause 4.3(b)(ii)—restrictions on determination that an action is not within a class of actions—should be removed from the agreement.

Government response

Clause 4.3 of the agreement allows the Minister to exclude a particular action from being assessed under the agreement. The intent of clause 4.3(b)(ii) is to provide certainty to proponents and ensure that assessments are not unnecessarily delayed, after a decision has been made as to whether the agreement will apply.

Clause 13 of the agreement provides that the Commonwealth Minister may cancel or suspend all or part of the agreement under certain circumstances; in particular, where the objects of the agreement are not being met.

Further, under an assessment bilateral agreement, the Commonwealth Minister remains the approving authority. Any assessment undertaken as part of the agreement must be sufficient to allow the Commonwealth Minister to have sufficient information to make an informed decision whether or not to approve the proposed action and, if so, under what conditions.

REPORT ON PUBLIC COMMENTS ON THE DRAFT WESTERN AUSTRALIA ASSESSMENT BILATERAL AGREEMENT

OVERVIEW

The assessment bilateral agreement (the agreement) between the Commonwealth and Western Australia (WA) is one aspect of the Commonwealth Government's 'one-stop-shop' policy. The agreement provides for the accreditation of WA processes to enable an integrated approach to the assessment of actions requiring approval from both the Commonwealth and WA.

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (EPBC Act), a draft agreement was published on 29 May 2014 with an invitation for any person to comment by 27 June 2014. Before entering into the agreement, the Commonwealth Environment Minister is required by section 49(A)(b) of the EPBC Act to take into account any public comments received in response to that invitation.

This report provides an overview of issues, both general and specific, that were raised in public submissions. The report also details amendments made to the agreement arsing from public comments.

A total of 20 submissions were received from industry, community groups, professional organisations and individuals (see Attachment A). Thirteen submissions were either substantially supportive or supportive of elements of the agreement. Seven submissions were generally unsupportive. A number of the submissions provided comments that did not relate directly to the assessment bilateral agreement. Submissions will be published on the Department of the Environment's website, except where the author has marked the submission or parts of the submission as confidential.

SUMMARY OF ISSUES RAISED

Many of the submissions raised general concerns regarding the agreement, including:

- whether the WA assessment process can adequately address matters of national environmental significance (MNES), including the resourcing and capacity of WA agencies;
- the ongoing role of the Commonwealth in relation to WA assessment processes, including clarity on the Commonwealth's role once the agreement is implemented and concerns over a possible lack of a Commonwealth role in cross jurisdictional assessments and a national perspective; and
- the potential for perceived conflict of interest due to possible state economic interests in projects being assessed.

Comments in relation to specific content of the agreement addressed issues including the following:

- the scope of WA assessment processes covered by the agreement, including arguments for either narrower or broader scope;
- consultation on assessment reports, including between WA and the Commonwealth;
- consultation and engagement with Indigenous people and communities;
- further opportunities to reduce duplication in the assessment process, specifically regarding clearing of native vegetation; and

- implementation of the agreement, including review mechanisms, comment periods, public release of information and consideration of cross border impacts.

GENERAL ISSUES

Adequacy and consistency of WA assessment processes to address MNES

Issue

Several submissions:

- provided specific examples of where impacts on MNES have not been assessed under the *Environmental Protection Act 1986* (EP Act) in relation to major projects;
- expressed concern that WA agencies would not have sufficient resources to implement the bilateral agreement,
- expressed concern that implementation of the agreement could lead to decreased protection for MNES; and
- raised the importance of consistency in assessments under the agreement, noting the delegation of responsibility for environmental management to various government ministers of WA.

Response

The agreement reflects relevant statutory requirements of the EPBC Act and Regulations in relation to assessment bilateral agreements (including under Part 5 of the EPBC Act and Part 3 of the EPBC Regulations) and includes those WA assessment processes that meet the requirements of Commonwealth legislation. The agreement also provides for continued co-operation between parties and additional opportunities to improve the operation of the agreement. For example:

- Clause 6.5 supports the WA and Commonwealth governments to work collaboratively together by ensuring ongoing measures to improve efficiency and effectiveness of administrative processes.
- Clause 6.9 requires WA decision-makers consider relevant Commonwealth guidelines, policies and plans, to the extent relevant.
- Clause 8.1 specifies that the Commonwealth will work with WA to address consistencies in the conditions attached to approvals for an action assessed under the Agreement and WA law. This approach is designed to minimise duplication in condition setting, which was supported by a number of submissions. This includes in relation to native vegetation clearing (Schedule 1, Item 3.2 and 3.3(c)).
- Clause 9 requires parties to work co-operatively, by a range of methods, including exchange of information (clauses 6 and 9.3) and the development and amendment of guidance material. Additional mechanisms for cooperation will be detailed in administrative arrangements.
- Clause 14 refers to the scope to make minor amendments to the agreement to facilitate improved efficiencies under the one stop shop policy, as well as providing for the parties to the agreement to make improvements to the operation of the agreement over time.
- Schedule 1 Item 6.2 contains detailed requirements for the content of assessment reports, to ensure adequate assessment of impacts on matters of national environmental significance.

A thorough analysis of WA legislation covered by the agreement was undertaken against the requirements of the EPBC Act and Regulations. For each class of actions, the analysis confirmed that the relevant WA process, in conjunction with the specified manner of assessment set out in Schedule 1, would meet the requirements of the EPBC Act and Regulations in relation to assessment of impacts to MNES. The Commonwealth will retain the ability to supplement WA conditions if they do not adequately address impacts on MNES.

As outlined in the Memorandum of Understanding signed between the State and the Commonwealth in December 2013 (the MOU), the Commonwealth and WA will consider activities to support the transition and implementation of the agreement, including the potential for embedding Commonwealth officers within WA agencies.

Commonwealth role

Issue

Submissions included comments regarding the ongoing role of the Commonwealth in relation to assessing potential impacts on MNES.

Response

The agreement will not reduce the Commonwealth's responsibilities under the EPBC Act with respect to MNES. Under the agreement, the Commonwealth Environment Minister will still be required to make a decision on whether to approve a proposal that will have, or is likely to have a significant impact on MNES under the EPBC Act. Should the Minister not be satisfied that the agreement is being complied with, or that assessment processes are not consistent with the objects of the EPBC Act and Australia's international obligations, sections 57 to 64 of the EPBC Act provide a mechanism by which the agreement can be cancelled or suspended (clause 13.1). In addition, under section 132 of the EPBC Act the Commonwealth Minister retains the power to request additional information from the proponent, state or any other person before making an approval decision.

Potential conflict of interest in assessment of MNES

Issue

Submissions included comments regarding the potential for conflict of interest when WA agencies assess major projects from which the state will receive a revenue stream.

Response

This concern was raised in relation to projects assessed by WA Environment Protection Authority (EPA). The EPA is an independent agency which is not subject to direction by the Minister and its advice to the WA Government is public. The assessment processes, including those processes which would be accredited under the agreement, require stakeholder engagement and consideration of public comments. The Commonwealth Minister retains an approval role, and must be satisfied that the assessment report provided under the agreement provides enough information about the relevant impacts of each proposed action on matters of national environmental significance (Schedule 1 Item 6.2).

Issues not directly related to the assessment bilateral agreement

Issue

A number of the submissions provided comments that did not relate directly to the assessment bilateral agreement, including in relation to an approval bilateral agreement with WA, cost recovery and about the one-stop-shop policy more generally.

Response

As outlined in the MOU, WA and the Commonwealth are pursuing an approval bilateral agreement to accredit WA to undertake approvals under the EPBC Act. As with the assessment bilateral agreement, there will be an opportunity for the public to comment on the draft approval bilateral agreement, in line with requirements of the EPBC Act.

Cost recovery will apply to projects referred on or after 14 May 2014 with exception for individuals and small businesses with less than $2 million annual turnover. The Agreement reflects both the Commonwealth and WA commitment to minimise costs to business while maintaining high environmental standards. This will occur through cooperative efforts to strengthen intergovernmental cooperation on the environment.

CONTENT OF THE BILATERAL AGREEMENT

Scope of accredited WA assessment processes

Issue

A number of submissions cited there was a lack of clarity regarding the scope of the agreement, particularly regarding the WA assessment processes covered. A number of submissions recommended that additional WA assessment processes should be included within the scope of the agreement.

Response

Schedule 1 has been amended to provide further clarity on how native vegetation clearing permits are addressed in the agreement. It clarifies that clearing permits assessed by WA are within the scope of the agreement other than statewide purpose permits where the relevant impacts are not assessed before the clearing permit is granted. This also applies to assessments conducted by the Department of Mines and Petroleum under delegation under the EP Act.

Assessments by Environmental Review and Management Program (ERMP) have been included in Schedule 1 for transitional purposes. Although that assessment process is no longer implemented in WA under the EP Act, there remain some projects being assessed under this process and the previous assessment bilateral agreement. Inclusion of ERMP therefore ensures the transition of those projects from the existing bilateral agreement to the agreement.

The scope of the agreement may be reviewed over time. Other assessment methods may be incorporated at a later time if they meet the relevant statutory requirements of the EPBC Act and Regulations.

Consultation on Assessment Reports

Issue

Some submissions were supportive of the collaboration between WA and the Commonwealth outlined in the agreement while others raised concerns that the agreement would reduce Commonwealth input to assessment reports and decision making on MNES.

Response

A collaborative approach between the parties is reflected in the agreement which provides for close cooperation throughout the assessment process. For example, in relation to the determination of relevant impacts to MNES (clause 6.6) and drafting of conditions (clause 8.1).

.Administrative arrangements will also be developed to further detail arrangements between State and Commonwealth agencies to give effect to the agreement.

Stakeholder Engagement: Indigenous peoples

Issue

A number of submissions expressed concern about the extent to which the agreement provides for consultation with Indigenous peoples.

Response

Clause 7.1(a) recognises the role and interests of Indigenous peoples in promoting conservation and ecologically sustainable use of natural resources and promote the cooperative use of Indigenous peoples' knowledge of biodiversity and Indigenous heritage. Clause 7.1(b) recognising the views of relevant Indigenous people are likely to be a primary source of Information on cultural heritage.

Clause 7.3 recognises that Indigenous people may have particular communication needs, and that WA will make special arrangements to ensure that such groups with particular communications needs have an adequate opportunity to comment on proposed actions. The agreement also relies on existing WA processes for stakeholder engagement.

Implementation of the Agreement

Review Mechanisms

Issue

The review mechanisms in the agreement were subject to a number of comments in the submissions. Of particular concern was the need for a review one or two years after the commencement of the agreement.

Response

The agreement reflects the requirement under the EPBC Act for review of the bilateral agreement every five years. Clause 10.2 also allows for a review of the agreement within two years of commencement.

Public comments on assessment information

Issue

Some submissions commented on the period required for public comment on assessment documentation outlined in Schedule 1. Comments related to the differing public comment requirements for different processes and the requirement for proponents responding to public

submissions to ‘take into account’ public comments rather than address the substance of public submissions.

Response

Public comment periods and public release of information under the agreement are consistent with EPBC Act and Regulation requirements. Minimum public comment periods for assessment documentation are provided in Schedule 1.

The agreement provides different minimum public comment periods for Assessment on Proponent Information and Public Environment Review. This is consistent with the requirements of the EPBC Regulations, which provide for different public comment periods depending on the complexity of the assessment approach.

Cross border assessments

Issue

Some submissions expressed concern regarding cross jurisdictional actions and impacts, and how such actions would be properly assessed.

Response

As outlined in clause 4.2, the agreement only applies to projects that occur wholly within WA. For projects that do not occur wholly within WA or which have impacts on other jurisdictions, WA and the Commonwealth must consult relevant jurisdictions and agree an appropriate assessment approach (this may include the WA processes outlined in Schedule 1). This approach is consistent with the 2012 assessment bilateral agreement.

MINOR TECHNICAL AMENDMENTS

In response to public comments outlined above, the following minor technical amendments were made to the agreement:

- Correction of a minor drafting error in clause 6.9(c).
- Amendment in Schedule 1 Item 2.1(a) to clarify scope of accreditation of native vegetation clearing permit process.

Attachment A: List of submissions

1. Western Power
2. H. Nore
3. Australian Conservation Foundation
4. Fremantle Ports
5. Wilderness Society, Conservation Council of WA and Wildflower Society of WA (combined)
6. Places You Love Alliance
7. Property Council of Australia
8. Environmental Consultants Association
9. Ningaloo Coast World Heritage Advisory Committee
10. B. Deehey
11. Kimberley Land Council
12. A.L. Hill
13. Urban Development Institute of Australia (WA)
14. Environmental Defenders Office WA
15. World Wildlife Fund
16. Minerals Council of Australia
17. J. Mumme
18. Chamber of Minerals and Energy of Western Australia
19. Association of Mining and Exploration Companies
20. Chamber of Commerce and Industry of Western Australia (*received after close of public comment*)