Chapter 4

Effectiveness of agreements

4.1 The Act provides for agreements to be established between the Commonwealth and state or territory governments. These agreements put in place mechanisms whereby the states or territories are delegated responsibility for some environment protection processes which would otherwise be undertaken by the Commonwealth.

4.2 Submitters to the inquiry provided comments on bilateral agreements and RFAs. Given the substantive information provided to the committee on RFAs and the complexity of the issues raised, the committee will discuss RFAs in a separate, subsequent report.

Bilateral agreements

4.3 Bilateral agreements between the Commonwealth and state and territory governments are provided for under the Act. Bilateral agreements are written agreements that provide for one or more of the following:

(i) Protecting the environment;

(ii) Promoting the conservation and ecologically sustainable use of natural resources;

(iii) Ensuring an efficient, timely and effective process for environmental assessment and approval of actions;

(iv) Minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa).[1]

4.4 Section 50 of the Act requires that the minister may only enter into a bilateral agreement if the minister is satisfied that the agreement:

(a) Accords with the objects of the Act; and

(b) Meets the requirements (if any) prescribed by the regulations to the Act.[2]

4.5 Bilateral agreements can be used to reduce duplication of environmental assessments or approvals processes. However, agreements on assessment are far more widespread than for approvals.

4.6 To date, bilateral agreements for environmental impact assessment exist between the Commonwealth and South Australia, New South Wales, the Northern

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1 EPBC Act, s. 45.

2 EPBC Act, s. 50.

Territory, Queensland, Tasmania and Western Australia.[3] Draft bilateral agreements for assessment processes are currently under negotiation between the Commonwealth and the Australian Capital Territory and Victoria.[4]

4.7 In contrast, there is currently only one very limited bilateral agreement that applies to approvals. This agreement, between the Commonwealth and New South Wales governments, accredits approvals granted in accordance with the Sydney Opera House management plan.[5]

4.8 While bilateral agreements are intended to minimise duplication in the environmental assessment and approval process, the committee heard evidence that proponents continue to experience duplication and overlap of Commonwealth and state and territory processes. The NFF stated:

> [W]hat we are pointing to is a streamlining of not just the EPBC Act but how you might incorporate the requirements at local and state levels in terms of assessment. What we are after is a one-stop shop that farmers can go to if they are looking to do a particular activity on their farm—for example, implement an infrastructure development. They get one assessment; they do not need to get one off local government, one off the state government and one off the federal government.

4.9 The committee heard evidence that the Commonwealth's role should be to provide strategic oversight through a legislative framework for use by the states and territories, and that assessment and approval of actions should not be the responsibility of the Commonwealth:

> Ms Stutsel – We certainly think the Commonwealth should have primary responsibility for the framing of the legislation, identifying matters of national environmental significance and ensuring there are appropriate bilateral assessment and approval processes in place with the states to remove the duplication that is occurring between those jurisdictional layers. We as an industry strongly support the existence of regulation. We consider that that provides a minimum for underperformance, but we are always looking to go beyond that in terms of continuous improvement to better align with societal expectations.
>
> CHAIR – Who do you think should have the call on whether or not something goes ahead?

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3 DEWHA, 2008, *Bilateral agreements*, http://www.environment.gov.au/epbc/assessments/bilateral/index.html (accessed 15 December 2008).

4 DEWHA, 2008, *Bilateral agreements*, http://www.environment.gov.au/epbc/assessments/bilateral/index.html (accessed 15 December 2008).

5 DEWHA, 2008, *Bilateral agreements*, http://www.environment.gov.au/epbc/assessments/bilateral/index.html (accessed 15 December 2008).

> Ms Stutsel – If the Commonwealth actually sets the regulatory framework, which is the decision-making process, then the states should be able to use that framework to make a determination about whether a project is in compliance with it.[6]

4.10 Concern was also raised about the operation of bilateral agreements in situations where the proponent had close links with the state or territory government, for example a wholly government-owned corporation, and the possibility of 'a clear and undeniable conflict of interest in the State Government operating in the simultaneous roles of proponent and assessor under a bilateral agreement'.[7] For example, Mr Ian Matthews was concerned about the RFA in Tasmania. He was concerned that state government entities with an economic interest in development approvals may have an inappropriate say in assessment or decision processes under agreements between the Commonwealth and states or territories.[8]

4.11 The bilateral agreement between the Commonwealth and the NSW government was criticised for a lack of 'rigorous processes to protect matters of national environmental significance'.[9] This criticism was also made about the agreements generally.[10]

4.12 The NSW bilateral agreement delegates development assessments required under Part 8 of the EPBC Act to Part 3A of the NSW *Environmental Planning and Assessment Act 1979*.[11] The agreement states that 'this assessment approach corresponds to assessment by Environmental Impact Statement and meets the requirements of a Public Environment Report under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*'.[12]

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6 Ms Melanie Stutsel, Director, Environment and Social Policy, Minerals Council of Australia, *Committee Hansard*, 9 December 2008, p. 4.

7 Mr Steve Burgess and Ms Elaine Bradley, *Submission 44*, p. 4.

8 Mr Ian Matthews, *Submission 34*, p. 2.

9 Central West Environment Council Inc of NSW, *Submission 43*, pp 3–4.

10 Lawyers for Forests, *Submission 68*, pp 12–13.

11 Commonwealth of Australia and the State of New South Wales, *An agreement between the Commonwealth of Australia and the State of New South Wales, Under Section 45 of the Environment Protection and Biodiversity Conservation Act 1999, Relating to environmental impact assessment*, 18 January 2007, http://www.environment.gov.au/epbc/assessments/bilateral/pubs/nsw-agreement-signed.pdf (accessed 17 February 2009).

12 Commonwealth of Australia and the State of New South Wales, *An agreement between the Commonwealth of Australia and the State of New South Wales, Under Section 45 of the Environment Protection and Biodiversity Conservation Act 1999, Relating to environmental impact assessment*, 18 January 2007, http://www.environment.gov.au/epbc/assessments/bilateral/pubs/nsw-agreement-signed.pdf (accessed 17 February 2009).

4.13 Under section 75F of Part 3A of the NSW *Environmental Planning and Assessment Act 1979*, the NSW Director-General has discretion to decide on the environmental assessment requirements for a project seeking approval.[13] Further, major developments and critical infrastructure approved under Part 3A are exempt from a number of other state approvals.[14]

4.14 The committee heard claims that this 'largely unfettered discretion with respect to preparing environmental impacts assessment requirements, and determining the adequacy of environmental assessments undertaken',[15] coupled with exemptions from other state approval processes, has meant that some actions in NSW may have avoided rigorous environmental impact assessment. The Central West Environment Council Inc of NSW stated:

> There is therefore no guarantee of adequate assessment of, for example, threatened species and native vegetation, local heritage, aboriginal cultural heritage, greenhouse gas emissions. It is inappropriate to accredit a process that potentially excludes comprehensive assessment of such matters.[16]

The Inland Rivers Network agreed.[17]

4.15 The application of Part 3A of the NSW *Environmental Planning and Assessment Act 1979* has been legally challenged on a number of occasions.[18] Critics have argued that the general failure of these challenges has demonstrated the lack of procedural rigour in Part 3A,[19] and in the NSW bilateral agreement more broadly.[20]

4.16 Some submitters wanted to see a reduction in the use of bilateral and other agreements under the Act. NPAC and the Conservation Council (ACT Region) (CCACT) argued that there should be limited or no use of declarations under section 84 of the Act (referred to as 'accredited assessment processes'), and that other exemptions (such as for bilateral agreements) should be removed from the Act.[21]

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13 *Environmental Planning and Assessment Act 1979 (NSW)*, s. 75F.

14 Central West Environment Council Inc of NSW, *Submission 43*, p. 4; NSW Environmental Defender's Office, 18 October 2006. *Fact sheet*, http://www.edo.org.au/edonsw/site/factsh/fs02_1_2.php, (accessed 6 February 2009).

15 Central West Environment Council Inc of NSW, *Submission 43*, p. 4.

16 Central West Environment Council Inc of NSW, *Submission 43*, p. 4.

17 Inland Rivers Network, *Submission 69*, section 6.

18 For examples, see NSW Environmental Defender's Office, 18 October 2006. *Fact sheet*, http://www.edo.org.au/edonsw/site/factsh/fs02_1_2.php, (accessed 6 February 2009).

19 ANEDO (NSW), Submission to the NSW Premier Re: Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Bill 2005, June 2005, http://www.edo.org.au/edonsw/site/policy/epandarefrombill050713.php (accessed 17 February 2009)

20 ANEDO, *Submission 90*, p. 18.

21 NPAC, *Submission 93*, pp 13, 18; CCACT, *Submission 94*, pp 13, 18.

4.17 The committee did not have an opportunity to test these concerns with governments because some state governments (NSW and Victoria) did not provide submissions to the inquiry. However, the committee notes that the high levels of ministerial discretion in the EPBC Act are a concern for many stakeholders, as outlined in the previous chapter. It appears that Part 3A of the NSW legislation creates higher levels of discretion again, particularly in regard to public consultation processes. The committee understands the concern that this causes stakeholders in some jurisdictions.

4.18 At the same time, the committee notes that the bilateral agreements in general cover only assessment; they do not extend to the actual decision on approval, which remains with the Commonwealth. That decision, under sections 136 to 140A of the Act, must be guided by principles, agreements and plans designed to ensure protection of matters of national environmental significance. The bilateral agreements do not alter those obligations.

Recommendation 6

4.19 The committee recommends that the Independent Review of the EPBC Act and / or the ANAO examine the effect of existing bilateral agreements on the quality of environmental assessments of matters of national environmental significance. The committee suggests that particular regard be given to the transparency of, public engagement in, and appeal rights in relation to assessments performed under a bilateral agreement, compared to the conditions that would have existed had the assessment been performed under the EPBC Act.

Activities undertaken by Commonwealth agencies

4.20 Under the Act, the Commonwealth is responsible for actions undertaken by Commonwealth agencies. Furthermore, actions which are likely to have a significant impact on the environment of Commonwealth land, or are undertaken by the Commonwealth and are likely to have a significant impact on the environment anywhere in the world, are prohibited unless approved by the minister. As a result, there are regular requirements for a wide range of Commonwealth agencies to deal with the Act and to seek decisions under it. Two of the most directly affected agencies, Defence and AFMA, made submissions to the inquiry.

Defence activities

4.21 As a Commonwealth agency, the Department of Defence is required to apply the principles of environmental management as outlined in the Act. Given that the Department of Defence is responsible for some 2.8 million hectares of land, the department's use and experience of the Act is considerable. [22]

22 Mr Colin Trinder, Director, Environmental Impact Management, Department of Defence, *Committee Hansard*, 9 December 2008, p. 56.

4.22 The Department of Defence discussed the issue of being required 'to seek additional approval for implementation of decisions by the Government or for the ongoing use of existing training areas for routine military activities, since that land has been set aside by the Government precisely for that purpose'.[23] Defence argued that the requirement to submit for additional approval for activities undertaken on Defence land was not an optimal use of resources, nor an efficient application of the Act.

4.23 The Department of Defence believed that the efficiency and effectiveness of the Act, as it applies to Commonwealth agencies and in particular the Department of Defence, could be improved by exempting certain of their activities from the formal assessment and approval processes under the Act:

> Defence considers a better approach might be to shift the centre of gravity in the legislation pertaining to Commonwealth agencies away from a traditional regulation / enforcement model to one that delivers more proactive guidance and advice, including benchmarking and auditing environmental practice. Defence considers sharing this information within other government agencies managing similar issues would enhance environmental performance. This approach could help drive continuous improvement, minimise impacts and reduce the resources needed to address the strict regulation and compliance enforcement processes that currently exist in the Act.[24]

4.24 The committee acknowledges the Department of Defence's desire to reduce repetition with regard to seeking approval for ongoing Defence activities.

Fisheries management

4.25 The CFA and AFMA were critical of the duplication and lack of integration between the Act, the *Fisheries Management Act 1991* (FMA) and the Commonwealth Fisheries Harvest Strategy Policy. The CFA and AFMA also discussed a lack of clarity regarding the roles of DEWHA, the Department of Agriculture, Fisheries and Forestry (DAFF) and AFMA in the management of fisheries.[25]

4.26 The CFA described what they believed to be a 'double jeopardy' whereby Commonwealth fisheries must be assessed under both the EPBC Act and the FMA:

> …despite meeting the sustainability objectives of the *FMA 1991*, the fishing industry is being further assessed under the *EPBC Act*, which is effectively creating a "double jeopardy" situation.
>
> It is important for the Government to determine clearly defined legislative responsibility for management of Australian fisheries resources and currently the duplication between DEWHA, DAFF and AFMA is significant.

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23 Office of the Secretary and Chief of the Defence Force, *Submission 67*, p. 10.

24 Office of the Secretary and Chief of the Defence Force, *Submission 67*, p. 5.

25 CFA, *Submission 57*; AFMA, *Submission 59*.

> For example, the Commonwealth fishing industry is exposed to the risk of being excluded from export markets by an unfavourable DEWHA strategic assessment, which can occur even if an industry is meeting all the requirements of the *FMA 1991*. Worse still, despite fulfilling all the requirements of the *FMA 1991*, industry is exposed to the risk of having fisheries closed through the listing of a key target or by-catch species under the provisions of the *EPBC Act*, which over-ride the *FMA 1991*.

4.27 DAFF acknowledged the intersection between the EPBC Act and the FMA:

> While Commonwealth fisheries are managed through the application of the FM Act, the management of Australia's domestic fishing activity including the management of internationally-shared and straddling fish stocks cannot be meaningfully separated from the EPBC Act. The EPBC Act, which looks at species from a biological conservation point of view, intersects with fisheries management in a number of ways, principally through Part 10 (*Strategic Assessments*), Part 13 (*Species and Communities listings*) and Part 13A (*International Movement of Wildlife Specimens*).

4.28 DAFF went on to explain that the Commonwealth Harvest Strategy Policy was intended to clarify 'the relationship between fisheries management and the EPBC Act in relation to the application of threatened species listing for fished stocks above a limit biomass reference point'.[26] However, clear guidance is not provided on threatened species listings for stocks below the limit biomass reference point and '[a]ction under both fisheries and environmental legislation may be considered when the limit reference point is exceeded'.[27]

4.29 DEWHA also provided an explanation of the Harvest Strategy Policy and remarked that:

> …it was developed jointly between the Department of Agriculture, Fisheries and Forestry and ourselves, because we recognised that there was some kind of confusion, sometimes, between how people perceived the different parts of the act. The policy really elaborated ways of thinking about fisheries and the interaction with the EPBC Act versus fisheries management. It set up ways of thinking about target catch levels and catch levels for fisheries at a point when the EPBC Act would become interested in them because of the relative overall reduction in the species…The harvest strategy is directed towards looking at the listings exercise.[28]

4.30 It was recommended to the committee that the 'double jeopardy' facing the fisheries industry be addressed through rationalisation of duplicated legislative requirements under the EPBC Act and the FMA. The CFA suggested:

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26 DAFF, *Submission 86*, p. 5.

27 DAFF, *Submission 86*, p. 5.

28 Mr Andrew McNee, Assistant Secretary, Marine Initiatives Branch, DEWHA, *Committee Hansard*, 9 December 2008, p. 78.

> That the Government initiate a comprehensive and transparent review of the interaction of the EPBC Act and the FMA 1991 with the objective of eliminating areas of duplication in preference for a more complementary legislative framework.[29]

4.31 In addition, and similarly to the Department of Defence, the CFA believed that a more pragmatic and collaborative arrangement between different Commonwealth agencies would improve both the operation of the Act and the environmental standards it seeks to achieve:

> In addition to legislative changes, the CFA strongly recommends the establishment of a government / industry consultative committee comprising representatives from DEWHA, DAFF, AFMA and CFA to encourage and promote a more functional and collaborative administrative arrangement on environmental issues and standards.[30]

4.32 The committee notes that there appears to be ongoing concern amongst fisheries managers regarding conflict and overlap between the EPBC Act and the FMA. The issues appear complex, and the committee was not in a position to assess whether the matters raised by stakeholders represent undesirable duplication, or parallel assessment processes necessary to ensure all aspects of fisheries conservation are properly considered and addressed.

Recommendation 7

4.33 The committee recommends that the government review the interaction between the EPBC Act and the Fisheries Management Act in relation to the conservation of fish species and relevant assessment processes.

29 CFA, *Submission 57*, p. 6.

30 CFA, *Submission 57*, p. 6.