

## **REPORT ON PUBLIC COMMENTS ON THE DRAFT NORTHERN TERRITORY 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 Northern Territory (the NT) was published on 7 April 2014 with an invitation for any person to comment by 6 May 2014.

This report provides a summary of submissions received on the draft NT 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.

A number of the submissions received provided comments that were out of scope for the public consultation process on the draft assessment bilateral agreement, including in relation to an approval bilateral agreement with the NT.

Seven (7) submissions were received on the draft assessment bilateral agreement:

1. Association of Mining and Exploration Companies
2. Property Council of Australia
3. Central Land Council
4. Environment Centre NT
5. Environmental Defender's Office NT
6. Indigenous Advisory Committee
7. Minerals Council of Australia

### **Effect of the Bilateral Agreement**

#### ***Issues Raised***

All submissions included comments directed at the Australian Government's 'one stop shop' policy and the use of the proposed NT draft assessment bilateral agreement (the draft agreement) to facilitate this policy.

Three (3) submissions were substantially in support of the draft agreement, noting the opportunities for streamlining of assessment and approval processes provided for by the reforms. Submissions in support also noted further opportunities to reduce duplication in the assessment process and improve the operation of the draft agreement, by providing greater certainty for proponents in relation to timeframes for the preparation of assessment reports, more frequent reviews of progress, and for Commonwealth transitional support.

Some of the remaining submissions supported elements of the one stop shop policy and the draft agreement generally. However, these submissions also raised a number of concerns, such as:

- the adequacy of NT environmental assessment processes and resourcing to address matters of national environmental significance (MNES), including the provision of adequate assessment documentation;

- the ongoing role of the Commonwealth in relation to NT assessment processes;
- mechanisms to review the draft agreement and decisions made under it; and
- the development of administrative arrangements.

### ***Response***

The Australian Government's one-stop-shop policy will put in place measures to maintain high environmental standards, while reducing duplication across jurisdictions to ensure efficient and effective environmental approvals.

The draft agreement relates to the process for environmental assessment of matters under the EPBC Act. The draft agreement replaces the previous assessment bilateral agreement between the NT and the Commonwealth, which was entered into in 31 May 2002. In 2013 and 2014, a review of the previous agreement was undertaken (the 2014 Review), which contained several recommendations that have been considered in the development of the draft agreement. The draft agreement reflects the 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 NT assessment processes that meet the requirements of Commonwealth legislation. The Commonwealth is satisfied that the draft agreement and accredited assessments conducted under the draft agreement meet the relevant requirements of the EPBC Act.

The draft agreement will not reduce the Commonwealth's responsibilities under the EPBC Act with respect to MNES. Under the draft 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 draft agreement is being complied with, or that assessment processes under the draft agreement do not give effect to the draft agreement in a way which accords 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 draft agreement can be cancelled or suspended.

In addition to the five-year review of the draft agreement required under Clause 10, the draft agreement provides for continued co-operation between parties and additional opportunities to improve the operation of the draft agreement in a number of ways:

- Clause 9 of the draft agreement requires parties to work co-operatively, by a range of methods, including exchange of information and the development of guidance material;
- Clause 14 of the draft agreement refers to the scope to make minor amendments to the agreement to facilitate improved efficiencies under the one stop shop policy; and
- Clause 14.1 provides for the parties to the draft agreement to make improvements to the operation of the agreement over time.

The Australian and NT Governments will continue to work collaboratively to further streamline environmental regulation, as permitted under national environmental law. Clause 6.4 supports this intent, by ensuring the parties effect ongoing measures to improve the efficiency and effectiveness of their own administrative processes. The administrative arrangements between the parties will describe how the parties will work together, including processes for communication in relation to assessments under the draft agreement, mechanisms for review

and oversight of the operation of the agreement and information sharing, as prescribed in clause 9.1.

Further, the implementation of the draft agreement will be overseen by a Senior Officers' Committee, representing both parties and established under draft clause 9.2. The administrative arrangements will detail and provide for the establishment, operation and terms of reference of the Senior Officers' Committee.

## **Content of the Bilateral Agreement**

### ***Issues Raised***

All submissions commented on the content of the draft agreement, making general or specific comments including providing suggested amendments to certain clauses.

Comments in relation to specific content of the draft agreement 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 scope of the agreement in relation to the coverage of MNES;
- condition-setting arrangements under the agreement;
- provision for consultation on assessment reports, including between the NT and the Commonwealth; and
- consultation and engagement with Indigenous people and communities in the environmental assessment process.

### ***Response***

The draft agreement reflects the requirements for an agreement under section 47 of the EPBC Act. The EPBC Act and EPBC Regulations contain further requirements relating to assessment bilateral agreements, including requirements to review the operation of a bilateral agreement. A thorough analysis of the NT legislation included under the draft agreement against the requirements of the EPBC Act and Regulations was undertaken by the Department. For each class of actions, the analysis confirmed that the relevant NT process, in conjunction with the specified manner of assessment set out in Schedule 1 to the draft agreement, met these requirements.

In undertaking an assessment under the draft agreement, the NT must consider Commonwealth guidelines and policies, such as the EPBC offset policy, recovery plans, conservation advices and threat abatement plans (Clause 6.8). Clause 6.8 has been amended in response to public submissions and to reflect the requirements of the EPBC Act. Clause 6.8 remains inclusive rather than exclusive such that plans and policies are to be considered where relevant, such as the plans and policies specified in Clause 6.8(a) – (c). Further, in response to submissions, clause 6.8 has been amended to include reference to management plans for World Heritage properties, National Heritage Places and declared Ramsar wetlands.

To further support the approach to environmental assessment under the draft agreement, clause 9.5(a) of the draft agreement commits the Commonwealth and NT to jointly develop guidance documents relating to the assessment of MNES. 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 draft agreement.

Clause 8.1 of the draft agreement specifies that the Commonwealth will work with NT to address inconsistencies in MNES conditions set under the EPBC Act. This approach is designed to minimise inconsistency in condition setting. Clauses 8.1 and 8.2 have been amended to better reflect the intent of the clauses.

A collaborative approach between the parties, as recommended by the 2014 Review, is reflected in other aspects of the draft agreement which, overall, provides for close cooperation between the parties to ensure environmental standards are being maintained. Measures for co-operation include the following:

- Clause 6.3 of the draft agreement contains detailed requirements for content of assessment reports, to ensure adequate assessment of impacts on matters of national environmental significance. An assessment report must describe the impacts on MNES.
- Under clause 6.5 of the draft agreement, the parties will use best endeavours to agree on common, outcome focussed recommendations.
- Under clause 6.8 of the draft agreement, that the NT consider all relevant Commonwealth and Territory guidelines, policies and plans, to the extent practicable.
- Detailed administrative arrangements and the establishment of a Senior Officers' Committee, under clauses 9.1 and 9.2 of the agreement.

The draft agreement also provides for information sharing arrangements (see clauses 6 and 9.3) that will allow the Commonwealth Minister to consider information in relation to assessment reports.

Under clause 9.1, administrative arrangements will be developed by the parties to support the operation of the draft agreement and the ongoing relationship between the parties. 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 development of updated administrative arrangements to support the operation of the draft agreement was also recommended by the 2014 Review.

The draft agreement will not reduce the Commonwealth's obligations under the EPBC Act with respect to MNES. The Commonwealth Minister will still be required to make a decision whether to approve a proposal and, accordingly, under the draft agreement retains the power to request additional information in relation to the assessment report (clause 6.7). The Commonwealth Minister may also declare that an action falls outside the scope of the draft agreement (clause 4.3(a)), with the agreement of the NT Minister (clauses 4.3(a) & (b)).

Consultation will continue to occur in accordance with the requirements of the EPBC Act. 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. The 2014 Review noted the adequacy of public comment and consultation processes under the existing agreement. The draft agreement reflects the current arrangements in the NT and Commonwealth statutory requirements.

The draft agreement recognises the important role of Indigenous people in promoting conservation and the ecologically sustainable use of natural resources. In particular, clause 7.1(b)(i) requires the NT to ensure that proponents take all reasonable steps to obtain the views of Indigenous people in relation to any relevant action under assessment. Clause 7.3(c) outlines consultation processes that may be applicable in relation to Indigenous communities, encompassing statutorily prescribed processes under Commonwealth and NT legislation, as well as recognition of the importance of advice that may be provided by relevant Land Councils. The requirements of clause 7.3 must also be reflected in public comment arrangements under Item 3.4 of Schedule 1. Clause 7.1(b)(ii) confirms 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 6.6(b) of the draft agreement has been amended to clarify 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.

### **Minor technical amendments**

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

- technical correction to the definition of Matter of NES (clause 1.1);
- amending clause 6.1(a)(iii) to directly reflect the requirements of the EPBC Act (s 48A(3));
- amend clause 6.6(b) to include cultural Information;
- amending clauses 6.3, 6.8, 7.2, 7.3, 8.1 and 8.2 to reflect drafting preferences of the NT without affecting the intent of the clause; and
- amendments to Clause 6.6, and Items 2, 3.5 and 3.6 of Schedule 1, to better reflect the role of an inquiry in relation to an EIS or PER.