



# Nature Conservation Council

The voice for nature in NSW

Regulatory Reform Taskforce  
Department of the Environment  
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2 February 2015

## **SUBMISSION ON THE NEW SOUTH WALES - COMMONWEALTH DRAFT ASSESSMENT BILATERAL AGREEMENT UNDER SECTION 45 OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999* (CTH)**

Dear Sir/Madam

The Nature Conservation Council of NSW (**NCC**) is the peak environment organisation for New South Wales, representing 130 member societies across the state. Together we are committed to protecting and conserving the wildlife, landscapes and natural resources of NSW.

NCC welcomes the opportunity to comment on the Draft Assessment Bilateral Agreement (**Draft Agreement**) with New South Wales under section 45 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). Our key concerns are outlined below.

### **ONE-STOP SHOP POLICY**

NCC does not support the Commonwealth Government's one-stop shop policy which includes the introduction of bilateral approval agreements and revision and weakening of bilateral assessment agreements.

As outlined previously by NCC<sup>1</sup>, the Federal government is best suited to make environmental decisions in the national interest and should not be divesting Federal powers to the States and Territories. In addition to protecting matters of national environmental significance (**MNES**)<sup>2</sup>, the Federal government is signatory and responsible for upholding a number of international environmental agreements<sup>3</sup>. International law obligations and national environment issues are matters for the Commonwealth government, not state and territory governments.

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<sup>1</sup> NCC submission on [Major Project Development Assessment Processes](#) (20 September 2013); [Inquiry into streamlining environmental regulation, 'green tape' and one stop shops](#) (30 April 2014); [NCC Submission of Objections: draft NSW – Commonwealth approval bilateral agreement](#) (13 June 2014)

<sup>2</sup> EPBC Act, s 3 (1(a))

<sup>3</sup> The Commonwealth is responsible for ensuring Australia meet its obligations under conventions and agreements such as:

- The Convention on Biological Diversity
- The Convention for the Protection of World Cultural and Natural Heritage
- The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar)
- The Convention on the Conservation of Migratory Species of Wild Animals
- The China-Australia Migratory Bird Agreement (CAMBA) and
- The Japan- Australia Migratory Bird Agreement (JAMBA)

Arguments that the one-stop shop policy will reduce duplication and improve efficiency have not been proven<sup>4</sup> and the reality is that devolvement of assessment and approval powers will create inconsistency, more confusion and less certainty. We are also concerned about conflict of interest where states and territories either benefit from (e.g. royalty recipient or political advantage) or are the proponents of high-impact projects. In this regard, federal government control and oversight is essential not only to protect the environment but also to retain the public trust. We are also concerned that State or Territory assessment and approval processes fail to meet the minimum standards set under the EPBC Act<sup>5</sup>, are contrary to the objects of the EPBC Act and ultimately lead to poor environmental outcomes for matters of national environmental significance.

## **GENERAL COMMENTS ON THE DRAFT AGREEMENT**

### ***Objects of the draft Agreement***

The draft Agreement has made some significant changes to the existing Agreement that not only expand NSW state government accreditation (under Schedule 1 via the addition of 6 new assessment pathways) but also weaken environmental protection for MNES. This is particularly evident in the changes made to the Objects of the draft Agreement. Despite the removal of the reference to *streamlining*, the draft objects are now more about process (i.e. efficiency, timeliness and minimising duplication) and commitment to a one-stop shop than they are about ensuring and committing to high quality environmental assessments and standards as explicitly stated in the existing Agreement. Not only is the Federal government watering down laws for environmental protection via these bilateral agreements they are also washing their hands of any national oversight and responsibility for the Australian environment.

### ***Parties to the Draft Agreement***

NCC is concerned that the NSW Minister for Planning is named as party to the draft agreement.<sup>6</sup> At the Commonwealth level, it is the Federal environment minister, advised by the federal environment department, who exercises the Ministerial functions under the EPBC Act. This distinction is important. The Commonwealth environment minister is not exercising a broad planning approval function. Instead, he/she has the specific function of determining whether development that has an impact on a matter of national environmental significance can go ahead. It is not appropriate for this function to be handed to the NSW Minister for Planning. The more appropriate party to the agreement would be the NSW Minister for the Environment.

Additionally we recommend that the agreement enable the Commonwealth Minister to be able to determine that a particular action is not within a class of actions, even after the NSW minister has given notice that an accredited process will apply. Clauses 4.3(b) and 5.4 currently prohibit this.

## **COMMENTS ON KEY CHANGES IN THE DRAFT AGREEMENT**

### ***Schedule 1***

The draft Agreement proposes to expand accreditation to cover the assessment of almost all development classes under Parts 4 and 5 of the NSW *Environmental Planning and Assessment Act 1979*. NCC does not support the accreditation of NSW assessment processes to replace federal project assessments required under the EPBC Act as they do not meet the higher EPBC assessment standards. EDO NSW has identified that this draft Schedule will increase complexity and fragmentation due to the numerous caveats and exclusions it contains thus adding

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<sup>4</sup> Senate Environment and Communications Committee, [Report on the EPBC Amendment \(Retaining Federal Powers\) Bill](#) 2012

<sup>5</sup> [ANEDO submission on Draft NSW-Commonwealth Bilateral Assessment Agreement](#), 18 December 2013, p7

<sup>6</sup> [NCC Submission of Objections: draft NSW – Commonwealth approval bilateral agreement](#), 13 June 2014 p7.

further confusion to the assessment process.<sup>7</sup> Also of concern to NCC are the conflicting, and in some cases reduced, assessment requirements particularly with respect to exhibition and public consultation periods.<sup>8</sup>

### **Assessment (Clause 6)**

In our view, draft clause 6 weakens the environment assessment process and further reduces the role of the Commonwealth in the assessment process. For example:

- Clause 6.3 (b) (ii) of the existing Agreement requires explicit assessment for each Matter of National Environmental Significance (MNES) and lists the 9 matters; comparatively clause 6.3(a) of the draft Agreement requires only 'sufficient information...on each relevant MNES' (with the list of MNES now absent) which reduces the rigour of the assessment process with regard to Matters of NES.
- The draft Assessment clause no longer requires consultation with the Commonwealth prior to finalising an Assessment Report and neither the Commonwealth or NSW need 'to endeavour, to the greatest extent possible, to agree on a proposed set of conditions'.<sup>9</sup> The draft Agreement now provides only for an undertaking by NSW to 'adequately' assess impacts on Matters of NES (Cl 6.2) and to provide an Assessment Report with recommended conditions (cl 6.3(c)).

These changes show that the Commonwealth, in addition to divesting its approval powers over national environmental matters as part of its one-stop shop policy, is also reducing its involvement and oversight in the assessment process.

### **Relevant plans, policies and other instruments (Clause 7)**

This new provision specifically refers to the mitigation hierarchy and offsetting policies. NCC is concerned with biodiversity offsetting as a conservation method due to its uncertainty in achieving long-term environmental outcomes.<sup>10</sup> Furthermore we do not support the accreditation or use of the NSW Biodiversity Offsets policy for reasons that were outlined in our submission to the NSW government on the draft NSW Biodiversity Offsets Policy for Major Projects.<sup>11</sup> These include the failure of the NSW Government to deliver on its commitment to achieve 'net positive' biodiversity outcomes; the failure to identify and protect 'red flag' areas including areas of high conservation value; the weakening of the 'like for like' offsetting requirements and multiple pathways to offsetting, including supplementary measures and mine site rehabilitation. In our view the NSW policy is inconsistent with and weaker than Commonwealth offsetting standards.

Clause 7.5 of the draft agreement requires decision makers to "have regard to sustainable development or ecologically sustainable development". NCC does not support the inclusion of the term 'principle of sustainable development' in draft clause 7.5 in addition to the term 'principles of ecologically sustainable development' (ESD). We are concerned that this clause anticipates proposed changes to the NSW planning system that would remove

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<sup>7</sup> [EDO NSW –Key Issues Summary](#) January 2015 pp 2-6

<sup>8</sup> For example, Draft Agreement Schedule 1, Item 3.3(b) specifies exhibition and 14 days public consultation for *inter alia* 'Part 5' developments, which under NSW law do not require exhibition.

<sup>9</sup> Bilateral Agreement between Commonwealth of Australia and NSW made under s 45 of the EPBC Act 1999 (Cth) 20<sup>th</sup> December 2013, Cl 6.5 Consultation and assessment

<sup>10</sup> See also Maron et al 'Faustian bargains? Restoration realities in the context of biodiversity offset policies' *Biological Conservation* 155(2012) 141-148; Curran M, Hellweg S and Beck J (2014) 'Is there any empirical support for biodiversity offset policy?' *Ecological Applications* 24 (4) 617-632; Bull JW, Suttle KB, Gordon A, Singh NJ and Milner-Gulland EJ (2013) 'Review Biodiversity offsets in theory and practice' 2013 *Fauna & Flora International*, Oryx, 47(3), 369–380; Norris P (2014) 'Seeking Balance: the promise and reality of biodiversity offsetting' 31 *EPLJ* 137.

<sup>11</sup> [NCC submission on draft NSW Biodiversity Offsets Policy for Major Projects](#), 16 May 2014.

ESD from NSW planning laws. It is our view that the NSW government's proposed definition of 'sustainable development' deliberately moves away from ESD and is not consistent with the EPBC Act or the National Strategy for Ecologically Sustainable Development. The EPBC Act and over 50 NSW laws (including the current *Environmental Planning and Assessment Act 1979*) use the term ecologically sustainable development, and the draft Agreement should be consistent with current laws.

#### ***Administration Arrangements (Clause 11)***

Draft clause 11 requires the parties to develop Administrative Arrangements for the implementation of the Agreement on or by the commencement date. We strongly encourage that any such Administrative Arrangements be subject to a public consultation process prior to the commencement of the agreement.

#### ***Review (Clause 13)***

Clause 13 of the draft Agreement requires 5 year reviews, transitional reviews and allows for third party studies. We strongly recommend that these reviews be undertaken independently from the Senior Officers' Committee (e.g. by the audit office) in order for the assessment to be rigorous, transparent and independent. This is especially pertinent with respect to the uncertainty surrounding offsetting which has been recognised in this agreement by the requirement for a transitional review of the effectiveness of the NSW Biodiversity Offsets Policy (Cl 7.2(d)).

#### ***Sharing information –ongoing EPBC Act matters (Clause 14)***

While the draft Agreement notes that the Commonwealth remains responsible for compliance and enforcement under the EPBC Act, there is no detail about how this will be fulfilled. In light of our significant concerns about the one-stop shop policy and the loss of national oversight on MNES, we strongly urge the Commonwealth government to take a strong and active role in monitoring and enforcing any bilateral assessment or approval agreement in place with NSW.

#### ***Audit (Clause 15)***

Clause 15 of the draft Agreement recognises that the Commonwealth Auditor-General may audit the operations of the Commonwealth public sector (as defined in section 18 of that Act) in relation to this Agreement. We consider it appropriate that NSW agencies involved in implementing the agreement also be subject to audit, and this could be carried out by the NSW audit office.

#### **CONCLUSION**

For the reasons outlined above, NCC does not support the draft Agreement. We urge the Government to address the key issues outlined above before finalising the agreement and to consider the broader implications of its one-stop shop policy on the protection of matters of national environmental significance.

Yours sincerely,



Kate Smolski  
Chief Executive Officer