18 January 2013

Ms Sophie Dunstone
Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: ec.sen@aph.gov.au

Re: Senate Committee Review - EPBC Amendment (Retaining Federal Approval Powers) Bill 2012

Dear Ms Dunstone,

The Minerals Council of Australia welcomes the opportunity to provide a submission to the Senate Committee Review of the EPBC Amendment (Retaining Federal Approval Powers) Bill 2012.

As you are aware, the Minerals Council of Australia (MCA) represents over 85% of minerals production in Australia. The MCA's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

In this submission, the MCA does not seek in any way to diminish the importance of effective protection of the environment, but rather promotes improvements to the efficiency and co-ordination of legislation and planning regimes within and between jurisdictions to achieve an overall better environmental outcome.

The MCA considers the proposed EPBC amendment to be inappropriate as it removes flexibility in the Act to accredit State/Territory processes (and associated opportunities for process efficiency) and hinders the reform process by providing a disincentive to national harmonisation of national environmental approvals. The amendment is also contrary to the ongoing reforms to the EPBC Act and in particular the comprehensive findings of the independent Hawke review of the *Environment Protection and Biodiversity Conservation Act 1999*.

The resources sector has seen a considerable increase in regulation over the past two years, much of which has been duplicative of other processes, reactive and poorly defined in terms of objectives and outcomes. Additional layers of regulatory process and assessment do not necessarily translate into improved outcomes, a fact confirmed in the Independent Review of the EPBC Act.

The MCA considers the opportunity to develop approval bilateral agreements, supported by robust accreditation and assurance standards should be retained within the Act. Furthermore, the delegation of EPBC Act requirements to the States/Territories allows the Commonwealth to assume a more strategic role including: monitoring and reporting of EPBC listed entities; bio-regional planning (pre-emptive of development); and as standard setter for the harmonisation of State/Territory processes. This would target Commonwealth resources more appropriately and facilitate greater biodiversity outcomes at an overall lower cost to society.

Yours sincerely

MELANIE STUTSEL
Director – Health, Safety, Environment and Community Policy

MINERALS COUNCIL OF AUSTRALIA

SUBMISSION ON THE EPBC AMENDMENT (RETAINING FEDERAL APPROVAL POWERS) BILL 2012

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18 JANUARY 2013

SUPPORTED BY:

CHAMBER OF MINERALS AND ENERGY OF WESTERN AUSTRALIA

NEW SOUTH WALES MINERALS COUNCIL

NORTHERN TERRITORY DIVISION OF THE MINERALS COUNCIL OF AUSTRALIA

QUEENSLAND RESOURCES COUNCIL

SOUTH AUSTRALIAN CHAMBER OF MINES AND ENERGY

TASMANIAN MINERALS COUNCIL

VICTORIAN DIVISION OF THE MINERALS COUNCIL OF AUSTRALIA

MCA Comments on the Proposed Amendment Bill

Is the Amendment Warranted?

The removal of the option to enter into approval bilateral agreements is a significant change to the potential functionality of the EPBC Act and diverges from the regulatory simplification reform agenda which has been underway since 2009. Given the significance of the proposed change, there is little to no explanation of the purpose of the change indicated with the Amendment Bill or the accompanying Explanatory Memorandum. More specifically, there is no explanation of 'the problem' the Amendment is intended to solve. The MCA therefore considers the proposed Amendment appears contrary to the COAG principles of best practice regulation (Principle 1: establishing a case for action before addressing a problem).

As detailed below, potential issues associated with the development of approval bilateral agreements have already been well identified as part of the broader reform process. Remedies to address these concerns are also at an advanced stage. Accordingly, the MCA considers the proposed amendment is completely unnecessary given the existing reforms which are aimed at addressing the same concerns, without loss of flexibility within the Act.

Need for Effective and Efficient Regulation

Effective regulation is essential for achieving the objectives of a modern state. Regulation can be pro-competitive and advantageous to the community in ways that promote growth in productivity and living standards. Good regulation is also important to protect heritage, biodiversity and other environmental values.

Regulatory 'burden' occurs where ineffective, inefficient regulation relative to minimum effective regulation increases the compliance costs to industry for no appreciable environmental gain. These costs represent a loss to the affected industry, the community and the economy as a whole.

The Australian Government recognises the need for effective regulation and this is reflected in its strong commitment to microeconomic reform including a better regulation and red tape reduction agenda[1]. This agenda is supported by the MCA.

COAG Commitments

The Council of Australian Governments (COAG) has long agreed with the need to ensure that regulatory processes are consistent with the Principles of Best Practice Regulation. Two relevant 'features of good regulation' as defined by COAG include[2]:

- Performance based regulations: Regulatory instruments should be performance based (focussed on outcomes and not inputs). There should be no restrictions on the use of standards as long as the objectives of the regulation are met.
- Compliance Strategies and enforcement: The regulatory burden can be reduced if the public (proponent) is required to undertake a minimum level of interaction with Government. This can be achieved through mutual recognition of approval processes within Government as well as between Governments.

The development of bilateral arrangements for assessment and approval, supported by robust accreditation standards is consistent with the above features for good regulation and the regulatory reform agenda more generally.

In further recognition of the urgency to address concerns over costs to business associated with duplication and delays caused by the multi-layered environmental approval process at the April 2012 COAG meeting, First Ministers re-affirmed their

[1] http://www.finance.gov.au/deregulation/index.html
[2] COAG - A Guide for Ministerial Councils and National Standard Setting bodies, October 2007.

commitment to 'high environmental standards, while reducing double-handling of assessment and approval processes[3]'. As part of this commitment COAG undertook to:

- fast track the development of bilateral arrangements for accreditation of state assessment and approval processes;
- develop risk and outcomes based environmental standards; and
- examine and facilitate the removal of unnecessary duplication and reduce business costs for significant projects.

While significant progress was made on these reforms, the final decision to implement them has unfortunately been delayed. The MCA considers that the proposed amendments the EPBC Act in the Bill are inconsistent with the ongoing COAG process surrounding these reforms and the significant investment already made in the development of robust accreditation standards to support the implementation of the approval bilateral arrangements.

Bilateral Agreements

The purpose of bilateral agreements for assessment and/or approval is to reduce the regulatory burden on business and development activity resulting from the multiple and intersecting layers of environmental protection legislation, at the State and Commonwealth level.

There are currently bilateral agreements in place for assessment under the EPBC Act with all States and Territories. However, only one bilateral agreement for approval has been entered into (NSW, for the Sydney Opera House)[4].

The MCA considers that bilateral agreements for assessment and in particular approval are a significantly underutilised mechanism under the EPBC Act. Even with the existing bilateral agreements for assessment, only 24% of matters considered 'controlled actions' proceed under an assessment approach set out in a bilateral agreement[5]. In its 2011 report, the Productivity Commission surmised that the reason assessment bilaterals remain relatively underutilised is due to the divergent nature of Commonwealth and State/Territory legislation (differing triggers), but also the absence of a structured process for businesses to directly seek assessment under a bilateral agreement.

Where accreditation of State/Territory processes under an approval bilateral occur, Commonwealth and State processes would be automatically integrated (without the requirement for proponents to directly seek assessment under a specific bilateral arrangements). This would potentially increase the usage of bilateral arrangements and therefore enhance the adoption of Commonwealth harmonised standards.

Barriers to the development of approval bilaterals were clearly identified in the Independent (Hawke) Review (discussed below). These include concerns over the standards of environmental protection, assurance, and the lack of Commonwealth compliance and auditing powers. These issues can be remedied through the application of appropriate safeguards, such as those provided in the Draft Framework of Standards for Accreditation of Environmental Approvals[6], developed in support of the recent COAG commitments and aligning with the Hawke review recommendations. These safeguards would encourage greater confidence and therefore usage of assessment and approval bilateral arrangements by State and Commonwealth Governments.

[3] COAG Communiqué, 13 April 2012
[4] http://www.environment.gov.au/epbc/assessments/bilateral/index.html
[5] Performance Benchmarking of Australian Business Regulation, Planning, Zoning and Development Assessments; Research Report; Productivity Commission, February 2011
[6] Draft Framework of Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999

Concerns over 'vested interests' of state governments in project approvals

Concerns have been raised by the conservation community and other groups that perceived 'vested interests' of State governments may result in decisions which are inconsistent with the objectives of the EPBC Act. In particular, it is recognised that a conflict of interest may be perceived in cases where State governments are the development proponents, assessors and approvers. In these circumstances, the MCA considers that it would be appropriate that there is enhanced oversight to ensure public confidence in the process. It is important to note however, that in some cases the Commonwealth Government can also be the proponent, and the sole assessor and approver (i.e. Commonwealth land or waters).

Independent (Hawke) Review Findings and Recommendations

Under Section 522A of the EPBC Act, the Act is required to be reviewed every 10 years from commencement. Accordingly, the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*, led by Dr Allan Hawke was undertaken between 2008 and 2009. The scope of the review included the operation of the Act and an analysis of the effectiveness of biodiversity and conservation arrangements, all with regard to Australian Government Policy objectives, notably to:

- promote the sustainability of Australia's economic development to enhance community well being while protecting biological diversity;
- facilitate delivery of Australia's international obligations;
- reduce and simplify the regulatory burden...while maintaining appropriate and efficient environmental standards; and
- ensure activities under the Act represent the most appropriate, efficient and effective and ways of achieving the Government's objectives

The review was comprehensive. It involved over 140 face to face stakeholder consultations in all Australian capitals and over 220 written submissions were received[7] after the initial call for public submissions. In addition, a further 119 submissions were received after the release of the interim report.

Concurrent to the Independent Review, the Senate Standing Committee on Environment, Communications and the Arts completed an enquiry into Operations of the EPBC Act. The recommendations from the enquiry were formally recognised in the Independent Hawke review final report.

Highly relevant to the proposed Amendment Bill, the Final Report[8] of the Hawke Review provides key recommendations on the long-term strategic role for the Commonwealth in environmental management. The report provides that the Commonwealth's role should be that of "leadership, as a champion of national interest and as a standard setter in environmental management" The report also provides five processes for undertaking the role efficiently[9]. Specifically, the Commonwealth should undertake:

1) Harmonisation - harmonise its practices with State and Territory regimes to the extent possible;
2) Accreditation - focus on accrediting State and Territory processes where they meet requisite standards;
3) Standardisation - facilitate uniform regulatory systems between the States and Territories;
4) Simplification - provide streamlined Environmental Impact Assessment (EIA) processes; and
5) Oversight - engage in performance monitoring of accredited systems.

[7] http://www.environment.gov.au/epbc/review/index.html
[8] Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, October 2009.
[9] Chapter 1 (pp12-13) and Chapter 2 (p63) of the Report of the Independent Review

The MCA considers that approval bilateral agreements are an important mechanism for achieving this long term strategic role for the Commonwealth.

Further, the potential use of approval bilateral agreements is specifically analysed in the Independent Review Report. After consideration of submissions received, the report concluded that (s2.36) "the Commonwealth should give full faith and accredit state systems that are proven to provide good environmental outcomes".

The Independent Review provides a number of specific recommendations where approval bilateral agreements are used to ensure that environmental objectives are achieved. These include the development of minimum criteria for the accreditation and assurance of State/Territory processes, enhanced Commonwealth compliance/auditing powers and a range of other procedural safeguards to ensure performance in line with the Act's objectives. Accordingly, the MCA supports the use of approval bilaterals where these appropriate standards and safeguards are in place.

At no stage does the Independent Review report recommend that the EPBC Act be reformed to remove the option to use approval bilateral agreements. Instead the review recommends that the (s2.38) "the Commonwealth should retain the option to enter into approval bilateral agreements". Accordingly, the MCA considers the proposed Amendment Bill is contrary to the findings of the Independent Review.

In the Australian Government Response to the Independent Review[10], the recommendations on streamlining and simplification of processes were agreed to, along with the accreditation of State and Territory processes where appropriate standards were met. Furthermore, the Commonwealth provided a commitment to enhancing the scope and use of mechanisms (including bilateral agreements to accredit state and territory assessment and approval regimes) to reduce duplication of systems and provide certainty for business without any loss of protection for matters of National Environmental Significance.

Consequently, the MCA understands that accreditation of state processes forms part of both the COAG process and the parallel EPBC Act reform process.

The Need for Retaining the Approval Bilateral Agreement Option

Regulatory Burden and the Minerals Industry

The minerals industry's position on the EPBC reforms have been previously provided in the 2009 MCA submission to the Hawke review[11]. Inefficiencies, lack of co-ordination and duplication between the different levels of government have been well explored over the course of the reform process. In addition, the argument for the Commonwealth to take a more strategic, oversight role, while delegating implementation to the States has been articulated in the Hawke Review's findings.

The minerals industry has a significant stake in ensuring the environmental assessment and approvals process is both efficient and effective. In each year of the Act's operation, based on departmental statistics, the mining industry has required the highest, or second highest, number of approvals and is twice as likely as other industries to be referred as controlled actions (despite having a footprint in the landscape of less than 0.3% of the total landmass[12]).

Duplication/overlap between State/Territory and Commonwealth assessment processes is an ongoing area of concern for the minerals industry and is a recognised as a priority concern under both the COAG and EPBC reform agendas. Specific areas of duplication and/or overlap include environmental planning and assessment requirements (including documentation, stakeholder engagement, offsets, and biodiversity assessment, monitoring and reporting). In addition, duplicative or

[10] Australian Government Response to the Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act*, Department of Sustainability, Environment, Water, Population and Communities; 2011.
[11] Minerals Council of Australia - Submission to the Independent Review of the Operation of the *Environment Protection and Biodiversity Conservation Act, January 2009*
[12] ACLUMP (2009); *Land Use Summary Australia*, Australian Collaborative Land Use and Management Program, 19 October 2009

contradictory conditioning for the same issues and poor timing/co-ordination of processes creates significant confusion and inefficiency.

Conflicting assessments - Mine Expansion Application

In 2008, a coal company sought to extend the operations of its mining operation, under Part 3A of the NSW Environmental Protection and Assessment Act 1979. The proposed extension required the clearing of vegetation for the expansion of the open cut, including the clearing of 13 hectares of endangered ecological communities, as well as potential habitat for other threatened species.

Due to the likelihood of impact to matters of National Environmental Significance, the proposal was referred to the Department of Sustainability, Environment, Water, Population and Communities (SEWPAC). The differences between the assessments of SEWPAC and NSW Department were significant and resulted in significant resources and time being tied up in negotiations to attempt to broker a single position.

In the end, two separate agreements on offsets had to be negotiated for the proposed project. This resulted in a delay to the project of over six months, which put at risk 100 jobs and significant economic and social benefits to the local community.

Delays Due to Lack of Integrated Processes

One MCA Member has two projects that are subject to both NSW and Commonwealth approvals. In each case, both of the NSW and Commonwealth approvals require biodiversity offsetting, but neither approval is consistent in the way the offsetting requirements apply. In both cases, the NSW and Commonwealth approvals require different offset packages

There is also no alignment between NSW and the Commonwealth regarding the method for securing the offsets. The company is yet to obtain a consistent position between the relevant NSW and Commonwealth government departments regarding the preferred method to be employed to secure the long term conservation of the offset areas, with the result that securing the long term conservation of those areas has been delayed. In addition, deadlines in NSW and Commonwealth approvals have needed to be extended to allow additional time for the respective government departments to reach a common position on the preferred method of ensuring the long term security of the offset areas. This issue remains unresolved

Delay costs for projects can vary widely, depending on the individual circumstances of a given development. However, opportunity costs for large projects may range up to $10 million for each month of delay. Aside from potential delay costs, dual approval processes increases uncertainty around timing for investors and developers, which in turn can affect investment decisions.

Strategic Reforms

Commonwealth Involvement in Project Approvals

The value of having Commonwealth resources and in particular the Commonwealth Minister involved in small-scale project developments or variations is questionable on both a value-for-money basis and return to the environment. Given the overlap between State and Commonwealth environmental approvals processes, there are clearly better and more strategic ways for the Commonwealth to focus its limited resources on protecting matters of national environmental significance.

Strategic Role for the Commonwealth

In line with the outcomes of the Hawke Review, it is the MCA's long held view that the Commonwealth should take a more strategic role as a 'standard setter' for environmental assessment and a greater oversight role for auditing and compliance. This would free up the Commonwealth to focus its resources on strategic matters, such as the monitoring and reporting of EPBC listed entities; bio-regional planning (pre-emptive of development); and as champion for the harmonisation of State/Territory processes.

The fuller implementation of assessment and approval bilateral arrangements (under a robust accreditation, assurance, auditing and compliance regime), provides a mechanism to give effect to these strategic reforms. Commonwealth resources, once removed from assessment and approval processes can be better targeted on the wider reform agenda and greater national harmonisation of environmental regulation.

Freeing up Commonwealth Resources

Outside of the strategic role for the Commonwealth, approval bilaterals are essential for streamlining criteria for approvals and specifically environmental offsets. This will in turn free up resources which can be applied to other purposes associated with the approval, namely compliance and enforcement. These resources may also be used to invest in the provision of better science for decision making (e.g. the Independent Scientific Advisory Committee).

Enabling Strategic Land Use Assessment and Planning Approaches

In addition to the reforms around environmental regulation, there is a growing focus on strategic land use assessment and planning approaches which encompass all landscape values (social, environmental, economic). An example of progress in this space is the recent development of a Multiple Land Use Framework under the COAG Ministerial Standing Council on Energy and Resources (SCER). The Framework, endorsed by SCER[13] in December 2012, provides the key elements for successful multiple land use planning, but leaves the task of implementation to the States as they hold regulatory responsibility for planning.

Key to a strategic land use assessment and planning system is the inclusion and consideration of all land use planning requirements/values, including those of the Commonwealth's EPBC Act. Therefore, a truly integrated land use assessment and planning regime can only be achieved if States are able to account for Commonwealth requirements at the outset. Accordingly, the MCA considers that delegation of assessment and approval powers to the States under a bilateral arrangement is essential to achieving this long term vision for integrated land use planning and sustainable land use.

[13] http://www.scer.gov.au/workstreams/land-access/mluf/