19 February 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: Questions on Notice - EPBC Amendment (Retaining Federal Approval Powers) Bill 2012

Dear Ms Dunstone,

Thank you for the opportunity to present before the Senate Committee on 15 February 2013. I provide below responses to the Questions on Notice requested by the Committee at the hearing.

1. Provision of MCA comments on the November 2012 draft framework of standards

Please see attached the MCA's letter to the Department of Sustainability, Environment, Population and Communities regarding the Draft Standards (dated 27 November 2012).

2. Provide comment on the impacts of approval bilateral arrangements on community confidence and the minerals industry's 'social license to operate'.

'Social license' is imperative to the minerals industry. Accordingly, MCA members are fully committed to continuous improvement in their performance, beyond regulatory requirements. As signatories to *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development* members have committed to 'contribute to conservation of biodiversity and integrated approaches to land-use planning'.

The industry considers that social license is much more than simply responding to regulatory requirements. It is not only about confidence in government processes, but confidence and acceptance of mining at a local and regional level brought about by the way industry operates, engages and works with the community and manages its environment. Indeed, the MCA considers that the social license to operate is a complement to the regulatory license and an effective means of bridging the lag between community expectations and regulatory requirements.

Community confidence in environmental assessment and approval processes is important whether it relates to approval bilaterals or the existing regulatory process. In response to the recommendations of the Hawke Review, the Government has proposed a number of reforms to the EPBC Act. These reforms include enhanced safeguards (including where bilateral arrangements are entered into), greater transparency of decision making and increased public participation. These reforms will go some way to building greater community confidence both within the construct of an approvals bilateral arrangements and the environmental assessment and approvals process more generally. The MCA also notes the high degree of community confidence in relation to the existing approvals bilateral for the Sydney Opera House.

3. Provide comment on the potential for increased litigation under a approval bilateral agreement.

The MCA considers there is no reason to suggest that the implementation of approval bilateral will lead to significantly increased litigation. In line with the Hawke Review recommendations, as long as assessment and approval processes address the objectives of the Act; are transparent in process (including public participation); have sufficiently robust regulatory safeguards in place and provide for an appropriate appeals process, the risk of increased litigation should be minimised. The

MCA would also contest that the introduction of approval bilaterals could reduce the incidence of spurious litigants who currently 'shop' for their desired outcome between the State and Federal approval processes.

Further to the above responses to the Questions on Notice, the MCA would like to provide an additional comment on the matter of resourcing for approval bilaterals. Specifically, the Committee raised concerns over the capacity of State government agencies to resource bilateral arrangements. It is important to note that the Government has committed to a number of very significant reforms in recent months, many of which are not resourced. Accordingly, the MCA considers that resourcing should not be a primary consideration when determining whether or not to retain a legal mechanism within the EPBC Act.

Yours sincerely

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

27 November 2012

Ms Kelly Pearce
Department of Sustainability, Environment, Water,
Population and Communities
GPO Box 787
Canberra ACT 2601

Re. Comments on Draft Framework of Standards for the Accreditation of Environmental Approvals

Dear Ms Pearce

The Minerals Council of Australia (MCA) welcomes the opportunity to provide feedback on the Draft Framework of Standards for the Accreditation of Environmental Approvals under the *Environment Protection and Biodiversity Conservation Act* (EPBC Act).

As you are aware, the 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.

As signatories to *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development*, MCA members commit to continuous improvement in their performance, beyond regulatory requirements.

The MCA has long supported the notion of the Commonwealth as standard setter, with administration of environmental regulation undertaken by the States/Territories. Accordingly, the MCA welcomes the COAG commitment to reform and streamline environmental assessments and approvals and looks forward to the full implementation of bilateral agreements between the Commonwealth and the States/Territories.

In reference to the Draft Framework of Standards for the accreditation of environmental approvals, the MCA provides the following comments for your consideration:

General Comments

The MCA strongly supports the reform's vision contained within the draft standards which states "*To strengthen intergovernmental cooperation and minimise costs to business through bilateral agreements under the EPBC Act which achieve high environmental outcomes".* In addition, the COAG environment regulation reforms productivity outcomes (more efficient regulation and more process certainty) have been supported by the MCA in many earlier submissions.

On system outcomes and assurance, the MCA considers it important that the reforms deliver certainty, efficiency and transparency of decision making and build community confidence through engagement and robust, defensible decisions.

The Draft Framework of Standards highlights the EPBC Act's risk based 'significant impact' threshold approach to environmental regulation and that this should be applied to assessment and approval process accredited under the bilateral agreements. The MCA supports this approach.

State/Territory Governments as Project Proponents

The MCA understands and supports the development and application of robust assurance standards which will give the community confidence in the effectiveness of the bilateral arrangements to achieve their stated environmental outcomes. It is also understood that the implementation of these standards will assure and allow for State/Territory Governments to assess and approve activities in which they can also be the proponent.

In recent months, there has been some public discourse around the perceived 'self interest' of State and Territory Governments in environmental and approval processes. Accordingly, the MCA holds concerns that if not carefully managed, these may be magnified where it is seen that State Governments are acting as the project proponent, assessor, approver and compliance enforcer. In instances where this may occur, the perceived conflict of interest may undermine community confidence not only for the project in question, but potentially flow on to a lack of confidence in the bilateral process as a whole. Accordingly, the MCA considers that the assurance safeguards already included to prevent this should be further highlighted in the Framework of Standards or supporting documentation.

Transitional Arrangements

Projects Already under EPBC Act Assessment

With respect to projects currently under referral or assessment through the EPBC Act, the MCA considers that there is a risk of creating uncertainty and additional complexity for proponents where assessment processes are transitioning to State or Territory control. Mining project assessments can take considerable time and major project assessments which have only recently commenced may miss the significant efficiency opportunities provided by the streamlining reforms.

Accordingly, the MCA considers there may be significant benefit in the Commonwealth developing supporting guidance on identifying logical points within the assessment process where handover can occur, accounting for the alignment of the two processes. This will ensure any potential risk of temporary duplication or inefficiencies arising from transition can be appropriately managed. The MCA also considers that any transition should be undertaken in close consultation with the proponent in question.

In addition, if revocation or suspension of the accreditation occurs (see expanded points below), there needs to be a clear statement of transitional arrangements for projects currently utilising that part of the State system which the Commonwealth has decided should be revoked / suspended.

Partial Accreditation

The MCA appreciates that accreditation can be most effective when holistically applied under the bilateral arrangements. However, accreditation can only be achieved where State/Territory plans, policies or guidelines are consistent with the requirements of the standards and the outcomes as provided in the Statement of Environmental and Assurance Outcomes.

In rolling out accreditation under the Bilateral Agreements, there are a number of risks which require consideration. Specifically, the full suite of State or Territory legislation, policies or programs may not be immediately consistent with Commonwealth requirements, resulting in varying degrees of consistency in any given jurisdiction. These varying levels of alignment would result in only some processes being 'accreditation ready', with other processes requiring substantial amendments, and therefore time, to achieve consistency and hence accreditation under the standards provided.

The standards respond to the above complexity by allowing for 'partial' accreditation or the accreditation of specific plans, policies or programs as put forward by the States/Territories and not restricting accreditation of specific legislative system or process. The MCA supports the flexible approach to accreditation/partial accreditation provided. However, in implementing this

approach, due consideration should be given to ensuring additional complexity for proponents is not created in the transitional 'partial accreditation' phase, which may be contrary to the purposes of the reforms in terms of timing and potential duplication.

Revocation/Suspension

The policy reinforces the Commonwealth's powers to revoke or suspend the accreditation of State and Territory assessment and approval processes. The MCA considers that there remains a risk that where holistic accreditation has been implemented, the revoking or suspension of a Bilateral Agreement may create significant uncertainty for proponents (noting the current New South Wales suspension as a case in point). It is important to ensure that inconsistencies/deficiencies identified within a single process do not impact on all assessment and approval processes under the Bilateral Agreement.

Guidelines on Accreditation and Suspension/Revocation processes.

Given there is some potential risk posed by partial accreditation and revocation/suspension (highlighted in the preceding sections), the MCA considers it important to acknowledge this accreditation timing matter with a view to providing guidelines on managing the accreditation and suspension/revocation process. The guidelines should aim to maximise consistency in the interim period before full accreditation is achieved and guide the approach taken for the staged accreditation and the suspension or revocation of accreditation. This will ensure the accreditation process remains logical, appropriately staged and minimise the potential for added complexity, duplication and potential risk for proponents.

Ministerial Approval

Under the EPBC Act, the Minister has discretion whether or not to approve an action. This is an important provision as it enables the Minister to consider all available information (including social and economic factors) as part of making determinations. The MCA considers it import to ensure that under accreditation, State Ministers are provided with equivalent discretional capacity to ensure the approval and assessment processes remain flexible to allow adaption to state specific circumstances. This Ministerial consideration is not well represented in the Draft Standards.

Flexibility

As previously provided , the MCA supports the environmental outcomes based/flexible approach to accreditation outlined in the Draft Standards. Flexibility will be essential to ensure that State/Territory process which achieve 'as good or better' outcomes for matters of National Environmental Significance (MNES), regardless of their specific process mechanics, are recognised. This will be particularly important in the accreditation of approaches, such as offsets, where the State/Territory approaches may differ in methodology to that of the Commonwealth, but offer equivalent protection.

Further to increasing the functionality of the bilateral arrangements, the MCA considers that flexibility in the accreditation of State assessment approaches, (as provided in the next section), is also important to encourage state participation in the bilateral arrangements process.

Accreditation of Alternative Assessment Approaches

Some jurisdictions, such as Western Australia, have streamlined 'assessment on proponent information' processes in place. These assessment mechanisms can be applied in specific circumstances where the proponent's proposal is 'assessment ready' and the impacts of proposed activities are well understood. It is the MCA's understanding that a similar 'Assessment on Referral Information' (ARI) process will also form part of the EPBC Act reforms. The MCA supports the accreditation of this and other streamlined assessment processes under EPBC Act and would encourage the Commonwealth to consider this at an appropriate time.

In addition, State/Territories may have other assessment process options which should be considered for accreditation, where it meets the required assurance outcomes.

Cost Recovery

Under a separate reform process, the Commonwealth is considering cost recovery of assessment processes under the EPBC Act. From discussions with DSEWPAC, the MCA understands that cost recovery will only be applied for the components of the assessment which the Commonwealth undertakes. Should cost recovery be pursued under a partial accreditation scenario, significant structural changes to the currently proposed cost recovery process will be required to provide clarity for proponents.

Given the complexities under a partial accreditation scenario, the MCA considers that the introduction of cost recovery for remaining Commonwealth processes should be deferred until accreditation arrangements have stabilised.

Specific Comments

Specific comments on individual clauses are provided below:

- Approval Bilateral Agreements.

  The Draft Framework of Standards emphasises (Clauses 11 and 12) the implementation of the currently unused "approval bilateral agreement". However, the document does not imply that any changes to the EPBC Act are required, but some provisions of the Act appear to constrain some steps proposed in the Draft Framework. These instances are noted below:

  - Clause 101 - Note 132 The "independent statutory decision maker" clause refers to the Commonwealth Minister as the decision maker and cites s134 of the EPBC Act (this appears to be an error as s133 empowers the Commonwealth Minister to approve). If a State Minister is to be the ultimate approver, the EPBC Act would appear to need to be amended. Specifically, if the ultimate decision maker remains the Commonwealth Minister, then this does not constitute a delegation of approvals.

  - Clause 66 - States that the Commonwealth may refer a proposal to a State decision maker to decide if it needs assessment for impacts on MNES and accompanying Note 84 refers to s 71 of the EPBC Act. However, s71 concerns a Commonwealth agency referring a matter to the Commonwealth Minister. This may require amendment to give effect to Clause 66.

  - Clause 64 - Introduces the new term "screening documentation" and says the proponent shall refer "screening documentation" to the State. The attached Note 82 refers to s 68(1) of the EPBC Act with requires referral to the Commonwealth Minister. This section would need to be amended to give effect to Clause 64. The way the new term "screening documentation" is used the Draft Framework implies it is documentation in line with a Notice of Intent or Initial Advice Statement and not a "referral" as defined under the EPBC Act, but which serves the same purpose. The MCA considers that this should be further clarified in the Draft Framework of Standards.

  - Clause 65 - States that if "screening documentation" has not been referred, then "decision makers" (not defined as either State or Commonwealth) can require referral. The attached Note 83 refers to s74A which concerns the Commonwealth Minister's capacity to reject a referral of an action that is part of a larger action. This section would require amending to give effect to this Clause 65.

  - Clause 102 - Examples of documentation are provided which include "initial screening or referral documentation" and the attached Note 134 refers to s74(3) of the Act. S74(3) concerns the Commonwealth

Minister publishing documentation on the Internet. This section would need to be amended to give effect to Clause 102.

- Offsets
  - Clause 32c - Provides ".. an assessment is made of any remaining, or residual, impacts on MNES, and whether those impacts are acceptable or not". Clause 34d also provides that offsets must be consistent with the EPBC Act Environmental Offsets Policy. The MCA considers that an important step has been missed between Clauses 34c and 34d, and the following should therefore be inserted:

    "the significance of residual impacts must be assessed in accordance with the Significant Impact Guidelines and if there are no significant residual impacts then environmental offsets are not required".

    The MCA considers that reinforcement of this point is critical, otherwise assessment officers may determine that any residual impact, however insignificant, requires an offset.

  - Clause 32d - Note 24 provides that the government is developing a new offsets policy. Note 24 should reflect that the Offsets Policy has now been finalised.

  - Clause 33 - Provides that "The requirement to 'avoid, mitigate, offset' can be met, in respect of each matter of national environmental significance but at a 'whole of matter' level, where the Minister accredits any combination of laws, plans, policies and programs as satisfying the Minister that no unacceptable or unsustainable impact will be approved." This Clause should be reworded as the intent in its current form is unclear.

- Page 16 - Under Commonwealth marine environment "Outcome" the term "Commonwealth marine waters" is used. This term is not used in the EPBC Act and should be changed to "Commonwealth marine environment".

- Clause 91 - States that "The decision-maker has regard to the principles of ecologically sustainable development, including the integration of economic, environmental and social considerations, the precautionary principle and the principle that the conservation of biological diversity and ecological integrity should be a fundamental consideration." The MCA considers that this representation potentially devalues the mandatory requirement under s136(1)(b) of the EPBC Act for the Commonwealth Minister to consider "economic and social matters". Section 136(1)(b) does not constrain this consideration to being "integrated" with other environmental considerations. Accordingly, the Draft Framework of Standards should more faithfully reproduce the mandatory unqualified requirement to consider "economic and social factors".

Yours sincerely

Chris McCombe
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