



Environmental Defender's Office ACT Inc.



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Director
Legislation Policy Section
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
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By email: epbc@environment.gov.au

Dear Director

Draft Commonwealth/ Australian Capital Territory Bilateral Agreement

The Environmental Defender's Office (ACT) (EDO) welcomes the opportunity to comment on the draft bilateral assessment agreement between the Commonwealth of Australia and the Australian Capital Territory (the draft Agreement) made under section 45 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act).

The Environmental Defender's Office (ACT) is a non-profit, community legal centre specialising in public interest environmental law. Our office is one of nine independently constituted and managed Environmental Defender's Offices in each State and Territory of Australia. We provide legal representation and advice, take an active role in environmental law reform and policy formulation and offer education programs designed to facilitate public participation in environmental decision-making.

The EDO notes that the aim of the draft Agreement is to allow the Commonwealth Minister administering the EPBC Act (the Commonwealth Environment Minister) to rely on specified environmental impact assessment (EIA) processes of the Australian Capital Territory (ACT) in assessing actions under the EPBC Act. The draft Agreement accredits the EIA process of assessment of actions which require an environmental impact statement (EIS) under the ACT *Planning and Development Act 2007* (the ACT Planning Act).

The EDO supports the broad aim of bilateral agreements in protecting the environment and minimising duplication and coordinating EIA processes. However, the Office has a number of recommendations which this Office believes would help

ensure that the bilateral agreement sets out best practice for environmental assessments and will provide appropriate environmental protection.

Summary of recommendations

The EDO recommends that the draft Agreement be amended so as to:

- require the ACT Planning and Land Authority (ACTPLA) to undertake public consultation on scoping documents;
- require an EIS to comply with the scoping document and adequately address public comments;
- require ACTPLA to endorse draft assessment documentation as complying with the scoping document before the draft EIS is released for public comment;
- require consultation on revised EIS;
- amend the time for public comment on an EIS and require the invitation to comment to be published on the internet;
- require guidelines for exercising Ministerial discretion whether to hold a public inquiry;
- require the proponent to provide copies of all submissions received on the draft EIS to the ACT Minister administering the ACT Planning Act (the ACT Minister);
- require any additional information provided by the ACT government to the Commonwealth Environment Minister to be publicly available; and
- clarify that public consultation is required if this agreement is amended or replaced.

In addition it is recommended that the Commonwealth consider whether the draft Agreement can validly restrict public access to assessment documentation.

1. Consultation on scoping document

The draft Agreement sets out that where a proposal requires an EIS the 'guidelines' for conducting the environmental impact assessment are contained in the scoping document which ACTPLA is required to prepare (under s212 of the ACT Planning Act). While ACTPLA must consult certain prescribed entities when preparing the scoping document, ACTPLA is not required to seek broader public comment on the scoping document. This is discretionary (item 2 of Schedule 1 to the draft Agreement and s212(3) of the ACT Planning Act and Regulation 51(3) of the *ACT Planning and Development Regulation 2008*).

The EDO considers it appropriate to have wider mandatory consultation on the scoping document for any action that is assessed under the Agreement. The scoping document is an important part of the EIA process as it sets out those matters that an EIS must address. Public consultation on the scoping document will have the benefit of helping to ensure that all appropriate matters are identified in an EIS.

The EDO recommends that the draft Agreement be amended to require ACTPLA to:

publish a draft scoping document and invite public comment on the document;
take into account any comments received; and
publish the final scoping document.

2. Requirement to ensure that EIS adequately addresses matters set out in scoping document and public comments

The purpose of preparing 'guidelines' for conducting EIA (referred to as scoping documents in the ACT) is to ensure that an EIS adequately addresses the environmental impacts of a proposal. However this objective will only be achieved if the final EIS addresses the matters outlined in a scoping document.

Currently the ACT EIA process set out in the draft Agreement and the ACT Planning Act does not make it clear what are the consequences if an EIS does not adequately address the matters set out in the scoping document or the matters raised in public consultation on the draft EIS.

It is noted that a draft EIS, provided to ACTPLA for public comment under the Act Planning Act must address each matter raised in the scoping document (s216(2)(a) of the ACT Planning Act). In addition a revised EIS prepared following public consultation must address each matter raised in the scoping document and any matter raised in public consultation (s221(3) of the ACT Planning Act).

It is also noted that the draft Agreement in effect also requires an EIS to address the matters raised in the scoping document (items 2, 3 and 4 of Schedule 1 and Schedule 4 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (the EPBC Regulations)).

The draft Agreement and the ACT Planning Act provide for ACTPLA to accept an EIS if satisfied that the EIS sufficiently addresses each matter raised in the relevant scoping document and the public submissions (s222(2)(a) of the ACT Planning Act and item 5 of Schedule 1 to the draft Agreement). If ACTPLA is not satisfied that the EIS is in accordance with the scoping document then ACTPLA must notify the proponent that the EIS has not been accepted (including the reasons) and inviting the proponent's response (s224 of the ACT Planning Act and item 5 of Schedule 1 to the draft Agreement). In this instance a proponent may respond by providing a revised EIS or in another way. Alternatively a proponent may choose not to respond. If the proponent does not provide a revised EIS or otherwise address the Authority's concerns in relation to addressing the scoping document, it appears that ACTPLA must still give the original EIS to the ACT Minister (see s225(1)(b) of the ACT Planning Act and item 5 of Schedule 1 to the draft Agreement), notwithstanding that it does not conform with the scoping document.

Where ACTPLA is not satisfied that an EIS sufficiently takes into account public representations, or sufficiently demonstrates how these have been taken into account, the Act does not clearly identify what should occur. The alternative to accepting an EIS (which can only occur under s222(2) of the ACT Planning Act if ACTPLA is satisfied that public submissions have been adequately addressed) is to take action under s224. However this section only refers to action ACTPLA must take if it is not satisfied that an EIS sufficiently addresses the matters raised in the relevant scoping document. It does not relate to where ACTPLA is not satisfied that an EIS adequately takes into account public representations.

The EDO is concerned that the process outlined in the draft Agreement and the ACT Planning Act is not clear. This Office is of the view that an EIS should not be approved unless it is prepared in accordance with the scoping document and adequately takes into account public representations. This is consistent with the requirement in the EPBC Act for an EIS to be prepared in accordance with the guidelines (s103(1) of the EPBC Act). While this may be the intent of the draft Agreement and the ACT Planning Act it is not clear that this is the case.

The EDO recommends that the draft Agreement be amended to:

clarify the consequences where an EIS does not adequately address the matters set out in a scoping document and the matters raised in public consultation; and

where ACTPLA is not satisfied that an EIS adequately address these matters, require ACTPLA to notify the ACT Minister that it has not accepted the EIS and the reasons for not accepting it.

3. Requirement to publicly notify EIS only after satisfied it complies with scoping document

In addition there appears to be no provision for ACTPLA to ensure that an EIS sufficiently addresses the matters set out in the scoping document prior to the public notification and public consultation on the EIS. Paragraph 216(2)(a) of the ACT Planning Act requires a draft EIS to address each matter raised in the relevant scoping document and item 3 of Schedule 1 to the draft Agreement presupposes that the EIS that is notified for public comment has been prepared in accordance with the scoping document.

However, in practice, the Authority's consideration of the EIS (and specifically whether it sufficiently addresses the matters set out in the scoping document) occurs after the public consultation period (see s222 of the ACT Planning Act). The draft Agreement does not specifically require ACTPLA to only publish a draft EIS if satisfied that it adequately addresses the matters in the scoping document.

The EDO is of the view that the draft Agreement should specifically require ACTPLA to satisfy itself that the draft EIS has been prepared in accordance with the scoping document prior to notifying it for public consultation. This ensures that the public has an opportunity to comment on an EIS which has specifically addressed all the relevant matters. Without this requirement, the public would not have an opportunity to comment on any revised EIS prepared later to address any previously unaddressed matters from the scoping document.

This requirement would be consistent with the EPBC Act process. Under the EPBC Act, the Commonwealth Environment Minister may only approve the publication of a draft EIS if satisfied that the draft statement is in accordance with the EIS guidelines (s103(2) of the EPBC Act).

The EDO recommends that the Agreement be amended to:

require ACTPLA to publicly notify the draft EIS only after it is satisfied that the draft EIS has been prepared in accordance with the scoping document.

4. Consultation on revised EIS

The draft Agreement provides for a proponent to provide a revised EIS if ACTPLA is not satisfied that an EIS adequately addresses matters outlined in a scoping document (item 5 of Schedule 1 to the draft Agreement). However, there is no provision for the public to be notified or to provide comment on any revised EIS.

It is possible that a revised EIS will provide substantial new information. Without an opportunity for public comment on any new material provided it is possible that the accuracy of the information will not be rigorously assessed. The EDO is of the view that it is important for the public to have an opportunity to provide comment on any revised EIS. This is consistent with the spirit of the EPBC Act which provides for public comment on EISs.

***The EDO recommends that the draft Agreement be amended to:
require the same notification and public consultation provisions to
apply in relation to a revised EIS as apply to the draft EIS.***

5. Time for public comment and notification of public consultation period

The draft Agreement requires the public to be given at least 28 days to provide comment on a draft EIS (see item 3 of Schedule 1 to the draft Agreement). However under the ACT Planning Act the public is required to be given at least 20 working days for comment on a draft EIS. In some instances 20 working days will equate to longer than 28 calendar days. For example, if there are a number of public holidays in a period.

The EDO considers that the minimum period for public consultation is best calculated according to business days. It ensures that if a consultation period falls during a public holiday period, for example over the Christmas period, this will enable a slightly longer timeframe for the consultation period. This appropriately takes into account the difficulty people may have in preparing submissions over a public holiday period. Consequently the EDO is of the view that the draft Agreement should reflect the time period of 20 working days, rather than 28 calendar days.

Clause 7 of the draft Agreement also sets out the advertising requirements for inviting public consultation on a draft EIS and scoping document. It requires an invitation to be published in newspapers circulating generally in each State and Territory.

It is recommended that clause 7 of the Agreement should be amended to also require the invitation to be published on ACTPLA's website. This is consistent with the requirement in s217(a) of the ACT Planning Act which requires invitations to comment on draft EISs to be published on ACTPLA's website. It is also consistent with the general publication requirements in the EPBC Act which generally require appropriate internet publication of public consultation periods. It is noted that the notification of a public consultation period for an EIS is also referred to in clause 3 of

Schedule 1 to the Agreement. It is recommended that this should also refer to a requirement to publish the notice on the internet.

***The EDO recommends that the draft Agreement be amended to:
require the public to be given at least 20 working days to provide comment on a draft EIS;
set out that when the public is invited to comment on the draft EIS or scoping document, the invitation shall be published in ACTPLA's website, as well as in newspapers circulating generally in each State and Territory.***

6. Guidelines on whether to hold a public inquiry

Under the draft Agreement and the ACT Planning Act, once the ACT Minister has received an EIS, he or she must decide whether to establish a panel to conduct an inquiry about the EIS (item 5 of Schedule 1 to the draft Agreement and s226 of the ACT Planning Act).

The EDO is concerned that the Minister has a largely unfettered discretion in determining whether or not to establish a panel. No guidance is given as to when a panel should be established. A further concern is that once a panel has been established there is no requirement for public hearings to be held or for community input into the process.

The EDO is of the view that guidance should be given as to when the Minister may choose to establish a panel. This is consistent with the EPBC Act which sets out criteria which the Commonwealth Environment Minister must consider when making a decision as to which assessment approach to follow (for example assessment by EIS or assessment by inquiry, see s87(2) of the EPBC Act). The EPBC Act also provides for hearings held as part of an inquiry to be conducted in public (see Division 7 of Part 8 of the EPBC Act). The EPBC Act also requires hearings held as part of an inquiry to be conducted in public (Division 7 of Part 8 of the EPBC Act).

***The EDO recommends that the draft Agreement be amended to:
provide guidance as to when a panel will be established ; and
require a panel to invite public comment as part of their inquiry.***

7. Requirement to provide submissions to the ACT Minister

The draft Agreement requires the ACT to prepare an assessment report in relation to the EIS and provide a copy of the report to the Commonwealth Environment Minister (clause 16 and item 6 of Schedule 1 to the draft Agreement).

Clause 16 of the Agreement requires the ACT to provide a copy of any other assessment documentation pertaining to the relevant impacts to the Commonwealth Environment Minister. This includes submissions which form part of the assessment process (by virtue of the definition of 'assessment documentation').

The EDO supports the requirement that all copies of submissions received in response to the draft EIS be provided to the Commonwealth Environment Minister.

This ensures that the Minister has all the relevant information before him or her and will enable the Minister to review a particular aspect of a submission in greater detail if he or she wishes. This is consistent with the requirement under section 104 of the EPBC Act for a proponent to provide to the Minister a copy of any comments received in relation to an EIS, following the public consultation period.

However, the draft Agreement does not currently require the proponent to provide copies of all submissions received as part of the public consultation process on the EIS to the ACT Minister (see item 4 of Schedule 1 to the draft Agreement). For the reasons outlined above, it is desirable that the ACT Minister receive copies of all the submissions and not just a summary of the submissions from the proponent.

Indeed it will be necessary for the ACT Minister to receive a copy of all the submissions in order for the ACT Minister to provide these submissions to the Commonwealth Environment Minister (as required under clause 16 of the draft Agreement).

***The EDO recommends that the draft Agreement be amended so as to:
require the proponent to provide to the ACT Minister an itemised list
of all submissions received in relation to the draft EIS and a copy of
any submission received.***

8. Public access to further information provided

When the ACT provides the Commonwealth Environment Minister with the Assessment Report and other assessment documentation, the ACT Government may provide 'additional information on social and economic matters under section 136 of the EPBC Act if such information will be relevant to the Commonwealth Environment Minister's decision whether to approve the action' (under clause 16.2 of the draft Agreement). This Office is of the view that any information which the Minister may rely upon in making a decision should be available for public comment (subject to the standard exceptions).

This is consistent with the spirit of the EPBC Act. It is also consistent with the requirement in clause 17 of the draft Agreement that the Commonwealth Environment Minister must provide the ACT with an opportunity to comment on any additional information used in a decision.

***The EDO recommends that the draft Agreement be amended so as to:
require public notification and invitation to comment on any
additional information provided to the Minister that was not
addressed as part of the State assessment process.***

9. Public consultation if agreement amended or replaced

Clause 37 of the draft Agreement provides for variation or replacement of the bilateral agreement. It is noted that it is envisaged that any variation would occur through the making of another bilateral agreement to vary or replace this agreement.

The EDO notes that the provisions in the EPBC Act relating to bilateral agreements, including notification and public consultation provisions and content requirements of agreements would apply to any such variation or replacement (see Part 5 of the EPBC Act). However this Office is of the view that there would be benefit in the draft Agreement expressly stating this.

***The EDO recommends that the draft Agreement be amended to:
specify that the provisions relating to the making of a bilateral agreement under the EPBC Act apply to any variation or replacement agreement.***

10. Restriction on public access to material

Clause 33 of the draft Agreement currently provides for public access to assessment documentation except where otherwise prohibited by the ACT Planning Act. The ACT Planning Act allows for the restriction of public access to certain specified information, including information that would disclose a trade secret, endanger life or physical safety, lead to property damage or theft, or jeopardise national security (see s411(6) and 412 of the ACT Planning Act).

However, this clause appears to be inconsistent with the EPBC Act which only allows a bilateral agreement to restrict public access to assessment documentation if it would have been restricted if considered under Part 8 of the EPBC Act (see regulation 3.30 of the EPBC Regulations). The type of information that is restricted under the EPBC Act is national security information, advice to the Minister or commercial-in-confidence information (see s93 of the EPBC Act).

While the EDO does not object to the restriction of public access to assessment documentation on these grounds it notes that such a requirement appears to be contrary to the prerequisite set out in paragraph 50(b) of the EPBC Act for the Minister to enter into the Agreement. Paragraph 50(b) provides that the Minister may only enter into a bilateral agreement if satisfied that the agreement meets the requirements prescribed in the regulations. Part 3 of the EPBC Regulations sets out the requirements that the Minister must be satisfied are met before the Minister enters into an agreement (regulation 3.01 of the EPBC Regulations). Part 3 in turn provides that a bilateral agreement must provide for public access to assessment documentation except where it would be restricted under Part 8 of the EPBC Act (regulation 3.03).

***The EDO recommends that:
the Commonwealth consider the ability to restrict the public access to assessment documentation as provided for in clause 33 of the draft Agreement.***

As the ACT Planning Act and associated regulations have only recently come into effect (on 31 March 2008), it is difficult to analyse whether in practice the EIA processes in this Act will provide appropriate environmental protection. Consequently the EDO strongly supports the mandatory five year review of the bilateral agreement.

Please do not hesitate to contact me on 6247 9420 if you would like to discuss any matters raised in this submission.

Yours sincerely

Environmental Defender's Office Ltd

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