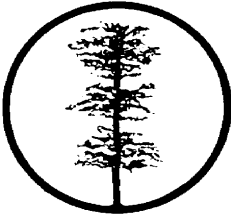


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19 June 2009

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SUBMISSION ON THE DRAFT BILATERAL AGREEMENT BETWEEN THE COMMONWEALTH OF AUSTRALIA AND THE STATE OF QUEENSLAND RELATING TO ENVIRONMENTAL IMPACT ASSESSMENT

The Environmental Defenders Office (Qld) Inc. ("EDO(Qld)") and Environmental Defender's Office of Northern Queensland Inc. ("EDO-NQ") ("EDOs") welcome the opportunity to provide comments on the draft agreement between the Commonwealth of Australia and the State of Queensland relating to Environmental Impact Assessment under the *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act").

The EDOs are community legal centres which specialise in public interest environmental law in Queensland. We frequently advise community member clients on their rights to engage with the assessment processes under both the EPBC Act and Queensland legislation. Should you have any queries about any part of this submission please do not hesitate to contact us.

Yours faithfully
Environmental Defenders Office (Qld) Inc. and
Environmental Defender's Office of Northern Queensland Inc.

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EDO (Qld)

EDO Submission in response to the Bilateral Agreement between the Commonwealth of Australia and the State of Queensland relating to Environmental Impact Assessment under the *Environment Protection and Biodiversity Conservation Act 1999*

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Introduction and summary

The proposed bilateral agreement between the Commonwealth of Australia and the State of Queensland relating to Environmental Impact Assessment (“the Bilateral Agreement”) will continue to ensure an improved minimum standard of Environmental Impact Statement (“EIS”) in Queensland. However, no attempt has been made to address the shortcomings of the previous Bilateral Agreement. These shortcomings were first identified in a joint submission previously made to the Commonwealth Minister for Environment and Heritage in 2002 by the EDOs, Queensland Conservation Council, WWF Australia, Humane Society International, and the Tasmanian Conservation Trust.¹ In relation to those previously identified shortcomings (which we confirm remain in the proposed new Bilateral Agreement) we repeat and rely upon that previous joint submission.

In addition to repeating and relying upon that previous joint submission, this submission provides further focused discussion on those shortcomings and presents recommendations to address them. Those recommendations are as follows:

1. The draft Bilateral Agreement should not entered into until the EIS process for major projects under the SDPWOA is overseen by the Queensland Department of Environment and Natural Resource Management.

Alternatively:

The draft Bilateral Agreement be amended to remove control of the EIS process under the SDPWOA from the Queensland to DERM, in relation to those proposed actions which would trigger the EPBC Act (e.g. those proposed actions which are likely to have a significant impact upon a matter of NES), and which would be assessed under the EIS processes in the SDPWOA pursuant to the terms of the current Bilateral Agreement.

2. The draft bilateral agreement should not entered into until the EIS process for major projects under the SDPWOA is removed and bought under either the EP Act or IPA.
3. Clause 28 of the draft bilateral agreement should be amended to establish a strong presumption that matters will be released on the grounds of public interest unless shown they should be exempt for valid and substantive reasons.

Alternatively:

Clause 28 of the draft Bilateral Agreement should be amended to reflect the standard in regulation 3.03 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

4. The draft bilateral agreement should not be entered into until the EP Act and IPA are amended to include offence provisions for providing false or misleading information to obtain an approval or in response to a condition of an approval, similar to sections 489 - 491 of the EPBC Act.

We submit that although the shortcomings highlighted in both this submission and the previous join submission referred to above are not addressed at present, the negotiation of a new bilateral agreement represents an excellent opportunity to increase the effectiveness of the Bilateral Agreement in achieving the objectives of the EPBC Act.

¹EDO, QCC, WWF, HSI and TCT, ‘*Submission on the proposed Queensland assessment bilateral agreement under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)*’, Brisbane, 4 October 2002.

Submissions

Benefits of the draft agreement

The previous Queensland bilateral agreement generally improved the EIS process in Queensland. It did this through:

1. requiring an EIS to be made for a greater number of projects compared to when there was no bilateral agreement; and
2. improving the quality of EIS made in Queensland; and
3. reducing the potential for duplication of assessment processes at State and Commonwealth government levels.

The proposed draft Bilateral Agreement has not changed on these points and so should continue to provide these benefits.

Concerns with the draft agreement

1. Conflict of interest

The EDOs' main concern with the Bilateral Agreement is that it gives control of EIS processes for large projects in Queensland under the *State Development and Public Works Organisation Act 1974* (Qld) ("SDPWOA") which impact upon matters of national environmental significance ("NES") to the Queensland Coordinator General and Department of Infrastructure and Planning ("DIP"), rather than the Department of Environment and Resource Management ("DERM").

The objectives of the EPBC Act revolve around environmental protection and ecologically sustainable development. However, this is not an explicit objective of the Coordinator General under the SDPWOA. Compared to the EPBC Act, the SDPWOA makes little mention of the need to ensure ecologically sustainable development and that matters of NES are adequately protected. Rather, the Coordinator General's major interest is in seeing development undertaken for economic benefit.

By placing the responsibility for the EIS in the hands of the Coordinator General, the purpose of the EIS process may change from ensuring ecologically sustainable development is taken into account, to facilitating development. The EDOs believe this amounts to a conflict of interest which will reduce the effectiveness of the EIS process to ensure protection of matters of NES.

The Commonwealth would give its approval to this conflict of interest if it entered into the Bilateral Agreement in its current form. Before entering into the Bilateral Agreement, the Commonwealth should place pressure on the Queensland government to reform its laws relating to EIS processes under the SDPWOA to avoid this conflict of interest. Alternatively, the Commonwealth should amend the draft Bilateral Agreement to remove control of the EIS processes under the SDPWOA from the Queensland Coordinator General to DERM, in relation to those proposed actions which would trigger the EPBC Act (e.g. those which are likely to have a

significant impact upon a matter of NES), and which would currently be assessed under the EIS processes in the SDPWOA pursuant to the terms of the current Bilateral Agreement.

Recommendation 1:

The draft Bilateral Agreement should not entered into until the EIS process for major projects under the SDPWOA is overseen by the Queensland Department of Environment and Natural Resource Management.

Alternatively:

The draft Bilateral Agreement be amended to remove control of the EIS process under the SDPWOA from the Queensland to DERM, in relation to those proposed actions which would trigger the EPBC Act (e.g. those proposed actions which are likely to have a significant impact upon a matter of NES), and which would be assessed under the EIS processes in the SDPWOA pursuant to the terms of the current Bilateral Agreement.

2. Encourages complexity

The draft Bilateral Agreement encourages the current complexity of the Queensland EIS system by accrediting three different EIS processes. There are three EIS processes in Queensland legislation – one under the SDPWOA, one under the EP Act, and one under IPA. There is no strong argument which can be made in favour of maintaining this fragmented system. Furthermore, as noted above, this system also contributes to the significant problem of the environmental impacts of major projects being assessed by the Coordinator General instead of DERM.

In line with the previous recommendation, the Commonwealth should not enter the bilateral agreement until the EIS process removed from the SDPWOA and bought under either the EP Act, the IPA, or both.

Recommendation 2:

The draft bilateral agreement should not entered into until the EIS process for major projects under the SDPWOA is removed and bought under either the EP Act or IPA.

3. Does not meet benchmark standards

The draft bilateral agreement does not meet all of the benchmark standards for bilateral agreements contained in the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) (“EPBC Regulations”), in particular in relation to regulation 3.03.

Regulation 3.03 states:

“3.03 Public access to assessment documentation

- (1) The bilateral agreement must provide that documentation about each assessment made under the manner of assessment specified in the agreement must be made available to the public.*
- (2) However, the bilateral agreement may provide that access to relevant documents may be restricted if it would not be available if the action to which the bilateral agreement applies had been assessed under Part 8 of the Act by the Commonwealth.*

Note: Information is not available on the grounds of national security, if it is advice to the Minister or if it is commercial-in-confidence. See, for example, the Act, section 95.”

Clause 28 of the draft bilateral agreement attempts to address this regulation with the following words:

“Public access to Assessment Documentation

The State of Queensland agrees that documentation about each assessment made under the manner specified in Schedule 1 will be available to the public in accordance with the relevant laws of the State of Queensland, except where corresponding information would not have been available to the public if the action had been assessed by the Australian Government under the Environment Protection and Biodiversity Conservation Act 1999.”

The words *“in accordance with the relevant laws of the State of Queensland”* in clause 28 limit the disclosure under this clause to a standard below that required by Regulation 3.03. In addition to the exemptions allowed by Regulation 3.03 of national security, advice to the Minister and commercial-in-confidence, the Queensland *Freedom of Information Act 1992* (“FOI Act”) imposes numerous other exemptions which can be used to greatly restrict access to information past the point envisaged by the EPBC Regulations. In the past this has been open to abuse, especially regarding a technical approach to using the “cabinet matter” exemption in section 36 of the FOI Act. This is unfortunate and indeed unacceptable, as there is a strong public interest argument in ensuring the public have sufficient access to information which relate to the matters of NES that will be assessed under the bilateral agreement.

In cases of abuse of this provision, it may be open for the public to appeal to the Commonwealth under section 57 of the EPBC Act. However, this line of appeal may not be open unless there is a clear breach of the agreement. As it stands, an abuse of the FOI Act which frustrates the objectives of the EPBC Regulations will not be in breach of the draft Bilateral Agreement. To limit the potential for abuse, clause 28 of the draft bilateral agreement should be amended to recognise there is a strong public interest in disclosure of information relating to matters of national environmental significance.

The EDOs' view on expanding the role of the public interest was also stated in our recent submission on the Queensland *Right to Information Bill 2009*²:

"The EDOs' firm view is that instances of public interest FOI access should be expanded. Currently, a public interest test is not applied to many exemptions, such as for Cabinet or Executive Council documents which are class exemptions lacking a public interest balancing test. The presumption that there can be no public interest arguments that would overcome the public interest in maintaining Cabinet confidentiality and collective ministerial responsibility is of great concern to the EDOs. The fact that release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public. We are also concerned and agree with the Panel that there is a risk that FOI officers may neglect to consider the public interest test because a request falls within an exemption.

We suggest that public interest considerations be given a greater role in determining whether information is released, similar to the New Zealand legislation. In New Zealand, unless information falls within a very limited number of exemptions, agencies must show that the information satisfies one of a number of criteria and then apply a test balancing the harm of releasing the information to determine whether this outweighs the public interest in keeping the information confidential."

Recommendation 3:

Clause 28 of the draft bilateral agreement should be amended to establish a strong presumption that matters will be released on the grounds of public interest unless shown they should be exempt for valid and substantive reasons.

Alternatively:

Clause 28 of the draft Bilateral Agreement should be amended to reflect the standard in regulation 3.03 of the *Environment Protection and Biodiversity Conservation Regulations 2000 (Cth)*.

4. Weakens enforcement of the EPBC Act

The Bilateral Agreement will reduce the scope for enforcement of the EPBC Act by allowing the offence provisions in the EPBC Act which prohibit the giving of false or misleading information³ to be circumvented. Courts apply a strict interpretation of criminal provisions and the supply of information to the Queensland Government under the SDPWO Act, EP Act or IPA is likely to be one step removed from being "in response to a requirement or request" under Parts 7, 8, 9 or 13 of the EPBC Act as required to satisfy section 489. The general provision of section 491 would also not apply as the provision of information to the Queensland Government.

² EDO-Qld and EDO-NQ, "Feedback on the Right to Information Bill 2009 (Qld) (public consultation draft)", 31 March 2009

³ ss. 489-491: EPBC Act

Recommendation 4:

The draft bilateral agreement should not be entered into until the EP Act and IPA are amended to include offence provisions for providing false or misleading information to obtain an approval or in response to a condition of an approval, similar to sections 489 - 491 of the EPBC Act.

Conclusion and summary of recommendations

The proposed draft Queensland Bilateral Agreement has not altered the previous bilateral agreement. Therefore, it can be expected to continue to provide the benefits realised under the previous agreement, but can also be expected to continue its shortcomings.

The proposed draft Queensland Bilateral Agreement:

1. will continue to encourage the complexity and conflict of interest issues caused by a separate EIS process for major projects under the SDPWOA;
2. does not meet benchmark standards for transparency of decision making; and
3. will weaken the ability to enforce the offence provisions of the EPBC Act.

To address these problems, the EDOs recommend the following actions be taken:

5. The draft Bilateral Agreement should not entered into until the EIS process for major projects under the SDPWOA is overseen by the Queensland Department of Environment and Natural Resource Management.

Alternatively:

The draft Bilateral Agreement be amended to remove control of the EIS process under the SDPWOA from the Queensland to DERM, in relation to those proposed actions which would trigger the EPBC Act (e.g. those proposed actions which are likely to have a significant impact upon a matter of NES), and which would be assessed under the EIS processes in the SDPWOA pursuant to the terms of the current Bilateral Agreement.

6. The draft bilateral agreement should not entered into until the EIS process for major projects under the SDPWOA is removed and bought under either the EP Act or IPA.
7. Clause 28 of the draft bilateral agreement should be amended to establish a strong presumption that matters will be released on the grounds of public interest unless shown they should be exempt for valid and substantive reasons.

Alternatively:

Clause 28 of the draft Bilateral Agreement should be amended to reflect the standard in regulation 3.03 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

8. The draft bilateral agreement should not be entered into until the EP Act and IPA are amended to include offence provisions for providing false or misleading information to obtain an approval or in response to a condition of an approval, similar to sections 489 - 491 of the EPBC Act.

By taking these actions, the Department of the Environment, Water Heritage and the Arts has an opportunity to further improve the standard of EIS processes under the EPBC Act.