ENVIRONMENTAL DEFENDERS OFFICE (SA) INC.

A Community Legal Centre specialising in public interest environmental law

28 September 2012

Ms Merridie Martin
Director, Strategy and Advice
Department of Environment, Water and Natural Resources

Via email merridie.martin@sa.gov.au

Dear Ms Martin

Re: Accreditation of the Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999.

The Environmental Defenders Office SA Inc (the EDO) is a community legal centre with twenty years experience specialising in environmental law issues. Engaging in law reform processes, including reviewing proposed changes to legislation to assess their level of protection for the environment, forms an important part of our work. As such, we welcome the opportunity to make a submission on this very important matter. We trust that our comments will be passed on to your colleagues at the Commonwealth level.

The EDO works with the South Australian and Commonwealth environmental and planning legal regimes every day. We have assessed the rigour of current environmental assessment processes and laws, tested their effectiveness in court, made numerous law reform submissions and have assisted many local communities to participate in planning and environmental law processes over a number of years. We strongly support the development of efficient and effective environmental laws in Australia.

The EDO and its counterparts interstate have consistently advocated for high environmental standards to be embedded in all jurisdictions. The EDO submits that environmental laws are a reasonable regulatory burden and that the overriding public purpose of best practice environmental laws and the fundamental public purpose of best practice environmental standards must be recognised.

In summary ;

1. The EDO is opposed to the creation of a Bilateral Approval Agreement

2. Insufficient time has been allocated to the process
3. Insufficient details exist as to how the Bilateral will be implemented

A. **Opposition to a Bilateral Approval Agreement**

We understand that the objectives of accreditation are twofold. The process seeks to achieve streamlining and efficiency (and allegedly reduced costs) through avoidance of duplication in approval processes whilst maintaining high environmental outcomes or standards.

The EDO is opposed to the implementation of a Bilateral Approval Agreement. The Commonwealth and the States have distinct interests when considering whether to approve certain projects. The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (the EPBC Act) sets out the Commonwealth's unique role in protecting matters of national environmental significance. Recognition and management of issues such as large scale mining development on matters including nationally significant threatened species requires a coordinated national response.

The Commonwealth also has sole responsibility for ensuring through the approvals process that Australia's international obligations with respect to matters such as world heritage, Ramsar sites and migratory bird species are met when assessing significant development proposals. It is alleged that the approvals process is costly. However, when measured as a proportion of project value it is mainly in the assessment stage, not the actual approval process that most of the costs are incurred.

There are numerous examples where Commonwealth involvement has led to clear, improved outcomes not assured by state processes. For instance in South Australia in late 2010, Heli-Experiences proposed a helicopter joyflight operation based north of Hanson Bay in the south-west corner of Kangaroo Island. The helicopter flights would track over and around the Flinders Chase National Park. The proposal was approved by the Kangaroo Island Council. This matter is notable because it was not referred initially by the proponent and was referred only as a result of a third party merits appeal lodged in the South Australian Environment, Resources and Development Court. The proposal was belatedly referred for its potential adverse affects on listed threatened species and communities, as well as listed migratory species present in the area including the Australian Sea-lion, White Bellied Sea -eagle and the Eastern Osprey. The referral resulted in conditions being imposed by the Commonwealth which were stricter than those imposed by the local Council.

B. **Concerns with the process for developing and adoption of an Approvals Bilateral**

We understand that by December 2012 the agreed environmental standards and a draft Approvals Bilateral will be in place. The public will have 28 days to consult on the draft as required by the EPBC Act following which the Bilateral will be tabled in Parliament for formal approval . The due date for completion is March 2013.

In our view this is a completely unworkable time frame. This is a complex proposal requiring in depth analysis and appropriate consultation neither of which has occurred. For example, we understand that a draft framework for accreditation setting out the required standards to be met by the States

has been developed by the Commonwealth, but this document is not available to the public. It is crucial that this be released for consultation.

The Commonwealth has advised that the relevant thresholds in drafting the standards are (i) an adequate level of environmental assessment and (ii) no unsustainable impacts on matters of national environmental significance. It is most important that we have comprehensive standards which are specific and prescriptive rather than broad aspirational goal. The standards should include good process rather than just outcomes to help ensure better environmental outcomes, greater public trust, and wider acceptance of decision-making. They include appropriate community consultation, independent objective environmental assessment, accountability and review.

Identifying best practice standards is essential, but it is just the first step. A *significant* amount of legislative amendment would be needed in South Australia and other jurisdictions before any of the proposed agreements could be finalised to an acceptable standard. Sufficient time must be allowed, including for consultation. The work involved to develop a suite of best practice standards for environmental regulation is substantial. This cannot be done to any level of depth in the time proposed.

The major concern with the short time frame is that the standards could be so broadly framed that it will be easy for states to argue that they have been met. This could raise serious, potentially legal, issues of Commonwealth abrogation of, for example, their duties regarding international environmental obligations.

Furthermore, the 28 day consultation period and the tabling of Agreements are not qualitative safeguards. When the draft South Australian Bilateral Assessment Agreement was released for public consultation, there were few submissions as the general community were not aware of the process and did not fully understand the implications of such an agreement for their local community. Similarly, while instruments such as Bilateral Agreements are subjected to parliamentary scrutiny, whether they are disallowed depends on the number of votes in Parliament, not necessarily the merits. Therefore transparency mechanisms alone do not guarantee appropriate standards. The only way to ensure that high Commonwealth standards are applied is to embed them comprehensively in State legislation.

C. **Consequences for the South Australian government**

This process will add considerably to South Australia's workload in respect of environmental impact approval and through the need to undertake compliance and enforcement actions as required under the EPBC Act. The relevant government departments must be adequately resourced to undertake these tasks. If insufficient resources are directed to these processes, South Australia may face regular involvement in legal challenges. There may also be difficulties with comprehensive and objective assessment of cross border impacts.

D. **Practical difficulties**

We understand that the Bilateral may cover all Commonwealth approval powers including referrals on proposed activities. We question how the relevant EPBC Act provisions will be transferred by way of the Bilateral including important consultation and review rights.

We understand that the Commonwealth will continue to have a monitoring role to ensure that decisions by the States meet all relevant international obligations in respect of matters such as World Heritage and Ramsar sites. However, we are concerned that the Commonwealth will not be able to effectively carry out this role. We are aware of many instances relating to enforcement of project approval conditions where the Commonwealth has been unwilling or unable to take action often due to a lack of resources.

Please contact the writer at melissa.ballantyne@edo.org.au or on 8410 3833 if you wish to discuss further.

Yours sincerely

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