



Environmental
Defenders Office

Submission on the draft Environmental Protection Regulations (Bilateral Agreements) Regulations 2021 (WA)

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About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Department of Water and Environmental Regulation (WA)

Sent via email only: bilateralregulations@dwer.wa.gov.au

For further information on this submission, please contact:

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Draft Environmental Protection (Bilateral Agreements) Regulations 2021

The Environmental Defenders Office (EDO) welcomes the opportunity to provide comment on the draft *Environmental Protection (Bilateral Agreements) Regulations 2021*. We understand that the proposed regulations are a step in implementing the 2020 amendments to the *Environmental Protection Act 1986* (EP Act) to provide for a person to apply for a matter to be considered a 'bilateral matter' under a bilateral agreement. We note both general and specific concerns with this approach.

General concerns

We note that the proposed regulations are intended to apply to proposals that may come under the existing WA assessment bilateral agreement (2014) and any future approval bilateral agreement in WA. The overriding assumption is that assessment (and potentially approval) under the *Environment Protection & Biodiversity Conservation Act 1999* (Cth) (EPBC Act) is not needed where impact assessment is done under accredited WA laws.

EDO has raised concerns with the proposed handover of environmental approval powers to states and territories including WA, both directly with the WA department, and through extensive engagement with the Independent Review of the EPBC Act in 2020 (**Samuel Review**). On behalf of the Places You Love alliance we have undertaken detailed legal analysis of WA laws to assess whether the current laws meet existing standards for matters of national environmental significance. It is our expert assessment that WA laws currently do not meet existing EPBC Act standards, and significant reform is needed at the state level before accreditation can be considered. The analysis is provided as an **Attachment**.ⁱ EDO will be making a detailed submission to this effect on any proposed approval bilateral agreement when exhibited for consultation.

In this respect, the proposed regulations are pre-empting passage of the necessary legislation at the federal level. The *EPBC Amendment (Streamlining Environmental Approvals) Bill 2020* and the *EPBC Amendment (Standards and Assurance) Bill 2021*, have not passed the Senate and have been subject to significant criticism through parliamentary inquiries due to concerns about environmental outcomes.ⁱⁱ

The regulations are also pre-empting finalisation of national environmental standards – the fundamental requirement recommended by the Samuel Review. Should WA proceed with negotiating an approval bilateral agreement based on the current settings of the EPBC Act (which the Samuel Review found to be vastly inadequate), it is likely that the agreement would be short-lived and require further and continued negotiations to ensure WA laws meet the agreed national environmental standards.

EDO recommends that regulations should be drafted and consulted upon when there is more clarity about the federal legislative framework for accreditation and legally enforceable national environmental standards have been made.

Specific Concerns

The proposed regulations are relatively brief and procedural, however, we raise the following concerns.

- **Reg 4 (3) and (4)** give discretion to accept late applications for potential bilateral matters. It is unclear how late in the assessment process a project could be declared a bilateral matter and effectively exempted from further federal assessment. The criteria for exercising this discretion is not clear or objective – it merely requires regard to be had to the extent of functions exercised. The Explanatory Memorandum states “This recognises that the later in the process that a bilateral application is received, the less likely it is that it will be accepted as the requirements of the bilateral agreement may no longer be able to be met, or it may not be reasonable or practicable to do so”, but it is unclear where the line will be drawn. This provision also lacks transparency – there is no requirement for the relevant State Entity to publish the reasons for its decisions to accept late applications.
- **Reg 5** requires bilateral applications to be in writing in the approved form and contain any information required as indicated in the form. The Explanatory Memorandum for the regulations refers to the need to provide information about impacts on matters of national environmental significance, but it is unclear what level of detail is required. The Explanatory Memorandum simply states: “Examples of information that may be required on an approved form include: • Information about whether a matter fits within the scope of a relevant bilateral agreement • Information regarding potential impacts to matters of national environmental significance.” The level of detail required in relation to potential impacts on MNES (and assessment undertaken) is absolutely critical.

Further, it is unclear what is the legal status of a bilateral matter once the application is processed, and it is unclear what level of transparency and public scrutiny there will be for the proposed process. The proposed regulations are brief and missing important details.

In summary, EDO holds both general and specific concerns about the draft regulations as part of the proposed handover of federal environmental approval powers. We recommend that proposals to facilitate accreditation of WA laws should not pre-empt the development of robust and legally enforceable national environmental standards.

Devolution of approval powers based on existing EPBC Act requirements in the short term will not create durability or certainty for WA industry, business or community, as national environmental standards will not be finalised for at least 2 years based on the current proposed pathway, necessitating continual amendment of WA legislation and regulations.

EDO would be happy to discuss our concerns in further detail. If you require further information please contact tim.macknay@edo.org.au.

Yours sincerely,

Environmental Defenders Office



Tim Macknay
Managing Lawyer, Perth



Rachel Walmsley
Head of Policy & Law Reform

Attachment:

Effectiveness of WA Environmental Protection Laws, EDO Analysis for the Places You Love Alliance, July 2021

ⁱ See also: [Devolving Extinction: The risks of handing environmental responsibilities to state & territories - Environmental Defenders Office \(edo.org.au\)](#)

ⁱⁱ See: [Environment Protection and Biodiversity Conservation Amendment \(Standards and Assurance\) Bill 2021 – Parliament of Australia \(aph.gov.au\)](#) and [Environment Protection and Biodiversity Conservation Amendment \(Streamlining Environmental Approvals\) Bill 2020 – Parliament of Australia \(aph.gov.au\)](#).