



Australian Government
Department of the Environment and Water Resources



Environmental Protection Authority

Review of Australian Government/Western Australian Government Assessment Bilateral Agreement

Review Report

August 2007

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BACKGROUND

The Bilateral Agreement

The Bilateral Agreement between the Australian Government and Western Australia under section 45 of the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act') relating to Environmental Impact Assessment ('the Agreement'), was entered into on 16 August 2002. A copy of the Agreement is at [Appendix 1](#).

The specific objects of this Agreement are to contribute to:

- (a) protecting the environment;
- (b) promoting the conservation and ecologically sustainable use of natural resources;
- (c) ensuring an efficient, timely, and effective process for environmental assessment and approval of actions; and
- (d) minimising duplication in environmental assessment of relevant impacts within the meaning of section 82 of the *Environment Protection and Biodiversity Conservation Act 1999* through Commonwealth accreditation of Western Australian processes.

The Agreement provides for the accreditation of the Environmental Review and Management Programme (ERMP) and the Public Environmental Review (PER) process under the Western Australian *Environment Protection Act 1986* (set out in Schedule 1 to the Agreement) to ensure an integrated and coordinated approach to environmental assessment for actions requiring approval from both the Australian Government (under the EPBC Act) and Western Australia.

An action does not require assessment under Part 8 (environmental impact assessment) of the EPBC Act if the action is assessed in the manner described in Schedule 1 to the Agreement.

The five year life of the Agreement ends on 15 August 2007. Undertaking this review meets a requirement of the EPBC Act and the Agreement and provides a basis on which to amend the agreement under section 56A of the EPBC Act.

Projects assessed under the Agreement

In the five year period since the Agreement entered into force 21 projects have been assessed or are being assessed under the Agreement, and are as follows:

| EPBC Act Project title | Proponent | Status |
|---|------------------------------|---|
| 1. Kemerton Silica Sand Pty Ltd/Mining/Kemerton/WA/Silica Sand Mine Expansion (EPBC 2002/910) | Kemerton Silica Sand Pty Ltd | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 2. Gunson Resources Limited/Mining/Shark Bay/WA/Coburn Mineral Sand Project (EPBC 2003/1221) | Gunson Resources Limited | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Approved – 20 July 2006 |

| EPBC Act Project title | Proponent | Status |
|---|--------------------------------------|---|
| 3. Worsley Alumina Pty Ltd/Mining/Darling Plateau/WA/Efficiency and Growth Increase of Alumina Production (EPBC 2004/1566) | Worsley Alumina Pty Ltd | Assessment process used – ERMP under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 4. Cape Bouvard Investments Pty Ltd/Urban and commercial new development/Mandurah/WA/Rural Subdivision of a 975.2ha property (EPBC 2004/1635) | Cape Bouvard Investments Pty Ltd | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 5. Straits Salt Pty Ltd/Mining/Exmouth Gulf/WA/Yannarie Solar Salt Project (EPBC 2004/1679) | Straits Salt Pty Ltd | Assessment process used – ERMP under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 6. Mt Gibson Mining Ltd/Mining/Mt Gibson/WA/Mt Gibson Iron Ore Project (EPBC 2004/1874) | Mt Gibson Mining Ltd | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Withdrawn – 1 November 2005 |
| 7. Humfrey Land Development/Tourism, recreation and conservation management/Houtman Abrolhos Islands/WA/Tourism Facility and Associated Infrastructure (EPBC 2005/2038 referred as 2006/2792) | MBS Environmental | Assessment process used - PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 8. Water Corporation/Water transport/Blackwood Plateau, southwest WA/WA/Yarragadee Water Supply Development (EPBC 2005/2073) | Western Australian Water Corporation | Assessment process used – ERMP under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 9. ChevronTexaco Australia Pty Ltd/Communication/Onslow to Barrow Island/WA/Greater Gorgon Development - Optical Fibre Cable, Mainland to Barrow Island (EPBC 2005/2141) | Chevron Texaco Australia Pty Ltd | Assessment process used – ERMP under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |

| EPBC Act Project title | Proponent | Status |
|--|--------------------------------|---|
| 10. Olympia Resources Limited/Mining/Keysbrook/WA/Mineral Sands Mine (EPBC 2005/2163) | Olympia Resources Limited | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 11. MG Kailis Tuna Pty Ltd/Aquaculture/Recherche Archipelago/WA/Southern Bluefin Tuna Farm (EPBC 2005/2165) | MG Kailis Tuna Pty Ltd | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Withdrawn 12 July 2007 |
| 12. Fortescue Metals Group Limited/Mining/Pilbara/Chichester Range/WA/Cloud Break Open Pit Iron Ore Mine (EPBC 2005/2205) | Fortescue Metals Group Limited | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 13. Mount Gibson Mining Limited/Mining/Mt Gibson/WA/open cut mine & assoc infrastructure (EPBC 2005/2381) | Mount Gibson Mining Limited | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 14. Woodside Energy Ltd/Mining/Burrup Peninsula/WA/site preparations (EPBC 2005/2391) | Woodside Energy Ltd | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Approved 22 December 2006 |
| 15. Albany Port Authority/Water transport/Port Albany/WA/APA dredging project (EPBC 2006/2540) | Albany Port Authority | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 16. Grange Resources Limited/Mining/Wellstead/WA/South down Magnetite Mine (EPBC 2006/2544) | Grange Resources Limited | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 17. BEMAX Cable Sands (WA) Pty/Ltd/Mining/Gwindinup/WA/Mining of titanium mineral sands in Happy Valley north and South, on private land and State Forest (EPBC 2006/2597) | BEMAX Cable Sands (WA) | Assessment process used – ERMP under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |

| EPBC Act Project title | Proponent | Status |
|--|-----------------------------------|--|
| 18. Barry Humfrey/Tourism, recreation and conservation management/Houtman Abrolhos Islands/WA/development of land based tourist facilities on Long Island (EPBC 2006/2792) | Humfrey Land Development | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 19. Moly Metals Australia Pty Ltd/Mining/near Marble Bar/WA/Spinifex Ridge Molybdenum Project (EPBC 2006/3104) | Moly Metals Australia Pty Ltd | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 20. Karara Management Services Pty Ltd/Mining/Shire of Morawa/WA/Karara Magnetite Project (EPBC 2006/3017) | Karara Management Service Pty Ltd | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |
| 21. CBH Sulphur Springs Pty Ltd/Mining/Pilbara/Sulphur Springs/WA/Panorama Copper-Zinc Mine (EPBC 2007/3310) | CBH Sulphur Springs Ltd | Assessment process used – PER under the Western Australian <i>Environment Protection Act</i> Assessment ongoing |

The Review Process

Section 65 of the EPBC Act requires a review of the operation of the Agreement to be carried out prior to its expiry on 15 August 2007.

Under clause 22.2 of the Agreement, the parties agreed that:

- (a) the review of this agreement under section 65 will be carried out jointly by Environment Australia and the relevant Western Australian agency;
- (b) the review will evaluate the operation of the agreement against the aim of the agreement;
- (c) the views of key stakeholders will be sought as part of the review;
- (d) the review will commence at least eight months before the agreement is due to expire, and will be completed at least three months before the agreement expires; and
- (e) the report of the review will be transmitted jointly to the Ministers.

CONSULTATION

The review process for the Agreement involved public consultation by way of a written invitation to key stakeholders to provide comments. A set of questions was compiled to assist input into the review (see [Appendix 2](#)).

Key stakeholders were identified as including development interests involved with the operation of the Agreement, relevant government agencies and non-government, business, industry and conservation interests.

The process of reviewing the Agreement also involved consultation with the relevant assessment and approval officers within the Australian Government Department of the Environment and Water Resources (the Australian Government Environment Department) and the Western Australian, Department of Environment and Conservation, Environment Protection Authority Service Unit, Environmental Impact Assessment Division.

EVALUATION OF THE OPERATION OF THE AGREEMENT

The following issues were canvassed with stakeholders in order to review the operation of the Agreement against the objects of the Agreement. Only two responses were received from Fortescue Metals Group Ltd and the Department of Industry and Resources (DoIR) in consultation with the Office of Development Approvals Coordination (ODAC) in response to the questions sent to stakeholders. Overall Fortescue Metals Group stated that they believe Western Australia has a very robust environmental impact assessment process. ODAC and DoIR considered that the Bilateral Agreement is meeting its specific objects and supports the continuation of the Agreement, with consideration given to ways to reduce duplication. An outline of their responses to the key issues is outlined below.

1. Public comment and consultation

Fortescue Metals Group Ltd commented that there was sufficient opportunity for public comment and consultation within their assessment process. They highlighted that the public had a number of opportunities to comment on the proposed project and that they conducted two field visits during the assessment process during which the public and federal government could comment on their proposed project.

2. Consideration of environmental impact

DoIR and ODAC commented that in general, the assessment processes for projects affecting matters of environmental significance have been timely, and there has been cooperation from the Commonwealth ensuring timelines have been met.

Proposal

Fortescue Metals Group Ltd suggested that the Department of Environment and Water Resources in consultation with the State of Western Australia develop guidance notices on aspects of impact assessment, coordination and consultation to ensure documents are complementary and reduce duplication for industry.

Response

Section 11.2 of the Agreement provides for the development of administrative arrangements which will streamline the referral process for proponents. It also provides for, where possible, the development of administrative arrangements which will allow proponents to simultaneously satisfy both Commonwealth and State requirements.

A number of documents have been prepared by the EPA to assist proponents and decision-making authorities to comply with the requirements of *Environmental Impact Assessment (Part IV Division 1) Administrative procedures 2002*. These include:

- EPA Referral Guide (DMA)– General Guide to State Government Departments and Local Authorities (as ‘Decision-Making Authorities’)
- EPA Referral Form (DMA) – Referral by the Decision-Making Authority
- EPA Referral Form (Proponent) – Referral by the Proponent

- EIA Scoping Document – Guide to Preparing an Environmental Scoping Document
- EIA Principles, Factors & Objectives – Guide to EIA Environmental Principles, Factors and Objectives
- PER/ERMP Guidelines – Guidelines for Preparing a Public Environmental Review/ Environmental Review and Management Programme

3. Efficient, effective and timely process, minimising duplication of two assessment processes

Fortescue Metals Group Ltd stated the Agreement has significantly reduced the duplication between the Australian Government and the Western Australian environmental assessment processes in respect of matters of national environmental significance. However they stated there is a need for greater coordination between the government agencies to reduce the differences in time between the State and Federal Ministers decisions.

Response

Under the amendments to the EPBC Act which came into force in February 2007 greater flexibility is now provided in relation to decision making on approval of proposals. The amendments to the EPBC Act repealed section 130 (1B) which prevented the Commonwealth Environment Minister from commencing the time for making a decision on approval until a notice had been provided from the State or Territory that a proposal had been assessed to the greatest extent practicable.

Proposal

DoIR and ODAC commented that the Agreement has reduced, but not minimised duplication between the Australian Government and the Western Australian environmental assessment processes in respect of matters of national environmental significance. They propose two processes to reduced duplication which are outlined below.

1. Full accreditation of Western Australian environmental processes to deal with matters of national environmental significance without approval from the Commonwealth Minister.
2. Accreditation of Western Australia to conduct environmental assessments of proposals on behalf of the Commonwealth that include activities within the Western Australian and Commonwealth jurisdictions.

Response

These are matters that can be considered in the context of any future discussions between the Commonwealth and Western Australia on further streamlining environmental assessment and approvals processes.

4. Further comments

Fortescue Metals Group Ltd commented that little guidance information was provided to explain the Federal assessment system. Most of the information they received was through the officers within the Department of Environmental and Water Resources.

Response

Schedule 1 to the Agreement provides a transparent overview of the manner of assessment required for the Western Australian processes to encompass the assessment of impacts on matters of national environmental significance. Schedule 1 specifies how the requirements of the EPBC Act and the EPBC Regulations are met through the accredited Western Australian assessment processes.

A great deal of information about the requirements of the EPBC Act is available in printed form and electronically on the Department of Environment and Water Resources website.

RECOMMENDATION

The review, in accordance with section 65 of the EPBC Act and clause 21 of the Agreement, has evaluated the operation of the Agreement against the object of the Agreement and sought the views of key stakeholders. In undertaking the review account has been taken of public comments received on the review and the experiences with the operation of the Agreement from 16 August 2002 to date.

The evaluation has demonstrated that the operation of the Agreement is meeting the objects of the Agreement, and is contributing to protecting the environment; promoting the conservation and ecologically sustainable use of natural resources; ensuring an efficient, timely and effective process for environmental assessment and approval of actions; and minimising duplication in environmental assessment of projects in respect of matters of national environmental significance.

In light of the outcome of the evaluation it is recommended that the Agreement be amended under section 56A of the EPBC Act, with suggested changes to the following clauses of the Agreement as a result of recent amendments to the EPBC Act by the Amendment Act:

- clause 4 and 5 be deleted and substituted so as to provide for a new expiry date for the Agreement, with new subsection 56(1) of the EPBC Act providing for the Agreement to specify when it is to cease to have effect;
- subclause 10.2 be deleted as a result of the amendment to the EPBC Act that removed the requirement for States/Territories to provide notices under section 130(1B) of the EPBC Act and substituted with a new subclause detailing the timing of an approved decision on the EPBC Act following the provision of a copy of an assessment report;
- clause 20 to be amended to provide for a review of the operation of the Agreement to be undertaken once every five years while the Agreement remains in effect in accordance with new subsection 56A of the EPBC Act;
- the inclusion of a new clause 21 relating to the ability to make amendments to the Agreement pursuant to new section 56A of the EPBC Act.

APPENDIX 1 - BILATERAL AGREEMENT

**AN AGREEMENT BETWEEN THE COMMONWEALTH OF
AUSTRALIA AND THE STATE OF WESTERN AUSTRALIA**

**UNDER SECTION 45 OF THE COMMONWEALTH
ENVIRONMENT PROTECTION AND BIODIVERSITY
CONSERVATION ACT 1999**

RELATING TO ENVIRONMENTAL IMPACT ASSESSMENT

Aim

The agreement aims to minimise duplication of environmental impact assessment processes and strengthen intergovernmental cooperation. In particular, this agreement provides for the accreditation of the Western Australian environmental impact assessment process (set out in Schedule 1) to ensure an integrated and coordinated approach for actions requiring approval under both Commonwealth (the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*) and Western Australian (the Western Australian *Environmental Protection Act 1986*) legislation.

- 2 The specific objects of this agreement are to contribute to:
- (a) protecting the environment;
 - (b) promoting the conservation and ecologically sustainable use of natural resources;
 - (c) ensuring an efficient, timely, and effective process for environmental assessment and approval of actions; and
 - (d) minimising duplication in environmental assessment of relevant impacts within the meaning of section 82 of the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* through Commonwealth accreditation of Western Australian processes.

Parties to the agreement

- 3 The parties to this agreement are the State of Western Australia and the Commonwealth of Australia.

Term of agreement

- 4 This agreement will commence on the date specified in a notice given by Western Australia to the Commonwealth as being the date of the coming into operation of the amendments to the Western Australian *Environmental Protection Act 1986* necessary to provide for the powers, duties and functions of that Act to be used to implement this agreement.
- 5 The agreement will expire five years after the date it is entered into.

Nature of the agreement

- 6 This agreement is a bilateral agreement for the purposes of section 45 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.
- 7 The parties note that, with the exception of clause 10, assessment means assessment of the relevant impacts, within the meaning of section 82 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.
- 8 The parties do not intend this agreement to create contractual or other legal obligations, or that a breach of the agreement will give rise to any cause of action, or right to take legal proceedings, other than as provided for in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

Effect of this agreement

- 9 Certain actions do not require assessment under Part 8 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.
- 9.1 Pursuant to subsection 47(1) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, it is declared that an action does not require assessment under Part 8 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* if the action is assessed in the manner specified in Schedule 1 to this agreement.

- 9.2 Clause 9.1 applies to actions which are taken wholly within Western Australia including its coastal waters. In relation to actions which are taken in more than one jurisdiction (including Western Australia), the parties agree to consult and use their best endeavours to reach agreement with other affected jurisdictions on an appropriate assessment process, such as the process set out in Schedule 1.
- 9.3 Consistent with section 49 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the parties note that the provisions of this bilateral agreement do not have any effect in relation to an action in a Commonwealth area or an action taken by the Commonwealth or a Commonwealth agency.
- 9.4 The parties agree that discussions will take place between the Commonwealth and Western Australia in relation to implementing Attachment 3 of the COAG Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment (“Compliance with State Environment and Planning Laws”).
- 9.5 Following these discussions, the parties intend to amend this agreement, as necessary, so that its provisions will apply to actions in a Commonwealth area, and actions taken by the Commonwealth or a Commonwealth agency, where it is agreed that those actions will be subject to State environment and planning laws.
- 10 Western Australia to provide a notice under s.130(1B)(b) that environmental impacts other than the relevant impacts have been assessed to the greatest extent practicable
- 10.1 This clause only applies to an action that:
(a) is a "controlled action" (as determined by the Commonwealth Environment Minister) taken or proposed to be taken in Western Australia;
(b) does not require assessment under Part 8 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* because an assessment is conducted in the manner specified in Schedule 1 of this agreement; and
(c) is an action:
(i) taken or proposed to be taken by a constitutional corporation;
(ii) taken by a person for the purposes of trade or commerce between Australia and another country, between two States, between a State and a Territory, or between two Territories; or
(iii) whose regulation is appropriate and adapted to give effect to Australia’s obligations under an agreement with one or more other countries.
- 10.2 The State of Western Australia notes that the Commonwealth Environment Minister may not decide whether to approve an action covered by subsection 130(1C) until a written notice described in subsection 130(1B) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* has been received from the State. Western Australia, through the Western Australian Environment Minister, will provide a notice in writing, pursuant to subsection 130(1B) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* when an assessment is conducted in the manner specified in Schedule 1 of this agreement.¹

¹ Note: A notice under section 130(1B)(b) is required whether or not an action is assessed in accordance with this Agreement.

- 10.3 The State of Western Australia undertakes to ensure that the environmental impacts that the action has, will have, or is likely to have (other than the relevant impacts) are assessed to the greatest extent practicable.

Procedures to be followed

11 Western Australia to use best endeavours to encourage proponents to refer actions

- 11.1 Western Australia, to assist proponents and the Commonwealth, will use its best endeavours to encourage proponents to refer to the Commonwealth Environment Minister actions that are proposed to take place in Western Australia that are likely to require approval under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.
- 11.2 The parties agree to develop administrative arrangements which will streamline the referral process for proponents. Where possible the parties will develop administrative arrangements which will allow proponents to simultaneously satisfy both Commonwealth and State requirements.
- 11.3 Subject to sections 69, 70 and 71 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the parties recognise that responsibility for referring actions which may require approval from the Commonwealth Environment Minister under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* lies with the person proposing to take the action.
- 11.4 The parties are not responsible for the actions of proponents who may or may not choose to refer actions.

12 Commonwealth to inform Western Australia of decision about whether a proposed action is a controlled action

- 12.1 This clause applies to an action or proposed action that is:
(a) referred to the Commonwealth Environment Minister under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*; and
(b) proposed to be taken in Western Australia.
- 12.2 For every decision by the Commonwealth Environment Minister that an action proposed to be taken in Western Australia is a controlled action, a written notice of the decision will be provided to the Western Australian Environment Minister within ten business days of the decision being made.

13 Advice from Western Australia that an accredited process will apply

- 13.1 This clause applies where:
(a) pursuant to clause 12.2, Western Australia receives a written notice from the Commonwealth Environment Minister that an action proposed to be taken in Western Australia is a controlled action; and
(b) the action does not require assessment under Part 8 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* if it is assessed in the manner specified in Schedule 1 to this agreement.
- 13.2 Western Australia agrees that as soon as practicable after receiving the written notice referred to in clause 12.2, the Western Australian Environment Minister will indicate in a written notice given to the Commonwealth Environment Minister whether the action is expected to be assessed by Western Australia in the manner specified in Schedule 1 to this agreement.

- 13.3 The parties note that the Western Australian Environment Minister may ask the Commonwealth Environment Minister, under section 79 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, to reconsider the decision that the action is a controlled action.
- 13.4 If the Western Australian Environment Minister indicates in writing that the action will not be assessed as a proposal by Western Australia under the Western Australian Environmental Protection Act 1986, then this agreement does not apply to that action.

14 Assessment documentation

- 14.1 When an action is assessed in the manner specified in Schedule 1 to this agreement Western Australia will:
- (a) provide a copy of the Assessment Report to the Commonwealth Environment Minister on or before the date on which the Report is published under section 44 of the Western Australian Environmental Protection Act 1986; and
 - (b) provide copies of other assessment documentation pertaining to relevant impacts to the Commonwealth Environment Minister as soon as reasonably practicable (but no more than ten business days) after the date on which the Assessment Report is published.
- 14.2 Western Australia may, when it provides the Assessment Report or the other assessment documentation referred to in clause 14.1, also provide additional information on social and economic matters to the Commonwealth Environment Minister. The parties note that the Commonwealth Environment Minister will consider such information in accordance with the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

15 Additional information

- 15.1 If, in deciding whether to approve the taking of an action assessed under this agreement, the Commonwealth Environment Minister uses any information described in section 136(2)(e) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the Commonwealth Environment Minister undertakes to provide a copy of this information to the Western Australian Environment Minister.
- 15.2 The Commonwealth Environment Minister agrees to give Western Australia an opportunity to comment on the accuracy of this information, subject to the requirements in section 130 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* relating to the time period within which the Commonwealth Environment Minister must decide whether to approve the action.

16 Monitoring compliance with conditions

- 16.1 This clause applies where an action:
- (a) is taken in Western Australia;
 - (b) requires the approval of the Commonwealth Environment Minister under Part 9 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*; and
 - (c) requires approval (however described) under the Western Australian Environmental Protection Act 1986.
- 16.2 The parties agree to cooperate in monitoring compliance with conditions attached to approvals, with the aim of reducing duplication. To this end the parties agree:
- (a) that each party will inform the other of any conditions attached to the approval(s) to take the action; and
 - (b) that best endeavours will be used to put cooperative arrangements in place for monitoring compliance with conditions on any action which is approved by both parties. The aim of these

arrangements is to ensure that reporting requirements for the proponent, and other monitoring efforts such as site inspections, are not duplicated.

17 Enforcing conditions on approvals

The parties agree to inform one another before commencing action to prosecute a person for breaching conditions of an approval for an action which has been approved by either parties, where the conditions relate to, or affect, a matter protected by Part 3 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

18 Varying conditions attached to an approval

The parties recognise the desirability of avoiding, to the extent practicable, attaching inconsistent conditions to approvals for an action under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and Western Australian legislation. To this end, the parties:

- (a) note that the Commonwealth Environment Minister is required by the provisions of section 134 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, to consider any relevant State conditions when deciding whether to attach a condition to an approval; and
- (b) agree to inform one another before varying the conditions attached to an approval for an action which has been approved by both parties, where the condition relates to, or affects, a matter protected by Part 3 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. The parties also agree to advise one another of any such variation after it has been made.

19 Administrative procedures

The parties agree to jointly develop administrative procedures, as required, to ensure that the requirements of this agreement are administered efficiently in accordance with their legal requirements. The administrative procedures may include guidelines on the exchange of any information about assessments, including consultation on draft assessment documentation.

Maintaining the agreement

20 Monitoring compliance with the agreement

The parties recognise that, under the Commonwealth Auditor-General Act 1997, the Auditor-General may audit the operations of the Commonwealth public sector (as defined in section 18 of that Act) in relation to this agreement.

21 Reviewing the agreement

- 21.1 The Commonwealth Environment Minister is required by section 65 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* to cause a review of the operation of this agreement to be carried out, and give a copy of the report of the review to the Western Australian Environment Minister.
- 21.2 The parties agree that:
 - (a) the review of this agreement under section 65 will be carried out jointly by Environment Australia and the Western Australian Environmental Protection Authority;
 - (b) the review will evaluate the operation of the agreement against the aim of the agreement;
 - (c) the views of the public and key stakeholders will be sought as part of the review;
 - (d) the review will commence at least eight months before the agreement is due to expire, and will be completed at least three months before the agreement expires; and
 - (e) the report of the review will be transmitted jointly to the Ministers.

22 Cancellling or suspending the agreement

- 22.1 Sections 57 – 64 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* provide that the Commonwealth Environment Minister may cancel or suspend all or part of this agreement (either generally or in relation to actions in a specified class) under certain circumstances. Sections 57 – 64 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* also set out a process for consulting on the cancellation or suspension of all or part of this agreement.
- 22.2 Section 63 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* requires the Commonwealth Environment Minister at the request of the Western Australian Environment Minister to cancel or suspend all or part of this agreement at the request of the Western Australian Environment Minister, but only if the request is made in accordance with the agreement.
- 22.3 A request by the Western Australian Environment Minister under section 63 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* to cancel or suspend all or part of this agreement is made in accordance with this agreement if:
- (a) the request is made on the grounds that the Western Australian Environment Minister is not satisfied that the Commonwealth has complied or will comply with the agreement; or
 - (b) the request is made on the grounds that the Western Australian Environment Minister is not satisfied that the aim of the agreement is being achieved; and
 - (c) before making the request, the Western Australian Environment Minister has informed the Commonwealth Environment Minister in writing of the reason(s) for requesting the suspension and allowed a period of at least twenty business days for the Commonwealth Environment Minister to respond.

Transfer of information

- 23 Each party agrees to comply promptly with any reasonable request from the other party to supply information relating to the management or administration of assessments covered by this agreement.
- 24 The parties agree that they can utilise data within the control of the departments of government of the other party for the purpose of meeting their respective responsibilities relating to this agreement including the assessment of environmental impacts under this agreement. Furthermore:
- (a) the parties recognise that data are held in different formats including electronic;
 - (b) this agreement applies only to data in existence at the time of the request and in the format held by the custodian;
 - (c) Western Australian Government agencies will participate in the transfer of information consistent with the Western Australian Land Information System Pricing and Transfer Policies which provide for, inter alia, the transfer of information at no cost. For the purposes of these Policies and this clause, the parties agree that the Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment as agreed by the Council of Australian Governments in 1997 comprises an agreed national program;
 - (d) the parties recognise that some data are, and will need to remain, confidential;
 - (e) the parties agree that the data transferred will be held securely to prevent unauthorised access;
 - (f) the parties agree that subject to clauses 28 and 30, data will not be transferred, used or communicated to any other person without the authorisation of the data custodian;
 - (g) the parties agree that the data will remain the property of the custodian;

- (h) the parties agree to use their best endeavours to ensure that data are not used inappropriately, particularly in relation to spatial resolution and attribute accuracy, and to the compilation and integration of data-sets of widely differing scales; and
- (i) the parties agree that transfer and use of data will be subject to such licence conditions as may be agreed, including addressing, as necessary, (a) to (h) (above).

Conflict resolution

- 25 Acting in a spirit of cooperation, the parties agree:
- (a) in the event that any dispute arises under this agreement, the parties will settle it by direct negotiation using their best endeavours;
 - (b) discussions aimed at resolution will normally take place at senior officials level in the first instance; and
 - (c) this clause is subject to the rights and obligations of each party under relevant sections of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (including those sections dealing with cancellation and suspension of bilateral agreements).
- 26 The parties will notify and consult each other on matters that come to their attention that may improve the operation of this agreement.

Relevant plans and agreements

- 27 The parties note that a number of agreements and plans may be relevant to assessments under this agreement. The parties agree that, when actions are assessed under this agreement, relevant agreements and plans will be taken into account as necessary. The parties agree that where the assessment covers impacts on:
- (a) World Heritage values of a World Heritage property, any management plan for the property is relevant; or
 - (b) the ecological character of a Ramsar wetland property, any management plan for the wetland is relevant; or
 - (c) a listed threatened species or ecological community, any recovery plan for the species or community, and any threat abatement plan for a process that threatens the species or community is relevant; or
 - (d) a listed migratory species, any wildlife conservation plan for the species is relevant.

Freedom of information legislation

- 28 If a party receives any request, including under Freedom of Information legislation, for any documents originating from another party which are not otherwise publicly available, the parties will consult on the release of those documents.
- 29 The parties recognise the need for expeditious consultation on such requests so that statutory obligations can be met.

Public access to assessment documentation

- 30 Western Australia agrees that documentation relating to the assessment of each action which is assessed in the manner specified in Schedule 1 will be available to the public, except where corresponding information would not have been available to the public if the action had been assessed by the Commonwealth under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

Public comment — particular needs groups

31 Western Australia will, in giving effect to the requirements in Schedule 1, make special arrangements, as appropriate, to ensure affected groups with particular communication needs have an adequate opportunity to comment on actions assessed in the manner specified in Schedule 1. The parties note that indigenous people affected by a proposed action may have particular communication needs, and will ensure, where appropriate, that affected indigenous people have reasonable opportunity to comment on actions assessed in the manner described in Schedule 1.

Interpretation

- 32 A reference in this agreement to the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* or the Western Australian *Environmental Protection Act 1986* is a reference to the relevant Act as in force at the date of this agreement. If either Act is subsequently amended in a manner that affects the operation of this agreement, the parties will seek to agree as soon as practicable on whether it is necessary to make another bilateral agreement varying or replacing this agreement.
- 33 A reference in this agreement to an Act includes a reference to any regulations and instruments under that Act (including the Administrative Procedures).
- 34 A reference in this agreement to the impacts of an action (or the relevant impacts of an action), includes a reference to any impacts (or relevant impacts, as the case may be) of that action outside of Western Australia.
- 35 Unless the contrary intention appears, the terms used in this agreement have the same meaning as in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.
- 36 Assessment Documentation means any formal report, study, agreement, submission or correspondence prepared by or received by Western Australia as part of the formal assessment processes set out in Schedule 1. This includes draft reports or studies which would normally be publicly available under the State's assessment process.
- 37 Assessment Report means the report prepared by the Western Australian Environmental Protection Authority for the purposes of section 44 of the Western Australian *Environmental Protection Act 1986* to the extent it addresses the relevant impacts of a controlled action assessed in the manner specified in Schedule 1.
- 38 Commonwealth Environment Minister means the Minister administering the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and includes a delegate of the Minister.
- 39 Environmental Review and Management Programme (ERMP) has the same meaning as in the Administrative Procedures made under section 122 of the Western Australian Environmental Protection Act 1986.
- 40 Public Environmental Review (PER) (under the Western Australian Environmental Protection Act 1986) has the same meaning as in the Administrative Procedures made under section 122 of the Western Australian Environmental Protection Act 1986.
- 41 Western Australian Environment Minister means the Minister administering the Western Australian *Environmental Protection Act 1986* and includes a delegate of the Minister.

Funding

- 42 The parties agree that, 12 months after the commencement of this agreement, and every 12 months thereafter until the expiry of the agreement, they will review the additional implementation costs that Western Australia may have incurred during the relevant 12 month period of the agreement. The Commonwealth agrees to reimburse Western Australia the additional implementation costs.
- 43 In clause 42, the additional implementation costs are the costs that the Commonwealth and Western Australia agree:
- (a) have been incurred by Western Australia in implementing this agreement; and
 - (b) would not, in the absence of this agreement, have been incurred by Western Australia in carrying out an adequate assessment of each action to which the Schedule applies.

Signed for and on behalf of the
COMMONWEALTH OF
AUSTRALIA by:

Signed for and on behalf of WESTERN
AUSTRALIA by:

The Hon Dr David Kemp MP

The Hon Dr Judy Edwards MLA

Minister for the Environment and
Heritage

Minister for the Environment and
Heritage

Date:

Date:

Schedule 1

Preamble

Subsection 47(1) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* provides that a bilateral agreement may declare that actions need not be assessed under Part 8 of that Act if the actions have been 'assessed in a specified manner'.

Clause 9.1 of this bilateral agreement declares that an action does not require assessment under Part 8 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* if it is assessed in the manner specified in this Schedule.

The specified manner of assessment

For the purposes of clause 9.1 of this bilateral agreement, an action is assessed in the manner specified in this Schedule if it is assessed in accordance with the following requirements.

For the purposes of regulations made under section 50 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the manner of assessment specified in this Schedule provides for the following assessment approaches:

- (a) preparation of a Public Environmental Review (PER) under the Western Australian *Environmental Protection Act 1986* – this assessment approach corresponds to assessment by public environment report under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*; and
- (b) preparation of an Environmental Review and Management Programme (ERMP) under the Western Australian *Environmental Protection Act 1986* – this assessment approach corresponds to assessment by environmental impact statement under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

1 Law under which the assessment has been carried out

The assessment is carried out by the State of Western Australia under Division 1 of Part IV of the Western Australian Environmental Protection Act 1986.

2 Selecting the assessment approach

2.1 The Western Australian Environmental Protection Authority (the EPA) determines, for the purposes of section 40 of the Western Australian Environmental Protection Act 1986, that:

- (a) the proposed action should be assessed by it; and
- (b) the proponent is required to undertake an environmental review and the level of assessment for that environmental review is either a PER or ERMP.

2.2 When deciding whether the proposed action is to be assessed using a PER or a ERMP, the EPA has information that it considers to be sufficient and considers criteria equivalent to the criteria set out in the guidelines (if any) issued under subsection 87(6) of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (to the extent relevant to the decision whether it is appropriate to use an approach corresponding to assessment by a public environment report, or an environmental impact statement).

3 Guidelines for assessment

3.1 The EPA will prepare written guidelines to ensure that the assessment:

- (a) assesses all relevant impacts that the action has, will have or is likely to have;
- (b) contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the action under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999;

- (c) if a PER is being prepared, addresses the matters prescribed in regulations for the purposes of section 97(2)(b) of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 relating to the preparation of guidelines for a draft public environment report under that Act; and
- (d) if an ERMP is being prepared, addresses the matters prescribed in regulations for the purposes of section 102(2)(b) of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 relating to the preparation of guidelines for a draft environmental impact statement under that Act.

- 3.2 If the proposed action is assessed using a PER or an ERMP, the EPA publishes draft guidelines and seeks public comment on the draft guidelines before they are finalised if, at the time the guidelines are being prepared:
- (a) the EPA believes the issues to be addressed in the assessment will be complex or there will be a high level of public interest in the issues;
 - (b) the Commonwealth Environment Minister has requested the publication of draft guidelines;
 - or
 - (c) the EPA considers that for any other reason it is appropriate to do so.

4 Setting the public review period

The public review period for both a PER and an ERMP for the purposes of section 8 of the Administrative Procedures is at least 28 days.

5 Inviting public comment

- 5.1 When the public is invited to comment during the public review period for a PER or an ERMP, the invitation is published in newspapers circulating generally in each State and Territory.
- 5.2 When the public is invited to comment on the draft guidelines for a PER or ERMP, as set out in clause 3.2 of this Schedule, the invitation is published in newspapers circulating generally in each State and Territory.
- 5.3 The advertisements include: the name of the action, a brief description of the action, its location(s), what matters are protected by a provision of Part 3 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, the name of the person proposing to take the action, the name of the designated proponent (if not the person intending to take the action), and how the relevant documents may be obtained and the deadline for public comments.

6 Responding to public submissions

If a PER or an ERMP is prepared, the proponent prepares for the purposes of section 40(6)(b) of the Western Australian Environmental Protection Act 1986:

- (a) a revised PER or a revised ERMP; or
- (b) a supplement to the PER or ERMP, taking into account the public submissions (if any) relating to the relevant impacts of the action which are received during the public review period. The revised PER or revised ERMP, or the supplement to the PER or ERMP, is submitted to the EPA.

7 Assessment reports

- 7.1 The EPA prepares an Assessment Report on the proposed action and forwards it to the Western Australian Environment Minister, who will forward it to the Commonwealth Environment Minister.
- 7.2 The Assessment Report takes into account:
- (a) the PER or the ERMP (as the case may be); and
 - (b) any comments provided by the public during the public review period; and

- (c) information provided by the proponent under clause 6 of this Schedule; and
- (d) any other relevant information available to the EPA.

- 7.3 The Assessment Report contains enough information about the relevant impacts of the action to let the Commonwealth Environment Minister make an informed decision whether or not to approve the taking of the action under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 including:
- (a) a description of:
 - (i) the action; and
 - (ii) the places affected by the action; and
 - (iii) any matters of national environmental significance that are likely to be affected by the action; and
 - (b) a summary of the relevant impacts of the action; and
 - (c) a description of feasible mitigation measures, changes to the action or procedures to prevent or minimise environmental impacts on relevant matters of national environmental significance proposed by the proponent or suggested in public submissions; and
 - (d) to the extent practicable, a description of any feasible alternatives to the action that have been identified through the assessment process, and their likely impact on matters of national environmental significance; and
 - (e) a statement of conditions for approval of the action that may be imposed to address identified impacts on matters of national environmental significance; and
 - (f) a statement of State or Territory approval requirements and conditions that apply, or are proposed to apply, to the action when the report is prepared, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the action.

APPENDIX 2 - SET OF REVIEW QUESTIONS

The aim of the review is to evaluate the operation of the agreement against the object of the agreement. The specific objects of this agreement are to contribute to:

- (a) protecting the environment;
- (b) promoting the conservation and ecologically sustainable use of natural resources;
- (c) ensuring an efficient, timely, and effective process for environmental assessment and approval of actions; and
- (d) minimising duplication in environmental assessment of relevant impacts within the meaning of section 82 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* through Commonwealth accreditation of Western Australian processes.

- 1) Have the assessment processes conducted under the bilateral agreement provided an adequate opportunity for public consultation and access to assessment documentation? For example:
 - Have draft guidelines been published and public comments sought?
 - Have the notifications seeking public comment on draft assessment documentation or guidelines been published in a newspaper circulating generally in each state and territory?
 - Has the draft assessment documentation been on public display?
 - Has the draft assessment documentation released for public comment contained sufficient information about the action and the potential relevant impacts?
 - Has public comment been properly taken into account?
 - Have the needs of any interest groups with particular communication needs been catered for?
- 2) Have assessments carried out under the bilateral agreement ensured that there has been an adequate and proper assessment of the likely impacts of actions on matters of national environmental significance? For example:
 - Have the assessment guidelines encompassed all the relevant impacts of the actions?
 - Have the assessment guidelines adequately detailed how the assessment is to address the likely impacts on matters of national environmental significance?
 - Have the environmental impact statements/development proposals/environmental management plans and the assessment reports contained sufficient information about the action and its relevant impacts?
- 3) Have the procedures set down in the bilateral agreement including the administrative procedures referred to in clause 20 been complied with? – [for response by Government agencies]
- 4) Has the bilateral agreement ensured that the assessment of proposals has occurred in a timely and efficient manner?
- 5) Has the bilateral agreement minimised duplication between Australian Government and Western Australian environmental assessment processes in respect of matters of national environmental significance?
- 6) Any further comments in relation to the operation of the bilateral agreement?

APPENDIX 3 - LIST OF SUBMISSIONS

| | Organisation | Name | Title |
|----|---|--------------|--------------------------------|
| 1. | Fortescue Metals Group Ltd | Julian Tapp | Head of Government Relations |
| 2. | Department of Industry and Resources (DoIR) and the Office of Development Approvals Coordination (ODAC) | Stuart Smith | Acting Director General (DoIR) |