

19 December 2008

Independent Review of the EPBC Act
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Canberra ACT 2601
Australia

By email: epbcreview@environment.gov.au

Dear Sir / Madam

EPBC Act Review – NSW Minerals Council Submission



The NSW Minerals Council (NSWMC) represents NSW's \$13.9 billion mining industry, which directly employs 47,000 people in mining and minerals processing and supports the employment of a further 200,000 in businesses related to the mining sector. The industry accounts for 35% of the State's export income and contributes around \$2 billion annually to State Government revenue through royalties and taxes.

NSWMC appreciates the opportunity to comment on the performance of the *Environmental Protection and Biodiversity Conservation Act 1999* (the Act). The NSW mining industry is a key stakeholder in the Act, and NSWMC believes that there are significant improvements that could be made to streamline assessment and approval processes under the Act.

NSWMC has contributed to, and fully supports, the submission being made to the Review by the Minerals Council of Australia. Following is a summary of some of the key issues for the NSW mining industry in relation to the operation of the Act.

1. Improving the efficiency of the Act

The number of referrals and projects nominated as controlled actions should be reduced by taking steps to eliminate low-risk actions from these processes. This would improve the efficiency of the Act by focusing the resources of both industry and governments on activities that pose a higher risk to matters of national environmental significance (MNES). Under the current arrangements:

- Many proponents tend to be overly conservative and submit lengthy referral documentation for activities unlikely to be controlled actions. This is done to ensure compliance, obtain benefits associated with submitting referrals (e.g. protection against new listings after approval), and reduce the risk of third party action at a later time that could invalidate a NSW approval. These referrals are unnecessary. Proponents should be given sufficient guidance and legal protection to reduce their frequency.
- The additional assessment requirements for controlled actions under NSW's assessment bilateral agreement are onerous, particularly in cases when there is a very low likelihood of any significant impacts on MNES. A better indication of the risk of impacts on MNES could be gained by firstly undertaking NSW assessment requirements. The Review should ensure that an option is available whereby a decision as to whether the proposal is a controlled action could be postponed until more scientific information becomes available through State based assessment processes. This would allow the level of assessment needed to satisfy the Act's requirements to be commensurate with the level of risk to MNES. Additionally, future reviews of the NSW assessment bilateral agreement should remove any assessment requirements found to be duplicative or that do not contribute to the protection of MNES.

A way of further reducing the number of unnecessary referrals and controlled actions would be to take into account proposed offsets at the referral stage. Offsets minimise the overall impacts of a project, including the risk of impacts on MNES.

In the medium to long term, NSWMC strongly believes it is unnecessary for the Commonwealth to be involved in individual project approvals. This would allow the Commonwealth to focus on strategic conservation activities. COAG's Business Regulation and Competition Working Group has specifically identified approval bilaterals as an area which Australian governments should focus on for early action. The timeframes to progress environmental assessment and approval bilaterals outlined in the Business Regulation and Competition Working Group's Implementation Plan have already lapsed, so it is essential that work begins as soon as possible to move these reforms forward in NSW.

NSWMC believes the establishment and endorsement of regional planning instruments that meet the Act's protection requirements are needed. Under such an arrangement, NSW and local Governments would ensure individual projects are consistent with the Act-approved instruments before granting approval. This would be a far more efficient model than the current situation. The Commonwealth could more appropriately focus on strategic investments, planning and assessing outcomes through monitoring and auditing compliance. Recently the Commonwealth and WA State Governments have proclaimed 'strategic assessments' under the Act as a vehicle for regional planning. NSWMC believes this approach should be investigated in NSW as a matter of urgency.

2. Ongoing certainty for approved developments

Mining is a capital-intensive business, and mining operations require certainty for long-term investments. However, there are a number of scenarios where the Act does not provide adequate protection for mines with State or Commonwealth approval. This means mines risk losing their approval, having that approval modified, or delaying that approval despite undertaking due diligence assessments. For example:

- There will be cases where projects are not referred to the Federal Minister because, for example, there are no threatened species or endangered ecological communities listed under the Act present on the project site. However, these projects are at risk of invalidating their State based approval if a species or endangered ecological community present on the site is subsequently listed under the Act after the project has commenced. In this scenario, the proponent is required under s 68 of the Act to refer the project to the Minister. Under s 74AA(1), the proponent commits an offence if it continues the action while the Minister is deciding whether it is a controlled action. The result is a lack of certainty for proponents, and major developments could potentially be halted or modified, creating significant disruption to businesses and their employees. This risk is likely to trigger more unnecessary referrals being lodged so that proponents get the protection against new listings offered by s 158A. NSWMC believes the protection against new listings offered by s 158A should be extended to any project that has been approved under State based assessment processes.
- Under s 78 of the Act, the Minister can review decisions on whether an action is a controlled action if 'substantial new information' or a 'substantial change in circumstances' arises. This is an important mechanism for the consideration of legitimate new information. However, there are concerns that the process can be used by vexatious opponents whose aim is to cause delays to projects rather than protecting MNES. NSWMC believes the review process for any new information presented should be more rigorous to ensure proponents are not required to respond to illegitimate claims.

There is a need to provide certainty to proponents that projects will not come under undue future scrutiny when due diligence assessments have been undertaken and have been found unlikely to significantly impact MNES.

3. State and Commonwealth consistency

There are significant issues of consistency between NSW and Commonwealth assessments and approvals:

- The Commonwealth and the NSW Government should at the very least impose approval conditions which are consistent with one another, and should go further by ensuring any conditions imposed are not duplicated in each of the approvals.
- Particular attention is needed in the developing area of environmental offsets. NSWMC is aware of instances where offsets have been proposed by regional NSW Government officers to address local initiatives, but which are unlikely to be accepted by the Commonwealth because they do not satisfy broader offsetting principles.



- As both NSW and the Commonwealth develop offsetting approaches, there is a need to ensure that inconsistencies in principles and practices between jurisdictions are minimised. With the recent introduction of NSW's BioBanking Scheme, NSW is a first mover in the area of systematic calculations of biodiversity offsets. It is essential that any biodiversity assessment and offsetting processes put in place by the NSW Government are recognised and accepted by the Commonwealth Government to avoid the need for any duplicative assessment or approval requirements. It is essential for clear guidance in this area so that proponents can develop offset strategies acceptable to all levels of Government.
- NSWMC is aware of inconsistencies in the naming of listed communities between NSW and Commonwealth legislation. This is confusing for proponents and has the potential to lead to situations where impacts on matters of environmental significance are not identified. Steps should be taken to ensure consistency between State and Commonwealth naming.

4. Other issues

- The location of mineral resources is fixed, and the economic viability of resources changes as commodity prices fluctuate and technology changes. This means that resources which are currently unviable to mine may become viable in the future. If offsets approved under the EPBC Act are located in these areas, there must be provisions to allow modifications of these offsets, provided suitable alternative offsets can be arranged. While this is recognised and catered for under NSW's BioBanking Scheme (s 127S(1) of the *Threatened Species Conservation Act 1995*), and other conservation strategies such as the Great Eastern Ranges initiative, there is a need for similar flexibility under the EPBC Act.
- The impacts of mining projects are often temporary, with mine rehabilitation reducing impacts on listed species after the initial impact. Assessments under the EPBC Act need to consider the impacts of mining in this context rather than assuming that they are permanent – similar to residential development. Commonwealth legislation and policies need to allow the net impact to be assessed over time rather than the impact at the initial stage of the project.



NSWMC looks forward to further consultation as the Review progresses. If you have any questions regarding this submission, please contact Rachelle Benbow, Director Environment & Community, on (02) 9274 1400.

Yours sincerely

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CHIEF EXECUTIVE OFFICER