

4 June 2009

Dr Allan Hawke
c / - Secretariat to the Independent Review of the EPBC Act
GPO Box 787
Canberra ACT 2601



Via email: EPBCReview@environment.gov.au

Re. MCA Feedback on the Senate Review of the Operation of the *Environment Protection and Biodiversity Conservation Act 1999*

Dear Dr Hawke,

The Minerals Council of Australia appreciates your recent participation in its recent Sustainable Development Committee meeting. As you are aware, minerals operations receive above-average scrutiny in the application of the *Environment Protection and Biodiversity Conservation Act* (EPBC Act), and the industry is therefore a keen stakeholder in its review. Following that meeting, we are writing to reiterate several key points of the discussion, particularly concerns regarding recommendations of the Senate Committee which also recently reviewed the Act's operation.

General Comments on the Senate Report

In representation to the Senate review of the operation of the EPBC Act, the MCA advocated enhanced protection of the environment and increased economic efficiency of regulation through [amongst other things]:

- a move towards 'outcomes-' rather than 'process-based' assessment of the Act's effectiveness; and
- improving administration of the Act such that activities which have caused the decline of biodiversity in Australia attract the most resources;
- providing better guidance on the definition of an 'action', specifically regarding a project's upstream and downstream scope for assessment;
- using a risk based approach to align the types of actions that will lead to impacts on different matters of national environmental significance;
- reduced overlap of monitoring, reporting and compliance requirements between Commonwealth and State jurisdictions;
- in the medium-term, removal of the Commonwealth from project-by-project approvals processes, through the broader establishment and fuller implementation of bilateral agreements for assessments and approvals and therefore having Commonwealth activities appropriately focussed on strategic investments and planning support, and assessing outcomes through monitoring and auditing compliance; and
- enhancing alignment of regional natural resource management planning, and the operation of the Act, to minimise duplicate planning processes, and land use conflicts, whilst maximising industry investment in the process and landscape (use of offsets, data collected etc.).

Whilst supportive of many of the Senate Committee's recommendations, especially those related to strengthening the objects of the Act, moving towards performance monitoring based on outcomes rather than process, and improving offsets policy, the MCA considers that the Senate missed the bigger-picture concerns of the industry, particularly those related to regulatory efficiency.

The MCA supports a role for the Commonwealth in biodiversity management, but does not support an additional layer of micro-management through project approvals, without any demonstrable additional environmental outcomes. The Senate Review was silent on COAG commitments to reduce unnecessary red tape and duplication across jurisdictions, with the implied conclusion that the EPBC Act is efficiently delivering environmental outcomes.

The MCA considers that many regulatory requirements related to biodiversity protection, administered by the State Governments through project approvals, are merely replicated through the EPBC Act process. The MCA considers

expansion of bilateral arrangements for approvals and assessments are an existing, and grossly underused¹, mechanism that can be used to improve efficiencies and reduce duplication. Key relevant points that the MCA seeks to reiterate for your consideration in the independent review include:

- the existing duplication in State and Commonwealth approvals, especially approval conditions, is unnecessary and inefficient;
- there are COAG commitments to reducing unnecessary regulatory burdens and duplication;
- with the expansion, in breadth and nature, of assessments and approvals agreements, a 'one stop project approval shop' is achievable;
- expansion of the Act's powers by including new triggers, such as land clearing, or greenhouse triggers, are at odds with commitments to reduce regulatory overlap (given there are existing State and Commonwealth controls for these 'market failures'); and
- there is a key role for the Commonwealth in biodiversity management, in meeting its legal obligations under the Act, and its International obligations, but project approvals is not the most efficient mechanism for meeting Commonwealth obligations.

Here we provide feedback on particular recommendations by the Senate Committee charged with reviewing the operation of the EPBC Act.

Recommendation 1: Strengthening Objectives of the Act

The MCA reiterates its support for the strengthening of the Act's objectives, in expectation that there will be parallel changes to monitoring performance of the Act, such that it is assessed and reviewed based on environmental outcomes, rather than volume of process. We also seek to highlight that strengthening of the Act's effectiveness does not require additional layers of regulation or process, rather, more strategic administration of the Act as it currently stands.

Recommendations 2 and 3: Regarding Consideration of Additional Triggers

Calls for additional 'triggers' by a diversity of stakeholders are seemingly borne from frustration with the Act's administration, rather than a need for additional regulatory mechanisms in the Act. Across each of the 'requested' new triggers, measures to protect biodiversity are already in place under the Act as it currently stands. If any individual action related to greenhouse gas emissions, or water extraction, or land clearing, is considered to potentially have a significant impact on a matter of national environmental significance (including listed threatened entities, wetlands of significance etc.), it should be referred to the Minister for approval. Additionally, there is the potential to list additional 'items of significance' under the Act as it currently stands.

Further, for each of the requested new triggers, there are other existing legislative instruments in place (Commonwealth and State), or being developed, which would mean the EPBC Act would provide little additional benefit, and at-worst promote the inefficient application of those other instruments.

Some specific additional concerns with each potential additional trigger are also highlighted:

Example 1. A Greenhouse / Climate Trigger

If the EPBC Act was considered to be the appropriate mechanism for managing greenhouse emissions or climate change its potential role in the Carbon Pollution Reduction Scheme (CPRS) would have previously been highlighted in the Government's consultation for that program. As outlined above, protection for biodiversity matters from any single action, including those generating greenhouse gases, likely to have a significant impact on biodiversity, is already provided under the EPBC Act.

Further, development of both an Emissions Trading Scheme (ETS) under the CPRS and greenhouse trigger in the EPBC Act, would cause distortions in the purportedly efficient market-based mechanisms used to allocate carbon use

¹ for example, the assessment bilateral with NSW only applies to actions assessed under the NSW Environmental Planning and Assessment Act, that is, not vegetation clearing that is approved under the Native Vegetation Act or activities undertaken by State Agencies under the National Parks and Wildlife Act – which combined, would include the vast majority of actions likely to influence biodiversity conservation

within the economy by the ETS. For example, once an EPBC Act referral is made to the Commonwealth and is publicly available, the carbon permit requirements for that project would be known and subject to market speculation. Further, there would be no barriers to carbon market 'gamers' from 'proposing' high-carbon projects through the public referral process, to inflate the price of their existing permits, before selling them and subsequently 'withdrawing' their proposed project².

Addition of a greenhouse trigger in the Act is not only at odds with COAG commitments to reduce regulatory burdens and duplication, it will likely distort potentially more efficient mechanisms for dealing with the market failure, and will likely promote the capture of innumerable projects not currently considered by the Act (e.g. building refurbishments, aviation, Commonwealth funding programs) that are more efficiently dealt with through other mechanisms.

Example 2. A Land Clearing Trigger

Minerals operations, by and large, refer projects to the Department for two reasons: (1) they clear land, or (2) they influence water quality. Regardless of the specific development actions, mechanisms to protect ecological communities and individual species that may be impacted by land clearing already exist. Under existing arrangements, any vegetation, and species therein, can be nominated and assessed for its national significance and protection by the Act. The MCA considers that in those circumstances where land is cleared that does not include EPBC-listed matters, including the vegetation itself, there is no need for the Commonwealth to be involved. Additionally, in most jurisdictions, broad scale land clearing has largely ceased, through regulation by State's specific native vegetation legislation and associated policies.

Example 3. A Water Extraction Trigger

As per the discussion for climate impacts, and land clearing, there are both existing protection mechanisms within the Act (e.g. there is no reason that water-reliant biodiversity entities cannot be nominated for listing threatened species or ecological communities under the EPBC Act), and a variety of other duplicative legislative and policy instruments being used to address water extraction. For example, see the table attached that outlines the current legislative protection mechanisms regarding water use and management, to which minerals operations comply.

Under the National Water Initiative there is a drive to establish market based mechanisms for protecting the environment and efficiently distributing access to water resources. Establishment of a water extraction trigger would impact on the efficient establishment and operation of water markets, in a similar way to that outlined for the carbon markets above.

Based on both existing protection mechanisms and developing water markets (which have provisions for environmental and cultural flows) the MCA considers it is unnecessary and inefficient to include a water extraction trigger in the EPBC Act.

Recommendation 4 - Proposed Cost Recovery for Increased Resourcing

The Senate recommends exploring cost-recovery from project proponents, but also highlights that it has not considered existing costs incurred on proponents. Current costs for proponents include (1) those related to the assessment process, including field surveys, data analysis, documentation, stakeholder engagement and reporting; and (2) those related to approval conditions such as ongoing monitoring and reporting requirements, and offset and other approval conditions. The MCA welcomes a robust financial impact assessment that is linked with the environmental outcomes achieved through the Act's administration, to support development of a framework that determines how costs should be apportioned amongst stakeholders in the regulatory process.

Recommendation 5 - Evaluation of Outcomes

The MCA reiterates its support for better outcomes-based-assessment, and asserts that the current information provided to the Department, through approvals conditions, could be much better utilised to monitor, analyse and report

² A similar problem may also eventuate with the interaction of the EPBC Act, and the NSW BioBanking Scheme, the latter effectively establishes a cap and trade for biodiversity credits, which when fully functional, would be influenced by the operation of the EPBC Act.

outcomes. For example, data and trends reported to State and Commonwealth Governments as part of approval conditions could be easily aggregated across reporters and used to analyse condition and trends in the matters of national significance being managed. In turn, this information should be used to target resources through the Act's administration. The 'new activity' recommended by the Senate does not need to cost significantly, if there is better use of existing resources.

The MCA again reiterates concerns that the Department is not utilising the investment made across 2006-2008 to audit biodiversity. If not made public during the review process, the biodiversity audit report should be made available to the independent review team, to ensure that they have the latest information on biodiversity trends, and an understanding of the quality of information supporting those assessments, to be able to link patterns to the operation of the Act. Calls for expanding financial investment in outcomes monitoring are premature when existing initiatives, and data / information, are not being efficiently utilised.

Recommendation 6 - Effect of Existing Bilateral Agreements

Of particular concern to the MCA are the Senate recommendations regarding Bilateral Agreements for assessments and approvals. The Senate did not make the connection between regulatory efficiency, environmental outcomes, and COAG commitments to reduce regulatory burdens, duplications and inefficiencies, particularly in the context of the use of Bilateral Agreements under the EPBC Act.

As the Productivity Commission recently highlighted³, increasing regulatory efficiency in project approvals is crucial, because it reduces societal costs, without impinging on environmental effectiveness. Inefficient regulatory arrangements result in increased compliance costs for business and government, lost revenue and taxation through project delays, 'lobbying or gaming' costs, and lost investment opportunities related to sovereign risks. The current economic climate provides an ideal platform for regulatory reform, whilst development pressure is reduced, meaning project approvals requirements will lessen, and a more efficient system can be developed for implementation when demand returns.

Recommendation 8 – Listings Under the Act

The MCA considers that if a species is listed, it is clearly a matter of national significance, and should be treated accordingly. Therefore, when an entity is listed, appropriate resources for monitoring and assessment must be allocated, in parallel with industry's efforts to assess impacts, mitigate impacts and monitor implementation. Listings should not be made lightly, as this dilutes the effectiveness of the 'national significance' approach. Monitoring and reporting of matters of national significance should clearly be of a spatial and temporal scale that enables assessment of the Act's environmental outcomes, and once protection is confirmed, enable an entity to be delisted, so that higher priority concerns receive limited resources.

Recommendation 9 – Use of Offsets

The MCA considers that the Senate recommendations regarding the use of offsets when habitat is 'already protected' reflects an overly simplistic understanding of how offsets are developed and applied. In NSW and Vic, for example, an area of cleared vegetation can be offset by improving the quality of similar area of vegetation elsewhere. The net outcome of the development is an improvement in the 'quality-quantity relationship' across the landscape. Therefore, there is no technical reason why land that is protected under legislation (e.g. a Native Vegetation Act, or a National Parks Act) cannot be used as an offset where its 'biodiversity quality' is improved through the offset arrangement (e.g. enhanced protection and active management). There may be political limitations to accepting that land managed by the State, or currently 'protected', is not being managed to its duty of care requirements, but these do not relate to the philosophies of offset development and application as they are currently applied.

³ Productivity Commission (2009) Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector

The MCA recommends a more holistic consideration of the role of offsets under the EPBC Act, and their interaction with other investments in the landscape (both government's and industry's), needs to be developed before the EPBC offsets policy is finalised. This review should consider the use of strategic assessments to accredit offset arrangements already developed by the jurisdictions.

Recommendation 10 – Merits Reviews

The MCA considers that the implications of merits review opportunities throughout the assessment process needs to be carefully considered. Besides being a boon for consultants, and lawyers, there needs to be careful consideration about whether such additional process would add anything to delivering environmental outcomes through operation of the Act. In addition, as outlined, the MCA considers that there are far better opportunities to deliver enhanced environmental outcomes rather than establishing another tranche of process in project approvals.

The Minerals Council of Australia reiterates its gratitude to Dr Hawke, and the review team, for providing the opportunity for direct engagement with the Sustainable Development Committee in this crucial review. The MCA further highlights the commitment of its members to protecting matters of national environmental significance, under a regulatory framework that is efficient and effective and promotes leadership in environmental performance.

Should you have any further questions regarding this issue, please do not hesitate to contact me directly, or Dr Jason Cummings – Assistant Director Environmental Policy on 02 6233 0627, who has carriage of this matter in the MCA Secretariat.



MELANIE STUTSEL
DIRECTOR – HEALTH, SAFETY, ENVIRONMENT AND COMMUNITY POLICY

Attachment 1

Overview of Existing Water Access Protection Mechanisms (National) and Project Approvals Processes
(Excluding Commonwealth)

State/ Territory	Relevant Acts, key regulations, guidelines, Codes of Practice.	Water	Mining	Environmental Protection	Planning			
Australia		Relevant Acts, key regulations, guidelines, Codes of Practice.	<ul style="list-style-type: none"> ■ National Water Initiative ■ National Water Quality Management Strategy 	<ul style="list-style-type: none"> ■ Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, the JORC Code 2004 ■ Enduring Value 	<ul style="list-style-type: none"> ■ EPBC Act 1999 			
NSW			Relevant Acts, key regulations, guidelines, Codes of Practice.	<ul style="list-style-type: none"> ■ Protection of Environment Operations Act 1997 ■ Water Management Act 2000 ■ Water Management Regulation 2004 	<ul style="list-style-type: none"> ■ Mining Act 1992 ■ Coal Mines Regulation Act 1982 ■ Mining Regulation 2003 ■ Coal Mines Regulations 1999 	<ul style="list-style-type: none"> ■ Protection of Environment Operations Act 1997 ■ Protection of the Environment Operations Regulation 1998 ■ Clean Waters Regulation 1972 	<ul style="list-style-type: none"> ■ Environmental Planning and Assessment Act 1979 ■ Environmental Planning and Assessment Regulation 2000 	
Vic				Relevant Acts, key regulations, guidelines, Codes of Practice.	<ul style="list-style-type: none"> ■ Water Act 1989 	<ul style="list-style-type: none"> ■ Mineral Resources (Sustainable Development) Act 1990 ■ Mineral Resources Development Regulations 2002 	<ul style="list-style-type: none"> ■ Environment Protection Act 1970 ■ Environment Effects Act 1978 	<ul style="list-style-type: none"> ■ Planning and Environment Act 1987 ■ Planning and Environment Regulations 2005
Qld					Relevant Acts, key regulations, guidelines, Codes of Practice.	<ul style="list-style-type: none"> ■ Water Act 2000 ■ Water Regulation 2002 ■ Environmental Protection (Water) Policy 1991 	<ul style="list-style-type: none"> ■ Mineral Resources Act 1989 (amended by the Natural Resources Act 2003) ■ Mineral Resources Regulation 2003 ■ Guidelines for preparing initial and later development plans under the Mineral Resources Act 1989 	<ul style="list-style-type: none"> ■ Environmental Protection Act 1994 ■ Environmental Protection Regulation 2008 ■ Guidelines
	Relevant Acts, key regulations, guidelines, Codes of Practice.							

State/ Territory		Water	Mining	Environmental Protection	Planning
WA	Relevant Acts, key regulations, guidelines, Codes of Practice.	<ul style="list-style-type: none"> Water and Rivers Commission Act 1995 Rights in Water and Irrigation Act 1914 	<ul style="list-style-type: none"> Mining Act 1978 Mining on Private Property Act 1978 Mining Regulations 1981 	<ul style="list-style-type: none"> Environmental Protection Act 1986 Environmental Protection Regulations 1987 Guidelines to Help You Get Environmental Approval for Mining Projects in WA 	<ul style="list-style-type: none"> Local Government Act 1995 Planning Commission Act 1985 Land Administration Act 1997 Statements of Planning Policy for Environment and Natural Resources
SA		<ul style="list-style-type: none"> Water Resources Act 1997 Water Resources Regulation 1997 Environment Protection (Water Quality) Policy 	<ul style="list-style-type: none"> Mining Act 1971 Mining Regulations 1998 	<ul style="list-style-type: none"> Environment Protection Regulations 1994 Environmental Protection Act 1993 	<ul style="list-style-type: none"> Development Act 1993 Development Regulations 1993
Tas		<ul style="list-style-type: none"> Water Management Act 1999 Water Management Regulations 1999 	<ul style="list-style-type: none"> Mineral Resources Development Act 1995 Mineral Resources Regulations 2006 Mineral Exploration Code of Practice Quarry Code of Practice 	<ul style="list-style-type: none"> Mineral Exploration Code of Practice Quarry Code of Practice 	<ul style="list-style-type: none"> Land Use Planning and Approvals Act 1993 Land Use Planning and Approvals Regulations 2004
NT		<ul style="list-style-type: none"> Water Act 1992 Water Regulations 2002 	<ul style="list-style-type: none"> Mining Act 1980 Mining Management Act 2001 Mining Regulations Mining Management Regulations 	<ul style="list-style-type: none"> Environmental Assessment Act 1994 Waste Management and Pollution Control Act 1998 Environmental Assessment Administrative Procedures 2003 Waste Management and Pollution Control (Administration) Regs 1998 	<ul style="list-style-type: none"> Planning Act 1999 Planning Regulations 2005

The environmental assessment process for mining projects by jurisdiction:

State	Level of Environmental Assessment					Level of Public Consultation	
Qld	Level 2: Simplified Environmental Approval		Level 1: EIS			Level 2: not required	Level 1: Full consultation
NT	Notification of Intent Public Environmental Review		EIS			PER: lower level consultation	EIS: full consultation
NSW	Environmental Assessment					Public exhibition of EA	
WA	Low impact - Informal Review	Unlikely to be environmentally acceptable	Consultative Environmental Review	Public Environmental Review	Environmental Review and Management Programme	Complex projects - Integrated Planning Approval System	Informal Review: public advice CER, PER, ERMP, IPAS: Full public consultation
SA	Mining and Rehabilitation Plan		EIS			MARP: scope for public consultation	EIS level: full public consultation
Vic	Environmental Effects Statement					Full public consultation	
Tas	Level 1 Assessment		Level 2 Assessment - EIS			Consultation after deemed Level 1	Consultation after deemed Level 2 and reviewed by EMPC
ACT	Public Environmental Reports		EIS			Final PER for public review	Draft EIS for public review