31 JUL 2002

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Environment Australia

Approvals & Legislation Division

~~Mr Geoff Prosser MP~~
Chairman
House of Representatives Standing Committee
on Industry and Resources
Parliament House
CANBERRA ACT 2600

Dear Mr Prosser

Thank you for your letter of 20 June 2002 to the Secretary of the Department of the Environment and Heritage in which you invited a submission to the inquiry into resources exploration impediments. The Secretary has asked me to respond on his behalf.

Attached is a submission to the inquiry. It focuses on the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) as this is the principal legislation under which the Commonwealth determines environmental approval.

The submission also provides information on Commonwealth legislation that protects cultural heritage. The proposed inclusion of heritage protection in the EPBC Act is outlined.

The contact officer for the purpose of clarification or further advice regarding this submission is Steve Watts, phone 6274 1063.

Yours sincerely

Gerard Early

Gerard Early
First Assistant Secretary
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22/7/02

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Department of the Environment and Heritage Submission to the House of Representatives Standing Committee on Industry and Resources Inquiry into resources exploration impediments

Summary of main points

Commonwealth environment approval processes have recently been reformed under a COAG agreement and through the introduction of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Under the EPBC Act, the Commonwealth focuses on matters of national significance and no longer becomes involved in matters that are the responsibility of the States and Territories. The EPBC Act provides for up-front decisions on whether or not the Commonwealth will be involved in environmental assessment and approval of a project. It also provides legislated timeframes within which Commonwealth decisions must be made. The EPBC Act promotes enhanced cooperation through accreditation of States and Territories environmental assessment processes. These new arrangements bring greater certainty and improved efficiency in environmental assessment and approval for the mineral and petroleum exploration industry.

In practice few mineral and petroleum exploration projects require approval under the EPBC Act. Since its commencement on 16 July 2000, a total of 51 mineral and petroleum exploration projects have been considered under the Act. Of these, 45 projects have been determined as having no significant impact on matters protected by the Act so required no assessment or approval. Fourteen of the 45 projects did not require assessment or approval as they were conducted in a manner consistent with guidelines that have been prepared in consultation with the industry. Of the total 51 projects referred only one project has required assessment and approval. Five projects are either still being considered within statutory timeframes or have been withdrawn by proponents.

Cultural heritage is protected under various Commonwealth Acts. Mineral and petroleum exploration proposals infrequently fall within the jurisdiction of this heritage protection legislation. For those proposals dealt with under Commonwealth heritage legislation, experience has demonstrated that proponents have been able to meet the heritage protection requirement without impinging on the viability of exploration activity. The management of Commonwealth heritage responsibilities is being further improved through a set of Bills before the Parliament that will incorporate heritage protection into the EPBC Act.

Introduction

The EPBC Act is the principal legislation under which the Commonwealth determines environmental approval. Since its commencement the EPBC Act has been delivering important benefits for the Australian community. The Act provides greater certainty in relation to Commonwealth involvement in environmental impact assessment of major projects. It enhances capacity for cooperation with the States and Territories through accredited processes and it sets strict timeframes within which government decisions must be made.

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Introduction

The EPBC Act is the principal legislation under which the Commonwealth determines environmental approval. Since its commencement the EPBC Act has been delivering important benefits for the Australian community. The Act provides greater certainty in relation to Commonwealth involvement in environmental impact assessment of major projects. It enhances capacity for cooperation with the States and Territories through accredited processes and it sets strict timeframes within which government decisions must be made.

Reform of Commonwealth environment legislation

The commencement of the EPBC Act marked a major reform of the Commonwealth's environmental approval process. The reform process implemented key aspects of the 1997 COAG Heads of Agreement on Commonwealth/States Roles and Responsibilities for the Environment.

The reform of the Commonwealth environment assessment and approval process was necessary for the following reasons:

- Under the now repealed *Environment Protection (Impact of Proposals) Act 1974*, Commonwealth involvement was triggered on the ad hoc basis of any project that required a Commonwealth decision. Many triggers were indirect and environmentally irrelevant such as foreign investment approvals, decisions to provide Commonwealth funding, licence decisions and export approvals. In many instances the former legislation required the Commonwealth to assess projects that raised environmental matters of only local or State and Territory significance.
- Once the Commonwealth was involved it assessed all of the environmental issues raised by a project, including those issues that are the responsibility of the local or State or Territory government.
- The private sector proponent could not initiate or trigger the assessment process. Projects were often delayed because of the time taken by government departments to initiate the processes.
- There was no requirement to take key decisions during the assessment process within set timeframes.
- Commonwealth involvement could occur late in the project development phase or, in some cases, even after the project had commenced. Proponents were on occasion faced with uncertainty about whether the Commonwealth would be involved and at what stage of the project. Commonwealth intervention often occurred after State or Territory approval processes had commenced, creating delay and hindering seamless integration of State or Territory and Commonwealth processes.
- There was no adequate means to accredit State and Territory environmental assessment processes. Accreditation could only be considered case-by-case. A separate accreditation decision was required for each project that triggered the Commonwealth assessment process. This contributed to duplication, delay, and hindered the alignment of Commonwealth and State or Territory approval processes.
- There was inconsistency in the environmental assessment of projects. Two projects could raise identical environmental issues and yet one project would trigger Commonwealth involvement (because of an indirect trigger such as the requirement for foreign investment approval) while the other project did not.

The COAG agreement recognised the need to reform the environment assessment and approval process. It was agreed that:

- the Commonwealth's involvement in environmental matters should focus on matters of national environmental significance;

- Commonwealth environmental assessment and approval process should only be triggered by proposals that have a significant impact on matters of national environmental significance; and
- the Commonwealth States and Territories should seek to establish bilateral agreements for the accreditation of environmental assessment and approvals process in order to minimise intergovernmental duplication.

Some key features of the EPBC Act

The following are some key features of the EPBC Act for environmental assessment and approvals.

Commonwealth involvement is triggered only by matters of national environmental significance

Under the EPBC Act, Commonwealth involvement in the environmental assessment and approval process only is triggered by projects or activities that are likely to have a significant impact on one of the following matters of national environmental significance:

- the Commonwealth marine environment (generally outside 3 nautical miles from the coast)
- World Heritage properties
- Ramsar wetlands of international importance
- nationally threatened species and ecological communities
- migratory species
- nuclear actions
- actions on Commonwealth land or by Commonwealth agencies

The Commonwealth assesses only matters of national environmental significance

Under the EPBC Act, if the Commonwealth is involved in the assessment of a project that involves matters of national environmental significance, it will only assess the environmental issues relating to the matters of national environmental significance. The States and Territories are responsible for assessing other environmental issues, and are required to certify that these other matters have been assessed. Consideration of the impact on matters of national environmental significance can be integrated in State or Territory assessments under either bilateral agreement (see below) or through case-by-case accreditation of State or Territory processes

The assessment process is triggered earlier to avoid delaying the project

The EPBC Act allows a private sector proponent to trigger the assessment and approval process early in the project development phase, ensuring timely initiation of the assessment process.

Specific statutory timeframes ensure an efficient process

The EPBC Act contains specific timeframes within which decisions must be made to ensure a timely and efficient process. These timeframes can be extended only in strictly limited circumstances.

Greater 'up-front' certainty
The EPBC Act relies upon direct, specifically defined environmental criteria. Proponents will therefore know 'up-front' whether a project or activity will trigger Commonwealth involvement and, if so, the extent of Commonwealth involvement. If the proponent is in any doubt as to whether the legislation applies, he or she may refer the matter to the Commonwealth Environment Minister who has 20 business days to make a binding decision on whether the legislation is triggered. The proponent may then rely on this advice. The potential for this decision to be reconsidered is strictly limited, minimising the potential for late intervention by the Commonwealth.

Accreditation is legislated and transparent
The EPBC Act significantly enhances the Commonwealth's capacity to accredit State and Territory processes and, in appropriate cases, State and Territory decisions. In particular, the EPBC Act provides a framework allowing the Commonwealth to:

- accredit State and Territory environmental assessment processes on a case-by-case basis;
- accredit State and Territory processes and systems (avoiding the need to provide accreditation on a case-by-case basis); and
- accredit State and Territory decisions if they are made in accordance with agreed management plans (the management plan is disallowable by the Parliament).

Environmental, economic and social factors are integrated
The EPBC Act requires the integration of environmental, economic and social factors into the approval decision. The EPBC Act requires that, in deciding whether to grant approval, the Commonwealth Environment Minister must consider any impacts on the matters of national environmental significance and economic and social matters. In considering these matters, the Commonwealth Environment Minister is required to take into account the principles of ecologically sustainable development. The EPBC Act provides that these principles include the principle that 'decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations'.

Micro-economic reform
The EPBC Act represents an important contribution to microeconomic reform because it breaks the nexus between the environmental assessment process and other Commonwealth decisions such as foreign investment approvals, export controls, Australian Competition and Consumer Commission authorisations and other licence decisions. These decisions are no longer delayed pending completion of the environmental assessment and approval process.

Projects are treated consistently
The EPBC Act ensures projects are treated consistently. If a project is likely to have a significant impact on a matter of national environmental significance then it triggers Commonwealth involvement. If a project is not likely to have

a significant impact on a matter of national environmental significance then Commonwealth involvement is not triggered.

Nationally consistent standards are promoted
The EPBC Act promotes the application of consistent standards in different jurisdictions. This occurs because the Commonwealth, in making decisions on environmental assessment accreditation, is obliged to apply consistent criteria and standards across the different jurisdictions.

Approaches to environmental protection are co-operative and strategic
The EPBC Act promotes the use of 'strategic assessments' for policies, programs and management plans. This allows the assessment of proposed developments on a regional or industry basis, ensuring cumulative impacts are considered early in the planning process.

Strategic assessments facilitate development by providing certainty (proponents will know whether their project is consistent with an industry or regional policy, plan or program endorsed by the Commonwealth) and by providing the opportunity to reduce the assessment burden in relation to individual projects.

Implementation and Operation of the EPBC Act
The Department of the Environment and Heritage has committed considerable resources to implementing the EPBC Act including the development of administrative systems and training and information programs.

Since commencement of the Act in July 2000 a total of 603 actions have been referred. Of these referrals 167 actions were determined to have or likely to have a significant impact on a matter of national environmental significance. Accordingly these actions have been or are currently the subject of environmental assessment and approval.

Of the 603 referred actions, 51 concerned mineral and petroleum exploration. Of these only one project was determined to have a significant impact on matters protected by the EPBC Act so needed to be assessed and approved with conditions set. Forty-five projects were determined to have no significant impact and so did not require assessment and approval. Fourteen of the 45 projects did not require assessment or approval because they were conducted in a manner consistent with guidelines that have been prepared in consultation with the industry. Four projects are still being considered within the statutory timeframes and one has been withdrawn by the proponent.

Guidelines have been prepared to assist proponents to determine whether an action has a significant impact on a matter of national environmental significance and so requires referral to the Commonwealth Environment Minister. These guidelines provide detailed guidance on whether and in what circumstances mineral exploration and offshore exploration is likely to have a significant impact on a matter of national environmental significance. In addition guidelines have been developed to assist the offshore seismic

exploration industry determine whether or not their activities may impact on large cetaceans and therefore will require approval under the EPBC Act. Both sets of guidelines dealing with exploration were developed in consultation with the industry and have proved useful to proponents in providing greater certainty about Commonwealth involvement and the need to refer actions under the EPBC Act.

A key objective of the EPBC Act is to promote a cooperative approach between governments to protect and manage the environment. This is being achieved through bilateral agreements between the Commonwealth and States and Territories. Bilateral agreements are aimed at strengthening intergovernmental cooperation and minimising duplication.

Under bilateral agreements the Commonwealth accredits States and Territories environmental assessment processes and systems. Accreditation in this context means reliance by the Commonwealth on State or Territory assessment processes. In effect bilateral agreements allow the Commonwealth to delegate to the State or Territory the responsibility for conducting environmental assessment and, in more limited circumstances, the responsibility for granting environmental approval under the EPBC Act. The Act imposes various constraints on the scope of any accreditation that can be effected through a bilateral agreement. The EPBC Act also imposes minimum standards for the environmental assessment processes. These standards must be met in order to gain accreditation.

A bilateral agreement is in place with Tasmanian. Agreements with the Northern Territory and Western Australia are in the process of being signed. If an action is covered by these agreements then it is assessed under the accredited State or Territory process. The action still requires approval from the Commonwealth Environment Minister.

Of the remaining States and Territories, negotiations are well advanced New South Wales, and Queensland. Discussion will continue with Victoria and the ACT following their environmental legislation review. At the outset South Australia did not wish to enter into an agreement though the recently elected State government has been approach to reconsider this position.

Where bilateral agreements are being negotiated but are not yet in place, the Commonwealth is using case-by-case accreditation of State and Territory environmental assessment processes where appropriate. In addition, coordinated assessments between the Commonwealth and States and Territories are also conducted to minimise duplication.

The Department works in consultation with Invest Australia on major project facilitation. This consultation is undertaken with the aim of ensuring that the environmental assessment and approval processes operate in harmony with other necessary approval and decision processes. Separately and in addition to consultations with Invest Australia, the Department works closely with proponent to ensure the timeframes reflect both statutory requirements and the proponents needs.

Cultural heritage protection

Heritage Protection Bills

On 27 June 2002, the Government introduced legislation to repeal out-dated heritage protection arrangements under the *Australian Heritage Commission Act 1976* and to include heritage protection in the EPBC Act. The Bills are the most far-reaching reforms to Commonwealth heritage legislation since 1975. The key elements include establishing a National Heritage List comprising places of outstanding value which will be provided with protection under the EPBC Act as matters of national environmental significance. The Bills will improve the management and protection of heritage places owned or controlled by the Commonwealth.

The growth of heritage protection in States and Territories has led the Commonwealth to reassess its role in heritage listing in order to avoid duplication with other jurisdictions. The new legislation fulfils the Government's policy of focussing its environmental role on matters of national significance.

Under the Bills the key benefits of the EPBC Act discussed above will also apply to heritage protection. In particular proposals that are not of national heritage significance will be considered under State or Territory environmental assessment processes. The inclusion of heritage as a specific obligation under the EPBC Act will clarify the somewhat unclear heritage protection obligations that currently exist. Heritage protection will be considered through the same legislation and under the processes that applies for other matters of national environmental significance rather than under separate legislation and processes. The new arrangements should also help minimise overall administrative and compliance costs. In particular the cost of Commonwealth involvement is expected to be reduced significantly as the Commonwealth will no longer be involved in matters that are the proper responsibility of the States.

Current Arrangements

Regulation of mineral and petroleum exploration under government environment and planning legislation routinely requires companies to identify, monitor and manage risks to the environment arising from their operations. Exploration companies generally operate under broad environmental management systems that provides the framework for the management of any environmental impacts resulting from their operations. Under these systems, specific environmental management policies and plans guide their day-to-day operations. The protection and management of cultural heritage typically is an integral part of these management policies and plans.

Australian Heritage Commission Act 1975

Until such time as heritage protection is included in the EPBC Act as discussed above, the *Australian Heritage Commission Act 1975* will continue to operate. Under this Act, places are entered onto the Register of the National Estate (RNE). Cultural heritage places include sites, areas, buildings or other structures. Entry in the RNE constrains the actions of the Commonwealth Government only.

In relation to mineral or petroleum exploration, Commonwealth Ministers, departments and agencies must not take any action that will adversely affect a place that is entered in the RNE unless there is no prudent and feasible alternative. Where no feasible or prudent alternative exists, the Commonwealth entity must minimise any adverse effects upon the heritage values of the place. The Commonwealth entity also must refer the proposal to the Australian Heritage Commission for comment and expert advice. The Commonwealth entity that is taking an action retains the final decision-making responsibility as to whether it will proceed with that action.

Since 1996, Commonwealth entities have made 255 requests for advice on mining and petroleum exploration projects. Of these 37 projects (14.5 per cent) were identified as having a significant impact on the National Estate. In addition the Commission has received voluntary requests for advice on mining proposals from 27 non-Commonwealth bodies. For all these projects (both Commonwealth and non-Commonwealth) the Commission provided advice on how to minimise adverse impact on the values of the listed place.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984
This Act aims to preserve and protect from injury or desecration areas and objects in Australia or in Australian waters that are of particular significance to Indigenous peoples. Since the Act was passed there have been a total of 38 mining explorations applications over 19 places (several applications can apply over one place).

Of the 38 applications, 11 required no further action, seven were withdrawn, two are still to be dealt with by State or Territory processes and two received protection through becoming part of Kakadu National Park. For 14 applications, the responsible minister of the day decided that the activity could take place. Two applications resulted in successful mediations to the satisfaction of the applicant and the Minister. Since the introduction of the Act no Minister has made a declaration to stop or hinder mining explorations in Australia.

Historic Shipwrecks Act 1976
The purpose of the *Historic Shipwrecks Act 1976* is to control actions that may result in damage, interference, or destruction of an historic shipwreck or historic relic, or its removal from Australian waters. This legislation is administered by the Commonwealth in conjunction with the States and Territories, each of which has complementary legislation to protect shipwrecks in State and Territory waters.

While some exploration projects may fall within the jurisdiction of the Act if activities are in the vicinity of historic shipwrecks, recent experience has been that no mineral or petroleum exploration proposals have been determined to have an impact on historic shipwrecks. In any event, as historic shipwrecks are very small in area any likely impact can be avoided by minor modifications to exploration proposals.