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Director  
Legislation Policy Section  
Department of the Environment and Heritage  
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By email: [tasbilateral@deh.gov.au](mailto:tasbilateral@deh.gov.au)

Dear Sir

## **Review of the Tasmania / Commonwealth Bilateral Agreement**

Thank you for the opportunity to participate in the review of the bilateral assessment agreement between the Australian government and the State of Tasmania (*the Agreement*) under section 45 of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*.

The Environmental Defenders Office is a non-profit, community legal centre specialising in public interest environmental and planning law. We provide legal representation and advice, take an active role in law reform and policy formulation and offer education programs designed to facilitate public participation in environmental decision making.

### ***Summary of Recommendations***

- Require the Board of Environmental Management to publish **all** draft guidelines and invite public comments.
- Require notices regarding assessment document to be published nationally.
- Require State government agencies to endorse draft assessment documentation as complying with guidelines before it is released for public comment.
- Provide copies of all submissions received to the Commonwealth Environment Minister.
- Require any additional information provided by the State of Tasmania to the Commonwealth Environment Minister to be publicly available.
- Allow the Commonwealth Environment Minister to defer an approval decision where the State approval decision is subject to appeal.
- Allow the Commonwealth Environment Minister to make recommendations to the State government regarding the assessment of matters other than matters of national environmental significance (including matters listed in the *Heads of Agreement on Roles and Responsibilities for the Environment*).

- Allow the Commonwealth Environment Minister to make recommendations to the State government regarding monitoring and enforcement of conditions attached to an approval for a controlled activity.
- Establish a dedicated education and advisory unit within Tasmania, to be jointly funded by the parties. The unit could operate in association with the existing EPBC Unit.

## Public consultation and Access to Information

### *Have draft guidelines been published and public comments sought?*

For proposed actions assessed by way of a Development Proposal and Environmental Management Plan (*DPEMP*), clause 3.2, Part B, Schedule 1 provides that the Board of Environmental Management (*the Board*) may seek public comment on draft guidelines for the DPEMP if:

- the Board believes the issues are complex or there will be a high level of public interest in the issue;
- the Commonwealth Environment Minister has requested that the draft guidelines be published; or
- the Board considers it is appropriate to publish the draft guidelines for any other reason.

There is also no requirement for the final guidelines to be published. We consider that it is appropriate to seek (and have regard to) public comment on draft guidelines for any action that is assessed under the Agreement.

**Recommendation:** Amend clause 3.2 to require that:

- the Board publish all draft guidelines and invite public comment;
- final guidelines for preparation of a DPEMP be published.

### *Have notifications been published in relevant newspapers?*

Regulation 16.03 of the EPBC Regulation requires notices regarding assessment material to be published in a national newspaper and a newspaper circulating in the State. If practical, notices should also be published in relevant regional newspapers.

However, the public notice provisions of the Agreement (Clause 7.1, Parts A and B, Schedule 1), require only that an invitation to comment on draft assessment documentation is published in newspapers circulating generally in Tasmania. Many controlled actions undertaken in Tasmania have potential impacts outside Tasmania (for example, where they impact on populations of migratory species) and it is appropriate that public notice be given at a national level.

In our experience, notice of draft assessment material is published in all relevant State newspapers and on the websites of both the Department of Environment and Heritage and the relevant state assessment authority (DPIWE or the RPDC). However, it would be preferable to include a requirement for notice to be published nationally – at least on the Department of Environment and Heritage website.

**Recommendation:** Amend clauses 7.1 in Parts A and B, Schedule 1 to require publication of notices regarding assessment documentation at a national level.

Pursuant to section 103(2) of the EPBC Act, the Minister may only approve the publication of a draft EIS if satisfied that the draft report adequately addresses the guidelines.

Clause 4 of Parts A and B, Schedule 1 provides that the EIS or DPEMP must be prepared in accordance with the guidelines, however there is no provision for the relevant assessment authority to ensure that the assessment documentation does adequately address the guidelines. In practice, it is likely that draft assessment documentation is provided to the assessment authority for comment prior to publication. We believe that it is preferable to explicitly provide for the relevant authority to endorse the assessment documentation before it is released for public comment.

***Recommendation:***

Amend clause 4 of Part A, Schedule 1 to read:

*“The proponent prepares an environmental impact statement in accordance with the guidelines mentioned in clause 3, and provides a copy to the Commission. If the Commission is satisfied that the environmental impact statement adequately addresses the matters set out in the guidelines, the environmental impact statement is released for public comment for a period of at least 28 days...”*

Amend clause 4 of Part B, Schedule 1 to read:

*“The proponent prepares a Development Proposal and Environmental Management Plan in accordance with the guidelines mentioned in clause 3, and provides a copy to the Board. If the Board is satisfied that it adequately addresses the matters set out in the guidelines, the Development Proposal and Environmental Management Plan is released for public comment for a period of at least 28 days...”*

## **Assessment of likely impacts of action on matters of national environmental significance**

The Assessment Report must take into account comments received from the public (see clauses 6.2, Parts A and B). However, while the Assessment Report is then provided to the Commonwealth Minister, the public comments themselves are not currently required to be provided to the Minister.

Submissions received from the public frequently raise critical issues and provide valuable information regarding the impact of a proposed action. While the assessment authority has regard to these submissions in finalising the Assessment Report, the Minister may wish to review the submission itself to determine whether the report adequately addresses the issues raised in the submission. We recommend that copies of all submissions received in response to the draft EIS or DPEMP be provided to the Minister.

***Recommendation:*** Amend paragraph 14.1 by inserting the following text after “The State of Tasmania also undertakes that it will provide copies of any other assessment documentation”:

*“(including any submission received in respect of the draft environmental impact statement or Development Proposal and Environmental Management Plan)”*

Alternatively, this matter may be addressed in the Administrative Procedures developed pursuant to clause 19 of the Agreement.

Clause 14.2 of the Agreement allows the State of Tasmania to provide “*assessment documentation relating to social or economic matters if such information will be relevant to the Commonwealth Environment Minister’s considerations...*” In our view, it is consistent with the spirit of the EPBC Act that any information on which the Minister may rely is made available for public comment (subject to standard exceptions). Therefore, any relevant social and economic matters should be addressed in the draft assessment documentation and the Assessment Report.

Where additional material is provided to the Minister, notice of such material should be published and public comment invited. This is consistent with the requirement in clause 15 for the Minister to provide the State of Tasmania with an opportunity to comment on additional information provided pursuant to s 136(2)(e) of the EPBC Act.

**Recommendation:** Amend clause 14.2 to require a copy of any additional information provided to the Minister that was not addressed as part of the State assessment process to be provided to any person who made a submission.

In 2002, the Tasmanian government assessed and approved the Meander Dam project. This decision was later overturned by the Resource Management and Planning Appeal Tribunal (*Tasmanian Conservation Trust v Director of Environmental Management and Rivers and Water Supply Commission* [2003] TASRMPAT 12). In that instance, the Commonwealth Environment Minister had not made an approval decision under Part 9 of the EPBC Act because further information requested of the State of Tasmania had not been provided before the Tribunal decision was released. Therefore, the Commonwealth Environment Minister was in a position to consider the findings of the Tribunal (to the extent that these findings touched on matters of national environmental significance).

In our view, it should be mandatory for the Commonwealth Environment Minister to have regard to any findings of an appeal body in respect of a controlled action.

**Recommendation:** Introduce amendments to the EPBC Act / Agreement to provide, where a decision by a State government agency to approve a controlled action is subject to an appeal, that the Commonwealth Environment Minister should:

- defer his or her decision regarding the controlled action until the appeal is finalised; and
- have regard to the relevant findings of the appeal body.

## Further comments

### *Assessment of impacts on matters other than MNES*

Pursuant to Clause 10.3 of the Agreement, the Tasmanian government undertakes to ensure that the environmental impacts (other than impacts on matters of national environmental significance (*MNES*)) are assessed “to the greatest extent practicable” for controlled actions:

- taken by a constitutional corporation

- taken for the purposes of trade or commerce between Australia and another country or between Tasmania and another State or Territory
- whose regulation is appropriate and adapted to give effect to Australia's obligations under an agreement with one or more other countries

Examples of relevant actions that could fall within this clause include energy projects (such as wind farms) intended for connection to interstate grids.

The State of Tasmania is required to provide a notice setting out how these matters were assessed. However, the Agreement does not currently provide any further mechanism by which the Commonwealth Environment Minister can effectively oversee the assessment of non-MNES impacts of a proposed action. We recommend that clause 10 be amended to allow the Commonwealth Environment Minister to take steps to ensure that the Assessment Report addresses relevant matters other than MNES.

**Recommendation:** Amend clause 10 to allow the Commonwealth Environment Minister to:

- require the State to provide further information or advice regarding the assessment of these matters;
- refuse to accept the Assessment Report provided by the State until a particular impact is adequately assessed.

Pursuant to Attachment 1 of the *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (COAG, 1997), the Commonwealth has an interest in a number of matters other than MNES, including:

- management of marine and coastal environments;
- conservation of biological diversity (other than threatened species and communities);
- movement and disposal of hazardous wastes;
- implementation of the National Strategy for Ecologically Sustainable Development;
- conservation of native vegetation and fauna; and
- prevention of land and water degradation.

Despite this Commonwealth interest, there are currently no mechanisms by which the Commonwealth can ensure that the State of Tasmania is fulfilling its responsibilities in respect of these matters. We recommend that the Agreement be amended to allow the Commonwealth to intervene in situations where it is satisfied that the State of Tasmania has not adequately assessed, or is not adequately managing, the impact of development on the matters listed in Attachment 1 of the Heads of Agreement document.

**Recommendation:** Introduce a new clause allowing the Commonwealth Environment Minister to require the State of Tasmania to prepare a report on its assessment / management of a particular environmental impact. The State must have regard to any advice given by the Minister in respect of the matter.

### ***Ensuring actions are referred***

Clause 11 of the Agreement provides that the parties will:

- work cooperatively to ensure proponents are aware of their obligations under the EPBC Act; and
- use their best endeavours to encourage proponents to refer actions to the Commonwealth Environment Minister

In our experience, very few Level 2 activities are referred to the Commonwealth. For the majority of developments referred to the Commonwealth Environment Minister, the proponent is a government agency (including local council) or a government business entity. We believe this demonstrates a need to improve awareness of obligations under the EPBC Act amongst other proponents.

Providing practical educational materials and advice regarding potential impacts requires a significant commitment of time and resources. Given the competing regulatory responsibilities, this educative role is typically accorded a low priority by government agencies. We would therefore support the establishment of a dedicated unit in Tasmania to undertake this task, under the auspices of the established EPBC Unit (the federally funded project between WWF Australia, the Australian Council of the National Trusts and the Tasmanian Conservation Trust).

The Tasmanian unit would provide an information and advisory service to increase understanding within industry of referral obligations and assessment procedures under the EPBC Act. The unit would also provide a useful resource in monitoring proposed developments and encouraging appropriate referrals. This would promote the objectives of the EPBC Act and assist the parties to achieve compliance with clause 11 of the Agreement.

***Recommendation:*** Establish a dedicated education and advisory unit within Tasmania, to be jointly funded by the parties. The unit could operate in association with the existing EPBC Unit.

### ***Cooperation to ensure enforcement***

Pursuant to clause 16.2 of the Agreement, the parties agree to cooperate in monitoring compliance with conditions attached to approvals. The principal aim of this clause is to minimise duplication, however it is also an opportunity for the Commonwealth Environment Minister to oversee the enforcement of conditions at the State level.

Effective enforcement is vital to maintaining public confidence in the environmental management system. We believe that the Tasmanian legislation accredited by the Agreement generally provides an appropriate suite of enforcement tools to secure effective environmental management. However, in our experience, insufficient resources and a lack of enforcement culture amongst councils and DPIWE consistently fails to secure compliance with conditions.

We believe that the Commonwealth Environment Minister should have power to intervene where a condition attaching to an authority issued by the State is not being complied with and the non-compliance is likely to impact on a MNES.

**Recommendation:** Insert a new clause 16.3:

*“Where:*

- (a) the Commonwealth Environment Minister is satisfied that one or more conditions attached to an approval are not being complied with; and*
  - (b) the conditions relate to, or affect, a matter of national environmental significance,*
- the Commonwealth Environment Minister may make any recommendation regarding ongoing monitoring and enforcement for the activity. The State of Tasmania must have regard to this recommendation in making a decision regarding enforcement under clause 17.”*

The Environmental Defenders Office appreciates the opportunity to comment on the Bilateral Agreement. Please do not hesitate to contact us if you wish to discuss anything raised in this submission.

Kind regards,

**Environmental Defenders Office (Tas) Inc**

Per:

Jessica Feehely  
Principal Lawyer