INDEPENDENT REVIEW OF THE EPBC ACT

NSWMC SUBMISSION

17 April 2020

NSW MINERALS COUNCIL

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1 Introduction

The NSW Minerals Council (NSWMC) welcomes the opportunity to provide a submission on the independent review (the Review) of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). NSWMC represents the NSW mining, and minerals processing industry and suppliers.

The mining industry directly employs more than **40,000** people in NSW. The industry in NSW spends **$13.7 billion** dollars a year with half of that being spent with NSW based business. The industry contributes more than **$2.3 billion** in royalties and taxes[1]. Coal is NSW's number one export earner, making **$23.1 billion** in 2018-2019[2].

Our members' main point of interaction with the EPBC Act is through the process of assessment and approval of major mining projects. These projects are also assessed at a state level. These processes can cause significant duplication of effort, adding time and costs to project assessment. While there have been improvements in recent years, including the bilateral assessment agreement between NSW and the Commonwealth, there remains much to do to achieve a streamlined assessment process.

With the Australian economy currently experiencing an unprecedented shock, the mining industry will be vital in how well we recover. Ensuring a pipeline of new projects is not delayed becomes even more important than before.

The EPBC Act Review provides an opportunity to identify ways to streamline the Commonwealth's assessment of projects and achieve a genuine one stop shop. In 2014 and 2015 approval bilateral agreements were negotiated by the Commonwealth with NSW, Qld and WA. Disappointingly these agreements were never finalised and since that time the momentum for a one stop shop for environmental approvals has been lost. It is time to regain that momentum.

The Review should acknowledge that there have been considerable improvements made in environmental regulation by the States and Territories since the commencement of the EPBC Act. Despite this there continues to be a lack of trust in state-based systems within the Commonwealth and this leads to duplication and delay.

At the heart of the Commonwealth process should be a strategic oversight to ensure that the state based environmental laws deal appropriately with the impacts on matters of national environmental significance. More regulation does not equate to better outcomes for the environment or the community.

[1] NSW Mining Industry Expenditure Impact Survey 2018/19, http://www.nswmining.com.au/expenditure-and-jobs-surveys

[2] Coal Services Mining Statistics, NSW

2 About this submission

This submission focuses on the key areas of reform relevant to NSWMC members. NSWMC has also contributed to the submission of the Minerals Council of Australia and supports the views and recommendations contained in the MCA submission.

Part 3 of this submission summarises our key recommendations to the Review.

Part 4 of this submission addressed NSWMC's key recommendations to the Review. We have endeavoured to link these to questions posed in the Review's Discussion Paper.

Part 5 addresses the remaining questions from the Review Discussion Paper where NSWMC can contribute.

3 Recommendations

Implement a genuine one-stop-shop for environmental assessment and approval

1. The Commonwealth must prioritise addressing barriers that prevent genuine accredited assessment such as the alignment of listings. Additional resources should be focussed on resolving barriers to accredited state assessment systems operating without the intervention of the Commonwealth.
2. The Commonwealth should identify the barriers to approval bilaterals and begin work to resolve those issues.
3. Project conditions should be harmonised wherever possible, and ideally Commonwealth approvals should aim to refer to State conditions.

Provide greater flexibility for offsetting

4. Amend the EPBC Act and the Environmental Offsets policy to allow for more flexible offset arrangement including:
    a. The accreditation of the NSW Biodiversity Offset Scheme variation rules
    b. The acceptability of ecological rehabilitation of mined land as an offset
    c. The capacity to pay into a recognised scheme to provide an offset.

Remove the water trigger

5. The Review should examine the utility of the "water trigger" and consider its removal given the extensive state legislative controls and processes that exist in this area.
6. In the event the water trigger is not removed
    a. Amend the definition of 'large coal mine' in the EPBC Act to confine it to greenfield mine developments and brownfield expansions of existing mines where the mining area is to be significantly increased
    b. Update the *Significant impact guidelines 1.3: Coal seam gas and large coal mining developments— impacts on water resources* to better define the circumstances where a development is considered to have a significant impact on water resources
    c. Amend the EPBC Act to include water as a matter that can be approved under a bilateral agreement.

Reduce not extend matters of environmental significance

7. Further matters of environmental significance should not be added. While some groups will recommend a 'climate trigger' this would be duplicative as these impacts are already dealt with through the National Greenhouse and Energy Reporting Scheme.
8. The nuclear action trigger should be amended to remove the mining or milling of uranium ore from the definition of "nuclear action".

Provide transparency and guidance in the assessment, approval and post approval processes

9. The Environmental Offsets Policy and the EPBC Act Offsets Assessment Guide should be updated to reflect current government policy.
10. Where there is a systemic need for additional guidance, such as around some listings, that guidance should be formalised and shared with proponents.

11. The Department of Agriculture Water and the Environment should provide regular updates and training both within the department and for users.

12. Modification of approval should result in a consolidated approval document, not multiple approvals.

13. In consultation with industry provide further guidance on what constitutes a “significant impact”.

Make greater use of strategic assessments

14. Provisions in relation to strategic assessment in Part 10 of the EPBC Act should be simplified and made more flexible.

15. Part 10 of the EPBC Act should be amended to provide that strategic assessment may be conducted in relation to identified controlling provisions, for example threatened species, whilst allowing for specific projects to be referred in relation to other MNES that may be impacted, for example, water resources.

Implement risk-based and outcome-based decision-making

16. Low risk projects should not require a referral or be exempt, and should be given the same protections in relation to offences under Part 3 of the EBPC Act as cases where an environmental approval is not required

17. Low risk projects should be defined through legislation or a due diligence code

18. DAWE should appoint a senior officer to provide advice to proponents in relation to referral requirements

19. The EPBC Act should provide a defence for proponents who do not refer but can demonstrate that they took reasonable steps to assess significant impact on MNES.

Retain Minister as the decision maker

20. No changes should be made to the decision-making powers under the EPBC Act. The Act already provides for an appropriate level of advice to the Minister.

Support appropriate community involvement

21. Community consultation in relation to the EPBC Act assessment process should be undertaken seamlessly with consultation required by the state-based assessment agency.

22. Repeal section 487 of the EPBC Act which will limit the meaning of ‘person aggrieved’ to the definition provided under *Administrative Decisions (Judicial Review) Act 1977.*

4 Key areas for reform

4.1 Move towards a genuine one-stop-shop for environmental assessment and approval (Q5, 6 and 10)

The Commonwealth should set standards regarding matters of national importance whilst allowing the states to be responsible for their implementation and adaptation. Outcomes and standards should be articulated in a risk-based and broad manner with the Commonwealth taking a monitoring and assurance role.

Ultimately the States and Commonwealth should be working towards a system where there is one assessment and approval process that meets the needs of both jurisdictions. There is no advantage to the environment, and significant social and economic loss in applying two systems in relation to one project.

In 2014 the NSW and Commonwealth Government negotiated an approval bilateral. The approval bilateral was never ratified. The same year saw the Upper Hunter Strategic Assessment (UHSA) near completion. The UHSA has not been completed. This momentum for a genuine one stop shop for environmental assessment and approvals needs to be revitalised, particularly if much needed mining projects are to be progressed swiftly.

In terms of biodiversity assessment and offsetting, while bilateral agreements have been useful there are still significant blocks that prevent a genuine accredited assessment process. In practical terms many mining projects still require significant assessment input from the Commonwealth because of:

- The separate state and Commonwealth listing regimes prevent the use of one system of assessment. The 2007 Hawke Review identified separate listing systems as a significant issue. While the Common Assessment Method (CAM) process has sought to align future listings for species, past listings and listings of communities remain an issue, particularly for mining projects in NSW.
- Different rules about what are appropriate offsets which apply at the state and Commonwealth levels (see 4.2 below).

The bilateral assessment agreement and the approach by the Commonwealth and NSW Governments to operating under that agreement has been useful, largely because it has resulted in better communication between the two jurisdictions, which translates to greater clarity for proponents. However, there is still a high level of duplication and time-consuming negotiation. Proponents are still dealing with both NSW and the Commonwealth.

For example, assessments of the listed Critically Endangered Environmental Community, the *Central Hunter Eucalypt Forest and Woodland* (CHEFW) have proven to be difficult. The listing advice for the CHEFW is complicated and difficult to apply and mapping of the community differs from mapping of the NSW communities with which it aligns. Achieving a common and practical interpretation of this advice between the Commonwealth, NSW and proponents was difficult and time consuming.

An amending agreement between NSW and the Commonwealth accrediting the NSW Biodiversity Offsets Scheme (BOS) has only been signed by all parties on 24 March 2020, and it remains to be seen whether it will bring a more streamlined process. Of itself the amending agreement does not address the issues that arise from different listings.

Regarding the assessment of water, this trigger for Commonwealth assessment is unnecessary and should simply be removed.

Conditions of approval should be harmonised and/or consolidated to assist proponents in complying with their obligations and to improve environmental outcomes. A recent example of where this has been done well, is the approval granted under the EPBC Act for the United Wambo mine (EPBC 2015/7600) where several conditions of the approval simply refer to the State development consent conditions.

Recommendations

1. The Commonwealth must prioritise addressing barriers that prevent genuine accredited assessment such as the alignment of listings. Additional resources should be focussed on resolving barriers to accredited state assessment systems operating without the intervention of the Commonwealth.
2. The Commonwealth should identify the barriers to approval bilaterals and begin work to resolve those issues.
3. Project conditions should be harmonised wherever possible, and ideally Commonwealth approvals should aim to refer to state conditions.

4.2 Provide greater flexibility for offsetting (Q18)

The Commonwealth requirements for offsetting should have greater flexibility. The States including NSW have introduced rules that allow for greater flexibility. In NSW this includes variation rules that provide where a like for like offset cannot be found, offsets with a higher value can be offered. Because this flexibility is not possible under the EPBC Act, the current assessment bilateral between NSW and the Commonwealth does not provide for the rules to be applied to Commonwealth listings.

The Offsets Policy has not been reviewed or updated since 2012. In that time there has been an evolution of the role of ecological offsets, including the recognition by NSW. The Commonwealth has also evolved, although it has taken a more cautious approach. When the Offsets Policy was developed, the Commonwealth's view was that undertaking ecological rehabilitation was mitigation and could not be counted as an offset.

The recently amended NSW-Commonwealth Assessment Bilateral allows for the recognition of ecological rehabilitation as an offset. It also allows for proponents to pay into a trust in order to discharge their offsetting responsibilities. The Environmental Offsets Policy should be amended to explicitly reflect these broader options for offsetting.

The Review should consider as a high priority how to change the Act so that state-based innovations can be recognised and accredited. The value of the state-based mechanisms is currently lost where the impacted species or habitat is listed at the Commonwealth level.

Recommendation

4. Amend the EPBC Act and the Environmental Offsets policy to allow for more flexible offset arrangement including:
    a. The accreditation of the NSW Biodiversity Offset Scheme variation rules
    b. The acceptability of ecological rehabilitation of mined land as an offset
    c. The capacity to pay into a recognised scheme to provide an offset.

4.3 Remove the water trigger (Q14 & 17)

In NSW, water take, and water trading is regulated under a complex legislative regime, including detailed and localised water sharing plans which ensure that the impacts on any water source as result of a development are acceptable from an environmental perspective. The adequacy of state based regulation in the area of impacts on water resources, can be seen from recent approvals granted under the EPBC Act where the Minister has included a condition in those approvals that simply refers to conditions of the state development consent relating to water and requires the proponent to comply with those conditions (see for example, the approval granted for the United Wambo project, 2015/7600).

The impacts of mining and coal seam gas projects on water are adequately assessed and regulated under State laws. As such, the water trigger has served only to introduce additional cost and delay in

project approval without corresponding benefits for the protection of water resources. This view was endorsed by the Commonwealth Independent Expert Scientific Committee in 2017, which recommended the removal of the water trigger in its Interim Report on the *Effect of Red Tape on Environmental Assessments and Approvals*.

Whilst the trigger was intended to apply only to *large* coal mining developments, in practice any coal mine development, large greenfield through to minor brownfield, is captured by the definition and requires referral. This has resulted in unnecessary regulatory burden and cost for proponents, with no evident environmental gain.

The definition in the EPBC Act of 'large' coal mining development, does not refer to the size of the mine, but rather whether the mine will have a significant impact on water resources. This is unnecessary given the water trigger, in s24D of the EPBC Act applies to a large coal mining development that has or will have a significant impact on water resources.

If the Review does not recommend the removal of the water trigger, the definition needs to be addressed to stop all coal mines from being caught up. The definition of a 'large coal mining development' in the Act should be changed to relate to the size of the mine. The definition should be confined to greenfield mine developments and brownfield expansions of existing mines where the mining area is to be increased and omitting any reference to a significant impact on water resources.

In addition, the *Significant impact guidelines 1.3: Coal seam gas and large coal mining developments— impacts on water resources* be updated to better define the circumstances where a development is considered to have a significant impact on water resources so that minor modifications etc are not picked up by the guidelines.

At present, approval bilateral agreements cannot cover projects involving the water trigger. The EPBC Act should be amended so that the water trigger is among the matters that state and territory approval decisions can cover under bilateral agreements. This will eliminate the need for large coal mining and goal seam gas developments to be subject to two separate approval processes which often result in two sets of approval conditions. The Commonwealth would maintain its proper role of strategic oversight and there would be no reduction in the standards required for state and territory processes to achieve accreditation.

Recommendations

5. The Review should examine the utility of the "water trigger" and consider its removal given the extensive state legislative controls and processes that exist in this area.
6. In the event the water trigger is not removed
    a. Amend the definition of 'large coal mine' in the EPBC Act to confine it to greenfield mine developments and brownfield expansions of existing mines where the mining area is to be significantly increased
    b. Update the *Significant impact guidelines 1.3: Coal seam gas and large coal mining developments— impacts on water resources* to better define the circumstances where a development is considered to have a significant impact on water resources
    c. Amend the EPBC Act to include water as a matter that can be approved under a bilateral agreement.

4.4 Reduce not extend matters of environmental significance (Q14)

NSWMC considers that the addition of new matters of national environmental significance (MNES) to the EPBC Act including the "water trigger" have extended the regulatory reach of the Commonwealth too far.

The starting point for debates as to the appropriate role of the Commonwealth must be that the Australian Constitution (Constitution) does not explicitly provide for federal legislative power with respect to environmental matters. The environment is not among the heads of power set out in section

51 of the Constitution. The source of power is indirect only, under both the external affairs and corporations powers. The 1997 *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment* likewise demarcates the appropriate role of State governments in our federal system to optimise regulatory efficiency:

- Clause 2 records the parties' agreement that a national partnership between all levels of government on environmental issues was to be based in principles including efficiency, in order to minimise unnecessary duplication and overlap between governments.
- Clause 5 states that environmental assessment and approval processes relating to MNES should be streamlined with the objective of relying on State processes as the preferred means of assessing proposals.

As well as the removal of the water trigger, NSWMC endorses the position of the MCA that the nuclear action trigger requires amendment to remove the mining or milling of uranium ore from the definition of "nuclear action".

The current MNES should otherwise not be expanded, consistent with maintaining an appropriate division between matters of federal and state regulation.

A greenhouse gas (GHG) or climate change trigger should not be introduced as it would be unnecessary duplicative of the existing National Greenhouse and Energy Reporting scheme. It would also operate to unfairly discriminate against new projects which, in contrast to existing projects, would become subject to a GHG trigger.

Any subsequent requirements placed upon proponents to minimise or offset GHG emissions, especially scope 2 and 3 emissions, would make many projects unfeasible. This would include mining, infrastructure and government projects, including airports. In the absence of an emissions trading scheme in Australia, offsetting would be cost prohibitive. At a broader policy level, scope 3 emissions should not be the subject of regulation through planning or environmental laws for several reasons including:

- The scope 3 emissions of a project equate to the scope 1 or 2 emissions of other separate project(s) where those projects are separately assessed and subject to the applicable planning and environmental regulation (in Australia or overseas).
- It would result in significant economic implications for Australian governments whilst not necessarily impacting upon the reduction of global GHG emissions in jurisdictions outside Australia. In other words, it is difficult to gauge the contribution of any particular action towards climate change in a global sense.

Further, in NSW it was recently confirmed by The Honourable Angus Taylor (in a letter to Minister Stokes in relation to the proposed Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019) that:

"Emissions resulting from overseas actions are already managed through relevant legislative frameworks by the countries where those actions are occurring. Any requirement to consider scope three emissions within a sub-national or state jurisdiction is inconsistent with long-accepted international carbon accounting principles and Australia's international commitments."

…

"The Government has a comprehensive set of policies to track, report and reduce domestic emissions. Australia's international emissions reporting is world class: no country has a more ambitious, comprehensive and timely reporting program for emissions. The National Greenhouse and Energy Reporting (NGER) scheme is a single, national framework for reporting on energy production, consumption and emissions, and in February this year the Government announced a $3.5 billion Climate Solutions Package that maps out, to the last tonne, how we will achieve the final 328 million tonnes of abatement needed to meet our 2030 Paris target.

The NGER scheme is designed to support the Government's international reporting obligations, and so does not require reporting of scope three emissions. The scheme is consistent with reporting systems in operation in the United States, the European Union and South Korea.

In its recent review of the NGER scheme, the Climate Change Authority considered a requirement to report scope three emissions. The Authority concluded that the challenges and burden of reporting scope three emissions outweigh any benefits, because the accurate estimation of scope three emissions associated with a specific economic activity is inherently complex and uncertain, involving many value chains across multiple economies.

Any requirement for Australian businesses to report or manage scope three emissions would duplicate existing obligations on third parties, would be impractical to implement and would impose a high regulatory burden for indeterminate benefits."

Recommendations

7. Further matters of environmental significance should not be added. While some groups will recommend a 'climate trigger' this would be duplicative as these impacts are already dealt with through the National Greenhouse and Energy Reporting Scheme.

8. The nuclear action trigger should be amended to remove the mining or milling of uranium ore from the definition of "nuclear action".

4.5 Provide transparency and guidance in the assessment, approval and post approval processes (Q10)

Consistency ensures that each party knows what to expect and helps to improve the perceived fairness of decisions.

NSWMC members report that interactions with the Commonwealth in relation to environmental assessment are frequently complicated and drawn out. This is due to a lack of consistency in application of Commonwealth policy and tools by Commonwealth staff and a lack of guidance material that ensure that application of policy and tools is undertaken consistently.

The Commonwealth Environmental Offsets Policy has not been updated since 2012. The EPBC Offsets Assessment Guide, which is used to calculate offset requirements has not changed since it was introduced in 2013. There has not been to our knowledge, additional guidance or training for users of the Assessment Guide since its inception.

Our members experience differing interpretations of how to use the assessment guide and how to estimate values, including within the same team or between teams at the Department of Agriculture Water and the Environment (DAWE). The most problematic has been where the approvals team has accepted its use in a certain manner, but the post-approval team interprets it a different way (see Example 1).

Example 1 - Inconsistencies and evolving advice/requirements for the EPBC Act Environmental Offsets Policy

In one instance relating to a simple modification to an offset strategy following approval, an offset land swap was proposed with the Commonwealth assessment officer requesting onerous re-assessment that was inconsistent with the original approved assessment. Multiple biodiversity assessments (as requested by the Commonwealth) were prepared that all indicated the offset swap was adequate for the impacted MNES, however differing interpretations in relation to risk of loss scores, quality scores and even MNES listing statuses were contended.

The officer indicated that an "evolution of the interpretation of the offsets policy" was the driver for the additional information and assessment requirements. This was not clear, predictable, open or transparent.

Due to the extended timeframe over which this issue was debated, assessment officers were changed on multiple occasions, resulting in further inconsistencies, assessment requirements and delays. This matter is still ongoing 18 months following the initial discussions in relation to the proposed offset swap.

Interpretation of listings by individual officers also causes difficulties for proponents (see Example 2). Commonwealth listings need to be written so that they can be applied by proponents and the States (where there is a bilateral assessment agreement). If there is a need for further guidance on the application of the listing in an assessment context, then this should be formalised so that its application is consistent and repeatable.

Example 2 – Interpretation of listings

A recent assessment involving the Central Hunter Valley Eucalypt Forest and Woodland (CHVFW) illustrated that the listing criteria is often unfit for the purpose of application in an assessment setting. In that case the mapping of the community caused significant difficulties, and how to resolve these was not clear from the listing advice.

A lengthy engagement process between the proponent, Commonwealth and NSW had to be undertaken to resolve these issues. This process is unsatisfactory, not repeatable and likely to cause inconsistency in the treatment of different assessments as it relies on the interpretation of DAWE officers.

There should be greater transparency in post-approval processes, including the consideration of management plans required under conditions of EPBC Act approvals. Improvements could be made in this area through the introduction of timeframes for the Department to assess management plans, and greater accountability around compliance with these timeframes.

Modifications to EPBC Act approvals should be permitted in a similar way to state approval processes, which will avoid the inefficiencies associated with administering multiple approvals for the one project. Where an EPBC Act approval is varied, a new consolidated approval should be issued which includes the varied conditions.

Changes should be made to the "significant impact" thresholds as described in the various Commonwealth guidelines to provide greater certainty and consistency in controlled action decisions. This is particularly the case for brownfield development where existing activities are already being undertaken on a site as currently it can be very difficult to ascertain under the guidelines whether any extension or modification of the existing approved operations should be considered to have a significant impact on MNES.

It is recommended that as part of the Review and/or in the implementation of new or revised policies and guidelines following the Review, that consultation be undertaken with the mining industry to further understand the specific areas where further guidance or clarification could be provided in the context of what constitutes a "significant impact".

Recommendations

9. The Environmental Offsets Policy and the EPBC Act Offsets Assessment Guide should be updated to reflect current government policy.
10. Where there is a systemic need for additional guidance, such as around some listings, that guidance should be formalised and shared with proponents.
11. DAWE should provide regular updates and training both within the department and for users.
12. Modification of approval should result in a consolidated approval document, not multiple approvals.
13. In consultation with industry provide further guidance on what constitutes a "significant impact".

4.6 Make greater use of strategic assessments (Q13)

NSWMC strongly supports the use of strategic assessments to replace assessments on a case-by-case basis. The EPBC Act should better define the operation and processes required for strategic assessments to promote their more widespread use.

The strategic assessment provisions in Part 10 of the EPBC Act should be simplified and made more flexible. They should provide for strategic assessment to be conducted in relation to identified controlling provisions, for example threatened species, whilst allowing for specific projects to be referred in relation to other MNES that may be impacted, for example, water resources.

In assessing the overall impacts of a range of actions taken under a policy, plan or program, strategic assessments have resulted in improved efficiency and environmental outcomes.

> **Example 3 – Growth Centre Program – Western Sydney**
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> For instance, the Growth Centres Biodiversity Offset Program (Growth Centres Program) which was established by the NSW government in 2008 and approved by the Australian government in 2012 under the EPBC Act has harmonised state and Commonwealth environmental approvals for Western Sydney. In its first 10 years, the Growth Centres Program operated over 661 hectares of high conservation value land at 19 locations. 638 hectares comprised of threatened ecological communities listed under state legislation and valuable habitat for 32 threatened flora and fauna species has now been protected using the program's funds.

The Upper Hunter Strategic Assessment (UHSA) a strategic assessment of a biodiversity plan for coal mining in the Upper Hunter Valley, commenced in 2012. Disappointingly the UHSA has not been finalised and endorsed by the NSW and Commonwealth governments. The UHSA and accompanying biodiversity plan involved years of work by the participating mining companies in gathering and assessing biodiversity data for the Upper Hunter Valley region.

The fact that the UHSA is yet to be finalised is extremely disappointing given not only the cost for the participating mining companies of undertaking the assessment, but more importantly the foregoing of the enhanced biodiversity outcomes that could be achieved through finalisation and endorsement of the assessment.

Recommendations

14. Provisions in relation to strategic assessment in Part 10 of the EPBC Act should be simplified and made more flexible

15. Part 10 of the EPBC Act should be amended to provide that strategic assessment may be conducted in relation to identified controlling provisions, for example threatened species, whilst allowing for specific projects to be referred in relation to other MNES that may be impacted, for example, water resources.

4.7 Implement risk-based and outcome-based decision-making (Q15)

EPBC processes should be risk-based and outcomes-focused to ensure that resources are expended on understanding and addressing critical environmental risks and focussing on MNES which may be materially impacted by proposed activities. In this regard, the Commonwealth's role should be one of oversight of the state processes (through bilateral agreements and accrediting of state processes), rather than an interventionist approach.

Approval and assessment under the EPBC Act should be risk-based such that low-risk projects do not require referral or are exempt, as opposed to receiving automatic approval. Projects that are low-risk (and therefore exempt from the requirement for referral and approved under the EPBC Act) should receive the same protection that is given to existing cases in which environmental approvals are not required (Part 4 of the EPBC Act) in relation to offences under Part 3 of the EPBC Act.

What constitutes a low-risk project could be outlined in a due diligence guideline (similar to the due diligence guidelines that apply to Aboriginal cultural heritage in NSW) or could be defined in the legislation through reference to specific thresholds (e.g. no new disturbance areas etc). In NSW, environmental impact assessment data is publicly available on the State Department's website and therefore the impacts of a proposed project can be verified by all relevant stakeholders and members of the public.

NSWMC encourages greater collaboration between the Government and proponents in controlled action determinations so that unnecessary referrals may be avoided, along with the associated time and expense. There should be a senior officer nominated within DAWE to provide advice to proponents in relation to referral requirements and projects that do not require referral. Further, unnecessary referrals might be avoided through legal protections to proponents in the EPBC Act, namely a defence for proponents who do not refer but can demonstrate they took reasonable steps in assessing whether a project has a significant impact on MNES.

Recommendations

16. Low risk projects should not require a referral or be exempt, and should be given the same protections in relation to offences under Part 3 of the EBPC Act as cases where an environmental approval is not required
17. Low risk projects should be defined through legislation or a due diligence code
18. DAWE should appoint a senior officer to provide advice to proponents in relation to referral requirements
19. The EPBC Act should provide a defence for proponents who do not refer but can demonstrate that they took reasonable steps to assess significant impact on MNES.

4.8 Retain Minister as the decision maker (Q20)

The priority for reform should be the integration of decision-making structures across the federal and state levels. NSWMC is strongly opposed to the introduction of a further, independent advisory or decision-making body which would be both unnecessary and serve to reduce public confidence in the regulatory system.

The elected government represented by the Minister should be the decision maker in relation to major projects. The Minister is best placed to weigh all the costs and benefits of major projects.

Continued and systematic issues with the NSW Independent Planning Commission (IPC) (which makes decisions on most major projects) came to a head in 2019 and the NSW Government appointed the NSW Productivity Commission to review the IPC. In the experience of the NSW mining industry, independent decision makers do not make better decisions, and in fact have been detrimental to an efficient and appropriate approvals system for the following reasons:

- Independent decision making in NSW has led to much a much longer process of assessment and decision making. In the five years from 2014-2019 the duration of the assessment and approval process in NSW has more than doubled. This increase in the duration of the process has largely been cause by a cumbersome two stage independent decision-making process.
- Independent decision makers in NSW have failed to follow express NSW Government policy. A lack of consistent application of government policy means that proponents are unable to properly assess a project's likelihood of success. A project which complies with all government policy and regulation should be approvable, not subject to the policy-making whims of a decision maker.
- Independent decision makers in NSW have consistently conflated their role as decision makers with that of assessors. This has led to unnecessary and duplicative re-assessment of projects, which is confusing for the community, undermines the assessing agency, is time consuming and has not led to better decisions.

Division 7 of Part 8 of the EPBC Act already provides for the ability of the Minister to appoint commissions of inquiry on the impacts of proposed actions. Reports from those inquiries must be considered as part of the decision-making process and are among the factors circumscribed under section 136 of the EPBC Act.

Recommendation

20. No changes should be made to the decision-making powers under the EPBC Act. The EPBC Act already provides for an appropriate level of advice to the Minister.

4.9 Support appropriate community involvement (Q20)

NSWMC supports the engagement of community stakeholders in the EPBC Act assessment process, provided that such opportunities for engagement are coordinated with State-based processes. It should be made clear when formal engagement opportunities are available so that community expectations can be appropriately managed.

However, NSWMC does not support community involvement in decision-making and does not consider that community members are well placed to determine complex projects such as mines. Mining projects are highly technical in nature and it would be unreasonable and unfeasible for community stakeholders to be involved in the process beyond engaging in consultation processes at clearly defined points in time.

Another aspect of community involvement is the ability for affected parties to bring judicial review proceedings before the Federal Court. Section 487 extends (but does not limit) the meaning of "person aggrieved" under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) for the purposes of the EPBC Act. NSWMC supports a repeal of this provision in order to bring the standing provisions of the EPBC Act into line with other Federal legislation. Alternatively, if the repeal of section 487 is not supported, given that the requirements for standing articulated in both sections 475 and 487 of the EPBC Act are relatively broad, there should be greater use in the EPBC Act of no-invalidity clauses which operate so that acts done or decisions made in breach of certain statutory requirements or common law duties will not result in their invalidity. This will enhance business certainty and reduce the potential for protracted disputes over technical objections aimed at stalling the progression of projects.

Recommendations

21. Community consultation in relation to the EPBC Act assessment process should be undertaken seamlessly with consultation required under state-based assessment.

22. Repeal section 487 of the EPBC Act which will limit the meaning of 'person aggrieved' to the definition provided under *Administrative Decisions (Judicial Review) Act 1977.*

5 Responses to other questions posed in the Discussion Paper

QUESTION 2: How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC Act? For example, the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?

The principles of ecologically sustainable development (ESD) are adequately reflected in the EPBC Act. The promotion of ESD through the conservation and ecologically sustainable use of natural resources is already a statutory object. Section 136(2)(a) of the EPBC Act mandates consideration by the Minister of the principles of ESD in deciding whether or not to approve the taking of an action and what conditions to attach to an approval. Section 3A which defines those principles for the purposes of the EPBC Act does not require amendment.

NSWMC endorses the position adopted by the Minerals Council of Australia (MCA) that existing mechanisms for environmental economic accounting are not sophisticated enough to guide an alternative approach to the assessment of ESD. Greater inclusion of cost benefit analysis in the Commonwealth assessment and approval process would result in unnecessary duplication of State-based considerations of ESD.

QUESTION 3: Should the objects of the EPBC Act be more specific?

The objects as currently laid down by section 3 of the EPBC Act remain appropriate. However, there could be greater and more explicit recognition of the economic considerations that must feature in environmental decision-making (though there is oblique reference to such considerations in section 3(1)(b) concerning the principles of ESD). Furthermore, since a "co-operative" or "partnership" approach between governments is a cornerstone of the EPBC Act, there could be greater elaboration of what this approach entails. NSWMC adopts the MCA's submission as to the principles that should underpin any definition of intergovernmental co-operation.

Finally section 3(1)(a) (Objects of Act) currently includes the following object of the Act:

> *(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance.*

This object could be further improved through clarifying that the EPBC Act is to provide specifically for protection of matters of national environmental significance only, rather than a broader objective of protecting the environment. This would be consistent with Chapter 2 of the EPBC Act which provides for the specific matters that are protected by the EPBC Act.

QUESTION 8: Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

Yes. The reformed EPBC Act should set national standards and broader environmental outcomes, whilst relying on endorsed or accredited state and territory impact assessment processes. Such an approach would be more closely aligned to the emphasis in the objects of the EPBC Act on coordination and partnership with the states.

QUESTION 9: Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?

The Commonwealth should articulate broad environmental outcomes, provided the focus is on consistency and harmonisation at a federal and state level. There should be an expanded role for bilateral agreements and accreditation to achieve such consistency and avoid duplicative processes. A common term of bilateral agreements is for the state to report regularly to the Commonwealth on the achievement of certain environmental objectives, which should give the Commonwealth confidence that its intended outcomes are being achieved.

QUESTION 11: How can environmental protection and environmental restoration be best achieved together?

- **Should the EPBC Act have a greater focus on restoration?**
- **Should the Act include incentives for proactive environmental protection?**
- **How will we know if we're successful?**
- **How should Indigenous land management practices be incorporated?**

Environmental protection and restoration will best be achieved together through the adoption of strategic approaches to regulation. In the mining industry, protection and restoration are often pursued in a case by case manner, where more widespread use of strategic assessments could guide where it occurs at a broader scale, hence achieving even better environmental protection outcomes. Indigenous land management practices should be incorporated where the appropriate opportunities exist.

QUESTION 12: Are heritage management plans and associated incentives sensible mechanisms to improve? How can the EPBC Act adequately represent Indigenous culturally important places? Should protection and management be place-based instead of values based?

Consideration of Indigenous culture should be consistent with state regulation where a considerable amount of work has gone into mapping of Indigenous cultural heritage, and comprehensive systems and processes have been put in place for protection and management of cultural heritage. It is critical that the Commonwealth approach to Indigenous cultural heritage is consistent with state processes, to avoid confusion and conflict in this area.

QUESTION 16: Should the Commonwealth's regulatory role under the EPBC Act focus on habitat management at a landscape-scale rather than species-specific protections?

Yes. As in the case of strategic assessments, which operate through the assessment of the overall impacts of a range of actions rather than on an individualised basis, a focus on landscape-scale habitat management would deliver more favourable outcomes than species-specific protections. Such an approach is well suited to use in mining regions.

QUESTION 18: Are there adequate incentives to give the community confidence in self-regulation?

Mining projects are heavily regulated and are required to comply with hundreds of conditions in carrying out mining operations. Compliance with those approvals is monitored by state regulators through the requirement for annual reporting as well as the requirement to report environmental

incidents that cause or threaten material harm to the environment. The maximum penalties for non-compliance are significant.

It is therefore the view of NSWMC and its members, that there is adequate protections in place through regulation to give the community confidence that individual companies will comply with planning and environmental regulation, including referring actions under the EPBC Act where required.

QUESTION 23: Should the Commonwealth establish new environmental markets? Should the Commonwealth implement a trust fund for environmental outcomes?

Given that proponents are required to source suitable offset arrangements, environmental markets have already emerged. Whilst NSWMC is not opposed in principle to the formalisation of environmental markets as a means of providing long-term certainty for Commonwealth purposes, their creation must be part of an integrated and strategic approach.

New environmental markets should be flexible and not duplicate or overlap with state-based systems. Likewise for the implementation of a trust fund for environmental outcomes, it should adopt a strategic approach to biodiversity protection and not duplicate the requirements of state funds.