Environmental Defenders Office

30 September 2024

Lodged online at Draft South Australian Assessment Bilateral Agreement - Climate (dcceew.gov.au)

Submission: Draft South Australian Assessment Bilateral Agreement

Environmental Defenders Office (**EDO**) is a national community legal centre specialising in public interest environmental law. Thank you for the opportunity to provide feedback on the draft bilateral agreement between the Commonwealth of Australia and State of South Australia made under section 45 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) relating to environmental assessment (**draft Agreement**).

Our understanding is that a new Agreement is needed because the previous agreement, in place since September 2014, is 'no longer operable'.[1] This is because it relates to laws that have been substantially amended or repealed.

Relevantly:

- In 2020-2021, the South Australian Government made amendments to the *Mining Act 1971* (SA). It also commenced the new Mining Regulations 2020 (SA) (which replaced the Mining Regulations 2011 (SA)).
- The *Development Act 1993* (SA) was repealed in March 2021. This was replaced by the *Planning, Development and Infrastructure Act 2016* (SA), which commenced in stages.

Disappointingly, stakeholders have not been provided with any explanatory material to assist them to understand the new draft agreement, including an explanation of how the bilateral agreement has been updated from its previous version to provide for the accreditation of these new laws, or how the new South Australian laws being accredited under the new agreement differ to previous South Australian laws. This has made it challenging for stakeholders respond to the draft Agreement on its face.

Our short submission addresses the following:

1. **Overarching comments on developing a new bilateral agreement for South Australia**
2. **Key concerns with the draft Agreement:**
    - Specified manner of assessment
    - Notification by SA Minister of suspension, termination or changed method of assessment
    - Background and Objects
    - Indigenous peoples

[1] https://www.dcceew.gov.au/environment/epbc/approvals/state-assessments/sa

T +61 2 9262 6989
E info@edo.org.au W edo.org.au

Suite 8.02, 6 O'Connell St Sydney, NSW 2000
ABN: 72002 880 864

- Conditions
- Aligning assessment processes

1. Overarching comments on developing a new bilateral agreement for South Australia

Commonwealth accreditation of new South Australian laws is not simply an administrative exercise involving updating the existing agreement to refer to new laws or machinery of government changes. Where the laws and standards to be accredited are substantially different to those previously accredited then consideration needs to be given to whether those new laws will provide for a proper assessment of the impacts of an action on matters of national environmental significance (MNES) protected by provisions in Part 3 of the EPBC Act.

Generally, we would expect that the specified manner for assessment, set out in clause 3 of Schedule 1 of the Agreement would deliver an equivalent level of assessment as required by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). As outlined below, we are concerned that in some instances it does not. We are also concerned that other changes to the Agreement, which may seem minor, have broader implications that need to be considered.

We also note that proposed reforms to the EPBC Act, set out in the Federal Government's *Nature Positive Plan*,[2] intend to require all accredited arrangements under the EPBC Act (including bilateral agreements or their equivalent) to be subject to National Environmental Standards. EDO previously conducted an audit of relevant SA laws for the Places You Love alliance to determine the extent to which they met the existing standards in the EPBC Act. The audit concluded SA laws did not meet all existing standards for matters of national environmental significance. While legislation and transitional arrangements for establishing new national environmental standards and nature positive legislative reforms are yet to be finalised and passed, we note this is likely to require further amendment to South Australia's laws and the assessment bilateral agreement itself. However, any future amendment is left to the discretion and agreement of the relevant Ministers. The Draft SA Bilateral agreement should include an explicit requirement that it must be amended where standards of assessment under the EPBC Act are improved. Alternatively, in light of this, it may be appropriate to delay the finalisation of the draft Agreement until the Nature Positive reform process is complete.

2. Key concerns with the draft Agreement

Below we highlight a number of key concerns with the draft Agreement:

- **Specified manner of assessment**

Schedule 1 of the draft Agreement sets out requirements for the specified manner of assessment for the various classes of actions covered in the draft Agreement. The classes of development under the *Planning, Development and Infrastructure Act 2016* are set out in item 2.1(b) of Schedule 1, as follows:

> ***Classes of action under the Planning, Development and Infrastructure Act 2016 (SA)***
>
> ***…***
>
> (b) *Where the assessment has been undertaken in accordance with the requirements of Item* ***Error! Reference source not found.*** *of this Schedule 1:*

[2] https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf

(i) *actions that are assessed under Division 2 of Part 7 of the Planning, Development and Infrastructure Act 2016 (SA), to which section 111 of that Act applies;*

(ii) *actions that are assessed under section 130 of the Planning, Development and Infrastructure Act 2016 (SA) and require public advertisement under section 130(12) of that Act, other than where the SA Minister has directed that an EIS be prepared under section 130(25) of that Act; and*

(iii) *actions that are assessed under section 131 of the Planning, Development and Infrastructure Act 2016 (SA) and require public notice under section 131(13) of that Act, other than where the SA Minister directs that an EIS be prepared under section 131(25) of that Act.*

Item 2.1(c) provides:

- The assessment approach in Item **Error! Reference source not found.**(i) of this Schedule 1 is taken to correspond to assessment by environmental impact statement under Division 6 of Part 8 of the EPBC Act.
- The assessment approaches in Items 1.1(b)(ii) and 1.1(b)(iii) of this Schedule 1 are taken to correspond to assessment by preliminary documentation under Division 4 of Part 8 of the EPBC Act.

Item 3 of Schedule 3 then provides that for classes of actions identified in item 2.1(b). Relevantly, item 3.2(a) provides (emphasis added):

Guidelines for assessment

(c) *The SA Minister must have issued the proponent of a controlled action described above at Item **(b)(i)** with written guidelines to ensure that the assessment:*

(i) *assesses all relevant impacts that the action has, will have or is likely to have on each matter protected by a provision of Part 3 of the EPBC Act;*

(ii) *provides enough Information about the controlled action and its relevant impacts to allow the Commonwealth Minister to make an informed decision whether or not to approve the controlled action under the EPBC Act; and*

(iii) *addresses the matters prescribed in regulations for the purposes of section 102(2)(b) of the EPBC Act relating to the preparation of guidelines for a draft environmental impact statement under that Act.*

This provides for the assessment requirements for classes of actions captured by 2.1(b)(i) to be aligned with EPBC Act requirements.

Notably, there are no equivalent provisions for classes of actions captured by 2.1(b)(ii) and (iii), which pursuant to item 2.1(c) are taken to correspond to assessment by preliminary documentation under Division 4 of Part 8 of the EPBC Act. It is unclear if this is intentional or an oversight. The provisions of the *Planning, Development and Infrastructure Act 2016* (SA) on their own would not be sufficient to provide an assessment of impacts of these classes of development on MNES on the preliminary documentation. Item 2.1(c) is potentially inconsistent with the EPBC Act if it determines that assessment of development set out in ss 130 and 131 of the SA PDI Act will always be on basis of

preliminary documentation, regardless of the likely impacts on matters of national environmental significance.

Accordingly, the bilateral agreement should provide similar provisions requiring Guidelines to be issued in relation to classes of actions captured by 2.1(b)(ii) and (iii). This would align with section 87(5) and Part 8, Division 4 of the EPBC Act.

This could be achieved either applying Item 3.2 to Item 2.1(b) in its entirety, or by including a separate provisions relating to classes of actions captured by 2.1(b)(ii) and (iii) that requires an assessment to, at a minimum, assesses all relevant impacts that the action has, will have or is likely to have on each matter protected by a provision of Part 3 of the EPBC Act; and provides enough Information about the controlled action and its relevant impacts to allow the Commonwealth Minister to make an informed decision whether or not to approve the controlled action under the EPBC Act.

- **Notification by SA Minister of suspension, termination or changed method of assessment**

It is proposed to insert a new clause 5.5 into the bilateral agreement as follows:

> ***5.5 Notification by SA Minister of suspension, termination or changed method of assessment***
>
> (a) *This clause ☒ applies to any controlled action that is within a class of actions to which clause* ***Error! Reference source not found.*** *applies, during the period from the date that the SA Minister gives notice to the Commonwealth Minister under clause* ***Error! Reference source not found.*** *that the controlled action will be assessed in a manner specified in Schedule 1, until the date that the SA Minister provides the final Assessment Report referred to in clause* ***Error! Reference source not found.*** *to the Commonwealth Minister in respect of that controlled action.*
>
> (b) *The SA Minister must advise the Commonwealth Minister, in writing, within 10 business days after:*
>
> *(i) the environmental assessment for the controlled action is:*
>
> (A) *suspended;*
>
> (B) *terminated; or*
>
> (C) *recommenced,*
>
> *with such notice to set out the date from which the suspension, termination or recommencement took effect, and the reasons for the suspension, termination or recommencement; or*
>
> *(ii) a new method of environmental assessment is decided for the controlled action, with such notice to set out the date from which the new method of environmental assessment took effect, and the reasons for changing the method of environmental assessment.*

The intent of this clause is unclear, and its wording is ambiguous. For example:

- Neither the terms ‘environmental assessment’ or ‘method’ are defined in the draft Agreement.
- The term ‘method’ is not used anywhere else in the Agreement, it appears unique to clause 5.5, and it is not clear what it is referring to.

- The term 'environmental assessment' is used generally elsewhere in the agreement, but not in the context of something that could be suspended, terminated or recommenced.

We are concerned that clause 5.5(b)(ii) could allow the South Australian government to substitute a new method of environmental assessment for projects captured by clause 5.5(a), without that new method having been properly accredited under the EPBC Act. There does not appear to be any process for the Commonwealth Minister to input into the decision to change to a new method of environmental assessment. If this is how this provision is intended to operate, then it is strongly opposed by EDO. If this is not how the provision is intended to operate then further clarification is needed.

- **Background and Objects**

We suggest that the language used in the Background and Objects of the Agreement (p 5) could be amended to better reflect Australia's international obligations and commitments being implemented through the Nature Positive Plan. For example, reference could be made to conservation **and recovery, halting extinctions** and **nature positive** outcomes.

We note the Objects of the Agreement (on p 5) differ from the objects of the previous 2014 agreement. Notably, reference to compliance with Australia's international obligations has been removed. No explanation has been provided for this change.

- **Indigenous peoples**

Clause 7.2(d)(i) of the draft Agreement updates the 2014 Agreement, to refer to groups of Indigenous peoples rather than simply Indigenous peoples. This could have the perverse outcome of excluding the views of relevant individuals. No explanation has been provided for this change.

- **Conditions**

Clause 8.1 of the draft Agreement deals with conditions attached to an approval. The intention of the parties is to avoid duplication between State and Commonwealth conditions of consent. We have concerns regarding the proposed addition (compared to the 2014 agreement) to clause 8.1 that the Commonwealth Minister consider any relevant State conditions that have been **or are likely to be imposed** under SA legislation on the taking of the controlled action when deciding whether to attach a condition to an approval. We do not support the emphasised wording. It could give rise to a scenario where the Commonwealth does not impose a condition on the understanding is likely to be imposed by South Australia, only for that condition not to be imposed and there to be a gap in appropriate conditioning of the approval.

- **Aligning assessment processes**

Clause 9.4 of the draft Agreement provides that there is opportunity to streamline assessment processes even where those assessment processes cannot be accredited. While that may be the case, any streamlining of assessment processes (especially processes that are not accredited) must not perversely undermine the assessment of impacts on MNES and robust and compliant decision-making under the EPBC Act.

Should you have any questions regarding EDO's submission, please contact rachel.walmsley@edo.org.au

Your sincerely

Environmental Defenders Office

Rachel Walmsley
Head of Policy and Law Reform