

COAG Taskforce Secretariat
Deregulation Group
Department of Finance and Deregulation
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Dear Ms Williams

Thank you for your invitation to provide comment on the Council of Australian Governments' (COAG) environmental regulation reforms in response to the Consultation Paper prepared by the COAG Taskforce for stakeholder meetings in June and July 2012.

You have sought our views on the COAG reforms and the proposed timeframes for implementation, any priority issues that governments should consider and whether there are any potential risks associated with the proposed reform.

NELA is particularly interested in the reforms to streamline environmental assessment and approvals. We welcome COAG's commitment to maintain high environmental standards, and the Commonwealth's policy of not altering the existing levels of environmental protection in the *Environment Protection Biodiversity Conservation Act 1999* (EPBC Act).¹ We would, in fact, support extending the matter to which the EPBC Act applies.

Drivers for the reforms

NELA is concerned that the drivers for the reforms are to favour development over protecting the environment, not just to improve the administration of environmental regulation and. The Business Council of Australia's submission to COAG² clearly targets the cost of substantive obligations to conduct environmental impact assessments and comply with conditions, not just the administrative costs of demonstrating compliance, referred to as 'red tape'. At the same time the Victorian, New South Wales and Queensland governments have recently flagged plans to significantly relax the native vegetation clearing controls and review planning laws. The Queensland Premier took the message further by calling on the Commonwealth to delegate its powers under the EPBC Act to the states, and to 'get out of the way' so they can compete with other states for development.³

NELA supports Australian governments doing more to improve the administration of environmental laws and putting more effort into monitoring and enforcement. We support the Commonwealth Government taking a leadership role in developing national standards and a streamlined national approach to environmental impact assessment. But NELA does not support the Commonwealth delegating its approvals powers under the EPBC Act to the states and territories.

¹ Council of Australian Governments meeting, Canberra 13 April 2012 Communiqué available at www.coag.gov.au/

² Business Council of Australia Discussion paper for the COAG Business Advisory Forum, 12 April 2012 available at <http://www.bca.com.au/Content/101966.aspx>

³ 'Get out of the way Gillard: Newman', Brisbane Times, 12 April 2012 available at <http://www.brisbanetimes.com.au/queensland/get-out-of-the-way-gillard-newman-20120412-1wvzq.html>

Commonwealth accreditation of state and territory impact assessment processes

Despite the Commonwealth having entered into bilateral agreements with all the states and territories to accredit environmental impact assessment processes, proponents and governments have not often used the accreditation process.

We understand the Commonwealth has proceeded to establish administrative arrangements with each state and territory to implement the COAG commitment to ensure state and territory accredited processes will be used more often. We are told the arrangements will make it clearer to the states and territories what the Commonwealth expects of them under the bilateral accreditation agreements. In doing so, it appears the Commonwealth is addressing a suggestion made by the Independent Review of the EPBC Act (the Hawke Review) (2.30).⁴

Many submissions to the Hawke Review described accreditation of state and territory assessment processes through bilateral agreements as encouraging accreditation of the process that was the 'lowest common denominator', or a 'race to the bottom' (2.25).

NELA urges the Commonwealth to address the risk of environment impact assessments by states and territories being of lower quality than those assessed by the Commonwealth by providing active oversight.

NELA supports the Commonwealth Minister actively exercising the obligations under the EPBC Act when deciding whether or not to approve a development that has been assessed under an accredited process. The Act requires the Minister to be satisfied that the accredited process will ensure relevant impacts are adequately assessed, and receiving a report of the outcome of the process that provides enough information to make an informed decision on whether or not to approve the development (s.87(4)).

We support the Minister publishing reasons for these decisions to publicly confirm that s/he is satisfied with assessment processes carried out by a state or territory.

Approval bilateral agreements

The Commonwealth has rarely used the option of accrediting a state or territory management plan or authorisation process ('approval processes') available under the EPBC Act (s46). COAG has now committed to develop bilateral arrangements to accredit state approval processes, with the frameworks to be agreed by December 2012 and agreements finalised by March 2013.

When accrediting an approval process the Commonwealth Minister must be satisfied that there is (or will be) adequate assessment of the impacts of actions on the matters protected, and the approved actions will not have unacceptable or unsustainable impacts on a matter protected, and it meets criteria specified in the regulations. The regulations require the Minister to be satisfied that the approval process is subject to public consultation and covers a range of matters including assessing impacts, identifying risks, and the decision maker taking into account the precautionary principle as well as setting out enforceable conditions, monitoring, reporting and auditing requirements.⁵

⁴ *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, 2009.

⁵ s46(3)(a) and Environment Protection Biodiversity Conservation Regulations 2000 Part 2B.

NELA views with alarm any proposal that amounts to a hasty transfer by the Commonwealth of any of its powers of approval under the EPBC Act to the states, and an associated withdrawal of the Commonwealth from environment regulation.

NELA wants to see the Commonwealth lead a package of reforms to deliver national environmental standards by reviewing state and territory processes with the aim of improving outcomes for the environment.

We are concerned about the short time frame for developing the bilateral agreements to accredit state approval processes because it leaves too little time for a critical analysis of those arrangements.

We strongly support the Department of Sustainability, Environment, Water, Population and Communities improving its compliance monitoring and auditing program and its enforcement functions along with taking an active role in assessment and approval.

NELA is particularly concerned that under state and territory approval processes the Minister for Planning is the determining authority, a portfolio with very different political and statutory considerations to the environment portfolio. The state/territory Minister for the Environment usually only has a concurrence or consultation role in the development approval process. We strongly believe that any accreditation arrangement must address the potential for a reasonable apprehension of bias on the part of the relevant state Minister, or where the relevant state government has an established policy position in relation to a particular development proposal.

The accreditation arrangements must also address circumstances where a state Minister is giving or refusing an approval under the EPBC Act when the state or territory policy is at odds with Commonwealth Government. Environmental approvals are inherently controversial and political.

For these reasons it is critical that the Commonwealth Minister remain actively involved in approval decisions by state and territory Ministers. NELA urges the Commonwealth Minister for Environment to maintain active oversight of accredited approvals and to exercise the power to suspend or cancel a bilateral agreement if there is a breach (as provided in Part 5, division 3 EPBC Act).

Increased use of strategic assessment

The COAG Communique from its meeting on 19 August 2011 recognised the role of greater use of regional planning and strategic impact assessments (SIA) as part of the reform of environmental regulation.⁶

NELA agrees. We are of the view that SIA can lead to better decision making for sustainable development if done in accordance with international best practice.

SIAs provide the mechanism for the Commonwealth to approve classes of development at regional or landscape scale, assessing cumulative impacts rather than conducting individual project assessments and approvals. Spatial planning maps, ecological surveys and similar instruments identify the matter to be protected, and a joint agreement specifies who will be the approval authority for each relevant decision and the high level conditions for

⁶ Council of Australian Governments meeting 19 August 2011 Communique available at www.coag.gov.au/

development to proceed. Having determined the framework for development, project-level regulation is left to the states, provided they adhere to the federal ground rules.

All states and the Australian Capital Territory have undertaken or are developing at least one joint SIA under the EPBC Act. They have been used for mining, urban development and infrastructure developments on a large scale. Each SIA has involved a complex process of documenting the necessary steps, what is to be done and how, and who is the appropriate decision maker at the state level. Achieving the goals of cumulative impact assessment, greater certainty for developers and improved environmental outcomes has been challenging for all concerned, but many lessons have been learned.

NELA has taken a particular interest in the emerging practice of SIA in Australia and many of our members have worked on the various SIAs. NELA held a forum on *Developments in strategic impact assessments* in May 2012, which focussed on the lessons from the SIA for Melbourne's Urban Growth boundary, global practice and challenges of current SIAs in Australia, particularly those for the Great Barrier Reef Marine Park. The speakers said the practice of SIA is in an early stage in Australia and many aspects need to be ironed out before it is to gain widespread support.

The presentations to the forum are available at www.nela.org.au.

National environment risk and outcomes based standards

According to the COAG Communique of 13 April 2012 COAG plans to agree national environment risk and outcomes based standards to support the bilateral assessment and approval agreements by December 2012.

NELA is concerned about the short time frames envisaged for developing national standards. Environmental assessment and approval regimes vary between states and territories and in some jurisdictions, such as the A.C.T., the strategic impact assessment provisions are far better than those in the EPBC Act; in others assessment provisions are not as rigorous or transparent as under the EPBC Act. Some states have no equivalent protection of threatened or listed species as under the EPBC Act. Any standardisation process will take time and NELA is concerned about the short timeframe committed.

NELA supports an amendment to the EPBC Act to provide a head of power for the national standards so that they have a statutory basis.

NELA looks forward to the opportunity to comment on draft standards.

Assessment and approval bilateral agreements - monitoring and performance audit power

NELA supports the Commonwealth undertaking performance auditing of both assessment and approval bilateral agreements, as recommended by the Hawke Review (16.90).

NELA also supports the Commonwealth having a monitoring and performance audit power to ensure the accredited process is achieving the outcomes expected, as recommended by the Hawke Review, and specified performance audit criteria for the accredited system before approval is granted (2.36).

Future consultation

NELA would like to actively contribute to the government's work on the reforms and we would appreciate the opportunity to participate in future consultation meetings.

If you wish to discuss matters raised in this letter please contact:

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