

Conservation Council of South Australia Inc

**Response to the Agreement
between the Commonwealth of Australia
and the State of South Australia,
under Section 45 of the
Commonwealth's *EPBC Act 1999*,
Relating to Environmental Impact Assessment.**

Submission by
Conservation Council
of South Australia Inc.
1 August 2007

Attn: **The Director**
Legislation Policy Section
Approvals and Wildlife Division
Department of the Environment and Water Resources
GPO Box 787
Canberra ACT 2601

Email: epbc@environment.gov.au

Introduction

The Conservation Council of South Australia (CCSA) is South Australia's peak non-government community environment organisation. Formed in 1971, it is an umbrella group for around 55 of the state's diverse environment groups, who represent some 60,000 individuals.

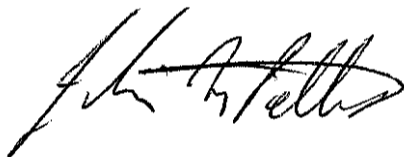
CCSA is pleased to make a submission on ***Agreement between the Commonwealth of Australia and the State of South Australia, under Section 45 of the Commonwealth's EPBC Act 1999, Relating to Environmental Impact Assessment.***

The Conservation Council of SA has been engaged with the *EPBC Act* since it came into effect in July 2000. The organisation believes the Act has considerable powers to protect Australia's environmental assets, and that its success depends directly on its administration.

Amongst other goals, EPBC Bilateral Agreements are intended to increase the efficiency and standard of environmental Assessments and Approvals and must be consistent with the objectives of the Act. These requirements provide the focus for the following submission.

Please do not hesitate to contact me with any queries or if you require further clarification on the matters raised at the Conservation Council of South Australia on (08) 8223 5155.

Yours sincerely,



Julie Pettett
Chief Executive Officer
Conservation Council of SA (CCSA)

General Comments on the Agreement

In our view the accredited process outlined in Schedule 1 must exclude section 48 (e) of the South Australian *Development Act 1993* (thus excluding the exemption for judicial review) and outline clear mechanisms for statewide agency advice to be taken in to account (in particular SA Department of Environment and Heritage (DEH)) to mitigate significant risk that the proposed Agreement could lead to a reduced standard of environment assessment for relevant actions in South Australia.

Wherever possible the Agreement should strengthen the opportunity for public consultation and engagement in accord with the objects of the *EPBC Act*.

Comments have been made throughout where the need for greater definition of the responsibilities of this Agreement in satisfying Commonwealth obligations to the Matters of Environmental Significance (MNES) has been identified.

Specific Comments on the Agreement

Body of the Agreement

Section 2, page 1

Section 50 of the *EPBC Act* provides that the Commonwealth Government may only enter in to an Agreement if it is satisfied that the Agreement accords with the objects of the *EPBC Act*.

Therefore we believe the objects of the Agreement should mirror the objects of the *EPBC Act*, in particular they should recognise the protection of heritage which is noticeably absent from clause 2 of the Agreement and directly relevant to assessment.

Equally clause 2 could allow provision to recognise comprehensively the objects of the *EPBC Act* as outlined in section 3 of the *EPBC Act 1999*. The author's note that the Agreement is to be read in conjunction with the Act does not provide adequate direction for this, instead we recommend that an additional clause be inserted to direct that "*the provisions of this bilateral agreement are to be read in conjunction with the EPBC Act 1999*".

5, page 1

For the purposes of a draft for public comment the Agreement would have benefited from the inclusion of an expiry date or sunset clause in this section.

That said the Agreement currently proposes a review every five years but has not provided details on an expiration date. We recommend a sunset clause of no more than 10 years be adopted and that the proposed period of review be shortened to four years to allow a minimum of two full reviews to occur within the life of the Agreement.

Clause 9.1, page 2

This section is pursuant to section 47(1) of the *EPBC Act* which provides the power to accredit assessment processes. We believe this section should also be pursuant to section 47 (2) of the Act as it refers to the full suite of Commonwealth requirements for environmental approvals for MNES.

9.3, page 2

Any proposed amendments to this Agreement, including that referred to in clause 9.3, should trigger further public consultation on the Agreement.

9.4, page 2

This clause appears to provide the Commonwealth discretion to delegate assessment and accredit any South Australian assessment process that meets the criteria outlined in Schedule 1 over and above the Major Development assessment process without triggering an amendment or recommencement of negotiation on the Agreement and subsequent period for public consultation. This provides even greater incentive to ensure that the process outlined in Schedule 1 provides adequate certainty of process.

10.1, page 3

This clause appears to provide for greater assessment of the likely environmental impacts associated with the assessment of a controlled action over and above the MNES where Commonwealth assessment does not apply because of this Agreement and section 83 of the *EPBC Act 1999* and actions (i), (ii) or (iii) apply. Assuming this in the intent of this clause it is supported in principle. Overall the clause would benefit however from greater clarification as its intent is not immediately clear.

10.4, page 3

The Agreement would benefit from including a definition of “relevant impacts”.

10.4, page 3

Given that the proposed South Australian Agreement is an Assessment Bilateral and not an Approval Bilateral, the ultimate responsibility for decision lies with the Commonwealth Minister. Under the *EPBC Act 1993* there are provisions for both Commonwealth Ministerial internal review and judicial review by the Federal Court. Neither are provided for in Schedule 1 of this Agreement and the right of judicial review in the assessment process is excluded through section 48 (e) of the *South Australian Development Act 1993*.

It is not clear that section 487 of the *EPBC Act* applies to the review of decisions under Bilateral Agreements. It is unclear if they are decisions under the “*EPBC Act or Regulations*”. In our view without standing for judicial review secured, this Agreement offers a poorer standard of assessment process.

Therefore we recommend that clause 10.4 and Schedule 1 of the Agreement be amended to accredit the Major Development assessment process ... except for section 48(e) of the Act.

We also recommend that the Commonwealth Government consider the merit of amending section 487 of the *EPBC Act* to recognise the status of Bilateral Agreements in line with decisions made under the Act and Regulations in regards to standing for judicial review.

11.1 and 11.2, page 4

These sections represent a gain in process and are supported in principle. The involvement of local government in particular is a marked improvement as outlined in 11.2.

11.3, page 4

Existing provisions for a State or agency of the State to refer a proposed action to the Commonwealth Minister for assessment as a controlled action, reiterated in the Agreement, are acknowledged.

Any mechanism for streamlining the referral process that detracts from the existing requirements on proponents to provide adequate information for assessment or sufficient opportunities for public comment are strongly opposed. Recommend that the section “- *may, in appropriate cases, provide a mechanism for streamlining the referral process*” be deleted from the Agreement.

14.1 (b), page 5

Recommend stating a time line for providing the Development Report consistent with the other time lines outlined in section 14 of at least no more than 10 business days.

15, page 6

This provision will add value to the process where the State or an agency of the State can review the data provided by proponents and can provide additional information to the Commonwealth about relevant impacts where this may have been underestimated or poorly understood. An underestimation could occur through a range of reasons including the inaccessibility of some ecological information and the specialist knowledge associated with the management of many MNES.

Equally this provision could be used to question the contributions of the public and specialist interest groups such as Recovery Teams received during the period of public comment where their information may be more up to date, where their technical recommendations do not align or have not been considered by State policy or where State Government is the proponent. It is critical that the specialist expertise of interest groups such as Recovery Teams be given sufficient consideration prior to the Commonwealth Minister's determination (see comments to section 28).

18 (a), page 7

Within the objects of the Agreement this clause is supported in principle however it will be critical to maintain public confidence in the Agreement that the consultation provided for in 18(a) is used to streamline and consolidate the condition process rather than weaken proponent's responsibilities to address relevant impacts, particularly where State Government is the proponent. This comment could equally apply to section 19 of the Agreement.

20, page 8

Provides for additional accountability in the Agreement and is supported in principle.

21.1, page 8

Refer to comments made for section 5. We recommend a sunset clause of no more than 10 years be adopted and that the proposed period of review be shortened to four years to allow a minimum of two full reviews to occur within the life of the Agreement.

21.2, page 8

We recognise and support the role provided for key stakeholder consultation in Agreement reviews.

28, page 10

In support of section 50 of the *EPBC Act* we believe section 28 of the Agreement should be amended so that it accords with the Commonwealth Minister's duties in relation to sections 51-55 of the *EPBC Act*.

We note particularly "*approved conservation advice for species and communities*" as unrecognised in the Agreement which must be addressed given recent amendments to the *EPBC Act* and that the Agreement needs to recognise that assessments must be consistent more broadly with Commonwealth obligations with respect to international conventions such as: CITES, the Bonn Convention, CAMBA, JAMBA and any other international agreement approved under subsection 209(4).

Refer also to comments made in relation to section 32.

32, page 11

As the information base for Recovery Plans and Threat Abatement Plans is constantly evolving and the Plans are only reviewed five-yearly it is critical that Recovery Teams where available, and equivalent planning bodies for other MNES, be specifically engaged in the public consultation provisions under this Agreement both as affected groups and as valuable resources. We recommend that they be specifically identified also in the Agreement.

38, page 12

Although the Agreement provides for the adoption of terms used in the *EPBC Act* a definition of MNES recognised in this Agreement would have been a useful addendum providing clarity, particularly given the absence of recognition afforded some MNES under the Agreements objects and section 28.

As an object of both the *EPBC Act* and Agreement but not defined in the South Australian *Development Act 1993* a definition of ecologically sustainable use (as per section 528 of the *EPBC Act*), would also have been a useful term to define in the Agreement.

43, page 11

In understanding that the proposed South Australian Agreement is an Assessment Bilateral and that the assessment process accredited is the responsibility of the Minister administering the South Australian *Development Act 1993* it is entirely appropriate that this Minister be a signatory to the Agreement. However given that most of the State's information and expertise, policy and legislation for the protection and management of MNES are the responsibility of the Minister for the Department of Water, Land and Biodiversity Conservation and the Department of Environment and Heritage we believe it is critical that the South Australian Minister for Environment and Conservation be a joint signatory to this Agreement on behalf of the South Australian Government.

Refer also to comments made in relation to Schedule 1 regarding statewide agency input.

Schedule to the Agreement

Preamble

Please refer to comment made in to clause 9.1 of the Agreement as it relates to section 47 (2) of the *EPBC Act*.

Section 1, page 14

Given that the proposed South Australian Agreement is an Assessment Bilateral and not an Approval Bilateral the ultimate responsibility for decision lies with the Commonwealth Minister. Under the *EPBC Act 1993* there are provisions for both Commonwealth Ministerial internal review and judicial review by the Federal Court. Neither are provided for in Schedule 1 of this Agreement and the right of judicial review in the assessment process is excluded through section 48 (e) of the *South Australian Development Act 1993*. In our view without standing for judicial review secured, this Agreement offers a poorer standard of assessment process.

Therefore we recommend that Schedule 1 of the Agreement be amended to accredit the Major Development assessment process ... except for section 48(e) of the Act.

2, page 14

This section determines that the Development Assessment Commission (DAC) will determine the level of assessment applicable. Given that most of the State's information and expertise, policy and legislation for the protection and management of MNES are the responsibility of the Minister for the Department of Water, Land and Biodiversity Conservation and the Department of Environment and Heritage we believe it is imperative in that determination that statewide agency input is assured.

3, page 15

The Guidelines for Assessment should be amended to include consideration of the Commonwealth's responsibilities recognised through section 28 of the Agreement. Please also refer to earlier comments made in this submission in relation to section 28 of the Agreement.

As with determining the level of assessment, DAC's development of the guidelines for assessment must be guided by statewide agency consultation, most particularly with DWLBC and SA DEH, consistent with the provisions accorded to EPA in 46(10) of the *Development Act 1993*. We also recommend including provision for public consultation on the guidelines.

4, page 15

To be consistent with other minimum periods of public consultation established by State Government legislation and to increase community opportunity to participate we recommend adopting a period of public consultation of no less than 6 weeks or 30 working days.

Given that most of the State's information and expertise, policy and legislation for the protection and management of MNES are the responsibility of the Minister for the Department of Water, Land and Biodiversity Conservation and the Department of Environment and Heritage we believe it is imperative that statewide agency input is assured in the assessment process.

Please refer to comments made in relation to section 32 regarding Recovery Teams and equivalent planning bodies as affected interests to be specifically targeted during the period of public consultation.

5, page 16

We believe that the proponent should, when responding to public comment, provide a summary of any such comment and demonstrate how those comments have been addressed, in accord with subsections 99(2)(b) and 104(2)(b) of the *EPBC Act*.

7, page 17

We recommend opportunities for advertising on relevant websites such as Planning SA and the EPBC website also be explored to maximise the public reach of advertising.