



Report on Public Comments on the Draft South Australian Assessment Bilateral Agreement

As required by section 49A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), a draft assessment bilateral agreement between the Commonwealth and the state of South Australia (SA) was published on 29 July 2024 with an invitation for any person to comment by 2 September 2024. On 28 August 2024, the consultation period was extended to 30 September 2024.

This report provides a summary of submissions. The following submissions were received and are listed in the order in which they were received:

1. Anonymous submission
2. Anonymous submission
3. Kangaroo Island/ Victor Harbor Dolphin Watch
4. Native Vegetation Branch, Department of Environment and Water
5. Tilt Renewables
6. Environmental Defenders Office
7. The Association of Mining and Exploration Companies (AMEC)
8. Urban Development Institute of Australia
9. Humane Society International

Six of the public comments were supportive of having a bilateral agreement in place, noting some caveats as discussed below with the assessment bilateral agreement (the **Agreement**). One public comment did not support the agreement, one did not indicate support either way and one public comment addressed concerns with a lack of explanatory material to understand the draft agreement and provided key concerns with the document/ process.

An overview of the key issues and our response is provided below.

1. Clarification on provision 2(b)

Issues raised

One of the public comments received referred to clause 2(b) of the draft agreement which provides that “*a breach of this Agreement will not give rise to any cause of action, or right to take legal proceedings, other than as provided for in the EPBC Act*”. The comment was that under the EPBC Act, the Minister (meaning the Commonwealth Minister) must:

- decide whether or not the bilateral agreement has been contravened; and
- decide what action he or she should take in relation to any contravention.

(s 57(2) of the EPBC Act)

The comment recommended clarification in the Agreement that the Minister may determine what action to take if there is a breach of the bilateral agreement.

Response

Clause 2(b) means that only the parties to the agreement (ie the Commonwealth and the State) can address breaches and only through the mechanisms set out in the EPBC Act. The rationale for this approach is to maintain flexibility and administrative efficiency, allowing the Commonwealth Minister to determine the appropriate response to a breach under the EPBC Act (such as suspension or termination of the agreement).

The agreement does not provide for any additional actions that can be taken beyond those contained in the EPBC Act. Section 48(2) of the EPBC Act provides that the agreement has no effect in relation to the EPBC Act if it inconsistent with either the EPBC Act or the EPBC Regulations.

2. Duplicity and improved environmental outcomes

Issue raised

One of the public comments received expressed support for the intent to remove duplicity in environmental assessment whilst a second comment indicated that the driver should be a coordinated approach between the State and Commonwealth that aims to achieve good environmental outcomes rather than fast track or better facilitate economic development. Two submissions raised concerns with clause 9.4 of the Agreement in relation to ensuring efforts to streamline processes outside of the accredited process must not undermine the assessment of impacts on matters of National Environmental Significance (MNES).

Response

Section 9.4 of the draft agreement is included to emphasise that the Commonwealth and State are committed to working together to streamline processes. For clarity, clause 9.4 does not, and cannot, reduce the standard of assessment required under the EPBC Act for matters of national environmental significance. The clause is intended solely to recognise opportunities for administrative collaboration between the Commonwealth and South Australia where assessment pathways fall outside the accredited processes in Schedule 1. Any such collaboration must continue to ensure that assessment information meets the statutory requirements under the EPBC Act and cannot operate to weaken the standard of analysis, documentation, or decision-making required for controlled actions.

3. Inclusion of the HRE Act

Issues raised

One of the public comments expressed strong support for the amendment of the draft agreement to include the *Hydrogen and Renewable Energy Act 2023 (SA) (HRE Act)*. The submission noted that inclusion of the HRE Act would facilitate the efficient development of hydrogen and renewable energy projects and that not including the HRE Act would lead to delays due to the separate approvals process. It was also stated that this would hinder progress towards the 82% renewable energy target by 2030 and the broader goal of net zero emissions by 2050.

Response

The HRE Act came into operation on 11 July 2024. Consultation between the Commonwealth and State for the draft agreement was already at an advanced stage by this time. A decision was made that inclusion at this late stage would delay the implementation of the draft agreement. The Commonwealth and the SA Government are supportive of the inclusion of the HRE Act in a future iteration of the Bilateral Assessment Agreement should an analysis determine that the HRE Act is compatible for a joint assessment process.

4. The bilateral agreement should be drafted to be easily understood

Issues raised

One of the public comments received expressed that the draft agreement should be worded so that it can be understood by members of the populace at large.

Response

The Australian Government is committed to the principles of open government, including providing accessible web information, content and services to all Australians regardless of disability, culture or environment. The draft agreement has been written with this in mind, whilst also ensuring that it incorporates the requirements outlined sections 45 – 65A of the EPBC Act relating to bilateral agreements.

5. Clear definitions and ambiguity of impact and significant impact

Issues raised

Two of the public comments received sought a clear definition of ‘impact’ and ‘significant impact’ under the EPBC Act whilst another comment indicated that clause 5.5 of the Agreement is ambiguous for terms including ‘environmental assessment’ and ‘method’.

Response

Clause 1.1 of the Agreement provides that terms have the same meaning as in the EPBC Act (or as otherwise defined in the Agreement).

An ‘impact’ is defined in s527E of the EPBC Act.

‘Significant Impact’ is defined in the *Significant Impact Guidelines 1.1 - Matters of National Environmental Significance*: A ‘significant impact’ is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.

Environmental assessment is a broadly used term that is described in the Objects of the draft agreement.

Method refers to the type of assessment, in this context a type of assessment that is not an accredited assessment.

6. Confusion between state jurisdictions and Commonwealth legislation

Issues raised

One of the public comments received indicated that confusion between State and Commonwealth legislation needs to be eliminated and more clearly defined with MNES as its guiding principle.

Response

A key object of the draft agreement is *ensuring the adoption of best practice regulatory processes for achieving a transparent, efficient, timely and effective process for environmental assessment of actions*. Explanatory information on the role of each jurisdiction is provided externally including on the department's webpage for [South Australia bilateral agreement for environmental assessments](#) and the department's webpage for [What's protected under the EPBC Act](#).

7. The timing of EPBC Act and State assessments

Issues raised

Three of the public comments mentioned that lack of detail around assessment timeframes and pathways was an issue. This included that the timing of the EPBC Act assessment does not match the timing of the State assessment timeframes and that these timeframes should be standardised. The point was also made that EPBC Act referrals should be aligned with Department of Energy and Mining (DEM) referrals, particularly for significant assessments for mining approvals. One comment noted that delineation of responsibilities needs to be included as well as adequate resourcing for controlled action decisions.

Response

The Commonwealth is committed to its ongoing collaboration with the State on the early identification of projects that may be suitable for bilateral assessment and ensuring adequate resourcing is available for decision making. This is facilitated through regular discussion including via monthly meetings between the Commonwealth and relevant state government departments. Where an assessment is undertaken through a bilateral arrangement, timelines are subject to the relevant state government legislation and may be impacted by the completeness of the information provided by a proponent. The Objects of the draft agreement include the parties working cooperatively to *ensure an efficient, timely and effective process for environmental assessment and approval of actions* and *to minimise duplication in the environmental assessment and approval processes of the Commonwealth and SA*. Measures to enable this have been integrated into the Administrative Arrangements.

8. Terms of Reference and Administrative Arrangements

Issues raised

One of the public comments received notes that the Administrative Arrangements do not appear to be publicly available. This submission also noted that a Terms of Reference from the Commonwealth regarding assessment requirements and timeframes would be beneficial.

There was also a comment that there is little guidance, timeframes or pathways through approvals included. There is minimal discussion on which department is responsible throughout the assessment and it appears there are requirements for engagement of both regulators at each stage.

Response

The development of Administrative Arrangements and a Terms of Reference will assist to meet the Object of the bilateral assessment agreement for the parties to work cooperatively. The purpose of the Administrative Arrangements is to facilitate effective and efficient operation of the bilateral assessment Agreement between the Commonwealth and South Australia. The terms of the Administrative Arrangements are agreed between the parties, are administrative in nature and do not create legal responsibilities upon the parties. As such, they are not a public facing document.

The Terms of Reference for each project assessed under the Assessment Bilateral Agreement will be issued by the relevant state department following collaboration with the Commonwealth. As the assessment is undertaken by the SA Minister, having regard to the EPBC Act, Terms of Reference are issued by the State, not by the Commonwealth.

As to the information about timeframes and contact points – this will be addressed where appropriate in public information.

9. Compliance reporting

Issues raised

One of the public comments indicated that currently a compliance report is required for EPBC and for the Mining Act and recommended that a single report should suffice whether assessed through a bilateral process or separately. Another recommended that reporting against EPBC conditions should occur at the same time in the same report.

Response

Ongoing compliance obligations including reporting are an important aspect to meet all conditions of an approved project. Proponents can consider preparing one report to cover both State and Commonwealth obligations, so long as the report is clear on each obligation that it is reporting on.

10. One way consultation

Issues raised

One of the public comments received indicated that the current consultation process appears to be one-way as the State shares suggested conditions with the Commonwealth though not vice versa.

Response

Under the draft agreement, the State completes an assessment report and provides it the Commonwealth to complete their approval process. Under Section 131 of the EPBC Act, before the Commonwealth Minister decides whether or not to approve, for the purposes of a controlling provision, the taking of an action, and what conditions (if any) to attach to an approval, he or she is

required to invite any other Minister who has administrative responsibilities relating to the action to make comments on a proposed assessment decision.

11. EPBC Act reform

Issues raised

Two of the public comments received raised potential issues with future reforms of the EPBC Act regarding how legislative powers will impact the EPBC referral process, concerns around the decision-making powers of the Chief Executive and that provision 14.3 of the Agreement only requires a review rather than an amendment.

Response

The Commonwealth will consider any potential impacts to bilateral agreements following reforms to the EPBC Act and provide explanatory material in due course. At this point in time, the reforms regarding bilateral agreements made under *Environment Protection Reform Act 2025* (Cth) have been passed by Parliament but not yet commenced.

Any amendments to the Agreement are subject to section 56A of the EPBC Act. Actions that have been referred to the Commonwealth Minister under Part 7 of the EPBC Act before the commencement of the reforms will continue to be assessed in accordance with the current legislation. Actions referred under Part 7 of the EPBC Act after commencement of the reforms will be assessed under the new legislation. Proponents will have the choice to 'opt in' to the new settings, by withdrawing their project and re-submitting. A facilitated process will be available to take into account the level of assessment already undertaken.

12. Different triggers for flora and fauna

Issues raised

One of the public comments received questioned how the different triggers for flora and fauna that meet EPBC Act requirements though not State requirements will be treated in a single assessment process. The commenter requested alignment based on rigorous scientific evidence around this gap with local context.

Response

The Department has undertaken a comprehensive benchmarking exercise to ensure that processes undertaken by the State align with processes undertaken by the Department.

13. Explanatory material for stakeholders

Issues raised

One of the public comments received raised a concern that stakeholders were not provided with explanatory material to assist understanding changes to the draft agreement in comparison to the previous bilateral agreement.

Response

The Commonwealth notes that whilst the previous assessment agreement with South Australia was available on the department's website, a supplementary document was not provided to outline changes. The Commonwealth will consider this comment for future public consultation for forthcoming bilateral agreements.

14. Assessment type under the Guidelines for Assessments

Issues raised

Two of the public comments received raised concerns with the implications of Schedule 1 in relation to the assessment type. One comment raised a concern that item 2.1(c) would result in the SA Government assessing a project using preliminary documentation rather than an assessment based on the activity. A second comment questioned whether it was an oversight under the guidelines for assessment in Schedule 1 to reference items 2.1(b)(i) in relation to the *Planning, Development and Infrastructure Act 2016* (PDI Act) though not items 2.1(b)(ii) and 2.1(b)(iii). The commenter noting that the PDI Act is not sufficient to provide assessment of impacts on MNES on the preliminary documentation only.

Response

Schedule 1, Item 4.01 of the EPBC Regulations requires that for an assessment approach corresponding to assessment by public environment report or environmental impact statement:

- (a) the decision maker prepares written guidelines for the assessment; or
- (b) the guidelines for the assessment are those prepared in writing by a state or territory agency or authority for assessment of all actions in the class of action for which the assessment is required.

Further, Schedule 1, Item 4.03 of the EPBC Regulations requires that the guidelines are designed to ensure that the assessment:

- (a) assesses all the relevant impacts of the action;
- (b) provides enough information about the action and its relevant impacts to allow the Minister to make an informed decision whether to approve the action; and
- (c) addresses the matters mentioned in Division 5.2 for an environmental impact statement or a public environment report.

The drafting in item 3.2(a) in Schedule 1 is to meet these requirements. The other two classes of action (essential infrastructure and Crown development) have been benchmarked against the requirements for assessment on preliminary documentation and so these obligations do not apply.

15. Substitution of a new method of environmental assessment

Issues raised

Two of the public comments raised concerns that clause 5.5(b)(ii) could allow the State to substitute a new method of environmental assessment that has not been properly accredited under the EPBC Act.

Response

This clause does not override the EPBC Act and instead serves as a communication function between the State and the Commonwealth, requiring the State to notify the Commonwealth that the assessment requirements have changed such that the Bilateral Agreement is no longer applicable or that a new method of assessment has taken effect. The Commonwealth Minister is still required to determine if the Assessment Report was prepared in accordance with the process specified in Schedule 1 to the Bilateral Agreement. To clarify this is the case, clause 5.5(b)(ii) of the Bilateral Agreement was amended as follows:

~~a new method of the environmental assessment approach or requirements is decided for the controlled action~~ are changed such that the controlled action would

(A) no longer be within a class of actions to which clause 4.1 applies; or

(B) be within a different class of actions to which clause 4.1 applies,

with such notice to set out the date from which the changed new method of environmental assessment approach or requirements took effect, and the reasons for changing the ~~method of environmental assessment approach or requirements~~.

16. Updates from the 2014 version of the Bilateral Agreement

Issues raised

Comments received from two of the submitters noted potential issues from updates of the draft agreement of the 2014 agreement. This includes that:

- The language used in the Background and Objects of the draft agreement could be better amended to reflect the Nature Positive Plan and that Australia complies with its international obligations.
- Concerns that Clause 7.2(d)(i) may potentially exclude individuals as it refers to groups of Indigenous peoples rather than Indigenous peoples.
- Concerns that Clause 8.1(b)(i) of the Agreement in comparison to the 2014 Bilateral Agreement emphasises that the Commonwealth Minister consider any relevant State conditions that have been or are likely to be imposed under SA legislation as it could lead to a scenario where conditions are not imposed.

Response

The wording of the draft agreement has been modernised, consistent with similar documents published by the Department following the 2014 bilateral agreement. The Agreement does not alter Australia's international obligations nor are the Background and Objects intended to be an exhaustive list. The Agreement is to be read in conjunction with the EPBC Act, the Significant Impact Guidelines and other relevant material prepared by the department.

The wording 'groups of Indigenous peoples' has been amended to read 'Indigenous peoples' in response to the concern raised.

Clause 8.1(a) of the Agreement indicates that the purpose of this section is to avoid inconsistent conditions applying. As the Agreement is an assessment bilateral agreement rather than an approval bilateral agreement, the Commonwealth still gives approval and imposes conditions relevant to MNES.

17. Standard of assessment and ambition of bilateral agreement

Issues raised

One of the public comments raised that the Agreement should move beyond protecting and conserving MNES to ensuring they are restored and recovered.

Response

While the comment seeks for the Agreement to impose obligations relating to restoration and recovery of Matters of National Environmental Significance (MNES), the scope of an assessment bilateral agreement is set by section 47 of the EPBC Act. Assessment bilateral agreements are limited to ensuring that accredited State processes provide sufficient information for the Commonwealth Minister to assess impacts on MNES in accordance with the EPBC Act.

The Objects of the Agreement are already aligned with the Objects of the EPBC Act, including protecting the environment and promoting the conservation and ecologically sustainable use of natural resources. The Agreement cannot expand beyond the legislative framework in Part 5 of the EPBC Act, which does not provide for bilateral agreements to impose restoration or recovery obligations separate from the approval and conditions framework in Part 9.

18. Taking into account documents when preparing Assessment Reports

Issues raised

One of the public comments raised that section 6.8 of the Agreement only requires that relevant policies and plans are taken into account and that this is insufficient. The commenter recommended that it should be a strict requirement for the Assessment Reports to consider proposals in a manner not inconsistent with the EPBC Act, guidelines, policies and plans.

Response

In relation to clause 6.8, the requirement for South Australia to “take into account” relevant guidelines, policies and plans is consistent with the requirements the EPBC Act and the EPBC Regulations for bilateral agreements. The Agreement also contains strong requirements for the identification, assessment and reporting of all relevant impacts on MNES, ensuring the Commonwealth Minister has sufficient information to consider avoidance, mitigation, offsets and other recovery-focused measures through the approval process.

Section 6.8 of the Agreement does not affect the statutory requirements of the Commonwealth Minister when making a decision whether to approve an action which has been assessed under the Agreement. When the Minister or delegate makes the decision, they are required to take into account the assessment report (under s 136(2)(b) of the EPBC Act). When making the decision, the

Minister or their delegate must not act inconsistently with relevant world heritage and national management plans (s 137 and 137A), the Ramsar Convention (s 138) and recovery plans (s139) or the conventions and agreements relevant to migratory species (s 140). The Agreement doesn't negate the decision maker's duty to not act inconsistently with these.

19. Taking into account documents when preparing Assessment Reports

Issues raised

One of the public comments raised that Object F of the Bilateral Agreement inappropriately limits the Commonwealth's approval making power in relation to the conditions on an approval where it is only 'likely' that a matter will be addressed by the State conditions of approval.

Response

Given that this is an assessment bilateral agreement not an approval bilateral agreement the Commonwealth should be imposing conditions related to MNES even where there is a SA condition that also relates to MNES. Otherwise, the Commonwealth would be relying on SA to enforce the conditions. To remove any ambiguity suggesting that the recital is read as fettering the Commonwealth Minister's discretion, Object F of the Bilateral Agreement was changed in the following way:

This Agreement will therefore enable the Commonwealth to rely on the SA assessment processes set out in Schedule 1 for assessment of controlled actions under the EPBC Act. In addition, ~~and where appropriate, the parties will work together so that conditions attached to Commonwealth approvals are strictly limited to matters not addressed in SA assessments and approvals, or likely to be addressed by the SA conditions of approval.~~ the parties will consult on the conditions proposed to be attached to an approval granted by either party and use their best endeavours to ensure that conditions related to Matters of NES are consistent.