Comments EPBC Amendment Bills 2014

QMDC comments on the Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 and the Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014

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These comments are presented by the Chief Executive Officer, Geoff Penton, on behalf of the Queensland Murray-Darling Committee Inc. (QMDC). QMDC is a regional natural resource management (NRM) group that supports communities in the Queensland Murray-Darling Basin (QMDB) to sustainably manage their natural resources.

1.0 Background

We urge the Senate Committee to evaluate this Bill by taking into consideration not only the impacts of individual developments but also the cumulative impacts, social, economic and environmental, of the total number of industries impacting on the environment and natural resource assets.

QUEENSLAND MURRAY-DARLING COMMITTEE

2.0 General comments

2.1 Potential impacts of delegating environmental approval powers to state and territory governments

QMDC asserts that before delegating environmental approval powers to the state and territory governments the Commonwealth needs to conduct a comprehensive audit of the environmental effectiveness and compliance of the state and territory governments. We are not confident that federal protection standards will be maintained under a "one stop shop" model.

Indeed under the long standing Intergovernmental Agreement on the Environment, the Queensland Government was required to use ecological sustainable development (ESD) principles to inform its own policy making and program implementation. ESD principles have therefore been incorporated into State legislation since 1992. However, QMDC has witnessed the Queensland Government's legislative reform program omit and remove references to, and undermine the application of, ESD principles in their entirety. Some key examples include:

- The *Transport Infrastructure Act 1994* (Qld), the primary Act concerned with Priority Port infrastructure (including ports on the Great Barrier Reef), does not have ESD as the object of the legislation. The word 'sustainability' does not occur in the entire Act.

- There are no ESD principles articulated in the new *State Planning Policy* (SPP) which forms the basis for all regional and local planning instruments that guide where development can occur. ESD is not mentioned at all in the entire SPP, ignoring a 'requirement' that the SPP advance the purposes of the *Sustainable Planning Act* which include 'ecological sustainability'.

- The *Regional Planning Interests Act 2014* (Qld) which seeks to balance competing land uses of mining and CSG development with agricultural and environmental priorities, also does not reference ESD, nor does it give practical effect to the principles of ESD, especially the precautionary principle.

- The new planning legislation, *Planning for Prosperity Act* is a step backward from the *Sustainable Planning Act* as it is expected the principles of ESD will be removed

- The upcoming review of the *Water Act 2000* (Qld) is also likely to remove ESD principles from the current objects of that Act.

- The *Environmental Offsets Act 2014* (Qld) also does not refer to ESD principles in the objects, even though it provides a mechanism for permitting serious environmental harm on our most endangered species, ecological communities and protected areas.

QMDC continues to assert that by deeming 'economic development' as the principal consideration in environment and planning decision making will continue the trend of decreases in Queensland's unique biodiversity and matters of national environmental significance (MNES) due to the failure to address the environmental impacts of development.

In order to balance social, economic and environmental objectives, decision-making on development is best guided by the long-established principles of ESD and Regional NRM Planning.

QMDC argue that if the new bilateral agreement and "one stop shop" approval process is allowed, it must at the very least prevent further erosion by state government and territory governments' and industries' on ESD, and the protection of MNES and regional natural resource assets.

2.2 Maintenance of high environmental standards

Given the influence of the Greentape reduction agenda on other areas of law there may be in our opinion a reduction of veracity of standards, QMDC hopes this is not the case. QMDC asserts this will need to be carefully monitored by the Commonwealth. A review of the reduction of state department resources and the ever increasing dominance of state planning departments is urgently needed as part of this Inquiry to ascertain whether the bilateral agreement and one stop shop will actually provide resources to not merely maintain high environmental standards to protect MNES, but more importantly improve or raise the bar of those standards. Improvement in environmental outcomes is clearly a top priority because by most environmental accounting measures nationally and internationally, ecosystems, habitat and biodiversity is still decreasing in spite of the current environmental protection afforded them.

2.3 Benefits of streamlining and reducing red tape

As part of the "Greentape reduction" agenda the Queensland Government aims to fast track or streamline major development projects by reducing assessment processes, including self-assessment and compliance, community/public participation and judicial scrutiny. This we believe risks lowering environmental standards. QMDC asserts the public interest is undermined by fast track or streamlined approvals that cause unacceptable impacts and deliver high risk or unsustainable development. A strong Commonwealth role in protecting MNES is one safeguard clearly needed when "economic growth" values dominate policy and legislative reform agendas.

Where duplication of state and federal functions may occur, QMDC believe the Commonwealth devolving powers to the State is not the best solution. Major projects backed by a state government require federal assessment and approval. A clear delineation of function and power must be expressed in legislation, ensuring the Commonwealth Environment Minister and State Environment Ministers maintain their overarching authority according to their jurisdictions and expertise.

QMDC is concerned that the 'burden of costs" are not accurately quantified by the Queensland Government with real data. The Queensland Competition Authority's final report on *Measuring and Reducing the Burden of Regulation in March 2013* highlights issues pertinent to this Inquiry and makes key recommendations which we believe should be supported by the Senate.

http://www.qca.org.au/Red-Tape-Reduction/Reducing-Regulatory-Burden/Framework-for-Reducing-regulatory-Burden/Final-Report/Final-Report#finalpos

2.4 Potential impacts of cost-recovery on environmental assessment and approval processes, including budgetary impact, cost impacts for proponents and impacts on process timing.

The following comments are in response to the *Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill.*

2.4.1 Regulation and relevant fees

> *The purpose of the Bill is to allow for cost recovery for environmental impact assessments, including strategic assessments, under the EPBC Act, consistent with the Australian Government Cost Recovery Guidelines. The relevant fees will be specified in the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) (the **Regulations**), except for fees in relation to assessment by an inquiry or strategic assessment, which will be made through a Ministerial determination.*

It is difficult to measure the integrity of the reform including the relevancy of fees, without viewing the content of the regulations. Community are increasingly faced with reform of legislation where relevant changes are enshrined within regulation that is not available at the same time a Bill is proposed.

2.4.2 Assessment of proposed action management plans to be part of approval process

> *The Bill also allows for cost recovery for the assessment and approval of action management plans submitted after the Minister has granted an approval under the EPBC Act, and for the variation of those plans.*

QMDC believes the assessment of proposed action management plans should be included in approval process to in order to assess whether a project/activity in its entirety will have too great an impact of relevant EPBC Act matters.

2.4.3 Accountability and action management plans and where costs recovered are spent

> *Action management plans allow the Minister to have ongoing oversight of an action, and more flexibility to specify required environmental outcomes or management strategies as more data becomes available or new technologies develop for environmental management. By setting out a formal process for developing, submitting and varying action management plans, the amendments allow for cost recovery for activities associated with approving these plans.*

These plans should also carry an accountablity mechanism to provide confidence to communities and public affected by the impacts of a project/activity.

Will the cost recovery mechanism require funds to be spent where true costs occur including public engagement in process? Public disclosure of where these funds are spent is necessary.

2.4.4 Items 2 and 3 – After subsection 95B(1) and after subsection 95B(3)

Item 2 inserts a new subsection into section 95B. Subsection 95B(1) currently requires the designated proponent to give the Minister a document that sets out information in relation to the relevant proposed action amended to take into account comments, and a summary of any comments received during the public comment period. If no comments are received, subsection 95B(3) requires the designated proponent to give the Minister a written statement to that effect.

Caution needs to be taken when assessing summary of comments to ensure key issues of concern are not lost in generic overviews. How will these summaries be checked to ensure key information is not lost? QMDC recommends an independent body needs to be appointed to summarise comments rather than the applicant.

2.4.5 Item 6 – Paragraph 134(3)(e)

Item 6 clarifies that a condition can be attached to an approval requiring the preparation of an action management plan under paragraph 134(3)(e) only where a person has made, or is taken to have made, an election under section 132B (inserted by item 5 above). It is intended that regulations made for the purpose of subsection 520(4A) (inserted by item 16 below) will require a fee to be paid at the time the action management plan is submitted for approval (rather than when a person makes an election under subsection 132B). Therefore if, when granting the approval or after the approval is given, the Minister determines that an action management plan is not required, the fee will not be payable.

The Minister needs to provide reasons why an action management plan is not required and state these reasons on a public website.

2.4.6 Item 9 – After section 134

This item inserts a new section 134A into the EPBC Act, which will enable the Minister to publish the action management plan for public comment before it is approved (see subsection 134A(1)). Paragraph 134A(1)(b) will require the Minister to set a minimum of 11 business for members of the public to provide comments. The Regulations will also be able to provide for requirements in relation to the way the Minister publishes the plan and invitations (see subsection 134A(2)). This amendment ensures that, where appropriate – for example where there is significant public interest in matters included in the action management plan – the Minister will be able to seek public comment on the plan.

This timeframe is unrealistic and denies public equitable access to legal process. The timeframe should be extended to a minimum of 28 days in order for the public and community groups to seek both expertise and community mandate for any comments submitted.

2.4.7 Item 10 – After subsection 143(1)

> *This item inserts new subsections 143(1A) and 143(1B) into the EPBC Act. Paragraph 143(1)(c) provides that the Minister may revoke, vary or add to any conditions attached to an approval given under section 133 where the holder of the approval agrees and the Minister is satisfied of various criteria. If the holder of the approval has made an election under section 132B (inserted by item 5 above), the Minister will be able to attach conditions to an approval requiring the submission and implementation of an action management plan.*

The Minister needs to clearly state reasons for any changes to the approval and publish them on a public website. Public should be invited to make comment on these changes.

> *In addition, subsection 143(1B) will enable the holder of an approval to request that the Minister vary a condition attached to an approval. The approval holder will need to make the request in writing. Currently the EPBC Act only contemplates variations to conditions being made unilaterally by the Minister. In practice, variations may be prompted by requests from or information provided by approval holders. This provision will formalise this process, and enable the Regulations to provide for cost recovery for the assessment of a variation application.*

Public comment should be invited as part of this request.

2.4.8 Item 11 – After section 143

> *This item inserts a new section 143A into the EPBC Act which provides for the variation of an action management plan. Under subsection 143A(1), a holder of an approval will at any time be able to apply to the Minister for a variation of an approved action management plan. The approval holder will need to make the application for a variation in writing, and also submit any fee payable and any information or documents required by the Regulations (see subsection 143A(2)). Once the Minister receives an application, the Minister will have the ability to request additional information be provided before making a decision (see subsection 143A(4)), if the Minister believes on reasonable grounds that the application does not include sufficient information. The Minister will be required to notify the holder of the approval in writing of his or her decision whether to approve the variation to the action management plan (see subsection 143A(5)).*

The public need to have a right to make submissions on variations of action management plans.

2.4.9 Item 13 – At the end of Part 11 of Chapter 4

> *It is anticipated that the fees for these types of assessments will be determined on a case-by-case basis, rather than specified in the Regulations. The fees the Minister will determine appropriate for these assessment approaches will be dependent on the specifics of each individual project being assessed and related departmental*

> *resources necessary to undertake the assessment. The Minister cannot determine the fees and fix them in Regulations in advance, as for other assessment methods, due the wide variations in the actual resources required to conduct these assessments. Strategic assessments may also provide a general public benefit, and cost recovery therefore may not be appropriate in some cases.*

A clear methodology needs to be outlined to show what matters will be taken into consideration when fees are set. How will the public benefit be measured and over what time duration?

> *Before making a determination, subsection 170CA(2) will require the Minister to consult with the person proposing to take the action, the designated proponent, or the person responsible for the policy, plan or program for strategic assessments (as the case requires), about the level of fee to be charged. This will provide the person proposing to take the action with greater certainty of costs prior to commencing the assessment, so that they can make amendments to their proposed action, or policy, plan or program, to avoid or mitigate the significance of the action's impact on matters of national environmental significance and potentially reduce the cost of their assessment. Fees will be based on the level of departmental resourcing required to conduct the assessment of the action or the strategic assessment of the plan, policy or program.*

QMDC believes there should be an opportunity for public comment on the level of fee. If there is a commitment to better planning to avoid impacts this would be in our opinion be excellent. QMDC and other NRM bodies could assist with planning to avoid impacts in the first instance but if early consultation shows an applicant that the costs of managing impacts will outweigh the benefits gained, and a more informed position can be reached on whether a development or activity will occur. this is supported by QMDC.

2.4.10 Item 14 – Subparagraph 496(1)(b)(iii)

> *Item 14 amends subparagraph 496(1)(b)(iii) as a consequence of item 19 below, to reflect the change in terminology from environmental management plan to action management plan.*

QMDC cannot see what benefit will be gained by changing the term "environmental" to "action", especially in light of the objects of the EPBC Act.

2.4.11 Item 15 – After Part 19

> *Subsection 514Y(2) will enable a person to apply to the Secretary to reconsider the way in which a method has been used to work out a fee prescribed by the Regulations under subsection 520(4C). As such, reconsideration will not be available where there is no discretion used in working out the fee. Nor will reconsideration be available to dispute the method determined to calculate the fee.*

It is unclear whether the term person includes any person.

2.4.12 Item 18 – After section 521

> *This item inserts a new section 521A into the EPBC Act, which will mean that timeframes in the EPBC Act do not run if all or part of a fee remains unpaid. Section 521A applies if a person has not paid all or part of a fee for service. In this situation:*
>
> *(b) Where the EPBC Act requires or allows the Minister or Secretary to do something relating to the service within a particular period of time, where the period has not begun, any time period specified in the EPBC Act will not begin running until the fee is paid. For example, if a fee remains unpaid, the time period of 20 days for making a controlled action decision specified in subsection 75(5) would not begin running.*

This timeframe needs to be communicated in a timely fashion to the public.

2.5 The *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014*

In relation to the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* (the Bill) QMDC's major concerns are: the devolvement of power involving the water trigger and the broadening of Ministerial considerations for accreditation.

2.5.1 The Water Trigger

QMDC supports the current jurisdiction which ensures the water trigger is applied to any "coal seam gas development" or "large coal mining development", which has or will have or is likely to have a significant impact on water resources, a protected matter under the EPBC Act. This trigger has in our opinion aligned legislation and policy to the much needed and awaited evidence based science to address regional concerns about the impacts on regional groundwater and surface water assets.

The current water trigger arrangement serves to strengthen existing federal and state government water legislation and planning and help to define those environmental, social, cultural and economic values that need to be upheld in order to provide for the needs of current and future generations.

Increasing the powers of the Commonwealth to be well informed on how to protect significant national water resources at a strategic level rather than by a case by case project level provides at a national and regional level greater certainty with regards to NRM and sustainable use of resources. It also illustrates to regional communities a commitment by the Commonwealth to protect nationally significant natural resource assets.

It was crucial an Independent Expert Scientific Committee was established in order to inform the Australian Government on the current and future impacts of CSG and coal mining developments on water resources, including the interrelation of impacts felt at a local and regional landscape scale and why and how that equates to a national impact.

We are concerned that the proposed amendments will remove this safe guard and evidenced based protective mechanism, allowing actions involving CSG and large coal mining developments affecting water resource assets to be declared as actions which do not require approval under Part 9.

It is our understanding that this amendment will also apply to any referrals subject to the water trigger which are not yet determined.

QMDC assert that these amendments undermine not only the rationale for the trigger, but community confidence in just legal process that is informed by the best available science. It is not appropriate to have State governments assessing developments without this trigger and level of science. It will result in assessments going back to the position regions were in before with the state government having the power to approve developments based on limited economic analysis with little science and Commonwealth validity.

2.5.2 The Broadening of Ministerial Powers

QMDC does not support broadening of discretionary ministerial powers. The Minister needs to clearly state reasons for any reasons to consider further issues pertinent to accreditation and if the public interest is a key consideration, the public should be invited to make comment on these changes.

3.0 Recommendations

That the Commonwealth:

3.1 Does not implement the proposed Bill enacting the approval bilateral agreements.

3.2 Improve the efficiency and effectiveness of the EPBC Act, and work closely with the state and territory governments to implement environmental assessments and approvals to higher environmental standards, e.g. upholding ESD as a core principle and goal; full assessment of cumulative and climate impacts; accountable and transparent governance arrangements for assessors and decision-makers; greater public access to environmental justice through public notification, public consultation and appeal rights processes; strengthening threatened species and environmental offsets laws.

3.3 Develop improved administrative processes with the state and territory governments under *assessment bilateral agreements.*

3.4 Should instigate a consultation process to define a set of national environmental standards and principles that state and territory assessments must abide by in order to be accredited. Accreditation is dependent on state and territory governments having both the necessary and complete legislative and outcome procedures and processes in place and operational before accreditation.

3.5 Should review all current bilateral assessment agreements against proposed national environmental standards and revoke all agreements that do not comply to those standards.