



**Bilateral agreement made under Sections 45 and 46 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) relating to environmental approval: Commonwealth of Australian and The State of Western Australia**

**Australian Government Department of the Environment**

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## About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia funded by its member companies, which generate 95 per cent of the value of all mineral and energy production and employ 80 per cent of the resources sector workforce in the state.

The Western Australian resources sector is diverse and complex, covering exploration, processing, downstream value adding and refining of over 50 different types of mineral and energy resources.

In 2013-14, the value of Western Australia's mineral and petroleum production was \$121.6 billion, accounting for 91 per cent of the state's total merchandise exports. Furthermore, the value of royalties received by the Western Australian government from the resources sector increased by 33 per cent from the 2012-13 financial year to reach a record \$6.98 billion in 2013-14.

## Recommendations

### Definitions and Interpretation

- CME considers the term "*serious environmental harm*" should be deleted from clause 1.1.
- CME considers it appropriate for clause 10.4(a) to be amended to state "*that may result in serious and irreversible damage to a Matter of NES*".
- CME recommends amending clause 1.1 to include a definition for a Commonwealth area.

### Effect of the Agreement

- CME recommends inclusion of coastal waters under clause 4.2(a) to ensure consistency with the assessment bilateral agreement.
- CME recommends the "*approved manner*" in clause 4.4(a) is clarified in the Administration Arrangements.

### Assessment

- CME recommends clause 5.1(c) to be updated as a standalone statement as clause 5.2 and the remaining number sequence adjusted accordingly.

### Decisions on Approval

- CME considers where a project triggers assessment under both Western Australia and Commonwealth environment legislation, the approval bilateral should include a clause to ensure a single set of offset requirements.
- CME considers "*law or planning regulations*" should be deleted and replaced with 'Law' which is the defined term in the Agreement and covers planning regulations.

### Escalation

- CME recommends the Administrative Arrangements include provisions for the process and timeframes of any dispute or concerns arising during the course of the Agreement.

## **Schedule 2 – Open Access to Information**

- CME recommends Schedule 2 is updated to include provisions to allow proponents open access to government advice provided as part of the referral.
- CME considers a clause should be added to allow proponents to identify information of a confidential nature to ensure this information is not made publicly available.

## **Other Issues**

- CME recommend the 2015-16 federal budget should include funding provisions made to the state agency to execute its regulatory roles under the agreements, rather than be reliant on introducing partial cost recovery mechanisms for matters of NES.

## Context

CME welcomes the opportunity to provide comment on the draft *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) environmental approval bilateral agreement between the Commonwealth of Australia and the State of Western Australia (the Agreement).

The Western Australian resources sector strongly supports the intention of the Australian Government's 'one-stop shop' policy to ensure Commonwealth environment regulation is both efficient and effective through establishment of assessment and approval bilateral agreements with States and Territories.

In establishing these agreements, the resources sector does not seek to remove or diminish environmental standards or safeguards. Public confidence in the assessment and approval process is of paramount importance to the resources sector. The resources sector seeks only to create a more streamlined process in meeting environmental outcomes through the removal of unnecessary and costly duplication.

The establishment of an approval bilateral agreement under the EPBC Act is a key milestone in meeting this outcome.

CME supports the overall premise and intent of the draft Agreement; however, recommend consideration of several matters outlined below to ensure it remains clear, transparent and effective.

## Definitions and Interpretation

The Agreement includes a definition for serious environmental harm aligned with the *Environmental Protection Act 1986* (EP Act). There is uncertainty on how this definition will interact with the EPBC Act given Clause 10.4 refers to serious environmental harm for a Matter of National Environmental Significance (NES), which will affect decisions made by the Western Australia Minister.

Given the introduction of serious environmental harm for a Matter of NES will create uncertainty for proponents and may also affect the relevant action/offences in the legislation, CME considers it is inappropriate for inclusion in the Agreement. Further, this terminology is not defined in the EPBC Act and has not been tested in relation to Matters of NES to date. As such, **CME considers the term “serious environmental harm” should be deleted from clause 1.1.**

The term “serious and irreversible damage to a Matter of NES” has been used throughout the Agreement and defined in the Matters of NES Significant Impact Guidelines<sup>1</sup> in relation to *significant impact*. Given there is only one reference to serious environmental harm in the Agreement under clause 10.4(A) which states “Where the Western Australia Minister or CEO is considering or proposing to make a decision that may result in Serious Environment Harm to a Matter of NES, the Western Australia Minister may determine that the action is not within the class of actions to which clause 4.1 applies.”

**CME considers it appropriate for clause 10.4(a) to be amended to state “that may result in serious and irreversible damage to a Matter of NES”.**

‘Commonwealth area’ should be defined given the term is referenced in Schedule 1 clause 4.3 in relation to the class of actions that do not apply within a Commonwealth area. Given the definition of ‘commonwealth area’ is unclear, **CME recommends amending clause 1.1 to include a definition for a Commonwealth area.**

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<sup>1</sup> Australian Government, Department of the Environment, *Significant Impact Guidelines 1.1 Environment Protection and Biodiversity Conservation Act 1999*, 2013.

## Effect of the Agreement

### 4.2 Scope

CME question why coastal waters have been excluded from the Scope of the Agreement given it has been included in the assessment bilateral agreement between the Commonwealth of Australia and the State of Western Australia (assessment bilateral agreement). **CME recommends inclusion of coastal waters under clause 4.2(a) to ensure consistency with the assessment bilateral agreement.**

### 4.4 Actions to be dealt with for the purposes of this Agreement

CME considers there is a lack of clarity on the requirements of the “*approved manner*” and whether this will result in revision of the Environmental Protection Authority (EPA) *Environmental Impact Assessment Administration Procedures 2012* or in the new Administration Arrangements to be prepared under clause 9.1 of the Agreement. **CME recommends the “*approved manner*” in clause 4.4(a) is clarified in the Administration Arrangements.**

## Assessment

Clause 5.1(c) does not follow from the opening line of the clause which refers to an action being assessed under an Accredited Process. **CME recommends clause 5.1(c) to be updated as a standalone statement as clause 5.2 and the remaining number sequence adjusted accordingly.**

## Decisions on Approval

### 6.1 Offsets

CME considers an agreed set of a single set of clear and transparent offsets guidelines is important for the successful implementation of a ‘one-stop shop’ for environmental approvals. Any duplication of offset requirements between State and Commonwealth legislation is a significant concern to the resources sector and should be avoided.

CME supports the Agreement allowing proponents to apply the Western Australia Government Environmental Offsets Policy and Guidelines. CME considers the note under clause 6.1(a) which states “*rehabilitation will contribute to reducing the residual significant impact on Matters of NES*” is a positive step for streamlining and reducing duplication of offsets for proponents triggering both state and the commonwealth environmental approvals.

Notwithstanding the above, clause 6.1(d) creates uncertainty for proponents given it specifies “*WA will have regard to the Commonwealth offsets assessment guide*” as a reference point for determining whether the offset is in accordance to requirements of clauses 6.1(b) and 6.2(c).

Further, clause 6.1(f) requires Western Australia to inform the Commonwealth if considering setting an offset condition not consistent with the outcome indicated by the Commonwealth offsets assessments guide. This removes flexibility of clause 6.1(d) and causes uncertainty over which guideline is to be followed and the process for Western Australia and the Commonwealth in resolving any discrepancy.

**CME considers where a project triggers assessment under both Western Australia and Commonwealth environment legislation, the approval bilateral should include a clause to ensure a single set of offset requirements.**

Clause 6.1(c)(vii) includes the wording “*law or planning regulations*”. **CME considers “*law or planning regulations*” should be deleted and replaced with ‘Law’ which is the defined term in the Agreement and covers planning regulations.**

## Escalation

The escalation process outlined in clause 10.1(a)(ii) states “*as early as practicable*” but does not specify the process or timeframes. CME is concerned this will result in delays if there are any disputes or concerns between Western Australia and the Commonwealth with regard to the Agreement.

Further, CME is concerned the escalation process outlined in clauses 10.3, 10.4 and 10.5 do not provide confidence or certainty to industry as it is unclear what the implications or process are for a proponent in the event Western Australia or the Commonwealth determine the action cannot precede.

CME considers the process and timeframes should be clearly understood between State and Federal governments and industry. **CME recommends the Administrative Arrangements include provisions for the process and timeframes of any dispute or concerns arising during the course of the Agreement.**

## Schedule 2 – Open Access to Information

CME supports the Open Access to Information initiatives listed in Schedule 2 and considers this should be expanded to allow proponents open access to information prepared by government agencies. For example, it would be beneficial for the advice provided by the Department of Environment Regulation or the Department of Parks and Wildlife to the EPA during referral process to be provided to the proponent for consideration and response.

**CME recommends Schedule 2 is updated to include provisions to allow proponents open access to government advice provided as part of the referral.**

Some information provided as part of the environmental assessment and approval could be considered as confidential in nature, such as commercially sensitive information or intellectual property. **CME considers a clause should be added to allow proponents to identify information of a confidential nature to ensure this information is not made publicly available.**

## Other Issues

### ***Resourcing implications for the Office of the Environmental Protection Authority***

CME is concerned about the resourcing impacts of implementing the Agreement on the EPA. Fulfilling EPBC Act approvals as outlined in the Agreement will result in a significant increase in workload for the EPA.


Further, adequate training for the Commonwealth offsets assessments will be required to successfully implement this Agreement.

As such, **CME recommend the 2015-16 federal budget should include funding provisions made to the state agency to execute its regulatory roles under the agreements, rather than be reliant on introducing partial cost recovery mechanisms for matters of NES.**

## Conclusion

CME welcomes the opportunity to provide comment on the approval bilateral agreement and looks forward to ongoing engagement throughout the implementation.

If you have any further queries regarding the above matters, please contact Kirrillie Caldwell, Policy Adviser – Environment, on (08) 9220 8507 or [k.caldwell@cmewa.com](mailto:k.caldwell@cmewa.com).

Authorised by	Position	Date	Signed
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