EIANZ webinar, 21 January 2015: Questions and answers

This document includes responses to questions asked by participants in a webinar on implementing the One-Stop Shop reform on 21 January 2015. These responses focus on questions that could not be answered on the day due to time constraints. Some questions have been summarised for clarity.

The webinar was presented by Stephanie Secomb and Joe Walters from the Department of the Environment (the Department), and hosted by the South East Queensland Division of the Environment Institute of Australia and New Zealand (EIANZ).

The presentation slides and an audio recording of the webinar (including answers to other questions) can be found on the EIANZ website: www.eianz.org/aboutus/past-events-3/onestopshop. For more information on the One-Stop Shop reform, please visit: www.environment.gov.au/epbc/one-stop-shop.

OPERATION OF THE AGREEMENTS

Question: *Under the One-Stop Shop, will assessment bilateral agreements gradually be replaced by approval bilateral agreements?*

Answer: The approval bilateral agreements will operate concurrently with the assessment bilateral agreements. Once an approval bilateral agreement comes into effect, actions that are subject to state or territory authorisation processes accredited under that agreement will no longer require approval from the Commonwealth under Part 9 of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). Actions that are likely to have a significant impact on matters of national environmental significance (MNES) will need to be referred to the relevant state or territory agency for assessment and a decision on approval.

If an action is subject to a process that is accredited under an assessment bilateral agreement, but not under an approval bilateral agreement, the state or territory will assess the impacts on MNES and the Commonwealth will still make the approval decision in accordance with current arrangements.

Question: *Once the agreements are implemented, will they apply retrospectively to projects submitted for approval, or only to projects submitted from the implementation date forward?*

Answer: This will vary from state to state depending on the provisions of the agreement.

In the case of Queensland:

- the new assessment bilateral agreement applies to projects that were already being assessed under the previous assessment bilateral agreement
- the approval bilateral agreement, once in effect, will not apply to projects referred prior to commencement. These projects will continue under the existing assessment arrangements and be subject to approval by the Commonwealth.

Once an approval bilateral agreement comes into effect, a proponent may choose to withdraw a current referral from the EPBC Act process and instead refer it to the state or territory. In

making a decision to withdraw, proponents are advised to seek legal advice and consult with the relevant jurisdiction, having regard to the specific requirements of the bilateral agreement and the extent of assessment already undertaken.

It should be noted that approval bilateral agreements do not automatically become operational upon signing. They will only take effect once the relevant state authorisation processes have been accredited by the Minister. This can only occur once the processes have been tabled in both Houses of Parliament for at least 15 sitting days without being disallowed.

Question: *Who would be responsible at the state level for making approval decisions, and is there any consideration of possible accreditation at a sub-jurisdictional scale? For example, recognition of regional natural resource management bodies?*

Answer: The EPBC Act requires that approval decision-makers must meet the legal definition of 'a state' or 'an agency of a state'. Whether a particular decision-maker can meet this test will depend on the relevant legislation. For example, in Queensland (unlike in NSW) local governments are bodies corporate and would meet the definition of 'an agency of a state'. A proposed amendment to the EPBC Act that is currently before the Senate would ensure that whether a particular state process is accredited depends on whether that process meets high environmental standards, rather than the identity and legal status of the decision-maker.

ESCALATION, ASSURANCE AND COMPLIANCE

Question: *Are there any formal mechanisms or tools in place to assist with potential Commonwealth-state tensions in assessment and approval bilateral agreements?*

Answer: The assessment and approval bilateral agreements provide for close cooperation between the parties and assurance mechanisms to ensure environmental standards are being maintained. Both types of agreement include a process to ensure any issues that may arise are resolved at the lowest possible level.

Under the assessment bilateral agreements, any concerns can be escalated through a Senior Officers' Committee (comprising senior officers from the Australian Government and the relevant state or territory) up to the ministerial level. Under the approval bilateral agreements, any issues may be escalated through the following mechanisms:

- *Senior Officers' Committee* — discussion by Commonwealth and state or territory officials
- *'Notice of Particular Interest'* — Commonwealth issues a public notice to the state/territory
- *Opt-out provision* — the state or territory may request (prior to their approval decision) that the Commonwealth assess or approve an individual project
- *Call-in provision* — in exceptional cases, the Commonwealth Minister may decide that a particular project is no longer covered by the approval bilateral agreement.

As a matter of last resort, the EPBC Act allows the Commonwealth Minister to suspend or revoke an agreement in whole or in part if they are not satisfied that a state or territory has complied or will comply with an assessment or approval bilateral agreement.

Question: *If actions are not referred to the Commonwealth under the approval bilateral agreements, how will the Department know what actions are being assessed by the states so that any issues can be escalated?*

Answer: The Senior Officers' Committee will be the forum for ongoing consultation between the Australian Government and states and territories and will address project-by-project issues if they arise. In addition, transparency around decisions and open access to information mean that jurisdictions will be accountable to the community and business, as well as the Commonwealth. These mechanisms will enable the Australian Government to be confident of the effective operation of the approval bilateral agreements, without being involved in onerous or detailed oversight of state and territory activities.

Question: *Will the compliance function reside with the bilateral partners? What resources will be available to monitor and audit compliance with approval conditions?*

Answer: The approval bilateral agreements will accredit state and territory approval processes. Compliance activities for these approvals, including allegations of non-compliance with conditions, will be the responsibility of the relevant state and territory government.

Under an assessment bilateral agreement, the Australian Government has responsibility for monitoring and enforcing any Commonwealth approval conditions that are applied following a state or territory assessment. For actions not subject to a process accredited under any bilateral agreement, or where a Commonwealth approval decision has already been made, standard compliance and enforcement measures will apply under the EPBC Act.

Question: *Under the approval bilateral agreements, will the Commonwealth have the power to impose penalties for non-compliance with project approval conditions if the relevant state agencies do not act on a breach?*

Answer: As the jurisdictions will be responsible for the enforcement of project approval conditions under the approval bilateral agreements, the responsibility for imposing penalties for non-compliance will rest with the relevant state or territory agency. Consistent with its ongoing assurance role under the One-Stop Shop reform, the Commonwealth will raise any concerns about the operation of the agreements through the Senior Officers' Committee. Any issues not addressed at that level may be escalated, as discussed above.

Question: *Is there any provision for third party referral on project non-compliance?*

Answer: If an approval bilateral agreement applies, third parties may raise allegations of project non-compliance with the state or territory agency that gave the approval. A person may also apply for a review of decisions in accordance with state or territory law. Under current arrangements, section 475 of the EPBC Act allows third parties to seek an injunction in the Federal Court if they believe that there has been a breach of the Act.

OFFSETS POLICIES

Question: *Is the intention that states will use the EPBC Act environmental offsets tool?*

Answer: The states and territories may use their own environmental offsets tool if the outcomes achieved would be the same or better than those achieved using the EPBC Act offsets tool. For example, the draft Queensland approval bilateral agreement includes a commitment that Queensland will use the EPBC Act Environmental Offsets Policy, or the

Queensland Offsets Policy once the Federal Environment Minister is satisfied that the Queensland policy will deliver an outcome equivalent to, or better than, the outcome that would be achieved if the EPBC Act policy were applied.

Question: *Where the Commonwealth has not recognised a state or territory offset policy under a bilateral agreement, must actions demonstrate compliance with the relevant state or territory offsets policy as well as the EPBC Act policy?*

Answer: As is the case currently, where a state or territory offset policy has not been accredited or endorsed by the Commonwealth, proponents will need to apply the EPBC Act policy to address impacts on MNES. Impacts on matters protected under state or territory law will remain subject to the offsets policy of the relevant jurisdiction.

DATA AND INFORMATION

Question: *Is the data sharing only aimed at state agencies at this stage, or at the public (including environmental consultants) as well?*

Answer: The bilateral agreements being negotiated under the One-Stop Shop for environmental approvals are between the Commonwealth and individual states and territories. However, the open information reforms being proposed under the bilateral agreements are aimed at enduring reform which will provide open access to information to the public. This will improve environmental outcomes and maximise efficiency for business and government, and ensure information on which regulatory decisions are made is fit for purpose.

Question: *What formats will the Commonwealth use to share sensitive mapping with state agencies (e.g. GIS, kmz etc.), given the restrictions on a number of licences?*

Answer: The mode of transfer for sensitive spatial data between agencies is still being determined. The focus at this stage is on providing open access to non-sensitive spatial data about MNES. These data will be downloadable in GIS file format from our spatial repository FED (www.environment.gov.au/fed/catalog/main/home.page). The Department is also trialling publishing web map services and web feature services (WMS/WFS) which can be incorporated into existing systems and/or applications. The Department does not publish kmz format at present but may do so in the future.

Question: *What if proponents are not willing to share their data?*

Answer: Under the draft approval bilateral agreements, the parties will strive to make third parties aware that, as part of conditions of approval, information will be made available to the public under an open licence (preferably Creative Commons). It should be noted that data collected by consultants/proponents is their intellectual property. However, the intent is that the proponent will be encouraged to make information which is not commercially sensitive and which is used to inform decision making (e.g. field surveys, reports etc.) publicly available.

Question: *Will there be metadata for all data, where will the data be kept and who will administer it?*

Answer: Data and information about regulatory matters is administered by each jurisdiction. In the case of the Department, metadata will available for all our datasets through either our

spatial data repository FED (www.environment.gov.au/fed/catalog/main/home.page) or via www.data.gov.au. The Department will continue to administer its datasets relating to MNES.

Question: *How will the Department manage the offsets data? Will quality assurance of the data be the responsibility of the Department or the proponent, and do you envisage any risks?*

Answer: In the interests of transparency the direct offsets secured under the EPBC Act will be made openly accessible to the public via the methods described previously (i.e. downloadable, WMS/WFS services) plus the development of an online map. Though the Department will undertake quality assurance of the offset data supplied by the approval holder, the Department also expects that the approval holder will undertake their own quality assurance of the offset data supplied.

Noting that the only offset information that the Department intends to make publicly available will be for those offsets that have been secured or, under certain circumstances, where the details of the proposed offsets are in already in the public domain (such as strategic assessments), the Department considers this process to be low risk.

Question: *How does the Commonwealth's referrals mapping tool deal with projects have been approved but not progressed? Will such projects be removed from the dataset?*

Answer: The EPBC referrals mapping tool is maintained by the Department to support the EPBC Act regulatory processes. The tool describes where applications under the EPBC Act have been made. It includes all referrals that have been received through the life of the EPBC Act including approved, not approved and withdrawn actions which is in line with the information made publicly available on the Department's website. Projects that have not proceeded will not be removed from the dataset. This is because these projects may be progressed at a later date provided that the EPBC Act approval has not lapsed.

Question: *When will the policy regarding the publication of data on national sensitive species be available for consultation?*

Answer: The Department recognises the need to avoid the potential adverse effects of publishing sensitive data. Most state and territory conservation agencies have protocols by which they apply sensitivity rules, however, there are different approaches applied by different jurisdictions.

The Department is working with the Atlas of Living Australia to harmonise approaches to managing sensitive species, potentially including a national sensitive data policy. A workshop with state and territory biodiversity data managers is proposed to discuss this issue. It is anticipated that a draft policy will prepared for public comment in the latter half of 2015.

JURISDICTION-SPECIFIC QUESTIONS

Question: *How is the working relationship between the Queensland and Federal Governments in terms of making the One-Stop Shop work efficiently?*

Answer: Queensland and the Commonwealth share a commitment to reducing the regulatory burden on business while maintaining high environmental standards. Queensland has actively engaged with the One-Stop Shop reform by aligning legislation, policy and practice with Commonwealth environmental standards. For example, Queensland has amended its legislation to include decision-making criteria which mirror the EBPC Act requirements that

apply to the Federal Environment Minister when accrediting a state authorisation process. Queensland has also amended legislation to allow conditions to be attached to approval decisions to protect MNES, and to allow for judicial review of approval decisions. The Commonwealth is committed to working with the new Queensland Government to further strengthen intergovernmental cooperation and explore additional streamlining measures.

Question: *When is an approval bilateral agreement planned to be signed and implemented in Victoria?*

Answer: Discussions with Victoria on the One-Stop Shop reform are ongoing. The Victorian Government has committed to reviewing Victorian planning and environmental laws. This could provide an opportunity to further align and streamline the environmental approval processes and broaden the scope of Victorian legislation that can be accredited under the EPBC Act. The Australian Government will work with the new Victorian Government in 2015 to progress the negotiation of an approval bilateral agreement.

OTHER QUESTIONS

Question: *What assurances are in place that the states and territories will have the expertise to undertake a sufficiently rigorous assessment?*

Answer: Under the One-Stop Shop, the Australian Government will retain responsibility for ensuring that the outcomes of the EPBC Act are met. The approach taken in developing the agreements means that only those processes that meet EPBC Act requirements, and adequately and comprehensively assess MNES, have been considered for accreditation. The Australian Government has also developed a strong assurance framework to enable it to be confident in the effective operation of the One-Stop Shop.

To further build state capacity, the Australian Government has offered to embed staff in state and territory agencies to ensure that implementation occurs as smoothly and as quickly as possible. The Australian Government will continue to provide guidance and states will be able to seek advice from the Commonwealth.

Question: *How are referral fees affected and where do these funds get used?*

Answer: Cost recovery fees are detailed in the EPBC Regulations available on the Federal Register of Legislative Instruments at www.comlaw.gov.au. A detailed list of applicable fees is also available in the final Cost Recovery Implementation Statement that is published on the Department's website at www.environment.gov.au/epbc/publications/final-cost-recovery-cris. As cost recovery applies only to assessment work done by the Commonwealth, it is a matter for state and territory governments as to whether they implement cost recovery under the One-Stop Shop.

Cost recovery is the charging of a fee to cover the cost of specific services provided by the Australian Government for work that benefits particular groups or individuals. Cost recovery fees are paid to the Department and form a part of the Department's funding to conduct assessment activities.

Question: *Is there an opportunity for greater involvement of environmental practitioners to assist in the development of credible applications, provide advice etc. as part of the One-Stop Shop?*

Answer: The specific role of environmental practitioners in environmental assessments will continue to be a matter for project proponents and the jurisdictions. The most significant difference is that it will be the states and territories undertaking the assessments and making approval decisions rather than the Commonwealth. For environmental practitioners, this will make it easier to navigate assessment processes.

The bilateral agreements provide for information sharing between jurisdictions and open access to environmental data, wherever possible. These measures are intended to assist governments and environmental practitioners in undertaking environmental impact assessments.