Urban Taskforce
AUSTRALIA

Reforming federal environment legislation

Submission to the independent review of the
Environment Protection and Biodiversity Conservation Act 1999.

19 December 2008

Urban Taskforce Australia Ltd. ABN: 21 102 685 174 | GPO Box 5396 Sydney NSW 2001
T 612 9238 3955 | F 612 9222 9122 | Level 12, 32 Martin Place Sydney NSW | Level 6, 39 London Circuit, Canberra ACT
admin@urbantaskforce.com.au | www.urbantaskforce.com.au

Contents

The **Urban Taskforce** is an industry organisation representing Australia's most prominent property developers and equity financiers. Our membership also includes key infrastructure providers, economists, planners, architects and lawyers involved in property development. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with both government and the community.

Executive Summary

The Urban Taskforce supports efforts to properly manage environmental resources and the pursuit of ecologically sustainable development. However, we also argue for the elimination bureaucratic duplication and red tape. Australia needs a more efficient approvals process for urban development if our nation is to get the housing, commercial, retail and industrial development it needs.

There are many instances where proposals become subject to assessment and approval pursuant to state and Commonwealth legislation. For example, 25 per cent of referrals made under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) relate to urban development and all of these urban development projects are subject to both state and federal approval requirements.[1] This duplication in assessment and approval is an inefficient use of resources and adds unnecessary time delay to the approval process. We believe that the substantive benefits are this additional layer of federal approval in relation to urban development is minimal, and possibly non-existent.

The objectives of the EPBC Act are long, repetitive and it is unclear how these conflicting and overlapping concepts are intended to be melded together. We ask that the objects of the Act be simplified to reflect the primacy of ecologically sustainable development as the rationale for the Act. The text of the Act and its administration should also be refined to ensure that regard is given to economic and social considerations as well as environmental considerations.

The EPBC Act is unusual piece of legislation, in that it is cloaked in the language and style of a natural resource management law but has increasingly assumed the role of federal town planning legislation. The difficulty that arises with omnibus legislation of this kind is that a decision-making approach that is appropriate for protected area, such as a world heritage site, is inappropriate when dealing with a request to carry out an activity on private land.

We recommend that the federal government consider either splitting the EPBC Act into two pieces of legislation, or at least dividing the administration of the legislation, so that the approvals process for infrastructure and urban development is more properly considered a matter of town planning rather than natural resources management.

Bilateral agreements have been reached where state driven environmental assessment processes are recognised as meeting Commonwealth environmental requirements and are sufficient to deal with matters of national environmental significance.[2] However, unless an "approvals bilateral" has been reached, there is still a need for *two approvals*, one from the state-based planning authority and the other from the Commonwealth.

For most urban development projects, this is an unfortunate, costly, time-wasting and pointless requirement. Section 46 of the Act provides for an "approval bilateral", under which the Commonwealth may effectively delegate the approval role to a state. The Urban Taskforce asks that the review support the broader application of section 46 through the

[1] *Independent Review of the Environmental Protection and Biodiversity Conservation Act 1999: Discussion Paper*, Australian Government Department of the Environment, Water, Heritage and the Arts 17.
[2] Although disappointingly, appropriate agreements have not yet been finalised with Victoria or the Australian Capital Territory.

development and implementation of an "approvals bilateral agreement" for urban development generally.

There is an increasing overlap between the state heritage sites/protected areas listed under the state legislation and the national and world heritage sites listed under the EPBC Act. This dual listing requires development proponents to go through an extensive process to satisfy state officials, and then usually, an additionally extensive process to satisfy federal officials. There is a tendency for each group of officials who become involved to want to "add something" to the process. An applicant will be forced into a series of compromises in order to meet the expectation of state officials, only to find that federal officials expect a further round of compromises. This kind of layered arrangement penalises applicants who make early and substantial concessions in order to protect the environment or heritage and reward applicants who engage in 'gaming'.

We ask that duplicated listing regimes be abolished. This means that all "lower order" heritage, state reservation or threatened species listings should automatically lapse when an equivalent Commonwealth listing is made.

The use of offsets helps to overcome the repeated conflict between property development and conservation so there are both:

- improved outcomes for biodiversity overall; and
- the social and economic needs of the community are still addressed.

Offset schemes, such as biodiversity banking, have been very successful in achieving balanced conservation outcomes in the United States. Land owners and developers can value the conservation attributes of their land. So instead of being seen as a liability, the conservation of a threatened species can now be valued by landowners.

The EPBC Act should automatically recognise state offset and biobanking schemes both when decisions are made as to whether an activity is a "controlled action" *and* at the approval stage. Without such recognition, innovative policies, such as biobanking, are unlikely to succeed.

Since the beginning of this year there has been some worrying interaction between state and Commonwealth departments, including administrative interference on the part of the Commonwealth and confusion of due process. These occurrences are not warranted, and are placing increased demands on limited resources. The interventions risk introducing unacceptable time delays without making any real improvement to assessments or environmental protection. We recommend improvements to the administrative process to overcome these problems.

Recommendations

- The objects of the EPBC Act should be simplified to reflect the primacy of ecologically sustainable development as the rationale for the Act.
- The text of the Act and its administration be refined to ensure that regard is given to economic and social considerations as well as environmental considerations.
- We recommend that the federal government consider either splitting the EPBC Act into two pieces of legislation, or at least dividing the administration of the legislation, so that the approvals process for infrastructure and urban development is more properly considered a matter of town planning rather than natural resources management.
- Duplicated listing regimes should be abolished. This means that all "lower order" heritage, state reservation or threatened species listings should automatically lapse when an equivalent Commonwealth listing is made.
- The Commonwealth should also delegate full approval authority for urban development to state officials (along with any policy guidance the federal government wants to give) so that land use decisions can be made on an integrated basis (that is, all biodiversity

issues, community amenity issues, social and economic issues can be considered together).

- The EPBC Act should automatically recognise state offset and biobanking schemes both when decisions are made as to whether an activity is a "controlled action" *and* at the approval stage.
- In the interest of improved administrative efficiency, the Commonwealth Department of Environment, Water, Heritage and the Arts should refrain from interfering in the assessment process when an "assessment bilateral agreement" is in place.
- The Commonwealth Department of Environment, Water, Heritage and the Arts should liaise with state planning departments on EPBC Act assessment and approval matters, and allow liaison with state environmental agencies to be handled by the state planning departments.
- The Commonwealth also advise state planning authorities of any of its requirements for environmental assessment at an early stage so these requirements may be included as part of the state requirements.
- If the Commonwealth is concerned with the content of advertisements relating to controlled activities, instead of requesting that all advertisements be referred for approval, the Commonwealth should simply develop a standard advertisement template that must be used by all state and local governments when advertising this class of development.
- Standard conditions that meet the EPBC Act requirements would progress the assessment and approval process if used in conjunction with an "approvals bilateral agreement" for urban development.

1. Introduction

The Urban Taskforce is pleased to make this submission as part of the Commonwealth's independent review of the *Environment Protection and Biodiversity Conservation Act 1999*. We congratulate the government for initiating this review.

The Urban Taskforce supports efforts to properly manage environmental resources and the pursuit of ecologically sustainable development. However, we also argue for the elimination bureaucratic duplication and red tape. Australia needs a more efficient approvals process for urban development if our nation is to get the housing, commercial, retail and industrial development it needs.

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the Australian Government's "environmental" legislation. This legislation provides the legal framework to protect nationally and internationally important flora, fauna, ecological communities and heritage places. These are defined by the Act as matters of "national environmental significance".

The states also have legislation that seeks to protect the environment and/or promote ecologically sustainable development.[3] State legislation allows development to proceed as long as it does not lead to an unacceptable impact on the natural, built, social or economic environments. The Act also requires that ecologically sustainable development be considered as part of the decision making process. While often criticised, there is no doubt that the state legislation is robust and able to ensure environmental protection in the decision making process. Decisions under state legislation are sometimes attacked by all sides in a debate, including environmental lobby groups and anti-development community activists. The criticisms advanced by the latter groups are often motivated by unhappiness with the

[3] In NSW the primary legislation addressing land use, management and the promotion of ecologically sustainable development is the *Environmental Planning and Assessment Act 1979*. In Queensland it is the *Integrated Planning Act 1997*. In Victoria it is the *Planning and Environment Act 1987*.

substance of the final decision, rather than the quality of the environmental assessment that has informed that decision.

There are many instances where proposals become subject to assessment and approval pursuant to state and Commonwealth legislation. For example, 25 per cent of referrals made under the EPBC Act relate to urban development (16 per cent residential development and 9 per cent urban development).[4] All of these urban development projects are subject to both state and federal approval requirements. At a state level, the approval process is led by a planning authority, but typically involves approval/consultation with environmental agencies, fire services, roads authorities, water utilities, energy utilities and others.

This duplication in assessment and approval is an inefficient use of resources and adds unnecessary time delay to the approval process.

In a 2006 report commissioned by the government-backed Australian State of the Environment Committee, a number of projects were nominated by then Department of the Environment and Heritage to illustrate the effectiveness of the EPBC Act. None of the case studies reviewed by the paper related to urban development projects, despite the fact that one quarter of EPBC Act referrals relate to urban development.[5] **We believe that the substantive benefits are this additional layer of federal regulation in relation to urban development is minimal, and possibly non-existent.**

2. The purpose of the Act

The objectives of the EPBC Act are set out in section 3. They are long, repetitive and it is unclear how these conflicting and overlapping concepts are intended to be melded together.

For example, section 3(1)(a) says the Act is

> ... to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance ...

"Environment" has a special meaning under the Act and is defined to include:

(a) ecosystems and their constituent parts, including people and communities; and

(b) natural and physical resources; and

(c) the qualities and characteristics of locations, places and areas; and

(d) heritage values of places; and

(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).[6]

So it is difficult to see what value section 3(1)(c) of the Act adds, when it says the Act is also

> to promote the conservation of biodiversity ...

Surely the protection of ecosystems, and their constituent parts (as provided by section 3(1)(a)) already provides for this?

In any event, both section 3(1)(a) and 3(1)(c) are rendered redundant by section 3(1)(b) which provides that the Act is

---

[4] *Independent Review of the Environmental Protection and Biodiversity Conservation Act 1999: Discussion Paper*, Australian Government Department of the Environment, Water, Heritage and the Arts 17.
[5] Chris McGrath, *Review of the EPBC Act* (2006).
[6] Section 528.

to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources ...

Section 3A of the EPBC Act sets out the principles of ecologically sustainable development which this object invokes:

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c) the principle of intergenerational equity-that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(e) improved valuation, pricing and incentive mechanisms should be promoted.

It is difficult to see how section 3(1)(a) or 3(1)(c) add anything to the objectives of the Act, when section 3(1)(b) is present and is expanded upon by section 3A.[7]

Even section 3(1)(b) is tautological in its own right because "ecologically sustainable development" is said to be achieved through the "conservation and ecologically sustainable use of natural resources". "Ecologically sustainable development" and "ecologically sustainable use of natural resources" are self-evidently synonyms. Furthermore the addition of the word "conservation" adds nothing when section 3(1)(b) is read in conjunction with the definition of "ecologically sustainable development" in section 3A.

Additionally, the concept of "ecologically sustainable development" is a more robust policy concept than the simplistic statement that the act is about "protection" (section 3(1)(a)) or "conservation" (section 3(1)(c)). An act is merely about "protection" if it generally prohibits harm to a particular species.[8] If the Act was primarily about protection, there could be no justification for allowing any damage to the environment unless it was warranted by reference environmental benefits alone. For example, a proposal to cut down several trees to build a new business park involves damage to the environment (the destruction of the trees). However, in practice, the business park may still be approved because the trees may be easily replaced by new plantings and the business park may offer significant social and economic benefits to the community.

In reality the EPBC Act sets up a system where approvals are required and are routinely issued even though some impact on the environment is anticipated. The question is not whether there will *an impact* on the environment but whether *the impact* is acceptable in the light of the social, economic and environmental benefits that may arise from a given activity.

In fact the Act is about, or should be about, balancing the different social, economic and environmental needs of the community in a single decision-making process. Hence section 3(1)(b) is the purpose that most appropriately sets out the rationale of the Act, and (1)(a) and (1)(c) could be omitted, or more clearly related to those sections of the Act that deal with Commonwealth reserves and import/export of wildlife.

Section 3(1)(d) says the Act is about promoting

[7] Remembering that section 3A in turn uses the term "environment" - which is very broadly defined.
[8] See, for example, the *National Parks and Wildlife Act 1974* (NSW) s112G.

> a co-operative approach to the protection and management of the environment involving governments, the community, landholders and indigenous peoples ...

This is broadly phrased and very inclusive, so it is unclear why there is a need for section 3(1)(f) and 3(1)(g).

Section 3(2) makes a series of assertions about the Act. Several assertions have one or more of the following characteristics:

- they undermine the objectives in section 3(1);
- they are not supported by the text of the Act; and/or
- they are not carried out, in practice.

Section 3(2)(a) says the Act

> recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas ...

However this statement weakens the principle of ecologically sustainable development by involving the Commonwealth in the approval process but limiting the Commonwealth's mandate to "matters of national environmental significance". This discourages the Commonwealth from making decisions that integrate economic and social considerations together with environmental considerations in a single decision-making process (as is required by the principles of ecologically sustainable development). For example, a state government may have both carefully planned the growth of housing in a region and also balanced the economic and social benefits of increasing the supply of housing against the environmental costs of increasing the urban footprint. It has adopted the strategy, but the Commonwealth may not recognise the finality of the strategy and instead focuses on a narrow range of environmental matters without considering the broader social and economic issues connected with the need to supply housing to the region.

Section 3(2)(b) and (c) says the Act

> strengthens intergovernmental cooperation, and minimises duplication, through bilateral agreements ... and ... provides for the intergovernmental accreditation of environmental assessment and approval processes ...

Yet, as is discussed later in this submission, no broad-based bilateral agreements have been reached to allow states to undertake an approval role. This has *increased* intergovernmental confusion and *increased* duplication.

Section 3(2)(d) says that the Act

> adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed ...

The efficiency and timeliness of the Act are undermined by institutional arrangements that divide the authority for approvals for routine urban development between two levels of government. In doing so there is a risk that one level of government (namely the Commonwealth) will not fully consider the full range of social and economic issues. Investment confidence in new urban development opportunities is already being undermined by policy conflicts between the state and federal government. For example, there is a lack of federal recognition for:

- offsets when decisions about "controlled actions" are made; and
- biodiversity banking schemes at both a "controlled actions" stage and approvals stage.

The fact that the Commonwealth has an approval role but does not endorse holistic strategies weakens investor confidence in state land release policies.

In short, **we recommend that:**

- **the objects of the Act be simplified to reflect the primacy of ecologically sustainable development as the rationale for the Act**;
- **the text of the Act and its administration be refined to ensure that regard is given to economic and social considerations as well as environmental considerations**; and
- **that approvals be issued by a single jurisdiction (states) in relation to urban development.**

3. Institutional arrangements within the federal government

The EPBC Act is unusual piece of legislation, in that it is cloaked in the language and style of a natural resource management law but has increasingly assumed the role of federal town planning legislation. In one breath it is addressing high level issues such nuclear activity, world heritage areas, Commonwealth marine protected areas, and in the next breath it is regulating urban land release in the Hunter region of NSW.

The difficulty that arises with omnibus legislation of this kind is that a decision-making approach that is appropriate for protected area, such as a world heritage site, is inappropriate when dealing with a request to carry out an activity on private land.

For example, in a world heritage area, the emphasis is rightly on protection alone. By designating areas as world heritage, the community as a whole has already taken the decision that in that particular area, the community's best interests are served by elevating protection above all other considerations. There is no need for a nuanced balancing of competing social, economic and environmental issues in such an area. However, in relation to private land, *there is* a need to consider not only the legitimate interests of the private land holder but also the need to satisfy social and economic goals articulated through state and regional strategies and the need to promote investment certainty and confidence.

At a state level this problem has been managed by segregating protected area management legislation, policy and administration from the state town planning authorities.

We recommend that the federal government consider either splitting the EPBC Act into two pieces of legislation, or at least dividing the administration of the legislation, so that the approvals process for infrastructure and urban development is more properly considered a matter of town planning rather than natural resources management.

4. Removing the duplication of approvals

The independent review has sought comment on the assessments and approvals system of the EPBC Act.

The Urban Taskforce has grave concerns with government processes that duplicate and overly complicate the environmental assessment and approvals. Urgent legislative reforms are required for a more efficient and transparent system.

We note that the Commonwealth and state governments have, *at least in principle*, reduced some of the duplication. Bilateral agreements have been reached where state driven environmental assessment processes are recognised as meeting Commonwealth environmental requirements and are sufficient to deal with matters of national environmental

significance.[9] Therefore the opportunity exists for the completion of one environmental assessment that meets both the State and Commonwealth legislative requirements. This is occurs by way of bilateral agreement between the Commonwealth and states. However, unless an "approvals bilateral" has been reached, there is still a need for *two approvals*, one from the state-based planning authority and the other from the Commonwealth Minister for the Environment, Heritage and the Arts.

For most urban development projects, this is an unfortunate, costly, time-wasting and pointless requirement. If the Commonwealth has agreed to accept that state environmental assessment processes are sufficiently comprehensive and able to ensure robust environmental assessment, then surely the Commonwealth must acknowledge that the same system is capable of "following through" to provide a transparent and justifiable approval.

The EPBC Act allows for such a system. Section 46 of the Act provides for an "approval bilateral", under which the Commonwealth may effectively delegate the approval role to a state. In other words, similar to the assessments agreements, the Commonwealth Minister for the Environment, Heritage and the Arts agrees to recognise state approval process as meeting the requirements of the EPBC Act under certain conditions. Unfortunately while there are a number of "assessments bilateral" in place, there is just one "approvals bilateral" applying specifically to the Sydney Opera House.

The benefits of a more integrated approach are clearly demonstrated through the consideration of two case studies.

Bondi Beach – Case Study

On 25 January 2008, Bondi Beach was listed as a site of "national heritage significance". No one would dispute that Bondi is a place of heritage value to the nation. Appropriately, the listing does not include private property and is confined to the beach, water and surrounding public foreshore. However, the implications for proponents seeking approval for development within or near the listed area is significant.

The beach and foreshore is currently managed by the local council. If the council thought that there was a need for improvements to the Bondi pavilion or car parks, such development could trigger the need for an approval under the EPBC Act. This is unnecessary as these activities are extensively considered under state and local planning requirements. The beach is loved by Sydneysiders generally and Eastern Suburbs residents in particular. The local council and the NSW Government are far more directly accountable (than the Federal Government) to those who are most passionate about the beach's protection. It is impossible to imagine what development might have been approved under local and state processes within the national heritage area which will now be forbidden. On the other hand it is possible to see the increase in red tape that the national heritage listing (in the absence of an approvals bilateral) will have on the simplest of development activity within the Bondi Beach heritage area.

Of even greater concern is the potential impact that this listing could have on development of private property in the vicinity of Bondi Beach. Though private property is not listed, the EPBC Act requires that development in the vicinity of a listed site, that may have a significant impact on the values of the site, may be defined as a "controlled action". This makes that activity subject to the approval process under Commonwealth legislation. In this situation there is a need for two approvals – one from either the state government or the local council, and the second from the Commonwealth Minister.

The Commonwealth Department of Environment, Water, Heritage and the Arts could find that it is drawn into state planning approval processes for development in the vicinity of Bondi Beach. Not only is this an unnecessary duplication of process, it is also a misalignment of objectives. That is, the local/state planning authorities are in the best position to deal with the holistic assessment of development proposals. Unlike the Commonwealth Department of

[9] Although disappointingly, appropriate agreements have not yet been finalised with Victoria or the Australian Capital Territory.

Environment, Water, Heritage and the Arts, state planning authorities must integrate their decision-making processes. That is, they cannot focus on a single issue. State planning authorities must fully integrate environmental, social and economic impacts when considering a proposal.

Clearly this situation is less than ideal. Surely the Commonwealth does not wish to engage in the day-to-day management of Bondi Beach or become embroiled in local land use and development approval processes.

The existing legislation provides the opportunity to avoid this situtaion and, as demonstrated in the following example, can enable efficient and transparent assessment and approval of development within or in the vicinity of listed areas.

Sydney Opera House – Case Study

The most appropriate means of ensuring that development assessments are able to proceed efficiently, while managing the tension that exists between environmental protection and the need for development, is the implementation of an "approvals bilateral" as permitted under section 46 of the EPBC Act.

In the case of the Sydney Opera House a management plan was developed in accordance with world heritage and national heritage management principles. The preparation of the plan was rigorous and the Commonwealth Minister is in the position to accredit the plan under the EPBC Act.

Once a plan of management has been approved and the Commonwealth and state ministers sign an "approvals bilateral agreement", no duplicate approval is required from the Commonwealth under the EPBC Act.

The advantage of following this process is that it engages the Commonwealth in the development of appropriate environmental protection system which is then to be used by the appropriate state minister when making a development determination. The preparation of such a plan binds the State so that approvals of development inconsistent with the plan cannot be granted.

It must be noted that entering into an "approvals bilateral agreement" does not exclude the Commonwealth. States must notify the Commonwealth of all proposed actions that will have or are likely to have significant impacts on the site.

Currently the Opera House "approvals bilateral agreement" is the only such agreement in existence, however the opportunity does exist for the development of a more generic approvals bilateral for urban development across the board.

The Urban Taskforce asks that the review support the broader application of section 46 through the development and implementation of an "approvals bilateral agreement" for urban development generally.

5. Reducing duplication between listing regimes

It is obvious that there is an increasing overlap between the State heritage sites/protected areas listed under the state legislation and the national and world heritage sites listed under the EPBC Act. For example, in NSW national and world heritage sites are also protected under state law through either:

- a listing the site on the NSW State Heritage Register (SHR); or
- the site being protected as a park or reserve under the *National Parks and Wildlife Act 1974*.

Similarly, there are threatened species that are both nationally listed, and listed at a state level. For example, Cumberland Plain Woodland is listed as an endangered ecological community under both the *Threatened Species Conservation Act 1995* (NSW) and the EPBC Act.

This dual listing requires development proponents to go through an extensive process to satisfy state officials, and then usually, an additionally extensive process to satisfy federal officials. There is a tendency for each group of officials who become involved to want to "add something" to the process. An applicant will be forced into a series of compromises in order to meet the expectation of state officials, only to find that federal officials expect a further round of compromises. This kind of layered arrangement penalises applicants who make early and substantial concessions in order to protect the environment or heritage and reward applicants who engage in 'gaming'.

We ask that duplicated listing regimes be abolished. This means that all "lower order" heritage, state reservation or threatened species listings should automatically lapse when an equivalent Commonwealth listing is made.

For example, once land is listed as a world heritage area, any lower order reservation in existence (such as a prior national park reservation) should lapse in favour of the new higher order listing. A subsequent lower level re-listing would be prohibited so long as the higher level listing is in place. This would also mean a state or local council heritage listing would automatically lapse if a site is listed as a national heritage site under the EPBC Act.

For example, in relation to Cumberland Plain Woodland, the existence of the national listing would remove the need for a separate state listing and the state listing would lapse.

Once the current system of multiple, overlapping listings is abolished, the confusing and conflicting mandate for multiple teams of federal and state officials to be involved on the same issue is removed. This does not mean, for example, that state officials may not become involved in protecting a nationally listed threatened species. However, if they do so, it should only be as the delegates of the Australian Government with the full authority to issues approvals in their own right (without seeking the approvals of the Federal Government). If the Australian Government does not want to delegate approving authority state officials should have no involvement in relation to the issues concerned.

Our preference would be that, along with the abolition of dual state/federal listings, **the Commonwealth should delegate full approval authority for urban development to state officials (along with any policy guidance the federal government wants to give) so that land use decisions can be made on an integrated basis** (that is, all biodiversity issues, community amenity issues, social and economic issues can be considered together).

6. Offsets

The use of offsets helps to overcome the repeated conflict between property development and conservation so there are both:

- improved outcomes for biodiversity overall; and
- the social and economic needs of the community are still addressed.

Offset schemes, such as biodiversity banking, have been very successful in achieving balanced conservation outcomes in the United States. Land owners and developers can value the conservation attributes of their land. So instead of being seen as a liability, the conservation of a threatened species can now be valued by landowners.

In NSW the biodiversity banking proposal put forward by the Department of Environment and Climate Changes (DECC) is innovative and seeks to provide certainty for industry upfront. One of the last hurdles remaining to the successful implementation of the NSW biodiversity banking scheme is the relationship between approvals under the state's *Environmental Planning and Assessment Act* and the EPBC Act. The independent operation of these two acts means that when there are threatened species or endangered communities listed under both acts, dual approval is required. In particular, there is no consideration of offsets under the biodiversity banking scheme at to the point of deciding whether a particular activity is at a "controlled action" or possibly even at the later approval stage.

We understand that the DECC has commenced negotiations with the Commonwealth Department on this matter but little progress has been made.

Similarly, in the growth centres of Western Sydney, new housing developments will not be subject to state environmental laws that protect endangered plants and animals. This is because the NSW government has assessed the environmental value of the areas (in which up to 181,000 homes will be built) at the *regional* planning stage rather than assessing threatened species in relation to individual housing developments. The *regional* assessment led to "biodiversity certification" being granted to the growth centres environmental planning policy. The decision will speed up planning decisions and make homes more affordable.

As part of the "biodiversity certification" process, the government committed to a comprehensive program of offsets - with $530 million to protect 3,800 hectares of native bush in Sydney's west. Even though this money will target the largest, most intact remains of Cumberland Plain Woodland for permanent protection, the whole arrangement is not recognised under the EPBC Act for the purposes of deciding whether or not a development is a "controlled action".

The EPBC Act should automatically recognise state offset and biobanking schemes both when decisions are made as to whether an activity is a "controlled action" *and* at the approval stage. Without such recognition, innovative policies, such as biobanking, are unlikely to succeed.

7. Improvements in the administrative processes

There is no doubt that "assessments bilateral agreements" have the potential to free up resources and introduce major efficiency gains while providing a robust assessment of environmental impact. Currently there exists six "assessments bilateral agreements" between the Commonwealth and the states including NSW, Queensland, Tasmania, Western Australia South Australia and Northern Territory and until recently, their implementation has provided relatively good assessment outcomes.

Since the beginning of this year there has been some worrying interaction between state and Commonwealth departments, including administrative interference on the part of the Commonwealth and confusion of due process. These occurrences are not warranted, and are placing increased demands on limited resources. The interventions risk introducing unacceptable time delays without making any real improvement to assessments or environmental protection.

7.1 Administrative interference

Unwarranted interference and slow response to requests for input is lengthening state assessment times for development proposals and making it virtually impossible to meet statutory timelines. For instance, we understand that the Department of Environment, Water, Heritage and the Arts is requesting that advertisements for development proposals that are subject to EPBC Act control be referred to them for approval prior to being placed in a newspaper. This is unnecessary given that the state planning departments use advertisement templates to ensure that EPBC Act requirements are met.

Furthermore (for example), in NSW the Commonwealth is provided with an opportunity to add to the "director-general's requirements" for the matters to be considered/included in environmental assessments. While this opportunity exists, the Commonwealth has been slow in providing its requirements, again impacting on statutory timelines.

The Urban Taskforce is aware of interference similar to that outlined above at the local level. The Commonwealth has made requests to local councils to approve advertisements, review draft assessment reports prior to the recommendation report being prepared on the issue.

The existence of the "assessments bilateral" is designed to limit the need for this type of interference. Currently, by stepping outside of the bilateral agreement, confusion as to appropriate process is being introduced.

In the interest of improved administrative efficiency, the Commonwealth Department of Environment, Water, Heritage and the Arts should refrain from interfering in the assessment process when an "assessment bilateral agreement" is in place.

7.2 Failure to recognise state planning departments as the contact point

The bilateral assessment agreements between the states and the Commonwealth accredit state planning processes as meeting Commonwealth requirements for determining the test for adequacy for an environmental assessment. However, it seems that within the last 12 months, officers of the Department of Environment, Water, Heritage and the Arts have commenced making direct contact with state environmental agencies (rather than state planning agencies) to seek additional information and/or expert advice on whether a referral to the Commonwealth Department is a "controlled action".

There seems to be a lack of recognition within the Department of Environment, Water, Heritage and the Arts that their counterpart at a state level is the appropriate planning department.[10] This misconception arises, in part, from the federal department's assumption of both the roles of planning authority and an environment agency, with the latter role apparently dominating. Federal officers appear to perceive state planning authorities (incorrectly) as pro-development when, in fact, they act as independent regulators, balancing development with the need for appropriate community and environment protection.

The Commonwealth Department of Environment, Water, Heritage and the Arts should liaise with state planning departments on EPBC Act assessment and approval matters, and allow liaison with state environmental agencies to be handled by the state planning departments.

7.3 Other improvements to existing "assessments bilateral agreements"

In the interest of harmonising state and Commonwealth legislation, the introduction of the simple initiatives as outlined below would help improve assessment times and enable state and local governments to meet statutory timelines while still meeting EPBC Act requirements.

A proponent is required to notify the Department of Environment, Water, Heritage and the Arts of a controlled action. The Department would normally advise the state or local government of this notification. **It would be appropriate that the Commonwealth also include its requirements for environmental assessment at this early stage so these requirements may be included as part of the state requirements.**

If the Commonwealth is concerned with the content of advertisements relating to controlled activities, instead of requesting that all advertisements be referred for approval, **the Commonwealth should simply develop a standard advertisement template that must be used by all state and local governments when advertising this class of development**.

A further improvement to the existing system could involve the Commonwealth taking the lead and issuing standard conditions of approval. **Standard conditions that meet the EPBC Act requirements would progress the assessment and approval process if used in conjunction with an "approvals bilateral agreement" for urban development.**

[10] For example, the NSW Department of Planning, the Victorian Department of Planning and Community Development and the Queensland Department of Infrastructure and Planning.

8. Further information

The Urban Taskforce is available to further discuss the issues outlined in this submission.

Please contact:

Aaron Gadiel
Chief Executive Officer
Urban Taskforce Australia
GPO Box 5396
SYDNEY NSW 2001

Ph: (02) 9238 3955

E-mail: admin@urbantaskforce.com.au