Submission to the Senate Environment and Communications Legislation Committee Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation and Cost Recovery) Bills 2014

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The Business Council of Australia (BCA) brings together the chief executives of more than 100 of Australia’s leading companies, whose vision is for Australia to be the best place in the world in which to live, learn, work and do business.

About this submission

This is the BCA’s submission to the Senate Environment and Communications Legislation Committee 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. The BCA is making this submission as many of our member companies will be directly impacted by the proposals.

Key points

- The BCA supports maintaining Australia’s environmental regulatory standards while at the same time streamlining their operation and effectiveness.
- The ‘water trigger’ should be repealed from the Environment Protection and Biodiversity Conservation Act (EPBC Act) as it duplicates state and territory regulatory arrangements.
- While the water trigger remains part of the EPBC Act, the Commonwealth should have the power to accredit state and territory processes that meet environmental standards for the purposes of approvals and assessments in relation to the water trigger.
- The changes made in the EPBC Amendment (Bilateral Agreement Implementation) Bill 2014 will contribute to maintaining or improving environmental outcomes while removing some procedural technicalities.
- The timing of the implementation of the cost recovery proposals is questionable given the broader reforms of the EPBC Act which are currently underway.
- Implementation of cost recovery should adhere to the Department of Finance’s Cost Recovery Guidelines:
  - cost recovery should reflect efficient costs
  - cost recovery should not be undertaken for processes which are duplicative.
- Cost recovery for strategic assessments is problematic due to the difficulty in establishing clear private benefits, substantial spillover benefits, and difficulty in establishing an efficient price as a result of the unique nature of each assessment.

Key recommendations

- The Commonwealth Government should continue to work collaboratively and cooperatively with the states and territories to effectively implement the streamlining of approvals processes.
- This should include the government putting in place an administrative framework to ensure that approval bilateral agreements remove duplication while maintaining environmental outcomes.
- The water trigger should be repealed from the EPBC Act as it duplicates state and territory regulatory arrangements.
- While the water trigger remains part of the EPBC Act, the Commonwealth should have the power to accredit state and territory processes that meet environmental standards for the purposes of approvals and assessments in relation to the water trigger.
- The proposed cost recovery regime should be deferred until the outcomes of the current reform process associated with the EPBC Act are known to the Commonwealth.
- The final cost recovery regulation should make explicit that the Commonwealth will not seek to undertake cost recovery for processes undertaken by the states and territories.
• Cost recovery should be consistent with an efficient price and process. This means that the prices should be based on the minimum costs necessary to deliver the product and still maintain quality over time.

• Cost recovery of strategic assessments should only be undertaken where it can be demonstrated that the benefits arising from the assessment are largely private.

• The Cost Recovery Guidelines should be amended to include advice on how to handle cost recovery proposals when the regulatory activity is the subject of pending reform processes.

**Detailed comments**

The BCA welcomes this opportunity to provide a submission in relation to both the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 and the Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014.

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

**Streamlining of processes**

The BCA recognises the important role of maintaining Australia’s sound environmental regulatory standards.

We have been critical of the duplication of environmental regulation between the Commonwealth Government and the states and territories. There does not need to be a trade-off between environmental outcomes and attempts to reduce regulatory burden. Numerous BCA submissions and reports have demonstrated how the burden of environmental regulation can be reduced at no cost to the environment.

We therefore support measures that will result in the regulatory standards associated with the EPBC Act being streamlined and becoming more outcomes focused.

The government’s plans to establish a one-stop-shop for environmental approvals can remove double handling of environmental approvals at no cost to environmental outcomes.

The Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 will ensure that the accreditation of state government environmental approvals processes by way of bilateral agreements is done on the basis of maintained or improved outcomes, rather than on the basis of procedural technicalities.

**Schedule 1**

The BCA supports the amendments to make clear that a referral to the Commonwealth is not required if a project is declared under a bilateral agreement. This will remove an administrative step that has been made redundant by the accreditation process.

In doing so it will remove a potential source of delays to assessments and approvals.

As with all aspects of the bilateral agreement, close administrative cooperation will be required between the Commonwealth and states to implement bilateral agreements in a way that ensures referral decisions at the state level are consistent with those that would have been made at the Commonwealth level.

Embedding Commonwealth officers in relevant state agencies to support the transition will be critical. The Commonwealth should work closely with the states and territories to put in place an administrative framework to ensure approval bilateral agreements remove duplication while maintaining environmental outcomes.
Schedule 2
Consistent with our comments on Schedule 1, we support the provisions which allow the Commonwealth to efficiently assess and approve projects should a bilateral agreement cease to cover the project.

Administrative arrangements will need to be made to facilitate such a transition, particularly where an assessment has already commenced, and where a state may continue with its own process.

Schedule 3, Part 1
The BCA continues to hold the position that the water trigger should be fully repealed from the EPBC Act as it duplicates state government processes, runs counter to the design philosophy of the EPBC Act (by singling out particular industries) and is not directly related to any of the Commonwealth’s international obligations.

Should the water trigger remain part of the EPBC Act, there is no policy rationale from excluding it from bilateral agreements that accredit state government approval and assessment processes that meet the standards of the EPBC Act.

Schedule 3, Part 2
Moving to allow the minister to recognise processes that are set out in legal instruments as well as legislation is welcome. This is consistent with the spirit of bilateral agreements, which recognise that there are multiple ways to achieve good environmental outcomes. It will also keep the focus of bilateral agreements on the environmental outcomes that need to be achieved by a particular process rather than on the legislative status of a process.

Schedule 4
All states and territories are involved in programs of continuous improvements to their legislative and regulatory arrangements as they apply to environmental management. Accordingly, it is critical that bilateral agreements recognise such improvements in an efficient and effective manner.

The BCA supports the requirement that any changes to state processes must be consistent with standards for accreditation (as outlined in proposed section 46A(2)).

We note that the process by which state amendments are reflected in bilateral agreements will require continued close cooperation and coordination between the Commonwealth and states and territories to ensure any amendments are considered by the minister in a timely fashion.

Schedule 5
The BCA supports the miscellaneous amendments in schedule 5 which will support the efficient operation of bilateral agreements and enable the minister to consider all relevant matters when deciding if to accredit a state process or management plan.

Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014

Context for the implementation of cost recovery
The implementation of cost recovery is complicated by the fact that the EPBC Act itself is currently the subject of broader reforms.

The Department of Finance is also currently going through the process of reviewing the government’s own Cost Recovery Guidelines.
The current Cost Recovery Guidelines do not provide guidance in relation to cost recovery proposals where the regulatory activity itself is undergoing considerable reform, as is currently the case with the EPBC Act. This is a considerable issue in the current circumstance, with the Commonwealth negotiating approval and assessment bilateral agreements with each state and territory.

The BCA recommends that the Cost Recovery Guidelines be amended to include advice on how to handle cost recovery proposals when the regulatory activity is the subject of pending reform processes.

The proposed implementation of cost recovery for one year only is therefore occurring in the context of an uncertain environment.

Industry places a strong value on predictability in relation to the operation of public policy and the application of regulation. This allows businesses to undertake appropriate planning and action to comply with the regime.

In instances where an activity undertaken by an agency is to be scaled back or changed significantly (as is the case given the reforms currently being undertaken) then the immediate need for cost recovery arrangements must be in question, along with an agency’s ability to calculate the likely efficient cost of the service.

Cost recovery proposals must be sequenced in such a way that reforms to the regulatory activity in question are sufficiently progressed to inform the need for and nature of cost recovery arrangements. Premature implementation of cost recovery arrangements simply increases the likelihood of significant adjustments shortly after their introduction.

In light of all of these factors, the BCA recommends that the proposed cost recovery regime be deferred until the outcomes of the current reform process associated with the EPBC Act are known to the Commonwealth.

Cost recovery

The BCA does recognise that cost recovery can play an important role in funding certain government services and activities.

The Cost Recovery Guidelines set out by the Department of Finance provide a strong foundation for the principles and processes surrounding cost recovery proposals.

In general, the implementation of cost recovery is appropriate when it conforms to these guidelines.

As noted earlier though, these guidelines are currently under review by the Department of Finance.

Of particular importance is that cost recovery should only be undertaken when there is a clearly identifiable beneficiary. In other words, the benefits of the activity are largely private. The benefits should also represent value for money for the private proponent.

Where the benefits of the activity undertaken are public then it is not appropriate to apply cost recovery to a private proponent.

Features of the Cost Recovery Guidelines that are worth highlighting in relation to this Bill include:

- A cost recovery impact statement should be prepared when new cost recovery processes are proposed:
  - The explanatory memorandum notes that a Cost Recovery Implementation Statement (CRIS) will be developed and published prior to the making of regulations implementing cost recovery.
  - While a draft CRIS was released for consultation in 2012, an updated draft is not currently available, which makes it difficult to accurately assess how cost recovery will be implemented.
  - Appropriate consultation with industry should be undertaken as part of the process of developing an updated CRIS.

- Charges should reflect the costs of providing the product or service:
The BCA would highlight that this should reflect the efficient costs of providing the product or service. This means that the prices should be based on the minimum costs necessary to deliver the product and still maintain quality over time.

Further to this last point, it does not make practical sense for cost recovery to be allowed for processes which are duplicative. This is a clearly an inefficient outcome. It is therefore a welcome development that the Commonwealth will not seek to recover costs that will be incurred by the states and territories. The regulations would benefit from making this explicit.

**Strategic assessments**

Under the proposed arrangements, the application of cost recovery for the undertaking of strategic assessments will be undertaken on a case-by-case basis at the discretion of the minister.

The explanatory memorandum notes that ‘strategic assessments may also provide a general public benefit, and cost recovery therefore may not be appropriate in some cases’.

The Department of Finance’s Cost Recovery Guidelines argue that where there are significant spillovers, funding should come from general taxpayer funding rather than user charges.

The BCA is supportive of both of these positions. We would like to avoid a situation in which an individual company, or number of companies, are unnecessarily made to bear the brunt of the costs associated with the undertaking of a strategic assessment due to:

- difficulty in confining private benefits
- the benefits accruing more broadly as a result of spillovers
- difficulty in establishing efficient prices as a result of the unique nature of each assessment.

Consequently we are of the view that a very strong case would need to be made to enact cost recovery for strategic assessments and that the default position should be that cost recovery not be undertaken for such activities.