Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

Submission on Draft NSW - Commonwealth Bilateral Approval Agreement

13th June 2014

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of independently constituted and managed community environmental law centres located across Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

The Australian Network of Environmental Defender's Offices (**ANEDO**) welcomes the opportunity to comment on the Draft NSW Bilateral Approval Agreement (**Draft Agreement**) under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).

Consistent with the *State of the Environment 2011* report, ANEDO supports a strong Commonwealth role in efficient and effective implementation of the EPBC Act to protect Australia's unique biodiversity and heritage. Australia's environment cannot be protected without strong federal environmental laws. As the *State of the Environment Report 2011* notes:

> *Our environment is a national issue requiring national leadership and action at all levels… The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.*[1]

We therefore support the establishment of best practice environmental standards in all Australian jurisdictions, and the retention of environmental *approval* powers by the Australian Government for matters of national environmental significance (**MNES**).

ANEDO has engaged in the 'one stop shop' process to date by preparing background papers on best practice environmental laws and standards,[2] making submissions on current legal standards,[3] meeting with members of the Government and COAG taskforce on request to provide expert input, and consultation and submissions on the Productivity Commission's inquiry into major project assessment and approval processes, presenting evidence at three parliamentary inquiries, and making submission on the draft assessment bilateral agreements when exhibited for NSW, Queensland, ACT and South Australia.[4]

Based on our years of experience across Australia with both state and Commonwealth environmental laws, and expert analysis of the proposals under the 'one stop shop' policy, ANEDO does not support the handover of environmental approval powers to the States.

The draft Commonwealth NSW approval bilateral agreement is the most critical and retrograde step in implementation of the 'one stop shop' policy to date. The signing of the MOU, the assessment bilateral agreement, and introducing proposed amendments to the EPBC Act have created momentum, and now the approval bilateral agreement facilitates the handover over Commonwealth approval responsibilities. The agreement has the potential, if signed, to endorse significant detrimental and permanent impacts on matters of national environmental significance.

Instead of rushing to sign approval bilateral agreements, the Australian Government should examine the range of policy alternatives for strengthening environmental laws that are available with an aim of improving the efficiency and effectiveness of national

[1] Australian Government expert committee, *State of the Environment 2011*, 'In brief', at 9.
[2] See ANEDO 'COAG environmental reform agenda: ANEDO Response – In Defence of Environmental laws' available at: http://www.edo.org.au/policy/policy.html.
[3] See ANEDO "Submission on the Draft Framework for the Accreditation of Environmental Approvals under the EPBC Act", 23rd November 2012, available at: http://www.edo.org.au/edonsw/site/pdf/subs/121123COAGCthaccreditationstandardsANEDOsubmission.pdf
[4] Submissions are available at: www.edo.org.au.

environmental law.[5] Efficiency can be increased by coordinating and improving assessment processes and putting in place a suite of consistent and robust environmental standards in all jurisdictions, without abdicating Commonwealth approval powers.

ANEDO analysis over the past two years make clear that no existing State or Territory major project assessment process meets the standards necessary for federal accreditation (notwithstanding some have been accredited). Nor do these processes meet best practice standards for environmental assessment.

In developing a way forward, ANEDO recommends a number of steps to improve the administration and effectiveness of Australia's environmental laws. In summary:

- The Australian Government should reverse its intention to pursue approval bilateral agreements, as their use is not necessary or justified.
- Instead, the Government should improve the efficiency and effectiveness of the EPBC Act, and work with States and Territories to improve their environmental assessment and approval processes.
- This should include revisiting the Hawke Review package, and developing better administrative arrangements with the States under *assessment* bilateral agreements (once State processes are improved).
- Administrative arrangements should include a 'highest environmental denominator' approach to promoting consistent standards across jurisdictions, and strengthening regulatory skills and resourcing at both state and federal levels.
- The Australian Government should consult further on a uniform set of national environmental standards that state assessments must comply with to be accredited, including the use of objective and robust science-based assessment methodologies.
- Improved State and Territory assessment standards must be a prerequisite to expanding assessment bilateral agreements. ANEDO opposes new assessment bilateral agreements until State/Territory assessment procedures are established in law, and independently certified as meeting federal standards.
- This should include requirements in State and Territory planning laws such as:
    - aim to promote and achieve ecologically sustainable development (ESD) through improved assessment standards;
    - more accountable governance arrangements (assessors, decision-makers);
    - greater transparency and public participation before decisions are made;
    - increased access to justice for communities, including court appeal rights;
    - leading practice monitoring, enforcement and reporting; and
    - renewed focus on implementing and strengthening threatened species laws.

Part 1 of this submission outlines ANEDO's general concerns about the Government's agenda for bilateral accreditation and 'one stop shop' assessments and approvals.

Part 2 of this submission highlights some specific concerns with the provisions of the draft Agreement between NSW and the Commonwealth.

Part 3 of this submission outlines ANEDO's significant concerns about accrediting the declared classes of action in Schedule 1 to the draft agreement.

[5] See ANEDO, Best practice standards for environmental law (June 2012), available on request or at www.edo.org.au; Wentworth Group of Concerned Scientists, *Statement on Changes to Commonwealth Powers To Protect Australia's Environment* (September 2012), at www.wentworthgroup.org; Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia* (August 2013), at www.aph.gov.au.

Part 4 of this submission makes brief comment on Schedules 2, 3 and 4.

Based on the range of concerns identified ANEDO submits that the draft approval bilateral agreement should be withdrawn.

1. General concerns with accreditation and 'one stop shop'

The draft Commonwealth NSW approval bilateral agreement is the most critical and retrograde step in implementation of the 'one stop shop' policy to date. The signing of the MOU, the assessment bilateral agreement, and introducing proposed amendments to the EPBC Act have created momentum, and now the approval bilateral agreement facilitates the handover over Commonwealth approval responsibilities. The agreement has the potential, if signed, to endorse significant detrimental and permanent impacts on matters of national environmental significance. Below we outline a range of fundamental concerns at the 'one stop shop' approach to environmental assessments and approvals.

The Commonwealth is responsible for matters of national environmental significance

The effective implementation of the EPBC Act is the most essential element of meeting Australia's international environmental obligations. We submit that this can only be achieved by the Australian Government retaining direct responsibility for key functions under the EPBC Act, such as decisions about when the Act is triggered and final approval decisions. As the signatory to international environmental agreements, the Australian Government's ongoing direct involvement is fundamental to meeting its legal obligations.

In brief, Commonwealth oversight of MNES is vital because:

- Only the Commonwealth Government can provide national leadership on national environmental issues;
- The Commonwealth must ensure that we meet our international obligations;
- State and Territory environmental laws and enforcement are not up to accreditation standards;
- States are not mandated to act (and do not act) in the national interest; and
- States often have conflicting interests, as they benefit directly from the projects they are assessing.[6]

The Commonwealth Environment Minister may enter into a bilateral agreement only if the agreement 'accords with the objects of' the EPBC Act.[7] This is vital because, while the present reform agenda has largely focused on 'streamlining' assessment, the objects of the EPBC Act (and the first object in chapter 3 on bilateral agreements) embody fundamental environmental goals.[8]

The EPBC Act's objects chiefly include protection and conservation of the environment and heritage (governments in partnership with Indigenous people and other groups),

[6] See ANEDO, 'Submission to the Senate Standing Committee on Environment and Communications regarding the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*'. Available at: http://www.edo.org.au/policy/ANEDO-Submission-EPBC-Retaining-Federal-Approval-Powers-Bill-2012.pdf.
[7] EPBC Act, s 50.
[8] See EPBC Act 1999, ss 3-3A and s 44(a).

fulfilment of our international obligations, and promotion of *ecologically sustainable development* (**ESD**).[9]

The Australian Government has recently re-released accreditation standards, comprising over 100 minimum standards required under the EPBC Act and Government practice.[10] Based on our extensive analysis of and interaction with planning and environmental laws, we submit that *no* State or Territory laws currently meet these minimum requirements – let alone the full suite of best practice standards that Australia should strive to implement.[11] Accreditation of State laws that do not meet these requirements will put at risk matters of national environmental significance, potentially breach our international obligations, and potentially expose the Commonwealth to legal liability.

Relinquishing federal approvals will not improve efficiency or effectiveness

It is difficult to see how delegating Commonwealth *approval* decisions to State governments will improve timeframes, reduce costs or promote sound environmental outcomes. The timeframe for Commonwealth *approval* is 30 business days from the date the Environment Minister receives the State's assessment report.[12]

Comprehensive *assessment* of projects is the longest and most complicated stage in the overall approvals process. The vast majority of time is rightly spent on assessment processes, often largely under State laws. This is to some extent inevitable because of the scale of project applications, complexity of environmental impacts, limitations on agency resources and data, and the importance of community engagement and consultation. As the Productivity Commission has noted:

> *…a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome.*[13]

Consequently, while efficiencies may be gained by improving and better coordinating environmental *assessment* processes with the States and Territories, the Australian Government must retain final approval powers and call in powers. The efficiencies to be gained from better coordination and integration of assessment processes do not displace the need for strong Commonwealth involvement.

Conflicts of interest

For many major development projects, the State/Territory government is either the proponent (such as a State energy authority or State-owned corporation), a significant beneficiary (such as a royalty recipient), or has a demonstrated political interest in the

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[9] Australian Government. *National Strategy for Ecologically Sustainable Development* (1992), http://www.environment.gov.au/node/13029. The Strategy states: *ESD is development which aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations. To do this, we need to develop ways of using those environmental resources which form the basis of our economy in a way which maintains and, where possible, improves their range, variety and quality. At the same time we need to utilise those resources to develop industry and generate employment.*

[10] Released March 2014. A previous *Draft Framework for the Accreditation of Environmental Approvals under the EPBC Act* and a *Statement of Environmental and Assurance Outcomes* were released in June and July 2102. See ANEDO's submission on these standards at www.edo.org.au.

[11] See for example, ANEDO, *Best practice standards for environmental law* (June 2012).

[12] EPBC Act 1999, s 130(1B). For other assessment types the period is between 20-40 days.

[13] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.

project proceeding. Relevant examples include mining and major infrastructure projects.[14] In general, the Commonwealth is a step removed from the development and therefore able to make a more objective and independent decision in the national public interest.

There are many examples of States signalling that they would progress major projects that would have had significant adverse environmental impacts that were ultimately rejected by the Commonwealth. For example, the Traveston Dam in Queensland, Franklin Dam in Tasmania, Jervis Bay rezoning in New South Wales, releasing of water from Lake Crescent in Tasmania for irrigation, and the Nobby's Headland development in New South Wales, were all State-backed projects that were rejected by the Commonwealth due to the unacceptable environmental impacts they were going to cause. A Commonwealth role in such cases is essential.

State laws do not meet high environmental standards

Accreditation of state planning laws is also an endorsement of state threatened species legislation. Current State and Territory laws do not meet federal standards.

In December 2012, ANEDO was commissioned to undertake an audit of threatened species and planning laws in all Australian jurisdictions.[15] The key finding of this report is that *no State or Territory biodiversity or planning laws currently meet the suite of federal environmental standards necessary to effectively and efficiently protect biodiversity.* While the laws in some jurisdictions look good 'on paper', they are not effectively implemented. We provide some examples of this below.

A number of important legislative tools available for managing and protecting threatened species are simply not used.[16] Key provisions are often discretionary. Critical tools such as recovery plans and threat abatement plans are not mandatory. Timeframes for action and performance indicators are largely absent. Effective implementation is further hampered by a lack of data and knowledge about the range and status of biodiversity across Australia.

Threatened species laws do not *prevent* developments that have unacceptable impacts on threatened species from going ahead. Project refusals on the basis of threatened species are extremely rare (for example, a handful of refusals under the EPBC Act), or are the result of third party litigation. Threatened species laws are further subjugated in many jurisdictions by the absence of third party rights that enable communities to enforce the laws to protect threatened species.

The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to 'fast-tracking' of environmental impact assessment for major projects. These provisions effectively override threatened species laws in all jurisdictions. Required levels of impact assessment tend to be discretionary, and projects can be approved even where they are found to have a significant impact on

[14] For examples, see ANEDO, 'In defence of environmental laws' (May 2012).
[15] ANEDO, *An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia* (2012), Report for the *Places You Love Alliance* of environmental NGOs. Available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/279/attachments/original/1380668130/121218Appendix1Reportontheadequacyofthreatenedspeciesandplanninglaws.pdf?1380668130
[16] For example, in Victoria, interim conservation orders and management plans are not utilised; in South Australia, no native plants have been declared prescribed species on private land; in Tasmania, no critical habitats have been listed and no interim protection orders have been declared; and in the Northern Territory, no essential habitat declarations have been made.

critical habitat, for example. The quality of different levels of species impact assessment is highly variable across local and state jurisdictions, and rarely audited.

Since completing the audit of threatened species and planning laws, many States and Territories have in fact *lowered* environmental legislative standards relevant to the protection of MNES. Such lowering of State/Territory standards is *increasing* the need for Commonwealth protection of the environment. For example, Queensland has relaxed requirements to permit clearing of previously protected regrowth and riparian native vegetation. NSW and Victoria are also in the processes of winding back native vegetation protection laws. Planning laws in Queensland and NSW are being 'streamlined' in ways that are unlikely to satisfy EPBC Act protections. Laws that relate to national parks are also being amended to allow hunting, grazing and increased commercial uses.

As the State of the Environment 2011 reported, '*Our unique biodiversity is in decline, and new approaches will be needed to prevent the accelerating decline in many species'*.[17] Given the decline in biodiversity, combined with increasing population pressures, land clearing, invasive species and climate change, streamlining and minimising legal requirements in relation to biodiversity assessment is completely inappropriate. Rather, the list of common failings make clear that threatened species laws in all jurisdictions need to be reviewed, strengthened, and fully resourced and implemented.

Fast-tracking major projects contradicts risk-based assessment

Planning reviews and reform proposals often express support for 'risk-based' and 'proportionate' approaches to development assessment and regulation.[18] Accordingly, most planning systems already stream projects into different categories and levels of assessment. However, moves in recent years to fast-track major projects often *contradict* the aim of proportionate, risk-based approaches.

For example, major project fast-tracking under state laws often override important environmental authorisations and licensing requirements. As discussed below, the NSW *Environmental Planning and Assessment Act 1979* (**EP&A Act**) continues to override important environmental law and licensing requirements (or 'concurrences') for major projects.[19] Fast-tracking mechanisms can also concentrate control in a single agency or decision-maker, limiting the role of expert advice and potentially increasing corruption risks. They may also limit public participation and transparency of process; and curtail judicial scrutiny of decisions.

By contrast, a truly *risk-based, proportionate* approach to environmental impact assessment would *focus* effort on major projects, not override or reduce scrutiny. This is because major projects tend to be the most significant in terms of scale, nature, complexity, breadth and duration of impacts, and level of public concern.[20] Projects with the most significant impacts deserve the most rigorous scrutiny and safeguards.

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[17] Australian Government, *State of the Environment 2011*, summary, p 4.

[18] See for example, Productivity Commission, *Research Report – Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (2011), p. xlviii; NSW Government, A New Planning System for NSW – White Paper (2013).

[19] For example, in NSW, under both Part 3A and its replacement system, 'State Significant Development' (SSD), major projects remain *exempt* from a significant list of 'concurrence' approvals normally required from various agencies (such as for coastal protection, fisheries, Aboriginal heritage, native vegetation, bush fire and water management). A range of other authorisations *cannot be refused*, and must be consistent with an SSD project approval (including aquaculture, mining leases and pollution licences). See *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), ss 89J and 89K. The revised system for fast-tracking 'State Significant Infrastructure' (SSI) retains many features of the former Part 3A.

[20] See, for example, EPBC Act s 87(4A) and factors to be considered in EPBC Regulations 2000, cl 5.03A.

ANEDO notes that if States seek to uphold federal EPBC Act requirements, they will need to increase environmental and assurance standards. However, by seeking to fast-track major projects, States will be *lowering* those standards (such as by reducing scrutiny or public participation), as with former Part 3A in NSW. By competing with one other to 'cut red tape' and attract investment, States risk a 'race to the bottom' for environmental standards.[21] This fundamental contradiction supports ANEDO's view that transfer of Commonwealth *approval* powers to the States is misconceived.

Inadequate assurance framework

There has been no clear indication of how monitoring, auditing, reporting, compliance and enforcement will work under the 'One Stop Shop' model, beyond the proposed call in/escalation provisions. It is unclear what baselines or indicators will be used to ensure that bilateral agreements will maintain environment protection standards; and what independent body with the necessary environmental expertise will be appointed to assess this. ANEDO believes it would not be possible for the Commonwealth to vacate this sphere by delegating powers to States and Territories, without risking MNES, potentially breaching our international obligations, and potentially exposing the Commonwealth to legal liability.

All governments should be required to report on whether strategic environmental outcomes and targets are being achieved – including in relation to promoting and achieving ESD. Without meaningful measurement, monitoring and reporting, it is impossible to arrest environmental decline and ensure Australia's development is ecologically sustainable.[22] If the focus is on reducing approval times and project delivery then the measurement indicators will only tell half the story. It will be impossible to accurately measure whether development approvals under an accredited bilateral approval agreement are promoting ESD and actually protecting and enhancing MNES as required by EPBC Act standards.

[21] See Senate Environment and Communications Committee, report on the *EPBC Amendment (Retaining Federal Approval Powers) Bill 2012* (March 2013), evidence at 2.26 and conclusion at 2.71.
[22] The *State of the Environment 2011* notes that 'Australia is positioned for a revolution in environmental monitoring and reporting.' However, 'Creating and using systems that allow efficient access to environmental information remain a great national-scale challenge.' See: http://www.environment.gov.au/soe/2011/report/future-reporting.html.

2. Comments on the draft Agreement's general provisions

This part identifies some key concerns with the drafting of the agreement.

Based on the range of concerns identified, we recommend that the agreement be withdrawn.

Objects (F) – This clause refers to parties using "best endeavours to implement the commitments in the Agreement acting in a spirit of cooperation...". Aspirational language is not enforceable or legally meaningful.

1. Definitions – "Minister" is the Planning Minister, whereas at the Commonwealth level the relevant Minister (and Department) is the Environment portfolio. This is a fundamental issue with the handover of powers as the Commonwealth environment department is handing over powers to state planning departments that do not have the same expertise or mandate.

1.4(b) Undertakings – This clause states "this agreement does not require NSW to make, to amend or repeal any NSW laws". This is emphasised in 2(b) "the parties do not intend this agreement to create contractual or other legal obligations between the parties..." , however the Act provides that the legal effect of the agreement is to switch off the EPBC Act approval requirements for actions approved under a relevant state authorisation process. The opportunity for improving standards is being ignored. As ANEDO have consistently said, state standards do not meet Commonwealth standards, and yet this agreement is endorsing NSW standards without any requirement for amendment. (This is discussed further in part 3 of this submission).

4. Effect of the agreement – This clause sets out that NSW will use its "best endeavours" to coordinate assessment and approval processes where an action may involve other jurisdictions. There is no legal definition of "best endeavours" or clarity on what might be required to discharge this obligation.

5.1 Identification of impacts on MNES – NSW need only take "reasonable steps" to inform a proponent that they may need to refer an action that is not covered by the agreement to the Commonwealth. This may be done by standard guidelines. There is no indication or requirement that the new guidelines and administrative arrangements be consulted on before they are finalised.

5.4 Expert Committee for CSG and large coal mines – Clause 5.4 states NSW will refer projects to the Committee for advice. It is unclear whether this clause will remain if the current EPBC Amendment Bill is passed and the water trigger is handed over to states.

6. Decisions on Approval – NSW will apply the avoid, mitigate, offset hierarchy (6.1) and where an impact cannot or will not be offset, the agreement indicates that the escalation process will apply. A compromise outcome can then be negotiated by senior officials. This allows NSW to make approval decisions that may not be consistent with EPBC Act standards (for example, offset requirements) and then negotiate an alternate outcome. There is a lack of transparency around how compromises will be negotiated, and a potential risk that standards may be compromised.

6.2 Offsets – One of the most concerning elements of the agreement is that the Commonwealth proposes to accredit the NSW Draft Biodiversity Offsets Policy for Major

Projects. The proposed NSW policy does not meet Commonwealth offsets standards for a range of reasons including:

1. It only applies to major projects and not all projects likely to have a significant impact on federally listed threatened species and ecological communities.
2. It allows for a broader category of supplementary measures to constitute an offset. The Commonwealth standard caps the use of 'indirect' offsets at 10%, while the draft NSW policy only limits research and education measures to 10%, but allows a broader range of measures to fulfil the other 90% of an offset (ie, under the NSW policy 100% of offset requirements can be met by supplementary measures).
3. Biodiversity offsets can be discounted for social or economic reasons.
4. It is a draft policy that is subject to further consultation and amendment.

Further detail of the flaws of the proposed NSW policy are set out in the EDO NSW submission on the draft policy[23].

6.3 – Approvals not inconsistent with plans etc – The agreement requires NSW decision-makers to "not act inconsistently with" international agreements relating to world heritage (WHC), wetlands (RAMSAR), threatened species and communities (CBD, Apia, CITES) and migratory species (Bonn, CAMBA, JAMBA, ROKAMBA) conventions. EDO NSW has recently provided preliminary advice to HSI on migratory species and Ramsar as to why the draft agreement is unlikely to meet our international obligations adequately.[24]

6.3(b) – This clause provides a subjective call in power if the Commonwealth Minister believes a NSW decision may be inconsistent with an international agreement, and a requirement for the NSW Minister to refer such a decision. It is unclear whether there is a clear triggering process for one or both Ministers to become aware of potential inconsistency at the pre-approval stage. If information regarding an inconsistency only comes to light post-approval, the Commonwealth cannot intervene. It is also unclear what happens if NSW fail to refer a decision.

6.4 – Consideration of policies and guidelines – The detail of what is to be taken into account will depend on what is in the Administrative Arrangements. These have not yet been made public, and it is unclear whether they will be publicly consulted upon.

6.5 – Approvals based on principles of environmental policy – This clause requires NSW decision makers to "have regard to sustainable development *or* ecologically sustainable development" [emphasis added]. We assume this is included due to the proposal to remove ESD from NSW planning laws. There is currently no definition of "sustainable development" in NSW planning legislation, and it does not meet EPBC Act standards which explicitly refer to ESD.

7 – Transparency and access to information – Wording in the agreement indicates reasonable consultation is only with those directly affected, and native title consultation is discretionary (7.1 Note). Processes for consultation with indigenous people are under review in NSW with cultural heritage legislation being consulted on currently, and so best practice may need to be reviewed.

[23] Available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1455/attachments/original/1400219519/140516_NSW_Biodiversity_Offsets_Policy_for_Major_projects_-_EDO_NSW_Submission.pdf?1400219519

[24] See: http://www.hsi.org.au/go/to/1540/protect-the-places-you-love-epbc-act-latest-news.html#.U5kW5HKSySp

7.4 – This clause indicates that NSW need only "seek to ensure" comments from any person are accepted and considered, not actually "ensure" that comments from any person are accepted and considered.

8.2 – Access to information – NSW is to commit to principles for open access, but this is not enforceable.

9 – Heritage plans – Clause 9(b) allows for "suitable alternatives" to management plans for world heritage and national heritage places, with no detail on what those alternatives would be required to address.

10 – Administrative Arrangements – The Administrative Arrangements are referred to throughout the agreement and would seem to be pivotal to the implementation of the agreement. However, the detail of the arrangements is not yet publicly available – it is to be developed by the parties (10.1). The arrangements are to be in place "on or by the commencement date" of the agreement so there is unlikely to be any public consultation.

10.2 – Senior Officers Committee – Much of the detail of how the Committee will operate is in the Administrative Arrangements, but this group has significant powers in terms of assessing the effectiveness of the agreement. For example, they can decide an evaluation not be undertaken in particular years (10.2(e)).

11. Reports – Information in annual reports does not include detail on conditions attached to approvals (11.1(b)), only information on compliance (c), and may be brief ((e)(iv)). Information on public complaints is limited to those complaints where there is not a formal right of review (d).

11.2 – Where NSW refuses third party standing to review a critical infrastructure project that is likely to significantly impact MNES, it need only notify the Commonwealth (11.2 (c)). There is no detail as to how equivalent standing to the Commonwealth standard will then be guaranteed in such cases.

12.2 – Transitional reviews – The clause stipulates a transitional review in 12 months, however specifying key performance indicators and seeking public comment are discretionary (12.2(c)).

13 – Sharing information on ongoing EPBC Act matters - Again the agreement uses the vague and unenforceable phrase indicating that parties will use "best endeavours" to inform/share information (c-e).

15 – Rectification – This short clause is vaguely worded that NSW is responsible for "addressing any issues that arise out of the process." It is unclear if this relates to project compliance, administrative compliance, failure to follow the process/agreement?

16. Escalation – This clause provides that Parties will act in a "spirit of cooperation". It is difficult to define or enforce such aspirational statements. Key concerns with the escalation process include:

- A decision to approve an action need only "substantially meet" requirements (16.1(c)(i).
- The escalation procedures are pre-approval. It is not clear who will notify the Commonwealth in time if NSW fails to. If the Commonwealth only becomes aware at the point the decision is made, procedures cannot be activated and it is too late to call in. This seems to assume reliance on third party monitoring.
- There is no duty on the Commonwealth Minister to consider whether to issue a Notice of Particular Interest or call in a project (j).

- Clause 16.3 acknowledges that NSW may make a decision that may not be consistent with clause 6 of the agreement "because of a consideration of all matters of relevance under applicable NSW law" (a), and that may be referred to the Commonwealth. This is likely to be a common occurrence given the NSW laws that, for example, give precedence to economic and social factors over biodiversity – as noted in relation to the proposed offsets policy. It is not clear in the draft agreement what happens after referral or what happens if a decision is not referred. It seems there is no role for the Commonwealth if an inconsistent decision has already been made.
- Escalation procedures only apply where a decision would "substantially not meet requirements" (16.4), ie, only substantial compliance is required, allowing some non-compliance. It is unclear how this will be decided.
- Clause 16.5 provides that where there is a dispute, NSW may request that the Commonwealth agree in writing that the action is unlikely to result in serious or irreversible damage to a MNES. This permits a degree of damage and for the agreement to still apply.

17. Suspension or cancellation – This clause has been consistently referred to by the Commonwealth as a key assurance safeguard, but it is politically unlikely to be used to suspend an entire agreement, even in the event of significant breaches. (For example, RFAs have never been suspended or cancelled despite systemic compliance issues).[25] This clause is brief and does not contain detail on grounds for cancellation or suspension other than, for example, "the agreement has become impractical" (17.2 C).

19. Amendment – Again details for notification and consultation are to be contained in Administrative Arrangements that are yet to be developed or consulted upon (19.1).

19.3 – **Amendment of legislation** – This clause does not detail clear triggers and criteria which is of concern as state planning legislation is in a state of transition in NSW. For example, in October 2013, the NSW Government introduced the Planning Bill 2013 and accompanying laws into Parliament to replace the ageing EP&A Act. The Bill since been withdrawn, but had it been passed, it would not have aligned with EPBC Act requirements in some key areas. For example, the necessary subordinate instruments and polices 'to ensure at least equivalent protection for matters of NES…'[26] would not have been in place by September; the Planning Bill's objects did not 'accord with' ESD in EPBC Act as required (s 50) and ESD (s 3-3A); and the breadth of 'biodiversity offsetting' permitted would have been inconsistent with the EPBC Act Offsets Policy etc. If similar planning reforms are revived in NSW, this will have significant implications for any Commonwealth accreditation of NSW approvals.

[25] See *If a Tree Falls* (2013), ANEDO Report on compliance with RFAs, available at www.edo.org.au.
[26] As required in the MOU, para 5.1.3.c, emphasis added.

3. Schedule 1 – Declared classes of action – Key concerns

Authorisation processes to be accredited under the Agreement

The draft Agreement (Schedule 1, clause 3.1) identifies the following authorisation processes that will be accredited:

a) Approvals under Part 4 of the EP&A Act (which includes State Significant Development (**SSD**)),
b) Approvals of State Significant Infrastructure (**SSI**), including critical State Infrastructure under Part 5.1 of the EP&A Act,
c) Approval of transitional Part 3A projects of the EP&A Act,
d) Threatened or migratory species licences under Part 6 of the *Threatened Species Conservation Act 1995*,
e) Threatened or migratory species licences under Part 7A of the *Fisheries Management Act 1994*.

Clause 3.1 also includes modifications of consents.

Nuclear installation projects are excluded from the "classes of action" set out in clause 4 of Schedule 1, but listed as a specified class of action that can be exempted in clause 2.2.

ANEDO has significant concerns about accrediting NSW major project assessment and approval processes – SSD, SSI, transitional part 3A, and modifications - in their current form. In summary, this is because these processes:

- *exempt* major projects from approvals required under other environmental laws, centralising authority within the Department and Minister for Planning, and limiting the role of environmental regulators like the NSW Office of Environment & Heritage (OEH) and Environment Protection Authority (EPA);
- retain a number of the potential conflict and corruption risks and ambiguities of the former NSW 'Part 3A' major projects fast-tracking regime;
- allow considerable discretion regarding environmental assessment requirements (EARs) – also known as Director-General's Requirements (DGRs);
- provide for 'staged' development consents – broad-brush initial approvals that leave discretion and uncertainty as to the project's ultimate design and impacts; and
- are unlikely to be sufficient or equivalent to all EPBC Act requirements – such as that the Agreement 'accords with the objects of' the Act (s. 50);[27] providing sufficient information to inform a federal approval decision (s. 47); or enhancing the conservation status of relevant MNES (s. 53).

For these and other reasons outlined in this submission, ANEDO opposes the current bilateral accreditation of NSW approval processes as a substitute for EPBC Act approvals.

ANEDO provided comment on the key concerns with the assessment processes in NSW in our submission on the *Draft Commonwealth – NSW Bilateral Assessment Agreement*. The laws have not changed and the assessment bilateral agreement was signed without

[27] Such as protecting MNES, promoting ESD and cooperatively fulfilling international obligations.

amendment, so the concerns remain. We reiterate some of the specific inadequacies of the relevant processes in more detail below.

State significant Development (SSD)

The provisions for Minister's approval of SSD are set out in Division 4.1 of Part 4 of the EP&A Act. Considerations in section 79C apply,[28] subject to the exemptions discussed below.

ANEDO does not support the accreditation of SSD approvals. There are a range of inadequacies with NSW assessment processes compared with EPBC Act requirements. These include major projects *exemptions* from many provisions intended to protect the environment; and concerns in relation to water impacts, mining decisions and biodiversity offset protections.

The current NSW SSD provisions allow the State Government to determine whether or not consent should be granted to projects deemed to be of State or regional significance. This takes the decision out of the hands of local councils and communities and is intended to allow for more strategic, 'integrated' decision-making.[29]

SSD projects are generally private, high investment developments that may have significant adverse environmental impacts, as well as positive and some negative social and economic consequences.[30] Examples include mining, oil and gas, intensive livestock agriculture, chemical manufacturing, timber milling and pulp processing, ports, hospitals, power stations and waste facilities.[31]

The NSW Planning Minister has the power to decide ('determine') all SSD projects, usually on the advice of the Planning Department or the Planning Assessment Commission (**PAC**).[32] SSD applications may be 'staged'.[33] For example, an applicant may seek approval for an overall proposal with or without seeking approval to commence

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[28] ***79C Evaluation***
(1) ***Matters for consideration—general***
In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
(a) the provisions of:
(i) any environmental planning instrument, and
(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
(iii) any development control plan, and
(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
(v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979), that apply to the land to which the development application relates,
(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
(c) the suitability of the site for the development,
(d) any submissions made in accordance with this Act or the regulations,
(e) the public interest.

[29] See Planning Department's State significant fact sheet (2011).

[30] A development can become SSD either because it falls into a category declared in a relevant State Environmental Planning Policy (**SEPP**) (such as the *State Environmental Planning Policy (State and Regional Development) 2011*); or if it is 'called in' (declared) by the NSW Planning Minister after seeking and publishing advice from the PAC (whether or not the PAC agrees).

[31] *State Environmental Planning Policy (State and Regional Development) 2011,* Schedule 1.

[32] *Environmental Planning and Assessment Act 1979* (NSW), s. 89D.

[33] As is the case with Part 4 applications considered by local councils.

the first stage.[34] These broad-brush initial approvals can leave discretion and uncertainty as to the project's ultimate design, impact, community engagement and assessment processes for future stages.

The previous NSW Minister for Planning delegated all SSD applications by private developers to the Department and the PAC for determination, for a more arms-length approach to private projects.[35] Nevertheless, the central roles of the Planning Minister and Planning Department contrast with the EPBC Act – where the decision maker is the Environment Minister, on expert advice of the Environment Department.

Environmental Impact Statement requirements and input from public authorities

Currently the EP&A Act requires all SSD to undergo a formal *Environmental Impact Statement* (**EIS**). This reflects its likely significant size and potential impacts. The project proponent must complete the EIS in accordance with project specific *Director-General's Requirements* (**DGRs**) set by the Planning Department, and the EP&A Regulation.[36] The EP&A Act sets out minimum 30 days' exhibition and submission requirements.[37]

ANEDO's main concerns with the process of setting environmental assessment requirements for SSD are that it lacks transparency, and the DGRs are subject to the Planning Department's discretion. While it is appropriate that all SSD is subject to a full EIS, NSW laws also confer unnecessary exemptions which could affect MNES.

Major project exemptions from other environmental laws

One of the most significant inadequacies with the SSD (and SSI) assessment and approval process, and one of the reasons it should not be federally accredited, is that major projects are *exempt* from many of the specific provisions intended to protect threatened species, heritage and the environment, and fully assess an action's impacts. This includes permits to clear native vegetation, harm threatened species or protected marine vegetation, excavate Aboriginal and other heritage, or use water. Other authorisations, such as licences to pollute, must be issued consistently with the Planning Department's development consent, instead of independent EPA assessment.[38]

Removing legal concurrence requirements to 'integrate' or improve coordination does not equate to risk-based, arms-length or transparent assessment.[39] It limits expert oversight

[34] Where a staged proposal is approved, future stages may be returned to the local council for assessment or they may remain with the NSW Government as SSD depending on the size and nature of each stage. Department of Planning and Infrastructure, Fact Sheet, *State significant assessment system: an overview* (September 2011), p 4.

[35] Under the current delegation, pursuant to *Environmental Planning and Assessment Act 1979* (NSW), s. 23, the PAC will determine larger and more controversial projects (that is, applications that have received more than 25 public submissions) or where a reportable political donation has been made. Senior Department of Planning staff will assess less controversial projects. The Minister will continue to determine all SSD applications lodged by *public* authorities. See Department of Planning and Infrastructure, Fact Sheet – *State significant assessment system: an overview* (September 2011), p 4.

[36] In preparing the DGRs, the Director-General of Planning must give relevant public authorities (such as the Office of Environment & Heritage (**OEH**) and the local council) 14 days to comment on the project proposal. The Director-General must have regard to the key issues raised by those authorities in setting the DGRs. The DGRs are to be issued within 28 days. For further information see *Environmental Planning and Assessment Regulation 2000* (NSW), Schedule 2.

[37] *Environmental Planning and Assessment Act 1979* (NSW), s. 89F. The minimum exhibition period for SSD is 30 calendar days (*EP&A Regulation 2000* (NSW), cl. 83), during which any person can make a written submission (EP&A Act s. 89F(3)). Note the Planning Bill 2013 proposes to reduce this to 28 days.

[38] See *EP&A Act 1979* (NSW), ss 89J-K, ss115ZG-H. See also EDO NSW, *Submission on NSW Planning White Paper* (June 2013), p 73, available at http://www.edo.org.au/edonsw/site/planning_reforms.php.

[39] Cf NSW Department of Planning and Infrastructure, *State significant fact sheet* (2011), p 3:

of consent conditions and community confidence in decision making; and undermines the rigour of major project assessment processes which the Commonwealth is seeking to accredit.

Further exemptions from threatened species assessments

SSD is also exempt from two further legislative protections for threatened species.[40]

First, development which affects threatened species must usually undergo a 'seven-part test' to establish whether its impact is significant. The concurrence of the head of the NSW Environment Department[41] is also needed if the development is on 'critical habitat', or will otherwise significantly affect threatened species.[42]

Second, significant impacts on critical habitat or threatened species also usually trigger a requirement to prepare a Species Impact Statement (**SIS**)[43] under threatened species laws. An SIS is to accompany the development application in order to better inform the decision-maker. These statements include important information on which species and communities are present; which are likely to be affected by the action; conservation status; local and regional abundance; adequate representation in conservation reserves; whether species are at the limit of their known distribution; details of species' habitat and of similar habitat in the region; quantitative and cumulative effects where possible; a description of mitigation measures; and feasible alternatives with regard to ESD.

However, SSD is *exempt* from both the seven-part test and SIS requirements. These are important to inform decision-makers on whether to approve an impact on threatened species, communities or their habitat.

Concerns about NSW assessment of water impacts

ANEDO strongly supports the inclusion of a ninth matter of national environmental significance in the EPBC Act designed to regulate certain mining activities that are likely to have a *significant impact* on water resources (**'water trigger'**). The trigger recognises the need for coordinated and effective environmental protection of Australia's valuable water resources, and the limitations of state mining and water laws to fulfil this role to date. Accordingly, ANEDO also strongly supports the retention of federal assessment powers under the water trigger. We therefore do not support recent proposed amendments to allow the water trigger to be handed over to states.[44]

ANEDO has raised several examples of inadequate regulation and legal exemptions for mining activities in relation to water use and approvals, including in NSW.[45] These

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The SSD system represents an integrated approach to development assessment with the department assessing matters that would otherwise require a concurrence or subsequent approval from a number of other Government agencies.

[40] *Environmental Planning and Assessment Act 1979* (NSW), s. 78A(8)-(8A); and s. 79B(2A), which states: 'This section does not apply to State significant development unless the requirement of an environmental planning instrument for consultation or concurrence specifies that it applies to State significant development.'

[41] Office of Environment and Heritage (OEH) (or consultation with the NSW Environment Minister)

[42] *Environmental Planning and Assessment Act 1979* (NSW), s. 79B.

[43] In accordance with Part 6, Division 2 of the *Threatened Species Conservation Act 1995* (NSW).

[44] See recent ANEDO submission to the Senate Inquiry into the EPBC Amendment (Implementing Bilateral Agreements) Bill 2014, available at: www.edo.org.au.

[45] For example, see SSD exemption under EP&A Act 1979 (NSW), s 89J(1)(g); see also E. Carmody, 'Exemptions from cease-to-pump rules in the Hunter coal field: mines 1, aquifers 0' (2013), 28 *Australian Environment Review* Vol. 4, 567 (accessible via http://edonsw.wordpress.com/2013/06/05/water-sources-at-risk-in-the-hunter/). See further ANEDO *Submission to the Senate Standing Committee on Environment and Communications regarding the Environment Protection and Biodiversity Amendment Bill 2013* (April 2013), at www.edo.org.au/edonsw/site/pdf/subs/130404EPBCAmendmentBillWaterTriggerANEDOsubmission.pdf.

concerns are reflected in the Senate Committee report on the water trigger Bill. The Committee concluded that 'there is sufficient concern and evidence of the inadequacy of State processes to warrant the involvement of the Commonwealth Government'.[46]

Given these circumstances – including limitations under NSW mining, planning and water laws;[47] ongoing controversy over the allocation of NSW coal mining tenures;[48] and the inter-jurisdictional nature of water protection – ANEDO submits that the Commonwealth should not delegate its powers to the NSW Government to assess the impacts of coal and CSG on water resources.

Emphasis on economic benefits of mining over ESD considerations

A central tenet of the EPBC Act is the agreed importance of integrating economic, environmental and social considerations under the principles of ESD. ANEDO is concerned at the increasing tendency for governments to emphasise the short-term *economic benefits* of major projects over and above an objective and balanced assessment of the longer-term costs and benefits, including negative environmental and social impacts. If this balance is tipped too far, the result is the erosion of community trust, the risk or perceptions of corruption, poor decision-making, and unsustainable development – none of which are in the public interest.[49]

Mining projects are a major category of controlled actions assessed under the EPBC Act. In NSW, most mining projects are classed as SSD.[50] Recent amendments to the NSW State Environmental Planning Policy for mining (**Mining SEPP**)[51] complicate the legal requirement that any bilateral agreement 'accords with the objects' of the EPBC Act. This is because the standards in the amended SEPP are inconsistent with EPBC Act standards, for the promotion of ecologically sustainable development. This is due to the prioritisation of consideration of the 'economic significance of the resource' over other considerations, and that the Mining SEPP now limits the *conditions* that can be placed on a mining project in relation to five environmental and social impacts: cumulative noise levels, air quality levels, air blast overpressure, ground vibration and aquifer interference. If the project meets the 'non-discretionary development standards' for these impacts, the project *cannot be refused* on those grounds, and the decision-maker cannot require 'more onerous standards' than those in the SEPP. This is of particular concern because, if the impacts *exceed* these standards, decision-makers may still *approve* the project under current SSD laws.

Draft Biodiversity Offsets Policy for Major Projects

As noted above, the draft agreement proposes to accredit the Draft NSW Biodiversity Offsets Policy for Major Projects.

ANEDO has consistently expressed a range of concerns about biodiversity offsetting – both in relation to specific schemes and methodologies, and more broadly because of

[46] Senate Environment and Communications Standing Committee, Report on *Environment Protection and Biodiversity Conservation Amendment Bill 2013 [Provisions],* May 2013, p. 21.
[47] See M West, 'Environment Protection Agency sidelined after warning of high risks at AGL coal seam gas project', *Sydney Morning Herald*, 25 November 2013, at: http://www.smh.com.au/business/environment-protection-agency-sidelined-after-warning-of-high-risks-at-agl-coal-seam-gas-project-20131124-2y41e.html#ixzz2n1xTSQpw.
[48] See 'ICAC recommends tighter controls to minimise coal mining corruption' (30 October 2013), at http://www.icac.nsw.gov.au/media-centre/media-releases/article/4436.
[49] See, for example, Independent Commission Against Corruption (ICAC), *Anti-corruption safeguards in the NSW Planning system* (February 2012); EDO NSW, *The State of Planning in NSW* (December 2010).
[50] See *State Environmental Planning Policy (State and Regionally Significant Development) 2011*.
[51] *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*.

the uncertainty in achieving long-term environmental outcomes.[52] Nevertheless, the *EPBC Environmental Offsets Policy* (2012) provides relatively strong and appropriate standards compared to some other schemes in Australia. This is particularly the case as standards in NSW and other state schemes are being watered down in response to lobbying, or to increase take-up.[53] The benchmark set by the EPBC Offsets Policy underlines the importance of the Commonwealth's ongoing role in environmental leadership, oversight and standards. As noted, the new NSW policy allows Commonwealth standards to be weakened in a number of ways:

- It only applies to major projects and not all projects likely to have a significant impact on federally listed threatened species and ecological communities.
- It allows for a broader category of supplementary measures to constitute an offset. The Commonwealth standard caps the use of 'indirect' offsets at 10%, while the NSW only limits research and education measures to 10%, but allows a broader range of measures to fulfil the other 90% of an offset (ie, under the NSW policy 100% of offset requirements can be met with supplementary measures)
- Biodiversity offsets can be discounted for social or economic reasons.
- It is a draft policy that is subject to further consultation and amendment.

Detailed concerns are set out in the EDO NSW submission on the proposed policy.[54]

Community appeal rights regarding SSD

Merit appeals are permitted for a third party in relation to SSD, but only if that person is an objector during public exhibition.[55] (Proponents have a broader range of rights.) Third party merit appeals must be commenced within 28 days of being notified of the approval.[56] However, merit appeals are *not* available:

- if the SSD project would not otherwise (if it were not SSD) be high-impact, 'designated development'; or
- if the decision is made after the PAC held a formal public hearing on the project.

The former Part 3A also removed merit appeal rights where a broad-brush 'concept plan' had been approved. By contrast, ICAC has suggested that third party merits appeal rights should be *expanded* to additional categories of private development.[57] Equitable third party merit appeals are a fundamental assurance standard that is not guaranteed by the draft agreement accreditation of NSW approvals.[58]

[52] See, for example, Maron, Hobbs, Moilanen et al., 'Faustian bargains? Restoration realities in the context of biodiversity offset policies', *Biological Conservation* 155 (2012) 141–148.
[53] See EDO NSW, *Submission the Review of the NSW Biodiversity Banking and Offsets Scheme* (July 2012) at www.edo.org.au/edonsw/site/pdf/subs/120709Biobanking_Review_submission.pdf.
[54] Available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1455/attachments/original/1400219519/140516_NSW_Biodiversity_Offsets_Policy_for_Major_projects_-_EDO_NSW_Submission.pdf?1400219519
[55] That is, lodged a submission objecting to the development during the exhibition period.
[56] *Environmental Planning and Assessment Act 1979* (NSW), s. 98.
[57] Including for projects that are significant and controversial (such as large residential flat developments); development that represents a significant departure from existing development standards; and development that is the subject of voluntary planning agreements. See ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 15.
[58] EDO NSW planning submissions (2011-13) at http://www.edonsw.org.au/planning_reforms.

State Significant Infrastructure (SSI)

The draft Agreement proposes to accredit NSW approvals for State Significant Infrastructure (**SSI**) applications.

Approval requirements for SSI are set out in section 115ZB of the EP&A Act.[59]

Similar to SSD, SSI projects are already declared by the State to be state significant, so this potentially compromises the State as the subsequent decision-maker in terms of potential conflicts of interest, and lack of objectivity.

As noted in our submission on the *Commonwealth – NSW Draft Assessment Bilateral Agreement*, ANEDO is concerned that the EPBC Act requirements for bilateral agreements will not be satisfied on the basis of present NSW assessment laws, particularly given the broad exemptions for major projects from environmental protections and assessment processes under the EP&A Act.

The most significant concerns with the proposal to accredit SSI approvals are that SSI projects are exempt from many approvals and concurrences under environmental laws (as with SSD); and that the SSI assessment system retains many features of the discredited former 'Part 3A' fast-tracking regime (including limits on appeal rights and enforcement, and consent modification that is open to broad departmental discretion).

According to the NSW Government:[60]

> *The SSI assessment system has been established to allow planning decisions on major infrastructure proposals, in particular linear infrastructure (such as roads, railway lines or pipes which often cross a number of council boundaries) or development which doesn't require consent but which could have a significant environmental impact (such as a port facility).*[61]

This includes development that would significantly affect the environment, where a public authority is both the proponent *and* determining authority. Generally the Planning Minister determines SSI proposals based on the Director-General's environmental

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[59] ***115ZB Giving of approval by Minister to carry out project***
(1) If:
(a) the proponent makes an application for the approval of the Minister under this Part to carry out State significant infrastructure, and
(b) the Director-General has given his or her report on the State significant infrastructure to the Minister, the Minister may approve or disapprove of the carrying out of the State significant infrastructure.
(2) The Minister, when deciding whether or not to approve the carrying out of State significant infrastructure, is to consider:
(a) the Director-General's report on the infrastructure and the reports, advice and recommendations contained in the report, and
(b) any advice provided by the Minister having portfolio responsibility for the proponent, and
(c) any findings or recommendations of the Planning Assessment Commission following a review in respect of the State significant infrastructure.
(3) State significant infrastructure may be approved under this Part with such modifications of the infrastructure or on such conditions as the Minister may determine.

[60] NSW Department of Planning and Infrastructure, *Fact sheet – State significant assessment system: an overview* (Sept. 2011), p 4.

[61] See further *State Environmental Planning Policy (State and Regional Development) 2011*, Sch. 3. SSI also includes, for example: public wharves, ports and boating facilities; public water storage or water treatment facilities, and pipelines; rail infrastructure; submarine telecommunication cables; and certain development in reserved land under the *National Parks and Wildlife Act 1974* (NSW). As with SSD, the Minister can also 'call-in' specific projects as SSI (including on the advice of the PAC or Infrastructure NSW).

assessment report.[62] The PAC may determine private SSI developments; and senior Planning Department officers may determine less controversial SSI proposals.[63] State significant infrastructure assessment has similarities to the SSD process.[64] For example, the Planning Department must consult agencies and issue Director-General's Requirements (**DGRs**);[65] the proponent's must address the DGRs in an Environmental Impact Statement (**EIS**);[66] there is a minimum 30-day public exhibition period;[67] staged approval is available;[68] and SSI is exempt from many environmental approvals, as discussed below.

Accordingly, ANEDO does not support the accreditation of SSI approvals to replace EPBC Act approvals. The Commonwealth should retain its powers to both *assess and approve* (or refuse) impacts on MNES in NSW, including impacts on EPBC-listed threatened and migratory species.

Exemptions for SSI from other environmental laws

As with SSD, SSI projects (including 'critical' SSI) *do not require* a range of additional authorisations that would ordinarily be needed before the project could proceed.[69] This includes, for example, an Aboriginal heritage impact permit; a permit to clear native vegetation (which could include federally listed species); a bush fire safety authority; or a water use approval.

In addition, where SSI development (or critical SSI) has been approved, a number of additional approvals *cannot be refused* if they are necessary for carrying out the project, and must be granted consistently with the approval.[70] These include aquaculture permits; mining leases; petroleum production leases; pollution licences; and pipeline licences.

This means that once the Planning Minister approves an SSI project there is very little that other public authorities (such as the EPA) can do to prevent or independently limit the project's impacts.

SSI limits community appeal rights

Unlike SSD, a third party objector to an SSI application (such as a community group) has no right to a *merit appeal* if dissatisfied with an SSI approval decision. A third party can bring *judicial review* proceedings (to challenge a legal error) against an SSI approval within three months of notification – provided they can afford the risks of paying the government's or other parties' costs if they lose. A third party could only bring judicial review proceedings against critical SSI (projects that are essential for the State[71]) with

[62] *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZA-115ZB.
[63] That is, if there are fewer than 25 submissions by members of the public objecting to the proposal and the relevant local council does not object to the proposal. See Department of Planning and Infrastructure, Fact Sheet, *State significant assessment system: an overview* (September 2011), p 5.
[64] Although local and state planning instruments will not generally apply to SSI, unless otherwise specified. Appeal rights also differ.
[65] *Environmental Planning and Assessment Act 1979* (NSW), s. 115Y(3).
[66] *Environmental Planning and Assessment Act 1979* (NSW), ss. 115Y and 115Z
[67] *Environmental Planning and Assessment Act 1979* (NSW), s. 115Z(3); *Environmental Planning and Assessment Regulation 2000* (NSW), cl. 194.
[68] This means the Minister may consider applications and give approval for an initial 'concept' proposal, with subsequent applications and approvals for separate stages. *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZD.
[69] *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZG.
[70] *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZH.
[71] See *Environmental Planning and Assessment Act 1979* (NSW), s. 115V; *State Environmental Planning Policy (State and Regional Development) 2011*, Schedule 5.

the Minister's permission.[72] As noted above, the draft agreement requires NSW to notify the Commonwealth in the event that the Minister does not give permission for third party judicial review, however, it is unclear what happens after such a referral.

SSI limits enforcement to protect threatened species and cultural heritage

Critical SSI is not subject to the usual range of administrative orders by which public authorities can enforce environmental laws. For example – interim protection orders and stop work orders to protect threatened species or State heritage, environment protection notices to reduce pollution, and remediation orders to restore land, water, habitat, or to protect or restore a damaged Aboriginal object or place – cannot be issued against a critical infrastructure project.[73]

These exemptions are anachronistic, reduce the incentives for major project proponents to comply with their conditions, and undermine public trust that conditions will be upheld. In such cases, the agency that approved the project may be the only party that can enforce conditions, with very little external scrutiny.

Modifications of SSD and SSI consents

Under the EP&A Act, the applicant can seek to alter the project after consent has been granted by applying to the original consent authority. Modifications can only be granted:

- if the modification would result in *substantially the same development* as that originally approved, and have *minimal environmental impact*; or
- if the modification would result in *substantially the same development* – with the additional impacts being subject to concurrence, notification and consultation requirements, and the decision-making considerations listed in s 79C of the Act; or
- to correct a minor error, mis-description or miscalculation.[74]

SSD modifications are therefore subject to more assessment safeguards than SSI, however as with former Part 3A, the ability for proponents to modify a consent for SSI is widely discretionary.[75] The process involves the NSW government agency (or other proponent) making a request to the Planning Minister via the Director-General. The Director-General *may* issue environmental assessment requirements to the proponent, but this is open to discretion. The Minister may grant the modification, with or without conditions, or refuse.

However, where SSD modifications may 'significantly affect' threatened species or critical habitat, these projects remain *exempt from* the usual concurrence and consultation safeguards involving the Environment Minister and OEH; and safeguards designed to protect threatened species under biodiversity offsetting arrangements.[76]

The standard concurrence requirements provide a clear and transparent process of considering threatened species impacts, expert agency advice, and publication of reasons where the consent authority does not accept that advice. As SSD projects and modifications are exempt from this process, this means that some of the largest projects

[72] *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZK.
[73] *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZG(3).
[74] *Environmental Planning and Assessment Act 1979* (NSW), s. 96; *Environmental Planning and Assessment Regulation 2000* (NSW), cl. 117.
[75] *Environmental Planning and Assessment Act 1979* (NSW), s.115ZI. Cf s. 75W (former Part 3A).
[76] *Environmental Planning and Assessment Act 1979* (NSW) ss. 96(2)(b), 79B(2A)-(3) and 96(5).

in NSW are dealt with in an unclear, ad hoc and less rigorous manner than smaller projects.

We note the 2013 Planning Bill proposed changes to allow broader discretion for SSD modifications. If such reforms do occur, this will have implications for the accreditation of approvals.

Transitional Part 3A projects

ANEDO opposes the accreditation of the Part 3A transitional provisions, based on the inadequacies and ambiguities of Part 3A that are preserved in the transitional provisions; and the potential for numerous assessment and approval processes that will increase fragmentation and complexity for all parties.

The proposal to 're-accredit' the discredited Part 3A assessment process threatens the rebuilding of public confidence in the NSW planning system, and confidence in the Commonwealth's environmental leadership role – particularly given the history of corruption risks, public antipathy and disenfranchisement under Part 3A.

In 2006, EDO NSW was the only organisation to make a submission on the Commonwealth's draft assessment bilateral agreement with NSW.[77] Our central concern with the former agreement was that it accredited Part 3A of the EP&A Act – the controversial major project fast-track process introduced in 2005.

EDO NSW opposed the accreditation of 'Part 3A' on several grounds, including:[78]

- the wide discretion given to the Director-General of Planning regarding environmental impact assessment, and what impacts should be considered;
- concerns about accrediting assessment reports of independent expert panels under s 75G, because there are no criteria for appointing 'experts', and practical barriers to community participation had not been overcome;
- major infrastructure projects under Part 3A treated many elements of public participation as discretionary;
- Part 3A projects are exempt from the need to obtain many legal authorisations;
- unclear administrative arrangements for assessments under the Agreement.

Part 3A was accredited under the former NSW Assessment Bilateral Agreement (2007-2012), notwithstanding the significant ambiguities and concerns that Part 3A did not provide equivalent protection to the EPBC Act. The Commonwealth's accreditation of Part 3A set a very poor precedent. Part 3A was found by ICAC to be a corruption risk,[79] and in 2011 it was repealed by the incoming Government, which vowed to restore trust in the planning system. However, transitional provisions preserved the Part 3A process for around 500 major projects then in the system. We understand there may be less than 40 transitional projects remaining.[80]

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[77] The federal Environment Minister's accreditation report (20 December 2006) noted:
The EDO raised concerns regarding the Commonwealth's accreditation of the assessment of activities under Part 3A of the New South Wales Environmental Planning and Assessment Act 1979 (the EPA Act). The EDO suggested that references to Part 3A of the EPA Act be removed from Schedule 1 of the draft bilateral agreement, and that assessment under the EPBC Act remain as a check for the projects of greatest impact in New South Wales. These comments were taken into account in further consultation with the New South Wales Government and in my decision to enter into the New South Wales agreement.

[78] See EDO NSW, *Comment on the Draft Agreement between the Australian Government and the State of NSW* (Dec. 2006), at: www.edonsw.org.au/planning_development_heritage_policy.

[79] ICAC (2010), *The exercise of discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005.*

[80] Figure based on a search of http://majorprojects.planning.nsw.gov.au, as at 11/12/2013.

ANEDO therefore does not support the re-accreditation of Part 3A transitional assessments and the proposed accreditation of Part 3A approvals.

Threatened or migratory species licences under Part 6 of the Threatened Species Conservation Act 1995 and Threatened or migratory species licences under Part 7A of the Fisheries Management Act 1994.

Schedule 1 – Declared class of actions - also proposes to accredit the licencing of harm to threatened species under Part 6 of the *Threatened Species Conservation Act 1995* (**TSC Act**) and Part 7A of the *Fisheries Management Act 1994* (**FM Act**). EDO NSW is concerned about the breadth of activities that may be licenced under these provisions and the associated level of assessment required. It is also unclear how requests for licences will be assessed when there is an inconsistency between the listing of species under the EPBC Act and the TSC Act/FM Act.

An application for a licence under Part 6 the TSC Act or Part 7A of the FM Act does not require the preparation of a Species Impact Statement before a licence can be granted, unless the area of land affected is listed as critical habitat. In deciding whether to approve a licence application, the Director-General must determine whether the activity will have a significant impact on a species, or local occurrence of a population or ecological community. The information that the Director-General must consider in making this decision is provided in the relevant Parts. EDO NSW is concerned that before an action will be considered likely to cause a significant effect, the action must result in the species, or the local occurrence of a population or ecological community being placed at risk of extinction. The EPBC Act is designed to "*protect native species (and in particular prevent the extinction, **and promote the recovery**, of threatened species) and ensure the conservation of migratory species*" (Part 1, Division 3, Paragraph 2e(i), emphasis added). As such, a standard that only requires an action to prevent the extinction of a species, or the local occurrence of a population or ecological community is insufficient. To be consistent with the EPBC Act, any action that will hinder or prevent the recovery of a threatened species or local community should be subject to a full Species Impact Statement before a licence for that action can be issued.

When considering a licence application the Director General must take into account a number of specified matters including any species impact statement prepared, any written submissions received concerning the application, any relevant recovery plan or threat abatement plan, the principles of ecologically sustainable development, whether the action proposed is likely to irretrievably reduce the long-term viability of the species, population or ecological community in the region, and whether the action proposed is likely to accelerate the extinction of the species or ecological community or place it at risk of extinction. However, the Director General is not prevented from approving a licence for an activity that that is inconsistent with these considerations. Further, the Acts allow for the creation of regulations that "*provide that development or an activity of a specified type constitutes, or does not constitute, development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats*". As a result, the Commonwealth cannot be satisfied that the bilateral agreement with ensure adequate consideration of threatened species impacts in the application of licences.

EDO NSW is also concerned that the extent of public consultation regarding licencing of activities will be lowered through the accreditation process. Both Acts allow for a deemed approval. Deemed approvals are inconsistent with the requirements of the EPBC.

4. Additional Schedules

Schedule 2 – Open access to information.

The principles outlined in this schedule are appropriate, but the protocols are largely unenforceable.

Schedule 3 – Guidance documents for MNES

Clause 1.1 (a) proposes that policy and guidance documents will be "streamlined". Given the complexity and potential uncertainty of what will be covered by the agreement, it is likely that guidance documents will need to include more detail, not less.

The details of guidance documents will be in the Administrative Arrangements (b). As noted above, these have not been made public and are unlikely to be consulted upon broadly. This is inappropriate if important standards are contained in such documents.

Clause 1.2(a) indicates that NSW will "have appropriate regard to, and not act inconsistently with" guidelines, advice, plans and other documents for particular species and ecological communities. It is not clear what "appropriate" means and how the appropriate standard differs depending on the type of document.

Schedule 4 – Additional streamlining measures

Schedule 4 lists measures that will be employed in an attempt to address any "residual duplication." This is an admission that the agreement as currently drafted does not create a 'one stop shop' but rather there will remain a degree of uncertainty as to what will be covered and what will not.

The schedule identifies "existing and future strategic assessments" as an opportunity for further streamlining. However, once project approval powers have been handed to NSW and the EPBC Act has effectively been switched off, the primary incentive to do strategic assessments will be removed. It is unclear why a State would go ahead with a lengthy and expensive strategic assessment process that would take time to do properly, when federal approvals no longer apply.

ANEDO strongly supports the increased use of strategic assessments as, when done properly, they are the best way to provide long-term landscape-scale planning that takes into account cumulative impacts. A significant flaw in project by project assessment and approval is that cumulative impacts are not fully considered. The Draft agreement exacerbates this failure by focusing on faster individual project approvals that remove incentives for doing comprehensive strategic assessments.