Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

Submission on Draft NSW - Commonwealth Bilateral Assessment Agreement

18 December 2013

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of 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 Assessment Agreement (**Draft Agreement**) under the EPBC Act. Consistent with the *State of the Environment 2011* report, ANEDO supports a strong Commonwealth role in efficient and effective implementation of the *Environment Protection and Biodiversity Conservation Act 1999* (**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]

In 2006, EDO NSW was the only organisation to make a submission on the Commonwealth's draft assessment bilateral agreement with NSW. Our central concern with the former agreement was that it accredited Part 3A of the *Environmental Planning & Assessment Act 1979* (**EP&A Act**) – the controversial major project fast-track process introduced in 2005. Part 3A was accredited under the former agreement (2007-2012), notwithstanding the significant ambiguities, corruption risks 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. Continued accreditation of discretionary processes will not protect matters of national environmental significance. Any accreditation of assessment processes must be based on clear and equivalent standards being enshrined in state legislation.

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**). Nobody is arguing for an inefficient or duplicative system. In this context, ANEDO has engaged in the COAG reform 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.

A range of policy alternatives for strengthening environmental laws are available to improve the efficiency and effectiveness of national environmental law.[4] Relevant recommendations made in the independent review of the EPBC Act in 2009 should be implemented.[5]

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[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] 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.
[5] See Report of the Independent Review of the EPBC Act, at www.environment.gov.au/epbc/review/index.html.

<u>Part 1</u> of this submission outlines ANEDO's general concerns about the Government's agenda for bilateral accreditation and 'one stop shop' assessments and approvals. ANEDO reiterates strong concerns about plans to develop *approval* bilateral agreements – noting that previous attempts to do so stalled due to significant complexity and uncertainty of any actual benefits; and the recent Senate Committee findings that delegating approval powers would put environmental standards at risk, and that 'duplication' in federal-state approval processes is minimal.[6] In summary, our concerns are as follows:

- The protection of Australia's environment depends on how seriously the federal government takes its role – including by retaining EPBC Act approval powers;
- Relinquishing federal approvals will not improve efficiency or effectiveness;
- Accrediting planning laws in a state of flux creates uncertainty and fragmentation;
- Bilateral agreements should be based on achieving environmental standards not meeting arbitrary timeframes;
- Commonwealth must retain control where States have a conflict of interest;
- State threatened species and planning laws do not meet high environmental standards;
- Fast-tracking major projects contradicts risk-based assessment; and
- Commonwealth must retain robust compliance, enforcement, reporting and assurance mechanisms in legislation.

<u>Part 2</u> of this submission comments on the provisions of the draft Agreement between NSW and the Commonwealth, to improve the drafting, rigour and operation of this and future bilateral agreements under the EPBC Act, should they proceed. This should not be taken as an endorsement of the bilateral accreditation process, as ANEDO's strong concerns about bilateral agreements are made clear in this submission.

<u>Part 3</u> of this submission outlines ANEDO's significant concerns about accrediting NSW major project assessment processes in their current form under Schedule 1 of the Draft Agreement, particularly as they:

- *exempt* major projects from approvals in other environmental laws;
- retain several risks and ambiguities of the former 'Part 3A' fast-tracking regime;
- allow considerable discretion regarding environmental assessment requirements;
- provide for 'staged' development consents that leave discretion and uncertainty; and,
- are unlikely to satisfy the Minister that the Agreement accords with EPBC objects.

For these and other reasons outlined in this submission, ANEDO opposes the accreditation of current NSW assessment processes as a substitute for EPBC Act assessment. No accreditation of assessment processes should occur until the necessary suite of best practice environmental process and outcome standards are enshrined in NSW legislation.

[6] The Report notes at 2.54: 'the committee was presented with no empirical evidence to substantiate claims that Commonwealth involvement was hampering approval processes'. At 2.71
'The committee expresses grave concern at the potential for significant environmental degradation if the policy of competitive federalism results in a 'race to the bottom' on environmental protection in a bid for increased resource exploitation.'
www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/completed_inquiries/2010-13/epbc_federal_powers/report/index.htm.

As an essential prerequisite to renewing *assessment* bilateral agreements, States and Territories must first *strengthen* their major project assessment and approval processes. This should include:

- improved, proportionate and comprehensive assessment standards;
- greater transparency and public participation;
- more accountable governance arrangements;
- leading practice monitoring, enforcement, audits and reporting; and
- increased community access to justice, to ensure confidence in decision making.

Part 4 of this submission notes the likely repeal and transition away from the EP&A Act to a new Act in 2014. While this brings into question whether outgoing EP&A Act processes should be accredited at all, there are also several areas where the new *Planning Bill 2013* (NSW) may not provide 'at least equivalent protection' to the EPBC Act. In particular:

- Many aspects of the new planning system remain undetermined or unclear;
- The Planning Bill's objects do not 'accord with' ESD under the EPBC Act;
- The breadth of biodiversity offsetting is likely to contradict the EPBC Act Offsets Policy;
- Major projects are still exempt from threatened species assessment processes;
- New Mining SEPP amendments could obstruct accordance with EPBC objects;
- Assessment/protection of MNES in 'development assessment codes' is uncertain;
- Proposed changes allow broad discretion for SSD modifications, as with Part 3A; and,
- Public priority infrastructure will be approved before impacts are clearly assessed.

Summary conclusion and recommendations

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 Commonwealth 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,[7] 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 Commonwealth Government should consult on and issue a uniform set of national environmental standards that state assessments must comply with to be accredited.
- 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 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.
- The Government should also review all current bilateral assessment agreements against the national environmental standards and revoke any that do not comply.

ANEDO therefore submits that any NSW Assessment bilateral agreement must be based on having the necessary suite of best practice environmental process and outcome standards are enshrined and in force in NSW legislation. The Draft Agreement should not be finalised until equivalent EPBC Act standards are codified in NSW.

[7] The Hawke Review (2009) identified a number of areas where the EPBC Act should be strengthened – including in relation to addressing cumulative impacts (at 3.3, 3.5, 3.6, 7.31, 7.60; see further the Government Response (2011), rec's 6 and 8); a single harmonised threatened species list; and the appointment of a National Environment Commission (which could oversee the rigour and effectiveness of assessment bilateral agreements).

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

Below we outline a range of broad concerns at the current proposals for accreditation and the proposed 'one stop shop' approach to both environmental assessments and approvals.

The protection of Australia's environment depends on how seriously the federal government takes its role – including by retaining approval powers

The federal Environment Minister may enter into a bilateral agreement only if the agreement 'accords with the objects of' the EPBC Act.[8] 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.[9]

The Act's objects chiefly include protection and conservation of the environment and heritage (governments in partnership with Indigenous people and other groups), fulfilment of our international obligations, and promotion of *ecologically sustainable development* (**ESD**). Successive governments have defined ESD as:

> *using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.*[10]

In 2012, the previous Australian Government consulted on draft accreditation standards, comprising 106 minimum standards required under the EPBC Act and Government practice.[11] 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.[12] 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.

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 Commonwealth Government retaining direct responsibility for key functions under the EPBC Act, such as decisions about when the Act is triggered and final approval decisions. The Commonwealth Government's ongoing role – as signatory to international environmental agreements – is fundamental to meeting its legal obligations.

In brief, Commonwealth oversight of MNES is vital because:

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[8] EPBC Act, s 50.
[9] See EPBC Act 1999, ss 3-3A and s 44(a).
[10] Australian Government. *National Strategy for Ecologically Sustainable Development* (1992), http://www.environment.gov.au/node/13029. The Strategy continues:
Put more simply, 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.
[11] *Draft Framework for the Accreditation of Environmental Approvals under the EPBC Act* (July 2012) and a *Statement of Environmental and Assurance Outcomes* (June 2012). See ANEDO's submission on these standards at www.edo.org.au.
[12] See for example, ANEDO, *Best practice standards for environmental law* (June 2012).

- 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 standard;
- 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.[13]

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. For example, the timeframe for Commonwealth *approval* is 30 business days from the date the Environment Minister receives the State's assessment report.[14]

Comprehensive *assessment* of projects is the longest and most complicated stage in the overall approvals process. This is to some extent inevitable because of the scale of project applications, complex 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.*[15]

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.

Accrediting planning laws in a state of flux creates uncertainty and fragmentation

Hasty accreditation of State and Territory laws will not be possible where the relevant regulatory requirements are at odds with standards under the EPBC Act. Furthermore, it is not appropriate for the Commonwealth to accredit laws that are in a state of flux and transition. For example, new NSW planning legislation is currently being debated in Parliament, and its outcome is uncertain. Many environmental standards are to be determined by future instruments that will not be finalised by 18th September 2014, when an approval bilateral agreement is intended to be in place. (This is discussed below in Part 4).

In March 2013, a Senate Committee found that there was minimal evidentiary basis for the claims of delay and duplication; and that environmental standards would be put at risk if federal approval powers were delegated. This finding coincided with the

[13] 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.
[14] EPBC Act 1999, s 130(1B). For other assessment types the period is between 20-40 days.
[15] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.

breakdown of negotiations on environmental standards and bilateral agreements, due to complexity, unclear benefits and unrealistic timeframes.

We note the resumption of these negotiations have again been accompanied by tight timeframes. However, we are not aware of any review or analysis of past bilateral assessment agreements that demonstrate improved efficiencies and environmental outcomes. Accordingly, there remains a significant prospect that accrediting multiple assessment processes across eight jurisdictions will increase fragmentation and complexity, rather than reduce it.

In order to achieve the Commonwealth's aim of 'maintaining high environmental standards', any reform process must be predicated on States and Territories having the necessary comprehensive suite of legislated process and outcomes standards in place and operative *before* accreditation can occur. For the assurance that environmental protection will be maintained to be credible, the process needs to be focussed on the achievement of the necessary standards, not the meeting of an arbitrary deadline.

Commonwealth must retain control where States have a conflict of interest

For many major development projects, the State 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 project proceeding. Relevant examples include mining and major infrastructure projects.[16] In general, the Commonwealth is a step removed from the development and therefore able to make a more reasoned and measured 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.

If accreditation is pursued, bilateral agreements must not apply to types of projects where the State/Territory has a potential conflict of interest in the project. As an additional safeguard, the federal Minister must retain a broad reserve power to 'call-in' specific projects for approval, audit or enforcement action.

State threatened species 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.[17] 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.*

[16] For examples, see ANEDO, 'In defence of environmental laws' (May 2012).
[17] 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

While the laws in some jurisdictions look good 'on paper', they are not effectively implemented. We give some examples below.

A number of important legislative tools available for managing and protecting threatened species are simply not used.[18] 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 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 this audit, many States and Territories have in fact *lowered* environmental legislative standards relevant to the protection of MNES. Such lowering of State 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 also being 'streamlined' in ways that are unlikely to satisfy EPBC Act protections (see Part 4 below). 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'.[19] Given the decline in biodiversity, combined with increasing population pressures, land clearing, invasive species and climate change, now is *not* the time to be streamlining and minimising legal requirements in relation to biodiversity assessment. 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.[20] Accordingly,

[18] 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.

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

[20] 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).

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 EP&A Act continues to override important environmental law and licensing requirements (or 'concurrences').[21] 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;[22] and projects with the most significant impacts deserve the most rigorous scrutiny and safeguards.

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.[23] This fundamental contradiction supports ANEDO's view that transfer of Commonwealth *approval* powers to the States is misconceived.

Commonwealth must retain robust compliance, enforcement, reporting and assurance mechanisms in legislation

There has been no clear indication of how monitoring, auditing, reporting, compliance and enforcement will work under the 'One Stop Shop' model. 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 matters of national environmental significance, potentially breaching our international obligations, and potentially exposing the Commonwealth to legal liability.

At present, it is clear that our planning systems fail to quantify environmental benefits and deterioration. There are inherent difficulties in measuring the efficiency and effectiveness of state planning systems, because jurisdictions are poor at integrating natural resource management indicators, and at reporting on 'triple bottom line' or ESD outcomes.[24] Even where governments commit to report on outcomes, they rarely

[21] 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.

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

[23] 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.

[24] See ANEDO's 10 best practice principles for planning and environmental laws, 'Principle 10 – Monitoring and review'. The COAG Reform Council's review of capital city strategic planning found that most Australian capitals (with the exception of Adelaide) have a poor record of monitoring and reporting on accountabilities,

incorporate social and environmental objectives and indicators. Major projects reporting, in particular, tends to focus on project value and employment numbers generated, providing an incomplete picture of benefits and costs. This is contrary to best practice reporting principles.[25]

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. Governments should also accelerate progress on national and state environmental accounts, and link this to improved major project monitoring and reporting.[26] Without meaningful measurement, monitoring and reporting, it is impossible to arrest environmental decline and ensure Australia's development is ecologically sustainable.[27] 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 assessment agreement are promoting ESD and actually protecting and enhancing MNES as required by EPBC Act standards.

timelines and performance measures (*Review of capital city strategic planning systems* (2011), available at http://www.coagreformcouncil.gov.au/reports/cities.cfm, 'Overview', criterion 9.

[25] See Audit Office on NSW, Judging Performance from Annual Reports (2000). The Office's Better Practice Principles include: *Objectives are clear and measurable; Focussing on results and outcomes; Discussion results against expectations; Reporting is complete and information; Explaining changes over time; Providing evidence of value for money and benchmarking; Discussing strategies, risks and external factors.*

[26] Environmental accounting initiatives are underway at the federal level. See Australian Bureau of Statistics, 'Completing the Picture - Environmental Accounting in Practice', 10 May 2012,. *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act* (August 2011), recommendation 67 ('accepted in principle'), pp 109-110. See also Hawke, A. (2009), Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Final Report, October 2009, Chapter 19; Wentworth Group of Concerned Scientists *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia*, (2008)

[27] 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

ANEDO provides the following comments on the drafting, rigour and operation of the NSW Draft Agreement. This should not be taken as an endorsement of the bilateral accreditation process. ANEDO's strong concerns about bilateral agreements are made clear in this submission and elsewhere. As noted, ANEDO submits that NSW Assessment bilateral agreement should not be finalised until the necessary suite of best practice environmental process and outcome standards are enshrined and in force in NSW legislation.

Background

We note that the exhibition of the draft Agreement follows a signed Memorandum of Understanding (**MOU**) between the NSW and Commonwealth Governments (dated 5 November 2013). The MOU and Background to the Draft Agreement refer to the Intergovernmental Agreement on the Environment (**IGAE**) 1992 and the COAG Heads of Agreement on the Environment 1997, where 'the Parties committed to working together across shared responsibilities to protect and conserve Australia's environment'.[28] Under the IGAE, all levels of Government should use 'the concept of ecologically sustainable development [and its principles[29]] … in the assessment of natural resources, land use decisions and approval processes.' While the MOU and draft Agreement both state that they do not create legal obligations between the parties,[30] the parties commit to 'strengthen intergovernmental cooperation' and to 'minimise costs to business while maintaining high environmental standards.'

Any agreements should involve Environment Ministers and departments

The principal decision maker under the EPBC Act is the federal Environment Minister, on expert advice of the Environment Department. However, the NSW draft Agreement delegates responsibility for assessments to the NSW Planning Minister, on advice of the State Department of Planning & Infrastructure. The draft Agreement makes no express role for the NSW Environment Minister or the Office of Environment and Heritage (**OEH**). While many state planning systems place assessment responsibilities in the hands of Planning departments, this is an important difference under the EPBC Act – because it focuses on matters of national *environmental* significance.

Advice of a specialised environment department (whether at federal or state level) is essential to ensure appropriate expertise and arms-length assessment of impacts on MNES is carried out. Accordingly, it would be more appropriate for the state *Environment Minister* to assume relevant responsibilities if the Commonwealth intends to accredit state assessment systems. The federal Environment Minister should retain *approval* powers.

[28] For example, under the 1997 COAG Heads of Agreement, 'The Commonwealth has an interest in relation to implementation of the *National Strategy for Ecologically Sustainable Development*'. (Attachment 1, item 25).
[29] See IGAE, clause 3.5 and Schedule 2.
[30] See for example, draft Agreement, 2(b); Commonwealth-NSW MOU, Background (D).

Effect of this Agreement (clause 4)

4.2 (Scope of agreement) – Clause 4.2(b) provides that, where an action occurs only partly in NSW, or has 'relevant impacts in other jurisdictions', the parties will consult to reach agreement on an appropriate assessment process (such as those in Schedule 1).

ANEDO submits that this clause is ambiguous, and the circumstances above merit the Commonwealth retaining assessment and approval powers for such actions. Clause 4.2(b) should be deleted or amended to retain Commonwealth oversight.

4.3 (Determination that an action is not within a class of action) – ANEDO supports the federal Minister maintaining a broad legal power to call in individual projects. However, clause 4.3(b) prevents the federal Minister from requiring Commonwealth assessment for a particular action once the NSW Minister has advised that an accredited State assessment process will apply (see cl. 5.3).

ANEDO submits that clause 4.3(b) should be deleted. The federal call-in power should remain broad (but could be subject to guidelines or criteria for exercise). The federal Minister should *not* be prevented from calling-in a project once the NSW Minister responds, as further information may have come to light, or the federal Minister may consider the nominated assessment process is not appropriate in the circumstances.

ANEDO has noted a range of circumstances where it is inappropriate for State governments to assess or approve projects on behalf of the Commonwealth, including where there is a conflict of interest (see Part 1). Actions affecting World Heritage Areas, and nuclear actions (which were excluded under the former NSW agreement (cl. 9.4)) and should also be expressly excluded in the Agreement itself.

Assessment (clause 6)

6.1 (Statutory undertaking) – The draft Agreement includes an undertaking by NSW that environmental impacts of certain actions 'will be assessed to the greatest extent practicable.'[31] At clause 6.1(b) the parties agree that this undertaking is satisfied by assessment in a manner specified in Schedule 1. However, this submission notes a range of inadequacies in the EP&A Act processes proposed to be accredited at Schedule 1. These methods may not necessarily satisfy the required NSW undertaking.

6.3 (Single assessment)[32] – The Agreement should provide that the parties will *agree on* the form of assessment that will provide sufficient information, rather than allowing this to be decided by NSW alone. ANEDO is aware of examples where sufficient information has not been provided in State assessment processes, such as the Alpha coal mine in Queensland and the Gloucester Gas Project in NSW.[33]

The reference to 'maximise the efficiency' of NSW assessment processes (6.3(c)) should also refer to maximising their 'environmental effectiveness'.

6.4 (Consistency and predictability) – The word 'streamlined' should be removed from subclause (b). This is an ambiguous and value-laden term that may erode the environmental 'effectiveness' of administrative processes that the clause aims to foster.

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[31] As required in the EPBC Act, s. 48A.
[32] This clause corresponds to EPBC Act requirements at s.47(4).
[33] See, for example, EDO NSW case summary, *Barrington-Gloucester-Stroud Preservation Alliance Incorporated v Planning Assessment Commission and AGL Upstream Infrastructure Investments Pty Limited*, at http://www.edonsw.org.au/barrington_gloucester_stroud_preservation_alliance.

6.8 (Relevant plans and policies) – NSW should agree to 'act consistently with', not only 'take into account' relevant guidelines, policies and plans. This would better reflect the federal Minister's approval obligations[34] and Australia's international obligations. Clause 6.8 should also list a range of additional policies, including those specified in the former NSW agreement (cl. 27), such as management and conservation plans for World Heritage, National Heritage, migratory species and Ramsar wetlands.

Transparency and access to information (clause 7)

ANEDO welcomes the inclusion of specific requirements in relation to engaging Indigenous Australians, public access generally, and for other particular needs groups. General public access should include timely publication of notices (for example, cl. 5) and other consultation opportunities. These should be done in ways that are relevant and engaging to the community.

Conditions (clause 8) – including enforcement

8.2 (Monitoring compliance with conditions) – Clauses 8.2 and 8.3 of the draft appear to support cooperation and allow either party to enforce contraventions of approval conditions. However, the overall implications of clauses 8, 9 and 11 are unclear with regard to Commonwealth and State monitoring, enforcement and auditing roles and responsibilities. This should be clarified. (See 'Commonwealth must retain robust compliance, enforcement and assurance mechanisms in legislation' above.)

Enforcement generally

Enforcement issues remain a significant source of ANEDO's concern about accrediting State assessment and approval processes. We understand that in the last three years the federal Environment Department investigated 980 incidents under the EPBC Act; and undertook over 40 court actions, resulting in fines and enforceable undertakings totalling almost $4 million.[35] If the Commonwealth's enforcement of the EPBC Act were 'switched off' for State-approved projects, the community would have no guarantee that States and Territories would fill the gap.[36] The draft Agreement does not address this problem.

In relation to enforcement by third parties (community members), ANEDO strongly supports 'open standing', as generally provided by NSW planning and pollution laws. However, as outlined in Part 3 of this submission, some 'fast-tracking' regimes limit third party standing for enforcement action where major projects breach conditions.[37]

In ANEDO's experience, State governments are not always willing and able to effectively enforce their own planning and environmental laws, let alone fill the Commonwealth's shoes. This is reflected in experience with post-approval monitoring of mining projects.[38] In its 2011 discussion paper on *Mining Law in NSW*, EDO NSW made nine recommendations to improve monitoring and enforcement.[39] While they were expressed to apply to the NSW mining industry, many are appropriate for major projects generally.

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[34] EPBC Act, s. 139.
[35] Department of SEWPaC/DEWHA, figures compiled from annual reports, 2009-10, 2010-11, 2011-12.
[36] In its submission on Draft Accreditation Standards (Dec. 2012), ANEDO stated that if accreditation did proceed, the Standards Framework and bilateral agreements must require *at least equivalent* legal enforcement powers and tools as at the federal level; and undertakings that States will increase their investigation, audits and enforcement action to fill the federal gap.
[37] For example, in relation to critical state infrastructure in NSW (see *EP&A Act 1979*, s 115ZK).
[38] See NSW Legislative Council Committee GPSC 5, Final report, Coal Seam Gas inquiry (2012).
[39] *Mining Law in NSW – Discussion paper*, part 3, available at http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf.

Cooperation and governance (clause 9)

While ANEDO does not support bilateral accreditation under present arrangements, the environmental effectiveness of *any* assessment bilateral relies on sound administrative arrangements. Such arrangements should include a 'highest environmental denominator' approach to promoting consistent standards across jurisdictions, and strengthening regulatory skills and resourcing at state and federal levels. The process of 'jointly developing' these arrangements between the parties must include stakeholder engagement and public consultation. The 'Exchange of information' provisions (9.3) should promote open government.

Review (clause 10)

The EPBC Act requires a review 'at least once every 5 years while the agreement remains in effect.' (s. 65(2)). Clause 10 of the draft Agreement mirrors this requirement, but does not require a more frequent or specific timeframe. It also says that the review is to be conducted jointly by the parties. Clause 10 should be amended to:

- *Provide for independent review.* This should preferably be conducted by a new National Environment Commission.[40] Alternatively, an independent review could be conducted the COAG Reform Council; jointly by the ANAO and the relevant State Audit Office; or jointly by an independent panel of environmental, government and industry experts.
- *Provide for a review after 2 years, as well as after 5 years of operation.* This would ensure the operation of bilateral agreements is reviewed early enough to redirect their operation for future projects. It would also to provide useful data in the event that the agreement is terminated before the end of 5 years (in which case there may have been no review of the agreement, as in NSW).
- *Require that the review seeks the views of key stakeholders and the public.* Under the former NSW bilateral agreement, the parties agreed to 'seek views of key stakeholders'[41] (though we understand that no review has been conducted).

Amendment (clause 14)

Clause 14 provides for 'minor amendments' to the Agreement (cl. 14.2), and for the parties to agree on whether legislative amendments mean that a new Agreement is necessary. Given the state of flux of the NSW planning system (and others), it should be made clear that significant amendments, and indeed a new Planning Act, would require a whole new Agreement. Although this is an appropriate safeguard, it also highlights the problem with accrediting EP&A Act processes that may soon be repealed – including the likely fragmentation and complexity of having numerous, separate accredited processes.

Freedom of information (clause 15)

Clause 15(b) should require expeditious consultation so that statutory FOI obligations can be met 'without delay', as per the former NSW agreement (cl. 29). ANEDO has had direct and recent experience with delays in FOI requests from both State and federal departments.

[40] See for example, EDO Victoria, 'Our proposal for National Environment Commission', http://www.edovic.org.au/law-reform/major-reports/proposal-national-environment-commission.
[41] NSW-Commonwealth Agreement (2007), 2.1(b)

Schedule 1 – Declared class of actions

Specific comments on the assessment processes that are proposed to be accredited under Schedule 1 are outlined in the next part of this submission. For present purposes we make brief comment on the important list of requirements under item 3 of Schedule 1 (guidelines, public comment and assessment report requirements).

The extensive list of additional requirements at item 3 demonstrates both the extent of obligations that the Commonwealth is proposing to give up; as well as the potential for bilateral agreements to *increase* fragmentation and complexity of assessment processes. This is because each State and Territory would adopt a different approach in attempting to fulfil federal obligations, whereas if the Commonwealth retained its proper obligations, it could fulfil these requirements by applying a single process to across all jurisdictions.

3. Problems with accrediting NSW EP&A Act assessments – Draft Agreement Schedule 1

Classes of actions to be accredited under the Agreement

The draft Agreement (Schedule 1 Item 2) declares four classes of actions that will no longer require *assessment* under Part 8 of the EPBC Act.[42] The four classes all relate to *major projects* assessed under the NSW *Environmental Planning and Assessment Act 1979* (**EP&A Act**), namely:

i) State Significant Development (SSD)[43]
ii) State Significant Infrastructure (SSI)[44]
iii) SSD modifications[45]
iv) Transitional Part 3A projects.[46]

The draft Agreement lists assessment requirements for each accredited class. 'Each of these assessment approaches are taken to correspond to assessment by Environmental Impact Statement under the EPBC Act.'[47]

ANEDO has significant concerns about accrediting NSW major project assessment processes in their current form. This is because these processes:

- *exempt* major projects from approvals in 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 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;
- 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);[48] providing sufficient information to inform a federal approval decision (s. 47); or enhancing the conservation status of relevant matters of NES (s. 53).
- may shortly be replaced by a whole new state Planning Act as early as 2014.

[42] These are classes to which clause 4.1 of the Agreement applies. See also EPBC Act, s. 47(1). To satisfy the exemption from EPBC Act assessment, these actions must be carried out in NSW, and in accordance with draft Agreement Schedule 1 (in particular the requirements under Item 3).
[43] Actions assessed under Part 4, Division 4.1 of the EP&A Act, including the following processes: evaluation of the matters listed under s 79C of that Act, and an environmental impact statement (**EIS**), and any report of the Planning Assessment Commission (**PAC**), and undertaken in accordance with Item 3 of Schedule 1.
[44] Actions assessed under Part 5.1 of the EP&A Act, where an EIS is conducted, and undertaken in accordance with Item 3.
[45] Actions assessed under Part 4, Division 7 of the EP&A Act, and classified as SSD, and undertaken in accordance with Item 3.
[46] Actions assessed under Schedule 6A, s 75W of the EP&A Act, and undertaken in accordance with Item 3. These are major project proposals that remain in the NSW system after Part 3A of the EP&A Act was repealed in 2011.
[47] Draft Agreement, Schedule 1, Item 2.
[48] Such as protecting MNES, promoting ESD and cooperatively fulfilling international obligations.

For these and other reasons outlined in this submission, ANEDO opposes the current bilateral accreditation of NSW processes as a substitute for EPBC Act assessment. We outline some specific inadequacies of each of the four categories in more detail below.

Not clear that NSW fulfils bilateral requirements, including for threatened species

The federal Environment Minister may enter into a bilateral agreement only if satisfied that the agreement 'accords with the objects of' the EPBC Act.[49] The Minister may only accredit State *assessment* processes if satisfied that those processes 'will include assessment of the impacts' on each protected matter of NES.[50] A further prerequisite is that assessment reports will give the federal Minister *sufficient information* to decide whether to approve the action or not.[51]

The draft Agreement includes provisions relating to impacts on listed threatened species, ecological communities and migratory species or their habitat (Part 6.3(b)(ii)(D)-(E)), among other matters. Accordingly, in addition to the requirements above, the federal Minister would also need to be satisfied that the Agreement:

- will *promote the survival of, and/or enhance the conservation status of, each species or community* that the accredited process will apply to;[52] and
- protects federally-listed species in a way that is consistent with Australia's international obligations,[53] species recovery plans and threat abatement plans.[54]

ANEDO is concerned that these requirements will not be satisfied on the basis of present NSW assessment laws, given the broad exemptions for major projects from environmental protections and assessment processes (discussed below), and the limited influence of NSW threatened species laws on development assessment and outcomes.[55]

We note that the previous NSW bilateral assessment agreement included 'Part A – Development Assessment' and a separate 'Part B' – Threatened species' Part B provides separate detail on NSW assessment processes as corresponding to EIS under the EPBC Act being:

- Assessment under Part 6 TSC Act 1995 (NSW)
- Assessment under Part 7A FM Act 1994 (NSW)]

The revised agreement does not include this level of separate detail in relation to the specified manner of assessment for threatened species. In light of concerns noted about the inadequacies of threatened species legislation and the state of transition of NSW planning laws, these processes must be strengthened, clarified and codified before any broader accreditation occurs.

[49] EPBC Act, s 50.
[50] EPBC Act, s. 47(2).
[51] EPBC Act, s. 47(4).
[52] EPBC Act, s. 53(1).
[53] Such as, under EPBC Act s. 53: the Biodiversity Convention, the Apia Convention for Conservation of Nature in the South Pacific, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); and under s. 54: the Bonn Convention on migratory species, and migratory bird agreements with China, Japan and Korea (CAMBA, JAMBA, ROKAMBA).
[54] Among other things, including any requirements in regulations. See EPBC Act, s 53.
[55] ANEDO has elsewhere noted a range of concerns regarding the practical application of NSW threatened species protection laws and their interaction with NSW planning laws. See ANEDO, *An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia* (2012), chapter 5.

Even if NSW processes were modified on a case-by-case basis for controlled actions – to apply 'exempt' concurrences and other EP&A Act threatened species assessment processes to *federally-listed* species – this would create fragmentation and complexity in NSW processes, rather than simpler assessments.

Accordingly, 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. As noted elsewhere, the Commonwealth should *always* retain control over certain other matters like World Heritage and nuclear actions.

(i) Action class 1 – State Significant Development (SSD)

The draft Agreement proposes to accredit the NSW EP&A Act assessment process for 'State Significant Development'.[56] ANEDO does not support the accreditation of SSD assessment for the reasons outlined in this submission. 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.

SSD includes projects with significant impacts, assessed by Department of Planning

The 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.[57]

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.[58] Examples include mining, oil and gas, intensive livestock agriculture, chemical manufacturing, timber milling and pulp processing, ports, hospitals, power stations and waste facilities.[59]

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**).[60] SSD applications may be 'staged'.[61] For example, an applicant may seek approval for an overall proposal with or without seeking approval to commence the first stage.[62] 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.

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[56] Draft Agreement, Item 2(a)(i) to Schedule 1.
[57] See Planning Department's State significant fact sheet (2011).
[58] 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).
[59] *State Environmental Planning Policy (State and Regional Development) 2011,* Schedule 1.
[60] *Environmental Planning and Assessment Act 1979* (NSW), s. 89D.
[61] As is the case with Part 4 applications considered by local councils.
[62] 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.

The current NSW Minister has delegated all SSD applications by private developers to his Department and the PAC for determination, for a more arms-length approach to private projects.[63] 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.[64] The EP&A Act sets out minimum 30 days' exhibition and submission requirements.[65]

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 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.[66]

Removing legal concurrence requirements to 'integrate' or improve coordination does not equate to risk-based, arms-length or transparent assessment.[67] It limits expert oversight 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.

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[63] 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.

[64] 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.

[65] *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.

[66] 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.

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

Further exemptions from threatened species assessments

SSD is also exempt from two further legislative protections for threatened species.[68]

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[69] is also needed if the development is on 'critical habitat', or will otherwise significantly affect threatened species.[70]

Second, significant impacts on critical habitat or threatened species also usually trigger a requirement to prepare a Species Impact Statement (**SIS**)[71] 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. The ability of an accredited assessment process to provide sufficient information is an important consideration for the federal Minister.[72]

The Commonwealth should not consider accrediting SSD and SSI assessment processes unless and until the range of specific safeguards (from which SSD and SSI are currently exempt) are reinstated.

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 new 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.

The draft Agreement includes a provision to delegate assessment of impacts of coal seam gas (**CSG**) or large coal mining developments on a water resource (Part 6.3(b)(ii)(F)). While the EPBC Act doesn't include specific prerequisites to making assessment bilateral agreements in relation to the water trigger,[73] the Act explicitly excludes *approval* bilateral agreements from applying to the water trigger.[74]

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[68] *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.'
[69] Office of Environment and Heritage (OEH) (or consultation with the NSW Environment Minister)
[70] *Environmental Planning and Assessment Act 1979* (NSW), s. 79B.
[71] In accordance with Part 6, Division 2 of the *Threatened Species Conservation Act 1995* (NSW).
[72] EPBC Act, s. 47(3).
[73] Cf other MNES under the EPBC Act, Chapter 3, Part 5, Division 2, Subdivision B.
[74] See EPBC Act, ss. 29(1) and 46; as amended by EPBC Amendment Bill 2013, Items 3A, 4A-4B

ANEDO has raised several examples of inadequate regulation and legal exemptions for mining activities in relation to water use and approvals, including in NSW.[75] These 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'.[76]

Given these circumstances – including limitations under NSW mining, planning and water laws;[77] ongoing controversy over the allocation of NSW coal mining tenures;[78] 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. This is consistent with the rationale for the water trigger's recent inception, and the spirit of the legislative requirement to maintain federal *approval* powers.

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 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.[79]

Mining projects are a major category of controlled actions assessed under the EPBC Act. In NSW, most mining projects are classed as SSD.[80] However, the proposed accreditation of SSD assessment may be complicated by recent changes to the NSW State Environmental Planning Policy for mining (**Mining SEPP**).[81] The Mining SEPP operates under (and in tandem with) the EP&A Act to regulate the assessment and approval of mining.[82] Recent amendments complicate the legal requirement that any bilateral agreement 'accords with the objects' of the EPBC Act (including the promotion of ecologically sustainable development) and provides sufficient information for approval decisions. We note two changes of particular concern.

First, the economic 'significance' of a resource is to be the consent authority's 'principal consideration' in determining whether to grant consent to the proposed development,

[75] 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.
[76] Senate Environment and Communications Standing Committee, Report on *Environment Protection and Biodiversity Conservation Amendment Bill 2013 [Provisions],* May 2013, p. 21.
[77] 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.
[78] 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.
[79] 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).
[80] See *State Environmental Planning Policy (State and Regionally Significant Development) 2011*.
[81] *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*.
[82] Part 2 of the Mining SEPP sets out types of development that are permissible with or without consent, or are exempt, complying or prohibited development under the EP&A Act. The Mining SEPP also overrides inconsistent provisions in other environmental planning instruments (see SEPP clauses 5 and 8).

ahead of other impacts assessable under the Mining SEPP.[83] Consideration of other matters, including environmental impacts, are to be 'proportionate' to the significance of the mineral resource, based on advice from the NSW mining department.[84] Assessment and approval processes that prioritise economic benefits as the principal consideration ahead of other impacts is *not* consistent with promoting ESD.[85]

While the Mining SEPP's 'weighting' requirement directs consent authorities at the approval stage, the State's *assessment* of impacts, and the information relied on, is also likely to be geared towards this new weighting.[86] The SEPP amendments came into force in November 2013, but have recently come under challenge in the NSW Upper House during consideration of the Planning Bill 2013.[87] Subject to the debate, the Mining SEPP's new weighting will remain in effect while the EP&A Act continues.

Case study – Warkworth decision and changes to NSW Mining SEPP

The recent Mining SEPP changes are believed to be a response to the recent NSW Land and Environment Court decision to uphold a community appeal against the Warkworth mine extension near the Hunter Valley village of Bulga.[88] EDO NSW represented the Bulga-Milbrodale Progress Association in this case.

Even under the old decision-making rules, in its initial February 2012 approval of the Warkworth extension, the NSW Planning Assessment Commission (**PAC**) found that the approval of coal mines was 'almost inevitable'; and that 'in almost all [similar] cases the mines have been approved and the [affected] communities have either been radically altered in character or become non-viable.' The PAC continued:

If this is to change then NSW will need to develop a clear policy position that provides further guidance to decision-makers as to how social impacts on rural villages are to be balanced in the approval process for coal mines.[89]

In April 2013, the Court overturned the PAC's approval due to the project's significant adverse impacts on biodiversity, the adverse noise, dust and social impacts, and inadequacies in the economic modelling.[90] The mining company and the Planning Department appealed the Court's decision on judicial review grounds in the NSW Court of Appeal. The parties now await judgment.

[83] Mining SEPP 2007, Part 3. Other impacts include: dust and noise pollution affecting local residents; limiting truck traffic on local roads near houses and schools; compatibility with other land uses such as agriculture, villages and tourism; and conditions to protect water resources, threatened species and biodiversity, minimise greenhouse emissions and waste, and rehabilitate the land.
[84] Mining SEPP 2007, clause 12AA.
[85] Including principles such as the integration of short-term and long-term economic, environmental, social and equitable considerations; the precautionary principle; ecological integrity as a fundamental consideration; intergenerational equity; and improved valuation of environmental costs and benefits. See EPBC Act 1999, ss. 3-3A.
[86] The exposure draft Mining SEPP amendments had included a requirement to consider the objects of the SEPP, which include the promotion of ESD, but this requirement was removed before the final SEPP amendments were made in November 2013.
[87] Planning Bill 2013 (accessed 11/12/2013) available at: http://parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/33e72ad6ea1238b5ca257c0c0014134d?OpenDocument.
[88] See for example, EDO NSW current cases at www.edo.org.au/edonsw/site/casework_key.php; see also Global Mail, *The town that wouldn't disappear* (July 2013) http://bulga.theglobalmail.org/.
[89] Planning Assessment Commission report on Warkworth Extension Project (09_0202), 3 Feb. 2012 pp 8-9.
[90] *Bulga Milbrodale Progress Association Inc v Minister for Planning & Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48. See also, EDO NSW, www.edo.org.au/edonsw/site/casework_key.php#bulga.

It is striking that the recent Mining SEPP amendments appear to *endorse and reinforce* the view that the approval of mining projects is 'almost inevitable', even where they have significant negative impacts on human settlements and the environments that support their quality of life.

ANEDO strongly opposes the prioritisation of economic benefits of major resource projects as the 'principal consideration' over other economic, social and environmental impacts. In our view, this distorts the rigour of the development assessment process. By contrast, the PAC's comments above underline the importance of more robust and balanced environmental, social and economic criteria in development decision-making processes; and the need to ensure that development assessment and approval ultimately aims to achieve ESD – as is required under federal EPBC Act standards.

Second, 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. Furthermore, the levels set in the standards are not best practice. For example, the Mining SEPP's new standards for air quality fail to address daily averages or levels of particulate matter recommended by the World Health Organisation and the National Environment Protection Measure (**NEPM**) for air quality – notwithstanding legal commitments to implement each NEPM under NSW laws.[91]

EPBC Offsets Policy sets good benchmarks, but there are gaps in NSW law

ANEDO does not necessarily support biodiversity offsetting because of its uncertainty in achieving long-term environmental outcomes.[92] Nevertheless, the *EPBC Environmental Offsets Policy* (2012) provides relatively strong and appropriate standards compared to 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.[93] The benchmark set by the EPBC Offsets Policy underlines the importance of the Commonwealth's ongoing role in environmental leadership, oversight and standards.

Along with the threat of weaker standards, in NSW the intent of securing offsets 'in perpetuity' to achieve environmental outcomes is not matched by legal protections.[94]

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[91] See for example *National Environment Protection Council (New South Wales) Act 1995*, s. 7. The Mining SEPP, cl. 12AB(4) requires (subject to authorities' discretion where standards are exceeded):
The development does not result in a cumulative annual average level greater than 30 µg/m^3 of PM_{10} for private dwellings. Note. This development standard does not prevent a consent authority from imposing conditions to regulate project-related air quality impacts that are not the subject of the development standard.
Recommendations in the *WHO Air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulfur dioxide* (2005) suggest an annual average for PM10 of 20µg/m^3. The NEPM for air quality currently has a mandatory requirement for daily averages of PM10 to be below 50µg/m^3 (with a number of allowable annual exceedences) and advisory standards of 25µg/m^3 for daily averages and 8µg/m^3 for annual averages for PM2.5. A summary of the NEPM standards is available at: www.environment.gov.au/atmosphere/airquality/standards.html.

[92] 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.

[93] 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.

[94] The usual policy intent is that offsets should endure as long as the impact that it is designed to offset (for example, an open cut mine). In practice, this would often require protection of the offset site 'in perpetuity',

There are several ways in which biodiversity offsetting agreements can be overridden (for example, by mining title rights), or revoked (for example, by the minister who made the agreement).[95]

Case study – Offsets and the Warkworth Mine Extension

The initial 2012 approval of the Warkworth Mine Extension by the NSW PAC would have allowed the mining of a site set aside in 2003 as a 'biodiversity offset' for threatened flora and fauna – under a previous approval condition for the same mine. The Land and Environment Court agreed with the Bulga Milbrodale Progress Association that mining the offset would be contrary to the public interest, and that the expansion would result in detrimental economic and social impacts on the Bulga community that are contrary to ESD principles.[96] As noted, the NSW Planning Department and the proponent are challenging this decision in the Court of Appeal.

This additional context of the case – that the company had previously agreed to 'offset' its biodiversity impacts as part of the original approval, then went back on this agreement with the sanction of the Planning Department – highlights the inadequacy of legal protections around biodiversity offset lands. It is particularly troubling if 'in perpetuity' protection of biodiversity can be set aside where doing so is economically convenient.

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.[97] (Proponents have a broader range of rights.) Third party merit appeals must be commenced within 28 days of being notified of the approval.[98] 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.

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.[99] EDO NSW also supported more equitable third party merit appeals.[100] The NSW Government has, however, rejected these recommendations in its Planning Bill 2013.

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as the original site either cannot be fully rehabilitated to accommodate the original ecosystems, or may be used for a different purpose (such as conversion to landfill).

[95] See *Threatened Species Conservation Act 1995* (NSW), ss 127S-127U.

[96] *Bulga Milbrodale Progress Association Inc. vs Warkworth Mining Limited & Ors* [2013] NSWLEC 48, available at http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=164038.

[97] That is, lodged a submission objecting to the development during the exhibition period.

[98] *Environmental Planning and Assessment Act 1979* (NSW), s. 98.

[99] 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.

[100] EDO NSW planning submissions (2011-13) at http://www.edonsw.org.au/planning_reforms.

(ii) Action class 2 – State Significant Infrastructure (SSI)

The draft Agreement proposes to accredit NSW assessment processes for State Significant Infrastructure (**SSI**) applications.[101]

As noted above, 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 assessment 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).

Accordingly, ANEDO does not support the accreditation of SSI assessment to replace EPBC Act assessment. 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.

Overview of SSI development types and assessment process

According to the NSW Government:[102]

> *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).*[103]

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 assessment report.[104] The PAC may determine private SSI developments; and senior Planning Department officers may determine less controversial SSI proposals.[105]

State significant infrastructure assessment has similarities to the SSD process.[106] For example, the Planning Department must consult agencies and issue Director-General's

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[101] Draft Agreement, Schedule 1, Item 2(a)(ii).
[102] NSW Department of Planning and Infrastructure, *Fact sheet – State significant assessment system: an overview* (Sept. 2011), p 4.
[103] 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).
[104] *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZA-115ZB.
[105] 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.
[106] Although local and state planning instruments will not generally apply to SSI, unless otherwise specified. Appeal rights also differ. See below.

Requirements (**DGRs**);[107] the proponent's must address the DGRs in an Environmental Impact Statement (**EIS**);[108] there is a minimum 30-day public exhibition period;[109] staged approval is available;[110] and SSI is exempt from many environmental approvals – as discussed below.

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.[111] 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.[112] 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[113]) with the Minister's permission.[114]

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.[115]

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.

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[107] *Environmental Planning and Assessment Act 1979* (NSW), s. 115Y(3).
[108] *Environmental Planning and Assessment Act 1979* (NSW), ss. 115Y and 115Z
[109] *Environmental Planning and Assessment Act 1979* (NSW), s. 115Z(3); *Environmental Planning and Assessment Regulation 2000* (NSW), cl. 194.
[110] 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.
[111] *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZG.
[112] *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZH.
[113] See *Environmental Planning and Assessment Act 1979* (NSW), s. 115V; *State Environmental Planning Policy (State and Regional Development) 2011*, Schedule 5.
[114] *EP&A Act,* s. 115ZK.
[115] *EP&A Act,* s. 115ZG(3).

In such cases, the agency that approved the project may be the only party that can enforce conditions, with very little external scrutiny. This raises questions about the likely adequacy of conditions, monitoring and enforcement under the draft Agreement (cl. 8).

Modification of SSI projects is largely discretionary

As with former Part 3A, the ability for proponents to modify a consent for SSI is widely discretionary.[116] 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. This process is more discretionary than the current *SSD modification* process (although the Planning Bill 2013 proposes to expand the discretionary approach as discussed below).

(iii) Action class 3 – Modifications of SSD consents

The third class of NSW assessment processes that the draft Agreement proposes to accredit is for SSD 'modification' applications.[117]

Consistent with our concerns about SSD and other existing assessment processes, ANEDO does not support this accreditation.

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, misdescription or miscalculation.[118]

SSD modifications are therefore subject to more assessment safeguards than SSI, above. 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.[119]

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

[116] *EP&A Act,* s.115ZI. Cf s. 75W (former Part 3A).
[117] Draft Agreement Schedule 1, Item 2(a)(iii). See also EP&A Act 1979 (NSW), Part 4, Division 7.
[118] *Environmental Planning and Assessment Act 1979* (NSW), s. 96; *Environmental Planning and Assessment Regulation 2000* (NSW), cl. 117.
[119] *Environmental Planning and Assessment Act 1979* (NSW) ss. 96(2)(b), 79B(2A)-(3) and 96(5).

Modifications should provide for adaptive management & continuous improvement

ANEDO notes that modification of development consents may be necessary to reflect updated information, such as changed environmental circumstances, new listings of endangered species, unexpected adverse impacts, or improvements in technology.

However, *additional safeguards should apply* to NSW major project modifications, to ensure these processes are not 'gamed' to reduce compliance obligations, avoid community transparency, or weaken environmental standards in favour of project profitability. In addition, regulators should have powers to require *continuous improvement* (that is, reasonably increase environmental protections in project conditions over time). For example, the US EPA requires the operators of polluting facilities to adopt 'best available technology' when licences are renewed.[120]

(iv) Action class 4 – Transitional Part 3A projects

The fourth and final class of NSW assessment processes that the draft Agreement proposes to accredit is for transitional Part 3A projects.[121]

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 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.

As noted, in 2006, EDO NSW was the only organisation to make a submission on the Commonwealth's draft assessment bilateral agreement with NSW.[122] 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:[123]

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[120] For example, in the USA, new major sources of pollution, or facilities undertaking major modifications, have to obtain permits ensuring that they avoid causing or contributing to pollution that threatens emissions standards. They must also implement best available technology to control pollution. See United States Environmental Protection Agency, New Source Review (23 July 2011) www.epa.gov/nsr/; see also *Clean Air Act* §7412 (USA).

[121] Draft Agreement Schedule 1, Item 2(a)(iv) – actions assessed under Schedule 6A, s. 75W of the EP&A Act 1979 (NSW). The EP&A Act states that Part 3A of the Act continues to apply to, and in respect of, a 'transitional Part 3A project' (Schedule 6A, clause 3(1)). This includes an approved project, an approved concept plan, a project where DGRs for a project or concept plan have been notified or adopted within 2 years before the Part 3A repeal date, and projects for which an environmental assessment for a project or concept plan was submitted before the repeal date (EP&A Act Schedule 6A, clause 2).

[122] 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.

[123] 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.

- 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,[124] 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 less than 40 transitional projects remaining.[125]

Following the repeal of Part 3A and the expiry of the previous bilateral agreement with NSW, the current legal arrangements require the Commonwealth to assess and approve any Part 3A projects that may have significant impacts on MNES. ANEDO supports the ongoing retention of Commonwealth assessment powers as a check for major projects of greatest impact in NSW.

[124] 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.*
[125] Figure based on a search of http://majorprojects.planning.nsw.gov.au, as at 11/12/2013.

4. Potential inadequacies of a new Planning Act in NSW

In 2014, the EP&A Act 1979 (NSW) may be replaced by a whole new planning system. This raises the question of whether it is appropriate to accredit assessment processes that will soon be replaced, or which are already repealed subject to transitional provisions (as in former Part 3A). If the Commonwealth intends to accredit a whole new Planning Act, this will require a whole new agreement.

ANEDO is concerned that attempts to accredit numerous different assessment processes under NSW and other State/Territory laws will increase complexity and fragmentation, rather than simplify project assessment and maintain or improve environmental outcomes. ANEDO is also concerned that future NSW laws may not align with EPBC Act requirements for project assessment and protection of MNES.

In October 2013, the NSW Government introduced the Planning Bill 2013 and accompanying laws into Parliament to replace the ageing EP&A Act. The Government had aimed to pass the new planning bills by the end of 2013. However, the fate of the legislation will now depend on further negotiations in 2014, after significant amendments in the Upper House which were strongly opposed by the Government.[126]

The 2013 MOU states that: NSW 'will not act inconsistently with relevant Commonwealth EPBC Act statutory guidelines, plans and policies in its decision-making'.[127] Specifically regarding *approval a*greements, 'Any accredited process will ensure that any decisions proposed by NSW will result in *at least equivalent protection* for matters of NES…'[128]

There are several potential areas where the *Planning Bill 2013* (NSW) may not align with the requirements of the EPBC Act and the MOU between the Commonwealth and NSW (dated 5 November 2013). These are set out below.

Many aspects of the NSW planning system remain undetermined or unclear, and do not yet provide 'at least equivalent protection' to MNES

The MOU between NSW and the Commonwealth aims to sign an *assessment bilateral* within 6 months, and an *approvals bilateral* within 12 months (by 18 September 2014).[129] However, the new planning system relies heavily on policies and instruments that have yet to be drafted, modelled or consulted on, and may not be finalised by 18 September 2014.[130]

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[126] See Planning Bill 2013, accessed December 2013, at: http://parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/33e72ad6ea1238b5ca257c0c0014134d?OpenDocument.

[127] MOU, para 2.1.2.a.

[128] MOU, para 5.1.3.c, emphasis added.

[129] Commonwealth-NSW Memorandum of Understanding, 5 November 2013, 4.1.1-5.1.1.

[130] These include:

- *Community Participation Plans* under the 'Community Participation Charter'.
- *NSW Planning Policies* which will inform the application of 'sustainable development' (See Planning Bill 2013, note to cl. 1.3) and replace strategic-level aspects of existing SEPPs.
- *Regional Growth Plans*, *Subregional Delivery Plans* and *Infrastructure Plans*.
- *Strategic environmental assessment* requirements for new strategic plans.
- Model *Development Assessment Codes* for faster, standards-based approvals.
- *New regulations* replacing the *EP&A Regulation 2000.*

If the Commonwealth intends to accredit the new planning system, ANEDO submits that the NSW Planning Bill must be amended for the recommencement of Parliament in 2014, to provide at least equivalent protection to the EPBC Act. Furthermore, the outstanding policies and instruments must support this protection. Otherwise, a potentially unwieldy amendment Bill will be needed later in the year to repair the inadequacies, ahead of any accreditation.

The Planning Bill's objects do not 'accord with' ESD in EPBC Act

The federal Environment Minister may enter into a bilateral agreement only if satisfied the *agreement* 'accords with the objects of' the EPBC Act (s 50), including ESD (s 3-3A).

Under the EP&A Act 1979, promotion of ESD is one of 10 equally-weighted objects (s 5). However, the Planning Bill 2013 has adopted a more explicit economic focus, and *removes all references* to ESD, and specific principles such the *precautionary principle*, the *polluter pays principle*, and *ecological integrity as a fundamental consideration*. The Bill's weakened concept of 'sustainable development' draws on the 1987 Brundtland Report, but does not accord with the definition of ESD or its principles under the EPBC Act (or the IGAE 1992).[131]

If a bilateral agreement that accredits the new Planning Act is to meet the EPBC objects, ANEDO submits that the NSW Planning Bill objects must be amended to incorporate the definition of 'ecologically sustainable development' found in s 3A of the EPBC Act (consistent with the IGAE 1992 and National Strategy for ESD[132]).

Breadth of 'biodiversity offsetting' may contradict EPBC Act Offsets Policy

The NSW Planning Bill permits the use of broadly-defined 'biodiversity offset contributions' (Div. 7.4). The Bill's definition of 'biodiversity offsets' (cl 1.12) includes standards that are less than 'equivalent' to the *EPBC Act Environmental Offsets Policy* (2012).[133] Also, offset contributions need not have any connection with the project itself.[134]

By contrast, the EPBC Offsets Policy requires that biodiversity offsets:

- 'improve or maintain the viability' of the environmental aspect affected;
- are built around 'direct offsets' that target the aspect affected, rather than general 'conservation or enhancement of the natural environment' permitted in the Bill;
- be *additional* to actions already required by any Act, schemes or programs; and
- are informed by scientifically robust information and the precautionary principle.

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[131] Under the Intergovernmental Agreement on the Environment (**IGAE**) 1992, all levels of Government should use 'the concept of ecologically sustainable development… in the assessment of natural resources, land use decisions and approval processes.' The IGAE includes the specific ESD principles now set out in the EPBC Act (see IGAE, clause 3.5 and Schedule 2).

[132] Under the 1997 COAG Heads of Agreement, 'The Commonwealth has an interest in relation to implementation of the *National Strategy for Ecologically Sustainable Development*'. (Attachment 1, item 25). The Strategy is available at http://www.environment.gov.au/node/13029.

[133] Available at: http://www.environment.gov.au/resource/epbc-act-environmental-offsets-policy.

[134] See, for example, Planning Bill, cl 7.21(1): 'A local plan can impose a biodiversity offsets contribution on development as a contribution towards biodiversity offsets for the conservation or enhancement of the natural environment of the State.' There need not be 'any connection' with the development and the 'object of expenditure of any money required to be paid'.

The breadth of the potential offset standards in the NSW Bill appears to contradict the EPBC Act Offsets Policy, which was agreed following expert stakeholder consultation and scientific review.[135]

To ensure NSW acts consistently with Commonwealth policies, ANEDO recommends that the Planning Bill adopt an 'improve or maintain' environmental outcomes test for biodiversity offsetting, and limit the use of indirect offsets as per the EPBC Offsets Policy.

Major projects still exempt from threatened species assessment processes

The Planning Bill does not specify a process for considering whether development will have a significant impact on threatened species that are *federally* listed (not state listed). Even if the Bill or NSW laws are amended to include federally listed species, a range of major projects are specifically *exempt* from the threatened species assessment processes set out in Part 6 of the Bill (also the case now under the *EP&A Act 1979*).

In particular, all State significant development, State infrastructure development (which replaces SSI) and Public priority infrastructure projects (or critical SSI) *will not require:*

- approval of (or consultation with) the NSW Office of Environment and Heritage where the development will significantly affect listed threatened species;[136]
- a 'Species Impact Statement' which is required for other ordinary development;[137]
- approvals for coastal protection, fisheries permits, heritage permits (including Aboriginal heritage impact permits), native vegetation clearing or aquifer interference (which are otherwise to be issued via a Planning Department-led 'one stop shop' for other projects).[138]

ANEDO recommends the Planning Bill be amended to include federal species where relevant; and require that major project applications are subject to the same legal checks and balances to protect threatened species as other projects. This includes robust and efficient concurrence requirements, and completion of a Species Impact Statement (SIS). Major projects should not be exempt from 'one stop shop' approvals under Part 6 of the Bill, as these approvals may well protect matters of national environmental significance.

Mining SEPP amendments could obstruct 'accordance with' EPBC objects

The NSW Government has noted its intention to carry over existing SEPPs to the new planning system. As discussed above, the new Mining SEPP requirements, which make the economic benefits of mining the decision-maker's principal consideration, do not appear to align with the promotion of ESD or its principles. This could obstruct legal requirements for any future bilateral agreement to be in accordance with EPBC objects. ANEDO recommends the Mining SEPP amendments be repealed before the new planning system begins.

[135] Examples include the Bill's broad references to 'research, surveys or educational programs with respect to biodiversity'; and 'actions under strategic government programs for the conservation or enhancement of the natural environment of the State' (cl 1.12). Also, the Bill's objects do *not* incorporate the precautionary principle (unlike the *EP&A Act 1979*), nor is it a specific consideration for biodiversity offset contributions.
[136] Planning Bill, cll 6.5(1)-6.6(1) exemptions.
[137] See Planning Bill 2013, cll. 4.45 (which excludes SSD) and 5.5 (cf cl. 5.2 which excludes SID, PPI).
[138] Planning Bill, Division 6.1.

Development assessment Codes – uncertain protection for MNES

The content of new Development Assessment Codes, and environmental assessment requirements for Code-assessable development, are unknown.[139] While Code assessment may not be put up for accreditation, these ambiguities make it unclear if NSW Codes would meet minimum EPBC requirements.[140]

For example, nothing in the Planning Bill specifically excludes environmentally sensitive areas (such as internationally listed Ramsar wetlands[141]) from simplified Code-assessment. However, the Ramsar management principles require that any action that may have a significant impact on a listed wetland's ecological character should be assessed under a statutory environmental impact assessment and approval process.[142] Similarly, nothing in the Bill prevents SSD from being 'code assessed'. This is a significant step down from the current *EP&A Act 1979*, which requires a formal Environmental Impact Statement to accompany all SSD applications.

ANEDO submits that 'Code assessment' of development should not be allowed where the project would affect MNES, such as wetlands or migratory species.

Public priority infrastructure impacts not clearly assessed before approval

The Planning Bill 2013 replaces 'critical SSI' with Public Priority Infrastructure (**PPI**). The Bill proposes that project definition reports for PPI would not be exhibited until *after* the Minister declares a development as PPI. This is particularly significant given that a PPI declaration is effectively an approval in itself.[143] Elsewhere we have noted the potential for conflict of interest where the State Government is both proponent and assessor (and potentially the 'approver'). The fact that State and Territory major project assessment processes do not allow consultation on major projects until too late in the process is another reason why they should not be accredited.[144]

There is a strong case for the Commonwealth to retain powers in relation to State infrastructure to avoid conflicts of interest by the State. However, if accreditation is to proceed, the Planning Minister's declaration of Public Priority Infrastructure should be required to show that they have considered MNES and applied the 'avoid and mitigate' hierarchy to minimise impacts. Consultation should come before approval if a PPI project is not identified in a strategic plan.

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[139] See, for example, Planning Bill, cl 3.25: '…The regulations may, for example, require a neighbourhood impact statement or strategic assessment to accompany the public exhibition of… a development assessment code.'

[140] For example, the requirement that *assessment* processes assess impacts on each protected matter; that state reports include sufficient information to inform the federal approval decision (EPBC Act, s 47); and requirements for accreditation in relation to Ramsar wetlands (s 52 and Schedule 6 EPBC Regulations).

[141] Planning Bill, cl 4.17.Under the EPBC Act (s. 52), the Minister can only enter a bilateral agreement relating to Ramsar wetlands, if satisfied that the agreement will promote the management of the wetland in accordance with Australia Ramsar management principles (and any requirements in regulations). In addition, relevant processes under an *approval* bilateral must not be inconsistent with Australia's obligations under the Ramsar Convention.

[142] Schedule 6 of the EPBC Regulations 2000.

[143] The remaining assessment is to focus on 'how', not 'whether' the development will proceed. See NSW Government, *A New Planning System for NSW – White Paper* (2013), at 7.5, p 171.

[144] EDO NSW has recommended additional safeguards around the declaration of PPI. See *Submission on A New Planning System – White Paper* (2013), pp 70-71, at www.edonsw.org.au.

Proposed changes to allow broad discretion for SSD modifications

As noted above, safeguards must apply to modifications of conditions, to ensure these processes are not 'gamed' to reduce compliance obligations, avoid community transparency, or weaken environmental standards in favour of profitability.

However, the exposure draft Planning Bill 2013 reduces the safeguards around SSD modifications in two ways. First, the Bill omits certain safeguards from existing modification provisions.[145] Second, the Bill as introduced in October provided that modifications for SSD would no longer be subject to a requirement that the development be 'substantially the same development'. This would make the modification process highly discretionary for a range of private major projects (as with SSI and former Part 3A).

Proposed changes to level of environmental assessment for SSD

Currently under the EP&A Act, all projects declared as SSD must undergo an environmental impact statement (**EIS**) process. While this approach provides some certainty, clarity and consistency, the Planning Bill 2013 does *not* require that all SSD requires an Environmental Impact Statement, weakening the existing requirements.[146] We submit that *all* SSD should continue to be subject to an EIS, not only the highest 'impact-assessed' (or 'designated') development category. Furthermore, the Commonwealth must not accredit SSD assessment that does not require a full EIS.

[145] Division 4.8 of the Planning Bill (April 2013 exposure draft); cf EP&A Act, sections 96-96A. See EDO NSW, submission on A *New Planning System White Paper* (June 2013), p 63.
[146] See EDO NSW, *Submission on A New Planning System White Paper* (June 2013), p 59, at www.edo.org.au/edonsw/site/pdf/subs/130628NSWPlanningWhitePaper_EDONSWsubmission.pdf