Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

Submission on Productivity Commission Issues Paper – Major Project Development Assessment Processes

25 March 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 Defenders Office's (**ANEDO**) is a network of independent community legal centres in each State and Territory. We have diverse expertise in law and policy on environmental protection, development assessment, planning and approval processes. As public interest lawyers, we strongly support the implementation of efficient and effective environmental laws in all Australian jurisdictions for the benefit and wellbeing of the Australian community. Major project development assessment and approval (**DAA**) processes are an integral part of these laws, and are often a touchstone for public perceptions of environmental planning systems generally.

The Australian Government has asked the Productivity Commission to undertake a study to benchmark Australia's major project development assessment processes against international best practice. The Commission is now seeking comment on its *Major Project Development Assessment Processes* Issues Paper (**Issues Paper**).[1]

As a preliminary comment, ANEDO is concerned that several recent inquiry referrals to the Commission seem geared towards 'streamlining' rather than leading practice environmental regulation.[2] For example, the current study arises from a Business Council of Australia (**BCA**) request, presented to the Council of Australian Governments (**COAG**) at its inaugural Business Advisory Forum (**BAF**) meeting in April 2012. The BCA enunciated six priority areas for competition and regulatory reform, including (relevantly):

- *streamlining environmental assessments and approvals, and*
- *improving the efficiency of major project development approvals.*[3]

COAG's April 2012 agreement with this (**proposed COAG reforms**) posed a significant risk to the integrity of Australia's environmental laws. ANEDO strongly opposes any 'streamlining' of existing DAA processes that provide for public participation, environmental protection and government accountability in planning decisions. We also oppose the delegation of federal project approval responsibilities to the States.

ANEDO supports appropriate measures to improve the effectiveness and efficiency of Australian planning systems and major project DAA processes. However, the efficacy of planning processes should not be judged solely on assessment processing timeframes or DA approval rates; rather, on whether the process incorporates comprehensive environmental impact assessment (**EIA**), genuine public consultation and produces ecologically sustainable outcomes. In our view, faster approvals that deliver poor-quality, high-risk or unsustainable development are not in the public interest.[4] We are very concerned that the special treatment of major projects in legislation often results in such a 'fast-tracking' scheme. This fundamentally contradicts a 'risk based' approach (discussed below) and thus is not supported by ANEDO.

ANEDO has made several recent policy contributions in support of these positions:

- an initial analysis of and response to the COAG agreement of 13 April 2012 proposing major reforms to Australia's environmental laws;[5]

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[1] February 2013, available at: http://www.pc.gov.au/projects/study/major-projects.
[2] See also, Submission to Productivity Commission Issues Paper and Inquiry on Mineral and Energy Resource Exploration, (March 2013) , available at www.edo.org.au or www.pc.gov.au.
[3] Business Council of Australia, *Discussion Paper for the COAG Business Advisory Forum* (2012).
[4] See EDO NSW Submission to the NSW Planning Review Issues Paper (joint with Nature Conservation Council of NSW and the Total Environment Centre) (March 2012), available at: http://edo.org.au/edonsw/site/pdf/subs/120314ncc_edo_tec_joint_sub_planning_system_review_issues.pdf.
[5] ANEDO, 'COAG environmental reform agenda: ANEDO response – in defence of environmental laws' (May 2012), available here: http://www.edo.org.au/policy/policy.html.

- meetings with and submissions to the Taskforce progressing the COAG reforms;
- a detailed submission on draft standards to accredit State approvals under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**);[6]
- a submission on a private member's Bill to remove the provisions from the EPBC Act that allow bilateral agreements to delegate federal project approval powers.[7]

Analysis by ANEDO and other legal, policy, science and economic experts has revealed a lack of clear evidence for the problems identified in the BCA paper (unnecessary overlap, duplication and delay); and significant drawbacks in the proposed solutions (streamlined assessment, bilateral 'approval' agreements).[8] This confusion and complexity led to COAG abandoning its initial, ambitious delivery timetable for an accreditation framework and agreements (December 2012 and March 2013).[9]

ANEDO submits that a truly risk-based approach to DAA would increase assessment effort on major projects, not override or reduce scrutiny. This is because projects with the greatest impacts deserve the greatest scrutiny and safeguards; and major projects tend to be the most significant in scale, nature, complexity, breadth and duration of impacts, and level of public concern.

There have been other consequences from COAG's April 2012 announcement. Firstly, the haste and lack of transparency in the decision has raised questions about the equity of exclusive forums like the BAF. Secondly, the COAG announcement also overrode the Environment Department's ability to progress the Government's 2011 response to the 2009 independent review of the EPBC Act (**Hawke Review**). Thirdly, the Senate Environment and Communications Legislation Committee recently inquired into a proposal to remove powers to establish bilateral 'approval' agreements from the EPBC Act.[10] It concluded: 'The committee rejects the claims made by business interests that Commonwealth powers of approval are the cause of inefficiencies, delays, and loss of income to project proponents.'[11] Overall, this Productivity Commission inquiry provides an opportunity for the Commission to take stock of the proposed COAG reforms, consider the recommendations of the Hawke Review, and identify leading practices for major project DAA that will achieve the aim of ecologically sustainable development.

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[6] ANEDO, *Submission on Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act 1999* (November 2012), http://www.edo.org.au/policy/121123-COAG-Cth-accreditation-standards-ANEDO-submission.docx.

[7] ANEDO, *Submission on Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (January 2013) available at www.edo.org.au.

[8] See for example, 'Open letter to the Prime Minister on transferring Commonwealth environmental law responsibilities', 5 December 2012, available at www.edovic.org.au. Other organisations have critiqued the COAG reform proposals, including Economists at Large and the Wentworth Group of Concerned Scientists. This was also the conclusion of a recent inquiry of the Senate Environment and Communications Legislation Committee, see report at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/completed_inquiries/2010-13/epbc_federal_powers/report/index.htm.

[9] For example, see COAG Business Advisory Forum communique, 6 Dec. 2012, at www.dpmc.gov.au/publications/baf/index.cfm: 'The Commonwealth noted the significant challenges that have emerged in developing accreditation arrangements that provide consistency for business and assurance to the community that high standards will be met and maintained.' See also M. Grattan and T. Arup, 'Environmental Powers to be kept by Canberra', *Sydney Morning Herald*, 6 Dec. 2012.

[10] In to the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (March 2013), a private members bill proposed by Senator Larissa Waters at the end of 2012

[11] The Senate Environment and Communications Legislation Committee, *Report on Inquiry in to Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (March 2013). (available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/completed_inquiries/2010-13/epbc_federal_powers/report/index.htm)

Summary of recommendations

Recommendation: *The Productivity Commission's study and recommendations must recognise the* ***public purpose and benefit of environmental laws****, objective standards and leading practices to achieve ecologically sustainable development. Governments, industry groups and businesses must also recognise the public benefit of environmental laws as a necessary cost of doing business responsibly.*

Recommendation: *The Commonwealth Government must retain a strong leadership and oversight role in assessment of major projects. The* ***Commonwealth Government must not delegate approval processes*** *to the States and Territories.*

Recommendation: *The Productivity Commission should* ***adopt the following 10 criteria*** *(outlined further at* ***Attachment A****) as a reference point to evaluate and shape major project assessment and approval processes. These elements must be clearly articulated in legislation (state and federal) as the basis of effective, leading practice planning and assessment laws:*

1. ***Clear objects that prioritise ecologically sustainable development (ESD)***
2. ***Objective tests for good environmental outcomes*** *('maintain or improve')*
3. ***Independent assessment*** *(arms-length and quality-assured)*
4. ***Comprehensive assessment*** *(including cumulative impacts, climate change)*
5. ***Projects must minimise environmental impacts*** *('impact hierarchy')*
6. ***Best practice standards for strategic environmental assessment (SEA)***
7. ***Oversight and review*** *(including federal 'call-in' and independent review)*
8. ***Public participation*** *(transparency, engagement, third party appeal rights)*
9. ***Compliance and enforcement*** *(effective tools, penalties, resources, 'standing')*
10. ***Monitoring and review*** *(laws, policies, implementation).*

These area-specific criteria can support the 12 criteria articulated in the Productivity Commission's Issues Paper, and the triple bottom line concept of 'sustainable wellbeing'.

Recommendation: *Planning and development decision-making at all levels (local, regional, State and national) must happen within the scope of a* ***clear legal framework*** *that* ***aims to achieve ecologically sustainable development (ESD).***

Recommendation: *In particular, federal, state and territory laws must:*

- *adopt* ***ESD as the overarching aim*** *of planning and major project schemes;*
- *introduce* ***legal requirements*** *to exercise powers and functions (including major project DAA decision-making) in accordance with ESD principles;*
- *build in* ***objective decision criteria and accountability mechanisms*** *to protect environmental assets in accordance with ESD principles;*
- ***approve*** *major project activities only if their impacts remain within identified and acceptable* ***environmental limits*** *of the catchment or region; and*
- *include* ***performance criteria*** *on whether ESD principles are being applied, and whether objective environmental outcomes are being achieved.*

Recommendation: *Major project DAA processes must ensure* ***equitable public participation and engagement rights****, including:*

- *place clear limits on discretionary decision making;*
- *require information to be made publicly available prior to decision-making;*
- *mandate genuine public participation at all stages of planning and DAA;*
- *require decision makers to provide reasons for decisions;*

- *include equitable merit appeal rights for decisions, and open standing to enforce breaches; and*
- *require consistent reporting on public participation methods, statistics and outcomes.*

Recommendation: *The Productivity Commission should identify leading practices for* ***robust environmental impact assessment (EIA)*** *for major projects. Broadly, we recommend that Australian jurisdictions must:*

- *improve the* ***independence and rigour*** *of project assessment and approval (including where a state government or authority is a proponent/beneficiary);*
- *identify and adhere to* ***targets and limits*** *across environmental indicators such as biodiversity, native vegetation, water, soil and air quality (including public health considerations), and greenhouse gas emissions;*
- *approve major projects only if their impacts remain within the identified and* ***acceptable environmental limits*** *of the catchment or region;*
- *require* ***assessment of the climate change impacts*** *of individual projects, and specific* ***conditions*** *to address these impacts (for mitigation and adaptation);and*
- *ensure effective* ***oversight and quality assurance*** *– including better offences and penalties for inaccurate or incomplete information; audits and enforcement; and clear regulatory responsibilities.*

Recommendation: *Instead of fast-tracking projects with the greatest environmental and social impacts, ANEDO recommends that Australian planning systems should provide* ***incentives that reward leading practice ecological sustainability****, social inclusion, environmental innovation and low-impact design.*

Recommendation: *ANEDO submits that the* ***Canadian model*** *for reducing major project assessment requirements is* ***not one that Australian governments can follow*** *if they are genuinely committed to maintaining or strengthening Australia's environmental assessment and development approval standards.*

Recommendation: *The Productivity Commission should identify* ***compliance monitoring, enforcement and reporting*** *as an essential area for improving major project regulation. Leading practices should include:*

- ***independent audits*** *of project compliance with licensing and consent conditions, as well as the accuracy of EIA predictions;*
- ***accurate, transparent and accessible information****, pre- and post-approval;*
- *clear lines of* ***enforcement responsibility****, and accountability for performance;*
- *ongoing* ***monitoring*** *and* ***responsiveness to community reporting*** *of breaches;*
- *enduring* ***proponent responsibilities*** *for future impacts and rehabilitation goals;*
- *a* ***tiered enforcement framework*** *– to deter misconduct and ensure breaches result in proportionate punishment;*
- *a wider range of* ***innovative enforcement tools*** *for regulators, community and the courts, as found in some other environment and pollution laws;*
- *a shared commitment from industry and governments to* ***fund improved monitoring and enforcement*** *in order to do business safely and responsibly;and*
- *options for* ***additional funding*** *of research, monitoring and enforcement activities, such as from royalties, licence fees or industry levies.*

Recommendation: *ANEDO submits that leading practice* ***strategic planning*** *must:*

- *describe how the goal of* ***ecologically sustainable development (ESD)*** *will be achieved via state, regional and local policies and planning decisions;*

- *undertake independent **baseline studies** of catchments' environmental qualities, such as water, soil, vegetation, biodiversity, minerals, air quality;*
- *provide for comprehensive rights of **public participation**, and support to engage – including tailored, inclusive engagement for indigenous peoples;*
- *take account of potential **cumulative impacts** of development over time;*
- *identify **competing land uses, including sensitive areas** where certain development (such as mining) is **prohibited** based on economic, environmental, social or cultural criteria;*
- *integrate **natural resource management goals** into the planning process;*
- *measure, publish and analyse **environmental data** across jurisdictions and sectors – to promote accuracy, transparency and evidence-based policy;*
- *promote **resilience to climate change** for communities and the environment, addressing risks and opportunities via mitigation and adaptation;*
- *integrate **infrastructure needs** ahead of new development, and prioritise **public transport and 'green infrastructure'.***

Recommendation: ANEDO strongly supports Hawke (EPBC) Review recommendation 6 to make the process for undertaking **strategic assessments** 'more substantial and robust'. This includes **mandatory information requirements**, and a criterion that approved activities and policies will **'maintain or improve'** environmental outcomes. ANEDO also outlines a range of best practice standards for strategic assessments at **Attachment A**.

Recommendation: *State and federal planning and assessment laws must be amended, to require proponents and decision-makers to deal effectively with the **cumulative impacts** of development, particularly major projects.*

Recommendation: *The Productivity Commission should consider and recommend a range of mandatory measures to improve the **climate change-readiness** of strategic planning systems and major project DAA processes. In particular:*

- *make the direct and indirect impacts of climate change a mandatory consideration in strategic planning – as per expert recommendations; and*
- *adopt a comprehensive assessment framework for the climate change implications of individual developments, particularly major projects – this framework could cover licensing, approval and post-approval mechanisms, and would complement a national carbon price.*

Recommendation: *ANEDO strongly supports the accelerated development of tools to better integrate, monitor and report on **environmental indicators** in strategic planning and major project DAA processes.*

Recommendation: *National and state-level **environmental accounting** should also be accelerated, to ensure planning systems properly account for environmental values, costs and benefits.*

Recommendation: *A corollary of improved environmental data-sharing and analysis is the need for **accurate, transparent and publicly accessible information**. The Productivity Commission could also identify gaps and leading practices in this regard.*

Recommendation: *ANEDO supports the establishment of an independent, statutory **Environment Commissioner** and Commission, noting the different roles and mandates of the National Sustainability Council and the Independent Expert Scientific Committee on Large coal mining and CSG developments.*

Recognising the public benefits of environmental regulation

ANEDO agrees with the Australian Government that 'improving environmental outcomes is part of ensuring a sustainable future for Australia', both for our quality of life, and our continued economic prosperity.[12] There is also evidence that the Australian community appreciates the need to protect Australia's environment, and regulate the impacts on it.[13] It is striking that the two regulatory sectors that the community perceives as being 'too lax' in the recent NSW government environmental survey[14] – property development and mining – are the same sectors that COAG's Business Advisory forum is seeking to 'streamline'.[15]

Similarly, ANEDO does not accept the premise that environmental laws are an unreasonable regulatory burden. Unfortunately, the proposed COAG reforms have shifted the focus further towards 'streamlining' environmental regulation, notwithstanding some verbal commitments to continued environmental rigour.

Numerous state and federal *State of the Environment* reports emphasise the importance of environmental safeguards for an ecologically sustainable future. Here is a key finding of the latest federal report:

> *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.*[16]

The report concluded that 'Australians cannot afford to see ourselves as separate from the environment'.[17]

Parliament also recognised this 'triple bottom line' linkage when it established the Productivity Commission. The Commission must have regard to the need: 'to ensure that industry develops in a way that is ecologically sustainable'; and 'for Australia to meet its international obligations and commitments'.[18] Australia's environmental commitments arise under instruments such as the Convention on Biological Diversity, World Heritage Convention, the Framework Convention on Climate Change, the Ramsar Convention on International Wetlands, and the Declaration on the Rights of Indigenous Peoples.

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[12] *Government Response to the Independent Review of the EPBC Act* (August 2011), Preamble, p 3. The response cites a 2010 UN Environment Program report which estimates that ecosystems deliver essential services worth US$21 trillion to US$72 trillion a year, comparable with the 2008 World Gross National Income of US$58 trillion.

[13] For example, in a 2012 survey of over 2000 people in NSW on behalf of Office of Environment & Heritage:

- *almost half the community believes we do not place enough emphasis on the protection of natural habitats in competition with other land use needs [the most common response, at 45%]*
- *almost half believe environmental regulation of two sectors, mining and property development/construction, is too lax, despite an increasingly positive view of environmental regulation of other sectors over successive surveys.*

See NSW OEH, *Who Cares about the Environment in 2012?* (March 2013), 'At a glance'.

[14] See NSW Office of Environment & Heritage, *Who Cares About the Environment in 2012?* (2013). By far the most common response on 'mining' and 'property development/ construction' was that regulation is 'too lax' (49% and 46% of respondents, respectively). Only 10% and 13% of respondents (respectively) thought mining and property development regulation was 'too strict'. For almost all other sectors mentioned, the most prevalent response was that regulatory strictness is 'about right' (fishing, farming, individuals, tourism, retail and forestry). See full report, pp 41-42, at www.environment.nsw.gov.au/community/whocares2012.htm.

[15] See BAF communique 12/4/2012: http://www.finance.gov.au/deregulation/communique-12--april-12.html.

[16] State of the Environment Committee, *Australian State of the Environment 2011* (report to the Minister for Sustainability, Environment, Water, Population & Communities), 'In brief' at 9; see www.environment.gov.au.

[17] *State of the Environment 2011*, 'Headlines'. The Report also notes: 'Our unique biodiversity is in decline, and new approaches will be needed to prevent accelerating decline in many species' (summary p 4).

[18] *Productivity Commission Act 1998* (Cth), subss 10(1)(i) and (j). In addition, 'At least one Commissioner must have extensive skills and experience in applying the principles of ecologically sustainable development and environmental conservation' (s 24(3)).

We welcome the Commission's statement that it will adopt a 'community-wide framework' in undertaking this study, having regard to the regulatory objectives of major project DAA processes 'and their net benefit to the wider community.' (Issues Paper p 2). However, we also express a note of caution, as these regulatory objectives (and the departments tasked with pursuing them) often have in-built pressures and incentives to prioritise economic outcomes over social and environmental outcomes. As explored below, clearer objects and a more balanced application of ESD principles are needed.

Recommendation: **The Productivity Commission's study and recommendations must recognise the public purpose and benefit of environmental laws, objective standards and leading practices to achieve ecologically sustainable development. Governments, industry groups and businesses must also recognise the public benefit of environmental laws as a necessary cost of doing business responsibly.**

Analysis of COAG proposal to delegate federal approval powers

The Productivity Commission's inquiry is to have regard to related work to develop bilateral arrangements for accrediting State and Territory environmental impact assessment (**EIA**) and approval processes.

The COAG reforms, as proposed by the BAF, target six priority areas:

- *addressing duplicative and cumbersome environment regulation;*
- *streamlining the process for approvals of major projects;*
- *rationalising carbon reduction and energy efficiency schemes;*
- *delivering energy market reforms to reduce costs;*
- *improving assessment processes for low risk, low impact developments; and*
- *best practice approaches to regulation.*[19]

At a first reading, these priorities seem like common sense – no one is advocating for a duplicative or inefficient regulatory system. However, on closer analysis the proposed reforms are extremely concerning for at least three reasons:

- the existence of sectoral bias;
- the abrogation of Commonwealth legal responsibilities; and
- because the reform criteria do not relate to improved environmental outcomes.

First, the proposals come from one section of one sector – the business community – as represented by the BAF.[20] No such forum exists for any other sector of the community. In comparison, the Independent Hawke Review process sought and analysed specific feedback on essentially the same issue (the effectiveness of the EPBC Act). The Hawke Review involved 220 public submissions, 119 supplementary submissions, as well as face- to-face consultations in each State and Territory.

Second, the BAF has effectively sought to remove the Commonwealth from the development assessment process by delegating these powers to the States. This is flawed for many reasons ANEDO has outlined, including that:

- States are not legally mandated to act in the national interest;

[19] COAG Communique, 13th April 2012, p 2 at < http://www.coag.gov.au/meeting_outcomes>.
[20] See the Business Advisory Forum communique 12 April 2013, at www.pm.gov.au/press-office/council-australian-governments-business-advisory-forum-communiqu%C3%A9; and the Business Council of Australia's discussion paper for the Business Advisory Forum, at www.bca.com.au/Content/101965.aspx.

- States may have inherent conflicts of interest as proponents of major projects;
- The Commonwealth is responsible for implementing Australia's international environmental obligations, for example to protect world heritage sites, Ramsar wetlands and federally listed threatened and migratory species; and
- The Commonwealth has an essential role in requiring consistent environmental standards and oversight of State processes relevant to matters of national environmental significance.[21]

It is interesting that, notwithstanding the Government's adoption of the COAG reforms, in late 2012 the federal Environment Minister was publicly scathing of State-based approval processes in relation to Queensland's Alpha Coal Mine. This and other recent examples (including proposals for alpine grazing, hunting and logging in national parks) clearly reinforce the need for rigorous Federal Government oversight, and the maintenance of high national environmental standards. This is further demonstrated by the Australian Government's recent move to introduce additional powers to enable the federal Environment Minister to consider the impact on water resources of coal seam gas and coal mine operations under the EPBC Act.[22]

Third, the COAG reforms are designed to reduce cost and time delays for new projects. As noted by the recent Senate Committee report, there is a dearth of hard evidence of purported cost and time delays.[23] There is *no* substantive evidence presented to show how the reforms will maintain environmental protection, guarantee public participation in assessment processes, or ensure that monitoring and enforcement under a 'States-only' model will be sufficiently comprehensive. Conversely, there *is* evidence to show that schemes to 'fast-track' approval of major projects do reduce the rigour of environmental assessment and public participation.[24]

The environmental consequences of fast-tracking major projects (including those projects with the greatest potential impacts regarding carbon emissions, water usage, land clearing, pollution, human health, biodiversity and cultural heritage) have not been quantified, nor is there a clear process for accounting for these impacts and assets, and the impacts of major projects on key environmental services provided by our landscapes.

The COAG reforms are incorrectly premised on the assumption that any so-called 'green tape' is unnecessary, instead of accommodating the unavoidable fact that adequate time must be allowed for comprehensively and accurately assessing the potentially significant or irreversible impacts of a proposed development.

In an initial response to COAG's far-reaching 'streamlining' agenda, ANEDO identified a number of public interest benefits of robust environmental laws at all levels of government.[25] In brief, environmental laws:

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[21] For further analysis of these concerns see: ANEDO, *COAG Environmental Reform Agenda – ANEDO Response: In defence of Environmental Laws*, May 2012, available at: http://www.edovic.org.au.

[22] See Environment Protection and Biodiversity Conservation Amendment Bill 2013 at http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5001_first-reps/toc_pdf/13055b01.pdf;fileType=application%2Fpdf#search=%22legislation/bills/r5001_first-reps/0000%22

[23] See Environment & Communications Legislation Committee Report on the Inquiry in to the EPBC Amendment (Retaining Federal Approval Powers) Bill 2012, March 2013.

[24] For example, see analysis of Part 3A of the *Environmental Planning & Assessment Act 1979* (NSW), which has now been repealed. Analysis and case studies of Part 3A processes are set out in EDO NSW planning submissions available at: <www.edonsw.org.au>.

[25] Available at: www.edo.org.au.

- lead to better decision-making as, with principles of ESD at their core, they ensure that long-term economic, environmental, social and equitable considerations are all taken into account;
- secure the rights of the community to be involved in decision-making, and allow communities to contribute valuable information and feedback 'on the ground';
- promote transparency and accountability by including reporting requirements, access to information and review rights;
- can help to address social disadvantage and 'fairness' in the legal system – environmental law can, for example, play a crucial role in assisting Aboriginal Australians to protect their cultural heritage;
- can ensure rigorous, objective, science-based approaches are used to assess the environmental impacts of development proposals.

Overall, the direct involvement of EDOs across Australia in environmental law over three decades has shown us that strong Commonwealth involvement is critical to effective environmental protection. ANEDO believes that the proposal to delegate Commonwealth approval responsibilities under the EPBC Act to States and Territories would wind back 30 years of important gains in environmental regulation.

Unfortunately, neither the 2012 draft standards to accredit State approval processes, nor the 2011 Australian Government Response to the Hawke Review of the EPBC Act, constitute best practice standards. Neither option includes the necessary improvements and regulatory innovations proposed by the Hawke Review – such as consideration of cumulative impacts, climate change and objective environmental tests. The proposed COAG reforms risk perpetuating certain deficiencies of the current system, to the long-term detriment of our environment, economy and society.

For further information and analysis, please see ANEDO's *Submission on Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act* (November 2012).[26]

ANEDO submits that:

- **delegating Commonwealth project approval powers will not achieve sought-after improvements to planning regulation, productivity and environmental outcomes;**
- ***no* state or territory planning or environmental laws currently meet the minimum requirements of the 106 elements outlined in the Australian Government's Draft Standards Accreditation Framework, let alone the full suite of best practice standards that Australia should implement;[27]**
- **States are fundamentally not in a position to stand in the Commonwealth's shoes to assess and approve impacts on matters of national environmental significance in the public interest, even with the most carefully worded standards.**

[26] Available at: www.edo.org.au.
[27] In June 2012, ANEDO prepared a series of best practice standards for planning and environmental regulation in response to COAG's April 2012 reform announcements. See below.

Benchmarking major project development assessment and approval processes

i) 10 best practice criteria for planning and environmental regulation

In June 2012, in response to the proposed COAG reforms, ANEDO prepared a series of best practice criteria for planning and environmental regulation.

ANEDO recommends that the Productivity Commission use the following 10 criteria (outlined further at Attachment A) as a reference point to evaluate and shape major project assessment and approval processes. These elements must be clearly articulated in legislation (state and federal) as the basis of effective, leading practice planning and assessment laws:

1. ***Clear objects that prioritise ecologically sustainable development (ESD)***
2. ***Objective tests for good environmental outcomes*** *('maintain or improve')*
3. ***Independent assessment*** *(arms-length and quality-assured)*
4. ***Comprehensive assessment*** *(including cumulative impacts, climate change)*
5. ***Projects must minimise environmental impacts*** *('impact hierarchy')*
6. ***Best practice standards for strategic environmental assessment (SEA)***
7. ***Oversight and review*** *(including federal 'call-in' and independent review)*
8. ***Public participation*** *(transparency, engagement, third party appeal rights)*
9. ***Compliance and enforcement*** *(effective tools, penalties, resources, 'standing')*
10. ***Monitoring and review*** *(laws, policies, implementation).*

ii) The Commission's proposed approach and criteria for benchmarking

ANEDO also welcomes the 12 criteria articulated in the Productivity Commission's Issues Paper (pp 8-9), based on 'commonly-used principles of good governance and regulatory design'.[28] ANEDO's 10 elements above complement the Commission's proposed criteria, providing further specifics around the role and function of environmental protection and planning laws.

As the Productivity Commission recently observed in relation to planning benchmarks:

> *…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.*[29]

The Commission's previous reports have not specifically recommended benchmarks or criteria that measure the conservation of environmental and natural resources, such as ANEDO's criteria 1 to 6 above. Until planning systems include such criteria, the ways we evaluate these systems' effectiveness will be incomplete, and there will be continued pressure from some parts of industry, business and government to reduce environmental regulation, and portray it as unnecessary 'green tape'. ANEDO urges the Commission to examine and recommend new ways of balancing the ledger through 'triple bottom line' indicators, with an overarching policy aim of achieving ESD.

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[28] See Productivity Commission Issues Paper, pp 8-9. The Commission's proposed assessment criteria include: *Clear, justifiable regulatory objectives; Consistency with other regulations; Cost-effectiveness; Proportionate and flexible regulatory requirements; Clear and predictable processes; Open and transparent processes; Appropriate opportunities for public participation and review of decisions; Clarity in roles and responsibilities; Accountable decision-makers; Appropriately skilled and resourced institutions; Regulatory outcomes consistent with objectives; Regular review and evaluation.*

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

In addition to applying the criteria noted above, the Commission could also apply the lens of *sustainable wellbeing* as part of its 'community-wide framework' for the inquiry. The federal Treasury Secretary has put forward this concept as a benchmark for guiding Australia's economic future. To maintain sustainable wellbeing, Dr Parkinson has emphasised the need to balance environmental and social capital, in addition to traditional notions of physical, financial and human capital: 'Running down the stock of capital in aggregate diminishes the opportunities for future generations.'[30] This long-term perspective encompasses a core principle of ESD – intergenerational equity.

Objectives and key features of major project DAA processes

This part of the submission considers the following aspects of objects and key features for major project development assessment and approval (**DAA**) processes:

i) Planning systems must embed 'ESD' in objects and decision criteria
ii) Equitable rights for public participation and engagement
iii) Robust, independent assessment of all environmental impacts
iv) Fast-tracking major projects and overriding concurrences contradicts a 'risk based' DAA approach
v) Canadian reforms – a diminished Environmental Assessment Act
vi) Compliance, enforcement tools and resourcing.

i) Planning systems must embed 'ESD' in objects and decision criteria

A fundamental problem with Australia's planning systems is the lack of clear and consistent regulatory objectives. This reduces the likelihood of balanced, 'triple bottom line' decision making. Major project DAA processes tend to further prioritise economic outcomes and benefits – without sufficiently valuing environmental and social benefits and costs.[31] To restore public confidence in planning systems and major project regulation, governments must ensure that economic imperatives are not unduly favoured at the expense of long-term sustainability. The concept of **ecologically sustainable development (ESD)**, and its principles provide this framework. Unlike the current approach however, ESD is 'not a factor to be balanced against other considerations; ESD *is* the balance between development and environmental imperatives'.[32]
ESD principles include:

- the precautionary principle[33]
- conservation of biodiversity and ecological integrity as a fundamental consideration in decision-making;
- intergenerational equity[34]
- improved valuation, pricing and incentive mechanisms;[35] and relatedly,
- the polluter pays principle.

[30] Dr Martin Parkinson, '*Sustainable Wellbeing- An Economic Future for Australia'*, Address for the Shann Memorial Lecture Series (August 2011), available at www.treasury.gov.au.
[31] See for example, NSW Government, *A New Planning System for NSW – Green Paper* (July 2012); Queensland Government, *Temporary State Planning Policy 2/12: Planning for Prosperity* (August 2012), Preamble.
[32] G. Bates, *Environmental Law in Australia* (5th ed, LexisNexis, 2002), para [5.19]-[5.20], cited by D. Farrier, et al, 'Biodiversity offsets and native vegetation clearance in New South Wales: The rural/urban divide in the pursuit of ecological sustainable development' (2007) 24 EPLJ 427.
[33] That a lack of full scientific certainty should not be used as a reason for postponing measures to prevent significant or irreversible environmental harm. In legal terms, where there is sufficient uncertainty, this principle reverses the onus of proof, requiring the proponent to prove the harm would *not* be significant.
[34] Maintaining and protecting the the health, diversity and productivity of the environment and natural resources for future generations.
[35] Valuation of goods and services should include environmental factors (assets, services, costs).

These principles have been adopted across international, federal, State and Territory legal systems, at least in some measure.[36] All Australian Government are also signatories to the *National Strategy for Ecologically Sustainable Development*.[37] This Strategy identifies a range of challenges and strategic approaches in areas such as environmental protection, land use planning, mining, environmental information and EIA. *'Sustainability'* is also one of four main goals of Australia's National Urban Policy, alongside productivity, liveability and governance.[38]

Australian environmental policy experts have continued to recognise the centrality of ESD, noting that despite its challenges, 'there is no other credible candidate for an integrative policy framework'.[39] However, more than 20 years on from the *National Strategy for ESD*, far greater effort is needed to apply ESD in practice.

There are at least three problems with current laws and decision-making frameworks in applying ESD:

- *First,* the laws that regulate planning and major projects are inconsistent in their recognition of ESD, and sometimes it is not recognised at all.
- *Second,* even where ESD is acknowledged as an object, legal decision making and assessment processes do not require that ESD be achieved, or that decision-makers act in accordance with its principles (with few exceptions).
- *Third*, decision-making frameworks contain no definitive duties to protect the environment,[40] or objective limits on its degradation.[41] As Tim Flannery has observed: 'A federal policy of zero tolerance to species extinction would be a strong foundation upon which to build protective legislation.'[42]

At most, state and federal decision-making rules simply require 'regard to' or 'consideration of' the environment or ESD. Decisions can be highly discretionary, and authorities may only need to pay cursory attention to ESD, with associated risks of long-term environmental degradation. ANEDO has illustrated this in more detail, with examples from three States and the Commonwealth, in a recent submission on a proposed national framework for CSG regulation.[43] We make several recommendations to address these problems.

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[36] See, for example, *Rio Declaration on Environment and Development 1992*; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), ss 3-3A; *Protection of the Environment Administration Act 1991* (NSW), s 6(2); *Sustainable Planning Act 2009* (QLD), ss 3-5.

[37] *National Strategy for Ecologically Sustainable Development (1992)*, at http://www.environment.gov.au/about/esd/index.html; The National Strategy defines 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'. See Australian Government Department of Sustainability and the Environment (SEWPaC) website, http://www.environment.gov.au/about/esd/publications/strategy/index.html.

[38] *National Urban Policy* (2011), 'Summary of priorities', available at www.majorcities.gov.au.

[39] See A. Hawke et al, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*,(October 2009), para 87. See also Dovers, S. (2008) 'Policy and Institutional Reforms', in D. Lindenmayer, S.Dovers, M. Harriss Olson & S. Morton (Eds.), *Ten Commitments: Reshaping the Lucky Country's Environment*, p 216.

[40] For example, under the *EPBC Act 1999* (Cth), actions that will have significant impacts on protected matters can still be approved. In NSW, there is only a requirement to consider the environmental impacts of the decision (see *Environmental Planning and Assessment Act 1979* (NSW), s 79C(1)(b); and s 89H (SSD).

[41] See, by contrast, the US *Clean Air Act* (42 USC ss 7401-7671), which places a range of specific obligations on the US EPA. See also *Massachussetts v Environment Protection Authority 549 US 1* (2007).

[42] T. Flannery, After the Future – Australia's new extinction crisis, Quarterly Essay, Issue 48 (2012), p 36.

[43] Australian Network of Environmental Defender's Offices (**ANEDO**) submission to COAG Standing Council on Energy and Resources, *Submission on the Draft National Harmonised Regulatory Framework for Coal Seam Gas 2012* (Feb 2013), pp 8-15, see www.edo.org.au.

Recommendation: **Planning and development decision-making at all levels (local, regional, State and national) must happen within the scope of a clear legal framework that aims to achieve ecologically sustainable development (ESD).**

Recommendation: **In particular, federal, state and territory laws must:**

- **Adopt ESD as the overarching aim of planning and major project schemes;**
- **Introduce legal requirements to exercise powers and functions (including major project DAA decision-making) in accordance with ESD principles;**
- **Build in objective decision criteria and accountability mechanisms to protect environmental assets in accordance with ESD principles;[44]**
- **Approve major project activities only if their impacts remain within identified and acceptable environmental limits of the catchment or region;[45]**
- **Include performance criteria on whether ESD principles are being applied, and whether objective environmental outcomes are being achieved.**

Case study – Warkworth mine extension

This example reveals the often limited influence of social and environmental factors where a major project is proposed. The 2012 approval of the Warkworth Mine Extension by the NSW Planning Assessment Commission (**PAC**) will allow the mining of a site set aside as a 'biodiversity offset' for threatened flora and fauna (as a condition of a previous mining approval in 2003). Residents also claim the extension would severely impact on Bulga village, and have relied on the offset site as a buffer from the mine.[46]

The Bulga Milbrodale Progress Association is currently challenging the mine extension on the basis that mining the offset is contrary to the public interest and ecologically sustainable development (**ESD**), and that the expansion will result in detrimental economic and social impacts on the Bulga community that are contrary to ESD principles. Significantly, in approving the expansion, the PAC observed:

> *… A number of rural communities have been faced with this situation in the past. In almost all cases the mines have been approved and the communities have either been radically altered in character or become non-viable. With the current price of coal this outcome is almost inevitable when the overall economic benefits of the mines are balanced against local community impacts. It appears that it is only if there are wider negative implications from the mining proposal that refusal becomes a possibility. If this is to change the 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.*[47]

These comments 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.

[44] This is consistent with ESD principles, including intergenerational equity; ensuring that biodiversity conservation and ecological integrity are fundamental considerations in decision-making; and internalising environmental costs.

[45] See, for example, John Williams Scientific Services Ltd, *An analysis of coal seam gas production and natural resource management in Australia – Issues and ways forward* (Oct. 2012), recommendations 1-2.

[46] EDO NSW is representing the Bulga Milbrodale Progress Association Inc. in a merit appeal challenging the PACT decision before the Land and Environment Court. See http://www.edo.org.au/edonsw/site/casework_key.php#bulga.

[47] Planning Assessment Commission, Warkworth Extension Project (09_0202), 3 February 2012, pp 8-9.

ii) Equitable rights for public participation and engagement

The Rio Declaration, to which Australia is a signatory, asserts that access to information, public participation and access to justice are critical to achieving ESD.[48] Community engagement is also a significant contributor to public confidence in planning systems. However, existing major project provisions, coupled with the complexity and scale of these projects, often limit community input. This is particularly the case for post-approval appeal rights and enforcement in most Australian States and Territories.

The vast majority of merit appeals are lodged by development proponents rather than third party objectors (97-99% in NSW in recent years). Where third party rights do exist, they are very rarely exercised, but the additional scrutiny promotes better decision making and accountability.[49] Indeed, *'Expanding the scope of third party merit appeals'* is one of ICAC's six key anti-corruption safeguards for the NSW planning system (2012).[50]

Attachment B includes excerpts relevant to major projects from the EDO NSW submission on the NSW Government's Planning *Green Paper*. This includes a section on the need for, and benefits of, equitable merit appeal and judicial review rights.

Recommendation: **Major project DAA processes must ensure equitable public participation and engagement rights, including:**

- **place clear limits on discretionary decision making;**
- **require information to be made publicly available prior to decision-making;**
- **mandate genuine public participation at all stages of planning and DAA;**
- **require decision makers to provide reasons for decisions;**
- **include equitable merit appeal rights for decisions, and open standing to enforce breaches; and**
- **consistent reporting on public participation methods, statistics and outcomes.**

iii) Robust, independent assessment of all environmental impacts

There are five broad problems with environmental impact assessment (**EIA**) for major projects in Australia:

- Lack of independent assessment approaches,[51] or comprehensive baseline data;
- Poor cumulative impact assessment (addressed under *Strategic planning* below);
- EIA is not linked to state-wide/catchment NRM targets, limits and requirements;
- Inadequate consideration of greenhouse emissions and climate change impacts;
- Limited government oversight and quality assurance of EIA.

ANEDO submits that a comprehensive analysis of major project development assessment and approval (**DAA**) processes would be incomplete if it did not address each of these risks and inadequacies, and identify leading practices to resolve them.

[48] World Resources Institute, 'Rio+20: Principle 10', www.wri.org/project/earth-summit-rio-2012.
[49] See, for example, N. Hammond-Deakin and E. Johnson (EDO NSW), 'Merits appeal rights in NSW: Improving environmental outcomes' (2012) 92 *IMPACT* Journal, 6-10.
[50] NSW Independent Commission Against Corruption (ICAC), *Anti-corruption safeguards in the NSW planning system* (Feb. 2012), available at www.icac.gov.au.
[51] We note that the NSW Government's *Planning Green Paper* (July 2012) flagged the possibility of independent appointment of environmental consultants for major projects (p 58).

The Productivity Commission should identify leading practices for robust EIA for major projects. Broadly, we recommend that Australian jurisdictions must:

- **improve the independence and rigour of project assessment and approval (including where a state government or authority is a proponent/beneficiary);**
- **identify and adhere to targets and limits across environmental indicators such as biodiversity, native vegetation, water, soil and air quality (including public health considerations), and greenhouse gas emissions;**
- **approve major projects only if their impacts remain within the identified and acceptable environmental limits of the catchment or region;**
- **require *assessment* of the climate change impacts of individual projects, and specific *conditions* to address these impacts (for mitigation and adaptation);**
- **effective oversight and quality assurance – including better offences and penalties for inaccurate or incomplete information; audits and enforcement; and clear regulatory responsibilities.**

ANEDO offices have made a number of recent submissions addressing these and other issues with EIA processes in detail, and would be happy to provide further information. In the meantime, please refer to ANEDO's submission on a *Draft National CSG Framework*, the EDO NSW submission on the *NSW Planning Green Paper*, and the EDO Victoria submission on the *ENRC Inquiry into the Environment Effects Statement process in Victoria*.[52]

iv) Fast-tracking major projects and overriding concurrences contradicts a 'risk based' DAA approach

Australian planning systems already classify or 'stream' development into different tracks based on the size and nature of the development. According to the Productivity Commission (2011), this *risk-based approach* 'speeds up most development assessments', freeing up resources to 'focus on proposals that are particularly technically complex or have a significant impacts on others'.[53]

Notwithstanding this 'streaming' approach, the desire to stream*line* major project assessments and approvals is a common thread across state planning systems, as those projects are significant economic drivers.[54] Existing major project streamlining mechanisms often override normal environmental law and licensing requirements (also known as **'concurrences'**).[55] These mechanisms may also concentrate control in a central agency or decision-maker; and limit public participation, transparency and judicial

[52] ANEDO, *Submission on the Draft National Harmonised Regulatory Framework for Coal Seam Gas 2012* (Feb. 2013) to COAG Standing Council on Energy and Resources, at www.edo.org.au; EDO NSW, Submission on NSW Planning Green Paper (Sept. 2012), at www.edonsw.org.au (see also **Attachment B**); EDO Victoria's submission to the Environment and Natural Resources Committee (ENRC) Inquiry into the Environment Effects Statement Process in Victoria (March 2010), at http://www.edovic.org.au/law-reform/submissions-and-issues-papers/environmental-effects-statement

[53] Productivity Commission Research Report, *Performance Benchmarking… Planning, Zoning and Development Assessments* (April 2011), pp XLVII-XLVIII.

[54] See COAG Business Advisory Forum papers, *Major Project Approvals Reforms – initiatives implemented by States and Territories…* (December 2012).

[55] 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.

scrutiny of decisions. In this way, states may compete with one other to 'cut red tape' and attract investment – which risks a 'race to the bottom' for environmental standards.

ANEDO submits that a truly risk-based approach to EIA would *focus* assessment effort on major projects, not override or reduce scrutiny. This is because:

- projects with the greatest impacts deserve the greatest scrutiny and safeguards, consistent with the Productivity Commission's 'risk-based' description; and
- major projects tend to be the most significant in terms of scale, nature, complexity, breadth and duration of impacts, and level of public concern.[56]

ANEDO is therefore perplexed that proposals to streamline major project DAA are found alongside references to 'risk-based' approaches, and assurances that fast-tracking will not lower environmental standards. It is doubly concerning when fast-tracking major project assessment is coupled with proposals to remove federal oversight and approval.

In ANEDO's view, two pillars of the proposed COAG reforms – 'lifting up' state assessment and approval processes for accreditation, and 'streamlining' state/territory major project assessment and approvals – are internally contradictory.[57] If state DAA processes seek to meet federal EPBC Act requirements, they would need to *increase* environmental and assurance standards. If States seek to 'fast-track' major projects (by reducing scrutiny or public participation), they will need to *lower* those standards. This has been the case with former Part 3A in NSW, the Victorian *Major Transport Projects Facilitation Act 2009,* and other fast-tracking legislation across Australia.

There is certainly evidence that current environmental assessment and approval conditions for major projects do not necessarily represent leading practice. For example, in NSW, recent involvement of the Planning Assessment Commission (**PAC**) suggests that assessment reviews by expert panels (in this case the PAC itself) can propose leading practice conditions on major projects. However, final *approval* may involve a compromise (via proponent negotiations, planning department recommendations, and separate PAC deliberation and decision making) resulting in final conditions that are less environmentally stringent, but more acceptable to the proponent.[58]

In Queensland, the major Alpha coal mine has been the subject of Commonwealth-State disputes over EIA requirements and conditions.[59] There have also been recent reports that project assessment staff in Queensland were pressured to approve major CSG projects without sufficient detail of plans and impacts – allegations that had been referred to the Queensland Crime and Misconduct as at February 2013.[60]

Overall, excessive streamlining of major project DAA erodes community trust; increases the risks and perceptions of corruption;[61] and the risk of imbalanced, unsustainable development.

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[56] See, for example, EPBC Act s 87(4A) and factors to be considered in EPBC Regulations 2000, cl 5.03A.
[57] See for example, COAG Draft *Statement of Environmental and Assurance Outcomes* (June 2012), p 4: 'More targeted regulation could also ensure greater proportionality between the scale of projects, their regulatory treatment and their likely environmental impacts.
[58] See, for example, A. Osman, K. Ruddock and E. Johnson (EDO NSW), 'The role of the NSW Planning Assessment Commission in "reviewing" planning projects', *IMPACT! Journal* (2012), at www.edonsw.org.au.
[59] See for example, 'Statement from Tony Burke', media release, 14 June 2012, available at http://www.environment.gov.au/minister/burke/2012/mr20120614b.html.
[60] J. McCarthy, 'Public servants tasked with approving massive CSG projects were blindsided by demands to approve two in two weeks', *The Courier Mail*, 11 February 2013, at http://www.couriermail.com.au.
[61] 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).

Recommendation: **Instead of fast-tracking projects with the greatest environmental and social impacts, ANEDO submits that Australian planning systems should provide incentives that reward leading practice ecological sustainability, social inclusion, environmental innovation and low-impact design.**[62]

See further **Attachment B**, under 'Fast-tracking "environmentally friendly" development for the mainstream'.

Case Study – The Victorian Desalination Plant Project and the problems with giving special treatment to major projects

The environment assessment processes for the Victorian Desalination Plant Project demonstrates the substantial weaknesses in the Victorian environmental effects statement (EES) process under the *Environment Effects Act 1978* (EE Act), and the urgent need to reform this process to increase certainty and reduce regulatory burden on parties (and thus negating the need for dedicated major project legislation).

It also demonstrates the highly problematic nature of 'fast-tracked' major projects. The Desalination Plan project was a Victorian government-backed project (and ultimately a public-private partnership), for which the Victorian Government initially did not intend to conduct an EES. This was despite the project being (at the time) the largest proposed desalination plant in the Southern hemisphere and very likely to have significant impacts on the environment. It was only after the Commonwealth Government determined that an assessment would be required under the EPBC Act (thus triggering the bilateral agreement), that the Victorian Government conceded to conduct an EES for the project. However, the Victorian government then drastically undermined the EES process due to its haste to approve and build the plant, in effect 'fast-tracking' the project.

The following elements of the Desalination Plant EES Process were problematic:

1. Inadequate timeframes limited constructive public participation in the assessment process and compromised the rigour of the assessment. The EES documentation for the Desalination Plant (over 1800 pages of highly complex, technical material plus works approvals of about 430 pages and 84 appendices which averaged approximately 90-100 pages each) was exhibited on 20 August 2008, with public submissions due on 30 September, 2008. The EES Inquiry Panel hearing was held just two weeks after this, on 14 October, 2008. The timing available to the community to review and digest material of such length and complexity, and to engage experts to prepare reports and give evidence at the hearing was unreasonable and inadequate. The consultation did not provide a real opportunity to the community to engage with the EES, digest its contents, and formulate a considered response.

2. Furthermore, the Inquiry Panel hearing itself was also rushed, with the Minister limiting the Inquiry Panel hearing to just under 3 weeks (14 October 2008 to 7 November 2008) and assigning a strict date for completion of their report. The Panel itself was critical of the limited timeframes, openly citing this as the reason for limiting the number and extent of oral presentations before the Panel. This had severe consequences for community participation and the rigour of the Inquiry Panel's recommendations. It also did not elicit serious consideration or meaningful changes from the project proponent.

3. The scoping documents for the project were drawn too narrowly. The Terms of Reference for the Inquiry Panel assessment ended up excluding consideration of the climate change impacts of the desalination plant, despite it being predicted to generate

[62] This reflects the ESD principle of 'improved valuation, pricing and incentive mechanisms'.

one million tonnes of CO_2-e from electricity use.[63] These Terms of Reference also excluded consideration of alternatives to a desalination plant to solve Melbourne's water problems. Submitters to the EES process were expressly prohibited from raising these issues in the EES hearing due to the narrow scoping set by the Minister. This also undermined the rigour of the assessment process and the independent role of the inquiry panel, and caused a great deal of frustration and distress to community members who were trying in good faith to participate in the inquiry process.

4. As mentioned, the project was strongly backed by the Victorian Government, and was structured as a public-private partnership. However, at the time if the EES, the project's private partner had not yet been chosen by the Victorian Government. Therefore, for the purposes of the EES, the Victorian Government Department of Environment and Sustainability (DSE) acted in the role of proponent of the project. This was hugely problematic, as it meant that the Government (through Planning Panels Victoria) was essentially assessing and approving its own major infrastructure project. This seriously compromised the independence of the assessment and approval process and community confidence in its outcomes.

The experience with the Victorian desalination plant exemplifies the typical 'characteristics' of fast-tracked major projects and the resulting detriment to the consultation process and environmental outcomes. The result was an extremely disenfranchised community and the project not enjoying wide public support across Victoria. This was evidenced by the sustained community protest and obstruction of the site throughout the construction of the project throughout 2010 and 2011.

v) Canadian reforms – a diminished Environmental Assessment Act

The Productivity Commission Issues Paper identifies Canada as both a comparable international jurisdiction to Australia, and as an alternative investment destination. The Commission also notes Canada's 2012 major project DAA reforms.[64] However, based on our understanding of Canada's reforms, **ANEDO submits that the Canadian model for 'streamlined' major project assessment is not one that Australian governments can follow if they are genuinely committed to maintaining or strengthening Australia's environmental assessment and development approval standards.**

In June 2012, Canada repealed the former *Canadian Environmental Assessment Act 1992* and replaced it with the *Canadian Environmental Assessment Act 2012* (**CEAA 2012**). Further amendments were made in December 2012. An analysis from Canadian Professor of Law, Meinhard Doelle, concludes that:

> *the key changes in CEAA 2012, including the shift in responsibility for the EA [environmental assessment] process, the discretionary triggering process, the changes to the process, the narrow scope, new powers of delegation, substitution and equivalency, the more restricted role of the public, all go counter to the improvements to CEAA 1995 suggested in the academic literature.'*[65]

Similarly, the Canadian environmental law centre, Ecojustice, has analysed the CEAA 2012 from the perspective of federal environmental protection and public participation. The analysis focused on substantive assessment rather than institutional structures.

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[63] Samitha Rao, 'Reforming the Environment Assessment Process in Victoria' (2010) 1 *National Environmental Law Review* 34, p 37.
[64] Productivity Commission Issues Paper, *Major Project Development Assessment Processes* (Feb. 2013), pp 9-10.
[65] Prof. Meinhard Doelle, 'CEAA 2012: The End of Federal EA As We Know It?' (2012) *24. Journal of Environmental Law & Practice 1.*

It concludes that the 2012 Act is 'significantly weaker than its predecessor.' Ecojustice notes five key changes under the CEAA 2012, four of which reflect this conclusion:[66]

- **The number of projects that require environmental assessment is drastically reduced, and discretion is increased.** The new Act shifts from an 'automatic trigger' approach to a 'listed projects' approach, whereby project types are listed in regulations at the Minister/Cabinet's discretion. In most cases, listed projects are then 'screened' by the Canadian Environmental Assessment Agency to determine if full assessment is necessary. This high level of discretion has led Ecojustice to predict that the federal Minister will require very few environmental assessments in practice.
- **Fewer factors and less information considered in environmental assessments.** For example, ANEDO understands it is no longer necessary to assess a project's impact on renewable resources for future needs; and the assessment may only consider environmental effects that relate to the federal government's jurisdiction. (The latter appears similar to existing limits in Australia's EPBC Act.) In addition, far less information is needed from project proponents under new 'prescribed information regulations'. It is understood that initial information requirements are *reduced* – or *removed* – on the range of species affected (i.e. federally protected matters only), impacts on critical habitat, consultation conducted, project's purpose, proximity to other projects (important to establishing cumulative impacts), summary of potential environmental effects, and the nature and extent of impacts on waterways.[67]
- **Short time limits are imposed on environmental assessments.** While the Minister and Cabinet have discretion to extend assessment time limits, default limits (which range between one and two years depending on size) may be insufficient for the assessing agency to gather information about environmental effects, scientific baseline data, expert input or consultation with affected groups.
- **Opportunities for public participation in environmental assessments are reduced.** The previous Act had an 'open standing' approach to participation in expert review panel hearings for the most significant projects – but this has been restricted to 'interested parties' who are directly affected by the project. Results to date have varied, with Ecojustice noting at least one example where people seeking to participate were prevented from doing so for various technical reasons. The changes mean that the public has fewer opportunities to provide input on decisions that affect the environment and health of Canadians at large.
- **Compliance enforcement capacity is increased.** This is perhaps the only environmentally positive outcome from the CEAA 2012 streamlining package, depending on how the powers are exercised. The new Act prohibits proponents and government agencies from taking actions on designated projects until an environmental assessment or screening is complete; and requires proponents to comply with conditions in a formal decision statement. The Act also creates inspection and enforcement powers to ensure compliance with these aspects.

Overall, the recent major project reforms in Canada, New Zealand's proposals to amend its *Resource Management Act 1991* to 'increase the influence of economic concerns',[68] and the proposed COAG reforms in Australia all reflect a concerning shift in emphasis

[66] See for example Ecojustice, *Legal Backgrounders*, 'Canadian Environmental Assessment Act' (May 2012); and 'Canadian Environmental Assessment Act (2012) – Regulations' (August 2012). Available at www.ecojustice.ca. Further information via personal communication, Feb. 2013.
[67] See Ecojustice, *Legal Backgrounder* (August 2012), pp 5-6, at www.ecojustice.ca.
[68] See further below; NZ Environment Commissioner, Dr Jan Wright, 'Proposed changes unbalance RMA - Environment Commissioner', media release, 1 March 2013, available at http://www.pce.parliament.nz.

towards streamlining environmental regulation. This is a counterintuitive reaction given the significant environmental, economic and demographic challenges for developed nations in the 21st century; and recent OECD and international proposals emphasising 'green growth' and valuing 'natural capital'.[69]

In Australia, the Senate Environment Committee has recently warned that state attempts to streamline environmental laws under the guise of 'competitive federalism' risks a 'race to the bottom' for environmental protection standards in Australia.[70] In ANEDO's view, similar negative outcomes are possible for environmental standards across international jurisdictions, unless benchmarking of international competitiveness takes account of triple bottom line outcomes, and prioritises the need for ecologically sustainable development.

vi) Post-approval monitoring, enforcement and resourcing

Environmental and planning laws need strong powers, commitments and resources to monitor compliance and enforce breaches. Otherwise, these laws cannot be efficient or effective systems that promote and ensure major project compliance. A combination of factors is needed for effective compliance and enforcement, including:

- independent and comprehensive EIA, drawing on baseline environmental data;
- robust and enforceable conditions on licences and development consents;
- ongoing monitoring and oversight of project operations after approval;
- independent regulators with the powers, skills and resources to act on breaches;
- open and accessible court processes for communities to take enforcement action.

Regulatory resources must keep pace with industry expansion to avoid increased risks to communities and the environment. In 2009, a Senate committee called for urgent review of under-resourcing of federal environmental regulation.[71] A headline finding of the 2011 *State of the Environment Report* concluded that 'Our extraordinary and diverse natural and cultural heritage is currently in good condition, but is threatened by natural and human processes, and a lack of public sector resourcing.' Evidence and submissions to the NSW CSG Inquiry also noted the limited resources available to monitor activities and enforce regulatory compliance.[72] Questions of regulatory independence and 'conflicts of duties' have also been raised, particularly where agencies are responsible for 'promoting and facilitating' an industry, as well as licensing and enforcement action.[73]

The above factors may in part explain why state and territory governments generally have a poor track record of enforcing compliance with their own environment and

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[69] See for example, S. Hammer et al, *Cities and Green Growth: A Conceptual Framework* (2011), OECD Regional Development Working Papers 2011/08, OECD. http://dx.doi.org/10.1787/5kg0tflmzx34-en; see also UNEP, *The Economics of Ecosystems and Biodiversity* (TEEB), at www.teebweb.org; see further UK Natural Environment White Paper, *The Natural Choice: Securing the Value of Nature* (2011), which led to the creation of the UK Natural Capital Committee, at www.defra.gov.uk/environment/natural/whitepaper/.

[70] Senate Environment and Communications Legislation Committee, *Report on Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (March 2013), recommendation 6 and paras 2.47, 2.70-2.73.

[71] See Senate Standing Committee report on *Operations of the Environmental Protection and Biodiversity Conservation Act 1999* (2009), rec. 4: 'The committee recommends that the government give urgent consideration to increasing the resources available to the department in the areas of assessment, monitoring, complaint investigation, compliance, auditing projects approved under Part 3 and enforcement action.'

[72] See, for example, Report of the NSW Legislative Council Committee Inquiry into CSG (2012), paras 13.52 and 13.58-61. See also EDO NSW, *Submission to the NSW Legislative Council CSG Inquiry* (October 2011).

[73] See, for example, NSW Ombudsman submission to the NSW Legislative Council Inquiry into CSG (2011).

planning laws.[74] Without a diverse range of compliance and enforcement options, backed by clear government commitments to audit compliance, investigate breaches and enforce the law, there will be little incentive on major project proponents to comply with the law.[75] Some fast-tracking regimes further limit third party standing for enforcement action where major projects breach conditions.[76]

Enforcement issues have been a further source of ANEDO's concern about proposals to accredit state DAA processes. If the Commonwealth's enforcement of the EPBC Act were 'switched off' for state-approved projects, the community would have no guarantee that States/Territories would fill the gap.[77] For example, in the last three years the federal Environment Department investigated 980 incidents under the EPBC Act. The Department also undertook over 40 court actions resulting in fines and enforceable undertakings totalling almost $4 million.[78]

Recommendation: **The Productivity Commission should identify compliance monitoring, enforcement and reporting as an essential area for improving major project regulation. Leading practices should include:**

- **independent audits of project compliance with licensing and consent conditions, as well as the accuracy of EIA predictions;**
- **accurate, transparent and accessible information, pre- and post-approval;**
- **clear lines of enforcement responsibility, and accountability for performance;**
- **ongoing monitoring and responsiveness to community reporting of breaches;**
- **enduring proponent responsibilities for future impacts and rehabilitation goals;**
- **a tiered enforcement framework – to deter misconduct and ensure breaches result in proportionate punishment;[79]**
- **a wider range of innovative enforcement tools for regulators, community and the courts, as found in some other environment and pollution laws;[80]**
- **a shared commitment from industry and governments to fund improved monitoring and enforcement – in order to do business safely and responsibly;**
- **options for additional funding of research, monitoring and enforcement activities, such as from royalties, licence fees or industry levies.[81]**

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[74] See, for example, EDO Victoria's report series 'Monitoring Victoria's Environmental Laws' which examines the extent and effectiveness of the Victorian government's implementation and enforcement of key environmental laws, at http://www.edovic.org.au/law-reform/major-reports/framework-for-action. See also case studies in ANEDO Submission on *Draft National Harmonised Framework for CSG* (Jan. 2013).

[75] See generally EDO NSW, *Court Imposed Fines and their Enforcement: Submission to the NSW Sentencing Council* (June 2006), at www.edo.org.au/edonsw/site/pdf/subs/060531finessub.pdf; see also The Hon Brian Preston, 'Principled Sentencing for Environmental Offences' (paper presented to EDO Annual Conference (May 2006), at www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_26May06_Preston.pdf/$file/Speech_26May06_Preston.pdf.

[76] For example, in relation to critical state infrastructure in NSW (see *EP&A Act 1979*, s 115ZK).

[77] 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.

[78] Department of SEWPaC/DEWHA, figures compiled from annual reports, 2009-10, 2010-11, 2011-12.

[79] The framework should include categories of serious offences, mid-range (strict liability) offences and minor (absolute liability) offences. See NSW Planning Review Panel (2012) rec 122.

[80] These tools should include orders to pay investigation costs; undertake works for environmental benefit (including funding organisations); complete audits, training and financial assurances; publicise offences or notify certain people; and removing any monetary benefit of the crime.

The strategic planning context for major projects in Australia

This part of the submission considers the following aspects related to strategic planning:

i) Leading practices for strategic planning
ii) Major project DAA must account for cumulative impacts
iii) Strategic environmental assessments need robust safeguards
iv) Improving climate change-readiness in major project DAA processes
v) Improved integration of NRM data and valuation of environmental assets.

i) Leading practices for strategic planning

The adequacy of Australia's strategic planning mechanisms varies across jurisdictions. However, many States and Territories lack the necessary tools and legislative requirements for comprehensive, engaging and coherent strategic planning to meet Australia's growing sustainability challenges. In 2011, the COAG Reform Council found that no capital city strategic planning system was consistent with COAG's nine agreed criteria, and made a range of recommendations to improve strategic planning.

ANEDO has recently considered strategic planning and major mining projects, and made recommendations to identify leading practices and integrate ESD in that context.[82] That submission, on the draft COAG/SCER guideline for harmonised CSG regulation, also analysed current initiatives to resolve competing land uses. This includes Queensland's Strategic Cropping Land Policy, the NSW Strategic Regional Land Use Policy, and a Draft 'Multiple Land Use Framework' produced for energy ministers.[83] In general, these policies focus on agricultural values, and give insufficient weight and protection to other ecological values, resources and land uses. Current policies also rely excessively on 'coexistence' where mining may be genuinely incompatible with existing land uses, environmental assets and landscape limits. This reflects the lack of 'environmental weight' in strategic planning and major project decision making.

Recommendation: **ANEDO submits that leading practice strategic planning must:**

- **describe how the goal of ecologically sustainable development (ESD) will be achieved via state, regional and local policies and planning decisions;**
- **undertake independent baseline studies of catchments' environmental qualities, such as water, soil, vegetation, biodiversity, minerals, air quality;**
- **provide for comprehensive rights of public participation, and support to engage – including tailored, inclusive engagement for indigenous peoples;**

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[81] See, for example, NSW Ombudsman, *Submission to NSW Legislative Council Inquiry into Coal Seam Gas* (Sept. 2011). See also SEWPAC, 'Cost recovery under the EPBC Act', at http://www.environment.gov.au/epbc/publications/consultation-draft-cost-recovery.html

[82] ANEDO's Feb. 2013 submission to COAG/SCER recommended (among other things):

Any national CSG framework should identify leading practices for strategic land-use planning. In the context of mining, this includes:

- *integrating economic, social and environmental factors in decision-making in accordance with ESD principles;*
- *identifying competing land uses and values between mining and other uses;*
- *undertaking baseline studies of environmental qualities;*
- *setting environmental limits and only allowing development within these limits;*
- *properly accounting for potential cumulative impacts;*
- *comprehensive, guaranteed rights of public participation in strategic planning;*
- *establishing protected environmental and agricultural areas where mining operations are prohibited.*

[83] For further information see ANEDO, *Submission on the Draft National Harmonised Regulatory Framework for Coal Seam Gas 2012* (Feb. 2013), at www.edo.org.au or www.edonsw.org.au.

- **take account of potential cumulative impacts of development over time;**
- **identify competing land uses, including sensitive areas where certain development (such as mining) is prohibited based on economic, environmental, social or cultural criteria;**
- **integrate natural resource management goals into the planning process;**
- **measure, publish and analyse environmental data across jurisdictions and sectors – to promote accuracy, transparency and evidence-based policy;**
- **promote resilience to climate change for communities and the environment, addressing risks and opportunities via mitigation and adaptation;**
- **integrate infrastructure needs ahead of new development, and prioritise public transport and 'green infrastructure'.**[84]

Cumulative impacts, climate change-readiness and NRM integration are discussed in more detail below, and further information on any of these areas is available on request.

ii) Major project DAA must account for cumulative impacts

Australia's environmental and planning laws are poor at addressing cumulative impacts, 'particularly in the fields of biodiversity, water and climate change regulation.'[85] Yet as areas of Australia are earmarked for development, there is a greater likelihood that individual projects will combine with past, present and likely future developments to have significant impacts. The recent UNESCO World Heritage Committee report on the Great Barrier Reef is a potent example of this problem (see below).[86]

Cumulative impact assessment and related processes like strategic environmental assessment (**SEA**) are only in their infancy in Australia.[87] Done well, these processes are essential to good strategic planning; and to assessing the full impacts of major projects alongside individual project assessment.

ANEDO recommends that State and federal planning and assessment laws must be amended, to require proponents and decision-makers to deal effectively with the cumulative impacts of development, particularly major projects.

Federally, the Hawke Review identified cumulative impact assessment as one of several areas where the EPBC Act should be strengthened.[88] This deficiency was also recognised in the Government Response to the Hawke Review.[89] In ANEDO's view, Commonwealth standards for assessing cumulative impacts must be strengthened, instead of delegating an inadequate, existing standard to the states.[90] It should also be remembered that the EPBC Act only applies to actions with a 'significant impact' on matters of national environmental significance – limiting federal cumulative assessment.

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[84] 'Green infrastructure' includes parks, gardens, waterways and wildlife corridors etc. See Australian Institute of Landscape Architects, http://www.aila.org.au/greeninfrastructure/.
[85] The Hon Brian Preston, Chief Judge of the NSW Land and Environment Court, 'Internalising Ecocentrism in Environmental Law' (2012), pp 6-7, speech to 2011 Wild Law Conference, Griffith University, QLD.
[86] United Nations Education, Scientific and Cultural Organisation (**UNESCO**), *WHC.12/36.COM/,* 'Mission Report, Reactive Monitoring Mission to Great Barrier Reef, Australia, 6th to 14th March 2012', at http://whc.unesco.org/en/documents/117104 (accessed March 2013).
[87] For example, the new Independent Expert Scientific Committee (**IESC**) on Coal Seam Gas and Large Mining Developments will advise on 'bioregional assessments' and any activity that will have significant impacts on water resources, 'in its own right; or when considered with other developments, whether past, present or reasonably foreseeable developments.' (*EPBC Act 1999* (Cth), s 505D; and s 528, 'large coal mining development' definition.)
[88] For example, see the Independent Review Report (2009), paras 3.3, 3.5, 3.6, 7.31, 7.60.
[89] See response to recommendations 6 and 8.
[90] See ANEDO submission on draft standards for EPBC Act accreditation (December 2012).

The inadequacy of cumulative impact assessment is similar at the state level. For example, cumulative impacts barely rate a mention in the NSW Planning Act, and it is not a specific consideration under 'section 79C' decision making considerations. As the Chief Judge of the NSW Land & Environment Court notes (remarks not limited to NSW), 'A solution is for the statute to require expressly cumulative impact assessment.'[91] The independent panel assisting the NSW planning review also recommended that cumulative impacts be embedded in statutory strategic planning mechanisms, along with climate change considerations.[92] Meanwhile, in Queensland and internationally, there is mounting concern about the cumulative impacts of development on one of Australia's environmental and tourism icons.

Case study – Cumulative impacts of major projects on the Great Barrier Reef

In 2012, a World Heritage Centre/IUCN mission found that the future of the Great Barrier Reef was threatened by the unprecedented scale of new coastal mining and port development proposals in Queensland. Subsequently, the World Heritage Committee noted 'with great concern the potentially significant impact on the [Reef's] Outstanding Universal Values'. The Committee decision called for urgent responses from the Australian Government to avoid the Reef being listed as 'World Heritage in Danger'.[93]

The Committee called on the Australian Government to cease development expansion beyond the existing footprint; 'ensure that development is not permitted if it would impact individually or cumulatively on the Outstanding Universal Value of the property'; and finalise a strategic assessment of the Reef for further consideration.[94]

The Committee recommended that Australian governments 'sustain and increase' conservation efforts; adopt clear scientific targets to protect the Great Barrier Reef, for 'improving its state of conservation and enhancing its resilience'; and ensure that any plans and developments contribute to achieving those targets, 'and an overall net benefit to the protection of Outstanding Universal Value'.

The Government is responding to the Committee through new reports and assurances.[95] However, it is difficult to reconcile the proposals from COAG and the Business Advisory Forum to 'streamline' (speed up) major project assessment and approvals, on one hand; with the World Heritage Commission's concerns about major project impacts on the Great Barrier Reef, on the other. Australia needs more, not less, cumulative assessment.

iii) Strategic environmental assessments need robust safeguards

In light of the COAG reforms, ANEDO is concerned that the Australian Government's intent to increase the use of strategic environmental assessment (or **SEA**) may place emphasis on 'streamlining' approvals, without the additional safeguards recommended in

[91] See the Hon B. Preston, 'Internalising Ecocentrism in Environmental Law' (2011), pp 6-7. For example, the US *National Environment Policy Act 1969* requires a detailed EIS for proposed laws and major federal government actions that significantly affect the human environment.
[92] T. Moore and R. Dyer, *The Way Ahead for Planning in NSW* (May 2012), Vol. 1, recommendations 8, 12, 13 and 19, available at www.planning.nsw.gov.au.
[93] Ibid, para 10. See further Australian Government Department of SEWPaC, at http://www.environment.gov.au/epbc/notices/assessments/great-barrier-reef.html.
[94] UNESCO World Heritage Committee, 'Decisions – 36COM 7B.8 – Great Barrier Reef (Australia) (N 154)', at http://whc.unesco.org/en/decisions/4657/ (accessed March 2013).
[95] See for example The Hon Tony Burke MP, Australian Environment Minister, media release 1/2/2013, at http://www.environment.gov.au/minister/burke/2013/mr20130201.html. See also Dr C. McGrath, 'Australia coy in report on heritage status of Great Barrier Reef', *The Conversation*, 4 February 2013.

the Hawke Review.[96] As an emerging field with a variety of implementation options, SEA presents new opportunities, but also a number of risks.[97] ANEDO has noted some of the inadequacies of strategic assessments to date, including in relation to the Melbourne Urban Growth Boundary and the Sydney Growth Centres assessment.[98] These risks must be managed and minimised by good process, standards and implementation.

With SEA still in its infancy in Australia, the Hawke Review of the EPBC Act supported increased use of strategic approaches, but also recommended that the Government 'strengthen the process for creating these plans and undertaking these assessments, so they are more substantial and robust' (rec. 6.1(b)). The Review also sets out a range of 'minimum information required for these assessments to be credible'.[99]

While the Government Response 'agreed in substance' with Hawke recommendation 6 (using and improving strategic assessment and regional plans), ANEDO is concerned that the Government rejected a central tenet of that recommendation. Namely, the addition of a robust, scientific 'improve or maintain' test with regard to environment and heritage.[100] As we have submitted, objective tests for environmental outcomes are a leading practice mechanism towards achieving ESD in planning and major project DAA. A 'maintain or improve test' is also consistent with the World Heritage Committee's decision on the Great Barrier Reef noted above.[101]

Given the broad scale, long-term implications of strategic environmental assessments, minimum safeguards are needed to ensure they are 'robust and fit for purpose.'[102]

Recommendation: **ANEDO strongly supports Hawke Review recommendation 6 to make the process for undertaking strategic assessments 'more substantial and robust'. This includes mandatory information requirements, and a criterion that approved activities and policies will 'maintain or improve' environmental outcomes. ANEDO also outlines a range of best practice standards for strategic assessments at Attachment A.**

iv) Improving climate change-readiness in major project DAA processes

The World Bank has recognised climate change as one of the most significant threats to the global economy.[103] The environmental and social risks are equally clear. According to the *State of the Environment Report 2011:*

> *Climate change will profoundly change the Australian environment, presenting widespread and significant risks to our ecosystems, native vegetation, water security, agricultural production systems and coastal communities.*[104]

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[96] The International Association of Impact Assessment has also developed a series of 'performance criteria' for a good-quality SEA process. These are broadly summarised as *Integrated, Sustainability-led, Focused, Accountable, Participative* and *Iterative*. See 'SEA Performance Criteria', IAIA Special Publication Series 1, available at www.iaia.org/publicdocuments/specialpublications/sp1.pdf.

[97] See, for example, *Report of the Independent Review of the EPBC Act 1999* (2009), para 3.37.

[98] See ANEDO, *Submission on 'Our Cities…' Discussion Paper* (March 2011), p 7 (Melbourne Urban Growth Boundary); EDO NSW, *Submission on the proposed Sydney Growth Centres Strategic Assessment* (June 2010).

[99] Hawke et al, *Report of the Independent Review of the EPBC Act* (2009), from para 3.45.

[100] Hawke et al, *Report of the Independent Review of EPBC Act* (2009), recommendation 6.2(b)(ii): That the EPBC Act be amended to provide… for strategic assessments to– '*insert an "improve or maintain" test for the approval of a class of actions in accordance with an endorsed plan, policy or program'*.

[101] UNESCO World Heritage Committee, 'Decisions – 36COM 7B.8 – Great Barrier Reef (Australia) (N 154)' (June-July 2012), para 8.

[102] Hawke et al, *Report of the Independent Review of the EPBC Act* (2009), 'The Next Generation of Planning for ESD', para 3.13.

[103] See The World Bank, *Turn Down the Heat: Why a 4C Warmer World Must Be Avoided* (2012).

ANEDO submits that climate change is an essential consideration for 21st century planning systems. It is a particularly pertinent issue for major projects, which both contribute to, and are at risk from, the impacts of climate change.

Australia's planning and mining laws do not require adequate assessment of, or conditions to address, greenhouse emissions and climate change impacts for major projects. The 2011 *Ulan* case highlighted the NSW Planning Department's unwillingness to use the DAA process to impose conditions relating to greenhouse emissions from coal mines.[105] There is also a lack of independent research and comparative analysis of the lifecycle greenhouse emissions of energy sources in Australia, including from emerging industries like coal seam gas (**CSG**).[106]

Unfortunately, governments are reluctant to address these legal inadequacies, and proposals to 'streamline' major project DAA processes and climate change programs are unlikely to assist. For example:

- the Australian Government rejected the Hawke Review recommendation for 'a requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments';[107]
- governments are pursuing the BAF's recommendations to dismantle purportedly 'inefficient' or 'non-complementary' climate change initiatives as part of the COAG reforms, recently drawing criticism from the federal Attorney-General;[108] and
- the NSW Government's 2012 Planning Green Paper does not refer to climate change at all (unlike the report of the expert Planning Review Panel).

ANEDO offices have made several recommendations to improve carbon accounting, particularly for mining projects, at the licensing, approval and post-approval stages.[109]

Recommendation: **The Productivity Commission should consider and recommend a range of mandatory measures to improve the climate change-readiness of strategic planning systems and major project DAA processes. In particular:**

- **make the direct and indirect impacts of climate change a *mandatory consideration in strategic planning* – as per expert recommendations;[110]**

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[104] *State of the Environment 2011*, Report to the Australian Government, 'Summary', available at http://www.environment.gov.au/soe/2011/report/key-findings.html.

[105] *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221. As Justice Pain noted at [59]: *'There is no formal document setting out the government's position on the treatment of scope 1, 2 and 3 GHG emissions and the risk of climate change in the development assessment process under the EP[&]A Act.'* The case involved merits review of the former Planning Minister's decision to consolidate various development consents, and approve an expansion that would effectively double the capacity of the Ulan coal mine 40km north of Mudgee.

[106] See *Report of the NSW Legislative Council Inquiry into CSG* (May 2012). The Committee found: *While it is impossible to reach a definitive conclusion as to the greenhouse gas emissions of Australian coal seam gas, the Committee considers it likely that at worst the greenhouse gas emissions of energy produced from coal seam gas would be equal to those produced from coal.* (see pp 194-203 &.para 12.69).

[107] *Response to the Independent Review of the EPBC Act* (2011), rec. 10.2 ('not agreed').

[108] Attorney-General Mark Dreyfus criticised the States 'for ending climate and renewable energy programs "that are perfectly complementary to the carbon price and under the pretext 'they are not needed"'', National Environmental Law Assoc Conference 2013. *Carbon Extra* 214, 8/3/2012 'Dreyfus attacks states on climate'.

[109] See ANEDO, Submission on the *Draft National Harmonised Regulatory Framework for Coal Seam Gas 2012* (February 2013), available at www.edo.org.au and www.edonsw.org.au. See EDO NSW, *Inquiry into Coal Seam Gas Impacts – Responses to Questions on Notice* (Jan. 2012), 'EDO recommendations relating to fugitive and other greenhouse emissions' pp 10-14, at: www.edo.org.au/edonsw/site/pdf/subs/120119csg_responses_questions_on_notice.pdf.

[110] Consistent with both the EPBC Act Independent Review and the NSW Planning Review Panel. See Hawke et al (2009), *Report of the Independent Review of the EPBC Act* (2009), recommendation 10.2. See also T. Moore and R. Dyer, *NSW Planning System Independent Review Panel Report*, Vol. 1, recommendations 8 and 19. For example, strategic planning objects should: 'Consider the scientifically

- **adopt a *comprehensive assessment framework* for the climate change implications of *individual developments*, particularly major projects– this framework could cover licensing, approval and post-approval mechanisms, and would complement a national carbon price.**

v) Improved integration of NRM data and valuation of environmental assets

Environmental outcomes, data collation and accounting

Strategic planning processes should aim to produce ecologically sustainable outcomes that maintain or improve Australians' environment and wellbeing, and that fully account for environmental values and ecological services. This requires a 'triple bottom line' approach to establish, monitor and report on strategic planning outcomes – integrating community engagement, economic indicators, NRM goals and catchment limits.

Government agencies already hold a substantial amount of information that could feed into strategic planning systems.[111] However, there is a disconnect between environmental data and current planning, monitoring and reporting systems (see 'Part 3A reporting' example below). According to the *State of the Environment 2011*, 'Australia is positioned for a revolution in environmental monitoring and reporting.'[112] However, 'Creating and using systems that allow efficient access to environmental information remain a great national-scale challenge.'[113] An expert panel assisting the COAG Reform Council agrees, noting the need for 'improving project and cost-benefit analysis frameworks so they take better account of externalities and do not unduly discount future benefits.'[114]

Federal, state and territory governments should also commit to develop and apply systems of *environmental accounts* that link to planning, environment and NRM targets.[115] While environmental accounts are not yet well established in Australia, there are initiatives underway at the federal level,[116] including as recommended by the Hawke Review.[117] Environmental accounts should be published alongside traditional economic budget indicators, and cross-referenced in annual reports from planning and environmental departments.

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anticipated impact of climate change within the footprint of the strategic planning study area and the broad measures required to mitigate its impact.'

[111] Including from catchment management authorities, state and federal departments, and State of the Environment reporting. See EDO NSW, NCC & TEC submission to NSW Planning Review Issues Paper (March 2012), pp 52-53.

[112] See Report to the Australian Government, *State of the Environment* (2011), 'Future reporting', http://www.environment.gov.au/soe/2011/report/future-reporting.html. These include more intelligent monitoring, increased standardisation and data-sharing, better data management and modelling, and national benchmarks for environmental and sustainability indicators.

[113] Report to the Australian Government, *State of the Environment* (2011), 'Future reporting'.

[114] See COAG Reform Council, *Review of capital city strategic planning systems* (Dec. 2011), 'Overview', p 2, available at: http://www.coagreformcouncil.gov.au/reports/cities.cfm.

[115] See for example, NSW Natural Resources Commission, 'Statewide Targets', at http://www.nrc.nsw.gov.au/WorkWeDo/StandardAndTargets/State-wideTargets.aspx. See also *The Economics of Ecosystems and Biodiversity* (TEEB) project, at www.teebweb.org.

[116] See *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 Bureau of Meteorology, 'Environmental accounts', at http://www.bom.gov.au/environment/activities/accounts.shtml.

[117] See Hawke, A. (2009), *Report of the Independent Review of the EPBC Act 1999*, Chapter 19; see also Wentworth Group of Concerned Scientists, *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia* (2008), at www.wentworthgroup.org.

Recommendations:

ANEDO strongly supports the accelerated development of tools to better integrate, monitor and report on *environmental indicators* in strategic planning and major project DAA processes.

National and state-level *environmental accounting* should also be accelerated, to ensure planning systems properly account for environmental values, costs and benefits.

A corollary of improved environmental data-sharing and analysis is the need for accurate, transparent and publicly accessible information. The Productivity Commission could also identify gaps and leading practices in this regard.[118]

Independent statutory Environment Commissioner (and overseas comparisons)

To give an independent voice on environmental protection, the Hawke Review also recommended establishing an Australian Environment Commissioner under the EPBC Act. The Australian Government Response rejected Hawke recommendation 71. Instead, in October 2012, the Government announced a 'Sustainability Council' to provide two-yearly reports to the Government on a range of triple bottom line indicators.[119] The 'IESC' has also been established under the EPBC Act in the specific context of water and mining. The influence of these bodies will depend on how their advice is taken and integrated in practice, and whether they substantively affect state planning systems.

Overseas jurisdictions are recognising the value of independent expert environmental advice and guidance. For example, in the UK, an Independent Committee has been established 'to advise the Government on the State of English Natural Capital'.[120]

New Zealand also has a Parliamentary Commissioner for the Environment. This statutory role provides an independent, authoritative perspective on significant law and policy changes. The NZ Commissioner recently 'criticised plans to increase the influence of economic concerns' in proposed amendments to the *Resource Management Act 1991* (NZ), confirming that similar pressures are being felt across the Tasman.[121] In Australia, while other sectors have more direct access to policy-making – such as through COAG's Business Advisory Forum – it is left to non-government bodies to articulate the strong public interest in environmental protection. Australia would greatly benefit from an independent, statutory office to oversee environmental decision-making; advise COAG, federal and state decision makers; and to educate the wider community.[122]

***Recommendation:* ANEDO supports an independent, statutory Environment Commissioner role, noting the different roles and mandates of the National Sustainability Council and the Independent Expert Scientific Committee on Large coal mining and CSG developments.**

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[118] See EDO NSW NCC & TEC submission to NSW Planning Review Issues Paper (Mar. 2012), F7, p 96-99.
[119] See SEWPAC website, http://www.environment.gov.au/sustainability/measuring/council.html.
[120] See UK environment department website, at http://www.defra.gov.uk/naturalcapitalcommittee/.
[121] NZ Environment Commissioner, Dr Jan Wright, 'Proposed changes unbalance RMA - Environment Commissioner', media release, 1 March 2013. See http://www.pce.parliament.nz.
[122] A new EDO Victoria report detailing further the proposal for the establishment of a National Environment Commission will soon be available at: http://www.edovic.org.au/law-reform/submissions-and-reports.

Efficiency and effectiveness of Australian DAA processes in protecting social, economic and environmental assets

This part of the submission notes the following aspects on efficiency and effectiveness:

i) State planning and major project reports must monitor 'triple bottom line'
ii) Effectiveness of federal laws – Independent review of the EPBC Act.

i) Planning and major project reports must monitor 'triple bottom line'

There are inherent difficulties in measuring the efficiency and effectiveness of state planning systems, because as noted above, jurisdictions are poor at integrating natural resource management (**NRM**) indicators, and reporting on 'triple bottom line' outcomes.

State and federal *State of the Environment Reports* note declining environmental trends across a range of indicators. A headline finding of the federal 2011 Report was that 'Our unique biodiversity is in decline, and new approaches will be needed to prevent accelerating decline in many species'. Australia has the highest number of mammal extinctions in recorded history than any other nation. According to the ABS, in the decade to 2011, the number of threatened fauna species in Australia increased from 353 to 439.[123] The Government Response to the Hawke Review also recognised the 'significant and ongoing decline' in global biodiversity as backdrop to the reforms. Notwithstanding this acknowledgement, it is clear that our planning systems fail to cost or quantify environmental deterioration. Without meaningful measurement, monitoring and reporting, it is impossible to arrest such problems and ensure that development is sustainable.

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, timelines and performance measures.[124] Even where governments commit to report on outcomes, social and environmental objectives and indicators are rarely referred to. 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.[125] Although governments may wish to report positive outcomes to encourage economic confidence, annual reports must also perform broader public accountability functions. The following case study appeared in the EDO NSW report, *The State of Planning in NSW* (2010).[126]

Case study – Part 3A reporting by the NSW Department of Planning

Up until October 2010, there have been approximately 260 Part 3A determinations, with 1 refusal (Bickham coal mine). There have only been 6 refusals in total since Part 3A commenced.[127]

The Department of Planning "Major Development Monitor" for 2008-09 reports the following

[123] ABS, *1370.0.55.001 - Measures of Australia's Progress: Summary Indicators* (2012), at http://abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0.55.001~2012~Main%20Features~Biodiversity~21 (accessed March 2013).
[124] COAG Reform Council, *Review of capital city strategic planning systems* (Dec. 2011), available at http://www.coagreformcouncil.gov.au/reports/cities.cfm. See 'Overview', criterion 9.
[125] 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.*
[126] Available at: http://www.edo.org.au/edonsw/site/policy_discussion.php#stateofplanning.
ANEDO understands that NSW has not produced any major project reporting since 2009-10.
[127] Stamford Plaza Double Bay, Somersby Quarry, coastal development in Cronulla, Bickham coal mine, Currawong, Moruya East Village.

statistics:

- *121 projects determined – 119 approved, 2 refused – 98% approval rate;*
- *9308 submissions made on projects;*
- *$6 billion in concept plan approvals;*
- *$10 billion in project plan approvals;*
- *27,702 potential jobs from approved concept plans;*
- *26,551 potential jobs from approved project applications;*
- *12 critical infrastructure declarations; and*
- *13 proposals were withdrawn prior to determination.*

Capital investment value, construction jobs and operational jobs numbers are summarised in tables, including economic and job value of refused projects. The report states that the reason there are negligible refusals under Part 3A is because "inappropriate or poorly-explained proposals are regularly removed from the system before a final refusal is made". However no evidence is publicly available to support this proposition.

It is clear that the current reporting focuses very much on economic outcomes. What is missing in the development monitor is any indication of the environmental and social costs of Part 3A projects. For example, a description of the impacts of converting farm land to mining in rural communities, and the impacts that Part 3A projects have on biodiversity, habitat loss and water extraction and pollution. Reporting should also include more analysis (for example, not just the total number of submissions received, but include a break-down of how many submissions were in favour or opposed to a proposal and key responses). Given that Part 3A covers the largest and most intensive developments in NSW, that have many identifiable impacts on communities, biodiversity and the environment, it is critical that these costs are quantified and reported accurately. This is consistent with ESD and triple-bottom line reporting.

ii) Effectiveness of federal laws – Independent review of the EPBC Act

The 10-year independent review of the EPBC Act, led by Dr Allan Hawke, has provided the most comprehensive, consultative and thorough analysis to date of the effectiveness of Australia's national environmental law. Unlike the 2012 COAG reform announcements, which came from one stakeholder group (the BAF), the Hawke Review's public consultation process sought and analysed specific feedback on the operation of the Act. As noted, this included 220 submissions, 119 supplementary submissions, and face-to-face consultations in each state and territory with industry, NGOs, the community, individuals, research groups, academics, individual corporations, and agencies from every level of government.

The Hawke Review Report made 71 recommendations to strengthen and improve the EPBC Act and clarify the scope and purpose of federal involvement in environmental matters. While the Hawke Review did recommend streamlining some regulatory processes and increasing the use of strategic assessments and bilateral agreements, it also recommended adding new matters of national environmental significance (including an interim greenhouse trigger); establishment of a federal Environment Commission; and improved enforcement, including greater access to courts for public interest litigation.

Almost two years later, the Australian Government's August 2011 formal response rejected a number of recommendations aimed at strengthening the EPBC Act. A clear emphasis in the Government response is the aim to 'substantially deregulate and improve efficiency.' The Government Response identifies a clear preference for a shift from individual project approvals to strategic approaches, streamlined assessment and approval processes, and developing cooperative national standards and guidelines to harmonise approaches between jurisdictions.

A significant EPBC amendment bill to implement these changes was listed for introduction in the 2012 Spring Session of federal parliament, but as at March 2013 has yet to be introduced. The progression of the April 2012 COAG reforms appears to have sidelined its introduction. However, this gives the Productivity Commission an opportunity to revisit the Hawke Review as they were intended – as a *package* of recommendations.

This is all the more vital given the limited evidence presented to justify the sweeping COAG reform proposals. The BAF policy paper provides only two examples to support its case. The example put forward for streamlining major projects (noted in the Productivity Commission Issues Paper, p 4) is both anonymous and lacking in context.[128] The 'more than 1500 conditions' required for that project underlines the complexity of major projects, and the need for proper assessment, timeframes and agency resources. As the Wentworth Group has noted, the BCA paper's other example, as to why state governments should be given federal approval powers, 'actually serves to demonstrate precisely why they shouldn't.' The federal Minister's refusal of the Traveston Crossing Dam on the Mary River – proposed and approved by Queensland authorities – was backed by scientific evidence of unacceptable impacts on listed threatened species.[129]

Major projects and the NSW Planning System Review

The Productivity Commission inquiry is to have regard to related work on development assessment processes by individual jurisdictions, such as the NSW Planning System Review.[130] This part of this submission considers the following aspects in NSW:

i) From 'Part 3A' to State Significant Development and Infrastructure
ii) General comments on the NSW Planning Green Paper
iii) Major projects and 'streamlined approval' in the Green Paper.

In addition, **Attachment B** includes excerpts on major projects from the EDO NSW 2012 submission on the NSW Government Planning Green Paper. ANEDO welcomes the Commission's consideration of these issues in the context of major project DAA processes nationally.

i) From 'Part 3A' to 'State Significant' Development & Infrastructure

The New South Wales experience with former 'Part 3A' of the *Environmental Planning and Assessment Act 1979* has eroded community confidence in proposals to 'fast-track' major project assessment and approval. The mistakes of Part 3A should also serve as a warning for future major project models.

In place from 2005 to 2011, the main effect of Part 3A was that it removed major projects from assessment and approval under the Part 4 and Part 5 of the Planning Act, and concentrated control of these projects in the Planning Minister and Department. The Part 3A system was characterised by discretionary decision-making, limitations on local decision-making and public scrutiny, high-level 'concept plan' approvals, override of environmental agency 'concurrences' (which persists today), and removal of third party

[128] The paper concludes that the relevant petroleum company 'invested more than $25 million' in the EIA, but provides no information on total project value, so relative costs cannot be assessed. Subsequent oral evidence from the BCA stated the project value for the proponent '…would have been in the hundreds of millions of dollars'. Senate Environment and Communications Legislation Committee, *Inquiry into EPBC Amendment (Retaining Federal Approval Powers) Bill 2012*, transcript, 8 February 2013.
[129] Wentworth Group of Concerned Scientists, *Statement on Changes to Commonwealth powers to protect Australia's environment* (2012), p 1, available at: www.wentworthgroup.org.
[130] Productivity Commission Issues Paper (2013), p 6.

merit appeal rights for the majority of applications.[131] In addition to these accountability failures, assessment and approvals under Part 3A were also inadequate at taking account of cumulative impacts, climate change or ecologically sustainable development.[132]

Overall, Part 3A led to profound community feelings of powerlessness, frustration, scepticism and disengagement. By the 2011 election year, it was a potent symbol of public discontent with the State Government. EDO NSW summarised the situation in its December 2010 report, *The State of Planning in NSW:*

> *Part 3A is demonstrably failing to implement ESD and is skewed in favour of economic outcomes over social and environmental impacts. Public participation is severely limited, especially regarding review rights, and the type of environmental assessment is discretionary. Instead of providing a robust regime requiring comprehensive public consultation and environmental assessment for the largest public infrastructure projects with the greatest impacts, the category of Part 3A projects keeps expanding to include private projects in response to 'streamlining' pressures and desired financial outcomes.*[133]

In the lead up to the NSW election in March 2011, the Liberal-National Opposition campaigned strongly on a public accountability platform. Its policies included repealing the controversial Part 3A and a sweeping review of state planning laws.

In mid-2011, the new Coalition Government introduced amendments to repeal Part 3A; created transitional provisions for the existing pipeline of major projects; and introduced a revised system called 'State Significant Development' (**SSD**) and 'State Significant Infrastructure' (**SSI**).[134] This 'interim' system commenced in October 2011, pending the outcome of the wider planning overhaul. Although it retains some problematic aspects of the system it replaced, the SSD/SSI provisions are seen as an improvement on Part 3A.

The SSD system narrows the scope of projects that were eligible for fast-tracking under Part 3A. It also reinstates the statutory assessment considerations that apply to other development decisions.[135] The Minister (or delegate) is still the consent authority for these projects,[136] which are assessed by the Planning Department. However, to reinforce an arms-length approach, the current Planning Minister has delegated his project decision-making authority to senior departmental officials and the expert Planning Assessment Commission (**PAC**).

In some circumstances, third party objectors can appeal on the merits against SSD decisions, but these rights are removed if the PAC holds a public hearing (which is not unusual).[137] Another significant shortcoming retained for both SSD and SSI is that major projects remain ***exempt*** from a list of 'concurrence' approvals required by law from

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[131] For Part 3A projects, merits appeals were only available if the project would otherwise be 'designated development' under Part 4 of the EP&A Act. Moreover, there was no merits appeal right for objectors if a concept plan has been approved for the project, or for critical infrastructure projects, or where the PAC had held a public hearing (former s 75L, EP&A Act).

[132] For example, in *Minister for Planning v Walker* [2008] NSWCA 224, the NSW Court of Appeal confirmed that a failure to consider ESD did not necessarily invalidate the Minister's decision to grant approval under former Part 3A. The Court of Appeal ruled that, although the Planning Minister must make decisions in the public interest, not having regard to ESD principles did not necessarily constitute a breach of that obligation.

[133] EDO NSW, *The State of Planning in NSW* (December 2010), p 35, available at: http://www.edo.org.au/edonsw/site/policy_discussion.php#stateofplanning.

[134] For more detail on the amendments to Part 3A and the new SSD and SSI regime, see EDO NSW factsheets at http://www.edo.org.au/edonsw/site/factsh/fs02_3_1b.php. As at June 2012 there were still over 230 Part 3A projects in the system which are subject to transitional arrangements.

[135] See Part 4, s 79C of the *EP&A Act 1979* (NSW).

[136] Although the current Planning Minister has delegated these powers to an independent Planning Assessment Commission (PAC) and the Planning Department.

[137] Merits appeal rights are available if the SSD would otherwise be 'designated development'; but are removed where the Planning Assessment Commission (PAC) holds a public hearing on the development.

various agencies (such as Aboriginal heritage impact permits and land-clearing approvals). Other authorisations *cannot be refused* by the agency (such as pollution licences from the NSW EPA), and their terms must be consistent with an SSD project approval.[138] These fast-track approaches reduce transparency, scrutiny and public trust.

ii) NSW Planning Green Paper: general comments & recommendations

The wider review of the NSW planning system is still in progress, with a detailed policy White Paper expected in the first half of 2013. The review should be a once-in-a-generation opportunity to implement leading practices, and reinvigorate the State's planning, assessment and approval laws after 30 years of piecemeal amendments. However, initial signals are less encouraging.

In May 2012, an independent review report by two former state ministers was delivered to the NSW Government, following public meetings and submissions. In July 2012, the Government released its initial policy response, *A New Planning System for NSW – Green Paper* (**Green Paper**), for further consultation. The Green Paper sets out five key concepts for the new planning system:[139]

- ***Community participation –*** *Involving the community early on key decisions;*
- ***Strategic focus –*** *Preparing good policies upfront to guide growth and development;*
- ***Streamlined approval*** *– Make proposal assessment faster and simpler by removing duplication;*
- ***Infrastructure provision*** *– Ensuring it is planned and delivered to support new and existing communities; and*
- ***'Delivery' culture –*** *Promote a can-do culture; government and councils accountable for results.*

A 'feedback summary' released by the Government in December 2012 revealed a significant divergence of opinion on the Green Paper's priorities. Broadly, development and industry groups were strongly supportive. Community groups and local councils were concerned at a lack of balance between economic, social and environmental issues (including public participation rights). Planners had mixed perspectives on various aspects; and public participation experts (and others) noted the significant resources and training needed to genuinely engage communities at the strategic planning stage.

EDO NSW made a detailed submission with 40 broad recommendations for a best practice planning system – highlighting 'ESD', community participation and environmental protection as essential factors.[140] Key recommendations include:[141]

- Adopt ecologically sustainable development (ESD) as the overarching aim, and reflect this in decision-making requirements and assessment processes
- Objective decision criteria (such as 'maintain or improve' environmental outcomes)
- Mandatory public participation at all stages, led by a statutory 'charter'
- Legal framework for strategic planning that includes cumulative impact assessment
- Make planning laws climate change-ready (assessment, mitigation and adaptation)

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[138] EP&A Act, ss 89J (Approvals etc legislation that does not apply) – including certain authorisations relating to coastal protection, fisheries, Aboriginal heritage, native vegetation, bush fire and water management; and 89K (Approvals etc legislation that must be applied consistently) – including aquaculture, mining leases and pollution licences.

[139] See NSW Government, *A New Planning System for NSW – Green Paper* (July 2012).

[140] EDO NSW Green Paper submission (Sept. 2012), available at: http://www.edo.org.au/edonsw/site/pdf/subs/120914A_New_Planning_System_for_NSW.pdf.

[141] Noting the overlap with ANEDO's 10 best practice elements for planning systems, and many of the evaluation criteria proposed by the Productivity Commission for assessing major project DAA.

- Integrate planning laws with environment protection and NRM laws and targets
- Independent, quality-assured, science-based environmental impact assessment
- Accountability – third party appeal rights, open standing, enforcement and reporting
- Fast-track green development for sustainable and socially responsible projects.[142]

A range of proposals in the NSW Green Paper are of concern regarding environmental protection, sustainability and equitable rights for the community. For example, the trade-off for 'early community participation' at the strategic level is that project-level input would be limited, and code-based assessment 'maximised'. Developers would be given greater certainty (and in some ways, more flexibility) to have development approved once local and regional strategies are set; and disproportionate rights to challenge unfavourable decisions. The Green Paper is also light on practical measures to ensure 'triple bottom line' integration of the environment, despite references to cumulative impacts and NRM.

If the NSW Government is to restore public trust and integrity to the planning system, the forthcoming White Paper will need to ensure a more equitable balance of rights and safeguards for the community and environment. The White Paper will also need to move beyond the Green Paper's economic growth focus, demonstrating a commitment to ESD.

iii) NSW Planning Green Paper: proposals to streamline major projects approval

The NSW Green Paper included a range of proposals relevant to major projects, including 'a suite of reforms to streamline assessment of state significant development'.[143] Proposals include:

- 'strategic compatibility certificates' to be issued for significant projects before local plans are finalised;
- reintroducing 'concept plan' approvals for major projects (see also **Attachment B**);
- 'streamlining concurrence requirements' by seeking out 'additional opportunities to integrate other relevant State agency approvals' (such as for 'aquifer interference');
- reducing the amount of project information proponents must provide (see concerns about this in the Canadian context, above), and
- codifying/streamlining environmental assessment requirements (**EARs/DGRs**).[144]

Perhaps the most striking feature of these proposals is the similarity in intent – and in some cases the same mechanisms – as the widely-condemned Part 3A regime. This is surprising given the erosion of public confidence under Part 3A; the 'bipartisan' agreement that the pendulum had swung too far towards fast-tracking; and the ensuing repeal of Part 3A. Not surprisingly, the official Green Paper Feedback Summary reported a lack of consensus on the above proposals. The plans to reintroduce major project fast-tracking also raise questions about achieving the NSW Government's State Plan commitments to 'Restore accountability to government', 'Return planning powers to local communities', and 'Restore confidence and integrity in the planning system'.[145]

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[142] See for example, Growth Management Queensland, *Green Door Information Paper,* July 2011.

[143] As one of 23 identified planning changes in the Green Paper, 'The NSW Government is proposing a suite of reforms to streamline assessment of state significant development including integration with state planning principles and streamlining concurrence requirements.' (NSW Government, *A new planning system for NSW – Green Paper* (July 2012), p 58)

[144] DGRs stands for Director-General's Requirements. See NSW Planning Green Paper, pp 58-59. more specifically, the Green Paper proposed to: 'maintain the current level of integration in the state significant assessment processes [i.e. 'concurrence' overrides] and look for additional opportunities to integrate other relevant State agency approvals []'

[145] See NSW Government State Plan, *NSW 2021* (2011), Goals 29-32, at www.2021.nsw.gov.au.

The Green Paper included one encouraging accountability proposal for major projects. It proposed to require EIA consultants to be 'chosen from an accredited panel' and required to 'meet certain standards regarding… impartiality and quality'.[146] EDO NSW, community groups and other stakeholders strongly supported measures to accredit EIA consultants, and options to break the nexus between consultants and direct payment by proponents. However, a number of industry submissions argued against this proposal.[147]

Major projects and the Victorian 'Environmental Effects Statement' Process

Further to the NSW example above, the Productivity Commission should have regard to the status of development assessment processes in Victoria. This final part of this submission considers aspects of the Victoria EIA system and how reform of this system could significantly improve the regulatory environment for communities and all proponents, without the need for special treatment of major projects.

EIA for major projects in Victoria is captured predominantly by the environmental effects statement (**EES**) process, under the *Environment Effects Act 1978* (Vic) (**EE Act**).[148] The EES process has been widely criticised.[149] EDO Victoria has previously outlined some of the fundamental deficiencies in the current system, and has suggested improvements to Victoria's EIA process so that it reflects leading practice. We do not propose to reiterate those in detail here and refer the Commission to EDO Victoria's submission to the Environment and Natural Resources Committee (**ENRC**) Inquiry into the Environment Effects Statement Process in Victoria.[150]

While the EE Act is not referred to as 'major project legislation', in practice the processes provides for the assessment of major project proposals only (it do not cater for smaller projects or projects with a moderate or limited level of environmental effects). Furthermore, the high degree of discretion has allowed the Victorian government to interpret the EE Act in the context of its own development agenda, which has led to a number of 'fast tracked' major project assessments and resulting poor environmental decisions. The best example of this is the EES done for the Victorian Desalination Plant Project (see case study above).

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[146] See NSW Planning Green Paper, p 58.

[147] Relevant submissions include the Property Council of Australia, Planning Institute of Australia, Rio Tinto and the NSW Minerals Council. See NSW Government, *Green Paper Feedback Summary* (December 2012), p 26, at www.planning.nsw.gov.au.

[148] With the exception of major transport projects, which are subject to the *Major Transport Projects Facilitation Act 2009*. Very few projects have progressed through this process since the inception of the Act in 2009. This is major project fast-track legislation and is thus not supported by ANEDO. See EDO Victoria, *Major Transport Projects Facilitation Bill 2009: Issues and concerns*, September 2009 at http://www.edovic.org.au/law-reform/older-submissions/major-transport-projects-facilitation-bill.

[149] See for example Murray Raff, 'The Renewed Prominence of Environmental Impact Assessment: "A Tale of Two Cities"' (1995) August, *Environmental and Planning Law Journal* 241; Rodger Eade, 'Issues in Environmental Impact Assessment in Victoria: What Has Scoresby Taught Us?' (2000) 18(4) *Urban Policy and Research* 515; Robyn Leeson, 'EIA and the Politics of Avoidance' (1994) February, *Environmental and Planning Law Journal* 71; Brad Jessup, 'Victoria and the Channel Deepening Project' (draft copy) in Tim Bonyhady and Andrew Macintosh (eds) *Mills, Mines & Other Controversies: The Environmental Assessment of Major Projects* (2010).

[150] Available at: http://www.edovic.org.au/law_reform/submissions_and_issues_papers/environmental_effects_statement. See also Samitha Rao, 'Reforming the Environment Assessment Process in Victoria' (2010) 1 *National Environmental Law Review* 34.

Additionally, the system lacks the fundamental attributes of transparency, accountability, certainty and rigour essential for best practice. This has resulted in a number of unsatisfactory assessments that have left the community with serious concerns about the projects and their potential impacts on the environment; and left proponents frustrated with the uncertainty in the process (and in some cases, the length of and costs associated with the process).

It is these latter inadequacies in the system that has resulted in the push for major project facilitation, the subject of a recent inquiry by the Victorian Competition and Efficiency Commission, titled *Securing Victoria's Future Prosperity: A Reform Agenda*.[151] One element of this was an investigation into major projects facilitation, detailed in an information paper provided to select stakeholders (of which EDO Victoria was one).

The Major projects facilitation information paper (**information paper**) noted that 'there is continuing concern that project approvals in Victoria are complex, uncoordinated and unnecessarily costly and time-consuming'.[152] ANEDO agrees with this proposition. However, as EDO Victoria has argued, the whole EIA system in Victoria desperately needs reform, and if this is achieved, it will significantly reduce the regulatory burden on all proponents, not just those of major projects. Additionally it will reduce the ability of the Minister to 'take or leave' requirements of the EES process, which will increase certainty.

In September 2011, the ENRC released its report of recommendations to the Victorian Government, titled *Inquiry into the Environment Effects Statement Process in Victoria*[153] (**ENRC report**). The EIA system proposed in this report will create certainty and bring clarity through a legislative rather than guideline-based regime. EDO Victoria has given in-principle support for these recommendations, and believes that, if implemented by government, there will be better assessments in shorter time frames for all projects in Victoria. The imperative to facilitate major projects through the project approval process in Victoria thus falls away. It does not make sense to continue with an inadequate EIA system, and get around it by designing a 'fast-track' for certain projects. The evidence from comparable jurisdictions interstate and abroad is that a well-designed EIA system can cope with projects of all sizes without the necessity of provision for exemptions.[154]

Accordingly, new EIA legislation should be drafted by the Victorian government incorporating the recommendations in the ENRC inquiry. The new EIA legislative scheme should not contain provisions for special treatment of major projects, and specific 'major project' legislation should not be developed.

We note that the Victorian Government's response to the ENRC inquiry indicated that having regard to ENRC's recommendations, the Government will proceed with reform of Victoria's EIA framework.[155]

In ANEDO's view, this reform would result in significant reductions in regulatory burden across the board, negating the need for specific major project legislation in Victoria.

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[151] See http://www.vcec.vic.gov.au/CA256EAF001C7B21/pages/vcec-inquiries-current-inquiry-into-a-state-based-reform-agenda#.UUj5Gld35I0

[152] Page 1 of the information paper.

[153] Environment and Natural Resources Committee, 'Inquiry into the Environment Effects Statement Process in Victoria' (September 2011), Parliamentary Paper No. 59 Session 2010-11.

[154] The EIA systems in Western Australia and the Federal Government are good examples of this.

[155] Victorian Government, Response to the ENRC Inquiry into the EES Process (March 2012), available at: http://www.parliament.vic.gov.au/images/stories/committees/enrc/EES/Govt_Response_to_the_ENRC_Inquiry_into_the_Environment_Effects_Statement_Process_in_Victoria_1_March_2012.pdf.

Attachment A – ANEDO, *Best practice standards for planning and environmental regulation* (June 2012)

Following COAG announcements in April 2012 to streamline environmental assessment and approvals at the federal and state levels, ANEDO released a briefing paper on *Best practice standards for environmental regulation* (June 2012).[156] Below is an excerpt of this paper.

For the purposes of this paper, "best practice standards" is taken to mean those elements/provisions that must be clearly articulated in legislation (both state and federal) to enshrine best practice environmental planning and assessment processes.

This section sets out 10 high-level elements that should form the basis for effective environmental and planning laws, state and federal:

1. ***Clear objects that prioritise ecologically sustainable development (ESD)***
2. ***Objective test for good environmental outcomes***
3. ***Independent assessment***
4. ***Comprehensive assessment based on best information available***
5. ***Projects must minimise environmental impacts (impact hierarchy)***
6. ***Best practice standards for strategic environmental assessment processes***
7. ***Oversight and review***
8. ***Public participation***
9. ***Compliance and enforcement***
10. ***Monitoring and review***

These principles aim to ensure that our natural capital is sustained for the benefit and appreciation of present and future Australians. In giving effect to these elements, governments and communities will also protect the social and economic benefits of a healthy environment, which all of us rely upon.

1. *Clear objects that prioritise ecologically sustainable development (ESD)*

Environment protection and planning legislation must set out clear objectives, which prioritise ecologically sustainable development (ESD) as the overarching aim.[157] These objectives must then be consistently and rigorously applied to all decisions and actions to implement the legislation.

2. *Objective test for good environmental outcomes*

All projects must be assessed against an objective and consistent test, such as whether the project will 'maintain or improve environmental outcomes'.[158] Robust, science-based

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[156] Australian Network of Environmental Defenders Offices, *Background Briefing Paper: Environmental Standards & Their Implementation In Law* (June 2012), at http://www.edo.org.au/policy/policy.html.

[157] See for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), sections 3 and 3A; see also *Protection of the Environment Administration Act 1991* (NSW), s 6. The aim of ESD is to achieve a level of development that meets the needs of the present without compromising the ability of future generations to meet their own needs. See World Commission on Environment and Development, *Our Common Future* (1987), at 43. Principles of ESD include: the precautionary principle; intergenerational and intra-generational equity; conservation of biological diversity and ecological integrity as a fundamental consideration; improved environmental valuation, pricing and incentive mechanisms (for example, internalising environmental costs and adopting the 'polluter pays' principle).

[158] For example, the Hawke review recommended a robust, scientific 'improve or maintain' test (with regard to environment and heritage) be adopted when approving a class of action under an endorsed policy, plan or practice. See Report of the Independent Review of the EPBC Act (2009), recommendation 6(2)(b)(ii).

methodologies and assessment tools should be developed to objectively and consistently apply the test to development proposals. Such a test will help ensure Australia develops in an ecologically sustainable way.

3. *Independent assessment*

Environmental assessment must be done by independent accredited experts, rather than by someone appointed and paid by the proponent. To increase transparency and remove any perceptions of bias, the experts should be assigned to a project by an independent body.

4. *Comprehensive assessment based on best information available*

Projects with the largest potential impacts should attract the greatest scrutiny. In addition to assessing the direct environmental impacts of a proposal, environmental assessment must be expanded to include:

- assessment of cumulative impacts of multiple projects
- assessment of climate change impacts (including mitigation and adaptation requirements), and
- assessment of the potential impacts of feasible alternatives.

Independent assessors and decision-makers must be provided with the best information available. Best practice assessment must therefore by underpinned by comprehensive baseline data and current environmental accounts, with resource and time allowances to address data gaps.

5. *Projects must minimise environmental impacts (impact hierarchy)*

Development proposals must demonstrate that they comply with an 'impact hierarchy':

- first that environmental impacts have been avoided wherever practicable
- second, that unavoidable impacts been mitigated to the extent practicable, and
- third, if necessary, how offsetting may be used to offset eligible impacts.

Any proposed biodiversity offsetting must comply with clear legal requirements including:

- avoidance of 'red-flag' environmental values that cannot be offset
- equivalency of values that may be offset ('like for like'), and
- ensuring that any offsets are protected in perpetuity (including from future development).

Offsetting schemes that do not meet these criteria must not be accredited.

6. *Best practice standards for strategic environmental assessment processes*

Strategic assessment of larger areas and multiple projects must be undertaken according to rigorous, objective and transparent legislative requirements[…]. Strategic assessment must:

- be based on comprehensive and accurate mapping and data

Several NSW environmental assessment processes adopt a test that actions cannot be approved unless they 'improve or maintain' environmental outcomes. This includes the Biobanking offsets scheme under the *Threatened Species Conservation Act 1995* (NSW), and the *Native Vegetation Act 2003* (NSW) which regulates land clearing. Similarly, a standard of "net environmental benefit" has been put forward in Western Australia and Victoria in the context of biodiversity offsetting. See eg, EPA Victoria, *Discussion Paper: Environmental Offsets* (2008), http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/$FILE/1202.3.pdf

- be undertaken at the earliest possible stage
- assess alternative scenarios and cumulative impacts
- involve ground-truthing of impact assessment
- involve extensive public consultation, and
- complement, but not replace, site-level impact assessment.

Any Commonwealth accreditation framework must ensure that the relevant strategic assessment meets strict, best practice criteria in terms of process, outcome and ongoing implementation. Accreditation can only occur when all criteria are met and it is demonstrated that the assessment will ensure ongoing maintenance or improvement of environmental values.

7. Oversight and review

Consistent with Australia's international obligations, and in order to accommodate new and emerging information, the Australian Government must retain a review or 'call-in' power over state-based projects, including those done under a strategic assessment or bilateral agreement. An expert 'Environment Commission' should be established to undertake an independent review role[…].

8. Public participation

Environmental assessment and planning laws must clearly prescribe mandatory public participation at each stage – in relation to strategic planning, strategic assessment and individual development assessment. All information relating to environmental assessment and decision-making must be publicly available. Sufficient timeframes must be set out in legislation to allow active, iterative, and considered participation from local communities. Involving the community should go beyond traditional 'inform and consult' models, and encourage best practice engagement that delivers more widely acceptable outcomes. Specific requirements must be made for consultation with Indigenous Australians wherever a proposal or assessment involves cultural heritage.

9. Compliance and enforcement

A range of regulatory tools and penalties should be available to address breaches of legislation. To ensure transparency and accountability, all legislation should include 'open standing' to bring proceedings for breaches. Statistics on compliance and enforcement should be published regularly, in a consistent and comparable form.

10. Monitoring and review

The efficacy of all environmental assessment and planning laws must be periodically and independently reviewed – to assess whether the relevant processes, implementation and decision-making are improving or maintaining environmental values, and whether the legislation is achieving ecologically sustainable development. There must also be specific legislative requirements for regular review of any accredited plan or policy.

Attachment B – *Excerpts from EDO NSW Submission (Sept 2012) on the NSW Government's Planning System Green Paper*[159]

This Attachment contains excerpts relevant to major projects from a comprehensive EDO NSW submission on the NSW Planning Review Green Paper. These excerpts have been re-numbered for clarity.[160]

i) State significant development – greatest impacts need greatest scrutiny

The initial proposals for major project assessment in the Green Paper pose significant risks to the Government's intent to restore public trust, transparency and accountability to the planning system; and are cause for significant community concern.[161] As noted, a consistent concern raised by EDO NSW seminar participants was the fear that the new system in practice will simply reinstate some of the worst aspects of Part 3A.
In particular:

- strategic level 'concept plan' approvals;
- 'public priority infrastructure'; and
- 'streamlining Director General Requirements' including 'reducing the 28 day consultation period if not required'

These proposals appear to replicate several inequities and governance risks of the former Part 3A. For example, as noted in this submission, there are a range of problems with exempting major projects from environmental concurrences.

The White Paper will need to demonstrate to the community that the Government, in its desire for 'streamlining', does not tip the balance too far by removing important checks and balances. The onus is on the NSW Government to prove to the community that the new system will not repeat mistakes of the past. Arbitrary rezoning for state significant development projects has the potential to completely undermine strategic planning.
The only way to do this is to include detail of the necessary safeguards and best practice procedural standards in the White paper, Exposure Bill and new Act.

Problems with concept plans

The concept plan process was one of the significant problems with former Part 3A. It allowed projects to be approved as concept plans with only a 'broad brush' description of the development. Detailed information about the development was not needed, and there was no formal opportunity for public participation, and no opportunity to challenge the Director-General's EARs.[162]

A concept plan approval was taken to indicate 'in principle' approval of a proposed project, deferring further detail to later.[163] Furthermore, it was possible to make a single application for approval of a concept plan and approval to carry out the project.[164] This meant that projects could be approved on the basis of concept plans without the need for further assessment. This made it difficult, or even impossible, to assess these projects effectively, since the breadth of the specific impacts of the proposal remained unclear.

[159] EDO NSW Green Paper submission is found at www.edo.org.au/edonsw/site/policy_submissions.php#4.
[160] Original page references from the submission are pp 42-44, 37-40, 48-50, 50-51 and 52-53, respectively.
[161] Green Paper pp 58-59.
[162] Section 75M, EP&A Act (now repealed). See EDO NSW *Major Projects Tool Kit* (2010).
[163] When determining whether to approve a concept plan, the Minister was required to decide what further assessment would be required before final approval was given. Final project applications for stages or elements of the concept plan could be determined by the Minister or by the local council
[164] Section 75M(3A) (now repealed).

Further, once concept approval was obtained, there was no opportunity for third party merits appeal for subsequent approvals.

If concept approvals are to be used in the new planning system then these key concerns would need to be resolved. The process for concept planning in the new system must be more robust. Authorities should be able to consider a range of options and be presented with objective evidence on impacts of the proposals *as well as* impacts if the proposal did not go ahead. There should be a clear option for decision-makers to refuse concept plans at an early stage. This reduces costs for developers and provides up front certainty.

Clear legal framework and decision-making criteria needed

EDO NSW has consistently proposed that all decision making, whether at local, regional or State level, must happen within the scope of a clear and prescriptive legislative framework that seeks to achieve ESD. In particular, a new planning system must foster better decision making for development proposals by:

- placing clear limits on discretionary decision making;
- incorporating objective decision making tools (such as a 'maintain or improve environmental outcomes' test);
- requiring information to be made publicly available prior to decision-making;
- mandating genuine and iterative public participation;
- requiring decision makers to provide reasons for decisions, and
- ensuring equitable merit appeal rights for decisions.[165]

Any framework for assessing State significant development must include these key features.

Within this framework for achieving ESD, it may be appropriate for State significant proposals to be assessed under additional criteria to those for local development,[166] provided assessment remains proportionate to potential impacts.[167] Clarity is needed as to how 'state planning principles' will be developed, how they will be applied, and how they relate to state planning policies?

EDO NSW has consistently submitted that the largest projects require the most comprehensive assessment requirements. Full carbon accounting is one example.

Full carbon accounting for major projects

EDO NSW believes full greenhouse gas (GHG) emissions accounting should be mandatory for State and regionally significant development and infrastructure under the new planning system. Carbon accounting should be one aspect of integrating climate change mitigation and adaptation into planning laws.

This would help to ensure that the true environmental costs of projects are taken into account in the assessment process (consistent with ESD principles). This should flow through from planning into other relevant areas of the law such as mining and petroleum legislation. Where other state or federal schemes already require GHG monitoring and reporting, the planning system could

[165] See joint submission (March 2012), response to Issues Paper Q's A12 and D31 (pp 38, 62).
[166] The Green Paper needs clarification on this point (p 58): 'As discussed in Chapter 7, the introduction of state planning principles will provide a better strategic framework in which to assess state significant proposals…' Does 'state planning principles' refer to high-level NSW Planning Policies, or something different?
[167] Green Paper, p 47.

integrate these schemes' findings. We explore integrating carbon accounting and considerations in more detail elsewhere.[168]

...

ii) 'Strategic compliance' and removal of concurrences

EDO NSW is concerned that the direction of several proposals to 'streamline' development assessment will weaken environmental impact assessment requirements and accountability. Areas of concern include: strategic compatibility certificates, fettering the ability of authorities to refuse projects, and removal of concurrences.

'Strategic compatibility certificates'

EDO NSW opposes the Green Paper's suggestion that 'any development proposal that conforms to the parameters set out in the strategic plan should be allowed to proceed', in advance of local plan updates, via a departmental 'strategic compatibility certificate'.[169] We would also oppose review rights for proponents whose strategic compatibility applications are rejected,[170] particularly without corresponding third party objector rights.

Our reasons for opposing the strategic compatibility concept are as follows:

- such approval would pre-empt local community input on subregional or local plans;
- it reduces clarity and rule certainty, by bypassing conditions in existing local plans;
- regional and subregional plans (and certainly State-level plans[171]) would likely be too high-level to allow meaningful application to the details of individual developments;
- the proposed mechanism lacks important safeguards to protect local social and environmental values (for example, where strategic data and principles do not account for site-specific values); and
- upfront 'strategic compliance' approvals risk repeating mistakes of the former Part 3A regime, across a broad range of development, for example, by fettering subsequent discretion, engagement and review.

The White Paper should instead canvass other measures that maintain environmental rigour, community engagement and accountability; as well as incentives for the timely but considered implementation of subregional and local land use plans.[172]

Consent authorities cannot refuse proposals that comply with subregional standards

The Green Paper proposes that 'councils and other consent authorities cannot refuse a proposal that complies with detailed building envelopes and standards developed through subregional planning…'.[173] We oppose this policy position.

Development assessment and approval processes should lead to well-planned, sustainable cities and neighbourhoods. It is not clear how a presumed 'right to develop'

[168] EDO NSW, NSW Legislative Council Inquiry into CSG Impacts, responses to questions on notice (January 2012), pp 10-14, at http://www.edo.org.au/edonsw/site/pdf/subs/120119csg_responses_questions_on_notice.pdf.
[169] The Green Paper proposes, for example, strategic compatibility certificate would be followed by consent authority determination 'after the consideration of community views' (p 53-54).
[170] Green Paper, pp 54 and 66.
[171] See Green Paper, Figure 14 flowchart, p 55. The first box states 'Development proposed consistent with *State* or regional/subregional planning strategies'. (emphasis added)
[172] The Green Paper notes these reforms seek to overcome 'delay or failure to implement metropolitan and regional strategic planning at the local level.'
[173] Green Paper, p 48; see also pp 53-54.

is better public policy than allowing the consent authority, with community input, to decide whether a proposed project is the best design and use of a site in the particular circumstances.[174]

The Land and Environment Court has recognised that it may not always be appropriate to develop a site to the maximum standards allowed, for example, at the interface of zones where neighbours' amenity may be adversely affected.[175]

While 'rule certainty' could be one possible justification for removing authorities' discretion to refuse compliant projects, this is undercut by the Green Paper's further proposals that proponents could seek to vary standards and requirements set out in subregional plans.[176]

Furthermore, we note the proposal for part code-based, part merit assessment risks 'compartmentalising' decisions.[177] If such proposals are to be assessed, consent authority should consider the impacts of the project as a whole.

The argument for a 'right to develop' has not been adequately made out in the context of the Government's commitment to triple bottom line outcomes.[178] As noted, courts have recognised that developing to the maximum scope of controls may not always be appropriate. It may be appropriate, for example, to give clearer statements via provisions or departmental policies, on when development *can* be refused despite meeting standards.[179]

Removing legal concurrence requirements through strategic planning

The Green Paper proposes the removal of agency concurrence and approvals for individual projects, on the basis that these will be dealt with upfront in strategic plans.[180] EDO NSW has strong concerns about the local environmental impacts of this proposal. Instead, a full and transparent consideration of concurrence requirements is needed to determine:

- the various causes of delay (including, for example, inadequate project information provided by the proponent);
- which requirements can be dealt with strategically; and
- which need to be retained at project level (such as threatened species, pollution licensing, Aboriginal cultural heritage and non-Aboriginal heritage considerations).

Dealing with some concurrences upfront, while retaining other important, site-specific environmental safeguards will promote efficiency and robust assessment.

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[174] Joint submission (March 2012), p 58, response to Issues Paper Q. D8.
[175] For example, in *Appwam Pty Ltd v Ashfield Council* [2011] NSWLEC 1001, the Court was required to assess a development on the interface of industrial and residential sites. Commissioner Morris found [at 37]: "*The redevelopment of land, which is zoned for industrial purposes at the interface with a residential area, presents design challenges to ensure that the different uses can function without adverse impacts being caused to the amenity of residents of those areas whilst maintaining efficient operations for the industrial business. These constraints can mean that it is not always possible to optimise the development controls that apply to such an industrial site and not adversely affect the amenity of adjacent residents*".
[176] Green Paper, p 55.
[177] Green Paper, p 55.
[178] See, for example, Green Paper, pp 18 and 29.
[179] For example, the *Mining Act 1992* (NSW) specifies general powers to refuse applications, and includes examples of reasons for doing so (without limiting the power's generality) – for example ss 22, 23(3), 41, 63. See also the *Petroleum (Onshore) Act 1991* (NSW), ss 19, 21 and 22.
[180] For example, Green Paper, p 55.

Major projects should be subject to integrated decision making – not concurrence exemptions or mandatory approvals.

The Independent Review Panel report recommends an 'Assessment Facilitation Unit' for dealing with concurrences – including for major projects.[181] We believe this is a more transparent and orderly alternative to a general removal of concurrences as proposed in the Green Paper.

Concurrence requirements are important because:

- they ensure expert government departments have a say about how projects proceed;
- they ensure that the objects of other environmental laws are met;
- they improve the level of scrutiny to the assessment and approval process, so that a project's particular environmental impacts are accounted for, and fully considered.[182]

EDO NSW agrees that some concurrences such as bushfire risk can be handled upfront,[183] and that baseline 'template conditions' could speed up assessment[184] subject to local conditions. However, we oppose a 'blanket' approach to removing concurrences due to environmental risk. Any new approach to concurrence would need to deal with the following issues.

- ***Transparency and environmental protections*** – While existing concurrences are clear and legally required, upfront 'negotiation' between agencies leaves scope for closed-door discretion (for example, on strategic approaches to Aboriginal heritage, threatened species and native vegetation protection or pollution licensing). There is no guarantee that existing environmental checks and balances will not be compromised.

- ***Proportionality***[185] – One reason for inter-agency concurrences is to ensure project scrutiny matches potential impacts.[186] Removing requirements for project-level agency agreement reduces tailored solutions; and increases the risk that important site-level qualities, or new information, will be overlooked or ignored.

- ***Major projects 'override'*** – State significant development and infrastructure projects continue to be *exempt* from a wide [range] of concurrences, as under former Part 3A.[187] These exemptions undermine the Government's commitment

[181] This Unit would be established in the Planning Department: 'to act as a central coordinating body for obtaining concurrences from other government departments and instrumentalities'. The Unit's involvement would be triggered once a specified period has elapsed since the concurrence authority received the project referral (for example 45, 55 or 65 days). See Independent Review Panel, Vol. 1, recommendations 76-91 (pp 9-10).
[182] EDO NSW, *Major Projects Toolkit: A voice for the community* (2010), funded by City of Sydney.
[183] See Green Paper, p 55.
[184] See, for example, Review Panel recommendation 86.
[185] Proportionality of impact assessment remains a Government objective (Green Paper, p 47).
[186] For example, a threshold of impact 'triggers' a need for expert agency consideration and agreement.
[187] For example, s 89J-K of the *EP&A Act* provides exemptions for the following:
(a) the concurrence under Part 3 of the Coastal Protection Act 1979 of the Minister administering that Part of that Act,
(b) a permit under section 201, 205 or 219 of the Fisheries Management Act 1994,
(c) an approval under Part 4, or an excavation permit under section 139, of the Heritage Act 1977
(d) an Aboriginal heritage impact permit under s 90 of the National Parks and Wildlife Act 1974
(e) an authorisation referred to in section 12 of the Native Vegetation Act 2003 (or under any Act repealed by that Act) to clear native vegetation or State protected land,

to proportional assessment, and integrating infrastructure, environment and NRM considerations in land use planning. Indeed, the Green Paper suggests such exemptions could expand to projects considered by Joint Regional Planning Panels (**JRPPs**).[188] Participants in the recent EDO NSW seminars expressed a high level of scepticism as to how the proposed changes will actually differ in practice from Part 3A. There is a genuine fear that some of the Green Paper's proposals for state significant development and infrastructure projects will simply reinstate Part 3A, to the exclusion of local communities.

- ***Strength of conditions*** – Removing concurrences would reduce on-the-ground expert scrutiny and threaten the adequacy of development approval conditions, as regulators (for example, the Environment Protection Authority) can no longer make independent decisions based on particular circumstances.

...

iii) Development assessment criteria – Objective tests needed for environmental outcomes

The Green Paper does not propose statutory assessment criteria that decision makers must comply with in determining development applications. This will be one of the most significant parts of the new planning system, as s 79C of the EP&A Act is currently.

The Independent Review Panel sets out a model for statutory assessment criteria, with some reference to s 79C.[189] The Panel included a range of important factors including climate change projections, human health and liveability; important natural resource and heritage considerations; as well as cumulative impacts (at least for 'merit' and 'impact' assessable development[190]). While we support retaining consideration of the 'public interest', we are concerned about the potential for a proposed 'public *benefit*' test to distort decision-making and override consideration of significant adverse impacts.[191] The main problem with the Review Panel's model is that, by listing factors to be 'taken into account', the relative weight of these factors remains open to discretion. There is no requirement that baseline environmental standards be met, but only factors considered.

Finally, there are no requirements to consider or apply the principles of ecologically sustainable development (**ESD**); or an overarching requirement that decision makers exercise their functions consistent with ESD. Overall, the proposed approach does not

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(f) a bush fire safety authority under section 100B of the Rural Fires Act 1997,
(g) a water use approval under section 89, a water management work approval under section 90 or an activity approval (other than an aquifer interference approval) under section 91 of the Water Management Act 2000.

Furthermore, the following authorisations cannot be refused if they are necessary for carrying out the SSD that is authorised by a development consent under Part 4, Div. 4.1:

(a) an aquaculture permit under section 144 of the Fisheries Management Act 1994,
(b) an approval under section 15 of the Mine Subsidence Compensation Act 1961,
(c) a mining lease under the Mining Act 1992,
(d) a production lease under the Petroleum (Onshore) Act 1991,
(e) an environment protection licence under Chapter 3 of the Protection of the Environment Operations Act 1997 (for any of the purposes referred to in section 43 of that Act),
(f) a consent under section 138 of the Roads Act 1993,
(g) a licence under the Pipelines Act 1967.

[188] Green Paper, p 56.

[189] Independent Review Panel, Vol. 1, recommendations 66-75, with specific focus in rec. 72:
The factors to be specifically taken into account during an assessment process are: Aboriginal heritage; air quality; biodiversity; climate change projections; employment creation; housing affordability; human health and liveability; non-indigenous heritage; social impacts; soils; water and the water cycle.

[190] Independent Review Panel, recommendation 73.

[191] Independent Review Panel, recommendation 75.

address several existing inadequacies in integrating environmental protection, natural resource management and ESD considerations into NSW land use planning.
...

iv) Independent and comprehensive environmental impact assessment

The Green Paper takes some encouraging first steps for improving environmental impact assessment (**EIA**). It proposes that (at least for State significant projects) 'consultants that provide Environmental Impact Statements should be':

- 'chosen from an accredited panel', and
- 'required to meet certain standards regarding the impartiality and quality of their work.'[192]

We strongly support these proposals, set out under the Green Paper's proposals for State significant projects. We submit that such safeguards are warranted for all types of EIA. The White Paper must provide details of how the new Act will explicitly address the potential for real or perceived bias in the system, by 'breaking the nexus' of direct payment between proponent and assessor.

Consistent with our previous submissions, we recommend a range of additional improvements to EIA processes to ensure that decision makers have the best information available. The new planning system must endeavour to:

- introduce a framework for the independent appointment of environmental consultants;
- introduce further measures to ensure the integrity of environmental impact statements including:
    - accreditation of environmental and planning consultants,
    - ensuring assessment and scrutiny is commensurate with potential impacts,
    - requiring or allowing decision makers to reject reports that are unsatisfactory,
    - replace public authority 'self-assessment' with a more accountable approach,
    - enhance transparency of EIA as part of renewed community engagement,[193]
    - adopt best practice standards for strategic environmental assessment as noted,
    - external peer-review of environmental assessment reports, and auditing of subsequent operating outcomes, and
    - requiring the Planning Minister to report annually on the EIA system (trends, statistics, impacts and accuracy of predictions);
- expand EIA provisions to require assessment of the cumulative impacts of multiple projects, the potential impacts of feasible alternatives, and climate change impacts (including mitigation and adaptation requirements);
- strengthen penalties for providing inaccurate information beyond false and misleading statements – to include negligent or reckless inaccuracies; and

[192] Green Paper, p 58.
[193] See, for example, EDO NSW, *Ticking the Box – Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* (November 2011). This report contains a number of case studies highlighting inadequacies in the current Review of Environmental Factors (REFs) process.

- link in best practice assessment with comprehensive baseline data and current environmental accounts, with resource and time allowances to address data gaps.

For more detailed information on improving EIA, including a range of system-wide co-benefits, please refer to Part 1 of our previous joint submission (March 2012).[194]

v) Equitable third party review and appeal rights: for accountable decisions

Appeal rights are a fundamental access to justice issue, and a source of community mistrust in the current system, as ICAC explains.[195] The Green Paper's only reference to appeal rights is that 'It is proposed that existing appeal rights under the Act be retained.'[196] We welcome this statement and look forward to further detail in the White Paper.

As outlined comprehensively in previous submissions,[197] the new planning system should:

- ensure more equitable appeal rights for certain ordinary (non-'designated') development, especially where development controls are exceeded;
- expand third party merits appeal categories to reduce corruption risks and improve decision making (as per ICAC's recommendations);
- expand appeal rights in relation to major projects, as the greatest impacts deserve the greatest scrutiny;
- ensure mandatory consultation on LEPs and rezoning rather than merits appeal rights;
- provide more equitable time periods for objectors to bring merits appeals; and
- substantially increase third party participation in conciliation and related processes.

As discussed above, we oppose rights for developers to apply for spot rezoning and new rights of review if rezoning applications are refused, given the new emphasis on upfront strategic planning. As noted, the Green Paper proposes these rights in addition to allowing greater flexibility of development standards.

In proposing more flexible development standards, the Green Paper does not indicate a position on appeal rights for third party objectors. In such circumstances, appeal rights to challenge 'exceeding' proposals would be an essential safeguard to community rights. Both the Independent Review Panel and the ICAC have supported third party appeal rights in this regard. For example, it is critical that merit reviews of state significant development are not precluded by review hearings.

The Independent Review Panel recommended that objectors should have (notifiable) merit appeal rights where they are directly affected by a project that exceeds local

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[194] NCC, EDO and TEC (March 2012), p 20, 'Improvement in the integrity of environmental impact assessment'

[195] ICAC, *Anti-corruption safeguards and the NSW planning system* (2012), p 22: *The limited availability of third party appeal rights under the EP&A Act means that an important check on executive government is absent. [These] rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur…*

[196] Green Paper, p 66.

[197] See joint submission (March 2012), from p 75, response to Issues Paper Part E.

standards.[198] Similarly, ICAC (2012) has suggested that additional third party merits appeal rights should apply to certain categories of private sector development, including development that:

- is significant and controversial (for example, large residential flat developments);
- represents a significant departure from existing development standards; and
- is the subject of voluntary planning agreements.[199]

We strongly emphasise the need to retain existing third party merits appeal rights for the community, and improve these rights to be on a more equitable footing with developers. As extensively documented, third party review rights clearly do *not* result in a deluge of unmeritorious cases coming before the court. While appeal rights on either side are exercised in very few cases,[200] developer appeals make up the vast majority of merit appeals to the LEC. In 2010-11, there were 378 developer appeals and only four objector appeals.[201] In other words, less than 1% of development determinations are appealed overall, and only 1% *of these appeals* are made by objectors. This in part reflects the additional resources available to developers, but also reflects the imbalance of when merit appeal rights are available.[202]

Finally, we welcome the Independent Review Panel's support for 'open standing' for civil enforcement proceedings.[203] We strongly recommend this be supported in the White Paper and expressly provided for in the new Act.

vi) Fast-tracking 'environmentally friendly' development for the mainstream

The new *Sustainable Planning Act* should adopt processes and standards that facilitate, encourage and reward green innovation.[204] Queensland's 'Green Door' policy (2011) is one such positive initiative, although one designed to mesh with an existing planning

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[198] Independent Review Panel, recommendations 25-26:
25. The establishment of a new right of third party appeal to be confined to a person or entity who lodged an objection to the proposed dispensation and who, on appeal, can demonstrate a direct adverse effect by the granting of the dispensation.
26. All objectors must be advised of any approval granting dispensation from compliance with a development standard and of the limited scope of permitted third party appeal rights against the granted dispensation.

[199] ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 15. See further Independent Review Panel, 'NSW Planning System Review Response', Vol. 2, p 66.

[200] 0.57% (indicative) as a proportion of development determinations. See Department of Planning, *Local Development Performance Monitoring 2010-11*, p 80, Table 6-1, at http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=29mGD0zKm9c%3d&tabid=74&language=en-AU.

[201] Department of Planning, *Local Development Performance Monitoring 2010-11*, pp 80-81.

[202] A recent EDO paper See for example, EDO NSW, *NSW Planning System's Sustainability Failures* (February 2012), at http://www.edo.org.au/edonsw/site/pdf/misc/120209planning_law_reform_cases.pdf. This paper documents three case studies where third party merits appeal rights were not available to challenge large and controversial developments, despite significant community concern. The *Huntlee* (residential development) and *Bega Wood Pellet Mill* cases did not involve designated development, and so did not have merits appeal rights. The *Haughton* power stations case involved designated development, but as they were deemed 'critical infrastructure' no merits appeal rights existed.

[203] Independent Review Panel, recommendation 120: *The open standing provisions in section 123 of the Environmental Planning and Assessment Act 1979 be incorporated in the proposed Sustainable Planning Act. An appropriate way should be provided to ensure early and effective intervention against unapproved activities that are having (or have the potential to have) significant impacts in a locality.*

[204] This reflects the ESD principle of 'improved valuation, pricing and incentive mechanisms':
(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems. See *Protection of the Environment Administration Act 1991* (NSW), s 6(2)(d).

system.[205] With the opportunity to build a new planning system, NSW should aim to go further, and 'make NSW number 1' in sustainability.

There is growing industry awareness that sustainable development needs to become the mainstream.[206] However, in recent years, governments of all persuasions have focused on the idea of 'cutting red tape' as a means of fast-tracking development and economic productivity.[207] Rarely do 'fast-tracking' initiatives target projects on the basis of fulfilling best practice standards of sustainability or environmental sensitivity.

In some cases the opposite is true. Many eco-friendly retrofitting initiatives (for example, introducing residential renewable or low-emissions generation, building houses with recycled material) are currently hampered by planning laws and building regulations.[208] This imposes a regulatory barrier to green businesses, and impedes more efficient use of resources.

To increase incentives for green development, EDO NSW would support measures to encourage proactive innovation in building and planning. For example, Queensland's small-scale 'Green Door' initiative required projects to demonstrate exceptional performance across four principles that identify key sustainability outcomes, and required early community engagement prior to lodging a development application.[209]

NSW should develop similar incentives but on a broader scale – moving from showcase initiatives to the mainstream. Significant efficiency gains can be made through processes that streamline approvals for forward-looking, low-impact, efficient and climate-adapted planning proposals that suit the local community.

[205] Growth Management Queensland, *Green Door Information Paper,* July 2011. In early 2012, the Green Door initiative was merged into the Major Projects Office (now Development Facilitation Services).
[206] See, for example, Siobhan Toohill, "Embedding Sustainability at Stockland", Centre for Social Impact: http://www.csi.edu.au/site/Knowledge_Centre/Asset.aspx?assetid=c9627ec3f646d127.
[207] See for example, COAG Communique, April 2012.
[208] As with restrictions on LEPs imposing more stringent housing construction standards than BASIX (see above).
[209] The policy aimed to accelerate decisions for development proposals that are identified to be the most sustainable in Queensland, emerged from a 2010 cross-sectoral summit on population growth. The principles relate to exemplary planning processes; ecological processes (including improved potable water use; reduction in waste; increase in ecosystem quality and production of energy from renewable sources and a reduction in carbon footprint); economic development and community wellbeing.