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The Director
Legislation and Policy Section
Approvals and Wildlife Division
Department of Environment and Heritage
GPO Box 787
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By facsimile: 02 6274 2214

Dear Director,

**Draft Agreement between the Australian Government
and the State of New South Wales**

The Environmental Defender's Office (EDO) welcomes the opportunity to provide comment on the *Draft Agreement between the Australian Government and the State of New South Wales* (Draft Agreement).

The aim of the Draft Agreement is to allow the Australian Government Minister for the Environment and Heritage to rely on specified environmental impact assessment (EIA) processes of the State of New South Wales in assessing actions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Three EIA processes are proposed to be accredited as set out in Schedule 1. These are:

- assessment of activities under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW)
- assessment of activities under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW)
- assessment of activities under Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW)

The EDO has serious concerns regarding the federal accreditation of assessment of activities under **Part 3A** *Environmental Planning and Assessment Act 1979* (NSW).

Schedule 1 states:

- assessment under Part 3A of the New South Wales *Environmental Planning and Assessment Act 1979*, which may include an environmental assessment report pursuant to section 75I informed by:
 - the environmental assessment under section 75F;
 - the assessment report of an independent hearing and assessment panel, pursuant to section 75G;
 - any preferred project report pursuant to section 75H; or
 - the report of any Commission of Inquiry appointed by the Minister under Division 2 of Part 6;



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this assessment approach corresponds to assessment by Environmental Impact Statement and meets the requirements of a Public Environment Report under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*;

There are a number of reasons why assessment processes under Part 3A should not be bilaterally accredited. These are set out as follows:

- Accrediting Part 3A is obviously problematic because there is such a wide discretion given to the Director-General as to how environmental impact assessment is done, and even what impacts should be considered. In contrast with Parts 4 and 5 - for which there is clear regulatory detail on matters which must be addressed in an EIS (or SEE) - under section 75F of Part 3A, the Director-General has largely unfettered discretion with respect to preparing environmental impacts assessment requirements, and determining the adequacy of environmental assessment undertaken.
- Accrediting assessment reports of independent expert panels under 75G is also concerning as there are no criteria for appointment of 'experts', and the hearings conducted to date have not fully overcome barriers to effective community participation.
- A key concern is that major infrastructure projects treat many elements of public participation as discretionary. For example, while the environmental assessment must be exhibited:
 1. there is no requirement for the Minister to have made any guidelines in the first instance: section 75F(1);
 2. there is no requirement for the proponent to respond to the issues raised (except if directed): section 75H(2);
 3. there is no requirement for the Director-General to require the proponent to make a preferred project report available to the public, notwithstanding that significant changes have been proposed to the project: section 75(H)(7);
 4. there is no requirement for the Director General to include submissions in the report to the Minister: section 75I(2);
 5. there is no requirement for the Minister to take such submissions into account in making his/her decision: section 75J(2);
 6. there is no requirement for independent panels, when constituted, to hear from the community: section 75G(4);
 7. there is no requirement for regulations to make provision for public exhibition, notification and registers: section 75Z; and
 8. there is no requirement for any community consultations provisions to be abided by except to make the environmental assessment available to the public: section 75X(5).
- Part 3A projects are exempt from the need to obtain many of the authorisations required under other legislation (under section 75U). There is therefore no guarantee of adequate assessment of, for example, local heritage, aboriginal cultural heritage, greenhouse gas emissions, threatened species and native vegetation; except potentially by exercise of discretion to impose conditions dealing with these matters. It is inappropriate to accredit a process that potentially excludes comprehensive assessment of such matters. As the recent case of *Gray v The Minister for Planning and Ors* [2006] NSWLEC 720 highlighted, it is problematic to assess adequacy from one standpoint without appropriate checks and balances.
- Clause 11.2 of the Draft Agreement is much looser than other similar agreements because there are no administrative arrangements yet determined. It is difficult to see how arrangements are



going to work with any certainty. In other jurisdictions such as Queensland, EIS procedures have been amended in the State Development and Public Works Regulations to include the requirements of the EPBC Act, in order to create complete certainty about how assessment would work under bilateral agreements. The Draft Agreement for NSW contains no such certainty.

It is therefore impossible to know with certainty exactly what process is being accredited, as the discretion built into Part 3A is so broad.

The EDO therefore recommends that the references to Part 3A be removed from Schedule 1 of the Draft Agreement, and that EPBC Act assessment remain as a check for the projects of greatest impact in NSW. This would be consistent with the Commonwealth laws performing a gate-keeper role for potentially undesirable projects.

For further information, please contact Rachel Walmsley, EDO Policy Director, 02 9262 6989 or on rachel.walmsley@edo.org.au

Yours sincerely

Environmental Defender's Office Ltd

Jeff Smith
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