

Submission on the Draft National Harmonised Regulatory Framework for Coal Seam Gas 2012

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

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

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Introduction

The Australian Network of Environmental Defender's Offices (**ANEDO**) welcomes the opportunity to comment on the *Draft National Harmonised Regulatory Framework for Coal Seam Gas 2012 (Draft Framework)* released by the COAG Standing Council on Energy and Resources (**SCER**) in December 2012.¹ As the Draft Framework is underpinned by the SCER's draft Multiple Land Use Framework, this submission also comments on that policy. The submission also includes review and input from the EDO NSW in-house scientific advisor and Aboriginal solicitor.

As a network of community legal centres, our interest is in the way coal seam gas (**CSG**) is regulated. In particular, we seek to help Australian communities understand and use the law to protect the environment. In assessing CSG regulation, we ask two broad questions:

- How effective are jurisdictions' laws and regulatory processes in protecting the environment and ensuring development in Australia is ecologically sustainable?
- To what extent do laws and regulatory processes allow for equitable community participation in land-use decisions regarding CSG and other land uses?

ANEDO has a strong history of engagement with Commonwealth, State and Territory regulation of water and land resources, including mining laws. This involves our offices' legal advice and casework, policy and law reform, community education and scientific advice functions.²

ANEDO's recent work on federal mining and planning policy includes submissions on the COAG draft standards for EPBC Act accreditation; on the Independent Expert Scientific Committee under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*; the Draft Energy White Paper; and the Clean Energy Future package.³

At state level, EDO QLD has recently commented on a range of mining and planning law reforms under the current and former State Governments.⁴ In NSW, recent work includes submissions on the State Government's Planning *Green Paper* (2012); the NSW *Strategic Regional Land Use Policy* (2012); and the NSW Legislative Council inquiry into CSG (2011-12). EDO NSW also released a law reform discussion paper on mining law in 2011;⁵ and an education booklet *Mining Law in NSW: A guide for the community* (2012).⁶ Other EDOs have contributed to policy and law reform in each State and Territory.

¹ Available at <http://www.scer.gov.au/workstreams/land-access/coal-seam-gas/> (accessed January 2013).

² For example, in 2011 and 2012, EDO NSW conducted 24 community legal education workshops and seminars on mining and CSG law at the request of rural and regional communities across NSW.

³ ANEDO, *Submission on Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act 1999* (November 2012), [DOCX 270 KB]; *Submission on the Inquiry into the Environment Protection & Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and large Coal Mining Development) Bill 2012* (April 2012) [PDF 44 KB]; *Submission on the Draft Energy White Paper* (March 2012) [PDF 246 KB].

(February 2012) [PDF 268 KB]; *Submission on the Clean Energy Legislative Package* (August 2011) [PDF 294 KB]. See www.edo.org.au for a full list of submissions.

⁴ See EDO QLD website, at www.edo.org.au/edoqld/law-reform/.

⁵ EDO NSW, *Mining Law in NSW – Discussion Paper* (June 2011). See www.edonsw.org.au.

⁶ *Mining Law in NSW: A guide for the community* (December 2012), available at <http://www.edo.org.au/edonsw/site/publications.php#mining>.

Drawing on this body of broader mining law reform work, this submission makes law reform recommendations relevant to CSG.

Executive Summary

ANEDO's experience with communities affected by coal seam gas suggests the current laws and policies that regulate CSG exploration and production are in need of reform. Our current regulatory approaches are a complex, evolving network of intersecting laws and policies, without clear oversight or direction. A national harmonised framework for CSG regulation should promote systems that:

- are comprehensive, but not unnecessarily complicated or inconsistent;
- fully account for all economic, social and environmental impacts of CSG on the site, region and State (both positive and negative);
- are science-based and evidence-driven;
- respect and engage communities in land use and project decision-making; and
- integrate with natural resource management (**NRM**) laws, principles and targets.

ANEDO welcomes the identification of 18 'leading practices' across the four main areas covered in the Draft Framework – well integrity, water management and monitoring, hydraulic fracturing and chemical use.

However, unfortunately both the Draft CSG Framework and the Draft Multiple Land Use Framework adopt an underlying presumption that CSG can occur in any landscape, provided impacts are properly 'managed'. This ignores a fundamental need for evidence-based land use planning and NRM objectives. Leading practice would be to identify environmental baselines and limits to the environment's carrying capacity (a catchment approach), and ensure that mining and any other development will not occur if it would compromise these limits and capacity.

In addition, there are several other important areas which the Draft Framework does not address in sufficient detail. This submission notes a number of areas that are central to the integrity and sustainability of CSG regulation. Many of these align with the 'significant considerations' identified by the SCER.⁷ Importantly, any national CSG framework must also outline specifics on:

- how jurisdictions will implement and comply with the 'leading practices'; and
- how COAG or the SCER will ensure that progress to implement the Framework will be independently measured, monitored and reported on.

To address these concerns, ANEDO makes a number of recommendations to **better regulate CSG across five broad areas**. We submit that any national harmonised regulatory framework must require the following:

- 1. Mechanisms to ensure development is ecologically sustainable, and subject to objective decision-making criteria;**
- 2. Thorough and independent assessment of all environmental impacts;**
- 3. Better community engagement in land-use decision making;**

⁷ The SCER's *Coal Seam Gas Policy Statement* (9 December 2011), under 'Drafting of a harmonised framework', gives a useful outline of 'significant considerations' – including 'environment, land access, occupational health and safety, reporting requirements, cumulative impacts, performance benchmarking; audit, compliance and accountability; transparency; and data sharing...'. However, the Draft Framework focuses on four core technical areas only. Available at <http://www.scer.gov.au/workstreams/land-access/coal-seam-gas/>.

4. **Long-term strategic planning that achieves triple bottom line outcomes;**
5. **Increased monitoring and enforcement, and regular reporting and review.**

First, the laws that regulate CSG and other mining⁸ should aim to achieve **ecologically sustainable development (ESD)**; and decision makers must exercise their functions and powers consistently with ESD principles.⁹ ‘ESD’ integrates environmental, social and economic factors into decision-making.

To do this effectively, legislation must require ESD principles to be applied in decision-making frameworks; and ensure that our mining, planning and NRM laws adopt consistent policy aims and objective environmental targets. By contrast, this submission shows how – at present – inconsistent and competing policy objectives, coupled with discretionary decision-making criteria, form a barrier to balanced decision making.

The overarching aim of mining (including CSG) and planning laws should be to achieve ESD, with objective decision-making criteria, assessment tools and performance measures to support this aim. In particular, ANEDO recommends that objective targets and limits should be identified and adhered to across various environmental indicators, as part of strategic planning and project assessment. CSG and other activities should only be approved if their impacts are within the identified and acceptable environmental limits of the catchment or region.¹⁰ This approach is consistent with achieving ESD.

Second, our laws should **improve environmental impact assessment (EIA)** to meet world’s leading practice. This should include:

- improving the **independence and rigour** of project assessment and approval;
- adopting a **catchment-wide approach to assess cumulative impacts and safe environmental limits**¹¹ – in relation to water, biodiversity, native vegetation, soil and air quality (including public health considerations), and greenhouse gas emissions;
- mandatory assessment of the **climate change impacts** of proposed projects (from mitigation and adaptation perspectives), with specific conditions to address these;
- funding independent scientific assessment of CSG’s lifecycle **greenhouse gas emissions** (including fugitive emissions) and its potential to contribute to or mitigate climate change;

⁸ For example, the *Petroleum and Gas (Production and Safety) Act 2004* (QLD); the *Petroleum Onshore Act 1992* (NSW); the *Mining Act 1992* (NSW); the *Environmental Planning and Assessment Act 1979* (NSW).

⁹ ESD principles include:

- The *precautionary principle* (if there is a threat of serious or irreversible harm, lack of full scientific certainty should not be a reason to postpone measures to prevent environmental degradation);
- *Conservation of biodiversity and ecological integrity* as a fundamental consideration in decision-making;
- *Intergenerational equity* (maintaining and protecting the health, diversity and productivity of the environment and natural resources for future generations);
- *Improved valuation, pricing and incentive mechanisms* – so that the valuation of goods and services includes environmental factors (assets, services, and costs); and
- The *polluter pays* principle (related to the principle above – that those who generate pollution or waste should bear the cost of containing, avoiding and abating it).

¹⁰ See further John Williams Scientific Services (2012), chapter 7, recommendations 1 and 2. Note, for example, ESD principles such as intergenerational equity, and including biodiversity conservation and ecological integrity as fundamental considerations in decision-making.

¹¹ Noting that cumulative impacts extend beyond CSG to other mining, agriculture and other impacts.

- **effective oversight and quality assurance of EIA** – including better offences and penalties for inaccurate or incomplete information; audits and enforcement; and clear regulatory responsibilities;
- adopting sophisticated, ‘triple bottom line’ **costs benefit analysis, not economic impact analysis** – so that the adverse environmental, economic and social impacts of CSG projects and development are considered as well as economic activity and benefits;¹²

Third, we seek laws that are fairer to local communities, by **improved notification, education, public participation, appeal and compensation rights**. This should include:

- ensuring that both mining and planning laws include comprehensive and mandatory rights to **public access to information, notification and consultation** at all stages (licensing, environmental assessment, approval and post-approval), including for major projects;
- improving trust and accountability through community rights for **merit appeals, judicial review, and ‘open standing’** for enforcement proceedings, including for major projects;
- consultation with **Indigenous communities** to identify and implement leading practices for tailored engagement strategies and cultural heritage protection;
- establishing a robust, equitable and transparent **compensation regime** for mine-affected stakeholders, in addition to comprehensive environmental management;
- Improving the clarity and consistency of **terminology** used across mining laws.

Fourth, our mining and planning laws should ensure effective **strategic planning**. Leading practices for strategic planning should:

- **engage and listen to communities**, and present a range of options and consequences for communities to deliberate on;
- **properly value environmental assets**, and the ecological services and social benefits they provide – as an integral part of ‘triple bottom line’ outcomes;
- **protect areas of high conservation value and key agricultural lands** from mining activities, as part of a balanced to resolving land use disputes and achieving ESD;
- **integrate decisions** on mining with regional, state/territory and federal NRM targets.
- **protect communities from** by providing minimum restricted areas around communities where coal seam gas extraction or related infrastructure may not occur.

Fifth, to improve compliance, regulatory systems need to ensure more widespread and effective **monitoring, enforcement and reporting**. This would include:

- practical steps to **measure, share and analyse environmental data** across jurisdictions;

¹² See for example, Report by Economists at Large (2011) in relation to the proposed China First Coal mine in the Galilee Basin, which discusses the importance of costs benefit analysis: http://bimblebox.org/wp-content/uploads/2012/01/Economists-at-Large_Report-for-Bimblebox-Landholders.pdf. See further the ‘stepwise approach’ to valuing environmental benefits under UNEP’s *The Economics of Ecosystems and Biodiversity* program, at <http://www.teebweb.org/publications/teeb-study-reports/local-and-regional/>.

- **accurate, transparent and publicly accessible** information, pre- and post-approval;
- shared commitment from industry and governments to **fund improved monitoring and enforcement** – as a necessity of doing business safely and responsibly;
- frequent, **independent audits of compliance** with licensing and planning conditions;
- effective **site rehabilitation** conditions, and enduring responsibility for future impacts and rehabilitation goals;
- clear lines of **enforcement responsibility**, and **accountability for performance**;
- specific steps on how jurisdictions will **implement and comply** with any National Harmonised CSG Framework, and how performance will be independently **assessed, monitored and reported on** (for example by the COAG Reform Council).

This submission considers these five areas in further detail below. Overall, ANEDO's recommendations identify a range of 'leading practices' that should be incorporated in any national CSG framework. It is hoped that these five overarching aims, and the accompanying recommendations, will assist in better harmonising the regulation of coal seam gas across Australia.

1. Mechanisms to ensure development is ecologically sustainable, and is subject to objective criteria

Recommendation: Any national CSG framework should identify 'achieving ecologically sustainable development' (**ESD**) as an overarching regulatory objective for CSG development. The Framework should require that ESD and its principles are given legal effect throughout mining and planning laws and decision-making across Australian jurisdictions.

Recommendation: In addition to the six criteria listed in the SCER's Coal Seam Gas Policy Statement (December 2011) to assess the harmonised framework, two further environmental protection criteria should be added. The new criteria should assess whether, under the regulatory model in question (or the national framework as a whole):

- 'the CSG industry develops consistently with the principles of ESD' and
- 'environmental outcomes and conditions are "maintained or improved" across a range of areas (including water, biodiversity, native vegetation, soil and air quality, and greenhouse gas emissions).'

Recommendation: Any national CSG framework should be finalised with inter-Council collaboration. In particular, the SCER should seek consultation and concurrence of the COAG Standing Councils on Environment and Water (SCEW) and Climate Change (SCCC).

To restore public confidence in mining and planning regulation, governments must overcome a significant challenge. Namely, the present tendency to interpret 'ESD' in a way that prioritises economic outcomes and benefits, without sufficient protection of environmental and social values (and the assessment of potential costs). This problem is apparent in the Draft Framework's simplified references to 'sustainable development'.¹³

¹³ Draft CSG Framework, p 8: 'Sustainable development means that investment in CSG projects should be financially profitable, environmentally sound, technically appropriate and socially responsible.' This is

ESD principles have been adopted across international, federal, State and Territory legal systems, at least in some measure.¹⁴ ESD principles include:

- Applying the precautionary principle (lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation)
- Conservation of biodiversity and ecological integrity as a fundamental consideration in decision-making;
- Intergenerational equity (maintaining and protecting the health, diversity and productivity of the environment and natural resources for future generations);
- Improved valuation, pricing and incentive mechanisms – so that the valuation of goods and services includes environmental factors (assets, services, and costs); and
- The polluter pays principle (related to the principle above – that those who generate pollution or waste should bear the cost of containing, avoiding and abating it).

All Australian Governments are also signatories to the *National Strategy for Ecologically Sustainable Development*.¹⁵ The Strategy identifies a challenge and approach for mining:

Challenge: *To further develop the mining industry in a way which manages the renewable and non-renewable resources on which it depends in an efficient manner which is also consistent with the principles of ESD.*

Strategic Approach: *This will be achieved by ensuring exploration and mining activities are conducted in accordance with the principles underlying this Strategy...*

More than 20 years on, far greater effort is needed to apply ESD in practice. Australian environmental policy experts have continued to recognise the implementation of ESD as a leading practice, noting that despite its challenges, ‘there is no other credible candidate for an integrative policy framework’.¹⁶ The alternative to prioritising and implementing ESD, as with past examples of poor natural resource management, is that we will continue to see an inexorable decline in environmental conditions for present and future generations; and heighten the risk of significant or irreversible environmental impacts, with lasting consequences for our society and economy.¹⁷

significantly different to accepted definitions of sustainable development, such as ‘Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’ (World Commission on Environment and Development, *Our Common Future*, 1987) This economic focus is continued throughout the Draft CSG Framework.

¹⁴ 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.

¹⁵ *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>.

¹⁶ 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.

¹⁷ See for example *State of the Environment 2011*, Report to Australian Government, ‘In brief – Headlines’: ‘Pressures of past human activities and recent droughts are affecting our inland water systems’;

There are three significant problems with current laws and decision-making frameworks. *First*, the laws that regulate CSG, mining and planning processes 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 its principles applied (with few exceptions). *Third*, decision-making frameworks contain no express duties to protect the environment,¹⁸ or objective limits on its degradation.¹⁹ For example, 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.’²⁰

At most, current State and Commonwealth decision-making rules simply require ‘regard to’ or ‘consideration of’ the environment or ESD. As a result, decisions can be highly discretionary, and authorities may only need to pay cursory attention to ESD, with associated risks of long-term environmental degradation. In the mining context, we illustrate this with examples from three States and the Commonwealth below.

Queensland

- The purpose of the *Sustainable Planning Act 2009* is ‘to seek to achieve ecological sustainability’ by ensuring development is ‘accountable, effective and efficient and delivers sustainable outcomes’ (s 3).²¹ However, mining and petroleum activities such as coal seam gas extraction are exempt from this regime (see analysis below).²²
- The purpose of the *Petroleum and Gas (Production and Safety) Act 2004*, under which resource authorities for gas extraction are issued, is to ‘facilitate and regulate the carrying out of responsible petroleum activities...’. This includes managing Queensland’s petroleum resources ‘in a way that has regard to the need for ecologically sustainable development.’²³
- All CSG developments in Queensland must obtain an environmental authority under the *Environmental Protection Act 1994*. ESD is the key object of this Act,²⁴ to be achieved by an integrated management program consistent with ESD (s 4).
- Major projects are assessed under the *State Development and Public Works Organisation Act 1971* (Qld).
- Groundwater management for CSG is only partly dealt with under the *Water Act 2000* (Qld) as the extraction of water that occurs as part of extracting the gas is

‘Australia’s land environment is threatened by widespread pressures’; ‘Our unique biodiversity is in decline, and new approaches will be needed to prevent accelerating decline in many species.’

¹⁸ 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).

¹⁹ 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 *Massachusetts v Environment Protection Authority* 549 US 1 (2007).

²⁰ T. Flannery, *After the Future – Australia’s new extinction crisis*, Quarterly Essay, Issue 48 (2012), p 36.

²¹ Ss 4-5 elaborate on achieving the Act’s purpose, including by ‘sustainable’ and ‘prudent’ resource use.

²² *Sustainable Planning Regulation 2009* (Qld) s10, sch 4 table 5

²³ *Petroleum and Gas (Production and Safety) Act 2004* (QLD), s 3 and subs 3(1)(a)(i) (emphasis added).

²⁴ *Environmental Protection Act 1994* (QLD), s 3: *The object of this Act is to protect Queensland’s environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development).*

authorised under the authority under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) referred to above.

Analysis – Queensland

When CSG developments are declared to be significant projects (soon to be known as coordinated projects) under the *State Development and Public Works Organisation Act 1974* (Qld) there is no obligation to seek to achieve or take account of ESD in assessment and decisions. The decision-maker under that Act, the Coordinator General, has broad criteria with wide discretion in decision making.²⁵ Accountability for decision-making is restricted by the exclusion of key parts of the *Judicial Review Act 1992* (Qld).²⁶

For significant projects, key environmental conditions are decided by the Coordinator General under the *State Development and Public Works Organisation Act 1974* (Qld).²⁷ The environmental authority under the *Environmental Protection Act 1994* (Qld) must still be obtained but the conditions of the environmental authority, including as decided by the Land Court on any appeal, must not be inconsistent with those required by the Coordinator General.

A CSG proposal will only need a water licence under the *Water Act 2000* (Qld) if it is proposed to use water produced by extracting the gas in a way that is not authorised under their authority under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld).²⁸ In the *Water Act 2000* (Qld), this is referred to as the company's 'underground water rights'.²⁹

There is no integrated land use planning that assesses if CSG projects or other uses are the best use for particular land. Regional planning processes have commenced, for example, for the Darling Downs area and Central Queensland that are subject to CSG projects. However we are not aware that any detailed, public, objective criteria have been set to lead to robust defensible outcomes of such planning processes.³⁰ Similarly, not all current legislation requires decision-makers to take account of cumulative effects.

CSG projects are restricted in some areas, for example strategic cropping land or national parks. Pipelines pertaining to those projects may go through even National Parks, however. Furthermore, some types of protected areas, for example Nature Refuges under the *Nature Conservation Act 1992* (Qld), are not protected against CSG projects. Given that CSG projects and accompanying infrastructure can interfere with both ecology and amenity of residents, more 'no go' areas including nature refuges and buffer zones around communities are needed.

There are public rights of submission, review and appeal in relation to 'level 1' petroleum activities. However the criteria do not catch all CSG projects for example proximate to nature refuges or communities. Those criteria for level 1 petroleum activities need to be expanded. Public notification logistics also need to be improved. While current

²⁵ *State Development and Public Works Organisation Act 1974* (Qld) s35

²⁶ *State Development and Public Works Organisation Act 1974* (Qld) s27

²⁷ This Act does not adopt ESD as the overarching aim. The Act's only reference to ESD is in the specific context of s138 ('Power in respect of water for purposes of works.' In s138(4) social, economic and industry considerations are mandatory, while consideration of ESD is discretionary only.

²⁸ Section 206 of the *Water Act 2000* (Qld).

²⁹ Section 362 of the *Water Act 2000* (Qld).

³⁰ See, Department of State Development, Infrastructure and Planning, Queensland Government, *Regional Planning* <<http://www.dsdiq.qld.gov.au/regional-planning/>>.

applications for those level 1 environmental authorities are now advertised on the website of the Department of Environment and Heritage Protection, the links to the application documents on the company's website regularly do not work, so people find utilising their rights of submission impeded.³¹

Several commentators in recent times have drawn attention to the serious risk that CSG development poses to water resources in Queensland³².

It is noteworthy that the National Water Commission³³, in establishing principles for managing the impact of CSG development on water, states that "Clear accountabilities should be identified for any short-or long-term cumulative impacts from CSG processes, clarifying which organisations are responsible for managing and rectifying or compensating for any impacts".

Christie³⁴ has sought to articulate a pathway for conflict resolution and environmental justice in the arena of coal seam gas development and environmental legislation. Christie argues that the extraction of water by the CSG industry, in time and space, may have an adverse effect on surface and groundwater systems some of which may already be fully or over allocated. The statutory meaning for ESD incorporates the precautionary principle as a consideration that must be taken into account as a legal obligation. The legal meaning for the precautionary principle in the *Environment Protection (Greentape Reduction) and Other Legislation Amendment Act 2012* (Qld) and the *Water Act 2000* (Qld) (s11(b)) follow the meaning set out in the Intergovernmental Agreement on the Environment (IGAE) (at 3.5.1). For similar reasons given for the application of the precautionary principle as a guiding principle for achieving ESD under the *Environment Protection Act 1994* (Qld), Christie points out that it could also be argued that risk assessment is a relevant consideration and should be part of the administrative decision-making process for ESD under the Water Act for the regulatory control of CSG activities to protect aquifers and springs.

For the CSG industry, this would mean an environmental risk assessment of the likelihood of identified risks that impact upon the elements of the purpose of Chapter 2 of the Water Act in the fracking process; and their consequences for sustainable water management and aquifer degradation. Risk management measures to reduce identified risks to an acceptable level of risk should be identified as part of the environmental authority approval process.

Christie further argues that the adaptive management framework and cumulative management area approach implemented by the Queensland government are both positive pathways for monitoring and managing cumulative impacts on groundwater following the commencement of CSG activities. But, as sound as both these approaches may be, they are not equivalent approaches to the precautionary principle: the precautionary principle avoids potential serious or irreversible environmental harm by taking preventative action, beforehand, based on risk assessment and management.

The inherent tension between the precautionary and adaptive approaches to

³¹ <http://www.ehp.qld.gov.au/land/petroleum/chapter5a-applications.html>

³² For example, Read, S (2012) The Tides of Change: Taking a Precautionary Approach to the Potential Water Impacts of CSG Development in Queensland. *Australian Environment Review* (2012) 87 (3) 83.

³³ <http://www.nwc.gov.au/nwi/position-statements/coal-seam-gas>, (accessed 26 February 2013).

³⁴ Christie, E (2012) Coal Seam Gas Development, Environment Legislation and Power: Towards a Pathway for Conflict Resolution and Environmental Justice. 32 *Queensland Lawyer* 225.

management of CSG development has been addressed by Letts³⁵, who makes reference (with respect to the adaptive approach) to the potential for any amendment to relevant environmental authority in a way that substantially affects economic or social benefits that are derived from CSG could become a political hot potato that the government was unwilling to deal with, and that in such a case it is feasible that the environment would lose out to economic and political considerations.

An adaptive management approach requires comprehensive monitoring and reporting. Swayne³⁶ has pointed out that the adaptive management approach to CSG groundwater impacts in Queensland relies on ongoing monitoring and reporting by the CSG operator as well as being dependent on the presence of suitable expertise within the Queensland regulatory authority to enable the appropriate evaluation and response to the emerging model and data. While the raw data is currently being collected and reported within Queensland, it is less clear how the Government intends to determine whether, and to what extent, the existing regulatory approach requires adjustment in response to this information. This is a clear weakness in the Queensland regulatory response.³⁷

New South Wales

- The chief law that regulates CSG licensing, the *Petroleum (Onshore) Act 1991*, has no objects to guide its implementation,³⁸ and does not refer to ESD at all. In deciding whether to grant a CSG title, the Resources Minister must ‘take into account the need to conserve and protect’ certain environmental values (such as flora, fauna and significant sites); and may include environmental conditions on titles.³⁹ However, there are no criteria to guide the exercise of this discretion.
- The objects of the *Mining Act 1992* (which regulates coal and other mining) are ‘to encourage and facilitate the discovery and development of mineral resources in New South Wales, having regard to the need to encourage [ESD]...’⁴⁰
- ESD is one of ten equally weighted objects in the *Environmental Planning and Assessment Act 1979 (NSW Planning Act)* (s 5);
- The objects of the *Water Management Act 2000* (NSW) are:
 - ‘to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular:
‘(a) to apply the principles of ecologically sustainable development;...’

The Act requires certain bodies to exercise their functions ‘consistently with the principles of [ESD]’.⁴¹

³⁵ Letts, L (2012) Coal Seam Gas Production - Friend or Foe of Queensland's Water Resources? 29 *Environmental and Planning Law Journal* 101.

³⁶ Swayne, N (2012) Regulating Coal Seam Gas in Queensland: Lessons in an Adaptive Environmental Management Approach? 29 *Environmental and Planning Law Journal* 163.

³⁷ Swayne, N (2012) Regulating Coal Seam Gas in Queensland: Lessons in an Adaptive Environmental Management Approach? 29 *Environmental and Planning Law Journal* at 179.

³⁸ The P(O) Act’s long title describes it as ‘An Act to regulate the search for and mining of petroleum; to repeal the *Petroleum Act 1955*; and for other purposes.’

³⁹ *Petroleum (Onshore) Act 1991*, s 74 (emphasis added). See also *Mining Act 1992* (NSW), s 237.

⁴⁰ *Mining Act 1992* (NSW), s 3A (emphasis added).

⁴¹ Including ‘management committees’ (s 14(3)), ‘water supply authorities’ in certain contexts (s 292(3), Schedule 3) and the Water Advisory Ministerial Corporation (s 372(4)).

Analysis – NSW

The absence of guiding objects, or references to ESD in the *Petroleum (Onshore) Act*, means that decision makers considering CSG licensing are unlikely to make decisions on the basis of ESD principles or triple bottom line outcomes. Requirements to ‘take into account’ environmental values – or ‘have regard to’ ESD (under the *Mining Act 1992*) – are also inadequate because they are so vague. There are no linkages to objective environmental criteria to guide discretionary considerations, and no requirement to apply ESD principles in making decisions or exercising powers under NSW mining laws.

The NSW Planning Act is central to the environmental assessment and development consent for CSG and other mining. However, as one of 10 objects, ESD is often downgraded due to the wide discretion afforded to decision makers. Key decision-making provisions (such as s 79C) do not refer to ESD. NSW Courts have suggested ESD and its principles must be considered as an aspect of the ‘public interest’, but only at a high level of generality.⁴² While the *Water Management Act* integrates ESD principles to some extent, the Act can be overridden by fast-track planning provisions for major projects.⁴³

Many stakeholders have called for a new NSW Planning Act to adopt ESD as the overarching objective, and to include objective tests for environmental outcomes in assessment and decision-making requirements.⁴⁴ In addition, to ensure that the projects with the greatest impact are given the greatest scrutiny, major projects including CSG should not override the legal checks and balances designed to minimise environmental impacts (including approvals or ‘concurrences’ under other laws). In a recent report on CSG, the former head of the NSW Natural Resources Commission concludes: ‘It is of concern that, by using the SSD [State Significant Development] approach, the largest projects potentially avoid many of the checks and balances in the system.’

In relation to objective tests for decision-making, ANEDO welcomes the recent emergence of several environmental outcome tests across different jurisdictions, such as ‘improve or maintain’, ‘no net loss’ and ‘neutral or beneficial impact’.⁴⁵ However, these tests are generally limited to individual NRM policies such as for native vegetation, biodiversity or water quality. They have not been translated into planning, EIA and major project laws in a systematic way.

⁴² See, for example, *Barrington Gloucester Stroud Preservation Alliance v Minister for Planning & Ors* [2012] NSWLEC 197, at 152-171.

⁴³ See, for example, ss 89J-89K and ss 115ZG-115ZH of the NSW Planning Act (*EP&A Act 1979*), which override many concurrences and approvals for State Significant Development and Infrastructure.

⁴⁴ See NSW Government, *Green Paper Feedback Summary* (December 2012), p 40. See further NCC NSW, EDO NSW and TEC, *Planning for Ecologically Sustainable Development*, submission to NSW planning review (March 2012).

⁴⁵ For example, the Independent Review of the EPBC Act recommended a robust, scientific ‘improve or maintain’ test (with regard to environment and heritage) be adopted when approving a class of action. See *Report of the Independent Review of the EPBC Act* (2009), recommendation 6(2)(b)(ii). 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. See also *Water Act 2000* (Qld) objects, under subs 10(2)(c)(ii). Similarly, a standard of “net environmental benefit” has been put forward in Western Australia and Victoria in the context of biodiversity offsetting. See for example EPA Victoria, *Discussion Paper: Environmental Offsets* (2008). Finally, under the *State Environmental Planning Policy (Sydney Drinking Water Catchment)*, development consent must not be granted ‘unless... the proposed development would have a neutral or beneficial effect on water quality.’ (cl 10)

Victoria⁴⁶

CSG extraction in Victoria is regulated under the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (**MRSD Act**). In particular, CSG falls within the definition of 'mineral' for the purposes of the Act⁴⁷ and hence mining activity and the requirement for mining licences applies to this activity.⁴⁸ The Act expressly requires that its administration is guided by principles of 'sustainable development',⁴⁹ although as in other States, provisions relating to 'sustainable development' oblige decision-makers merely 'to have regard to' the enumerated principles.⁵⁰

Analysis - Victoria

The substantive weaknesses in application of ESD principles to CSG exploration and mining in Victoria are, *firstly*, that the principles articulated in the MRSD Act are in no way binding on decision-makers (other than in their consideration), and are not expressed in the form of controlling provisions. Furthermore, while there is scope for an environmental effects statement (**EES**) to be prepared and considered by the (administering) Minister, nothing flowing from the EES is binding in terms of any subsequent decision to approve CSG-related mining activity.⁵¹ Preparation of an EES arises under the *Environmental Effects Act 1978* (Vic) and it gives rise to no specific legally enforceable rights or duties. Additionally, mining activity is generally exempted from the need for other environmental controls and approvals, such as planning permits for the removal of native vegetation or the need for approvals under the *Environment Protection Act 1970* (Vic).⁵²

Secondly, the concept of 'sustainable development' used in section 2A of the MRSD Act is not strictly adoption of principles of ecologically sustainable development. The section elaborates a weakened and modified version of ESD principles. Although certain ESD principles arise under that section, the enunciated principles adopt equally weighted requirements to consider, for example, 'recognition of the need to develop a strong, growing, diversified and internationally competitive economy that can enhance the capacity for environment protection'⁵³ and a highly modified elaboration of the intergenerational equity principle aimed at emphasising economic, rather than ecological, considerations.⁵⁴

As it stands, ANEDO is of the view that Victoria's current mining laws do not give adequate protection to the environment, to sensitive land uses, or to the communities who stand to be adversely affected. This problem will be drastically exacerbated with the introduction or expansion of coal seam gas mining in Victoria.

⁴⁶ A comprehensive analysis and critique of mining law in Victoria is contained in Environment Defenders Office Victoria *Reforming Mining Law in Victoria* (2012), at <http://www.edovic.org.au/law-reform/major-reports/reforming-mining-law-victoria> (viewed 27 February 2013)

⁴⁷ MRSD Act (Vic), s 4

⁴⁸ MRSD Act, s 14

⁴⁹ MRSD Act, s 2A

⁵⁰ MRSD Act, s 2A(1)

⁵¹ MRSD Act, s 42(7)

⁵² See EDO Vic, *Reforming Mining Law in Victoria* (2012), p 22.

⁵³ MRSD Act, s 2A(2)(d)

⁵⁴ MRSD Act, s 2A(2)(a): '...community wellbeing and welfare should be enhanced by following a path of economic development that safeguards the welfare of future generations'

Commonwealth

One of the objectives of the federal EPBC Act is 'promote' ESD 'through the conservation and ecologically sustainable use of natural resources'.⁵⁵ ESD principles are set out in s 3A of the Act. These must be 'taken into account' in deciding whether to approve a 'controlled action'.⁵⁶ Economic and social matters must also be considered.⁵⁷ It is generally an offence to take an action that will have a significant impact on a protected matter, such as threatened species or ecological communities.⁵⁸ However, the Minister can still approve actions that will have a significant impact, in which case no offence applies.⁵⁹

Analysis - Commonwealth

The implementation of ESD under national environmental law remains at a high level of generality, such as requiring ESD principles to be 'taken into account'. The EPBC Act is also limited to assessing impacts on 'matters of national environmental significance' (MNES). State mining and planning laws often have more influence over the assessment of CSG proposals and environmental protection, although the federal Environment Minister retains important assessment and/or approval powers where MNES are affected. An important finding of the Independent Review of the EPBC Act was: 'In affirming the principles of ESD as the cornerstone of the Act, some amendments need to be made to the objects and structure of the Act to make their expression clearer.' The Australian Government agreed to retain the principles of ESD as 'core concepts', but rejected recommendations to clarify the Act's objects, to better reflect these principles.⁶⁰ This is unlikely to assist the balanced application of ESD principles at the federal level.

Conclusion

As we have seen, Australian laws rarely require decision makers to use their powers and functions to ensure development is ecologically sustainable. This reduces the likelihood of balanced, 'triple bottom line' decision making about CSG, mining and other land uses. In ANEDO's view, it is critical that State, Territory and Commonwealth laws do more to prioritise ESD; and in accordance with ESD principles,⁶¹ build-in objective decision-making criteria and accountability mechanisms to protect our environmental assets over the long-term.

Objective tests and decision criteria would not only have environmental benefits, but would also increase certainty and reduce corruption risks and public mistrust.⁶² According to the NSW ICAC, 'A re-emphasis on the importance of strategic planning,

⁵⁵ Among other objects for environment and heritage protection (see *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), s 3.

⁵⁶ *EPBC Act 1999* (Cth), s 136(2)(a).

⁵⁷ *EPBC Act 1999* (Cth), s 136(1).

⁵⁸ See, for example, *EPBC Act 1999* (Cth), ss 18-18A.

⁵⁹ *EPBC Act 1999* (Cth), ss 136 and 139; and s 19.

⁶⁰ See *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009), para 89. See also *Australian Government Response to the EPBC Act Review* (August 2011), response to recommendations 1 and 2 ('agreed in part') and 3 ('not agreed').

⁶¹ Including intergenerational equity; ensuring that biodiversity conservation and ecological integrity are fundamental considerations in decision-making; and internalising environmental costs.

⁶² See Independent Commission Against Corruption (NSW), *Anti-corruption safeguards and the NSW planning system* (Feb. 2012), p 5. ICAC stated that the 'increasing tendency towards departures from the stated requirements' and the 'existence of a wide discretion to approve projects... creates a corruption risk and community perception of lack of appropriate boundaries.'

clear criteria to guide decisions and a consistent decision-making framework will help address this issue.’

In this regard we make three recommendations for the Draft CSG Framework. In brief:

- achieving ESD must be the overarching aim of any harmonised framework, with legal requirements to exercise powers and functions in accordance with ESD principles;
- the framework’s performance criteria should include whether ESD principles are being applied, and whether objective environmental outcomes are being achieved;
- any national harmonised CSG Framework must be jointly finalised with COAG’s Standing Councils on Environment and Water and on Climate Change.

Importantly, as explored below, CSG and other development activities should only be approved if their impacts are within the identified and acceptable environmental limits of the catchment or region.

2. Thorough and independent assessment of all environmental impacts – including cumulative impacts

Recommendation: Any national CSG framework should identify the following as leading practices for environmental impact assessment, and require Australian jurisdictions to implement them:

- improving the **independence and rigour** of project assessment and approval;
- adopting a **catchment-wide approach to assess cumulative impacts and safe environmental limits**⁶³ – in relation to water, biodiversity, native vegetation, soil and air quality, and greenhouse gas emissions;
- mandatory assessment of the **climate change impacts** of proposed projects (mitigation and adaptation perspectives), with specific conditions to address these;
- funding independent scientific assessment of CSG’s lifecycle **greenhouse gas emissions** (including fugitive emissions) and its potential to contribute to or mitigate climate change;
- **effective oversight and quality assurance** – including better offences and penalties for inaccurate or incomplete information; audits and enforcement; and clear regulatory responsibilities.

Recommendation: CSG and other activities should only be approved if their impacts are within the identified and acceptable environmental limits of the catchment or region.⁶⁴ Targets and limits should be identified and adhered to across various environmental indicators, such as water, biodiversity, native vegetation, soil and air quality (including public health considerations), and greenhouse gas emissions.

The Draft CSG Framework proposes 18 leading practices which are applicable to some or all of the four identified areas of CSG operations (well integrity, water management, hydraulic fracturing and chemical use). The four ‘overarching leading practices’ include:

⁶³ Noting that cumulative impacts extend beyond CSG to other mining, agriculture and other impacts.

⁶⁴ See further John Williams Scientific Services (2012), chapter 7, recommendations 1 and 2.

- the use of comprehensive environmental impact assessments;
- the development of comprehensive environmental management plans;
- a hierarchy of risk control measures through CSG operations; and
- verifying key system elements by qualified persons.⁶⁵

ANEDO welcomes the Draft Framework's detailed exploration of potential water impacts and certain other risks of CSG development. We also strongly support the Independent Expert Scientific Committee's role in this area.⁶⁶ However, the Draft Framework's focus on water impacts must be expanded to include a detailed, holistic consideration of other environmental aspects such as biodiversity, native vegetation, soil and air quality (including public health considerations⁶⁷). In addition, the Draft Framework must emphasise a catchment- or landscape-scale approach to environmental assessment across these areas.

In this submission ANEDO identifies five broad problems with environmental impact assessment (**EIA**) for CSG and other major projects in Australia:

- i) Lack of **independent assessment** approaches, or requirements for decisions based on comprehensive baseline data;
- ii) Poor **cumulative impact assessment**;
- iii) EIA is not linked to state-wide/catchment **NRM targets**, limits and requirements;
- iv) Inadequate consideration of **greenhouse gas and climate change impacts** of proposed projects, from both mitigation and adaptation perspectives;
- v) Limited government **oversight and quality assurance** of EIA, including offences and penalties for inaccurate information, and avoidance of conflicts of duties.

Any national CSG framework should address each of these risks, and identify leading practices to resolve them.

i) Independent and rigorous environmental assessment

Most environmental impact assessment (**EIA**) in Australia is primarily based on studies that are carried out or paid for directly by the project proponent. While this is accepted industry practice, it also creates perceptions and risks regarding the independence and comprehensiveness of the information provided. Geoscience Australia has also advised that individual proponents' assessment of *cumulative* impacts are 'unavoidably inadequate', as they don't have access to a full suite of information.⁶⁸

⁶⁵ See SCER, *Draft National Harmonised Regulatory Framework – CSG* (December 2012), pp 17-20.

⁶⁶ See, for example, ANEDO submission to the Inquiry into the Environment Protection & Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and large Coal Mining Development) Bill 2012 (April 2012), at http://www.edo.org.au/policy/120426epbc_bill_inquiry.pdf.

⁶⁷ For example, a national coalition of health groups recently noted that 'The risks to human health from energy and resources policy are not being well accounted for in current policy decisions.' See Climate and Health Alliance, 'Health groups call for urgent action to address health risks from coal and coal seam gas', media release, 13 Feb. 2013.

⁶⁸ See Dr John Williams Scientific Services Ltd (2012), p 97, citing Geoscience Australia and Dr M.A. Habermehl, *Summary Of Advice In Relation To The Potential Impacts Of Coal Seam Gas Extraction In The Surat And Bowen Basins, Queensland Phase One Report Summary For Australian Government Department Of Sustainability, Environment, Water, Population And Communities* (29 September 2010).

There are many practical ways to improve the independence and rigour of EIA processes for CSG and other developments.⁶⁹ These include:

- independent appointment and formal accreditation of EIA consultants;⁷⁰
- peer-review of EIA reports, and follow-up audits of actual operating outcomes;
- ensuring assessment and scrutiny is commensurate with potential impacts (including integrated compliance with other environmental protection laws);
- requiring decision makers to reject EIA reports that are unsatisfactory, or are not based on comprehensive baseline information about environmental qualities;
- replacing public authorities' self-assessment of projects with an arms-length approach;
- enhanced transparency and community input into EIA processes, pre-approval;⁷¹
- adopt leading practices for cumulative impact assessment and strategic environmental assessment;⁷²
- requiring relevant Ministers to report annually on the EIA system (trends, statistics, impacts and accuracy); and,
- integrate EIA with local baseline data, regional and state/territory NRM targets, and a national system of environmental accounts.⁷³

ii) Catchment-wide approaches to cumulative impact assessments

One of the main criticisms of CSG expansion is that there has not been adequate consideration of the cumulative impacts of CSG and other activities – either through strategic planning or project assessment. This is a problem with environmental assessment in Australia generally,⁷⁴ notwithstanding recent initiatives such as the NSW *Strategic Regional Land Use Policy* (which fails to integrate impacts on biodiversity and other values beyond water and key agricultural lands).

Cumulative impacts barely rate a mention in the planning Acts of NSW and Queensland. The Acts that regulate CSG and other mining don't refer to cumulative impacts at all.⁷⁵ This is a serious flaw, heightened by the fact that CSG, coal mining, agriculture and other land uses are increasingly intersecting and degrading the environment.⁷⁶

⁶⁹ See EDO NSW *Submission on A New Planning System for NSW: Green Paper* (September 2012) pp 50-51.

⁷⁰ (Rather than direct appointment and payment by the project proponent). Relatedly, the NSW Government recently suggested that EIA consultants for major projects could be chosen from an accredited panel, and be required to 'meet certain standards regarding the impartiality and quality of their work'. See NSW Government, *A New Planning System for NSW – Green Paper* (July 2012), p 58.

⁷¹ 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 NSW Review of Environmental Factors (REF) process, including lack of transparency.

⁷² See ANEDO, *Environmental Standards and their Implementation in law – Background Briefing Paper* (June 2012).

⁷³ See for example, Australian Bureau of Statistics media release, 'Completing the Picture - Environmental Accounting in Practice' (10 May 2012), at <http://www.abs.gov.au/>.

⁷⁴ The Chief Judge of the NSW Land and Environment Court has noted: 'This failure to deal with cumulative environmental effects is particularly encountered in the fields of biodiversity, water and climate change regulation.' See The Hon B. Preston, 'Internalising Ecocentrism in Environmental Law', Speech to the 3rd Wild Law Conference, 16-18 September 2011, Griffith University, Queensland, pp 6-7.

⁷⁵ That is, *Petroleum (Onshore) Act 1991* (NSW); *Mining Act 1992* (NSW); and the *Petroleum and Gas (Production and Safety) Act 2004* (QLD). There is only one reference in the *Environmental Protection Act 1994* (QLD) under Part 4A - Temporary emissions licences.

⁷⁶ See for example, Australian Government Department of Sustainability, Environment, Water, Population and Communities, 'Pressures on Australian land', www.environment.gov.au/land/pressures/index.html.

The former NSW Natural Resources Commissioner, Dr John Williams, recently examined CSG from a scientific perspective. His 2012 report makes two salient recommendations on CSG assessment and cumulative impacts:⁷⁷

Recommendation 1: The approach used for assessing CSG developments (and any other developments) should be, first, to understand regional landscape capacity, and then to determine if there is capacity for the development without crossing landscape limits.

Recommendation 2: Current development approval processes should be updated to approve new developments only on the basis of landscape limits and the expected cumulative impacts of the existing and proposed developments.

ANEDO strongly supports these recommendations as 'leading practices' for any national CSG framework.

Importantly, the Williams review also gives a practical example of this landscape-centred management approach, in the form of a cumulative impact assessment tool developed by the Namoi Catchment Management Authority (**CMA**) in Northern NSW. The Namoi tool uses comprehensive environmental baseline data to establish the carrying capacity of the landscape, and then models the cumulative impact of potential mining developments to see what activities can take place without exceeding this capacity.⁷⁸ The next section emphasises the need to integrate such tools into legal frameworks.

iii) Linkage to natural resource management targets and legislation

Australia's mining and planning laws do interact on some level with other laws for water, pollution and threatened species protection. However, these linkages must be substantially improved in two ways.

First, as noted in Part 1 above, major project fast-tracking provisions must not override approval (or 'concurrence') requirements from environmental protection agencies.⁷⁹

Second, mining and planning laws must include requirements to comply with targets and standards in NRM laws and policies. This includes state and national strategies for native vegetation and biodiversity protection, regional environmental plans and catchment action plans. At present, there is no specific requirement for mining and planning laws to consider, let alone comply with, such NRM targets. Yet this is a ready source for integrated, evidence-based and cost-efficient policy and process.

High-level targets can be implemented while taking into account local information and changes. The Namoi CMA tool is one example of this, but as the Williams review notes:

⁷⁷ See John Williams Scientific Services Pty Ltd, *An analysis of coal seam gas production and natural resource management in Australia - Issues and ways forward* (October 2012) pp 102-103.

⁷⁸ See John Williams Scientific Services, *ibid* (2012), p 102; see further EcoLogical Australia, *Proposed Framework for Assessing the Cumulative Risk of Mining on Natural Resource Assets in the Namoi Catchment*, prepared for Namoi CMA (2011).

⁷⁹ For example, under NSW SSD provisions (Part 4.1 of the Planning Act), most CSG exploration and production proposals (along with other mining) are exempt from many concurrence approvals, such as limits on land clearing in the *Native Vegetation Act 2003* and impacts on Aboriginal cultural heritage. Instead, the Planning Department has obligations to consult other agencies on EIA requirements. This process is less transparent, and the Planning Department is not bound to follow environmental agencies' recommendations. Other approvals, such as pollution licences, must be granted in accordance with the development consent for SSD. See *Environmental Planning and Assessment Act 1979* (NSW), ss 89J-K.

'Unfortunately the current legislative arrangements in NSW mean that the outputs of the Namoi CMA tool will have no legislative power.⁸⁰

To give two further examples of policies and targets, the NSW Government has, on advice from its Natural Resources Commission, adopted thirteen state wide NRM targets.⁸¹ More recently, COAG's Standing Council on Environment and Water (**SCEW**) released *Australia's Native Vegetation Framework*, which contains five goals and numerous time-specific targets.⁸² As the SCEW Framework notes:

State and territory and local governments can: ... use strategic regional and land use planning to avoid unsustainable development; ... integrate native vegetation and change land management practices towards sustainability.

This can only happen if our mining and planning laws specifically require that decisions accord with targets and standards established under our NRM laws.

iv) Considering greenhouse gas and climate change impacts of CSG projects

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.⁸³

Climate change is also recognised as one of the most significant threats to the world economy.⁸⁴ Given this context, Australia's mining and planning laws do not provide for adequate assessment and conditioning of the greenhouse gas emissions and climate change impacts of CSG and other major projects.

Industry-provided emissions estimates for CSG have been criticised on the basis that there is very little independent analysis and research on life-cycle emissions to date – particularly in Australia. As a result, the NSW Legislative Council's Inquiry into CSG (**NSW CSG Inquiry**) 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.⁸⁵

⁸⁰ John Williams Scientific Services, *ibid* (2012), p 102. The Report continues: 'The existing arrangements in NSW and Queensland and federally do not use an assessment of regional landscape capacity and landscape limits to determine what developments should proceed.'

⁸¹ Available at <http://www.nrc.nsw.gov.au/content/documents/Standard%20and%20targets%20-%20The%20Standard%20and%20targets.pdf>.

⁸² See COAG SCEW, *A National Framework to Guide the Ecologically Sustainable Management Of Australia's Native Vegetation* (December 2012), available at www.coag.gov.au:

- *Goal 1: 'Increase the national extent and connectivity of native vegetation'*
- *Goal 2: 'Maintain and improve the condition and function of native vegetation'*
- *Goal 3: Maximise the native vegetation benefits of ecosystem service markets*
- *Goal 4: 'Build capacity to understand, value and manage native vegetation'*
- *Goal 5: 'Advance the engagement and inclusion of Indigenous peoples in management of native vegetation.'*

⁸³ *State of the Environment 2011*, Report to the Australian Government, 'Summary', available at <http://www.environment.gov.au/soe/2011/report/key-findings.html>.

⁸⁴ See for example, World Bank, *Turn Down the Heat: Why a 4C Warmer World Must Be Avoided* (2012).

⁸⁵ NSW Legislative Council Inquiry Report into Coal Seam Gas (May 2012), pp 194-203 and para 12.69.

The Committee also recommended mandatory conditions of consent to ‘minimise fugitive emissions’; and ‘to comply with an upper limit of 0.1 per cent fugitive emissions.’⁸⁶ The SCER could assess this recommendation as a leading practice for a national framework.

In addition, at the request of the Committee, EDO NSW made several recommendations to improve carbon accounting for CSG projects – at the licensing, approval and post-approval stages. These recommendations are summarised at **Attachment A**.⁸⁷

In addition to considering the recommendations at **Attachment A** to this submission, ANEDO submits that any National CSG Framework needs to:

- establish a work program to fund the ongoing, independent scientific assessment of lifecycle greenhouse gas emissions from Australian CSG, and its potential to contribute to or mitigate climate change; and
- address the issue of ‘fugitive’ greenhouse gas emissions, including leading practices for mandatory caps and conditions.

v) **Adequacy, oversight and quality assurance of EIA processes**

ANEDO offices have previously noted concerns about inadequate government oversight of environmental impact assessment for CSG. In NSW, this was particularly problematic when CSG exploration did not require a detailed environmental assessment or development consent. Until Planning Act reforms commenced in October 2011, most CSG exploration was only subject to a preliminary ‘review of environmental factors’ (REF), instead of a more comprehensive and transparent Environmental Impact Statement (EIS).⁸⁸ Among other problems, REFs are not publicly released until *after* the Department awards the licence, reducing public scrutiny and confidence in the process.⁸⁹ As examined in the Fullerton Cove case below, REFs are still used for small-scale CSG exploration, and all other activities that do not require formal development consent (including coal exploration).⁹⁰

Case study – Fullerton Cove Residents Action Group v Dart Energy & Ors [2012] NSWLEC 207

The Fullerton Cove Residents Action Group (FCRAG) challenged a proposal for the drilling of CSG exploration wells by Dart Energy at Fullerton Cove, a small area 11km from Newcastle, bounded by a number of national parks and conservation areas, including an internationally-listed Ramsar wetland.

The Pilot Appraisal Exploration Program (Pilot) was for two vertical wells drilled into two separate coal seams, with four lateral wells, two in each coal seam. The Pilot included the pumping of

⁸⁶ NSW Legislative Council Inquiry Report into Coal Seam Gas (May 2012), recommendation 30. The NSW Government Response (October 2012) stated the Government ‘is considering this recommendation...’.

⁸⁷ Further details are available in EDO NSW’s full response: EDO NSW, *Inquiry into Coal Seam Gas Impacts – Responses to Questions on Notice* (January 2012), ‘EDO recommendations relating to fugitive and other greenhouse emissions’ pp 10-14.

⁸⁸ See, for example, EDO NSW, *Ticking the Box – Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* (November 2011), at www.edo.org.au/edonsw/site/pdf/pubs/ticking_the_box.pdf. This report contains a number of case studies highlighting inadequacies in the NSW Review of Environmental Factors (REF) process.

⁸⁹ See EDO NSW, *Ticking the Box – Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* (November 2011).

⁹⁰ See Part 5, *Environmental Planning and Assessment Act 1979* (NSW); and the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*.

water out from the coal seams (16,000 litres per day), allowing the gas to flow during a 12-month period. The purpose of the project was to test whether the gas was suitable for commercial production and sale. The drilling was to take place on a floodplain zone, in a high water table area, near the protected wetlands. The project was controversial because of its sensitive surroundings, and protests were held outside the site for nine days prior to the injunction.

The FCRAAG challenged the Department's approval of the Pilot, under Part 5 of the NSW Planning Act, in the Land and Environment Court. The FCRAAG argued that the Pilot required a full Environmental Impact Statement (**EIS**), including mandatory public consultation. The FCRAAG also argued that the Pilot was not properly assessed under Part 5, particularly in relation to potential impacts on groundwater and threatened species.

In September 2012, the Court granted the first injunction against CSG drilling at Fullerton Cove. The Court's interlocutory orders restrained Dart Energy from conducting any drilling as part of the Pilot. The injunction remains in place while the main case, heard before Justice Pepper on 15-19 October 2012, is determined (judgment is reserved at the time of writing).

The Court held that an injunction was necessary because Dart Energy had declined to provide an undertaking that it would not proceed with drilling and production while the Court case was on foot. In granting the injunction, Justice Sheahan stated that 'if significant environmental harm is, in the end, caused beneath the surface, damages will not be an adequate remedy.'⁹¹

As the NSW Fullerton Cove case illustrates, some CSG wells in very sensitive areas will not be classified as development that automatically requires a full EIS. In response to concerns about preliminary REFs (including the finding that no REF for CSG exploration had ever triggered further assessment requirements), the NSW CSG Inquiry into CSG recommended greater involvement of environmental agencies in these assessments. However, the NSW Government did not accept this recommendation.⁹²

We briefly note two further issues on EIA adequacy, oversight and quality assurance.

As noted above, requirements for independent EIA are strongly recommended. However, to further strengthen regulatory incentives to comply with existing EIA requirements, ANEDO recommends that mining and planning laws be amended to:

- place **positive duties** on proponents to provide accurate and comprehensive information, or 'best information available'; and
- **strengthen offences** for providing false and misleading information – to include negligent or reckless inaccuracies at least as strong as the EPBC Act.⁹³

Finally, ANEDO recommends that any national CSG framework should examine and address potential or perceived **conflicts of duties** – where one agency 'promotes' the CSG and mining industries, as well as licensing, regulating and enforcing industry activities.⁹⁴ The NSW Ombudsman has highlighted the importance of regulatory independence and clear delineation of duties in the CSG context – noting the need to

⁹¹ *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd* [2012] NSWLEC 207 at [39].

⁹² See NSW Legislative Council Inquiry Report into Coal Seam Gas (May 2012), recommendation 12: 'That the NSW Government require, in the preparation of a Review of Environmental Factors, referral to the Office of Environment and Heritage.' The NSW Government Response (Oct. 2012) rejected the recommendation, stating that the current 'advisory roles' for the OEH and the Environment Protection Authority (EPA) are sufficient.

⁹³ See for example, *EPBC Act 1999* (Cth), s 489, under 'Duty to provide accurate information'. Cf *Petroleum (Onshore) Act 1991* (NSW), s 135, which creates an offence only for 'false information' and records, etc.

⁹⁴ For example, the NSW Department of Trade and Investment is tasked with supporting and promoting the CSG industry. At the same time, it assesses certain environmental impacts, issues licences and regulates compliance.

separate industry 'promotion' from its 'regulation'.⁹⁵ We note the NSW CSG Inquiry recommended establishing a Petroleum Ombudsman, and a compliance unit within the NSW EPA, among other governance recommendations.⁹⁶ In our view, it is not leading practice to have a single agency responsible for both promoting and regulating CSG.

3. Better community engagement in land-use decision-making

Recommendation: Any national CSG framework should identify leading practices for improved notification, education, public participation, and compensation rights for landholders, traditional owners and community members; and require jurisdictions to implement them. Leading practices include:

- Ensuring that both mining and planning laws include comprehensive, mandatory rights to notification and consultation at all stages (licensing, environmental assessment, approval and post-approval), including for major projects;
- Supporting public trust and accountability through community rights for merit appeals, judicial review, and 'open standing' for enforcement proceedings, including for major projects;
- Establishing a robust, equitable and transparent compensation regime for mining-affected stakeholders, in addition to comprehensive environmental management;
- Improving the clarity and consistency of terminology used across mining laws.

Recommendation: Any national CSG framework should require consultation with Indigenous communities to identify and implement leading practices for tailored engagement strategies. These could include specific notification strategies to reach all relevant persons (particularly those who can 'speak for country'); sufficient information and consultation periods; and other ways to ensure identification and protection of Indigenous heritage, and continuing connections to country and culture.

Note: Further recommendations on leading practice land-use planning and decision-making are found in Part 4 below.

In focusing on four 'core areas' of CSG operations, the Draft CSG Framework does not deal with broader community engagement or land use issues in any detail. For this it defers to the supporting 'Draft Multiple Land Use Framework' (MLUF). This part of the submission examines the need for better community engagement in land use planning decisions on CSG, in the context of the draft MLUF and other recent developments. It outlines a range of issues and leading practices in community engagement and decision-making. These matters must be addressed if the CSG industry is to have a genuine 'social licence to operate'.

In ANEDO's experience, community notification, engagement and participation in decision-making remains a key problem in Australia's regulatory regimes for CSG. It is not surprising that land access and consultation regarding CSG activities has been controversial; particularly where impacts are uncertain, the industry is rapidly expanding, legal processes are complex and inconsistent, and landowners' rights are limited.

⁹⁵ See NSW Ombudsman, *Submission to NSW Legislative Council Inquiry into Coal Seam Gas* (Sept. 2011).

⁹⁶ *Report of the NSW Legislative Council Inquiry into Coal Seam Gas* (May 2012), recommendations 31-35.

Two of the desired outcomes for the draft 'MLUF' are to 'Better inform public discourse' and 'Deliver better outcomes for affected communities and land holders'.⁹⁷ While these are worthy aims and outcomes, the MLUF is a very brief and high-level document, which makes its impact difficult to assess (as discussed further in the next section).

As a network of community legal centres, our offices frequently conduct environmental law workshops at the request of local communities across Australia, to help people understand the law and their rights. In recent years, requests for information on mining laws have increasingly dominated these requests.⁹⁸

Some key concerns that community members have raised at our workshops include:

- Lack of notification and consultation regarding CSG exploration licences;
- Difficulty obtaining information about CSG exploration licences;
- Concerns about environmental, social and economic impacts associated with CSG exploration and production, especially on water, health and property values;
- Confusion and concern about environmental assessment and development approval processes, and landholders' (often limited) ability to influence them;
- Concern about negotiating 'access arrangements', and the ability to protect properties from damage caused by CSG activities.

There have been some recent improvements in community engagement before mining decisions are made.⁹⁹ However, these are often changes in policy only, rather than law. For example, in NSW there is no *legal* requirement to either notify the public of, or seek comment on, an application for a CSG exploration licence.¹⁰⁰ It is important that appropriate rights and obligations are enshrined in the law itself. This promotes certainty, transparency, accountability and public confidence. Setting out such processes in policies or guidelines alone risks uncertainty (because they are easy to change), 'practical obscurity' (where obligations are hard to find), and non-compliance (because they are harder to enforce).

ANEDO offices have previously recommended a range of appropriate reforms to community and landholder rights in jurisdictions dealing with CSG (and other mining).¹⁰¹ In brief, these cover the three broad areas noted in the boxed recommendation above – mandatory engagement and participation rights at all stages; accountability of decisions and access to justice through the courts; and fair compensation rights.

⁹⁷ COAG SCER, 'Multiple Land Use Framework' page, www.scer.gov.au/workstreams/land-access/mluf/.

⁹⁸ For example, in 2011 and 2012, EDO NSW conducted 24 community legal education workshops and seminars on mining and CSG law at the request of rural and regional communities. To deal with this increased load, EDO NSW has also released a comprehensive booklet, *Mining Law in NSW: A guide for the community* (December 2012), available at <http://www.edo.org.au/edonsw/site/publications.php#mining>.

⁹⁹ For example, see NSW Department of Trade and Investment, 'Public comment on applications for exploration licences', at <http://www.resources.nsw.gov.au/community-information/comment>. The NSW Government has also recently established an advisory Land and Water Commissioner to assist landholders to negotiate access arrangements. The effectiveness of this position is yet to be seen.

¹⁰⁰ Departmental guidelines currently require applicants to publish notice of applications in a newspaper.

¹⁰¹ See for example, EDO NSW, *Submission to NSW Legislative Council Inquiry on CSG* (September 2011), pp 16-19; and *Response to Questions on Notice from the CSG Inquiry* (January 2012), pp 6-9, both available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#3; see also EDO NSW *Mining Law in NSW – Discussion paper* (June 2011), Part 2, available at http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf.

We also recommend that wherever practicable, legislators act to increase consistency of terminology and processes across different mining laws; and to minimise discretionary decision-making unless it is linked to clear criteria and accountability mechanisms. Legislative harmonisation should take a 'highest common denominator' approach to environmental protection, and enact leading environmental practices in line with ESD.

In addition, we note that in 2012 the NSW CSG Inquiry made a range of recommendations to improve community and landholder rights. While a number of these recommendations were not accepted, ANEDO believes such requirements would together rectify some of the inequity, complexity and inconsistency around landholders' rights and environmental protection under CSG and mining laws.¹⁰² Any national CSG framework should identify leading practices for improved landholder and community rights, and require relevant Australian jurisdictions to implement them.

Coal seam gas and indigenous stakeholders

Any national CSG framework should highlight the need for tailored engagement strategies for Indigenous communities as part of leading-practice community engagement. It is not clear whether indigenous groups have been consulted on the development of the Draft CSG Framework or the Multiple Land Use Framework (**MLUF**). However, Indigenous peoples should be consulted to identify and implement leading practices. This could include specific notification strategies to reach all relevant Indigenous stakeholders (such as through community centres, elder groups, newspapers, radio), particularly those who can 'speak for country';¹⁰³ sufficient information and consultation periods;¹⁰⁴ and ways to ensure protection of Indigenous heritage, and to foster continuing connection to country and culture.

The objects of the EPBC Act include the promotion of cooperative environmental protection and management 'involving governments, the community, land-holders and indigenous peoples'; implementing Australia's international responsibilities; and promoting the use of Indigenous knowledge of biodiversity, conservation and sustainable use.¹⁰⁵ State and Territory mining and planning laws are less explicit in this regard. Aboriginal culture and heritage protections may also be overridden by major project fast-tracking provisions.¹⁰⁶ This reinforces the need for any national CSG framework to identify and implement leading practices to respect and engage indigenous peoples.

Improved consultation and partnerships with Indigenous communities is consistent with the aims of national environmental law; and the UN *Declaration on the Rights of Indigenous Peoples* (which Australia has supported since 2009). The Declaration outlines rights to participate in decision-making in matters which would affect Indigenous people; and rights to conserve and protect the environment and the productive capacity of lands and resources.¹⁰⁷ It also notes that States shall consult and cooperate with Indigenous peoples in good faith: 'prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development... of

¹⁰² See for example, recommendations 14-22.

¹⁰³ As opposed to those who can 'speak about country.'

¹⁰⁴ Noting the time needed to gather Traditional Owners and elders to discuss projects and agree positions.

¹⁰⁵ *EPBC Act 1999* (Cth), s 3(1)(d)-(g).

¹⁰⁶ For example, in NSW, an Aboriginal heritage impact permit is no longer needed for State significant development (SSD) for which development consent has been given. See *EP&A Act 1979* (NSW), s 89J(1)(d).

¹⁰⁷ United Nations *Declaration on the Rights of Indigenous Peoples* (2007), available at:

www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. See Articles 18, 23, 32.1 and 29.1 respectively.

mineral, water or other resources'; and 'before adopting and implementing legislative or administrative measures that may affect them.'¹⁰⁸ Similar rights are found in ILO Convention 169, currently being reviewed under the National Human Rights Plan.¹⁰⁹

4. Long-term strategic planning that achieves triple bottom line outcomes

Recommendation: 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.*

Recommendation: Clarify the Draft Multiple Land Use Framework (**MLUF**) to:

- *acknowledge the public benefit of land-use for high conservation value and prime agricultural lands, particularly in any 'coexistence' or 'multiple land use' principles;*
- *allow for the exclusion of resource exploration and mining from high conservation value and prime agricultural lands on the basis of sound scientific and socio-economic evidence, to ensure that the CSG and mining industries can operate on an ecologically sustainable basis.*

Recommendation: The SCER should consult publicly on the Draft MLUF and publish any supporting studies and consultations. The SCER should also seek review from the Standing Council on Environment and Water (SCEW) on additional desired environmental outcomes for the MLUF (such as an 'improve or maintain' test) and any other relevant environmental considerations that should be included.

Recommendation: Similarly, the National CSG Framework itself must explicitly acknowledge the public benefits of protected areas and private conservation lands as important, enduring land uses. Regulatory systems should adopt leading practices to identify and protect high conservation value and prime agricultural lands from mining.

A central conclusion of the recent Williams review of CSG in Australia is the 'Need for effective strategic regional planning and governance':

*'...it is possible and desirable to use our knowledge of landscape process to work out, upfront, where we can safely mine and where mining would compromise agriculture, water resources, biodiversity, other land uses and landscape environmental function.'*¹¹⁰

¹⁰⁸ UN Declaration on the Rights of Indigenous Peoples (2007). See Articles 19 and 32 respectively.

¹⁰⁹ See, for example, International Labour Organization, *C169 - Indigenous and Tribal Peoples Convention 1989 (No. 169)*, articles 6, 7 and 15, available at:

http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169. See also Australia's National Human Rights Action Plan, priority item 5, at

<http://www.ag.gov.au/Consultations/Documents/NationalHumanRightsActionPlan/National%20Human%20Rights%20Plan.pdf>.

The report confirms a ‘paramount’ need for knowledge-based strategic regional land-use planning; a need to recognise that individual EIAs are insufficient to deal with cumulative impacts; and that strategic planning under existing NRM policies must ‘inform and bind’ *statutory* planning processes. ANEDO supports all of these recommendations.

While the central importance of strategic planning is now widely acknowledged, the Draft CSG Framework does not deal with land-use planning issues in any detail. For this it again defers to the supporting ‘Draft Multiple Land Use Framework’ (MLUF). This part of the submission comments on the draft MLUF approach, and the need to better recognise environmental values in land use planning decisions related to CSG. The submission then evaluates recent strategic land-use planning initiatives in NSW and Queensland, which have arisen in response to widespread concerns about CSG regulation.

Any ‘Multiple Land Use Framework’ must recognise environmental values

The MLUF is a brief document that sets out four desired outcomes and eight high-level principles to achieve them, across nine ‘component’ areas. In brief, the outcomes are:

- *Instil a shared commitment between the minerals and petroleum sector and regulators [and the community] on multiple and sequential land uses;*
- *Better inform public discourse;*
- *Provide for merit based land access decisions; and*
- *Deliver better outcomes for affected communities and land holders.*¹¹¹

While many of the MLUF’s draft outcomes, principles and components could potentially reflect leading practices on community engagement and land use planning, we identify three major limitations that must be addressed before the MLUF is finalised.

First, despite dealing with the crucial ‘triple bottom line’ issue of land use decision-making, the MLUF does not include any desired *environmental outcomes*. Indeed, the MLUF addresses socio-economic issues almost in isolation from environmental considerations.¹¹² This perpetuates a key gap in the Draft CSG Framework. The absence of environmental outcomes may reflect the limited terms of reference of the SCER’s ‘Land Access’ work stream,¹¹³ and the resource extraction-focused policy objectives of the Land Access Working Group, which is tasked with delivery of the

¹¹⁰ John Williams Scientific Services (2012), p 101.

¹¹¹ SCER, ‘Multiple Land Use Framework’ webpage, at www.scer.gov.au/workstreams/land-access/mluf/.

¹¹² The only exception is the MLUF component on ‘Assessments and Approvals’. This refers to ‘streamlined’ and ‘risk-based’ project approvals, ‘based on best available science, evidence and sustainable development principles.’ The MLUF contains no detail on the precise meaning or practical implementation of this component. Furthermore, there is no reference to ‘ecologically’ sustainable development, biodiversity protection, cumulative impacts or landscape-scale assessment. The meaning of ‘best available’ information (above) is also unclear. For example, the Draft CSG Framework refers to the need for ‘baseline and ongoing monitoring for all vulnerable water sources’ (‘leading practice 8’). The Framework later states that ‘A comprehensive EA/EIS process will *ideally* establish an environmental baseline as a reference point...’ (see ‘leading practice 1’, p 18, italics added). However, the Draft Framework doesn’t set *minimum requirements* for baseline information, so it is not clear whether ‘best available’ science and evidence necessarily includes baseline data.

¹¹³ The MLUF and Draft CSG Framework are developed under the SCER’s Council Priority Issue 2: ‘Addressing issues impacting on investment in resources exploration and development, including land access, community, infrastructure, and labour.’ See the SCER’s MLUF webpage, <http://www.scer.gov.au/workstreams/land-access/mluf/>

MLUF.¹¹⁴ There is a clear need for additional environmental outcome objectives and inter-Council dialogue.

Second, the MLUF's guiding principles focus on high-level, ambiguous terms like 'coexistence' and 'multiple and sequential land use'. A 'multiple land use framework' that avoids the consideration or adoption of 'mining exclusion areas' effectively prioritises mining over other land use interests, including biodiversity conservation. While the principle of 'Best use of resources' refers to intergenerational equity considerations, the general thrust of the MLUF suggests that CSG and other mining could be allowed to occur in almost any land-use context.¹¹⁵ There is no acknowledgement that in some cases, CSG and mining will be incompatible with existing or preferred land uses, as both planning experts and NRM scientists have acknowledged elsewhere.¹¹⁶ This must be clarified.

Third, while ANEDO welcomes the guiding principle that 'engagement and education are paramount to informed debate', there is inadequate supporting information to assess the full intent and implications of the draft MLUF itself. We note that the SCER commissioned an underpinning research report, although this has not been publicly released.¹¹⁷ The SCER website notes that the report included stakeholder consultation, but it is not clear which agencies or organisations informed its development.¹¹⁸ Finally, it is not known whether SCER's Land Access Working Group includes environmental agencies or stakeholders. These factors make it difficult to test the rigour of the MLUF's principles, or the scope and assumptions of the underpinning research. The SCER should consult publicly on the Draft MLUF, publish supporting studies and consultations held to date, and seek review from the Standing Council on Environment and Water.

Strategic planning initiatives – NSW Strategic Regional Land Use Policy

There has been a high level of community interest in the development of the NSW *Strategic Regional Land Use Policy (SRLUP)*, including almost 1600 written submissions on the draft policy alone.¹¹⁹ An official analysis found that 70% of submissions were concerned with how the SRLUP would protect the natural environment.¹²⁰ This included 41% of community group submissions, and 36% of individual submissions (not including form letters). The official analysis also found 'There is a strong view from community, agricultural and environment groups that the SRLUPs should clearly identify "no go" zones in which mining and coal seam gas development is not allowed.'¹²¹ This included submissions from seven of the 12 key stakeholder groups who were closely involved.

¹¹⁴ LAWG policy objectives, available at <http://www.scer.gov.au/workstreams/land-access/>.

¹¹⁵ See, for example, the 'desired outcome' of *Merit based land use decisions* – 'Ensure land is not arbitrarily excluded from other uses without fully understanding the consequences. Providing certainty for industry and improved community confidence in land use decisions.' See also the 'Coexistence' principle.

¹¹⁶ See, for example, The Hon R. Dyer and The Hon T. Moore, *The Way Ahead for Planning in NSW: Recommendations of the NSW Planning Review*, recommendation 8 – that strategic planning should 'Identify sensitive areas containing (or likely to contain) factors that will limit or prevent development taking place, such as: [among other things] biodiversity and other ecological constraints...'. See also John Williams Scientific Services (2012), p 106, which asks: 'Will governments establish "no go" zones for CSG development?', and notes that in some circumstances, 'coexistence is not possible'.

¹¹⁷ As confirmed by personal communication with SCER Secretariat, 29 January 2013. Unpublished report prepared by Sinclair Knight Merz. See: <http://www.scer.gov.au/workstreams/land-access/mluf/>.

¹¹⁸ COAG SCER, MLUF webpage, <http://www.scer.gov.au/workstreams/land-access/mluf/>.

¹¹⁹ NSW Government, *Strategic Regional Land Use Policy* (September 2012).

¹²⁰ Goldberg Blaise report for the NSW Department of Planning and Infrastructure, *Analysis of Feedback: Draft Strategic Regional Land Use Plans* (June 2012), p20.

¹²¹ Goldberg Blaise, *Analysis of Feedback: Draft Strategic Regional Land Use Plans* (June 2012), p12.

The NSW SRLUP was finalised in September 2012. By this stage its scope had narrowed to protecting agricultural lands and resources – particularly water. While high conservation value lands were mapped, the SRLUP does not specifically protect them by making them ‘no go’ areas. In December 2012, EDO NSW made a submission on the draft ‘Gateway’ assessment process to give effect to the SRLUP.¹²² The submission made 20 recommendations across a range of areas, and identified a number of significant shortcomings:

- while the proposed Gateway process allows for additional scientific scrutiny, it does not afford definitive protection to mapped Strategic Agricultural Land;
- there is no specific prohibition of exploration or mining in strategic agricultural or high conservation value lands, despite the Government’s previously stated belief (in Opposition) ‘that agricultural land and other sensitive areas exist in NSW where mining and coal seam gas extraction should not occur.’¹²³
- the inability for the expert panel to refuse a ‘Gateway certificate’ (removing previously proposed powers to do so), no matter how severe the potential impact on Strategic Agricultural Land; and
- a complex series of exceptions which limit the application and rigour of the new processes (including the Gateway assessment and Aquifer Interference Policy) and introduce additional inconsistency and complexity to the system.¹²⁴

Strategic planning initiatives – Queensland Strategic Cropping Land policy

Certain agricultural land in Queensland is designated as Strategic Cropping Land (**SCL**). There is a ‘trigger map’ which shows generally where SCL can be found in Queensland.¹²⁵ The SCL laws operate as an additional assessment step before CSG activities can be authorised.¹²⁶

The assessment will be determined largely by whether the activities will have a ‘permanent’ or ‘temporary’ impact on the land.¹²⁷ A ‘permanent impact’ will occur if:

- the CSG activities impede the land from being cropped for at least 50 years;¹²⁸ or
- the land cannot be restored to its pre-CSG condition.¹²⁹

¹²² Available at: http://www.edo.org.au/edonsw/site/policy_submissions.php.

¹²³ NSW Liberals & Nationals policy statement, *Strategic Regional Land Use: Triple bottom line assessment to protect our regions* (2011), p 2.

¹²⁴ For example, the following activities are to be excluded from the new Gateway assessment – renewals of existing exploration licences and production leases; ‘linear infrastructure’ associated with CSG and mining; and expansions of CSG and mining projects that are located on Strategic Agricultural Land, but within existing leases. See NSW Government, *Strategic Regional Land Use Policy* (September 2012), p 4.

¹²⁵ See: <http://www.derm.qld.gov.au/land/planning/strategic-cropping/mapping.html>. Note this is a DERM website (the department under the previous government). Information on DNRM’s new approach to SCL is still forthcoming. DNRM and the Minister for Agriculture, Fisheries and Forestry jointly administer the SCL laws.

¹²⁶ Further general info on SCL is available at the departmental website. See also: Explanatory Notes, Strategic Cropping Bill 2011 (Qld).

¹²⁷ CSG (petroleum activities) are defined as a ‘development’ activity – *Strategic Cropping Land Act 2011* (Qld), ss 13, 17 and 18.

¹²⁸ *Strategic Cropping Land Act 2011* (Qld) s 14(1)(a). Example: drilling or CSG wells on the land at a level or density which, or the cumulative effects of which, would impede the land from being cropped for at least 50 years.

¹²⁹ *Strategic Cropping Land Act 2011* (Qld) s 14(1)(b).

A 'temporary impact' on land is one that does not fit into either of these categories.¹³⁰

Most CSG activities such as gas wells and pipelines are considered by the Queensland Government to have only a 'temporary' impact, under the debatable assumption that land can be adequately restored once the project has finished. However, water storage ponds and gas compression stations are considered likely to have a more permanent impact, and thus they are not expected to be allowed on Strategic Cropping Protection Areas except in 'exceptional circumstances'.

5. Increased monitoring and enforcement, and regular reporting and review

Recommendation: Any National CSG Framework must incorporate compliance monitoring, enforcement and reporting as a core area of CSG regulation. Leading practices identified in the framework should include:

- practical steps to **measure, share and analyse environmental data** across Australian jurisdictions, including publication of baseline data;
- frequent, **independent audits of compliance** with licensing and development conditions;
- **accurate, transparent and publicly accessible** information, pre- and post-approval;
- effective **site rehabilitation** conditions, and enduring responsibilities for future impacts and rehabilitation goals;
- clear lines of **enforcement responsibility**, and **accountability for performance**;
- **shared commitment** from industry and governments to **fund improved monitoring and enforcement** – as a necessity of doing business safely and responsibly.

Recommendation: Any National CSG Framework must incorporate specific steps to assess and monitor jurisdictions' implementation and compliance with the Framework itself. This could include, for example, a direction to the COAG Reform Council to review and compare annual State and Territory performance against the Framework and each leading practice.

The SCER's policy statements acknowledge 'Compliance and accountability' as a 'significant consideration' for the Draft CSG Framework.¹³¹ However, this has not been translated as a core area covered in the Draft Framework itself. Any National CSG Framework should incorporate compliance-monitoring, enforcement and reporting requirements. Some leading practices for these areas are identified below.

Monitoring and enforcement against breaches by CSG operators is a significant issue, particularly in NSW and Queensland. For example, in 2012, Eastern Star Gas was issued with a \$3000 fine for discharging pollution into the Bohena Creek. However, this enforcement may not have been possible but for the monitoring conducted by

¹³⁰ Or if it is a development of a type prescribed under a regulation. See *Strategic Cropping Land Act 2011* (Qld), s 14(4).

¹³¹ See SCER *CSG Policy Statement* (December 2011) under 'Drafting of a harmonised framework'. 'Significant considerations' include 'environment, land access, occupational health and safety, reporting requirements, cumulative impacts, performance benchmarking; audit, compliance and accountability; transparency; and data sharing...'

conservation groups. In addition, many conditions of consent granted do not attach monitoring programs before the commencement of projects (see case studies below).

Among other things, lack of baseline monitoring makes it even harder to prove causation when an accident does occur – a practical problem in some present cases. Proving causation and assigning responsibility can be further muddled when companies merge or projects are on-sold, as frequently occurs. Such problems have led to calls for greater use of the precautionary principle to deal with uncertainty around mining impacts. This may include, where appropriate, placing the ‘burden of proof’ on proponents to prove their activities are safe; or on those who deny responsibility for particular environmental impacts, to prove they did not cause them.¹³²

In its 2011 discussion paper, EDO NSW made nine recommendations to improve monitoring and enforcement of the mining industry.¹³³ While they are expressed to apply to NSW, many of these provide an appropriate basis as ‘leading practices’ generally. Other recommendations would assist in determining what ‘leading practices’ might look like, through further empirical analysis:

- i) *Initiate an **independent performance audit of compliance and enforcement activities** in relation to mining in NSW, including consideration of adequate resourcing. The audit should be conducted by the NSW Auditor-General and/or NSW Ombudsman, with the results made public.*
- ii) *Increase ongoing monitoring and **responsiveness to community reporting**, to identify breaches of conditions of mining operations.*
- iii) *Establish a process to independently **audit mining operators’ performance** against Environmental Assessment predictions, statements of commitment, Subsidence Management Plans and mine site rehabilitation.*
- iv) *Adopt a **tiered enforcement framework** for mining and planning legislation, to ensure breaches of mining approvals and conditions result in punishment that deters misconduct. The framework should include categories of serious offences, mid-range (strict liability) offences and minor (absolute liability) offences.*
- v) *Planning laws should give prosecutors and courts a **wider range of innovative enforcement tools** as in other environment and pollution laws. These tools should include orders to pay investigation costs; undertake works for environmental benefit, including fund environmental organisations; complete audits, training and financial assurances; publicise offences or notify certain people; and remove any monetary benefit of the crime.*
- vi) *Provide the Planning Minister with **powers to suspend or revoke mining approvals** for breaches of conditions. In addition, establish a process for **landowners to apply** to revoke their consent to land access if mining operations breach conditions.*
- vii) *Increase **resourcing for relevant compliance and enforcement divisions** in order to improve rates of audits, investigations and prosecution.*
- viii) *Review the adequacy of **noise impact guidelines**.*
- ix) *Introduce **compulsory environmental bonds**.*

Importantly, **regulatory resources** must keep pace with industry expansion, to avoid increased risks to communities and the environment. The SCER should outline how additional funding of research, monitoring and enforcement activities will be raised, such

¹³² See further The Hon B. Preston, ‘Internalising Ecocentrism in Environmental Law’, Speech to the 3rd Wild Law Conference, 16-18 September 2011, Griffith University, Queensland, pp 7-8.

¹³³ *Mining Law in NSW – Discussion paper*, part 3, available at http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf.

as from royalties, licence fees or industry levies.¹³⁴ In 2009, a Senate committee called for urgent review of under-resourcing of federal environmental regulation.¹³⁵ Evidence and submissions to the NSW CSG Inquiry also noted the limited resources available to monitor activities and enforce regulatory compliance.¹³⁶ The resourcing question is all the more pertinent given recent calls to delegate federal approval (and therefore enforcement) powers to the States. For example, in the last three years, the federal Environment Department investigated 980 incidents across Australia under the EPBC Act, further demonstrating the ongoing need for federal involvement.¹³⁷

Compliance case studies

Below are two relevant case studies on compliance and enforcement issues, one in NSW and one in Queensland. They highlight the need for a combination of factors for effective compliance and regulation of CSG and mining operations. This includes:

- comprehensive environmental impact assessment;
- robust title and consent conditions;
- mandatory baseline data, ongoing monitoring and oversight of mining operations;
- independent regulators with the powers, skills and resources to act against breaches; and
- open and accessible court processes for communities to take enforcement action themselves where necessary.

CSG in the NSW Pilliga region

The Pilliga forest is Australia's largest inland forest. It is home to numerous threatened species. The layers of sandstone under the forest filter water into the Great Artesian Basin. Over 50 ponds were drilled in the forest by Eastern Star Gas.¹³⁸

A May 2012 report by conservation groups highlighted a number of breaches of petroleum exploration licence conditions from unauthorised discharges of CSG water and treated water in and around the Bimblewindi Water treatment plant.¹³⁹ The conservation groups commissioned scientific testing that compared contaminated spill areas with uncontaminated areas and found trace elements up to 171 times naturally occurring levels for metals such as zinc, and others including lead, arsenic and chromium.¹⁴⁰

¹³⁴ See, for example, NSW Ombudsman, *Submission to NSW Legislative Council Inquiry into Coal Seam Gas* (Sept. 2011).

¹³⁵ See Senate Standing Committee report on *Operations of the Environmental Protection and Biodiversity Conservation Act 1999* (March 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.'

¹³⁶ 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).

¹³⁷ The Department also undertook over 40 court actions resulting in fines and enforceable undertakings totalling almost \$4 million. Department of SEWPaC/DEWHA, figures compiled from annual reports, 2009-10, 2010-11, 2011-12.

¹³⁸ S. Coutts, "Pillaging the Pilliga", *The Global Mail*, 26 October 2012, available at <http://www.theglobalmail.org/feature/pillaging-the-pilliga/447/>.

¹³⁹ Northern Inland Council for the Environment & the Wilderness Society, "The Truth Spills out: A case study of Coal Seam Gas Exploration in the Pilliga", May 2012.

¹⁴⁰ Northern Inland Council for the Environment & the Wilderness Society, "The Truth Spills out: A case study of Coal Seam Gas Exploration in the Pilliga", May 2012, pg. 22.

Of particular frustration was that there had been eight audits into the CSG operation by the NSW Government but none had led to any action against the companies involved.¹⁴¹ However as a result of these breaches Santos, on taking over the Pilliga CSG operation, halted operations in February 2012 and agreed to commit \$20 million to rehabilitation of the area.¹⁴²

A July 2012 visit by journalists found that many of the problems still remained, with native animals drinking polluted water from uncovered ponds and ponds on the verge of overflowing. Many wallabies, goannas, kangaroos and turtles have been found dead in or near the drilling ponds. Some of the ponds were lined with plastic and others were scraped together mounds of dirt.¹⁴³

In its May 2012 report, the NSW CSG Inquiry concluded:

It is inexcusable that this pollution went undetected by NSW Government authorities, despite community complaints, until Santos admitted many months later that a breach had occurred. ... This incident demonstrates the weakness in Government monitoring and enforcement activities.... Given this example... the Committee must be sceptical of the claim by the industry that all coal seam gas companies are meeting their licence conditions...

Queensland cases involving chemical concerns and breaches

There are concerns about the chemicals used during the 'fracking' process, and the lack of comprehensive analysis to date by the national chemical regulator, NICNAS. These concerns have not been helped by recent incidents in Queensland where projects involving gas drilling have caused damage to the environment. For example, various prosecutions are ongoing in Queensland after contamination to groundwater from the wells of the Kingaroy underground coal gasification project. While underground coal gasification involves a different process to CSG exploration, it still uses wells to extract the gas from the coal seam which involves risks to aquifers.

In March 2010, five days after commencing operations, there was a failure involving the fracturing of cement grout lining of the well wall. This led to the well becoming blocked and gas escaped into the surrounding geology along with the contaminants benzene and toluene.¹⁴⁴ Bore monitoring data revealed benzene in the lower aquifer known as the Kunioon coal seam, which stabilised at a level 15 times greater than the water trigger level permitted by the environmental authority.¹⁴⁵ There is no safe level of benzene in drinking water.¹⁴⁶ Surrounding landowners were advised not to use the water and Cougar Energy was required to provide replacement water supplies to them.¹⁴⁷ The project was shut down in July 2010.

In September 2012, the Queensland Ombudsman released a report on its investigations into the Kingaroy underground coal gasification project.¹⁴⁸ The report looked at the issues raised by the

¹⁴¹ Northern Inland Council for the Environment & the Wilderness Society, "The Truth Spills out: A case study of Coal Seam Gas Exploration in the Pilliga", May 2012, pg. 13

¹⁴² S. Coutts, "Pillaging the Pilliga", *The Global Mail*, 26 October 2012, available at <http://www.theglobalmail.org/feature/pillaging-the-pilliga/447/>.

¹⁴³ S. Coutts, "Pillaging the Pilliga", *The Global Mail*, 26 October 2012 available at <http://www.theglobalmail.org/feature/pillaging-the-pilliga/447/>.

¹⁴⁴ *Cougar Energy Ltd v Debbkie Best, Chief Executive Under the Environmental Protection Act 1994* [2011] QPEC 150 at [10].

¹⁴⁵ *Cougar Energy Ltd v Debbkie Best, Chief Executive Under the Environmental Protection Act 1994* [2011] QPEC 150, at [12].

¹⁴⁶ *Cougar Energy Ltd v Debbkie Best, Chief Executive Under the Environmental Protection Act 1994* [2011] QPEC 150 at [27].

¹⁴⁷ *Cougar Energy Ltd v Debbkie Best, Chief Executive Under the Environmental Protection Act 1994* [2011] QPEC 150 at [30].

¹⁴⁸ Queensland Ombudsman, "An investigation into the approval and oversight of the Kingaroy underground coal gasification project", September 2012 found at <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2012/5412T1124.pdf>.

decision of the Environmental Authority that no Environmental Impact Statement (EIS) was required when there was the potential for impacts on water quality, hydrology and groundwater.¹⁴⁹

The report expressed concern about the lack of continuous monitoring and review of the conditions of approval to ensure best practice was being followed.¹⁵⁰ Another concern was the fact that no one with groundwater expertise reviewed the conditions for the environmental authority.¹⁵¹ The report recommended that all projects should collect baseline monitoring data with a minimum of 12 months data completed prior to production commencing.¹⁵² The Ombudsman concluded that “in my view the nature of novel or emerging technologies, when associated with high or unknown risks of environmental harm, warrants a greater level of oversight and monitoring by the regulator.”¹⁵³

Improving data collation, sharing and analysis across jurisdictions

Any national CSG framework should identify practical steps to measure, share and collate environmental data across jurisdictions. The former NSW Natural Resources Commissioner notes:

*It is particularly important to increase data collection and data exchange between industry, research and policy institutions. There will be a need to expand monitoring, but equally – and in some instances more – important that analysis and evaluation receive a great deal of attention.*¹⁵⁴

The State of the Environment 2011 notes that ‘Australia is positioned for a revolution in environmental monitoring and reporting.’¹⁵⁵ However, ‘Creating and using systems that allow efficient access to environmental information remain a great national-scale challenge.’¹⁵⁶

ANEDO strongly supports the development and integration of tools for monitoring, data-sharing and sustainability indicators, to improve understanding and evidence-based policy. Governments should agree on practical steps and provide ongoing funding to capitalise on these initiatives. The need for reliable information reinforces the importance of robust and independent EIA processes (see part 2 above). More reliable EIA processes would aid the integration of data-sets from different sources, such as planning and environmental agency databases, strategic and site-based EIA, and state and national reporting tools.¹⁵⁷

¹⁴⁹ Queensland Ombudsman, “An investigation into the approval and oversight of the Kingaroy underground coal gasification project”, September 2012, pg 8-11.

¹⁵⁰ Queensland Ombudsman, “An investigation into the approval and oversight of the Kingaroy underground coal gasification project”, September 2012, pg 15.

¹⁵¹ Queensland Ombudsman, “An investigation into the approval and oversight of the Kingaroy underground coal gasification project”, September 2012, pg. 21.

¹⁵² Queensland Ombudsman, “An investigation into the approval and oversight of the Kingaroy underground coal gasification project”, September 2012, pg. 29-30.

¹⁵³ Queensland Ombudsman, “An investigation into the approval and oversight of the Kingaroy underground coal gasification project”, September 2012, pg. 43.

¹⁵⁴ John Williams Scientific Services (2012), p 104.

¹⁵⁵ 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.

¹⁵⁶ Report to the Australian Government, *State of the Environment* (2011), ‘Future reporting’.

¹⁵⁷ For example, see NSW OEH, BioMetric: Terrestrial Biodiversity Tool for the NSW Property Vegetation Planning System, at <http://www.environment.nsw.gov.au/projects/BiometricTool.htm>; and Australia’s National Plan for Environmental Information, which aims to co-ordinate and manage ‘comprehensive, trusted and timely environmental information’ over the long term, at www.environment.gov.au/npei.

A corollary of improved data-sharing is the need for leading practices that require accurate, transparent and publicly accessible information. A national CSG framework could identify gaps and leading practices in this regard. For example, the NSW CSG Inquiry has recommended a requirement that baseline environmental information be made publicly available.¹⁵⁸ The Draft CSG Framework is less certain, referring to the use of independent third parties and publication of assessment reports 'if required'. Further work is needed on information standards for comparable, national compliance and enforcement reporting.

Practical steps to evaluate jurisdictions' compliance with the Framework

This submission has outlined five broad areas where a national harmonised CSG framework could identify 'leading practices', beyond the four 'core' technical areas in the Draft Framework. While *identifying* 'leading practices' is important, any such Framework must also outline specific steps on how jurisdictions will **implement and comply** with leading practices; and how that progress will be **assessed and monitored**. It should also build in regular **review mechanisms** to ensure the framework remains up to date.

Practical steps should include a direction to the COAG Reform Council to review and compare relevant State and Territory performance against the leading practices for CSG regulation. This could begin one year after any National CSG Framework is finalised, with a public report six months later.¹⁵⁹ COAG should require the SCER to address the Reform Council report findings in regular revisions of the framework. We note that the Reform Council's 2011 review of capital cities recommended 'clear frameworks for measuring progress and monitoring implementation of strategic planning in cities.'¹⁶⁰ Any national framework for CSG regulation should build-in similar processes.

Further measures are needed to ensure that, where State or Territory CSG laws and processes *do not* meet 'leading practice', there are requirements or incentives to raise regulatory standards. We note that some industry sectors are currently calling for 'reduced regulation', 'streamlined approvals' and 'less red tape'. However, fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest. As the Productivity Commission notes:

*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.*¹⁶¹

There is certainly evidence that current environmental assessment and conditions for major mining projects do not necessarily represent 'leading practice'. For example, Queensland's Alpha coal mine has been the subject of Commonwealth-State disputes

¹⁵⁸ The NSW Government agreed in principle with this recommendation 3. It is examining implementation options, with a caveat that baseline information about CSG reserves may be commercially sensitive. See *NSW Government Response to Legislative Council Inquiry into CSG* (October 2012), recommendation 3.

¹⁵⁹ See for example, COAG Reform Council, *Review of capital city strategic planning systems* (2012), which involved three processes: a review of State and Territory capital city strategic planning systems against nine agreed criteria; support for continuous improvement in strategic planning; and building and sharing knowledge of best practice planning approaches.

¹⁶⁰ COAG Reform Council, *Review of capital city strategic planning systems* (December 2011), recommendation 3.

¹⁶¹ Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.

over EIA requirements and conditions.¹⁶² 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. These allegations have been referred to the Queensland Crime and Misconduct at the time of writing.¹⁶³

In NSW, recent decisions involving the expert Planning Assessment Commission (**PAC**) suggest that, even where expert panel reviews identify leading practice approaches (in this case the PAC itself), final approval processes may involve a compromise. That is, companies will attempt to negotiate less stringent conditions, which are then recommended by State planning departments, and may be accepted by the PAC as final decision maker.¹⁶⁴

¹⁶² See The Hon Tony Burke, House of Representatives Hansard, 30 May 2012, 15:04pm.

¹⁶³ 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>.

¹⁶⁴ 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) EDO NSW.

ATTACHMENT A – Excerpt from EDO NSW, *Legislative Council Inquiry into Coal Seam Gas Impacts: Responses to Questions on Notice* (Jan. 2012)¹⁶⁵

EDO NSW recommendations relating to fugitive and other greenhouse emissions (summary)

- *Further independent scientific studies into the lifecycle greenhouse gas (GHG) emissions of CSG, coal and other energy sources in NSW and Australia (both non-renewable and renewable).*
 - *This will assist decision makers to make good decisions on energy production and development; form an objective basis to evaluate efficiency claims; and help transition to a low-carbon economy, consistent with Australia's commitments and international obligations.*
- *Mandate the assessment of GHG emissions of proposed mining projects at the **environmental impact assessment stage**, and assessment of plans to minimise emissions.*
- *Include GHG emissions and climate change as an **explicit, mandatory consideration** for decision makers:*
 - *in assessing **applications for development consent** under the Environmental Planning & Assessment Act 1979 (eg at s 79C or equivalent); and*
 - *in assessing **applications for exploration or production titles** under the Petroleum (Onshore) Act 1991 (eg at s 74).*
- *Mining and planning laws could mandate that decision makers **impose GHG-related conditions** on exploration and production **titles**, and/or development **consents** (instead of relying on discretion to impose or not impose such conditions).*
- *Even if imposing GHG-related conditions remains discretionary, the Petroleum (Onshore) Act 1991 (**P(O) Act**) should make **specific reference** to and permit **conditions** that protect air quality and minimise GHG emissions (eg at ss 74-77).*
- *Move towards including **GHGs** as pollutants in State **pollution control laws**, to recognise their contribution to environmental degradation and encourage behavioural change.*
- *Increase requirements on industry to **monitor and minimise emissions** during CSG/coal extraction. Minimisation/mitigation could include improved extraction technologies, carbon credit offsets or other abatement measures.¹⁶⁶*
- *Increase **resourcing** for relevant **compliance and enforcement** divisions in order to improve rates of audits, investigations and prosecutions (for breaches of conditions).*
- *Fund additional compliance activities through industry **licensing fees/levies**.*

¹⁶⁵ Available at

http://www.edo.org.au/edonsw/site/pdf/subs/120119csg_responses_questions_on_notice.pdf.

¹⁶⁶ Christensen et al, at 411. See eg *Greenpeace Australia v Redbank Power Company and Singleton Council; Hunter Environment Lobby v Minister for Planning* ('Ulan').