AUSTRALIAN CONSERVATION FOUNDATION

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Submission on draft assessment bilateral agreement between the Commonwealth and the State of New South Wales (NSW)

The Australian Conservation Foundation (ACF) welcomes the opportunity to comment on the draft New South Wales bilateral agreement relating to environmental assessment (Draft Agreement) under the *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act).

Summary

ACF opposes the current process of handing over approval powers for matters of national environmental significance under the EPBC Act to state and territory governments. The Commonwealth must remain engaged in the regulatory process for matters of national environmental significance (MNES) because:

- The Commonwealth Government is best placed to provide national leadership on national and cross border issues such as rivers, migratory birds, and nuclear matters;
- The Commonwealth is responsible for meeting Australia's international obligations;
- Environmental standards will be at risk if federal approval powers are delegated;
- State and Territory environmental laws and enforcement are not up to the required standard;[1]
- States often have conflicting interests, as they benefit directly from the projects they assess;[2] and
- Multiple State Auditor-Generals' reports have found state governments are struggling to fulfil their existing statutory obligations. States do not have the capacity to take on delegated Commonwealth powers under the Act.[3]

ACF does support an efficient environmental regulatory system that delivers strong outcomes for MNES and a high level of transparency for regulatory decision making. There is potential for such efficiencies to be delivered through robust assessment bilateral agreements that maintain important community safeguards, information transparency provisions, manage conflicts of interest and provide for strong outcomes for MNES.

1 An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia – 2012 https://envirojustice.org.au/downloads/files/law_reform/edo_vic_ANEDO_adequacy_threatened_species_laws_report.pdf

[2] See ANEDO, 'Submission to the Senate Standing Committee on Environment and Communications regarding the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012'*. Available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1406/attachments/original/1398406160/130118-ANEDO-Submission-EPBC-Retaining-Federal-Approval-Powers-Bill-2012.pdf?1398406160

[3] Western Australian Auditor General's report on 'Ensuring Compliance with Conditions on Mining' September 2011 p7-9 and Queensland Auditor General's Report on 'Environmental Regulation of the resources and waste industries' p1.

ACF is of the view that the Draft Agreement with NSW does not meet Commonwealth standards or legislative requirements, and will ultimately lead to a diminution of regulatory processes and environmental outcomes that would normally be achieved under the EPBC Act. Additionally ACF is concerned the proposed Draft Agreement will add unnecessary complexity to the assessment process and represents a risk to proponents who require approval under the EPBC Act based on assessments undertaken through the agreement. Specific concerns are discussed further below.

Accrediting new assessment pathways

The majority of gains to be delivered in efficiency can be delivered through well designed assessment bilateral agreements, with the Commonwealth maintaining an approval role for matters of national environmental significance. However the proposed accreditation of almost all classes of development under Parts 4 and 5 of the *NSW Environmental Planning and Assessment Act* 1979 represents a substantial backward step in maintaining national environment standards and streamlining assessments. In particular the inclusion of new processes under the Planning Act and substantial caveats on these, such as exclusions based on the consent authority under clause 2(A)(c), is confusing and adds additional complexity to the bilateral agreement and assessment process. Whilst the caveats are valid, they indicate that that many of these processes are not sufficient to meet Commonwealth standards.

Alarmingly the proposed addition of these assessment methodologies under the Draft Agreement enables NSW government ministers or agencies to act as both proponents and regulators of an activity, albeit without approval powers. This adds a significant conflict of interests to the environment assessment process.

Public confidence in environmental regulation in NSW is generally considered to be low. Scandals highlighted through the NSW Independent Commission Against Corruption regarding mining licenses, whistleblowers' reports in the media regarding the mining domination of the environmental assessment processes,[4] numerous CSG leaks and non-compliances across the state, criticisms of the Department of Planning's lack of oversight of CSG[5] and the raft of critical submissions to the NSW Senate Inquiry into the performance of the NSW Environment Protection Authority are all testament to this.[6]

Accrediting inadequate State assessment processes in a piecemeal fashion is not an effective way to achieve the Commonwealth's stated policy aims, including those aims to simplify project assessments and approvals, improve efficiency and maintain high environmental standards.

Accrediting NSW Major Project Offsets Policy for the purposes of the EPBC Act

The revised draft bilateral agreement has removed all references to the EPBC Act environmental offsets policy and intends to solely accredit NSW offsetting processes for the purposes of the EPBC Act. This includes the recent NSW Major Project Offsets Policy which would likely be applicable to the majority of assessments completed under the Draft Agreement.

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[4] 'Former environment employee blasts miners' dominance in NSW' – SMH January 21, 2015 http://www.smh.com.au/environment/former-environment-employee-blasts-miners-dominance-in-nsw-20150121-12v67p.html

[5] NSW Chief Scientist & Engineer, Independent Review of Coal Seam Gas Activities in NSW – Study of regulatory compliance systems and processes for coal seam gas (2014), p 3, at www.chiefscientist.nsw.gov.au.

[6] 'EPA has lost community's trust, inquiry told' SMH September 11, 2014 http://www.smh.com.au/environment/epa-has-lost-communitys-trust-inquiry-told-20140911-10f09i.html and Performance of the NSW Environment Protection Authority (Inquiry) - http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/743BDB8875807D85CA257CFC002142D1

Accreditation of the NSW Major Projects Offsets policy is a clear breach of EPBC Act standards and Commonwealth legislation. The sole reliance on the NSW offsets policy within the Draft Agreement will create unnecessary uncertainty for business while greatly compromising environmental outcomes.

The EPBC Act standards stipulate that offsets under a bilateral agreement must:

> '*achieve longterm environmental outcomes for matters protected under the EPBC Act and be consistent with either the EPBC Act Environmental Offsets Policy, or another policy accredited by the Minister as achieving the objects of the EPBC Act* ***to an equivalent or better level***'.[7]

It is apparent that the final NSW Major Projects Offsets Policy will result in poorer outcomes for matters of national environmental significance when compared to those delivered under the existing EPBC Act Environmental Offsets Policy. Specific areas of inconsistency with EPBC Act standards and Commonwealth legislation are discussed further below:

Enabling mine site rehabilitation to be considered as a suitable offset

The NSW Major Projects Offsets Policy enables the consideration of mine site rehabilitation as a component of their offsets package. In contrast the use of mine site rehabilitation to offset residual impacts from a mining development is generally precluded under sections 7.6 and 7.7 of the EPBC Act offsets policy, which relate to 'additionality' and timeliness respectively.

In NSW mine site rehabilitation is a standard lease requirement under the NSW *Mining Act* 1992. The standard requirement as part of any mineral or coal mining lease is the rehabilitation of the disturbed site to the satisfaction of the Minister for Resources and Energy. This must be done in accordance with a Mining Operations Plan (MOP) which then must identify the post mining land use and set out a detailed rehabilitation strategy. These are activities that are already required to occur in the absence of an offset proposal. There may be some capacity for post mining land use to be additional above a specified baseline – such as that set in the mining lease or MOP, but such activities will fail to deliver timely offset outcomes.

Under the EPBC Act offsets policy, offsets must be delivered in a timely fashion, this is defined as being at or before the time of impact. Whilst it is convenient for mining companies to discharge their mining lease obligations and meet their offset requirements through mine site rehabilitation, there is very good reason why such activities are not considered suitable offsets – primarily it is not physically possible to mine and rehabilitate the same site at the same time. Time lags between operational extraction and mine-site rehabilitation can be substantial, often decadal. Once rehabilitation commences the time until any native vegetation represents suitable habitat for EPBC Act listed species or communities can again take decades, let alone time until species occupancy. In many cases mine site rehabilitation has delivered less than ideal results for native habitat restoration and threatened species occupancy.[8]

Further, the NSW *Framework for Biodiversity Assessment* (FBA) methodology is highly unlikely to deliver equivalent or better outcomes to the *EPBC Act Offsets Assessment Guide* for mine site rehabilitation (notwithstanding the likely breaches of Sections 7.6 and 7.7 of the EPBC Act offsets policy noted above). Generally, the NSW FBA generates more value of offset through its credit

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[7] Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999 (2014) – p 12 - http://www.environment.gov.au/system/files/resources/40e7000f-4d52-47fe-9a61-ff2b321aec3b/files/standards-accreditation-2014_0.pdf

[8] Cristescu, R. H., Rhodes, J., Frére, C., Banks, P. B. (2013), Is restoring flora the same as restoring fauna? Lessons learned from koalas and mining rehabilitation. Journal of Applied Ecology, 50: 423–431. doi: 10.1111/1365-2664.12046

calculation for mine site rehabilitation, as it does not account for the significant time lag between the impact occurring and the offset deliverable. This factor is explicitly accounted for under the EPBC Act *offsets assessment guide* and has a very significant bearing on outcomes generated through the guide. This is due to the time until ecological benefit and threatened species status functions that drive much more stringent requirements under the EPBC Act process.

The double counting of sites as biodiversity and carbon offsets

The NSW Major Projects Offsets Policy enables the double counting of biodiversity and carbon offsets, specifically stating:

> *'Land management requirements for the purpose of creating carbon credits are not considered to be legal requirements for biodiversity management under this policy. This means that the same site can potentially generate both biodiversity credits and carbon credits through the same management actions.'*[9]

This policy position direct contradicts the EPBC Act Environmental Offsets Policy, which precludes accounting for conservation actions undertaken under other programs or schemes, such as the Carbon Farming Initiative (CFI) or Emissions Reduction Fund (ERF).[10]

Similarly, using biodiversity offsets to generate carbon credits is not permitted under Commonwealth law. Section 3.5 of the Commonwealth *Carbon Farming Regulations 2011* deems biodiversity offsets to be ineligible for consideration under the CFI, stating:

> *'...a specified eligibility requirement is that the project area, or any part of it, is not used to meet an obligation under a Commonwealth, State or Territory law to offset or compensate for the adverse impact of an action on vegetation*.'

These regulations remain in effect in the transition to the ERF. The Government has not publicly mooted any change to this provision as part of the transition to the new ERF rules.

The draft assessment bilateral and the draft approval bilateral (for which comment has closed) both contain provisions that directly contradict standards established under the EPBC Act, as well as existing Commonwealth regulations. It is in no way apparent that the NSW Major Projects Offsets Policy will deliver an equivalent outcome to that achieved under the EPBC Act, let alone a better one, as is required by the EPBC Act standards.

As well as diminution of Commonwealth regulatory standards and protections for matters of national environmental significance, if implemented such an approach will likely create a significant compliance liability for proponents that seek to use their offsets for CFI/ERF purposes and as a biodiversity offset for an EPBC approval. The proposal to accredit the NSW Major Projects Offsets Policy without any apparent measures within the agreement to safeguard against this risk is alarming.

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[9] NSW Major Project Offsets Policy (2014) p 12 - http://www.environment.nsw.gov.au/biodivoffsets/bioffsetspol.htm
[10] EPBC Environmental Offsets policy (2012) p 22 - http://www.environment.gov.au/epbc/publications/epbc-act-environmental-offsets-policy