Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

Submission on the Queensland draft assessment bilateral agreement

21 November 2014

The Australian Network of Environmental Defender's Offices (**ANEDO**) is a network of independently constituted and managed community legal centres across Australia.

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

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Executive Summary

The Australian Network of Environmental Defender's Offices (**ANEDO**) welcomes the opportunity to make a submission on the draft Qld Assessment Bilateral Agreement, Amending Agreement No. 4 (**the Agreement**).

The development of assessment bilateral agreements should be a process that provides the opportunity for state and territory governments to improve their environmental assessment laws. Assessment bilateral agreements must not be used to weaken existing assessment processes. The weakening of the Environmental Impact Statement (**EIS**) process for major projects in Qld by using the new and substandard 'Impact Assessment Report' (**IAR**) represents a substantial step backwards from rigorous assessment.

The Agreement is only triggered when there are *significant impacts* on matters of national environmental significance (**MNES**). This includes significant impacts on World Heritage, the Great Barrier Reef Marine Park, migratory species, internationally recognised wetlands and species, and significant impacts from nuclear actions. The requirement that impacts must be 'significant' to trigger assessment under the EPBC Act is an already high threshold and rigorous environmental assessment of actions that present a risk of such impacts is absolutely necessary to achieve the objects of the EPBC Act and provide for the protection of the environment.

ANEDO has five main concerns and suggestions for improvements to the Agreement:

1. Procedural rights are an important function of transparent and accountable Commonwealth environment law. The Commonwealth Minister should not accredit the new process unless Qld removes the prohibition on statutory judicial review of the Coordinator General's decisions under the *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWO Act**) for environmental impact assessment.[1]

2. The IAR cannot be considered equivalent to an EIS, even where the Commonwealth Minister requests some of the requirements in Schedule 1 SDPWO Regulation. By removing the requirement for public notification and opportunity for public submissions on the draft Terms of Reference (**TOR**), the IAR process is clearly made sub-standard and weaker to the existing EIS. The inclusion of the IAR process in the Agreement should be removed altogether.

3. An IAR lacks an extraordinary amount of crucial information that the Commonwealth Minister needs before approving damaging significant impacts on MNES. If the Commonwealth government does not remove the IAR process from the Agreement, then at least it should amend the Agreement to provide that all information set out in Schedule 1 of the SDPWO Regulation shall be required for an IAR.

4. Instead of removing the need for supplementary information, the Agreement should be amended to require a revised EIS with tracked changes and supplementary information in the form of a stand-alone document, which could be annexed to the EIS.

[1] *State Development and Public Works Organisation Act 1971* (Qld), s. 27AD.

This would enhance the public's access to information demonstrating how submissions in response to the EIS have been considered.

5. The Agreement should retain the requirement that the draft TOR for an EIS must be publically notified. Public participation in the EIS process is absolutely vital to a properly transparent and accountable process in accordance with the objects of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). To remove the public notification requirements means the Commonwealth Government is walking away from its responsibilities under the Intergovernmental Agreement on the Environment.

In addition, we refer to and rely on ANEDO's submission to the Amending Agreement No. 3 dated 6 December 2013 (**Annexure A**), which sets out our submissions and recommendations for other aspects of the Agreement other than the new IAR process.

Submissions on the proposed amendments to the Qld Assessment Bilateral

Slightly more criteria to declare an IAR, but CG's decision still not open to review

6. The Coordinator General (**CG**) is a senior public servant who coordinates major projects in Queensland (including coordinated projects,[2] prescribed projects, and state development areas). Amendments to Qld legislation recently empowered the CG to declare that a coordinated project should be assessed by way of a less comprehensive IAR rather than an EIS.[3]

7. The criteria the CG must apply in deciding whether to use an IAR to assess the environmental impacts of a coordinated project, is simply "*only if satisfied the environmental effects of the project do not, having regard to their scale and extent, require assessment through the EIS process*".[4] Other factors are considered in determining whether to declare the project a coordinated project.[5]

8. Proposed amendments to the Agreement add minor requirements to the CG's decision to declare whether a coordinated project (which significantly impacts on MNES) needs assessment under an EIS or an IAR. Specifically, the CG must:[6]

    8.1. Have information that the CG considers to be sufficient to make the decision;
    8.2. Consider criteria equivalent to EPBC guidelines made under s.87(6) EPBC Act;[7]

[2] For a full list of the types of projects for which an EIS has been required, see: http://www.dsdip.qld.gov.au/assessments-and-approvals/coordinated-projects-map.html
[3] *State Development and Public Works Organisation Act 1971* (Qld), s. 26(1).
[4] *State Development and Public Works Organisation Act 1971* (Qld), s. 26(2).
[5] *State Development and Public Works Organisation Act 1971* (Qld), s. 27(1)-(2).
[6] Proposed amendment to the Queensland Assessment Bilateral Agreement, Schedule 1, Class 2, Item 2.2.
[7] It does not appear that any s.87(6) EPBC Act guidelines have been gazetted, even though the Departmental has an *Environment Assessment Manual - Implementing Chapter 4, EPBC Act* (2012) available here:

8.3. Ensure that the IAR includes an assessment of the relevant impacts, and is assessed in accordance with Commonwealth Minister's request (i.e., that EIS-type requirements are added to the IAR – see paragraphs 10 to 12 below.

9. As this layer of requirements is under the Agreement, not in statute, there is no opportunity for statutory judicial review of the CG's application of the above factors when making a decision to use an IAR or an EIS to assess MNES.

> **Recommendation 1**: Procedural rights are an important function of a transparent and accountable Commonwealth environment laws. The Commonwealth Minister should not accredit the new process unless Qld removes the prohibition on statutory judicial review of the Coordinator General's decisions under the SDPWO Act for environmental impact assessment.

The Commonwealth has no power to overturn the Qld CG's decision to use an IAR

10. The standard process under the current bilateral arrangements is that the Commonwealth Minister makes a concurrent decision on whether a referral is a controlled action (and what the controlling provisions are),[8] and on the type of assessment to be undertaken,[9] including whether the assessment will be by way of using an accredited assessment process under the Agreement.[10] Then, Queensland confirms that it will apply the accredited assessment approach,[11] which up until now has always been an EIS.

11. While the foregoing step remains, the proposed amendments allow Qld to "trump" the Commonwealth Minister's decision on the level of assessment and opt for a less comprehensive assessment. Under the proposed amendments, if the CG proposes to use an IAR rather than an EIS, the CG must advise the Minister of its intention to use an IAR.[12] The Commonwealth Minister has only 10 days to ask that "another assessment process is used."[13]

12. It does not appear that the Commonwealth Minister has any power to direct that a full EIS be used instead of an IAR. The Minister can make a request[14] which requires the CG to provide the proponent written guidelines for the IAR that are similar to EIS requirements under Schedule 1 SDPWO Regulation.[15] Practically, this means that if the Commonwealth decides the Agreement will apply and a Part 4 SDPWO Act

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http://www.environment.gov.au/resource/environment-protection-and-biodiversity-conservation-act-1999-environment-assessment-manual

[8] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 75(5).

[9] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 88(1).

[10] Current Queensland Assessment Bilateral Agreement, cl.17.1.

[11] Current Queensland Assessment Bilateral Agreement, cl.17.2.

[12] Proposed amendment to the Queensland Assessment Bilateral Agreement, cl.17.4.

[13] Proposed amendment to the Queensland Assessment Bilateral Agreement, cl.17.4.

[14] Proposed amendment to the Queensland Assessment Bilateral Agreement, cl.17.4.

[15] The Guidelines are also "designed to ensure" that the IAR assesses all relevant impacts; provides enough information about the action and its relevant impacts to allow the Minister to make an informed decision about whether or not to approve the action under the EPBC Act, and addresses matters in Div 5.2 EPBC Regulations for an EIS: Proposed amendment to the Queensland Assessment Bilateral Agreement, Schedule 1, Class 2, Item 2, para 3.2. Note the drafting implies that the guidelines will not need to replicate Schedule 1 SDPWO Regulation, rather the IAR guidelines will be "designed to ensure that the IAR addresses the matters mentioned in Schedule 1 SDPWOA Regulation."

assessment process will be used, and the CG advises s/he wants to use an IAR, then the Commonwealth only has the option of requesting additional EIS-type information be included along with the IAR.

13. Notwithstanding the foregoing, the draft Agreement considers the IAR plus EIS-type information to be equivalent to an EIS under the EPBC Act.[16] ANEDO does not consider the two are equivalent, however. For one thing, the IAR plus EIS-type layer of requirements is missing the EPBC Act EIS requirements to have draft TOR and public notification and submissions. Moreover, even where the Minister is concerned that the IAR process selected by the CG will be insufficient to adequately assess the significant impacts on MNES and therefore makes a cl.17.4 request, there is no opportunity for public input into the structure of the IAR.

Recommendation 2: The IAR is not equivalent to an EIS, even where the Commonwealth Minister requests some of the requirements in Schedule 1 SDPWO Regulation. By removing the requirements for public notification and public submissions on the draft Terms of Reference for the IAR, the process is sub-standard and weaker to the existing EIS. The IAR process should be removed from the final Agreement.

Content requirements for an IAR are weaker than an EIS

14. Although ANEDO does not support the reform, we note that the additional requirements for publically notifying a draft IAR[17] is an improvement on the recently introduced state process for an IAR in the SDPWO Act, where there is no mandatory requirement to publically notify the IAR unless one of the state approvals requires public notification.[18] Such an additional layer of scrutiny is absolutely necessary given that the Agreement is only triggered when there are ***significant*** impacts on MNES.

15. However an IAR assessing significant impacts on MNES does not require significant information to be provided about the impacts on MNES. For example, there are:

    15.1. No detailed content requirements equivalent to Schedule 1 SDPWO Act, including:
    - No details of impacts on MNES,[19] safeguards and mitigation measures;[20]
    - No requirement to detail the proponent's environmental history;[21]
    - No requirement to set out the source, reliability, uncertainties, or date of any information provided in the IAR;[22]
    - No identification of affected persons, including a statement mentioning any communities that may be affected and describing the communities' views.[23]

[16] Proposed amendment to the Queensland Assessment Bilateral Agreement, Schedule 1, Item 1, para 1.3((a)(ii).
[17] Proposed amendment to the Queensland Assessment Bilateral Agreement, Schedule 1, Class 2, Item 2, paras 4.2, 4.3.
[18] *State Development and Public Works Organisation Act 1971* (Qld), s.34H(1)(a).
[19] *State Development and Public Works Organisation Regulation 2010* (Qld), Schedule 1, item 2.
[20] *State Development and Public Works Organisation Regulation 2010* (Qld), Schedule 1, item 3.
[21] *State Development and Public Works Organisation Regulation 2010* (Qld), Schedule 1, item 6.
[22] *State Development and Public Works Organisation Regulation 2010* (Qld), Schedule 1, item 7.
[23] *State Development and Public Works Organisation Regulation 2010* (Qld), Schedule 1, item 2(i).

15.2. No public notification and submissions on a draft TOR for the IAR.

16. Leaving out this crucial information when assessing significant impacts on MNES is unlikely to allow the Minister to have sufficient information to make an approval decision.

Recommendation 3: The IAR process under Part 4 of the SDPWO Act is totally inappropriate to use to assess significant impacts on MNES and should not be accredited. An IAR lacks an extraordinary amount of crucial information that is needed in order for the Commonwealth Minister to approve damaging significant impacts on MNES.

Changes to the way in which proponents respond to public submissions

17. The Commonwealth proposes to amend the Agreement to remove the requirement for a proponent to prepare 'supplementary information' in response to public submissions on the draft EIS/IAR. Instead, the proponent will provide a 'revised' EIS/IAR under the new provisions of the SDPWO Act[24] which 'considers and summarises or takes into account the issues raised by the public in submissions.'[25] The key practical differences are:

    17.1. There is no longer a need under the Agreement to provide 'supplementary information.' We note it has been the practice to provide supplementary information in the form of a standalone document;
    17.2. There are no clear requirements which set out *how* the submissions have been taken into account or summarised and considered. Will it still be in a standalone document annexed to the EIS/IAR? Or will the content of the EIS/IAR reflect it?

18. Practically, and from a community and public interest perspective, it is important that the community is provided with a document that clearly sets out a summary of public submissions and how they have been considered and taken into account. Instead of what the proposed Agreement currently contemplates, there should be Revised EIS/IAR with tracked changes and supplementary information in the form of a standalone document, which could be annexed to the EIS/IAR.

19. If proponents are not required to provide clear, transparent information on how submissions have been taken into account and considered, they expose themselves to an increased threat of litigation by community groups who allege that submissions have not been properly considered.

Recommendation 4: Instead of removing the need for supplementary information, the Agreement should be amended to require a revised IAR/EIS with tracked changes and supplementary information in the form of a standalone document, which could be

[24] *State Development and Public Works Organisation Act 1971* (Qld), s. 34B(2), 34J(2).
[25] Proposed amendment to the Queensland Assessment Bilateral Agreement, Schedule 1, Class 2, Item 2, para 5.1.

annexed to the IAR/EIS. This would enhance the public's access to information on how submissions have been considered.

Amendments remove the requirement for public notification of draft TOR for an EIS

20. The draft agreement proposes to remove the mandatory requirement[26] to publicly notify the draft TOR for an EIS under the SDPWO Act. The new paragraph 4.1 reads, "*Where the assessment is by EIS the CG must ensure that: if appropriate, having regard to the objects of the EPBC Act and any comments from the Commonwealth Minister, the draft TOR are made available to the public and released for public comment under s.29(1)(b) SDPWO Act*".

21. The TOR determines the scope of the EIS. Too often, under the current Agreement, proponents hide behind a failure to properly account for the assessment of environmental effects on the basis that it was not mentioned in the TOR. Notwithstanding this deficiency, the proposed amendments essentially leave public notification and an opportunity for submissions on the draft TOR in the total discretion of the CG. ANEDO is opposed to the removal of these important procedural rights for the community.

22. Although the proposed Agreement reflects the existing discretion given to the CG in the SDPWO Act itself, which allows the CG to decide whether to allow for public notification and comments on the draft TOR,[27] the Agreement has always required such notification and opportunity for comment. As it is written, the proposed Agreement would result in the Commonwealth abandoning requirements for public notification of the draft TOR.

Recommendation 5: Retain the requirement that the draft TOR for an EIS must be publically notified. To do otherwise would mean the Commonwealth Government is walking away from its responsibilities under the Intergovernmental Agreement on the Environment.

[26] Currently at Schedule 1, Clause 2, Item 2, paragraph 4.1 of the Agreement.
[27] *State Development and Public Works Organisation Act 1971* (Qld), s. 29(1)(b).