Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

Submission on (Revised) Draft NSW - Commonwealth Bilateral Assessment Agreement

30 January 2015

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of eight independently constituted and managed community environmental law centres located across the States and Territories.

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.

EDO ACT (tel. 02 6243 3460)
edoact@edo.org.au

EDO NSW (tel. 02 9262 6989)
edonsw@edonsw.org.au

EDO NQ (tel. 07 4031 4766)
edonq@edo.org.au

EDO NT (tel. 08 8981 5883)
edont@edo.org.au

EDO QLD (tel. 07 3211 4466)
edoqld@edo.org.au

EDO SA (tel. 08 8359 2222)
edosa@edo.org.au

EDO TAS (tel. 03 6223 2770)
edotas@edo.org.au

EDO WA (tel. 08 9221 3030)
edowa@edowa.org.au

Submitted to: **OneStopShop@environment.gov.au**

For further information, please contact **rachel.walmsley@edonsw.org.au**

Executive Summary

The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) welcomes the opportunity to comment on the Revised Draft NSW Bilateral Assessment Agreement (**Draft Agreement**) under the EPBC Act.[1] If and when finalised, this agreement would replace the assessment bilateral currently in force, signed by the two governments in December 2013 (**Existing Agreement**). This submission addresses the following:

- ***The need for a strong federal role in environmental protection***
- ***Draft Assessment Bilateral Agreement – Key changes in brief***
- ***Proposal to accredit six additional NSW assessment pathways***
- ***Additional requirements for NSW assessment process (clauses 6-7)***
- ***Other proposed changes in the Draft Agreement***
- ***New Schedules to the Draft Agreement.***

Overall, ANEDO does not support the accreditation of NSW assessment processes as they stand,[2] either for major project assessments already accredited, or other assessment pathways proposed here. **In summary, we oppose this accreditation because:**

- Accrediting inadequate State assessment processes in a piecemeal fashion is not an effective way to achieve the Commonwealth's stated policy aims to simplify project assessments and approvals and maintain high environmental standards.
- The necessity and effectiveness of accrediting 6 further assessment pathways is unclear, as demonstrated by the Draft's numerous caveats and exclusions, which add considerable complexity to an already confusing assessment process.
- The Draft Agreement would allow development proposals and their impacts on Matters of national environmental significance (**NES**) to be assessed by the NSW Minister or agency that is also *proposing* the development, or responsible for promoting that type of development.[3] This creates a potential conflict of duties,[4] and is no substitute for the federal Environment Minister and the expertise of his or her Department.
- Part 5 assessments by Review of Environmental Factors (**REFs**) are not rigorous enough to replace federal assessment, and are not designed to assess 'significant impacts' as the EPBC Act requires.
- If a similar expansion of scope is proposed for the draft NSW-federal *Approval* Bilateral, then 'high environmental standards' will simply not be maintained by current NSW laws.

For these and other reasons outlined in this submission, ANEDO does not support the accreditation of current NSW assessment processes as a substitute for EPBC Act assessment. Any NSW Assessment bilateral agreement must be based on having the necessary suite of best practice environmental process and outcome standards enshrined and in force in NSW legislation. The Draft Agreement should not be finalised until equivalent EPBC Act standards are codified in NSW law.

---

[1] Draft Bilateral Agreement under section 45 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), December 2014 (**Draft Agreement**). On exhibition from 12 December 2014 to 2 February 2015. See: http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw#assessment

[2] See ANEDO submission on previous draft NSW-Commonwealth Assessment Bilateral, Dec. 2013, p 18.

[3] An example of the first kind is NSW Roads and Maritime Services; an example of the second kind is NSW Trade & Investment – Division of Resources & Energy.

[4] As the NSW Ombudsman has noted in the context of CSG regulation by NSW Trade & Investment. See NSW Ombudsman, *Submission to NSW Legislative Council Inquiry into Coal Seam Gas* (Sept. 2011).

The need for a strong federal role in environmental protection

ANEDO supports a strong Commonwealth role in efficient and effective implementation of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) to protect Australia's unique biodiversity and heritage. Australia's environment cannot be protected without strong federal environmental laws. As the most recent *State of the Environment Report (2011)* notes:

> *Our environment is a national issue requiring national leadership and action at all levels… The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.*[5]

ANEDO has outlined a range of broad concerns about proposals for accreditation and the flawed 'one stop shop' approach.[6] Although we have fundamental concerns with this approach, ANEDO has engaged extensively with the ongoing reforms, including submissions on draft assessment bilateral agreements in each State and Territory.[7]

In NSW, ANEDO made a detailed submission on the Existing Agreement, in its draft form, in December 2013.[8] In brief, that submission opposed the accreditation of NSW 'major project' assessment processes,[9] on the basis that these did not meet EPBC Act assessment standards. ANEDO also made a submission on a further draft agreement to accredit NSW project *approvals* (to replace federal assessments, approvals and enforcement under the EPBC Act).[10] While that Draft Approval Bilateral has not yet been finalised;[11] we are concerned that once operating, an *approval* bilateral would effectively 'switch off' the EPBC Act's protections where a development proposal is assessed and approved under an accredited State process.

As noted in previous submissions, ANEDO supports the establishment of best practice environmental standards in all Australian jurisdictions, and the retention of environmental *approval* powers by the Australian Government for Matters of National Environmental Significance (**MNES**). We reiterate that Commonwealth oversight of MNES is vital because:

- Only the Commonwealth Government can provide national leadership on national environmental issues;

---

[5] Australian Government expert committee, *State of the Environment 2011*, 'In brief', at 9.

[6] These concerns include:
- The protection of Australia's environment depends on how seriously the federal government takes its role – including by retaining approval powers
- Relinquishing federal approvals will not improve efficiency or effectiveness
- Accrediting planning laws in a state of flux creates uncertainty and fragmentation
- Commonwealth must retain control where States have a conflict of interest
- State threatened species laws do not meet high environmental standards
- Fast-tracking major projects contradicts risk-based assessment
- Commonwealth must retain robust compliance, enforcement, reporting and assurance mechanisms in legislation.

[7] Available at www.edo.org.au/

[8] *Submission on Draft NSW-Commonwealth Bilateral Assessment Agreement* (2013), Download PDF.

[9] For State Significant Development (SSD) (including modifications), State Significant Infrastructure (SSI), and transitional 'Part 3A' major projects.

[10] *Submission on Draft NSW-Commonwealth Bilateral Approval Agreement* (June 2014) Download PDF

[11] Once signed by the federal Environment Minister, it would be subject to a disallowance period in both Houses of the Australian Parliament (15 sitting days). We note that the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014, a Bill that would lower the bar for making approval bilateral agreements, is now before the Senate.

- The Commonwealth must ensure that we meet our international obligations;
- State and Territory environmental laws and enforcement are not up to standard;
- States are not mandated to act (and do not act) in the national interest; and,
- States often have conflicting interests, as they benefit directly from the projects they are assessing.[12]

Furthermore, we submit that any accreditation of State/Territory *assessment* processes must be based on clear and equivalent standards being enshrined in state legislation. That is, States and Territories must first strengthen their project assessment and approval processes, under law, as a prerequisite to renewing assessment bilateral agreements. Stronger state laws would include, for example:

- improved, proportionate and comprehensive assessment standards that are designed to achieve ecologically sustainable development (**ESD**);
- greater transparency and public participation;
- more accountable governance arrangements;
- leading practice monitoring, enforcement, audits and reporting; and
- increased community access to justice, to ensure confidence in decision making.

A range of policy alternatives for strengthening environmental laws are available to improve the efficiency and effectiveness of national environmental law, rather than hasty accreditation of State laws.[13] This should include revisiting the Independent Review of the EPBC Act (**Hawke Review**) package of recommendations,[14] developing a 'highest environmental denominator' approach to consistent environmental standards across jurisdictions, and strengthening state and federal regulatory skills and resourcing.

Draft Assessment Bilateral Agreement – Key changes in brief

We note that in December 2013, the Commonwealth accredited NSW 'major project' assessment processes to effectively replace EPBC Act assessment processes, where a major project proposal (such as a mine, freeway or resort in NSW) will affect the national environment.

We understand that the new Draft Agreement proposes to expand this accreditation to (partially) cover the assessment of almost all classes of development under Parts 4 and 5 of the *NSW Environmental Planning and Assessment Act 1979* (**Environmental Planning Act**).[15] Namely:

---

[12] 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://www.edo.org.au/policy/ANEDO-Submission-EPBC-Retaining-Federal-Approval-Powers-Bill-2012.pdf.

[13] See ANEDO, *Best practice standards for environmental law* (June 2012), available on request or at www.edo.org.au; Wentworth Group of Concerned Scientists, *Statement on Changes to Commonwealth Powers To Protect Australia's Environment* (September 2012), at www.wentworthgroup.org; Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia* (August 2013), at www.aph.gov.au.

[14] The Hawke Review (2009) identified a number of areas where the EPBC Act should be strengthened – including addressing cumulative impacts (at 3.3, 3.5, 3.6, 7.31, 7.60); a single harmonised threatened species list; and a new National Environment Commission (which could oversee bilateral agreements).

[15] Processes for small-scale development such as *exempt* and *complying* development are not being accredited.

v) **Designated development**[16] (excluding local assessment – see below);
vi) **Private development that requires consent under 'Part 4'** of the NSW Act ***and*** **a species impact statement (SIS)**[17] (excluding local assessment);
vii) **Private development that requires consent under 'Part 4'** of the NSW Act but does *not* require an SIS (excluding local assessment);
viii) **Modifications to the above classes** (project expansions/revised conditions);[18]
ix) **'Part 5' development that requires a Review of Environmental Factors (REF)** (public projects other than excluded fisheries activities; some private projects);[19]
x) **'Part 5' development that requires an Environmental Impact Statement (EIS)**.[20]

However, at the same time the Draft Agreement *significantly limits this accreditation by excluding local assessment* of projects – if the decision-maker ('consent authority') is a local council, a Joint Regional Planning Panel (**JRPP**) or an Independent Hearing and Assessment Panel (**IHAP**).[21] This is a wide exclusion, as almost all development is determined by these local authorities (other than major projects, which are already accredited).

The Draft Agreement also adds a number of new and modified clauses (see **Attachment A**).[22] However, the absence of an explanatory statement or guide hinders the community's ability to understand the practical effect of, or comment on, the changes.

ANEDO's analysis and comments on the Draft Agreement are outlined below. For clarity, each section begins with an overview of the proposed change as we understand it.

---

[16] High-impact projects that are not 'State significant', such as cement works, chemical industries, mineral processing, abattoirs and quarries. See *Environmental Planning and Assessment Regulation 2000* Schedule 3.
[17] An SIS is required under NSW fisheries or threatened species laws where a project may significantly affect threatened species.
[18] I.e. Designated Development and other development that requires consent under Part 4 of the Planning Act.
[19] 'Part 5' development includes State-proposed infrastructure, and other development that does not require development consent or exhibition, but is still assessed and approved by an agency, e.g. Department of Trade & Investment – Division of Resources and Energy, or Roads & Maritime Services. The Draft Agreement excludes Part 5 fisheries activities from accreditation).
[20] This is similar to 'ix' above, but is where a preliminary REF has indicated that the development may have significant environmental impacts which require a further EIS; however this rarely happens in practice – most Part 5 activities fall under 'ix' above.
[21] Draft Agreement, Schedule 1, Item 2(c).
[22] For example:
- Added requirements for NSW Assessment Reports to the federal Minister, including a reference to the NSW *Offsets Policy for Major Projects* (clauses 6-7);
- Collaboration to develop heritage management plans in shared federal-state areas (cl. 10);
- Additional information-sharing but little detail on compliance/enforcement (cl. 14); and
- New Schedules on public information access (Sch. 2), guidance on Matters of NES (Sch. 3) and a table of future areas for 'streamlining', including in relation to strategic assessments of NSW processes, threatened species lists, and other areas (Sch. 4).

Proposal to accredit six additional NSW assessment pathways

The *Existing* Agreement accredits 4 NSW 'major project' assessment pathways to replace EPBC Act project assessments, subject to various conditions in Schedule 1.[23] The most significant change in the *Draft* Agreement is the proposal to 'partially' accredit six further project assessment pathways under the NSW Environmental Planning Act (Draft Agreement, Schedule 1, items 2(v)-(x), outlined above).

Schedule 1 of the Draft Agreement retains many of the conditions under the Existing Agreement which must be satisfied for the NSW assessment to replace federal assessment. These include requirements for the NSW Government to issue 'Guidelines or Directions' to proponents; to exhibit assessment documentation for 'Public Comment'; and specifications for the NSW 'Assessment Report' to the federal Minister.[24]

Analysis and comment

While the practical effect of this proposed partial accreditation appears limited, ANEDO does not support accreditation of *assessment* processes under NSW laws as they stand[25] – either for major project assessments already accredited, or additional assessment pathways proposed in the Draft Agreement. Expanding on the high-level reasons in the Executive Summary, specific concerns about the Draft Agreement and NSW assessment processes are outlined below.

We submit that the Draft Agreement will increase complexity and fragmentation, without raising legal standards for accountability or environmental protection. On one hand the Draft Agreement seeks to accredit most remaining assessment pathways under Parts 4 and 5 of the NSW Environmental Planning Act. On the other hand, it creates significant exclusions or modifications to these same processes, if they are to be relied upon. In particular, in relation to 'Part 4' private development assessments,[26] the Draft Agreement explicitly *excludes* projects that would be determined by the usual consent authorities for these projects (local councils, JRPPs, IHAPs[27]).

---

[23] Existing accredited pathways are:
- i) **State Significant Development** (**SSD**) (major private projects assessed under Part 4 Division 4.1 of the NSW Planning Act);
- ii) **State Significant Infrastructure** (major public infrastructure projects assessed under Part 5.1 of the NSW Planning Act);
- iii) **Modifications to SSD projects** (proposals to expand projects or modify conditions);
- iv) **Transitional Part 3A projects** (major project provisions operating between 2005-2011, now being phased out as old major project applications are determined).

[24] Draft Agreement and Existing Agreement, Schedule 1, Items 3.2-3.4.

[25] See ANEDO submission on previous draft NSW-Commonwealth Assessment Bilateral, Dec. 2013, p 18.

[26] Namely:
- v) Designated development (excluding local assessment);
- vi) Part 4 development requiring an SIS (excluding local assessment);
- vii) Part 4 development generally (excluding local assessment);
- viii) Modifications to Designated Development, or other development that requires consent under Part 4;

[27] Draft Agreement, Schedule 1, Item 3.3(c). The local council will usually be the consent authority for Part 4 development (excluding major projects) unless the Planning Act, regulations, a State Environmental Planning Policy (SEPP) or Local Environmental Plan (LEP) declares someone else to be the consent authority – such as the Planning Minister, Joint Regional Planning Panel (**JRPP**) or Independent Hearing and Assessment Panel (**IHAP**). See *Environmental Planning & Assessment Act 1979* (NSW) s 4, 'consent authority'; see also sections 76A-78A of the Act; and the *Standard Instrument (Local Environmental Plans) Order 2006* ('Standard Instrument LEP') cl. 1.2. See further EDO NSW *Categories of development* factsheet.

While we agree there are legal and practical reasons why local authorities should not be left to shoulder national or international environmental obligations, this throws into question the rationale for accrediting these categories in the first place, and raises additional questions as to how and when this would apply in practice.

Adding further to the complexity to the Draft Agreement, the various assessment pathways are subject to different assessment requirements and certain exemptions. For example, Designated Development and some other proposals will require at least 28 days' public consultation (reduced from 30 days in the Existing Agreement).[28] However, three of the newly accredited assessment pathways will require only 14 days' public consultation.[29]

We note that the Draft Agreement requires exhibition of 'Part 5' developments that affect Matters of NES for at least 14 days' public consultation.[30] This is significant because the NSW Environmental Planning Act does *not* require Part 5 development to be exhibited. Indeed this is a major criticism of Part 5 itself - infrastructure is often 'self-assessed' and approved by the agency proposing it, without public scrutiny of the application or environmental assessment. Some private development (such as coal and coal seam gas exploration) is also assessed and approved under Part 5 without exhibition. While this could be interpreted as an attempt to raise State assessment standards, it does so without requiring consistent processes or the necessary legal amendments.

There are at least four further drawbacks to accrediting NSW 'Part 5' assessments, examined below:

- Part 5 assessments are not rigorous enough to replace federal assessment
- Part 5 'REF' reports are not designed to assess significant impacts
- Accrediting Part 5 would increase fragmentation and complexity
- Other mechanisms to accredit NSW 'Part 5' assessments are being pursued

First, accreditation is premised on the view that Part 5 assessments – which usually involve a small-scale 'Review of Environmental Factors' (**REF**) – are adequate to replace federal EPBC Act assessment. EDO NSW and others have noted a range of inadequacies with the REF process.[31] This includes limited arms-length oversight (often by the 'sponsoring' agency, but not by the NSW Office of Environment & Heritage); no public scrutiny or consultation on the likely impacts; and little transparency (an REF is only required to be published after the activity is approved).

Second, the Government should not accredit Part 5 REFs because this assessment pathway is not designed to assess 'significant' impacts on MNES. This is important as the EPBC Act's threshold for federal involvement is a 'significant impact' on Matters of NES. This is not only concerning and contradictory, it is also potentially superfluous. That is, it is unclear how a Part 5 proposal[32] would be 'significant' enough to trigger EPBC Act

---

[28] Draft Agreement, Schedule 1, Item 3.3(a) (not vii-viii). Cf Existing Agreement (2013), Schedule 1, Item 3.3(a).
[29] Draft Agreement, Schedule 1, Items 2(a)(vii), (viii) and (ix), namely: development requiring consent under Part 4 (where no Species Impact Statement is required); modifications to Part 4 development; and development assessed under Part 5 where no EIS is required.
[30] Amongst other development classes. See Draft Agreement, Schedule 1, Item 3.3(b).
[31] See, for example, EDO NSW, *Ticking the Box – Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* (November 2011), Download PDF.
[32] i.e. Under Draft Agreement, Schedule 1, Item 2(a)(ix).

assessment without also triggering an EIS process under the Environmental Planning Act (section 112) – a process that the Draft Agreement would accredit separately.[33]

Third, as with the Draft Agreement generally, accrediting 'Part 5' assessments would increase regulatory fragmentation and complexity. It would increase fragmentation because *some* Part 5 activities will need to be exhibited (if they affect matters of NES) while others will not. It would increase complexity because exhibition is a 'requirement' under the Draft Agreement, but not anywhere in legislation or regulation. (The Draft Agreement explicitly states that it 'does not require NSW to make, to amend or to repeal any NSW Laws' (clause 1.4(b)). This may confuse communities, proponents and regulators alike; and will weaken the community's ability to know their rights and understand how they can engage in the decision-making process.

Fourth, the interaction between the Draft Agreement and ongoing strategic assessment processes is unclear. That is, we understand that NSW and the Commonwealth are pursuing a strategic assessment of NSW 'Part 5' assessment processes (under Part 10 of the EPBC Act). For example, there is currently an EPBC Act strategic assessment of NSW Roads and Maritime activities under Part 5 out for public comment.[34] Given that the Commonwealth is trying to increase efficiency and reduce 'duplication', the rationale for these parallel processes and consultations is unclear, and requires further explanation.

Overall, we strongly oppose the abandonment of federal assessments in the circumstances set out in the Draft Agreement.

Additional requirements for NSW assessment process (clauses 6-7)

Clauses 6 and 7 contain the most significant changes to NSW *assessment requirements* compared with the Existing Agreement, although they do not amend the NSW Environmental Planning Act.

6. Assessment

A new clause 6.1 (*Identification of impacts on Matters of NES*) specifies that NSW will (a) draw proponents' attention to EPBC approval requirements; and (b) require or request the proponent to identify any likely impacts on each Matter of NES.[35]

Clause 6.2 (*Undertaking to assess impacts on Matters of NES*) modifies existing clause 6.5, requiring NSW to ensure that impacts on Matters of NES are 'adequately assessed and addressed in the Assessment Report', instead of 'assessed to the greatest extent practicable'.

Clause 6.3 (*General approach to assessment*), previously titled 'Single assessment', has been expanded with more specific details for assessment reports.[36] For example, impacts are to be assessed 'having regard to the full [i.e. national] extent of the species' or community's range or habitat' (6.3(b)(ii)).

[33] Draft Agreement Schedule 1, Item 2(a)(x).
[34] See: http://www.environment.gov.au/protection/assessments/strategic/nsw-roads-and-traffic-management.
[35] Presumably in the proponent's environmental assessment which is submitted to the NSW decision-maker.
[36] See for example Draft Agreement clause 6.3(b)-(e). The clause still requires that 'all [significant] impacts of the action on each relevant Matter of NES are separately identified…', but the list of MNES has been removed (6.3(b)(i)).

Other provisions of clause 6 have been removed.[37]

Analysis and comment

While the draft language in 6.2 is weaker than existing 6.5, the practical effect seems limited, as both existing and draft clauses go on to state that complying with NSW assessment processes will be adequate to meet these requirements.[38]

Regarding the 'full extent' reference (6.3(b)(ii)), it is not clear if this change is intended to limit consideration of 'local' impacts, or allow consideration of 'cumulative' impacts, or some other purpose. The policy intent should be to include cumulative impact considerations, not to overlook local impacts and extinctions as 'insignificant' impacts that do not require assessment. Finally, we support the omission of existing clauses 6.2 and 6.4. We agree these omitted provisions are unnecessary, ambiguous and do not encourage high standards of environmental protection.

7. Relevant plans, policies and other instruments[39]

This significant new provision in the Draft Agreement contains five subclauses:

7.1. Avoid, mitigate, offset hierarchy
7.2. Offsets
7.3. Assessment not inconsistent with plans, etc
7.4. Consideration of policies and guidelines
7.5. Assessment based on principles of environmental policy.

Clause 7.1 commits the NSW Government to apply an 'avoid, mitigate, offset' hierarchy when assessing impacts of a proposed development and making recommendations to the Commonwealth Minister.

Clause 7.2 commits NSW to ensure that, when considering the use of biodiversity offsets (in accordance with 7.1), its Assessment Report will address (as applicable to the project):

- how the NSW Biodiversity Offsets Policy for Major Projects 'has been applied'; or
- how the Biobanking assessment methodology rules[40] (or Fisheries NSW Policy and Guidelines) 'have been considered and/or applied'.

Clause 7.3 requires a NSW Assessment Report to 'address… whether granting (or not granting) approval… is consistent with ("not inconsistent with") *[sic]…*' various EPBC Act requirements – including specific plans, principles and conventions on world heritage, national heritage, wetlands, listed communities and species.

Clause 7.4 expands on clause 6.8 of the Existing Agreement. It commits NSW, when assessing developments and forming recommendations to the Commonwealth, to

[37] For example, clause 6.2 *Proponent service delivery charter*; 6.4 *Consistency and predictability*.
[38] For use of the term 'greatest extent practicable' (used in relation to impacts other than on Matters of NES), see *EPBC Act 1999*, s 48A(2) (*Agreements including declarations about approvals*) and 48A(3) (*Agreements including declarations about assessment*). The term 'adequately assessed' is also used elsewhere in the Act – s. 87 (*Minister must decide on approach for assessment*), subs. (4) (*Accredited assessment process*).
[39] NB: entitled 'Decisions on Approval' in the Draft Agreement's contents page.
[40] I.e. 'the rules established under s 127B of the *Threatened Species Conservation Act 1995…'.*

ensure NSW will 'consider' relevant bioregional plans, strategic assessment reports under the EPBC Act, and other Commonwealth policies, advice or guidelines on Matters of NES. This obligation is limited to plans and materials identified for that purpose in the Administrative Arrangements.

Clause 7.5 is a new clause, in which 'NSW undertakes to ensure that, subject to applicable NSW laws, NSW will have regard to the principles of sustainable development or ecologically sustainable development [ESD], as set out in the applicable NSW laws', when assessing actions and making recommendations to the Commonwealth.

Analysis and comment

Mandating the 'avoidance hierarchy' in clause 7.1 is a fundamentally important element of maintaining environmental standards, although the requirements for how a proponent must demonstrate application of the hierarchy are not clear.

Draft clause 7.2 is relatively weak, in that it does not specifically require *compliance with* any of the relevant policies. Also, EDO NSW has elsewhere noted a range of inadequacies with the NSW Biodiversity Offsets Policy, including when compared with the Commonwealth EPBC Offsets Policy (2012).[41] For example, the NSW offsets policy does not meet Commonwealth offsets standard in relation to 'like for like' offsetting and limiting the use of indirect offsets. We have serious concerns about any Commonwealth accreditation of the new NSW offsets policy.

Draft clauses 7.3 to 7.5 provide some additional strengthening to the Existing Agreement, although this could be more strongly expressed. For example, clauses 7.3 and 7.4 do not explicitly require *compliance with* relevant plans and policies (etc), although such compliance may be needed to satisfy the EPBC Act. Also, the words 'consistent with' are preferable to 'not inconsistent with'. The effectiveness of clause 7.4 is further limited by the fact that the Administrative Arrangements are yet to be released.

Clause 7.5 is an important and positive improvement over the Existing Agreement. Nevertheless, it is no substitute for properly operationalising the principles of ESD in NSW *legislation*, including the Environmental Planning Act. Also, while the inclusion of 'ESD' is sound, the parallel reference to 'sustainable development' is confusing and should be removed. The EPBC Act itself, and over 50 NSW laws (including the Environmental Planning Act's objects) refer to principles of ESD, not 'sustainable development'.

Other proposed changes in the Draft Agreement

We note that some assessment requirements have been amended in various (sometimes minor) ways,[42] including to deal with the additional assessment pathways being accredited. While some such amendments may improve on the Existing Agreement (including in clauses 7-11), we are concerned that there is no intention to back these changes with legal rights or obligations.

[41] Submission on the Draft NSW Biodiversity Offsets Policy for Major Projects, May 2014 - **Download PDF**. As compared to http://www.environment.gov.au/epbc/publications/epbc-act-environmental-offsets-policy.
[42] We understand that some changes may be proposed to reflect the Draft Approval Bilateral Agreement.

1. Definitions and interpretation

Clause 1.4 (*Undertakings by NSW*) specifies that the Agreement does not require NSW to do anything inconsistent with NSW laws; or to make, amend or repeal any of its laws.

Analysis and comment

The fact that the Agreement seeks to create obligations between governments – without translating these obligations into legal reforms and requirements – increases inconsistency, complexity and confusion, and may reduce the enforceability of NSW's obligations.

5. Cooperative approach to referrals

Clause 5.4 (*Notification by NSW Minister that an accredited process will apply*) has been modified to state that 'the NSW Minister must, within 10 business days… advise the Commonwealth Minister, in writing, that the action will be assessed in a manner specified in Schedule 1 [i.e. an Accredited Process]…'. Also, a new subclause (b) commits the parties to 'ensure that the Accredited Process is used … to the greatest extent possible.'[43]

Analysis and comment

ANEDO does not support the directive nature of the amendments to clause 5.4, particularly given our concerns with accrediting NSW assessment processes generally. These changes appear to direct the NSW Minister to apply an accredited process, replacing the term 'advise… whether' (Existing Agreement) with the term 'advise… that'. We also note that, once the NSW Minister advises that a project will be assessed via an Accredited Process (as per 5.4), the Commonwealth Minister cannot 'call in' the project to be assessed under federal laws (cl. 4.3(b)). At the very least, the Agreement should provide greater flexibility to apply a federal assessment, rather than apparently directing that a NSW process apply.

8. Transparency and access to Information

Amendments to clause 8 substantially expand on the Existing Agreement (clause 7). This includes more detail, to similar effect, on consulting with Indigenous peoples (8.1); general public access to project documentation (8.2); and specifying that public comments 'by any person within Australia will be accepted and considered…' (8.4).

Analysis and comment

While such detail may improve transparency and accessibility, clause 8.2 is limited by excessive use of qualifiers such as 'where relevant' and 'wherever possible'. These should be removed. It is also unclear how these obligations interact with NSW laws and departmental processes. For example, while we welcome the NSW commitment in 8.2(b) to ensure information is published 'wherever possible, before that information is used by the decision-makers', this is not standard practice or legally

[43] Also, a new clause 5.2 (*Commonwealth consideration of proposed action*) states that a Commonwealth agency may direct a developer (proponent) to the NSW Government for a decision on whether the development will be assessed under an accredited NSW process.

required for Part 5 environmental assessments (REFs). As noted above, this is a significant point of criticism of the Environmental Planning Act that remains unamended.

9. Co-operation

Clause 9.1 (*Open access to Information*) replaces and expands existing clause 9.3 on exchange of information. Schedule 2 provides further detailed guidance on 'open access'.

Analysis and comment

We support additional focus on open government, which also reflects NSW State Plan goals 29-32.

10. Heritage management plans

Under this new clause, the two governments agree to work cooperatively to prepare and implement management plans for World Heritage properties and National Heritage places that occupy both Commonwealth and State lands; 'or (b) suitable alternatives to those plans.'

Analysis and comment

We support cooperative preparation and implementation of management plans for world heritage and national heritage sites. However, the reference to 'suitable alternatives' is ambiguous. Subclause (b) should be removed, or require at least equivalent protections as the EPBC Act and management principles.

11. Administrative Arrangements

This clause modifies provisions in the Existing Agreement (clause 9) in relation to Administrative Arrangements (new 11.1) and the intergovernmental Senior Officers' Committee (new 11.2).

Analysis and comment

The revised clause contains several minor improvements on the existing clause, such as the inclusion of a timeframe at 11.1 for developing Administrative Arrangements ('on or by the Commencement Date' for the Agreement). Nevertheless, the contents of these Arrangements should be subject to consultation *before* commencement. Clause 11.2 commits the Senior Officers' Committee to an annual review of the Agreement; and 11.2(g) provides that an evaluation report will be published, which promotes transparency. However, subclause 11.2(e) permits the two governments to agree that an evaluation 'is not to be undertaken in a particular year or years'. This wide discretion should be removed. Annual reviews should also require involvement or consultation with NSW and federal audit offices (see also clauses 13-14 below).

12. Reports

This is a new clause which relates to annual reports from NSW to the Commonwealth, including information on NSW monitoring of approval conditions; modifications of conditions; the number of complaints about Accredited Processes in relation to Matters of NES (at 12.1). Clause 12.2 relates to exchange of information, incorporating clause 9.3 of the Existing Agreement.

Analysis and comment

The reference to NSW reporting on modifications of project conditions (as accredited in the Existing and Draft Agreements) suggests the need for additional legislative safeguards to ensure Matters of NES are specifically considered in the modification process (for example, in NSW Environmental Planning Act, section 96). This is important as project modifications are a frequent occurrence including for major projects, and usually involve an expansion or intensification of the activity, either of which could affect Matters of NES. The reference to 'complaints' is of limited value unless the public is informed of relevant rights and complaint-handling processes; and is no substitute for access to the courts.

13. Review

This clause relates to *Five year reviews* (13.1), *Transitional reviews* (13.2) and *Third party studies* (13.3). Clause 13.1 is similar to existing clause 10.1 on reviews of the Agreement. Clause 13.2 is a new addition. It requires an initial review by the Senior Officers' Committee 12 months after the Agreement commences; and states the parties 'may agree to seek public comments' (emphasis added). The transitional review may be cancelled in limited circumstances (for example, where this Agreement is varied or replaced). Clause 13.3 states that these reviews 'may include' external or third-party 'studies, evaluations and other activities intended to analyse the success of the Agreement in achieving its objects.'

Analysis and comment

Five year reviews and the transitional review should be conducted at arms-length, such as a joint review by the NSW and federal (**ANAO**) audit offices or Ombudsmen. As the Senior Officers' Committee is responsible for overseeing implementation of the Agreements, having the same Committee reviewing its own actions is less rigorous than an independent review. While the intent of 13.3 to involve third parties is a step forward, this is no substitute for *mandatory public consultation* and *independent review* against the Agreement's objects. Finally, we understand that despite review clauses in previous bilateral agreements, such reviews have not previously occurred. This is concerning for accountability, and a lost opportunity to learn from past agreements.

14. Sharing Information – ongoing EPBC Act matters

This new clause adopts some aspects of clauses 8.2-8.3 in the Existing Agreement, on monitoring and enforcing approval conditions. At clause 14(a), the parties also 'note that the Commonwealth remains responsible for compliance and enforcement under the EPBC Act.'

Analysis and comment

Monitoring, compliance and enforcement is a key area of concern under bilateral agreements, not least due to limited resourcing and capacity at State and federal levels. Unfortunately, beyond clause 14(a), the Draft Agreement contains no detail on how these important obligations will be arranged and fulfilled. Clause 14 also omits an equivalent to existing 8.2(a) on *collaboratively* monitoring compliance with conditions. Importantly, while the parties may 'note' federal EPBC enforcement responsibilities, if *approval* bilateral agreements are signed, these compliance and enforcement powers will be 'switched off' where those agreements apply. The community must then rely on State departments and regulators to monitor compliance and take enforcement action where there is a breach.

15. Audit

This clause notes the Commonwealth Auditor-General's (ANAO) powers to audit Commonwealth agencies (as per existing clause 11 and EPBC Act requirements (section 48A(4)).

Analysis and comment

The role of the NSW Audit Office should also be recognised in this clause, and the parties should request these audit agencies to jointly review the operation of any bilateral agreement. We note that the ANAO recently audited the federal Environment Department and found significant inadequacies in its compliance monitoring systems, due in part to under-resourcing. There has been no recent performance audit of the NSW Planning Department, although the Chief Scientist & Engineer has criticised its lack of oversight of CSG.[44] The parties and their audit offices should consider any implications of the ANAO's recommendations for compliance and enforcement under any bilateral agreement – including adequacy of the NSW Planning Department's compliance systems, policies and resources.

New Schedules to the Draft Agreement

Proposals to accredit additional NSW assessment processes (Schedule 1) are examined under 'Key changes in brief' above. The Draft Agreement also contains 3 new schedules.

Draft Agreement, Schedule 2 – Open access to information

This Schedule, which expands on clause 9.1 of the Draft Agreement, aims to give effect to protocols of 'open access' to public sector information.

Analysis and comment

We welcome these aims and protocols in principle, although there are several exceptions which may water down their practical effect. These should be strengthened.

Draft Agreement, Schedule 3 – Guidance documents for Matters of NES

This Schedule commits the Commonwealth and NSW to 'streamline policy and guidance documents developed by each party for assessments and approvals' (Background, Item 1).

Analysis and comment

This commitment seems out of place, given that Schedule 3 essentially calls for NSW to take into account federal statutory and non-statutory documents and guidelines, with further detail to be covered in Administrative Arrangements. The references to *streamlining* should be removed, and the Administrative Arrangements publicly consulted on.

[44] 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.

Draft Agreement, Schedule 4 – Additional streamlining measures

This Schedule expands considerably on Existing Agreement clause 9.4. It includes a table of proposed cooperative measures such as preparing 'additional guidance for industry', 'for authorities' and for 'Indigenous consultation processes' (see for example Schedule 4, Item 2.2).

Analysis and comment

Again, the reference to 'streamlining' in Schedule 3 and in Schedule 4 seems contradictory, in that both schedules call for improving existing guidance. The references to *streamlining* should be removed if the aim is actually *improvement*.

Attachment A: Comparison of Draft NSW Bilateral Agreement clauses and Existing Agreement

As the consultation documents do not include a comparison between the Existing and Draft Agreements, we set out a table for this purpose below.

Draft Agreement (December 2014)	**Existing Agreement (equivalent clause)**
1. Definitions and interpretation	1
2. Nature of this Agreement	2
3. Agreement Period	3
4. Effect of this Agreement	4
5. Cooperative approach to referrals	5 (Procedures for referral)
6. Assessment	6
7. Decisions on approval	*NEW*
8. Transparency and access to information	7
9. Cooperation	9 (Cooperation and Governance)
10. Heritage management plans	*NEW*
11. Administrative Arrangements	9.1
12. Reports	*NEW*
13. Review	10
14. Sharing information - ongoing EPBC Act matters	*NEW*
15. Audit	11
16. Escalation	12 (Dispute resolution)
17. Suspension or cancellation	13
18. Transitional	*NEW*
19. Amendment	14
20. Freedom of information	15
21. General provisions	16
Schedule 1 - Declared classes of actions	*Schedule 1*
Schedule 2 - Open access to information	*NEW*
Schedule 3 - Guidance documents for MNES	*NEW*
Schedule 4 - Additional streamlining measures	*NEW*