Submission on the *Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act 1999*

23 November 2012

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 Defenders Office's (**ANEDO**) includes independent EDO offices in each State and Territory with expertise in environmental assessment and approval legislation. As public interest lawyers, we strongly support the implementation of efficient and effective environmental standards in legislation in all Australian jurisdictions.

ANEDO has previously released its analysis of and response to the agreement made at the 13 April 2012 meeting of the Council of Australian Governments (COAG) with regard to major reforms of Australia's environmental laws (**COAG reforms**).[1] We reiterate our concerns, in particular with regard to the proposal for the Commonwealth to hand over approval responsibilities under the EPBC Act to the States and Territories. ANEDO does not support the delegation of Commonwealth assessment and approval responsibilities to States and Territories as decreed by COAG on advice from the Business Advisory Forum.

EDOs across Australia support the view that 'improving environmental outcomes is part of ensuring a sustainable future for Australia', both for our quality of life, and our continued economic prosperity.[2]

Numerous state and federal *State of the Environment* reports back the importance of rigorous environmental safeguards for an ecologically sustainable future.[3] Accordingly, we do not accept the premise that environmental laws are an unreasonable regulatory burden. A key finding of the federal State of the Environment Committee in 2011 was:

> *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.*[4]

ANEDO therefore submits that the Council of Australian Governments (**COAG**) must recognise the fundamental public purpose of best practice environmental laws and standards to address important policy challenges in 21st century Australia.

The development and implementation of best practice environmental laws and standards is vitally important. In this context, we welcome the public release of the *Draft Framework of Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999* (July 2012) (**Standards Framework**), and the *Statement of Environmental and Assurance Outcomes* (June 2012) (**Statement of Outcomes**), particularly given the environmental outcomes that are at stake, the speed of the current COAG agenda, and the limited public consultation opportunities to date.

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[1] ANEDO, 'COAG environmental reform agenda: ANEDO response – in defence of environmental laws' (May 2012), available here: http://www.edo.org.au/policy/policy.html

[2] *Government Response to the Independent Review of the EPBC Act* (August 2011), Preamble, p 3, available at www.environment.gov.au. The response cites a UN Environment Program report (2010) which estimates that ecosystems deliver essential services worth US$21 trillion to US$72 trillion a year, comparable with the 2008 World Gross National Income of US$58 trillion.

[3] As the *State of the Environment Report 2011* (Cth) notes, 'Our unique biodiversity is in decline, and new approaches will be needed to prevent accelerating decline in many species' (summary, p 4).

[4] State of the Environment 2011 Committee, *Australian State of the Environment 2011*, 'In brief' at 9 (independent report to the Minister for Sustainability, Environment, Water, Population and Communities).

The draft Standards Framework is a relatively comprehensive list of the current minimum legal requirements under the EPBC Act, with additional considerations derived from current Commonwealth government practice. The length and detail of the minimum requirements serves to illustrate the critical role the Commonwealth currently plays in environmental protection. The document demonstrates the scope of what the Commonwealth is giving away.

The Framework however does not constitute a list of best practice standards as it does not include the necessary improvements and regulatory innovations proposed by the Hawke Review of the EPBC Act. For a logical and credible reform process, the standards proposed by the Hawke Review to improve some of the deficiencies of the current system – such as consideration of cumulative impacts – would need to be implemented first to make sure the federal 'bar' is set high. The current COAG process may perpetuate certain deficiencies by instilling some of the current minimum legal requirements that are not best practice.

Based on our extensive analysis and interaction with planning and environmental laws in each jurisdiction, we submit that *no* state or territory planning or environmental laws currently meet the minimum requirements of the 106 elements outlined in the Draft Standards Framework, let alone the full suite of best practice standards that Australia should be striving to implement.[5]

From our extensive analysis of planning and environmental laws in each jurisdiction, we remain unconvinced that delegating Commonwealth project approval powers will achieve sought-after improvements to planning regulation, productivity and environmental outcomes. Nor are we convinced that it is possible to avoid the likelihood that such delegation will lead to a decline in environmental protection outcomes.

In this context, this submission comments on:

1. COAG's *Statement of Environmental and Assurance Outcomes* (June 2012) (**Statement of Outcomes**)

2. the Australian Government's *Draft Framework of Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999* (July 2012) (**Standards Framework**).[6]

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[5] In June 2012, ANEDO prepared a series of best practice standards for planning and environmental regulation in response to COAG's April reform announcements. These 10 standards (outlined at **Attachment A**) are a useful reference point to evaluate the readiness of State laws and shape the progress of the draft accreditation standards.

[6] Available at: http://www.environment.gov.au/epbc/publications/accreditation-standards-framework.html

1. COAG's *Statement of Environmental and Assurance Outcomes* (June 2012)

In relation to the Statement of Outcomes, we note concerns in relation to 5 key issues:

- Transparency and public engagement
- Fast-tracking major projects versus proportional assessment
- Productivity outcomes and ecologically sustainable development
- Environmental outcomes
- Systems Outcomes

Transparency and public engagement

While the overarching system outcomes of the COAG reforms include 'transparency' and 'appropriate opportunities for public engagement' (p 8), the reform process to date has not met these aims. Beginning with the surprise announcement in April 2012, ordinary transparency, participation and policy-making processes have been jeopardised by COAG's rapid, self-imposed timeframes. For example, public consultation on specific details has been limited and late; there has been significant 'information asymmetry' between stakeholders; COAG has provided no clear deadlines when it has sought public comment; and the taskforce has not published any submissions. These factors have combined to diminish community confidence. Such significant regulatory reforms deserve a more timely, inclusive evidence-based approach that puts all stakeholders on an equal footing.

'Fast-tracking' major projects contradicts the aim of 'proportional assessment'

We submit that there is an inherent contradiction in the logic of the COAG agenda and the Outcomes Statement, which states that '[m]ore targeted regulation could also ensure greater proportionality between the scale of projects, their regulatory treatment and their likely environmental impacts.'[7] Logically, 'fast-tracking' major projects contradicts the aim of 'proportional assessment.' The projects with the greatest potential impacts on the environment require the most thorough assessment. (This is discussed further below in relation to the Standards Framework).

We note that 'major projects provisions' in state planning laws already prioritise such projects as economic drivers. These provisions often override other environmental law and licensing requirements, and limit local-level decision making, public participation and judicial scrutiny of decisions.[8]

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[7] COAG Draft Statement of Outcomes, p 4

[8] In NSW, under both Part 3A and its replacement system, 'State Significant Development' (SSD), major projects remain *exempt* from a significant list of 'concurrence' approvals normally required from various agencies (such as for coastal protection, fisheries, Aboriginal heritage, native vegetation, bush fire and water management). A range of other authorisations *cannot be refused*, and must be consistent with an SSD project approval (including aquaculture, mining leases and pollution licences). See *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), ss 89J and 89K. In addition, the current revised system for fast-tracking 'State Significant Infrastructure' (SSI) retains many features of the former Part 3A.

If the balance is tipped too far, the result is the erosion of community trust, the risk or perceptions of corruption, and the danger of unbalanced, unsustainable development.[9] 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.*[10]

For example, the current NSW Government came to power in 2011, vowing to repeal the notorious 'Part 3A' major projects provisions and restore trust in the NSW planning system. COAG's acceptance of the Business Advisory Forum's suggestion to 'streamline major project assessment' threatens this confidence-rebuilding process. It is doubly concerning when fast-tracking major project assessment is coupled with the removal of Commonwealth oversight and approval of potentially significant impacts.

Productivity outcomes should provide for ecologically sustainable development

The Statement's overarching productivity outcome for the reforms,[11] and the more detailed outcomes in Table 1 of the document,[12] do not integrate long-term economic, social and environmental considerations in accordance with principles of ecologically sustainable development (**ESD**). Such an approach to improving productivity may increase economic benefits in the present, but may transfer the costs of a degraded environment to future generations.

We submit that any productivity outcomes should aim to ensure development that is ecologically sustainable. In particular, COAG's outcomes should take into account the contribution of a healthy environment to a productive society and economy over the long term;[13] and the productivity risks of environmental degradation posed by streamlining environmental assessment.

COAG could also apply the lens of 'sustainable wellbeing' in its approach to productivity. The federal Treasury Secretary put forward this concept as a benchmark for guiding Australia's economic future in 2011. To maintain sustainable wellbeing, the Secretary emphasised the need to balance environmental and social capital, in addition to traditional notions of physical, financial and human capital. He noted that 'Running down the stock of capital in aggregate diminishes the opportunities for future generations.'[14]

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[9] See, for example, Independent Commission Against Corruption (ICAC), *Anti-corruption safeguards in the NSW Planning system* (February 2012); EDO NSW, *The State of Planning in NSW* (December 2010).

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

[11] 'To reduce unnecessary costs for business and contribute to increased productivity and economic growth.'

[12] These outcomes (p 4) are broken down into 'more efficient regulation' and 'more process certainty'.

[13] See for example, Australian Bureau of Statistics, 'Completing the Picture – Environmental Accounting in Practice', media release, 10 May 2012, which estimated that Australia's environment assets are worth $4,574 billion; see further Australian Government *Response to the Independent Review of the EPBC Act* (August 2011), Preface, p 3, which notes the UNEP estimate that ecosystems deliver essential services worth between US$21 trillion and US$72 trillion a year worldwide.

[14] Dr Martin Parkinson, '*Sustainable Wellbeing- An Economic Future for Australia*', Address for the Shann Memorial Lecture Series (August 2011).

Environmental outcomes must be translated, implemented, clear and measurable

While the Statement's proposed environmental outcomes are generally sound (pp 5-8), they are broad and aspirational. The proposed outcomes will be meaningless if they are not translated into carefully considered comprehensive legislative amendments in each state and territory. For example, the overarching reference to ensuring 'Australia's high environmental standards are maintained' (and the following four points) imply a level of equivalent protection to the EPBC Act that has not been carried over to the standards themselves.

Outcomes and standards must be clear and measurable. It would be difficult, for example, to measure whether 'authorised actions' have any 'unacceptable or unsustainable impacts' (overarching outcomes, p 5) without further definition and clarification of what is unacceptable, or unsustainable.

System outcomes must relate to environmental protections and be measurable

According to the Statement of Outcomes, the overarching outcome for assessment and approvals systems and assurance is (p 8):

> *The community has confidence that systems will deliver certainty, efficiency, transparency, appropriate opportunities for public engagement and legally robust decisions.*

This outcome is not linked to the achievement of the EPBC Act's objects, which relate to conservation and environmental protection,[15] and is almost immeasurable. It is unclear how community confidence can be measured, and who may encompass the 'community',[16] as different parts of the community may give different answers.

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[15] Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 3.

[16] The document on p 2 separates expectations of proponents, industry, conservation groups and public.

2. Draft Framework of Standards to accredit approval processes

In relation to the Draft Standards Framework we make comments regarding:

- The need for a comprehensive list of legal requirements for environmental outcomes and assessment processes
- Standards must be equivalent and in force
- Standards versus considerations
- Risk based thresholds and major projects
- Potential for State conflicts of interest
- Compliance, enforcement and resourcing
- Review and audit standards
- Progressive accreditation
- Evolution of law and policy – process safeguards
- Public exhibition standards

The need for a comprehensive list of legal requirements for environmental outcomes and assessment processes

As stated, EDOs across Australia do not support the delegation of Commonwealth approval powers to States. That said, we submit that the Standards Framework provides a good starting point for a discussion around what best practice standards should include – for all jurisdictions. It is in this context that we comment on the draft Standards Framework. This submission should not be read as supportive of the entering of approval bilateral agreements by the Commonwealth with the States. This is a clear and unequivocal position of ANEDO.

We note the inclusion of a relatively comprehensive list of accreditation requirements for bilateral agreements, as set out in the EPBC Act, including the linkage to important international obligations. While State/Territory government views on these requirements are not available for scrutiny, we note that the Commonwealth cannot and should not resile from these standards. They represent the minimum legal requirements for bilateral agreements (Part 5), which may be open to challenge if standards are not met.[17]

The length and detail of the requirements highlights:

- the significance of the functions which the Australian Government proposes to delegate (and that these go significantly beyond ‘assessment’ bilaterals);
- the amount of work States and Territories would need to do to improve their environmental assessment and approval laws – by way of amendments, implementation and resourcing – if they wish to be in the position to adequately fill the Commonwealth’s shoes under the EPBC Act (which we do not support);
- the unrealistic timeframe set by COAG, to sign agreements by March 2013.

We note also the inclusion of *process* and *assurance* standards in the draft Framework, and deem these mandatory elements of legislative frameworks in *all* jurisdictions. In our experience, good processes yield better environmental outcomes, greater public trust, and wider acceptance of decision-making. We discuss the drafting of these standards further under the next two headings.

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[17] See COAG, draft Statement of Outcomes, p 8.

Standards must require 'equivalence' and be given effect in State/Territory law

ANEDO notes the Minister's intention that the Standards Framework 'is about lifting States up to the level of environmental protection provided by the Commonwealth, not letting Commonwealth standards drop.'[18] We agree that State based environmental protection needs to be improved. However we do not agree that this would be the outcome of an approvals accreditation based on the proposed standards, especially if there is no requirement for all of the standards to be included in legislation. Rather than lifting standards of environmental protection generally, it is likely that States will simply put forward for endorsement mechanisms tailored to cover "significant impacts" on "matters of national environmental significance" while maintaining their current unsatisfactory approach to the large range of matters that are already their responsibility.

The proposed accreditation standards can (and if approval bilateral agreements proceed, must) be improved by being expressed more definitively. That is, individual standards must require safeguards that are 'at least equivalent' to EPBC Act requirements, that provide 'equivalent or improved protection' compared with Commonwealth law, or that are 'equally rigorous' in protecting matters of national environmental significance. This language should replace terms like 'adequate' and 'appropriate', which are subjective and ambiguous (see examples below).

The terminology of *equivalence* is flexible enough to apply across different jurisdictions, while providing a more objective benchmark for environmental protection and legal certainty. Importantly, the standards should require equivalence of specific safeguards, and should not allow accreditation of a system that is 'on average' equivalent.
We submit that if any accreditation is made, public trust in the protection of national environment and heritage assets will be damaged. This damage could be moderated in part if environmental and assurance safeguards are built in to State and Territory legislation as mandatory pre-conditions of any accreditation process. It is paramount that no accreditation occurs until all legal provisions are operational. We are very concerned by the clear intention in the Draft Framework that a 'flexible approach' should be adopted with regard to accreditation, and that '[e]ach jurisdiction may propose for accreditation a set of arrangements that combine legislative provisions with plans, policies and programs.[19]

We believe that the public will find it totally unacceptable if mechanisms to maintain or improve environmental outcomes and system integrity are left to policies, procedures or other instruments that may be unenforceable, discretionary or less accountable than protections in law. Caution must also be exercised in accrediting processes that may be 'in force under law'[20] but are not adequately set out in the law itself.[21] The EPBC Act

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[18] The Hon Tony Burke, media release, 'Environmental standards a priority for the federal government', 2/11/2012.

[19] See draft Standards Framework, paras 20-22

[20] See draft Standards Framework, p 8; and standards in paras 59 (identifying MNES), 71 (risk-based assessment), 75 (environmental assessment) and 95 (transparency).

[21] For example, in NSW, 'reviews of environmental factors' (REFs) are conducted to fulfil EIA processes for Part 5 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). However, REFs are not referred to in the law itself, and have been criticised for their lack of independence, rigour, transparency, accuracy and departmental oversight. See *Report of the NSW Legislative Council Inquiry into Coal Seam Gas* (May 2012), pp 87-91; and EDO NSW, *Ticking the Box: Flaws in the environmental assessment of Coal Seam Gas exploration activities* (November 2011).

appears to limit processes 'under law' to *management arrangements*; whereas *authorisation processes* must be 'in law'.[22]

Standards versus Considerations: important matters must not be discretionary

ANEDO welcomes the inclusion of system and assurance standards in the Draft Framework. However, we are concerned with the number of requirements contained in 'considerations' rather than standards, and reiterate our view that the proposed discretionary accreditation will result in a reduction to protection of national environmental assets.

At present, the distinction between 'standards' and 'considerations' in the draft Framework is unclear. The preface explains that *standards* are essential requirements, while *considerations* providing extra guidance.[23] However, many of the system and assurance safeguards are only given full rigour under *considerations*; while the corresponding standards use more subjective language, such as 'adequate' or 'appropriate'.[24] Furthermore, despite the preface's explanation, some proposed 'considerations' are fundamental requirements with legislative backing.

Examples include:

- that decision makers have regard to ESD principles[25]
- independent statutory decisions based on statutory criteria[26]
- public consultation (such as access to information, sufficient timeframes and incorporation of public comments into assessment and decision making)[27]
- review by courts and extended standing 'at least equivalent' to the EPBC Act[28]
- 'a robust range of enforcement and compliance options' (audits, penalties etc).[29]

Including such important safeguards as discretionary 'considerations' creates significant uncertainty around the scope and rigour of the minimum standards, and the negotiation of bilateral agreements. It also does not sit comfortably with the Minister's statements

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[22] *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), ss 46(2)(a) and 46(2A)(a).

[23] Draft Standards Framework, p 4. In brief, *standards* reflect 'specific accreditation requirements', and law and policy that is 'essential' to maintain high environmental standards. *Considerations* give 'additional guidance' on areas that the federal Minister will 'take into account' in determining if standards have been met.

[24] For example, '*appropriate* opportunities for public engagement' (Draft Standards Framework, p 22); 'There has been or will be *adequate* assessment of the impacts on [MNES]' (para 95); 'There is *adequate* opportunity for public consultation throughout the assessment and approval process' (para 100); 'States and Territories maintain an *appropriate* system to ensure compliance by proponents with conditions of approval [relating to MNES]' (para 118). Italics added.

[25] See Draft Standards Framework, para 91 (which references ss 3A and 136, EPBC Act; and the Intergovernmental Agreement on the Environment 1992).

[26] See Draft Standards Framework, 'Transparent processes and decisions – Considerations for accreditation', para 101 (references s 134, EPBC Act).

[27] See Draft Standards Framework, para 102 (references Part 16, EPBC regulations).

[28] See Draft Standards Framework, 'Transparent processes and decisions', para 110 (references the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 487, EPBC Act).

[29] '*States and Territories have a robust range of enforcement and compliance options, injunctive and investigatory powers, capacity for audits, appropriate remediation orders and appropriate civil and criminal penalties…'* See Draft Standards Framework, para 129.

that the standards 'are as stringent as any applied under existing law',[30] if there is no guarantee that legal requirements will be *at least equivalent* under bilateral agreements.

If accreditation goes ahead, at a minimum, a number of these more precise requirements must be moved from 'considerations' to the standards. Additionally, if the standards make clear that State laws must have *equivalent* protections, the Framework should clarify what 'considerations' will determine whether equivalence has been achieved. This clarification is needed to better align with the Minister's intention to 'lift up' the States to meet federal standards, and promote greater assurance that the EPBC Act's 'high environmental standards' will be maintained.

The proposed 'discretionary' role of considerations, coupled with the clear intention in the Draft Framework that a 'flexible approach' be adopted with regard to accreditation,[31] reinforces ANEDO's view that the accreditation process will not achieve the stated aims of maintaining high environmental standards.

Contradiction between 'risk-based' threshold for environmental assessment and major projects fast-tracking; cumulative impacts must be fully assessed

We make two comments on the framework's references to risk-based regulation.[32] First, we submit that a risk-based approach to environmental impact assessment would *focus* assessment effort on major projects, not limit or override scrutiny. This is because:

- major projects tend to be the most significant in their scale and nature, complexity, breadth and duration of impacts, and level of public concern;[33] and
- projects with the greatest impacts deserve the greatest scrutiny and safeguards.[34]

In that sense, two pillars of the COAG reforms – 'lifting up' State assessment and approval processes for accreditation, and 'streamlining' State/Territory major project assessment and approvals – are internally contradictory. If State processes seek to uphold federal EPBC Act requirements, they will need to increase environmental and assurance standards. If States seek to fast-track major projects (by reducing scrutiny or public participation), they will need to *lower* those standards, as with former Part 3A in NSW and other fast-tracking legislation across Australia[35]. This fundamental contradiction supports ANEDOs view that transfer of Commonwealth approval powers to the States is misconceived.

Furthermore, according to the draft Framework, accredited State and Territory assessment and approval processes will only cover actions that meet the threshold of 'significant impact' on a matters of national environmental significance (para 9). This is problematic as it does not deal adequately with the importance of cumulative impact assessment.[36] As noted, the Hawke Review identified a number of areas where the

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[30] The Hon Tony Burke, media release, 'Environmental standards a priority for the federal government', 2 November 2012.
[31] See draft Standards Framework, paras 20-22
[32] See Draft Standards Framework, paras 9 and 71-74.
[33] See, for example, EPBC Act s 87(4A) and factors to be considered in EPBC Regulations 2000, cl 5.03A.
[34] See Draft Standards Framework, para 73, 'Assessment approaches… reflect the level of risk of the proposed action to [MNES] and the amount of information available…'. In the same way, 'designated development' in NSW requires more in-depth assessment than ordinary development (EP&A Act, Part 4).
[35] Another example is the Victorian *Major Transport Projects Facilitation Act 2009*.
[36] So far the draft standards only explicitly recognise cumulative impacts as part of 'all relevant impacts' under 'Adequate environmental assessment and approvals based on good policy' (para 81). There are also

EPBC Act should be strengthened – including in relation to addressing cumulative impacts.[37] This deficiency was recognised in the Government Response to the Review.[38] The Commonwealth standard for assessing cumulative impacts should be strengthened, instead of delegating an inadequate standard to states that will not arrest the decline in nationally significant biodiversity.

Australia's environmental and planning laws are known to be poor at addressing cumulative impacts, 'particularly in the fields of biodiversity, water and climate change regulation.'[39] Yet as areas of Australia are earmarked for development, there is a greater likelihood that individual projects will combine with other past, present and likely future developments to have significant impacts. This is a further reason why we say the proposed accreditation is untenable. The Commonwealth must not proceed with accreditation, unless state planning and assessment laws are comprehensively amended to deal effectively with cumulative impacts, and States are required to make an 'undertaking' that all cumulative impacts will be assessed and taken into account in State decisions.[40]

States assessing MNES creates conflict of interest

A recent ANEDO publication discussed the inherent conflict of interest that can arise when a state government conducts and environmental impact assessment for the purposes of assessing impacts on a (or several) matters of national environmental significance, particularly when it is a State backed major project.[41] This is a primary reason for ANEDOs overall objection to the proposed accreditation.

As it stands, the Draft Framework does not take sufficient measures to safeguard against this and is unclear as to what powers the federal Environment Minister intends to retain to oversee the States' administration of the EPBC Act. The potential scope of bilateral approval agreements in a range of circumstances remains unclear.

If the accreditation path is pursued, ANEDO submits there are at least two essential pre-conditions:

- there must be a reserve a power for the federal Environment Minister to 'call-in' specific projects for approval, audit or enforcement action (as outlined below); and
- bilateral agreements must not apply to projects where the relevant State/Territory is either the proponent (such as a State energy authority or State-owned corporation), a significant beneficiary (such as a royalty recipient), or has a demonstrated political interest in the project proceeding. In this respect, the Framework should include enhanced mandatory probity standards.

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references in the appendices, in relation to management principles for Ramsar wetlands, national and world heritage.

[37] For example, see 3.3, 3.5, 3.6, 7.31, 7.60.

[38] For example, in response to recommendations 6 and 8.

[39] The Hon Brian Preston, Chief Judge of the NSW Land and Environment Court, 'Internalising Ecocentrism in Environmental Law', pp 6-7, speech to 2011 Wild Law Conference, Griffith University, Queensland.

[40] See for comparison the undertaking in the standards for 'Adequate environmental assessment', para 77.

41 ANEDO, 'COAG environmental reform agenda: ANEDO response – in defence of environmental laws' (May 2012), available here: http://www.edo.org.au/policy/policy.html

Reserve call-in powers

A significant concern about approval bilaterals is that the Commonwealth will 'vacate the field' of enforcing compliance for individual projects approved by an accredited State or Territory (as well as delegating the approval itself). In the event of significant breaches or risks to matters of national environmental significance from an approved development[42] – particularly where a proponent's breach puts at risk Australia's international environmental protection obligations – it is essential that the Commonwealth retain broad powers to intervene.

Accordingly, in addition to powers to suspend or revoke agreements, it is essential that the Commonwealth retain a call-in power for individual projects (amending the EPBC Act if necessary). This should allow the Minister to:

- approve a project (such as for high-risk projects, or where the State/Territory process has not been followed, or is unlikely to comply with required standards);
- take enforcement action against a proponent where State/Territory monitoring or enforcement is inadequate; and
- conduct compliance and environmental performance audits (under new powers).[43]

Exclude bilaterals for State projects and other potential conflicts of interest

The draft Standards Framework is silent on the potential for States to approve projects where a State authority or corporation is the proponent (such as for infrastructure, forestry, energy or land release projects). Unless these projects are explicitly exempted, a State government could:

- propose a project that may have significant impacts on matters of national environmental significance;
- proceed to assess, make conditions for, and approve the development itself; and
- be responsible for monitoring and enforcing compliance.

As stated, this would create serious conflicts of interest, increase corruption risks or perceptions, and delegitimise approval bilaterals generally.

Similarly, conflicts of interest may exist where States receive significant financial benefits from developments, such as mining royalties. Conflicts of interest may also exist where State governments perceived that they have a political mandate to deliver certain projects. These projects are currently approved by the Commonwealth at arms-length for the purposes of the EPBC Act. State Ministers are ordinarily responsible for serving the State's own interests, which can (and have in the past) conflict with national environmental protection priorities. As ANEDO has previously noted, in both the situations above, 'the State has a clear conflict of interest that reasonably casts doubt on

[42] It is not clear how the Australian Government could otherwise force a State to take enforcement action, other than threatening to suspend or revoke an entire agreement. This is an unwieldy option in the circumstances, and may also put at risk compliant projects. It is therefore less likely to be used than a specific reserve power that allows Commonwealth intervention in individual projects where necessary.

[43] See *Government Response to the Independent Review of the EPBC Act* (August 2011), response to recommendation 61 ('Agreed'): *'The Australian Government agrees with Recommendation 61, and will amend the EPBC Act to incorporate provisions that enable the auditing of both compliance with legislation (compliance auditing) and environmental outcomes (performance audits).'*

its ability to objectively and credibly pass judgment on proposed development.'[44]This built in conflict of interest is one reason why ANEDO believes the delegation of Commonwealth assessment and approval responsibilities to states and territories is untenable, regardless of the standards they are required to meet.

Compliance, enforcement tools and resourcing

Generally speaking, state and territory Governments have a poor track record of enforcing compliance with their own state-based environment and planning laws.[45] This forms a further source of concern for ANEDOs regarding the proposed accreditation. If proceeded with, the Standards Framework and bilateral agreements must:

- require *at least equivalent* legal enforcement powers and tools, under accredited State and Territory processes, to those available under the EPBC Act and associated laws (such as *Administrative Decisions (Judicial Review) Act 1977*);
- secure an undertaking that the States will increase their investigation, audits, enforcement action and proactive compliance activities to the extent that the Commonwealth withdraws from these activities.

Equivalent enforcement tools

The draft standard for State/Territory 'compliance roles' is very general and does not require equivalent enforcement powers and tools. Instead, it requires that 'States and Territories maintain an appropriate system to ensure compliance…' (para 118), with further detail left to the 'considerations' (paras 128-129). The availability of equivalent enforcement tools is an important prerequisite for community assurance. The accreditation standards must reflect this definitively. Best practice standards should include a diverse range of innovative compliance and enforcement tools.

As noted above, the fact that approval bilaterals may 'switch off' the Australian Government's ability to require compliance, pursue breaches and enforce conditions for individual projects – as early as March 2013 – is one of the most significant consequences of the COAG reforms.[46] This is all the more significant because, in response to the independent review of the EPBC Act, the Australian Government agreed to improve the range and flexibility of enforcement tools under the Act.[47] The COAG reforms will potentially largely neutralise this recommendation (unless a call-in power is retained), removing one of the few highlights for environmental protection and access to justice in the Government's review response.

Equivalent resourcing for compliance and enforcement

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[44] See ANEDO, *In defence of environmental laws* (May 2012), pp 6-7. Examples to date include the Traveston Crossing Dam proposal on the Mary River, Queensland; the Shoalwater Bay rail line and coal terminal proposal in Queensland, 2008; Victoria's consideration of the Scoresby Freeway project that was proposed near Melbourne in 2003.

[45] See, for example EDO (Victoria)'s report series 'Monitoring Victoria's Environmental Laws' which examines the extent and effectiveness of the Victorian government's implementation and enforcement of key environmental laws, at http://www.edovic.org.au/law-reform/major-reports/framework-for-action.

[46] It is understood that the Commonwealth's role will be scaled back to higher level oversight of agreements and 'system' compliance.

[47] Recommendations 54, 55, 56 ('Agreed'). Cf recommendations 48, 49, 50, 51, 52 and 53 ('Not agreed').

Enforcement tools must be backed by clear government commitments to audit compliance, investigate breaches and enforce the law, or there will be little incentive to comply.[48]

In the last three years, the federal Environment Department investigated 980 incidents across Australia under the EPBC Act. The Department also undertook over 40 court actions resulting in fines and enforceable undertakings totalling almost $4 million.[49] If the Commonwealth vacates the field, the community currently has no guarantee that States/Territories will fill the breach.[50] Indeed, given their record of lack of enforcement action, there are considerable concerns regarding this.

Review and audit of bilateral agreements must be independent and transparent

ANEDO does not support the entering of approval bilateral agreements and thus does not wish to comment in detail on the proposed review and audit of these contained in the assurance standards in the Draft Framework, only to say that:

- If the accreditation proceeds, the assurance standards must *require an independent audit* of the operation of approval bilaterals one or two years after they commence.[51] This audit could be undertaken by the Australian National Audit Office, in consultation with the audit office or Ombudsman for the relevant State or Territory. Audit reports must be conducted in a timely manner and be published, and regular review procedures should require public consultation. Public confidence in this process will be affected by the precedent set by the process for review of RFAs under the EPBC Act, which are regularly delayed and of limited scope.[52]

- We note that, as examples of past practice, the draft Standards Framework refers to existing clauses in assessment bilaterals (including review by the parties, audits and considerations for 'information exchange'.[53]) If the Australian Government proceed with approval bilaterals, which represent a significant step

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[48] Studies have demonstrated that the certainty of being apprehended is more significant than the penalty itself. See generally EDO NSW, *Court Imposed Fines and their Enforcement: Submission to the NSW Sentencing Council*, 8 June 2006, at www.edo.org.au/edonsw/site/pdf/subs/060531finessub.pdf; see also The Hon Brian Preston, 'Principled Sentencing for Environmental Offences' (paper presented to Environmental Defender's Office Annual Conference, 26 May 2006, at www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_26May06_Preston.pdf/$file/Speech_26May06_Preston.pdf>.

[49] Department of SEWPaC/DEWHA, figures compiled from annual reports, 2009-10, 2010-11, 2011-12.

[50] While this is difficult to guarantee, for reference we note that a deliverable in the 2009-10 federal Environment Department budget was that the Department investigate 100% of reported EPBC compliance incidents in accordance with its published compliance and enforcement policy (and this target was achieved). See DEWHA annual report, 2009-10, p 68.

[51] This must be more definitive than the Draft Framework, para 121, which as a *consideration* suggests: 'For example, agreements could be jointly reviewed [by the parties] 12 months after commencement' and 'Agreements could also be reviewed 3 years after commencement, involving possible third party review.'

[52] It is understood that the government responses to the 10-year reviews of Victorian and NSW RFAs completed in 2010 have still not been released.

[53] Draft Standards Framework, paras 113 and 123 (pp 24-25).

beyond assessment bilaterals,[54]additional safeguards must be applied to help the community have confidence in the process.

Progressive accreditation should not occur

The reference to 'progressive accreditation' in the Draft Framework seems to indicate a willingness of the Commonwealth to enter approval bilateral agreements with the States and Territories in March 2013 (in accordance with the COAG timelines), on the understanding that the States and Territories will then 'progressively' change their laws, policies and plans to eventually bring them in line with the standards. If this is the intention of the Commonwealth, then this approach is vigorously opposed by ANEDO.

If accreditation is proceeded with, the Government must ensure that a comprehensive suite of standards is in place and legally enforceable in the relevant jurisdiction – regardless of whether a whole Act or only part of an Act is proposed for accreditation - *prior* to approval bilaterals being entered by the Commonwealth with any given State and Territory.

ANEDOs concerns stem from the precedent set by the use of Regional Forestry Agreements (RFAs) in Australia.[55] It is envisioned by the Commonwealth that it can retract an accreditation of approvals under the EPBC Act in certain instances if they are unhappy with how a given State or Territory is using those approval powers. However history has shown with regard to RFAs that once entered, these sorts of agreements are very difficult (and the Commonwealth has proven itself unwilling) to unravel. This is true even when a State has blatantly failed to comply with an RFA. The best example of this is the manifest failure of the Tasmanian Government to meet its obligations under RFAs over the years, and the absolute unwillingness of the Commonwealth to address this.[56]

ANEDO's concern with progressive accreditation is also informed by our State based-EDO office's experiences with the accreditation of State assessment processes that have been occurring for several years. This is illustrated well by a NSW example, where the NSW Government proposal that the Australian Government accredit the biocertification process for the Sydney Growth Centres. The initial proposal fell well short of meeting federal standards,[57] and the federal Environment Department was instrumental in ensuring necessary improvements. While this improved the biodiversity offsetting requirements, the enabling legislation that passed the NSW Parliament included a clause preventing any third party review of the process. So while potential environmental outcome standards may have been improved through federal intervention, the broader process standards in the relevant State legislation – relating to transparency, accountability and review – were clearly inadequate.

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[54] For example, approval bilaterals would remove an existing plank of arms-length final decision-making; and 'switch off' the federal Minister's powers of project approval and specific compliance and enforcement roles (on the assumption of equal rigour) in a manner so far unforeseen.

[55] RFAs are an example of a state instrument 'accredited'. If an 'approved' RFA is in place with regard to a certain forest, logging activities in that forest are exempt from the approval requirement of the EPBC Act.

[56] In fact in once infamous instance, the Commonwealth resolved the situation of the Tasmanian governments non-compliance with an RFA but simply changing the terms of the agreement to avoid litigation, see Brown v Forestry Tasmania [2008] HCATrans 202 http://www.austlii.edu.au/au/other/HCATrans/2008/202.html

[57] See, for example, draft Statement of Outcomes, p 15, 'Listed threatened species and communities…', which notes 'The agreement will promote the survival and/or enhance the conservation status of each species or community to which the provision relates'. See further EPBC Act, sections 18-18A and 53(1)(b).

Further, an extremely poor precedent was set by the Commonwealth accreditation of assessment processes under part 3A of the NSW *Environmental Planning & Assessment Act 1979*, in the assessment bilateral agreement between the Commonwealth and NSW. Part 3A was subsequently found to be a corruption risk by ICAC due to the lack of process standards and has subsequently been repealed.

Finally, there are a range of foreseeable practical problems with piecemeal accreditation. The accreditation of certain Acts in certain jurisdictions (or certain parts of Acts in certain jurisdictions) will be confusing to both development proponents and the community. It will be very difficult for stakeholders to establish the 'accreditation' status of each state-based approval that is required, and will make the suite of environmental regulation in any given jurisdiction more difficult to navigate, rather than easier.

It is also true than for many projects, approvals are required under multiple State or Territory Acts. So even if one or two of the state level approvals required have accreditation for EPBC Act purposes, others may not. This may require the development proponent to seek approval from the Commonwealth for the project under the EPBC Act regardless, and there will be little if no efficiency saving.

Evolution of law and policy requires robust safeguards and information sharing

ANEDO notes the proposal to regularly update standards, policies and approaches in response to new scientific information, knowledge and experience, as well as international leading-practice environmental management. Unfortunately, again, we are concerned that this is an optimistic approach by the Commonwealth and that in practice this will not occur as envisioned. For example, recent experience with mining approvals in NSW[58] suggests that planning departments will often revert to regressive standard conditions of consent, rather than adopt leading practices that develop over time through expert panel or specialist environment court decisions.

A commitment to facilitating law and policy evolution reinforces the need for a number of protections advocated strongly in this submission, if the proposed accreditations proceed. These include transparency of information (including advice from expert panels); best practice public participation rights; decisions based on objective criteria; broad rights for appeal and review by the Courts; robust compliance and enforcement; independent audits and regular review.

Finally, any agreements should facilitate the better integration of environmental outcomes and information. This should include data from state and federal *State of the Environment* reporting, the National Plan for Environmental Information, the new National Sustainability Council, and from state government agencies and local councils.[59]

Public exhibition of draft bilateral agreements should exceed minimum periods

The federal Environment Minister is required to invite public comments on a draft bilateral agreement 'within a specified period of *at least* 28 days…'.[60] If approval bilateral

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[58] Such as Boggabri Coal Project, Maules Creek, Ironstone near Gloucester, and Majors Creek mines.
[59] See Australian Government websites, www.environment.gov.au/soe/index.html; www.environment.gov.au/npei/index.html; www.environment.gov.au/sustainability/measuring/index.html. See further EDO NSW, NCC and TEC joint Submission to NSW Planning Review Issues Paper (March 2012), Part F, at: edo.org.au/edonsw/site/pdf/subs/120314ncc_edo_tec_joint_sub_planning_system_review_issues.pdf.
[60] EPBC Act, s 49A(a), emphasis added.

agreements process, ANEDO submits that the Minister should provide more than the minimum consultation period for scrutiny of the draft agreements, particularly those agreements that are the most detailed, or require consideration of considerable additional content (such as scrutiny of lengthy environmental and planning provisions in State/Territory legislation).

A longer consultation period would encourage scrutiny and understanding of these significant changes. This would be an appropriate requirement given the limited transparency and engagement on the reforms to date, and the potential for several draft agreements to be on exhibition at once, which may not have been envisaged in the 28-day minimum. As with many issues noted in the Draft Framework, the recommendations of the Hawke Review provide a best practice standard that should be applied. For example, in relation to public consultation on draft agreements, Hawke recommends 60 days.

Conclusion

The direct involvement of EDOs across Australia in environmental law over many years has shown us that strong Commonwealth involvement is critical to effective environmental protection. ANEDO believes that the proposed delegation of Commonwealth approval responsibilities under the EPBC Act to States and Territories as decreed by COAG represents a winding back of 30 years of important gains in environmental regulation. We submit that history shows (through the experience with assessment bilaterals and RFAs) that overall environmental standards in Australia will not be improved as a result of the proposed accreditation. We also believe that States are fundamentally not in the position to stand in the shoes of the Commonwealth and assess impacts on matters of national environmental significance in the public interest. This is the reality even with the most carefully worded standards, especially if the proposals for accreditation standards and bilateral agreements are progressed according to the current COAG agenda and timeframes.

Attachment A: Best practice standards for planning and environmental regulation

Following COAG announcements in April 2012 to streamline environmental assessment and approvals at the federal and state levels, ANEDO released a briefing paper on *Best practice standards for environmental regulation* (June 2012).[61] Below is an excerpt of this paper.

For the purposes of this paper, "best practice standards" is taken to mean those elements/provisions that must be clearly articulated in legislation (both state and federal) to enshrine best practice environmental planning and assessment processes.

This section sets out 10 high-level elements that should form the basis for effective environmental and planning laws, state and federal:

1. **Clear objects that prioritise ecologically sustainable development (ESD)**
2. **Objective test for good environmental outcomes**
3. **Independent assessment**
4. **Comprehensive assessment based on best information available**
5. **Projects must minimise environmental impacts (impact hierarchy)**
6. **Best practice standards for strategic environmental assessment processes**
7. **Oversight and review**
8. **Public participation**
9. **Compliance and enforcement**
10. **Monitoring and review**

These principles aim to ensure that our natural capital is sustained for the benefit and appreciation of present and future Australians. In giving effect to these elements, governments and communities will also protect the social and economic benefits of a healthy environment, which all of us rely upon.

1. Clear objects that prioritise ecologically sustainable development (ESD)

Environment protection and planning legislation must set out clear objectives, which prioritise ecologically sustainable development (ESD) as the overarching aim.[62] These objectives must then be consistently and rigorously applied to all decisions and actions to implement the legislation.

2. Objective test for good environmental outcomes

All projects must be assessed against an objective and consistent test, such as whether the project will 'maintain or improve environmental outcomes'.[63] Robust, science-based

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[61] Australian Network of Environmental Defenders Offices, *Background Briefing Paper: Environmental Standards & Their Implementation In Law* (June 2012), at http://www.edo.org.au/policy/policy.html.

[62] See for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), sections 3 and 3A; see also *Protection of the Environment Administration Act 1991* (NSW), s 6. The aim of ESD is to achieve a level of development that meets the needs of the present without compromising the ability of future generations to meet their own needs. See World Commission on Environment and Development, *Our Common Future* (1987), at 43. Principles of ESD include: the precautionary principle; intergenerational and intra-generational equity; conservation of biological diversity and ecological integrity as a fundamental consideration; improved environmental valuation, pricing and incentive mechanisms (for example, internalising environmental costs and adopting the 'polluter pays' principle).

[63] For example, the Hawke review recommended a robust, scientific 'improve or maintain' test (with

methodologies and assessment tools should be developed to objectively and consistently apply the test to development proposals. Such a test will help ensure Australia develops in an ecologically sustainable way.

3. Independent assessment

Environmental assessment must be done by independent accredited experts, rather than by someone appointed and paid by the proponent. To increase transparency and remove any perceptions of bias, the experts should be assigned to a project by an independent body.

4. Comprehensive assessment based on best information available

Projects with the largest potential impacts should attract the greatest scrutiny. In addition to assessing the direct environmental impacts of a proposal, environmental assessment must be expanded to include:

- assessment of cumulative impacts of multiple projects
- assessment of climate change impacts (including mitigation and adaptation requirements), and
- assessment of the potential impacts of feasible alternatives.

Independent assessors and decision-makers must be provided with the best information available. Best practice assessment must therefore by underpinned by comprehensive baseline data and current environmental accounts, with resource and time allowances to address data gaps.

5. Projects must minimise environmental impacts (impact hierarchy)

Development proposals must demonstrate that they comply with an ‘impact hierarchy’:

- first that environmental impacts have been avoided wherever practicable
- second, that unavoidable impacts been mitigated to the extent practicable, and
- third, if necessary, how offsetting may be used to offset eligible impacts.

Any proposed biodiversity offsetting must comply with clear legal requirements including:

- avoidance of ‘red-flag’ environmental values that cannot be offset
- equivalency of values that may be offset (‘like for like’), and
- ensuring that any offsets are protected in perpetuity (including from future development).

Offsetting schemes that do not meet these criteria must not be accredited.

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regard to environment and heritage) be adopted when approving a class of action under an endorsed policy, plan or practice. 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. Similarly, a standard of “net environmental benefit” has been put forward in Western Australia and Victoria in the context of biodiversity offsetting. See eg, EPA Victoria, *Discussion Paper: Environmental Offsets* (2008), http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/$FILE/1202.3.pdf

6. Best practice standards for strategic environmental assessment processes

Strategic assessment of larger areas and multiple projects must be undertaken according to rigorous, objective and transparent legislative requirements[…]. Strategic assessment must:

- be based on comprehensive and accurate mapping and data
- be undertaken at the earliest possible stage
- assess alternative scenarios and cumulative impacts
- involve ground-truthing of impact assessment
- involve extensive public consultation, and
- complement, but not replace, site-level impact assessment.

Any Commonwealth accreditation framework must ensure that the relevant strategic assessment meets strict, best practice criteria in terms of process, outcome and ongoing implementation. Accreditation can only occur when all criteria are met and it is demonstrated that the assessment will ensure ongoing maintenance or improvement of environmental values.

7. Oversight and review

Consistent with Australia's international obligations, and in order to accommodate new and emerging information, the Australian Government must retain a review or 'call-in' power over state-based projects, including those done under a strategic assessment or bilateral agreement. An expert 'Environment Commission' should be established to undertake an independent review role[…].

8. Public participation

Environmental assessment and planning laws must clearly prescribe mandatory public participation at each stage – in relation to strategic planning, strategic assessment and individual development assessment. All information relating to environmental assessment and decision-making must be publicly available. Sufficient timeframes must be set out in legislation to allow active, iterative, and considered participation from local communities. Involving the community should go beyond traditional 'inform and consult' models, and encourage best practice engagement that delivers more widely acceptable outcomes. Specific requirements must be made for consultation with Indigenous Australians wherever a proposal or assessment involves cultural heritage.

9. Compliance and enforcement

A range of regulatory tools and penalties should be available to address breaches of legislation. To ensure transparency and accountability, all legislation should include 'open standing' to bring proceedings for breaches. Statistics on compliance and enforcement should be published regularly, in a consistent and comparable form.

10. Monitoring and review

The efficacy of all environmental assessment and planning laws must be periodically and independently reviewed – to assess whether the relevant processes, implementation and decision-making are improving or maintaining environmental values, and whether the legislation is achieving ecologically sustainable development. There must also be specific legislative requirements for regular review of any accredited plan or policy.