Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

House of Representatives inquiry into streamlining environmental regulation, 'green tape' and 'one stop shops' for environmental assessments and approvals

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

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

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Executive Summary

The House Environment Committee has been asked to *inquire into and report on the impact of 'green tape' and issues related to environmental regulation and deregulation.* It is disappointing that the focus of this inquiry appears to be 'the potential for deregulation' – that is, the rollback of environmental legislation as a priority. This is despite a recent Senate Committee finding that federal-state duplication is minimal and that environmental standards would be put at risk if federal approval powers were delegated to the states.

ANEDO strongly opposes moves to reduce environmental regulation merely to ease perceived pressure on business and fast-track major development. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest. It is striking that the two regulatory sectors that the community perceives as being 'too lax' in a 2012 NSW government survey – property development and mining – are the same sectors that Council of Australian Governments (COAG) 's Business Advisory forum is seeking to 'streamline.'

Two pillars of the 'green tape' agenda – delegating approval powers to the states, and 'streamlining' State and Territory major project assessments – are internally contradictory. If State processes seek to uphold the requirements of the main federal environmental law, the *Environmental Protection and Biodiversity Conservation Act* (EPBC Act), they will need to *increase* environmental standards. On the other hand, if States seek to further fast-track major projects (by reducing assessment processes, public participation or judicial scrutiny), this will *lower* environmental standards.

ANEDO also makes the important point that the current Commonwealth role in environmental regulation does not 'duplicate' State roles. Rather, the EPBC Act specifically regulates impacts on nine Matters of National Environmental Significance which are *not* given special consideration in state assessment or approval processes, as the EPBC Act requires.

Hasty bilateral agreements to delegate Commonwealth government powers to State and Territories, as proposed by the Federal government's 'one stop shop' approach, may, in fact, create complexity and fragmentation with a confusing "eight stop shop" of different state and territory systems as Commonwealth requirements are 'bolted on' to the different state legislative structures.

In December 2012, ANEDO was commissioned to undertake an audit of threatened species and planning laws in all Australian jurisdictions. The key finding of this report is that **"***no State or Territory biodiversity or planning laws currently meet the suite of federal environmental standards necessary to effectively and efficiently protect biodiversity."* The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to 'fast-tracking' of environmental impact assessment for major projects. These provisions effectively override threatened species laws in all jurisdictions. Project refusals on the basis of threatened species are extremely rare.

The existing delegations of project assessments to States and Territories have been in place for nine years under the EPBC Act. However, the Commonwealth has never audited their environmental effectiveness, or whether States and Territories are complying. It is unclear exactly how the Commonwealth will ensure that federal environment protection standards will be maintained under the delegation of approval powers to the states under 'one stop shop' model.

A similar risk arises for enforcement where environmental conditions are breached. In the three years to 2012, ANEDO understands that the Commonwealth Environment Department

conducted around 980 EPBC Act investigations, as well as 40 prosecutions resulting in fines and enforceable undertakings totalling almost $4 million. If the Commonwealth vacates the field by signing approval bilateral agreements, the community currently has no guarantee that States and Territories will fill the breach.

The delegation of approval powers from the Commonwealth government to the states also ignores serious conflict of interest issues where the State (or a State-owned corporation) is the development's proponent and also responsible for assessing the development for approval. Such situations reasonably cast doubt on the state's ability to objectively and credibly pass judgment on proposed development. Obvious examples are mining and major infrastructure projects, where states stand to gain large royalty payments if mines are approved.

Instead of looking at the rollback of environmental regulation and the lowering environmental standards, ANEDO would welcome a mature examination of how our environmental laws can best respond to pressing 21st century challenges. These include increasing climate impacts, more intense development pressures on the environment, especially from mining and coal seam gas projects, and the loss of threatened species at an unprecedented rate. In developing a way forward, ANEDO recommends a number of steps to improve the administration and effectiveness of Australia's environmental laws. In summary:

- The Commonwealth Government should reverse its intention to pursue *approval* bilateral agreements, as their use is not necessary, justified or beneficial. The Commonwealth must retain final approval powers for matters of national environmental significance.
- Instead, the Government should improve the efficiency and effectiveness of the EPBC Act, and work with States and Territories to improve their environmental assessment and approval processes and standards.
- Administrative arrangements should include a 'highest environmental denominator' approach to promoting consistent standards across jurisdictions.
- Before pursuing accreditation of state *assessment* systems, the Commonwealth should further consult on a uniform set of national environmental standards that state assessments must comply with to be accredited.
- Any reform process must be predicated on States and Territories having the necessary, comprehensive suite of legislated process and outcomes standards in place and operative before accreditation of assessment systems can occur.

Introduction

Thank you for the opportunity to comment on this inquiry.[1] The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) is a network of independently constituted and managed community legal centres across Australia. Each EDO is dedicated to protecting the environment in the public interest. For the last 30 years, EDOs have provided legal representation and advice; taken an expert role in environmental law reform and policy formulation; and offered a public outreach program to help urban and rural communities understand and participate in environmental impact assessment and decision making. Notwithstanding recent funding cuts,[2] EDOs aim to continue to be a voice for the protection of the environment, and the laws that make this happen. ANEDO has released several briefing notes, submissions and reports responding to calls to cut so-called 'green tape' since 2012.

The resources outlined briefly below and **attached** may assist the Committee in understanding a different perspective on the 'green tape' agenda. In particular, effective environmental protection needs robust environmental laws. ANEDO therefore supports a clear Commonwealth role in the protection of Australia's unique biodiversity and heritage, over and above State and Territory laws. This submission deals with:

- *Terms of reference – increased environmental effectiveness, not deregulation*
- *Communities expect strong national environmental protection and legal safeguards*
- *Contradictions in the 'green tape' playbook*
- *An alternative vision to the 'green tape' and 'one stop shop' agenda*
- *Recommendations for a way forward*
- *Overview and links to attachments and other resources.*

1. Terms of reference – increased environmental effectiveness, not deregulation

The House Environment Committee has been asked to *inquire into and report on the impact of 'green tape' and issues related to environmental regulation and deregulation.*[3] It is disappointing that the focus of this inquiry appears to be 'the potential for deregulation' – that is, the rollback of environmental legislation as a priority. This is despite a recent Senate Committee finding that federal-state duplication is minimal, and further findings that environmental standards would be put at risk if federal approval powers were delegated.[4]

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[1] *The inquiry will have particular regard to:*
• jurisdictional arrangements, regulatory requirements and the potential for deregulation;
• the balance between regulatory burdens and environmental benefits;
• areas for improved efficiency and effectiveness of the regulatory framework; and
• legislation governing environmental regulation, and the potential for deregulation. See:
http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=environment/index.htm, accessed March 2014.

[2] The unanticipated withdrawal of all federal funding from EDO offices, announced by the Attorney-General in December 2013, has placed very significant strain on our offices' capacity to assist the community on public interest environmental law matters and participate in parliamentary inquiries such as this one. To date, many EDOs relied almost exclusively on federal funding to assist communities across Australia. The sudden withdrawal of almost $10 million over four years, as well as annual Community Legal Service Provision funding, raises the real prospect of imminent closure for some offices and staff. As EDOs provide unique services not covered by Legal Aid, this would leave several States and Territories without any independent community legal centres who can advise on planning and environmental issues that affect people's homes, communities and livelihoods.

[3] See further terms of reference at:
http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=environment/index.htm, accessed March 2014.

[4] Senate Environment and Communications Committee, Report on the *EPBC Amendment (Retaining Federal Powers) Bill 2013.*

We would instead welcome a mature examination of how our environmental laws can best respond to pressing 21st century challenges (such as biodiversity loss, land use change and climate change responses), and fulfil our national and international obligations,[5] while maintaining Australians' high quality of life. We hope that the Committee is cognisant of the need to ensure that hard-won environmental protections, which all Australians enjoy, are not eroded or abandoned in the interest of short-term gain, as dictated by a narrow subset of interests.

We submit that strong environmental protections are essential to Australians' quality of life, now and in the future; and to what the Treasury Secretary has called *sustainable wellbeing*.[6] While our work constantly highlights room for improvement, environmental laws have helped to keep our air clean, our water potable, our land and forests productive and fertile, and our life expectancy long. As the *Sustainable Australia Report 2013* from the National Sustainability Council notes:

> *Running down our natural capital risks serious economic and social implications and would undercut the wellbeing of future generations of Australians. A healthy natural environment with functioning ecosystem processes is therefore an economic and social imperative.*[7]

Environmental laws seek to safeguard these important values, assets and opportunities for future generations. Australian governments at all levels have agreed that this is embodied, and should be implemented, in the concept of ecologically sustainable development (**ESD**). ESD means 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.[8] ESD involves integrating environmental, social and economic factors in decision-making, guided by legal principles designed to ensure this balancing act. These include the precautionary principle, intergenerational equity, biodiversity and ecological integrity, and the polluter pays principle.[9]

Consistent with ESD principles, the National Sustainability Council's report reiterates the need to reduce the environmental impact of economic growth, via 'the integration of environmental considerations into business and public policy decision making.'[10] While this integration requires more than regulation, environmental laws and ESD are a vital part of it. Removing existing safeguards from environmental laws actively *hinders* this integration, when experts are making clear that it is more important than ever.

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[5] The *EPBC Act 1999* is the main vehicle under which the Australian Government fulfils its international environmental obligations. These include the Ramsar Convention on Wetlands of International Importance; the Convention on Biological Diversity; and the World Heritage Convention.

[6] The federal Treasury Secretary has put forward this concept as a benchmark for guiding Australia's economic future. To maintain 'sustainable wellbeing', Dr Parkinson emphasises the need to balance *environmental* and *social capital*, in addition to traditional notions of physical, financial and human capital, noting: 'Running down the stock of capital in aggregate diminishes the opportunities for future generations. Parkinson, M., '*Sustainable Wellbeing - An Economic Future for Australia'*, Address for the Shann Memorial Lecture Series (August 2011), available at www.treasury.gov.au.

[7] Australian Government National Sustainability Council, *Sustainable Australia Report 2013*, p 81, at http://www.environment.gov.au/resource/sustainable-australia-report-2013-conversations-future.

[8] Australian Government, *National Strategy for Ecologically Sustainable Development* (1992), at http://www.environment.gov.au/node/13029.

[9] See for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3-3A; Environmental Planning and Assessment Act 1979 (NSW), s 5(a)(vii); *Protection of the Environment Administration Act 1991* (NSW), s 6; *Sustainable Planning Act 2009* (Qld), ss 3-5.

[10] Australian Government National Sustainability Council, *Sustainable Australia Report 2013*, pp 79-86.

2. Communities expect strong national environmental protection and legal safeguards

The Australian community expects the Commonwealth government to safeguard our environment for present and future generations.[11] It is striking that the two regulatory sectors that the community perceives as being 'too lax' in a 2012 NSW government survey[12] – property development and mining – are the same sectors that COAG's Business Advisory forum is seeking to 'streamline'.[13]

Ongoing challenges such as salinity, water quality, resource industry expansion, biodiversity loss and climate change can only be resolved with proper land-use planning, natural resource management and environment protection regulations as a major part of the regulatory toolkit. Similarly, public trust in government decisions can only be maintained where there is proper community engagement and legal scrutiny. An ANEDO briefing note (**Attachment B**) provides the Committee with further explanation as to 'why environmental laws matter'.

Yet it is these same important regulatory and governance processes which are the target of pejorative 'green tape' labels. Claims that 'environmental standards will be maintained' are often made, but with very little focus or evidence as to what this means, how high standards will be achieved, and importantly, how this will be measured. These commitments to high environmental standards should be a key focus of this inquiry.

For example, bilateral assessment agreements with States and Territories have been in place for nine years under the EPBC Act. However, the Commonwealth has never undertaken a comprehensive audit or systemic review of their environmental effectiveness, or of States' and Territories' compliance.[14] It remains unclear how the Commonwealth will ensure that federal environment protection standards will be maintained under the 'one stop shops' model. For example, there is no proposed independent expert body will assess this. ANEDO submits that it would be appropriate for such an assurance role to be performed by an independent environment commission.

A similar risk arises for enforcement where environmental conditions are breached. In the three years to 2012, we understand the federal Environment Department conducted around 980 EPBC Act investigations, as well as 40 prosecutions resulting in fines and enforceable undertakings totalling almost $4 million.[15] It is unclear from discussions to date with the Commonwealth, exactly what their ongoing role will be in terms of compliance and

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[11] For example, in one 2012 survey 85% of Australians surveyed agreed that the federal government should be able to block or require changes to major projects that could damage the environment (Lonergan Research on behalf of the Places You Love Alliance of environmental NGOs, Oct. 2012).

[12] See NSW Office of Environment & Heritage, *Who Cares About the Environment in 2012?* (2013), pp 41-42. By far the most common response on 'mining' and 'property development/ construction' was that regulation is 'too lax' (49% and 46%, respectively). Only 10% and 13% of respondents thought mining and property development regulation was 'too strict' (respectively). For almost all other sectors mentioned, the most prevalent response was that regulatory strictness is 'about right' (fishing, farming, individuals, tourism, retail and forestry).

[13] See BAF communique 12/4/2012: http://www.finance.gov.au/deregulation/communique-12--april-12.html.

[14] Reports of inadequate compliance do exist however. See, for example, NT EPA, *The Redbank Copper Mine – Environmental Quality Report* and *Recommendations on the Environmental Assessment and Regulation of Mine Sites* (2014):

> *"For Northern Territory projects that are assessed under the bilateral agreement…, the Commonwealth Government reports that NT assessment reports do not generally contain sufficient information for the Commonwealth Environment Minister to make an informed approval decision under the [EPBC] Act 1999. … [T]he Commonwealth has had to seek further information from the proponent after the NT assessment … on 75% of occasions (Department of Sustainability, Environment, Water, Population and Communities, Northern Territory Environment Protection Authority 2013)".*

Available at http://www.ntepa.nt.gov.au/news/2014/redbank-report-released.

[15] Figures compiled from federal Environment Department annual reports 2009-10, 2010-11, 2011-12.

enforcement. If the Commonwealth vacates the field by signing approval bilateral agreements, the community currently has no guarantee that States and Territories will fill the breach.[16] In this context, a recent Senate Inquiry called for a priority COAG review of 'reduced resources in state environment departments and the dominance of state planning departments, and its implications for protecting matters of environmental significance.'[17]

Even if commitments to *maintain* existing environmental standards were accepted at face value, this is effectively 'lowering the bar' at a time when *improvement* in environmental outcomes is clearly needed – as the *State of the Environment 2011* headlines show.[18]

3. Contradictions in the 'green tape' playbook

Two pillars of the 'green tape' agenda – bilateral accreditation of State *assessment* and *approval* processes, and 'streamlining' State and Territory major project assessments – are internally contradictory. If State processes seek to uphold EPBC Act requirements, they will need to *increase* environmental standards. On the other hand, if States seek to further fast-track major projects (by reducing assessment processes, public participation or judicial scrutiny), they will need to *lower* environmental standards.

We also make the important point that the Commonwealth role in environmental regulation does not 'duplicate' State roles. Rather, the EPBC Act specifically regulates impacts on nine Matters of National Environmental Significance (**MNES**) which are *not* given special consideration in state assessment or approval processes, as the EPBC Act requires. This is demonstrated by the list of important additional requirements set out in appendices to recent bilateral assessment agreements.[19] To the limited extent that state and federal functions do overlap (assessing the same project, if not the same impacts), this should not be addressed by hastily devolving federal powers. There are a range of other efficiency options noted below.

A further important point is that State processes are overseen by Planning Ministers and departments, whereas the EPBC Act is overseen by the Commonwealth Environment Minister and department. Matters of national environmental significance should continue to be protected by ministers and agencies that have the clear mandate and expertise to do so. Although the Productivity Commission supported bilateral agreements, it did *not* support the consolidation of assessment, approval and enforcement functions in State planning agencies – as occurs for major projects in various State jurisdictions now being accredited:

> *In the Commission's view, there is a strong 'in principle' rationale for embedding more independence in major project assessment arrangements by assigning this responsibility to an independent regulator. … Similarly, there is merit in (related) monitoring and enforcement activities (chapter 10) residing with an independent regulator.*[20]

The rationale for arms-length assessment, monitoring and enforcement by a federal agency is even stronger where the major project is backed by a state authority.

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[16] One 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.

[17] Senate Environment and Communications Committee, Report on the EPBC Amendment (Retaining Federal Powers) Bill 2013, recommendation 5.

[18] See: http://www.environment.gov.au/topics/science-and-research/state-environment-reporting.

[19] Agreements available at: http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop.

[20] Productivity Commission, *Major Project Development Assessment Processes* (2013), p 166, recommendation 6.5.

4. An alternative vision to the 'green tape' and 'one stop shops' agenda

ANEDO remains unconvinced that rushing to 'deregulate and delegate' project assessment and approval powers is an appropriate way to achieve sought-after improvements to planning regulation, productivity and environmental outcomes.

There are several alternative ways to improve the operation of environmental laws, the business-environment relationship, and federal-state interaction on major projects without focusing on 'streamlining' (reducing) environmental protections. We give three examples below, followed by recommendations for a way forward.

First, ANEDO has published 10 best practice principles for environmental and planning laws (**Attachment A**). The Committee can use these principles as a basis to assess the effectiveness of the current regulatory framework at state and federal levels.

Second, we note that the Wentworth Group of Concerned Scientists has put forward an alternative model that provides a better balance between business and environmental outcomes, while maintaining the Australian Government's important approval and oversight roles.[21]

Third, there are a range of administrative efficiencies recommended in the independent Hawke Review of the EPBC Act, and other inquiries.[22] The Hawke Review was a major, consultative, evidence-based inquiry to strengthen and improve the EPBC Act after 10 years of operation.[23] Dr Hawke and his expert panel made clear that its 71 recommendations should be implemented as an 'integrated package of reforms'.[24]

In 2011, the then Government's response cherry-picked aspects of the Hawke Review, but a range of important recommendations were rejected, or are yet to be implemented five years on from the Review. These include:

- a single, harmonised threatened species list based on robust scientific criteria;[25]
- methods to assess and avoid cumulative impacts of multiple projects;[26]
- establishing a statutory National Environment Commission and Commissioner;[27]
- an interim 'greenhouse trigger' to require federal approval of major polluting projects, in the absence of a national carbon price;[28]
- strategic assessment processes that must 'maintain or improve' environmental outcomes, and that consider cost-effective climate change mitigation options;[29]

[21] Wentworth Group of Concerned Scientists, *Statement on Changes to Commonwealth powers to protect Australia's environment* (2012), p 1, available at: www.wentworthgroup.org.
[22] Including the Senate Environment and Communications Committee inquiry into the EPBC Amendment (Retaining Federal Powers) Bill 2013; Environment and Communications References Committee report on *Effectiveness of threatened species and ecological communities' protection in Australia*; House of Representatives Standing Committee report on *Managing Australia's Biodiversity in a Changing Climate* (2013).
[23] Unlike the 2012 COAG 'green tape' announcements, which came from one stakeholder group, the Hawke Review's public consultation process sought and analysed specific feedback on the operation of the Act. This included 220 submissions, 119 supplementary submissions, and face-to-face consultations in each state and territory with industry, NGOs, the community, individuals, research groups, academics, individual corporations, and agencies from every level of government. See Hawke, A., et al., *Report of the Independent Review of the EPBC Act* (2009) (**Hawke Review Report**), at http://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008, accessed March 2014.
[24] Hawke Review Report (2009), iii, letter to then Environment Minister, The Hon Peter Garrett MP.
[25] Hawke Review Report (2009). See also Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia* (2013), rec's 1 and 7.
[26] See Hawke Review Report at 3.3-3.6, 7.31, 7.60; see also Government Response (2011) rec's 6, 8.
[27] Hawke Review Report, rec 71; see also EDO Victoria (2013), http://www.edovic.org.au/law-reform/major-reports/proposal-national-environment-commission.
[28] Hawke Review Report, rec. 10(1).

- a range of enforcement, accountability and transparency mechanisms to improve decision-making and community access to justice.[30]

The planned (partial) implementation of Hawke Review recommendations was itself swept aside by the 'green tape' agenda in 2012. In contrast to the Hawke Review, the overnight acceptance of the 'green tape' agenda was marked by sectoral imbalance, minimal evidence and no public consultation.

5. Recommendations for a way forward

In developing a way forward, ANEDO recommends a number of steps to improve the administration and effectiveness of Australia's environmental laws. In summary:

- The Commonwealth Government should reverse its intention to pursue *approval* bilateral agreements, as their use is not necessary, justified or beneficial.
- Instead, the Government should improve the efficiency and effectiveness of the EPBC Act, and work with States and Territories to improve their environmental assessment and approval processes and standards.
- This should include revisiting implementation of the Hawke Review package; and developing better administrative arrangements with the States under *assessment* bilateral agreements (once State processes are improved).
- Administrative arrangements should include a 'highest environmental denominator' approach to promoting consistent standards across jurisdictions; and strengthening state and federal regulatory skills and resourcing.[31]
- Before pursuing accreditation of state assessment systems, the Commonwealth should further consult on a uniform set of national environmental standards that state assessments must comply with to be accredited.[32]
- Any reform process must be predicated on States and Territories having the necessary, comprehensive suite of legislated process and outcomes standards *in place and operative before* accreditation of assessment systems can occur.
- This should include requirements in State and Territory planning laws such as:
  - laws that aim to promote and achieve ecologically sustainable development (**ESD**);
  - improved assessment standards, including cumulative and climate impacts;
  - more accountable governance arrangements for assessors and decision-makers;
  - greater transparency and public participation before decisions are made;
  - increased access to justice for communities, including court appeal rights;[33]
  - leading practice monitoring, enforcement and reporting; and
  - renewed focus on implementing and strengthening threatened species laws.[34]
- The Government should also review all current bilateral assessment agreements against the national environmental standards and revoke any that do not comply. This could be done on the expert advice of a new National Environment Commissioner.

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[29] Hawke Review Report, rec's 6(2)(b)(ii) and 10(2).
[30] See for example, Hawke Review Report, rec's 43-44 and 46; and 48-53 ('Not agreed').
[31] See also Senate Environment and Communications Committee report on the EPBC Amendment (Retaining Federal Powers) Bill, recommendation 5.
[32] As per the Hawke Review Report, recommendation 4(4). We note the Commonwealth Government has recently released *Standards for Accreditation of Environmental Approvals under the EPBC Act 1999*, available at: http://www.environment.gov.au/system/files/resources/40e7000f-4d52-47fe-9a61-ff2b321aec3b/files/standards-accreditation-2014_0.pdf
[33] See for example, ICAC, *Anti-corruption safeguards in the NSW Planning System* (2012), rec. 16.
[34] See report, **Attachment D**; also Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia* (2013).

6. Overview and links to attachments and other resources

Below is a brief overview of the attachments to this submission, and their relevance to the present inquiry.

A. ANEDO Briefing Note - *Best practice standards for planning and environmental regulation* (2012)

Following COAG announcements in April 2012 to streamline environmental assessment and approvals at federal and state levels, ANEDO released a briefing paper on *Best practice standards for environmental regulation* (June 2012). This sets out 10 high-level elements that should form the basis for effective environmental and planning laws (federal and state):

1. *Clear objects that prioritise ecologically sustainable development (ESD)*
2. *Objective test for good environmental outcomes ('maintain or improve' test)*
3. *Independent assessment and quality assurance*
4. *Comprehensive assessment based on best information available*
5. *Projects must minimise environmental impacts (impact hierarchy)*
6. *Best practice standards for strategic environmental assessment (SEA)*
7. *Oversight and independent review of decisions*
8. *Public participation, engagement and third party appeal rights*
9. *Compliance and enforcement tools, penalties, resources and 'open standing'.*
10. *Monitoring and review of laws, policies and implementation.*

These standards are set out **in full** further below (after the overview of attachments).

B. ANEDO Briefing note - Objections to the proposal for an environmental 'one stop shop' (2013)

This briefing note argues that we need a strong Commonwealth role, not State delegations and a series of 'one stop shops', to ensure the efficient and effective implementation of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), and the protection of matters of national environmental significance (**MNES**) in perpetuity.

It also notes that hasty bilateral agreements may cause complexity and fragmentation by 'bolting on' important EPBC Act requirements to inadequate and under-resourced State systems and processes. If the additional requirements only apply to projects that affect MNES, this will lead to a confusing variety of assessment pathways and effectiveness.

Instead, State and Territory environmental impact assessment processes should *only* be accredited when they achieve the objectives of the EPBC Act, and enshrine best practice environmental standards (see for example, **Attachment A**). These standards should be applied across the board, to *all* environmental impact assessment in each State and Territory, not just to Commonwealth-accredited assessments. Developments that pose conflicts of interests (as a proponent or beneficiary) must be excluded from State delegations.[35] Powers to call in projects on other environmental grounds are also needed.

[35] The Hawke Review (rec. 4) called for, at a minimum, establishing joint State-Commonwealth panels to assess projects where the proponent is either the State or Territory or Australian Government.

C. ANEDO Briefing note – *In defence of environmental laws* (2012)

This briefing note provides an overview of:

- COAG's decision to accept the green tape agenda in place of evidence-based reforms;
- why environmental laws matter to Australian values and ways of life;
- why Commonwealth involvement in environmental regulation is vital; and
- how environmental laws should work in Australia.

In summary, environmental laws matter because they:

- protect the public's right to be informed of, and participate in, decision-making processes that affect the environment and communities;
- can ensure the rigorous, science-based assessment of environmental impacts;
- promote decisions that integrate environmental, social and economic factors in accordance with the principles of ecologically sustainable development (**ESD**);
- provide enforcement mechanisms where environmental laws are breached; and
- provide community assurances of government accountability and 'access to justice'.

Commonwealth oversight of Matters of National Environmental Significance (**MNES**) is vital because:

- only the Commonwealth Government can provide national leadership on national environmental issues;
- the Commonwealth must ensure that we meet our international obligations;[36]
- 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, where they propose or benefit directly from the projects they are assessing.

D. ANEDO Report - An Assessment of the Adequacy of Threatened Species and Planning Laws in all Jurisdictions of Australia (2012)

In December 2012, ANEDO was commissioned to undertake an audit of threatened species and planning laws in all Australian jurisdictions.[37] This report outlines the legal framework for managing threatened species in each jurisdiction. It identifies strengths and weaknesses of the relevant laws; assesses whether the laws are effectively implemented and enforced; and analyses some of the interactions between threatened species laws and planning legislation.

The key finding of this report is that *no State or Territory biodiversity or planning laws currently meet the suite of federal environmental standards necessary to effectively and efficiently protect biodiversity.* While the laws in some jurisdictions look good 'on paper', they are not effectively implemented. We give some examples below.

A number of important legislative tools available for managing and protecting threatened species are simply not used.[38] Key provisions are often discretionary.[39] The quality of

[36] For example, the Ramsar Convention on International Wetlands; the Convention on Biological Diversity; the World Heritage Convention; and the Declaration on the Rights of Indigenous Peoples.
[37] This report was commissioned by the Places You Love Alliance of more than 35 environment groups. It is available at http://www.edonsw.org.au/planning_development_heritage_policy.
[38] For example, in Victoria, interim conservation orders and management plans are not utilised; in South Australia, no native plants have been declared prescribed species on private land; in Tasmania, no critical

different levels of species impact assessment is highly variable across local and state jurisdictions, and rarely audited. Effective implementation is further hampered by a lack of data and knowledge about the range and status of biodiversity across Australia.

Threatened species laws do not *prevent* developments that have unacceptable impacts on threatened species from going ahead. Project refusals on the basis of threatened species are extremely rare (for example, a handful of refusals under the EPBC Act), or are the result of third party litigation.[40]

The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to 'fast-tracking' of environmental impact assessment for major projects. These provisions effectively override threatened species laws in all jurisdictions.[41]

Since completing this report, many States and Territories have in fact *lowered* environmental legislative standards relevant to the protection of MNES – *increasing* the need for Commonwealth protection of the environment.[42]

As the State of the Environment 2011 reported, 'Our unique biodiversity is in decline, and new approaches will be needed to prevent the accelerating decline in many species'.[43] Given the decline in biodiversity, combined with increasing population pressures, land clearing, invasive species and climate change, now is *not* the time to be streamlining and minimising legal requirements in relation to biodiversity assessment. Rather, the list of common failings make clear that threatened species laws in all jurisdictions need to be reviewed, strengthened, and fully resourced and implemented.

E. Submissions on draft Commonwealth-State bilateral assessment agreements (2013)

While not formal attachments to this inquiry submission, ANEDO has made submissions on each draft bilateral *assessment* agreement proposed by the Commonwealth to date – to accredit development assessment laws and processes in Queensland (December 2013), NSW (December 2013) and South Australia (March 2013).[44] The NSW and Queensland agreements were signed within a few days of the submission period closing, suggesting very limited consideration of community feedback.

ANEDO has noted the following broad concerns with accreditation and 'one stop shops':

- The protection of Australia's environment depends on how seriously the federal government takes its role – including by retaining EPBC Act approval powers;
- Relinquishing federal approvals will not improve efficiency or effectiveness;

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habitats have been listed and no interim protection orders have been declared; and in the Northern Territory, no essential habitat declarations have been made.

[39] For example, critical tools such as recovery plans and threat abatement plans are not mandatory. Timeframes for action and performance indicators are largely absent.

[40] However, in many jurisdictions, threatened species laws are further subjugated by the absence of third party rights that enable communities to enforce threatened species laws.

[41] Required levels of impact assessment tend to be discretionary, and projects can be approved even where they are found to have a significant impact on critical habitat, for example.

[42] For example, Queensland has relaxed requirements to permit clearing of previously protected regrowth and riparian native vegetation. NSW and Victoria are also in the processes of winding back native vegetation protection laws. Planning laws in Queensland and NSW are also being 'streamlined' in ways that are unlikely to satisfy EPBC Act protections. Laws that relate to national parks are also being amended to allow hunting, grazing and increased commercial uses.

[43] Australian Government, *State of the Environment 2011*, summary, p 4.

[44] ANEDO submissions are available at www.edo.org.au.

- 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 (the principle that projects with the most significant impacts deserve the most rigorous scrutiny);
- Commonwealth must retain robust compliance, enforcement, reporting and assurance mechanisms in legislation.

Draft *assessment* bilateral agreements are in train with all other jurisdictions, and the Government proposes these will be followed by *approval* bilateral agreements by September 2014.

Approval agreements will effectively abdicate federal responsibility for project approval and compliance oversight of development projects which may have *significant impacts* on the nine Matters of National Environmental Significance – matters declared by the Australian Parliament as worthy of national and protection and oversight under the *EPBC Act 1999*.

ANEDO analysis over the past two years make clear that *no* existing State or Territory major project assessment process meets the standards necessary for federal accreditation (notwithstanding some have been accredited). Nor do these processes meet best practice standards for environmental assessment (such as ANEDO's 10 principles at **Attachment A**, and a range of recommendations made by the Hawke Review of the EPBC Act).

ANEDO remains opposed in-principle to *approval* bilateral agreements in their entirety. Only the federal government, backed by strong federal environmental laws, can properly uphold Australia's national and international environmental obligations. As the federal State of the Environment 2011 Report concluded:

> *Our environment is a national issue that requires 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.*[45]

F. Submissions to Productivity Commission inquiry on Major Project assessment (2013)

While not formal attachments to this inquiry submission, ANEDO's contribution to the Productivity Commission inquiry into *Major Project Development Assessment Processes* detailed concerns, and provided recommendations, in response to the 'streamlining, green tape and one stop shops' agenda. Notwithstanding our concerns about this referral, ANEDO made comprehensive submissions to the two stages of the Commission's inquiry.[46]

ANEDO's five key areas for reform in our follow-up submission were as follows:

- Embed ecologically sustainable development (**ESD**) in objects and decision criteria;
- Provide equitable rights for public participation and engagement at each stage in the development assessment and approval process;
- Robust, independent assessment of all environmental impacts;
- Projects with the greatest impacts deserve the greatest scrutiny (not streamlining);
- Improved compliance, monitoring, enforcement tools and resourcing.

[45] State of the Environment Committee, *State of the Environment Report 2011*, available at http://www.environment.gov.au/topics/science-and-research/state-environment-reporting/soe-2011.
[46] Submissions to Productivity Commission inquiry on Major Project assessment, March 2013 and September 2013, available at www.edo.org.au.

ANEDO also noted three broad concerns with the Productivity Commission's Draft Report.

First, that it did not sufficiently emphasise the inadequacies of existing state assessment and approval systems, and their lack of readiness for *assessment* bilateral agreements.

Second, we opposed the Commission's proposals to progress *approval* bilateral agreements under the EPBC Act – noting that recent attempts to do so were abandoned due to complexity and uncertainty of any actual benefits; and Senate Committee findings that federal-state 'duplication' is minimal, and further findings that environmental standards would be put at risk if federal approval powers were delegated.

Third, we recommended that the Commission's final report should clarify that any recommendations for 'streamlining' or 'reducing duplication' are *contingent upon* implementing other recommendations to strengthen assessment and approval processes – through improved State and Territory assessment standards; greater transparency and public participation; better governance arrangements; leading practice monitoring, enforcement and reporting; and increased access to justice to restore community faith in decision making.

Attachment A – ANEDO, Best practice standards for planning and environmental regulation (June 2012)

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).[47] 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 (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.[48] 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'.[49] Robust, science-based

[47] 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.

[48] 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).

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

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.

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.

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).

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.