Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

Submission on Draft Bilateral Assessment Agreement between the Queensland and Australian Governments

6 December 2013

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

Who we are

1. 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. EDOs are non-profit, non-government community legal centres which help disadvantaged people both rural and urban understand and access their legal rights to protect the environment. As public interest lawyers, we strongly support the implementation of efficient and effective environmental standards in legislation in all Australian jurisdictions.

Previous relevant work

2. ANEDO has made recent respected policy contributions in this field including:
   a. an initial analysis of the COAG agreement of April 2012 proposing major reforms to Australia's environmental laws;[1]
   b. meetings with and submissions to the COAG Taskforce for those reforms;
   c. a detailed submission on previous draft standards to accredit State approvals under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**);[2]
   d. a submission on a private member's Bill to remove the EPBC Act provisions that allow bilateral agreements to delegate federal approval powers;[3]
   e. multiple submissions to the Productivity Commission inquiries into mineral exploration and major project assessment and approval.[4]

3. EDO Qld and EDO NQ made specific submissions on the Queensland assessment bilateral agreement in 2002 and again in 2009.[5] Some of the early criticisms we made of the assessment bilateral agreement, for example issues of conflict of interest on the part of the Queensland Coordinator General, are manifest in case studies in this submission.

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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] ANEDO, *Submission on Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act 1999* (November 2012), http://www.edo.org.au/policy/121123-COAG-Cth-accreditation-standards-ANEDO-submission.docx.

[3] ANEDO, *Submission on Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (January 2013) available at www.edo.org.au.

[4] ANEDO, 2012-2013, available at www.pc.gov.au and http://www.edo.org.au/policy/policy.html.

[5] "*Submission on the proposed Queensland assessment bilateral agreement under the EPBC Act 1999 (Cth)*", 4 October 2002, Joint submission by EDO Qld, EDO NQ, Queensland Conservation Council, WWF Australia, Humane Society International, and the Tasmanian Conservation Trust; "*Submission on the Draft Bilateral Agreement between the Commonwealth of Australia and the State of Queensland Relating to Environmental Impact Assessment*", 19 June 2009, Joint submission by EDO Qld and EDO NQ, available here: http://www.edo.org.au/edonq/images/stories/law_reform_submissions/20082009/edonq_and_edoqld_joint_submission_-_qld_bilateral_agreement_-_19-6-09.pdf

Industry causes delays in assessment, not Commonwealth government

4. Claims by industry that delays in assessment are wholly due to regulatory requirements are not supported by the evidence. Often proponents delay steps in assessments for commercial reasons or choose to vary the referral that is lodged with the Commonwealth Government[6] but refuse to acknowledge responsibility.

5. Significant delays have also occurred when Queensland has failed to provide sufficient information on the impacts of actions on matters of national environmental significance ("MNES") to allow a proper decision to be made by the Commonwealth.[7] This submission highlights some of these examples and the need to ensure processes are not short cut to bad standards.

A strong and ongoing role for the Commonwealth is needed

6. As the federal State of the Environment Committee has made clear, the Commonwealth Government is best placed to manage and assess national (and international) environmental issues.[8]

7. In March 2013 the Senate Environment and Communications Committee found that there was minimal evidentiary basis for the claims of delay and duplication by the Commonwealth; and that environmental standards would be put at risk if federal approval powers were delegated. Also in 2013, the Productivity Commission's draft report on major projects highlighted the dramatic influx of investment in Australia over the last decade (under existing regulatory models). However, this has not been matched by increases in regulatory capacity of environment departments, as highlighted by Senate Committee reports in 2009 and 2013. [9]

8. Whilst we do not support the use of an approval bilateral agreements in Queensland, or elsewhere in Australia[10] we consider administrative efficiencies can be gained and some necessary improvements in environmental standards can be made by improving the existing bilateral assessment arrangements between the Queensland and Federal Governments. ANEDO believes that changes need to be made to develop an assessment bilateral agreement where positive environmental outcomes are guaranteed as opposed to procedures merely being followed.

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[6] For example http://www.environment.gov.au/epbc/notices/assessments/2010/5642/2010-5642-variation-proposal.pdf

[7] For example the conflict between the Commonwealth and Queensland governments over the Alpha coal and rail proposal in 2012, dealt with later in this submission.

[8] See *State of the Environment Report 2011*, Headlines: '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.'

[9] See Senate Standing Committee reports on *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (March 2013), rec. 5; and on *Operations of the Environmental Protection and Biodiversity Conservation Act 1999* (March 2009), rec. 4, i.e.: '*The committee recommends that the government give urgent consideration to increasing the resources available to the department in the areas of assessment, monitoring, complaint investigation, compliance, auditing projects approved under Part 3 and enforcement action.'*

9. ANEDO is unaware why it is proposed to expand the matters of MNES that Queensland can assess under the Draft Queensland Bilateral Assessment Agreement ("Draft Agreement").

Improving Queensland laws and process to acceptable standard

10. The re-negotiation of the existing assessment bilateral agreement between Queensland and the Commonwealth provides an opportunity for the Commonwealth to ensure that Draft Agreement achieves the objectives of the EPBC Act and that only environmental assessment laws and systems of a high standard are accredited.

11. In particular, accreditation should not occur until recommendations for strengthening major project assessment and approval processes are implemented – 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 for communities, to restore confidence in decision making.

12. However, *any assessment accreditation must not be premature.* We are concerned that little to no attempt has been made to address the shortcomings of the existing bilateral assessment agreement between the Commonwealth and Queensland. These shortcomings were first identified in a submission previously made to the Commonwealth Minister for Environment and Heritage in 2002 and again in 2009,[11] many of which have not been addressed in the Draft Agreement.

13. ANEDO is not opposed to assessment bilateral agreements in theory, but their practical success is contingent on the quality of the process being accredited. We submit that assessment bilateral agreements will only be successful in achieving the objects of the Act if they accredit robust state assessment processes that allow for the impact on MNES to be fully understood and determined in a scientifically sound and principled manner and that reflect best practice assessment processes. If bad processes are endorsed then this is likely to have significant negative impacts on biodiversity, which is contrary to the objects of the Act.

14. The serious conflict of interest issues on the part of the Queensland-Coordinator General are detailed in this submission.

15. We note that the Queensland Government is continuing to reform Queensland's planning laws. Queensland has indicated that it intends on repealing the *Sustainable Planning Act 2009* (Qld) ("SPA") and replacing it with the *Planning for Queensland's Development Act 2014.* We note the Queensland Government has indicated to EDO Qld that the purpose of the new legislation will no longer be "ecological sustainability", rather the purpose of the legislation will be to facilitate development. We note if there will be a reduction of environmental standards in new legislation, the Commonwealth Minister will be unlikely to be satisfied that the accreditation of such legislation is in accordance with the objectives of the EPBC Act.[12]

16. Further, allowing states to conduct assessments on behalf of the Commonwealth does not mean that Commonwealth should take no interest in those assessments. It is the Commonwealth's responsibility to ensure assessments are conducted in a manner and to a standard that allows proper understanding of the impacts on nationally significant issues. This should be enshrined in assessment agreement.

[11] See note 1.
[12] EPBC Act, section 50(a).

17. We understand that the Commonwealth and Queensland are currently in discussions regarding a new EIS process that aims to adequately assess matters of national environmental significance. ANEDO welcomes a new EIS process if it will require higher benchmarks for environmental outcomes, access to justice and governance safeguards. Improved standards should be applied to all State assessments (not just to MNES) which will produce a more consistent and coherent assessment process for proponents and the community. Having different standards within QLD for MNES and non-MNES will create confusion for proponents and added bureaucracy and delays. If this occurs it is a clear demonstration that the real aim of reform is not about efficiency and streamlining, but about removing the Commonwealth from environment protection.

Purpose of the Bilateral Agreement includes strengthening environmental protection

18. One of the purposes of the proposed amended assessment bilateral agreement is "to remove duplication of environmental assessment processes, strengthen intergovernmental cooperation and promote a partnership approach to environmental protection and biodiversity conservation."[13] The purpose is not just to streamline assessments – it is also to protect the environment and ensure high environmental standards, consistent with the primary purpose of the EPBC Act. [14]

19. This renegotiation of assessment bilateral agreements is a once in a generation opportunity across Australia to lift environmental standards and to produce a more consistent national standard of environmental protection. This is necessary, as environmental health is declining throughout Australia.[15] EDOs across Australia agree with 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.[16] This submission will scrutinise the best way to achieve that objective.

[13] Draft Agreement, Clause 1.

[14] See for eg Clause 2 QLD Assessment Bilateral Agreement. See further *EPBC Act 1999* (Cth), s 3.

[15] Examples of environmental degradation in Queensland are in the State of the Environment Queensland 2011, particularly Chapter 4, which is available here: http://www.ehp.qld.gov.au/state-of-the-environment/report-2011/pdf/state.pdf

[16] *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.

Key Law Reform Recommendations – Qld assessment bilateral submission

	Issue	Recommendation	Draft Bilateral clause no.	Submission section
1.	**Questionable whether Draft Agreement (and consequently, any approval bilateral agreement which requires adequate assessment) is compliant with EPBC Act**	That the draft Agreement not be entered into without major revision to ensure it does comply with the EPBC Act, as discussed throughout this submission.		1-4
2.	**Commonwealth needs key powers over assessments under the bilateral agreement to ensure that statutory obligations are fulfilled**	There must be effective and efficient cooperation between Queensland and the Commonwealth at this early and important stage of assessment. To achieve this, the requirement for the Commonwealth and Queensland to agree on ToR, assessment documentation and a draft assessment report must be maintained. There must not be any limits placed on how many times Queensland may provide a draft assessment report for comment. • Clause 18.1 should be amended to require the Commonwealth and Queensland to agree on draft TOR and to agree where there are substantial modifications for a project. • The Commonwealth should ensure appropriate assessment documentation is prepared and provided. Clause 18 should be amended to require the Commonwealth to agree on the assessment documentation. • Clause 18.2 or 19 should be amended such that the draft assessment report requires agreement, rather than only being provided once to the Commonwealth for comment.	18.1, 18.2, 18.5, 18.7	5-16

		• The Draft Agreement should be amended to make clear that the Commonwealth must be able to impose whatever conditions necessary to protect MNES. • "Outcome focussed conditions" should be defined by outcomes that further the object of the EPBC Act.		
3.	**Class 2 assessments (major projects) require ESD as the objective, comprehensive and independent assessment, Federal oversight, and open standing for enforcement**	Part 4 SDPWOA should not be accredited. Only the Queensland Environment Minister should be accredited to conduct the assessment of impacts of MNES under the Part 1 Chapter 3 Environmental Protection Act 1994 (Qld). Alternatively, before entering into the Draft Agreement, the Commonwealth should require Queensland to reform its laws relating to EIS processes under the SDPWOA to avoid conflicts of interest, re-introduce judicial and merits review into the Coordinator-General's decisions, and amending the objective of SDPWOA to be ecologically sustainable development. No new Agreement should be concluded until this occurs. The Government's negotiation of bilateral assessment agreements should be predicated on the achievement of the necessary standards, not the meeting of an arbitrary deadline.	Schedule 1, Item 2	17-38
	Qld Environment Minister should have responsibility for assessment under SPA in addition to EPA assessments to ensure state assessment is undertaken by DEHP			39-48
4.	Preferable to use the Class 3 EIS, under the EP Act	The EIS process under Part 1 Chapter 3 Environmental Protection Act 1994 (Qld) (Class 3 of the Draft Agreement) should be the only assessment method accredited.	Schedule 1, Item 3	42-43
5.	Queensland Minister must be the Environment Minister	All references in the Draft Agreement to a Minister with respect to Queensland, must be defined as the Queensland Environment Minister.	13.2, 16.2, 17.1, 20, 27.2	44-48
6.	**Importance of retaining and**	The Draft Agreement should include a clause that excludes	16, 17	49-54

	exercising the discretion for Commonwealth to assess other than under the bilateral agreement	the operation of the assessment bilateral to projects where Queensland is either the proponent or a GOC. Clause 13.2 of the Draft Agreement should be deleted.		
7.	**No standing for the public to enforce false and misleading provisions under the assessment bilateral agreement**	Each of the accredited assessment laws should contain equivalent false and misleading provisions as those set out in section 489-491 EPBC Act. There needs to be open standing for the public to enforce false and misleading provisions of either the EPBC Act or state accredited legislation, especially in the instance of the Coordinator General assessing an EIS under SDPWOA. The Commonwealth itself must be able to enforce false and misleading provisions under the EPBC Act, even if the provision of the information is considered to be under the bilateral agreement rather than under the EPBC Act.	n/a	55-60
	Actions that are inappropriate for Queensland to assess			61-99
8.	Actions in, or impacting on, the GBRMP must be assessed by the Commonwealth under a strategic assessment that meets best practice standards	Clause 12.4(a) and (b) should be removed from the Draft Agreement. All actions that may have impacts on MNES and that are proposed to be carried out in the GBRMP should be assessed by GBRMPA, as well as all actions in Queensland that may have impacts on the GBRMP.	12.4(a),(b)	64-74
9.	Queensland cannot adequately assess impacts in Commonwealth marine areas	It is more appropriate that assessment of actions that may impact on MNES in Commonwealth marine areas be undertaken by the Commonwealth. Clause 12.4(b) should be removed from the Draft Agreement.	12.4(b)	75-78
10.	Queensland cannot adequately assess nuclear actions in the absence of specialised standards	Clause 12.4(c) regarding the assessment of nuclear actions be removed from the Draft Agreement. A clause should be included expressly prohibiting Queensland to assess nuclear actions.	12.4(c)	79-84
11.	Queensland cannot adequately assess impacts concerning the water trigger	The assessment of the impacts of mining and CSG projects on water resources, particularly groundwater, should be conducted by the Commonwealth on advice from the	n/a	85-99

		Independent Scientific Expert Committee. The Commonwealth is better placed than Queensland to assess the cumulative impacts of an action in Queensland, on groundwater both within and outside of Queensland's borders.		
12.	**Queensland should be required to seek advice from Commonwealth agencies**	Clause 18.3 of the Draft Agreement should be amended to ensure Queensland 'must' (not 'may') seek advice on relevant matters from Commonwealth agencies with relevant expertise.	18.3	100-101
13.	**Public access to information must be improved**	Public access to information be improved, for example, by ensuring information on environmental assessment of all projects are maintained on both Queensland and Commonwealth websites, and that all major correspondence between Queensland the Commonwealth concerning an EIS is made publically available.	n/a	102-104
14.	**Open standing for review and appeal**	To meet best practice standards, there must be open standing to permit review or enforcement of EIA processes.	n/a	105-107

1. Questionable whether Draft Agreement (and consequently, any approval bilateral agreement which requires adequate assessment) is compliant with EPBC Act

1. The Commonwealth Environment Minister may only enter into a bilateral agreement if he or she is satisfied that the agreement accords with the objectives of Act[17] and meets the requirements of the regulations.[18] Importantly, the Minister can only enter into an approval bilateral agreement if satisfied that there has been or will be an adequate assessment of the impacts on MNES.[19]

2. Placing control of the assessment of significant impacts on matters of national environmental significance under the control of a government department with an apparent or actual bias for economic development (that is, the Coordinator General and DSDIP) is not in accordance with the objects of the EPBC Act. This along with other deficiencies of the draft Bilateral is discussed at some detail later in this submission.

3. In addition this situation brings into question whether the Minister can be satisfied that the agreement will promote:

    a. the management of World Heritage properties within Queensland in accordance with the Australian World Heritage management principles;[20]
    b. the management of Ramsar Wetlands in accordance with the Australian Ramsar management principles;[21]
    c. the survival and/or enhance the conservation status of each listed threatened species and threatened ecological community;[22] and
    d. the survival and/or enhance the conservation status of each listed migratory species.[23]

4. Based on the preceding analysis of the assessment procedures, standards and examples of outcomes under the Queensland state legislation, it is unclear how the Minister could be satisfied that there has been or will be an adequate assessment of the impacts on MNES.

Recommendation 1
That the draft Agreement not be entered into without major revision to ensure it does comply with the EPBC Act, as discussed throughout this submission.

[17] EPBC Act, section 50(a).
[18] EPBC Act, section 50(b).
[19] EPBC Act, section 46(3)(b).
[20] EPBC Act, section 51(1)(b).
[21] EPBC Act, section 52(1)(b).
[22] EPBC Act section 53(1)(b)
[23] EPBC Act section 54(1)(b).

2. Commonwealth needs key powers over assessments under the bilateral agreement to ensure statutory obligations are fulfilled - clauses 18-19 Draft Agreement

5. The Commonwealth Minister has a statutory obligation to ensure that a bilateral agreement requires the provision of a report containing enough information about the relevant impacts of the action to let the Minister make an informed decision whether to approve or not.[24]

6. The current process for Queensland and the Commonwealth to develop an assessment report is set out in the existing clause 15 of the Assessment Bilateral Agreement. It requires Queensland to provide the following documents to be agreed between the Commonwealth and Queensland :

    a. Draft Terms of Reference;
    b. Assessment Documentation (e.g. Environmental Impact Statement); and
    c. Draft Assessment Report.

Terms of Reference (TOR) cl 18.1 draft Agreement

7. The proposal is to remove the existing requirement for Queensland and the Commonwealth to actually agree on draft TOR. Whilst agreed standard TOR can be used, if such agreement cannot be reached then the Draft Agreement only requires Queensland to consult with the Commonwealth.[25] Additionally, if there are substantial changes to a project, Queensland only consults the Commonwealth.

8. This is unacceptable as the Commonwealth Minister has a statutory requirement to ensure the appropriate documentation is provided to him or her as the decision maker.[26]

9. It is foreseeable that failure to agree on standard TOR prior to assessment will cause delays if the Commonwealth requires further information under clause 18.7 of the Draft Agreement, which might have been avoided with agreement on TOR at an early stage.

Assessment Documentation no longer required to be provided to Commonwealth or agreed - cl 15 existing Agreement, cl18 draft Agreement

10. Whilst the Commonwealth provides Queensland with its requirements for Assessment Documentation,[27] the proposal is to remove the existing obligation for Queensland to provide assessment documentation (for example an EIS) to the Commonwealth. The existing process was clearly designed to ensure that the Commonwealth has a role in ensuring appropriate assessment documentation is prepared and provided. The Draft Agreement compromises the Minister's statutory

[24] EPBC Act, section 47(4).
[25] Draft Agreement, clause 18.1.
[26] EPBC Act section 47(4).
[27] Draft Agreement, clause 18.5.

obligation to ensure that a final report is provided that contains enough information on the relevant impacts.

One opportunity only for Commonwealth to review Draft Assessment Report compromises s.47(4) purpose and could lead to inefficiencies cl 19 draft Agreement

11. Clause 19 would require Queensland to provide a final Assessment Report including a chapter on MNES. Under new proposals, this would be the only opportunity that the Commonwealth has to consider whether sufficient information will be contained in the Final Assessment Report (and thus satisfy the Minister's statutory requirement under section 47(4) EPBC Act).[28]

12. Whilst it may give the impression that such a one-off process will be sufficient, even with the existing provisions to agree beforehand there can be significant delays in the approval of projects as the Commonwealth Minister finds he or she has insufficient information in order to make a decision.

13. The Alpha Coal case, below, emphasises both the Queensland's governments unwillingness to do a thorough job on assessing matters of national significance and the need for a cooperative relationship between the Commonwealth and the States. This will not occur unless the Commonwealth keeps powers in relation to the assessment process rather than merely being consulted by Queensland.

Case example: Alpha Coal Project

Queensland undertook a Class 2 assessment process (an EIS under the *State Development and Public Works Organisation Act 1974* (Qld)) under the Queensland-Commonwealth assessment bilateral agreement. Despite the provisions of the assessment bilateral being triggered, which required inclusion of impacts on MNES, Queensland did not comply with the bilateral agreement as its EIS failed to address the impacts of Commonwealth listed marine species, which may have been affected by light and dust from the action. In June 2012 the Federal Environment Minister delayed his decision on the Alpha Coal Project because the information contained in the assessment report, prepared using the accredited EIS process, was insufficient for the Commonwealth Minister to make a decision.

Commonwealth must ensure "outcome focussed conditions" are of a high standard

14. The Draft Agreement provides that Queensland and the Commonwealth will endeavour, to the greatest extent possible, to agree on a proposed set of common, outcome-focussed conditions.[29] If an action is approved, ANEDO is supportive of seeking a single set of conditions that ensure protection of MNES and appreciates

[28] Draft Agreement, clauses 18.2 and 18.7.
[29] Draft Agreement, clause 18.2.

the certainty that provides for proponents, community, and enforcement agencies alike. The purpose of applying conditions to the approvals of projects that may cause significant harm to the environment is to protect the environment.

15. However, it remains the obligation of the Commonwealth Minister under the EPBC Act to ensure adequate protection for matters of national environmental significance, through conditions if so required. If a condition is considered by the Commonwealth Minister to be necessary to protect matters of national environmental significance, then it should be included as a condition of approval and the Commonwealth Minister must not be obliged to promote an overriding purpose of achieving a single set of conditions. ANEDO considers an additional clause should be included after clause 18.2 to the effect that the Commonwealth may impose whatever conditions necessary to protect MNES

16. There is no guidance on the "outcome" of the outcome-focussed conditions. ANEDO is particularly concerned that this ambiguous clause may be interpreted by the parties in different ways. The wording of clause 18.2 suggests that the parties will attempt to agree on conditions in every case, meaning that there will be an approval warranting conditions in every case. To avoid any interpretation that 'outcome' equivocates to 'approval', the clause should be expressly stated that the 'outcome' is 'an outcome that furthers the EPBC Act's objectives'.

Case example: Traveston Dam

After an EPBC Act referral on the impacts of threatened species for the Traveston Dam (where the proponent was a government-owned corporation), Queensland undertook an EIS process under the assessment bilateral agreement (SDPWOA EIS process). The Queensland Government approved the project with a number of conditions. The Commonwealth requested information which was lacking in Queensland's EIS, regarding necessary information on the various threatened species. Queensland's failure to supply the information caused considerable delays and the Commonwealth commissioned its own experts due to the poor quality information provided in Queensland's EIS on threatened species. After the Commonwealth obtained the further information necessary to make a decision, the Commonwealth Minister determined that the impacts on nationally protected species like the Australian lungfish, Mary River Turtle and Mary River Cod were unacceptable and could not be mitigated.

Recommendation 2

There must be effective and efficient cooperation between Queensland and the Commonwealth at this early and important stage of assessment. To achieve this, the requirement for the Commonwealth and Queensland to agree on ToR, assessment documentation and a draft assessment report must be maintained. There must not be any limits placed on how many times Queensland may provide a draft assessment report for comment.

• Clause 18.1 should be amended to require the Commonwealth and Queensland to agree on draft TOR and to agree where there are substantial modifications for a project.

• The Commonwealth should ensure appropriate assessment documentation is prepared and provided. Clause 18 should be amended to require the Commonwealth to agree on the assessment documentation.

• Clause 18.2 or 19 should be amended such that the draft assessment report requires agreement, rather than only being provided once to the Commonwealth for comment.

• The Draft Agreement should be amended to make clear that the Commonwealth must be able to impose whatever conditions necessary to protect MNES.

• "Outcome focussed conditions" should be defined by outcomes that further the object of the EPBC Act.

3. Class 2 assessments (major projects) require ESD as the objective, comprehensive and independent assessment, Federal oversight, and open standing for enforcement

17. ANEDO is concerned that the Draft Agreement continues to give control of EIS processes for major projects in Queensland under the *State Development and Public Works Organisation Act1974* (Qld) ("SDPWOA") which impact upon MNES to the Queensland Coordinator-General and Department of State Development, Infrastructure and Planning ("DSDIP"), rather than the Department of Environment and Heritage Protection ("DEHP"). The EIS process in Part 4 SDPWOA is the most frequently used process for the environmental assessment of projects requiring both Commonwealth and Queensland Government approval.[30]

18. The outcomes of the SDPWOA EIS processes (Class 2 of the Draft Agreement) cast doubt over their capacity to adequately assess MNES. The case examples of Traveston Dam as well as the Alpha Coal Project highlight the problems under the accredited EIS processes under the SDPWOA.

Objectives of SDPWOA are contrary to the objectives of the EPBC Act

19. The SDPWOA is a conglomeration of devices for enabling the coordination and expedition of major projects. Unlike both the EPA and the SPA, the SDPWOA contains no object or purpose statement that commits the operation of the Act to the end of ecological sustainability.[31]

[30] There are 29 projects currently being assessed under Part 4 SDPWOA. For information about current and completed projects see: http://www.dsdip.qld.gov.au/assessments-and-approvals/coordinated-projects.html. Almost all of these projects require Commonwealth approval under the EPBC Act.

[31] See sections 3 and 4 *Environmental Protection Act 1994* (Qld) and sections 3, 4 and 5 *Sustainable Planning Act 2009* (Qld). We note however, that there are plans to repeal the *Sustainable Planning Act 2009* (Qld) and replace it with a new act, *Planning for Queensland's Development Act 2014*. The Queensland Government indicates the new purpose will be economic development, which also conflicts with ESD.

20. The objectives of the EPBC Act revolve around environmental protection and ecologically sustainable development. However, this is not an objective of the Queensland Coordinator-General under the SDPWOA when either assessing or determining major projects. Compared to the EPBC Act, the SDPWOA makes little mention of the need to ensure ecologically sustainable development and that MNES are adequately protected. Rather, the Coordinator-General's major interest is in seeing development undertaken for economic benefit. ANEDO submits that to continue the accreditation of an environmental impact assessment process that is carried out under legislation which has economic considerations as its primary objective, is not consistent with the objectives of the EPBC Act.[32]

21. By placing the responsibility for environmental assessment and an EIS process in the hands of the Queensland Coordinator-General, the purpose of the EIS process changes from ensuring ecologically sustainable development is promoted, to effectively facilitating development. An assessment of the adequacy of the EIS content is made by the Coordinator-General under the objectives of economic development, not under the objectives of ecologically sustainable development. This inherent conflict of interest will continue to reduce the effectiveness of the EIS process to ensure protection of matters of NES.

Case example: Four Corners Investigation on CSG assessment[33]

A more detailed consideration of this case example is at a later section of this submission. An investigative journalist reported that 900 pages of documents regarding the assessment and approval of two major CSG projects, declared 'coordinated projects' by the Coordinator-General, and obtained by ABC's Four Corners through the Right To Information legislation in Queensland, "*detail an approval process that was rushed, made with insufficient information, and put commercial considerations above environmental ones*."

No independent or comprehensive assessment due to C-G's conflict of interest, creates the need for oversight and review

22. For many major development projects the State government is the proponent, the owner of a proponent, a strong supporter of the project, or has an expectation of receiving revenue as a result of the project. In such situations, the State has a clear conflict of interest that reasonably casts doubt on its ability to objectively and credibly assess a proposed action that may affect MNES.

23. Class 2 actions are assessed under Queensland's 'major projects' legislation, being Part 4 SDPWOA and regulations. The Queensland Coordinator-General currently supervises environmental assessment of major projects under the existing

[32] We note that the Commonwealth Minister may enter into a bilateral agreement only if the Minister is satisfied that the agreement accords with the objects of the EPBC Act: section 50(b).
[33] http://www.abc.net.au/4corners/stories/2013/04/01/3725150.htm

assessment bilateral agreement and the Draft Agreement proposes that such accreditation of this assessment system will continue.

24. The main role of Queensland's Coordinator-General is to promote, facilitate and encourage large scale economic developments in Queensland. The Coordinator-General has extremely broad executive power to, amongst other things; declare proposed developments to be 'Coordinated Projects.'[34]

25. The equivalent process at the Federal level requires assessment under EPBC Act by the Environment Minister and the Environment Department. An analogy at the Federal level of using the SDPWOA model of assessment, would be the Commonwealth Department of Infrastructure and Regional Development assessing MNES, with an assessment report on MNES carried out under an EIS process in the *Infrastructure Australia Act 2008* (Cth) conducted by the Commonwealth Minister for Infrastructure and Regional Development. It is patently obvious that an EIS process on MNES is inappropriate under such legislation, nor is it appropriate that the Commonwealth Department (or Minister) of Infrastructure undertake an assessment report of MNES, so it is unclear why equivalent circumstances are accredited at a state level. The Queensland community, which prides itself on its unique environment and heritage, expects that environmental impacts will be rigorously assessed by authorities with the necessary expertise and arms-length independence.

26. There is a very clear incentive for the Coordinator-General to control the environmental assessment process and ultimately give approval for these projects, despite adverse environmental impacts or even longer term adverse or marginal economic benefits. We are aware of only two such Queensland major projects having ever been refused by the Qld State government:

    a. the Springbrook Naturelink Cableway in 2000 – which posed an unacceptable threat to sensitive ecosystems in World Heritage areas; and

    b. the Sun Aqua Sea Cage Project in 2004 – where nutrient discharge effects into Moreton Bay could not be adequately addressed.

27. There are currently 30 Coordinated Projects undergoing environmental impact assessment under the supervision of the Coordinator-General,[35] and 25 of these projects have been deemed a controlled action by the Commonwealth Minister.

28. There exists a clear conflict of interest in the Coordinator-General assessing environmental impacts and at a state level, approving major projects. Obvious examples are mining and major infrastructure projects. In these instances the State

[34] SPDWOA Act 1971, section 26.

[35] Listing of current EIS projects supervised by the Coordinator-General is found here (accessed 28 November 2013): http://www.dsdip.qld.gov.au/assessments-and-approvals/current-eis-projects.html

cannot make an impartial decision as to assessment and if a project should go ahead.[36]

29. Conflicts of duties exist where the Queensland government perceives that they have a political mandate to deliver certain projects, for example, major port development along the GBRMP coastline. These projects are currently approved by the Commonwealth at arms-length for the purposes of the EPBC Act. The Coordinator General is ordinarily responsible for serving the Queensland's own interests, such as ensuring a clear passage for large coal ships to reach ports. This can (and has in the past) conflict with national environmental protection priorities, such as protecting the Great Barrier Reef World Heritage area from the dumping of dredged spoil. The Agreement should exclude a range of classes of projects upfront where there is likely to be conflicts of interest, including where the State is the proponent, partner or significant beneficiary.

Case example: Four Corners Investigation on CSG assessment[37]

In April 2013, a whistle blower from the Queensland Coordinator-General's Department of Infrastructure and Planning, came forward and revealed that preliminary approval had been given to huge coal seam gas (CSG) projects despite the Coordinator-General not having all the relevant information on the potential impacts on groundwater. ABC's Four Corners program investigated and reported that the companies didn't supply enough basic information for an informed decision to be made about the environmental impacts. Despite this, various government agencies [including the Coordinator General] permitted the developments to go ahead, allowing the companies to submit key information at a later date.

The whistle blower said of the assessment process for a $20 billion project by Queensland Gas Corporation, "We were only given a matter of days to prepare conditions for that report. We were actually not given any time to do any reading or assessment of the material. We were just instructed to write conditions for QGC, which is, again, unbelievably bad."

This case example casts light on Queensland's Coordinator General's preparedness what has occurred in not only the approval process of coordinated projects, but also the assessment process being cut short.

30. Although we support the retention of the Commonwealth's 'call in' power at clause 13 of the Draft Agreement (especially for coordinated projects or to assess projects in which Queensland has an interest), it is likely that potential political repercussions of calling in a project for assessment make this an unattractive option for the Commonwealth. It therefore becomes imperative that the Commonwealth not accredit Class 2 in Schedule 1 of the Draft Agreement or alternatively, exercises its 'call in' power. This is discussed below at paragraph 49.

[36] Purposeful promotion by the State of a major development prior to an environmental impact assessment is a feature of coordinated projects. See for example, comments by the State pre-EIS regarding Shoalwater Bay (Premier Bligh, Media Statement, 15 July 2008, available here: http://statements.qld.gov.au/Statement/Id/59180) and regarding Traveston Dam (Premier Beattie, Media Statement, 5 July 2006, available here: http://statements.qld.gov.au/Statement/Id/47037)

[37] http://www.abc.net.au/4corners/stories/2013/04/01/3725150.htm

SDPWO Act assessments do not provide equitable or equivalent appeal rights

31. The reports prepared under the accredited assessment processes in the SDPWOA, (and the recommendations made therein), ultimately determine the outcome of the approval processes at the state level.

32. Best practice environmental frameworks require affected communities to be consulted and to participate where there are environmental risks that might affect them. At an international level, principle 10 of the *Rio Declaration of Environment and Development* promotes access to information, public participation, and access to justice in environmental matters. In particular, it states "Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

33. Despite this, in Queensland there is no statutory judicial review of a decision by the Coordinator-General[38] including decisions on Coordinated Projects – arguably the State's biggest and environmentally risky projects. While judicial reviews cases are rarely run the potential for such cases to be run by any aggrieved person is part of a robust and accountable decision-making system. This is another reason why the SDPWO Act should not be accredited.

34. In the absence of State statutory judicial review rights, section 487 of the EPBC Act should be amended to include specifically the application of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to bilateral agreements in the following terms:

> **487 Extended standing for judicial review**
> (1) This section extends (and does not limit) the meaning of the term ***person aggrieved*** in the *Administrative Decisions (Judicial Review) Act 1977* for the purposes of the application of that Act in relation to:
> (a) a decision made under this Act, the regulations or a bilateral agreement; or
> (b) a failure to make a decision under this Act, the regulations or a bilateral agreement; or
> (c) conduct engaged in for the purpose of making a decision under this Act, the regulations or a bilateral agreement.

35. Additionally, there is no provision in the SDPWOA for merits review. Therefore, there is no arms-length mechanism by which the public may hold the Coordinator General to account. Furthermore, even if there was a mechanism for review, there are few mandatory environmental considerations or outcomes guaranteed by the Act or the

[38] Section 27AD *State Development and Public Works Organisation Act 1971* (Qld). ANEDO notes that Queensland's Environment Minister has recently tried to publicly allay concerns that community participation from the Federal Government's 'one stop shop' policy would be less than it currently is. During the interview, Minister Powell said, "There is always judicial review of both our state decisions and those Commonwealth decisions...so checks and balances will remain…" However, the Minister was only referring to a small range of State decisions. Interview with Queensland Environment Minister Powell on ABC Radio available at: http://blogs.abc.net.au/queensland/2013/09/the-memorandum-of-understanding.html

Draft Agreement against which the reasonableness of the Coordinator General's decision or recommendations could be measured.

36. The importance of the Commonwealth retaining discretion to 'call in' assessment of projects, or alternatively – not accredit Class 2 actions – is discussed in this submission at paragraph 49.

37. Alternative ways of reducing conflicts of interest include:

    c. Increased transparency and accountability of the Coordinator-General's assessment process;
    d. Introducing judicial review, merits review and open standing into the SDPWOA;
    e. Provide open standing for the public to enforce false and misleading provisions; and
    f. Ensuring maximum public access to information on the environmental assessment.

38. Whilst not remedying the inherent conflict of interest that sits at the heart of the SDPWOA process, these amendments would go some way to counter-balancing it. We refer to the section "Public access to information must be improved" below at paragraph 102.

Recommendation 3

Part 4 SDPWOA should not be accredited. Only the Queensland Environment Minister should be accredited to conduct the assessment of impacts of MNES under the Part 1 Chapter 3 *Environmental Protection Act 1994* (Qld).

Alternatively, before entering into the Draft Agreement, the Commonwealth should require Queensland to reform its laws relating to EIS processes under the SDPWOA to avoid conflicts of interest, re-introduce judicial and merits review into the Coordinator-General's decisions, and amending the objective of SDPWOA to be ecologically sustainable development. No new Agreement should be concluded until this occurs. The Government's negotiation of bilateral assessment agreements should be predicated on the achievement of the necessary standards, not the meeting of an arbitrary deadline.

4. Qld Environment Minister should have responsibility for assessment under SPA in addition to EPA assessments to ensure state assessment is undertaken by DEHP

39. The Draft Agreement also accredits an EIS process under the *Sustainable Planning Act 2009* (Qld) ("SPA"). The EIS process under SPA is only used for "impact assessable" development applications under the assessment bilateral agreement or under an accredited assessment process.[39] ANEDO notes this process appears to be infrequently used by proponents. This may be one of two reasons:

[39] SPA Regs, s.32

a. Most development applications that may impact on MNES appear to be declared 'coordinated projects' by the Coordinator-General and thus the SDPWOA accredited process applies; or
b. The 'normal' impact assessable development application process through the Integrated Development Assessment System ("IDAS") is used to obtain a state approval, and the EPBC Act Part 8 assessment process (which may or may not include an EIS) is used to obtain Commonwealth approval.

40. The overriding object of SPA is ESD.[40] Accreditation of an assessment process that has ESD as the object of its relevant legislation, is consistent with the objects of the EPBC Act. ANEDO notes however, that the Chief Executive of SPA referred to in Schedule 1 of the Draft Agreement, is in fact, the Director-General of the Department of State Development, Infrastructure and Planning.[41]

41. We note that the Queensland Government is continuing to reform Queensland's planning laws. Queensland has indicated that it intends on repealing the *Sustainable Planning Act 2009* (Qld) and replacing it with the *Planning for Queensland's Development Act 2014.* We note the Queensland Government has indicated to EDO Qld that the purpose of the new legislation will no longer be "ecological sustainability", rather the purpose of the legislation will be to facilitate development. We note if there will be a reduction of environmental standards in new legislation, the Commonwealth Minister will be unlikely to be satisfied that the accreditation of such legislation is in accordance with the objectives of the EPBC Act.[42]

Preferable to use the Class 3 EIS under EP Act

42. The Queensland Environment Minister and the Queensland Department of Environment and Heritage ("DEHP") are responsible for environmental assessment under Part 1 Chapter 3 *Environmental Protection Act 1994* (Qld) for non-planning matters (for example, environmental authorities for mining activities). The objects of the EP Act are the protection of the environment and ESD.

43. One means of ensuring the above problems concerning SDPWOA accreditation will not exist is to only accredit Class 3 in which the DEHP assesses the action. This would avoid the conflict of interest issues outlined above and would mirror the EPBC Act where the Federal Environment department undertakes the environmental assessment. ANEDO considers that Class 3 actions are appropriate to accredit.

[40] *Sustainable Planning Act 2009* (Qld), section 3.
[41] The 'objectives' of DSDIP as stated on their website are, "Champion the interests of business and industry in Queensland; Fast track delivery of major resource and industrial development projects; Diversify and build resilience in regional and state economies; Assist property and construction industries to grow and flourish through streamlined planning processes; Re-empower local governments and their communities to plan for their futures; and Improve service delivery." DSDIP's 'Strategic Direction' website available here: http://www.dsdip.qld.gov.au/our-department/strategic-direction.html
[42] EPBC Act, section 50(a).

Recommendation 4

The EIS process under Part 1 Chapter 3 *Environmental Protection Act 1994* (Qld) (Class 3 of the Draft Agreement) should be the only assessment method accredited.

Queensland Minister must be the Environment Minister

44. The logical and appropriate person for supervision of assessment of impacts would be the Queensland Minister for Environment and Heritage Protection. Only the Queensland Environment Minister has protection of the environment as his or her objective.

45. The notification by Queensland that an accredited process will apply, is by the "State of Queensland".[43] Once this occurs, the Commonwealth is no longer able to exercise its discretion to call in the project for assessment under Part 8 EPBC Act. Given the importance of this notification, it should be made clear that the notification described in clause 17.2 and 13.2 is the Queensland Environment Minister.

46. There are several references in the Draft Agreement to "Queensland Minister" (Clause 13.2), "Queensland Environment Minister" (clause 16.2) and "Relevant Queensland Minister" (clauses 20, 27.2).

47. The effect of the new definition of 'Relevant Minister,'[44] is to recognise the minister responsible for assessments under relevant accredited Queensland legislation. For example, the relevant minister (described at clause 20) under SDPWOA assessments is the Minister for State Development, Infrastructure and Planning. ANEDO considers it is inappropriate for the Minister for SDIP to conduct an assessment of MNES for the reasons outlined earlier in this submission. ANEDO does not support the deletion of the existing clause 44 (being the definition of 'Queensland Minister' as that Minister administering the *Environmental Protection Act 1994*).

48. ANEDO strongly submits that the Minister for State Development, Infrastructure and Planning, has no logical role in the assessment of MNES.

Recommendation 5

All references in the Draft Agreement to a Minister with respect to Queensland, must be defined as the Queensland Environment Minister.

[43] Draft Agreement, clause 17.2.
[44] Draft Agreement, at page 17, clause 44, definition of 'Relevant Queensland Minister'.

5. Importance of retaining and exercising the discretion for Commonwealth to assess other than under the bilateral agreement

49. We note there has been no change to the Draft Agreement concerning the Commonwealth Minister's power to retain control of the assessment of MNES. ANEDO is supportive of the Commonwealth Minister to retain that discretion. The Draft Agreement notes that the Minister would only exercise such a power in limited circumstances where a particular action "would be more appropriately undertaken by the Commonwealth".[45]

50. We note that when the Commonwealth decides the action is a controlled action (clause 16), there is no requirement for the Commonwealth to advise if the Queensland assessment bilateral will apply. Clause 17.1(a) requires the Commonwealth to notify that the action is a controlled action. Clause 17.1(b) simply provides for circumstances that Queensland can notify (under clause 17.2) that the bilateral agreement will apply.

51. The practical effect of sections 16 and 17 is that as soon as the Commonwealth advises that it is a controlled action, and if the action is one that falls within the scope of the bilateral agreement, then Queensland can notify the Commonwealth that an accredited assessment will be used within 10 days.[46] The Commonwealth cannot 'call in' the assessment after Queensland has given this notification that an accredited assessment process will be used.[47] This means that the only time the Commonwealth can 'call in' the assessment, is at the time of determining that the action is a controlled action. Such a restriction on the Commonwealth's powers to call in an assessment is unreasonable, given that the Commonwealth may not have sufficient information about the proposed action at the referral stage to determine whether the action should be assessed by the Commonwealth.

52. 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.[48] This is a major reason for ANEDO's overall objection to the proposed accreditation of Class 2 actions, which are assessed by the Coordinator-General of DSDIP).

53. The Draft Agreement is silent on the potential for Queensland to assess projects where a State authority or corporation is the proponent (such as for port development, infrastructure, forestry, energy or land release projects).

54. As ANEDO has previously noted, 'the State has a clear conflict of interest that reasonably casts doubt on its ability to objectively and credibly pass judgment on

[45] Note to clause 13 of the Draft Agreement.
[46] Draft Agreement, clause 17.3
[47] Draft Agreement, clause 13.2
[48] ANEDO, 'COAG environmental reform agenda: ANEDO response – in defence of environmental laws' (May 2012), available here: http://www.edo.org.au/policy/policy.html

proposed development.'[49] This built in conflict of interest is one reason why ANEDO believe the delegation of Commonwealth assessment and approval responsibilities to states and territories is untenable, regardless of the standards they are required to meet.

Recommendation 6

The Draft Agreement should include a clause that excludes the operation of the assessment bilateral to projects where Queensland is either the proponent or a GOC. Clause 13.2 of the Draft Agreement should be deleted.

6. No standing for the public to enforce false and misleading provisions under the assessment bilateral agreement

55. Under the EPBC Act, it is an offence to provide information in response to a requirement or request under Parts 7, 8, 9, 13 or 13A, which can be reckless[50] or negligent.[51] Recklessness in this section includes intention and knowledge.[52] Although not explicitly stated in the legislation, it is probable that omitting information would also fall within this definition.[53]

56. The provision against false and misleading information under the SDPWOA is comparatively narrow. It prohibits giving the Coordinator-General a *document* (rather than the EPBC Act's broader '*information*'), containing information that the person *knows* is false or misleading in a material particular.[54] This provision requires actual knowledge that a document is false or misleading, whereas the broader provision in the EPBC Act encompasses recklessness or negligence. There are similar provisions under *Sustainable Planning Act 2009* (Qld)[55] and the *Environmental Protection Act* (Qld).[56] There is no third party enforcement in the SDPWOA – only the Coordinator-General can enforce the false and misleading provisions in SDPWOA.

57. Despite the above, the provision of information by the Coordinator-General to the Commonwealth Minister under an assessment bilateral agreement does not appear

[49] 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 and the Shoalwater Bay rail line and coal terminal proposal in Queensland, 2008.
[50] *EPBC Act* s 489(1).
[51] *EPBC Act* s 489(2A).
[52] See *Criminal Code* (Cth) s 5.4(4), and the note under s 489(1)(b) of the *EPBC Act*.
[53] This is because information that omits important details, such as an EIS that omits major impacts of the project, is misleading; in the context of environmental assessment, it creates the false impression that there are no other important impacts to be considered. There is relevant case law under the EPBC Act, trade practices legislation and corporations law to support this view.
[54] SDPWOA, section 157O.
[55] SPA s587.
[56] EP Act, s480, 481. s480A provides that it is an offence to give incomplete documents. We note that the EP Act is broader that SPA, in that it provides, 'ought reasonably to know'.

to be provided under a requirement of the EPBC Act.[57] Courts apply a strict interpretation of criminal provisions and the supply of information to the Queensland Government under the SDPWO Act, EP Act or SPA is likely to be one step removed from being "in response to a requirement or request" under Parts 7, 8, 9 or 13 of the EPBC Act as required to satisfy section 489. Rather, it is by a requirement of the bilateral agreement itself, and therefore would not be subject to the section 489 offence. The general provision of section 491 would also not apply as the information is in this case provided to the Queensland Government, not one of the entities listed under section 491. As the information is provided under the assessment bilateral agreement, under current provisions the Commonwealth itself will not be able to enforce the false and misleading provisions under the EPBC Act.

58. The following example sets out how a proponent may have (allegedly) provided a false and misleading EIS. This example is a brief summary of what has been reported elsewhere[58] concerning Gladstone Ports Corporation.

Case example: Alleged false and misleading EIS

The Gladstone Ports Corporation (GPC) is a Queensland Government owned corporation in charge of the port expansion and dredging projects in Gladstone Harbour. A 2009 study, co-funded by the GPC and CQUniversity, confirmed rising effects of chemical contamination in molluscs in key areas of the harbour which were later earmarked for dredging.[59] However, GPC's 2011 environmental impact statement (EIS) for the project did not address the study; instead, it relied on previous studies and its own monitoring and testing data. GPC has asserted that "the release of the study to the public or Government departments is the responsibility of the commissioning body, which in this case was CQUniversity." [60] The omissions meant the chemical was ignored in toxicology tests on marine samples by the state government and prevented Commonwealth regulators from having the latest information before approving the dredging project.[61]

59. If Queensland is unwilling to enforce its own legislation regarding the false and misleading provisions, the Draft Agreement needs to invoke the scope for enforcement of the EPBC Act by allowing third party enforcement of the offence provisions in the EPBC Act which prohibit the giving of false or misleading information. [62]

[57] That is, the EIS is not provided under any of Parts 7, 8, 9, 13 or 13A EPBC Act.
[58] Gladstone Observer article available here: http://www.gladstoneobserver.com.au/news/gpc-may-have-breached-law/2084832/
[59] Burdon, D. (2013, December 2). GPC-funded study on toxic chemical kept from authorities. The Morning Bulletin/Sunshine Coast Daily. Retrieved from http://www.sunshinecoastdaily.com.au/news/gpc-funded-study-toxic-chemical-kept-authorities/2078594/
[60] http://www.gpcl.com.au/Portals/0/2013%20media%20releases/15_November_2013_Fact_Sheet_-_No_Creative_Writing_Just_the_Facts.pdf
[61] Burdon, D. (2013, December 2). GPC-funded study on toxic chemical kept from authorities. The Morning Bulletin/Sunshine Coast Daily. Retrieved from http://www.sunshinecoastdaily.com.au/news/gpc-funded-study-toxic-chemical-kept-authorities/2078594/
[62] EPBC Act, ss.489-491.

60. The legislative intent behind including Part 8 in the matters to which the false and misleading offence provisions apply, was clearly that false and misleading information provided in an EIS or other assessment methods was unacceptable and punishable. There are no public policy reasons why false and misleading information provided for the purpose of assessment under a bilaterally accredited process, or an assessment report on an EIS provided under a bilateral agreement, should not be subject to the same offence provisions.

Recommendation 7

Each of the accredited assessment laws should contain equivalent false and misleading provisions as those set out in section 489-491 EPBC Act or other assessment method.

There needs to be open standing for the public to enforce false and misleading provisions of either the EPBC Act or state accredited legislation, especially in the instance of the Coordinator General assessing an EIS under SDPWOA. The Commonwealth itself must be able to enforce false and misleading provisions under the EPBC Act, even if the provision of the information is considered to be under the bilateral agreement rather than under the EPBC Act.

7. Actions that are inappropriate for Queensland to assess

61. ANEDO believes that the effective implementation of the EPBC Act by the Australian Government is the most essential element of meeting Australia's international environmental obligations. The ongoing role of the Australian Government – as signatory to international environmental agreements – is fundamental to meeting its legal obligations.

62. In addition to matters in which Queensland has a conflict (addressed above), there are new types of actions proposed to be assessed by Queensland. Clause 12.4 of the Draft Agreement proposes to extend the existing bilateral agreement to actions on land or state waters in the GBRMP, Commonwealth marine areas and nuclear actions. ANEDO considers that these actions should only be assessed by the Commonwealth and that clause 12.4 be deleted. We address each of these matters below.

63. ANEDO notes the proposed removal of the existing clause 9, which allows the Commonwealth to determine whether the assessment bilateral agreement has effect, for actions in Commonwealth marine areas, on a case by case basis. If removed, the Commonwealth would no longer have the discretion to decide whether it is in fact appropriate for Queensland to assess the proposed action in a Commonwealth marine area or the GBRMP. Whilst the general discretion remains at clause 13 of the Draft Agreement, that exercise is limited to a time period before Queensland has given notice under 17.2.

Actions in, or impacting on, the GBRMP must be assessed by the Commonwealth pursuant to under UNESCO's recommendations, cl.12.4(a)-(b)

64. As the Commonwealth Department of the Environment is aware, the health of the Great Barrier Reef continues to decline rapidly.[63] An Australian Institute of Marine Science study after the UNESCO mission visit showed that in the last 27 years to 2012 the reef has lost a staggering 51% of coral cover.[64] In June 2014, UNESCO will consider whether to place the Great Barrier Reef World Heritage Area on the 'World Heritage In Danger' List. Strong protection of its outstanding universal values is critical to the future of the Reef.

65. Since the World Heritage Committee recommendations in June 2012, the need for urgency is increased, as the Queensland government has implemented legislative and administrative initiatives that seriously weaken protection for the Great Barrier Reef, [65] and proposed others.[66] Neither the Queensland nor the Commonwealth government has chosen to implement a moratorium on development in order to achieve the highly precautionary decision-making recommended until the Great Barrier Reef World Heritage Area Strategic Assessment is completed and then considered in 2015. [67] Instead, a range of development proposals are being progressed by both the Commonwealth and Queensland governments.[68]

66. It is useful to briefly outline the boundaries regarding state coastal waters, the Great Barrier Reef Marine Park (GBRMP), and the Great Barrier Reef World Heritage Area.

    a. The GBRMP Act 1977 (Cth) established the GBRMP, which covers most of the Great Barrier Reef World Heritage Area. The GBRMP Act 1977 also established a system for permitting various activities to be carried out in the GBRMP. It also

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[63] UNESCO, SOC Report 2013 for the Great Barrier Reef, available here: http://whc.unesco.org/en/soc/1874

[64] Glen De'ath et al 'The 27 year decline of coral cover on the Great Barrier Reef and its causes' 2012 Australian Institute of Marine Science http://www.scienceinpublic.com.au/wp-content/uploads/Full-PNAS-paper-for-publication.pdf

[65] WWF Australia &the Australian Marine Conservation Society *Report to UNESCO World Heritage Committee* http://awsassets.wwf.org.au/downloads/mo030_fight_for_the_reef_report_to_the_unesco_world_heritage_committee_1feb13.pdf , Legal Advice, Appendix 4.

[66] *Vegetation Management Framework Amendment Bill 2013 (Qld)* would enable clearing of an estimated 700,000 hectares of young forest, some of which would be in Reef catchments. See WWF Australia *Submission on Vegetation Management Framework Amendment Bill 2013 (Qld)* April 2013. http://www.parliament.qld.gov.au/documents/committees/SDIIC/2013/10-VegetatationMgmtFramewk/submissions/057.pdf

[67] Mission Report Recommendation 8: Adopt the highest level of precaution in decision-making regarding development proposals with potential to impact the property, and to Prevent any approval of major projects that may compromise the outcomes of the Strategic Assessment, until the Strategic Assessment is completed and its resulting plan for the long-term sustainable development for the property has been considered by the World Heritage Committee. During this period, the State Party is requested to ensure no developments are permitted which create individual, cumulative or combined impacts on the OUV of the Great Barrier Reef World Heritage area and its long-term conservation.

[68] WWF Australia & the Australian Marine Conservation Society *Report to UNESCO World Heritage Committee* p14, list of projects.

established the Great Barrier Reef Marine Park Authority, which has various responsibilities for the management of the GBRMP.[69]

b. The Great Barrier Reef World Heritage Area is an area larger than the boundaries of the GBRMP. There are many areas of the World Heritage Area that are not included in the GBRMP, for example, harbours on the adjacent coast and islands. (A map is available[70] which shows the World Heritage Area Boundary, the GBRMP and the World Heritage areas excluded from the GBRMP.)
c. State waters are generally waters 3 nautical miles seaward of the territorial sea baseline.[71] There are areas of the GBRMP which extend to the Queensland coastline, so there are overlapping areas of the GBRMP and Queensland state waters.
d. There are around 70 islands that are owned by the Australian Government and form part of the GBRMP.

67. A provision of a bilateral agreement does not have any effect in relation to an action in the GBRMP, unless the agreement expressly provides otherwise.[72] The Draft Agreement indicates that actions on land in the GBRMP or actions in state waters (those parts of the GBRMP in which state waters overlap) could be assessed under the Draft Agreement.[73] We note there is no provision for assessment of actions in waters that are exclusively in the GBRMP (that is, where there is no overlap with state waters).

68. Under clause 12.4(b), the scope of MNES that Queensland could assess also extends to actions on land or in Queensland state waters within the GBRMP that will have or is likely to have a significant impact on the environment.[74] The scope of the Draft Agreement also extends to actions on land or state waters outside the GBMP that will have or is likely to have a significant impact on the environment in the GBRMP.[75] It also extends to assessment of actions on land and state waters in the GBRMP that would otherwise be criminal offences without approval.[76]

Hypothetical case example: GBRMP coastal development

A proponent wishes to build a large resort on the Whitsunday coast. The development site includes a marina, which is within state waters and also in the GBRMP. The development may have an impact on MNES in the GBRMP. The development can be assessed under the Draft Agreement under clause 12.4.

[69] http://www.gbrmpa.gov.au/zoning-permits-and-plans/zoning/zoning-maps
[70] http://whc.unesco.org/download.cfm?id_document=119876
[71] *OCS (Coastal Water (State Powers) Act 1980, Coastal Waters (State Title) Act 1980, Seas and Submerged Lands Act 1973*.
[72] EPBC Act 1999, section 49(1A).
[73] Draft Agreement, clause 12.4(a).
[74] EPBC Act 1999, section 24B(1).
[75] EPBC Act 1999, section 24B(2).
[76] EPBC Act 1999, section 24C.

69. If there are actions that may have an impact on MNES in the GBRMP, whether actions are taken in the GBRMP land and overlapping state waters, or they are taken outside of the GBRMP but may have impacts on MNES in the GBRMP, ANEDO submits that those matters should be assessed by GBRMPA or alternatively by the Commonwealth and not the Queensland Government. GBRMPA has the specific expertise, knowledge and resources to adequately assess MNES in the GBRMP.

70. A recent report on the status of implementation of recommendations by the World Heritage Committee, recommended that the Australian Government not fast-track assessment processes for actions likely to have a significant impact on the Great Barrier Reef World Heritage Area.[77] The report further recommended that any proposed action likely to have a significant impact on the Great Barrier Reef World Heritage area should require assessment under the EPBC Act instead of in the manner specified in Schedule 1 of the Assessment Bilateral with the Queensland Government. The Draft Agreement is clearly contrary to those recommendations.

71. ANEDO acknowledges that draft Strategic Assessments and Programs of the GBR coastal and marine zones have been prepared and are in the process of consultation. Whilst this submission makes no comment on the adequacy of those draft Strategic Assessments and draft Programs, a strategic assessment and program, in theory, has the potential and capacity to adequately assess cumulative impacts on the Reef. Queensland state assessment systems, including those proposed to be accredited in Schedule 1 of the Draft Agreement, are completely inappropriate and inadequate to use a means of assessing MNES in World Heritage Areas of any kind.

72. We note however, that it has been reported that Queensland's compilation of their section of the Strategic Assessment for the Reef (compiled by DSDIP) was so poorly prepared that the Commonwealth requested that it be re-written by Queensland, with the Commonwealth requesting Queensland to "better protect the environment by identifying priority conservation areas where development would be restricted or excluded. The Commonwealth also asked Queensland be more specific about outcomes for matters such as marine turtles, threatened species, migratory species and national heritage places."[78]

73. Queensland is not in a position to assess the actions referred to at clause 12.4(b) (regarding section 23 and 24A) and clause 12.4(a) due to the following reasons:

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[77] "Report to the UNESCO World Heritage Committee – Status of Implementation of Recommendations in World Heritage Committee Decision 36 COM 7B.8, Great Barrier Reef (Australia) and the March 2012 Reactive Monitoring Mission" WWF and Australian Marine Conservation Society, February 2013, available here: http://awsassets.wwf.org.au/downloads/mo030_fight_for_the_reef_report_to_the_unesco_world_heritage_committee_1feb13.pdf

[78] Brian Williams, "Report to UNESCO on protection measures for Great Barrier Reef late and poorly written" *The Courier Mail*, 6 September 2013. Article available here: http://www.couriermail.com.au/news/queensland/report-to-unesco-on-protection-measures-for-great-barrier-reef-late-and-poorly-written/story-fnihsrf2-1226711971668

a. The inherent conflict of interest (see paragraphs 17 - 38) under the SDPWOA EIS process does not allow for an objective and comprehensive assessment of MNES in the GBRMP;
b. Queensland lacks the expertise necessary to assess MNES in the GBRMP – there are no specific EIS requirements included, meaning that GBR assessment will simply fall under the normal accredited state assessment processes;
c. The conflict of interest and the lack of expertise will likely result in the Commonwealth requiring additional information not provided in the EIS, creating inefficiencies and delays; and
d. Inclusion in the Agreement would conflict with UNESCO's recommendations and may endanger Australia's international obligations.

74. ANEDO does not consider that the assessment processes under state legislation set out in Schedule 1 of the Draft Agreement can produce a satisfactory assessment of MNES in the Great Barrier Reef.

Recommendation 8

Clause 12.4(a) and (b) should be removed from the Draft Agreement. All actions that may have impacts on MNES and that are proposed to be carried out in land or state waters within the GBRMP should be assessed by GBRMPA, as well as all actions in Queensland that may have impacts on the GBRMP.

Actions in, or impacting on, Commonwealth marine areas must be assessed by the Commonwealth pursuant to under UNESCO's recommendations

75. Under clause 12.4(b), the scope of actions that Queensland could assess also extends to actions on land or in Queensland state waters that will have a significant impact on MNES in Commonwealth Marine areas,[79] including Commonwealth Marine Reserves such as the Gulf of Carpentaria, West Cape York and the Coral Sea Commonwealth Marine Reserve. Actions that may have significant impacts on MNES in Commonwealth marine areas (including marine reserves) are currently assessed by the Commonwealth Environment Department under the EPBC Act.

76. We note there is no provision in the Draft Agreement for assessment of actions in waters that are exclusively in the Commonwealth marine areas (that is, where there is no overlap with state waters), indicating that actions proposed to be taken exclusively within Commonwealth marine areas will continue to be assessed by the Commonwealth under the EPBC Act.

77. The Australian network of Commonwealth Marine Reserves includes parts of the ocean that are managed primarily for the conservation of their ecosystems, habitats and the marine life they support. The effective management of these marine

[79] EPBC Act, section 23 and 24A.

reserves is "one of the most effective mechanisms for maintaining the long-term health and productivity of our oceans."[80] These Marine Reserves also protect various migratory species, whose movements are not necessarily limited to the marine reserve (for example, coastal nesting sites for listed turtle species) or state borders, and which may be subject to international agreements.

78. These marine reserves were established under the EPBC Act,[81] they include federally listed species made under the EPBC Act, and should be afforded protection under the EPBC Act. Commonwealth MNES in Commonwealth marine reserves require assessment and protection from agencies with the expertise and knowledge, and pursuant to legislation with environmental protection and more specifically, ESD, as its objective. For reasons set out earlier in this submission, Queensland has not demonstrated it has capacity to adequately assess MNES. The assessment of MNES in Commonwealth marine areas should continue to be assessed by the Commonwealth.

Hypothetical case example: coastal development

A proponent wishes to undertake a major project near Bundaberg on the Queensland coast. The project is next to a loggerhead turtle nesting site and is likely to have impacts on loggerhead turtles in the Coral Sea Commonwealth Marine Reserve and is a controlled action under the EPBC Act. Due to the significant investment the proponent is offering, the Coordinator-General has declared it to be a 'coordinated project' under SDPWOA. The development could be assessed under the Draft Agreement under clause 12.4(b) under Class 2 in the bilateral agreement. (Refer to earlier paragraphs regarding the concerns with Queensland undertaking assessments).

Recommendation 9
It is more appropriate that assessment of actions that may impact on MNES in Commonwealth marine areas be undertaken by the Commonwealth. Clause 12.4(b) should be removed from the Draft Agreement.

Queensland cannot adequately assess nuclear actions in the absence of specialised standards, cl.12.4(c)

79. The Draft Agreement proposes that Queensland be accredited to assess nuclear actions under the accredited state assessment processes.[82] We note however, that as a Part 3 matter, Queensland could already assess nuclear actions under the existing bilateral agreement. The new amendment simply makes clear that Queensland cannot assess certain nuclear actions (discussed below).

[80] Department of Environment, "Commonwealth marine reserves – Overview", available here: http://www.environment.gov.au/topics/marine/marine-reserves/overview
[81] Chapter 15, Division 4.
[82] Draft Agreement, clause 12.4(c).

80. The scope of 'nuclear actions'[83] Queensland proposes to assess is extremely broad, even with the four exclusions.[84] ANEDO is aware of the Queensland Premier's pre-election commitment of not developing any uranium mines in Queensland.[85] The radioactive nature of uranium means that it's mining, transportation and management poses significant and long-term environmental risks and requires a different and higher level of assessment than other minerals, however there are significant problems with assessment of the extent of contamination or the environmental impacts of uranium mining.[86]

81. We note Uranium Mining Implementation Committee recommendation 4.4 for a Queensland oversight committee.[87] We further note UMIC's recommendation 4.6 that must Queensland seek specialist advice from the Federal Department of Environment's Supervising Scientist Division when assessing nuclear actions.

82. Queensland's environmental impact assessment procedures, even under the EP Act, are inadequate to deal with nuclear-specific issues. Specialised regulations and benchmarks of the highest standards would first need to be prepared. Additionally, necessary expertise and skills must first be established within relevant Queensland departments, which is currently lacking in Queensland.[88] Until this occurs, ANEDO submits that the Commonwealth should not accredit Queensland's assessment systems and should reserve accreditation until such regulations are prepared.

83. To allow Queensland to assess nuclear actions in the absence of special assessment requirements would be contrary to the objects of the EPBC Act and by entering into the Draft Agreement, the Commonwealth Minister would not be satisfying the prerequisite that the assessment bilateral agreement accords with the objects of the EPBC Act.[89]

84. Overall, ANEDO does not support the accreditation of existing assessment laws in Queensland to assess nuclear actions.

Recommendation 10

[83] EPBC Act, section 22.
[84] Exclusions set out in clause 12.4(c)a.-d and EPBC Act 140A(a)-(d), being a nuclear fuel fabrication plant, a nuclear power plant, an enrichment plant and a reprocessing facility.
[85] "*No plan to change LNP uranium policy: Newman*" ABC News, 16 November 2011, available here: http://www.abc.net.au/news/2011-11-16/no-plan-to-change-lnp-uranium-policy/3673946
[86] Senate Standing Committee on Environment and Communications, "*Regulating the Ranger, Jabiluka, Beverly and Honeymoon uranium mines*", 14 October 2003, report available here: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed%20inquiries/2002-04/uranium/report/index
[87] Uranium Mining Implementation Committee (UMIC), "Recommencement of uranium mining in Queensland - A best practice framework." March 2013, available here: http://mines.industry.qld.gov.au/assets/mines-pdf/umic-framework-report-summary.pdf
[88] Ibid.
[89] EPBC Act, section 50(b).

Clause 12.4(c) regarding the assessment of nuclear actions be removed from the Draft Agreement. A clause should be included expressly prohibiting Queensland to assess nuclear actions.

Queensland cannot adequately assess impacts concerning the water trigger

85. The Water Trigger was introduced into the EPBC Act in June 2013.[90] It operates to ensure that large coal mines and coal seam gas (CSG) activities which are likely to have a significant impact on water resources, obtain Commonwealth approval.[91] The amendment to the EPBC Act was a clear statement that Australia's water resources are an integral and interconnected resource vital to Australia's (not just Queensland's) future.

86. ANEDO considers that the Queensland Government should not be accredited to assess the water impacts of some of the largest resource projects in Australia. Our reasons are set out below.

The State Government lacks the capacity to adequately assess water impacts

87. The Water Trigger was largely brought about (with bipartisan political support) in response to concerns that State Governments were not adequately dealing with the impacts of mining and CSG projects on water resources, particularly groundwater.[92]

88. The current Commonwealth Department of Environment's website states:

> *"[In introducing the trigger] the Government has responded to community concern to ensure the long term health and viability of Australia's water resources and the sustainable development of the coal seam gas and coal mining industries"* [93]

89. In 2011, the National Water Commission (NWC), the Commonwealth body responsible for driving national water reform, expressed its concerns for the cumulative impact of CSG operations on water resources in Queensland:

> *"The significant uncertainties surrounding the water resource impacts associated with CSG developments demand a precautionary and adaptive management approach…The Commission remains concerned about the degree to which the sector remains separate from other water management arrangements in Queensland."* [94]

[90] The EPBC Amendment Bill 2013 (Cth) passed the Parliament on 19 June 2013, and received Royal Assent on 21 June 2013.
[91] See EPBC Act, section 24D
[92] See Tony Windsor's comments: http://www.theage.com.au/federal-politics/political-news/more-powers-on-csg-mines-meets-public-expectations-20130312-2fxqt.html
[93] Available here: http://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/what-protected/water-resources
[94] National Water Commission's Biennial Assessment (2011), available here: http://nwc.gov.au/publications/topic/assessments/ba-2011/governance at 1.3.2

90. The Queensland Government has acknowledged their limitations in assessing water impacts of large scale resource activities. In the National Partnership Agreement *on CSG and large coal Mining Development* (NP Agreement) the State Government agreed that there is a "critical need to understand the science" that underpins mining and CSG activities.[95] In view of this 'critical need', the Commonwealth established the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC). Under the NP Agreement, Queensland has a responsibility to seek advice from the IESC at 'appropriate stages' during the assessment of a project which is likely to have a significant impact on water resources.[96]

91. As recent as this year, Queensland's Department of Environment and Heritage Protection (DEHP) acknowledged that CSG projects in particular "are frequently large and high profile, involving significant investment with the potential for environmental harm."[97] Whilst, DEHP claims that they are well funded to adequately regulate the environmental impacts of the growing industry,[98] for the most part, the assessment of large scale water impacts is likely to lie with the State's Coordinator General due to a preference of the current State Government to declare large coal mines and CSG projects to be Coordinated Projects.[99]

92. If a Coordinated Project declaration is made, the assessment of water impacts will be overseen by the Coordinator General within 18 months under a special process in the SDPWOA without the oversight of Queensland's chief environmental regulator, the Department of Environment and Heritage Protection (DEHP). When the EIS is completed, the Coordinator General will prepare an assessment report which can impose any conditions they see fit, including conditions relating to management of negative water impacts based on their assessment of the EIS.[100]

93. Any conditions the Coordinator General recommends must be included in the final state approvals for the mine or CSG activities and any conditions sought by the State's Environmental watchdog - DEHP - cannot be inconsistent with the Coordinator General's conditions.[101]

94. The problem is that the role of Coordinator General is, in reality, not solely about environmental considerations. Rather, his role is the fast tracking of projects of state significance. This is reflected in the very wide discretion the Coordinator General

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[95] *National Partnership Agreement on CSG and large coal Mining Developmen*t available here: http://www.ehp.qld.gov.au/management/impact-assessment/pdf/partnership-agreement.pdf at 3.
[96] *National Partnership Agreement on CSG and large coal Mining Developmen*t available here: http://www.ehp.qld.gov.au/management/impact-assessment/pdf/partnership-agreement.pdf at 15(c).
[97] DEHP's submission to the Queensland Competition Authority, available here: http://www.qca.org.au/files/INV-EHP-Submission-IssuesPaperReqForComments-1013.pdf at 5
[98] DEHP's submission to the Queensland Competition Authority, available here: http://www.qca.org.au/files/INV-EHP-Submission-IssuesPaperReqForComments-1013.pdf
[99] See http://www.dsdip.qld.gov.au/assessments-and-approvals/completed-eis-projects.html and http://www.dsdip.qld.gov.au/assessments-and-approvals/current-eis-projects.html for a list of Coordinated Projects.
[100] *State Development and Public Works Organisation Act 1971* (Qld) s 35(4)
[101] *Environmental Protection Act 1994* (Qld) s 205

has in preparing their report including having regard to any other material they consider is relevant to the project.[102]

95. Moreover, the Coordinator General's role to drive economic development is in direct conflict to careful environmental scrutiny of water impacts.

Case example: Four Corners Investigation of CSG assessment[103]

Simone Marsh, the Senior Environmental Specialist who assessed Queensland Gas Corporation's ("QGC") CSG 'coordinated projects', was only given a matter of days to prepare conditions for that report. The assessment team were not given any time to do any reading or assessment of the material, rather they were instructed to write conditions for QGC. The scientist was then instructed to write the Greenhouse Gas assessment for the QGC project in half a day. It was a brief with complex calculations and projections.
When it came time for the Commonwealth Government to assess the CSG projects, the Commonwealth Environment Minister had the Santos and the QGC projects independently examined by Geoscience Australia. It found that parts of the companies' Environmental Impact Statements were "insufficient or inadequate". This shows the immense pressure in these departments to rush and provide inadequate assessment. It also highlights potential risks of corruption, even if corruption was not found in this case.

Inefficiencies and uncertainties due to inter-jurisdictional water assessment and current lack of knowledge about impacts on GAB

96. Australia's Great Artesian Basin ("GAB") crosses multiple State borders and covers close to 1.7 million square hectares.[104] The intake area for the basin stretches across Queensland and New South Wales to the South and the Northern Territory to the West.[105] Whilst the aquifers of the GAB are "separated from each other by lower permeability layers" there is increasing knowledge of the interconnectivity between the aquifers themselves.[106] In the first full scale assessment of the GAB since 1980, CSIRO concluded that groundwater has an even greater potential to "move vertically across GAB formations than [we] previously thought."[107]

[102] *State Development and Public Works Organisation Act 1971* (Qld) s 35(1)
[103] Case example directly attributed to the transcript of the story, available here: http://www.abc.net.au/4corners/stories/2013/04/01/3725150.htm
[104] http://csiro.au/science/Great-Artesian-Basin-Assessment
[105] Great Artesian Basin Coordinating Committee: http://www.gabcc.org.au/public/content/ViewCategory.aspx?id=52
[106] http://www.dnrm.qld.gov.au/ogia/coal-seam-gas-groundwater-management
[107] CSIRO Great Artesian Basin Assessment (2013) http://www.csiro.au/Organisation-Structure/Flagships/Water-for-a-Healthy-Country-Flagship/Sustainable-Yields-Projects/Great-Artesian-Basin-Assessment.aspx

97. If Queensland undertakes an assessment of cumulative water impacts on the GAB there is no requirement for them to consider impacts on the GAB aquifers in other States. Retaining assessment powers at a Federal level would consider water impacts across borders without significant jurisdictional complications. In addition, as recent as this year, it is apparent that a whole new range of information is expected to be opened up on water impacts in Queensland in the coming years. [108]

98. The National Water Commission has commented that Queensland's water management laws are currently inadequately integrated with other management arrangements in Queensland.[109] It is therefore unlikely Queensland will have an assessment framework capable of undertaking cumulative impacts on water of a variety of activities such as urban sprawl, mining, coastal development, agriculture and climate change within its current assessment processes.

99. ANEDO submits that only the Commonwealth Government could have this 'bird's eye,' cumulative approach to water resource assessment in the Great Artisan Basin.

Recommendation 11

The Commonwealth Government is better placed than Queensland to assess the cumulative impacts of a controlled action in Queensland, on groundwater both within and outside of Queensland's borders.

8. Queensland should be required to seek advice from Commonwealth agencies

100. We further note that a new 18.3 of the Draft Agreement allows Queensland to obtain advice from Commonwealth agencies. EDOs recognise that Commonwealth agencies have the necessary expertise and resources to be able to provide advice on MNES.

101. It is imperative that Queensland be required to obtain advice from Commonwealth agencies when assessing MNES.

Recommendation 12

ANEDO submits that clause 18.3 of the Draft Agreement should be amended to ensure Queensland 'must' (not 'may') seek advice on relevant matters from Commonwealth agencies with relevant expertise.

[108] In relation to mining impacts on the GAB, the CSIRO noted in its 2013 Assessment report; "the outcomes of the Assessment are likely to result in consideration of a new range of information (reflecting an updated knowledge of how the GAB operates) by State and Commonwealth government regulators before approval to proceed, if any, is provided." See Water Resource Assessment Q&A: http://www.csiro.au/Organisation-Structure/Flagships/Water-for-a-Healthy-Country-Flagship/Sustainable-Yields-Projects/Great-Artesian-Basin-Assessment/Updates-and-FAQ.aspx

[109] National Water Commission's Biennial Assessment (2011), available here: http://nwc.gov.au/publications/topic/assessments/ba-2011/governance

9. Public access to information must be improved

102. Public access to information held by Queensland and the Commonwealth regarding the assessment of MNES is important in promoting open, accountable government. Queensland has expressed public support for promoting public access to information. The Queensland Premier has said that, "Now we are reversing 20 years of secrecy and becoming more open about decision-making and Government processes."[110]

103. To achieve this objective in environmental assessment processes, all information relating to environmental assessment and decision-making must be publicly available. For example, major correspondence between each of the Commonwealth, Queensland and the proponent should be made publically available on Queensland and Commonwealth websites. Additionally, the Commonwealth and Queensland websites containing information on the each project's environmental assessment processes, should remain online even after the period for commenting has closed or the projects has been determined.

104. The ANEDO Sept 2013 submission[111] to the Productivity Commission on Major Projects (pp 47-50) made some recommendations in response to their part 10.2. i.e. that States should:

    a. report annually on environmental outcomes and targets;

    b. develop and integrate sustainability indicators and tools for monitoring and data-sharing; and

    c. Publish compliance and enforcement statistics at least annually in a consistent and comparable form.

Recommendation 13

Public access to information should be improved, for example, by ensuring information on environmental assessment of all projects are maintained on both Queensland and Commonwealth websites, and that all major correspondence between Queensland the Commonwealth concerning an EIS is made publically available.

10. Open standing for review and appeal

105. For an open and accountable system under the EPBC Act, the public needs to play an essential watchdog role to ensure the rule of law is respected. The existing resourcing and enforcement culture in Queensland highlights the importance of

[110] Ministerial Media Statements, Premier Newman, 13 August 2013, available here: http://statements.qld.gov.au/Statement/2013/8/13/queenslanders-asked-to-think-about-open-government

[111] http://pc.gov.au/__data/assets/word_doc/0007/128248/subdr092-major-projects.docx

public access to information and public involvement in assessment, review and enforcement processes.

106. It is not merely essential to maintain all existing EPBC Act legislative provisions and administrative practices that provide rights to the general public, but to look further at strengthening those to make the system more robust. ANEDO submits that to bring the EPBC Act to best practice criteria,[112] the Act and/or Draft Agreement should allow for:

    a. allow "any person" to appeal on the merits against EIA decisions;
    b. allow "any person" to apply for judicial review of administrative decisions made in relation to the EIA process;
    c. allow "any person" to bring an action to enforce EIA legislation; and
    d. make it an offence to breach EIA legislation.

107. Funding for EDOs needs to be increased or at least maintained as EDOs are the only place that rural and urban clients may go to for free legal assistance concerning the EPBC Act in Queensland. This is important for a robust system, the more so if government plans to streamline operations.

Recommendation 14

To meet best practice standards, there must be open standing to permit review or enforcement of EIA processes.

[112] See Attachment A.

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).[113] 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.[114] 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

[113] 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.

[114] 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).

All projects must be assessed against an objective and consistent test, such as whether the project will 'maintain or improve environmental outcomes'.[115] Robust, science-based 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).

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[115] 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 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

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.

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.