Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

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

16 March 2014

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 Environmental Defenders Offices (EDO) in each State and Territory with expertise in environmental assessment and approval legislation. EDOs are non-profit, non-government community legal centres which help rural and urban communities 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's work on environmental assessment and approval policy includes:
    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 on those reforms;

    c. a 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]

[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.

AN OVERVIEW OF THE KEY ENVIRONMENTAL ASSESSMENT ISSUES

Industry causes delays in assessment, not Commonwealth government

3. 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[5] but refuse to acknowledge responsibility.

A strong and ongoing role for the Commonwealth is needed

4. 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.[6]

5. In March 2013, the Senate Environment and Communications Committee found (a) that there was minimal evidentiary basis for the claims of delay and duplication by the Commonwealth; and (b) that environmental standards would be put at risk if federal approval powers were delegated.

6. In November 2013, the Productivity Commission's report on major projects highlighted the dramatic influx of investment in Australia over the last decade (under existing regulatory models).[7] However, this has not been matched by increases in regulatory capacity of environment departments, as highlighted by Senate Committee reports in 2009 and 2013. [8]

7. Whilst ANEDO does not support the use of approval bilateral agreements, in South Australia (SA) or elsewhere in Australia, ANEDO considers that administrative efficiency can be increased and some necessary improvements in environmental standards can be made by improving the existing bilateral assessment arrangements between the SA 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.

8. One of the clearest indicators, that a strong and ongoing role for the Commonwealth is needed in the assessment of the impact of actions on Matters of National Environmental Significance ("MNES"), is contained in clause 4.2(b) of the Draft

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

[6] 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.'

[7] At page 7.

[8] 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.'*

Bilateral Agreement between The Commonwealth of Australia and SA relating to environmental assessments ("Draft Agreement").

> *"For actions which do not occur wholly within SA, or which are taken in SA but have relevant impacts in other jurisdictions, the parties will consult and use their best endeavours to reach agreement with other affected jurisdictions on an appropriate assessment process, such as that set out in Schedule 1."*

By way of example, imagine an action being proposed that will impact across the borders of SA, Queensland and NSW – the varying potential economic benefits for each state, the differing potential environmental impacts for each state, the likely political/electoral ramifications for each state government and the level of existing cooperation (or animosity) between the state governments will make effective consultation and agreement extremely difficult.

Under clause 4.3 of the Draft Agreement, the Commonwealth can step in and assess the impact of the action on the MNES under the EPBC Act. However, unless the Commonwealth retains its current level of staffing and expertise in relation to environmental assessment (extremely unlikely), then effective environmental assessment will not be possible.

9. In summary, ANEDO is very concerned that SA lacks the resources, expertise, national perspective and political will to properly assess the impact of actions on MNES. Will SA be able to properly assess environmental impacts beyond the borders of SA? Will SA be able to properly balance (a) the perceived benefits to the SA economy flowing from an activity; and (b) the SA and cross border environmental impacts of an activity?

Improving SA laws and process to an acceptable standard

10. The re-negotiation of the existing assessment bilateral agreement between SA 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. *Any assessment accreditation must not be premature.* ANEDO is concerned that little or no attempt has been made to address the shortcomings of the existing bilateral assessment agreement between the Commonwealth and SA. These shortcomings were first identified in a submission previously made to the Commonwealth Minister for Environment and Heritage, 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 upon the quality of the process being accredited. ANEDO submits that assessment bilateral agreements will only be successful in

achieving the objects of the EPBC 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 EPBC Act.

14. We note that the SA Government is undertaking a review of SA's planning laws. If there is 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.[9]

15. Allowing states to conduct assessments on behalf of the Commonwealth does not mean that the 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 agreements.

The purpose of the Bilateral Agreement includes strengthening environmental protection

16. The objects of the Draft Agreement include "to maintain(ing) high environmental standards" and "ensuring the adoption of best practice regulatory processes for achieving an efficient, timely and effective process for environmental assessment of actions."[10] 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. [11]

17. However, a comparison of the aims and objects of the existing SA Assessment Bilateral (Clauses 1 & 2) and the background and objectives of the Draft Agreement (Clauses A to H) reveals a very concerning shift away from environmental protection and biodiversity conservation as the dominant objective towards a cooperative trade-off between environmental standards and business costs.

18. The 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 continues to decline across Australia.[12]

[9] EPBC Act, section 50(a).
[10] Draft Agreement, Clauses B, C and D.
[11] See for e.g. Clauses B, C and D SA draft Assessment Bilateral Agreement. See further *EPBC Act 1999* (Cth), s 3.
[12] See SA State of the Environment Report 2013 – "There is also cause for concern—such as further decline of already poor biodiversity, increased use of natural resources, increased average temperatures, increased development and industrial activity in sensitive areas such as the coastal zone, increased use of private motor vehicles, reduced water flows for the natural environment from the River Murray, and changes in the acidity, salinity and temperature of the marine environment." http://www.epa.sa.gov.au/soe_2013/

19. ANEDO agrees 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.[13]

20. This submission contains 21 recommendations that, in relation to the Draft Agreement will improve the environmental outcomes.

SUMMARY OF ANEDO CONCERNS AND RECOMMENDATIONS

	ANEDO CONCERN	RECOMMENDATIONS SUMMARY
1	The Draft Agreement is not compliant with EPBC Act	**1.**Draft Agreement not be entered into without major revision to ensure that it complies with the EPBC Act, as detailed in this submission.
2	Commonwealth needs key assessment powers to ensure statutory obligations are fulfilled	**2.** Effective and efficient cooperation between SA and the Commonwealth. **3.** Commonwealth and SA must agree on assessment documentation and a draft assessment report must be maintained. No limits on how many times SA may provide a draft assessment report for comment. **4.** Commonwealth should ensure appropriate assessment documentation is prepared and provided. **5.** Draft assessment report must require agreement, rather than only being provided once to the Commonwealth for comment. **6.** Commonwealth must be able to impose whatever conditions necessary to protect MNES. **7.** Outcome focussed conditions" should be defined by outcomes that further the object of the EPBC Act.
3	Major developments/projects require (a) ESD as their objective; and (b) comprehensive and independent assessment with Federal oversight.	**8.** Only the SA Environment Minister should be accredited to conduct the assessments. **9.** Alternatively, before entering into the Draft Agreement, the Commonwealth should require SA to reform its laws relating to EIA processes under the *Development Act 1993* and the *Mining Act 1971.*
4	Importance of retaining and exercising the Commonwealth discretion to assess other than under the bilateral agreement.	**10.** Assessment bilateral not to operate for projects where the proponent is SA or a government owned entity. **11.** Clause 4.3(b) of the Draft Agreement should be deleted.

[13] *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.

5	No standing for the public to enforce the EPBC Act false and misleading offence provisions	**12.** Accredited assessment laws to contain equivalent false and misleading provisions as those set out in section 489-491 EPBC Act. **13.** Open standing for the public to enforce false/misleading provisions of either the EPBC Act or state accredited legislation. **14.** Commonwealth must be able to enforce false/misleading provisions even if the provision of the information is under the bilateral agreement rather than the EPBC Act.
6	Inappropriate for SA to assess some Actions	**15.** Assessment of actions that may impact on MNES in Commonwealth marine areas be undertaken by the Commonwealth. **16.** Assessment of nuclear actions be removed from the Draft Agreement. **17.** Commonwealth to assess the cumulative impacts of a controlled action in SA on groundwater both within and outside of SA's borders.
7	SA should be required to seek advice from Commonwealth agencies	**18.** Amend clause 6.4(e) to ensure SA 'must' (not 'may') seek advice on relevant matters from Commonwealth agencies with relevant expertise. Amend clause 2(c) to require the Commonwealth to provide such transitional and ongoing support "as determined" by SA.
8	Public access to information must be improved	**19.** For example, by ensuring information is kept on SA and Commonwealth websites, and that all major correspondence between SA and the Commonwealth concerning an EIS is publically available.
9	Open standing for review and appeal	**20.** To meet best practice standards, there must be open standing to permit review or enforcement of EIA processes. **21.** Reinstate EDO funding to enable communities to access free information and advice on EPBC Act processes.

9 ANEDO CONCERNS AND 21 RECOMMENDATIONS

1. It is questionable whether the 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[14] and meets the requirements of the regulations.[15] 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 of an action on MNES.[16]

2. Placing control of the assessment of significant impacts on MNES under the control of SA government departments with an apparent or actual bias for economic development (that is, the SA Department of Planning, Transport and Infrastructure and the Department of Manufacturing, Innovation, Trade Resources and Energy – the SA Minister for Sustainability, Environment and Conservation is not a proposed signatory) is not in accordance with the objects of the EPBC Act.

3. Based on the ANEDO analysis of the assessment procedures and standards under the SA state legislation and the terms of the Draft Agreement, it is clear that under the Draft Agreement:

    - the Ministers cannot be properly satisfied that the Draft Agreement will promote:

        a. the management of World Heritage properties within SA in accordance with the Australian World Heritage management principles;[17]
        b. the management of Ramsar Wetlands in accordance with the Australian Ramsar management principles;[18]
        c. the survival and/or enhance the conservation status of each listed threatened species and threatened ecological community;[19] and
        d. the survival and/or enhance the conservation status of each listed migratory species.[20]

    - The Ministers cannot be properly satisfied that there will be an adequate assessment of the impacts of an action on MNES.

[14] EPBC Act, section 50(a).
[15] EPBC Act, section 50(b).
[16] EPBC Act, section 46(3)(b).
[17] EPBC Act, section 51(1)(b).
[18] EPBC Act, section 52(1)(b).
[19] EPBC Act section 53(1)(b)
[20] EPBC Act section 54(1)(b).

Recommendation 1
The Draft Agreement not be entered into without major revision to ensure that it does comply with the EPBC Act, as detailed in this submission.

2. The Commonwealth needs key powers over assessments under the bilateral agreement to ensure statutory obligations are fulfilled

4. 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.[21]

5. The current process for SA and the Commonwealth to develop an assessment report is set out in the existing clause 14 of the 2008 Assessment Bilateral Agreement. It requires SA to provide the following documents to the Commonwealth:

    a. EIS, PER or Development Report as part of the Assessment Report; and
    b. Any other assessment documentation.
    c. SA may also provide information on social and economic matters.

Draft Assessment Report – assessment documentation no longer required to be provided to the Commonwealth or agreed - clause 6.6 Draft Agreement

6. There is agreement that SA and the Commonwealth will endeavour "to the greatest extent possible" to agree on a proposed set of common conditions.[22] If, after receiving the draft Assessment Report, the Commonwealth wants further information, SA has a discretion as to whether to provide it or not.[23] In addition, if the Commonwealth does not seek further information from SA, within the required timeframe, then it is taken that the Commonwealth has no additional requirements.[24]

7. This is unacceptable as the Commonwealth Minister has a statutory requirement to ensure that the appropriate documentation is provided to him or her as the decision maker.[25]

8. The Draft Agreement breaches the Commonwealth Minister's statutory obligation to ensure that a final report is provided that contains enough information on the relevant impacts.

[21] EPBC Act, section 47(4).
[22] Draft Agreement – Clause 6.6(a).
[23] Draft Agreement – Clause 6.6(d).
[24] Draft Agreement – clause 6.6(c).
[25] EPBC Act section 47(4).

One opportunity only for the Commonwealth to review Draft Assessment Report compromises s.47(4) purpose and could lead to inefficiencies - clause 6.7 Draft Agreement

9. Clause 6.7 requires SA to provide a final Assessment Report. 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).[26]

10. Whilst the Draft Agreement gives the impression that such a one-off process will be sufficient, 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.

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

11. The Draft Agreement provides that SA and the Commonwealth will endeavour, to the greatest extent possible, to agree on a proposed set of standard outcome-focussed conditions.[27] If an action is approved, ANEDO is supportive of seeking a single set of conditions that ensure protection of MNES and appreciates 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.

12. However, it remains the obligation of the Commonwealth Minister under the EPBC Act to ensure adequate protection for MNES, through conditions if so required. If a condition is considered by the Commonwealth Minister to be necessary to protect MNES , 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 6.5 to the effect that the Commonwealth may impose whatever conditions necessary to protect MNES.

13. 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 6.5 suggests that the parties will attempt to agree on conditions in every case, potentially meaning that there will be an approval warranting conditions in every case. To avoid any interpretation that 'outcome' is the equivalent of 'approval', the clause should expressly state that the 'outcome' is 'an outcome that furthers the EPBC Act's objectives'.

[26] Draft Agreement, clauses 6.6(a) and 6.6(b).
[27] Draft Agreement, clause 6.5(c).

Recommendation 2
There must be effective and efficient cooperation between SA and the Commonwealth at this early and important stage of assessment.

Recommendation 3

To achieve this, the requirement for the Commonwealth and SA to agree on assessment documentation and a draft assessment report must be maintained. There must not be any limits placed on how many times SA may provide a draft assessment report for comment.

Recommendation 4

The Commonwealth should ensure appropriate assessment documentation is prepared and provided. Clause 6.6 should be amended to require the Commonwealth to agree on the assessment documentation.

Recommendation 5

Clauses 6.6 and 6.7 should be amended such that the draft assessment report requires agreement, rather than only being provided once to the Commonwealth for comment.

Recommendation 6

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

Recommendation 7

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

3. Major developments or projects require (a) ESD as their objective; and (b) comprehensive and independent assessment with Federal oversight.

14. NEDO is concerned that the Draft Agreement continues to give control of EIA processes for major projects in SA under the *Development Act 1993,* which impact upon MNES, to the SA Minister for Planning rather than the SA Minister for Sustainability, Environment and Conservation. In addition, the Draft Agreement has the Minister for Mineral Resources and Energy as a co-signatory to the Draft Agreement and includes mining leases, retention leases, miscellaneous purpose licences and programs for environmental protection and rehabilitation (under the SA *Mining Act 1971*) as classes of action that do not require assessment under Part 8 of the EPBC Act.[28]

Purpose of the Mining Act 1971 is contrary to the objectives of the EPBC Act

15. The object of the *Development Act 1993*, through (inter alia) Development Plans that facilitate sustainable development and the protection of the environment, is to provide for proper, orderly and efficient planning and development.[29] Accreditation of assessment processes under the Development Act is consistent with the objects of the EPBC Act – but sustainable development is not expressly stated as the overriding object under the Development Act.

16. Under the *Mining Act 1971*, all mining activity in SA is regulated by the Minister for Mineral Resources and Energy. The object of one part of the Mining Act is to "ensure that mining operations that have (or potentially have) adverse environmental impacts are properly managed to reduce those impacts as far as reasonably practicable and eliminate, as far as reasonably practicable, risk of significant long term environmental harm".[30] Overall, the purpose of the *Mining Act 1971* is to facilitate and regulate mining activity in SA. The Mining Act 1971, contains no object or purpose statement that commits the operation of the Act to ecological sustainability.

17. The objectives of the EPBC Act revolve around environmental protection and ecologically sustainable development. However, this is not an objective of the *Mining Act 1971* which the Minister for Mineral Resources and Energy must bear in mind when assessing applications for mining activity. Compared to the EPBC Act, the *Mining Act 1971* makes little mention of the need to ensure ecologically sustainable development and the need to ensure that MNES are adequately protected. Rather, the major interest of the Minister for Mineral Resources and Energy is to facilitate activities that (potentially) have economic benefit. ANEDO submits that to continue the accreditation of an environmental impact assessment

[28] Draft Agreement – Clause 4.1 and Schedule 1.

[29] Section 3.

[30] Section 70A

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.[31]

No independent or comprehensive assessment due to the Minister for Mineral Resources and Energy's conflict of interest and due to the Minister for Planning's multifaceted role – both requiring independent oversight and review

18. For many major development projects the SA 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 casts doubt on its ability to objectively and credibly assess a proposed action that may affect MNES.

19. For the Minister for Mineral Resources and Energy and the Minister for Planning there will be conflicts of interest in terms of their state and EPBC Act obligations when assessing environmental impacts and, at a state level, approving major projects. Obvious examples are mining and major infrastructure projects. In these instances the State cannot make an impartial decision as to assessment and as to whether a project should go ahead. To mirror the EPBC Act process, the SA Environment Minister should have the EPBC Act responsibilities.

20. The equivalent process at the Federal level requires assessment under the EPBC Act by the Environment Minister and the Environment Department. An analogy, at the Federal level, of using the SA Development Act/Mining Act 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 EIA process in the *Infrastructure Australia Act 2008* (Cth) conducted by the Commonwealth Minister for Infrastructure and Regional Development. An EIA process on MNES would be inappropriate under such legislation and it would be inappropriate for the Commonwealth Department (or Minister) of Infrastructure to undertake an assessment report of MNES. It is wrong for an equivalent process to be accredited at a state level. The SA 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.

21. Although we support the retention of the Commonwealth's 'call in' power at clause 4.3 of the Draft Agreement (especially to assess projects in which SA 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.

[31] ANEDO notes 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).

SA Minister must be the Environment Minister

22. The logical and appropriate person for supervision of assessment of impacts is the SA Minister for Sustainability, Environment and Conservation. It is the SA Environment Minister who has protection of the environment as his or her objective, not the Planning or Mining Ministers.

23. The notification by SA that an accredited process will apply is by the "SA Minister".[32] 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, the notifications described in clause 5.3 and 4.3 should be given by the SA Environment Minister.

24. Under clause 1.1 of the Draft Agreement, "SA Minister" is defined as "the SA Minister administering legislation accredited for the purpose of this Agreement and includes a delegate of the Minister". These are the Minister for Planning and the Minister for Mineral Resources and Energy. ANEDO considers it is inappropriate for these Ministers to conduct assessments of MNES for the reasons outlined earlier in this submission.

Development Act 1993 and Mining Act 1971 assessments do not provide equitable or equivalent appeal rights

25. The reports prepared under the accredited assessment processes in the *Development Act 1993 and Mining Act 1971* (and the recommendations made therein), ultimately determine the outcome of the approval processes at the state level.

26. 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."

27. Despite this, in SA, the right to judicial review of decisions in relation to major developments and projects is specifically excluded under the *Development Act 1993*.[33] 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.[34] This is another reason why the *Development Act 1993* should not be accredited.

[32] Draft Agreement, clause 5.3.

[33] Development Act 1993 – section 48E.

[34] The High Court decision in Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs) [2010] HCA 1 (3 February 2010) determined that such provisions cannot prevent judicial review. However, the restrictions remain in the SA Development Act 1993.

28. 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.

29. Additionally, there is no provision in the *Development Act 1993* for merits review.[35]Therefore, there is no arms-length mechanism by which the public may hold the Minister for Planning accountable. Furthermore, even if there was a mechanism for review, there are few mandatory environmental considerations or outcomes guaranteed by the Act or the Draft Agreement against which the reasonableness of the Minister's decision or recommendations could be measured.

30. Under the Development Act 1993, any person may apply for a court order to remedy or restrain a breach of the Act.[36] However, the Court is specifically prohibited from cancelling or varying a development authorisation granted by the Governor (i.e. a major development or project).[37]

31. Alternative ways of reducing conflicts of interest include:

    a. Increased transparency and accountability of the State assessment process;
    b. Introducing judicial review, merits review and open standing into the Development Act;
    c. Provide open standing for the public to enforce false and misleading provisions; and
    d. Ensuring maximum public access to information on the environmental assessment.

32. Whilst not remedying the inherent conflict of interest that sits at the heart of the SA processes under the Draft Agreement, these amendments would go some way to counter-balancing it.

[35] Development Act 1993 – section 48(12).

[36] Development Act 1993 – section 85.

[37] Development Act – section 85(6)(e).

Recommendation 8

Only the SA Environment Minister, as the most appropriate minister, should be accredited to conduct the assessment of impacts of MNES.

Recommendation 9

Alternatively, before entering into the Draft Agreement, the Commonwealth should require SA to reform its laws relating to EIS processes under the *Development Act 1993* and the *Mining Act 1971* to: avoid conflicts of interest; re-introduce judicial and merits review; and amend the primary objectives of the two Acts to promote 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. Importance of retaining and exercising the discretion for the Commonwealth to assess other than under the bilateral agreement

33. The Commonwealth Minister retains the power to control the assessment of MNES. ANEDO supports retention of this discretion.[38]

34. We note that when the Commonwealth decides the action is a controlled action (clause 5.2), there is no requirement for the Commonwealth to advise if the SA assessment bilateral will apply. Clause 5.3 requires the Commonwealth to notify that the action is a controlled action and provides for SA notifying that the bilateral agreement will apply.

35. The practical effect of clauses 5.2 and 5.3 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 SA can notify the Commonwealth, within 10 days (wherever possible), that an accredited assessment will be used.[39] The Commonwealth cannot 'call in' the assessment after SA has given this notification that an accredited assessment process will be used.[40] 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.

36. A recent ANEDO publication discussed the inherent conflict of interest that can arise when a state government conducts an environmental impact assessment for the purposes of assessing impacts on a (or several) matter(s) of national environmental significance, particularly when it is a State backed major project.[41]

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

38. 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 proposed development.'[42] This built in conflict of interest is one reason why ANEDO believes that the delegation of Commonwealth assessment and approval responsibilities to states and territories is untenable, regardless of the standards they are required to meet.

[38] Draft Agreement clause 4.3.
[39] Draft Agreement, clause 5.3(a).
[40] Draft Agreement, clause 4.3(b).
[41] ANEDO, 'COAG environmental reform agenda: ANEDO response – in defence of environmental laws' (May 2012), available here: http://www.edo.org.au/policy/policy.html
[42] See ANEDO, *In defence of environmental laws* (May 2012), pp 6-7.

Recommendation 10
The Draft Agreement should include a clause that excludes the operation of the assessment bilateral to projects where the proponent is SA or a government owned entity.

Recommendation 11
Clause 4.3(b) of the Draft Agreement should be deleted.

5. No standing for the public to enforce the EPBC Act false and misleading offence provisions in relation to assessment bilateral agreement information

39. 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[43] or negligent.[44] Recklessness in this section includes intention and knowledge.[45] Although not explicitly stated in the legislation, it is probable that omitting information would also fall within this definition.[46]

40. Under the *Development Act 1993* (SA), it is an offence to furnish information or make a statement that is false or misleading (whether through inclusion or exclusion).[47] Under the *Mining Regulations 2011* (SA), it is an offence, in furnishing information, to make a statement that is false or misleading.[48]

41. Courts apply a strict interpretation of criminal provisions and the supply of information to the SA Government under the *Development Act* or *Mining Act* 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 not apply as the information is provided to the SA 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.

42. If SA 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

[43] *EPBC Act* s 489(1).
[44] *EPBC Act* s 489(2A).
[45] See *Criminal Code* (Cth) s 5.4(4), and the note under s 489(1)(b) of the *EPBC Act*.
[46] 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.
[47] Section 103.
[48] Regulation 97

EPBC Act by allowing third party enforcement of the offence provisions in the EPBC Act which prohibit the giving of false or misleading information. [49]

43. The legislative intent, behind including Part 8 in the matters to which the false and misleading offence provisions apply, is clearly that false and misleading information provided in an EIS or other assessment processes is 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 12
Each of the accredited assessment laws should contain equivalent false and misleading provisions as those set out in section 489-491 EPBC Act.

Recommendation 13
There needs to be open standing for the public to enforce false and misleading provisions of either the EPBC Act or state accredited legislation.

Recommendation 14
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.

6. Actions which are inappropriate for SA to assess

44. ANEDO believes that the effective implementation of the EPBC Act, by the Commonwealth Government, is essential if Australia is to fulfil its international environmental obligations. The ongoing role of the Commonwealth Government – as signatory to international environmental agreements – is fundamental to meeting its legal obligations.

45. In addition to matters in which SA has an actual or perceived conflict of interest (addressed above), there are new types of actions proposed to be assessed by SA. The Draft Agreement proposes to extend the existing bilateral agreement to actions in Commonwealth marine areas, to nuclear actions and to the water impacts of large resource projects. ANEDO considers that these actions should only be assessed by the Commonwealth. Each of these matters are addressed below.

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

46. Under clauses 4.1 and 6.4(c) (ii)(g), the scope of actions that SA could assess also extends to actions on land or in SA state waters that will have a significant impact on

[49] EPBC Act, ss.489-491.

MNES in Commonwealth Marine areas,[50] including Commonwealth Marine Reserves such as parts of the South-west and South-east Commonwealth Marine Reserves Network. 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.

47. 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.

48. 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 reserves is "one of the most effective mechanisms for maintaining the long-term health and productivity of our oceans."[51] These Marine Reserves also protect various migratory species, whose movements are not necessarily limited to the marine reserve or state borders, and which may be subject to international agreements.

49. These marine reserves were established under the EPBC Act[52]. They include federally listed species under the EPBC Act and should be afforded protection under the EPBC Act. Commonwealth MNES in Commonwealth marine reserves require assessment and protection: (a) by agencies with the expertise and knowledge; and (b) pursuant to legislation with environmental protection and more specifically, ESD, as its objective. For reasons set out earlier in this submission, SA 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.

Recommendation 15
It is more appropriate that assessment of actions that may impact on MNES in Commonwealth marine areas be undertaken by the Commonwealth, not by SA.

SA cannot adequately assess nuclear actions in the absence of specialised standards

50. The Draft Agreement proposes that SA be accredited to assess nuclear actions under the accredited state assessment processes.[53]

[50] EPBC Act, section 23 and 24A.
[51] Department of Environment, "Commonwealth marine reserves – Overview", available here: http://www.environment.gov.au/topics/marine/marine-reserves/overview
[52] Chapter 15, Division 4.
[53] Draft Agreement, clauses 4.1, 6.4(c)(ii)(H).

51. The scope of 'nuclear actions'[54] SA proposes to assess is extremely broad. 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. There are significant problems with assessment of the extent of contamination or the environmental impacts of uranium mining.[55]

52. SA's environmental impact assessment procedures 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 SA departments. Until this occurs, ANEDO submits that the Commonwealth should not accredit SA's assessment systems and should reserve accreditation until such regulations are prepared.

53. To allow SA 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.[56]

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

Recommendation 16
Assessment of nuclear actions be removed from the Draft Agreement. A clause should be included to expressly prohibit SA assessing nuclear actions.

SA cannot adequately assess impacts concerning the water trigger

55. The Water Trigger was introduced into the EPBC Act in June 2013.[57] 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.[58] 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 SA's) future.

56. ANEDO considers that the SA Government should not be accredited to assess the water impacts of large resource projects in SA. Our reasons are set out below.

A. The State Government lacks the capacity to adequately assess water impacts

[54] EPBC Act, section 22.
[55] 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
[56] EPBC Act, section 50(b).
[57] The EPBC Amendment Bill 2013 (Cth) passed the Parliament on 19 June 2013, and received Royal Assent on 21 June 2013.
[58] See EPBC Act, section 24D

57. 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.[59]

58. 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"* [60]

59. Pursuant to clause 6.4(d) of the Draft Agreement, "SA will refer coal seam gas or large coal mining developments that are likely to have a *significant* impact on water resources to" the Expert Scientific Committee "for advice". "SA will *take account of*" that advice in the Assessment Report.
60. Providing SA with such a broad discretion is of serious concern to ANEDO. Firstly, the referral requirement should not require SA to make a threshold decision on the likelihood of a *significant* impact on water – that is one of the roles of the Expert Scientific Committee. If there is likely to be an impact on water resources, then a referral should be mandatory. Secondly, for SA to simply "take account" of the Expert Scientific Committee is not sufficient. SA should be required to make decisions that are consistent with that advice.

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

61. Australia's Great Artesian Basin ("GAB") crosses multiple State borders and covers close to 1.7 million square hectares.[61] The intake area for the basin stretches across Queensland and New South Wales to the South and the Northern Territory to the West.[62] 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.[63] In the first full scale assessment of the GAB since 1980, the CSIRO concluded that groundwater has an even greater potential to "move vertically across GAB formations than [we] previously thought."[64]

62. If SA undertakes an assessment of cumulative water impacts on the GAB, there is no requirement for SA to consider impacts on the GAB aquifers in other States. Retaining assessment powers at a Federal level would enable consideration of

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[59] 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

[60] Available here: http://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/what-protected/water-resources

[61] http://csiro.au/science/Great-Artesian-Basin-Assessment

[62] Great Artesian Basin Coordinating Committee: http://www.gabcc.org.au/public/content/ViewCategory.aspx?id=52

[63] http://www.dnrm.qld.gov.au/ogia/coal-seam-gas-groundwater-management

[64] 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

water impacts across borders without significant jurisdictional complications. It should be noted that a whole new range of information is expected to be available regarding mining impacts on the GAB in the coming years. [65]

63. ANEDO submits that only the Commonwealth Government could have the necessary 'bird's eye,' cumulative approach to water resource assessment in the Great Artisan Basin and across Australia.

Recommendation 17
As the Commonwealth Government is better placed, than SA, to assess the cumulative impacts of a controlled action in SA on groundwater both within and outside of SA's borders – the Commonwealth Government should retain this important role.

7. SA should be required to seek advice from Commonwealth agencies

64. Clause 6.4(e) of the Draft Agreement allows SA to obtain advice from Commonwealth agencies. ANEDO recognises that Commonwealth agencies have the necessary expertise and resources to be able to provide advice on MNES.

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

66. Under clause 2(c) of the Draft Agreement, the extent of transitional and ongoing support to be provided to SA, by the Commonwealth, is to be considered and detailed in Administrative Arrangements. Such uncertainty will detract from SA's capability to give effect to the Objects of the Draft Agreement.

Recommendation 18
Clause 6.4(e) of the Draft Agreement should be amended to ensure SA 'must' (not 'may') seek advice on relevant matters from Commonwealth agencies with relevant expertise. Clause 2(c) of the Draft Agreement should be amended to require the Commonwealth to provide such transitional and ongoing support "as determined" by SA.

[65] 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

8. Public access to information must be improved

67. Public access to information held by SA and the Commonwealth regarding the assessment of MNES is important in promoting open, accountable government.

68. 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, SA and the proponent should be made publically available on SA and Commonwealth websites. Additionally, the Commonwealth and SA 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.

69. The ANEDO Sept 2013 submission[66] 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 19
Public access to information should be improved, for example, by ensuring information on environmental assessment of all projects are maintained on both SA and Commonwealth websites, and that all major correspondence between SA and the Commonwealth concerning an EIS is made publically available.

9. Open standing for review and appeal

70. 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. Public access to information and public involvement in assessment, review and enforcement processes is essential.

71. It is essential to maintain all existing EPBC Act legislative provisions and administrative practices that provide rights to the general public and it is essential to further strengthen those provisions to make the system more robust. ANEDO submits that to bring the EPBC Act up to best practice standards (as set out in Attachment A), the Act and/or Draft Agreement should allow for:

    a. allow "any person" to appeal on the merits against EIA decisions;

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

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.

72. Funding for EDOs across Australia needs to be reinstated.

73. In SA, EDO(SA) is the only community legal service, specialising in environmental law, that rural and urban community members may go to for free legal assistance concerning the application of the EPBC Act in SA.

74. Such assistance is vital for there to be community confidence in, and an understanding of, the environmental assessment and approval system under the EPBC Act. The system will only work effectively and efficiently if the community supports it.

Recommendation 20
To meet best practice standards, there must be open standing to permit review or enforcement of EIA processes.

Recommendation 21
EDO funding should be reinstated to enable communities across Australia to access free information and advice regarding the EPBS Act processes.

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).[67] 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.[68] 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

[67] 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.

[68] 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'.[69] 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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[69] 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 e.g., 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.