Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

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

13th June 2014

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

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

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Executive Summary

Australian Network of Environmental Defender's Offices (**ANEDO**) does not support the handover of environmental approval powers to the States. We support the establishment of best practice environmental standards in all Australian jurisdictions, and the retention of environmental *approval* powers by the Australian Government for matters of national environmental significance. See the alternative seven steps pathway we support on page 6 of this Submission.

Our future prosperity depends on a healthy environment. It is unacceptable for the Commonwealth to weaken environmental protection by delegating to Queensland approval decision-making on any matters of national environmental significance. The Traveston Dam example shows how the Commonwealth needed to protect listed threatened species and say no to a Queensland-approved dam. Even the World Heritage Committee recently noted the transfer of decision-making powers to the Queensland Government "appears premature" before governance requirements to implement a long term plan for sustainable development of the Great Barrier Reef is in place.

Based on our years of experience across Australia with both State and Commonwealth environmental laws, and expert analysis of the proposals under the 'one stop shop' policy, ANEDO does not support the handover of environmental approval powers to the States and we do not consider the Queensland Draft Approval Bilateral Agreement (**Draft Agreement**) should be entered into.

ANEDO submits that at a minimum, substantial change to the Draft Agreement is required to limit the matters of national environmental significance to be delegated, as well as changes to the accredited legislation and the Draft Agreement itself, summarised as follows:

1. **Actions in World Heritage Areas** and actions in the Great Barrier Reef Marine Park should be excluded, along with actions anywhere in Queensland subject to the water trigger and nuclear actions. Inclusion of certain nuclear actions in the bilateral, such as mining uranium or transporting waste, is a retrograde step with serious national and international implications.

2. **State-owned corporations and agencies** routinely have a direct interest in proposed developments here in Queensland. Their actions should be excluded from any approval bilateral. Queensland will prefer royalties or income over the national interest.

3. **Conflict of interest:** The Queensland Coordinator-General is proposed to be a key approvals decision-maker for major projects. The Queensland Coordinator-General would have a conflict of interest between national environmental protection and their main current role of promoting development. A more appropriate Queensland delegate for any approvals decision-making is the State Environment Minister.

4. **Inadequate Queensland legislation:** Queensland's project assessment legislation proposed to be accredited does not meet the standards necessary for Commonwealth accreditation. For practical legal enforceability the various *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act)** decision-making criteria and duties, such as to comply with international treaties such as the World Heritage Convention, need to be required to be each separately and specifically written into the Queensland legislation.

5. Further, provisions about taking a developer's **environmental record** into account in decision-making and provisions outlawing supply of **false and misleading information by a developer** need to be strengthened in Queensland legislation to be the same as the EPBC Act.

6. **Accountability and Enforcement:** The Draft Agreement and accredited legislation do not confer extended legal standing for community groups for judicial review or open standing for enforcement equal to the EPBC Act. Relevant Queensland legislation does not include those provisions, which means legitimate community groups may be unable to take action as a safeguard against official inaction.

7. **Public access to information:** It is also important that Queensland is required to have provisions about public access to information in Queensland legislation, not just policy. This is a valuable safeguard for the public.

8. **Likelihood of poor state enforcement:** What resources will be provided to Queensland to implement bilateral approval responsibilities? The Qld State Government is not resourced to adequately administer Commonwealth laws and its poor record of enforcement has been exposed in 2014 by the Queensland Audit Office. The potential cost to the tax-payer where these laws are poorly enforced could quickly outweigh any perceived benefit of delegation of approvals.

9. **Call-in Powers:** The Commonwealth needs power to exercise call-in powers to decide an application not merely before a decision is made by Queensland but within a period after Queensland makes a delegated decision. This flexibility is important to ensure Commonwealth oversight.

Under the Commonwealth Government's proposed policy, each state and territory will have different regulatory requirements, creating a patchwork regulatory system. There is a strong likelihood that rather than deliver streamlined approval processes, the delegation of approval powers to Queensland with new legislation including new terminology will result in approval delays. Without proper Commonwealth assessment, individual and community stakeholders will feel disengaged.

Based on the range of concerns identified in this submission, ANEDO submits that the draft approval bilateral agreement should be withdrawn.

If it is not withdrawn, ANEDO submits that the recommendations highlighted throughout this submission should at least be implemented.

Introduction

The ANEDO welcomes the opportunity to comment on the Draft Agreement. Consistent with the *State of the Environment 2011* report, ANEDO supports a strong Commonwealth role in efficient and effective implementation of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) to protect Australia's unique biodiversity and heritage. Australia's environment cannot be protected without strong federal environmental laws. As the *State of the Environment Report 2011* notes:

> *Our environment is a national issue requiring national leadership and action at all levels… The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.*[1]

We therefore support the establishment of best practice environmental standards in all Australian jurisdictions, and the retention of environmental *approval* powers by the Australian Government for matters of national environmental significance (**MNES**).

ANEDO has engaged in the 'one stop shop' process to date by preparing background papers on best practice environmental laws and standards,[2] making submissions on current legal standards,[3] meeting with members of the Government and COAG taskforce on request to provide expert input, and consultation and submissions on the Productivity Commission's inquiry into major project assessment and approval processes; presenting evidence at three parliamentary inquiries, and making submission on the draft assessment bilateral agreements when exhibited for NSW, Queensland, ACT, and South Australia.[4]

Based on our years of experience across Australia with both state and Commonwealth environmental laws, and expert analysis of the proposals under the 'one stop shop' policy, ANEDO does not support the handover of environmental approval powers to the States. The Draft Agreement is the most critical and retrograde step in implementation of the 'one stop shop' policy to date. The signing of the Memorandum of Understanding (**MOU)**, the assessment bilateral agreement, and introducing proposed amendments to the EPBC Act have created momentum, and now the approval bilateral agreement facilitates the handover of Commonwealth approval responsibilities. The agreement has the potential, if signed, to endorse significant detrimental and permanent impacts on matters of national environmental significance.

Instead of rushing to sign approval bilateral agreements, the Australian Government should examine the range of policy alternatives for strengthening environmental laws that are available to improve the efficiency and effectiveness of national environmental law.[5] Efficiency can be increased by coordinating and improving assessment processes and putting in place a suite of consistent and robust environmental standards in all jurisdictions, without abdicating Commonwealth approval powers.

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[1] Australian Government expert committee, *State of the Environment 2011*, 'In brief', at 9.
[2] See ANEDO 'COAG environmental reform agenda: ANEDO Response – In Defence of Environmental laws' available at: http://www.edo.org.au/policy/policy.html.
[3] See ANEDO "Submission on the Draft Framework for the Accreditation of Environmental Approvals under the EPBC Act", 23rd November 2012, available at: http://www.edo.org.au/edonsw/site/pdf/subs/121123COAGCthaccreditationstandardsANEDOsubmission.pdf
[4] Submissions are available at: www.edo.org.au.
[5] See ANEDO, Best practice standards for environmental law (June 2012), available on request or at www.edo.org.au; Wentworth Group of Concerned Scientists, *Statement on Changes to Commonwealth Powers To Protect Australia's Environment* (September 2012), at www.wentworthgroup.org; Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia* (August 2013), at www.aph.gov.au.

ANEDO analysis over the past two years make clear that no existing State or Territory major project assessment process meets the standards necessary for federal accreditation (notwithstanding some have been accredited). Nor do these processes meet best practice standards for environmental assessment.

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

1. The Commonwealth Government should reverse its intention to pursue approval bilateral agreements, as their use is not necessary or justified.
2. Instead, the Government should improve the efficiency and effectiveness of the EPBC Act, and work with States and Territories to improve their environmental assessment and approval processes.
3. This should include revisiting the Hawke Review package, and developing better administrative arrangements with the States under *assessment* bilateral agreements (once State processes are improved).
4. Administrative arrangements should include a 'highest environmental denominator' approach to promoting consistent standards across jurisdictions, and strengthening regulatory skills and resourcing at both state and federal levels.
5. The Commonwealth Government should consult further on a uniform set of national environmental standards that State assessments must comply with to be accredited, including the use of objective and robust science-based assessment methodologies.
6. Improved State and Territory assessment standards must be a prerequisite to expanding assessment bilateral agreements. ANEDO opposes new assessment bilateral agreements until State/Territory assessment procedures are established in law, and independently certified as meeting federal standards.
7. This should include requirements in State and Territory planning laws such as:
    - aim to promote and achieve ecologically sustainable development (**ESD**) through improved assessment standards;
    - more accountable governance arrangements (assessors, decision-makers);
    - greater transparency and public participation before decisions are made;
    - increased access to justice for communities, including court appeal rights;
    - leading practice monitoring, enforcement and reporting; and
    - renewed focus on implementing and strengthening threatened species laws.

Part 1 of this submission outlines ANEDO's general concerns about the Government's agenda for bilateral accreditation and 'one stop shop' assessments and approvals.

Part 2 of this submission highlights some specific concerns with the provisions of the draft Agreement between Queensland and the Commonwealth.

Part 3 of this submission outlines ANEDO's significant concerns about accrediting the declared classes of action in Schedule 1 to the draft agreement.

Part 4 of this submission makes brief comment on Schedules 2, 3 and 4.

Based on the range of concerns identified throughout this submission, ANEDO submits that the draft approval bilateral agreement should be withdrawn.

1. General concerns with accreditation and 'one stop shop'

The draft Commonwealth Queensland approval bilateral agreement is the most critical and retrograde step in implementation of the 'one stop shop' policy to date. The signing of the MOU, the assessment bilateral agreement, and the introduction of proposed amendments to the EPBC Act have created momentum, and now the approval bilateral agreement facilitates the handover of Commonwealth approval responsibilities. The agreement has the potential, if signed, to endorse significant detrimental and permanent impacts on matters of national environmental significance. Below we outline a range of fundamental concerns over the 'one stop shop' approach to environmental assessments and approvals.

The Commonwealth's role for matters of national environmental significance

The effective implementation of the EPBC Act is the most essential element of meeting Australia's international environmental obligations. We submit that this can only be achieved by the Commonwealth Government retaining direct responsibility for key functions under the EPBC Act, such as decisions about when the Act is triggered and final approval decisions. The Commonwealth Government's ongoing role – as signatory to international environmental agreements – is fundamental to meeting its legal obligations.
In brief, Commonwealth oversight of Matters of National Environmental Significance (**MNES**) is vital because:

- Only the Commonwealth Government can provide national leadership on national environmental issues;
- The Commonwealth must ensure that we meet our international obligations;
- State and Territory environmental laws and enforcement are not up to standard;
- States are not mandated to act (and do not act) in the national interest; and,
- States often have conflicting interests, as they benefit directly from the projects they are assessing.[6]

The Commonwealth Environment Minister may enter into a bilateral agreement only if the agreement 'accords with the objects of' the EPBC Act.[7] This is vital because, while the present reform agenda has largely focused on 'streamlining' assessment, the objects of the EPBC Act (and the first object in chapter 3 on bilateral agreements) embody fundamental environmental goals.[8]

The EPBC Act's objects chiefly include protection and conservation of the environment and heritage (governments in partnership with Indigenous people and other groups), fulfilment of our international obligations, and promotion of *ecologically sustainable development* (**ESD**).[9] The Commonwealth Government has recently re-released accreditation standards, comprising over 100 minimum standards required under the EPBC Act and government

[6] See ANEDO, 'Submission to the Senate Standing Committee on Environment and Communications regarding the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*'. Available at: http://www.edo.org.au/policy/ANEDO-Submission-EPBC-Retaining-Federal-Approval-Powers-Bill-2012.pdf.
[7] EPBC Act, s 50.
[8] See EPBC Act 1999, ss 3-3A and s 44(a).
[9] Australian Government. *National Strategy for Ecologically Sustainable Development* (1992), http://www.environment.gov.au/node/13029. The Strategy states: *ESD is development which aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations. To do this, we need to develop ways of using those environmental resources which form the basis of our economy in a way which maintains and, where possible, improves their range, variety and quality. At the same time we need to utilise those resources to develop industry and generate employment.*

practice.[10] Based on our extensive analysis of and interaction with planning and environmental laws, we submit that *no* State or Territory laws currently meet these minimum requirements – let alone the full suite of best practice standards that Australia should strive to implement.[11] Accreditation of State laws that do not meet these requirements will put at risk matters of national environmental significance, potentially breach our international obligations, and potentially expose the Commonwealth to legal liability.

Relinquishing federal approvals will not improve efficiency or effectiveness

It is difficult to see how delegating Commonwealth *approval* decisions to State governments will improve timeframes, reduce costs or promote sound environmental outcomes. For example, the timeframe for Commonwealth *approval* is 30 business days from the date the Environment Minister receives the State's assessment report.[12]
Comprehensive *assessment* of projects is the longest and most complicated stage in the overall approval process. This is to some extent inevitable because of the scale of project applications, complex environmental impacts, limitations on agency resources and data, and the importance of community engagement and consultation. As the Productivity Commission has noted:

> *…a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome.*[13]

Consequently, while efficiencies may be gained by improving and better coordinating environmental *assessment* processes with the States and Territories, the Commonwealth Government must retain final approval powers and call in powers. The efficiencies to be gained from better coordination and integration of assessment processes do not displace the need for strong Commonwealth involvement.

Conflicts of interest

For many major development projects, the State government is either the proponent (such as a State energy authority or State-owned corporation), a significant beneficiary (such as a royalty recipient), or has a demonstrated political interest in the project proceeding. Relevant examples include mining and major infrastructure projects.[14] In general, the Commonwealth is a step removed from the development and therefore able to make a more objective and independent decision in the national public interest.

There are many examples of States signalling that they would progress major projects that would have had significant adverse environmental impacts that were ultimately rejected by the Commonwealth. For example, the Traveston Dam in Queensland, Franklin Dam in Tasmania, Jervis Bay rezoning in New South Wales, releasing of water from Lake Crescent in Tasmania for irrigation, and the Nobby's Headland development in New South Wales, were all State-backed projects that were rejected by the Commonwealth due to the unacceptable environmental impacts they were going to cause. A Commonwealth role in such cases is essential.

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[10] Released March 2014. A previous *Draft Framework for the Accreditation of Environmental Approvals under the EPBC Act* and a *Statement of Environmental and Assurance Outcomes* were released in June and July 2102. See ANEDO's submission on these standards at www.edo.org.au.
[11] See for example, ANEDO, *Best practice standards for environmental law* (June 2012).
[12] EPBC Act 1999, s 130(1B). For other assessment types the period is between 20-40 days.
[13] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.
[14] For examples, see ANEDO, 'In defence of environmental laws' (May 2012).

State laws do not meet high environmental standards

Accreditation of State planning laws is also an endorsement of State threatened species legislation. Current State and Territory laws do not meet federal standards.
In December 2012, ANEDO was commissioned to undertake an audit of threatened species and planning laws in all Australian jurisdictions.[15] The key finding of this report is that *no State or Territory biodiversity or planning laws currently meet the suite of federal environmental standards necessary to effectively and efficiently protect biodiversity.* While the laws in some jurisdictions look good 'on paper', they are not effectively implemented. We give some examples below.

A number of important legislative tools available for managing and protecting threatened species are simply not used.[16] Key provisions are often discretionary. Critical tools such as recovery plans and threat abatement plans are not mandatory. Timeframes for action and performance indicators are largely absent. Effective implementation is further hampered by a lack of data and knowledge about the range and status of biodiversity across Australia.

Threatened species laws do not *prevent* developments that have unacceptable impacts on threatened species from going ahead. Project refusals on the basis of threatened species are extremely rare (for example, a handful of refusals under the EPBC Act), or are the result of third party litigation. Threatened species laws are further subjugated in many jurisdictions by the absence of third party rights that enable communities to enforce the laws to protect threatened species.

The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to 'fast-tracking' of environmental impact assessment for major projects. These provisions in effect override threatened species laws in all jurisdictions. Required levels of impact assessment tend to be discretionary, and projects can be approved even where they are found to have a significant impact on critical habitat, for example. The quality of different levels of species impact assessment is highly variable across local and state jurisdictions, and rarely audited.

Since completing this audit, many States and Territories have in fact *lowered* environmental legislative standards relevant to the protection of MNES. Such lowering of State standards is *increasing* the need for cohesive, strong Commonwealth protection of the environment. For example, Queensland has relaxed requirements to permit clearing of previously protected regrowth and riparian native vegetation. Planning laws and the major projects legislation in Queensland are also being 'streamlined' in ways that are unlikely to satisfy EPBC Act protections. Laws that relate to national parks are also being amended to allow grazing and increased commercial uses.

As the *State of the Environment 2011* report stated, 'Our unique biodiversity is in decline, and new approaches will be needed to prevent the accelerating decline in many species'.[17] Given the decline in biodiversity, combined with increasing population pressures, land clearing, invasive species and climate change, now is *not* the time to be streamlining and minimising legal requirements in relation to biodiversity assessment. Rather, the list of

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[15] ANEDO, *An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia* (2012), Report for the *Places You Love Alliance* of environmental NGOs. Available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/279/attachments/original/1380668130/121218Appendix1Reportontheadequacyofthreatenedspeciesandplanninglaws.pdf?1380668130

[16] For example, in Victoria, interim conservation orders and management plans are not utilised; in South Australia, no native plants have been declared prescribed species on private land; in Tasmania, no critical habitats have been listed and no interim protection orders have been declared; and in the Northern Territory, no essential habitat declarations have been made.

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

common failings make clear that threatened species laws in all jurisdictions need to be reviewed, strengthened, and fully resourced and implemented.

Fast-tracking major projects contradicts risk-based assessment

Planning reviews and reform proposals often express support for 'risk-based' and 'proportionate' approaches to development assessment and regulation.[18] Accordingly, most planning systems already stream projects into different categories and levels of assessment. However, moves in recent years to fast-track major projects often *contradict* the aim of proportionate, risk-based approaches.

For example, the fast-tracking of major projects under State laws often overrides important environmental authorisations and licensing requirements. Fast-tracking mechanisms can also concentrate control in a single agency or decision-maker, limiting the role of expert advice and potentially increasing corruption risks. They may also limit public participation and transparency of process, and curtail judicial scrutiny of decisions.

By contrast, a truly *risk-based, proportionate* approach to environmental impact assessment would *focus* effort on major projects, not override or reduce scrutiny. This is because major projects tend to be the most significant in terms of scale, nature, complexity, breadth and duration of impacts and level of public concern;[19] projects with the most significant impacts deserve the most rigorous scrutiny and safeguards.

ANEDO notes that if States seek to uphold federal EPBC Act requirements, they will need to increase environmental and assurance standards. However, by seeking to fast-track major projects, States will be *lowering* those standards (such as by reducing scrutiny or public participation). By competing with one other to 'cut red tape' and attract investment, States risk a 'race to the bottom' for environmental standards.[20] This fundamental contradiction supports ANEDO's view that transfer of Commonwealth *approval* powers to the States is misconceived.

Inadequate assurance framework

There has been no clear indication of how monitoring, auditing, reporting, compliance and enforcement will work under the 'one stop shop' model. It is unclear what baselines or indicators will be used to ensure that bilateral agreements will maintain environment protection standards, and what independent body with the necessary environmental expertise will be appointed to assess this. ANEDO believes it would not be possible for the Commonwealth to vacate this sphere by delegating powers to States and Territories, without risking matters of national environmental significance, potentially breaching our international obligations, and potentially exposing the Commonwealth to legal liability.

All governments should be required to report on whether strategic environmental outcomes and targets are being achieved – including in relation to promoting and achieving ESD. Without meaningful measurement, monitoring and reporting, it is impossible to arrest environmental decline and ensure Australia's development is ecologically sustainable.[21] If the focus is on reducing approval times and project delivery then the measurement

[18] See for example, Productivity Commission, *Research Report – Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (2011), p. xlviii.
[19] See, for example, EPBC Act s 87(4A) and factors to be considered in EPBC Regulations 2000, cl 5.03A.
[20] See Senate Environment and Communications Committee, report on the *EPBC Amendment (Retaining Federal Approval Powers) Bill 2012* (March 2013), evidence at 2.26 and conclusion at 2.71.
[21] The *State of the Environment 2011* notes that 'Australia is positioned for a revolution in environmental monitoring and reporting.' However, 'Creating and using systems that allow efficient access to environmental information remain a great national-scale challenge.' See: http://www.environment.gov.au/soe/2011/report/future-reporting.html.

indicators will only tell half the story. It will be impossible to accurately measure whether development approvals under an accredited bilateral approval agreement are promoting ESD and actually protecting and enhancing MNES as required by EPBC Act standards.

2. Comments on the draft Agreement's general provisions

This Part identifies some key concerns with the drafting of the agreement. Based on the range of concerns identified, we recommend that the agreement be withdrawn. If the agreement is continued with, the recommendations outlined should at least be implemented and concerns addressed.

Objects (D) – This clause refers to parties using "best endeavours to implement the commitments in the Agreement acting in a spirit of cooperation...". Aspirational language is not enforceable or legally meaningful and should be strengthened to convey firm committed statements.

1. Definitions – "Queensland Minister" is either the Queensland Minister for State Development Infrastructure and Planning, or the Queensland Minister for the Environment, depending on the type of approval, whereas at the Commonwealth level the relevant Minister (and Department) is for the Environment. This is a fundamental issue with the handover of powers – the Commonwealth Environment Department is handing over powers to State planning departments that do not have the same expertise or mandate.

4. Effect of the agreement – This clause sets out that Queensland will use its "best endeavours" to coordinate assessment and approval processes where an action may involve other jurisdictions. There is no legal definition of "best endeavours" or clarity on what might be required to discharge this obligation. This term should be defined or made more certain.

5.1 Identification of impacts on MNES – Queensland will be required to "use its best endeavours" to inform a proponent that they may need to refer an action that is not covered by the agreement to the Commonwealth. This may be done by standard guidelines, which are unlikely to be subject to public consultation. There is no apparent justification for why Queensland is not mandatorily required to inform a proponent that their action must be referred to the Commonwealth. This requirement should be mandatory.

5.4 Seeking expert advice – Most of the detail regarding the obtaining of expert advice will be set out in Administrative Arrangements, for which there has been no public consultation to date. Public consultation should be undertaken with respect to the Administrative Arrangements.

5.4(d) Expert Committee for CSG and large coal mines – Clause 5.4(d) states Queensland will refer projects to the Committee for advice and take that advice into account in the State's decision. This clause must remain if the *EPBC Amendment (Bilateral Agreement Implementation) Bill 2014* is passed and the water trigger is handed over to States.

6. Decisions on Approval – Queensland will apply the 'avoid, mitigate, offset' hierarchy (cl. 6.1) and where an impact cannot or will not be offset, the agreement indicates that the escalation process in clause 16 will apply. A compromise outcome can then be negotiated by senior officials. This allows Queensland to make decisions that may be inconsistent with EPBC Act standards (for example, requirements for offsets under cl.6.2 or requirements for decisions to not be inconsistent with international obligations under cl.6.3) and then negotiate an alternate outcome. There is also a lack of transparency around how compromises will be negotiated. The environmental protection standards which Queensland

will apply must be at least as strong as EPBC Act standards of assessment and approval; any negotiations over compromises in environmental protection must be transparent.

6.2 Offsets – ANEDO has major concerns about the conditioning and practical application of offsets.[22] The requirement for the decision maker to apply the EPBC Act Environmental Offsets Policy is an improvement on the current *Environmental Offsets Act 2014* (Qld), which does not require the Queensland Coordinator General to be bound to any minimum standard of offsets requirements. However there is a caveat in the second part of cl.6.2(a)(ii) which appears to allow deviation from the EPBC Act Environmental Offsets Policy, due to "the unique nature of the impact or a proposed offset or the nature of the project overall". Whilst the intention may be to capture specific impacts for which a different methodology may be appropriate (e.g. marine offsets), the language of "unique nature of the impact, proposed offset, or the project overall" could capture almost all circumstances. Each project and its impacts is unique, and broad, unclear language such as this widens the discretion of the decision maker, is inconsistent with the *Standards for Accreditation* (paragraph 28(d)) and should be removed.

ANEDO does not consider that any future accreditation of the draft Queensland Environmental Offsets Policy would be a 'minor amendment' of the Approval Bilateral Agreement.

6.3 Approvals not inconsistent with plans, etc – Unusual drafting has been undertaken which provides that "the parties agree that… the decision maker will not act inconsistently with [various requirements]." For a clear, unequivocal and enforceable requirement, the words "the parties agree that" should be removed. This would make it consistent with the NSW draft approval bilateral agreement which imposes a clear requirement on the State, not just an 'agreement to agree'. This equally applies to cl.6.4 of the Draft Agreement. See below under Part 3 for substantive submissions on the statutory requirements relating to this clause.

7.2 Public access to documentation – Clause 7.2(b) does not impose a positive obligation on Queensland to actually apply the Open Licence (Schedule 2) provisions, rather there is a weaker obligation to simply 'seek to apply'. The words "seek to" should be removed if the commitment to transparency is to be genuine and enforceable.

7.4 Public comments – Clause 7.4(c) contemplates a variation of a proposal after the application has been published. This can be confusing for the public to determine the variation and so clear requirements must be further detailed. Clause 7.4(d) also contemplates a variation after public notification. ANEDO submits that making a determination on whether variations are 'substantially the same' as the original can be highly discretionary and re-notification should be required for all variations.

8.2 Open access to information – Queensland is to commit to principles for open access, however this type of language is unenforceable. Clause 8.2(iii) provides a wide discretion for confidential material and should be limited to confidential material as prescribed by statute (e.g. *Information Privacy Act 2009* (Qld)). Practical issues such as failing to disclose entire pages of relevant content simply because of a phone number on the page must be considered. Clause 8.2(d)(v) permits an unreasonably wide, unilateral discretion to not release information, which is inappropriate; no such discretion appears in the EPBC Act and this sub-clause should be removed.

9. Protection of heritage values – Clause 9(b)(ii) allows for "suitable alternatives" to management plans for world heritage and national heritage places, with no detail on what

[22] For further details, refer to ANEDO's recent submission to the Senate Inquiry on offsets, available here: http://www.aph.gov.au/DocumentStore.ashx?id=2b783f27-432b-4e37-8d0e-dc924072dffc&subId=251166

those alternatives would be required to address. If strategic assessments are to be carried out, these must incorporate the management plans for the properties.

10. Administrative Arrangements – The Administrative Arrangements are referred to throughout the agreement and would seem to be pivotal to the implementation of the agreement. However, the detail of the arrangements is not yet publicly available – it is to be developed by the parties (cl.10.1). The arrangements are to be in place "on or by the commencement date" of the agreement so there is unlikely to be any public consultation.

10.2 Senior Officers Committee – much of the detail is in the Administrative Arrangements, but this group has significant powers including assessing the effectiveness of the agreement. Again, there is no transparency in how this Committee deliberates and decides, as there are no mandatory requirements to disclose this information under the 'Transparency' clause.

11. Reports – Strong data in accurate, detailed reports is essential. Information in annual reports (cl.11.1(b)) does not include detail on conditions attached to approvals, only information on compliance (cl.11.1(iv)). Providing information on the MNES relating to actions approved is a vague requirement (cl.11.1(b(iii)) and therefore difficult to enforce. There should also be reporting requirements for setting out the transparency and public accessibility of information and implementation and how well clause 7 has been implemented. There should also be reporting requirements of whether or how Schedule 2 Open Access to Information has been implemented.

12. Review of the Agreement – The clause stipulates a transitional review in three years' time in 2017, in stark contrast to NSW which has an initial 12 month review. Seeking public comment as part of the review is discretionary (cl.12.1(c)(iii)) and should instead be mandatory and the Queensland review should be undertaken within 12 months.

13. Sharing information on ongoing EPBC Act matters - Again the agreement uses the vague and unenforceable phrase indicating that parties will use "best endeavours" to inform/share information (cl.13(c)-(e)). This phrase should be strengthened to require that information as to ongoing EPBC Act matters must be shared.

15. Rectification – This short clause is vaguely worded that Queensland is responsible for "addressing any issues that arise out of the process." This phrase should be clarified to ensure certainty as to whether it relates to project compliance, administrative compliance and/or failure to follow the process/agreement.

16. Escalation

- Escalation procedures only apply were a decision would "substantially not meet requirements" (cl.16.4(a)(ii), cl.16.3(a)(i)), and cl.16.5(a)(i)(B) i.e., only substantial compliance is required, allowing some non-compliance. It is unclear how this will be decided. It reinforces the need to ensure public interest standing for third party enforcement of the agreement.
- There is no duty on the Commonwealth Minister to consider whether to issue a Notice of Particular Interest or call in a project (cl.16.4(e)). Additionally there is no duty on the Queensland Minister to consider whether to make a determination that the Commonwealth should be notified (cl.16.5(e)). This creates a situation where neither the state nor the Commonwealth have a duty to consider whether the Commonwealth should be notified or call in the project, and where the Commonwealth cannot escalate post-approval.
- The escalation procedures are only for the pre-approval stage (cl.16.4(b)). It is not clear who will notify the Commonwealth in time if Queensland fails to. If the Commonwealth only becomes aware at the point the decision is made, procedures

cannot be activated and it is too late to call in (which again highlights the need for third party monitoring).

17. Suspension or cancellation – This clause has been consistently referred to by the Commonwealth as a key assurance safeguard, but it is politically unlikely to be used to suspend an entire agreement, even in the event of significant breaches.[23]

19. Amendment – Again, details for notification and consultation are to be in Administrative Arrangements that are yet to be developed and unlikely to be consulted upon (cl19.1). The details around notification and consultation should be opened for public consultation.

19.3 Amendment of legislation – This clause does not detail clear triggers and criteria, which is of concern as Queensland's mining, environmental and planning legislation is in a state of transition.

3. Schedule 1 – Declared classes of action – Key concerns

All matters of national environmental significance are delegated

Significant impacts on all MNES are proposed to be delegated to Queensland. ANEDO is opposed to the delegation of any approval powers to Queensland on all MNES, for the reasons outlined generally in Part 1 of this submission and specifically in Part 3.2 of this submission. Submissions and recommendations on the following selected MNES do not reflect a condonance of MNES not specifically mentioned.

Actions in the Great Barrier Reef Marine Park and World Heritage Area must remain with the Commonwealth

The Draft Agreement proposes to delegate approval powers to Queensland to approve actions in[24] or impacting on the Great Barrier Reef Marine Park (**GBRMP**)[25] and the wider GBR World Heritage Area.[26] The Queensland Government, including the Coordinator General whose primary purpose is to facilitate economic development in Queensland, would be able to approve significant impacts on the GBRMP and the GBR World Heritage Area. For further information, see our submissions regarding the Office of the Coordinator General below.

The delegation of approval powers to Queensland represents the most significant and retrograde policy shift for management of the GBR in the 40 year history of the GBRMP. In our view, Queensland's current framework is seriously flawed and requires significant reform to provide adequate protection and management of the GBR. EDO Qld has completed a detailed analysis of Queensland's regulatory framework and has found it is wholly inadequate to assess and approve impacts on the GBR.[27] The proposed layer of requirements in the bilateral agreement does not substantially address our key concerns, especially as the Draft Agreement itself is of limited enforceability.

[23] For example, RFAs in NSW have never been suspended or cancelled despite systemic compliance issues. See *If a Tree Falls* (2013), ANEDO Report on compliance with RFAs, available at www.edo.org.au.
[24] Draft Agreement, clause 4.2(c)(i) makes clear that the Agreement applies to actions wholly or partly in the GBRMP.
[25] Draft Agreement, Schedule 1, clause 2.1(h) and clause 2.2(h).
[26] Draft Agreement, Schedule 1, clause 2.1(a) and clause 2.2(a).
[27] For detailed submissions on the specific problems with Queensland's legal framework for management of the Reef, see EDO Qld's submission (2014) on the Draft Coastal Zone Strategic Assessment Program Report, available here: http://www.edo.org.au/edoqld/news/edos-submission-on-the-great-barrier-reef-strategic-assessment/

Whilst Clause 5.4(a) is essential as it provides that advice must be sought from the GBRMPA and must be taken into account,[28] the arrangement for the provision of advice will be set out in a MoU between the GBRMPA and Queensland. Yet there are no transparency provisions for this clause. To ensure adequate transparency, the new arrangements must be consulted on before they are publicised, the MoU must consider how the decision-maker should take into account the advice from the GBRMPA and the GBRMPA's advice must be made publically available.

Recommendation: Remove Schedule 1, clause 2 relating to the GBRMP and World Heritage properties.

Water trigger must not be delegated to Queensland

The Draft Agreement indicates a proposed delegation of the approval of impacts which will have or is likely to have a significant impact on water resources from coal seam gas or large coal mining development (the 'water trigger').[29] ANEDO is totally opposed to the proposed delegation in the Draft Agreement as well as the proposed amendments to the EPBC Act to allow Queensland to approve the 'water trigger'.[30]

The 'water trigger' prevents delegation to the States to approve impacts on water resources and was introduced on the basis that State government assessment and approval processes for CSG and large coal mining were not sufficiently rigorous to protect water resources.

Whilst the Draft Agreement requires Queensland to obtain advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC),[31] there is no requirement to apply IESC's advice, merely a requirement to 'take into account.'[32] At the very least, ANEDO submits that the decision maker must be required to apply the advice from the IESC.[33]

Case example – assessment and conditioning of CSG coordinated projects

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 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[34] that the companies did not 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.

[28] Draft Agreement, clause 5.4(a).
[29] Draft Agreement, Schedule 1, clause 2.1(j) and clause 2.2(j).
[30] For further detail, refer to the ANEDO submission dated 30 May 2014 to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014, available here: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1482/attachments/original/1401763257/140530_Senate_Inquiry_into_EPBC_(Bilateral_Agreement_Implementation)_Bill_-_ANEDO_submission.pdf?1401763257
[31] Draft Agreement, cl.5.4(d)(i).
[32] Draft Agreement, cl.5.4(d)(ii).
[33] We note that the Commonwealth Minister is only required to 'take into account' the advice from the IESC (s.136(2)(fa) EPBC Act), however ANEDO considers a stronger obligation is required, especially given the inherent risks in Queensland assessing and approving the water trigger.
[34] GAS LEAK!, reported by Matthew Carney 1 April 2013, ABC Four Corners, available here: http://www.abc.net.au/4corners/stories/2013/04/01/3725150.htm See also interview with Simone Marsh by Alan Jones, 31 March 2014, available here: http://www.2gb.com/audioplayer/38636#.U5k8JfmSy0c

The whistle blower said of the assessment process for a $20 billion project by Queensland Gas Corporation (**QGC**), "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." These allegations cast light on what has occurred in the assessment and approval process of coordinated projects.

Clause 5.4(d)(ii) suggests an intention to take into account the IESC's advice in a 'transparent' manner', however there are no requirements in the Draft Agreement as to what is a 'transparent manner'. To give enforceable effect to this rather than lip service, the 'transparent manner' requirements must be set out in the Draft Agreement, rather than any administrative arrangements that are unenforceable.

Recommendation: Remove Schedule 1, clause 2 relating to the water trigger. Include enforceable transparency provisions regarding how IESC's advice is to be taken into account in cl.5.4(d)(ii).

No requirement to seek and take into account expert advice on nuclear actions

The Coordinator-General and the Queensland Environment Minister will have, for the first time, the power to approve various nuclear actions in Queensland.[35] This includes transporting spent nuclear fuel or radioactive waste, establishing radioactive waste facilities, and establishing a nuclear installation (for a nuclear reactor for research or production of nuclear materials for industrial or medical use).[36] It does not include a nuclear power plant or other prohibited actions.[37]

We note Uranium Mining Implementation Committee recommendation 4.4 for a Queensland oversight committee.[38] We further note UMIC's recommendation 4.6 that Queensland must seek specialist advice from the Commonwealth Department of Environment's Supervising Scientist Division when assessing nuclear actions. Yet the Draft Agreement does not follow this recommendation – there is no mandatory requirement for Queensland to seek expert advice from the Supervising Scientist, however Queensland 'may' seek such advice.[39] There is no justification as to why 'may' should not be amended to 'must,' so that there is a mandatory requirement to seek such advice.

There are no transparency provisions in the Draft Agreement concerning public notification and consultation on the Administrative Arrangements, which will govern how Queensland may obtain advice from the Supervising Scientist. The Administrative Arrangements will not even need to be in place for the first six months from the commencement of the approval bilateral agreement.[40] Yet the Queensland Government intends to start assessing nuclear actions in July 2014 without special legislation tailored for uranium assessments,[41] presumably under the December 2013 assessment bilateral agreement.[42]

[35] Draft Agreement, Schedule 1, clause 2.1(f) and clause 2.2(f).
[36] EPBC Act, s.22.
[37] EPBC Act, s.140A; Draft Agreement clause 4.2(d).
[38] 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
[39] Draft Agreement, clause 5.4(b).
[40] Draft Agreement, clause 10.1.
[41] see info here at pages v and 3 and also the Uranium Action Plan here released last year
[42] Queensland Assessment Bilateral Agreement (Amending Agreement No.3, December 2013), clause 12.4(c).

Queensland's environmental impact assessment procedures, even under the *Environmental Protection Act 1994* (**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.

All operating uranium mines in Australia have a history of leaks, spills and accidents. A Senate Inquiry in 2003 found the uranium mining sector had a pattern of non-compliance and underperformance, and further found an absence of reliable data to measure the extent of contamination or its impact on the environment.[43] ANEDO is totally opposed to the delegation of powers to assess and approve nuclear actions to Queensland and submits this must be removed from the Schedule 1 clause 2 proposed actions. 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.[44]

> **Recommendation**: Remove Schedule 1, clause 2 relating to nuclear actions. Amend clause 5.4(b) to be a mandatory requirement to seek and take into account advice from the Supervising Scientist.

Inappropriate for the Coordinator-General to approve impacts on National Heritage listed for indigenous or historical values

Schedule 1, clause 2.1(b) appears to allow the Queensland Environment Minister to approve impacts on National Heritage places, excluding National Heritage places listed because of indigenous or historic National Heritage values. However the Coordinator-General's powers in respect of National Heritage are not similarly constrained,[45] meaning that the Coordinator-General can approve impacts on National Heritage values listed because of indigenous or historic National Heritage values. Whilst the Coordinator-General may currently assess and condition impacts on indigenous cultural heritage and historical sites if they are coordinated projects, ANEDO submits that it is inappropriate to have a senior public servant such as the Coordinator-General, with no expertise in indigenous or historic values, to be assessing and approving significant impacts on National Heritage places listed for their indigenous or historic values.

> **Recommendation**: Remove Schedule 1, clause 2.2 relating to the Coordinator-General approving impacts on National Heritage.

Authorisation processes and classes of action to be accredited

The Draft Agreement (Schedule 1, clause 3.1) identifies the following authorisation processes that will be accredited:

- EP Act, for an environmental authority required for a resource activity (Chapter 5 EP Act):

[43] *Regulating the Ranger, Jabiluka, Beverley and Honeymoon uranium mines*, (October 2003), Environment, Communications, Information Technology and the Arts References Committee of the Commonwealth Senate, available here: http://www.aph.gov.au/~/media/wopapub/senate/committee/ecita_ctte/completed_inquiries/2002-04/uranium/report/report.ashx
[44] EPBC Act, s.50(b).
[45] Draft Agreement, Schedule 1, clause 2.2(b).

    - Following preparation of an EIS pursuant to an EIS requirement in the EP Act;[46] or
    - Following preparation of an EIS that has been approved for voluntary submission;[47]
- *State Development and Public Works Organisation Act 1971* (SDPWO Act), for a coordinated project that has a Part 4A bilateral project declaration.[48]

ANEDO does not consider either of these authorisation processes to contain standards equivalent to those in the EPBC Act. Examples of these concerns are set out below. If accredited, we consider the new arrangements reflect a lower standard than the EPBC Act. On that basis, we do not support the accreditation and submit the Draft Agreement should not be entered into.

Requirements to ensure the accredited authorisation process and bilateral agreement are not inconsistent with international obligations

There are two components to accrediting laws: one component is for the Minister to enter into a bilateral agreement[49] and the second component is for the Minister to accredit the authorisation process (and publish the accreditation).[50]

Requirements for accrediting the authorisation process

To satisfy the second component, the Minister must be satisfied that the authorisation process (e.g. Part 4A SDPWO Act):

- is not inconsistent with Australia's various obligations under international conventions;[51]
- will promote the management of the environmental matter in accordance with various management principles;[52]
- is not inconsistent with any recovery plan or a threat abatement plan for listed threatened species and ecological communities s.53(2)(c);
- will promote the survival of and/or enhance the conservation status of listed migratory species,[53] listed threatened species and ecological communities s.53(2)(c).

It is clear that the SDPWO Act and the EP Act do not satisfy these criteria:

- SDPWO Act: The sole requirement in the SDPWO Act remotely relevant to these criteria, is a requirement for the Coordinator General to "ensure the approval and conditions are not inconsistent with the bilateral agreement".[54] ANEDO does not consider that the Commonwealth Environment Minister could be satisfied that this sole reference to the bilateral agreement (requiring the approval to not be

[46] Draft Agreement, Schedule 1, clause 3.1(a).
[47] Draft Agreement, Schedule 1, clause 3.1(b).
[48] Draft Agreement, Schedule 1, clause 3.1(c) and clause 4.1(a)(ii).
[49] EPBC Act, s.45(1) and s.46(1).
[50] EPBC Act, s46(2A)(b) and s46(3)(c).
[51] For example, the World Heritage Convention s51(2)(a); Ramsar Convention on wetlands s.52(2)(a); the Biodiversity Convention s.53(2)(a)(i); the Apia Convention s.53(2)(a)(ii); the Convention on International Trade in Endangered Species of Wild Fauna and Flora s.53(2)(a)(iii)
[52] For example, the place in accordance with the National Heritage management principles s.51A(2); wetlands in accordance with the Australian Ramsar management principles s.52(2)(b); will promote the management of World Heritage properties (including the Wet Tropics, the Great Barrier Reef, Gondwana Rainforests in south-east Queensland) in accordance with the Australian World Heritage management principles s.52(2)(b).
[53] EPBC Act s.54(2)(b).
[54] SDPWO Act, s.54W(2)(b).

inconsistent with the bilateral agreement) sufficiently satisfies the mandatory criteria for accrediting the *legislation*.

- EP Act:
    - The decision maker must comply with any regulatory requirement,[55] including carrying out an objective environmental assessment against various outcomes.[56] Whilst some of these may be relevant to MNES (e.g. wetlands and groundwater),[57] clearly not all MNES are caught by the outcomes and the requirements are not sufficiently consistent with international obligations, as per the mandatory requirements of the EPBC Act.
    - Regulatory requirements also include to 'consider' environmental values[58] and MNES[59] in the Regulation, however the requirement to 'consider' is very weak (as opposed to the stronger standard in the EPBC Act) and again does not satisfy the mandatory requirements of the EPBC Act.
    - The decision-maker must 'have regard to' 'standard criteria,'[60] which includes a Commonwealth agreement.[61] This means a decision maker could 'have regard' to the bilateral agreement, not follow it and therefore be in breach of the bilateral agreement (whilst complying with the EP Act).

In respect of the mandatory criteria for accrediting legislation, there is a clear gap between the Standards for Accreditation[62] and the actual requirements of the EPBC Act.[63] In any event, ANEDO does not consider that the mandatory obligations set out in sections 51(2), 51A(2), 52(2), 53(2) and 54(2) are satisfied.

If the bilateral agreement is not complied with (e.g. an approval decision is inconsistent with our obligations under the World Heritage Convention), a community group wishing to challenge a development approval could approach the Federal Court seeking a declaration that the approval bilateral agreement has not been followed therefore it should be assessed and approved under the EPBC Act. A *second* action could be brought challenging the state legislation (if standing is established – see below). ANEDO submits that to avoid multiple actions in multiple jurisdictions, the criteria in sections 51(2), 51A(2), 52(2), 53(2) and 54(2) EPBC Act should be included as criteria in the accredited legislation.

> **Recommendation**: Require the SDPWO Act and the EP Act to be amended to expressly include the mandatory criteria in 51(2), 51A(2), 52(2), 53(2) and s.54(2) EPBC Act.

Requirements for entering into the bilateral agreement

Cl.6.3 of the Draft Agreement provides that "the parties agree that… the relevant decision maker will not act inconsistently with" various international obligations and management arrangements. Additionally, there is a wide caveat which appears as a note to cl.6.3:

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[55] EP Act, s.175(2)(a) and s.176(2)(a).
[56] EP Regulation, s.51(a).
[57] EP Regulation, Schedule 5, Table 1.
[58] EP Regulation, s.51(b).
[59] EP Regulation, s.51(d).
[60] EP Act, s.175(2)(b)(iii) and s.176(2)(b)(iv).
[61] EP Act, Schedule 4.
[62] For example, paragraphs [32], [35], [38], [42], [47], [50], [54] of the *Standards for Accreditation*.
[63] That may be one of the main reasons why the Federal Government has recently sought to amend the EPBC Act to allow the effective accreditation of unenforceable guidelines and procedures. For further information, see page 4 of the ANEDO submission dated 30 May 2014 to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014, available here: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1482/attachments/original/1401763257/140530_Senate_Inquiry_into_EPBC_(Bilateral_Agreement_Implementation)_Bill_-_ANEDO_submission.pdf?1401763257

Queensland may provide notice to the Commonwealth if it proposes to make a decision that is different to the requirements of this clause 6.3 and if so, escalation procedures apply as provided for by clause 16.

Queensland is under no obligation to provide such notice due to the use of 'may' rather than 'must'. If Queensland makes a decision to approve that is inconsistent with the bilateral agreement without providing notice to the Commonwealth, it is arguable whether the Commonwealth will have any power at all to call it in.[64]

ANEDO submits that the words "the parties agree that" be removed from cl.6.3 to ensure a clear obligation (not just an obligation to agree), and that the 'note' be removed. Otherwise, a large loophole opens for Queensland, which does not presently exist for approvals made by the Commonwealth Minister under the EPBC Act.

Recommendation: Remove from cl.6.3 the Note and the words ""the parties agree that".

No extended standing for judicial review, contrary to the Accreditation Standards

The EPBC Act confers extended standing for judicial review to individuals and organisations that have engaged in series of activities in for protection or conservation of, or research into the environment.[65] This is an extension on the meaning of 'a person aggrieved' under statutory judicial review. Paragraph [111] of the Standards for Accreditation provides "There are rights of review by courts together with extended standing under State or Territory law at least equivalent to those existing for decisions under the EPBC Act".[66]

Under the proposed arrangements, statutory judicial review would be available under the *Judicial Review Act 1991* (Qld) to challenge decisions made under Part 4A SDPWO Act and Chapters 3 and 5 of the EP Act. However none of the proposed accredited legislation confers extended standing for judicial review, contrary to the Standards.[67]

Additionally, the proposed arrangements do not include an equivalent s.488 EPBC Act allowing representative proceedings in judicial review, whereby an individual can bring an application on behalf of an unincorporated association.

Case example: Nathan Dam

In 2003 and 2004, the Nathan Dam Federal Court case was successful in correcting serious legal errors that impacted on the GBR. However it is unlikely the applicants would have qualified to go to Court under the inferior proposed rules in the Bill. The current definition of 'person aggrieved' is "a person whose interests are adversely affected by the decision". It is arguable that the parties in these cases – the Queensland Conservation Council and the Worldwide Fund for Nature (Australia) – would not have qualified for standing without the s.487 EPBC Act extension.

[64] Draft Agreement, cl.16.4(b).
[65] EPBC Act, s.487.
[66] From the footnote to [111] of the *Standards: "*Review rights in relation to decisions under the EPBC Act to approve individual developments stem from the Administrative Decisions (Judicial Review) Act 1977 (Cth) which provides for judicial review, including of decisions under the EPBC Act. Section 487 of the EPBC Act provides for extended standing in relation to judicial review."
[67] We note that merits review is available under the EP Act 1994 for objectors to an environmental authority, however due to the differing nature of the grounds for judicial and merits review, there must be extended standing for statutory judicial review.

If the accredited authorisation processes are not amended to confer extended standing, it would mean that each public interest case brought by an individual or community group will now be subject to argument regarding whether they qualify as a 'person aggrieved' under the *Judicial Review Act 1991* (Qld).[68] It would cause delays in progressing proceedings quickly and place an undue burden on public interest litigants to establish standing, which does not presently exist for judicial review of decisions under the EPBC Act.

Recommendation: Require the EP Act and SDPWO Act to expressly confer extended standing akin to s.487 EPBC Act. Alternatively, require amendments to the *Judicial Review Act 1991* (Qld) to expressly confer extended standing akin to s.487 EPBC Act.

Community rights to enforce breaches are worse than those under the EPBC Act

The EPBC Act allows individuals and organisations (whether incorporated or not) who have been engaged in environmental protection activities for the past two years to enforce the conditions of a grant of approval, by way of seeking injunctions.[69] The case of *Booth v Bosworth*[70] outlines the importance of ensuring clear access to the courts for individuals or organisations acting in the public interest.

Case example: Booth v Bosworth

Booth v Bosworth[71] demonstrated the great value of third party rights to enforce the EPBC Act. Conservationist Dr Carol Booth successfully enforced the EPBC Act to halt the large-scale electrocution of spectacled flying-foxes on a lychee property in north Queensland, which led to the end of government-permitted electrocution of flying-foxes. Dr Booth relied on s.475(6) and qualified for standing to bring the action on the basis that she had engaged in a series of activities for the protection or conservation, or research into, the environment during the previous 2 years.

Yet Part 4A SDPWO Act, one of the authorisation processes proposed to be accredited, excludes public interest enforcement. Sections 54ZL and 54ZM SDPWO Act incorporate most of the standing provisions under s.505 EP Act, but expressly amend the operation of the EP Act to exclude third parties acting in the public interest.[72] There is no justification for reducing standing for public enforcement. There must be standing for enforcement of and declarations under the SDPWO Act, equivalent to that of the EPBC Act s.475(7). Otherwise, this represents a reduction of standards compared with those in the EPBC Act.

Additionally, whilst enforcement of the EP Act is better than the SDPWO Act, leave of the Court is required and s.505 EP Act is narrower than s.475(7) EPBC Act.

Enforcement rights for the public need to be equivalent to those under the EPBC Act, so the public may act as a watch dog in the case of official inaction.

[68] Queensland Government representatives have suggested that extended standing is not needed as it is already recognised in case law. ANEDO strongly disputes this view. It is the precise reason the Federal Government in 1998 ensured there were provisions extending standing for individuals and community groups with a history of environmental protection activities.
[69] EPBC Act, s.475.
[70] *Booth v Bosworth* [2000] FCA 1878; *Booth v Bosworth & Anor* [2001] FCA 1453; *Bosworth v Booth* [2004] FCA 1623
[71] Ibid
[72] SDPWO Act, s.54ZL(4).

Recommendation: Require the EP Act and SDPWO Act to expressly confer extended standing for enforcement akin to s.475(7) EPBC Act.

The SDPWO Act includes inferior provisions to outlaw supply of false and misleading documents compared to the EPBC Act

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[73] or negligent.[74] Recklessness in this section includes intention and knowledge.[75] Although not explicitly stated in the legislation, it is probable that omitting information would also fall within this definition.[76]
The existing offence provision against giving false and misleading information under the SDPWO Act is narrower than the EPBC Act as 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.[77] The SDPWOA provisions require actual knowledge that a document is false or misleading, whereas the broader provision in the EPBC Act encompasses recklessness or negligence.

The Queensland Government has responded to these concerns[78] by indicating that the new s.54ZG(4) SDPWO Act provides that an environmental approval may be cancelled in relation to a specified provision if information provided to the Coordinator-General during the assessment did not accurately identify the likely impacts and the information was inaccurate because of the proponent's negligence or deliberate act or omission. However this is an unsatisfactory response as s.54ZG(4) SDPWO Act is clearly a much lower standard. For example:

- Whilst s.54ZG(4) SDPWO Act broadens the scope of the SDPWO Act to 'negligence' and 'information', this only relates to the cancellation of an approval. Therefore there is still no offence section for the provision of 'reckless or negligent' information, which is in marked contrast to the strength of the EPBC Act provisions;[79]
- Given the issues of standing addressed above, there is no equivalent standing provisions allowing the public to enforce false and misleading provisions.

Case example of false and misleading information – Abbot Point T3

The current Abbot Point T3 EPBC 2008/4468 investigation set out below is an example of how the EPBC provisions currently work regarding false and misleading information. The below example contains publically available information.
In early 2013 Greenpeace raised concerns with the Federal Environment Minister about some of the information provided for the EPBC Act assessment of the Abbot Point Terminal 3 expansion project (T3) proposed by Hancock Coal Infrastructure Pty Ltd (Hancock).

Around the time Hancock was preparing information to provide to the then Department of Sustainability Environment Water Population and Communities

[73] EPBC Act s 489(1).
[74] EPBC Act s 489(2A).
[75] See *Criminal Code* (Cth) s 5.4(4), and the note under s 489(1)(b) EPBC Act.
[76] 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.
[77] SDPWO Act, s.157O.
[78] Document tabled by the Queensland Department of State Development Infrastructure and Planning with the S State Development, Infrastructure and Industry Committee's expedited inquiry into the Bill that introduced the new Part 4A SDPWO Act, available here:
[79] For example, see EPBC Act s.489.

(Department) for assessment of T3 under the EPBC Act, a parallel assessment was being undertaken as part of the Abbot Point Cumulative Impact Assessment (CIA). A survey study released as part of the CIA indicated that there were larger and more diverse populations of listed threatened species and migratory bird species in the wetlands adjacent T3 than had been previously recorded.

It was alleged that Hancock knew of this study but provided conflicting information to the Department, such that Hancock had recklessly or negligently provided false or misleading information in contravention of the EPBC Act. We note that although these allegations were investigated by the Department, this alleged contravention of the EPBC Act might also have been pursued as a third party enforcement action. The offences of recklessly or negligently providing false or misleading information under s489 of the EPBC Act are broader than the similar offence in s157O of the SDPWO Act, which applies only to "a document containing information the person knows is false or misleading in a material particular."

Where a proponent is entirely responsible for the quality of the information provided for assessment, as is the case under the EPBC Act, it is appropriate that offences such as these extend to recklessness and negligence. This distinction is particularly important where offences are the basis of third party enforcement rights, where a narrowing of such an offence provision would only increase the risks of taking enforcement action and act as a further barrier.

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 CQ University, confirmed rising effects of chemical contamination in molluscs in key areas of the harbour which were later earmarked for dredging.[80] 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 CQ University." [81] 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.[82]

ANEDO submits that false and misleading provisions equivalent to those in the EPBC Act must be included in the SDPWO Act to ensure an offence provision (not simply a cancellation of approval provision provision) that encompasses:

- to encompass recklessness or negligence not needing actual knowledge; and
- to encompass false and misleading 'information' (not a 'document').

[80] 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/

[81] Gladstone Ports Corporation, "No creative writing, just the facts", 15 November 2013. Retrieved from: http://www.gpcl.com.au/Portals/0/2013%20media%20releases/15_November_2013_Fact_Sheet_-_No_Creative_Writing_Just_the_Facts.pdf

[82] 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/

Recommendation: Require the SDPWO Act to be amended to include an offence that is publically enforceable for the provision of false and misleading information, with the same scope as Part 17, Division 17 EPBC Act.

Inherent conflict of interest for the Coordinator General to approve impacts on MNES

ANEDO has raised serious concerns with the Coordinator General having responsibility to assess MNES, which are set out in detail in our earlier submission on the Queensland Draft Assessment Bilateral Agreement.[83] In summary, these are:

- The logical and appropriate person for supervision of assessment of impacts is the Queensland Minister for Environment and Heritage Protection. Only the Queensland Environment Minister has protection of the environment as his or her objective.
- The SDPWOA is a conglomeration of devices for enabling the coordination and expedition of major projects. Unlike the EP Act, the SDPWO Act contains no object or purpose statement that commits the operation of the Act to the end of ecological sustainability.[84]
- The CG does not have a proven track record of refusing projects on the basis of environmental considerations. For example, we note the proposed Traveston Dam approved by CG which would have had significant impacts on the Mary River turtle such as those described at the examples at paragraph [25] of the Standards.
- The CG has an insolvable conflict of interest, in which he is required to advance a program of works for economic development yet is now required to consider whether to approve projects on the basis of environmental considerations, where a refusal may inhibit short-term economic development. See Four Corners example.
- 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 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 Draft 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.
- There is no public enforcement of breaches of the provision of false and misleading information under the SDPWO Act, unlike the EPBC Act.

Under the recent amendments to the SDPWO Act, the CG will make a decision whether to approve the impacts on matters of national environmental significance concurrently or after has made a decision that the project should be awarded 'coordinated project' status. Therefore the Coordinator General has already made a determination under the existing provisions of the SDPWO Act that the project has significance to Queensland, including potentially strategic significance to the locality, region or state, including for the infrastructure, economic and social benefits, capital investment or employment opportunities it may provide. This will shift the approval process from a person responsible for protecting

[83] ANEDO submission on the Draft Bilateral Assessment Agreement between the Queensland and Australian Governments (December 2013), retrieved from: http://www.edo.org.au/edoqld/wp-content/uploads/2013/12/ANEDO-submission-on-the-Qld-assessment-bilateral-agreement.pdf

[84] See ss. 3 and 4 *Environmental Protection Act 1994* (Qld) and ss. 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 and Development Act 2014*. The Queensland Government indicates the new purpose will be prosperity; the common meaning of prosperity emphasizes financial wealth.

the environment (the Commonwealth Environment Minister) to a person clearly biased for promoting development.

As previously stated, ANEDO is opposed to the delegation of Federal approval powers to Queensland. However if the approval bilateral agreement is entered into, the SDPWO Act should not be accredited under the agreement, rather the Environment Minister should be responsible and accountable for decisions made pursuant to any approval bilateral agreement.

Recommendation: Remove Schedule 1, clause 2.2, 3.1(c), 4.1(a)(ii) so that the CG is not given approval powers.

Provisions concerning an applicant's history are of a lower standard than the EPBC Act

SDPWO Act plus Draft Agreement do not confer a strong, broad consideration of a person's history

There is a watered down requirement to take into account the applicant's 'environmental record' when making a decision on whether to allow the approval, compared with the EPBC Act requirements. Section 136(4) EPBC extends to considering:

- the applicant's 'history' in relation to environmental matters;
- the history of the executive officers of the company. This is important and relevant if directors had a history of major breaches, as it means they cannot simply incorporate a new company with a clean history; and
- the history of the parent company and executive officers of the parent company.

Section 54W(3)(a) SDPWO Act provides the power to consider the proponent's environmental record. The definition of 'environmental record' under s.54I SDPWO Act is comparably very narrow, confined to proceedings under environmental law of the proponent and its parent if it is a subsidiary, as well as policies/planning framework of the proponent and its parent. There are clear gaps in standards between the s.136(4) EPBC Act considerations and the definition of 'environmental record' in s.54I SDPWO Act:[85]

- Firstly, the SDPWO Act's provisions on this matter do not extend to executive officers, which represents a reduction in standards from s.136(4)(b) EPBC Act. In contrast to the EPBC Act, there is no requirement to consider circumstances in which executive officers with a poor environmental history have simply incorporated a new company; and
- Secondly, 'history' is not defined in the EPBC Act and could potentially include the number of complaints resulting in investigations, warnings, fines – all without 'legal proceedings' necessarily being filed. In contrast, the SDPWO Act provisions are limited to legal proceedings.
- The above problems recur when considering whether to approve the transfer of an approval,[86] suspend/revoke of an approval,[87] or vary conditions of an approval.[88]

The Office of the Coordinator General may seek to justify these gaps on the basis of the wide discretion conferred upon him, to "consider any other matter the Coordinator General

[85] Including further relevant amendments moved by the Queensland Government on 4 June 2014.
[86] EPBC Act, s.145B.
[87] EPBC Act, ss.144, 145
[88] EPBC Act, s.143.

considers relevant".[89] If that is to be accepted, why are there any criteria at all? Clearly there has been an attempt to meet the EPBC Act benchmark, yet the SDPWO Act has fallen short.[90]

ANEDO submits that the SDPWO Act should be amended to ensure that the stronger EPBC provisions relating to the proponent's environmental history (including executive officers) is included in the SDPWOA and that the definition of 'environmental record' is amended to broaden the scope, not limited to legal proceedings and akin to the EPBC provisions.

EP Act plus Draft Agreement do not confer a strong, broad consideration of a person's history

The Draft Agreement suggests a "decision maker may consider whether the proponent…is a suitable person…, including having regard to the person's history in relation to environmental matters."[91] This may be an equivalent standard to s.136(4)(a) EPBC Act, however the EP Act does not clearly meet the other EPBC Act criteria concerning a person's environmental history. For example, the EP Act requires that approvals (environmental authorities) to only be granted to 'registered suitable operators'.[92] However there is discretion ('may') to either refuse[93] an application to be a registered suitable operator, or cancel/suspend a registration,[94] on the basis of the applicant's environmental record or a disqualifying event, including that of the corporation's executive officers or another company of which any of the executive officers are or have been an executive officer.[95] Therefore the following gaps with the EP Act remain:

- If the person is a body corporate that is a subsidiary of another body or company, the applicant's history does not clearly extend to the history in relation to environmental matters of the parent body and its executive officers, which is a lower standard than s.136(4)(c) EPBC Act; and
- There is discretion whether to consider register, cancel or suspend a suitable operator if they have a disqualifying event.

As with the SDPWO Act problems above, there must be amendments to the EP Act to ensure a broad consideration of a proponent's history, akin to that of the EPBC Act. Clear criteria in the accredited legislation are necessary, rather than amending the Draft Agreement only.

> **Recommendation**: Require amendments to the SDPWO Act and the EP Act to ensure the consideration of a person's history (including of parent companies and executive officers) is part of the decision-making criteria, with equivalent strength and enforceability of s.136(4) EPBC Act.

Removing referrals will remove valuable public participation and limit access to information

The proposed removal of the Part 7 EPBC Act requirements for referral, public notification of the referral and seeking submissions from the public at this early stage will exclude the provision of valuable public information on the relevant impacts. Early public input at this

[89] SDPWO Act, s.54W(3)(b).
[90] The *Standards for Accreditation* failed to specifically identify the wide remit of s.136(4) EPBC Act: see [93] of the *Standards.*
[91] Draft Agreement, clause 5.3(a)(note).
[92] EP Act, s.173(1).
[93] EP Act, s.318H.
[94] EP Act, s.318K.
[95] EP Act, s.318H(c).

stage is often valuable for determining the draft terms of reference for the EIS. For example, a proponent may not have accurately identified the relevant impacts on specific MNES (e.g. the proponent may have overlooked migratory species) in its referral. Whereas under the proposed arrangements (EPBC Act amendments plus Draft Agreement), the public does not have the early opportunity to advise the state government (or indeed, the Commonwealth) about whether the proponent has identified the particular MNES that may be significantly impacted. When new MNES are identified by the public in the EIS stage, rather than providing that opportunity at an early referral stage, the proponent would then have to commission further environmental impact assessment for the protected matter, leading to inefficiencies.

Recommendation: The EPBC Act Amendment Bill should not be passed. At a minimum, the state legislation must have an equivalent referral process that provides an equivalent level of public notification and public access to information as that which exists in Part 7 EPBC Act for Referrals.

4. Additional Schedules

Schedule 2 – Open access to information

The principles outlined in this schedule are appropriate, but the protocols are largely unenforceable.

Schedule 3 – Guidance documents for MNES

Clause 3(a) proposes that policy and guidance documents will be "streamlined". Given the complexity and potential uncertainty of what will be covered by the agreement, it is likely that guidance documents will need to include more detail, not less.

The details of guidance documents will be in the Administrative Arrangements (cl.3(b)). As noted above, these have not been made public and are unlikely to be consulted upon broadly. This is inappropriate if important standards are contained in such documents. Clause 1.1(a) indicates that Queensland will "have appropriate regard to, and not act inconsistently with" guidelines, advice, plans and other documents for particular matters of NES. It is not clear what "appropriate" means and how the appropriate standard differs depending on the type of document.

Schedule 4 – Additional streamlining measures

Schedule 4 lists measures that will be employed in an attempt to address any "residual duplication." This is an admission that the Draft Agreement as currently drafted does not create a 'one stop shop' but rather there will remain a degree of uncertainty as to what will be covered and what will not.

The schedule identifies "existing and future strategic assessments" as an opportunity for further streamlining. However, once project approval powers have been handed to Queensland and the EPBC Act has effectively been switched off, the primary incentive to do strategic assessments (other than perhaps the Great Barrier Reef Strategic Assessment as required by UNESCO) will be removed. It is unclear why a State would go ahead with a lengthy and expensive strategic assessment process that would take time to do properly, when federal approvals no longer apply.

ANEDO strongly supports the increased use of strategic assessments as, when done properly, they are the best way to provide long-term landscape-scale planning that takes into

account cumulative impacts (although we note the current Draft Strategic Assessment Coastal Zone Program Report does not take into account cumulative impacts). A significant flaw in project by project assessment and approval is that cumulative impacts are not fully considered. The Draft Agreement exacerbates this failure by focusing on faster individual project approvals that remove incentives for doing comprehensive strategic assessments.