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using the law to protect the natural and built environment

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Regulatory Reform Taskforce
Department of the Environment

By email: onestopshop@environment.gov.au

Dear Sir or Madam

Draft Bilateral agreement between the Tasmanian and Commonwealth governments relating to environmental assessment

EDO Tasmania is a non-profit, community based legal service specialising in environmental and planning law. EDO Tasmania is a member of the Australian Network of Environmental Defenders Offices (***ANEDO***).

EDO Tasmania welcomes the opportunity to provide a submission on the draft assessment bilateral agreement. Our submission briefly addresses the one-stop shop approach, makes some general comments regarding the draft Agreement and specific comments regarding provisions of the draft Agreement.

In general, our submission uses the terminology and abbreviations contained in the *Draft Bilateral agreement made under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) relating to environmental assessment* (the ***draft Agreement***). The exception to this is that the draft Agreement refers to the existing bilateral agreement between the Commonwealth and Tasmanian governments as the "previous bilateral agreement". We refer to it in this submission as the "current Agreement".

One-stop shop approach

EDO Tasmania, and ANEDO more broadly, oppose the proposed delegation of approval powers to State governments to create a 'one-stop shop'. Our position regarding deficiencies in this policy has been articulated in a number of previous documents, including *Objections to the proposal for an environmental 'one stop shop*[1].

We do not seek to repeat our previous comments, but maintain our concerns. In particular, it remains our view that the Commonwealth Government is best placed to manage and assess national (and international) environmental issues.[2] In this context, we commend the recent commitment by the ACT government to retain Commonwealth involvement in approvals relating to these issues.[3]

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[1] www.edotas.org.au/wp-content/uploads/2013/12/anedo_opposition_one_stop_shop.pdf (attached). See also Dr Chris McGrath's recent article, *A critical evaluation of the One - Stop Shop policy.* nela.org.au/NELA/NELR/Critical_Evaluation_One_Stop_Shop_Policy_Chris_McGrath.pdf.

[2] This is supported by a range of government publications. See, for example, *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.'

[3] See *Planning And Development (Bilateral Agreement) Amendment Bill 2014*

Despite the Senate Environment and Communications Committee findings that there was limited evidence to support claims of delay and duplication as a result of the approval obligations under the EPBC Act, we acknowledge that there is scope for improvement in the coordination and consistency of environmental assessments. However, the efficiencies to be gained from better coordination and integration of assessment processes do not displace the need for strong Commonwealth involvement.

Comprehensive assessment of projects is the longest and most complicated stage in the overall approvals process, an inevitable result of the complexity of environmental impacts, 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.*[4]

The Productivity Commission has also noted, in relation to major projects, that the dramatic influx of investment in Australia over the last decade[5] has not been matched by increases in regulatory capacity of environment departments. Senate Committee reports in 2009 and 2013 both recommended increased resources to support assessment, monitoring and compliance activities.[6] EDO Tasmania notes that, irrespective of whether assessment responsibility rests with the State or Commonwealth government, rigorous, efficient and effective assessments are not possible unless adequate resources are available.

General comments regarding the Draft Agreement

1. Under the *Environment Protection and Biodiversity Conservation Act 1999* (***EPBC Act***), 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 one-stop shop 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]
2. It is therefore regrettable that the draft Agreement moves away from the more assertive and forthright objectives in the current Agreement that are directly consistent with the objects set out in s 3 of the EPBC Act. In particular the objects of "protecting the environment" and "promoting the conservation and ecologically sustainable use of natural resources" have been replaced with less direct objectives of avoiding "unacceptable impacts on matters of national environmental significance".
3. The proposed objects in the draft Agreement are also narrower than the EPBC Act objects, and those reflected in the current Agreement. For example, while the EPBC Act objects refer to "efficient and timely assessment", the draft Agreement aims for "swift decisions". This seemingly minor change reflects a significant change in emphasis – a "timely assessment" will be one which is made as swiftly as a proper assessment of the potential impacts allows, rather than one that is simply made swiftly.

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[4] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.
[5] Above, p 7.
[6] 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.'
[7] EPBC Act, s 50.
[8] See EPBC Act, ss 3-3A and s 44(a).

4. Object G requires the parties to endeavour to put in place a comprehensive approvals bilateral agreement by **18 September 2014**. For all the reasons articulated above, EDO Tasmania does not support this object and believes that the Commonwealth should retain its approval role in relation to actions which will impact on matters of national environmental significance.

   Significantly, the draft approval bilateral agreement has only recently been released and is open for comment until **11 September 2014**. Aiming to have "a comprehensive approvals bilateral agreement" in place only one week later raises concerns about the seriousness with which any objections made during the public comment period will be taken.

Specific provisions of the draft Agreement

Clause 1

5. The definition of "assessment report" in paragraph (c) refers to a Statement of Reasons under the *Land Use Planning and Approvals Act 1993* (Tas) (***LUPAA***). We note that a statement of reasons has yet to be prepared for a project of regional significance, as no such projects have been assessed to date. We also note that clause 6.3(b) requires Tasmania to ensure that an assessment report includes relevant information. We recommend that LUPAA be amended to require a Statement of Reasons issued under s.60T to meet the necessary requirements in the draft Agreement.

6. We note that actions assessed under LUPAA which are not declared projects of regional significance, nor characterised as Level 2 activities or treated as such under *Environmental Management and Pollution Control Act 1994* (***EMPCA***) will not be declared actions for the purposes of the draft Agreement (they are also not covered by the current Agreement). Level 1 developments assessed under LUPAA may have a significant impact on matters of national environmental significance, and may therefore still require assessment and approval under the EPBC Act.

Clause 2

7. The Commonwealth and the State of Tasmania acknowledge in clause 2(c) the need for "transitional support". The Commonwealth will, in theory, reduce its workload via the "one stop shop" whilst the State of Tasmania's workload will increase. It is inequitable that the draft Agreement should be framed such that Commonwealth support "will be considered". The Commonwealth should commit to providing support in this draft Agreement.

   As outlined above, without adequate resources (including technical support), rigorous and timely assessment is not practicable.

Clause 5

8. The current Agreement committed the Commonwealth and Tasmania to "work cooperatively" to ensure proponents are aware of their EPBC Act obligations particularly with respect to referral of actions. The draft assessment bilateral alters this to place the burden entirely on Tasmania. Additional resources should be provided commensurate with the increased burden of this transfer of responsibility.

Clause 6

9. In clause 6.1(a), Tasmania undertakes to ensure that the environmental impacts of an action will be "assessed to the greatest extent practicable". However, clause 6.1(b) provides that this undertaking will be taken to be achieved where the assessment processes set out in Schedule 1 are followed.

   We consider that this is an inappropriately narrow interpretation of the obligation in clause 6.1(a) – while the processes in Schedule 1 are designed to ensure rigorous assessment, the calibre of the

assessment in relation to a particular development proposal will vary depending on the circumstances, including the assessment guidelines, the time available for the assessment, the material supplied by the proponent and the level of community input. Going through the process does not, in and of itself, guarantee that the impacts will be rigorously assessed (though, in many cases, it will). We believe that the undertaking in clause 6.1(a) should remain without qualification, and that clause 6.1(b) should be deleted.

10. While it is not clear what a "proponent service delivery charter" might look like, clause 6.2 is a sensible addition to make clear to all parties at the outset what can be expected from the process and the timetable for the various steps.

11. Clause 6.3 provides a list of matters which must be included in the Assessment Report. It is sensible to include this in the main body of the draft Agreement rather than repeat them in the Schedule as seen in the current Agreement.

    Clause 6.3 requires amendment to better reflect the factors to be considered under the EPBC Act and ecologically sustainable development outcomes. In particular, Clause 6.3 should specifically require:

    - an assessment of the social and economic impacts of the proposal (see 136(1)(b), EPBC Act). In particular, the assessment report should address the likely economic benefit to the State of Tasmania and the Commonwealth and the likely economic benefit to the community (outside of government). To the greatest extent practicable the assessment should consider the value of the environmental resources the proposal will use, consume or render inaccessible. This could be included be inserting subparagraph "(D) economic and social impacts of the action".
    - an assessment of how the proposal's impact on Matters of NES will interact or accumulate with other impacts on Matters of NES which can be identified or sensibly speculated upon. This could be referred to as the "cumulative impact" on the Matter of NES.
    - that the Assessment Report include a record of the proponent's environmental history (see s 136(4) EPBC Act).

12. In Clause 6.8, Tasmania agrees to "have regard to" relevant guidelines and policies. This provision should be amended to require Tasmania to "act consistently with" such plans, rather than simply have regard to them. This would better reflect the objects of the EPBC Act, the Commonwealth Minister's approval obligations and Australia's international obligations.

    Clause 6.8 refers to "relevant plans and policies" and states that this includes recovery plans, Commonwealth offset guidelines and reports on strategic assessments. While the list in clause 6.8 is not exhaustive, we recommend that the range of additional policies and plans included in clause 27 of the current Agreement be included in this list (including heritage management plans, wetland management plans, wildlife conservation plans and threat abatement plans).

Clause 7

13. The more comprehensive provision in relation to transparency and access to information for Indigenous peoples is welcomed. In light of the reality of land tenure in Tasmania at present, it would be sensible to expand the provision to include all land held by the Tasmanian Aboriginal community and not only land held under native title.

14. Clause 7.2 "Public access generally" should be expanded to make clear that "all" documentation will be made available without charge and will be posted on appropriate, accessible websites.

Clause 8

15. Clause 8.1(c) provides, to minimise duplication, the Commonwealth will use its best endeavours to "ensure that conditions attached to an approval under the EPBC Act are limited to Matters of NES not addressed, or likely to be addressed, by conditions of approval attached by Tasmania."

    We acknowledge that there is no practical benefit in duplication, and that duplication can result in uncertainty in relation to enforcement responsibilities. However, the assessment and approval criteria under the EPBC Act are not identical to those under the relevant Tasmanian legislation. As a result, a condition regarding environmental impact on a matter of NES which may satisfy the Tasmanian government may not be sufficiently strict to satisfy the Commonwealth Minister. In this regard, we note the additional conditions imposed by the Commonwealth Minister to minimise impacts on Tasmanian devils and quolls (and to compensate for losses) at the Venture Minerals' Riley Creek site (EPBC 2012/6339).

    It is important that the Commonwealth retain power to impose conditions relating to matters of NES where the Commonwealth Minister considers that the impact on matters of NES have not been adequately addressed by conditions of approval attached by Tasmania (that is, where the matters are addressed, but are not addressed adequately). In practice, this is likely to be resolved through consultation between the Commonwealth and Tasmania. However, we recommend that clause 8.1(c) be deleted, or amended to reflect the situation outlined above.

16. EDO Tasmania welcomes the provisions in clauses 8.2 and 8.3 in relation to enforcement, recognising that assessment and approval processes rely on rigorous and consistent enforcement to achieve their aims. The draft Agreement should go a step further and articulate clearly where the responsibility for enforcement lies. Whilst that responsibility is found in the EPBC and Tasmanian legislation there is broad discretion afforded to government agencies around enforcement. This draft Agreement provides an opportunity to make clear which government will enforce conditions.

Clause 9

17. The Administrative Arrangements (the Arrangements), the work of the Senior officers' committee and the development of Guidelines must be open and transparent.

    Various stakeholders may have useful contributions in relation to the Arrangements and Guidelines, based on their experience with the assessment and approvals process. The draft Agreement should therefore provide for draft Arrangements (9.1) and Guidelines (9.5) to be made available for public comment before they are finalised.

18. Clause 9.2 should require publication of the minutes (or a meeting report) of the senior officers' committee meetings

19. Clause 9.1(d) provides that the Arrangements will "allow proponents to simultaneously satisfy both requirements under the EPBC Act and relevant Tasmanian Law". Consideration should be given to the wording of this paragraph, given that the Arrangements are not a legal instrument. Satisfaction of the requirements of the Arrangements cannot replace compliance with the legislation and proponents should be made aware of that.

Clause 10

20. Clause 10 largely duplicates s 65 of the EPBC Act in requiring five yearly review of the Agreement. While we strongly support regular review of the operation of the Agreement, and the involvement of the State government in that review, Clause 10.1(b) imposes an additional cost burden by providing that Tasmania must undertake the review "at [its] own cost". Additional resources should be made available to allow Tasmania to undertake these reviews efficiently and effectively.

Clause 15

21. There is ambiguity in subclause (a) in that it is not clear if "another party" refers to the other party to the draft Agreement or to third parties. The *Right to Information Act 2009* (Tas) covers the release of all material held by government and includes a process for obtaining an affected third party's views on release. This provision should make clear that it concerns only documents originating from the Commonwealth or State of Tasmania.

Conclusion

The draft Agreement proposes relatively minor changes to the current Agreement, but should be further amended to ensure that the EPBC Act objects are better reflected and an undue financial burden is not placed on the Tasmanian government.

The draft Agreement could present an opportunity to improve the overall environmental assessment regime in Tasmania. Until such improvements have been demonstrated, we maintain our opposition to the development of an approvals bilateral agreement and any reduction in the role of the Commonwealth in approvals relating to matters of NES.

Thank you for the opportunity to comment on the draft Agreement. If you wish to discuss any matter raised in our submission, please do not hesitate to contact Adam Beeson on 03 6223 2770.

Kind regards,
Environmental Defenders Office (Tas) Inc
Per:

Adam Beeson
Lawyer

Attach: ANEDO One-stop shop position paper