Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

Draft Approval Bilateral Agreement between the Tasmanian and Commonwealth governments relating to environmental approval

11 September 2014

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

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Submitted to: Regulatory Reform Taskforce - Department of the Environment

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Introduction

ANEDO welcomes the opportunity to provide a submission on the draft approval bilateral agreement (the ***Draft Agreement***). Our submission briefly addresses the one-stop shop approach and makes a range of comments regarding the Draft Agreement.

In general, our submission uses the terminology and abbreviations contained in the Draft Agreement. The main pieces *of* Tasmanian legislation relevant to this submission are:

- *Environmental Management and Pollution Control Act 1994* (the ***EMPC Act***)
- *Land Use Planning and Approval Act 1993* (the ***LUPA Act***)
- *State Policies and Projects Act 1993* (the **SPP Act**)

General Observations

One-Stop Shop Approach

1. ANEDO opposes the proposed delegation of approval powers to State governments under the policy which purports 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] and EDO Tasmania's recent submission in relation to the draft Tasmanian assessment bilateral agreement.[2] The ANEDO submission in relation to the NSW draft approval bilateral agreement also sets out these objections in detail.[3]
2. We will not repeat these previous comments in this submission, 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.[4] Importantly, the Commonwealth government is less subject to political influence relating to matters other than environmental protection when making its assessment (e.g. economic issues, attracting investment to the State). In Tasmania, projects of state significance in particular are approved by the Premier and, by virtue of their declaration as a project of significance, considered to be of economic value. It is not hard to imagine the Tasmanian government seeking to relax environmental standards in order to approve such projects.
3. ANEDO strongly supports greater use of the strategic assessment provisions under the EPBC Act. Done properly, such assessments are the best way to provide long-term landscape-scale planning that takes into account cumulative impacts, provides certainty to proponents and can ultimately achieve greater assessment efficiencies. Tasmanian Irrigation is a key example of the benefits of this process. The draft Agreement's emphasis on faster individual project approvals removes the incentive for undertaking comprehensive strategic assessments.

Adequacy of current legislation

4. The Draft Agreement provides for the Board of the EPA, a Development Assessment Panel or the Governor (on advice from the Premier, following assessment by the Tasmanian Planning Commission) to approve certain developments that will or may have a significant impact on matters of national environmental significance, such as threatened species listed under the Commonwealth legislation. Those decisions are currently required by law to be made by the Commonwealth Environment Minister.

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[1] www.edotas.org.au/wp-content/uploads/2013/12/anedo_opposition_one_stop_shop.pdf. 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] See www.edotas.org.au/wp-content/uploads/2013/10/140815-EDO-Tasmania-submission-Tasmanian-Assessment-Bilateral.pdf

[3] http://www.edo.org.au/policy/20140613-Submission-on-NSW-Commonwealth-Approval-Bilateral-Agreement.pdf See pp 5 – 9.

[4] 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.'

5. Under the EPBC Act, the Commonwealth Environment Minister may enter into a bilateral agreement only if the agreement 'accords with the objects of' the EPBC Act. 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.[5]
6. Neither the Commonwealth nor Tasmanian governments have made public any assessment of whether Tasmanian state laws meet the same standards as Commonwealth laws. A recently released report prepared by ANEDO[5] shows that, in relation to threatened species, Tasmanian laws do not meet the standards of the Commonwealth legislation. In particular, current laws do not:
   - Include all threatened and migratory species listed under the EPBC Act;
   - Specifically require decision makers to have regard to international obligations under the Convention of Biological Diversity, Ramsar Convention, Convention of Migratory Species, JAMBA, CAMBA or ROKAMBA.
7. Despite these deficiencies, Clause 2 of the draft Agreement provides:

   (c) An undertaking by Tasmania (however expressed) in this Agreement does not operate to require Tasmania or any person in Tasmania to do anything to the extent that the doing of that thing would be inconsistent with Tasmanian Laws.

   (d) To avoid doubt, this Agreement does not require Tasmania to make, or amend or to repeal any Tasmanian Laws.
8. The EPBC Act provides that the legal effect of the Draft Agreement is to remove the EPBC Act approval requirements for actions approved under an accredited state authorisation process. While this provides an opportunity for improving the standards in Tasmanian legislation, Clause 2 suggests that opportunity is deliberately being ignored.
9. We acknowledge that the Agreement itself does not accredit the authorisation processes set out in Schedule 1, and that amendments to legislation may be negotiated before such processes are accredited for the purposes of the EPBC Act. However, the explanatory document for the draft Agreement clearly expresses the intention to accredit the processes in Schedule 1 in their current form – nothing has been provided by either the Tasmanian or Commonwealth governments to indicate that the listed processes will not be accredited without amendment.

Inadequate assurance framework

10. There has been no clear indication of how monitoring, auditing, reporting, compliance and enforcement will work under the 'One Stop Shop' model, beyond the proposed call in/escalation provisions in Clause 16 (see below). The draft Agreement does not set out what baselines or indicators will be used to ensure that bilateral agreements will maintain environment protection standards, or to ensure the consistent application of the escalation provisions. In particular, it is not currently clear whether reporting regarding the implementation of the draft Agreement will focus principally on efficiency (e.g. approval times and project delivery) or on environmental outcomes, such as the achievement of ESD and reversing environmental decline.
11. Without clearer guidance, ANEDO believes any delegation by the Commonwealth of its approval powers risks Matters of National Environmental Significance (***NES***) and may jeopardise Australia's compliance with our international obligations.
12. Performance indicators will be identified by the Administrative Arrangements proposed in

[5] *Assessment of the adequacy of threatened species & planning laws* - September 2014 – Prepared by ANEDO for the Places you Love Alliance
https://www.acfonline.org.au/sites/default/files/resources/Assessment%20of%20the%20adequacy%20of%20threatened%20species%20%20planning%20laws%20Sept14.pdf

clause 10. However, in the absence of any public opportunity to comment on those Arrangements, we cannot be satisfied that the necessary standards for environmental protection will be maintained. In the event that the draft Agreement is signed, we urge the government to provide an opportunity for public comment on any draft Administrative Arrangements prior to finalisation of the document.

Comments on the Draft Agreement – 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 draft agreement be withdrawn.

Objects

13. In Object C, the reference to "one-stop shop" imports a political slogan into the document inappropriately. Furthermore, as outlined below in relation to Schedule 1, the policy will not create a one-stop shop as numerous assessment and approval processes will remain outside the scope of the draft Agreement.
14. Object F refers to the parties using "their best endeavours to implement the commitments in the Agreement acting in a spirit of cooperation...". This aspirational language is not enforceable or legally meaningful.

Clause 2 – Nature of the Agreement

15. Clause 2(c) explicitly notes that any undertakings under the draft Agreement will not require Tasmania "to do anything to the extent that the doing of that thing would be inconsistent with Tasmanian Laws." As discussed below, clause 6.4 purports to require decision makers under accredited Tasmanian authorisation processes to have regard to a series of documents that are not currently required to be considered under Tasmanian laws.
16. As discussed above, we are also concerned by the repeated assertion that Tasmanian laws will not need to be made, amended or repealed for the purposes of the draft Agreement (clause 2(d)).

Clause 4 – Effect of the Agreement

17. Clause 4(b) requires Tasmanian to use its "best endeavours" to coordinate assessment and approval processes where an action involves other jurisdictions. There is no legal definition of "best endeavours", or clarity on what might be required to discharge this obligation.

Clause 5.2 – Assessing Matters of NES

18. Under clause 5.2, Tasmania is required to adequately assess impacts on matters of NES. Clause 5.2(b) provides that the impacts will be taken to be adequately assessed provided they are
    - "assessed in accordance with applicable Tasmanian Laws to the extent permitted by those Laws (whether expressly or impliedly)" and
    - assessed in accordance with clause 5.3 (which sets out general assessment requirements).
19. As outlined elsewhere in this submission, ANEDO remains concerned that assessment in accordance with the authorisation processes outlined in Schedule 1 will not adequately assess impacts on matters of NES to the required standards. For example, those laws do not explicitly provide for the following matters to be considered:
    - Compliance with international obligations (including world heritage, migratory species and Ramsar wetlands);
    - Indirect impacts (which s.527E of the EPBC Act requires to be considered in relation to a controlled action).

If an assessment of impacts on matters of NES is deemed adequate despite being limited to considerations "permitted by" existing laws, we risk compromising international obligations and failing to address the breadth of impacts covered under the EPBC Act.

Clause 5.4 – Seeking Expert Advice

20. Tasmania should be required to seek advice from the Commonwealth in relation matters affecting Australia's international obligations. For example, advice should be sought from the Commonwealth in relation to proposals to locate tourism operations in the Tasmanian Wilderness World Heritage Area. Clause 5.4(b) currently says Tasmania "may" seek advice. We recommend that the clause be amended to provide that Tasmania "must" seek advice. The sentence will need to be redrafted to provide for Tasmania to use its judgment as to when international obligations are relevant to a proposal. The drafting should be conservative, adopting a similar approach to that applied in the EPBC Act with respect to referrals.

21. We note the approach adopted in the *Planning and Development (Bilateral Agreement) Amendment Bill 2014* (ACT), requiring the Commonwealth to be notified and invited to provide advice in relation to various proposals. In the absence of a clear requirement to seek such advice in the draft Agreement, we recommend that the Tasmanian government consider similar legislation.

Clause 6 - Offsets

22. The DPIPWE *General Offset Principles* are not prescriptive, and cannot be guaranteed to achieve an outcome "equivalent to, or better than" would be achieved under the Commonwealth *Environmental Offset Policy 2012*. In particular, the General Offset Principles do not explicitly restrict the use of indirect offsets to 10% or, and some doubt remains over the enforceability of planning permit conditions imposing offsets requirements (see *H and A van Beelan v. Kingborough Council* [2010] TASRMPAT 245).

23. Clause 6.2 also provides for alternative offset approaches to be agreed between the parties where the Commonwealth Minister is satisfied that the proposal "would provide an acceptable environmental outcome consistent with the objects of the EPBC Act". There is no guidance or criteria outlined in the draft Agreement on how the Minister would determine that the offset provides an acceptable environmental outcome. "Acceptable" is not a term used in the EPBC Act.

24. Clause 6.4 states:

> To ensure that actions approved in accordance with an Accredited Process will not have unacceptable or unsustainable impacts on Matters of NES, the parties agree that in assessing the impacts of those actions, and deciding whether to approve those actions and, if so, under what conditions, Tasmania will ensure that relevant decision-makers:
>
> (a) have regard to any relevant bioregional plans;
>
> (b) take into account any Information on the relevant impacts of the actions that was given to the Commonwealth Minister under an agreement under Part 10 of the EPBC Act;
>
> (c) have regard to any relevant approved conservation advice;
>
> (d) take into account such other policies, advice or guidelines relating to relevant Matters of NES, published from time to time by the Commonwealth; and
>
> (e) where relevant - record how those plans, policies or guidelines were taken

It is not clear that this clause can be complied with. There is scope within the various authorisation processes in Schedule 1 to set terms of reference for the assessment. However, unless the documents listed in clause 6.4 are explicitly, or by necessary implication, allowed to be considered under Tasmanian laws, application of this clause could result in matters being taken into account which may be deemed irrelevant or unable

to be considered. For example, the Resource Management and Planning Appeal Tribunal has recently held that despite the inclusion of a requirement to consider "cumulative impacts" in the terms of reference for an assessment under the existing bilateral agreement; this was not sufficient to require or empower the Board of the EPA to consider such impacts in making its determination with respect to a mine proposal (see *Tarkine National Coalition Inc. v. West Coast Council and Venture Minerals Limited* [2013] TASRMPAT 103).

Clause 7 – Public access to documentation

25. Clause 7.2 should be expanded to make clear that "all" documentation will be made available without charge and will be posted on appropriate, accessible websites. The documents listed in Clause 7.2(a)(i) will often themselves refer to other documents. In EDO Tasmania's experience, the EPA has required requests to be made under the *Right to Information Act 2009* for documents referred to in reports and other documents submitted to that agency. Whilst we consider that the disclosure requirements of that legislation clearly authorise release of this material, we recommend that clause 7.2 also be amended to make clear that all documents and any source material referred to in those documents should be published on the internet or otherwise provided.
26. There appears to be a typographical error in the cross-referencing in 7.2(c).

Clause 8 – Open Access to information

27. We support the objectives of clause 8.2 and Schedule 2 to increase the scope of readily available information, and to encourage a more transparent culture amongst government and developers.
28. Guidance documents developed under clause 8.3 have the potential to significantly affect the implementation of the Draft Agreement. We strongly recommend that the clause be amended to require public consultation in relation to the development of significant guidance documents.

Clause 9 – Heritage Management Plans

29. Clause 9(b) allows for "suitable alternatives" to management plans for World Heritage and National Heritage Places, with no detail on what those alternatives would be required to address. Management plans are accepted as a suitable mechanism for managing use and development within World Heritage and national heritage places, and the development of such plans is consistent with the requirements of existing legislation (for example, *National Parks and Reserves Management Act 2002* (Tas). It is hard to conceive what could be anticipated as an alternative to a management plan – we recommend that this option be removed.
30. Given the significance of international obligations relating to the management of world heritage areas, and the recent criticism by the World Heritage Committee of the proposal to alter the boundaries of the Tasmanian Wilderness World Heritage Area (***TWWHA***), it is important that a comprehensive, contemporary management plan be in place for the TWWHA. We note that Schedule 4 indicates that the parties will work together to finalise a new management plan for the TWWHA. We recommend that any applications which may have a significant impact on the world heritage values of the TWWHA be explicitly excluded from the draft Agreement until such time as the management plan is finalised.

Clause 10 – Administrative Arrangements

31. The Administrative Arrangements (***Arrangements***) are referred to throughout the draft Agreement and appear pivotal to the implementation of the agreement. However, the detail of these arrangements is not yet publicly available – the Arrangements are to be developed by the parties (10.1). The Arrangements are to be in place "on or by the commencement date" of the agreement, making it unlikely that there will be any public consultation in relation to the Arrangements.

32. 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 (10.1) and Guidelines (10.5) to be made available for public comment before they are finalised.
33. Clause 10.2 should require publication of the minutes (or a meeting report) of the Senior officers' committee meetings.

Clause 11 - Reports

34. Clause 11.1(c) should make clear that the report for the World Heritage Committee is to be provided to the Commonwealth for submission. This report should include the predicted impacts on the World Heritage values of the World Heritage property and a map with the World Heritage boundary and proposal footprint overlaid. The clause should require the report to be signed by the Department Secretary or Minister. This is because it will be relied on by the Commonwealth in an international forum. It is inadequate to leave this further information to be specified by the Senior Officers' Committee. There is no reason to think (in light of clause 10.2) there will be any World Heritage expertise on the Senior Officers' Committee.

Clause 12 - Review

35. Clause 12 largely duplicates s 65 of the EPBC Act in requiring five yearly review of the Draft Agreement. While we strongly support regular review of the operation of the Draft Agreement, and the involvement of the State government in that review, clause 12.1(b) imposes an additional cost burden by requiring the Tasmanian government to meet its costs in participating in the review. Additional resources should be made available to allow Tasmania to undertake these reviews efficiently and effectively.

Clause 14

36. The use of the expression "suitable approach" adds a subjective element likely to give rise to dispute. There is also significant vagueness in what "subject to consultation" means in 14.1(a)(i).
37. It is likely there will be significant expense in an audit, review or evaluation. An audit, review or evaluation (under current wording) can only be undertaken where a party believes this "has been or is likely to be an adverse systemic outcome". Given these two factors, subclause (e) should require publication on the internet of the report arising from the audit, review or evaluation (subject to any provisions in relation to confidential material).

Clause 16 - Escalation

38. While we welcome the recognition that it is appropriate for the Commonwealth to retain (or reclaim) approval powers in some instances, we do not consider that the escalation provisions adequately ensure that environmental standards will be met. In particular:
    - Escalation procedures apply only where a decision made under an accredited authorisation process does not "substantially meet" the requirements of the draft Agreement. There is no guidance on what level of compliance will be sufficient to "substantially meet" the assessment requirements – given the significance of matters of NES, rigorous compliance with the assessment provisions should be required.
    - The Commonwealth is not obliged to issue a notice of particular interest, and there is no clear guidance on the circumstances in which a notice would be issued.
    - Escalation procedures can only apply prior to approval. Where the assessment involves a recommendation by the Board of the EPA, there is an opportunity for the Commonwealth to step in prior to the final approval being granted by a planning authority.

In the other accredited authorisation, the Commonwealth will not be able to exercise its escalation powers if it only becomes aware of a project when it is approved. There is no provision in the Draft Agreement to allow the Commonwealth to step in and require further assessment, or to refuse to authorise a project, even where it is clear that the approval has been given without compliance with the Draft Agreement procedures.

- We support the requirement for the Commonwealth to be given advance warning of a proposed decision where the State government considers that the decision may have "serious or irreversible" impacts on a matter of NES. This would allow an opportunity for the Commonwealth to exercise its escalation powers. However, we are concerned at how narrow this requirement is, given that there is no definition of "serious or irreversible". Furthermore, if the State government fails to notify the Commonwealth prior to approval, the Commonwealth has no power to invalidate an approval, even where matters of NES will be irreversibly degraded.
- Similar to the statutory requirement proposed in the *Planning and Development (Bilateral Agreement) Amendment Bill 2014* (ACT), if the Draft Agreement is signed, we recommend that all proposed determinations affecting matters of NES be provided to the Commonwealth 10 days prior to approval. This would ensure that the Commonwealth had an opportunity to activate escalation procedures in relation to any proposal.

39. It would be appropriate for the Tasmanian Minister to be able to refer actions to the Commonwealth for determination at the request of a proponent. This might be utilised where a proponent is concerned about perceptions of bias in Tasmania decision-makers impinging on their social licence for instance.

40. It would also be appropriate to require the Tasmanian Minister to determine that clause 4.1 does not apply to an action where the State government was the proponent, to avoid the perception of bias.

Schedule 1

Decisions covered by the draft Agreement

41. Developments in Tasmania are divided into level 1, 2 or 3 activities. All activities that are not level 2 or 3 are level 1. Level 1 activities do not usually involve the Board of the EPA, although they can be "called-in" and treated as Level 2 activities. Level 2 activities are listed in Schedule 2 of the EMPC Act. All level 2 activities require a planning permit from the local Council, and must be referred to the EPA Board for assessment. Level 3 activities are projects of state significance.

Projects of State Significance

42. These are projects declared by the Governor on the recommendation of the Premier to be projects of state significance under the *State Policies and Projects Act 1993* (the ***State Projects Act***). A project is eligible to be declared a project of State significance if it satisfies two or more of the following criteria:

    (a) significant capital investment;

    (b) significant contribution to the State's economic development;

    (c) significant consequential economic impacts;

    (d) significant potential contribution to Australia's balance of payments;

    (e) significant impact on the environment;

    (f) complex technical processes and engineering designs;

    (g) significant infrastructure requirements.

    There are no published guidelines on when a project will meet the "significant" threshold under each of these criteria.

Both Houses of Parliament must approve the order made by the Governor for it to have effect. The Planning Commission is able to determine terms of reference for an impact assessment for a project of state significance, and to conduct the assessment (including public hearings) in a manner it deems appropriate. While this power is broad, there is no explicit requirement for all matters of NES to be considered under the current legislation.

An approval under the State Projects Act cannot be appealed to the Resource Management and Planning Appeal Tribunal (the ***Appeal Tribunal***) or subjected to judicial review under the *Judicial Review Act 2000*. This is a more restrictive review provision than provided for under the EPBC Act.

Projects of regional significance[6]

43. The LUPA Act provides for special permits to be granted for projects of regional significance[7]. The Minister for Planning and Local Government can declare a project to be a project of regional significance where it is of regional planning significance, requires high-level assessment or has a significant environmental impact. To date, no projects have been declared a project of regional significance.

44. Rather than being determined by the local Council, an application for a project of regional significance is determined by a specially constituted Development Assessment Panel (the ***Panel***). The Panel can determine assessment guidelines, and must consult with the EPA regarding its environmental assessment requirements. Again, there is currently no explicit statutory requirement for matters of NES to be addressed as part of this assessment.

45. The EPA Director may determine that the project should be referred to the EPA Board for assessment as a Level 2 project (see below). If the Director decides the EPA Board does not need to undertake an assessment, it will be up to the Panel to assess environmental impacts. The Panel is required to publicly advertise the project and any person can make a representation.

46. There is no right of appeal under the LUPA Act with respect to projects of regional significance. Judicial review would be available, however the test for standing will be "person aggrieved" under the *Judicial Review Act 2000*, rather than the broader provision under the EPBC Act.

Level 2 Activities that require a planning permit

47. Under the EMPC Act, a planning authority is required to refer any application for a Level 2 activity to the EPA Board for assessment. The EPA Board will determine the terms of reference for the public environment report or Development Proposal and Environmental Management Plan (**DPEMP**) to be prepared by the proponent. There are broad guidelines for these reports, however the guidelines do not currently refer to all matters of NES.

48. The DPEMP will be advertised and available for public comment – any person can make a representation during the public comment period.

49. Following its assessment, the EPA Board can direct the planning authority to refuse the application, or can recommend that the proposal be approved (with or without conditions). The Council may still refuse the application, or can impose additional conditions in relation to planning matters. The Appeal Tribunal ruled in 2013 that all environmental matters (and associated conditions) are to be determined by the EPA Board - only planning matters will be addressed by the planning authority.[8]

50. The proponent or any person who has lodged a representation can appeal the decision of the Council (incorporating the decision of the EPA Board) to the Appeal Tribunal.

[6] LUPA Act pt 4 div 2A

[7] LUPA Act s 60D

[8] *Tarkine National Coalition Inc. v. West Coast Council and Venture Minerals Limited* [2013] TASRMPAT 103, [16].

Level 2 activities that do not require a planning permit

51. Level 2 activities that do not require a planning permit must be referred to the EPA Board for assessment by the proponent (s.27 of the EMPC Act). As above, the EPA Board will determine terms of reference and make its assessment following a public comment period. The EPA Board can refuse the application, or issue an Environment Protection Notice setting out the conditions of approval.

52. The decision to approve or refuse a level 2 activity under section 27 of the EMPC Act can be appealed to the Appeal Tribunal by "a person aggrieved by the decision of the Board".[9]

Level 1 activities that are "called-in" by the EPA

53. The vast majority of level 1 activities are determined by planning authorities with no involvement from the EPA Board. However, the EPA Director can require a planning authority to refer an application to the Board where s/he considers that it will have a significant environmental impact. This is known as "calling-in" the project. Where this occurs, the proposal will be dealt with as if it is a level 2 activity and assessed and decided according to the process described above.

54. There is no guidance as to when the Director will call in a Level 1 activity.

Decisions not covered by the draft Agreement

Despite the rhetoric of the "one-stop shop", it is clear that a wide range of approvals granted under Tasmanian laws will not be covered by the draft Agreement. Clause 5.1(b) recognises this, and requires the Tasmanian government to ensure that reasonable steps are taken to notify proponents for actions assessed other than under the processes listed above that the obligation to refer to the Commonwealth Minister remains.

The following processes are not covered by the draft Agreement and, to the extent that proposals will impact on matters of NES, will require Commonwealth approval:

Level 1 Activities (excluding those "called in" by the EPA)

55. This category covers most of the development decisions made in Tasmania. Current figures about the number of development applications are not available. The figure in 2008/2009 was 8,997[10]. While many of those decisions would not have a significant impact on a matter of NES, many will have such an impact (for example, subdivision developments often impact on threatened species or vegetation communities) and would still require approval by the Commonwealth Minister. There does not appear to have been any analysis of how many Level 1 developments would require Commonwealth approval.

56. Schedule 4 provides for the parties to:

> cooperate in preparing non-statutory species-specific policy prescriptions, for the use of proponents and local planning authorities, that if implemented, the parties agree will not have significant impacts on MNES. Prescriptions will be prepared for EPBC-listed species which have historically generated a high number of assessments under the EPBC Act.

57. It is not clear how these policy prescriptions will be implemented, or how they will ensure that impacts on matters of NES are adequately assessed and environmental values protected.

Level 2 activities assessed as part of a rezoning

58. Schedule 1, clause 3.1(c) covers determinations made under s.57(6) and 58(2) of the LUPA Act following assessment by the EPA Board. The clause does not cover determinations

[9] *Environmental Management and Pollution Control Act 1994* s 27(7).
[10] COAG - Local Government and Planning Ministers Council - First National Report on Development Assessment Performance 2008/09 Prepared by the South Australian Government https://www.coag.gov.au/sites/default/files/brcwg_report_card_progress_deregulation_priorities_attach_A.pdf

made under s.43F of the LUPA Act following assessment by the EPA Board. Such determinations are made as part of a combined rezoning and development application process.

Dams

59. Dam permits are issued under the *Water Management Act 1999* (Tas) and do not require separate planning permits or threatened species permits.

Aquaculture

60. Fish farming is assessed under the *Marine Farming Planning Act 1995* and the *Living Marine Resources Management Plan 1995*.

Vegetation clearing

61. While forestry operations covered by the Regional Forest Agreement (that is, all forestry operations in Tasmania) do not require approval under the EPBC Act, vegetation clearing associated with other activities is not exempt. Clearing and conversion associated with agriculture, subdivision developments, and infrastructure projects may still require Commonwealth approval where matters of NES will be impacted.

Mineral Exploration

62. While significant mining operations will be assessed as Level 2 activities, mineral exploration is excluded from the operation of the LUPA Act. Therefore, under the Draft Agreement mineral exploration that will or may have a significant impact on a matter of NES will need to be referred to the Commonwealth.

Threatened species permit

63. Activities which involve "taking" (that is, killing or injuring) threatened species, including research activities, vegetation clearing in critical habitat or relocation, require a permit under the *Threatened Species Protection Act 1995*.

Fishing

64. Commercial fishing operations are excluded from the operation of the LUPA Act.

Nuclear actions

65. The Draft Agreement excludes the following developments: a nuclear fabrication plant, a nuclear power plant, an enrichment plant and a reprocessing facility. Such developments cannot be approved by the State government and must be referred to the Commonwealth Minister.

Commonwealth Marine Areas

66. Schedule 1 clause 2 does not include actions in a Commonwealth marine area or actions taken outside a Commonwealth marine area that might have a significant impact on that marine area. Clause 4.3 of Schedule 1 states:

> Item 4.1 does not apply to an action within a Commonwealth marine area. However, Item 4.1 does apply to an action taken outside a Commonwealth marine area which is likely to have a significant impact on that marine area.

The inclusion of this clause and the note to clause 2 of Schedule 1 is confusing. It is likely to lead to dispute as to whether projects which impact on Commonwealth marine areas require Commonwealth approval. In our opinion the manner of drafting results in impacts on Commonwealth marine areas (whether from within the area or from outside it) require Commonwealth approval. The most well-known recent approval which required approval under this part of the EPBC Act was the proposed Gunns' pulp mill at Bell Bay. To the extent

that the time taken for the assessment of that project is used to justify moves to "streamline" the assessment process, it is important to note that, if the Draft Agreement was in force at the time, the Gunns Pulp Mill would still have been referred to the Commonwealth Minister due to the potential impact on a Commonwealth Marine area.

Note: Schedule 1, clause 4.3(b) should be amended to replace both instances of "special permit of environment protection notice" with "special permit or environment protection notice".

Conclusion

The Draft Agreement could present an opportunity to improve the overall environmental approval regime in Tasmania. However, this opportunity appears to have been ignored and approval powers will be delegated despite current laws failing to adequately ensure protection of matters of national environmental significance. Until significant 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