Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

Submission on Draft ACT/Commonwealth Government Bilateral Approval Agreement

12 September 2014

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of independently constituted and managed community environmental law centres located in each State and Territory of Australia.

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

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Introduction

The Australian Network of Environmental Defender's Offices (ANEDO) welcomes the opportunity to comment on the Draft ACT Bilateral Approval Agreement (the Agreement) under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Australia's environment cannot be protected without strong federal environmental laws to protect Australia's unique biodiversity, heritage and other natural and cultural environmental values. Australia's environment is a national and international issue requiring dedicated national leadership and action. Consistent with the *State of the Environment 2011* report, ANEDO supports a strong Commonwealth role in efficient and effective implementation of the EPBC Act. 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).

[1] Australian Government expert committee, *State of the Environment 2011*, 'In brief', at 9.

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 submissions on the draft assessment bilateral agreements when exhibited for NSW, Queensland, South Australia and on the draft approval bilateral agreements for NSW, Queensland and Tasmania.[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 and territories.

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 with an aim of improving the efficiency and effectiveness of national environmental law.[5] Efficiency can be increased by integrating environmental statutes, 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.

Analysis by ANEDO over the past two years makes it 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:

- The Australian Government should reverse its intention to pursue approval bilateral agreements, as their use is not necessary or justified.
- 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.
- This should include revisiting the Hawke Review package, and developing better

[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.

administrative arrangements with the states under *assessment* bilateral agreements (once state processes are improved).

- 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.
- The Australian 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.
- 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.

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

The draft Commonwealth/ACT approval bilateral Agreement and implementation of the 'one stop shop' policy in the ACT is another retrograde step for environmental protection. The signing of the 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 draft Agreement has the potential, if signed, to endorse significant detrimental and permanent impacts on MNES. Below we outline a range of fundamental concerns at the 'one stop shop' approach to environmental assessments and approvals.

The Commonwealth is responsible 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 Australian Government retaining direct responsibility for key functions under the EPBC Act, such as decisions about when the Act is triggered and final approval decisions. As the signatory to international environmental agreements, the Australian Government's ongoing direct involvement is fundamental to meeting its legal obligations.

In brief, Commonwealth oversight of 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 accreditation standards;
- 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 ESD.[9]

The Australian Government has recently re-released accreditation standards, comprising over 100 minimum standards required under the EPBC Act and Government 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 MNES, 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

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[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 1999, 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.*

[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).

outcomes. 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 approvals process. The vast majority of time is rightly spent on assessment processes, often largely under state laws. This is to some extent inevitable because of the scale of project applications, complexity of 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 Australian 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/territory 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.

[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 with a recent update in September 2014.[15] In both reports, the key finding 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.[16]

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 effectively *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. The quality of different levels of species impact assessment is highly variable across local and state jurisdictions, and rarely audited.

Since completing the audit of threatened species and planning laws, many states and territories have in fact *lowered* environmental legislative standards relevant to the protection of MNES. Such lowering of state/territory standards is *increasing* the need for Commonwealth protection of the environment. For example, Queensland has relaxed requirements to permit clearing of previously protected regrowth and riparian native vegetation. NSW and Victoria are also in the process of winding back native vegetation protection laws. Planning laws in Queensland and NSW are being 'streamlined' in ways that are unlikely to satisfy EPBC Act protections. Laws that relate to national parks are also being amended to allow hunting, grazing and increased commercial uses.

[15] ANEDO, *An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia* (2014), Report for the *Places You Love Alliance* of environmental NGOs. Available at: http://www.placesyoulove.org/wp-content/uploads/2014/09/Assessment-of-the-adequacy-of-threatened-species-planning-laws-FINAL.pdf.
[16] Above, n 15, 65.

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.[17] 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, major project fast-tracking under state laws often override important environmental authorisations and licensing requirements.[18] 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] It stands to reason that 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 another 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 beyond the proposed call-

[17] See for example, Productivity Commission, *Research Report – Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (2011), p. xlviii; NSW Government, A New Planning System for NSW – White Paper (2013).

[18] The NSW *Environmental Planning and Assessment Act 1979* continues to override important environmental law and licensing requirements (or 'concurrences') for major projects in NSW, under both Part 3A and its replacement system, 'State Significant Development' (SSD), major projects remain *exempt* from a significant list of 'concurrence' approvals normally required from various agencies (such as for coastal protection, fisheries, Aboriginal heritage, native vegetation, bush fire and water management). A range of other authorisations *cannot be refused*, and must be consistent with an SSD project approval (including aquaculture, mining leases and pollution licences). See *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), ss 89J and 89K. The revised system for fast-tracking 'State Significant Infrastructure' (SSI) retains many features of the former Part 3A.

[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.

in/escalation provisions. 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 MNES, 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 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. The effect of the proposed Agreement between the ACT and the Commonwealth

The draft bilateral Agreement aims to reduce unnecessary duplication of the environmental approval process at Federal and Territory levels. The Territory will act on the Commonwealth's behalf for approval of proposed actions that would otherwise be assessed by the Australian Government under the EPBC Act. In effect, proposed actions requiring assessment under Part 9 of the EPBC Act will be included in assessments done under the *Planning and Development Act* 2007 (ACT) (the PD Act) and in accordance with the draft Agreement, none of which are an appropriate substitute for federal law and oversight.

The draft Agreement is said to be part of the Australian Government's implementation of a 'one stop shop' for environmental approvals, but ANEDO is concerned that the current Standards for Accreditation of Environmental Approvals under the EPBC Act will in fact result in a multiplicity of assessment and approval regimes across Australia.

We are not arguing for an inefficient or duplicative system, however we do support the establishment of best practice harmonised environmental legislation in all Australian jurisdictions, and the retention of environmental approval powers by the Australian Government for matters of national environmental significance under the EPBC Act.[22]

[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.

[22] See also, ANEDO, *Submission on Draft NSW - Commonwealth Bilateral Approval Agreement* (13 June 2014) http://www.edo.org.au/policy/20140613-Submission-on-NSW-Commonwealth-Approval-Bilateral-Agreement.pdf.

ANEDO notes that while the intent of the draft Agreement is to create a more streamlined process, the extent to which approvals impacting on MNES falling within the jurisdiction of the National Capital Authority are covered by the draft Agreement is unclear (for example, the natural or amenity values of a place on the national heritage list).[23] Federal involvement is a consistent application of federal standards rather than the fragmented and complex application by different governments pursuant to the 'one stop shop' policy.

Removing checks and balances of federal approvals is not a good gauge for efficiency and until state and territory planning legislation adequately reflect federal environmental standards the integrity of the EPBC Act is undermined. No accreditation of processes should occur until the necessary suite of best practice environmental process and outcome standards are enshrined in ACT legislation.

3. Specific concerns about the ACT draft bilateral Agreement

Schedule 1 - Declared class of actions: 3. Authorisation processes (to be accredited under the draft Agreement)

The draft Agreement (Schedule 1, clause 3) identifies the following authorisation processes that will be accredited:

(a) the process for the grant of a development approval under Chapter 7 of the PD Act where the development proposal has been assessed under the impact track in Division 7.2.4 of Part 7.2 of Chapter 7 of the PD Act and where:
  (i) the development application for a development proposal includes a completed EIS in accordance with Part 8.2 of the PD Act; or
  (ii) the ACT Minister has issued an exemption from the requirement for the development application to include a completed EIS in accordance with section 211 of the PD Act; or

(b) the process for the amendment of a development approval under Chapter 7 of the PD Act where the proposed amendment has been assessed under the impact track in Division 7.2.4 of Part 7.2 of Chapter 7 of the PD Act and where:
  (i) the application for amendment includes a completed EIS in accordance with Part 8.2 of the PD Act; or
  (ii) the ACT Minister has issued an exemption from the requirement for the application for amendment to include a completed EIS in accordance with section 211 of the PD Act.

A new Planning & Development (Bilateral Agreement) Amendment Bill 2014 has been drafted seeking to expand the range of development application conditions of approval in the accredited Chapter 7 to include offsets. The Bill is discussed in further detail below as

[23] Such as the High Court–National Gallery Precinct, the Australian War Memorial and Memorial Parade and the Old Parliament House and Curtilage and the pending proposed listings of Canberra – the Planned National Capital. See: https://www.nationalcapital.gov.au/index.php?option=com_content&view=article&id=599&Itemid=346.

is the new draft ACT Offsets Policy that has been developed to facilitate the accreditation of ACT approval processes.

ANEDO has significant concerns about accrediting the Impact Track assessment and approval processes pursuant to the PD Act. In summary:

- The ACT Draft Biodiversity Offsets Policy does not meet federal standards
- Planning & Development (Bilateral Agreement) Amendment Bill 2014 contains limitations
- The ACT Minister's Call-In powers should not be accredited
- Community appeal rights regarding Chapter 7 approvals are limited
- ACT laws are in a state of flux and transition
- Increased integration is required between ACT planning laws and biodiversity laws
- Assurance and administrative framework is deficient in detail

For these and other reasons outlined in this submission, ANEDO opposes the current bilateral accreditation of ACT approval processes as a substitute for EPBC Act approvals.

ACT Draft Biodiversity Offsets Policy does not meet federal standards

The draft Agreement proposes to accredit the Draft ACT Biodiversity Offsets Policy which has been developed to implement the 'one stop shop'. [24]

ANEDO has consistently expressed a range of concerns about biodiversity offsetting[25] in relation to specific schemes and methodologies, and more broadly because of the uncertainty in achieving long-term environmental outcomes.[26] The *EPBC Environmental Offsets Policy* (2012) provides relatively strong and appropriate standards compared to some other schemes in Australia. The benchmark set by the EPBC Offsets Policy underlines the importance of the Commonwealth's ongoing role in environmental leadership, oversight and standards. Application of the proposed ACT offset policy will weaken these Commonwealth standards in a number of ways. Further, as it is a draft policy subject to further consultation and amendment, the content is uncertain and therefore should not be accredited in advance of independent verification that it meets the federal standards.

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[24] ACT Government, *ACT Environmental Offsets Policy* (August 2014) ACT Government Environment and Planning Directorate. Available at: http://www.environment.act.gov.au/environment/environmental-offsets-policy.

[25] ANEDO Submission to the Inquiry into Environmental Offsets, 4 April 2014, p 3. Available at: http://www.edo.org.au/policy/140408-ANEDO-Submission-To-Senate-Inquiry-Into-Offsets.pdf; ANEDO Submission on the draft EPBC Act Environmental Offsets Policy 21 October 2011, p 2. Available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/302/attachments/original/1380674370/111021epbc_offsets.pdf?1380674370.

[26] See, for example, Maron, Hobbs, Moilanen et al, 'Faustian bargains? Restoration realities in the context of biodiversity offset policies', *Biological Conservation* 155 (2012) 141–148.

ACTPLA must take reasonable steps to implement the offsets policy (s111M) and Guidelines about the implementation of the policy is a notifiable instrument (s111N). Elements of the policy need to be incorporated into the legislation thereby providing biodiversity protection appropriate to any offsetting regime as well as certainty and setting clear limits to the use of offsets for development.

Offsets must be Additional

Additionality requires the offset to produce a gain in biodiversity that would not otherwise have occurred or is otherwise above the existing duty of care attached to a site. The requirement of 'additionality' must be based on clear criteria to ensure that offsets are not approved unless they provide a conservation benefit additional to what would otherwise occur. An offset in an otherwise protected area does not provide an additional net value. It is effectively not an offset at all.

It is of great concern that the ACT is intending to use offsets within existing conservation reserves and further that it relies on the Commonwealth Advanced Offset Guideline to do so in relation to areas that have been reserved from 16 July 2000.[27] ANEDO strongly disagrees with this policy which appears to have been developed due to the ACT's relative small land mass so as to permit, in our opinion, what will eventually result in disproportionate development in the ACT.[28]

Offsets on reserves

Offsets on reserves in the ACT are not additional because they involve actions that should already be undertaken as part of a high level duty of care by the ACT government owing to conservation in nature reserves. As a result there is little capacity to achieve a biodiversity gain that is additional to existing commitments. The government would be aware that the Strategic Assessment of Urban Development at Gungahlin ACT (2012) included offsets within the Canberra Nature Park; these actions represent existing commitments by the ACT Government in Action Statements prepared under its *Nature Conservation Act* 1980.[29] Offsetting in reserves is effectively the replacement of existing funding for environmental protection with funding from development creating a dependency between conservation and development and a cost shifting regime.[30] Use of offsetting in this way is *contrary* to the Australian Government's Environmental Offsets policy that offsets in the existing conservation estate or use of a site that is already unable to be built upon (eg due to zoning laws) are not generally additional.[31]

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[27] ACT Government, above n 24, 11.
[28] ACT Environmental Defenders' Office, Submission No 19 to Environment and Planning Directorate ACT Government, *ACT Environmental Offsets Policy and Delivery Framework Position Paper*, 11 July 2013, 7. See http://www.environment.act.gov.au/environment/environmental-offsets-policy.
[29] Dr Phillip Gibbons, ANU submission to the Senate Inquiry into Environmental Offsets, 3 April 2014, 2.
[30] Ibid.
[31] Australian Government's Environmental Offsets policy, October 2012, 22.

Advanced offsets

Advanced offsets are a supply of offsets for potential future use before an impact is undertaken and they provide known gains in biodiversity prior to development. Advanced offsets also provide a means to better manage the risks associated with the time delay in realizing the conservation gain for a protected matter.[32] A scheme that encourages the expansion of advanced offsets and incentivizes proponents (or offset providers) should be developed and encouraged. In our opinion sites reserved and managed for conservation purposes cannot be then used retrospectively under the guise of the advanced offsets policy. To do so provides uncertain future gains well after development.[33]

Further, offsets established in existing native vegetation that is unlikely to have been cleared under existing Commonwealth or State regulations and is not suitable for alternative land uses such as agriculture delivers a net loss of biodiversity equivalent with the area of biodiversity that is impacted.[34]

Findings by Senate Inquiry into Environmental Offsets

The Senate Committee into Environmental Offsets examined the application of the principle of additionality in relation to offsets being used to protect land that it is already protected as a park or nature reserve. The committee reported that this practice does not deliver a conservation gain and that it has the potential to *undermine* the objectives of the EPBC Act to promote the conservation of biodiversity. The Committee recommended the Commonwealth Environmental Offsets Policy be revised to provide further clarity on the principle of additionality and that the Environment Department ensures all offsets adequately reflect the principles of additionality, and are not granted in relation to areas that are already protected under existing Commonwealth, state or territory legislation or policy.[35]

Offsets must be based on principles of net gain

Page 7 of the Offsets Policy paper states the aim of offsetting, as part of the environmental approvals process, is to maintain or improve the likelihood of ecological communities and threatened species and their habitats, including matters of NES, persisting in the ACT. We submit that the 'improves or maintains' standard is insufficient, and that the offsets policy should have the goal of enhancing environmental quality as posited in WA and Victoria. Enhancing environmental quality is a mechanism that should be incorporated into the PD Act and is one which acknowledges the current trajectories of biodiversity loss and that positive action is required to halt and reverse this trend.[36]

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[32] Ibid, 9.
[33] Above, n 29.
[34] Ibid.
[35] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Environmental_Offsets/Report/~/media/Committees/Senate/committee/ec_ctte/environ_offset/report/report.pdf 96-97.
[36] Above, n 28.

'Improving or maintaining' is adopted from a flawed NSW policy where applications are routinely approved in advance of suitable offsets being found.[37] It has been observed that only 36% of development proposals met the 'improve or maintain' standard in NSW and a true 'improve or maintain' can only be met where the policy also reduces demand for biodiversity loss. [38]

Biodiversity offsets should be used as a last resort

The 'mitigation hierarchy' and use of offsets as a last resort should be clearly set out in the PD Act as a mandatory pre-condition before any offsetting option is considered. There must be appropriate guidance and emphasis on how a proponent can demonstrate its endeavours to genuinely 'avoid' and 'mitigate' the environmental impact aspects of the proposed development prior to considering offsets. Without proper guidance such as a compulsory, comprehensive assessment avoidance and mitigation measures, the process might be construed as being merely a box-ticking exercise. A transparent assessment of whether appropriate avoidance measures have been undertaken is essential particularly for MNES. To do otherwise will simplify the process and will allow proponents to place undue reliance on offsetting in order to obtain project approval. Further, there must be capacity in the legislation for a development proposal to be rejected where some impacts cannot be avoided or mitigated rendering the proposal inappropriate.[39]

Offsets must be based on the 'like for like' principle

The ACT Offsets policy fluctuates in what it defines as 'like for like' ecological principle. It firstly lists this principle as 'environmental offsets must be of a size and scale proportionate to the residual impacts on the protected matter'.[40] However this is not a clear definition of what constitutes the 'like for like' principle. It merely describes that the amount of land in an action being affected needs be the same size as the offset to mitigate the impact. This principle should be defined as 'Ensuring the environmental value of the sites being used as an offset is equivalent to the environment values impacts by the proposed action.'[41] The other definition given for 'like for like' describes actions impacting on specific threatened or migratory species, ecological community, Ramsar wetland or heritage property to be offset by a gain in another protected matter.[42] This more closely reflects the definition of 'like for like' principle. The policy goes on to say that if you cannot offset an impact on such a protected environment, then the offset can be gained by bringing a lower quality habitat to the same standard as the affected area. This does not constitute a 'like for like' offset. We recommend the legislation should make it clear that a proposal to offset an environment impact through a greater amount

[37] Dr Phil Gibbons, Submission No 20 to Environment and Planning Directorate ACT Government, ACT Environmental Offsets Policy and Delivery Framework Position Paper, 17 July 2013, 1.
[38] P Gibbons et al 2009. An operational method to assess impacts of land clearing on terrestrial biodiversity. Ecological Indicators 9, 26-40.
[39] ACT Environmental Defenders' Office, above n 28, 4.
[40] ACT Government Offset Policy, above n 24, 5.
[41] ACT Environmental Defender's Office, above n 28, 6.
[42] ACT Government Offset Policy, above n 24, 6.

of land with lower environmental values will not be accepted. Especially for something as critically important as MNES.

Legislation and policy should set clear limits on the use of offsets

The PD Act and the offsetting framework must include clear parameters. The use of 'red flag' or 'no go' areas are essential to make it clear that there are certain matters and areas in relation to which offsetting cannot be an appropriate strategy. This is particularly relevant to critical habitat and threatened species or communities that can withstand no further loss and to MNES. Guidance in the legislation is required so that there is certainty concerning what is an unacceptable impact and a regulatory framework must set out clear sites, species and communities ('red flag areas') where it is simply not appropriate to offset or allow any further detrimental impact.

Offsets must achieve benefits in perpetuity

We note the revised Guidelines on page 2 state that the leaseholder agrees to manage values in perpetuity for developments, including land developments, which result in permanent loss of biodiversity values. Again, a legal mechanism is required in the PD Act to assure this outcome is obtained. Enforcement mechanisms must also be available.

Monitoring requirements specified in legislation and offset arrangements must be legally enforceable

'Transparent governance arrangements including being able to be readily measured, monitored, audited and enforced' is mentioned at point 8 of the Key Principles on page 5 of the Offsets Policy, however these arrangements are not clearly defined in the Policy. The new Division 7.3.6A of the Planning & Development (Bilateral Agreement) Amendment Bill 2014 establishes Offset Conditions (s 165B) and Offset Management Plans (s 165C) including the requirement that the proponent must prepare a draft offset management plan for the offset (s 165E). The management plan must detail how the effectiveness of the plan is to be monitored and when the plan is to be reviewed.[43]

The ANEDO has previously submitted that the monitoring and evaluation of approved offsets arrangements must be established and adequately resourced to determine whether promised environmental outcomes are achieved over the short and long term and that they must be underpinned by strong enforcement and compliance mechanisms in legislation. It is essential offset projects are properly monitored as evidence to show that offset schemes actually achieve the intended biodiversity outcomes is severely lacking.[44]

[43] Planning & Development (Bilateral Agreement) Amendment Bill 2014, s165E(d).

[44] For example see: Maron et al, "Can Offsets Really Compensate for Habitat Removal? The Case of the Endangered Red-Tailed Black Cockatoo" (2010) 47 Journal of Applied Ecology 348, at 348; Maron et al, "Faustian Bargains? Restoration Realities in the Context of Biodiversity Offset Policies" (2012) 155 Biological Conservation 141, at 144; Gibbons & Lindenmayer, "Offsets for Land Clearing: No Net Loss or the Tail Wagging the Dog" (2007) 8(1) Ecological Management and Restoration 26; Bekessy et al "The Biodiversity Bank Cannot be a Lending Bank" (2010).

Furthermore, ecological outcomes may be threatened by further development. In other jurisdictions, offset areas do not get managed in the long term as they end up being the site of new development (and further offset). An example of this is the current Warkworth Mine extension near Bulga in NSW, where a previous offset area was proposed to be mined.[45]

We reiterate the importance for enforcement and compliance mechanisms to be built into the PD Act and that long term management must be incorporated into the Offset Management Plans so that all parties adhere to obligations to achieve the proposed biodiversity outcomes.

90% Direct Offset Rule

The Offsets policy recommends 90% of offsets should be achieved through direct offset measures and a maximum of 10% should be achieved through indirect offset measures with an allowance for deviation from this percentage in certain circumstances.[46]

There should be extremely minimal use of indirect offsets. Allowing expanded use of indirect offsets would result in net loss of impacted matters. ANEDO opposes the use of indirect offsets or 'compensatory measures' to achieve the goal of enhancing, or 'improving or maintaining', environmental quality. This principle essentially allows a developer to buy their way out of a difficult offsetting requirement. This will be particularly detrimental for areas where there is no offset available because of the scarcity of the impacted matter. What is being suggested is a compensatory payment, not an offset. Use of indirect offsets result in even higher uncertainty of linkages with impacts, and higher risk that biodiversity outcomes may not be achieved.

There also needs to be greater legislative certainty in achieving 90% direct offsets as this is currently only a guideline in the offsets policy and left largely up to the discretion of the proponent.[47]

Access of Offsets calculator to the public[48]

The Offsets policy does give basic guidelines as to how offsets will be calculated including considerations for public land offsets, discounts for existing duty of care and certainty scores for public land. However, the Offsets calculator is largely unattainable to the general public and makes the process for public consultation and community engagement largely impossible when they are unable to engage in all the information available for offsets regimes in the ACT. We recommend the Offsets calculator be made more easily accessible to the public.

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[45] *Bulga Milbrodale Progress Association Inc. v Warkworth Mining Limited & Ors*.
[46] ACT Government, above n 25, 6.
[47] Mr Robert Neil, Commissioner for Sustainability and Environment, Submission No 13 to Environment and Planning Directorate ACT Government, ACT Environmental Offsets Policy and Delivery Framework Position Paper, 11 July 2013, 4.
[48] ACT Planning and Environment Directorate, *Environmental Offsets Policy*, 22 August 2014, http://www.environment.act.gov.au/environment/environmental-offsets-policy.

Offsets should be applied to all projects not just MNES and ACT threatened species

The current ACT Policy only lists offsets for MNES or listed ACT threatened species. It is a standard lower than that of Victoria, NSW and Queensland. This means that offsets will apply only to those ecological communities that are over 90% cleared in the ACT. Modified examples of these communities are important for the conservation of these ecological communities. [49]

Limitations of the Planning & Development (Bilateral Agreement) Amendment Bill 2014

The Planning & Development (Bilateral Agreement) Amendment Bill 2014 (the Bill) presented by the ACT Minister for Planning is aimed at amending the PD Act to facilitate and implement the 'one stop shop'.[50] Although the Bill, which is yet to be passed by the ACT Legislative Assembly, increases the transparency of consideration of 'protected matters'[51] impacted by proposals and provides assurance that protected matters will be adequately considered by Conservator,[52] there are limitations to this Bill:

- The Bill ensures the planning authority (ACTPLA) cannot make a decision that is inconsistent with advice from the Conservator about protected matters, however if the ACT Minister is the decision-maker, following the exercise of call-in powers, the decision can be inconsistent with Conservator advice if the decision is consistent with the ACT offsets policy and provides a substantial public benefit.[53]

- The role of the Conservator is vital to the identification and protection of biodiversity in the ACT, however the appointment is not statutory and lacks independence. There is also no requirement for the Conservator to possess requisite experience in biodiversity and threatened species matters.

- Development applications involving protected matters to be referred to the Conservator applies if the planning and land authority is satisfied that a proposed development is likely to have a significant adverse environmental impact on a protected matter,[54] however it is unclear what criteria ACTPLA will apply in making a determination. We submit this provision should not only clarify the threshold at which involvement by the Conservator is enlivened, but recommend environmental protection would be improved if Conservator involvement is triggered as soon as it is clear an MNES will be impacted.

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[49] Dr Phil Gibbons, above n 37, 2.
[50] Planning & Development (Bilateral Agreement) Amendment Bill 2014, Explanatory Memorandum, 3. Available at: http://www.legislation.act.gov.au/es/db_50283/default.asp.
[51] Defined as a matter protected by the Commonwealth; or a declared protected matter, s 111A.
[52] The Conservator is to provide advice on any development application that results in significant adverse environmental impacts on 'protected matters', s 147A.
[53] Planning & Development (Bilateral Agreement) Amendment Bill 2014, 128(1A).
[54] Planning & Development (Bilateral Agreement) Amendment Bill 2014, 147A.

- If a proposed development application is likely to have a significant adverse environmental impact on a matter protected by the Commonwealth it must be referred to the Commonwealth Minister administering the EPBC Act for consideration.[55] If the Commonwealth Minister does not give an advice within 10 working days then the decision maker (ACT) may approve the application.[56] Neither the ACT Minister nor the planning authority can make a decision that is inconsistent with the Commonwealth Minister's advice if given.[57] While we acknowledge that, to the extent it operates, this is an improvement to a complete delegation of federal approval powers, we hold significant reservations. There is nothing binding upon the Commonwealth Minister to consider the application and provide an advice. It appears that the very entering of this draft Agreement makes it clear the Commonwealth are determined to relinquish its responsibilities towards MNES. While we do not oppose this provision, it appears unlikely this Federal government will avail itself of the discretion provided.

- The Explanatory Memorandum to the Bill states section 127A and surrounding provisions were drafted to give effect to the Parliamentary Agreement for the 8th Legislative Assembly for the ACT. Clause 3.15 of the Parliamentary Agreement requires ACT Labor to support an ongoing approvals role for the Federal Government in environmental protection on MNES under the EPBC Act, however in practical terms s 127A is unlikely to fulfil this commitment. We submit Clause 3.15 can only be fulfilled if the ACT government withdraws from being a party to the draft bilateral Agreement.

- If a proposal is referred to the Commonwealth Minister pursuant to s 127A, the Minister is given 10 days to provide written advice. We submit that even if the power was exercised, 10 days is an unrealistically short time frame within which an informed and comprehensive advice could be provided. We submit this provision could be improved by increasing the timeframe to 21 days.

- ACTPLA cannot give development approval if it is inconsistent with the advice from the Conservator, however this is limited to relevant impacts on MNES only. Whilst we acknowledge the Bill was drafted for the purpose of facilitating the bilateral Agreement with the Commonwealth, we recommend that this amendment is an opportunity to broaden the scope of the Conservator's influence to the impact of threatened species in the ACT as well as nationally. Extension of the provision in this way would assist in the raising of the environmental protection bar and would produce a consistent rather than fragmentary assessment approach.

ACT Minister's Call-In powers should not be accredited

Division 7.3.6 in the PD Act – *Deciding development applications* – refers to the approval of the development applications assessed in the accredited Division 7.2.4 of the PD Act.

[55] Planning & Development (Bilateral Agreement) Amendment Bill 2014, 127A.
[56] Planning & Development (Bilateral Agreement) Amendment Bill 2014, 127A(3).
[57] Planning & Development (Bilateral Agreement) Amendment Bill 2014, 128(1)(b)(v).

Therefore, whilst not specifically referred to as an Accredited Process, the draft Agreement appears to accredit approvals for applications decided by ACT Planning Minister pursuant to the call-in powers.[58]

Ministerial call-in power for development applications are projects that are essentially declared by the Minister to raise a major policy issue or to be in the public benefit.[59] As decision-maker, this potentially compromises the ACT due to potential conflicts of interest and lack of objectivity. Further shortcomings include limits on third party appeal rights and enforcement and modification that is open to broad departmental discretion as call-in approvals do not require a range of additional authorisations and referrals to agencies that would ordinarily be needed before the project could proceed.[60] As a result once the Planning Minister approves a project there is little other public authorities and agencies (such as ACTPLA, the EPA and the Conservator) can do to assess and advise on the project's impacts. Approvals exercised pursuant to such power tends to undermine public trust that conditions will be upheld and more often than not the agency that approved the project may be the only party that can enforce conditions, with very little external scrutiny. We submit there ought to be minimum obligations established. Such obligations must be satisfied before processes such as the Ministerial call-in power can be accredited.

Unlike other DA approvals, a third party objector to a call-in approval (such as a community group) has no right to a merit appeal if dissatisfied with the decision. A third party can bring judicial review proceedings (to challenge a legal error) against a call-in approval provided they can afford the risks of paying the government's costs if they lose.

ANEDO does not support the accreditation of approvals made pursuant to the call-in power to replace EPBC Act approvals. The Commonwealth should retain its powers to both *assess and approve* (or refuse) impacts on MNES in the ACT, including impacts on EPBC-listed threatened and migratory species.

Community appeal rights regarding Chapter 7 approvals are limited

ANEDO does not support the accreditation of Division 7.2.4, Chapter 7 approvals as third party appeal rights are very limited.

Merit review

The PD Act has previously been criticised as being unnecessarily restrictive on the standing of third parties to apply for a merits review of decisions to approve a development proposal in the impact track.[61] Appeals to ACAT are permitted for a third party only if that person is an objector during public exhibition *and* the development

[58] *Planning and Development Act 2007* (ACT) s 158; Schedule 4 – *Additional streamlining measures* also details an agreement to broaden the scope of accreditation of ACT processes.
[59] Ibid, the items are fully described in s 159(2)(a)-(c).
[60] *Planning and Development Act 2007* (ACT) s 148(1).
[61] EDO ACT, to Mr Andrew Barr MLA, *Suggested amendments to review rights and other provisions of the Planning and Development Act 2007 (ACT)* Submission 31 March 2010.

application may cause the entity to suffer material detriment.[62] Proponents have a broad range of rights.[63] Third party merit appeals are a fundamental assurance standard and a corruption safeguard.[64]

Judicial review

In relation to judicial review, recent amendments to the *Administrative Decisions (Judicial Review) Act* 1989 (ACT) replaced the test for standing with an more expansive definition, namely a party may apply for judicial review if the matter raises a significant issue of public importance.[65] However this test specifically excludes the PD Act and the narrow test for standing applies, namely the applicant has to show that their interests will be adversely affected. The current restrictive standing provision in the *ADJR Act 1989* (ACT), and its subsequent effect of limiting appeal rights, operates to restrict the ability of the community to scrutinise government decisions. This undermines government transparency and accountability.

As opportunity for third parties to scrutinise or test decisions impacting on MNES are limited, then unless it is adjusted to reflect the broader definition in the EPBC Act,[66] the ACT planning laws ought not be accredited. Anything less than open standing places unnecessary restriction to access to justice for genuine third party grievances.

ACT laws are in a state of flux (relevant to Clause 18.3 Amendment of legislation)

Clause 18.3 does not contain clear criteria about what amendments will trigger the exercise of obligations required by this Clause. This is also concerning as the planning and biodiversity laws in the ACT are in a transitional state at a time when the parties propose to enter the Agreement. The current *Nature Conservation Act* 1980 has not been reviewed since its inception and does not meet federal standards. Although the review process for this outdated Act is underway there is no guarantee what shape the final Act will take or whether these changes will accord with the environmental protection standards prescribed under the EPBC Act. Further there are changes to be made to the PD Act as a consequence of the review and the Bill. Again, it is unsatisfactory to accredit ACT legislation when it is in such a state of uncertainty.

In order to achieve the Commonwealth's aim of 'maintaining high environmental standards', any reform process must be predicated on states and territories having the

[62] That is, lodged a submission objecting to the development during the exhibition period; PD Act Schedule 1 Item 6.
[63] *Planning and Development Act 2007* (ACT), s191; Schedule 1.
[64] ICAC has suggested that third party merits appeal rights in NSW should be *expanded* to additional categories of private development for projects that are significant and controversial (such as large residential flat developments); development that represents a significant departure from existing development standards; and development that is the subject of voluntary planning agreements. See ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 15.
[65] Section 4A of the *Administrative Decisions Judicial Review Act 1989 (ACT)*
[66] *Environment Protection and Biodiversity Act 1999* (Cth) s 487.

necessary comprehensive suite of legislated process and outcomes standards in place and operative before accreditation can occur. For the assurance that environmental protection will be credible, the process needs to be focused on the achievement of the necessary standards, not the meeting of an arbitrary deadline. ANEDO recommends the federal role should be to improve, not merely maintain, environmental standards.[67]

Integration is required between ACT planning laws and biodiversity laws

Accreditation of state and territory planning laws is in effect an endorsement of current threatened species legislation. Links between the PD Act and other environmental legislation ought to be strengthened to ensure the ACT environment is protected by a thorough suite of interrelated legislation. As discussed above, the ACT Government is in the process of reviewing the *Nature Conservation Act* 1980. During the review it was submitted that biodiversity objectives ought to be integrated within the PD Act in order ensure threatened ecosystems and species are recognised within the assessment and approval process. [68] Increased consultation with the Conservator is necessary as the Conservator's functions include overseeing policies, programs and plans for the effective management of nature conservation in the ACT and monitoring the state of nature conservation; [69] the Conservator can also advise on the reaches of the Nature Conservation Strategy. Greater environmental protection can be achieved through mandatory consultation with the Conservator in the course of both the environmental assessment process and the strategic assessment process prior to the approvals processes.

Historically a number of important legislative tools available for managing and protecting threatened species are not used, key provisions are often discretionary and critical tools such as action plans and land management agreements are not mandatory or transparent. Timeframes for action and performance indicators are absent and not made publically available. Effective implementation is further hampered by a lack of data and knowledge due to a lack of resources and consequentially a lack of reporting. ANEDO is concerned that the failings of the Territory's biodiversity laws to effectively avoid and mitigate impacts on threatened species will be exacerbated in relation to 'fast-tracking' approvals where the development proposal has been assessed under the Impact track in Division 7.2.4 of Part 7.2 of Chapter 7 of the PD Act.

The State of the Environment 2011 reported, 'our unique biodiversity is in decline, and new approaches will be needed to prevent the accelerating decline in many species'.[70] 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 development approvals. Rather, the list of

[67] See Hawke Review 2009 and State of Environment Report 2011.
[68] EDO ACT, *Submission on the Draft Nature Conservation Bill 2013* (10 January 2014) http://www.edoact.org.au/sites/default/files/EDO%20ACT%20submission%20NCBill%202013%20100114.pdf.
[69] *Nature Conservation Bill 2013* (ACT) s 18.
[70] Above n 1, 592.

common failings make clear that threatened species laws in all jurisdictions including the ACT need to be reviewed, strengthened, and fully resourced and implemented.[71]

Assurance and administrative framework is deficient in detail

As discussed at page 8, there has been no clear indication of how monitoring, auditing, reporting, compliance and enforcement will work under the 'One Stop Shop' model. Accreditation should not occur when additional enforcement responsibilities and committed resourcing are not clear. EPBC enforcement will essentially be 'switched off' in relation to approvals accredited by the bilateral Agreements leaving the states and territories with responsibility to monitor, audit and enforce with ineffective tools that are not on par with the Commonwealth standard.

The bilateral Agreement between the Commonwealth and the ACT must be transparent, consistently monitored and enforceable in order to ensure environmental protection requirements are met. A transparent Agreement helps to ensure that decisions made pursuant to it are made legitimately. We recommend public access to information should be improved. We note Clauses 7 *Transparency and access to Information* and 8.2 *Co-operation*: *Open access to Information* and we suggest the draft Agreement be amended to expand the requirements for publicly available documents. For example, the draft Agreement should require certain information to be publicly available on government websites such as all information and major correspondence between the Commonwealth, the ACT and the proponent relating to approvals impacting MNES and content of the *Administrative Arrangements* (Clause 10) as these arrangements are pivotal to the implementation of the draft Agreement, but have not been made publically available.

ANEDO submits that the draft Agreement should also include a requirement to publish any major communications involving stakeholder engagement and public consultation periods. Additionally, any Freedom of Information requests ought to be met without delay. We note Schedule 2 – *Open access to Information* and the principles as outlined are appropriate, but remain concerned as the protocols are largely unenforceable. Further, Clause 13 *Sharing Information – ongoing EPBC Act matters* possesses breadth and open-ended obligations concerning monitoring compliance with approvals and enforcing conditions on approvals.

ANEDO recommends the draft Agreement be amended to:

- Include a role for annual scrutiny and independent reporting by the Office of the Commissioner for Sustainability and the Environment, and the ACT Auditor-General to the ACT Legislative Assembly, with a copy of the review report provided to the Australian Government on an annual basis,
- Include a requirement for an annual report to the ACT Government, with a copy to the Australian Government, on planning and environment dispute resolution by ACT Government agencies, and merits review and judicial review institutions (courts, tribunals, the ACT Ombudsman etc),

[71] See ANEDO, above n 15.

- A commitment by the ACT and Commonwealth governments to collaborate to produce user-friendly Q and A pages and/or flow charts clearly explaining the operation of the Agreement and relevant legislation for citizens who may wish engage with its provisions.

As part of a thorough monitoring scheme, this draft Agreement ought to also be modified in order to require adaptive management and continuous improvement of environmental protection standards. It is crucial to ensure that compliance obligations aren't reduced to avoid transparency as this would significantly weaken community confidence and environmental standards in favour of project profitability.

These comments should not be taken as support for the draft Agreement which is clearly opposed for the reasons noted earlier in the submission.

Auditing under the Agreement (Clause 14)

ANEDO is concerned that the environmental protection standards set by legislation are not actually being implemented in practice. The draft Agreement must indicate a commitment by the ACT Government that they will develop standard operating procedures which encompass the objects of the draft Agreement, particularly, the objectives of ensuring Australia complies with its international obligations and that MNES are protected as required under the EPBC Act.[72] The bilateral Agreement should be amended to require regular independent audits of assessor competency and specify relevant mandatory training programs, for example, the audits ought to be independently conducted by a body such as the Commissioner for Sustainability and the Environment to ensure rigour.

Review (Clause 12)

ANEDO acknowledges the 12 month transitional review, however the key performance indicators are unknown (12.2(b)) and seeking public comment is discretionary (12.2(c)). Any reviews of the Agreement should be made independently and seek the views of the public and key stakeholders to ensure the most complete review of the Agreement, particularly in relation to whether ACT legislation accords with the EPBC's environmental protection standards.

Rigorous review of the draft Agreement is also essential to ensure that environmental protection standards are actually implemented in practice. Without this report, it is unclear what the effect of the Agreement is. As previously noted,[73] it is a concern that audits of the previous bilateral assessment Agreement was not undertaken by the Australian Government, despite the fact that this was agreed to in the 2009 Agreement.[74] The report

[72] Commonwealth of Australia*, Bilateral Agreement under section 45 and 46 of the Environment Protection and Biodiversity Conservation Act* (2014), Objects, pt E (a) & (b).
[73] EDO ACT submission to draft bilateral assessment Agreement, 29 April 2014. Available at: http://edoact.org.au/sites/default/files/EDO%20ACT%20draft%20Bilateral%20Assesment%20Agreement%20ACT%20280414.pdf.
[74] Commonwealth of Australia, *An Agreement between the Commonwealth of Australia and the Australian Capital Territory Under section 45 of the Environment Protection and Biodiversity Conservation Act Relating to Environmental Impact Assessment* (2009), pt 23.

is overdue and there are no indications from the Commonwealth website that the report has been published in accordance with the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth).[75]

Senior Officers' Committee:

ANEDO notes the proposed establishment of the Senior Officers' Committee at Clause 10.2 of the draft Agreement, but recommends that the Committee be required to seek community stakeholder feedback on the operation of the Agreement, consistent with a commitment to transparency and dispute resolution. ANEDO notes previous findings by the ACT Auditor-General's Report included reference to a failure by ACT Government agencies to:[76]

- Apply a robust risk management framework;
- Implement appropriate project governance or oversight arrangements to benefit from the combined knowledge and expertise of the different agencies and consultants involved in the project;
- Critically assess feasibility or otherwise throughout the project, including cost implications of information that was available; and
- Critically review the work and advice provided by consultants engaged in the project.

This may be rectified by the operation of a Senior Officers' Committee, but the ANEDO would prefer the Committee operate in a participatory and open way with regard to community stakeholders.

Much of the detail of how the Committee will operate is in the *Administrative Arrangements*, however these are yet to be developed or consulted upon and have not been made public; it is unclear whether they will be publicly consulted upon. These circumstances are concerning as the Committee has significant powers in terms of assessing the effectiveness of the Agreement.

ANEDO is concerned:

- There is no transparency as to how this Committee deliberates and decides as there is no mandatory requirement to disclose this information pursuant to Clause 7 – *Transparency and Access to Information,*
- That it be made clear there will be one Committee responsible for each state and Territory,
- The Committee be comprised of expert, suitably qualified persons, for example the ACT Commissioner for Sustainability and the Environment and that the role be dedicated and independent from Government, and
- There is potential for conflict of interests with other decision-making responsibilities or other management tasks.

[75] Reg 16.02(2)(a).
[76] Available at: http://www.audit.act.gov.au/auditreports/reports2011/Report_3-2011_North_Weston_Pond_Project%20-%20post%20tabling%20revised.pdf.