NSW EDO

DEFENDING THE ENVIRONMENT
ADVANCING THE LAW

Submission on the proposed amendments to the *NSW Bilateral Agreement in relation to Environmental Assessment*

prepared by

EDO NSW

21 February 2019

About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

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Executive Summary

The EDO NSW is a community legal centre specialising in public interest environmental law. We welcome the opportunity to provide comment on the proposed draft amendment to the Commonwealth - NSW Bilateral Agreement in relation to Environmental Assessment (**draft Amending Agreement).**

We welcome the track changed version of the documents on public exhibition that clearly show the amendments that are proposed.

We have extensive experience advising on the NSW biodiversity and planning legislation referred to in the draft Amending Agreement - namely the *Biodiversity Conservation Act 2016* and the amended *Environmental Planning & Assessment Act 1979*, and also on the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and would be happy to provide the Commonwealth with further detail and legal analysis.[1]

EDO NSW supports efficient and effective environmental regulation, with comprehensive guidance and upfront certainty about the rules and processes for both development proponents and communities. However, achieving efficiencies through accreditation cannot be at the expense of maintaining environmental standards.[2] Accreditation is much more than an administrative exercise.

The consultation materials state that this amending exercise is "minor" and relates to updating the names and relevant provisions of the NSW legislation that is accredited since reforms have occurred at the state level.

Commonwealth accreditation of the new NSW biodiversity laws is *not* simply a minor administrative exercise. While the "intent" of the overall agreement remains the same – to streamline assessment requirements – the substantive detail of what laws and standards are being accredited is substantially different.

EDO NSW has published significant expert analysis of the new NSW laws and documented the weakening of standards for environmental protection. In our expert view, it is legally questionable to pursue accreditation in the absence of significant amendment to the NSW laws to meet national standards.

Our primary recommendation is that the Amending Agreement must not be signed until relevant amendments to NSW offset rules and regulations have been made and have commenced.

This submission identifies both our overarching concerns with the proposed Commonwealth endorsement of new NSW biodiversity laws, and also makes specific comments on proposed amendments.

[1] See also: *Submission on (Revised) Draft NSW – Commonwealth Bilateral Assessment Agreement*, 30 January 2015 - **Download PDF** and https://www.edonsw.org.au/biodiversity_legislation_review for submissions and analysis of NSW laws.

[2] EDOs of Australia have published extensive analysis on the legal flaws of the 'one stop shop' model, and the clear legal reasons why federal leadership and responsibility must be retained for matters of national environmental significance (see fn 11).

Part One of this submission addresses the following key issues:

- Accrediting weaker standards is not a "minor" amendment
- Endorsement of the NSW Biodiversity Offset Scheme, the offset rules, Biodiversity Assessment Method and Biodiversity Conservation Regulation 2017
- Inclusion of Commonwealth land and actions under the agreement

Part Two makes recommendations regarding specific clauses of the draft Amending Agreement.

Part One: Key issues

1. Accrediting weaker standards is not a "minor" amendment

The Department of the Environment website[3] states that the Bilateral Agreement needs amending because:

> *Changes to NSW legislation, including the introduction of the Biodiversity Conservation Act 2016 (BC Act) and the Environmental Planning and Assessment Amendments Act 2018 (EP&A Act), mean amendments are needed to the Bilateral Agreement.*
>
> *The amendments are minor in nature and will continue to minimise duplication of environmental assessments. The original Bilateral Agreement's intent is unchanged and the existing content has been kept wherever possible.*

And further:

> *Most changes reflect wording in the new NSW legislation. While the relevant parts of the legislation keep the same intent, names and numbers have changed and need amendment in the Bilateral Agreement.*

It is true that the **intent of the Bilateral Agreement** remains unchanged in relation to the objective to "minimise duplication in the environmental assessment and approval processes of the Commonwealth and NSW."[4] However, it is disingenuous to claim the **intent of the legislation** being accredited is unchanged given the substantial weakening of NSW biodiversity laws.

The new NSW laws enshrine significant discretion for decision-makers and have reduced standards for environmental protection. For example, mine site rehabilitation decades in the future can count as an offset now; offset requirements may be discounted in favour of other socio-economic factors; and supplementary measures - such as research projects or paying money into a fund - are a readily accessible alternative to finding a direct offset (that is, protecting the actual plant or animal that

[3] See: http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/nsw.
[4] Object F(e) of the Agreement, p6.

has been impacted by a development). The high degree of indirect offsetting permitted is a good example of where the NSW laws diverge from EPBC Act standards.

The fact that the NSW laws set to be accredited by the amendments are substantially weaker, means that they are likely to have a significant effect of the operation of the principal agreement, including its ability to ensure protection of matters of national environmental significance (MNES). This is a key consideration for the Minister when determining if amendments are minor.[5] It is also questionable whether accrediting lower standards is consistent with the stated objective of the Agreement itself to "ensure Matters of NES are protected as required by the EPBC Act."[6]

Furthermore, by categorising the amendments as minor, the Minister avoids certain requirements including to publish a statement of reasons for entering into the agreement and a report on the comments (if any) received on the draft of the agreement in s45 (4)(b) and (c). The minor amendment process also avoids the consultation requirements of s49A, including a requirement to consider the role and interests of indigenous peoples in promoting the conservation and ecologically sustainable use of natural resources in the context of the proposed agreement, taking into account Australia's relevant obligations under the Biodiversity Convention.[7]

We submit that the practical effect of the proposed endorsement of the new NSW laws is **not** "minor" in its potential implications for assessment of matters of national environmental significance, and fulsome consultation should be conducted including more comprehensive reasoning and analysis of the impacts of the proposed amendments.

2. Endorsement of the NSW Biodiversity Offset Scheme, Biodiversity Assessment Method and Biodiversity Conservation Regulation 2017 rules

The explanatory materials state:

> *The Australian Government intends to endorse NSW's new Biodiversity Offset Scheme (BOS), which includes the BAM, the offset rules, the Biodiversity Conservation Regulation 2017, and payments to the Biodiversity Conservation Trust.*
>
> *Both governments agree that endorsing the BOS for both NSW and Commonwealth-listed threatened species and communities will provide for robust, transparent biodiversity and streamlining outcomes.*

[5] Section 56A(b) requires that "the Minister is satisfied that the amendment will not have a significant effect on the operation of the principal agreement" when determining whether an amendment is minor.
[6] Object F(b) of the Agreement, p6.
[7] See section 56A. Provisions for making and amending of Bilateral Agreements are set out in Part 5 of Chapter 3, ss44-56A *EPBC Act 1999*.

The BOS is largely consistent with NSW's previous offsetting approaches. NSW has committed to amending the NSW BOS offset rules, and is considering amending the related regulations, to align offsetting with Australian Government requirements and ensure like-for-like offsets are achieved for Commonwealth-listed threatened species and communities.

A joint Australian and NSW Government review in 2020 will assess the effectiveness of NSW offset approaches in ensuring long-term environmental outcomes for relevant matters of national environmental significance.

While offset obligations can be calculated in BAM credits for EPBC Act projects, the Australian Government may not accept the specific application of the offset rules for projects approved before Amending Agreement No. 1 is signed. The Commonwealth Minister or a delegate will determine this on a case by case basis.

The justification provided for the proposed Commonwealth endorsement of the NSW Biodiversity Assessment Method is explained as follows:

The BAM establishes a single consistent approach to assessing biodiversity values and biodiversity impacts from development. The BAM builds on and supersedes previous NSW statutory assessment and offsetting mechanisms, BioBanking and the FBA.

The BAM ensures development impacts are offset to achieve no net loss of biodiversity. It also uses a framework to avoid, mitigate and offset proposed impacts to biodiversity.

Despite technical changes, the BAM's coverage and approach remain conceptually consistent with prior approaches.

While there are some improvements in the new NSW laws – for example, the BAM does establish a single consistent approach to offsetting, and the investment in private land conservation via the Biodiversity Conservation Trust is welcome - there are a number of problems with these statements that make the proposal to endorse the new state processes legally questionable. These problems include that:

- It is claimed that the BOS is "largely consistent" with previous offsetting approaches. This is true to the extent that the former NSW *Major Projects Offsets Policy* set a policy trajectory for weakening environmental protections by increasing the flexibility and range of options available to project proponents requiring offsets. As revealed in government documents sought under FOI laws, that policy was accredited despite enshrining lower standards.[8] The new policy (the BOS) has actually increased that flexibility

[8] 14 May 2018: Documents released under Freedom of Information law (FOI) show that the Australian Government identified significant areas where the *NSW Biodiversity Offsets Policy for Major Projects*, which assesses whether and on what basis projects can undertake broadscale land clearing, failed to meet the environmental standards of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act): https://www.edonsw.org.au/foi_offsets_win_hsi.

considerably further and widened the gap between NSW and Commonwealth offset standards to the extent that endorsement would be even more inappropriate. For example, indirect offsetting is expanded (including payments in lieu of offsets), offsets may be discounted for socio-economic reasons not ecological reasons, and offset credit can be given for mine rehabilitation in the distant future. The Australian Government is now proposing to accredit even lower standards than it erroneously did previously.

- It is indicated that NSW has committed to amending the BOS offset rules, but there is no timeframe for this.
- It is stated that NSW is only "considering" amendment to regulations to ensure better alignment with Commonwealth requirements for like-for-like offsets. These essential amendments appear to be discretionary and up for debate.
- The proposed review of whether the new offsets approach is actually achieving ecological outcomes is not until 2020. While some delay is necessary as the offsets market is not yet sufficiently established meaning evaluation of longer term outcomes can only be speculative at this stage, it seems the amending agreement will be signed before any evaluation of the new BOS scheme is undertaken, and in the absence of evidence that it can effectively protect threatened species and ecological communities of national significance.
- It is claimed that the BAM "ensures development impacts are offset to achieve no net loss of biodiversity." The NSW laws do **not** establish an effective no net loss standard.[9]
- While the BAM may be "conceptually consistent with prior approaches" at a high level – ie, it is a technical tool for assessing impacts on biodiversity values - at a detailed level it enshrines weaker standards and does not achieve a no net loss standard.

Perhaps in anticipation of such criticism, the explanatory material concludes with a specific statement on how NSW offset rules will apply. The confusing nature of the statement implies a recognition that there are currently differing standards:

> *The offset rules requiring the retirement of like-for-like credits or funding conservation actions that directly benefit the listed species or community impacted, meet the Australian Government's requirements.*
>
> *The NSW offset rules allow for variations where like-for-like offsets cannot be found, whereas the Commonwealth requires a like-for-like outcomes. NSW has committed to establishing a mechanism to ensure offsets for EPBC Act purposes achieve like–for-like outcomes. This will include minor amendments to the offset rules, and may include amendments to the BC Regulation to prevent the variation rules from applying to EPBC Act projects.*
> *…*

[9] For expert analysis see: NSW biodiversity and land management laws: Draft regulations and products on public exhibition – EDO NSW submission, June 2017 – **Download all submissions combined**.

NSW will also ensure payments to the Biodiversity Conservation Trust for EPBC Act projects are disbursed in a like-for-like manner to meet Australian Government requirements.

Furthermore as noted, the Commonwealth also proposes to endorse future mine rehabilitation as offsets. This is also high risk for species and ecological communities of national significance that are impacted by mining. A potential offset in the distant future for a species or community impacted by a mining project today may well be too late.

The final sentence in the Explanatory materials is a vital commitment:

The Australian Government will not sign the Amending Agreement No. 1 until the necessary changes and/or mechanisms have been implemented.

Significant amendments need to be made to the Regulations, offset rules, BOS and BAM to ensure an effective no net loss standards is rigorously applied and to significantly limit indirect offsetting.[10] These need to be developed, independently reviewed, made and commenced before the Commonwealth can have any certainty about what it is endorsing.

3. Inclusion of Commonwealth land and actions under the agreement

The draft Amending Agreement also proposes that actions on Commonwealth land and by Commonwealth agencies will be brought under the Bilateral Agreement.

The Explanatory materials state:

There are also minor administrative changes to make the Bilateral Agreement more relevant and fit for purpose. The most significant of these are:

Broadening the scope to include Commonwealth land, actions and agencies - Clause 4.2

The original Bilateral Agreement excludes actions in Commonwealth areas or by Commonwealth agencies. The proposed amendment will allow Commonwealth projects to be assessed under the Bilateral Agreement, with agreement of the Commonwealth Minister for the Environment and the NSW Minister for Planning.

Again, this is not a minor administrative matter. It is not equivalent to updating the name of legislation or a Department. It is essentially outsourcing assessment of actions on Commonwealth land to NSW. While there are valid arguments for independent assessment processes for actions by Commonwealth agencies (ie, rather than self-assessment), the justification of the proposed divestment of responsibility for assessing impacts on Commonwealth land is unclear. The

[10] For further analysis of the BOS and BAM, including over 200 recommendations for reform, see: NSW biodiversity and land management laws: Draft regulations and products on public exhibition – EDO NSW submission, June 2017 – **Download all submissions combined**.

implication that Commonwealth projects could benefit from being assessed under weaker NSW laws is troubling. There are significant biodiversity and heritage values on Commonwealth land for which the Commonwealth should retain responsibility.

Bearing these fundamental problems in mind, Part Two provides feedback on the specific amendments that are proposed.

Part Two: Recommendations for specific clauses

This part makes recommendations on the clauses and proposed revisions in the:

- *Amending Agreement No. 1*
- *Attachment A to Amending Agreement No. 1*
- *Schedule 1 – Declared classes of actions*
- *Schedule 2 – Open access to information* and *Schedule 3 – Guidance documents for Matters of National Environmental Significance*
- *Schedule 4 – Additional streamlining measures*

Amending Agreement No. 1

[1] Commencement
As noted we submit that the amended agreement must not commence until significant amendments to NSW regulations and offset rules have been made and have commenced.

Attachment A to Amending Agreement No. 1

Objects (p8-9)
[D] and [E] References to establishing a 'one stop shop' for environmental approvals should be deleted.
[H] References to finalising an approval bilateral agreement should be deleted.
EDOs of Australia have published extensive analysis on the legal flaws of the 'one stop shop' model, and the clear legal reasons why federal leadership and responsibility must be retained. This commentary and expert analysis is available on our website.[11]

[11] For example, key concerns with the 'one stop shop' approach include:
- The protection of Australia's environment depends on how seriously the federal government takes its role – including by retaining approval powers
- Relinquishing federal approvals will not improve efficiency or effectiveness
- Accrediting planning laws in a state of flux creates uncertainty and fragmentation
- Commonwealth must retain control where States have a conflict of interest
- State threatened species laws do not meet high environmental standards
- Fast-tracking major projects contradicts risk-based assessment
- Commonwealth must retain robust compliance, enforcement, reporting and assurance mechanisms in legislation.

For further analysis see: https://www.edonsw.org.au/briefing_one_stop_shop https://www.edonsw.org.au/federal_government_risks_creating_an_8_stop_shop_of_fragmented_rules and https://www.edonsw.org.au/federal_handover_of_environmental_approval_powers_to_the_states.

[1.4(b)] Undertakings by NSW (p12)
This clause currently states "*To avoid doubt, this Agreement does not require NSW to make, to amend or to repeal any NSW Laws*." However, as noted, the FAQ indicate the NSW will "consider" making amendments to the regulation and offset rules as part of this accreditation process. It should be made clear that the necessary amendment to NSW laws will occur prior to any signing of the draft Amending Agreement.

[2] (c) Nature of this Agreement (p12)
The clause relating to embedded Commonwealth officers is being repealed. Given the extensive changes to NSW law, we submit that this arrangement should be renewed, especially while the new NSW assessment processes are in transition (see also **[11.1] Administrative arrangements**).

[4.2] (c) and (d) Scope (p13)
We do not support the Agreement being extended to actions on Commonwealth land by Commonwealth Agencies (see above).

[4.3] Determination that an action is not within a class of actions and **[5.4] Notification by the NSW Minister whether an accredited process will apply** (pp13-14)
These provisions are potentially unclear. 4.3(b) indicates the Commonwealth cannot exclude an action where NSW has decided it will be assessed under an Accredited process. We submit that the Commonwealth should be able to call in or exclude actions.

[5.5] Use of Accredited Process to assess an action (p14)
This currently states "*The parties agree to use their best endeavours…, to ensure that the Accredited Process is used for the assessment of an action to the greatest extent possible*." This seems to imply that partial application of an Accredited process is sufficient and potentially provides scope for an unaccredited process to be used regarding an action exempt from Commonwealth assessment under the Agreement without explicit endorsement of that process? This should be clarified. If it is not possible to apply an accredited process comprehensively, then that would indicate the process may not be fit for purpose.

[7.1] Avoid, mitigate, offset hierarchy (p17)
The clause to be deleted refers to the situation where a residual impact cannot be offset then an escalation process is triggered. The new proposed wording in **(c)** implies that everything is amenable to offsetting under the NSW Biodiversity Offsets Scheme and rules. This is a fundamental flaw in the NSW scheme and a key reason why we do not believe the Commonwealth should accredit the NSW Biodiversity Offset Scheme. It is also unclear what the consequences of NSW choosing not to comply are in **(c)(iii).**

[7.2] Offsets (p17)
(a) and **(b)(i)** - We do not support the Commonwealth proposal to endorse the BOS as 'an endorsed state policy' due to the weaker offset standards in NSW as compared to the national standards. We do not support this new clause as it will

facilitate significant impacts by allowing broader and less direct offsetting (as noted above).
(e) indicates that the effectiveness of the BOS will be assessed as part of the 5 year review of the Agreement (the FAQ states "*A joint Australian and NSW Government review in 2020 will assess the effectiveness of NSW offset approaches in ensuring long term environmental outcomes for relevant matters of national environmental significance*"). This effectively means that in the meantime, the Commonwealth is proposing to endorse a scheme without any evidence that it works.

[8.4] Public comment (p23)
We recommend this clause be amended to say "NSW *must* ensure…" rather than "NSW must *seek to* ensure" that public comment will be accepted and considered.

[16.1] (c) Escalation (p29)
We remain concerned about this clause indicating that requirements for assessment need only be "substantially met."

[19.2] Minor amendment (p30)
As discussed above, we are concerned about the definition of "minor" and disagree that the proposed amendments will not have a significant effect on environmental outcomes for MNES.

Schedule 1 – Declared classes of actions

Schedule 1 sets out the declared classes of actions that are intended to be exempt from assessment under the EPBC Act.

[2]. Classes of actions to which 4.1 applies
This clause sets out 8 categories of action and their corresponding assessment pathways.

We note that the first bilateral agreement in 2013 accredited 4 NSW "major project" assessment processes, namely State significant development (**SSD**), State Significant infrastructure (**SSI**), Modification of SSD projects, and transitional major projects. The revised agreement in 2015 then accredited 6 additional NSW assessment pathways. This expanded the accreditation to almost all classes of development under parts 4 and 5 of the NSW EP&A Act (including designated development, private development, and modifications), but excluded local assessment processes (for example, where the decision-maker is a local council or joint or independent planning panel). Our detailed analysis of these accreditation pathways is set out in our *Submission on (Revised) Draft NSW – Commonwealth Bilateral Assessment Agreement*, January 2015.[12]

Clause **[2]** in schedule 1 to this draft Amending agreement does three things:

- Updates references to relevant parts and provisions of the EP& A Act that have changed since that Act was amended (and renumbered) in 2018 (**2.(a)(i)-(viii)**);

[12] Transitional Part 3A projects – see fn 23: Submission on Revised NSW Commonwealth Assessment Bilateral Agreement. EDOs of Australia submission. 30 January 2015 - **Download PDF**

- Retains accreditation of the NSW assessment pathways except for Part 5 projects (**2.(a)(ix) and (x)**);
- Retains exclusion of local decisions and updates names of local, regional and Sydney district planning panels (**2.(c)**)

In relation to excluding Part 5 assessments, the Explanatory materials state:[13]

> *Activities assessed and approved under Part 5 of the EP&A Act are primarily carried out by or on behalf of NSW public authorities and do not require development consent through the Department of Planning and Environment, meaning there are limited savings from including Part 5 projects within the Bilateral Agreement. The Bilateral Agreement will be amended to exclude Part 5 projects.*

[2.(a)(ix)and (x)] These clauses refer to Part 5 assessment pathways and will be deleted. As previously submitted, EDO NSW does not support Commonwealth accreditation of Part 5 assessment processes for a range of reasons including that assessment by Review of Environmental Factors (REF) is not rigorous enough to replace federal assessment of specific significant impacts as required by the EPBC Act, the process has less transparency and independent scrutiny. We therefore support the removal of Part 5 assessments from the Agreement.

We note separate processes for strategic assessment of Part 5 activities (for example, NSW Roads and Maritime activities[14]) are aimed at streamlining assessments, but we submit that Part 5 projects that are likely to have a significant impact on a MNES should be subject to federal assessment processes.

Schedule 2 – Open access to information and *Schedule 3 – Guidance documents for Matters of National Environmental Significance*

We note there are no proposed changes to these schedules. Please refer to our previous submission for analysis of these existing clauses.

Schedule 4 – Additional streamlining measures

As noted, we do not support the finalisation of the Approval Bilateral Agreement, and recommend [**2-1.1**] be deleted.

[**1.2**] sets out a table of additional streamlining measures such as strategic assessments. It is proposed to delete reference to strategic assessment of biodiversity certification under the former NSW *Threatened Species Conservation Act 1995*. We note that the biodiversity certification provisions under the new *Biodiversity Conservation Act 2017* include weaker standards making federal

[13] See: http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/nsw
[14] See: *Submission on Strategic Assessment of RMS 'Part 5' environmental impact assessment procedures to replace EPBC Act assessments/approvals* - EDO NSW submission 2015.
13 February 2015 - **Download PDF**

accreditation inappropriate. This should not be included in a priority list of future strategic assessments unless significant amendments are made to strengthen the biodiversity certification standards and requirements under NSW law.

Strategic assessment of Part 5 activities is also to be deleted from the table. Our comments on the inadequacies of Part 5 are noted above and in our 2015 submission on the existing agreement and related submissions. We continue to oppose federal accreditation of Part 5 processes due to the lack of rigor and the fact they are not fit for the purpose of assessing matters of national environmental significance.