Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

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

02 February 2015

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

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

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Executive Summary

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

Australia's future prosperity and quality of life depends on a healthy environment. It is unacceptable for the Commonwealth to weaken environmental protection by delegating to South Australia **(SA)** approval decision-making on any matters of national environmental significance.

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 the SA Draft Approval Bilateral Agreement (**Draft Agreement**) should not be entered into.

If a Draft Agreement is to be entered into, ANEDO submits that at a minimum, (a) substantial changes to the Draft Agreement are required to limit the matters of national environmental significance to be delegated and to address other deficiencies; and (b) changes to the accredited legislation are required – as summarised as follows:

1. Actions anywhere in SA subject to the **water trigger and nuclear actions** should be excluded. Inclusion of certain nuclear actions in the bilateral, such as mining uranium and transporting waste, is a retrograde step with serious national and international implications.

2. **Conflict of interest - state-owned corporations and agencies** routinely have a direct interest in proposed developments in SA. Their actions should be excluded from any approval bilateral. The SA government will have a clear conflict of interest as both a national environmental protection regulator and a promotor of development. Inevitably, short term political interest will influence the SA government to prefer royalties or income over the national interest. If the SA government is to take on this dual role, a more appropriate SA delegate for any approvals decision-making is the SA Environment Minister, not the Minister for Mineral Resources and Energy.

3. **Inadequate SA legislation:** The processes, under SA's mining, petroleum and geothermal energy assessment legislation, proposed to be accredited do not meet the standards necessary for Commonwealth accreditation. For practical legal enforceability the various *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act)** decision-making criteria and duties, so as to comply with international treaties such as the World Heritage Convention, need to be each separately and specifically written into the SA legislation.

4. Provisions about taking a developer's **environmental record** into account in decision-making and provisions outlawing the supply of **false and misleading information by a developer** need to be strengthened in SA legislation to mirror the EPBC Act.

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

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

7. **Likelihood of poor state enforcement:** What resources will be provided to SA to implement bilateral approval responsibilities? The SA State government is not resourced to adequately administer Commonwealth laws. The potential cost to the tax-payer where these laws are poorly enforced could quickly outweigh any perceived benefit of delegation of approvals.

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

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

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

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

Introduction

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

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

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

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

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

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

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

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

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

1. The Commonwealth Government should reverse its intention to pursue approval bilateral agreements, as their use is not necessary or justified.

2. Instead, the Government should improve the efficiency and effectiveness of the EPBC Act, and work with States and Territories to improve their environmental assessment and approval processes.

3. This should include revisiting the Hawke Review package, and developing better administrative arrangements with the States under *assessment* bilateral agreements (once State processes are improved).

4. Administrative arrangements should include a 'highest environmental denominator' approach to promoting consistent standards across jurisdictions, and strengthening regulatory skills and resourcing at both state and federal levels.

5. The Commonwealth Government should consult further on a uniform set of national environmental standards that State assessments must comply with to be accredited, including the use of objective and robust science-based assessment methodologies.

6. Improved State and Territory assessment standards must be a prerequisite to expanding assessment bilateral agreements. ANEDO opposes new assessment bilateral agreements until State/Territory assessment procedures are established in law, and independently certified as meeting federal standards.

7. This should include requirements in State and Territory accredited laws such as:

    - aim to promote and achieve ecologically sustainable development (**ESD**) through improved assessment standards;
    - more accountable governance arrangements (assessors, decision-makers);
    - greater transparency and public participation before decisions are made;
    - increased access to justice for communities, including court appeal rights;
    - leading practice monitoring, enforcement and reporting; and
    - renewed focus on implementing and strengthening threatened species laws.

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

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

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

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

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

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

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

The Commonwealth's role for matters of national environmental significance

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

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

The Commonwealth Environment Minister may enter into a bilateral agreement only if the agreement 'accords with the objects of' the EPBC Act.[7] This is vital because, while the present reform agenda has largely focused on 'streamlining' assessment, the objects of the EPBC Act

[6] See ANEDO, 'Submission to the Senate Standing Committee on Environment and Communications regarding the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*'. Available at: http://www.edo.org.au/policy/ANEDO-Submission-EPBC-Retaining-Federal-Approval-Powers-Bill-2012.pdf.
[7] EPBC Act, s 50.

(and the first object in chapter 3 on bilateral agreements) embody fundamental environmental goals.[8]

The EPBC Act's objects emphasise the protection and conservation of the environment and heritage (governments in partnership with Indigenous people and other groups), fulfilment of our international obligations, and promotion of *ecologically sustainable development* (**ESD**).[9]
In March 2014, the Commonwealth Government 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 outcomes. For example, the timeframe for Commonwealth *approval* is 30 business days from the date the Environment Minister receives the State's assessment report.[12]

Comprehensive *assessment* of projects is the longest and most complicated stage in the overall approval process. This is to some extent inevitable because of the scale of project applications, complex environmental impacts, limitations on agency resources and data, and the importance of community engagement and consultation. As the Productivity Commission has noted:

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

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

Conflicts of interest

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

[8] See EPBC Act, 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).
[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).

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, the 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.

State laws do not meet high environmental standards

Accreditation of State planning laws (and in SA – mining, petroleum and geothermal energy laws) is also an endorsement of State threatened species legislation. Current State and Territory laws do not meet federal standards.

In December 2012 (and updated in September 2014), ANEDO was commissioned to undertake an audit of threatened species and planning laws in all Australian jurisdictions.[15] The key finding of this report is that *no State or Territory biodiversity or planning laws currently meet the suite of federal environmental standards necessary to effectively and efficiently protect biodiversity.* While the laws in some jurisdictions look good 'on paper', they are not effectively implemented.

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

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

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

As the *State of the Environment 2011* report stated:

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[15] ANEDO, *An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia* (2012), Report for the *Places You Love Alliance* of environmental NGOs. Available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/279/attachments/original/1380668130/121218Appendix1Reportontheadequacyofthreatenedspeciesandplanninglaws.pdf?1380668130
Updated September 2014 - https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1406/attachments/original/1414370394/Assessment_of_the_adequacy_of_threatened_species__planning_laws-V5.pdf?1414370394

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

'Our unique biodiversity is in decline, and new approaches will be needed to prevent the accelerating decline in many species'.[17]

Given the decline in biodiversity, combined with increasing population pressures, land clearing, invasive species and climate change, now is *not* the time to be streamlining and minimising legal requirements in relation to biodiversity assessment. Rather, the list of common failings make clear that threatened species laws in all jurisdictions need to be reviewed, strengthened, and fully resourced and implemented.

Fast-tracking major projects contradicts risk-based assessment

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

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

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

ANEDO notes that if States seek to uphold federal EPBC Act requirements, they will need to increase environmental and assurance standards. However, by seeking to fast-track major projects, States will be *lowering* those standards (such as by reducing scrutiny or public participation). By competing with one other to 'cut green and 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 as to how monitoring, auditing, reporting, compliance and enforcement will work under the 'one stop shop' model. It is unclear what baselines or indicators will be used to ensure that bilateral agreements will maintain environment protection standards, and what independent body with the necessary environmental expertise will be appointed to assess this. ANEDO believes it would not be possible for the Commonwealth to vacate this sphere by delegating powers to States and Territories, without risking 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

[17] Australian Government, *State of the Environment 2011*, summary, p 4.
[18] See for example, Productivity Commission, *Research Report – Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (2011), p. xlviii.
[19] See, for example, EPBC Act s 87(4A) and factors to be considered in EPBC Regulations 2000, cl 5.03A.
[20] See Senate Environment and Communications Committee, report on the *EPBC Amendment (Retaining Federal Approval Powers) Bill 2012* (March 2013), evidence at 2.26 and conclusion at 2.71.

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 fast 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.

Part 2. Comments on the Draft Agreement's general provisions

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

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

1.2 Counterparts – It is unclear as to what the intention of this clause is. "Counterpart" could refer to identical copies of the agreement or could refer to parts of the agreement that "compliment" each other.

2.1 Definitions – The "SA Minister" administering the Schedule 1, clause 3 Accredited Processes legislation is the Minister for Mineral Resources and Energy **("Mining Minister")**. At the Commonwealth level, the relevant Minister (and Department) is the Minister for the Environment. This is a fundamental issue with the handover of powers – the Commonwealth Environment Department is handing over powers to a SA minister and department that do not have the same expertise or mandate. The "Chief Executive of the relevant SA department" is the Chief Executive of the Department of State Development who does not have relevant or sufficient environmental expertise.

5.2(b) Effect of the agreement - Scope – This clause indicates that SA will use its "best endeavours" to coordinate assessment and approval processes where an action involves other jurisdictions. There is no legal definition of "best endeavours" or clarity on what might be required to discharge this obligation. This term should be defined or made more certain. This clause highlights a fundamental defect in the, so called, "one stop shop" approach. For actions that cut across state/territory borders, there will be a number of "shops" each with its own differing assessment and approval processes.

5.2(e) Effect of the agreement – Scope – This attempt at clarification creates more uncertainty. Who will determine whether an action is "substantially the same"? What criteria will the decision-maker use?

6.1 Identification of impacts on MNES – SA will "use its best endeavours" to inform a proponent that they may need to refer an action that is not covered by the agreement to the Commonwealth. There is no logical reason why SA should not be required to inform a proponent that their action must be referred to the Commonwealth. "Best endeavours" is vague, uncertain and insufficient. SA should be required to inform a proponent. In addition, the Notes to clause 6.1 indicate that the notification "may" be undertaken in accordance with guidelines and the requirement to identify impacts on MNES "may" be included in guidelines or templates. Both these "options" should be made mandatory. Such guidelines should be subject to public consultation.

[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.

6.4(a) & (b) Seeking expert advice – Given the lack of SA resources and expertise, SA should be obligated ("must" not "may"): to seek the advice of the Supervising Scientist in regard to a nuclear action; and to seek advice from the Commonwealth on Australia's international obligations. Most of the detail regarding the obtaining of expert advice will be set out in Administrative Arrangements, for which there has been no public consultation to date. Public consultation should be undertaken with respect to the Administrative Arrangements.

6.4(c) Expert Committee for CSG and large coal mines – SA will be obligated to refer projects to the Committee for advice and take that advice into account in the State's decision. SA should be obligated to act upon the advice that is provided. This clause must remain if the *EPBC Amendment (Bilateral Agreement Implementation) Bill 2014* is passed and the water trigger is handed over to States. In regard to the "likely to have a significant impact on water resources" criterion for referral, who will make that determination, on what criteria and when? Given the likely conflict of interest that SA will have in such circumstances, the Mining Minister should not be the decision-maker.

6.5 Statutory Undertaking - Subclause 6.5(c)(ii) should be joined to subclause 6.5(c)(iii) by "and", not "or". SA's undertaking to ensure that the impacts are assessed to "the greatest extent practicable" should be clarified by the inclusion of *"The parties agree that "greatest extent practicable" is satisfied where the assessment has been undertaken in a manner of assessment consistent with the relevant Accredited Process."*

7.2 Decisions on Approval – SA will apply the 'avoid, mitigate, offset' hierarchy (cl. 7.2) and where an impact cannot or will not be offset, the agreement indicates that the dispute resolution process in clause 17 will apply. A compromise outcome can then be negotiated by senior officials. This allows SA to make decisions that may be inconsistent with EPBC Act standards (for example, requirements for offsets under cl.7.3 or requirements for decisions to not be inconsistent with international obligations under cl.7.4) and then negotiate an alternate outcome. There is also a lack of transparency around how compromises will be negotiated. The environmental protection standards which SA will apply must be at least as strong as EPBC Act standards of assessment and approval. Any negotiations over compromises in environmental protection must be transparent.

7.3 Offsets – ANEDO has major concerns about the conditioning and practical application of offsets.[22] The caveat, in clause 7.3(a)(iii)(A), appears to allow deviation from the EPBC Act Environmental Offsets Policy, due to "the unique nature of the impact or a proposed offset or the nature of the project overall". Whilst the intention may be to capture specific impacts for which a different methodology may be appropriate (e.g. marine offsets), the language of "unique nature of the impact, proposed offset, or the project overall" could capture almost all circumstances. Each project and its impacts are unique. Broad, unclear language such as this widens the discretion of the decision maker, is inconsistent with the *Standards for Accreditation* (paragraph 28(d)) and should be removed.
Clause 7.3(a)(iii)(B) should specify that *only* when the Commonwealth advice is that "the proposed offset would provide an acceptable environmental outcome consistent with the objects of the EPBC Act", SA may apply the proposed offset. Under the current draft clause 7.3(a)(iii)(B), irrespective of what the Commonwealth advice is, SA can apply the proposed offset. Note: clause 7.3(a)(iii)(B) incorrectly refers to clause 7.2(a)(iii)(A). The reference should be to clause 7.3(a)(iii)(A)

7.4 Approvals not inconsistent with plans, etc. – The wording "the parties agree that… the decision maker will not act inconsistently with [various requirements]" creates an "agreement to agree". For a clear, unequivocal and enforceable requirement, the words "the parties agree that"

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

should be removed. This would make it consistent with the NSW draft approval bilateral agreement which imposes a clear requirement on the State, not just an 'agreement to agree'. This equally applies to cl.7.5 of the Draft Agreement. See below under Part 3 for substantive submissions on the statutory requirements relating to this clause. ANEDO is concerned that SA will not have the resources or expertise to meet the obligations in clause 7.4.

7.5 Consideration of policies and guidelines – As in clause 7.4, the decision-maker should be required to "not act inconsistently with" the matters referred to in clause 7.5(a),(b),(c) and (d) – rather than being required to merely "take them into account" or "have regard" to them. ANEDO is concerned that SA will not have the resources or expertise to meet the obligations in clause 7.5.

7.6 Approvals based on principles of environmental policy - The decision-maker is required to merely "have regard to" the IGAE principles of environmental policy. The decision-maker should be required to "implement" of "give effect to" these vital principles.

8.2 Public access to documentation – The clause 8.2(b) publication exemption should be restricted to information that is exempt under SA law. The highly restrictive and unnecessary exemptions in clause 8.2(b)(i), (ii), (iii) and (iv) should be removed.

8.4 Public comments – Any variation to a proposal after an application is received and published, should be subject to public re-notification.

9.2 Open access to information – All information should be released at no cost to users. To charge for "large volumes" and "complex filtered data" will undermine community confidence and participation in the process.

9.3 Guidance documents – Public consultation and comment should be part of the development process for guidance documents.

10. Heritage management plans – Clause 10(b)(ii) allows for "suitable alternatives" to management plans for world heritage and national heritage places, with no detail on what those alternatives would be required to address. If, for example, strategic assessments are to be carried out, these must incorporate the management plans for the properties.

11. Administrative arrangements – The Administrative Arrangements are referred to throughout the agreement and would seem to be pivotal to the implementation of the agreement. However, the detail of the arrangements is not yet publicly available – it is to be developed by the parties (cl.11.1). The arrangements are to be in place "by the commencement date" of the agreement so there is unlikely to be any public consultation. Failure to consult will undermine community confidence and participation in the process.

11.2 Senior Officers Committee (SOC) – Much of the detail is in the Administrative Arrangements (cl. 11.2(a) & (c)). The SOC has significant powers including being responsible for the ongoing operation of the Agreement and assessing the effectiveness of the Agreement. In regard to accountability and transparency: the SOC evaluation reports on the Agreement should be required to be published within four weeks after completion (not "as soon as practicable" cl. 11.2(g)); the SOC reports should be published without the parties being able to veto the contents (as allowed under cl. 11.2(g)); and annual SOG evaluation reports should be mandatory (contrary to cl. 11.2(e)).

12. Reports to the Commonwealth – Strong data is essential information for the provision of accurate annual reports. Clause12.1(b) does not include detail on conditions attached to approvals, only information on compliance (cl.12.1(iv)). Providing "information on the MNES relating to actions approved" is a vague requirement (cl.12.1(b)(iii)) and therefore difficult to enforce. There should also be reporting requirements for (a) setting out the transparency and public accessibility of information and implementation; and (b) how well clause 8 has been

implemented. There should also be reporting requirements in regard to whether, and how, Schedule 2 Open Access to Information has been implemented.

13. Review of the Agreement – In contrast to NSW which has an initial 12 month review, the Agreement is only required to be reviewed every five years. There is no requirement that public comment will be sought as part of the review. To facilitate community participation and confidence in the bilateral process, it should be mandatory to seek public comment and an initial review should be undertaken within 12 months. Under cl.13.1(d), the publication of the review report should be required within four weeks after completion (not "as soon as practicable").

14. Sharing information on ongoing EPBC Act matters - Again the agreement uses a vague and unenforceable phrase indicating that parties will use "best endeavours" to inform/share information and notify. This phrase should be strengthened to make these obligations mandatory ("the parties must").

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

17. Dispute Resolution

- These procedures only apply were a decision would "substantially not meet requirements" (e.g. cl.17.4(a)(ii), cl.17.5(a)(ii), cl.17.3(a)(ii)) i.e., only substantial compliance is required, allowing some non-compliance. It is unclear how this standard will be decided. It reinforces the need to ensure public interest standing for third party enforcement of the agreement.

- There is no duty on the Commonwealth Minister to consider whether to issue a Notice of Particular Interest or call in a project (cl.17.4(e)). Additionally there is no duty on the Mining Minister to consider whether to make a determination that the Commonwealth should be notified (cl.17.5 – last paragraph). This creates a situation where neither the state nor the Commonwealth have a duty to consider whether the Commonwealth should be notified or call in the project, and where the Commonwealth cannot escalate post-approval.

- The escalation procedures are only for the pre-approval stage (cl.17.4(b)). It is not clear who will notify the Commonwealth in time if SA fails to. If the Commonwealth only becomes aware at the point the decision is made, procedures cannot be activated and it is too late to call in (which again highlights the need for third party monitoring).

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

19.1 Amendment – Again, details for notification and consultation are to be in Administrative Arrangements that are yet to be developed and unlikely to be consulted upon. The details around notification and consultation should be open for public consultation.
19.3 Amendment of legislation – This clause does not detail clear triggers and criteria, which is of concern as SA's planning legislation is under review, with recommendations recently being provided to the SA government. In 2015, it is likely that SA's Environment Protection Act will be

[23] For example, RFAs in NSW have never been suspended or cancelled despite systemic compliance issues. See *If a Tree Falls* (2013), ANEDO Report on compliance with RFAs, available at www.edo.org.au.

reviewed. In addition, there are parliamentary inquiries underway to review SA biodiversity legislation and to examine the impacts of fracking (and the relevant legislative framework). Changes to the abovementioned SA legislation are likely to require consequential amendments to the SA Mining and PGE legislation.

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

All matters of national environmental significance are delegated

Significant impacts on all MNES[24] are proposed to be delegated to SA. ANEDO is opposed to the delegation of approval powers to SA on all MNES, for the reasons outlined generally in Part 1 of this submission and specifically in Part 2 of this submission. Submissions and recommendations on selected MNES are set out below.

Water trigger must not be delegated to SA

The Draft Agreement indicates a proposed delegation of the approval of impacts which will have or is likely to have a significant impact on water resources from coal seam gas or large coal mining development (the 'water trigger').[25] ANEDO is totally opposed to the proposed delegation in the Draft Agreement as well as the proposed amendments to the EPBC Act to allow SA to approve the 'water trigger'.[26]

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

Whilst the Draft Agreement requires SA to obtain advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC),[27] there is no requirement to apply IESC's advice, merely a requirement to 'take into account.'[28] At the very least, ANEDO submits that the decision maker must be required to apply the advice from the IESC.[29]

> Case example – assessment and conditioning of CSG coordinated projects
>
> In April 2013, a whistle blower from the Queensland Coordinator-General's Department of Infrastructure and Planning, came forward and revealed that preliminary approval had been given to huge CSG projects despite the Coordinator-General not having all the relevant information on the potential impacts on groundwater. ABC's Four Corners program investigated and reported[30] that the companies did not supply enough basic information for an informed decision to be made about the environmental impacts. Despite this, various government agencies [including the Coordinator-

[24] With the exception of the Great Barrier Reef Marine Park.
[25] Draft Agreement, Schedule 1, clause 2.2(h).
[26] For further detail, refer to the ANEDO submission dated 30 May 2014 to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014, available here: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1482/attachments/original/1401763257/140530_Senate_Inquiry_into_EPBC_(Bilateral_Agreement_Implementation)_Bill_-_ANEDO_submission.pdf?1401763257
[27] Draft Agreement, cl.6.4(c)(i).
[28] Draft Agreement, cl.5.4(c)(ii).
[29] We note that the Commonwealth Minister is only required to 'take into account' the advice from the IESC (s.136(2)(fa) EPBC Act), however ANEDO considers a stronger obligation is required, especially given the inherent risks in SA assessing and approving the water trigger.
[30] GAS LEAK!, reported by Matthew Carney 1 April 2013, ABC Four Corners, available here: http://www.abc.net.au/4corners/stories/2013/04/01/3725150.htm See also interview with Simone Marsh by Alan Jones, 31 March 2014, available here: http://www.2gb.com/audioplayer/38636#.U5k8JfmSy0c

General] permitted the developments to go ahead, allowing the companies to submit key information at a later date.
The whistle blower said of the assessment process for a $20 billion project by Queensland Gas Corporation (**QGC**), "We were only given a matter of days to prepare conditions for that report. We were actually not given any time to do any reading or assessment of the material. We were just instructed to write conditions for QGC, which is, again, unbelievably bad." These allegations cast light on what has occurred in the assessment and approval process of coordinated projects.

Clause 6.4(c)(ii) suggests an intention to take into account the IESC's advice in a 'transparent manner'. However, there are no requirements/criteria/guidance in the Draft Agreement as to what is a 'transparent manner'. For this standard to be enforceable, the 'transparent manner' requirements must be set out in the Draft Agreement and not in unenforceable administrative arrangements.

Recommendation: Remove Schedule 1, clause 2.2(h) relating to the water trigger. Failing the removal of Schedule 1, clause 2.2(h) - include a requirement that the IESC advice be "applied" or, at the very least, include enforceable transparency provisions regarding how the IESC's advice is to be taken into account in cl.6.4(c)(ii).

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

The Mining Minister will have the power to approve various nuclear actions in SA.[31] This includes transporting spent nuclear fuel or radioactive waste, establishing radioactive waste facilities, and establishing a nuclear installation (for a nuclear reactor for research or production of nuclear materials for industrial or medical use).[32] The power does not include power to approve a nuclear power plant or other prohibited actions.[33]

There is no mandatory requirement for SA to seek expert advice from the Supervising Scientist. However, SA 'may' seek such advice and take it into account.[34] Given the potentially harmful impacts of nuclear actions, it should be a mandatory requirement to seek the advice and to act in compliance with the advice (not merely take it into account).

There are no transparency provisions in the Draft Agreement concerning public notification and consultation on the Administrative Arrangements, which will govern how SA may obtain advice from the Supervising Scientist.[35]

SA's environmental impact assessment procedures are inadequate to deal with nuclear-specific issues. Specialised regulations and benchmarks of the highest standards would first need to be prepared. Additionally, necessary expertise and skills must first be established within relevant SA departments, which is currently lacking in SA.

All operating uranium mines in Australia have a history of leaks, spills and accidents. A Senate Inquiry in 2003 found the uranium mining sector had a pattern of non-compliance and underperformance, and further found an absence of reliable data to measure the extent of contamination or its impact on the environment.[36] ANEDO is totally opposed to the delegation of

[31] Draft Agreement, Schedule 1, clause 2.2(f).
[32] EPBC Act, s.22.
[33] EPBC Act, s.140A; Draft Agreement, Schedule 1, clause 4.4.
[34] Draft Agreement, clause 6.4(a).
[35] Draft Agreement, clause 6.4(a).
[36] *Regulating the Ranger, Jabiluka, Beverley and Honeymoon uranium mines*, (October 2003), Environment, Communications, Information Technology and the Arts References Committee of the Commonwealth Senate, available here: http://www.aph.gov.au/~/media/wopapub/senate/committee/ecita_ctte/completed_inquiries/2002-

powers to assess and approve nuclear actions to SA and submits this must be removed from the Schedule 1 clause 2.2 proposed actions. To allow SA to assess nuclear actions in the absence of special assessment requirements would be contrary to the objects of the EPBC Act and by entering into the Draft Agreement, the Commonwealth Minister would not be satisfying the prerequisite that the assessment bilateral agreement accords with the objects of the EPBC Act.[37]

> **Recommendation**: Remove Schedule 1, clause 2.2(f) relating to nuclear actions. Failing the removal of Schedule 1, clause 2.2(f) - amend clause 6.4(a) to be a mandatory requirement to seek and take into account advice from the Supervising Scientist.

Authorisation processes and classes of action to be accredited

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

(i) the process for the authorisation of an action by the grant of an exploration licence, a mining lease, a retention lease, or a miscellaneous purpose licence under the Mining Act 1971 (SA) **("Mining Act")** with the approval of a Part 10A Mining Act Program for Environmental Protection and Rehabilitation **("PEPR")**; [38]

(ii) the process for the authorisation of an action, on the Cultana Training Area, by the approval of a PEPR.[39]

(iii) the process for the authorisation of an action, that has been classified by the SA Mining Minister as (a) a *medium impact activity* under the Petroleum and Geothermal Energy Act 2000 (SA) **("PGE Act")**, by the approval of a PGE Act statement (or revised statement) of environmental objectives **("SEO")**; or (b) a *high impact activity* under the PGE Act and for which an environmental impact assessment has been prepared under Part 8 of the Development Act, by the approval of a SEO.[40]

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

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

There are two components to accrediting laws: one component is for the Minister to enter into a bilateral agreement,[41] and the second component is for the Minister to accredit the authorisation process (and publish the accreditation).[42]

Requirements for accrediting the authorisation process

04/uranium/report/report.ashx
[37] EPBC Act, s.50.
[38] Draft Agreement, Schedule 1, Clause 3(a).
[39] Draft Agreement, Schedule 1, Clause 3(b).
[40] Draft Agreement, Schedule 1, Clause 3(c) & (d).
[41] EPBC Act, s.45(1) and s.46(1).
[42] EPBC Act, s46(2A)(b) and s46(3)(c).

To satisfy the second component, the Commonwealth Environment Minister must be satisfied that the authorisation process (i.e. under the Mining Act or the PGE Act):

- is not inconsistent with Australia's various obligations under international conventions;[43]
- will promote the management of the environmental matter in accordance with various management principles;[44]
- is not inconsistent with any recovery plan or a threat abatement plan for listed threatened species and ecological communities s.53(2)(c);
- will promote the survival of and/or enhance the conservation status of listed migratory species,[45] listed threatened species and ecological communities s.53(2)(c).

It is clear that the Mining Act and the PGE Act do not satisfy these criteria. *Some* examples are summarised below.

In regard to the processes under the Mining Act:

- Under Part 10A of the Mining Act and Part 7 of the Mining Regulations 2011, PEPR must be submitted to and approved by the Mining Minister. The matters to be set out in the PEPR under section 70B and Part 7 and the object of Part 10A (see section 70A) are insufficient for the Commonwealth Environment Minister to conclude that the mandatory criteria for accrediting the SA legislation are met.
- In relation to a retention lease, a Part 10A program need only be provided to the Mining Minister within 12 months after the grant of the lease. The Mining Minister can extend the 12 month period. For an exploration licence, there is no 12 month requirement. In certain circumstances, under section 28 of the Mining Act, it can be the Governor of SA who decides whether an exploration licence should be granted – that decision is taken to be a decision of the Mining Minister.
- In regard to the PEPR requirement under Schedule 1, cl.3(a) of the Draft Agreement, the operation of section 70B(8) of the Mining Act and Mining Regulation 66 enable the development and use of "standardised" PEPRs for exploration license operations. Such PEPRs could not meet the accreditation requirements under the EPBC Act.
- In relation to public consultation and comment on exploration license applications and the Part 10A program – the Mining Regulations[46] only require the program to include "information on any consultation undertaken" without any requirement to consult or any set timeframes or consultation processes. In Schedule 1, clause 4.3 of the Draft Agreement, an attempt is made to remedy this serious deficiency – with a requirement that the public be given at least 14 days to comment on Part 10A programs. However, there are no requirements as to how the public should be notified (e.g. gazette, newspaper) or how or where the public should be able to access copies of the program. In addition, it is unclear how, and to what extent, the Schedule 1, clause 4.3

[43] For example, the World Heritage Convention s51(2)(a); Ramsar Convention on wetlands s.52(2)(a); the Biodiversity Convention s.53(2)(a)(i); the Apia Convention s.53(2)(a)(ii); the Convention on International Trade in Endangered Species of Wild Fauna and Flora s.53(2)(a)(iii)

[44] For example, the place in accordance with the National Heritage management principles s.51A(2); wetlands in accordance with the Australian Ramsar management principles s.52(2)(b); will promote the management of World Heritage properties in accordance with the Australian World Heritage management principles s.52(2)(b).

[45] EPBC Act s.54(2)(b).

[46] Mining Regulation 65.

public consultation process could be restricted by the extensive restrictions on public access to documents contained in clause 8.2 of the Draft Agreement.

- In relation to public consultation and comment on mining leases, the public notification and consultation process is at least included in the Mining Act, rather than in the Draft Agreement. However, the process only requires public notification in a newspaper circulating in SA and in regional newspaper (not across Australia). Gazette and internet notification are required.[47]

In regard to the processes for the granting of licences for petroleum exploration and production and associated activities under the PGE Act:

- Under Part 12 of the PGE Act and PGE Regulations 12 and 13, SEO must be submitted to and approved by the Mining Minister. The matters to be set out in the SEO are insufficient for the Commonwealth Environment Minister to conclude that the mandatory criteria for accrediting the SA legislation are met.

- In certain circumstances, under section 103A of the PGE Act, it can be the Governor of SA who decides whether a statement of environmental objectives should be approved – that decision is taken to be a decision of the Mining Minister.
- In relation to public consultation and comment on SEO – the PGE Act[48] only requires public notification in a newspaper circulating in SA (not across Australia) and no other form of public notification (e.g. on the internet). In addition, it is unclear how, and to what extent, the Schedule 1, clause 4.3 public consultation process could be restricted by the extensive restrictions on public access to documents contained in clause 8.2 of the Draft Agreement.

Requirements for entering into the bilateral agreement

The Minister may enter into a bilateral agreement only if the Minister is satisfied that the agreement accords with the objects of the EPBC Act.[49] The objects of the EPBC Act, are, in summary, to protect the environment and promote ESD.[50]

The proposed Accredited Processes, under the Draft Agreement, fail to accord with the objects of the EPBC Act in very fundamental way.

The Mining Minister, when deciding whether to grant an exploration licence, mining lease, retention lease or miscellaneous purposes lease under the Mining Act, is not required to specifically and expressly take into account environmental protection and environmental impacts. The Mining Minister is provided with a discretion to grant the licence/lease ("the Minister may grant any person…")[51] unfettered by environmental considerations. It is only if/when the Mining Minister turns his/her mind to possible conditions to attach to the lease/licence (once the decision to grant the licence/lease is made) that the Minister is required to "give proper consideration to the protection of …. the environment".[52] In regard to exploration licence conditions, the Mining Minister need only give "consideration to the protection of … the environment" and not "proper

[47] Mining Act, s.35A.
[48] PGE Act, s.102.
[49] EPBC Act, s.50.
[50] EPBC Act, ss. 3, 3A & 44(a).
[51] Mining Act, ss. 52(1), 41A(1), 34(1), 28(1).
[52] Mining Act, ss. 30(2), 34(6), 41A(5), 52(4).

consideration", as he is expressly required to do in regard to mining lease, retention lease and miscellaneous purposes lease conditions.

The Mining Minister, when deciding whether to grant a licence for a regulated activity and what conditions to impose under the PGE Act, is not required to specifically and expressly take into account environmental protection and environmental impacts. The Mining Minister is provided with a discretion to grant the licence ("the Minister may …… grant a license")[53] unfettered by environmental considerations. It is a mandatory condition of every licence that the licensee must have adequate technical and financial resources to ensure compliance with the licensee's environmental obligations.[54] The Mining Minister has a discretion to impose any other conditions he/she considers appropriate – but there is no mandatory requirement to give consideration to the protection of the environment, when imposing conditions.[55]

An additional concern is in relation to cl.7.4 of the Draft Agreement. It provides that "the parties agree that… the relevant decision maker will not act inconsistently with" various international obligations and management arrangements. The cl.7.4 agreement is qualified by a broad caveat which appears as a note to cl.7.4:

> *SA may provide notice to the Commonwealth if it proposes to make a decision that is different to the requirements of this clause 7.3* [should read 7.4] *and if so, escalation procedures apply as provided for by clause 17.*

SA is under no obligation to provide such notice due to the use of 'may' rather than 'must'. If SA makes a decision to approve that is inconsistent with the bilateral agreement without providing notice to the Commonwealth, it is uncertain whether the Commonwealth will have any power at all to call it in.[56]

The words "the parties agree that" should be removed from cl.7.4 to ensure a clear obligation (not just an obligation to agree), and the 'note' should be removed. As the Draft Agreement currently reads, SA could act inconsistently with international obligations (and not inform the Commonwealth) – an option that the Commonwealth Minister under the EPBC Act does not have.

Recommendation: Remove, from cl.7.4, the Note and the words ""the parties agree that".

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

The EPBC Act confers extended standing for judicial review to individuals and organisations that have engaged in series of activities in for protection or conservation of, or research into, the environment.[57] This is an extension on the meaning of 'a person aggrieved' under statutory judicial review. Paragraph [111] of the Standards for Accreditation provides "There are rights of review by courts together with extended standing under State or Territory law at least equivalent to those existing for decisions under the EPBC Act".[58]

In regard to standing for judicial review in SA, there is no statutory judicial review scheme in SA.

[53] PGE Act, s.12(1).
[54] PGE Act, s. 75.
[55] PGE Act, s. 76.
[56] Draft Agreement, cl.17.4(b).
[57] EPBC Act, s.487.
[58] From the footnote to [111] of the *Standards: "*Review rights in relation to decisions under the EPBC Act to approve individual developments stem from the Administrative Decisions (Judicial Review) Act 1977 (Cth) which provides for judicial review, including of decisions under the EPBC Act. Section 487 of the EPBC Act provides for extended standing in relation to judicial review."

If the accredited authorisation processes are not amended to confer extended standing, it would mean that each public interest case brought by an individual or community group in SA will now be subject to argument regarding whether they have the requisite standing. It would cause delays in progressing proceedings quickly and place an undue burden on public interest litigants to establish standing, which does not presently exist for judicial review of decisions under the EPBC Act.

Recommendation: Require the Mining Act and the PGE Act to expressly confer extended standing akin to s.487 EPBC Act.

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

The EPBC Act allows individuals and organisations (whether incorporated or not) who have been engaged in environmental protection activities for the past two years to enforce the conditions of a grant of approval, by way of seeking injunctions.[59] The case of *Booth v Bosworth*[60] outlines the importance of ensuring clear access to the courts for individuals or organisations acting in the public interest.

Case example: Booth v Bosworth

Booth v Bosworth[61] demonstrated the great value of third party rights to enforce the EPBC Act. Conservationist Dr Carol Booth successfully enforced the EPBC Act to halt the large-scale electrocution of spectacled flying-foxes on a lychee property in north Queensland, which led to the end of government-permitted electrocution of flying-foxes. Dr Booth relied on s.475(6) and qualified for standing to bring the action on the basis that she had engaged in a series of activities for the protection or conservation, or research into, the environment during the previous 2 years.

Under the Mining Act, there are no third party enforcement rights. It is only the Mining Minister who has enforcement powers.[62] Under the PGE Act, there are no third party enforcement rights. It is only the Mining Minister who has enforcement powers.[63]

There must be standing for enforcement of environmental protection obligations under the Mining Act and PGE Act Accredited Processes, equivalent to that of the EPBC Act s.475(7). Otherwise, this represents a reduction of standards compared with those in the EPBC Act.

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

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

The PGE Act contains inferior provisions to outlaw supply of false and misleading documents compared to the EPBC Act

Under the EPBC Act, it is an offence to provide information in response to a requirement or request under Parts 7, 8, 9, 13 or 13A, which can be reckless[64] or negligent.[65] Recklessness in

[59] EPBC Act, s.475.
[60] *Booth v Bosworth* [2000] FCA 1878; *Booth v Bosworth & Anor* [2001] FCA 1453; *Bosworth v Booth* [2004] FCA 1623
[61] Ibid
[62] For example, Mining Act sections 70E & 70H.
[63] For example, PGE Act section 108.
[64] EPBC Act s 489(1).
[65] EPBC Act s 489(2A).

this section includes intention and knowledge.[66] Although not explicitly stated in the legislation, it is probable that omitting information would also fall within this definition.[67]

The existing offence provision against giving false and misleading information under the PGE Act is narrower than the EPBC Act - the PGE Act offence is only committed if the false/misleading information is, at the request of the SA Minister, verified by a signed declaration. It is the making of the declaration that is the offence. There is no offence attaching to the provision of false/misleading information, in the absence of a declaration.[68]

Under the Mining Act or the PGE Act, there are no public enforcement rights in regard to the provision of false and misleading information by proponents, unlike the EPBC Act.

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

Inherent conflict of interest for the SA Minister for Mineral Resources and Energy ("Mining Minister") to approve impacts on MNES

The Mining Act and the PGE Act are administered by the Department of State Development on behalf of the Minister for Mineral Resources and Energy.
ANEDO has serious concerns about the Mining Minister being responsible for assessing MNES. In summary, these include, but are not restricted to, the following:

- The logical and appropriate person for supervision of assessment of impacts is the SA Minister for Sustainability, Environment and Conservation ("Environment Minister"). Only the SA Environment Minister has protection of the environment as his or her objective.

- The Mining Act and PGE Act licence, regulate and coordinate the life cycle of mining and petroleum projects. Unlike the Environment Protection Act 1993 (SA), the Mining Act and PGE Act contain no object or purpose statement that commits the operation of the Acts to the end of ecological sustainability.[69] One of the objects of the PGE is to merely minimise environmental damage from petroleum activities with the remaining objects focused on creating an effective and efficient petroleum exploration and production industry.[70]

- The Mining Minister, when approving PEPR under the Mining Act and SEO under the PGE Act,[71] must have regard to and to seek to further the objects of the Natural Resources Management Act 2004 (SA) – to "assist in the achievement of ecologically sustainable development" in SA.[72] This is a far weaker (and much more convoluted) obligation than the obligation of the SA Environment Minister to promote ESD.

- The Mining Minister has an irreconcilable conflict of interest, in which he/she is required to advance a program of works for economic development yet is now required to consider

[66] See *Criminal Code* (Cth) s 5.4(4), and the note under s 489(1)(b) EPBC Act.
[67] This is because information that omits important details, such as an EIS that omits major impacts of the project, is misleading; in the context of environmental assessment, it creates the false impression that there are no other important impacts to be considered. There is relevant case law under the EPBC Act, trade practices legislation and corporations law to support this view.
[68] PGE Act, section 130.
[69] *Environmental Protection Act 1993* (SA), s. 10..
[70] PGE Act, s.3.
[71] Mining Act, s. 70A(2). PGE Act , Part 12.
[72] Natural Resources Management Act 2004 (SA), s. 7.

whether to approve projects on the basis of environmental considerations, where a refusal may inhibit short-term economic development.

- The conflict is clearly illustrated by the powers given to the Mining Minister to assist in the conduct of mining operations by lending mining equipment or money to advance mining operations.[73]

- At a political level, conflicts exist where the SA government perceives that it has a political mandate to deliver certain resource projects. These projects are currently approved by the Commonwealth at arms-length for the purposes of the EPBC Act. The Mining Minister is ordinarily responsible for serving SA's own perceived interests in the promotion and development of resource projects. This can (and has in the past) conflict with national environmental protection priorities. The Draft Agreement should exclude a range of classes of projects upfront where there is likely to be conflicts of interest, including where the State is the proponent, partner or significant beneficiary.

As previously stated, ANEDO is opposed to the delegation of Federal approval powers to SA. However if the approval bilateral agreement is entered into, neither the Mining Act nor the PGE Act should be accredited under the agreement, rather the SA Environment Minister, with appropriate amendments to the Environment Protection Act 1993 (SA), should be responsible and accountable for decisions made pursuant to any approval bilateral agreement.

Recommendation: Remodel the Agreement to replace the Mining Minister with the Environment Minister, under the Environment Protection Act 1993 (SA), as the approver in the accredited processes.

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

Neither the Mining Act, the PGE Act nor the Draft Agreement require a strong, broad consideration of an applicant's history

Under the Draft Agreement, there is no requirement to take into account the applicant's 'environmental record' when making a decision on whether to allow the approval, compared with the EPBC Act requirements. Section 136(4) EPBC Act extends to considering:

- the applicant's 'history' in relation to environmental matters;

- the history of the executive officers of the company. This is important and relevant if directors had a history of major breaches, as it means they cannot simply incorporate a new company with a clean history; and

- the history of the parent company and executive officers of the parent company.

At best, under the Mining Act,[74] when considering a mining exploration licence application, the Mining Minister may refuse an application on public interest grounds.

[73] Mining Act, s.71.
[74] Mining Act s. 29(8)

Under the PGE Regulations licence application requirements,[75] the focus is upon the financial resources and technical expertise of applicants with no environmental 'history' requirements. An SEO "may" include a system for evaluating a licensee's environmental performance – presumably it's current, not past, performance. In any event, the system is discretionary not mandatory.[76]

The Mining Act and the PGE Act should be amended to ensure that the stronger EPBC provisions relating to the proponent's environmental history (including executive officers) are included.

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

Part 4. Additional Schedules

Schedule 2 – Open access to information

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

However, Schedule 2, clause 5 provides such a broad discretionary range of exemptions from information disclosure that the purpose and intent of clause 9.2 of the Draft Agreement (Open Access to information) is rendered meaningless and ineffective.

Schedule 3 – Guidance documents for species and ecological communities

Clause 1.1(a) proposes that policy and guidance documents will be "streamlined". Given the complexity and potential uncertainty of what will be covered by the Draft Agreement, it is likely that guidance documents will need to include more detail, not less.

The details of guidance documents will be in the Administrative Arrangements (cl.1.1(b)). As noted above, these have not been made public and are unlikely to be subject to public consultation. This is inappropriate if important standards are contained in such documents. Clause 1.2(a) indicates that SA will "have appropriate regard to, and not act inconsistently with" guidelines, advice, plans and other documents for particular MNES. It is not clear what "appropriate" means and how the appropriate standard may differ depending on the type of document.

Schedule 4 – Additional streamlining measures

Schedule 4 lists measures that will be employed in an attempt to "achieve greater process efficiency while maintaining high environmental standards". Clearly, based on the proposed "additional streamlining measures" listed in Table 1, the current Draft Agreement does not create a 'one stop shop' but rather there will remain significant uncertainty as to what will be covered and what will not.

The Schedule identifies "a strategic assessment targeting key MNES in SA" as an opportunity for further streamlining. However, once project approval powers have been handed to SA and the EPBC Act has effectively been switched off, the primary incentive to do strategic assessments will

[75] PGE Regulations, Part 2 – particularly Regulation 4.
[76] PGE Act, s. 100(3)(b).

be removed. It is unclear why SA would go ahead with a lengthy and expensive strategic assessment process that would take time to do properly, when federal approvals no longer apply.

ANEDO strongly supports the increased use of strategic assessments as, when done properly, they are the best way to provide long-term landscape-scale planning that takes into account cumulative impacts. A significant flaw in project by project assessment and approval is that cumulative impacts are not fully considered. The Draft Agreement exacerbates this failure by focusing on faster individual project approvals that remove incentives for doing comprehensive strategic assessments.

Conclusion

The draft Agreement could present an opportunity to improve the overall environmental approval regime in SA. However, this opportunity appears to have been ignored and approval powers will be delegated despite current laws failing to adequately ensure protection of matters of national environmental significance. Until significant improvements have been demonstrated, we maintain our opposition to the development of an approvals bilateral agreement and any reduction in the role of the Commonwealth in approvals relating to matters of NES.

Thank you for the opportunity to comment on the draft Agreement. If you wish to discuss any matter raised in our submission, please contact James Blindell on 08 8359 2222.