

# Australian Network of Environmental Defender's Offices



Australian Network of Environmental  
Defender's Offices Inc

## Submission on Productivity Commission Draft Report – Major Project Development Assessment Processes

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

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

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## Introduction

The Australian Network of Environmental Defender's Offices (ANEDO) welcomes the opportunity to comment on the Productivity Commission's *Draft Report on Major Project Development Assessment Processes (draft report)*.<sup>1</sup> In December 2012 the Australian Government asked the Productivity Commission to undertake a study to benchmark Australia's major project development assessment processes against international best practice. This referral emerged from a COAG Business Advisory Forum recommendation, which ANEDO opposed on the basis of lack of evidence, community consultation, or public benefit. In March 2013, ANEDO made a comprehensive submission to the Commission's *Major Project Development Assessment Processes Issues Paper (Issues Paper)*.<sup>2</sup> The Commission now seeks feedback on its draft report.

We note that the draft report's five key areas for proposed reform are:

- Achieving regulatory objectives
- Reducing regulatory overlap and duplication
- Improving timeframes and coordination
- Regulatory certainty, transparency & accountability
- Compliance costs.

By comparison, ANEDO's five key areas for reform can be summarised as:

- Embed ecologically sustainable development (**ESD**) in objects and decision criteria
- Equitable rights for public participation and engagement at each stage in the development assessment and approval process
- Robust, independent assessment of all environmental impacts
- Fast-tracking major projects by exempting or streamlining assessment requirements contradicts a 'risk based' approach
- Improved compliance, monitoring, enforcement tools and resourcing.

ANEDO has three broad concerns with the Draft Report.

First, that it does not sufficiently emphasise the inadequacies of existing state assessment and approval systems, and implies these systems are sufficient for assessment bilateral agreements.

Second, we are very concerned that the draft report encourages progress towards *approval* bilaterals (to delegate federal approval powers under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* to the States and Territories) – notwithstanding the recent attempts to do so were abandoned due to significant complexity and uncertainty of any actual benefits; and the recent Senate Committee findings that 'duplication' in federal-state approval processes is minimal, and that environmental standards would be put at risk if federal approval powers were delegated.

Third, in its final report, the Productivity Commission should clearly emphasise that any recommendations for 'streamlining' and reducing duplication are contingent upon implementation of recommendations for strengthening major project assessment and approval processes – through improved State and Territory assessment standards; greater transparency and public participation; better governance arrangements; leading practice monitoring, enforcement and reporting; and increased access to justice for communities, to restore confidence in major project decision making. ANEDO looks forward to improvements on these three broad concerns in the final report.

<sup>1</sup> Available at <http://pc.gov.au/projects/study/major-projects>.

<sup>2</sup> ANEDO (March 2013), at [http://pc.gov.au/data/assets/pdf\\_file/0019/122581/sub014-major-projects.pdf](http://pc.gov.au/data/assets/pdf_file/0019/122581/sub014-major-projects.pdf).

## Summary of ANEDO positions on draft Productivity Commission recommendations

Draft PC Rec.	Summary ANEDO Position
<b>Evaluating regulatory objectives (Draft Chapter 5)</b>	
5.1	<ul style="list-style-type: none"> <li>The final report should specify 'ecologically sustainable development' (ESD), with reference to ESD principles, as the most credible primary object for integrated planning, major projects and environmental legislation.</li> </ul>
5.2	<ul style="list-style-type: none"> <li>The overarching object of achieving ESD should be operationalised in decision-making requirements under planning, major project and environmental laws.</li> </ul>
<b>Application stage (Draft Chapter 6)</b>	
6.1	<ul style="list-style-type: none"> <li>ANEDO strongly supports the need for objective, legislated criteria to declare major projects.</li> <li>Consistent with a 'risk-based' approach, major project pathways should require the most rigorous assessment, not 'fast-track' exemptions from thorough assessment.</li> </ul>
6.3	<ul style="list-style-type: none"> <li>ANEDO strongly supports upfront and iterative community engagement with communities on major project proposals.</li> <li>This should include the ability to comment on draft terms of reference for environmental impact assessment, and access to clear information and reports relied upon by agencies.</li> </ul>
<b>Assessment stage (Draft Chapter 7)</b>	
7.1	<ul style="list-style-type: none"> <li>The final report should not recommend the adoption of approval bilateral agreements as their use is not necessary or justified.</li> <li>the Australian government should improve the efficiency of environmental assessment and approval processes under the EPBC act by improving administrative arrangements with the states under assessment bilateral agreements, rather than pursuing approval bilateral agreements.</li> <li>Draft recommendation 7.1 must be amended to state that improvement in state and territory assessment standards is a prerequisite to any expansion of assessment bilaterals.</li> <li>to ensure EPBC Act standards are met, the Australian government should issue a uniform set of comprehensive national environmental outcome and process standards that any state processes must comply with, in order to be accredited for assessment bilateral agreements.</li> <li>the Australian government should also review all current and proposed bilateral assessment agreements against those standards, and revoke any that do not comply until the state laws meet the requirements.</li> <li>Assessment matters that could be further addressed in the final report include: independent and quality-assured EIA approaches (see 7.5); linking EIA to natural resource management (NRM) targets, limits and requirements; embedding consideration of climate change impacts of major projects.</li> </ul>

7.2	<ul style="list-style-type: none"> <li>• ANEDO strongly supports the new EPBC act ‘water trigger’ as an appropriate measure for national oversight of significant environmental impacts, and the fulfilment of Australia’s international obligations under the Ramsar convention and other treaties.</li> <li>• ANEDO also strongly supports the protection of Commonwealth powers from delegation, firstly on the basis that state assessments and exemptions provide insufficient protection, and secondly noting that the valuable and interconnected nature of water in Australia creates unique national responsibilities.</li> </ul>
7.4	<ul style="list-style-type: none"> <li>• ANEDO supports improved agency coordination (which may include Major Project Coordination Offices), but does <i>not</i> support centralisation of major project assessment and approval processes in a single agency (such as planning departments, coordinators general, or the MPCO itself).</li> <li>• The final report’s recommendation should therefore: <ul style="list-style-type: none"> <li>- clarify that an MPCO should be separate from assessment and approval functions;</li> <li>- link this proposal to draft recommendation 7.5, on institutionally separating policy and regulatory functions.</li> </ul> </li> </ul>
7.5	<ul style="list-style-type: none"> <li>• ANEDO strongly supports recommendations to improve the independence and rigour of project assessment and approval (including where a state government or authority is a proponent or beneficiary of a project), in order to support and improve public confidence.</li> <li>• a number of state jurisdictions centralise policy, assessment, approval and enforcement functions in a way that presents regulatory and governance risks.</li> <li>• The final report should also consider models for independent accreditation and/or allocation of consultants who provide major project EIA reports.</li> <li>• ANEDO agrees that a national Environmental Protection Agency should also be considered. However, this should be distinguished from a high-level ‘National Environment Commission’ that could conduct audits, advise on bilateral agreements and standards, and promote national leadership.</li> </ul>
7.6	<ul style="list-style-type: none"> <li>• ANEDO strongly supports this recommendation and submits that the final recommendation should provide more detail on what sufficient ‘resources, capacity and skills’ entails, and how sufficiency can be measured.</li> <li>• The final report should, for example, examine and compare the growth in major project investment (draft report, figure 1, p 7) with recent trends in regulatory staffing levels in project assessment and approval agencies in each Australian jurisdiction.</li> <li>• The final report should support a dedicated, independent review of regulatory resourcing for agencies responsible for monitoring, enforcement and compliance with environmental and planning laws.</li> </ul>
7.7	<ul style="list-style-type: none"> <li>• There is a lack of evidence of ‘unnecessary’ assessment requirements, and ample evidence that reducing such requirements does not promote effective public policy outcomes.</li> <li>• While tiered assessment is useful to categorise types of projects, excessive tiering <i>within</i> major projects could risk fragmentation and complexity.</li> <li>• Removing legal concurrence requirements is not equivalent to ‘improved coordination’l it is the inverse of risk-based and transparent assessment.</li> <li>• A risk-based approach means the greatest impacts deserve the greatest scrutiny, not ‘fast-track’ exemptions.</li> </ul>
7.8	<ul style="list-style-type: none"> <li>• ANEDO supports consideration of a national, robust approach to offsetting.</li> </ul>

	<ul style="list-style-type: none"> <li>• However, ANEDO strongly disagrees with the draft report's findings that an 'improve or maintain' environmental outcomes test for offsets may conflict with the principles of ESD. These objective, standards-based decision criteria are consistent with leading practice, and with ESD principles.</li> <li>• The commission's final report should reconsider and acknowledge the benefits of objective environmental standards such as 'no net loss' or 'maintain or improve' for Australian jurisdictions' planning, development and environmental protection frameworks. This is important given the uncertain reliability of biodiversity offsetting.</li> </ul>
7.9	<ul style="list-style-type: none"> <li>• ANEDO supports clear and enforceable conditions, based on a mix of prescriptive and outcomes-based requirements. Outcomes-based conditions must be measurable and enforceable (with appropriate resources and agency culture); and must emphasise proactively preventing environmental damage, rather than risking that damage and reacting when it happens.</li> <li>• Amendments to conditions must be limited, transparent and allow for continuous improvement.</li> <li>• The final report should acknowledge that court oversight of project conditions tends to improve departmental conditions</li> <li>• Biodiversity offsets must be limited, consistent, transparent, legally protected, and based on sound science and policy, not economic convenience.</li> <li>• The final report should discuss proponents' examples of 'onerous' or 'unnecessary conditions' with specific feedback from the regulator involved.</li> </ul>
<b>Approval Stage (Draft Chapter 8)</b>	
8.1-8.2	<ul style="list-style-type: none"> <li>• The Commonwealth Government must retain a strong leadership and oversight role in assessment of major projects, and not delegate approval processes to the States and Territories.</li> <li>• ANEDO opposes restarting approval bilaterals negotiation on the basis that: <ul style="list-style-type: none"> <li>- delegating Commonwealth project approval powers will not achieve sought-after improvements to planning regulation, productivity and environmental outcomes;</li> <li>- no State or Territory planning or environmental laws currently meet the minimum requirements of the 106 elements outlined in the Australian Government's Draft Standards Accreditation Framework (including procedural and substantive environmental standards), let alone the full suite of best practice standards that Australia should implement;</li> <li>- States are fundamentally not in a position to stand in the Commonwealth's shoes to assess and approve impacts on matters of national environmental significance in the public interest, even with the most carefully worded standards.</li> </ul> </li> <li>• The draft report's five-step process is likely to be misinterpreted as suggesting State and Territory assessment systems are 'accreditation ready', despite evidence to the contrary. Instead, the final report should first recommend significant legislative reform to bring state assessments up to reliable and equivalent standards; along with institutional reform to independently verify that equivalence. These should be prerequisites to any further progression of assessment bilaterals.</li> </ul>
8.5	<ul style="list-style-type: none"> <li>• ANEDO is more concerned with the safeguards around decision-making processes (best available information, public participation, transparency, independent assessment, accountability and oversight) than with who makes a particular decision.</li> <li>• However, the NSW experience under former 'Part 3A' damaged confidence in major project decision making, particularly as it concentrated power</li> </ul>

	<p>in the Minister and Planning Department, and limited community participation, including recourse to the courts.</p> <ul style="list-style-type: none"> <li>• The argument that ministerial decisions are ‘democratically accountable’ (see p 199) may be of limited assistance regarding decisions on individual projects, and is also undermined if federal approval powers are put in the hands of State ministers.</li> </ul>
8.6	<ul style="list-style-type: none"> <li>• ANEDO strongly agrees that governments should provide transparent and accessible information on decision making processes, considerations and consultation processes.</li> <li>• The draft recommendation could clarify that decision making processes and criteria should be <i>legislated</i>.</li> </ul>
8.7	<ul style="list-style-type: none"> <li>• ANEDO strongly supports the public provision of statements of reasons by decision makers. Such statements should be required to follow a prescribed format, and this should include requirements to publish all information that informed the decision-maker.</li> </ul>
<b>Review and appeal of regulatory decisions (Draft Chapter 9)</b>	
9.1	<ul style="list-style-type: none"> <li>• ANEDO strongly supports equitable third party merits review and judicial review rights for major projects – <i>including</i> where the Minister is the decision maker. Third party appeal rights help to hold decision-makers accountable, improve the quality of decisions, reduce corruption risks, provide access to justice for affected communities, and promote public confidence in decision making.</li> <li>• Many jurisdictions prevent judicial review and third party enforcement of laws in relation to major infrastructure projects. ANEDO submits that judicial review and enforcement rights in such circumstances are a fundamentally important accountability measure.</li> </ul>
9.2	<ul style="list-style-type: none"> <li>• ANEDO supports broad standing at a minimum for merit appeals (such as in draft recommendation 9.2) and open standing for judicial review and enforcement, including for major projects (see also third party enforcement, from 10.3).</li> <li>• Barriers to standing in judicial review add to costs, and distract from substantive issues.</li> <li>• Costs risks in judicial review and enforcement proceedings limit access to justice for ‘third party’ community members (see below).</li> </ul>
9.1 (INFO REQU EST)	<ul style="list-style-type: none"> <li>• ANEDO strongly supports the improvement of existing costs arrangements for third parties. Costs are a significant barrier to access to justice, especially where proceedings are brought in the ‘public interest’.</li> <li>• Merits review, judicial review and third party enforcement should be ‘own costs’ proceedings</li> <li>• At a minimum, courts in all jurisdictions should be empowered to grant ‘no costs’ or ‘own costs’ orders to protect public interest applicants.</li> </ul>
<b>Monitoring of compliance &amp; enforcement (Draft Chapter 10)</b>	
10.1- 10.2	<ul style="list-style-type: none"> <li>• The final report should expand on the relationship of draft recommendation 10.1-2 to draft recommendations 7.5 (institutional separation) and 7.6 (regulatory resourcing).</li> <li>• Major project conditions, monitoring, enforcement and reporting needs much improvement. We note a range of further considerations for the final report, including: <ul style="list-style-type: none"> <li>- in-depth examination and independent review of regulatory resourcing</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>- assessment of environmental outcomes and targets in annual reports</li> <li>- development and integration of tools for monitoring, data-sharing and sustainability indicators</li> <li>- compliance and enforcement statistics should be published regularly, in a consistent and comparable form.</li> </ul>
10.3	<ul style="list-style-type: none"> <li>• ANEDO strongly supports third party rights to initiate legal action to enforce approval conditions, and improving legal costs rules to ensure they are not a barrier to community access to justice.</li> </ul>
10.1 (INFO. REQ)	<ul style="list-style-type: none"> <li>• ANEDO strongly supports <i>open standing</i> to bring enforcement proceedings for breaches of all environmental and planning legislation.</li> <li>• Governments should amend laws where open standing is not already available (including exemptions for major projects or forestry approvals).</li> <li>• A variety of other effective mechanisms can be relied on to prevent vexatious litigation, including professional obligations, and courts' powers.</li> </ul>
<b>Strategic approaches (Draft Chapter 11)</b>	
11.1	<ul style="list-style-type: none"> <li>• Strategic environmental assessment (SEA) should not replace individual project assessment. The use of SEA in conjunction with project assessment will still lead to efficiencies because major environmental issues are identified and considered upfront.</li> <li>• Recommendation 11.1 should emphasise 'environmental outcomes' not just 'regulatory outcomes'.</li> <li>• ANEDO strongly supports Hawke Review recommendation 6, to make the EPBC Act strategic assessments processes 'more substantial and robust'. This must include mandatory information requirements and objective environmental outcomes.</li> <li>• SEA must be undertaken according to rigorous, objective and transparent legal requirements (for process, implementation and outcomes). ANEDO's core elements for SEA include: <ul style="list-style-type: none"> <li>- Strong legislative standards and science-based tools</li> <li>- Strong decision making criteria, including a 'maintain or improve' test</li> <li>- Comprehensive and accurate mapping and data</li> <li>- Undertake strategic assessment at the earliest possible stage</li> <li>- Require alternative scenarios to be considered</li> <li>- Ground-truthing of landscape-scale assessment is vital</li> <li>- Mandating public participation at all stages for positive outcomes</li> <li>- Strategic assessment should complement, not replace, site-level assessment</li> </ul> </li> </ul>
11.2	<ul style="list-style-type: none"> <li>• The final report and recommendation should note additional leading practices for strategic planning, including: <ul style="list-style-type: none"> <li>- integrating economic, social and environmental factors in decision-making in accordance with ESD principles;</li> <li>- identifying competing land uses and values, and establishing protected areas where certain types of development are prohibited;</li> <li>- properly accounting for cumulative impacts, including setting environmental limits and only allowing development within these limits.</li> </ul> </li> </ul>

## Evaluating regulatory objectives (Draft report Ch 5)

### Clarity and consistency

#### PC draft recommendation 5.1:

*Governments should review legislative and regulatory objectives across major development assessment and approval processes within their jurisdictions to ensure that they are clear and concise, with unnecessary objectives removed.*

#### ANEDO position:

- The final report should specify 'ecologically sustainable development' (ESD), with reference to ESD principles, as the most credible primary object for integrated planning, major projects and environmental legislation.
- This objective and its principles must be consistently and rigorously applied to all decisions and actions to implement the legislation.
- Secondary objectives may also be adopted, such as responding to climate change – noting that planning systems are essential to both mitigation and adaptation.
- We do not accept that Australia's planning systems can be absolved of responsibility for abating climate change on the basis of a highly uncertain carbon price.

### **Ecologically sustainable development as the overarching and integrating objective**

As submitted previously, planning, major projects and environmental legislation across Australia should adopt ESD as the overarching object, with reference to its recognised principles.<sup>3</sup> This is consistent with the adoption, by all Australian Governments, of the *National Strategy for Ecologically Sustainable Development*. This Strategy prioritises ESD principles, and defines ESD as:<sup>4</sup> 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'. ESD principles have been adopted across international, federal, State and Territory environmental and planning frameworks.<sup>5</sup> The four goals of Australia's 2011 National Urban Policy (productivity, liveability, governance and sustainability) are also broadly consistent with integrated decision-making to achieve ESD.<sup>6</sup>

ANEDO submits that the draft report emphasises the challenges of applying ESD without sufficient emphasis on the benefits and opportunities. For example, the citation of Justice Stein (p 107) is from an article positing that the courts have an obligation to develop and assist decision makers to apply ESD principles such as the precautionary principle.<sup>7</sup>

<sup>3</sup> See for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), sections 3 and 3A; see also *Protection of the Environment Administration Act 1991* (NSW), s 6. Recognised principles of ESD include:

- the precautionary principle;
- intergenerational and intra-generational equity;
- conservation of biological diversity and ecological integrity as a fundamental consideration;
- improved environmental valuation, pricing and incentive mechanisms (for example, internalising environmental costs, 'polluter pays' principle).

<sup>4</sup> *National Strategy for Ecologically Sustainable Development* (1992), at <http://www.environment.gov.au/about/esd/index.html>; See Australian Government Department of Sustainability and the Environment (SEWPaC) website, <http://www.environment.gov.au/about/esd/publications/strategy/index.html>.

<sup>5</sup> See, for example, World Commission on Environment and Development, *Our Common Future* (1987); *Rio Declaration on Environment and Development 1992*; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), ss 3-3A; *Protection of the Environment Administration Act 1991* (NSW), s 6(2); *Sustainable Planning Act 2009* (QLD), ss 3-5.

<sup>6</sup> *National Urban Policy* (2011), 'Summary of priorities', available at [www.majorcities.gov.au](http://www.majorcities.gov.au).

<sup>7</sup> The Hon Justice Paul Stein, AM, 'Are Decision-makers too Cautious with the Precautionary Principle?' (February 2000), 17 *Environmental and Planning Law Journal* 1, p 3.

In addition to governments across Australia, public policy experts, including the Hawke EPBC Act Review, have continued to recognise the centrality of ESD, noting that despite its challenges, ‘there is no other credible candidate for an integrative policy framework’.<sup>8</sup>

The draft report briefly acknowledges the ‘sustainability’ and ‘integration’ benefits of ESD (p 106). In addition to these and further environmental benefits<sup>9</sup>, ESD also provides for long-term social and economic benefits by:<sup>10</sup>

- considering the present and future needs of people and a healthy environment;
- engaging citizens in the decisions that shape our towns, cities and society;
- promoting healthy, liveable and resilient communities and development;
- assisting decision makers by properly assessing true costs and benefits of activities;
- driving innovation and encouraging use of new technologies, which can improve efficiency, stimulate investment, and reduce pollution and production costs;
- encouraging use of sustainable building design, which can lead to reduced consumer costs (for example, reduction in spending on electricity and water), and
- lowering the incidence of disputes, and the associated legal and court costs, by integrating decision-making factors and providing for meaningful public engagement.

Notwithstanding these benefits, far greater effort is needed to apply ESD in practice. At most, state and federal decision-making rules simply require ‘regard to’ or ‘consideration of’ the environment or ESD. Decisions can be highly discretionary, and authorities may only need to pay cursory attention to ESD, with associated risks of long-term environmental degradation. ANEDO reiterates its previous recommendation that:

*Planning and development decision-making at all levels (local, regional, State and national) must happen within the scope of a clear legal framework that aims to achieve ecologically sustainable development (ESD).*

### **Major projects must aim to achieve ESD; decisionmakers must apply its principles**

The draft report suggests ‘Objectives for specific major project pathways could be specified.’ (p 103) We submit that the overarching aim of ESD must apply to major project development assessment and approval (**DAA**), whether or not jurisdictions have specific major projects legislation. This is very important given the potential for significant environmental, economic and social impacts of major projects, as well as the long-term nature of many major project investments (such as energy and infrastructure). There is a risk that major project legislation in some jurisdictions may exempt major projects from ESD considerations and objectives. We submit that there is no justification for exempting major projects from an ESD-targeted approach, which is designed to genuinely integrate environmental, social and economic factors in decision making.

### **Objectives to address climate change mitigation and adaptation**

ANEDO generally supports the Commission’s five general leading practices elements for objects clauses – namely clarity, brevity, consistency, and accountability and transparency (draft report, box 5.3). However, in the discussion of ‘consistency’ (p 100),

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<sup>8</sup> See A. Hawke et al, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, (October 2009), para 87. See also Dovers, S. (2008) ‘Policy and Institutional Reforms’, in D. Lindenmayer, S. Dovers, M. Harriss Olson & S. Morton (Eds.), *Ten Commitments: Reshaping the Lucky Country’s Environment*, p 216.

<sup>9</sup> For example, ESD is important in protecting biological diversity and ecological integrity, managing environmental risk and uncertainty, encouraging full accounting of environmental costs, and encouraging sustainable outcomes that reduce pollution and consumption.

<sup>10</sup> Nature Conservation Council of NSW, EDO NSW and Total Environment Centre, ‘Planning For Ecologically Sustainable Development’, submission to NSW Independent Planning Review Panel Issues Paper (2012).

we strongly disagree with the argument that ‘objects to address [climate change] mitigation are arguably unnecessary in the presence of a national carbon price.’

First, planning and major project DAA systems are in a unique position to influence the carbon intensity of each State’s economy, to contribute to Australia’s transition to a low carbon future, and to ensure Australian industry develops in ecologically sustainable ways. Addressing both climate change *mitigation and adaptation* in planning systems will confer significant economic, social and environmental benefits on Australia, and will reduce the long-term costs of adaptation (as the Executive Director of the International Energy Agency, the Australian *State of the Environment 2011* report and the Productivity Commission itself have noted).<sup>11</sup>

Second, there is considerable uncertainty as to:

- the future of an Australian carbon price following the September 2013 election, as the incoming Coalition government intends to repeal the Clean Energy Future laws; and
- in any case, whether the price signal from a carbon price (if it were retained) would rise to the level necessary to change behaviour, and reduce pollution to the extent necessary to avoid dangerous climate change.<sup>12</sup>

Finally, climate change has been acknowledged as a ‘diabolical’ and multidimensional policy problem which requires a range of policy measures at state and federal level. While we accept the need for careful examination of policy levers to abate contributions to greenhouse emissions, we do not accept that Australia’s planning systems can be absolved of responsibility for abating climate change on the basis of a highly uncertain carbon price.

### ***Guidance on weighting differing objectives***

#### **PC draft recommendation 5.2:**

*Where conflicting objectives are unavoidable, parliaments and governments should provide guidance to their regulators on the priority and weighting of different objectives. A range of approaches may be appropriate, from the inclusion of an overarching policy goal in objects clauses, to providing guidelines on how to make tradeoffs between objectives.*

#### **ANEDO position:**

- The overarching object of achieving ESD should be operationalised in decision-making requirements under planning, major project and environmental laws.
- ANEDO supports additional guidance on fully integrating economic, social and environmental considerations and applying ESD principles in decision-making.
- However, ANEDO is concerned that existing assessment and approval processes emphasise short-term economic considerations over longer term social and environmental considerations. This includes recent law reform proposals in NSW.
- We reiterate that federal, State and Territory laws must:

<sup>11</sup> M. van der Hoeven, ‘Energy security: looking towards uncertainty’ (8 March 2012) in *OECD Observer* at [http://iea.org/index\\_info.asp?id=2393](http://iea.org/index_info.asp?id=2393); see also Australian Government, *State of the Environment Report 2011*, which concluded that ‘Early action by Australia to reduce emissions and to deploy targeted adaptation strategies will be less costly than delayed action.’ See <http://www.environment.gov.au/soe/2011/summary/headlines.html>. See also Productivity Commission, *Barriers to Effective Climate Change Adaptation* (Draft Report), at [www.pc.gov.au](http://www.pc.gov.au).

<sup>12</sup> For example, the starting price for the carbon tax in 2012 was \$23 a tonne; the carbon price in the EU emissions trading scheme (to which Australia was to link from 2014) is trading at around \$10 a tonne; whereas University of Cambridge climate economist, Dr Chris Hope, has noted the estimated level of environmental damage from carbon pollution is around ten times this amount. ABC Lateline, ‘Climate economist warns of impact of climate change’, 27/7/13, [www.abc.net.au/lateline/content/2013/s3813766.htm](http://www.abc.net.au/lateline/content/2013/s3813766.htm).

- *Adopt ESD as the overarching aim of planning and major project schemes;*
- *Introduce legal requirements to exercise powers and functions (including major project DAA decision-making) in accordance with ESD principles;*
- *Build in objective decision criteria and accountability mechanisms to protect environmental assets in accordance with ESD principles;*
- *Approve major project activities only if their impacts remain within identified and acceptable environmental limits of the catchment or region;<sup>13</sup>*
- *Include performance criteria on whether ESD principles are being applied, and whether objective environmental outcomes are being achieved.*

Guiding and prioritising legislative objectives must include guidance material, but must also be integrated into legislative requirements at key decision-making points. ANEDO therefore reiterates our previous recommendation to guide the implementation and achievement of ESD (as per summary comments above).<sup>14</sup>

There are significant examples of guidance on implementing ESD and applying its principles, from the national to the local level. This includes national and state objectives and strategies, and local government guidance on integrating natural resource management.<sup>15</sup>

ANEDO would support a conscious effort from governments at all levels to update and invest in additional guidance for decision-makers to properly integrate economic, social and environmental factors in decision-making, consistent with ESD principles. In addition, we would support regular agency reporting being tied to legislative and policy objectives, including those expressed in the *National Strategy for ESD*.

### **Existing decision making emphasises economic benefits over negative impacts**

Although we agree in principle with the Commission's draft recommendation, ANEDO is concerned that, if this recommendation is not couched to prioritise ESD, governments will tend to unduly emphasise *the economic benefits* of major projects above the potential negative environmental and social impacts. While examples can be found across many jurisdictions, recently the NSW Government has made two significant moves in this direction:

- The exposure draft Planning Bill 2013 (NSW) unduly prioritises economic growth in a range of ways. This includes a weakened definition of 'sustainable development', which waters down and omits key ESD principles (cl 1.3); draft strategic planning principles (cl 3.3); and a modified 'public interest' test which requires decision makers to consider 'in particular whether any public benefit outweighs any adverse impact of the development' (cl 4.19(2)(d)).
- Proposed amendments to the influential *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)* which would require that the economic 'significance' of a mineral resource to be the decision-maker's 'principal consideration' (for example, over competing land uses) under the Mining SEPP when weighing up the impacts of a mining development proposal.<sup>16</sup>

<sup>13</sup> See, for example, John Williams Scientific Services Ltd, *An analysis of coal seam gas production and natural resource management in Australia – Issues and ways forward* (Oct. 2012), recommendations 1-2.

<sup>14</sup> ANEDO, Submission to Productivity Commission Major Projects Issues Paper (March 2013), p 15.

<sup>15</sup> For example, the *National Strategy for Ecologically Sustainable Development* (1992); NSW Natural Resources Commission Standard (at [www.nrc.nsw.gov.au](http://www.nrc.nsw.gov.au)); Local Government NSW resources website, <http://www.lgnsw.org.au/policy/ecologically-sustainable-development>.

<sup>16</sup> See further EDO NSW, *Submission on amendments to the Mining SEPP – State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* (August 2013), at <http://edo.org.au/edonsw/edonsw/site/pdf/subs/130809MiningSEPPamendments.pdf>.

### **Case study – proposed changes to NSW Mining SEPP<sup>17</sup>**

The proposed NSW Mining SEPP changes have been reported as being a response, at least in part, to recent decisions of the Land and Environment Court which have upheld community appeals against mining expansions in the *Bulga v Warkworth* and *Boral Berrima Colliery* cases.<sup>18</sup> EDO NSW represented the community groups in both cases.

ANEDO strongly opposes the prioritisation of economic benefits of major resource projects as the 'principal consideration' over other economic, social and environmental impacts. In our view, the law should not distort the rigour of the development assessment process by requiring decision-makers to prioritise the economic benefits of mining ahead of any negative impacts, or more appropriate land uses (such as agriculture or rural residential).

The NSW Planning Department website stated that the amendments in the proposed SEPP 'aim to increase confidence for investors and the community about how decisions are made on mining proposals'; and are intended to require that 'economic and environmental issues... are properly balanced'.

These aims are pertinent in the context of NSW Planning Assessment Commission (PAC) comments in its February 2012 approval of the Warkworth mine expansion, near the Hunter Valley village of Bulga.<sup>19</sup> The PAC found itself faced with an 'almost inevitable' outcome, under existing decision-making powers, that 'in almost all [similar] cases the mines have been approved and the communities have either been radically altered in character or become non-viable.' The PAC continued:

*If this is to change then NSW will need to develop a clear policy position that provides further guidance to decision-makers as to how social impacts on rural villages are to be balanced in the approval process for coal mines.*<sup>20</sup>

In saying this, the PAC went on to approve the Warkworth mine extension on the basis of existing decision making criteria.

As the Productivity Commission's draft report notes (p 108), in April 2013, following a merit appeal by a local residents' group, the Land and Environment Court overturned the PAC's approval, due to the extension's significant adverse impacts on biodiversity, and the adverse noise, dust and social impacts, and inadequacies in the economic modelling.<sup>21</sup> The mining company and the Planning Department are now appealing the Court's decision on judicial review grounds in the NSW Court of Appeal.

<sup>17</sup> Draft *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013*, exhibited 29 July to 12 August 2013, at [http://planspolicies.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=6065](http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=6065).

<sup>18</sup> See for example, EDO NSW current cases at [www.edo.org.au/edonsw/site/casework\\_key.php](http://www.edo.org.au/edonsw/site/casework_key.php); see also Global Mail, *The town that wouldn't disappear* (July 2013) <http://bulga.theglobalmail.org/>.

<sup>19</sup>

<sup>20</sup> See Planning Assessment Commission, report on Warkworth Extension Project (09\_0202), 3 Feb. 2012, pp 8-9 (emphasis added):

*Submissions from community organisations, individuals and Singleton Council all raised the issue of the negative impact of open-cut mining on the viability of rural communities generally and specifically on the risks to Bulga village posed by the proposed project.*

*A number of rural communities have been faced with this situation in the past. In almost all cases the mines have been approved and the communities have either been radically altered in character or become non-viable. With the current price of coal this outcome is almost inevitable when the overall economic benefits of the mines are balanced against local community impacts. It appears that it is only if there are wider negative implications from the mining proposal that refusal becomes a possibility. If this is to change then NSW will need to develop a clear policy position that provides further guidance to decision-makers as to how social impacts on rural villages are to be balanced in the approval process for coal mines.*

<sup>21</sup> *Bulga Milbrodale Progress Association Inc v Minister for Planning & Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48. See also, EDO NSW, [www.edo.org.au/edonsw/site/casework\\_key.php#bulga](http://www.edo.org.au/edonsw/site/casework_key.php#bulga).

It appears that the proposed SEPP amendments *are* intended to clarify the Government's policy position when mining comes into insoluble conflict with environmental and social values. However, the amendments appear to *endorse and reinforce* the view that the approval of mining projects is 'almost inevitable', even where they have significant negative impacts on human settlements and the environments that support their quality of life.

In our view, the proposed SEPP would not 'properly balance' economic and environmental issues, and will decrease the NSW community's confidence in decision-making on major projects. It is also likely to reinforce community perceptions that mining and property/construction regulation, more than any other industries, is 'too lax'.<sup>22</sup>

By contrast, we submit that the PAC's comments above underline the importance of more robust and balanced environmental, social and economic criteria in development decision-making processes; and the need to ensure that development assessment and approval ultimately aims to achieve ESD.

## Application stage (draft report ch 6)

### ***Major project assessment pathways***

The draft report (p 116) notes that currently 'all projects declared as state significant developments [SSD] (New South Wales) must undergo an environmental assessment.' While this current approach provides some certainty, clarity and consistency, the recent exposure draft Planning Bill 2013 (NSW) does *not* require that all SSD requires an Environmental Impact Statement, weakening the existing requirements.<sup>23</sup>

### ***Issues with the application stage***

#### **Draft PC recommendation 6.1**

*Governments should establish statutory criteria as to which projects have access to designated major project pathways. Limited ministerial discretion should be available to 'declare' or 'call-in' a project that does not meet the criteria (making it subject to a major project pathway). However, in exercising this power the Minister must:*

- *follow guidelines on when and how the power can be used*
- *publicly report the reasons for any declaration against the guidelines.*

#### **ANEDO position:**

- ANEDO strongly supports the need for objective, legislated criteria to declare major projects.
- Consistent with a 'risk-based' approach, major project pathways should require the most rigorous assessment, not 'fast-track' exemptions from thorough assessment.
- ANEDO does not generally support discretionary powers to declare further development applications as major projects. Nevertheless, if such discretion is available, we agree that its exercise must be clearly limited, both in legislation and in mandatory published guidelines.

<sup>22</sup> See NSW Office of Environment & Heritage, *Who Cares About the Environment in 2012?* (2013), pp 41-42. In response to a question about regulation of different sectors, by far the most common response (in a survey of over 2000 NSW residents) was that mining regulation is 'too lax' (49% of respondents). Only 10% of respondents thought mining regulation was 'too strict'. For almost all other sectors mentioned (fishing, farming, individuals, tourism, retail and forestry), the most prevalent response was that regulatory strictness is 'about right' (the other exception, apart from mining, was the property/construction sector – for which 46% said regulation is 'too lax'). See full report at [www.environment.nsw.gov.au/community/whocares2012.htm](http://www.environment.nsw.gov.au/community/whocares2012.htm).

<sup>23</sup> See EDO NSW, *Submission on A New Planning System White Paper* (June 2013), p 59, at [www.edo.org.au/edonsw/site/pdf/subs/130628NSWPlanningWhitePaper\\_EDONSWsubmission.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/130628NSWPlanningWhitePaper_EDONSWsubmission.pdf)

- ANEDO also supports requirements to seek, and publish, independent advice. However, the public interest rationale for giving ministers discretion to declare major projects *against* independent expert advice is unclear.
- Clear criteria is also needed for environmental assessment requirements, rather than relying on the discretion of ministers or senior bureaucrats to determine parameters.

ANEDO strongly supports the need for objective, legislated criteria to declare major projects. However, as the draft report notes, in most jurisdictions, ‘...discretionary powers are exercised without reference to objective criteria and clear processes...’ (p 119). For example, Queensland legislation confers very broad discretion as to what is a ‘coordinated project’ or when major projects are called in. Broad discretion to declare major projects is often matched by broad discretion on the parameters of environmental impact assessment (**EIA**) (see chapter 7 below). This discretion and uncertainty is one important reason why State and Territory major project assessment processes are not up to standard for Commonwealth bilateral accreditation.

The draft report cites the revised State Significant Development (**SSD**) process in NSW as a positive example of statutory criteria and limited discretion (p 120). However, EDO NSW has recommended a range of measures in relation to the new Planning Bill 2013 to more appropriately limit ministerial discretion.<sup>24</sup> For example, the requirement to seek Planning Assessment Commission (**PAC**) advice before calling in a development as ‘SSD’ would be strengthened if the Minister could only call-in a project if the PAC advice agreed it was ‘state significant’. EDO NSW also recommended additional safeguards around the declaration of ‘Public Priority Infrastructure’.<sup>25</sup> Suggestions include:

- seeking advice from the PAC before a declaration (as for SSD),
- exhibiting a project definition report *before*, instead of *after*, the Minister declares (i.e. approves) a development as Public Priority Infrastructure (**PPI**); and
- removing the proposed exemptions for PPI from a range of legal provisions, including the Planning Bill’s objects, strategic plans, inter-agency concurrence requirements and appeals (draft cl 5.27).

**Draft PC recommendation 6.3:**

*Regulators should ensure transparency in the processes used to set the terms of reference (TOR) of the environmental impact assessment for a major project by allowing for public consultation on draft TOR and by reporting the:*

- *advice provided to the assessment authority and used in setting the TOR*
- *referral agencies’ rationale for their advice, including how risks were assessed*
- *assessment authority’s rationale for setting the TOR, including how and why the TOR differ from the advice received and how risks were assessed.*

**ANEDO position:**

- ANEDO strongly supports upfront and iterative community engagement with communities on major project proposals.
- This should include the ability to comment on draft terms of reference for environmental impact assessment (**EIA**), and access to clear information and reports relied upon by agencies.

<sup>24</sup> EDO NSW, *Submission on A New Planning System for NSW White Paper* (June 2013) p 58-59.

<sup>25</sup> EDO NSW, *White Paper submission* (2013), pp 70-71.

Draft recommendation 6.3 is a positive step with regard to ANEDO's previous recommendation on equitable public participation and engagement rights.<sup>26</sup> As the draft report notes (pp 127-129), and in ANEDO's experience, many Australian jurisdictions do not allow consultation on major projects until too late in the process. This finding is another important reason why State and Territory major project assessment processes are not up to standard for Commonwealth bilateral accreditation.

ANEDO is not aware of any indications that this is likely to change. Indeed, as noted above, the exposure draft Planning Bill 2013 (NSW) proposed that project definition reports would not be exhibited until *after* the Minister declares a development as Public Priority Infrastructure. This is particularly significant given that a PPI declaration is effectively an approval in itself.<sup>27</sup>

In Victoria, while the draft report cites EES consultation processes as a leading practice (pp 127-128), by the time the community gets to comment on the draft scoping documents for a project, generally the project is already considered 'locked in'. In addition, the consultation requirements for EES processes are contained in guidelines, not the Act. While the guidelines may support very high standards of consultation, the government can decide to depart from them at any time.<sup>28</sup>

## Assessment stage (draft ch 7)

### 'Duplication between assessment processes'

#### Draft PC recommendation 7.1:

*The Australian and state and territory governments should strengthen and expand the scope of existing bilateral assessment agreements under the Environment Protection and Biodiversity Conservation Act 1999. Areas for improvement include agreements on standards and procedures for assessment and extending the number of regulatory processes accredited under current bilateral agreements.*

#### ANEDO position:

- The final report should not recommend the adoption of approval bilateral agreements as their use is not necessary or justified.
- Instead, the Australian Government should improve the efficiency of environmental assessment and approval processes under the EPBC Act by improving administrative arrangements with the States under *assessment* bilateral agreements.
- ANEDO opposes the expansion of assessment bilaterals until State/Territory assessment procedures are independently certified as meeting federal standards.
- No existing State and Territory major project assessment process meet the standards necessary for federal accreditation (notwithstanding some have been accredited).

<sup>26</sup> ANEDO (March 2013), recommendation #6:

**Recommendation:** Major project DAA processes must ensure **equitable public participation and engagement rights**, including:

- place clear limits on discretionary decision making;
- require information to be made publicly available prior to decision-making;
- mandate genuine public participation at all stages of planning and DAA;
- require decision makers to provide reasons for decisions;
- include equitable merit appeal rights for decisions, and open standing to enforce breaches; and
- require consistent reporting on public participation methods, statistics and outcomes.

<sup>27</sup> The remaining assessment is to focus on 'how', not 'whether' the development will proceed. See NSW Government, *A New Planning System for NSW – White Paper* (2013), at 7.5, p 171.

<sup>28</sup> An example is the desalination plant at Wonthaggi, where ministerial discretion was used to fast-track the project, including by reducing public consultation.

- The Australian Government should consult on and issue a uniform set of national environmental standards that state assessments must comply with to be accredited.
- The Australian Government should also review all current and proposed bilateral assessment agreements against those standards and revoke any that do not comply.
- Draft recommendation 7.1 must be amended to state that improvement in State and Territory assessment standards is a *prerequisite* to expanding assessment bilaterals.
- Assessment matters that could be further addressed in the final report include:
  - Options for more independent and quality-assured EIA approaches (see 7.5);
  - Linking EIA to natural resource management (**NRM**) targets, limits and requirements;
  - Embedding consideration of emissions and climate change impacts of major projects.

### **The need for clear federal assessment standards & review of existing agreements**

Each State and Territory has an assessment bilateral agreement with the Commonwealth under the EPBC Act.<sup>29</sup> The best way to achieve greater efficiency in any concurrent Federal and State assessments while maintaining environmental standards is to improve the operation of assessment bilateral agreements. However, although States have been accredited by the Australian Government, in reality a number of States processes do not meet federal standards even for environmental assessments, and should not have been accredited. Accordingly, action under assessment bilateral agreements should be twofold.

- 1) The Australian Government should develop, consult on and issue a uniform set of national standards with which state processes must comply in order to be accredited for assessment bilateral agreements (not approval agreements). This will ensure environmental standards are not weakened for projects undergoing assessment under bilateral agreements. Any bilateral agreement that does not meet these standards should be renegotiated to reflect this standard.
- 2) The Australian Government should work with the States to improve administrative processes under assessment bilateral agreements. This will lead to greater efficiency and certainty for proponents.

### **Statistics on assessment approach for controlled actions**

The draft report notes five broad concerns raised by industry stakeholders (p 138) – summarised as unnecessary duplication; uncoordinated administration; regulator conduct and capacity; ‘unnecessary or burdensome assessment requirements’; and ‘disproportionate or poorly targeted approval conditions (including offsets)’.

ANEDO submits that the final report should be revised to emphasise the limited evidence for these contentions – particularly claims of ‘duplicative’ and ‘burdensome’ assessment – with regard to the statistics on p 141 of the draft report. We interpret Table 7.3 to reveal three particular points:

- half of all projects found to be ‘controlled actions’ are assessed on preliminary documentation (plus 3% on referral information only);
- one in three controlled actions are already assessed under accredited State/Territory processes (22% bilaterals; 12% individually accredited assessment processes); and
- significantly, only 12% of controlled actions are actually subject to either a federal EIS or public environmental report (around 10 projects per year);.

<sup>29</sup> Although the NSW agreement has lapsed and is reportedly being renewed.

Furthermore, this table is for projects declared as controlled actions only, whereas '72 per cent of projects referred to the Commonwealth over the life of the Act have not needed further assessment and approval'.<sup>30</sup> This has two significant implications:

- it significantly shrinks the proportion of *referred projects* that are subject to federal environmental assessment (the source of industry's claims about 'duplication'); and
- it reinforces the Wentworth Group's solution of better guidance for business on what projects should be federally referred in the first place (by way of 'science-based guidelines or standards').

Finally, ANEDO understands that there a number of projects that are referred to the Australian Government that do not need a State assessment. There is no duplication for these projects, and the federal process therefore fills a gap that bilateral agreements would not cover. However, statistics on the number of such projects are not available.

### **Discretion in State EIA processes makes it unclear what process will be followed**

The draft report notes that 'ad hoc' accreditation has occurred for some 12% of controlled actions over the life of the EPBC Act (Table 7.3, n=123/1067). One possible reason for this ad hoc approach, instead of wider accreditation, is the problem of broad discretion on the parameters of State-based EIA process. This problem is exacerbated by the existence of broad discretion to declare major projects in the first place (see chapter 6 above).

EDO NSW raised this concern regarding the Australian Government's proposal to accredit the controversial former 'Part 3A' major project fast-track under the *Environmental Planning and Assessment Act 1979* (NSW). EDO NSW noted that, given the level of ministerial and bureaucratic discretion within Part 3A, the Australian Government could not be certain what projects were being accredited; what assessment requirements would apply; and therefore, whether the State process would meet federal standards.<sup>31</sup> Notwithstanding these concerns, Part 3A was accredited for EPBC Act purposes under a bilateral assessment agreement.<sup>32</sup>

EDO NSW was the only submitter on the proposal to accredit Part 3A for the purposes of federal EPBC Act approvals. This may suggest a lack of community awareness or understanding about EIA and approval processes and the significance of such delegations; and a lack of sufficient community engagement or notification processes. ANEDO suggests that federal and state governments make improved efforts to engage and educate communities on the link between state and federal assessment processes.

### **Additional EIA issues for consideration in the final report**

While the draft report notes that industry views on the five 'key issues' are contested (p 138), ANEDO has noted five very different concerns about EIA for major projects.<sup>33</sup>

<sup>30</sup> Wentworth Group of Concerned Scientists, submission 1 to Productivity Commission Major Project Issues Paper, *Statement on changes to Commonwealth powers to protect Australia's Environment* (September 2012). Based on 2010-11 SEWPAC annual reporting figures, the Wentworth Group found that 52% of projects referred to the Australian Government for possible assessment by SEWPAC are found *not* to be controlled actions outright, and a further 20% were able to proceed without further assessment if carried out in a 'particular manner'.

<sup>31</sup> EDO NSW, *Submission on the proposed Sydney Growth Centres Strategic Assessment* (2010) [http://www.edo.org.au/edonsw/site/pdf/subs/100625growth\\_centres\\_strategic\\_assessment%20\\_EPBC.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/100625growth_centres_strategic_assessment%20_EPBC.pdf).

<sup>32</sup> The draft report notes this agreement has now expired, but is expected to be renewed in 2013. ANEDO has no further information, although State Significant Development has replaced Part 3A.

<sup>33</sup> See ANEDO submission to PC Issues Paper (March 2013), p 16:

- *Lack of independent assessment approaches, or comprehensive baseline data;*
- *Poor cumulative impact assessment...*

We welcome the Commission's endeavours to address several of these in the draft report. Matters that could be further addressed in the final report include:

- Options for independent and quality-assured assessment approaches (such as mandatory accreditation and arms-length appointment of EIA consultants – see 7.5);
- Linking EIA to state-wide/catchment NRM targets, limits and requirements;
- Mandatory consideration of greenhouse emissions and climate change impacts.

In particular, ANEDO recommended that Australian jurisdictions must:

- *improve the independence and rigour of project assessment and approval (including where a state government or authority is a proponent/beneficiary);*
- *identify and adhere to targets and limits across environmental indicators such as biodiversity, native vegetation, water, soil and air quality (including public health considerations), and greenhouse gas emissions;*
- *approve major projects only if their impacts remain within the identified and acceptable environmental limits of the catchment or region;*
- *require assessment of the climate change impacts of individual projects, and specific conditions to address these impacts (for mitigation and adaptation);...* (March 2013, p 17)

**Draft PC recommendation 7.2:**

*The Australian Government should undertake and publish a regulatory impact assessment of the 'water trigger' amendment to the Environment Protection and Biodiversity Conservation Act 1999, including the exclusion of water trigger-related actions from bilateral approval arrangements.*

**ANEDO position:**

- ANEDO strongly supports the new EPBC Act 'water trigger' as an appropriate measure for national oversight of significant environmental impacts, and the fulfilment of Australia's international obligations under the Ramsar Convention and other treaties.
- ANEDO also strongly supports the protection of Commonwealth powers from delegation, firstly on the basis that State assessments and exemptions provide insufficient protection, and secondly noting that the valuable and interconnected nature of water in Australia creates unique national responsibilities.

ANEDO strongly supports the inclusion of a ninth 'matter of national environmental significance' (**MNES**) designed to regulate mining activities which are likely to have a *significant impact* on Australia's water resources (**'water trigger'**). As the then Environment Minister noted in introducing the Bill, the Australian community expects that the federal Minister responsible for water has the power to review actions that significantly impact on water resources.

Commonwealth oversight of MNES, including water resources, 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;
- States often benefit directly from the projects they are assessing.<sup>34</sup>

- 
- *EIA is not linked to state-wide/catchment NRM targets, limits and requirements;*
  - *Inadequate consideration of greenhouse emissions and climate change impacts;*
  - *Limited government oversight and quality assurance of EIA.*

<sup>34</sup> See Australian Network of Environmental Defenders Offices (ANEDO), 'Submission to the Senate Standing Committee on Environment and Communications regarding the *Environment Protection and*

ANEDO has raised several examples of inadequate regulation and legal exemptions for mining activities in relation to water use and approvals.<sup>35</sup> Accordingly, ANEDO also strongly supported amendments to the water trigger Bill to preclude the delegation of approvals, for controlled actions under the water trigger, to the States.<sup>36</sup> This reflects the conclusion of the Senate Committee inquiry into the water trigger Bill, that: ‘there is sufficient concern and evidence of the inadequacy of State processes to warrant the involvement of the Commonwealth Government’.<sup>37</sup>

Finally, any regulatory impact statement prepared for the water trigger must be grounded in the need for effective environmental protection of Australia’s valuable water resources, and the ongoing limitations of state mining and water laws to fulfil this role to date.

### **‘Uncoordinated administration of assessment processes’**

#### **Draft PC recommendation 7.4:**

*Where they do not exist, State and Territory Governments should establish a major projects coordination office to:*

- *advise proponents on statutory requirements*
- *develop project agreements that document agreed working arrangements among regulators and timeframes for the completion of processes*
- *electronically track and report on progress against statutory and regulator-determined timeframes*
- *facilitate interactions with relevant Australian Government regulators and local governments.*

*These offices should be close to the centre of government and access should be limited to complex, large-scale projects of state or territory significance.*

#### **ANEDO position:**

- ANEDO supports improved agency coordination (which may include Major Project Coordination Offices (**MPCO**)), but does *not* support centralisation of major project assessment and approval processes in a single agency (such as Planning Departments, Coordinators General or the MPCO itself).
- In the final report, recommendation 7.4 should therefore:
  - clarify that an MPCO should be separate from assessment and approval functions;
  - link this proposal to draft recommendation 7.5 on institutional separation/governance.

As ANEDO has noted, risks of centralisation of major project assessment and approval processes in a single agency (or the MPCO itself) include less rigorous assessment, conflicts of duties, reduced community confidence and corruption risks. ANEDO welcomes the Commission’s acknowledgements of these risks in the draft report (p 150).

ANEDO further welcomes the Commission’s comments that:

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*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>.

<sup>35</sup> For example, see E. Carmody, ‘Exemptions from cease-to-pump rules in the Hunter coal field: mines 1, aquifers 0’ (2013), 28 *Australian Environment Review* Vol. 4, 567 (via link below); and ‘Water sources at risk in the Hunter’, EDO NSW blog, 5/6/2013 at <http://edonsw.wordpress.com/2013/06/05/water-sources-at-risk-in-the-hunter/>.

<sup>36</sup> EPBC Amendment Bill 2013, Items 3A, 4A, 4B. ANEDO also made five recommendations to broaden and increase the water trigger’s effectiveness. See ‘Submission to the Senate Standing Committee on Environment and Communications regarding the *Environment Protection and Biodiversity Amendment Bill 2013*’ (April 2013), at

[www.edo.org.au/edonsw/site/pdf/subs/130404EPBCAmendmentBillWaterTriggerANEDOSubmission.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/130404EPBCAmendmentBillWaterTriggerANEDOSubmission.pdf)

<sup>37</sup> Senate Environment and Communications Standing Committee, Report on *Environment Protection and Biodiversity Conservation Amendment Bill 2013 [Provisions]*, May 2013, p. 21.

- establishing ‘one-stop shop arrangements for the broad class of major projects in Australia’ is ‘impractical’; and
- MPCOs ‘would *not* have the authority to override the decision-making capacity of regulators.’ (p 151)

These important points need to be stated more clearly in recommendation 7.4.

Otherwise, the Commission’s draft recommendation could be misread as suggesting a centralised, ‘one stop shop’ model that is subject to the very risks that the Commission warns of – such as regulatory capture and erosion of public confidence.

ANEDO submissions and representations have provided the Commission with examples of these risks in existing and proposed major project DAA arrangements. ANEDO is very concerned that several jurisdictions are fast-tracking major projects by centralised, ‘single agency’ assessment and approval, and/or by reducing legal authorisation requirements for major projects compared with smaller ones. These systems contrast with the Commission’s recommended approach to MPCOs and institutional separation. They also significantly undermine the arguments for *increasing* assessment bilaterals, and for any move to *approval* bilaterals under the EPBC Act. A further illustration follows.

The Queensland Coordinator-General has various roles including to supervise EIA of ‘coordinated projects’ (previously significant projects) and to make decisions on those projects. If the project is a ‘controlled action’ being assessed according to an assessment bilateral, the Coordinator-General’s report is sent to the federal Environment Minister who makes the decisions under the EPBC Act.

For major resource projects that are ‘coordinated projects’, the Coordinator-General makes decisions on environmental conditions, and arms-length oversight is restricted. The Department of Environment and Heritage may not impose conditions on environmental authorities that are inconsistent with those of the Coordinator-General. Even if there is a public objection to the Land Court, the Land Court may not recommend a condition inconsistent with those decided by the Coordinator-General. The *Judicial Review Act 1991* (Qld) does not apply to the Coordinator-General’s decisions, so only the unwieldy common law prerogative writs could be used to review decisions.

Overall, this concentrates decision-making power on the environment in the hands of an entity whose primary role is promoting development, and which could potentially be subject to risks of regulatory capture or heavy lobbying. The Coordinator-General also has a great deal of discretion in the process, which lacks accountability.<sup>38</sup>

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<sup>38</sup> As ANEDO previously noted, there have also been recent reports that project assessment staff in Queensland were pressured to approve major CSG projects without sufficient detail of plans and impacts. See for example, J. McCarthy, ‘Public servants tasked with approving massive CSG projects were blindsided by demands to approve two in two weeks’, *The Courier Mail*, 11 February 2013, at <http://www.couriermail.com.au>; see also *ABC 4 Corners*, ‘Gas Leak!’, 1/4/2013, at <http://www.abc.net.au/4corners/stories/2013/04/01/3725150.htm>.

## **Regulator conduct, capability and independence**

### **Draft PC recommendation 7.5:**

*Where not already the case, the Australian and State and Territory Governments should institutionally separate regulatory assessment and enforcement functions from environmental policy functions, provided the expected benefits exceed the costs.*

### **ANEDO position:**

- ANEDO strongly supports recommendations to improve the independence and rigour of project assessment and approval (including where a state government or authority is a project proponent or beneficiary), in order to increase public confidence.
- A number of state jurisdictions centralise policy, assessment, approval and enforcement functions in a way that presents regulatory and governance risks.
- The final report should also consider models for independent accreditation and/or allocation of consultants who provide EIA reports on major projects.
- ANEDO agrees that a national EPA should also be considered. However, this should be distinguished from a high-level 'National Environment Commission' that could usefully conduct independent audits, provide advice on bilateral agreements and standards, and coordinate and promote national environmental leadership.

ANEDO agrees that arms-length, independent assessment and enforcement functions would improve the effectiveness and rigour of major project regulation, and support public confidence in DAA processes. For example, relying on state Planning Departments to develop policy, set environmental impact assessment (EIA) requirements, assess EIAs, approve projects, set conditions, and enforce compliance with those conditions, is an inappropriate concentration of functions in a single office or department.

We therefore support a detailed examination of options to relocate a range of regulatory and enforcement functions in an independent agency (such as a Planning Commission or Environmental Protection Authority) in jurisdictions where this hasn't already occurred.

### **Accreditation of EIA consultants**

As a further accountability measure, the Commission should also consider options to require that EIA reports for major projects are undertaken by professionally accredited and independently appointed experts, rather than by someone appointed and paid by the proponent.<sup>39</sup> Accreditation could be done through an industry, government or co-regulatory body, including by building on existing voluntary accreditation mechanisms.<sup>40</sup>

The lack of independent assessment approaches was one of the broad problems with EIA for major projects identified in ANEDO's previous submission (p 16), along with the need to improve the independence and rigour of project assessment and approval processes.<sup>41</sup>

The draft report focuses on assessment by regulatory agencies. However, agencies and decision-makers rely heavily on the information in EIA reports which are provided by the

<sup>39</sup> For example, the NSW Treasury and Government recently suggested that EIA consultants for major projects could be chosen from an accredited panel, and be required to 'meet certain standards regarding the impartiality and quality of their work'. See NSW Government, *A New Planning System for NSW – Green Paper* (July 2012), p 58. This proposal made limited progress by the White Paper stage (April 2013).

<sup>40</sup> See for example, EDO NSW submission to the NSW Planning White Paper (2013), Appendix, [www.edo.org.au/edonsw/site/pdf/subs/130628NSWPlanningWhitePaper\\_EDONSWsubmission.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/130628NSWPlanningWhitePaper_EDONSWsubmission.pdf).

<sup>41</sup> Stakeholders also raised this concern in the NSW Independent Planning Review. See T. Moore & R. Dyer, *NSW Planning System Review Issues Paper*, December 2011, pp 24-25.

proponent, and prepared by consultants paid by proponents. This raises potential risks of conflicts of duty, and perceived or actual risks of corruption. Formal accreditation for major project EIA would have a range of potential co-benefits, including increased reliability and re-use of EIA information, less delays in seeking further information, continuous improvement of professional standards, and greater trust in decision making.

### **A national EPA, with high-level oversight by a National Environment Commission**

For national environmental matters under the EPBC Act, the Commission's draft report recommends transferring responsibility to a new, National Environment Commission for threshold 'significant impact' assessment, assessment of environmental impacts, and advice to the Environment Minister on whether to approve or refuse the project.

ANEDO supports further investigation of this positive approach. However, this agency could be renamed to avoid confusion with other higher-level oversight roles that a new 'National Environment Commission' (**NEC**) could play.

In particular, EDO Victoria has recently issued a discussion paper on a *Proposal for the establishment of a National Environment Commission*.<sup>42</sup> Without indicating a definitive model, this discussion paper proposed the following (p 11):

*The core objective of the National Environment Commission should be to ensure the protection of the environment, the conservation of biodiversity, and the principles of ecologically sustainable development by providing independent scrutiny, reporting and advice. Its primary focus should be activities under the EPBC Act, however as a national commission it could also provide a valuable strategic thinking and leadership role across the Commonwealth Government's environmental portfolio. In our view the most critical role for a national commission is to provide an independent review and audit of Commonwealth and State activity under the EPBC Act to ensure the objectives of the Act are being met.*

*With this in mind and drawing on the experiences in other jurisdictions we see three capacities as being the most beneficial under current governance arrangements:*

- 1. review and audit;*
- 2. future planning and Commonwealth leadership; and*
- 3. investigation and inquiry.*

*The model we propose is also consistent with the Statement on Changes to Commonwealth Powers to Protect Australia's Environment proposed by the Wentworth Group.*

It is important to emphasise the distinction between this proposal for an NEC, and the specific, national 'EPA-like' regulatory role described in the Commission's draft report.<sup>43</sup>

ANEDO therefore supports further examination of federal environmental policy and regulatory structures to maintain the highest standards of environmental protection and institutional governance. This could include a combination of:

- i) a strong, well-resourced Australian Government Environment Department responsible for environmental policy and administering legislation;
- ii) establishment of an Australian Environment Protection Agency to provide independent regulatory and enforcement functions on individual projects; and

<sup>42</sup> (May 2013) Available at <http://www.edovic.org.au/law-reform/major-reports/proposal-national-environment-commission>.

<sup>43</sup> The EDO Vic discussion paper also noted (p 13):

*In our view the Commission should not have any involvement in policy development or advice to the Minister on individual assessment decisions, or compliance and enforcement of individual projects, as this would reduce the independence and objectivity of the Commission and result in a conflict of interest when providing audit and review functions.*

- iii) a National Environment Commission to provide higher-level oversight, review and advice functions.

**Draft PC recommendation 7.6:**

*Governments need to ensure that regulatory agencies have the resources, capacity and skills to efficiently administer major development assessment and approval processes.*

**ANEDO position:**

- ANEDO strongly supports this recommendation. The final recommendation should provide more detail on what sufficient 'resources, capacity and skills' entails, and how sufficiency can be measured and reported.
- The final report should, for example, examine and compare the growth in major project investment (draft report, Figure 1, p 7) with recent trends in regulatory staffing levels in project assessment and approval agencies in each Australian jurisdiction.
- The final report should support a dedicated, independent review of regulatory resourcing for agencies responsible for monitoring, enforcement and compliance with environmental and planning laws.

As our previous submission noted, regulatory resources must keep pace with industry expansion, to avoid increased risks to communities and the environment. In 2009, a Senate committee called for urgent review of under-resourcing of federal environmental regulation.<sup>44</sup> Evidence and submissions to the NSW CSG Inquiry also noted the limited resources available to monitor activities and enforce regulatory compliance.<sup>45</sup>

The resourcing question is all the more pertinent given recent calls to delegate federal approval (and therefore enforcement) powers to the States. For example, in the three years to 2012, the federal Environment Department investigated 980 incidents across Australia under the EPBC Act, demonstrating the ongoing need for federal involvement.<sup>46</sup> In its final report the Commission could examine how additional funding of baseline research, monitoring and enforcement activities will be raised, such as from royalties, licence fees or industry levies.<sup>47</sup>

The draft report section, 'High performing regulators', contains very little detail on the existing and comparative capacity of major project regulatory authorities in Australian (or overseas) jurisdictions. The draft report (pp 158-59) briefly notes the recent Senate Committee comments about job cuts impairing regulators' effectiveness.<sup>48</sup>

Relevantly, the Committee went on to make two pertinent recommendations:

*Recommendation 5*

*2.70 The committee recommends that COAG, as a matter of priority, undertakes an assessment of the capabilities of state government environment departments and their*

<sup>44</sup> See Senate Standing Committee report on *Operations of the Environmental Protection and Biodiversity Conservation Act 1999* (March 2009), rec. 4: 'The committee recommends that the government give urgent consideration to increasing the resources available to the department in the areas of assessment, monitoring, complaint investigation, compliance, auditing projects approved under Part 3 and enforcement action.'

<sup>45</sup> See, for example, Report of the NSW Legislative Council Committee Inquiry into CSG (2012), paras 13.52 and 13.58-61. See also EDO NSW, *Submission to the NSW Legislative Council CSG Inquiry* (October 2011).

<sup>46</sup> The Department also undertook over 40 court actions resulting in fines and enforceable undertakings totalling almost \$4 million. Department of SEWPaC/DEWHA, figures compiled from annual reports, 2009-10, 2010-11, 2011-12.

<sup>47</sup> See, for example, NSW Ombudsman, *Submission to NSW Legislative Council Inquiry into Coal Seam Gas* (Sept. 2011).

<sup>48</sup> See further Senate Environment and Communications Committee, *Report on the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (March 2013), at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=ec\\_ctte/completed\\_inquiries/2010-13/epbc\\_federal\\_powers/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/completed_inquiries/2010-13/epbc_federal_powers/report/index.htm)

capacity to engage effectively with the Commonwealth to protect matters of national environmental significance. The committee further recommends that COAG make an assessment as to the implications for reduced resources in state environmental departments and the dominance of state planning departments and its implications for protecting matters of national environmental significance.

...

**Recommendation 6**

2.73 The committee recommends that COAG urgently consider the implications of competitive federalism in relation to the effective of operation of the Environment Protection and Biodiversity Conservation Act 1999 and our national environmental and international environmental obligations.

ANEDO strongly supports these Senate Committee recommendations. However, these inquiries would be better placed in the hands of an independent body, such as an NEC.

In the final report, the Commission should:

- first, conduct a preliminary examination of regulatory agencies' funding trends, relative to the number and value of major projects (see draft report Figure 1, p 7);
- second, support a fulsome, independent review of resourcing for regulatory agencies;
- third, survey the federal Environment Department's recent cost recovery proposals.<sup>49</sup>

See further discussion of monitoring and enforcement at Chapter 10.

### **'Unnecessary' assessment requirements**

#### **Draft PC recommendation 7.7**

Where it is not already the case, regulators should establish a hierarchy of assessment methods for major projects that correspond to different levels of regulatory scrutiny. Criteria for determining the level of assessment should be identified and in the public domain.

#### **ANEDO position:**

- There is a lack of evidence of 'unnecessary' assessment requirements, and ample evidence that reducing such requirements does not promote effective public policy.
- While tiered assessment is useful to categorise different types of projects, excessive tiering *within* the major projects category could risk fragmentation and complexity.
- Removing legal concurrence requirements is not 'improved coordination', rather, this is the inverse of *risk-based*, objective and transparent assessment.
- A risk-based approach means the greatest impacts deserve the greatest scrutiny, not 'fast-track' exemptions.

ANEDO's previous submission (pp 17-20) highlighted in detail our concerns that 'Fast-tracking major projects and overriding concurrences contradicts a "risk based" DAA approach'. That submission noted:

*Existing major project streamlining mechanisms often override normal environmental law and licensing requirements (also known as 'concurrences').<sup>50</sup> These mechanisms may also concentrate control in a central agency or decision-maker; and limit public participation, transparency and judicial scrutiny of decisions. In this way, states may*

<sup>49</sup> See SEWPAC, <http://www.environment.gov.au/epbc/publications/consultation-draft-cost-recovery.html>. ANEDO has not had the capacity to engage in cost recovery discussions to date.

<sup>50</sup> For example, in NSW, under both Part 3A and its replacement system, 'State Significant Development' (SSD), major projects remain *exempt* from a significant list of 'concurrence' approvals normally required from various agencies (such as for coastal protection, fisheries, Aboriginal heritage, native vegetation, bush fire and water management). A range of other authorisations *cannot be refused*, and must be consistent with an SSD project approval (including aquaculture, mining leases and pollution licences). See *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), ss 89J and 89K. The revised system for fast-tracking 'State Significant Infrastructure' (SSI) retains many features of the former Part 3A.

compete with one other to 'cut red tape' and attract investment – which risks a 'race to the bottom' for environmental standards.

ANEDO submits that a truly risk-based approach to EIA would focus assessment effort on major projects, not override or reduce scrutiny. This is because:

- projects with the greatest impacts deserve the greatest scrutiny and safeguards, consistent with the Productivity Commission's 'risk-based' description; and
- major projects tend to be the most significant in terms of scale, nature, complexity, breadth and duration of impacts, and level of public concern.<sup>51</sup>

ANEDO is therefore perplexed that proposals to streamline major project DAA are found alongside references to 'risk-based' approaches, and assurances that fast-tracking will not lower environmental standards. It is doubly concerning when fast-tracking major project assessment is coupled with proposals to remove federal oversight and approval.

For example, in NSW, there are significant concerns about the ongoing removal of legal requirements for inter-agency 'concurrence' requirements under various state environmental laws. This means major projects are still exempted from many approvals normally needed under threatened species, heritage and natural resource management (NRM) laws. Other authorities, such as pollution licences, must be issued consistently with the Planning Department's approval (instead of independent EPA assessment).<sup>52</sup> Removing legal concurrence requirements is not equivalent to 'improved coordination'. Rather, it is the inverse of *risk-based*, objective and transparent assessment.

### **'Poorly targeted and disproportionate' conditions and offsets**

#### **Draft PC recommendation 7.8:**

COAG should commission an independent national review of environmental offset policies and practices, to report by the end of 2014. The review should:

- consider the merit of a single national offsets framework
- survey the consistency of offset policy objectives against the principles of ecologically sustainable development
- critically assess the methodologies used for identifying offsets
- examine the role of market-based offset approaches.

#### **ANEDO position:**

- ANEDO supports consideration of a national, robust approach to offsetting. However, ANEDO strongly disagrees with the draft report's finding that an 'improve or maintain' environmental outcomes test for offsets may conflict with the principles of ESD.
- These objective, standards-based decision criteria are consistent with leading practice, and with ESD principles such as conservation of biodiversity and ecological integrity, intergenerational equity, and improved valuation and internalisation of environmental costs.
- The Commission's final report should reconsider and acknowledge the benefits of objective environmental standards such as 'no net loss' or 'maintain or improve' for Australian jurisdictions' planning, development and environmental protection frameworks. This is important given the uncertain reliability of biodiversity offsetting.

Principle 10 of ANEDO's best practice standards for environmental and planning laws notes:

<sup>51</sup> See, for example, EPBC Act s 87(4A) and factors to be considered in EPBC Regulations 2000, cl 5.03A.

<sup>52</sup> See EP&A Act 1979 (NSW), ss 89J-K, ss115ZG-H. See also EDO NSW, *Submission on NSW Planning White Paper* (June 2013), p 73, available at [http://www.edo.org.au/edonsw/site/planning\\_reforms.php](http://www.edo.org.au/edonsw/site/planning_reforms.php).

*The efficacy of all environmental assessment and planning laws must be periodically and independently reviewed – to assess whether... improving or maintaining environmental values, and... achieving ecologically sustainable development.*<sup>53</sup>

This approach is applicable to biodiversity offsetting laws and policies across Australia. However, ANEDO strongly disagrees with the draft report's suggestion that giving fundamental consideration to environmental protection and improvement – including in the context of offsets – is inconsistent with 'ecologically sustainable development' (ESD) or its principles. In particular, the draft report refers to the 'no net loss' and 'improve or maintain' environmental outcomes standards as examples of this (pp 95, 168). We make three points in relation to consistency with ESD.

First, ANEDO has consistently recommended that major project laws build-in objective decision criteria and accountability mechanisms to protect environmental assets in accordance with ESD principles.<sup>54</sup> ANEDO submits that standards such as 'improve or maintain', 'neutral or beneficial effect' and 'net environmental benefit'<sup>55</sup> reflect the leading practice of adopting objective standards and decision criteria.<sup>56</sup>

Second, an 'improve or maintain' test reflects key principles of ESD as articulated in the Hawke Review recommendations,<sup>57</sup> and in the objects of the EPBC Act itself (s 3A):

- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;*
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;*
- (e) improved valuation, pricing and incentive mechanisms should be promoted.*

Third, terms like 'maintain', 'improve' and 'enhance' are used in definitions of ESD in Australia and elsewhere, invoking the need to support 'the ecological processes on which life depends'.<sup>58</sup> As the WA EPA has observed, a *net environmental benefit* test 'recognises that the environment has been significantly compromised in the past and that halting and reversing the decline of the environment is now a priority'.<sup>59</sup>

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<sup>53</sup> See Attachment A to our previous submission to this inquiry (March 2013).

<sup>54</sup> See principle 5 of ANEDO's 10 best practice standards for environmental and planning laws, at Attachment A to our previous submission to this Productivity Commission Inquiry (March 2013): *Development proposals must demonstrate that they comply with an 'impact hierarchy' [to avoid, mitigate, and then (if necessary and appropriate) offset impacts]...*

*Any proposed biodiversity offsetting must comply with clear legal requirements including:*

- *avoidance of 'red-flag' environmental values that cannot be offset*
- *equivalency of values that may be offset ('like for like'), and*
- *ensuring that any offsets are protected in perpetuity (including from future development).*

*Offsetting schemes that do not meet these criteria must not be accredited.*

<sup>55</sup> On 'net environmental benefit' see EPA Victoria, *Discussion Paper: Environmental Offsets* (June 2008); EPA Western Australia (Jan. 2006) *Environmental Offsets, Position Statement No 9*.

<sup>56</sup> See for example ICAC (NSW), *Anti-corruption safeguards for the NSW planning system* (2012).

<sup>57</sup> For example, the Hawke EPBC Act Review (2009) recommended a 'maintain or improve' environmental outcomes test be adopted under a strengthened regime for Strategic Environmental Assessment under the EPBC Act (recommendation 6(2)(b)(ii)); see also recommendation 2 on confirming and reinforcing ESD.

<sup>58</sup> Since 1990, the accepted Commonwealth definition (as per the National Strategy for ESD) is: *using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased*

See <http://www.environment.gov.au/about/esd/publications/strategy/intro.html#WIESD>.

<sup>59</sup> Environmental Protection Authority Western Australia (January 2006) *Environmental Offsets, Position Statement No 9*.

### **Implications of rejecting a ‘maintain or improve environmental outcomes’ criterion**

It should not be difficult to accept that present and future quality of life will be increased by *maintaining and improving* ecological processes that promote clean air, fertile soil, food production, water quality, and lower greenhouse gas concentrations. Resilient and biodiverse ecosystems also provide benefits to public health, cultural, spiritual and recreational pursuits.

By contrast, rejecting an ‘improve or maintain’ or ‘net environmental benefit’ standard, implies that our policymakers should prescribe (and society and communities should accept) a gradual but definite deterioration of environmental qualities over time.<sup>60</sup> This would include a continual degradation of matters of national environmental significance protected under the EPBC Act, such as World Heritage Areas like the Great Barrier Reef, threatened and migratory species, and Australia’s water resources.

ANEDO submits that many Australians would not support a policy of gradual environmental degradation as an appropriate legacy for present and future generations. Rather, with the goal of ESD, we should aim to avoid and minimise environmental impacts of development to the extent possible; and move towards planning and development systems that identify and operates within the carrying capacity of the Australian landscape.

In conclusion, we strongly recommend that the final Commission report reconsider the benefits of objective environmental standards such as ‘maintain or improve’ and ‘net environmental benefit’ within Australia’s planning, development and environmental protection frameworks; including in working towards an overall goal of achieving ESD.

#### **Draft PC recommendation 7.9**

*Governments should ensure that regulatory agencies only set conditions and offsets that:*

- *are consistent with objectives and directed at the impacts of the development to be consented*
- *are outcome-based wherever possible*
- *can be amended by agreement, provided there is a strong case and the proponent is first consulted*
- *do not direct compliance, or the manner of compliance, with other legislation*
- *are public, and explain what impact the condition is seeking to address*
- *are enforceable, precise and reasonable in all other respects.*

#### **ANEDO position:**

- ANEDO supports clear and enforceable conditions, based on a mix of prescriptive and outcomes-based requirements. Outcomes-based conditions must:
  - be measurable and enforceable (with appropriate resources and agency culture); and
  - must emphasise proactively *preventing* environmental damage, rather than risking that damage, and reacting when it happens.
- Modifications and amendments to conditions must be limited, transparent (to the public as well as the proponent) and allow for continuous improvement.
- Court oversight of project conditions tends to improve departmental conditions.
- Consent authorities may not apply lessons from court judgements, stifling best practice.
- The final report should discuss proponents’ examples of ‘onerous’ or ‘unnecessary conditions’ with the regulator concerned, regarding the decision maker’s rationale.
- Biodiversity offsets must be limited, consistent, transparent, legally protected, and based on sound science and policy, not economic convenience.

<sup>60</sup> For example, by interpreting ‘ecologically sustainable development’ as allowing a long-term degradation of environmental values, in favour of an increase in material wealth and production.

We consider conditions and offsets separately here, as they raise some distinct issues.

### ***Project conditions must be clear, robust and enforceable***

#### **Outcome-based conditions must prevent harm, be enforceable, and be monitored**

Draft recommendation 7.9 (point two) proposes that conditions and offsets 'are outcome-based wherever possible'. The term 'outcome-based' needs to be clearly defined to avoid lax interpretation and enforceability. Also, the recommendation itself should note the need for prescriptive conditions in relevant circumstances. The final report should clarify these issues in its discussion of 'outcomes-based' conditions, to avoid the risk of misinterpretation and unintended policy outcomes

ANEDO submits that a mix of 'prescriptive' and 'outcomes-based' conditions are likely to be appropriate for any given project. For example, if 'outcomes-based' refers to the use of robust, objective, science-based standards (such as the National Environmental Protection Measure for air quality,<sup>61</sup> or ANZECC guidelines for water quality<sup>62</sup>), then ANEDO supports such standards. However, prescriptive requirements are also vital and complementary, such as a condition that there be no direct discharge into a local river.<sup>63</sup>

By contrast, reliance on 'outcomes' could imply a shift towards *reactive* measures when harm occurs, rather than *proactive* conditions which prevent harm. This is not an acceptable way of protecting community and environmental values. In addition, if the relevant 'outcomes' remain high-level, are not measurable, or not attributable to a particular project or strategic planning area, then this creates new problems of proof and enforceability. Long-term outcomes must therefore have specific (possibly prescriptive) 'waypoints' that allow meaningful monitoring, auditing and adaptive management.

#### **Amendments must be limited, transparent and allow for continuous improvement**

With regard to point three of recommendation 7.9 – modification of development consents may be necessary to reflect updated information, such as changed environmental circumstances, new listings of endangered species, unexpected adverse impacts, or improvements in technology. This does not necessarily mean 'amendment by agreement' with proponents. We make two further comments.

First, **safeguards must apply** to modifications of conditions, to ensure these processes are not 'gamed' to reduce compliance obligations, avoid community transparency, or weaken environmental standards in favour of profitability. For example, in NSW:

*Division 4.8 of the Planning Bill [April 2013 exposure draft] permits modification of development consents under Part 4. These provisions omit certain safeguards from existing provisions (EP&A Act, sections 96-96A). EDO NSW recommends the existing checks and balances that apply to modifications under s 96 should be carried over to the new Act (per clause 4.38) (**Recommendation 55**). In addition to requiring a development is 'substantially the same', these safeguards include:*

- *ensuring that modifications involve minimal environmental impact [or further consultation];*
- *satisfying consultation and notification requirements (for the public and agencies);*
- *consideration of submissions; and*

<sup>61</sup> See Australian Government Department of Sustainability and Environment (SEWPAC), at <http://www.environment.gov.au/atmosphere/airquality/publications/cmp.html>.

<sup>62</sup> See Australian Government Department of Sustainability and Environment (SEWPAC), at <http://www.environment.gov.au/water/publications/quality/nwqms-guidelines-4-vol1.html>.

<sup>63</sup> As in *Ironstone Community Action Group Inc v NSW Minister for Planning and Duralie Coal Pty Ltd* [2011] NSW LEC 195. See N. Hammond-Deakin and E. Johnson, 'Merits appeal rights in New South Wales: Improving environmental outcomes', (2012) *IMPACT! ANEDO journal*, 92 (2012) 7.

- *limitations on modifications that affect threatened species and critical habitat.*<sup>64</sup>

Second, regulators should have **powers to reasonably increase environmental protections in project conditions over time**. For example, in the pollution context, this may include requirements that operators adopt 'best available technology' when licences are renewed, to ensure continuous improvement (as in the USA).<sup>65</sup> In sum, modification of conditions must allow for both genuine adaptive management and continuous improvement.

### **High number of conditions reflects complexity and impacts of major projects**

ANEDO agrees with the Commission that the number of conditions on a project is not, in itself, evidence of over-regulation. Major projects are often, by definition, those with the greatest complexity and potential impacts. If proponents are correct in suggesting that the *number* of conditions on major projects has increased, this would in part be due to the fact that the *scale* of major projects have increased to unprecedented levels (see draft report, Figure 1, p 7) – as have their individual and cumulative impacts. Some complexity is therefore unavoidable, and the benefit of simplifying or reducing conditions is likely to present concomitant risks. Improving regulators' resourcing, independence and coordination are better solutions.

Relatedly, some industry bodies have argued that federal conditions *additional to* state conditions is evidence of duplication or unnecessary burden. However, we submit that this is evidence of the inadequacy of state assessment and approval conditions. What is missing from the draft report (and recent roundtables) is the view of decision makers (commissions, planning and environment departments) as to the rationale for conditions which proponents have anecdotally put forward as onerous. The final report should inquire into decision makers' perspectives for each example cited in the report.

### **Primary conditions are often inadequate, and improved by judicial scrutiny**

Most of the evidence provided to the Commission describes industry perceptions of poorly targeted or excessive conditions.<sup>66</sup> ANEDO offices, and our clients who are affected by the impacts of major projects long after they are approved, have a very different perspective. The courts too (along with the federal Environment Department) often have different interpretations of adequate conditions compared with proponents and state-based decision makers.

In NSW, recent decisions involving the expert Planning Assessment Commission (**PAC**) suggest that, even where reviews by expert panels identify leading practices (in this case the PAC itself), final approval and conditions may involve further compromise. That is, companies will attempt to negotiate less stringent conditions, which are then

<sup>64</sup> EDO NSW, submission on A New Planning System White Paper (June 2013), p 63.

<sup>65</sup> For example, in the USA, new major sources of pollution, or those facilities undertaking major modifications, have to obtain permits ensuring that they avoid causing or contributing to pollution that threatens emissions standards. They must also implement best available technology to control pollution (see United States Environmental Protection Agency, New Source Review (23 July 2011) [www.epa.gov/nsr/](http://www.epa.gov/nsr/)). The USEPA is required to set out a list of the major sources of some 188 listed pollutants that present a threat to human health and the environment; and must regulate their emissions by reference to the cleanest existing facilities. New and existing plants must then do what is necessary to meet these standards (*Clean Air Act* §7412). See further EDO NSW, *Clearing the Air: Opportunities for improved regulation of pollution in New South Wales* (2011), at [http://www.edo.org.au/edonsw/site/policy\\_discussion.php#clearing](http://www.edo.org.au/edonsw/site/policy_discussion.php#clearing).

<sup>66</sup> Although the indigenous employment example (p 25) may not be an appropriate one, given the EPBC Act's objects to partner with Indigenous peoples on land management (see s 3(d),(g)).

recommended by State planning departments, and may be accepted by the final decision maker.<sup>67</sup>

One of the key benefits of community rights to court-based merit reviews is that poorly defined or inadequate conditions can be rectified. Many public interest cases illustrate this. For example, the 2011 *Duralie Extension Project* case (NSW) resulted in 'stricter, more precise, and more enforceable [conditions] than those imposed by the Minister.'<sup>68</sup> These included conditions relating to water discharge, biodiversity protection and offsetting, noise and dust, and monitoring and transparency of ongoing operations.

Notwithstanding improvements imposed in court conditions, in ANEDO's experience, primary decision makers such as planning departments tend *not* to evolve their conditions in *subsequent primary decisions*. This tendency to revert to previous practice, rather than evolve with recent decisions, hinders continuous improvement. It may also increase the likelihood of inadequate conditions being challenged by communities at risk.

### ***Offsets must be limited, transparent, legally protected, and science-based***

Issues relating to objective standards or criteria in offsetting are addressed at 7.8 above. We note two further issues here.

#### **EPBC Act offsets policy provides relatively strong protection**

First, while ANEDO does not necessarily support offsetting (because of its uncertainty in achieving long-term outcomes), we were a stakeholder alongside industry groups in the development of the Australian Government's Biodiversity Offsets Policy. We submit that the federal Policy provides relatively strong and appropriate standards compared to other schemes in Australia (particularly as the standards in state offsetting schemes are being watered down in response to lobbying, or to 'increase demand' and participation<sup>69</sup>). This is an appropriate benchmark for a national offsets policy, and underlines the Australian Government's ongoing importance in national environmental leadership, oversight and standards.

#### **Protection of offsets is undermined by legislative loopholes**

Second, the intent of 'in perpetuity' protection for offsets is not matched by legal protections. The normal policy intent is that offsets should endure as long as the impact that it is designed to offset (for example, an open cut mine). In practice, this may require protection of the offset site 'in perpetuity', as the original site is either very unlikely to be fully rehabilitated to accommodate the original ecosystems, or may be used for a different purpose (such as conversion to a landfill site). However, there are several ways in which biodiversity offsetting agreements can be overridden (for example, by mining tenement rights), or revoked (for example, by the minister who made the agreement).

For example, the 2012 approval of the Warkworth Mine Extension by the NSW PAC would have allowed the mining of a site set aside as a 'biodiversity offset' for threatened flora and fauna *under a previous approval condition for the same mine* in 2003. The Land and Environment Court agreed with the Bulga Milbrodale Progress Association that

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<sup>67</sup> See, for example, A. Osman, K. Ruddock and E. Johnson (EDO NSW), 'The role of the NSW Planning Assessment Commission in "reviewing" planning projects', *IMPACT! Journal* (2012) EDO NSW.

<sup>68</sup> See for example, N. Hammond-Deakin and E. Johnson, 'Merits appeal rights in New South Wales: Improving environmental outcomes', *IMPACT!* (ANEDO journal), 92 (2012) 6-10.

<sup>69</sup> See, EDO NSW, *Submission the Review of the NSW Biodiversity Banking and Offsets Scheme* (July 2012) at [www.edo.org.au/edonsw/site/pdf/subs/120709Biobanking\\_Review\\_submission.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/120709Biobanking_Review_submission.pdf).

mining the offset would be contrary to the public interest, and that the expansion would result in detrimental economic and social impacts on the Bulga community that are contrary to ESD principles.<sup>70</sup> As the draft report notes (Box 5.5, p 108), the NSW Planning Department and the proponent are challenging this decision in the Court of Appeal.

This additional context of the *Warkworth* case – that the mine had agreed to ‘offset’ its biodiversity impacts as part of an original approval, then went back on this agreement with the effective support of the PAC and the Planning Department – raises important issues with regard to community trust in the planning system. It also points to the inadequacy of legal protections around biodiversity offset lands, if ‘in perpetuity’ protection can be set aside where doing so is economically convenient.

## Approval stage (draft ch 8)

### ‘Duplication of approval processes’

#### **Draft PC recommendation 8.1:**

*Governments should aim to establish a ‘one project, one assessment, one decision’ framework by restarting negotiations on bilateral approval agreements between the Australian Government and the States and Territories. Such agreements must ensure that rights of appeal are no less than those in the Environment Protection and Biodiversity Conservation Act 1999.*

#### **Draft PC recommendation 8.2:**

*To ensure the successful negotiation of bilateral assessment and approval agreements:*

- *the task of negotiating the agreements should be properly scoped, approved by COAG and published with a timetable of key milestones*
- *priority should be given to approval responsibilities for activities in urban areas (other than on Commonwealth land)*
- *the COAG Reform Council should monitor progress with developing the agreements, examine how well they are working and draw out implications for improving current and future agreements. To facilitate this, State and Territory Governments should prepare annual reports on their implementation of the agreements.*

#### **ANEDO position:**

- The Commonwealth Government must retain a strong leadership and oversight role in assessment of major projects, and not delegate approval processes to the States.
- ANEDO opposes restarting *approval bilateral* negotiations on the basis that:
  - delegating Commonwealth project approval powers will not achieve sought-after improvements to planning regulation, productivity and environmental outcomes;
  - *no* State or Territory planning or environmental laws currently meet the minimum requirements of the 106 elements outlined in the Australian Government’s Draft Standards Accreditation Framework (including procedural *and* substantive environmental standards), let alone the full suite of best practice standards that Australia should implement;<sup>71</sup>

<sup>70</sup> *Bulga Milbrodale Progress Association Inc. ats Warkworth Mining Limited & Ors* [2013] NSWLEC 48, available at <http://www.caselaw.nsw.gov.au/action/pjudg?jgmid=164038>.

<sup>71</sup> In June 2012, ANEDO prepared a series of best practice standards for planning and environmental regulation in response to COAG’s April 2012 reform announcements (see previous submission, Att. A). For further information and analysis, see ANEDO’s *Submission on Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act* (November 2012), available at <http://www.edo.org.au/policy/policy.html>.

- States are fundamentally not in a position to stand in the Commonwealth's shoes to assess and approve impacts on matters of national environmental significance in the public interest, even with the most carefully worded standards.
- The draft report's five-step process is likely to be misinterpreted as suggesting state and territory assessment systems are 'accreditation ready', despite evidence to the contrary.
- Instead, the report should recommend significant legislative reform to bring state assessments up to reliable and equivalent standards; along with institutional reform to independently verify that equivalence.

The draft report presents a five-step process which the report says 'could decrease duplication while addressing concerns that bilateral agreements may reduce environmental standards.'<sup>72</sup> ANEDO does not support this proposed process. In our view, the draft report is unduly optimistic about the capacity of state and territory assessment systems to take the place of federal processes through accreditation (at step 1).

As noted in response to Chapter 7, ANEDO's analysis and submissions have found that no State or Territory system for major project assessment meets the EPBC Act assessment standards; and there a range of sound reasons for retaining federal *approval* powers indefinitely. State assessment processes vary widely; are based on significant discretion; rely largely on data and assessment information from the proponent; provide variable and limited opportunities for community and judicial oversight; adopt limited transparency, enforcement and monitoring of outcomes; all while project investments staffing levels continue to come under increasing pressure. In general, EPBC Act standards are clearer and assessments more robust (as evidenced by refusals and more rigorous conditions, both recent and past). Nonetheless, processes and standards under the EPBC Act itself need to be strengthened in accordance with recommendations of the 10-year Hawke Review in 2009.

In proposing increased accreditation of state assessment processes as 'step 1', the draft report gives insufficient regard to these inadequacies and uncertainties. ANEDO is concerned that the Commission's five-step process, and draft recommendations in chapters 7-8, are likely to be interpreted to suggest that State and Territory assessment processes are 'accreditation ready'. However, information in the draft report and submissions (including from SEWPAC), along with the recent Senate inquiry on approval powers, all provide evidence to the contrary (see below). This concern is compounded by recent Coalition announcements of plans to 'establish a one-stop-shop for environmental approvals and dramatically simplify the approvals process... while maintaining environmental standards.'<sup>73</sup>

As noted under chapter 7, instead of recommending increased bilateral accreditation of assessment and approval processes, the draft report should first call for significant legislative reform to bring state assessments up to reliable and equivalent standards; and recommend institutional reform to independently verify that equivalence. These should be prerequisites to any further progression of assessment bilaterals.

*Approval* powers for all matters of national environmental significance should remain with the Australian Government, including for the reasons outlined below.

<sup>72</sup> Productivity Commission draft report, p 188. The five steps include: increasing federal accreditation of state assessment processes; strengthening State and Territory approval processes; a targeted approach to initial bilateral approval negotiation (urban areas, good information); monitoring of implementation progress by the COAG Reform Council; and careful design of bilateral approval negotiation process (draft report, p 17)

<sup>73</sup> The Hon Tony Abbott and the Hon Greg Hunt, 'The Coalition's policy for a one-stop-shop for environmental approvals', joint press release, 26 June 2013.

### **No reliable evidence of a public benefit from transferring federal approval powers**

The draft report notes SEWPAC's comments that negotiation of bilateral approval agreements would have resulted in more complex regulatory systems (p 187). In addition to our strong objections to delegating federal approval powers, ANEDO agrees that approval bilaterals are unlikely to deliver the efficiency savings sought by the mining industry and elements of the major development sector. There are sounder investments to be made in law reform and agency resourcing at state and federal levels, to improve the effectiveness and environmental protections in state DAA systems, and implement the Hawke Review respectively. This view is also reflected in the recent Senate Committee Inquiry into an EPBC Amendment Bill to retain federal powers.

Over the past 30 years, and more so with the passage of the EPBC Act in 1999, Australian communities have placed significant reliance and trust in successive federal governments to protect matters of national environmental significance. Given this responsibility, ANEDO submits that there is no reliable evidence that delegating approval powers to the States will result in a benefit to the Australian community. In particular:

- 1) there is no empirical evidence of unnecessary environmental regulatory burden for *any* development as a result of concurrent federal and State approval processes.
- 2) there is no evidence that the use of bilateral approval agreements would reduce time and costs associated with project assessment (indeed the evidence is to the contrary).
- 3) evidence shows that adoption of bilateral approval agreements would lead to a lowering of environmental standards and thus have a negative impact on the environment.

Each of these is discussed below.

### **No evidence of unnecessary regulatory burden from concurrent federal/state assessment; no evidence that approval agreements would reduce time and costs**

In a recent inquiry into the EPBC Act, the Senate Standing Committee on Environment and Communications (**Senate Committee**) did not support the transfer of federal approval powers to State Governments via approval bilateral agreements. The Committee's findings were based on evidence presented to it by 175 submitters including the Business Council of Australia, Minerals Council of Australia, Australian Chamber of Commerce and Industry, the Queensland Premier, and SEWPAC.

The Senate Committee made the following statements:

- *...the committee was presented with no empirical evidence to substantiate claims that Commonwealth involvement was hampering approval processes*
- *The committee rejects the claims made by business interests that Commonwealth powers of approval are the cause of inefficiencies, delays, and loss of income to project proponents.*<sup>74</sup>

The Senate Committee also stated that there was no evidence that existing arrangements were imposing unreasonable cost on industry, or that approval bilateral agreements would improve business efficiency. The Committee strongly concluded that federal approval powers should be retained by the Commonwealth.

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<sup>74</sup> Senate Environment and Communications Legislation Committee, *Report on Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013, p. 26

As our previous submission explains, the April 2012 COAG proposal to adopt bilateral approval agreements was ill-conceived and not based on proper understanding of what a transfer of approval powers to States would entail. As SEWPAC itself noted, having thoroughly investigated the proposal alongside the Department of the Prime Minister and Cabinet, adoption of bilateral approval agreements would *not* result in any simplification of the regime, and in fact would add to the complexity – as each State overlaid their own approval processes onto the federal system.<sup>75</sup>

### **Evidence that bilateral approval agreements would lower environmental standards**

The Senate Committee also found that the use of bilateral approval agreements would weaken environmental standards due to the inability of State governments to comply with federal standards, and the need to retain national oversight of these important functions. For example, the Committee stated:

*international obligations compel the Commonwealth to retain its powers for approving matters of national environmental significance in order to deliver strong national coordination and control to protect Australia's biodiversity, to reduce habitat loss and land degradation and to protect the nation from biosecurity risks*<sup>76</sup>

The Committee also found that de-funding of environment departments by a number of State Governments meant that environmental assessments would suffer.

### **The misunderstanding surrounding 'duplication'**

With regard to the issue of so-called 'duplication' of State and federal environmental assessments, we believe that much of the discussion about duplication reflects a misunderstanding of the State/federal situation. Contrary to industry claims and some media reports, State and federal environmental regulation is not duplicative; instead, environmental regulation by both State and Australian governments is part of the shared responsibility for the environment set up by the 1992 *Inter-Governmental Agreement on the Environment*. Australian and State governments have responsibility for different aspects of environmental protection. In particular:

- 1) Federal regulation considers the impacts on the *nationally significant environmental matters* set out in the EPBC Act. A number of these matters do not come within State considerations at all.
- 2) Federal assessment considers those matters from the perspective of the *national interest*, and Australia's *international obligations*. These considerations are not part of State assessments at all.

Federal environmental regulation therefore provides a critical role in Australia's national environmental protection regime and achieving our international obligations.

In supporting a strong, continuing role for the Australian Government in major project assessment and approval, ANEDO is not in favour of 'duplication' – rather we support the continuation of shared responsibilities between State and federal governments.

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<sup>75</sup> SEWPAC stated: "...significant challenges emerged in developing approval bilateral agreements that provide consistency and certainty for business, and assurance to the community that high standards will be met and maintained. Consequently, approval bilateral agreements are not being progressed until these challenges can be met by states and territories." Senate Environment and Communications Legislation Committee, Report on *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013, p. 11.

<sup>76</sup> Senate Environment and Communications Legislation Committee, Report on *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013, p. 26

## **Responsibility for making approval decisions**

### **Draft PC recommendation 8.5**

*Ministers should be the decision makers for major project primary approvals. Governments should consider whether this is better achieved through administrative or legislative means. Guidelines should be established as to what types of decisions Ministers can delegate.*

#### **ANEDO position:**

- ANEDO is more concerned with the safeguards around decision-making processes (best available information, public participation, transparency, independent assessment, accountability and oversight) than with who makes a particular decision.
- However, the NSW experience under former 'Part 3A' damaged confidence in major project decision making, particularly as it concentrated power in the Minister and Planning Department, and limited community participation, including recourse to courts.
- The argument that ministerial decisions are 'democratically accountable' (see p 199) may be of limited assistance regarding decisions on individual projects, and is also undermined if federal approval powers are put in the hands of State ministers.

## **Improving the decision making process**

### **Draft PC recommendation 8.6:**

*Governments should publish the process that decision makers need to follow when making approval decisions, including:*

- *the factors that decision makers need to take into account when reaching decisions*
- *how to consult with other decision makers, agencies and interested parties and take account of community concerns.*

#### **ANEDO position:**

- ANEDO strongly agrees that governments should provide transparent and accessible information on decision making processes, considerations and consultation processes.
- The draft recommendation could clarify that decision making processes and criteria should be legislated for improved clarity, certainty, consistency and public confidence.

### **Draft PC recommendation 8.7:**

*Decision makers should be required to publish statements of reasons (including identification of the risks being mitigated) for their approval decisions and conditions for all major projects.*

#### **ANEDO position:**

ANEDO strongly supports the public provision of statements of reasons by decision makers. Such statements should be required to follow a prescribed format, and this should include requirements to publish all information that informed the decision-maker. Where it is considered appropriate to withhold particular information, this should be subject to a prescribed public interest test modelled on Freedom of Information laws.

## Review and appeal of regulatory decisions (draft ch 9)

### What reviews should be allowed?

#### Draft PC recommendation 9.1:

*Judicial review is appropriate for major project primary approval decisions where a Minister is the decision maker. For decisions not made by a Minister, including those that are deemed because a Minister has not made a decision, limited merits review is appropriate. Where necessary, jurisdictions should amend their legislation to allow judicial review of ministerial decisions.*

#### ANEDO position:

- ANEDO strongly supports equitable third party merits review and judicial review rights for major projects – *including* where the Minister is the decision maker.
- Third party appeal rights help to hold decision-makers accountable, improve the quality of decisions, reduce corruption risks, provide access to justice for affected communities, and promote public confidence in decision making generally.
- Many jurisdictions prevent judicial review and third party enforcement of laws in relation to major infrastructure projects. ANEDO supports judicial review and enforcement rights in such circumstances.

ANEDO welcomes the Commission's discussion of different perspectives on appeal rights in Chapter 9, including important contributions to transparency and accountability.<sup>77</sup> As previously submitted, appeal rights are a fundamental access to justice issue, 'an important check on executive government',<sup>78</sup> and a source of community mistrust in current planning systems.<sup>79</sup>

However, the draft report's discussion focuses almost exclusively on 'third party' merit appeal rights (see for example, Table 9.1). This overlooks the broader context – that the vast majority of merit appeals are lodged by development proponents rather than third party objectors.<sup>80</sup> It should also be noted that:

- merit appeal rights are available to proponents in a much wider range of circumstances than for third party community members;
- in most jurisdictions appeal rights are more limited for major projects, or their exercise may be subject to ministerial discretion; and
- the vast majority of major project applications are approved (for example, 98% in NSW<sup>81</sup>), which means that limiting appeal rights disproportionately affects objectors.

These factors have led to considerable public concern about the equity of appeal rights.

We note that industry submissions cited in Chapter 9 ignore, and often dispute, the public interest and access to justice benefits of appeal rights that ANEDO and others

<sup>77</sup> See further **Attachment B** to ANEDO's previous submission on the need for, and benefits of, equitable merit appeal and judicial review rights.

<sup>78</sup> ICAC (NSW), *Anti-corruption safeguards and the NSW planning system* (2012), p 22:

*The limited availability of third party appeal rights under the EP&A Act means that an important check on executive government is absent. [These] rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur...*

<sup>79</sup> See EDO NSW, Submissions on NSW Government Planning Green Paper and White Paper (part 9), available at [http://www.edo.org.au/edonsw/site/planning\\_reforms.php](http://www.edo.org.au/edonsw/site/planning_reforms.php).

<sup>80</sup> 97-99% for local development appeals in NSW in recent years. See Department of Planning, Local Development Monitors: <http://www.planning.nsw.gov.au/performance-monitoring>. Statistics for major projects across jurisdictions are more difficult to find, due to limited and inconsistent reporting and definitional issues.

<sup>81</sup> For example, the NSW Department of Planning reported a 98% approval rate in the Major Development Monitor 2008-09 (119 of 121 DAs); and 2009-10 (138 of 140).

have documented in previous submissions.<sup>82</sup> However, it is important to remember that each of these cases has raised significant public interest matters, clarified what laws mean in practice, and provided essential access to justice for affected communities. The NSW Independent Commission Against Corruption (**ICAC**) agrees that third party appeal rights provide an important check on executive power, and in doing so, reduce corruption risks.<sup>83</sup>

Some submissions (draft report pp 213-15) have argued that third party merits appeal rights should be removed on the basis such appeals are rarely successful. ANEDO reiterates that although third party rights are very rarely exercised, the additional scrutiny promotes better decision making and accountability.<sup>84</sup> In addition, these benefits accrue despite the fact that third party appeals rarely overturn major project approvals. As noted above, merit appeals by local communities often result in better and clearer conditions, rather than a refusal. Such outcomes can provide a compromise that accommodates the interests of both developers and communities, following an arms-length appraisal.

Interestingly, the opposite argument is also being used against appeals – that the recent *success* of some communities exercising appeal rights (merits and judicial review) is a reason to curb access to justice. Rare as they are, some recent high-profile court refusals that have overturned government decisions – such as the Warkworth mine and Berrima Colliery expansions in NSW – have raised important issues for the integrity of state assessment and approval processes. These cases have thrown a spotlight on the adequacy and scrutiny of proponents’ economic and scientific assessments, and how competing public interests are resolved (often at the expense of rural communities).<sup>85</sup>

In Western Australia, the Supreme Court recently upheld an appeal questioning the legality of agency approvals for the James Price Point Gas Hub. This case raised significant governance issues in relation to conflicts of interest of assessment and approval bodies, and the rigour of state ministerial approvals.<sup>86</sup>

The existence of court appeal rights is likely to influence corporate behaviour as much as decision makers’ behaviour (even if appeal rights are not exercised). For example, it is in proponents’ interests to consult early with communities, listen to them, and address all reasonable concerns. The inverse is also true. Reducing or limiting third party appeal rights reduces the incentive for proponents to address communities’ legitimate concerns, because the proponent is confident that their project approval is beyond challenge.

Overall, while certain views contend that third party appeal rights create ‘uncertainty’, ANEDO is strongly of the view that such rights promote access to justice, expose poor procedures that may otherwise go undetected, and encourage better and more accountable decision-making. The absence of such rights would significantly reduce

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<sup>82</sup> See, for example, p 16 and **Attachment B** to ANEDO’s previous submission on the need for, and benefits of, equitable merit appeal and judicial review rights.

<sup>83</sup> ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 15.

<sup>84</sup> See, for example, N. Hammond-Deakin and E. Johnson (EDO NSW), ‘Merits appeal rights in NSW: Improving environmental outcomes’ (2012) 92 *IMPACT Journal*, 6-10.

<sup>85</sup> See, for example, *Bulga Milbrodale Progress Association Inc v Minister for Planning & Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, at 450-496. In particular:

[451] *The [Input-Output] analysis is a limited form of economic analysis... The deficiencies in the data and assumptions used affect the reliability of the conclusions.... More fundamentally... the IO analysis does not assist in weighting the economic factors relative to the various environmental and social factors...*

[452] *The [Benefit Cost Analysis], and the Choice Modelling on which the BCA depends, are also deficient...*

<sup>86</sup> See for example, ABC News, ‘Supreme Court chief justice rules against controversial Kimberley gas hub approvals’, 19/8/2013, at <http://www.abc.net.au/news/2013-08-19/supreme-court-delivers-decision-over-gas-hub-approvals/4896184>.

oversight and quality assurance of decision making, and allow significant decisions to be made on the basis of deficient information or processes. In turn, the costs of poor decision-making are largely borne by communities, governments and the environment, instead of the proponent of the profitable activities concerned.

### **Procedural matters**

#### **Draft PC recommendation 9.2:**

*Standing to initiate judicial or merits reviews of approval decisions should be limited to:*

- *proponents*
- *those whose interests have been, are, or could potentially be directly affected by the project or proposed project, or*
- *those who have taken a substantive interest in the assessment process.*

*In exceptional circumstances, the review body should be able to grant leave to persons other than those mentioned above to bring a review application if a denial of natural justice would occur if they were not granted leave.*

#### **ANEDO position:**

- ANEDO supports *broad standing for merit appeals* (such as in draft recommendation 9.2); and *open standing for judicial review and enforcement*, including for major projects (see also 10.3 on third party enforcement).
- Barriers to standing in judicial review add to costs and distract from substantive issues. Costs risks in judicial review and enforcement proceedings continue to limit access to justice for 'third party' community members (see information request 9.1).

ANEDO strongly supports legal standing for third parties such as community members and conservation groups with an interest in a major project or decision. The final report should make separate recommendations for merits and judicial review standing, as they raise some distinct issues, and their legal treatment varies across jurisdictions.

### **Merits review**

In relation to *merits review*, ANEDO strongly supports broad standing. At a minimum, this should reflect that in draft recommendation 9.2. Broad standing should be retained, and where necessary expanded for community members in relation to major projects.<sup>87</sup>

As previously documented, third party merit appeal rights for community members clearly do *not* result in a deluge of unmeritorious cases coming before the court. While appeal rights on either side are exercised in very few cases (less than 1% in NSW),<sup>88</sup> developers bring the vast majority of merit appeals (97-99% in the NSW LEC).<sup>89</sup>

Limits on third party merits review is common for major projects in many jurisdictions. This raises a range of equity and access to justice issues. Removal of merits review for major projects also tends to disadvantage community objectors more than proponents, because the vast majority of major projects are approved (which satisfies the proponent).

<sup>87</sup> Even if standing for *commercial competitors* is narrowed on the basis of perceived misuse.

<sup>88</sup> 0.57% (indicative) as a proportion of development determinations. See Department of Planning, *Local Development Performance Monitoring 2010-11*, p 80, Table 6-1, at <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=29mGD0zKm9c%3d&tabid=74&language=en-AU>.

<sup>89</sup> Separate statistics on major project appeals are very difficult to find across Australian jurisdictions. Using NSW local development as an indicator, in 2010-11, there were 378 developer appeals and only four objector appeals. Department of Planning, *Local Development Performance Monitoring 2010-11*, pp 80-81.

In South Australia, third parties cannot apply for merit appeal of major projects under the *Development Act 1993* (SA). There are also no third party merit appeal rights for major projects, or otherwise, in Western Australia. Victoria generally gives standing to third party objectors, but there is no merits review of approval decisions or any other decision under the *Major Transport Project Facilitation Act* (Victoria's fast-tracking legislation).

In the ACT, third party standing is limited to 'eligible entities' to apply to ACAT for review of a development approval decision under the 'impact track'.<sup>90</sup> In Tasmania, for a Project of State Significance, any person who makes a representation is entitled to appear at a Planning Commission hearing.<sup>91</sup> However, there is no right to appeal against (or seek judicial review of) the Minister's decision in relation to a Project of State Significance.

In NSW, merit review rights for private State Significant Development decisions are removed where the Planning Assessment Commission holds a formal public hearing (which can be ordered at the discretion of the Planning Minister). Former Part 3A also removed merit review rights where a broad-brush 'concept plan' had been approved. ICAC has suggested that third party merits appeal rights should be expanded to additional categories of private development, including projects that are significant and controversial (for example, large residential flat developments).<sup>92</sup> The NSW Government has however rejected this recommendation in its Planning Bill 2013.

### **Judicial review**

For third party *judicial review* proceedings (and enforcement – see chapter 10), there is a strong rationale to expand access to allow *open standing*. This is because there is a general public interest in ensuring that decision makers lawfully comply with procedures, and that development complies with the law and development conditions once it has been approved. Open standing also provides a pressure valve for regulators whose resource constraints mean they cannot prioritise every worthy case.

Open standing for civil proceedings has been recognised as leading practice, and widely supported by a range of parties, including the NSW Independent Planning Review Panel.<sup>93</sup>

ANEDO notes the significant barrier that costs pose to community access to justice in response to information request 9.1 below. A further danger of limiting standing for community members is that scarce community resources must be first spent to demonstrate standing, before proceeding to the issue of whether the law has been breached.

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<sup>90</sup> *Planning and Development Act 2007* (ACT) s 408. A third party is an 'eligible entity' if they have made a representation in relation to the application, and approval of the development application may cause the third party to suffer material detriment. *Planning and Development Act 2007* (ACT) Schedule 1 items 6 and 12.

<sup>91</sup> For a standard project any person who makes a representation is entitled to either appeal against the decision to the Resource Management and Planning Appeal Tribunal ()

<sup>92</sup> Other suggested categories include development that represents a significant departure from existing development standards; and development that is the subject of voluntary planning agreements. See ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 15.

<sup>93</sup> T. Moore & R. Dyer, Independent Review Panel, *The Way Ahead for Planning in NSW*, rec. 120.

**PC information request 9.1:**

*The Commission seeks feedback on the advantages and disadvantages of the current legal costs arrangements in each jurisdiction. To what extent do the current provisions allowing the award of legal costs against unsuccessful third parties impact access to justice, or the extent to which vexatious litigation occurs?*

**ANEDO position:**

- ANEDO strongly supports the improvement of existing costs arrangements for third parties. Costs should not act as an artificial barrier to access to justice, especially where proceedings are demonstrated to meet a 'public interest' test.
- Merits review, judicial review and third party enforcement should be 'own costs' proceedings by default.
- At a minimum, courts in all jurisdictions should be empowered to grant 'no costs' or 'own costs' orders to protect public interest applicants.

ANEDO strongly supports more equitable costs arrangements to protect third party community members seeking access to justice through the courts.<sup>94</sup> The issue of legal costs should be considered in the context that there are very few 'low cost' options to protect the environment or test environmental laws in the public interest. In particular:

- legal aid is very limited for civil matters generally (or may not be available at all for environmental protection<sup>95</sup>); and
- law firms with pro bono programs may face conflicts with their traditional client base if they take on environmental matters.

Most people therefore rely on government regulators (which may have approved the development in the first place) to be able and willing to respond to complaints of environmental damage or breach of conditions. Open standing provisions are a strong step towards third party access to the courts. However, this can be hindered by the risks imposed by costs rules. Communities' access to justice still relies either on private funds, or capacity and expertise of not-for-profit public interest legal centres, like Environmental Defenders' Offices, and a network of experts and barristers willing to do *pro bono* work.

Access to justice is a critical issue in relation to major projects because of their sizable environmental, social and economic impacts; the imbalance of resources between governments and project proponents on one hand, and affected community members on the other; and the fact that people from lower socio-economic backgrounds and areas are likely to have less access to legal services and expertise, less formal education, and are often subject to more significant threats of environmental degradation. This is one reason ANEDO offices dedicate significant resources to serve rural and regional areas.

**NSW**

In NSW, despite a number of positive factors in favour of community access to the Land and Environment Court (**LEC**), the threat of an adverse costs order is one of the greatest deterrents bringing public interest proceedings.<sup>96</sup> Importantly, different classes of action in the LEC attract different costs rules. In particular, the default rule in 'class 1'

<sup>94</sup> See, for example, ANEDO, *Submission to the Administrative Review Council on Judicial Review in Australia – Consultation Paper* (July 2011), at <http://www.edo.org.au/policy/110701arc.pdf>.

<sup>95</sup> For example, legal aid for environmental cases in NSW was removed in 2013. See Jeff Smith, 'Legal Aid cuts threaten environmental justice' (June 2013), EDO NSW blog, at <http://edonsw.wordpress.com/2013/06/07/httpedonsw-wordpress-com20130607legal-aid-cuts-threaten-environmental-justice/>.

<sup>96</sup> See, for example, L. Ogle, "Community Experience of the Court", *Promises, Perception, Problems and Remedies, Land and Environment Court and Environmental Law 1979-1999*, Conference proceedings, p 26.

*merits review* promotes access to justice by requiring each party to pay their own costs (unless some other costs order should be made).<sup>97</sup>

By contrast, in ‘class 4’ LEC proceedings (including judicial review and third party civil enforcement), the default rule is that ‘costs follow the event’. This presents a high risk and a barrier to third parties seeking to challenge a legal error, or enforce a breach of the law. Community groups face the prospect of paying the legal bills of large companies and government agencies if they are unsuccessful. NSW courts have discretion to depart from the normal costs rules under the LEC Rules or the Uniform Civil Procedure Rules (UCPR), including for cases brought in the public interest. However, this discretion is rarely exercised. The procedure is uncertain, not straightforward, and the courts often require ‘something more’ than showing that the case was brought in the public interest.<sup>98</sup>

As in other jurisdictions, a range of costs risks remain a barrier to access to justice in NSW. For example, in *Anderson* (2008),<sup>99</sup> two traditional owners who fought for many years to protect their cultural heritage were denied a public interest costs order. The court held that rule 4.2 of the *LEC Rules*, introduced to improve access to justice for public interest cases, did not displace the usual order as to costs.<sup>100</sup> In *Illawarra Residents for Responsible Mining Inc v Gujarat NRE Coking Coal Ltd*,<sup>101</sup> a residents group sought to challenge the legality of longwall mining alleged to be outside the original approval area. The mining company applied for a \$75,000 bank guarantee from IRRM as security for costs. The court upheld Gujarat’s motion, but reduced the sum to \$40,000. As IRRM was not able to comply with this requirement, the residents group had to abandon their case in December 2012.

EDO NSW has argued that public interest litigants need clearer and simpler laws, and a shift of cost risks in a way that promotes equitable access to justice, irrespective of financial means. EDO NSW has previously made six key recommendations for costs rules reform, to deal with barriers to access to justice for public interest litigants.<sup>102</sup>

**Case study – Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 3) [2013] NSWLEC 152<sup>103</sup>**

In 2012, EDO NSW represented a local community group who took judicial review action in the LEC and sought to prevent exploratory CSG drilling in the sensitive Fullerton Cove area. Fullerton Cove is significant for its natural and cultural heritage, and the proposed pilot drilling site was adjacent to the Hunter Estuary National Park and the Ramsar-listed Hunter Estuary Wetlands.

The community group was successful in obtaining an interim injunction, but lost the substantive case (which the Court nonetheless acknowledged to be in the public interest). The group had

<sup>97</sup> In NSW, legal costs for planning and environmental cases rely on the *Uniform Civil Procedure Rules 2005* (UCPR) under the *Civil Procedure Act 2005* (NSW) (see for example, rule 42.1); and the *Land and Environment Court Rules 2007*.

<sup>98</sup> This derives from the statutory requirement in the UCPR, rule 42.1 (that costs generally follow the event unless it appears to the Court that another order should be made). See *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 3)* [2010] NSWLEC 59 at [53]. In the NSW Court of Appeal, see *Hastings Point Progress Association Inc v Tweed Shire Council (No 3)* [2010] NSW CA 39 and *Minister for Planning v Walker (No 2)* [2008] NSWCA 334.

<sup>99</sup> *Anderson on behalf of Numbahjng Clan within the Bundjalung Nation v NSW Minister for Planning (No 2)* [2008] NSWLEC 272.

<sup>100</sup> See LEC Rules 2007, rule 4.2 – Proceedings brought in the public interest, available at [http://www.austlii.edu.au/au/legis/nsw/consol\\_reg/laecr2007323/s4.2.html](http://www.austlii.edu.au/au/legis/nsw/consol_reg/laecr2007323/s4.2.html).

<sup>101</sup> [2012] NSWLEC 259. See [http://www.edo.org.au/edonsw/site/casework\\_key\\_past.php#illawarra](http://www.edo.org.au/edonsw/site/casework_key_past.php#illawarra)

<sup>102</sup> See EDO NSW submissions to the NSW Law Reform Commission (2010-11), available at: [http://www.edo.org.au/edonsw/site/policy\\_submissions.php#caj](http://www.edo.org.au/edonsw/site/policy_submissions.php#caj).

<sup>103</sup> Judgement available at: <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmid=167148>. See further EDO NSW, ‘Current cases’, [www.edo.org.au/edonsw/site/casework\\_key.php#fullerton](http://www.edo.org.au/edonsw/site/casework_key.php#fullerton)

argued that the area's sensitivity and potential groundwater impacts called for a full Environmental Impact Statement under the *Environmental Planning and Assessment Act 1979* (NSW), instead of the limited Review of Environmental Factors relied upon by the Department of Trade and Investment (Mineral and Resources Division). While the initial injunction was lifted after the substantive proceedings, the mining company did not proceed with the drilling.

In submissions on whether the court should apply the usual costs rule (and require the community group to pay the company and the Department's costs), the Department pursued the community group for its costs, despite the group arguing for no costs order as it had brought the case on public interest grounds.

In September 2013, the LEC rejected the Department's application for costs, with Justice Pepper stating, 'In my opinion, the litigation brought by Fullerton to protect Fullerton Cove epitomises the very concept of litigation properly brought in the public interest.'<sup>104</sup>

The Court strongly rebuked the Department for pursuing a costs order, and instead ordered the Department itself to pay the community group's fees for the costs hearing.

While the Fullerton Cove case was ultimately a vindication of community access to justice, the Department's pursuit of costs in these circumstances is concerning. It suggests that some agencies may use the threat of costs orders to dissuade legitimate public interest actions that may inconvenience significant industries – even though, as this case demonstrates, such actions allow more careful scrutiny of public decisions, greater accountability, and help to clarify the law. This case also highlights the potential power imbalance between the resources of the State and project proponents, and communities seeking to challenge decisions on legitimate legal grounds. Faced with significant costs risks, many communities would not show the same level of resolve.

## **Victoria**

In Victoria, *merits review* of planning decisions is available for third parties in the Victorian Civil and Administrative Tribunal (**VCAT**). As a general rule, VCAT is a 'no costs' jurisdiction where each party bears its own costs. Several mechanisms exist to prevent vexatious litigation. For example, VCAT has the power to award costs where it is satisfied that a party has conducted the proceeding in a way that unnecessarily disadvantaged the other party, such as by bring vexatious litigation or unreasonably prolonging the case.<sup>105</sup> Additional provisions under planning laws allow VCAT to order compensation if a party brings a case vexatiously or frivolously, or to gain a financial advantage.<sup>106</sup> Although VCAT is willing to use these provisions if necessary, they have been used very rarely.<sup>107</sup> The limited use of these provisions is evidence of the lack of vexatious litigation that does occur.

For third party applicants seeking *judicial review* in Victoria, the 'two way costs rule' applies whereby the unsuccessful party bears the successful party's costs. In EDO Victoria's experience, the threat of having costs awarded against them is a real barrier to a number of clients who seek to litigate on public interest grounds. On at least four occasions in the past two years, EDO Victoria clients have not gone ahead with cases that had strong public interest grounds and good prospects of success, due to concerns over costs.

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<sup>104</sup> Further, the Court held (at [48]) that the Department's cross-examination:  
*...only served to reinforce the genuineness of Fullerton's contention that it had commenced the litigation in the public interest in order to protect Fullerton Cove from what it perceived to be an inadequate assessment of the potential adverse consequences of coal seam gas exploration in that environmentally sensitive area.*

<sup>105</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 109.

<sup>106</sup> *Planning and Environment Act 1987* (Vic), s 150(4).

<sup>107</sup> J. Pizer, *Pizer's Annotated VCAT Act* (4<sup>th</sup> ed), p 548.

For example, in one instance two individuals sought to challenge the decision by Victoria Police to enter into a memorandum of understanding (**MOU**) with private companies to share information about people protesting against the Victorian desalination plant. The individuals did not proceed with the challenge because they were not able to obtain a protective costs order and they could not bear the costs risks. The case would have raised important public interest issues, including the appropriateness of the MOU and the impacts of police behaviour on the right to privacy and freedom of assembly.

## **Queensland**

There is no third party merits or statutory judicial review of approval decisions for Queensland's largest projects, which are declared as requiring state 'coordinated' environmental assessment under the *State Development and Public Works Organisation Act 1971* (Qld). As third parties concerned about the public interest have no clear access to justice on these projects, the issue of costs does not even arise; they can only make public submissions at various stages of the EIS process.

For non-'coordinated', but still potentially major development projects, third parties who have made public submissions on certain categories of applications can seek a merits review of development approvals in the Queensland Planning and Environment Court (**QPEC**). However, amendments to the *Sustainable Planning Act 2009* (Qld) (**SPA**) in November 2012 changed the longstanding position from parties generally bearing their own costs, to costs now being in the QPEC's discretion.<sup>108</sup> While costs do not necessarily follow the event, EDO Qld clients are increasingly reluctant to bring proceedings given the increased risk of an adverse costs order if they are unsuccessful. This change was not justifiable on the need to reduce vexatious litigation, which was infrequent and able to be addressed under the QPEC's previous costs powers.<sup>109</sup>

Like the QPEC, the Queensland Land Court (**QLC**) can conduct merit reviews involving environmental issues, but in relation to the impacts of proposed mining or petroleum projects. Unlike the QPEC, however, parties still bear their own costs in the QLC unless ordered otherwise.<sup>110</sup> This has allowed access to justice in a number of major projects involving public interest concerns,<sup>111</sup> while still allowing costs orders in appropriate cases.<sup>112</sup>

## **South Australia**

In South Australia, third parties cannot apply for merits review of major projects under the *Development Act 1993* (SA). For applicants seeking *judicial* review of major projects, the usual costs rule applies in the Supreme Court – meaning the losing party usually pays the other party's legal costs. For example, the lack of merits review and the existence of the usual costs order were real obstacles for Aboriginal elders, represented by EDO SA, seeking to challenge the South Australian Government's approval of the Olympic Dam mine expansion. While this development had significant economic benefits and was strongly supported by the SA Government, there were also a range of community concerns around intergenerational environmental impacts, public engagement, and the assessment and approval process for such an enormous project. Whilst a judicial review

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<sup>108</sup> The court has range of considerations in its discretion to order costs: section 457(2) *Sustainable Planning Act 2009* (Qld).

<sup>109</sup> See EDO Qld's submission at: <http://www.parliament.qld.gov.au/documents/committees/SDIIC/2012/05-Sustainable-Planning/submissions/033-EnvironmentalDefendersOffice.pdf>.

<sup>110</sup> Section 34 of the *Land Court Act 2000* (Qld).

<sup>111</sup> See, for example, *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd* (No 2) [2012] QLC 67.

<sup>112</sup> For example. *Dunn v Burtenshaw* (2010) 31 QLCR 156.

application was initially lodged in the Supreme Court, ultimately it was withdrawn due to the risk of costs and other factors.

## **Tasmania**

For appeals against standard planning approvals under the *Land Use Planning and Approvals Act 1993* (Tas), there is a statutory presumption that each party will bear their own costs. The Resource Management and Planning Appeal Tribunal can depart from that position and award costs against an unsuccessful party if satisfied that it would be “fair and reasonable” to do so, having regard to statutory criteria.<sup>113</sup> Those criteria include whether the appeal was frivolous and vexatious or otherwise lacked merit, or if the actions of the unsuccessful party had unnecessarily prolonged the appeal. Costs are awarded in only a small proportion of cases.

For projects which have been declared to be Projects of State Significance under the *State Policies and Projects Act 1993* (Tas), there are no provisions for costs to be awarded in respect of Planning Commission hearings. On one hand, this encourages broad public participation. On the other hand, it also deprives successful third parties of the opportunity to recover their expenses. For example, community group, Save Ralphs Bay Inc, estimated that it incurred costs in excess of \$80,000 in presenting evidence to the Tasmanian Planning Commission in relation to a proposed canal estate development at Lauderdale, which both the Commission and Government ultimately rejected.<sup>114</sup> However, the community group were not able to apply for any of their costs to be recovered from the developer. In some instances, including the Lauderdale canal estate proposal, the Tasmanian Government has entered into an agreement requiring the developer to cover assessment costs incurred by the Government, but failed to enforce the agreement.

### **Case study – Lauderdale Quay major project proposal, Tasmania**<sup>115</sup>

In 2008-2009, EDO Tasmania represented a community group, Save Ralphs Bay Inc, in Commission hearings regarding a 477-lot canal estate housing and marina development proposed by Walker Corporation. The development, the first canal estate to be proposed in Tasmania, was declared a Project of State Significance. There was widespread community opposition to the proposal on a range of grounds, including development of a Conservation Area, loss for critical feeding and roosting habitat for resident and migratory shorebirds, risks to the habitat of the endangered Spotted Handfish, disturbance of contaminated sediments, denitrification, visual impacts and lack of strategic planning. After four weeks of detailed hearings, the Planning Commission concluded that the proposal was ‘inherently unsustainable’ and recommended that the project be refused. In June 2010, the Premier accepted the Commission’s recommendation and rejected the proposal.

## **ACT**

In the ACT Supreme Court and Magistrates Court, awarding of costs is at the court’s discretion.<sup>116</sup> The defendant can apply to the court to order that the plaintiff give security for costs.<sup>117</sup> To order security for costs the court must be satisfied that one of the situations listed in rule 1901 are present,<sup>118</sup> including whether ‘the justice of the case

<sup>113</sup> See the *Resource Management and Planning Appeal Tribunal Act 1993*, s 28(3).

<sup>114</sup> The Commission’s report and recommendations is available at [http://www.planning.tas.gov.au/\\_data/assets/pdf\\_file/0012/152400/Lauderdale\\_Quay\\_Development\\_Proposal\\_-\\_Integrated\\_Assessment\\_Report\\_.pdf](http://www.planning.tas.gov.au/_data/assets/pdf_file/0012/152400/Lauderdale_Quay_Development_Proposal_-_Integrated_Assessment_Report_.pdf)

<sup>115</sup> A detailed overview of the project and its assessment is available in this article: J MacDonald and J Feehely. 2010. “Ralphs Bay Saved: A Tasmanian Story”. *National Environmental Law Review* 2&3, p38.

<sup>116</sup> *Court Procedure Rules 2006* (ACT) r 1721.

<sup>117</sup> *Court Procedure Rules 2006* (ACT) r 1900.

<sup>118</sup> *Court Procedure Rules 2006* (ACT) r 1901.

requires the order to be made'.<sup>119</sup> In deciding whether to order security for costs, the court may consider a variety of factors including 'the means of the people standing behind the proceeding', 'whether an order for security for costs would stop or limit the progress of the proceeding', and 'whether the proceeding involves a matter of public importance'.<sup>120</sup>

In the ACT Civil and Administrative Tribunal (**ACAT**), the presumption is that parties are to bear their own costs, with some exceptions.<sup>121</sup> For example, a party may be ordered to pay the reasonable costs of the other party if they cause unreasonable delay or obstruction.<sup>122</sup> If it is in the interests of justice to do so,<sup>123</sup> a party may be ordered to pay the costs, or part of the costs of the other party if they contravene an order of the ACAT.<sup>124</sup> In relation to the review by the ACAT of some decisions, including those made under the *Planning and Development Act 2007* (ACT) which governs approval of development applications for major projects, the ACAT may order the applicant to pay the reasonable costs of the other party if the application is frivolous or vexatious.<sup>125</sup> If the ACAT decides in favour of the applicant, the other party may be ordered to pay the applicant's filing fee.<sup>126</sup>

## Monitoring of compliance and enforcement (draft ch 10)

### *Clarity of regulators' responsibilities and prioritisation of matters*

#### **Draft PC recommendation 10.1 (p 243):**

*Governments should ensure that agency responsibility and strategies for monitoring of compliance and enforcement with project conditions are clearly specified and communicated to stakeholders.*

#### **Draft PC recommendation 10.2 (p 250):**

*Regulators should produce an annual major projects compliance statement that reviews monitoring and compliance activities and identifies redundant or ineffective conditions on approvals.*

#### **ANEDO position:**

- Environmental assessment and planning laws must be periodically and independently reviewed to assess whether they are improving or maintaining environmental values, and whether the legislation is achieving ecologically sustainable development.
- The final report could expand on the relationship of draft recommendation 10.1-2 above to draft recommendations 7.5 (institutional separation) and 7.6 (regulatory resourcing).
- Major project conditions, monitoring, enforcement and reporting needs much improvement. We note a range of further considerations for the final report, including:
  - in-depth examination and independent review of regulatory resourcing
  - assessment of environmental outcomes and targets in annual reports
  - develop and integrate tools for monitoring, data-sharing and sustainability indicators
  - compliance and enforcement statistics should be published in comparable forms.

<sup>119</sup> *Court Procedure Rules 2006* (ACT) r 1901(h).

<sup>120</sup> *Court Procedure Rules 2006* (ACT) rr 1902(1)(a),(h) and (i).

<sup>121</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(1).

<sup>122</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(2)(b).

<sup>123</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 49.

<sup>124</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(2)(c).

<sup>125</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(2)(d), s 32(1).

<sup>126</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(2)(a).

## **Post-approval monitoring, enforcement and resourcing**

ANEDO's previous submission (p 22) noted that a combination of factors is needed for effective compliance and enforcement, including:

- independent and comprehensive EIA, drawing on baseline environmental data;
- robust and enforceable conditions on licences and development consents;
- ongoing monitoring and oversight of project operations after approval;
- independent regulators with the powers, skills and resources to act on breaches;
- open and accessible court processes for communities to take enforcement action.

We recommended that the Productivity Commission identify compliance monitoring, enforcement and reporting as an essential area for improving major project regulation. ANEDO's recommendation further noted (p 23, emphasis added):

*Leading practices should include:*

- **independent audits** of project compliance with licensing and consent conditions, as well as the accuracy of EIA predictions;
- **accurate, transparent and accessible information**, pre- and post-approval;
- clear lines of **enforcement responsibility**, and accountability for performance;
- ongoing **monitoring** and **responsiveness to community reporting** of breaches;
- enduring **proponent responsibilities** for future impacts and rehabilitation goals;
- a **tiered enforcement framework** – to deter misconduct and ensure breaches result in proportionate punishment;
- a wider range of **innovative enforcement tools** for regulators, community and the courts, as found in some other environment and pollution laws;
- a shared commitment from industry and governments to **fund improved monitoring and enforcement** in order to do business safely and responsibly;
- options for **additional funding** of research, monitoring and enforcement activities, such as from royalties, licence fees or industry levies.

ANEDO welcomes the draft report's engagement with many of these issues, and resulting recommendations. With reference to the above, the final report could examine:

- evidence that regulatory resources are insufficient or have not kept pace with industry expansion (as noted under recommendation 7.6), with potential for further reductions;
- adequacy of proponents' performance and responsibility for environmental outcomes;
- adequacy of monitoring and responsiveness to community reporting of breaches;
- options to fund improved monitoring and enforcement, data quality and quantity.

Noting that the Productivity Commission may have limited capacity to address all of these issues in the present inquiry, ANEDO supports more in-depth examination, including a fulsome and independent review, of regulatory resourcing and capacity (see comments under 7.6).

Finally, to increase transparency, public confidence and awareness of enforcement, legislation should require enforcement authorities (such as departments and local councils) to:

- adopt and publish enforcement policies,
- publish all compliance data provided by proponents (online wherever possible)<sup>127</sup>
- publish data on complaints received and investigated, and
- report on the exercise of enforcement powers (with support and resourcing to do so), to be published regularly, in a consistent and comparable form.

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<sup>127</sup> For example, s 320(2) of the *Protection of the Environment Operations Act 1997* (NSW) states that 'The EPA or other regulatory authority may disclose monitoring data by publishing it in such manner as it considers appropriate.' The new Act should include provisions that maximise transparency.

## **Compliance case studies**

At **Attachment B** are two relevant case studies on compliance and enforcement issues – one on CSG in the NSW Pilliga region, and one in Queensland cases involving chemical concerns and breaches. At least two other significant incidents are noteworthy since the Commission’s draft report. First, major subsidence from licensed coal extraction beneath the Sugarloaf State Conservation Area in NSW, and botched remedial work which poured grout into waterways and ‘...resulted in damage to the vegetation, rock, soil, sand and stone within the ephemeral drainage channel’.<sup>128</sup> Second, a large inland oil spill in Queensland, where questions have been raised about regulatory resources.<sup>129</sup> These case studies and incidents reinforce the need for a combination of factors for effective compliance and regulation of major projects, as noted above.

## **Recommendations to improve monitoring and enforcement in the mining industry**

In its 2011 discussion paper on *Mining Law in NSW*, EDO NSW made nine recommendations to improve monitoring and enforcement.<sup>130</sup> While they were expressed to apply to the NSW mining industry, many are appropriate for major projects generally:

- i) *Initiate an **independent performance audit of compliance and enforcement activities** in relation to mining in NSW, including consideration of adequate resourcing. ...*
- ii) *Increase ongoing monitoring and **responsiveness to community reporting**, to identify breaches of conditions of mining operations.*
- iii) *Establish a process to independently **audit mining operators’ performance** against Environmental Assessment predictions, statements of commitment, Subsidence Management Plans and mine site rehabilitation.*
- iv) *Adopt a **tiered enforcement framework** for mining and planning legislation, to ensure breaches of mining approvals and conditions result in punishment that deters misconduct.*
- v) *Planning laws should give prosecutors and courts a **wider range of innovative enforcement tools** as in other environment and pollution laws.<sup>131</sup>*
- vi) *Provide the Planning Minister with **powers to suspend or revoke mining approvals** for breaches of conditions. In addition, establish a process for **landowners to apply** to revoke their consent to land access if mining operations breach conditions.*
- vii) *Increase **resourcing for relevant compliance and enforcement divisions** in order to improve rates of audits, investigations and prosecution.*
- viii) *Review the adequacy of **noise impact guidelines**.*
- ix) *Introduce **compulsory environmental bonds**.*

## **Planning and major project reports must monitor ‘triple bottom line’**

As ANEDO’s previous submission noted, there are inherent difficulties in measuring the efficiency and effectiveness of state planning systems, because jurisdictions are poor at

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<sup>128</sup> NSW Office of Environmental Heritage, ‘Direction to carry out remedial work’, 28/8/2013. See also *Sydney Morning Herald*, ‘Mine subsidence devastates Sugarloaf Conservation Area, 28/8/2013, at <http://www.smh.com.au/nsw/mine-subsidence-devastates-sugarloaf-conservation-area-20130828-2spuc.html>.

<sup>129</sup> ABC Radio National, ‘Greens claim Santos oil spill reveals “self-regulation gone mad”’, 12/6/2013, at <http://www.abc.net.au/radionational/programs/breakfast/oil-spill/4747030>.

<sup>130</sup> *Mining Law in NSW – Discussion paper*, part 3, available at [http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining\\_law\\_discussion\\_paper.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf).

<sup>131</sup> *These tools should include orders to pay investigation costs; undertake works for environmental benefit, including fund environmental organisations; complete audits, training and financial assurances; publicise offences or notify certain people; and remove any monetary benefit of the crime.*

integrating natural resource management (NRM) indicators, and at reporting on 'triple bottom line' outcomes.<sup>132</sup>

The COAG Reform Council's review of capital city strategic planning found that most Australian capitals (with the exception of Adelaide) have a poor record of monitoring and reporting on accountabilities, timelines and performance measures.<sup>133</sup> Even where governments commit to report on outcomes, social and environmental objectives and indicators are rarely referred to. Major projects reporting, in particular, tends to focus on project value and employment numbers generated, providing an incomplete picture of benefits and costs. This is contrary to best practice reporting principles.<sup>134</sup>

As ANEDO's previous submission noted, it is clear that our planning systems fail to cost or quantify environmental deterioration. Without meaningful measurement, monitoring and reporting, it is impossible to arrest such problems and ensure that the development of Australian industry is ecologically sustainable.

Governments across Australia have invested significant resources in information gathering, mapping and target-setting for environmental and NRM outcomes.<sup>135</sup> However, planning and major project legislation, and agency cultural factors, have failed to harness these investments by linking data and targets to effective triple-bottom-line reporting or environmental accounts.

ANEDO submits that regulators should be required to report on whether strategic environmental outcomes and targets are being achieved – including in relation to an overall objective of achieving ESD (see chapter 5). In addition, regulators should assess and report on how projects are applying *adaptive management* to suit changing environmental conditions and scientific updates; and *continuous improvement* in response to changing technology. At present, there is too little emphasis on verifying that predicted impacts turn out to be accurate, that mitigation is effective, or that major projects are applying best available technology to minimise adverse impacts on health, safety and environmental values like air, water and biodiversity.

While environmental accounts are not yet well established in Australia, there are initiatives underway at the federal level,<sup>136</sup> including as recommended by the Hawke Review of the EPBC Act, and by the Wentworth Group.<sup>137</sup> The Productivity Commission

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<sup>132</sup> One of ANEDO's 10 best practice principles is:

**Principle 10 – Monitoring and review**

*The efficacy of all environmental assessment and planning laws must be periodically and independently reviewed – to assess whether the relevant processes, implementation and decision-making are improving or maintaining environmental values, and whether the legislation is achieving ecologically sustainable development. There must also be specific legislative requirements for regular review of any accredited plan or policy.*

<sup>133</sup> COAG Reform Council, *Review of capital city strategic planning systems* (Dec. 2011), available at <http://www.coagreformcouncil.gov.au/reports/cities.cfm>. See 'Overview', criterion 9.

<sup>134</sup> See Audit Office on NSW, *Judging Performance from Annual Reports* (2000). The Office's Better Practice Principles include: *Objectives are clear and measurable; Focussing on results and outcomes; Discussion results against expectations; Reporting is complete and information; Explaining changes over time; Providing evidence of value for money and benchmarking; Discussing strategies, risks and external factors.*

<sup>135</sup> See, for example, NSW Natural Resources Commission, 'Statewide Targets', at <http://www.nrc.nsw.gov.au/WorkWeDo/StandardAndTargets/State-wideTargets.aspx>.

<sup>136</sup> See Australian Bureau of Statistics, 'Completing the Picture - Environmental Accounting in Practice' media release, 10 May 2012, at <http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbyReleaseDate/7F28835E079362EACA2579F900124A79?OpenDocument>.

<sup>137</sup> See *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act* (August 2011), recommendation 67 ('accepted in principle'), pp 109-110. See also Hawke, A. (2009), *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Final Report, October 2009, Chapter 19; Wentworth Group of

should review progress on national and state environmental accounts, and make recommendations that link this work to improved major project monitoring and reporting.

Finally, ANEDO notes that the Productivity Commission is currently undertaking a study on *Valuing non-market outcomes in policy analysis*, due October 2013.<sup>138</sup> While ANEDO has not had input into that study, the final report should take account of any relevant findings or recommendations that enable policymakers to better account for environmental values. For example, in the UK, an Independent Committee has been established 'to advise the Government on the State of English Natural Capital'.<sup>139</sup>

### **Improving data collation, sharing and analysis across jurisdictions**

The Commission's final report could identify practical steps to measure, share and collate regulatory and environmental data across jurisdictions. As Dr John Williams, environmental consultant and former NSW Natural Resources Commissioner notes:

*It is particularly important to increase data collection and data exchange between industry, research and policy institutions. There will be a need to expand monitoring, but equally – and in some instances more – important that analysis and evaluation receive a great deal of attention.*<sup>140</sup>

The State of the Environment 2011 notes that 'Australia is positioned for a revolution in environmental monitoring and reporting'.<sup>141</sup> However, 'Creating and using systems that allow efficient access to environmental information remain a great national-scale challenge'.<sup>142</sup>

ANEDO strongly supports the development and integration of tools for monitoring, data-sharing and sustainability indicators, to improve understanding and evidence-based policy. Governments should agree on practical steps and provide ongoing funding to capitalise on these initiatives. The need for reliable information reinforces the importance of robust and independent EIA processes, including the use of independent, accredited consultants. More reliable EIA processes would aid the integration of data-sets from different sources, such as planning and environmental agency databases, strategic and site-based EIA, and state and national reporting tools.<sup>143</sup>

A corollary of improved data-sharing is the need for leading practices that require accurate, transparent and publicly accessible information. The draft report makes a number of relevant recommendations, and the final report could identify gaps and leading practices in this regard.<sup>144</sup> Further work is needed on information standards for comparable, national compliance and enforcement reporting.<sup>145</sup>

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Concerned Scientists *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia*, (2008) .

<sup>138</sup> See further <http://pc.gov.au/research/environment/valuing-non-market-outcomes>.

<sup>139</sup> See UK environment department website, at <http://www.defra.gov.uk/naturalcapitalcommittee/about/>.

<sup>140</sup> John Williams Scientific Services (2012), p 104.

<sup>141</sup> See Report to the Australian Government, *State of the Environment* (2011), 'Future reporting', <http://www.environment.gov.au/soe/2011/report/future-reporting.html>. These include more intelligent monitoring, increased standardisation and data-sharing, better data management and modelling, and national benchmarks for environmental and sustainability indicators.

<sup>142</sup> Report to the Australian Government, *State of the Environment* (2011), 'Future reporting'.

<sup>143</sup> For example, see NSW OEH, BioMetric: Terrestrial Biodiversity Tool for the NSW Property Vegetation Planning System, at <http://www.environment.nsw.gov.au/projects/BiometricTool.htm>; and Australia's National Plan for Environmental Information, which aims to co-ordinate and manage 'comprehensive, trusted and timely environmental information' over the long term, at [www.environment.gov.au/npei](http://www.environment.gov.au/npei).

<sup>144</sup> For example, the NSW Parliament's CSG Inquiry recommended a requirement that baseline environmental information be made publicly available.<sup>144</sup>

<sup>145</sup> See S. Morton and A. Tinney, *Independent Review of Australian Government Environmental Information Activity – Final report* (November 2012), Australian Government Dept of SEWPAC.

## **Third party enforcement**

### **Draft PC recommendation 10.3:**

*Governments should ensure that third parties can initiate legal action to enforce conditions on primary approvals. Consideration should be given to ensuring legal costs do not present a barrier to legitimate actions of this type by individuals or bona fide community groups.*

### **ANEDO position:**

- ANEDO strongly supports third party rights to initiate legal action to enforce approval conditions, and improving legal costs rules to ensure they are not a barrier to community access to justice.

### **PC information request 10.1**

*The Commission seeks feedback on the most appropriate arrangements for standing in third party enforcement cases. In addition to allowing people directly affected by noncompliance to take enforcement action, possible approaches would also include applying standing to:*

- *people or organisations that had participated in the initial approval process for a project*
- *'interested persons' such as any person or organisation directly affected by a project, or any person or group involved with 'protection or conservation of, or research into, the environment' in recent times (for example, within the past two years)*
- *any person.*

### **ANEDO position:**

- To ensure transparency and accountability, ANEDO strongly supports open standing to bring enforcement proceedings for breaches of all environmental and planning legislation across Australian jurisdictions.
- Governments should amend their legislation where open standing for enforcement is not already available (including exemptions for major projects or forestry approvals).
- A variety of other mechanisms can be relied on to prevent vexatious litigation, including professional obligations, and courts' powers and appropriate discretions.

ANEDO strongly supports 'open standing' to bring enforcement across all jurisdictions. Open standing for enforcement of major project compliance is most appropriate, as the number, size and complexity of such projects all increase the potential for non-compliance to go undetected or unaddressed by the relevant state agency. The general importance of open standing for environmental justice is evident from successful third party enforcement actions addressing non-compliance that would have otherwise gone unenforced by regulators. This includes community actions under Queensland and Commonwealth legislation preventing the electrocution of flying foxes, and against pollution of the Coxs River in the NSW Blue Mountains.<sup>146</sup>

Some jurisdictions such as NSW adopt a positive general position that open standing should be available for enforcement, such as in planning and pollution laws.<sup>147</sup> This accountability measure supports regulators' enforcement powers, and enjoys wide support from a range of stakeholders in environmental and planning law.<sup>148</sup> By contrast, limiting standing adds a further barrier to community access to justice, requiring additional resources and time to argue for standing rather than the substantive issues.

<sup>146</sup> See EDO QLD, [www.edo.org.au/edoqld/success-stories/more-bat-wins-using-queensland-law/](http://www.edo.org.au/edoqld/success-stories/more-bat-wins-using-queensland-law/); and EDO NSW, [www.edo.org.au/edonsw/site/casework\\_key\\_past.php#delta](http://www.edo.org.au/edonsw/site/casework_key_past.php#delta), respectively.

<sup>147</sup> See for example, *Environmental Planning and Assessment Act 1979* (NSW), s123; *Protection of the Environment Operations Act 1997* (NSW), s 252. See also Productivity Commission draft report, Table 10.1.

<sup>148</sup> See T. Moore & R. Dyer, NSW Independent Planning Review Panel, Issues Paper (2011). The final panel report (2012) said 'open standing was an essential ingredient that should be carried over'. Vol. 1, rec. 120.

In South Australia, the *Development Act 1993* has an open standing provision, but under the *Environment Protection Act 1993*, standing is limited to those 'whose interests are affected by the subject matter of the application'. To give an example, this proved a real difficulty for the Whyalla Red Dust Action Group (**WRDAG**) in terms of civil enforcement action lodged by them in relation to air pollution from Onesteel's pellet plant and associated processes. Although WRDAG was incorporated, the Supreme Court held that whilst individuals within the group may have had their interests affected, the incorporated association did not. However, if the application had been made by individuals, they may have faced significant costs risks in the event the action was lost.

In Queensland, standing for third party enforcement for major projects varies.<sup>149</sup> For example, there is no standing for third party enforcement in the SDPWO Act. Limited standing for third party enforcement of environmental approvals may be available under the *Environmental Protection Act 1994* (Qld).<sup>150</sup> However, third party enforcers under this Act are subject to the QPEC's general discretion as to costs – a significant risk that weighs against community enforcement action. Similar risks apply under the SPA, where costs are usually awarded to the successful party.<sup>151</sup>

In Tasmania, parties have to demonstrate a 'proper interest' to take civil enforcement action to enforce compliance with planning or environmental legislation,<sup>152</sup> although this has generally been interpreted liberally.<sup>153</sup>

Even where standing is available for third party enforcement, the main barrier to access to justice arises where applicants are (usually by default) required to pay the costs of the other party if they lose (known as a 'costs jurisdiction'). ANEDO submits that this should be replaced with 'own party costs' as the default position (see 9.1). A variety of other effective mechanisms can be relied on to prevent vexatious litigation, including professional obligations to the court to ensure cases have reasonable prospects, and courts' ability to dismiss vexatious claims or depart from the usual rule and award costs on a discretionary basis (for example, where a party has caused unnecessary delay).

Finally, *exemptions* from open standing are a further barrier to access to justice. For example, the inability for third parties to bring enforcement proceedings under Integrated Forestry Operations Approvals (**IFOAs**)<sup>154</sup> and major infrastructure projects (such as critical state significant infrastructure in NSW<sup>155</sup>). These exemptions are anachronistic, reduce the incentives for major projects to comply with their conditions, and undermine public trust in governments' willingness to ensure those conditions are upheld. In such cases, the agency that approved the project may be the only party that can enforce conditions, with very little external scrutiny.

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<sup>149</sup> Across the *State Development and Public Works Organisation Act 1971* (**SDPWO Act**), *Environmental Protection Act 1994* and *Sustainable Planning Act 2009* (Qld) (**SPA**).

<sup>150</sup> To persons with affected interests, or those who obtain the court's leave.

<sup>151</sup> *Sustainable Planning Act 2009* (Qld), s 457(9).

<sup>152</sup> *Environmental Management and Pollution Control Act 1994*, s 48; *Land Use Planning and Approvals Act 1993*, s 64.

<sup>153</sup> The Tribunal has generally taken a liberal view of what constitutes a "proper interest" for the purposes of these provisions (see *Drewitt v Resource Management and Planning Appeal Tribunal (No 2)* [2008] TASSC 43).

<sup>154</sup> See for example, ANEDO, *One Stop Chop: How Regional Forest Agreements Streamline Environmental Destruction* (July 2013), at <http://www.edovic.org.au/blog/RFA-report>; see also EDO NSW (N. Hammond-Deakin, N. and S. Higginson), *If a Tree Falls: Compliance failures in the public forests of New South Wales* (2011), at [http://www.edo.org.au/edonsw/site/policy\\_discussion.php#ifatreefalls](http://www.edo.org.au/edonsw/site/policy_discussion.php#ifatreefalls).

<sup>155</sup> See *Environmental Planning & Assessment Act 1979* (NSW), s 115ZK; exposure draft Planning Bill 2013 (NSW), cll 6.4 and 10.12.

## Strategic approaches (draft ch 11)

### Strategic assessment

#### Draft PC recommendation 11.1:

*Drawing on the lessons learnt from the use of Strategic Assessments to date, governments should use the tool in circumstances where it is likely to produce a reduction in the costs of project approval, while delivering regulatory outcomes equal or superior to those delivered under existing processes.*

#### ANEDO position:

- Strategic assessment should not replace individual project assessment. The use of strategic assessment in conjunction with project assessment will still lead to efficiencies because major environmental issues are identified and considered upfront.
- Recommendation 11.1 should emphasise 'environmental outcomes' not just 'regulatory outcomes'.
- ANEDO strongly supports Hawke Review recommendation 6, to make EPBC Act strategic assessments processes 'more substantial and robust'. This must include mandatory information requirements and objective environmental outcomes.
- Strategic assessment must be undertaken according to rigorous, objective and transparent legislative requirements (for process, implementation and outcomes). ANEDO's core elements for SEA include:
  - *Strong legislative standards and science-based tools*
  - *Strong decision making criteria, including a 'maintain or improve' test*
  - *Comprehensive and accurate mapping and data*
  - *Undertake strategic assessment at the earliest possible stage*
  - *Require alternative scenarios to be considered*
  - *Ground-truthing of landscape-scale assessment is vital*
  - *Mandating public participation at all stages for positive outcomes*
  - *Strategic assessment should complement, not replace, site-level assessment.*

In light of the COAG reforms, ANEDO is concerned that the Australian Government's intent to increase the use of strategic environmental assessment (or **SEA**) may place emphasis on 'streamlining' approvals, without the additional safeguards recommended in the Hawke Review.<sup>156</sup> ANEDO has noted some of the inadequacies of strategic assessments to date, including in relation to the Melbourne Urban Growth Boundary and the Sydney Growth Centres assessment.<sup>157</sup> These risks must be managed and minimised by good process, standards and implementation.

**Attachment A** to this submission identifies a number of core benchmarks or elements necessary for robust and effective SEA in Australia, as part of environmental and planning laws generally. This draws on ANEDO's experience with the EPBC Act and Review, and international best practice.

<sup>156</sup> The International Association of Impact Assessment has also developed a series of 'performance criteria' for a good-quality SEA process. These are broadly summarised as *Integrated, Sustainability-led, Focused, Accountable, Participative* and *Iterative*. See 'SEA Performance Criteria', IAIA Special Publication Series 1, available at [www.iaia.org/publicdocuments/specialpublications/sp1.pdf](http://www.iaia.org/publicdocuments/specialpublications/sp1.pdf).

<sup>157</sup> See ANEDO, *Submission on 'Our Cities...' Discussion Paper* (March 2011), p 7 (Melbourne Urban Growth Boundary); EDO NSW, *Submission on the proposed Sydney Growth Centres Strategic Assessment* (June 2010).

## Strategic planning

### **Draft PC recommendation 11.2:**

*State and Territory Governments should continue to improve the quality of their strategic planning by:*

- *making broad decisions about development at the strategic level so as to reduce the number of issues that need to be considered at the project level*
- *using more effective public consultation techniques*
- *ensuring thorough analysis of plan impacts through the collection of baseline environmental and heritage data and the use of Strategic Assessments.*

### **ANEDO position:**

- The final report and recommendation should note additional leading practices for strategic planning, including:
  - integrating economic, social and environmental factors in decision-making in accordance with ESD principles;
  - identifying competing land uses and values, and establishing protected areas where certain types of development are prohibited;
  - properly accounting for cumulative impacts, including setting environmental limits and only allowing development within these limits.

While various jurisdictions are moving to emphasise strategic planning, this rarely translates to minimum (legislative) standards for baseline studies, or a reliance on best scientific information. A central conclusion of the recent Williams review of coal seam gas in Australia is the 'Need for effective strategic regional planning and governance':

*'...it is possible and desirable to use our knowledge of landscape process to work out, upfront, where we can safely mine and where mining would compromise agriculture, water resources, biodiversity, other land uses and landscape environmental function.'*<sup>158</sup>

The report confirms a 'paramount' need for knowledge-based strategic regional land-use planning; a need to recognise that individual EIAs are insufficient to deal with cumulative impacts; and that strategic planning under existing NRM policies must 'inform and bind' statutory planning processes. ANEDO supports all of these recommendations.

ANEDO's previous submission (pp 24-30) dealt in detail with 'The strategic planning context for major projects in Australia', examining the following aspects:

- i) Leading practices for strategic planning*
- ii) Major project DAA must account for cumulative impacts*
- iii) Strategic environmental assessments need robust safeguards*
- iv) Improving climate change-readiness in major project DAA processes*
- v) Improved integration of NRM data and valuation of environmental assets.*

ANEDO identified that leading practices for strategic land-use planning include:

- *integrating economic, social and environmental factors in decision-making in accordance with ESD principles;*
- *identifying competing land uses and values;*
- *undertaking baseline studies of environmental qualities;*
- *setting environmental limits and only allowing development within these limits;*
- *properly accounting for potential cumulative impacts;*
- *comprehensive, guaranteed rights of public participation in strategic planning;*
- *establishing protected areas where certain types of development are prohibited.*

<sup>158</sup> John Williams Scientific Services (2012), p 101.

## Attachment A: Strategic Environmental Assessment\* – Best practice elements, background and international benchmarks<sup>159</sup>

\*Strategic environmental assessment (**SEA**) is a decision making tool that allows informed consideration of the environmental impacts and consequences of particular activities, at a wider scale than individual assessment. For example, SEA allows consideration of cumulative impacts by considering the environmental constraints of an area prior to decisions about individual developments.

In 2011, the Australian Government indicated a shift in national environmental law towards strategic environmental assessment,<sup>160</sup> and that its EPBC Act reforms 'will ensure better and smarter environmental protection into the future'.<sup>161</sup> Used well, strategic assessments based on comprehensive and accurate data can have a range of benefits for the environment and sustainable development.<sup>162</sup>

This paper identifies a number of core benchmarks or elements necessary as part of robust and effective SEA in Australia, and environmental and planning laws generally. It draws on ANEDO's experience with the EPBC Act and Review, and ANEDO's preliminary review of international use of SEA. The paper includes three parts:

- Best practice elements for SEA in Australia
- Background information on strategic environmental assessment (**SEA**)
- Preliminary analysis of SEA internationally.

### **Best practice elements for SEA in Australia**

As an emerging field, strategic assessment also carries a number of risks.<sup>163</sup> ANEDO has noted some of the inadequacies of strategic assessments to date.<sup>164</sup> These risks must be managed and minimised by good process, standards and implementation, including as outlined in the eight points below.

#### **1. Strong legislative standards and science-based tools**

The Review of the EPBC Act supported increased use and strengthening of strategic approaches, noting that 'safeguards need to be created to ensure that plans are robust and fit for purpose'.<sup>165</sup> Legislative standards for the form, content and procedures around strategic assessments are particularly important. This is because the endorsement of policies and activities under strategic methods can have significant and long-term implications over several decades.<sup>166</sup>

Australia has significant expertise to apply rigorous, science-based approaches to development and land use planning.<sup>167</sup> Accordingly, all governments must commit to:

<sup>159</sup> This attachment is based on an SEA background paper prepared by ANEDO in June 2012.

<sup>160</sup> 'This will be done through greater use of strategic approaches, such as regional environment plans, strategic assessments, and regional recovery plans.' Australian Government, *National Environmental Law Reform – Better for the environment* (August 2011).

<sup>161</sup> Australian Government, *National Environmental Law Reform – Better for the environment* (August 2011).

<sup>162</sup> See, for example, *Report of the Independent Review of the EPBC Act 1999* (2009), para 3.34-35.

<sup>163</sup> See, for example, *Report of the Independent Review of the EPBC Act 1999* (2009), para 3.37.

<sup>164</sup> For example, ANEDO, *Submission on 'Our Cities...' Discussion Paper* (March 2011), p 7 (Melbourne Urban Growth Boundary) at [www.edo.org.au](http://www.edo.org.au); EDO NSW, *Submission on the proposed Sydney Growth Centres Strategic Assessment* (June 2010), at [www.edo.org.au/edonsw/site/policy\\_submissions.php#4](http://www.edo.org.au/edonsw/site/policy_submissions.php#4).

<sup>165</sup> *Report of the Independent Review of the EPBC Act 1999* (2009), recommendation 6; 'The Next Generation of Planning for ESD', para 3.13. For example, the Review noted that the 'current provisions for strategic assessments only require development of terms of reference and a draft report'.

<sup>166</sup> For example, the federal Environment Minister's recent approval decision for actions under the endorsed Sydney growth centres program has effect until 31 December 2041.

<sup>167</sup> CSIRO, cited in the *Report of the Independent Review of the EPBC Act 1999* (2009), para 3.41.

- implement rigorous standards and information requirements for SEA in legislation
- collaborate with leading institutions (beyond industry) to develop and apply better tools, and
- train and educate staff in best practice strategic assessment.

The Review of the EPBC Act sets out 'minimum information required for these assessments to be credible'.<sup>168</sup> The aim is to ensure that the decision maker has comprehensive information before them, that decisions are consistent with ESD, and to ensure public confidence in those decisions.

## **2. Strong decision making criteria, including a 'maintain or improve' test**

Decisions to approve strategic assessments must be bound by transparent and objective criteria. As with development decisions generally, the current legislative requirements for approving strategic assessments could be augmented by a robust 'maintain or improve environmental outcomes' test. This test could also be adapted to heritage outcomes. Establishing a genuine 'maintain or improve' test at a federal level may involve the development of an objective and scientifically valid assessment methodology.<sup>169</sup> ANEDO would strongly support the development of a consistent methodology, to ensure that strategic assessment proposals meet an objective and positive environmental standard.

In deciding whether to approve a strategic assessment, the decision maker should also be required to consider: the strategic assessment report; any expert panel reports; any public submissions on the strategic assessment report; and any other public submissions made.

## **3. Comprehensive and accurate mapping and data**

A lack of adequate data can undermine the benefits of strategic assessment, make decisions more risky, and threaten important environmental values that are overlooked or under-reported. All governments must commit to upfront investment in mapping, identifying and filling data gaps, before allowing strategic assessment and decision-making. Decision makers must be required to refuse development proposals and assessments with inadequate supporting data and studies.

## **4. Undertake SEA at the earliest possible stage for maximum benefit**

We strongly support undertaking strategic assessment at the earliest possible stage in the development proposal process (including early identification of high conservation value areas) in order to optimise environmental outcomes. Early integration reflects international best practice noted above. Conducting strategic assessment later may mean the federal strategic assessment process is limited to adding extra conditions rather than a more active and comprehensive role.

## **5. Require alternative scenarios to be considered**

We strongly support requirements to properly consider alternative scenarios and proposals at the strategic assessment stage when developing policies, plans or programs to be approved. This should include analysis of the consequences of the various options.<sup>170</sup> Weight should be given to options that minimise impact on matters of national environmental significance and retain ecological integrity. Without

<sup>168</sup> *Report of the Independent Review of the EPBC Act 1999* (2009), paras 3.45-49.

<sup>169</sup> For examples of 'maintain or improve' tests, see Australian Government, *EPBC Act Environmental offsets policy* (2012); and the NSW *Biobanking Assessment Methodology* (2011).

<sup>170</sup> As the *Report of the Independent Review of the EPBC Act 1999* suggests, analysis of the consequences of different options should include: estimates of impacts; how the plan avoids, mitigates and offsets impacts on protected matters; level of uncertainty associated with the analysis (para 3.45(d)).

considering alternatives, there is no basis for concluding that the proposed policy has adequately avoided, mitigated or offset environmental impacts (impact hierarchy).<sup>171</sup>

#### **6. Ground-truthing of landscape-scale assessment is vital**

Site-level verification of landscape-scale strategic assessment is essential, to address potential local data gaps and provide quality assurance (including for federal and state strategic assessment<sup>172</sup>). While landscape-scale assessment may reduce survey costs, these benefits must not come at the expense of rigorous, verifiable environmental impact assessment.

#### **7. Mandating public participation at all stages for positive outcomes**

The scale and complexity of strategic assessments warrant longer consultation periods than for individual assessments, and should similarly go beyond traditional 'inform and consult' models. The Review of the EPBC Act recommended extending the comment period for draft strategic assessment reports to 60 business days.<sup>173</sup> Once a policy, plan or program has been endorsed, there should be mandated opportunities for public participation when that policy is reviewed, with minimum review requirements set out in legislation.

#### **8. SEA should complement, not replace, site-level assessment**

It is important that SEA and site-level assessment be properly integrated using a 'tiered' approach. These two processes are related but distinct, as reflected in international research and best practice. Strategic assessment provides a framework to identify cumulative impacts and issues, and with sufficient data,<sup>174</sup> can be used to head off risks and land-use conflicts. However, any moves to *replace* site-level assessment with strategic assessment are likely to be inappropriate and high-risk, both for local communities and environmental values. In concert with SEA, site-level assessment will continue to play a vital role in quantifying the impacts of projects, and providing decision makers with the best information available.

### **Conclusion on strategic assessment standards and implementation**

Proposed reforms to streamline environmental assessment and approvals [COAG 2012] will affect both state and federal environmental assessment and planning laws. Two stated goals of the COAG reforms were to agree on 'standards' within a relatively short timeframe, and to finalise bilateral approval agreements. Furthermore, there is a clear intention to increase the use of strategic assessments to further streamline project assessment processes. In ANEDO's view, legislation that does not incorporate these core elements, either state or federal, will not protect the environment or deliver ecologically sustainable development outcomes.

### ***Background information on SEA***

Strategic environmental assessment seeks to take a holistic approach to assessment of (potential) impacts on the environment. In essence, rather than taking a case-by-case approach to project assessments, as is the practice with environmental impact assessment (**EIA**), SEA considers the environment as part of a system, incorporating direct, indirect and cumulative impacts, as well as short- and long-term impacts; identifies multiple actors and priorities; and deals with the interface between the

<sup>171</sup> See further, ANEDO *Submission to the EPBC Act Independent Review – interim report* (2009), p 7.

<sup>172</sup> Such as 'biocertification' in NSW. See further: <http://www.environment.nsw.gov.au/biocertification/>.

<sup>173</sup> *Report of the Independent Review of the EPBC Act 1999*, paras 3.57-58.

<sup>174</sup> As the *State of the Environment Report 2011* noted, 'creating and using systems that allow efficient access to environmental information remain a great national-scale challenge.' *State of the Environment Report 2011*, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, 'Future reporting'.

environment and social and economic factors.<sup>175</sup> Various users define the term differently, but one common definition describes SEA as:

*The systematic and comprehensive process of evaluating at the earliest possible stage the environmental effects of a policy, plan or program [PPP] and its alternatives.*<sup>176</sup>

Another source describes SEA simply as 'the application of EIA to PPPs'.<sup>177</sup> Certainly in the global context, the expanding use of SEA is broadly consistent with strategies to 'mainstream the environment' in all aspects of activities.<sup>178</sup>

### **The role of SEA in policy development**

Unlike EIA, SEA has an important role in defining the policy which precedes the actual activity or project proposal. In this sense its role kicks in early, at the policy development stage, and is sustained right through to project assessment. As stated by the United Nations Environment Programme (**UNEP**), SEA is important because it:

*extends the aims and principles of EIA to the higher levels of decision-making when major alternatives are still open and there is far greater scope than at the project level to integrate environmental considerations into development goals and objectives. It allows problems of environmental deterioration to be addressed at their 'upstream source' in policy and plan-making processes, rather than mitigating their 'downstream symptoms' or project-level impacts.*<sup>179</sup>

An early example of how SEA has worked at the 'policy development' level in the legislative context is under the US's *National Environmental Policy Act 1969*, which requires that the policies, regulations and public laws of the country be 'interpreted and administered in accordance with' this Act; and that all public authorities:

*include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement ... on the environmental impact of the proposed action.*<sup>180</sup>

In this respect, SEA can act as a 'filter' for the development of policies (including legislation), which in turn become plans, programs, and ultimately, projects. This process is known as 'tiering', the idea being that if EIA is applied in this way, there is 'less need to assess the detail of each subsequent project'.<sup>181</sup> In this way a holistic approach is taken and efficiency gains can be made.

It should be noted that, at least according to UNEP:

*SEA has proven relatively difficult to apply to policy, especially at the highest level of government directions and actions. These decisions traditionally have been "off limits" to external scrutiny, and there is often political and bureaucratic resistance to policy assessment. In addition, policy-making processes are fluid and not necessarily straightforward from the standpoint of applying systematic and structured assessment procedure. Many policies evolve in an incremental and non-systematic fashion. In such cases, more flexible forms of SEA are necessary.*<sup>182</sup>

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<sup>175</sup> See eg Pinter et al, *Strategic Environmental Assessment: A Concept in Progress*, 2004. See also Buckley 1997, who identifies 'at least seven different types of SEA': policy EA, issue-based EA, geographical EA, temporal EA, technological EA, sectoral EA and generic-project EA.

<sup>176</sup> Adapted from Therivel and Partidario, *The Practice of Strategic Environmental Assessment*, 1996.

<sup>177</sup> Marsden, *Strategic Environmental Assessment in Australia: An evaluation of section 146 of the EPBC Act 1999*, 1999, 395.

<sup>178</sup> World Bank, 2000, 2002; Kjørven and Lindhjem, 2002, cited in UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, 2004, 85.

<sup>179</sup> UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, 2004, 86.

<sup>180</sup> *National Environmental Policy Act 1969*, S 102 (4332)(C).

<sup>181</sup> Marsden, 1999, 395.

<sup>182</sup> UNEP 2004, 95.

This suggests the need for caution in advocating in an unqualified way the appropriateness of SEA for all policy-related assessments.

On the other hand, commentators have suggested that SEA of policies and associated legislative proposals:

*is arguably the most critical type of SEA. Without policy level EA, nations can and do continue on unsustainable development paths, despite project-scale EIA. Indeed, it has been argued that some governments knowingly use project-scale EIA as a sop to public concerns over environmental sustainability.*<sup>183</sup>

### **The difference between SEA and EIA**

SEA has been said to be closely related to other members of the assessment 'family', including EIA, social impact assessment, cumulative environmental assessment, integrated environmental assessment, sustainability assessment and policy analysis.<sup>184</sup>

Marsden emphasises the significance of this relationship – **while SEA may have a separate role to these other tools, it does not replace them.** Rather, it is:

*important that these other forms of assessment are carried out effectively in their own right and that they are well integrated with one another to avoid unnecessary duplication. ... **it must also be remembered that whatever the utility of SEA, it cannot and should not replace other environmental management instruments** ... These coexist beside one another, and perform different functions.*<sup>185</sup>

This position is reinforced in international law. For example, UNEP's 2004 report on integrating EIA and SEA states that these two processes are related but distinct:

*The relationship between SEA and project EIAs can be considered as occurring within a tiered system. ... There is a series of linked decisions leading, ultimately, to project approvals. Fundamental, early decisions are made at the policy level. These decisions set the context for 'downstream' decisions which have more limited focus. Basically, these decisions form a hierarchy. An early policy decision might deal with strategic issues ... Individual [projects] would then be subject to site-specific EIAs.*

*... In a tiered or hierarchical EIA approach, the type and nature of the environmental information provided through the application of EIA depends on the needs of the decision makers at specific stages. For higher level policy or planning decisions, the environmental information will not be precise and quantitative and probably will relate to general, broadly defined, issues rather than specific impacts. Later, when EIA is applied at the project level (for projects that are a direct outcome of a policy or plan), detailed impact specific, technical information is needed.*<sup>186</sup>

In other words, **it is not envisaged that SEA ever replace more traditional project-based EIAs:** rather, project-based EIA remains a part of the SEA process, which is intended to cover all levels and types of decision-making.

### ***Preliminary analysis of best practice SEA internationally***

While there is no single agreed definition of SEA, a number of common principles or criteria have been developed to define the parameters of SEA globally. For example, the International Association of Impact Assessment (**IAIA**) has developed a series of

<sup>183</sup> Buckley, *Strategic Environmental Assessment*, 1997, 174.

<sup>184</sup> Marsden, *An International Overview Of Strategic Environmental Assessment, With Reference To World Heritage Areas Globally And In Australian Coastal Zones*, 2002, citing Goodland (1997) & Petts (1999), 35.

<sup>185</sup> Marsden 2002, 35 [emphasis added].

<sup>186</sup> UNEP 2004, 147.

'performance criteria' for a good-quality SEA process.<sup>187</sup> In summary, these state that SEA should be:

**1. Integrated**

- Applies as early as possible in proposal design.
- Is 'tiered to', or works in conjunction with, other policies in relevant sectors/regions and, where appropriate, to project-based EIA.

**2. Sustainability-led**

- Is guided by principles of ESD (in particular achieving parity between environmental, social and economic considerations).
- Considers alternative proposals (particularly those that are more sustainable).

**3. Focused**

- Provides sufficient, reliable and useable information for decision-making.
- Is customized to the circumstances, ie, the scope of assessment is commensurate with the proposal's potential impact or consequence for the environment.
- Objectives and terms of reference are clearly defined.
- Is time and cost effective.

**4. Accountable**

- The initiating agency is responsible for assessing the environmental effects of new or amended policies, plans or programs (PPPs).

**5. Participative**

- Provision is made for public involvement, consistent with the potential degree of concern and controversy of the proposal.

**6. Iterative**

- Assessment results and information are made available sufficiently early that the decision-making process can be influenced in a meaningful way.

### **International instruments**

In July 2010, the *Protocol on Strategic Environmental Assessment (Protocol)* entered into force. It was developed under the UN Economic Commission for Europe Convention on Environmental Impact Assessment ('Espoo Convention') and adopted in Kiyv in May 2003 at the Environment for Europe Ministerial Conference. Nineteen EU states are currently Parties to the Protocol.

The objective of this Protocol is to provide for a high level of protection of the environment, including health, by:

1. Ensuring that environmental, including health, considerations are thoroughly taken into account in the development of plans and programmes;
2. Contributing to the consideration of environmental, including health, concerns in the preparation of policies and legislation;
3. Establishing clear, transparent and effective procedures for strategic environmental assessment;
4. Providing for public participation in strategic environmental assessment; and
5. Integrating by these means environmental, including health, concerns into measures and instruments designed to further sustainable development.<sup>188</sup>

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<sup>187</sup> See IAIA, 'SEA Performance Criteria', IAIA Special Publication Series 1, Available from [www.iaia.org/publicdocuments/specialpublications/sp1.pdf](http://www.iaia.org/publicdocuments/specialpublications/sp1.pdf). The IAIA is a global network on 'best practice in the use of impact assessment for informed decision making regarding policies, programs, plans and projects'. See <http://www.iaia.org/about/>.

According to the Protocol, the Parties are *required* to evaluate the environmental consequences of their official plans and programs. They *may* also apply SEA to policies and legislation, but this isn't mandatory.

The Protocol provides for extensive public participation in government decision-making in numerous development sectors. The public doesn't only have the right to know about plans and programs but also the right to comment, have their comments taken into account and be told of the final decision and why it was taken. This links the Protocol to the *Aarhus Convention* and its pillar on public participation in strategic decision-making.

### **Comparative jurisdictions**

Globally, there is a move towards using SEA prior to, or as part of, project-based EIA. Most of the countries that have made provision for SEA are in Europe and North America, and a wide range of institutional arrangements in force for its implementation.

There doesn't appear to be any country that subjects all environmentally significant government policy, plan and programme proposals to SEA.<sup>189</sup> That said, some countries do apply SEA to all levels of decision-making, with varying limitations on their scope of application. For example, in Canada, the SEA process applies to policy, plan and programme initiatives submitted for Cabinet decision. In the Czech Republic SEA process applies to concepts in eight sectors, and the Netherlands has two types of SEA process, comprising an 'E-test' of regulations and 'other intentions', and SEA of specified plans and programmes.<sup>190</sup>

Most countries apply SEA only or primarily at the level of plans or programs, and to a limited range of sectors and areas (eg water, waste, transport and energy). These are specified in some cases (as in the Netherlands) and categorised generally in others (eg US *National Environmental Policy Act* requirements for programmatic environmental impact statements). In the European Commission SEA Directive, both spatial and sector plans and programmes are covered.<sup>191</sup> As noted in UNEP's report:

*Generally, SEA systems that apply to plans and programmes are based or modelled on EIA legislation, and follow the same or comparable requirements and procedure. In contrast, SEA systems that apply only or primarily to policy or legal acts are based on non-statutory provision and procedure. These systems either operate similarly, but separately from the EIA process (e.g. Canada, Denmark) or use a comparable process of policy appraisal, which integrates environmental with other factors (e.g. UK, Netherlands E-test). A less formal, minimum procedure provides for greater flexibility in introducing and implementing SEA to complement the way the law or policy-making process works. However, non-statutory SEA frameworks also lack rigour, transparency and consistency of application, and what constitutes appropriate provision and procedure in relation to policy and legal acts is open to argument.*<sup>192</sup>

This preliminary overview would suggest that there is a wide range of ways in which SEA can and has been implemented, with varying levels of force and also success. In ANEDO's view, our best chance of effective SEA must incorporate the best practice elements above.

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<sup>188</sup> Public Participation Campaign, *Entry in to Force of SEA Protocol*, <[http://www.participate.org/index.php?option=com\\_content&view=article&id=174:entry-into-force-of-sea-protocol-&catid=48:news-from-other-sources&Itemid=107](http://www.participate.org/index.php?option=com_content&view=article&id=174:entry-into-force-of-sea-protocol-&catid=48:news-from-other-sources&Itemid=107)>.

<sup>189</sup> UNEP 2004, 94-5.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid, 88 [emphasis added].

## Attachment B: Two compliance and enforcement case studies

These case studies, one from NSW and one for Queensland, highlight the need for a combination of factors for effective compliance and regulation of major projects, such as CSG and mining operations. This includes:

- comprehensive environmental impact assessment;
- robust licensing and consent conditions;
- mandatory baseline data, ongoing monitoring and oversight of project operations;
- independent regulators with the powers, skills and resources to act against breaches; and
- open and accessible court processes for communities to take enforcement action themselves where necessary.

### **CSG in the NSW Pilliga region**

The Pilliga forest is Australia's largest inland forest. It is home to numerous threatened species. The layers of sandstone under the forest filter water into the Great Artesian Basin. Over 50 ponds were drilled in the forest by Eastern Star Gas.<sup>193</sup>

A May 2012 report by conservation groups highlighted a number of breaches of petroleum exploration licence conditions from unauthorised discharges of CSG water and treated water in and around the Bimblewindi Water treatment plant.<sup>194</sup> The conservation groups commissioned scientific testing that compared contaminated spill areas with uncontaminated areas and found trace elements up to 171 times naturally occurring levels for metals such as zinc, and others including lead, arsenic and chromium.<sup>195</sup>

Of particular frustration was that there had been eight audits into the CSG operation by the NSW Government but none had led to any action against the companies involved.<sup>196</sup> However as a result of these breaches Santos, on taking over the Pilliga CSG operation, halted operations in February 2012 and agreed to commit \$20 million to rehabilitation of the area.<sup>197</sup>

A July 2012 visit by journalists found that many of the problems still remained, with native animals drinking polluted water from uncovered ponds and ponds on the verge of overflowing. Many wallabies, goannas, kangaroos and turtles have been found dead in or near the drilling ponds. Some of the ponds were lined with plastic and others were scraped together mounds of dirt.<sup>198</sup>

In its May 2012 report, the NSW CSG Inquiry concluded:

*It is inexcusable that this pollution went undetected by NSW Government authorities, despite community complaints, until Santos admitted many months later that a breach had occurred. ... This incident demonstrates the weakness in Government monitoring and enforcement activities.... Given this example... the Committee must be sceptical of the claim by the industry that all coal seam gas companies are meeting their licence conditions...*

<sup>193</sup> S. Coutts, "Pillaging the Pilliga", *The Global Mail*, 26 October 2012, available at <http://www.theglobalmail.org/feature/pillaging-the-pilliga/447/>.

<sup>194</sup> Northern Inland Council for the Environment & the Wilderness Society, "The Truth Spills out: A case study of Coal Seam Gas Exploration in the Pilliga", May 2012.

<sup>195</sup> Northern Inland Council for the Environment & the Wilderness Society, "The Truth Spills out: A case study of Coal Seam Gas Exploration in the Pilliga", May 2012, pg. 22.

<sup>196</sup> Northern Inland Council for the Environment & the Wilderness Society, "The Truth Spills out: A case study of Coal Seam Gas Exploration in the Pilliga", May 2012, pg. 13

<sup>197</sup> S. Coutts, "Pillaging the Pilliga", *The Global Mail*, 26 October 2012, available at <http://www.theglobalmail.org/feature/pillaging-the-pilliga/447/>.

<sup>198</sup> S. Coutts, "Pillaging the Pilliga", *The Global Mail*, 26 October 2012 available at <http://www.theglobalmail.org/feature/pillaging-the-pilliga/447/>.

### **Queensland cases involving chemical concerns and breaches**

There are concerns about the chemicals used during the 'fracking' process, and the lack of comprehensive analysis to date by the national chemical regulator, NICNAS. These concerns have not been helped by recent incidents in Queensland where projects involving gas drilling have caused damage to the environment. For example, various prosecutions are ongoing in Queensland after contamination to groundwater from the wells of the Kingaroy underground coal gasification project. While underground coal gasification involves a different process to CSG exploration, it still uses wells to extract the gas from the coal seam which involves risks to aquifers.

In March 2010, five days after commencing operations, there was a failure involving the fracturing of cement grout lining of the well wall. This led to the well becoming blocked and gas escaped into the surrounding geology along with the contaminants benzene and toluene.<sup>199</sup> Bore monitoring data revealed benzene in the lower aquifer known as the Kunioon coal seam, which stabilised at a level 15 times greater than the water trigger level permitted by the environmental authority.<sup>200</sup> There is no safe level of benzene in drinking water.<sup>201</sup> Surrounding landowners were advised not to use the water and Cougar Energy was required to provide replacement water supplies to them.<sup>202</sup> The project was shut down in July 2010.

In September 2012, the Queensland Ombudsman released a report on its investigations into the Kingaroy underground coal gasification project.<sup>203</sup> The report looked at the issues raised by the decision of the Environmental Authority that no Environmental Impact Statement (EIS) was required when there was the potential for impacts on water quality, hydrology and groundwater.<sup>204</sup> The report expressed concern about the lack of continuous monitoring and review of the conditions of approval to ensure best practice was being followed.<sup>205</sup> Another concern was the fact that no one with groundwater expertise reviewed the conditions for the environmental authority.<sup>206</sup> The report recommended that all projects should collect baseline monitoring data with a minimum of 12 months data completed prior to production commencing.<sup>207</sup> The Ombudsman concluded that "in my view the nature of novel or emerging technologies, when associated with high or unknown risks of environmental harm, warrants a greater level of oversight and monitoring by the regulator."<sup>208</sup>

<sup>199</sup> *Cougar Energy Ltd v Debbkie Best, Chief Executive Under the Environmental Protection Act 1994* [2011] QPEC 150 at [10].

<sup>200</sup> *Cougar Energy Ltd v Debbkie Best, Chief Executive Under the Environmental Protection Act 1994* [2011] QPEC 150, at [12].

<sup>201</sup> *Cougar Energy Ltd v Debbkie Best, Chief Executive Under the Environmental Protection Act 1994* [2011] QPEC 150 at [27].

<sup>202</sup> *Cougar Energy Ltd v Debbkie Best, Chief Executive Under the Environmental Protection Act 1994* [2011] QPEC 150 at [30].

<sup>203</sup> Queensland Ombudsman, "An investigation into the approval and oversight of the Kingaroy underground coal gasification project", September 2012 found at <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2012/5412T1124.pdf>.

<sup>204</sup> Queensland Ombudsman, "An investigation into the approval and oversight of the Kingaroy underground coal gasification project", September 2012, pg 8-11.

<sup>205</sup> Queensland Ombudsman, "An investigation into the approval and oversight of the Kingaroy underground coal gasification project", September 2012, pg 15.

<sup>206</sup> Queensland Ombudsman, "An investigation into the approval and oversight of the Kingaroy underground coal gasification project", September 2012, pg. 21.

<sup>207</sup> Queensland Ombudsman, "An investigation into the approval and oversight of the Kingaroy underground coal gasification project", September 2012, pg. 29-30.

<sup>208</sup> Queensland Ombudsman, "An investigation into the approval and oversight of the Kingaroy underground coal gasification project", September 2012, pg. 43.